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Domestic Relations

David H. Kelsey

Thomas C. Montoya

DOMESTIC RELATIONS

DAVID H. KELSEY* and THOMAS C. MONTOYA**

In a recent issue of this law review, an initial survey of New Mexico domestic relations law was published.[1] This article updates that survey and focuses primarily on judicial developments in New Mexico domestic relations law. Recent statutory developments are discussed with references to further reading.

I. CASE LAW

A. *Jurisdiction*

The New Mexico Supreme Court twice during the Survey period addressed the problem of whether New Mexico courts have jurisdiction to dissolve a marriage. In the first case, the court construed the statutory residency requirements. In the second, jurisdiction to dissolve such a marriage was considered in relation to the doctrine of *forum non conveniens.*

The first jurisdiction case, *Hagan v. Hardwick,*[2] interpreted N.M. Stat. Ann. §40-4-5 (1978). Section 40-4-5 provides that the district courts have jurisdiction to decree a dissolution of marriage when "either party has resided in this state for at least six months immediately preceding the date of filing [the Petition] and has a domicile in New Mexico." The *Hagan* opinion arrived at the correct result, but incorrectly interpreted section 40-4-5 by confusing the statutory definitions of "domicile" and "residence" as they are used for purposes of divorce jurisdiction.[3] *Hagan* decided three issues

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*Shareholder, Atkinson & Kelsey, P.A., Albuquerque, New Mexico; Adjunct Professor of Law, University of New Mexico School of Law.

**Associate, Atkinson & Kelsey, P.A., Albuquerque, New Mexico.

1. Shapiro, *Domestic Relations and Juvenile Law,* 11 N.M. L. Rev. 135 (1981).
2. 95 N.M. 517, 624 P.2d 26 (1981).
3. Section 40-4-5 reads:

> The district court has jurisdiction to decree a dissolution of marriage when at the time of filing the petition either party has resided in this state for at least six months immediately preceding the date of the filing and has a domicile in New Mexico. As used in this section, "domicile" means that the person to whom it applies:
>
> A. is physically present in this state and has a place of residence in this state;
>
> B. has a present intention in good faith to reside in this state permanently or indefinitely. . . .

regarding the interpretation of section 40-4-5 for divorce jurisdiction purposes. The first was that "domicile" is substantially synonymous with "residence." The second was that residence need not be literally immediate to filing in order to fulfill the statutory residence requirement. Third, the court decided that the concept of "matrimonial domicile" will not be used in New Mexico. These determinations appear to be contrary to New Mexico law and policy.

The first question concerned whether the petitioner in *Hagan* was domiciled in New Mexico. Neither the petitioner nor the respondent was continuously present in New Mexico for six months immediately preceding the filing. Both had lived in New Jersey for the majority of that period. The petitioner lived in New Mexico before moving to New Jersey and prior to her marriage to the respondent. The petitioner had been physically present in New Mexico for thirty-four days prior to filing her petition. The district court found that the petitioner had moved to New Jersey for educational purposes only, and had intended at all times to retain New Mexico as her home. She had listed her parents' address as her permanent address, retained her New Mexico teaching certificate, visited New Mexico frequently during college breaks, registered to vote in New Mexico in 1973, and contacted New Mexico firms concerning employment after her graduation. The respondent contended that these facts were insufficient as a matter of law to satisfy the jurisdictional requirements of the statute.

The New Mexico Supreme Court recognized that the right to apply for dissolution of marriage was statutory,[4] and that there is a legitimate state interest[5] in imposing a domicile requirement in order to prevent couples seeking a divorce from forum-shopping.[6] The meaning of the jurisdictional requirements, therefore, is a matter of statutory construction and legislative intent. The *Hagan* court ruled that the word "resided," as used by the legislature in the statute, is substantially synonymous with "domicile." Domicile merely requires "physical presence in the state at some time in the past, and concurrent intention to make the state one's home."[7] The court held that because the petitioner had been physically present in the state in the past and had intended to retain New Mexico as her home, she met the statutory requirements.

4. 95 N.M. at 518, 624 P.2d at 27, *citing* Allen v. Allen, 52 N.M. 174, 194 P.2d 270 (1948).

5. 95 N.M. at 518, 624 P.2d at 27, *citing* Sosna v. Iowa, 419 U.S. 393 (1975).

6. 95 N.M. at 518, 624 P.2d at 27, *citing* Wallace v. Wallace, 63 N.M. 414, 417, 320 P.2d 1020, 1022-23 (1958).

7. 95 N.M. at 518, 624 P.2d at 27, *citing* Worland v. Worland, 89 N.M. 291, 551 P.2d 981 (1976).

This holding does not comport with New Mexico law. The definition of "domicile" used by the court is taken from early case law and is not consistent with the statutory definition, or with later developments in New Mexico case law. The legislature defines "domicile" in section 40-4-5 to require that a person "(A) is physically present in this state and has a place of residence in this state; (B) has a present intention in good faith to reside in this state permanently or indefinitely."[8] Petitioner failed to fulfill the statutory requirement of section 40-4-5(A). She was neither physically present nor had a place of residence in this state for six months immediately preceding the date of the filing. If the legislative definition of "domicile" had been used, the district court could not have taken jurisdiction.

The error of the *Hagan* decision is in the holding that "domicile" and "residence" are substantially similar. A brief history of the definition of the two terms in New Mexico will illustrate the distinction between them.

The New Mexico Supreme Court in *Allen v. Allen*[9] held that "residence" and "domicile" could be used interchangeably when determining divorce jurisdiction. *Allen v. Allen,* however, was decided under section 25-704 of the 1941 statutes. That section was a predecessor to section 40-4-5. The prior statute did not mention "domicile" in providing divorce jurisdiction. It only required that the plaintiff be a "resident" for the statutory period. The great weight of authority indicated that jurisdiction over the subject matter of divorce rested upon domicile.[10] In this context, the *Allen* court looked to Missouri law, which contained similar language, to determine that "residence" is substantially synonymous with "domicile."[11] In 1971, the term "domicile" was added to the divorce jurisdiction statute.[12] The term "resided," however, was not deleted, and the two terms are used in different ways. The terms "resided" and "domicile," as used in section 40-4-5, therefore, cannot be synonymous.[13]

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8. N.M. Stat. Ann. §40-4-5 (1978).

9. 52 N.M. 174, 194 P.2d 270 (1948). In *Allen,* the supreme court stated: "The statutory terms 'resident or residence' as used in the divorce statutes, contemplate, as we think, an actual residence with substantially the same attributes as are intended when the term 'domicile' is used." *Id.* at 178, 194 P.2d at 273.

10. Golden v. Golden, 41 N.M. 356, 364, 68 P.2d 928, 932 (1937). *See also* Lorenzo v. Lorenzo, 85 N.M. 305, 512 P.2d 65 (1973): "In the past this court has sometimes used the words 'residence' and 'domicile' interchangeably for the purpose of divorce jurisdiction, but the test has always been domicile and not residence." *Id.* at 310, 512 P.2d at 70.

11. 52 N.M. at 178, 194 P.2d at 273.

12. 1971 N.M. Laws ch. 273, §1.

13. Properly, the terms are distinguishable. "Residence" may connote a temporary, permanent, or transient character; or it may mean one's fixed abode, depending upon the purpose of

In *Perez v. Health and Social Services,*[14] the court of appeals defined "residence" as used under the Special Medical Needs Act.[15] The court said "A 'residence' is the place where one actually lives or has his home; a person's dwelling place or place of habitation; an abode; the house where one's home is; a dwelling house."[16] Thus defined, "residence" connotes the place where one actually lives and has a dwelling. This definition comports with the first of the two requirements for "domicile" as defined in section 40-4-5(A): physical presence and a place of residence. The statute, however, adds a second requirement. "Domicile" connotes actual residence and in addition, the intention to reside in the state permanently or indefinitely. "Residence" therefore pertains to physical presence, while "domicile" pertains to physical presence coupled with an intention to remain permanently or indefinitely. The New Mexico Supreme Court recognized this principle in *Crownover v. Crownover,*[17] when the court stated "residence for the required period of time with domiciliary intent is a necessary jurisdictional prerequisite of divorce in New Mexico."[18]

The holding of the *Hagan* court ignores the distinction between "domicile" and "residence" which has been established in New Mexico by both statute and case law. The effect of the decision will be to enlarge jurisdiction over divorce cases in New Mexico. Such a change is not well founded on New Mexico law.

There is a second problem with the *Hagan* decision. The court ignored the provision of section 40-4-5 requiring residence "*immediately* preceding the date of the filing."[19]

Webster's Third New International Dictionary defines "immediately" as "without interval of time."[20] "Immediate" is defined as

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the particular object of its use. Switzerland Gen. Ins. Co. v. Gulf Ins. Co., 213 S.W.2d 161 (Tex. Civ. App. 1948). In some instances, residence requires mere physical presence. Weible v. United States, 244 F.2d 158 (9th Cir. 1957). In others, something more than physical presence is required. The element of intent then becomes material, People *ex. rel.* Heydenreich v. Lyons, 374 Ill. 557, 30 N.E.2d 46 (1940), even where "residence" is not deemed to be the equivalent of "domicile."

By comparison, domicile is said to be inclusive of residence, having a broader and more comprehensive meaning than residence. Smith v. Smith, 45 Cal.2d 235, 288 P.2d 497 (1955). Residence, together with the requisite intent, is necessary to acquire domicile, but actual residence is not necessary to preserve a domicile after it is once acquired. Consequently, one may be a resident of one jurisdiction while having a domicile in another. Williams v. Williams, 191 Ga. 437, 12 S.E.2d 352 (1940).

14. 91 N.M. 334, 573 P.2d 689 (Ct. App. 1977).
15. N.M. Stat. Ann. §27-4-1 to -5 (1978).
16. 91 N.M. at 337, 573 P.2d at 692.
17. 58 N.M. 597, 274 P.2d 127 (1954).
18. *Id.* at 606, 274 P.2d at 132.
19. N.M. Stat. Ann. §40-4-5 (1978) (emphasis added).
20. Webster's Third New International Dictionary 1129 (1976).

"acting or being without the intervention of another object, cause, or agency."[21] Petitioner in *Hagan* was not physically present in New Mexico for six months "without interval of time" preceding the date of the filing. A literal interpretation of section 40-4-5 would thus deprive the district court of jurisdiction.

This was the result in a 1967 New Mexico case, *Heckathorn v. Heckathorn.*[22] In *Heckathorn* the parties lived in California from 1959 until 1962. During the time they lived in California, the parties visited in-laws in Albuquerque and defendant investigated some jobs in New Mexico. Prior to July 1962, however, there was no intention to move back to New Mexico. On July 9, 1962, plaintiff left defendant in California and returned to New Mexico. The supreme court said that the trial court did not have power to grant a divorce to plaintiff unless she had been a resident for one year immediately before instituting the divorce proceeding, because residence for the required period of time is a necessary jurisdictional prerequisite of divorce in New Mexico. Because the jurisdictional prerequisite was absent, the decree of divorce was a nullity.

The *Hagan* court ignored *Heckathorn* and the statutory use of "immediately" in relation to "residence." Instead, the court found jurisdiction because the *Hagan* petitioner was once domiciled in New Mexico and intended at all times to retain New Mexico as her home.[23] If the *Hagan* "intent" approach is used, any returning domiciliary could invoke immediate jurisdiction on the basis of an assertion the forum state was always regarded as "home." This seems open to abuse. If a literal approach is used, however, a lifelong domiciliary of New Mexico could be precluded access to the courts because of a weekend fishing trip to Colorado. The *Hagan* court avoided these problems by construing section 40-4-5 to pertain to new arrivals to New Mexico, but not to former New Mexico domiciliaries. The *Hagan* result is therefore correct, so long as the petitioner never actually intended to change her domicile.

The third point to be made about *Hagan* concerns the intent of the petitioner to change her domicile. This intent can be established by the use of the concept of "matrimonial domicile." "Matrimonial domicile" is a generally accepted rule which states that "a woman at marriage loses her own domicile, and acquires that of her husband, although she may acquire a separate domicile when living apart from her husband."[24] Matrimonial domicile is recognized in New Mex-

21. *Id.*
22. 77 N.M. 369, 423 P.2d 410 (1967).
23. 95 N.M. at 517, 624 P.2d at 26.
24. Stevens v. Stevens, 4 Wash. App. 79, 81, 480 P.2d 238, 240 (Ct. App. 1971).

ico.[25] The *Hagan* court, however, ignored the doctrine. If matrimonial domicile is applied to the *Hagan* facts, New Mexico did not have divorce jurisdiction, because the matrimonial domicile was in New Jersey and petitioner was therefore a New Jersey domiciliary.

There are sound policy reasons for the rule of matrimonial domicile. There is no need for the woman automatically to be the spouse who loses original domicile. Stated without sex distinction, the rule would mean that if the marital domicile is different from original domicile of a spouse, the marital domicile should determine the domicile of both spouses. Both spouses would continue to have the same domicile until either spouse left the marital domicile and acquired a new domicile by fulfilling the residency requirements in another jurisdiction. Such a rule promotes the unity of the marital union, regardless of which spouse actually determines the marital domicile. At the very least, the concept of marital domicile is persuasive on the issue of the good faith intent of the petitioner to maintain his original domicile in New Mexico. Married couples generally agree to reside together in the same place. If that marital residence fulfills statutory requirements and one spouse has domiciliary intent, the law should also regard the other spouse to have domiciliary intent, so long as the spouses remain together.

The *Hagan* court found New Mexico jurisdiction. In so doing, it must have been looking at petitioner's original domicile, not her marital domicile. If matrimonial domicile continues to be operative in New Mexico, the petitioner in *Hagan v. Hardwick* was a foreign domiciliary and she did not satisfy the jurisdictional requirements of section 40-4-5.

In the second jurisdiction case, *Buckner v. Buckner,*[26] the supreme court discussed the relation of *forum non conveniens* to a divorce action when the sole issue is incompatibility of the parties. The court concluded that the district court had no discretion to dismiss the case.

The Buckners were engaged in a suit for separate maintenance, alimony, and child support in New York. Five years after initiation of this suit, petitioner filed for divorce in New Mexico on grounds of incompatibility. Petitioner had established residence in New Mexico for a sufficient time to petition legally for dissolution of marriage.

25. Crownover v. Crownover, 58 N.M. 597, 607, 274 P.2d 127, 133 (1954). The New Mexico Equal Rights Amendment, N.M. Const. art. 2 § 18, repealed prior statutory law which mandated that the domicile chosen by a husband was automatically that of his wife. *See* 1907 N.M. Laws ch. 37 § 2.

26. 95 N.M. 337, 622 P.2d 242 (1981).

Respondent filed a motion to dismiss for lack of jurisdiction and *forum non conveniens.* The trial court granted the motion. The supreme court reversed, construing section 40-4-1.[27]

Section 40-4-1 provides "[o]n the Petition of either party to a marriage, a District Court *may* decree a dissolution of marriage [on the ground of] incompatibility."[28] Respondent contended that the use of the word "may" instead of "shall" made discretionary whether the court would grant a divorce. Therefore the court had the authority to dismiss the petition for *forum non conveniens.*

The supreme court took the opportunity to discuss the doctrine of *forum non conveniens* and its applicability to New Mexico proceedings. The court described factors to be weighed in determining whether the doctrine should be invoked. Important considerations are: 1) the relative ease of access to sources of proof; 2) availability of compulsory process for attendance of unwilling witnesses; 3) the cost of obtaining willing witnesses; 4) possibility of a view of the premises, if a view would be appropriate to the action; 5) all other practical problems that make trial of a case easy, expeditious and inexpensive.[29] Other factors to be considered are the enforceability of the judgment if one is obtained, and the relative advantages and obstacles to fair trial. The plaintiff may not, by choice of an inconvenient forum, vex, harass, or oppress the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.[30]

Having discussed generally the doctrine of inconvenient forum, the *Buckner* court then found that the doctrine has no applicability in a divorce action when the only issue is whether the parties are incompatible. None of the problems pertaining to witnesses, proof, or viewing obtain. The petitioner could establish incompatibility by his own testimony without any other witnesses or evidence. Neither is harassment or expense a problem. It would be equally as expensive for the petitioner to litigate incompatibility in New York as it would be for respondent to litigate incompatibility in New Mexico. The balance is therefore evenly struck between the two forums. Because the balance is not strongly in favor of the foreign forum, the petitioner's choice of forum should not be disturbed. The court noted

27. N.M. Stat. Ann. §40-4-1 (1978).
28. *Id.* (Emphasis added).
29. 95 N.M. at 339, 622 P.2d at 244.
30. *Id.*

that the doctrine of inconvenient forum is by its nature a drastic remedy to be exercised with caution and restraint. It is essential that a suitable alternative forum be available for the doctrine to be exercised.[31]

The court noted that the record in *Buckner* did not indicate whether an alternative forum existed in New York in which the petitioner could have his cause litigated. The fact that a legal separation suit was pending in New York is no impediment under New Mexico law to the filing of a divorce action, because the New Mexico statutes provide that the two causes of action are separate and distinct.[32]

The *Buckner* decision indicates that whenever inconvenient forum is used as a defense, in addition to complying with the factors cited, the practitioner should include the allegation that an alternative forum is available to the plaintiff. The *Buckner* court further implied that although *forum non conveniens* is not applicable to a divorce action when the only issue is incompatibility, the doctrine may be applicable to other issues incident to a divorce action, such as alimony and child support.[33]

The more general consequence of the *Buckner* decision is that any party is entitled to an ex parte divorce on the grounds of incompatibility in New Mexico, so long as the residency requirement has been met. The consequence of the *Hagan* decision was to expand the application of domicile for divorce jurisdiction purposes. Both the *Hagan* and *Buckner* decisions appear to enlarge divorce jurisdiction in New Mexico.

B. *Custody and Visitation*

One custody and visitation case was decided during the Survey year. In *In re Hooker,*[34] the supreme court considered the powers of

31. *Id.* The court noted that the doctrine of *forum non conveniens* has been adopted by the Restatement (Second) of Conflict of Laws §84 (1971). The court quoted the Restatement: "A state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff." *Id.* The court noted that comment c to section 84 of the Restatement lists the important factors to be considered: "1) that since it is for the plaintiff to choose the place of suit, his choice of a forum should not be disturbed except for weighty reasons, and 2) that the action will not be dismissed unless a suitable alternative forum is available to the plaintiff." Restatement (Second) of Conflict of Laws §84, Comment c (1971).

32. *Compare* N.M. Stat. Ann. §40-4-3 (1978) (provides for division of property without a dissolution of the marriage) *with* N.M. Stat. Ann. §40-4-5 (1978) (provides for dissolution of marriage).

33. If the issue is child custody, a statutory basis for *forum non conveniens* now exists in New Mexico, as section 40-10-8 of the New Mexico Child Custody Jurisdiction Act, N.M. Stat. Ann. §40-10-1 to -24 (Cum. Supp. 1981).

34. 94 N.M. 798, 617 P.2d 1313 (1980).

the trial court in a civil contempt action. The court held that such actions are remedial in nature. The case also suggests some practical procedures for laying the ground work for damages in a contempt action.

In *Hooker* the mother of minor children had died. The trial court appointed the maternal uncle the guardian of the children. The uncle lived in Georgia and removed the children to that state. The father, who was divorced from the mother, consented to the guardianship with the condition that he be granted reasonable visitation. The father, after making two trips to Georgia to see his children, alleged that he was denied visitation. The record revealed that the uncle engaged in a heated argument with the father and refused to allow the father to enter his home or to be alone with the children. The uncle refused several requests by the father and the father's attorney to make arrangements for the children to spend part of the summer vacation with the father. The trial court held the uncle in contempt of court for failure to grant reasonable visitation, placed temporary custody of the children in the father, and assessed a jail term, costs, and attorney fees against the uncle. The trial court later vacated the jail term, but affirmed the assessment of legal and travel expenses and added an additional assessment for subsequent legal expenses.

The supreme court affirmed the action of the district court. The supreme court held that a fine for damages for civil contempt is remedial in nature and is designed to reimburse the innocent party for the wrong done as the result of the contemptor's action. Recovery is limited to the actual costs and expenses, including counsel fees incurred in investigating and prosecuting the contempt.[35] The court also held that where a district court appoints a guardian, the court has concurrent jurisdiction with the foreign jurisdiction where the guardian has moved.[36]

The supreme court did not include as reimbursement travel expenses incurred by the father on his second trip to Georgia. The court reasoned that the evidence did not sufficiently demonstrate that the uncle had any notice or knowledge of the second trip. The supreme court stated that it was inequitable to hold the uncle liable for travel costs when he could have done nothing to prevent them. Therefore, before making a request for travel expenses in a contempt

35. Reimbursement includes attorney's fees. "In the prosecution of the contempt proceedings the trial court in its discretion may allow the complainant a reasonable attorney's fee to be assessed against the violator as a part of the expenses and costs incurred by the complainant." Royal Int'l Optical Co. v. Texas State Optical Co., 92 N.M. 237, 245, 586 P.2d 318, 327 (1978), cited with approval in *Hooker*, 94 N.M. at 800, 617 P.2d at 1315.

36. 94 N.M. at 800, 617 P.2d at 1315, *citing* N.M. Stat. Ann. §45-5-211 (1978).

or other action, counsel should notify the adverse party of the client's or client's attorney's intention to incur these expenses.[37]

C. *Child Support*

Four cases were decided in the survey year in the area of child support. *Harper v. New Mexico Department of Human Services, Income Support Division*[38] held that a New Mexico state regulation applying New Mexico community property laws had been pre-empted by a federal regulation. In *Henderson v. Lekvold*[39] the trial court refused to reduce child support obligations because of financial burdens voluntarily undertaken. *Montoya v. Montoya*[40] determined that the date of filing the petition for child support was the pertinent date for modification. In *Mask v. Mask,*[41] the supreme court concluded that social security benefits received by a child after the retirement of his parent could not be offset against that person's obligation of support.

Over the past few years, a series of cases involving the relation of New Mexico's community property system to Aid to Families with Dependent Children (AFDC), have been decided by the New Mexico appellate courts with conflicting results. The conflicts have been reconciled to some extent by *Harper v. New Mexico Department of Human Services. Harper* clarified the prior inconsistent holdings of the court of appeals in *Duran v. New Mexico Department of Human Services,*[42] and *Barela v. New Mexico Department of Human Services,*[43] as well as the holding of the Tenth Circuit Court of Appeals in *Nolan v. C. de Baca.*[44] The holding in *Harper,* which benefits children of parents receiving AFDC, necessitates a discussion of *Duran, Barela,* and *Nolan.*

The facts in all four cases are similar. The mother had a child by a previous marriage, and the mother's new husband did not adopt the

37. The supreme court did not state what notice is sufficient to demonstrate the adverse party had knowledge of the travel plans. Due to the supreme court's reasoning that it is inequitable to hold a party liable for travel costs when he could have done nothing to prevent them, it is possible that the ruling could be extended to require notice of any costs and expenses which are intended to be assessed against the adverse party when the adverse party could have done nothing to prevent them.

38. 95 N.M. 471, 623 P.2d 985 (1980).

39. 95 N.M. 288, 621 P.2d 505 (1980).

40. 95 N.M. 189, 619 P.2d 1233 (1980).

41. 95 N.M. 229, 620 P.2d 883 (1980).

42. 95 N.M. 196, 619 P.2d 1240 (Ct. App. 1980). *See also* Duran v. New Mexico Dep't of Human Serv., 95 N.M. 188, 619 P.2d 1232 (1980).

43. 94 N.M. 288, 609 P.2d 1244 (Ct. App. 1979), *cert. denied,* 94 N.M. 629, 614 P.2d 546 (1979).

44. 603 F.2d 810 (10th Cir. 1979), *cert. denied sub. nom.* Ingram, Dep't of Human Serv. v. Nolan, 444 U.S. 1068 (1980).

child. The mother applied for AFDC benefits for the child. Pursuant to the state regulations,[45] and in keeping with New Mexico's community property law, one-half of the new husband's income is presumed to be available to the wife, and therefore available to the child. Under this formulation, the child's eligibility for AFDC may be terminated or substantially reduced. This differs from federal law. Under federal regulations,[46] the determination of eligibility of the child for AFDC benefits is made only in relation to the availability of support from the child's natural or adoptive parent, or from a step-parent who is legally obligated to support the child under New Mexico law. Income from another source will not be considered for purposes of AFDC eligibility in the absence of proof of actual and regular contributions to the child from that source.

Nolan and *Barela* held that the state regulation concerning AFDC programs cannot contravene federal regulations implementing these programs. Both cases rendered the state regulation invalid pursuant to the supremacy clause of the United States Constitution.[47] *Nolan* and *Barela* took the view that the federal regulation clearly *limits* a state to consideration only of actual contributions to the budget group (the child), the income of the natural or adoptive parent, and the income of a step-parent legally obligated by state law to provide support. Income from any other source must be shown to be actually available for current use on a regular basis. Thus, a step-parent cannot be deemed to be supporting the child absent proof of actual contributions to the child.

Duran v. New Mexico Department of Human Services had a different emphasis and reached a contrary result. *Duran* overruled both *Nolan* and *Barela. Duran* focused on the mother and her legal obligation to support her child. Because the mother is legally entitled to one-half of the income of the new husband, one-half of the stepfather's income is deemed available to the child for AFDC purposes, irrespective of whether the child is actually receiving the income. Under New Mexico statutory law, the child may force the mother to adequately support the child.[48] Under *Duran,* the source of the

45. New Mexico Dep't of Human Serv. Manual §221.832(A). This section was revised in October of 1981. The revision deleted a long analysis of community property law.

46. 45 C.F.R. §233.90(a) (1978). Since the *Harper* decision, Congress has amended the Social Security Act to require that a state plan for aid and services to needy families with children must provide that in making a determination for AFDC benefits, the state agency shall take into consideration the income of step-parents living with dependent children. Omnibus Budget Reconciliation Act of 1981, 42 U.S.C. §602(A) (31). This amendment changes the result of *Harper, Nolan,* and *Barela,* and affirms the result in *Duran.* The analysis of community property principles in *Duran,* which were approved in *Harper,* remain unchanged.

47. U.S. Const. art. VI.

48. The method would be via a judgment pursuant to N.M. Stat. Ann. §40-3-10A (1978).

mother's income or entitlement is irrelevant. The new husband is not deemed to be supporting the child; it is the mother who supports the child. Therefore, the state regulation does not conflict with the federal regulation.

Harper upheld *Nolan* and *Barela,* and overruled *Duran.* The *Harper* court recognized that the *Duran* court's analysis and conclusions concerning New Mexico community property law were correct. The court found that the conclusive presumption of the Department of Human Services' regulation conflicted with federal regulations which preempted community property principles of New Mexico. The court held that a wife's community interest in the new husband's income could not be presumed available to the child without a showing of actual contributions.

The *Harper* decision is correct. Clearly, in determining financial eligibility and the amount of the assistance payment for the child, it should not matter whether the child happens to live in a community or non-community property state or whether the child is able to obtain a judgment against his mother and execute on her community property interest to enforce the mother's obligation to him. The determination should be based on factors more closely related to actual fulfillment of the child's actual needs.

The second child support case decided during the survey period was *Henderson v. Lekvold.*[49] In *Henderson,* the main issues addressed were: 1) whether the father could rely on his excessive voluntarily-incurred financial obligations as a basis for reduction of his child support obligations; 2) whether the trial court properly considered the potential future earnings of the mother in reducing child support; 3) to what extent the trial court could consider the financial resources and lifestyle of the mother and her new spouse in determining the amount of child support; and 4) whether the trial court erred in the weight given to the Child Support Guidelines as incorporated into the stipulated divorce decree.

The parties were divorced in 1977. The divorce decree incorporated a stipulation and agreement of the parties. The decree awarded custody of two children to the mother and provided for child support payments by the father. The decree also stated that in the event the father's income increased, the support payments would increase in accordance with the Child Support Guidelines promulgated by the court.[50] The decree provided that the parties would own the family

49. 95 N.M. 288, 621 P.2d 505 (1980).

50. The Child Support Guidelines are those promulgated by the Bernalillo County District Judges to assist in fixing amounts for child support.

home as tenants-in-common, and the mother would live there and make the mortgage payments. If she moved, however, the residence would be sold and the money divided.

The father's salary increased, and he increased the support payments temporarily. He later discontinued the increased amount of child support. The mother remarried and moved to Wyoming. The father purchased the mother's one-half interest in the residence. The mother was employed at the time of the divorce, but not at the time the trial court modified the child support obligation. The mother's new husband had a minor son, and an income equivalent to the father's income. The mother had prospective income available to her. The lifestyle of the mother and her children improved after her remarriage.

The trial court made three findings. First, the court found that the father had been unable to pay the substantial indebtedness of the parties and maintain his obligation to pay child support. The second finding was that there had been a substantial and favorable change in the mother's financial circumstances since her remarriage. Third, the court found that the lifestyle of the children had improved considerably. The trial court reduced the father's child support obligation.

The supreme court reversed. The court repeated the *Spingola v. Spingola*[51] test for modification of an award of child support, stating that there must be a substantial change of circumstances which materially affects the existing welfare of the child and which must have occurred since the prior adjudication where child support was originally awarded. The court stated that both parents have the duty to support their minor children.[52]

The supreme court then found that the primary strain on the father's finances were the mortgage payments on the house he purchased from the mother. The court stated that the father had voluntarily assumed an excessive financial burden only for his convenience and investment. The court then held that where the father's salary had increased and the increased burden on his finances was the result of an obligation he incurred voluntarily, it was an abuse of discretion for the trial court to reduce his child support obligations to the extent they were reduced.

As to the mother's remarriage, the court noted that *Spingola* held that the remarriage of either or both of the parties may have some

51. 91 N.M. 737, 580 P.2d 958 (1978).

52. 95 N.M. at 292, 621 P.2d at 509, *citing* Petition of Quintana, 83 N.M. 772, 497 P.2d 1404 (1972) and N.M. Stat. Ann. §40-4-7(B)(3) (1978).

effect upon the financial resources available to support and maintain the children and that this factor is one of many to be considered in modifying a child support award. However, the totality of the circumstances needs to be considered. The court then stated that it was clear that the new husband had no duty to support the parties' children. The court further reasoned that the trial court, in reducing support, had impermissibly shifted the duty of support from the children's father to their step-father. The supreme court additionally held that it was error for the trial court to refuse to enforce the terms of the original decree pertaining to the escalating schedule of child support as provided by the Child Support Guidelines.

Henderson provided an opportunity for the court to apply the analysis of New Mexico community property law which was presented in *Duran v. New Mexico Department of Human Services*[53] and approved in *Harper v. New Mexico Department of Human Services.*[54] In *Duran,* Judge Hendley determined that a spouse has a present and vested property interest in one-half of the community income, and that this income can be used to meet that spouse's obligations. The mother has a legal obligation to support her children. Her interest in the community property should be used for that purpose. Under the *Duran* analysis, one-half of the income of the step-father in *Henderson* should have been considered in determining the father's petition for reduction of child support.[55]

53. 95 N.M. 196, 619 P.2d 1240 (Ct. App. 1980).

54. 95 N.M. 471, 623 P.2d 985 (1980).

55. Although Wyoming is not a community property state, the mother still has a legal obligation to support her children. The entitlement, or lack of entitlement of the mother to a present and vested property interest in the income of her new spouse under Wyoming law was not determined by the supreme court, as required by Hughes v. Hughes, 91 N.M. 339, 573 P.2d 1194 (1978). In *Hughes,* the supreme court stated:

> Although wives in common-law states have no legal title to property purchased with the husband's earnings, the case law in those states has created many benefits, incidents, and immunities in favor of wives that attach themselves to such separate marital property. Therefore the wife, in many common-law states and certainly in Iowa, has inchoate equitable rights to her husband's separate property where she has made contributions to preserving and bettering that property, whereas in a typical community property state she has no such rights since she has community property rights instead. . . .
>
> . . . Although the property traceable to Col. Hughes' earnings was clearly his separate property, we hold that the characterization of this property as separate must be made under the applicable laws of the State of Iowa and therefore the property is subject to all the wife's incidents of ownership, claims, rights and legal relations provided in any and all of the laws of the State of Iowa that affect marital property.

91 N.M. at 344, 346, 573 P.2d 1199, 1201. *Hughes* required New Mexico to look to Wyoming law to determine the wife's equitable entitlement to the separate property of her husband. If the wife has such an entitlement under the law of the other jurisdiction, the child should share in that entitlement, because of the mother's obligation to support the child. Applying the lan-

The applicable date for modification of child support payments was determined by the supreme court in *Montoya v. Montoya,*[56] to be the date of filing of the petition or pleading rather than the date of hearing, absent an unreasonable delay in bringing the case to trial by a party, or unless there are unusual circumstances. The *Montoya* court overruled *Gomez v. Gomez*[57] to the extent that *Gomez* could be interpreted to hold that the applicable date for modification should be the date of hearing.

In *Mask v. Mask,*[58] the supreme court addressed the issue of whether social security benefits received by a child after the retirement of his parent could be offset against that parent's obligation of support. The court concluded that they could not.

The action for recovery of child support arrearages was brought in the context of a contempt proceeding for failure to pay child sup-

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guage from *Hughes* and *Duran,* which was approved in *Harper,* if a divorced spouse remarries and lives in a common law state, the equitable rights of the divorced spouse to the new husband's property should be considered available to the wife, and therefore available to her children. Applying *Spingola,* the increased income available to the children due to the equitable interest of the mother in the property of a wealthy husband, should be sufficient grounds for a modification of the support obligation of the father. The stepfather is not deemed to be supporting the stepchildren. It is the mother who supports them from income which the law regards as belonging to her, notwithstanding the fact that her new husband may be the only wage earner.

The *Henderson* court recognized the holding in *Spingola* that the remarriage of either or both of the parties may have some effect upon the financial resources available to support and maintain the children. Thus a subsequent remarriage is a factor to be considered for an increase in child support from the father. The *Henderson* court then proceeded to hold that it was error for the trial court to, in effect, shift the duty of support from the children's father to the stepfather. If the *Henderson* reasoning is applied, then a mother's remarriage can never be considered as a basis for decreasing the child support obligation of the father. The *Spingola* "remarriage factor" could then only be applied to *increase* the father's child support obligation. Such an increase in the father's child support obligation could only be justified on the reasoning that the mother's remarriage is a financial liability to her, resulting in a reduced contribution from her to the support of her children. A mother's remarriage would not be a financial liability to her unless she had a duty to support her new husband who is poorer than the children's father. It is not consistent to reason that a remarried mother has a duty to support her poor husband as a basis for an increase in the father's child support obligation, but a remarried mother has no right to support from a wealthy husband which could be a basis for a reduction of the father's child support obligation. In every state, spouses have a duty to support each other. In community property states, each spouse has a present and vested property interest in the income of the other spouse. Because of the spousal support obligation and community property principles (as well as inchoate equitable rights in a common law state), a remarried mother may have greater or lesser resources available to her for the support of her children. The *Spingola* remarriage factor should be applied consistently to require a decrease in child support if a mother's resources increase due to remarriage. Such an application of *Spingola* would not mean the stepfather is supporting his stepchildren any more than *Spingola* now means that a father is supporting the new husband if the father's support obligation is increased as a result of the mother's remarriage.

56. 95 N.M. 189, 619 P.2d 1233 (1980).

57. 92 N.M. 310, 587 P.2d 963 (1978).

58. 95 N.M. 229, 620 P.2d 883 (1980).

port. The trial court found that the defendant had been in default in his support payments for ten years and nine months. The defendant claimed as an offset the amount of monthly checks the child received from the Social Security Administration. The social security checks resulted from the defendant's contributions to the social security fund and from his retirement. The trial court allowed an offset against the total arrearages in an amount equal to the excess of the monthly social security payment over the monthly child support payment. The trial court further allowed an offset for the entire amount of the social security payments received by the child after her eighteenth birthday.

The supreme court, in *Mask,* considered whether 1) income from a collateral source excuses a parent from compliance with the support provisions of the divorce decree, and 2) whether the excess of the social security payments over the monthly support obligations can be used as an offset against the arrearages accruing prior to the commencement of the social security benefits.

Regarding the first issue, the supreme court recognized the general rule that a court cannot retroactively modify a support order which has accrued and become vested.[59] The court said, however, that in the context of a contempt proceeding, equitable principles are applicable.[60] Therefore such a modification may sometimes be proper. In a proceeding for the enforcement of a support order, any valid defense against payment may be raised. Applying equitable principles, the supreme court affirmed the trial court. The court held that the defendant may receive a credit against his support obligation, but only to the amount of that obligation for each month after the child began receiving the benefits.

Regarding the second issue, the supreme court reversed the trial court's allowance of "carry-back" credit for support payments which were delinquent prior to the time social security benefits began. The supreme court held that to allow such a credit would violate federal law. The court stated that federal regulations prohibit the custodial parent from recovering support arrearages out of social security payments.[61] The non-custodial parent cannot seek to satisfy his support obligations by way of social security payments made directly to the child from the Social Security Administration. The court held that, under federal law, the benefits belong to the child

59. 95 N.M. at 231, 620 P.2d at 885, *citing* Gomez v. Gomez, 92 N.M. 310, 587 P.2d 963 (1978).

60. 95 N.M. at 231, 620 P.2d at 885, *citing* Corliss v. Corliss, 89 N.M. 235, 549 P.2d 1070 (1976).

61. 95 N.M. at 232, 620 P.2d at 886.

and not the father. Therefore, they cannot be part of the father's child support payments.

The supreme court said the allowance of "carry-back" credits violated equitable principles in two ways. First, if the credits were allowed, the defaulting defendant would receive a windfall, and the benefit of the social security payments. To disallow the credits would give the child the benefit of the extra payments. As between the two, the child should receive the extra benefits, because the father had defaulted. Second, the supreme court looked to the current need of the child as an equitable consideration. To allow a "carry-back" credit disregards the fact that when the need for food, clothing, lodging and other necessities arises, the need is current, and therefore the obligation of the supporting parent is current. The expectation of future benefits does not satisfy a current need. To allow "carry-back" credits is to encourage fathers to delay current child support payments in the expectation of future benefits from a collateral source.

D. *Property Division*

Five New Mexico decisions in the Survey year applied New Mexico community property principles. *Dominguez v. Cruz*[62] upheld a property contract between unmarried parties who were living together. *Hurley v. Hurley*[63] considered the question of valuation of goodwill in a professional practice. *Lucas v. Lucas*[64] addressed the issue of whether proceeds under a covenant not to compete were community property. *Padilla v. Roller*[65] found that a coal lease was community real property. *Delph v. Potomac Insurance Co.*[66] decided that the intentional burning of a community residence by one spouse will not bar recovery by the innocent spouse under a fire insurance policy issued to the community. Finally, *Execu-Systems v. Corlis*[67] found that a real estate listing agreement was not community property.

In *Dominguez v. Cruz,*[68] New Mexico's "mini-Marvin"[69] decision, the New Mexico Court of Appeals determined the property rights of people who had lived together in a non-marital relationship. The court held that an oral agreement respecting property

62. 95 N.M. 1, 617 P.2d 1322 (Ct. App. 1980).
63. 94 N.M. 641, 615 P.2d 256 (1980).
64. 95 N.M. 283, 621 P.2d 500 (1980).
65. 94 N.M. 234, 608 P.2d 1116 (1980).
66. 95 N.M. 257, 620 P.2d 1282 (1980).
67. 95 N.M. 145, 619 P.2d 821 (1980).
68. 95 N.M. 1, 617 P.2d 1322 (Ct. App. 1980).
69. *See* Marvin v. Marvin, 18 Cal.3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

rights is enforceable, notwithstanding the fact that the parties were living together and engaging in sexual relations. The parties brought property into the relationship, pooled their financial resources for their mutual benefit, shared household chores and expenses, bought property for joint use and ownership, and acquired personal property which they agreed would be jointly owned. They planned to marry but did not. The plaintiff was seeking a distribution of property which the defendant claimed she owned. The trial court concluded that pursuant to an oral contract, implied partnership, or joint venture, the parties acquired the property jointly and were entitled to an equal distribution of that property. On appeal, plaintiff argued that an agreement by cohabiting adults, under a promise of marriage, is not a partnership or joint venture.

The court of appeals noted that the presence or absence of the marital state was irrelevant in this action, because marriage is only one type of civil relationship and the possibility of others clearly exists. The court indicated it would not treat an arrangement for mutual support, joint purchase of personal property and distribution of incomes differently from any other civil relationship, because the relationship is "like a marriage." If an agreement such as an oral contract can exist between business associates, it can also exist between two cohabiting adults who are not married, provided the essential elements of the contractual relationship are present.[70]

The *Dominguez* decision is significant, not only because it holds that an oral agreement, implied partnership or joint venture is enforceable, even between parties who live together and engage in sexual relations, but also for an issue not presented, but necessary to the decision. The problem with the *Dominguez* decision is that the court of appeals attempted to distinguish between an oral property agreement, which the courts recognize, and a common law marriage, which New Mexico does not recognize for public policy reasons.[71] It may often happen that the circumstances surrounding an oral property agreement look very much like a common law marriage. If the

70. The court cited Dolan v. Dolan, 107 Conn. 342, 140 A. 745 (1928), where the Connecticut court found that a husband and wife could be joint venturers where they had combined their property, money, efforts, skill, or knowledge in some common undertaking, which was a pooling of monies for joint benefit in maintaining a home and meeting joint obligations.

71. The public policy of New Mexico respecting the relation between contract and marriage was determined in Tellez v. Tellez, 51 N.M. 416, 186 P.2d 390 (1947). In *Tellez*, the supreme court held that a contract whereby one spouse agrees to pay the other spouse for his or her care, which is part of the other spouse's duties as a spouse, is against public policy and is therefore void. The supreme court in *In re* Estate of Lord, 93 N.M. 543, 602 P.2d 1030 (1979) reaffirmed the public policy basis for that decision and stated "[i]t is the policy of this state to foster and protect the marriage institution. It is not the policy of the state to encourage spouses to marry for money." *Id.* at 544, 602 P.2d at 1031.

parties were able to have an oral property agreement which is severable from their oral or implied agreement to live together, the parties would be equally able to have an oral or implied agreement that their oral property agreement is linked, or is made a condition, to their oral agreement to live together. The agreement to live together would be an incidental part of the property contract and presumably would be enforced under *Dominguez*. Such an arrangement would be hard to distinguish from a common law marriage.

This possibility was not expressly presented to the court of appeals in *Dominguez*. If this case were to arise, the *Dominguez* decision would directly contradict New Mexico policies against common law marriage. The court of appeals did suggest that an issue could be raised as to whether the Dominguez-Cruz agreement was contrary to public policy. The court may have meant to speak to this special case. An oral agreement conditioned on the existence of a sexual relationship between unmarried couples may not be enforced as contrary to public policy.

A contract for payment made in consideration of marriage is void against public policy.[72] If this is so, a contract for distribution of property, partnership or joint venture, made in consideration of a living arrangement involving conjugal relations, should also be void as against public policy. The policy adopted by New Mexico in refusing to recognize common law marriage argues against recognizing relations like that of *Dominguez,* even to the extent of enforcing property agreements made pursuant to the relationship.

As reported in the last Survey, New Mexico appellate decisions have begun to define judicially the areas of property division. In *Hurley v. Hurley,*[73] the New Mexico Supreme Court addressed the issue of valuation of goodwill in a professional practice. The findings of *Hurley* have been important in later cases and must be briefly reviewed here. The *Hurley* court recognized that goodwill can and does exist in a professional practice even though founded upon the personal skill and reputation of an individual.[74] The *Hurley* court then found that although an individual right to a professional practice is a property right which cannot be classified as community property,[75] the value of the practice as a business at the time of the dissolution of the community is community property. The court determined that even though goodwill may not be a saleable asset, it

72. *See* note 71 *supra.*

73. 94 N.M. 641, 615 P.2d 256 (1980). For an in-depth analysis of this case, *see* Note, *Community Property—Valuation of Professional Goodwill,* 11 N.M. L. Rev. 435 (1981).

74. 94 N.M. at 643, 615 P.2d at 258.

75. *Id.* at 644, 615 P.2d at 259.

can have value, and difficulty of valuation is no reason to ignore it. Once the existence and value of goodwill are established, it should be included in and divided with other community property.

There is no definitive rule for the determination of the value of goodwill. Each case must be decided on its own facts and circumstances. Opinion evidence is admissible but not conclusive. A community interest can only be acquired while the parties are married, but the value of that interest must be determined at the time of dissolution without dependence upon the potential or continuing income of the professional spouse.[76]

Some of the factors to be considered in arriving at the value of goodwill are: the length of time the professional has been practicing, his comparative success, his age and health, and any past profits of the practice. Attention should also be given to the physical and fixed resources of the practice. A capitalization of excess earnings method was introduced at trial to determine the value of the goodwill of the doctor's practice. The supreme court stated that this is a legitimate, although not exclusive, method of evaluation of community goodwill.[77]

In *Lucas v. Lucas,*[78] the supreme court decided two issues: first, whether proceeds under a covenant not to compete were community property and second, to what extent the sale of goodwill is an implicit part of the sale of a business. The covenant not to compete in *Lucas* was negotiated as part of the sale of a mutual business. Part of the community assets was the parties' holding of stock in the business. The sale was completed after the dissolution of marriage. The covenant not to compete was individually negotiated with the purchaser. The seller acquired $10,000 a year for ten years. The proceeds from the covenant not to compete were declared separate property because they were to be received after the divorce. The court decided that the right to compete was a personal right, and was therefore the separate property of the owner.[79] The business goodwill was found to have been an implicit part of the sale of the business. The community stock was but one of several different sales by different stock owners of the business which were made to the same purchaser. All sales were contingent on the ability of the purchaser to purchase all the corporate stock of the business. The price paid for the stock was both fair and reasonable. The price paid exceeded the total assets of the corporation after allowing for depreciation.

76. *Id.*
77. *Id.*
78. 95 N.M. 283, 621 P.2d 500 (1981).
79. 95 N.M. at 285, 621 P.2d at 502.

The supreme court found the business' goodwill was sold as part of the stock sale. The court distinguished *Hurley* because the stock purchase price was greater than the net asset value of the business. The supreme court determined that the amount received by the shareholders which exceeded the actual value of the assets could only be attributed to the business goodwill.

There are some theoretical difficulties with the analysis in *Lucas*. The intangible which was sold under the covenant not to compete is scarcely distinguishable from goodwill attributable to the business. There were other shareholders in the business, but the business was operated by the appellant who was a licensed mortician. If a mortician is considered a professional, following *Hurley,* the *right* to practice is not a community property right, although the *value of the practice as a business* at the time of dissolution is community property. The value of the business was determined in *Lucas,* but the value of the *practice* of appellant as a business was not determined. This precise asset was determined by the *Hurley* court to be goodwill, which was divisible as community property. The *Hurley* court awarded as community property the present value of the ability of Dr. Hurley to maintain his practice and receive a return on the goodwill associated with his name.

In *Lucas,* the appellant conveyed, under a covenant not to compete, his ability to maintain his practice and receive a return on the goodwill associated with his name. It is difficult to conceive the value of a covenant not to compete to the purchaser if the covenant does not include the goodwill associated with the name of the seller. If the goodwill associated with the name of the seller were negative or negligible, it would not be necessary to pay the seller $10,000 a year not to compete.

It should make little difference that the covenant not to compete was negotiated after the dissolution of the marriage. The covenant was negotiated along with the sale of assets of the business. The fact that the assets were sold after the dissolution should not affect their characterization as community assets. In *Hurley,* the supreme court held that the value of the *practice as a business* at the time of dissolution of the community is community property. This is distinguished from the value of the business as represented by stock ownership. In *Lucas,* the value of the practice of the business of the appellant as a mortician was not included in the community assets of the parties. That value should have been characterized as the community property goodwill of the appellant's practice as a business, notwithstanding its characterization as a covenant not to compete. The two cases are inconsistent.

In *Padilla v. Roller,*[80] the court was presented with the issue of whether a transfer of a coal lease was a transfer of community real property, requiring both husband and wife to join in the transfer, as provided by New Mexico statutes.[81] Following a line of New Mexico cases on oil and gas leases,[82] the court held that a coal lease was community real property. Therefore, the husband could not effectively convey the coal leases without his wife's signature.

The responsibility of the innocent spouse where the husband committed an intentional tort was raised in *Delph v. Potomac Insurance Co.*[83] The court found that the tort could not be imputed to the innocent spouse. In *Delph,* while a dissolution of marriage proceeding was pending, the husband intentionally set fire to the community residence. The insurance company claimed fraud by the community. The issue was whether the intentional burning of a community residence by one spouse will bar recovery by the innocent spouse under a fire insurance policy issued to the community. The supreme court held that the husband's fraud could not be attributed or imputed to the innocent spouse, because such activity was of no benefit to the community. Therefore, such action could only void the policy as to the tortfeasor.[84]

In *Execu-Systems, Inc. v. Corlis,*[85] the supreme court addressed the issue of whether a real estate listing agreement was a "transfer" of real property requiring the signature of both husband and wife pursuant to N.M. Stat. Ann. §40-3-13 (1978). The statute requires that spouses join in the conveyance of community real property. The husband and wife owned a house jointly. The husband listed the house with the plaintiff realtor. The listing agreement provided for payment of a commission if the house were sold within the listing period. The wife did not join in signing the agreement. The plaintiff realtor knew the wife was a joint owner. Within the listing period, the husband found a buyer and sold the house without going through the listing agent. The agent filed suit to recover his commission. The supreme court held that a listing agreement is a contract for services and not an interest in property within the meaning of

80. 94 N.M. 234, 608 P.2d 1116 (1980). For other discussions of this case, *see* Recent Development, 21 Nat. Resources J. 415 (1981); Lebeck, *Estates and Trusts,* 12 N.M. L. Rev. 363 (1982).

81. N.M. Stat. Ann. §40-3-13 (1978).

82. 94 N.M. at 235, 608 P.2d at 1117, *citing* Sachs v. Board of Trustees, 89 N.M. 712, 557 P.2d 209 (1976).

83. 95 N.M. 257, 620 P.2d 1282 (1980).

84. *Id.* at 260, 620 P.2d at 1285, *citing* McDonald v. Senn, 53 N.M. 198, 204 P.2d 990 (1949).

85. 95 N.M. 145, 619 P.2d 821 (1980).

section 40-3-13. The wife's signature was not required to bind her husband, because the listing agreement was not an interest in property. Therefore, under ordinary contract law, the husband was liable on the contract, even though at the time of contracting, he could not have performed his part of the agreement to convey the property without his wife's signature.

A United States Supreme Court case, *McCarty v. McCarty*[86] decided this year, will have a great impact on New Mexico law. *McCarty,* therefore, will be discussed at length. In *McCarty,* the United States Supreme Court held that federal law precludes a state court from dividing military retired pay pursuant to state community property laws. Since *LeClert v. LeClert*[87] was decided in 1969, New Mexico courts have held that military retirement pay[88] is community property, and is divisible upon divorce. The *McCarty* decision overrules *LeClert* and supporting authorities, and establishes new law in New Mexico.

Colonel McCarty was a United States Army officer. A regular commissioned officer of the United States Army who retires after twenty years of service is entitled to retired pay. Retired pay terminates with the officer's death, although he may designate a beneficiary to receive any arrearages which remain unpaid at death. In addition, statutory plans exist which allow the officer to set aside a portion of his retired pay for his survivors.

McCarty, a regular army colonel, filed a Petition for Dissolution of Marriage in California, a community property state. At the time, he had served approximately eighteen of the twenty years required for retirement with pay. Under California law, as in New Mexico, each spouse, upon dissolution of marriage, has an equal and absolute right to a half interest in all community and quasi-community property, but retains his or her separate property. In his petition, Colonel McCarty requested that his military retirement benefits be confirmed to him as his separate property. The trial court held that Colonel McCarty's retirement benefits were community property, divisible upon divorce, and ordered him to pay to his former wife a specified portion of the benefits upon retirement.

Subsequently, Colonel McCarty retired and began receiving retired pay. Under the dissolution decree, the former wife was entitled to approximately forty-five percent of the retired pay. On review of this award, the California Court of Appeals affirmed the

86. 101 S. Ct. 2728 (1981).

87. 80 N.M. 235, 453 P.2d 755 (1969).

88. The terms "retired pay" and "retirement pay" are used interchangeably in the *McCarty* opinion and in this article.

trial court's decree. The court of appeals rejected Colonel McCarty's contention that the federal scheme of military retirement benefits pre-empts state community property law, and that the supremacy clause precludes the trial court from awarding the former wife a portion of his retired pay. The California Supreme Court denied Colonel McCarty's petition for hearing. The United States Supreme Court accepted appellate jurisdiction and reversed the judgment of the California Court of Appeals.

Colonel McCarty argued that California's application of community property concepts to military retired pay is in conflict with federal law in two ways. First, the California courts concluded that military retired pay is awarded as deferred compensation for services previously rendered. Colonel McCarty asserted that under federal law military retired pay is, in fact, current compensation for reduced, but currently rendered, services. Accordingly, retired pay is his separate property, because under California law, the earnings of a spouse after the dissolution of the marital community are separate property.

The Supreme Court discussed the question of whether military retired pay is deferred compensation, or reduced compensation for reduced services. The Court indicated the possibility that Congress intended military retired pay to be in part current compensation, and that states must tread with caution in this area, least they disrupt the federal scheme. The Court did not decide whether federal law prohibits a state from characterizing retired pay as deferred compensation, however, because it agreed with Colonel McCarty's second argument that the application of community property law is in conflict with the federal military retirement scheme.

Colonel McCarty's second argument was that the application of community property law would be in conflict with the federal retirement scheme regardless of whether retired pay is defined as current or deferred compensation. The federal scheme, which provides for the retiree to designate a beneficiary or survivor at the death of the retiree, pre-empts state community property laws. The Supreme Court recognized that the whole subject of the domestic relations of husband and wife belongs to the laws of the states and not to the laws of the United States. Thus, state family and family-property law must do major damage to clear and substantial federal interests before the supremacy clause will demand that state law be overridden.[89] The *McCarty* Court, in determining the test which would justify a finding of pre-emption, cited *Hisquierdo v. Hisquierdo.*[90]

89. 101 S. Ct. at 2735.
90. 439 U.S. 572 (1979).

The Court construed *Hisquierdo* to hold that there are two pertinent questions: first, whether the right as asserted conflicts with the express terms of federal law and, second, whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition.

Congress has not directly declared that military retired pay is not divisible upon divorce. The *McCarty* Court, however, in considering the first prong of the *Hisquierdo* test, found a conflict between the application of state community property laws and other specified congressional enactments regarding the distribution of retirement benefits. As a result of the conflict, the Supreme Court found an intent of Congress that military retired pay be a personal entitlement of the retiree, and is therefore not divisible upon divorce.

The Court found congressional intent that military retired pay be a personal entitlement in two ways. First, the Court cited congressional pronouncements to that effect. Second, the Court found that the statutory schemes which allow a retiree to designate a beneficiary to receive any unpaid arrearages in retired pay at his death, and which permit the retiree to set aside a portion of his retired pay for his survivors, indicate congressional intent for retired pay to be a personal entitlement.[91] A personal entitlement is therefore separate property, and is not divisible on divorce. For these reasons, the

91. The Court reasoned that if military retired pay were community property, the service member would not be able to deprive a spouse of his interest in the property under the statutory schemes. An annuity under either of the survivor's plans (the Retired Serviceman's Family Protection Plan (RSFPP), 10 U.S.C. §§1431-1446 (1976 & Supp. III 1979) and the Survivor Benefit Plan (SBP), 10 U.S.C. §§1447-1455 (1976 & Supp. III 1979)) is not assignable or subject to execution, levy, attachment, garnishment, or other legal process. A spouse is not able to claim an interest in an annuity which is not payable to her on the ground it was purchased with community assets. Because a military service member has the discretion to use retired pay to provide for a beneficiary or survivor under the statutory schemes, military retired pay must be the separate property of the service member.

Further, the Court stated that a division of retired pay under community property law would have the anomalous effect of placing an ex-spouse in a better position than a widow under the RSFPP and the SBP, because the interest of the ex-spouse under community property law is a presently vested property interest, whereas the interest of the widow in the retired pay is subject to disabling conditions. Some conditions are: 1) the retiree must elect to provide for a survivor; 2) the survivor's annuity terminates upon remarriage before sixty; and 3) annuity payments are subject to Social Security offsets. An ex-spouse is not an eligible beneficiary of an annuity under the RSFPP or the SBP. 10 U.S.C. §1434(a) (Supp. III 1979); 10 U.S.C §§1447(3) (1976) and 1450(a) (1976 & Supp. III 1979). The Court decided that these provisions make it clear that Congress intended to favor the widow over the ex-spouse. 101 S. Ct. at 2739. It is inconceivable to the Court that Congress intended to place the ex-spouse in a better position than the widow under the two survivor statutory schemes. This anomaly would result if retired pay were subject to community property division.

Finally, the Court stated that it is clear that Congress intended for military retired pay actually to reach the beneficiary because retired pay cannot be attached to satisfy a property settlement incident to the dissolution of marriage and an Army enlisted man may not assign his pay. *Id.*

Supreme Court found that California's community property division of retired pay conflicted with explicit congressional intent that retired pay accrue to the retiree.

Having found a conflict between state and community property principles and the statutes pertaining to military retirement, the Supreme Court next applied the second prong of the *Hisquierdo* test. The Court found that the application of community property principles to military retired pay threatens grave harm to clear and substantial federal interests. Harm would result from the application of community property principles to retired pay because the two major goals for which Congress enacted a military retirement system would be frustrated. These goals are: 1) to provide compensation for the retired service member, and 2) to meet the personnel management needs of the active military forces.

The community property interest conflicts with the first of these goals in that it diminishes that portion of the benefit Congress has said should go as compensation to the retired service member alone. Further, the community property division of retired pay may disrupt the carefully balanced scheme Congress has devised to encourage a service member to set aside a portion of the retired pay as an annuity for a surviving spouse or dependent children. This result may obtain because the retiree may be less likely to purchase an annuity for the survivor or beneficiaries, if one-half of his retired pay belongs to his spouse or ex-spouse.

The community property interest conflicts with the second of these goals by disrupting military personnel management.[92] The Court said that the military retirement system is designed to serve as an inducement for enlistment and reenlistment, to create an orderly career path, and to ensure youthful and vigorous military forces. Retired pay is one of the inducements selected to make military service attractive, and the application of state community property law,

92. Community property principles might interfere with the personnel management needs of encouraging orderly promotion and a youthful military. The reduction of retired pay by a community property award not only discourages retirement by reducing the retired pay available to the service member, but gives him a positive incentive to keep working because current income after divorce is not divisible as community property. The Court said that Congress has determined a youthful military is essential to the national defense. It is not for the states to interfere with that goal by lessening the incentive to retire created by the military retirement system.

The Supreme Court noted that the ex-spouse may still have a right to claim Social Security benefits and to garnish military retired pay for purposes of support. Because Congress has specifically provided protection for ex-spouses in the Civil Service and Foreign Service contexts, Congress may well decide that more protection should be afforded a former spouse of a retired service member. The Supreme Court therefore left to Congress the burden of making provision for the spouse of a military service member.

which would divide the retired pay, interferes with a legitimate exercise of the power of the federal government.

Justice Rehnquist, in a well reasoned dissent, concluded that military retired pay is community property divisible on divorce. Justice Rehnquist stated that the majority failed to cite the correct test for pre-emption in the family law context which *Hisquierdo* established. The *Hisquierdo* Court stated, "On the rare occasion where state family law has come into conflict with the federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted."[93] Justice Rehnquist said the majority "cannot, even to its own satisfaction, plausibly maintain that Congress has 'positively required by direct enactment' that California's community property law be preempted by the provisions governing military retired pay. The most that the court can advance are vague implications from tangentially related enactments or Congress' *failure* to act."[94]

The dissenting opinion analyzed the five previous cases where the Supreme Court found pre-emption of community property law, and concluded that the cases clearly establish that there is no precedent for the *McCarty* holding. Justice Rehnquist reasoned that the majority made an improper analytic jump in ruling that retired pay cannot be treated as community property simply because parts of it, or proceeds of parts of it—arrearages and the annuity—cannot be so treated. The dissent stated that if a conflict exists between California's community property law and the decision of the serviceman to fund an annuity out of retired pay, the answer is not to pre-empt community property treatment across the board, but pre-empt it only to the extent of the conflict, i.e., to permit community property treatment of retired pay less any amounts which are used to fund an annuity.

Justice Rehnquist's opinion is persuasive respecting the proper distribution of powers of federal and state goverments. Each of the two governments is to exercise its powers so as not to interfere with the free and full exercise of the powers of the other.[95] The states have reserved power to control the domestic relations of husband and wife.[96] A state law is superseded by a federal law only to extent that

93. 439 U.S. at 581.
94. 101 S. Ct. at 2743. (Emphasis by Justice Rehnquist).
95. Educational Films Corp. v. Ward, 282 U.S. 379 (1931).
96. Popovici v. Agler, 280 U.S. 379 (1930).

the two are inconsistent.[97] The exercise by the state of its police power, which would be valid if not superseded by federal acts, is superseded only where the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together.[98] Although Congress has not expressly declared that military retired pay is not divisible on divorce, the majority in *McCarty* found by inference a pre-emptive congressional intent to do so. This analysis ignores the fact that federal powers are enumerated, not inferred, powers and state powers are unenumerated, or inferred.[99] In the absence of express language to the contrary, the states should have the power to divide military retired pay upon divorce, pursuant to the tenth amendment of the United States Constitution.[100]

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97. AFL v. Watson, 60 F.Supp. 1010 (S.D. Fla. 1945), *rev'd on other grounds,* 327 U.S. 582 (1946).

98. Kelly v. Washington, 302 U.S. 1 (1937).

99. The *McCarty* decision simply makes the policy decision to shift the burden to ex-spouses, most of whom are women, to cause Congress to enact legislation to confirm their community property rights. The Supreme Court could have just as readily invoked *Hisquierdo* and traditional deference to the states' reserved powers, and placed the burden on the retirees, most of whom are men, to cause Congress expressly to declare that military retired pay is *not* divisible on divorce. Congress could well provide for the interest of a wife in the military retired pay of her husband, because it has enacted similar legislation in the Foreign Service and Civil Service contexts. Women will nonetheless carry the burden to cause such legislation to be enacted.

100. U.S. Const. amend. X. Another troubling aspect of the *McCarty* opinion is that the Court did not address the issue of whether *McCarty* will have retroactive, or only prospective application. The Court failed to include one sentence regarding retroactivity in the decision as is routinely provided by the California courts. *See In re* Marriage of Brown, 15 Cal.3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

Among the factors or circumstances which the courts have considered in deciding whether and to what extent a judicially changed rule of law should be given retroactive operation are: 1) the degree to which the prior rule may have been justifiably relied on, especially where matters of property or contract law are involved; 2) the degree to which the newly announced rule can be effectuated without being applied retroactively; and 3) the likelihood that retroactive operation of the overruling decision may substantially burden the administration of justice. *See* Annot., 10 A.L.R. 3d 1371, 1378 (1966).

In *In re* Marriage of Brown, the California Supreme Court held that pension rights, whether or not vested, represent a property interest. To the extent such rights derive from employment during coverture, they comprise a community asset divisible upon divorce.

Brown overruled French v. French, 17 Cal. 2d 775, 112 P.2d 235 (1941). The *Brown* court noted the general rule is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation. The court then recognized exceptions to that proposition such as when considerations of fairness and public policy preclude full retroactivity. *Brown* observed that the resolution of the issue of prospective application turns on two factors: 1) the extent of public reliance upon the former rule; and 2) the ability of litigants to foresee the coming change in the law. The court also noted that complete retroactivity might reopen controversies long settled by final judgment. The *Brown* court chose limited retroactivity to apply to any case in which the property rights arising from the marriage had not yet been adjudicated, to cases still subject to appellate review, or cases in which the trial court expressly reserved jurisdiction to divide pension rights. The *McCarty* decision should be given only limited retroactivity for the same reasons cited in *Brown.*

II. STATUTORY DEVELOPMENTS

Important statutory developments during the Survey year centered around two enactments, one state and one federal. On the state level, the New Mexico legislature enacted the New Mexico Child Custody Jurisdiction Act (NMCCJA),[101] effective July 1, 1981. The NMCCJA is based on the Uniform Child Custody Jurisdiction Act (UCCJA).[102] On the federal level, the United States Congress enacted the Parental Kidnapping Prevention Act (PKPA).[103] Both the NMCCJA and the PKPA are jurisdictional statutes and mandate full faith and credit in child custody determinations. This section will discuss both the state and federal enactments. The state enactment and its policies will be described and differentiated from prior state law. Problems with the NMCCJA will be discussed. The federal enactment will be described and related to the NMCCJA, with a commentary on possible pre-emption problems. The section concludes with a discussion of a second state enactment concerning joint custody.

A. *New Mexico Child Custody Jurisdiction Act*

The New Mexico Child Custody Jurisdiction Act[104] is an effort to clarify jurisdiction over children. The primary objectives of the NMCCJA are: 1) to prevent harm done to children by shifting them from state to state to relitigate custody; and 2) to prevent jurisdictional conflict between the states after a custody decree has been rendered.[105] These objectives are carried out by regulations concerning

101. N.M. Stat. Ann. §§40-10-1 to -24 (Cum. Supp. 1981).

102. 9 Uniform Laws Annotated §§1-28 (Uniform Child Custody Jurisdiction Act).

103. 28 U.S.C.S. §1738A (Law. Co-op. Supp. 1981).

104. Much of the discussion on the NMCCJA is derived from Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the UCCJA,* 14 Fam. L.Q. 203 (1981).

105. N.M. Stat. Ann. §40-10-2 (Cum. Supp. 1981) provides:

> It is the purpose of the New Mexico Child Custody Jurisdiction Act [N.M. Stat. Ann. §§40-10-1 to -24 (Cum. Supp. 1981)] to:
>
> A) avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well being;
>
> B) promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;
>
> C) assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;

initial jurisdiction to render a custody decree and jurisdiction to modify a custody decree of another state; the binding force and res judicata effects of custody decrees; and communication between courts having simultaneous custody proceedings. The key provision of the NMCCJA is section 40-10-15,[106] which concerns modification jurisdiction.

Prior to enactment of the NMCCJA, New Mexico law provided that New Mexico courts had jurisdiction to determine the custody of a child only if: 1) the child was domiciled in New Mexico; 2) the child was physically present in New Mexico; or 3) the parties disputing custody were personally subject to the jurisdiction of the court.[107] Foreign custody decrees were entitled to full faith and credit, and were given effect as res judicata, but only as to the facts before the court rendering the decree.[108] Upon a showing of changed circumstances indicating that the welfare of the child would best be served by a change of custody, the full faith and credit clause did not prohibit a modification of the foreign decree.[109] The trial court had considerable discretion in determining child custody determinations.[110] These decisions were based on the rationale that because states have continuing jurisdiction to modify their own custodial

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D) discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;
E) deter abductions and other unilateral removals of children undertaken to obtain custody awards;
F) avoid relitigation of custody decisions of other states in this state, insofar as feasible;
G) facilitate the enforcement of custody decrees of other states;
H) promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and
I) make the laws of New Mexico uniform with the laws of other states which enact similar laws.

106. N.M. Stat. Ann. §40-10-15 (Cum. Supp. 1981) provides:

A. If a court of another state has made a custody decree, a district court of New Mexico shall not modify that decree unless:

(1) it appears that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with the Child Custody Jurisdiction Act [40-10-1 to 40-10-24 NMSA 1978] or has declined to assume jurisdiction to modify the decree; and

(2) the district court of New Mexico has jurisdiction . . .

107. Worland v. Worland, 89 N.M. 291, 551 P.2d 981 (1976); Montoya v. Collier, 85 N.M. 356, 512 P.2d 684 (1973); Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1020 (1958).

108. Allgood v. Orason, 85 N.M. 260, 511 P.2d 746 (1973); Smith v. South, 59 N.M. 312, 283 P.2d 1073 (1955).

109. Allgood v. Orason, 85 N.M. 260, 511 P.2d 746 (1973); Tuft v. Tuft, 82 N.M. 461, 483 P.2d 935 (1971); Terry v. Terry, 82 N.M. 113, 476 P.2d 772 (1970).

110. Merrill v. Merrill, 82 N.M. 458, 483 P.2d 932 (1971); Kotrola v. Kotrola, 79 N.M. 258, 442 P.2d 570 (1968).

decrees, the decrees were not regarded as non-modifiable, final judgments. Consequently, the foreign state custodial decrees were not entitled to full faith and credit in New Mexico, and could be modified on the basis of a claim of changed circumstances. Issues allegedly not presented at the prior custody determination were not precluded by res judicata. The full faith and credit clause did not prevent a New Mexico modification of a foreign state decree.[111] These legal loopholes led to abduction of children from other states into New Mexico, with consequent uprooting of the children's lives and a continual round of litigation over child custody. Due to the enactment of the NMCCJA, all prior New Mexico decisions regarding custody jurisdiction and the res judicata effect of custody determinations are overruled insofar as they conflict with the provisions of the NMCCJA.[112]

The NMCCJA eliminates jurisdiction based on the physical presence of the child.[113] The act prohibits modification of custody decrees of other states, with very limited exceptions.[114] The act also requires the summary enforcement of out-of-state custody decrees.[115] The NMCCJA replaces multiple and concurrent interstate jurisdiction with strictly limited jurisdiction.[116]

Initial jurisdiction and modification jurisdiction are treated differently. Initial jurisdiction can be acquired in three primary ways: first, by "home state" jurisdiction; second, by "significant connection" jurisdiction; and third, by "emergency" jurisdiction.[117] A fourth initial jurisdictional ground provides for New Mexico to exercise jurisdiction if no other state has jurisdiction under the three primary jurisdictional bases, or another state has declined to exercise jurisdiction because New Mexico is the more appropriate forum, and it is in the best interest of the child that New Mexico assume jurisdiction.[118]

111. Allgood v. Orason, 85 N.M. 260, 511 P.2d 746 (1973); *See* People *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1947).

112. The exclusive method of determining subject matter jurisdiction in custody cases . . . is the Uniform Child Custody Jurisdiction Act (citation omitted). The provisions of the Act supersede any contrary decisional and statutory laws. (Citations ommitted). Accordingly, authorities . . . predating the . . . Act . . . are inapposite.

[T]here is no provision in the Act for jurisdiction to be established by reason of the presence of the parties or by stipulation or consent.

In re Marriage of Ben-Yehoshua, 91 Cal. App. 3d 259, 261, 154 Cal. Rptr. 80, 83 (1979), cited in Bodenheimer, *supra* note 104 at 206, n.15.

113. N.M. Stat. Ann. §40-10-4(B) (Cum. Supp. 1981).

114. N.M. Stat. Ann. §40-10-15 (Cum. Supp. 1981).

115. N.M. Stat. Ann. §§40-10-14, 40-10-16 (Cum. Supp. 1981).

116. N.M. Stat. Ann. §40-10-4(A) (Cum. Supp. 1981).

117. *Id.*

118. N.M. Stat. Ann. §40-10-4(A)(4) (Cum. Supp. 1981).

Home state jurisdiction[119] is where the child lived for six months prior to the proceedings. Home state jurisdiction is extended for an additional six months if the child has been removed from the state.[120] This provision rejects jurisdiction of New Mexico as a refuge state,[121] and deters pre-litigation kidnapping.

Jurisdiction can also be in a state which has a "significant connection" with the child and family.[122] This jurisdictional test, however, is qualified by the rule against a "physical presence" jurisdiction. In other words, presence of the child for a visit or with a snatching parent is not sufficient to confer "significant connection" jurisdiction.[123]

Emergency jurisdiction is provided by section 40-10-4(3). This section allows a New Mexico court to issue protective orders to safeguard a child who is in New Mexico when emergency situations, such as mistreatment, abuse, or abandonment, arise[124]. Attempts have been made in other UCCJA states to gain access to a court which otherwise lacks jurisdiction by claiming the existence of an emergency. Generally, courts have resisted efforts to circumvent the UCCJA in this manner.[125]

Modification jurisdiction is provided by N.M. Stat. Ann. §40-10-15 (Cum. Supp. 1981). Under section 40-10-15, jurisdiction to modify an existing custody decree is reserved for the state which rendered the decree. New Mexico "shall not modify" that decree.[126] New Mexico must respect and defer to the exclusive continuing jurisdiction of the prior state. Continuing jurisdiction ends only if all the parties and the child have taken up residence in other states, or if the state of the initial decree has declined to exercise its modification jurisdiction.[127] Exclusive continuing jurisdiction is not affected by the child's residence in New Mexico for six months or more. Although New Mexico becomes the child's home state, significant con-

119. "Home state" means the state in which the child, immediately preceding the time involved, lived with his parents, a parent, or a person acting as a parent for at least six consecutive months. In the case of a child less than six months old, the state in which the child lived from birth with any of the persons mentioned is the home state. Periods of temporary absence of any of the above-named persons are counted as part of the six-month period or any other period.

N.M. Stat. Ann. §40-10-3(E) (Cum. Supp. 1981).

120. N.M. Stat. Ann. §40-10-4(A)(1)(b) (Cum. Supp. 1981).

121. If the child has no home state, there will often be "significant connection" jurisdiction in the state from which the child was taken. *See* text accompanying note 100 *infra*. That jurisdiction can continue longer than six months after the child's departure.

122. N.M. Stat. Ann. §40-10-4(A)(2) (Cum. Supp. 1981).

123. N.M. Stat. Ann. §40-10-4(B) (Cum. Supp. 1981).

124. N.M. Stat. Ann. §40-10-4(A)(3) (Cum. Supp. 1981).

125. Bodenheimer, *supra* note 104, at 225 (citing authorities).

126. N.M. Stat. Ann. §40-10-15 (Cum. Supp. 1981).

127. N.M. Stat. Ann. §40-10-15 (Cum. Supp. 1981).

nection jurisdiction continues in the state of the prior decree where the court record and other evidence exists and where one parent or another contestant continues to reside. Only when the child and all parties have moved away is deference to another state's continuing jurisdiction no longer required.[128]

Other provisions of the NMCCJA contribute to the objectives of the Act. Section 40-10-13 gives binding force and res judicata effect to the initial custody decree. Other sections ward off the possibility of conflicting custody decrees.[129] Section 40-10-13 provides that a custody decree rendered by a court in a state with subject matter jurisdiction binds all parties who have been duly notified and given an opportunity to be heard.[130] The custody decree is conclusive to these parties regarding all issues of law and fact and the custody determination, unless and until that decree is modified pursuant to the NMCCJA. The NMCCJA does not require personal jurisdiction over an absent party.[131]

To ward off the possibility of conflicting custody decrees,[132] the NMCCJA uses a combination of three devices. First, it places an obligation on the parties to inform the court of the pendency of any custody proceeding in another jurisdiction.[133] Second, it requires the courts involved to communicate and consult with each other so that

128. There is an apparent conflict between the modification jurisdiction provision of § 40-10-15 of the NMCCJA and the emergency jurisdiction provision of § 40-10-4(A)(3). If § 40-10-4 (A)(3) is an exception to § 40-10-15, § 40-10-15 does not provide for an exception. Section 40-10-15(A) provides:

> If a court of another state has made a custody decree, a district court of New Mexico shall not modify that decree unless: (1) it appears the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with the Child Custody Jurisdiction Act or has declined to assume jurisdiction to modify the decree; and (2) the district court of New Mexico has jurisdiction.

If § 40-10-4(A) (3) is an exception to § 40-10-15, then arguably the other provisions of § 40-10-4 which provide for "home state" jurisdiction are also exceptions. Such an interpretation would create a potential conflict between a "continuing jurisdiction" forum and a "home state" forum.

129. *See* text accompanying notes 132-135 *infra*.

130. N.M. Stat. Ann. §§ 40-10-6, -13 (Cum. Supp. 1981).

131. N.M. Stat. Ann. § 40-10-13 (Cum. Supp. 1981). On the question of personal jurisdiction, *see generally* Bodenheimer and Neelay-Kvarme, *Jurisdiction over Child Custody and Adoption after Shaffer and Kulko,* 12 U. Cal. D. L. Rev. 229 (1979), and *Developments in the Law—The Constitution and the Family,* 93 Harv. L. Rev. 1156, 1246-48 (1980).

132. It is possible for two states to have overlapping jurisdiction at the initial jurisdiction stage. One state may be the child's home state. The other may have significant contacts with the child and family. This conflict does not occur in modification proceedings, because modification jurisdiction is generally exclusive under N.M. Stat. Ann. § 40-10-15 (Cum. Supp. 1981).

133. N.M. Stat. Ann. § 40-10-10 (Cum. Supp. 1981). The statute requires each party to give information under oath on, among other things, any past or pending proceeding concerning the custody of the child. At least one court has held that compliance with this section is jurisdictional. That is, noncompliance voids the entire proceedings. Pasqualone v. Pasqualone, 63 Ohio St. 2d 96, 406 N.E.2d. 1121 (1980).

the proceedings will go forward in only the more appropriate forum.[134] Third, if the question of forum is not resolved, the act applies a priority-of-filing rule.[135] The provisions of the NMCCJA combine to fulfill the purpose of the Act to make jurisdiction clear-cut and exclusive wherever possible. This certainty furthers the objective of the NMCCJA to prevent the harm done to children who are shifted from state to state for custody relitigation.[136]

B. *Federal Enactment*

On December 28, 1980, President Carter signed into law the Parental Kidnapping Prevention Act of 1980 (PKPA).[137] The new federal law adds section 1738A to Title 28, Chapter 115 of the United States Code (Judiciary and Judicial Procedure) and institutes one of the most far-reaching changes in the full faith and credit obligation in the nation's history.[138] Full faith and credit to prior custody determinations is *mandatory* where the original forum had jurisdiction under the new federal law. This new law is substantially the same as the jurisdictional provisions of the New Mexico Child Custody Jurisdiction Act (NMCCJA).[139]

The PKPA specifically provides that the jurisdiction of a state court which has made a child custody determination consistently with the provisions of the PKPA continues as long as the court has jurisdiction under the law of its state and as long as the state remains the residence of the child or of any contestant.[140] Therefore, the

134. N.M. Stat. Ann. §§40-10-7, 40-10-20 to -23 (Cum. Supp. 1981). Additionally §40-10-8 provides for a New Mexico court to decline to exercise its jurisdiction upon a finding of inconvenient forum. Section 40-10-8 lists several factors to be considered in a determination of inconvenient forum, and duties to be administered when an inconvenient forum determination is made.

135. N.M. Stat. Ann. §40-10-7(A) (Cum. Supp. 1981).

136. The NMCCJA included a reciprocity provision which is expressly excluded under the UCCJA Model Act: "The provisions of the Child Custody Jurisdiction Act shall apply only between those states which have enacted the same or similar legislation." N.M. Stat. Ann. §40-10-24 (Cum. Supp. 1981). Section 40-10-24 theoretically would render the NMCCJA inapplicable to any child snatched from a non-UCCJA state and brought to New Mexico. Massachusetts, Texas, Mississippi, the District of Columbia, Virgin Islands and Puerto Rico have not passed the UCCJA. Massachusetts has adopted the UCCJA by judicial decision, and Texas has passed a version of the UCCJA. The custodial determination would then fall back upon pre-NMCCJA law. While 47 states have passed UCCJA-like legislation, any dissimilar provisions of a foreign state's UCCJA enactment conceivably could allow New Mexico to take jurisdiction from a foreign state which otherwise would have jurisdiction under the UCCJA. It is to be hoped these anomalous results would not be permitted. In any case, pre-emption by the PKPA may prevent these results.

137. 28 U.S.C.S. §1738A (Law. Co-op. Supp. 1981).

138. Commentary, *Parental Kidnapping Act of 1980 and Hague Convention on Civil Aspects of International Child Abduction,* 2 Fairshare 9 (Feb. 1981).

139. *See* N.M. Stat. Ann. §40-10-4 (Cum. Supp. 1981).

140. 28 U.S.C.S. §1738A(b)(2) (Law. Co-op. Supp. 1981) provides that a "contestant" may include any person who claims a right to custody or visitation of a child.

removal of the child from a state which has entered a custodial decree according to the jurisdictional standards of the PKPA or the UCCJA does not prevent the initial custody determination state from exercising jurisdiction. No other state may assume jurisdiction, as a matter of federal law.

A court of one state may modify a determination of the custody of a child made by a court of another state under two circumstances. The first is if the court has jurisdiction to make such a custody determination. The second is if the court of the other state either no longer has jurisdiction or has declined to exercise jurisdiction to modify such determination.[141] The PKPA also provides that a court of a state shall not exercise jurisdiction in any custody proceeding which is commenced during the pendency of a proceeding in a court of another state, if the court of the other state is exercising jurisdiction consistent with the provisions of the PKPA.[142]

As with the NMCCJA, the PKPA contains an emergency jurisdictional provision.[143] This provision allows a state court to assume jurisdiction if a child is physically present in the state and has been abandoned, or if it is necessary in an emergency to protect the child because he has been subjected to, or is threatened with, mistreatment or abuse.[144]

The provisions of the PKPA are similar and often identical to those of the UCCJA. Jurisdictions which have not adopted the UCCJA,[145] therefore, now have the provisions of the UCCJA imposed upon them by federal law. Any state versions of the UCCJA which are inconsistent with the provisions of the PKPA are almost certain to be pre-empted by the federal act under the supremacy clause.

A question arises as to the power of Congress to enact legislation of this type affecting the sovereignty of the several states. The PKPA was enacted pursuant to the commerce clause authority of Con-

141. 28 U.S.C.S. § 1738A(f) (Law. Co-op. Supp. 1981).

142. 28 U.S.C.S. § 1738A(g) (Law. Co-op. Supp. 1981).

143. 28 U.S.C.S. § 1738A(c)(2)(C) (Law. Co-op. Supp. 1981).

144. The utility of the PKPA emergency provision for modification jurisdiction in any forum but the forum having initial or continuing custody jurisdiction is questionable. Subsection (f) of the PKPA, which provides for modification jurisdiction, makes no exception for emergency jurisdiction in another state. If subsection (f) is controlling, only the forum having initial or continuing custody jurisdiction may entertain emergency modification jurisdiction. The entire United States must enforce the outstanding custody determination according to the terms of the decree, and may not modify the custody determination of the single local district court judge. The lack of a provision for emergency modification jurisdiction in any other forum but the court with initial or continuing jurisdiction under the PKPA may also invalidate the emergency jurisdiction provisions of all the states which have enacted the UCCJA. Indeed, the enactment of the PKPA may pre-empt any state's UCCJA which conflicts with the provisions of the federal act.

145. *See* note 136 *supra.*

gress.[146] The PKPA may be subject to constitutional attack on the ground that Congress exceeded its enumerated powers in imposing restraints on the power of the states to adjudicate domestic controversies.[147]

The PKPA provides two sections which aid in enforcement of its provisions. First, Title IV-D of the Social Security Act[148] was amended to make the Federal Parent Locator Service and its state components available in child-snatching cases. Previously, such services and interstate cooperation were available only for enforcement of child support orders and for alimony and maintenance enforcement. Second, the Federal Fugitive Felon Act was amended to void prior administrative directives of the Fugitive Felon Act[149] which prohibited the use of the Fugitive Felon Act in child-snatching cases. The amendment declares that the intent of Congress is to apply the Fugitive Felon Act to child-snatching cases involving interstate or international flight to avoid prosecution under applicable felony statutes. In order for a party or a state to invoke the use of the Federal Bureau of Investigation, a state felony conviction for childnapping or custodial interference must be obtained before application is made to the FBI to discover, apprehend and extradite a child-snatcher.[150]

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146. The ". . . tendency of parties involved in [custodial] disputes to . . . resort to the . . . interstate transportation of children . . . [results in a disruption of] their occupations and commercial activities; and . . . among the results of those conditions and activities are . . . burdens on commerce. . . ." Findings and Purposes, Parental Kidnapping Prevention Act of 1980 (Pub. L. 96-611 § 7(a)(3) and (4)), 94 Stat. 3568 (1980).

147. Another problem area is the effective date of the PKPA. Congress did not provide an effective date in the enactment itself. Generally, under these circumstances, the effective date is the date of enactment, or December 28, 1980. Robertson v. Bradbury, 132 U.S. 49 (1889); Lapeyre v. United States, 84 U.S. (17 Wall.) 191 (1873). An ambiguity regarding the effective date of the PKPA arises because the Act was attached as a rider to an amendment to Title 18 of the Social Security Act providing for Medicare coverage of pneumococcal vaccine and its administration. The amendment to Title 18 of the Social Security Act and the PKPA are contained in Pub. L. 96-611, approved December 28, 1980. Section 2 of Pub. L. 96-611 provides an effective date of July 1, 1981. That date may be applicable to the amendment only or to both the amendment and the PKPA. Therefore, interstate custodial cases arising between December 28, 1980 and July 1, 1981 may be decided on the interpretation of the effective date clause of § 2 of Pub. L. 96-611. A case addressing this issue is currently pending before the New Mexico Supreme Court. New Mexico may be the first state to make the determination of the effective date of the PKPA.

148. 42 U.S.C. 651 (1976).

149. 18 U.S.C. 1073 (1976).

150. New Mexico's custodial interference statute is N.M. Stat. Ann. § 30-4-4 (1978). Custodial interference is a fourth degree felony. There are practical problems hindering the use of the FBI in child-snatching cases. The FBI has traditionally been reluctant to participate in child custody disputes. Because a state felony conviction must first be obtained before the FBI will intervene, the state district attorney has the responsibility for enforcement of a custodial interference violation. District attorneys, however, are as reluctant to utilize their resources in child-snatching cases as is the FBI. Under the usual custodial interference statute, there must

C. *Joint Custody in New Mexico*

Another state statutory enactment during the survey year concerned child custody. The New Mexico legislature enacted a bill dealing with joint custody of minors.[151] Case law on this issue was sparse in New Mexico prior to the Act.[152] The Act directs the trial court first to consider an award of joint custody and make such an award if it is in the best interests of the minor.[153] The Act also allows the court to award joint legal custody without awarding joint physical custody.[154] The award of joint custody may be modified or terminated upon motion, but such modification, even if the parties stipulate to it, must be in the minor's best interests.[155]

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be a finding of probable cause that the child-snatching parent has left the state with the child. These requirements usually mean the child-snatching parent must first be located outside the state before the state and federal agencies are empowered to discover the child-snatching parent's whereabouts. If the child-snatching parent is located, however, a felony warrant can be issued by the local district attorney. The foreign-state authorities would then be empowered to extradite the child- snatcher for prosecution.

151. N.M. Stat. Ann. §40-4-9.1 (Cum. Supp. 1981).

152. The only reported decision is Jones v. Jones, 67 N.M. 415, 356 P.2d 231 (1960). In *Jones,* the supreme court approved the trial court's action in awarding joint custody. The court addressed the problems caused by the limitation placed on the parents' movements where joint physical custody is awarded. The court felt that if such a limitation was required in the minor's best interests, such a limitation could be imposed.

153. N.M. Stat. Ann. §40-4-9.1(A) (Cum. Supp. 1981).

154. N.M. Stat. Ann. §40-4-9.1(C) (Cum. Supp. 1981).

155. N.M. Stat. Ann. §40-4-9.1(B) (Cum. Supp. 1981).