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DOMESTIC RELATIONS

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INTRODUCTION

This article focuses primarily on judicial and statutory development in New Mexico domestic relations law during the survey year.[1] The article is divided into the following sections: Custody Jurisdiction, Custody and Visitation, Child Support, Alimony, Property and Debt Division, and Children's Code.

I. CUSTODY JURISDICTION, CUSTODY AND VISITATION

A. *Custody Jurisdiction*

During the period surveyed, the New Mexico appellate courts decided three custody jurisdiction cases, *Elder v. Park*,[2] *Trask v. Trask*,[3] and *Meier v. Davignon*.[4] Of these cases, *Elder* was an initial jurisdiction case, and the others were modification jurisdiction cases.

1. Initial Jurisdiction

Elder v. Park held that New Mexico may not assume child custody jurisdiction during the pendency of a custody proceeding in another state if the court of that state is exercising jurisdiction consistently with the provisions of the Parental Kidnapping Prevention Act [5] (PKPA), and the New Mexico Child Custody Jurisdiction Act[6] (NMCCJA).[7] The court of appeals applied the "priority of filing rule" and determined that if the foreign state has custody jurisdiction under its own laws and a custody proceeding has been filed, even though process has not been served, New Mexico must defer to the jurisdiction of the foreign state.[8] *Elder* also held that while an ex parte custody order entered without notice in a foreign state may not be enforceable in New Mexico, the lack of notice does not result in the loss of subject matter jurisdiction in the foreign state.[9]

Elder concerned a child born to unwed parents in New Mexico in 1973.[10] In

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1. April 1, 1986 to April 1, 1987.
2. 104 N.M. 163, 717 P.2d 1132 (Ct. App. 1986).
3. 104 N.M. 780, 727 P.2d 88 (Ct. App. 1986).
4. 105 N.M. 567, 734 P.2d 807 (Ct. App. 1987).
5. 28 U.S.C. § 1738A (1980).
6. N.M. STAT. ANN. §§ 40-10-1 to—24 (Repl. Pamp. 1986).
7. 104 N.M. at 166, 717 P.2d at 1135.
8. *Id.* at 168, 717 P.2d at 1137.
9. *Id.* at 169, 717 P.2d at 1138.
10. *Id.* at 164, 717 P.2d at 1133.

1976, the parents separated.[11] The child lived with father in New Mexico and saw mother regularly.[12] In 1980, mother moved to New Hampshire.[13] The child visited with mother in New Hampshire during the summers of 1981, 1982, and 1983.[14] By arrangement, the child remained with mother in New Hampshire after the summer of 1983 through June 1984, but returned to New Mexico for the Christmas holidays.[15] In June 1984, mother advised father she was going to seek legal custody of the child.[16] Father went to New Hampshire and brought the child to New Mexico.[17] Mother obtained an ex parte temporary custody order in New Hampshire and filed an action in New Mexico to enforce the New Hampshire order.[18] Father filed for custody in New Mexico.[19] The trial court found that New Hampshire had jurisdiction and dismissed the New Mexico custody petition.[20] Father appealed and the appellate court affirmed.[21]

The appellate court stated that the major device by which the PKPA advances its purposes is the home state[22] requirement.[23] The court held that under New Hampshire law, New Hampshire was the child's home state, because notwithstanding visitation with the father, the child lived in New Hampshire for more than the six consecutive statutory months immediately prior to commencement of the New Hampshire custody proceeding.[24] The appellate court observed that some courts have held that no case is pending in a foreign court unless the notice requirements of the relevant custody acts have been satisfied.[25] Other courts recognize that a court does not lose subject matter jurisdiction because it has not yet satisfied the notice requirements imposed by the various acts.[26] The New Mexico court determined that the better rule mandates that courts should not act in custody matters where proceedings have commenced in courts in other states in accordance with the jurisdictional requirements of the PKPA and applicable state law.[27] Thus, New Mexico should defer to New Hampshire on the basis of

11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 164-65, 717 P.2d at 1133-34.
19. *Id.* at 165, 717 P.2d at 1134.
20. *Id.*
21. *Id.* at 164, 717 P.2d at 1133.
22. The PKPA defines home state as:

> The State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as a parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period.

28 U.S.C. § 1738A(b)(4). The New Mexico definition of home state, nearly identical, is found at N.M. STAT. ANN. § 40-10-3(E).
23. 104 N.M. at 168, 717 P.2d at 1137.
24. *Id.* at 167, 717 P.2d at 1136.
25. *Id.* at 168, 717 P.2d at 1137.
26. *Id.*
27. *Id.* at 168-69, 717 P.2d at 1137-38.

the mother's prior filing in New Hampshire.[28] The temporary New Hampshire order, however, was not enforceable in New Mexico because of due process considerations and the absence of proper notice.[29]

The *Elder* decision observes the purpose and policy of the PKPA[30] and the NMCCJA.[31] Under *Elder*, at the initial custody determination stage, there can be no jurisdictional competition in New Mexico with a court of another state.

2. Modification Jurisdiction

The court of appeal's decisions in *Trask*[32] and *Meier*[33] confused the issue of custody modification jurisdiction in New Mexico. *Trask* and *Meier* involved New Mexico modification of initial New Mexico custody determinations. Although both cases had similar facts, the results were different. In each case, the parties were awarded joint custody of the children at issue. In both cases the mother was permitted to move with the children outside New Mexico while the father remained in New Mexico and continued to exercise visitation. At the time of the custody modification suit in *Trask*, the children had primarily resided with their mother outside of New Mexico for approximately three years.[34] In *Meier*, the child had primarily resided with its mother outside New Mexico for approximately two years.[35] In neither case was New Mexico the home state[36] of the child at the time of the proceeding. In both cases, when the mother challenged jurisdiction, the father asserted New Mexico jurisdiction based upon the "significant connection"[37] provision of the NMCCJA. In *Trask*, the appellate court determined that New Mexico lacked custody modification jurisdiction.[38] In *Meier*, the appellate court determined that New Mexico continued to have custody modification jurisdiction.[39]

Certain factual distinctions exist between the cases. In *Trask*, although New Mexico had home state custody jurisdiction at the time of the initial custody determination, the children were born in Maryland and lived in New Mexico

28. *Id.* at 169, 717 P.2d at 1138.

29. *Id.* at 170, 717 P.2d at 1139.

30. The main purposes of the PKPA are to promote cooperation between states respecting custody determinations, facilitate the enforcement of custody determination of sister states, discourage continuing controversies over child custody, avoid jurisdictional competition and conflict between state courts in matters of child custody, and deter interstate abduction and other unilateral removals of children undertaken to obtain custody awards. 28 U.S.C. § 1738A, Note (quoting Pub. L. 96-611 § 7(C)).

31. The purposes of the NMCCJA are similar to the purposes of the PKPA, *supra* note 30. N.M. STAT. ANN § 40-10-2 (Repl. Pamp. 1986).

32. 104 N.M. 780, 727 P.2d 88 (Ct. App. 1986).

33. 105 N.M. 567, 734 P.2d 807 (Ct. App. 1987).

34. 104 N.M. at 781, 727 P.2d at 89.

35. 105 N.M. at 568, 734 P.2d at 808.

36. See *supra* note 22 for a definition of "home state."

37. In New Mexico there are four custody jurisdiction bases: 1) home state jurisdiction, 2) significant connection jurisdiction, 3) emergency jurisdiction, and 4) "no other state has jurisdiction" jurisdiction. N.M. STAT. ANN. § 40-10-4 (Repl. Pamp. 1986).

38. 104 N.M. at 783, 727 P.2d at 91.

39. 105 N.M. at 571, 734 P.2d at 811.

for less than one year before returning to Maryland.[40] In *Meier*, however, the child lived in New Mexico for approximately four years before moving with the mother to Oklahoma.[41] Furthermore, for a period of one year after their divorce, the parents shared joint physical custody of the child and for approximately two years after the child and mother moved to Oklahoma, physical custody of the child alternated every five months until the child entered school.[42] After the child attained school age, the mother had physical custody during the school year and the father had physical custody during the summer months, the spring school vacation and one week at Christmas.[43]

Custody modification jurisdiction, as contemplated by the Uniform Child Custody Jurisdiction Act[44] (UCCJA), however, was not intended to turn on the distinctions found in *Trask* and *Meier*. The different results in *Trask* and *Meier* highlight a flaw in the UCCJA and create controversy in custody modification cases which could result in increased litigation of custody jurisdiction in New Mexico. Because of the significance of this conflict for custody jurisdiction law, this discussion will treat it in some detail.

Two jurisdictional laws apply to a custody jurisdiction case. One is local state law which in New Mexico, is the NMCCJA. The NMCCJA is derived nearly verbatim from the UCCJA, which has been enacted in all states.[45] The other jurisdictional law is the Parental Kidnapping Prevention Act, a federal law which is patterned on the UCCJA but which has some important distinctions, one of which is discussed later in this article.

The flaw in the UCCJA is that the jurisdictional basis for initial custody jurisdiction is identical to the jurisdictional basis for modification custody jurisdiction.[46] This equal jurisdictional treatment of initial custody and modification custody is a change from the original "continuing jurisdiction" principle provided in the New Mexico domestic code.[47] Originally, once New Mexico assumed custody jurisdiction, it continued that jurisdiction until it declined it in favor of another state.[48] The continuing jurisdiction under former law was exclusive.[49] As stated in *Meier*, the concept of continuing jurisdiction in the original court is "central to the UCCJA scheme of discouraging resort to another state to get a new custody decree superseding an existing one."[50] Although the NMCCJA

40. 104 N.M. at 781, 727 P.2d at 89.
41. 105 N.M. at 568, 734 P.2d at 808.
42. *Id.*
43. *Id.*
44. UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 115 (1988).
45. *Id.*
46. *See supra* note 37. N.M. STAT. ANN. § 40-10-3(G) provides: "'Modification decree' means a custody decree which modifies or replaces a prior custody decree, whether made by the court which rendered the prior decree or by another court."
47. N.M. STAT. ANN. § 40-4-7(C) provides: "The district court shall have exclusive jurisdiction of all matters pertaining to the guardianship, care, custody, maintenance and education of the children . . . so long as they, or any of them remain minors . . ."
48. *Id.*
49. *Id.*
50. 105 N.M. at 569, 734 P.2d at 809 (quoting R. Crouch, *Interstate Custody Litigation* (BNA 1981) at 13).

attempts to create continuing jurisdiction, in application, continuing jurisdiction is lost after a child moves to another state for more than six months.[51] As it is interpreted in the New Mexico courts, jurisdiction under the NMCCJA follows the *home state* of the child. Neither the UCCJA nor federal law intended this result.

Before the UCCJA, jurisdiction followed the child.[52] Although states which entered original custody decrees would claim exclusive continuing jurisdiction to modify those decrees, any state where the child was present could and would assert jurisdiction to modify a prior custody decree. The law of this period has been characterized as that of "seize and run"; it encouraged forum shopping and made conflicting custody decrees the order of the day.[53] The UCCJA was a remedial law designed to eliminate this objectionable feature of the prior law by plugging the loophole which based jurisdiction on the physical presence of the child.[54] Federal law, with respect to child custody determinations, is provided in the PKPA.[55] The name of the Act is a misnomer. In actuality, the Act is a full faith and credit act for state child custody determinations. The PKPA provides that every state shall enforce and not modify, except as provided in the Act, any child custody determination made consistently with the provisions of the Act.[56] An initial child custody determination is consistent with the Act if the determination is based upon jurisdictional prerequisites which are very similar to the jurisdictional basis of the UCCJA and the NMCCJA.[57]

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51. See, e.g., Serna v. Salazar, 98 N.M. 648, 651 P.2d 1292 (1982).

52. See *Worland v. Worland*, 89 N.M. 291, 551 P.2d 981 (1976).

53. Bodenheimer, *Interstate Custody, Initial and Continuing Jurisdiction Under The UCCJA*, 14 Fam.L.Q. 203 (1981).

54. *Id.* at 204. See N.M. STAT. ANN. § 40-10-4(B) and (C).

55. 28 U.S.C. § 1738A.

56. 28 U.S.C. § 1738A(a).

57. 28 U.S.C. § 1738A(c) and (d) provide:

> (c) A child custody determination made by a court of a State is consistent with the provisions of this section only if—
>
> (1) such court has jurisdiction under the law of such State; and
>
> (2) one of the following conditions is met:
>
> (A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;
>
> (B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such state assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;
>
> (C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;
>
> (D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise juris-

There are, however, major differences between the PKPA and the UCCJA. Under the PKPA, home state jurisdiction is given priority.[58] The "significant connection" jurisdiction basis is utilized only if there is no other state jurisdiction.[59] Under New Mexico law, "significant connection jurisdiction" is an alternative to, and on an equal footing with, "home state jurisdiction."[60] A second major distinction between the federal law and the uniform law exists in the provisions for modification jurisdiction. Under the PKPA, the initial custody determination state retains jurisdiction to modify its decree without having to fulfill the requirements for the initial custody determination.[61] So long as the state has custody jurisdiction under its own law and remains the residence of a contestant (normally a parent), it continues to have modification jurisdiction.[62]

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diction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

The New Mexico jurisdictional prerequisites are provided by N.M. STAT. ANN. § 40-10-4, as follows:

A. A district court of New Mexico which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial decree or modification decree under the following circumstances if:

(1) New Mexico:

(a) is the home state of the child at the time of commencement of the proceeding; or

(b) had been the child's home state within six months before commencement of the proceeding and the child is absent from New Mexico because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in New Mexico;

(2) it is in the best interest of the child that a district court of New Mexico assume jurisdiction because:

(a) the child and his parents, or the child and at least one contestant, have a significant connection with New Mexico; and

(b) there is available in New Mexico substantial evidence concerning the child's present or future care, protection, training and personal relationships;

(3) the child is physically present in New Mexico and:

(a) the child has been abandoned; or

(b) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected; or

(4) it appears that:

(a) no other state would have jurisdiction under prerequisites substantially in accordance with Paragraph (1), (2) or (3) of this subsection, or another state has declined to exercise jurisdiction on the ground that New Mexico is the more appropriate forum to determine the custody of the child; and

(b) it is in the best interest of the child that the New Mexico district court assume jurisdiction.

58. 28 U.S.C. § 1738A(c)(2)(A) and (B).

59. *Id.*

60. *Olsen v. Olsen*, 98 N.M. 644, 651 P.2d 1288 (1982).

61. 28 U.S.C. § 1738A(d).

62. *Id.*

Therefore, under federal law, if a state initially made a custody determination, it would continue to have modification jurisdiction if local law permitted, even if that state were not the home state of the child or did not have significant connections with the child. This provision is similar to the continuing jurisdiction feature under former New Mexico law. The continuing jurisdiction feature of federal law, which, as *Meier* states, is "central to the UCCJA scheme . . . ",[63] is lost in New Mexico. The test for modification jurisdiction in New Mexico is identical to the test for initial jurisdiction.[64] Where, as in *Trask*, another state has become the child's home state, jurisdiction will follow the child. Although significant connection jurisdiction potentially remains in New Mexico, closer and more significant connections with the child will always be more available in the other state. The other state will have more substantial evidence concerning the child's present or future care, protection, training and personal relationships. All that would remain in New Mexico would be the child's other parent, the relatives, if any, and the physical presence of the child during visitation periods. Furthermore, *Trask* specifically held that more is required than child visitation with a resident parent in New Mexico for New Mexico to exercise modification jurisdiction.[65]

Legislative enactment of a "continuing jurisdiction" provision in the NMCCJA could remedy this flaw. In addition, judicial interpretation of the NMCCJA which distinguished initial from modification jurisdiction in accordance with the original intent of the UCCJA would provide a remedy.

Professor Brigitte Bodenheimer, the reporter for the special committee which drafted the UCCJA, interprets the language of Section 14 of the UCCJA—from which Section 15 (the modification section) of the NMCCJA was taken—[66] in such a manner:

1) Exclusive jurisdiction to modify an existing custody decree is reserved for the state that rendered the decree.[67] Other states must respect the exclusive continuing jurisdiction of the prior state.[68] Continuing jurisdiction ends only if all the parties and the child have taken up residence in other states,[69] or if the state of the decree has declined to exercise its modification jurisdiction.[70]

2) Section 14 is the key provision which carries out the UCCJA's two objectives of (1) preventing the harm done to children by shifting them from state

63. 105 N.M. at 569, 734 P.2d at 809.

64. N.M. STAT. ANN. §40-10-4(A).

65. 104 N.M. at 782, 727 P.2d at 90.

66. The modification section of the NMCCJA is Section 40-10-15. This section is concerned with New Mexico modification of out of state custody decrees, not modification of New Mexico decrees. Section 40-10-15 is taken from Section 14 of the UCCJA which has been adopted in every state and the District of Columbia. Although Section 14 of the UCCJA is not directly involved in the *Trask* case, a discussion of its application is necessary because Section 14 controls jurisdiction in the foreign state to modify New Mexico's custody decree. If the foreign state does not have jurisdiction, then New Mexico retains jurisdiction. Also the analysis of Section 14 of the UCCJA is important for a view of how New Mexico fits into the uniform scheme.

67. Bodenheimer, *supra* note 53, at 214.

68. *Id.*

69. *Id.* at 215.

70. *Id.* at 222.

to state to relitigate custody, and (2) preventing jurisdictional conflict between the states after a custody decree has been rendered.[71]

3) Exclusive continuing jurisdiction is not affected by the child's residence in another state for six months or more.[72] Although the new state becomes the child's home state, significant connection jurisdiction continues in the state of the prior decree where the court record and other evidence exist and where one parent or another contestant continues to reside.[73] Only when the child and all parties have moved away is deference to another state's continuing jurisdiction no longer required.[74]

4) Due to the exclusive nature of continuing jurisdiction, the rules governing modification jurisdiction are markedly different from the rules applicable to initial jurisdiction.[75]

5) Initial jurisdiction is determined primarily by Section 3 of the UCCJA (Section 4 of the NMCCJA).[76]

6) Modification jurisdiction is governed primarily by Section 14 of the UCCJA (Section 15 of the NMCCJA).[77]

7) Once a custody decree has been rendered in one state, jurisdiction is determined by Section 14 of the UCCJA (Section 15 of the NMCCJA).[78]

8) Only one state—the state of continuing jurisdiction—has power to modify the custody decree.[79] Only that state decides whether to decline the exercise of its jurisdiction in any particular case.[80]

9) There can be no concurrent jurisdiction and no jurisdictional conflict between two states.[81]

The Bodenheimer analysis was forcefully and persuasively applied in Kumar v. Superior Court of Santa Clara County,[82] where the California Supreme Court, sitting en banc, held that New York had continuing jurisdiction to modify its custody decree as long as New York retained significant connections with the child and exercised its jurisdiction. The decision clearly and carefully distinguished between modification jurisdiction and initial jurisdiction, and if applied to the *Trask* facts, would mean New Mexico would have continued to have jurisdiction. In *Kumar*, husband and wife were divorced in New York in 1974; mother received custody of the child and father was granted visitation rights.[83]

71. *Id.* at 214.

72. *Id.* at 215. Professor Bodenheimer identified "the myth of a six-month limit of continuing jurisdiction." Bodenheimer, *supra* note 52, at 219-20. She criticizes the extreme view which holds that as soon as the child acquires a new home state upon six-month residence, the state of the prior decree loses jurisdiction altogether. *Id.* This misconception, she says, ignores or misinterprets Section 14 of the UCCJA. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 216.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. 32 Cal. 3rd. 689, 652 P.2d. 1003, 186 Cal. Rptr. 772 (1982).

83. *Id.* at 691, 652 P.2d. at 1004, 186 Cal. Rptr. at 773.

In 1979, mother took the child to California.[84] Approximately one and one-half years after arriving in California, mother commenced proceedings in California to modify the New York custody decree.[85] The trial court found California had jurisdiction because the closest contacts with the child's present and future living environment and present and predictable development were in California and because available witnesses were in that state.[86] The court further found that the state with the closest contacts with the child could best gauge the child's best interests.[87] The supreme court reversed the trial court by writ of mandate.[88]

The *Kumar* court stated that the trial court had erroneously concluded that California had the closest contacts with the child and it found that error determinative.[89] The court criticized the trial court's treatment of the competing jurisdictional claims as though it were involved in an initial custody dispute with competing concurrent jurisdiction.[90] The *Kumar* court stated that the Commissioners' note to Section 14 of the Uniform Act[91] makes clear that New York would lose jurisdiction in this case only if "all persons involved have moved away or contact with the state has otherwise become slight. . . ."[92] Quoting from another work of Professor Bodenheimer,[93] the court stated that the jurisdiction of the decreeing state continues and is exclusive as long as the noncustodial parent lives in the decree state, unless that parent loses contact with the children, for example, by not using visitation privileges for three years.[94]

The *Kumar* court noted what Professor Bodenheimer calls the "myth of concurrent modification."[95] Under the "myth," the new state has jurisdiction as the home state and the original state has jurisdiction because it has some connection with the child.[96] A court laboring under the "myth" will then consider which forum has greater connection with the child and will conclude that the new state has the "closest connections."[97] The *Kumar* court characterized this analysis as confused because of its failure to distinguish clearly between initial and modification jurisdiction.[98] The *Kumar* court stated that initial jurisdiction is determined by the guidelines of Section 3 of the UCCJA (Section 4 of the NMCCJA), which points to the state with the closest connections to the child and with information about the child's present and future well-being.[99] *Kumar* explained,

84. *Id.*
85. *Id.*
86. *Id.* at 693, 652 P.2d. at 1005, 186 Cal. Rptr. at 774.
87. *Id.*
88. *Id.* at 691, 652 P.2d. at 1004, 186 Cal. Rptr. at 773.
89. *Id.* at 698, 652 P.2d. at 1008, 186 Cal. Rptr. at 777.
90. *Id.* at 699-700, 652 P.2d. at 1009-10, 186 Cal. Rptr. at 778-79.
91. *Id.* at 698, 652 P.2d at 1008, 186 Cal. Rptr. at 777, (quoting UNIF. CHILD CUSTODY JURISDICTION ACT, § 14, 9. U.L.A. 154 (1979)).
92. *Id.*
93. Bodenheimer, *Uniform Child Custody Jurisdiction Act; A Legislative Remedy For Children Caught In The Conflict of Laws*, 22 VAND. L.REV. 1207, 1237 (1969).
94. *Kumar*, 32 Cal.3d at 698, 652 P.2d at 1008-09, 186 Cal. Rptr. at 777-78.
95. *Id.* (citing Bodenheimer, *supra* note 93, at 1237).
96. *Kumar*, 32 Cal.3rd at 698, 652 P.2d. at 1008, 186 Cal. Rptr. at 778, n.10.
97. *Id.* at 699, 652 P.2d. at 1009, 186 Cal. Rptr. at 778.
98. *Id.*
99. *Id.*

however, that modification jurisdiction is best viewed as an extension of the recognition and enforcement provisions of the Uniform Act.[100] Under Section 14 of the UCCJA, the strong presumption is that the decree state will continue to have modification jurisdiction until it loses all or almost all connection with the child.[101] Only if that state has lost contact must the court turn to Section 3 of the UCCJA (which is the same as Section 4 of the NMCCJA) to determine which other state has closest contact.[102]

In conclusion, the *Kumar* court held that New York had continuing jurisdiction to modify its decree so long as the non-custodial parent continued to reside there[103] and continued to assert and exercise his custody and visitation rights.[104] Quoting from the Commissioners' notes to the Uniform Laws,[105] the *Kumar* court stated that only if the father continued to live in state one but let mother keep the children for several years in state two without asserting his custody rights and without visits of the children in state one, would modification jurisdiction of state one cease.[106]

In *Trask*, the appellate court would not find that New Mexico had jurisdiction to modify its decree on the mere fact of the child's visitation and the father's continued residence in New Mexico.[107] Professor Bodenheimer, the Commissioners who drafted the Uniform Act, and the convincing analysis provided in *Kumar* all demonstrate that child visitation and the continued residence of one parent in a state *is* a sufficient basis for the continued exercise of modification jurisdiction; all would reach the opposite result from the New Mexico Court of Appeals.

The justification for the *Trask* decision is that for New Mexico to have modification jurisdiction, Section 4 of the NMCCJA requires a finding of one of the four jurisdictional bases.[108] Although the NMCCJA was enacted nearly verbatim from the UCCJA, it is difficult to reconcile the Bodenheimer/Commissioners'/*Kumar* analysis with the express wording of the significant connection basis jurisdiction of the NMCCJA. Although visitation with the non-custodial parent in New Mexico might be considered "significant" because of the Bodenheimer/Commissioners'/*Kumar* analysis, the NMCCJA also requires that there be "substantial" evidence concerning the child's present or future care, protection, training and personal relationships.[109] Regardless of the frequency of visits, in most cases the required substantial evidence will be lacking and "significant connection" jurisdiction will be lost.

A method to resolve the conflict between the Bodenheimer/Commissioners'/*Kumar* analysis and Section 4 of the NMCCJA is available: The court, faced

100. *Id.*
101. *Id.*
102. *Id.* at 699, 652 P.2d. at 1009-1010, 186 Cal. Rptr. at 778-779.
103. *Id.* at 700, 652 P.2d at 1010, 186 Cal. Rptr. at 779.
104. *Id.*
105. 9 U.L.A. at 154-55 (1979).
106. 32 Cal. 3rd at 700, 652 P.2d at 1010, 186 Cal. Rptr. at 779, n.14.
107. 104 N.M. at 782, 727 P.2d at 90.
108. *See supra* note 37.
109. N.M. STAT. ANN. § 40-10-4(A)(2).

with a jurisdictional question could determine that the foreign state, under its version of Section 14 of the UCCJA, *lacks* jurisdiction because of the continued presence in New Mexico of one parent and visiting children. As a consequence, New Mexico would continue to have modification jurisdiction. Under this theory, because the foreign state would not have jurisdiction under its law, New Mexico would have jurisdiction under the fourth jurisdictional basis of Section 4, which provides that New Mexico has jurisdiction if no other state has jurisdiction.[110]

B. Custody

During the survey period, New Mexico courts made three significant decisions in the area of custody: *Fitzsimmons v. Fitzsimmons*,[111] *Seeley v. Jaramillo*,[112] and *Alfieri v. Alfieri*.[113] All these cases concerned what circumstances would allow a court to modify a prior custody decree.

Fitzsimmons was a custody modification case decided under the prior joint custody statute.[114] In *Fitzsimmons*, the trial court, after orally awarding both parents joint legal and physical custody of the children, subsequently modified its decision and awarded sole legal custody to the father.[115] The court found that the mother had left the family home in Grants and was pursuing a career in architecture in Albuquerque.[116] Wife had a close personal and sexually intimate relationship with a paramour but the parties did not introduce evidence at trial regarding the effect of the mother's relationship on the children.[117] The appellate court reversed the award of sole custody to the father and remanded the case for reconsideration of the custody issue.[118]

The appellate court decided that the mother should not be considered less capable or less fit to be a custodial parent because of her employment or pursuit of a career.[119] The *Fitzsimmons* court stated that the mother's employment should not be accorded a different or negative effect when compared with a father's employment.[120] Since the working mother is a common and often necessary phenomenon in our society, this condition should not reflect on the adequacy of the mother's parenting ability.[121] The court noted that the trend in New Mexico case law is to encourage a divorced spouse to gain economic autonomy so as to extricate herself or himself from a position of dependency.[122] Furthermore, the

110. N.M. STAT. ANN. § 40-10-4(A)(4).
111. 104 N.M. 420, 722 P.2d 671 (Ct. App.), *cert. quashed* 104 N.M. 378, 721 P.2d 1309 (1986).
112. 104 N.M. 783, 727 P.2d 91 (Ct. App. 1986).
113. 105 N.M. 373, 733 P.2d 4 (Ct. App. 1987).
114. N.M. STAT. ANN. § 40-4-9.1. This statute was extensively rewritten by the 1986 Legislature, 1986 N.M. Laws, 824.
115. 104 N.M. at 422-23, 722 P.2d at 673-74.
116. *Id.* at 424, 722 P.2d at 675.
117. *Id.* at 426-27, 722 P.2d at 677-78.
118. *Id.* at 429, 722 P.2d at 680.
119. *Id.* at 425, 722 P.2d at 676.
120. *Id.* at 424, 722 P.2d at 675.
121. *Id.*, quoting *Greene v. French*, 97 N.M. 493, 496, 641 P.2d 524 (Ct. App. 1982).
122. *Id.*

implication that the mother was less able to manage or less deserving of custody because of her employment was not in accord with the national trend.[123]

Although the father utilized the help of the paternal grandparents to provide child care services, the mother used paid child care arrangements.[124] The appellate court determined that the absence of maternal grandparents and the corresponding need to utilize paid child care arrangements should not deprive an otherwise good parent of shared physical custody.[125] Although there was evidence to show that husband's view of wife's lifestyle, i.e., pursuit of higher education and a career, was not in line with his view of a wife's "traditional role," there was no evidence to show that her actions had a detrimental effect on the children.[126] Finally, the court determined that engaging in a non-marital sexual relationship generally is not, standing alone, grounds for a change of custody, and that not every act of indiscretion or immorality should deprive a mother of the custody of her children.[127]

In another custody modification case, *Seeley*, the court of appeals decided that remarriage of either parent is not a sufficient reason for changing a custody order.[128] In *Seeley*, the parents originally were awarded joint custody of their child with primary physical custody placed in the father.[129] Subsequently, the mother remarried and moved to modify custody, alleging that her remarriage would provide a more stable home for the child than that provided by the father.[130] The trial court transferred primary custody of the child to the mother.[131] The court of appeals remanded for the adoption of sufficient findings of fact.[132] Subsequently the trial court adopted an amended decision finding that, although the father had cared for the child properly and adequately, the mother had remarried and established a stable home environment, that the child was still of tender years and that the child was of the same sex as the mother.[133] On this basis the trial court awarded custody to the mother. The father appealed and the appellate court reversed.[134] The court of appeals held that, generally, remarriage of either parent is not of itself a sufficient reason for changing an order of custody.[135] The court determined that the evidence indicated that essentially the same conditions existed at the time of the modification hearing as existed at the time of the divorce.[136] The court of appeals observed that public policy favors the continuation of the child custody judgments in order to promote stability and

123. *Id.*
124. *Id.* at 424-25, 722 P.2d at 675-76.
125. *Id.* at 425, 722 P.2d at 676.
126. *Id.* at 426, 722 P.2d at 677.
127. *Id.* at 425-26, 722 P.2d at 677-78.
128. 104 N.M. at 786, 727 P.2d at 94.
129. 104 N.M. at 784, 727 P.2d at 92.
130. *Jaramillo v. Jaramillo*, 103 N.M. 145, 146-147, 703 P.2d 922, 923-924 (Ct. App. 1985), appeal after remand *Seely v. Jaramillo, 104 N.M. 783, 727 P.2d 91 (Ct. App. 1986).*
131. 104 N.M. at 784, 727 P.2d at 92.
132. *Id.*
133. *Id.* at 785, 727 P.2d at 93.
134. *Id.*
135. *Id.* at 786, 727 P.2d at 94.
136. *Id.*

continuity in the child's custodial and environmental relationships. Such judgments should only be changed upon a showing of a material change of conditions affecting the child's interest.[137] The appellate court determined that the fact that the child was of tender years and was of the same sex as the mother reflected a continuation of the status quo at the time of the entry of the original decree.[138] The court noted that in the 1986 Joint Custody Act, the legislature provided that, "in proceedings in which the custody of a child was at issue, the court should not prefer one parent as a custodian solely because of gender."[139] Because the evidence demonstrated that the child was happy and well-adjusted and that the father had cared for the child properly and adequately, substantial evidence did not support the order for a modification of custody.[140]

The third important custody modification decision during the survey period, *Alfieri*, involved the custodial parent's right to travel.[141] In *Alfieri*, mother originally was awarded sole custody of the child, and father was granted specified visitation rights.[142] Subsequently, the trial court expanded and again specified father's visitation rights.[143] Afterward, mother secretly moved from the marital home in New Mexico to California.[144] When father asked the court to modify custody based on mother's move, the court determined that the child should reside in New Mexico and continued custody in the mother on the condition that she move back to New Mexico.[145] If the mother did not return to New Mexico, the trial court awarded the parties joint custody of the child, and placed child's principal residence with the father.[146] Mother appealed and the court of appeals affirmed.[147]

The appellate court observed that the United States Supreme Court has recognized that the right of an individual to travel freely throughout other states or territories is secured by the United States Constitution.[148] The court recognized, however, that where relocation is contrary to the best interests of a child, state courts generally have upheld judicial restrictions or limitations upon removing the child from the jurisdiction.[149] The court should not interfere with the right of a custodial parent to relocate except where the move would be clearly contrary to the child's welfare.[150] The *Alfieri* court stated that where the non-custodial parent challenges the other parent's right to remove a child from the state, the decision whether to grant the relocation is addressed to the sound discretion of

137. *Id.*
138. *Id.* at 787, 727 P.2d at 95.
139. *Id.* n.1.; N.M. STAT. ANN. §40-4-9.1(C).
140. 104 N.M. at 786, 727 P.2d at 94.
141. *Alfieri*, 105 N.M. at 376, 733 P.2d at 7.
142. *Id.* at 375, 733 P.2d at 6.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. 105 N.M. at 374, 380, 733 P.2d at 5, 11.
148. *Id.* at 376, 733 P.2d at 7.
149. *Id.*
150. *Id.*

the trial court.[151] The appellate court determined that substantial evidence upheld the trial court's determination that the move to California was not in the child's best interests.[152]

A significant aspect of the *Alfieri* decision is the court's implication that a decree which provides specified visitation rights may limit a parent's natural right to custody, which includes the right to remove the child from this jurisdiction.[153] The appellate court determined that the mother, as custodial parent, could not unilaterally abrogate the father's right to specific visitation with his daughter without court approval.[154] Previously, although visitation rights were reserved in a non-custodial parent, a custodial parent assumed a personal right to travel and a right to travel with the child.[155] The *Alfieri* decision implies that a parent's natural rights to custody of a child are subject to visitation conditions, which the custodial parent may not abrogate unilaterally without court approval. The same limitation on the right to travel with the child, absent agreement or court approval, has been codified for joint custodial parents under the new Joint Custody Act.[156]

The practitioner should also consider *Alfieri* together with the decision in *Trask v. Trask*.[157] *Trask* creates a strong argument that if a child has resided outside New Mexico for a period of six months or more, New Mexico loses subject matter jurisdiction to modify child custody orders with respect to that child.[158] Due to *Trask*, a non-custodial parent should initiate a custody modification suit within six months of a custodial parent's removal of a child from New Mexico, to maintain custody modification jurisdiction in New Mexico. In such a suit the non-custodial parent could argue that either custody should be changed to the New Mexico resident or that a curtailment of the visitation or periods of responsibility reserved to the New Mexico resident is not in the children's best interest. If the non-custodial parent does not bring such a suit, the New Mexico resident risks not only the loss of frequent association with the child, but the loss of New Mexico custody jurisdiction altogether.

C. *Visitation*

Dillard v. Dillard[159] presented the question of whether the district court should suspend child support payments and place the monies in trust to coerce visitation. In *Dillard*, the trial court found that mother failed to provide reasonable visitation to father, and therefore the trial court ordered father to pay his child support obligation into a savings account for the children's benefit until mother provided reasonable visitation.[160]

151. *Id.*
152. *Id.* at 379, 733 P.2d at 10.
153. *Id.* at 376, 733 P.2d at 7.
154. *Id.* at 377, 733 P.2d at 8.
155. *Id.* at 376, 733 P.2d at 7.
156. N.M. STAT. ANN. § 40-4-9.1 (1978).
157. 104 N.M. 780, 727 P.2d 88 (Ct. App. 1986).
158. *Id.*
159. 104 N.M. 763, 727 P.2d 71 (Ct. App. 1986).
160. *Id.* at 764, 727 P.2d at 72.

On appeal, the appellate court noted that withholding child support payments as a punitive measure is not favored unless the reduction is in the overall best interests of the children.[161] Similarly, withholding child support payments to force visitation must be disfavored.[162] The court determined that the public policy of New Mexico provides that child support exists to benefit the children, and that only in extreme circumstances should courts authorize the withholding of child support to coerce visitation.[163]

II. CHILD SUPPORT

During the survey year New Mexico courts decided five significant cases involving child support: *Dillard v. Dillard*,[164] *Hopkins v. Guin*,[165] *Olguin v. Manning*,[166] DeTevis v. Aragon,[167] and *White v. White*.[168] In *Dillard*, the trial court ordered that father pay child support into a savings account to coerce the mother into allowing reasonable visitation.[169] The trial court then directed that the funds accumulated in the savings account be used to create a trust for the post-minority education of the children.[170] The order provided that any money left over after the children concluded their education or failed to attend college would revert to father.[171] On appeal, the court held that the district court had no jurisdiction to provide for children who have passed the age of majority and that the trial court acted beyond its statutory authority in establishing a child support trust which provided for the parties' children's post-minority education.[172] The appellate court determined that as a matter of policy it did not look favorably upon an accumulation of all child support payments during the minority of the children for the purpose of providing a college education, when during their minority, the children are most in need of their parents' financial support.[173]

In *Hopkins*, the parties entered into an agreement defining net pay for the purposes of determining child support payments to exclude father's disability benefits.[174] Subsequently, the trial court considered father's disability income in assessing support.[175] Father appealed, claiming the trial court abused its discretion in its award of child support.[176]

The appellate court held that the trial court could disregard the parties' agree-

161. *Id.* at 768, 727 P.2d at 76.
162. *Id.*
163. *Id.*
164. 104 N.M. 763, 727 P.2d 71 (Ct. App. 1986).
165. 105 N.M. 459, 734 P.2d 237 (Ct. App. 1986), *cert. quashed*, 105 N.M. 395, 733 P.2d 364 (1987).
166. 104 N.M. 791, 727 P.2d 556 (Ct. App. 1986).
167. 104 N.M. 793, 727 P.2d 558 (Ct. App. 1986).
168. 105 N.M. 600, 734 P.2d 1283 (Ct. App. 1987).
169. 104 N.M. at 764, 727 P.2d at 72.
170. *Id.*
171. *Id.*
172. *Id.* at 766, 727 P.2d at 74.
173. *Id.*
174. 105 N.M. at 461, 734 P.2d at 239.
175. *Id.*
176. *Id.* at 462, 734 P.2d at 240.

ment concerning the disability benefits.[177] The parties, by agreement, could not circumvent the mandatory statutory provisions[178] imposed on the court in child support determinations.[179] *Hopkins* also remarked that a litigant faces a heavy burden in challenging an award of child support on the basis of an abuse of discretion.[180]

Olguin also involved consideration of the effect of a stipulation on a child support determination.[181] In *Olguin*, father was originally ordered to pay child support of $150 per month for the three children.[182] Later, father and mother stipulated to increase support to $200 per month.[183] The stipulation was signed by the parties and filed with the court, but it was not signed by a judge.[184] Subsequently, when one child turned eighteen, father requested a decrease in his child support obligation.[185] The trial court reduced support but utilized the support provided in the stipulation, not the support provided by the order.[186]

The father then appealed, arguing that the trial court should not have accepted the stipulation because the stipulation was not signed by the judge.[187] While recognizing that the trial court was not bound by the parties' agreement where the welfare of the children was concerned and so was free to reject a stipulation of the parties in a support proceeding,[188] the court of appeals determined that the trial court did not abuse its discretion in adopting the parties' stipulation.[189] The appellate court found that to set aside a stipulation of settlement usually requires that there be a showing equivalent to that necessary to set aside a contract in equity and that such a showing had not been made in this case.[190]

The most significant child support decision during the survey period was *DeTevis v. Aragon*,[191] which was a modification proceeding involving complex issues of split custody (where the custody of siblings is divided between the parents) and the effects of remarriage on support obligations. *DeTevis* is important because of its illustration of the sometimes highly complex circumstances involved in a child support determination.

In *DeTevis*, at divorce, two children resided with father and the other child with mother.[192] Father was ordered to pay child support to mother, but mother

177. *Id.* at 464, 734 P.2d at 242.

178. N.M. STAT. ANN. §40-4-11 (1978). These provisions require the trial court to make a specific determination and finding of the amount of support to be paid by a parent to provide properly for the care, maintenance and education of the minor children, considering the financial resources of the parent.

179. 105 N.M. at 464, 734 P.2d at 242.

180. *Id.* at 462, 734 P.2d at 240.

181. 104 N.M. at 791, 727 P.2d at 556.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 791-92, 727 P.2d at 556-57.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 792, 727 P.2d at 558.

190. *Id.*

191. 104 N.M. 793, 727 P.2d 558 (Ct. App. 1986).

192. *Id.* at 797, 727 P.2d at 562.

was not ordered to pay child support to father.[193] Father remarried and filed a motion to decrease alimony and child support.[194] Mother responded by filing a motion to increase child support.[195] In discovery, mother requested financial information from husband's new wife, who had intervened in the action.[196] Over the objection of father and new wife, who contended the information was irrelevant, the trial court ordered new wife to produce certain earned income information.[197] After hearing, the trial court denied both father's and mother's motions and found there had been no significant change of circumstances warranting modification of the alimony or child support obligations of the parties.[198] The trial court ruled it would not consider the community earnings of new wife in determining whether father's support obligation should be modified.[199] Both parties appealed.[200]

The court of appeals held that the legal obligation of a parent to provide child support is not changed by virtue of the remarriage of one or both of the natural parents, and that in the absence of adoption, the primary obligation of support is not shifted from a parent to a step-parent.[201] *DeTevis* stated that a subsequent marriage by either or both of the parties may have some effect upon the financial resources available to support and maintain children and that remarriage is one of a number of factors to consider when acting upon a motion to modify an award of child support.[202] *DeTevis* held that the earnings attributable to the labor and talent of each spouse are community property; both spouses have a present vested right to one-half of the community property derived from their marriage.[203] Therefore, *DeTevis* held a spouse has a legal obligation to use his or her community property interest, even if derived from a subsequent spouse's income, to support his or her children.[204] Stated differently, *DeTevis* holds that an obligor spouse is required to use one-half of the combined earning of both spouses to support the obligor spouse's children of a prior marriage.

Although the remarriage of a parent does not in itself constitute a sufficient change of circumstances to justify a modification of child support, *DeTevis* held that it is an element to be considered.[205] In deciding whether to modify a support order, the trial court, in its broad discretion, should consider all of the relevant factors and circumstances to achieve a fair balancing of the equities in light of the best interest and welfare of the children and the financial resources of the parents.[206]

193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at 798, 727 P.2d at 563.
200. *Id.* at 796, 727 P.2d at 561.
201. *Id.* at 798, 727 P.2d at 563.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.* at 799, 727 P.2d at 564.
206. *Id.*

DeTevis held that since the father had directly raised an issue involving a demand for payment of child support, it was error for the trial court to fail to adopt a finding as to the amount of child support properly payable from the mother to the father.[207] The court affirmed the trial court's denial of the father's motion for decrease in child support and alimony.[208] The court remanded for further proceedings in connection with wife's claim for increased child support and for husband's motion for an award of child support.[209]

In the *White*[210] case, the court of appeals emphasized that any stipulation of the parties concerning child support is subject to court approval. The *White* court held that a stipulation to use child support guidelines cannot rob the court of its authority to set child support at an amount the court determines to be fair, even if that amount is higher or lower than that suggested by the parties.[211]

III. ALIMONY

During the survey year, the court of appeals decided six significant alimony cases, which are *State of New Mexico ex rel. Benzing v. Benzing*,[212] *Mitchell v. Mitchell*,[213] *DeTevis v. Aragon*,[214] *Mattox v. Mattox*,[215] *Michaluk v. Burke*,[216] and *Wolcott v. Wolcott*.[217]

In *Benzing*,[218] a case of first impression, the court of appeals held that the Revised Uniform Reciprocal Enforcement of Support Act[219] (RURESA) may be utilized to enforce alimony obligations.[220] The parties in *Benzing*, were divorced in New Jersey in 1972 pursuant to a property settlement agreement incorporated into a judgment.[221] Wife was awarded alimony of $100 per week.[222] In 1982, husband retired with a retirement income of 40% less than before retirement.[223] In 1983, husband moved to New Mexico and stopped paying alimony.[224] Wife filed a RURESA action to enforce support, and husband requested that the trial court terminate his alimony obligation.[225] The trial court reduced husband's alimony obligation by 40% and ordered him to make payments on accrued arrearage.[226] Husband appealed, arguing that RURESA only applies to child

207. *Id.*
208. *Id.* at 801, 727 P.2d at 566.
209. *Id.*
210. *White*, 105 N.M. 600, 734 P.2d 1283, (Ct. App. 1986).
211. *Id.* at 604, 734 P.2d at 1287.
212. 104 N.M. 129, 717 P.2d 105 (Ct. App. 1986).
213. 104 N.M. 205, 719 P.2d 432 (Ct. App.) *cert. denied*, 104 N.M. 84, 717 P.2d 60 (1986).
214. 104 N.M. 793, 727 P.2d 558 (Ct. App. 1986).
215. 105 N.M. 479, 734 P.2d 259 (Ct. App. 1987).
216. 105 N.M. 670, 735 P.2d 1176 (Ct. App. 1987).
217. 105 N.M. 608, 735 P.2d 326 (Ct. App.) *cert. denied*, 105 N.M. 618, 735 P.2d 535 (1987).
218. *Benzing*, 104 N.M. at 129, 717 P.2d at 105.
219. N.M. STAT. ANN. §§ 40-6-1 to 41 (1978).
220. *Benzing*, 104 N.M. at 130-31, 717 P.2d at 106-7.
221. *Id.* at 130, 717 P.2d at 106.
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*

support obligations and that the court did not have jurisdiction under RURESA to entertain the claim for alimony.[227] Husband also argued that in construing the divorce decree the trial court should have applied New Jersey law to terminate his support obligation because his support obligation had ended under New Jersey law.[228]

The *Benzing* court observed that a specific RURESA provision states duties of support under RURESA are those imposed under the laws of the state where the obligor is present for the period during which support is sought, so New Mexico law applied in determining the nature and extent of the duty to be enforced.[229] Applying New Mexico law, the *Benzing* court upheld the trial court's alimony award.[230]

In *Mitchell*,[231] the court of appeals determined that alimony may be justified even though the recipient eventually receives a large amount of property.[232] Although *Mitchell* did not specify how much property wife received from division of the community estate, the court rejected husband's claim that because of the amount of property wife was to receive, wife was not and never was entitled to alimony.[233] The court justified a $30,000 (twenty payments of $1,500 per month) alimony award because the trial court considered the factors supporting an alimony award, wife had not yet received her share of the property, the award allowed her to meet her needs and pay debts (some of which were husband's separate debts), and allowed her to get a start in her profession selling real estate.[234] This holding is significant because previously, litigants often made the claim that receipt of a large amount of property disqualified the recipient from an alimony award.

In *DeTevis*,[235] the court of appeals reiterated the principle that questions involving motions for modification of child support and alimony are analogous and the same legal principles generally apply to both. *DeTevis* determined that the remarriage of a husband, unaccompanied by a showing of the existence of other relevant and material circumstances, is not sufficient to justify modification of alimony.[236] Remarriage, however, combined with other significant factors and relevant evidence, may constitute a basis to justify modifications of alimony.[237]

In *Mattox*,[238] husband appealed the trial court's alimony award, arguing that the trial court should have considered as additional income the amount wife would receive if she were to liquidate the majority of her community property award and invest the proceeds.[239] The court of appeals rejected that argument

227. *Id.*
228. *Id.* at 131, 717 P.2d at 107.
229. *Id.*
230. *Id.* at 132, 717 P.2d at 108.
231. *Mitchell*, 104 N.M. at 214, 719 P.2d at 441.
232. *Id.* at 214, 719 P.2d at 441.
233. *Id.*
234. *Id.*
235. *DeTevis*, 104 N.M. at 799, 727 P.2d at 564.
236. *Id.* at 799, 727 P.2d at 564.
237. *Id.*
238. *Mattox*, 105 N.M. at 481, 734 P.2d at 261.
239. *Id.* at 486, 734 P.2d at 266.

and determined that a spouse is not required to convert the majority of her community property award into income-producing property to meet living expenses.[240] While income-producing property may normally be considered in setting alimony, proceeds from selling the property itself should not be considered, except in such rare cases where fairness requires.[241]

In *Michaluk*,[242] the court of appeals clarified the distinction between an award of lump sum alimony and an award of periodic alimony and considered whether an award of lump sum alimony terminates when the wife dies before she actually receives the lump sum alimony. In *Michaluk*, wife was awarded $35,000 in lump sum alimony, but she died during the pendency of the appeal and before receipt of the alimony award.[243] Husband contended that the trial court should not have awarded lump sum alimony in this case, reserving lump sum alimony only for cases with compelling circumstances, and that wife's right to receive the lump sum alimony terminated upon her death.[244]

The court of appeals decided that the alimony statute[245] provides the district court with the authority to award either lump sum or periodic alimony and that the statute states no preference for one form of alimony over the other.[246] The appellate court held that the trial court did not abuse its discretion in awarding lump sum alimony to wife. In deciding whether lump sum alimony terminates upon the death of the recipient, the court of appeals reasoned that lump sum alimony is viewed as akin to accrued, periodic alimony.[247] Because the authority to modify an alimony decree does not include the authority to make a retroactive modification of accrued and vested payments, once installments become due, the right to those accrued installments of alimony becomes a fixed property right.[248] The judgment for accrued alimony, then, becomes a non-modifiable judgment, entitled to full faith and credit in all the states.[249] Therefore, although wife died before receipt of the lump sum alimony award, her estate was entitled to collect it.

In *Wolcott*,[250] the court of appeals considered whether a voluntary career change undertaken in good faith justified modification of an alimony obligation. In *Wolcott*, a settlement agreement and divorce decree ordered husband to pay $300 per month alimony for five years.[251] At the time of the divorce, husband was an Albuquerque physician specializing in obstetrics and gynecology.[252] Subsequently, husband was accepted in a psychiatric residency program in Washington, D.C.[253] Husband closed his Albuquerque office and commenced his residency.[254]

240. *Id.*
241. *Id.*
242. *Michaluk*, 105 N.M. at 673, 735 P.2d at 1179.
243. *Id.* at 672-73, 735 P.2d at 1178-79.
244. *Id.* at 673, 735 P.2d at 1179.
245. N.M. STAT. ANN. § 40-4-7 (1978).
246. 105 N.M. at 673, 735 P.2d at 1179.
247. *Id.* at 675, 735 P.2d at 1181.
248. *Id.*
249. *Id.* at 675-76, 735 P.2d at 1181-82.
250. *Wolcott*, 105 N.M. at 608, 735 P.2d at 326.
251. *Id.*
252. *Id.*
253. *Id.* at 609, 735 P.2d at 327.
254. *Id.*

His annual gross income was reduced to approximately one-fourth of his annual gross income at the time of the divorce.[255] Husband unilaterally reduced his alimony payments contrary to the terms of the divorce decree.[256] Husband then moved to terminate or abate alimony.[257] The trial court denied the motions and found that husband did not act in good faith with regard to his alimony obligation when he voluntarily made the career change.[258]

On appeal, husband argued that his voluntary career change justified modification of his support obligation.[259] The court of appeals determined that a voluntary career change, even though made entirely in good faith, does not automatically mandate a reduction in support obligations.[260] The court of appeals observed that the common trend in various jurisdictions is that a good faith career change, resulting in decreased income, may constitute a material change in circumstances that warrants a reduction in a spouse's support obligation.[261] Where the career change is not made in good faith, however, a reduction of a spouse's support obligation will not be warranted.[262] In this case, the trial court's finding that husband's career change was not made in good faith was supported by the evidence; the court of appeals affirmed the trial court.[263]

IV. COMMUNITY PROPERTY & DEBTS

During the survey year, the appellate courts decided important issues concerning valuation of a professional practice in a closely-held corporation, application of full faith and credit, retirement, apportionment and reimbursement.

In *Mitchell v. Mitchell*,[264] the court of appeals considered whether to characterize a CPA practice as community property, and how to value such a practice, including how to value its goodwill. In addition, the court of appeals considered the principle of "commingling" as applied to a stock account and whether husband was entitled to reimbursement for post-divorce expenditures on community debts which he made from community assets.[265]

In *Mitchell*, husband became a CPA and commenced practice prior to marriage.[266] At the date of marriage, the practice owned a couch, a calculator, some small office equipment, and generated yearly gross income of $995.[267] At the time of divorce, husband's practice reported a yearly income of $154,000.[268] The trial court determined that the business was community property.[269] On

255. *Id.*
256. *Id.*
257. *Id.* at 608, 735 P.2d at 326.
258. *Id.*, 735 P.2d at 328.
259. *Id.* at 608, 735 P.2d at 326.
260. *Id.* at 610, 735 P.2d at 328.
261. *Id.* at 609, 735 P.2d at 327.
262. *Id.*
263. *Id.* at 610, 735 P.2d at 328.
264. *Mitchell*, 104 N.M. at 209, 719 P.2d at 436.
265. *Id.* at 212, 214-15, 719 P.2d at 439, 441-42.
266. *Id.* at 209, 719 P.2d at 436.
267. *Id.*
268. *Id.*
269. *Id.*

appeal, husband contended the practice was separate property because it was acquired prior to marriage.[270]

The appellate court reiterated the rule that the individual right to practice a profession is separate property, but the value of the practice of the business at the time of divorce is community property.[271] The appellate court upheld the trial court's characterization of the business as community property because husband's investment prior to marriage was negligible; the trial court properly concluded that the primary value of the practice was derived from husband's efforts after marriage.[272]

As to the goodwill of the practice, the appellate court defined professional goodwill as the difference between the total value of the professional association or corporation and the aggregate value of its separable resources and property rights, less liabilities.[273] *Mitchell* stated that when goodwill exists, an appropriate method for determining its value is the capitalization of excess earnings method.[274] The capitalization of excess earnings method views goodwill as the amount of earnings in excess of a fair return on net tangible assets and other invested capital. [275] Thus, *Mitchell* recognized that goodwill is the value of the business in excess of its hard assets and that the value is divisible upon divorce.[276] The trial court heard expert testimony that accounting practices are valued at between 50% and 100% of the preceding year's gross fees depending on profitability and type of work and clients.[277] The appellate court approved the trial court's use of a capitalization factor of 100% of the annual gross fees ($154,000) to arrive at the value of goodwill.[278] The approved capitalization factor is important as a starting point in valuation of an accounting practice.

The court of appeals also upheld the trial court's characterization of the stock account as community property.[279] First, the court stated that in New Mexico there is a presumption that property acquired during marriage is community property.[280] This presumption can be overcome by a preponderance of the evidence that certain property is separate property.[281] The court reasoned, however, that if separate property has been so intermingled with community property that it cannot be traced or identified, evidence of the property's separate status prior to commingling is insufficient to overcome the presumption that such property,

270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.* at 210, 719 P.2d at 437.
274. *Id.*
275. BACA, FAMILY LAW IN NEW MEXICO 178, (Legal Education Institute, Inc. 1988). The formula approach is determined by a three-step process based on Rev. Rul. 59-60: 1) Determine average earnings for at least five years, adjusting for atypical fluctuations in earnings; 2) subtract a fair return on the tangible assets and invested capital. The rate of return depends on the risk involved; 3) The remainder is capitalized at a rate appropriate for the degree of risk involved in the practice. This is the value of the professional goodwill.
276. 104 N.M. at 211, 719 P.2d at 438.
277. *Id.*
278. *Id.*
279. *Id.* at 212, 719 P.2d at 439.
280. *Id.*
281. *Id.*

acquired during marriage, is community property.[282] Because the *Mitchell* court agreed with the trial court's finding that the funds going into and out of the stock account were not specifically traceable to separate or community funds or expenditures, it upheld the trial court's determination that the stock was community property.[283]

Concerning the debt issue, the trial court determined that from entry of the parties' prior partial decree of divorce, until trial, husband spent $129,000 of community assets to preserve and maintain community property.[284] The trial court reimbursed husband $129,000.[285] The appellate court upheld the award, reasoning that on the date the property was divided, the community obligations had been paid with community funds and that the value of the community estate was the same as it had been on the date of divorce.[286] The *Mitchell* court stated that the trial court did not abuse its discretion by reducing the amount of the community estate available for distribution by the amount paid by husband.[287]

The appellate court decision on this issue was incorrect. The facts stated that husband used community assets to pay community obligations.[288] If the assets used to pay the obligations were husband's separate assets, then husband was entitled to reimbursement. However, because the assets husband used to pay the obligations belonged to the community, the community, not husband, should have been reimbursed, and wife was entitled to one-half of that reimbursement.

In *Willis v. Willis*,[289] the supreme court determined that a Texas divorce decree should be granted full faith and credit when it characterized New Mexico real property as husband's separate property.[290] In *Willis*, the parties were divorced in Texas in 1973.[291] Certain mineral, oil and gas interests in New Mexico were at all times held in husband's name alone.[292] Both parties personally appeared in the Texas proceedings.[293] The Texas decree divided all the property of the parties, wherever located, and granted the mineral, oil and gas interests to the husband.[294] Wife filed suit in New Mexico for partition of the interests, accounting, and money due.[295] The trial court dismissed the suit on the grounds of full faith and credit, comity and res judicata; wife appealed.[296]

The supreme court would not go behind the Texas decree to permit relitigation of matters presented and decided in the Texas court, nor could it refuse full faith and credit to foreign decrees.[297] The *Willis* court, however, also stated that while

282. *Id.*
283. *Id.*
284. *Id.* at 215, 719 P.2d at 442.
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.*
289. 104 N.M. 233, 719 P.2d 811 (1986).
290. *Id.* at 235, 719 P.2d at 813.
291. *Id.* at 234, 719 P.2d at 812.
292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.*
297. *Id.* at 235, 719 P.2d at 813.

the general rule is that in rem decrees which affect title to out-of-state property ordinarily are not entitled to full faith and credit, res judicata or comity considerations, that rule did not apply to the *Willis* case, because, in *Willis*, no order affecting the title to or requiring conveyance of the New Mexico interest was entered in Texas.[298] The Texas decree simply confirmed husband's separate ownership of the property. As a result, New Mexico would give full faith and credit to that decree.[299]

The result in *Willis* is correct, but the supreme court was incorrect in its statement that in rem decrees affecting title to out-of-state property ordinarily are not entitled to full faith and credit. Where parties personally appear before a state court, an in rem decree affecting title to out-of-state property is ordinarily entitled to full faith and credit.[300]

In an important case, *McCauley v. Tom McCauley & Son, Inc.*,[301] the court of appeals determined the appropriateness of a corporation dissolution action when wife was awarded a minority interest in a close corporation at the time of divorce and later claimed that the majority stockholders engaged in oppressive conduct which prejudiced her interest.[302] Additionally, the *McCauley* court decided what factors were appropriate for determining the value of a close corporation subject to a corporate dissolution, the value of a minority interest in a close corporation, and whether it was error for the trial court to award wife an interest in oil, gas and mineral rights after directing that the corporation purchase her stock.[303]

The *McCauley* case is discussed in the commercial law survey article which is published in this issue of the New Mexico Law Review.[304] Although *McCauley* was decided in a commercial law context, the practitioner should carefully review *McCauley* because in reality the case involves the distribution of a community interest in a close corporation incident to a divorce. Considerations applied by the court of appeals to dissolve the corporation involved in the *McCauley* case are identical to those which commonly occur in marital dissolution/close corporation cases. These considerations involve: 1) valuation of a close corporation; 2) valuation of a minority interest in a close corporation; and 3) options available to the trial court in dividing a community interest in a close corporation.

In *Sparks v. Caldwell*,[305] the New Mexico Supreme Court determined whether New Mexico had jurisdiction to award a former wife an interest in her former husband's military retirement pay after the parties' divorce, when husband was a Washington resident at the time of the suit. In *Sparks*, the parties were divorced

298. *Id.*

299. *Id.*

300. In *Fenner v. Fenner*, 106 N.M. 36, 738 P.2d 908 (Ct. App. 1987), *cert. denied*, 106 N.M. 7, 738 P.2d 125 (1987), quoting *Rozan v. Rozan*, 49 Cal. 2d 322, 330, 317 P.2d 11, 15 (1957), which involves a similar fact pattern, the court of appeals observed that if a court has entered a decree of specific performance, but the conveyance has not been executed, the majority of states will give effect to the decree. *Id.* at 41, 738 P.2d at 913.

301. 104 N.M. 523, 724 P.2d 232 (Ct. App. 1986).

302. *Id.* at 524-25, 724 P.2d at 233-34.

303. *Id.* at 525, 724 P.2d at 234.

304. Hertz and Harmon, Commercial Law, 18 N.M.L. Rev. 2 (1988).

305. 104 N.M. 475, 723 P.2d 244 (1986).

in New Mexico in 1971.[306] In 1985, the former wife filed a separate civil action in New Mexico to declare her interest in her former husband's military retirement pay.[307] In 1985, husband was a resident of Washington.[308] Husband was neither a resident of nor domiciliary of New Mexico, nor did he consent to the district court's jurisdiction.[309] The supreme court considered the trial court's jurisdiction to entertain the matter by writ of prohibition.[310]

The supreme court construed the provisions of the Federal Uniformed Services Former Spouse's Protection Act (FUSFSPA) [311] which provides that a state district court may divide military retired pay in accordance with state law, if it has personal jurisdiction over the retired military member.[312] The jurisdictional bases provided in FUSFSPA for division of military retirement benefits are residence or domicile of the member within the jurisdiction or consent of the member to jurisdiction.[313] The supreme court determined that New Mexico did not have jurisdiction over the former husband in *Sparks* and dismissed the case.[314] *Sparks* is important, because, in its holding, the supreme court observed that the continuing jurisdiction of the divorce court did not avail the district court in the civil action, because the court's continuing jurisdiction in the divorce court extends only to child custody and child support matters.[315]

In a second military retirement case, *Reyes v. Reyes*,[316] the court of appeals determined that the New Mexico trial court could not divide military retirement benefits which were not distributed in a prior Colorado divorce decree. Under Colorado law, military retirement benefits do not constitute property and so are not subject to division upon dissolution of marriage.[317]

In *Reyes*, the parties were divorced in Colorado in 1981, but the divorce decree, which awarded alimony to wife, did not mention husband's military retirement.[318] Husband filed the decree in New Mexico and moved to terminate alimony.[319] Wife answered and requested the court to award her a portion of husband's military retirement pay pursuant to Section 40-4-20.[320] The trial court refused to terminate alimony and awarded wife a portion of husband's retirement.[321] Husband appealed, and the appellate court reversed the division of the military retirement benefits.[322] In its decision, the *Reyes* court reasoned that the authority to modify a division of property in a prior divorce action depends on

306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.*
310. *Id.*
311. 10 U.S.C. § 1408 (1982).
312. 104 N.M. at 476, 723 P.2d at 245.
313. *Id.*
314. *Id.*
315. *Id.*
316. 105 N.M. 383, 733 P.2d 14 (Ct. App. 1987).
317. *Id.* at 384, 733 P.2d at 15.
318. *Id.* at 383-384, 733 P.2d at 14-15.
319. *Id.* at 383, 733 P.2d at 14.
320. *Id.* at 384, 733 P.2d at 15.
321. *Id.* at 383, 733 P.2d at 14.
322. *Id.* at 383-84, 733 P.2d at 14-15.

the law of the jurisdiction which granted the award.[323] In Colorado, military retirement benefits do not constitute property and are not subject to division upon dissolution of marriage.[324] Since the trial court had to follow Colorado's substantive law, the court was without authority to award wife part of husband's military benefits.[325]

In a third military retirement case, *White v. White*,[326] the court of appeals determined that the Federal Uniformed Services Former Spouse's Protection Act (FUSFSPA) [327] does not necessarily prohibit a trial court division of gross retirement pay. FUSFSPA provides that a court may treat disposable retired pay as property of the member and his spouse in accordance with state law.[328] "Disposable" retired pay is gross pay less statutorily specified deductions, including federal and state tax liability, life insurance, disability retirement and certain allotments.[329] Husband contended that FUSFSPA limits a state court division of retirement benefits to disposable pay, rather than gross pay.[330] The trial court agreed with husband and divided only the husband's disposable, or net pay, rather than his gross retirement pay.[331]

The appellate court determined that the statutory deductions were, with the exception of withholding tax, under the direct or indirect control of the retiree and might vary significantly amongst retirees.[332] The *White* court determined that FUSFSPA was not intended and did not operate to affect characterization of retired pay, and that such characterization is a state law question.[333] *White* stated that FUSFSPA primarily establishes a scheme to permit an ex-spouse to enforce or garnish retirement pay while also affording the retiree protection limiting the amount "garnished" in enforcement of state court orders.[334] Because the characterization of retirement pay is a state law question, the division of gross, rather than disposable military retirement pay is not inconsistent with FUSFSPA.[335] The appellate court remanded the case to the trial court for a division of husband's gross military retirement benefits.[336] The appellate court remarked that a trial court was not foreclosed from authorizing appropriate deductions when the failure to do so would work an injustice or would be inequitable.[337]

The consequence of the *White* division is that although state courts may divide gross military retirement benefits as between the parties, enforcement of that division is nonetheless limited by FUSFSPA to that part of the retirement pay which is defined as "disposable." Therefore, if there is a discrepancy between

323. *Id.* at 384, 733 P.2d at 15.
324. *Id.*
325. *Id.*
326. 105 N.M. 600, 734 P.2d 1283 (Ct. App. 1987).
327. 10 U.S.C. § 1408(c)(1) and (d) (1982).
328. 105 N.M. at 603, 734 P.2d at 1286.
329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.*
335. *Id.* at 603-04, 734 P.2d at 1286-87.
336. *Id.* at 604, 734 P.2d at 1287.
337. *Id.*

the amount of retirement pay awarded to a non-military spouse under New Mexico law, and the amount that can be enforced under FUSFSPA, the non-military spouse will be required to find other sources to satisfy the disparity.

In a fourth important retirement case, the appellate court, in *Mattox v. Mattox*,[338] reviewed a trial court's division of retirement benefits using a present value or lump sum method as well as the trial court's decision to disregard the tax consequences incident to a division of community property. Although the New Mexico Supreme Court has determined in *Schweitzer v. Burch*,[339] that, absent agreement, the trial court must divide community property retirement benefits on a "pay as it comes in" basis, *Mattox* is instructive for the implication it holds for retirement division law.

In *Mattox*, husband acquired an interest in his retirement plan during twenty-three years of marriage.[340] At the time of the divorce, the pension had not matured, i.e., husband was not eligible to retire for two more years, when husband would be age fifty-three.[341] The trial court based its valuation of the pension on the assumption that husband would not cash it in and that he would retire on the date when he would be eligible to retire, which was when he had worked twenty-five years and was age fifty-three.[342] Husband argued that the trial court should have valued his pension as if he would have retired at age sixty-five.[343] Husband also argued that the pension should be valued as if it were cashed in as of the date of trial, a date which was two years before he was eligible to retire.[344] The appellate court rejected both arguments stating that the trial court properly valued husband's pension benefit using the earliest date it matured, taking into account monetary contributions and current pension entitlement accrued during marriage and based upon husband's current salary.[345]

The *Mattox* court determined that under current New Mexico case law a spouse is entitled to a community share of the portion of the pension that is vested but unmatured at the date of divorce.[346] In valuing unmatured pension benefits for the purpose of lump sum distribution, the trial court is required to determine their present value.[347] Answering husband's contention that the trial court should have used age sixty-five as his retirement age in valuing the pension, the *Mattox* court determined that a spouse could not unilaterally choose to postpone retirement when pension benefits are fully vested and matured so as to impair a non-employee spouse's interest in those retirement benefits.[348] In valuing the pension, the trial court's use of the date when husband was first eligible to retire was proper.[349]

338. 105 N.M. 479, 734 P.2d 259 (Ct. App. 1987).
339. 103 N.M. 612, 711 P.2d 889 (1985).
340. 105 N.M. at 480, 734 P.2d at 260.
341. *Id.* at 483, 734 P.2d at 263.
342. *Id.* at 482-83, 734 P.2d at 262-63.
343. *Id.* at 483, 734 P.2d at 263.
344. *Id.* at 482-83, 734 P.2d at 262-63.
345. *Id.*
346. *Id.* at 481, 734 P.2d at 261.
347. *Id.*
348. *Id.* at 483, 734 P.2d 263.
349. *Id.* at 482-83, 734 P.23d at 262-63.

The court of appeals also upheld the trial court's assumption that husband would work to age fifty-three when the pension matured. Prohibiting the community from using future employment years in valuing the pension would come dangerously close to defeating the community interest of the non-employee spouse to the pension benefits.[350] Thus, under *Mattox*, a pension plan matures when the employee is eligible to retire and is entitled to receive the benefits earned through the years.[351]

Mattox raises the question of how to apply its holding to a case where the trial court divides retirement benefits on a "pay as it comes in basis."[352] Once pension benefits have matured and an employee spouse is eligible to retire but chooses not to retire, is the non-employee spouse entitled to receive from the employee spouse a sum equivalent to that which the non-employee spouse would have received if the employee spouse had retired? This question has not been directly answered by the New Mexico courts but was answered in the affirmative by a California court in *In Re Marriage of Gillmore*. [353] In its decision the *Mattox* court relied upon *Gillmore* for the proposition that one spouse cannot, by invoking a condition wholly within his control, defeat the interest of the other spouse.[354] Carrying this proposition to its logical conclusion would require the New Mexico court to follow the California court in holding that once pension rights have matured and an employee spouse is eligible to retire, but chooses not to, the employee spouse must pay the non-employee spouse the amount of benefits which the non-employee spouse would have received if the employee spouse had retired.

Finally, the court of appeals affirmed the trial court's decision not to consider the tax consequences of the property division in *Mattox*.[355] The *Mattox* court stated that although the general rule requires that the trial court consider tax consequences when deciding a property settlement upon dissolution of marriage,[356] such tax consequences should only be considered if they are immediate and specific.[357] *Mattox* stated that requiring the trial court to consider tax consequences in light of numerous unknown factors, such as when an asset will be sold, the price of the asset upon sale, or the tax laws and tax rates at the time of the sale, would be unreasonable.[358] Where tax consequences are too speculative, it is proper for the trial court to disregard them.[359]

The appellate court decided a significant apportionment case in *Dorbin v. Dorbin*.[360] *Dorbin* clarified the concept of apportionment[361] under New Mexico

350. *Id.* at 482, 734 P.2d at 262.
351. *Id.*
352. *Schweitzer v. Burch*, 103 N.M. 612, 711 P.2d 889 (1985); *supra* text accompanying note 339.
353. 29 Cal.3d 418, 629 P.2d 1, 174 Cal. Rptr. 493 (1981).
354. 105 N.M. at 484, 734 P.2d at 264.
355. *Id.* at 485, 734 P.2d at 265.
356. *Id.* at 485, 734 P.2d at 265.
357. *Id.*
358. *Id.*
359. *Id.*
360. 105 N.M. 263, 731 P.2d 959 (Ct. App. 1986).
361. "Apportionment is the principle courts apply when an asset is acquired during marriage, using both separate and community monies. At divorce, the asset is apportioned between separate and community interests in a manner which achieves substantial justice." *Id.* at 265, 731 P.2d at 961.

law. The appellate court also decided the circumstances under which reimbursement is authorized for community funds spent for the benefit of separate property, or for separate funds spent for the benefit of community property.

During the parties' marriage, in *Dorbin*, wife purchased a town house for $69,000, making a cash down payment of $10,000 from her separate property.[362] The balance of $59,000 was financed by a real estate contract.[363] Wife took title to the town house in her name alone as her separate property, with husband's knowledge and consent.[364] During the marriage, the parties paid $3,000 in principal on the real estate contract and $24,156 in interest.[365] At the time of trial the town house was worth $100,000 with an equity value of $44,000. [366] The trial court awarded the community a lien of $27,156 against the town house, representing $24,156 in interest and $3,000 in principal.[367]

On appeal, the court of appeals reversed the trial court's decision that the community was allowed to recover both principal and interest paid during the marriage on wife's separate residence.[368] The appellate court, however, did not rigidly follow prior New Mexico law on apportionment which had allowed the community a lien for mortgage payments made with community money, but only to the extent that mortgage principal was reduced.[369] Instead, *Dorbin* extended prior New Mexico law by granting the community not only a sum equal to the principal mortgage reduction, but also a sum equal to a portion of appreciation equity.[370] The *Dorbin* court approved an apportionment formula utilized by the California Supreme Court which related appreciation equity to the principal payments made by the community to determine the total amount of the community lien.[371] The court supplied a graphic formula to illustrate the process.[372] In applying the formula, the appreciation equity is first apportioned according to the ratio by which the respective community and separate funds were used to pay the principal on the original purchase price. The cash equity is then apportioned according to the separate or community source of funds used to pay the purchase price. Finally, the total equity is divided by combining the respective community and separate property shares of the cash equity and appreciation equity.[373] The *Dorbin* court emphasized the method it used is an approved method, but also recognized other appropriate apportionment formulas which it distinguished.[374]

The *Dorbin* court also clarified when reimbursement will be allowed to either the community or the owner of separate property. *Dorbin* held that when community money is spent to benefit separate property, without the acquisition of an asset, for example, when money is paid for interest, taxes and insurance, neither New Mexico statute nor case law authorizes reimbursement.[375] Similarly,

362. *Id.* at 264, 731 P.2d at 960.
363. *Id.*
364. *Id.*
365. *Id.* at 265, 731 P.2d at 961.
366. *Id.*
367. *Id.* at 264, 731 P.2d at 960.
368. *Id.* at 267, 731 P.2d at 963.
369. *Id.* at 266, 731 P.2d at 962; *Chance v. Kitchell*, 99 N.M. 443, 659 P.2d 895 (1983).
370. 105 N.M. at 267, 731 P.2d at 963.
371. *Id.* at 266, 731 P.2d at 962.
372. *Id.* at 267, 731 P.2d at 963.
373. *Id.* at 267-68, 731 P.2d at 962-63.
374. *Id.* at 268, 731 P.2d at 963.
375. *Id.* at 269, 731 P.2d at 964.

when separate money is spent for the benefit of the community, but no asset is acquired, for example, if separate money is spent for food, clothing, travel, etc., reimbursement is not authorized.[376] On the other hand, reimbursement is authorized, via apportionment, when an asset is acquired with community and separate monies.[377] The *Dorbin* court concluded that it is sound policy to only allow reimbursement or apportionment when an asset is acquired because to do otherwise would invite litigation for accountings between spouses to determine who paid for the most insignificant thing.[378] The *Dorbin* court remanded the case to the district court to apportion the interest in wife's residence according to the formula in the opinion.[379]

CHILDREN'S CODE

Three important principles were decided by the court of appeals in three cases arising under the Children's Code. In the first, *In re Reuben & Elizabeth O. v. Department of Human Services*,[380] the court of appeals upheld a trial court's termination of parental rights. In doing so, the court emphasized that in such an action the court may not balance the backgrounds of the parties to determine which party might provide a preferable environment for the child but, instead, must apply the specific factors provided in the Children's Code for termination of parental rights.[381]

In *State v. Julia S.*,[382] the court of appeals clarified when a child may be subject to punishment for contempt under the Children's Code.[383] In its decision, the *Julia* court distinguished between a "child in need of supervision" (CHINS)[384] and delinquent[385] children and discussed the policy of the law as it affects each classification. In holding that a CHINS child may be subject to punishment for contempt under the Children's Code, the appellate court approved the specific statutory requirements which must be met before a CHINS child may be incarcerated.[386] The appellate court, however, disapproved of the use of the general, inherent contempt powers of the district court other than as provided in the Children's Code.[387]

In *Matter of Angela R.*,[388] the court of appeals decided that child hearsay may be permitted in a sexual abuse case. Furthermore, not only may parents or medical experts report such hearsay, but also social workers and others may do so.[389]

376. *Id.*
377. *Id.*
378. *Id.*
379. *Id.* at 270, 731 P.2d at 965.
380. 104 N.M. 644, 725 P.2d 844 (Ct. App. 1986).
381. *Id.* at 649, 725 P.2d at 849.
382. 104 N.M. 222, 719 P.2d 449 (Ct. App. 1986).
383. *Id.* at 223, 719 P.2d at 450.
384. N.M. STAT. ANN. § 32-1-3(N)(1978).
385. N.M. STAT. ANN. § 32-1-3(P)(1978).
386. *Id.* § 32-1-34(F)(1978).
387. 104 N.M. at 227, 719 P.2d at 454.
388. 105 N.M. 133, 729 P.2d 1387 (Ct. App. 1986).
389. *Id.* at 135, 729 P.2d at 1389.

CONCLUSION

The number and variety of issues decided by the New Mexico appellate courts in the domestic relations area demonstrate the complex and comprehensive issues facing the judiciary, the bar, and litigants. The domestic relations litigation explosion is due not only to the increased number of litigants, but also to the increased number of issues which are litigated. It is not uncommon for a limited divorce case to involve a large number of issues. Due to the development of family courts, which limit their attention to domestic relations issues, and the careful consideration given to domestic relations matters by the appellate courts, the judicial system has recognized the specialization and unique handling which domestic relations cases require. The attention given by the appellate courts to family law cases during the survey year demonstrates the seriousness with which the judicial process regards domestic relations matters. Although the courts cannot prevent dissolution, they are able to ameliorate its harsh effects.