

UNDERSTANDING CHILD CUSTODY — IN — NEW MEXICO

What You Need to Know about Custody,
Time-Sharing, and Child Support



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OPENING STATEMENT



For many readers this eBook begins with a separation.

Some of you recently separated from your spouses and are considering a divorce with children involved.

Other readers are unmarried and are living with your partners while teetering towards a breakup.

The final group of readers are unmarried and have never lived with the co-parent. This final group includes parents with amicable time-sharing arrangements that have turned hostile. This group also includes parents that are seeking information about parental rights and responsibilities regarding an unborn child.

In all three scenarios, a child was either born or conceived during the relationship and the reader is reeling from the separation and searching for information regarding New Mexico law on custody, time-sharing, and child support.

Parents from all three groups tend to share a combination of three emotions – sadness, anger, and fear. Sadness and anger generally stem from the breakup. Fear is often caused by the uncertainty of an unknown future and the prospect of traveling through a daunting legal system.

During this difficult time, family and friends with good intentions can provide bad advice that is based on secondhand stories, fuzzy memories from personal experiences, or a misunderstanding of New Mexico law. This bad advice can lead to bad decisions that harm your case.

This eBook provides parents with the first easily accessible guide towards understanding the process and laws surrounding custody, time-sharing, and child support in New Mexico. The following chapters were written from the eye and hand of an *experienced* attorney that has practiced family law in New Mexico for over a decade.

CHAPTER 1: ESTABLISHING PARENTAL RIGHTS

New Mexico law presumes that a child is best served when both parents play an active role in the child's development. New Mexico law strongly encourages parental involvement from individuals that demonstrate a willingness and ability to provide their child with adequate care, maintenance, and supervision.

For children born during marriage, the husband and wife are presumed to be the child's natural parents.

For children born outside of marriage, there are two common situations that a parent faces in order to establish parental rights and responsibilities. The first scenario takes place when the child's paternity is contested. The second scenario occurs when paternity is not contested.

When paternity is contested, the child's natural mother is established by proof of birth. A man is presumed to be the child's natural father when he openly holds the child out as his natural child, thereby establishing a personal, financial, or custodial relationship with the child. Despite this presumption, when paternity is contested, the court will determine if the man is the child's biological father by ordering a paternity test to be performed through a third party agency.

The process of receiving a court ordered custody and time-sharing arrangement generally begins when an unmarried parent files a *Petition to Establish Paternity, Custody, Time-sharing, and Child Support*. Once the *petition* is filed and paternity

A man is presumed to be the child's natural father when he openly holds the child out as his natural child, thereby establishing a personal, financial, or custodial relationship with the child.

is established, a hearing is set to determine the appropriate custody and time-sharing.

At the initial hearing, the court begins by determining whether the alleged father is accepting parentage, or if the mother is denying parentage. In situations where parentage is disputed, the court order will order the man to take a DNA test. Generally, fathers are required to initially pay for the DNA test. In most cases, the initial cost is subsequently split if he is found to be the child's biological father.

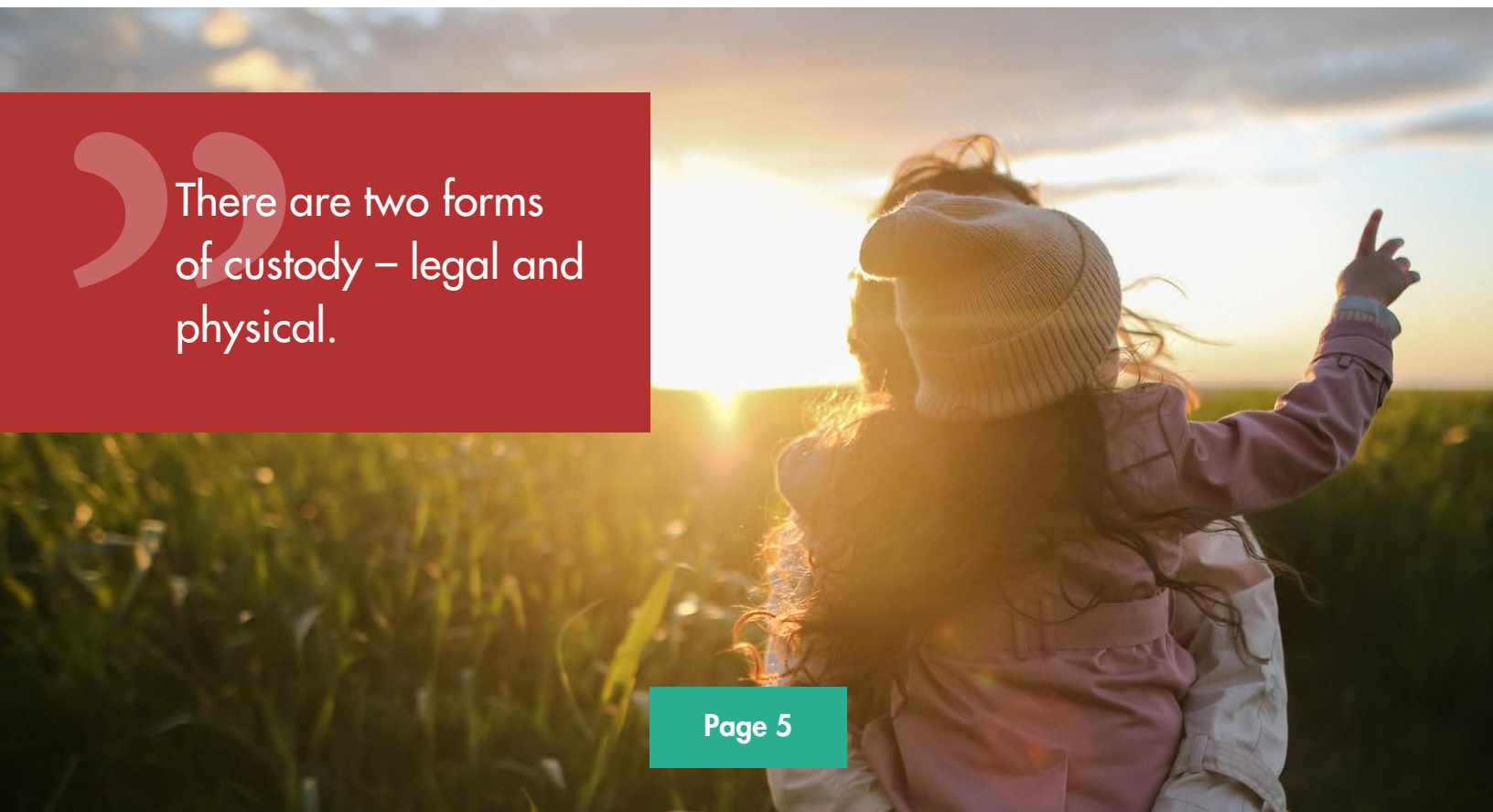
LEGAL AND PHYSICAL CUSTODY:

Custody is one of the most important reasons why parents seek court involvement.

There are two forms of custody – *legal* and *physical*. Parents often use the two types of custody interchangeably, despite their inherent differences.

“Legal custody” means the right to make major decisions in a child's life in the areas of residence, religion, recreation, education, childcare, medical, and dental treatment. Joint legal custody means that both parents have the right to make major decisions in a child's life. Joint legal custody prevents one parent from calling all of the shots – making major changes without the other parent's approval.

New Mexico law presumes that joint legal custody is in the child's best interests – but a *legal presumption* does not mean a *legal right*. A legal presumption

A woman with long dark hair, wearing a white knit beanie and a pink jacket, is seen from behind, carrying a child in a field. The sun is low on the horizon, creating a warm, golden glow. The woman's right arm is raised, pointing towards the sky. The field appears to be a cornfield with tall stalks.

There are two forms of custody – legal and physical.

essentially means that the court begins with the belief that joint legal custody is in the child's best interests until the other side can introduce enough evidence to prove otherwise.

An award of joint legal custody means:

1. Each parent shall have significant, well-defined periods of time-sharing with the child;
2. Each parent shall have responsibility for the child's financial, physical, emotional, and developmental needs during their time-sharing; and
3. Both parents must approve major changes to the child's life.

Joint legal custody means that each parent is entitled to significant and well-defined periods of time-sharing with the child. Joint legal custody does *not* mean that parents are entitled to *equal* time-sharing.

Physical custody means the time that each parent has a child. Parents often use the term "joint physical custody" to mean 50-50 time-sharing. In reality, joint physical custody simply means that both parents have specific and well-defined periods of time-sharing with a child. Parents can have *joint* physical custody, while at the same time one parent has *primary* physical custody. This means that both parents have time-sharing with a child, but one parent has the child for a greater percentage of time.

Joint physical custody simply means that both parents have specific and well-defined periods of time-sharing with a child.

Although parents may share joint custody, New Mexico courts tend to grant one parent primary physical custody – especially in situations where the child is younger than 10-years-old, or when one parent has a history of acting as the child's primary caregiver.

CHAPTER 2:

BEST INTERESTS OF THE CHILD

Custody disputes generally arise after a breakup or divorce when the mother and father are unable to agree on the appropriate time-sharing schedule. When these disagreements occur, New Mexico courts are forced to intervene and determine the appropriate system of time-sharing between the feuding parents.

It is well established that the sole factor in child custody decisions is the best interests and welfare of the child. From the beginning, New Mexico courts presume that joint custody is in the best interests of the child.

New Mexico courts implement a three tiered approach to determine the best interests of the child in relation to physical custody (i.e. time-sharing).

The first tier involves referring the parties to mediation, in the hopes of facilitating an amicable agreement. When mediation fails, the court generally refers the parents to Court Clinic for a “Scheduled On-call Consultation.” During this “On-Call” process, a Court Clinician will interview all of the parties, review the relevant information, and then present the assigned judge with a recommendation for time-sharing. In jurisdictions outside of Albuquerque, this process is often referred to as either an “Advisory Consultation,” or “Priority Consultation.” Although the names differ from one jurisdiction to the next, the overall process is relatively similar.

Parents that disagree with Court Clinic’s recommendations must file an objection within 11 days from the date the recommendations were entered. A hearing is then set to address the objections. The assigned judge may adopt the Court Clinic’s recommendations as an enforceable order, or may adopt the recommendations subject to a few changes. In complex cases that involve physical or mental abuse, the assigned judge may appoint a private child custody expert (aka “11-706 expert”) to conduct an intensive – *and very expensive* – evaluation. The evaluation is presented to the court in the form of an 11-706 report. This report summarizes

the expert's clinical recommendations, and proposes a time-sharing schedule that is based on the completed evaluation.

In cases where the child is under 14 – or with more complex cases involving abuse, neglect, or mental health issues – the court may appoint a Guardian ad Litem (“GAL”). GAL's are attorneys appointed by the court to speak on the child's behalf. The GAL may conduct a background investigation of the child, working alone or in tandem with the 11-706 expert to provide recommendations to the court.

The GAL process is more extensive than the Court Clinic process. Correspondingly, the GAL process is also *vastly* more expensive than Court Clinic. GAL's are generally involved with cases that are more complex and require a more intensive investigation process. This process often includes home visits and a more thorough investigation into family members, counselors, and other collateral sources.

In situations where the child is at least 14-years-old, the child's desires will heavily influence the judge's decision unless there is strong evidence to suggest that the child's desires are contrary to his/her best interests.

As illustrated above, the court is presented with several options to determine the appropriate custody and time-sharing arrangement when parents are unable to reach an amicable agreement. Although these options vary in their intensity, scope, and expense, the judge's ultimate goal is to determine “the best interests of the child.” Within each level the following factors are evaluated to reach a determination on the child's best interests:

1. The wishes of the child's parent or parents;
2. The wishes of the child;
3. The interaction and interrelationship of the child with his/her parents, siblings, and any other person who may significantly affect the child's best interest;
4. The child's adjustment to her home, school, and community; and
5. The mental and physical health of all individuals involved.

CHAPTER 3:

WHAT TIME-SHARING WILL I RECEIVE?

Custody and time-sharing are the two towers of parentage that cast a shadow on virtually every other issue in family court.

When a child is born outside of marriage, there are two paths that a case generally will follow.

The first path involves fathers that have already developed a relationship with the child. In this scenario, at times, the parents agree on an amicable time-sharing arrangement without the court's influence.

The time-sharing that the parties follow after the separation is crucial for bonding, and also for establishing a "*status quo*." This status quo heavily influences the court's decision regarding time-sharing, in the event that the amicable relationship falls apart with the case eventually splashing into court.

The second path for children born outside of marriage involves situations where the father has not established a relationship with the child, and consequently the child has not bonded with the absent parent. The lack of relationship and bonding can be caused by a number of different reasons, such as:

1. Newborn child,
2. Newly discovered parentage, or
3. Prison, military, or some other factor preventing the father from establishing a relationship.

When the parent and child have not developed a relationship, and both parents are unable to reach an amicable agreement regarding custody and time-sharing, the court is tasked with determining the appropriate system of time-sharing. Particularly in Albuquerque, the court's initial time-sharing decision is heavily

influenced by the ***Suggested Time-sharing Guidelines*** that were developed by child psychologists.

As the Guidelines demonstrate, New Mexico courts generally prefer the initial time-sharing to begin with one primary home. In the court's view, having a primary home and custodial parent enables the child to develop essential bonding and appropriate attachment to the custodial parent. At the beginning stages, the Guidelines suggest short, predictable, and frequent visitation with the non-custodial parent to ensure appropriate bonding. As the child ages, the guidelines provide increased time-sharing with the non-custodial parent, eventually moving into a 50-50 relationship.

For practical purposes, and for real world illustration, let me outline the sliding scale of time-sharing schedules New Mexico courts generally use with time-sharing disputes. These time-sharing schedules are in line with the suggested guidelines, and demonstrate how time-sharing expands with a child's age and developmental progress.

SUPERVISED VISITATION:

1-2 hours for 1-2 times per week. Supervised visitations either take place at a third-party agency – generally either APN or Neutral Corner – or at the home of an immediate family member, or responsible party.

Supervised visitation is generally ordered in cases with infants that have not developed a relationship with one parent. This form of visitation may also be considered with other bonding issues, such as long periods of absence, emotional abuse, or mental health issues. Lastly, supervised visitation can also be ordered in cases with substance abuse issues, domestic abuse, or other issues threatening the child's safety/welfare – such as when an Order of Protection (i.e. Restraining Order)

Custody and time-sharing are the two towers of parentage that cast a shadow on virtually every other issue in family court. When a child is born outside of marriage, there are two paths that a case generally will follow.

has been entered, or Children, Youth, and Families Department (“CYFD”) has substantiated claims of abuse or neglect.

2-4 hour visits, up to four times per week:

This increased time-sharing schedule affords predictable and frequent time-sharing. With this system the court prefers one primary home for bonding and attachment to the custodial parent. This time-sharing facilitates the child’s developmental progress with primary and secondary bonding.

One Full day visit:

6-8 hours per visit.

This time-sharing schedule provides the non-custodial parent with a full day of time-sharing. This system allows the secondary parent and child to enjoy malls, parks, and other events during the day.



Supervised visitation is generally ordered in cases with infants that have not developed a relationship with one parent.

Initial overnight. Every other Friday/Saturday after school to Saturday/Sunday afternoon:

Time-sharing progresses into overnights, every-other weekend.

Every Week 1-2 days.

Consecutive overnights each week.

5-2 Split:

Every-other weekend, such as Friday after school/p.m. to Monday drop off at school/a.m.

Dinner visit on the off week (i.e. Wednesday from 5-8 p.m.).

2-2-3 Split:

Friday p.m. to Monday a.m.;

Monday after school/p.m. to Wednesday drop off at school/a.m.;

Wednesday afternoon to Friday a.m. drop off.

4-3 Split:

Monday to Friday.

Friday to Monday.

This system of time-sharing is generally disfavored because the schedule has the potential for different exchange days each week. As such, this system creates inconsistency with the child's schedule.

50-50 Time-sharing:

The parents share equal time-sharing. This 50-50 time-sharing can be divided during the week, or could involve the parent's alternating weeks.

WHAT TIME-SHARING WILL YOU RECEIVE?

Parents should expect to receive one of the time-sharing schedules listed above, in situations where parents are unable to agree on the appropriate time-sharing, ultimately New Mexico judges will make the decision.

From the judge's perspective, a crucial factor in determining the appropriate time-sharing schedule is the "status quo" time-sharing that has occurred since the date of separation. For married or non-married parents, the time-sharing that takes place from the date of separation becomes the status quo. This status quo, in turn, influences the court's decision regarding the appropriate time-sharing *after* the divorce, or separation.

New Mexico courts that are tasked with determining initial time-sharing generally prefer slow and steady increases. Notwithstanding this fact, the court is reluctant to disrupt a child's routine (i.e. status quo time-sharing) based on the plethora of negative developmental repercussions that such a change can trigger.

Possibly the person reading these words is now standing at a crossroads with time-sharing. Potentially you just discovered that you are going to be a parent and want to be as heavily involved with your child as possible. Alternatively, it is possible that you have a child and are now separating from the child's co-parent. Another alternative is that you are married with children and are contemplating a divorce or separation.

No matter what road you are traveling, a key takeaway is that when a New Mexico court is asked to develop an initial time-sharing plan, the court generally



begins with short, frequent, and predictable time-sharing. Albuquerque courts in particular tend to follow the guidelines previously mentioned. This time-sharing is *gradually* expanded, allowing time for the non-custodial parent and child to develop an indelible bond. New Mexico courts generally believe that this gradual expansion of time-sharing prevents potential attachment disorders, and other developmental issues.

Based on the court's preference for slow progress, it is imperative for parents that desire maximum time-sharing to become *immediately* involved with the child's development. If you are still living with the other parent, but anticipate a separation/divorce, immediately get involved with the following activities:

- General care of the child;
- Potty training;
- Teaching numbers, letters, and colors;
- Taking time off work to attend appointments;
- Taking the child to appointments and necessities;
- Attending school functions;
- Helping child with homework;
- Involvement with sports, music, dance, and other extracurricular; and
- Involvement with family friends, and activities.

As you have read, it is essential for parents to seek maximum time and involvement from the date of birth, or separation. This involvement creates a status quo and bonding that can bypass the beginning stages of slow and incremental time-sharing that New Mexico courts tend to prefer.

No matter what road you are traveling, a key takeaway is that when a New Mexico court is asked to develop an initial time-sharing plan, the court generally begins with short, frequent, and predictable time-sharing.

CHAPTER 4:


HOW MUCH CHILD SUPPORT WILL I PAY OR RECEIVE?

Child support is calculated through guidelines that were created by the New Mexico legislature. The child support guidelines were created to provide uniform, consistent and predictable results that are based on a number of factors. The amount of child support that a parent is required to pay is calculated based on the following:

1. **Each parent's time with the child (time-sharing);**
2. **Each parent's gross monthly income;** and
3. **Other monthly expenses:**
 - Includes insurance premiums paid for the child; and
 - Work-related child care expenses.
 - New Mexico courts can also include extraordinary medical, dental, or counseling expenses that are not covered by insurance. The court also considers any travel expenses that a parent incurs for visitation.

1. TIME-SHARING:

Time-sharing is one of the biggest factors that determines the total amount of support that a parent must pay. If a parent has the child for less than 35% of the time (i.e. less than 128 days in a calendar year) then the court will use a Worksheet A to calculate child support. Alternatively, the court uses a Worksheet B when a parent has the child for 35% of the time or more (i.e. 128 days or more in a calendar year).



The child support guidelines were created to provide uniform, consistent and predictable results that are based on a number of factors.

The amount of child support that one is required to pay is lower with a Worksheet B, because the court assumes that both parents are providing a suitable home for the child, and are sharing the expenses of raising the child.

2. GROSS MONTHLY INCOME:

The second major factor that affects child support – gross income – is more complex and multifaceted than time-sharing (i.e. whether a parent has 35% of time-sharing or not). For this reason, it is important to present an in-depth review of the many factors that can affect gross income, and ultimately one’s overall child support payment.

New Mexico law defines gross income as income from any source, and essentially means a parent’s fixed monthly income, or income that a parent receives on a fixed basis. This includes a parent’s salaries, wages, tips, commissions, bonuses, dividends, fixed profit on rental properties, severance pay, pensions, interest, annuities, social security benefits, worker’s compensation, unemployment/disability benefits, and significant in-kind benefits (such as basic housing allowances) that reduce personal living expenses.

Your gross income is deducted by any alimony payments involving the child, or support payments for *prior* born children that are court ordered. Additionally, gross income does not include means tested income such as food stamps, TANF, or

any other government assistance programs that are “means tested.” Lastly, gross income does not include any gifts that one receives.

Calculating gross income is generally straight forward when a parent’s income is composed by a fixed, monthly wage. On the other hand, determining gross income and one’s requisite child support obligation becomes a bit more complex in the following situations:

Your gross income is deducted by any alimony payments involving the child, or support payments for prior born children that are court ordered.

A. Unemployment:

New Mexico courts presume that a parent will earn income based on full-time employment. Based on this presumption, New Mexico courts will impute (calculate) an unemployed parent’s gross income at minimum wage – \$1,551 – for children that are six years or older. Conversely, the court refrains from imputing a parent at minimum wage **only** when the unemployed parent is the *primary custodial parent* actively caring for a child that is *under* the age of six.

B. Underemployment:

The New Mexico child support statutes offer little guidance for courts to determine when a parent is purposefully reducing one’s income with the aim of reducing the corresponding child support obligation. Judges have wide discretion to decide if a parent is not generating income at their full potential.

Courts can determine and then impute potential income to an underemployed parent in order to discourage parents from dodging the obligation to support one’s child and to goad the parent into full employment by attaching an unpleasant consequence (i.e. a mounting child support payment that is based on a higher income than one is actually earning).

When determining whether to impute income for underemployment, judges consider the credibility of the allegedly underemployed parent and decide whether that parent has acted in “good faith” in their career choice.

“Good faith” typically means that the parent is acting for a purpose other than to reduce or avoid one’s child support obligation.

In cases where the court finds that a parent is not acting primarily to reduce one’s child support obligation, the court then examines the reasonableness of the career choice. Similar to most family law issues, the judge has immense power to decide if the parent’s career choices are being guided with an eye focused on reducing one’s child support obligation.

C. Disability:

Individuals that are drawing disability benefits are required to pay child support, and the gross income is determined by the total amount that one receives in disability.

There are two different types of Social Security Disability benefits that an individual can receive: **Social Security Disability Insurance (SSDI)**, or **Supplemental Insurance Income (SSI)**. SSDI is only received by individuals who have worked enough years to qualify. Conversely, one is not required to have worked a certain amount of time to qualify for SSI.

A key distinction between the two types of disability benefits is the fact that children whose parents are eligible for SSDI benefits may be eligible to receive benefits for the children. In other words, dependent children of



family members that are receiving SSDI can receive money on behalf of the parent drawing SSDI benefits. In situations where the custodial parent receives Social Security payments for the child, on behalf of the non-custodial parent, the non-custodial parent may receive a credit against his/her support obligation up to the total support obligation.

For example, if the non-custodial parent owes \$300 a month in child support and the child receives \$250 a month through SSDI, on behalf of the non-custodial parent, then the non-custodial parent's support obligation would be reduced by the \$250. In this situation, the non-custodial parent would be required to pay the deficiency of \$50. In the event that the child receives more money each month through SSDI than the court ordered support obligation, the paying parent is not entitled to a reduction/offset over and above the court ordered support payment that can be used as a credit against support payments that were delinquent when the social security payments began. *See Mask v. Mask*, 95 N.M. 229, 620 P.2d 883.

On the other hand, dependents of SSI recipients are not entitled to receive auxiliary/derivative benefits on behalf of their children. Nevertheless, the total amount received in SSI benefits will be used as the individual's gross income for the purpose of calculating the requisite child support obligation, even if the total amount is lower than minimum wage.

D. On-line Child Support Calculator:

The New Mexico courts website provides a **free online program that enables parents to calculate child support**. Play with all of the figures yourself. Accessing the program will enable you to understand how the factors that were discussed above work together to impact one's monthly child support obligation.

Access the child support worksheet:

[CLICK HERE!](#)

CHAPTER 5:

COMMON CHILD SUPPORT QUESTIONS

Do I get credit for the child support payments that I am making for other children?

Yes and no. A parent can only deduct child support payments from their gross monthly income if child support is being paid for a child that was born *before* the child at issue. New Mexico courts only permit deductions for *prior* born children.

Are gifts considered gross income when calculating child support?

No. Gross income does not include gifts under NMSA § 40-4-11.1(C)(2).

Can I modify the child support that is ordered?

Yes. Child support in New Mexico can be modified based on a material change in circumstances. A material change in circumstance is present if a change in the factors discussed above causes either an increase or decrease of 20% or more to your monthly support obligation. If your monthly support obligation does not increase or decrease by 20%, then your child support will remain the same. In other words, a monthly child support obligation of \$300 would need to increase or decrease by *a minimum* of \$60 to demonstrate the requisite material change in circumstances.

Is my monthly support obligation automatically modified once a change of income increases or decreases the monthly support by 20% or more?

No. Child support will *only* be modified back to the date that the necessary *Motion to Modify Child Support* is filed. In other words, child support will not be modified until a motion is filed and the court orders the modification to take place, based on the requisite 20% change.

What income is used for a parent that is unemployed?

New Mexico courts can impute a parent's gross income at a minimum wage – or \$1,551 per month – when that parent is unemployed and the child is at least six years old.

When does child support end?

Child support ends when the child is legally emancipated, either by court order or when the child reaches the age of 18; in situations where the child is 18, but still in high school, child support will continue until the child turns 19, or when the child graduates from high school (whichever occurs first). Child support also ends if the child joins the military, dies, or gets married. Child support can continue indefinitely in situations where the child has a disability that makes it impossible for the child to become self-sufficient. *See NMSA § 40-4-7; See also Cohn v. Cohn*, 123 N.M. 85.

My ex refuses to let me see my children. Can I stop paying child support?

No.

Is child support tax deductible?

No.



Questions
Answers

Can the court automatically withhold child support from a parent's pay check?

Yes. The court can order Child Support Enforcement Division (CSED) to enter a wage withholding order that automatically deducts child support from a parent's paycheck.

Can parents agree to a lower child support payment than what is required under the New Mexico Child Support Guidelines?

Yes. The court can deviate from the child support guidelines if there is a written finding in the decree, judgement, or order of child support that applying the guidelines would be unjust or inappropriate. Moreover, circumstances creating a substantial hardship for a parent may justify the court to adjust the child support. Nevertheless, every decree or child support order that deviates from the guideline amount must contain a statement of the reasons for the deviation (i.e. substantial hardship), and both parents must agree to the modified amount. See NMSA § 40-4-11.2. Additionally, a completed child support worksheet must be attached to the order establishing or modifying child support. See NMSA § 40-4-11.6.

Child support can continue indefinitely in situations where the child has a disability that makes it impossible for the child to become self-sufficient.

Which parent is allowed to claim a child as a dependent for tax exemption purposes?

According to IRS Publication 501, the parent that has a child for 51% of the time, or more, may claim the child as a dependent.

CHAPTER 6:

DOES NEW MEXICO HAVE JURISDICTION OVER MY CUSTODY CASE?

Jurisdiction is a legal word that essentially means *power*. No jurisdiction – *no power*. New Mexico courts must have jurisdiction before possessing the necessary power to determine issues such as custody, time-sharing, and child support.

Generally speaking, a custody matter begins in New Mexico when a parent files a *Petition to Establish Paternity, Custody and Time-sharing*, through the Domestic Matters Court (DM Court). Before this *petition* can be filed, one must first determine whether a New Mexico court has jurisdiction over the parties and the child.

Jurisdiction is clear when both parents live in New Mexico and the child was born in New Mexico. Jurisdictional issues become more complicated when a child's parents live in separate states, or when a child is born in one state and then subsequently moves to a different state.

In situations where a child is born in one state and then moves to another state, the "*Home state of the child*" is given priority in determining which state may exercise jurisdiction over the underlying child custody dispute. The home state of the child is the state where the child has lived with the parents, a parent, or a person acting as a parent, for at least six consecutive months *before* the custody case is opened. In the case of a newborn, or a child less than six months old, the home state is the state where the child has lived since birth.

Temporary absences are counted as part of the six month period.

As an example, New Mexico is the home state of the child when the child has lived in New Mexico with a parent, or a person acting as a parent, for at least six consecutive months *before* the child custody proceeding is first opened. For a child less than six months old, New Mexico is considered the home state if the

child has lived in New Mexico since birth, with a parent or person acting as the parent.

In either scenario, the initial custody case could be opened in New Mexico with the requisite *Petition to Establish Paternity, Custody, Time-sharing and Child Support*.

The issue of jurisdiction becomes cloudy when a custody case is initially opened in New Mexico, with a resulting custody order surrounding issues such as custody, time-sharing, and child support. After this custody order is entered by a New Mexico court, the child and one of the parents subsequently relocates to another state (i.e. second state). In this situation, New Mexico retains continuing, exclusive jurisdiction over the custody dispute, provided that either party to the initial custody case remains in New Mexico. See 28 U.S.C.A. § 1738A(d).

Let's assume that a custody case is initially opened in New Mexico, with New Mexico entering a custody order. Sometime in the future the child and one parent moves to another state (second state), and then lives in the second state for six consecutive months, giving the second state "home state jurisdiction." After the child has lived in second state for six consecutive months, the parent either desires to modify New Mexico's existing custody order, or desires for the second state to adopt New Mexico's order as an order of its court, granting the second state enforcement power over New Mexico's original order.

In this scenario the second state could assert jurisdiction and modification power over the custody dispute provided that one of the following scenarios is present: (1) New Mexico no longer has continuing jurisdiction over the custody matter because *neither* party to the initial dispute still resides in New Mexico; or (2) New Mexico declines/relinquishes jurisdiction because it believes that the second state is a more appropriate forum.

As stated above, New Mexico has the power to decline/relinquish jurisdiction if it determines that another state is a more appropriate forum to hear the child

New Mexico has the power to decline/ relinquish jurisdiction if it determines that another state is a more appropriate forum to hear the child dispute.



Jurisdiction is a legal word that essentially means power. No jurisdiction – no power.

dispute. New Mexico courts consider and balance the following factors, when deciding whether to assert or relinquish jurisdiction:

1. Has domestic violence taken place? Moreover, if abuse is likely to continue in the future, which state can provide the best protection for the parties and the child;
2. How long has the other state been the child's home state;
3. The distance between the court in New Mexico and the state that would assume jurisdiction;
4. The financial means of both parties involving travel;
5. Prior agreements regarding the state that would assume jurisdiction;
6. The location and nature of the evidence required to decide the custody matter, such as the child's testimony;

7. Each court's ability to quickly and efficiently decide the custody issue; and
8. Which state has a closer connection with the child, or with the child and one or more of the parties?
 - This factor also considers which state is more familiar with the facts and issues at play within the custody dispute.

If New Mexico ultimately decides that the second state is a more appropriate forum, it will then "stay" (i.e. pause) its proceedings until proceedings are started in the second state.

As you can see, there are a number of different situations where two states must interact and then ultimately decide which state will assert jurisdiction over the child at issue.

We have also seen that there are a number of different factors that determine which state has jurisdiction over a custody dispute.

As a practical matter, the issue of which court will assert jurisdiction over a custody dispute is brought before both courts when either parent files a motion requesting a "Uniform Child Custody Jurisdiction and Enforcement Act teleconference," (UCCJEA teleconference) or when the court sets the teleconference *sua sponte* ("on its own motion"). A hearing is then held allowing judges from both courthouses to communicate through a UCCJEA teleconference. During this UCCJEA teleconference, the judges from both states discuss the factors listed above and reach a decision on which court has jurisdiction over the custody dispute at hand.

There are a number of different situations where two states must interact and then ultimately decide which state will assert jurisdiction over the child at issue.

Once a decision is made, the parties can then move forward with the underlying custody dispute in the state that has asserted jurisdiction over the matter.

CHAPTER 7:

HOW DO I STOP MY EX FROM REMOVING MY CHILD FROM NEW MEXICO WITHOUT MY PERMISSION?

For many parents that are reading these words, a fear has recently crept into your mind that your ex is planning to remove your child from New Mexico without your permission.

The following scenario possibly describes your situation: You and your ex had a child outside of marriage. Cracks began to form in the relationship and you eventually parted ways. Despite the problems with your relationship, you were able to reach an agreement regarding the custody and time-sharing of your child without involving a New Mexico court.

Time passes with no problems. Because the agreement is working you decide to keep the court out of your life, thinking to yourself: "If it ain't broke don't fix it."

One day the harmonious relationship shatters. Possibly you discover that your ex is plotting to take your child to another state without your permission.

Alternatively, possibly the agreement falls apart when one parent decides that they no longer wish to honor the mutual agreement.

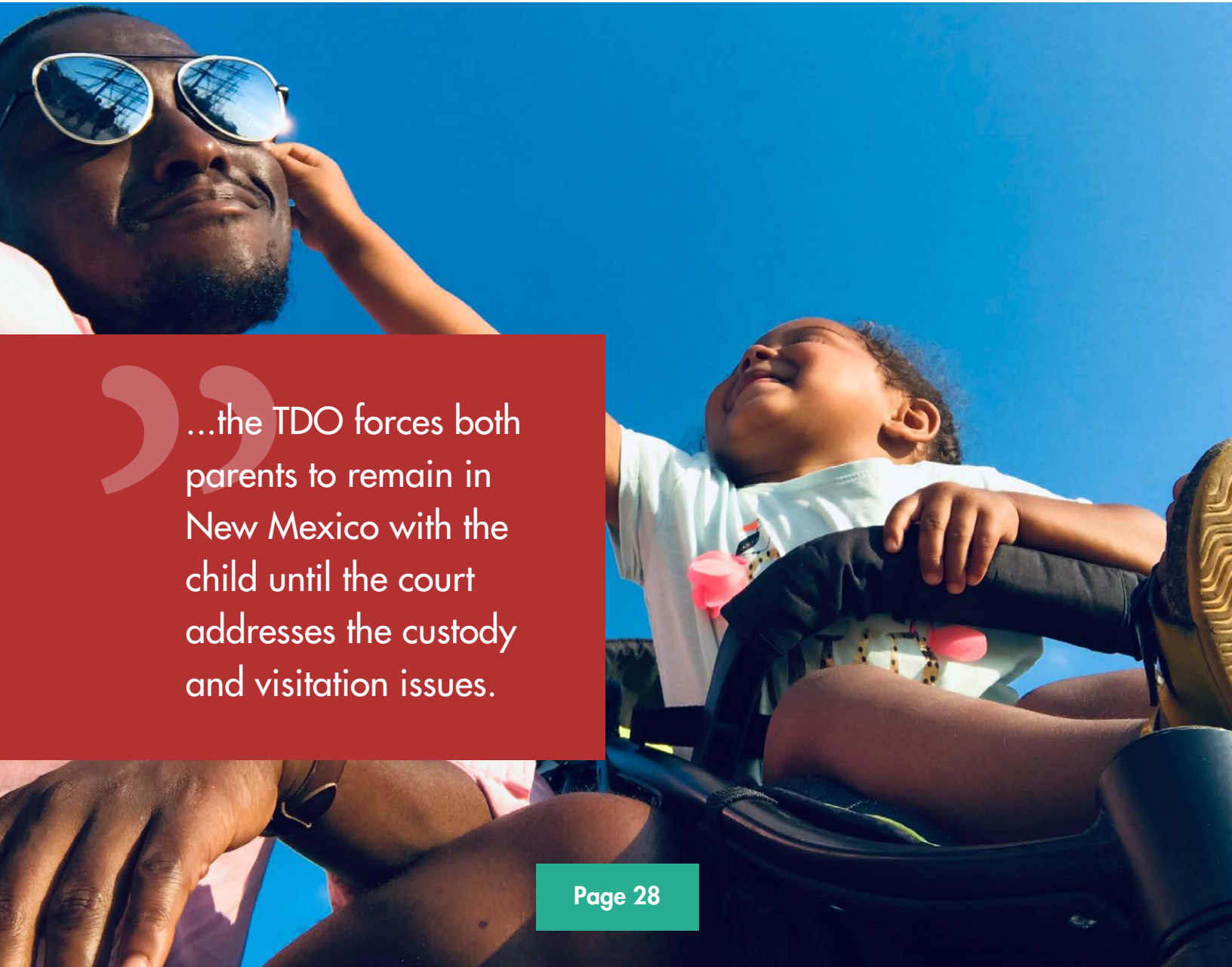
For any reason – or no reason at all – your ex denies visitation according to your previous schedule. The police are called. The reporting officer refuses to become involved with the custody dispute, telling you: "I cannot get involved with your *Domestic Matter* because there is no court order regarding custody and

time-sharing.” In other words, the officer tells you that he/she cannot offer you any assistance because you lack an enforceable court order.

In both scenarios above, one is left with the resounding realization that a valid and enforceable court order has become both essential and necessary.

The first step towards achieving a valid and enforceable court order is determining if a New Mexico court has jurisdiction over the child and the custody matter. Read Chapter Six, for more information on whether New Mexico has jurisdiction over the custody case.

Let’s assume for the sake of clarity that the child was born in New Mexico, and has lived exclusively in New Mexico. In this situation, the first step that a parent must



...the TDO forces both parents to remain in New Mexico with the child until the court addresses the custody and visitation issues.

take to obtain a court ordered visitation schedule begins with filing a *Petition to Establish Paternity, Custody and Time-sharing*.

The party filing this *petition* can also request a Temporary Domestic Order (“TDO”) from the court, which essentially freezes the “status quo” – or what the parents were doing before the TDO was entered. A TDO is invaluable in situations where one parent is threatening to remove the child from New Mexico, because the TDO prevents *both* parents from removing the child from New Mexico without a valid court order or written consent of the other parent.

In other words, the TDO forces both parents to remain in New Mexico with the child until the court addresses the custody and visitation issues.

“WHAT HAPPENS IF I LET MY EX REMOVE OUR CHILD FROM NEW MEXICO BEFORE A CASE IS FILED?”

Let’s assume that one parent leaves New Mexico with the child, and then lives in another state (let’s say Texas) with the child for six consecutive months. In this scenario, Texas becomes the child’s “home state” after six months – enabling the parent to file the initial custody case in Texas.

In this example, the child’s home state, Texas, would have “Initial Child Custody Jurisdiction.” This essentially means that Texas would have the power to make any decisions regarding the child, in an *initial* custody case. Texas asserting jurisdiction creates a number of potential issues for the parent that remains in New Mexico:

- The parent in New Mexico will be forced to incur the time, expense, and stress of traveling to Texas to address any custody and visitation issues.
- The custody matter will now be controlled by laws that could be less favorable than those provided by New Mexico courts.
- The parent remaining in New Mexico will likely be relegated to an “Out of State/Vacation” times-sharing schedule.
- Jurisdiction battles can significantly increase litigation costs.

CHAPTER 8:

ORDER OF PROTECTIONS THAT INVOLVE CHILDREN

I have a love/hate relationship with the order of protection process. At times my heart is filled with love when thinking about how an order of protection provides security to individuals that have suffered domestic abuse and *legitimately* face an immediate threat of serious harm. At darker times, my stomach is filled with fear and loathing when thinking about the various ways that parents abuse the order of protection process.

Like most aspects of life, the order of protection process has a light side and a dark side. On the sunny side of the spectrum, order of protections are important tools that protect abused individuals from the threat of serious harm.

On the dark side of the force, I have repeatedly witnessed the order of protection process being manipulated. This abuse generally occurs as a calculated means to gain the upper-hand in divorces and custody disputes.

The process of obtaining an order of protection has several shortcomings. New Mexico courts tend to lean on the side of caution regarding claims of domestic abuse – especially when a child is involved. As such, the court often finds that the *Petition for Order of Protection* establishes the necessary “probable cause” for the assigned judge to reasonably believe that an act of domestic abuse has occurred. When the necessary probable cause is found, the court will issue an *ex parte* temporary order of protection (i.e. an order without a hearing).

A temporary order of protection (“TRO”) typically prevents the accused individual from contacting the alleged victim until a hearing is held to determine if an act of abuse occurred. By law, the initial hearing must be held ten days from the date that the TRO is granted. At the initial hearing, the Special Commissioner determines if an act of domestic abuse occurred that warrants the TRO to be extended – generally for six months to one year.

Unfortunately, due to the overwhelming number of cases that pour into New Mexico courts, it is common for the initial hearing to be extended past the 10 day time limit, with the court citing “good cause” for the extension.

“Good cause” often means that the court lacks the manpower to hear the matter within 10 days. Because of this fact, at times, a TRO can remain in place for several weeks before a hearing is held to determine if an act of abuse actually occurred.

In some instances, feuding parents take matters into their own hands and will file a baseless *Petition for Order of Protection*, in order to receive a TRO that grants the requesting parent sole custody over the child[ren] that are involved with the alleged abuse.

This TRO remains in place until a hearing is held to determine if an act of abuse occurred. In the meantime, the wrongly accused parent is often forbidden from having any contact with the child, and must stay 100 yards away from the child and the child’s school, until the matter is heard and decided by a Special Commissioner.

Because of this fact, many wrongfully accused parents are unable to communicate with their children – in any manner whatsoever – until the TRO is dismissed. Every



Like most aspects of life, the order of protection process has a light side and a dark side.

minute separated from your child can seem like an eternity, especially when the required hearing is extended past the ten day limit.

Most of the special commissioners are skilled at determining if an act of abuse occurred. Special commissioners generally look for several key elements to determine if the claims listed in the *Petition* have any merit. Nevertheless, the supply of special commissioners, not to mention the hours in a day to hear all of the claims of abuse, simply cannot meet the demand of *petitions* that are filed on a daily basis.

At the scheduled hearing, the special commissioner listens to both sides and determines if “by a preponderance of the evidence” domestic abuse has occurred. “Preponderance of the evidence” is a low burden of proof, and means “more likely than not.” In my experience, preponderance of the evidence generally means “based on all of the evidence, does the commissioner believe that an act of abuse occurred that places the requesting party in an immediate threat of harm.”

CYFD is routinely involved with cases that include allegations of abuse against children. When CYFD is involved, the scheduled hearings will generally be continued if CYFD is still investigating the alleged abuse and is not prepared to testify whether the investigator believes that an act of abuse occurred.

CYFD’s testimony is *extremely* important. It is highly likely that the special commissioner will extend the Order of Protection, for a period of six months, when CYFD testifies that an act of abuse occurred that places the child in an immediate threat of danger.

Under the Family Violence Protection Act, the special commissioner has six months of jurisdiction to determine custody and time-sharing issues. This means that if an Order of Protection is ultimately entered, the special commissioner has the jurisdiction/power to enter a custody and time-sharing order that is valid for up to six months.

Most of the special commissioners are skilled at determining if an act of abuse occurred.

If the *petition* is ultimately dismissed, the special commissioner loses jurisdiction and the parents will not have an enforceable custody and time-sharing order. In this situation, the parents must file a *Petition to Establish Paternity, Custody and*

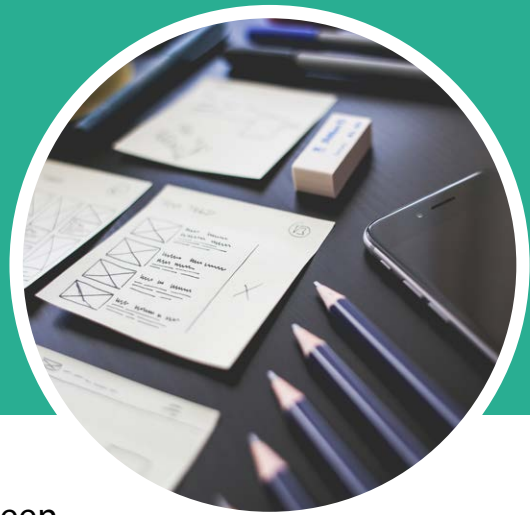


Time-sharing with the appropriate Domestic Matters Court (i.e. DM Court), to obtain an enforceable custody and time-sharing order.

At times, parents abuse the order of protection process for several reasons:

- The *Petition for Order of Protection* is filed in the Domestic Violence Division, under the Family Violence Protection Act (“FVPA”). Temporary orders are generally entered because judges tend to lean on the side of caution.
- Because the *petition* is filed under the FVPA, in the DV Division, a hearing is required to take place within 10 days. Conversely, a *Petition to Establish Paternity, Custody and Time-sharing*, is filed in the DM division and generally takes one to three months for the initial hearing to take place.
- Under the FVPA, both the filing fee and service of process fees are waived.
- Because of the 10 day requirement and waiver of fees, some parents will attempt to jam custody issues into the DV court through the *Petition for Order of Protection*.

CHAPTER 9: PARENTING PLANS



A “Parenting Plan” is essentially a contract between two parents that defines each parent’s responsibilities in the co-parenting relationship. Parenting Plans are enforceable court documents that outline each parent’s rights and responsibilities, providing structure to a potentially chaotic co-parenting arrangement.

Parenting plans generally come in two forms – *Temporary* and *Permanent*.

TEMPORARY PLANS:

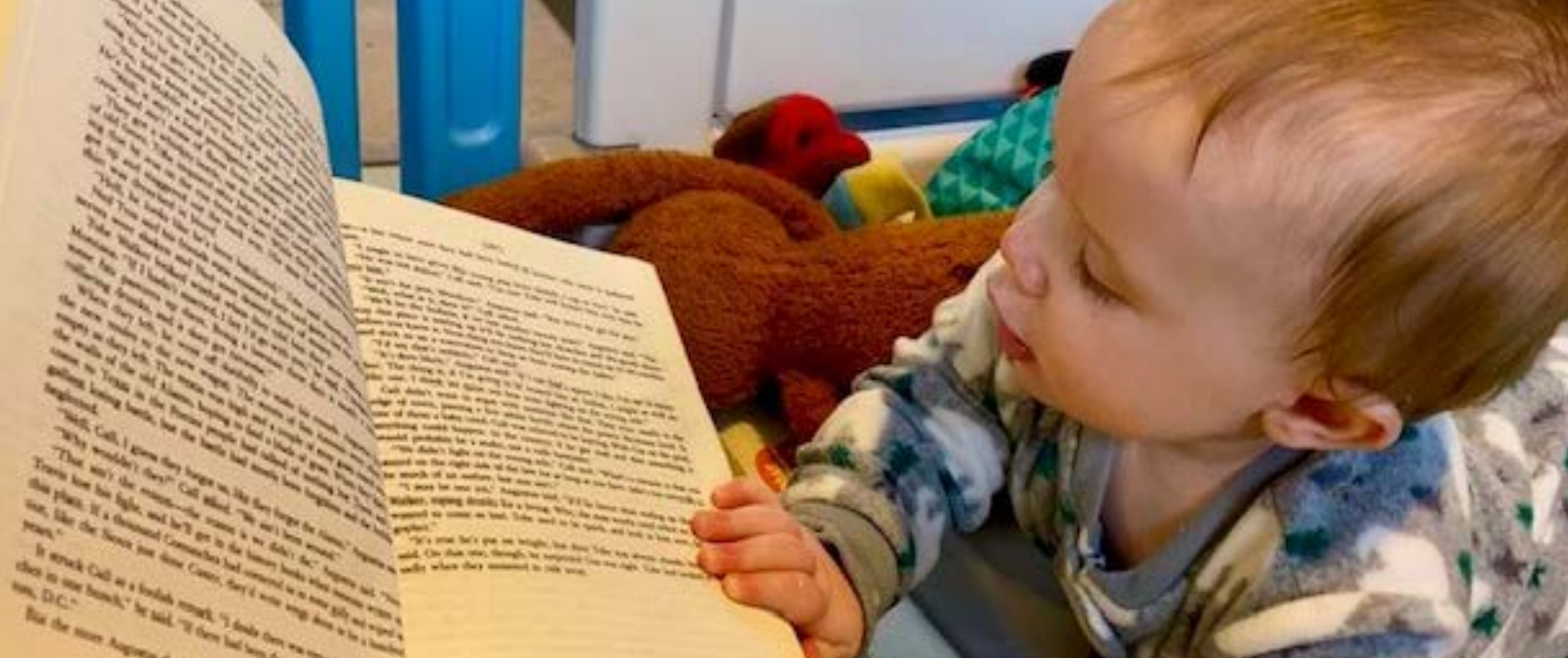
A Temporary Domestic Order (“TDO”) is generally issued when either parent files a *Petition to Establish Paternity, Custody, Time-sharing, and Child Support*. This TDO freezes the “status quo,” and prevents both parents from interfering with the other parent’s relationship with the child.

TDO’s generally state: “If you are living apart, you shall each continue to have frequent contact and communication with any minor child of both parties, personally and by telephone.”

TDO’s are “one-size-fits-all” orders that freeze the status quo in custody and divorce cases. TDO’s do not provide a specific time-sharing or communication schedule between the parties. As addressed repeatedly throughout this book, parents should immediately establish maximum time-sharing from the date of separation. The purpose of the TDO is to freeze this status quo.

Parents should *immediately* involve the court in the following situations:

1. One parent refuses to continue the status quo time-sharing after the TDO is entered;
2. One parent denies visitation and/or communication after the separation; or
3. The parents have not established a status quo and cannot agree on the appropriate time-sharing schedule.



Parents that fall under 1 – 3 above should immediately file a *Motion for Interim Time-sharing* (e.g. Motion for Temporary Order), requesting a temporary time-sharing order. Failing to file such a motion could result in one parent denying visitation, establishing a detrimental status quo, or essentially calling all of the shots regarding visitation and communication.

Once the motion above is filed, a hearing is generally set within one to three months. This hearing is usually a “Summary Hour Hearing,” which means that it will be a quick hearing where the judge will hear a summary of the issues and enter a temporary order. This hearing is not a full blown “Evidentiary Hearing” where witnesses and/or experts are called to testify regarding the child’s best interests. As such, the temporary order generally remains in place until a final resolution is entered through mediation, custody evaluation, settlement, or trial (i.e. Evidentiary Hearing).

Because the initial hearing is set as quickly as possible – and is generally a short hearing – the assigned judge is generally forced to enter a temporary order that is based on surface level information. In other words, based on the quick turnaround, judges are generally prevented from digging deep into the specific facts of each case through testimony, or recommendations from an assigned custody evaluator. Because of this fact, and as repeatedly stated throughout this book, judges are *heavily* influenced by the status quo at the initial hearing. The status quo, or lack thereof, influences the judge’s temporary time-sharing order. Over time, this temporary order develops momentum and can influence the permanent time-sharing order.

“PERMANENT” PARENTING PLANS:

The word “permanent” in family law is an illusory term. Custody, time-sharing, and child support orders are always subject to modification based on a “substantial and material change of circumstances.” The term “permanent” in family law essentially means that the issue has been resolved following either resolution or litigation, and a final order has been entered.

With that said, “permanent” parenting plans are entered in the following scenarios:

1. Mutual agreement of the parties;
2. After an evidentiary hearing where the assigned judge hears testimony and renders a decision on the appropriate system of time-sharing;
3. After a Report Back Hearing following the completion of the following:
 - Court Clinic On-Call (generally in Albuquerque through Court Clinic);
 - Priority Consultation or Advisory Consultation (generally completed in jurisdictions other than Albuquerque through S.R. Solutions); or
 - Guardian Ad Litem or 11-706 completes an investigation and enters recommendations.

At the “Report Back Hearing” the appointed clinician, consultant, expert, or GAL makes recommendations regarding the appropriate time-sharing. The assigned judge listens to the recommendations, hears objections and counter-arguments, and then makes a final decision regarding the child’s best interests.

WHAT SHOULD A PARENTING PLAN INCLUDE?

Under New Mexico law, parenting plans are only required to outline time-sharing between parents. Nevertheless, in order to prevent unnecessary arguments, confusion, and interaction between co-parents, an *ideal* parenting plan should include:

- Specific times (be as precise as possible) for all regular *and* holiday time-sharing;
- The exchange location for all exchanges;
- Transportation issues and/or requirements;



- Methods of communicating information about the child (i.e. emergency situations);
- Detailed description of how disputes will be resolved (i.e. mediation, written offers, etc.);
- Status quo providers and activities: religion, education, child care, recreational activities and medical care providers (medical, dental, and therapeutic);
- Steps for changing the child's status quo providers and activities; and
- Specific information or requirements that are essential to creating a co-parenting arrangement that reduces arguments, interaction, and potentially litigation.

Well defined parenting plans create clear boundaries and obligations between co-parents. Well defined parenting plans create an enforceable roadmap that guides co-parents towards a structured and clearly defined co-parenting relationship.

CHAPTER 10: Q&A WITH PROFESSOR RYAN J. KELLY, PHD



Up to this point we have examined child custody from an attorney's perspective. As we have seen, New Mexico judges have immense power to determine a child's best interests regarding custody and time-sharing. A judge's ultimate decision should always be guided by child psychology and developmental concerns that impact each child's best interests.

In this chapter, Professor Ryan J. Kelly addresses a handful of child development issues, as well as the Suggested Guidelines that have been repeatedly discussed throughout this book. By viewing custody from a Professor's perspective, you will gain a deeper understanding of the current research and data regarding optimal child development strategies.

Tell us a little about yourself, Professor Kelly:

I have a BA in psychology and an MA in Developmental Psychology. I also earned a PhD in Human Development and Family Studies from Auburn University. I am a tenured Associate Professor of Family and Child Studies at the University of New Mexico. I also serve as the graduate coordinator of Family and Child Studies. I have published many manuscripts on topics related to family functioning and children's development and I serve on the editorial board for *Child Development* and the *Journal of Youth and Adolescence*.

Tell us about your *personal* experience with child development:

I have been married for nearly five years and my wife and I have a 2 year old son (Jack). Having a child has shed light on the hard work that goes into being a parent

and I have a newfound respect for all parents. Parenting can be challenging, stressful and overwhelming at times and I respect anyone who takes on this role.

I have tried to integrate research findings into my own parenting. Although I'm not always successful, I try to be warm, gentle, nurturing and kind to my child. In addition, I know that father involvement is so important for kids, and although I have a fulltime career, a main priority is to be with my child for multiple hours every day.

What is your primary focus with child development?

My work focuses on the impact that family risk and stress has on children's health and development. Types of family risk that I have focused on include marital aggression (e.g., parents arguing/fighting), parental alcoholism, and parents' use of harsh parenting tactics (includes yelling and hitting children).

What areas of child development are you currently researching?

My most recent work has investigated the impact of harsh parenting tactics on children's health and development in New Mexico. We have specifically investigated children's sleep. We are finding that when parents are harsh toward their kids, the kids often maintain heightened levels of arousal and struggle to relax as much as they otherwise could. This in turn leads to frequent night wakings and difficulty falling asleep. This is important to know, because many parents maintain the belief that using verbal and physical aggression tactics towards kids (e.g., spanking) helps children to become better people. Our findings do not support that idea.

Do children experience any developmental issues when raised exclusively by one parent?

Some children do. As many single parents can attest, raising a child without the help of a spouse can be stressful. Single parents often times feel very stressed and this can impact children. Stressed parents often spend less time playing and interacting with their children. They may also read to them less and this confers risk.

In addition, single parents often have fewer economic resources and this unfortunately can be very stressful for children. For example, families who struggle to make ends meet often times do not have an adequate food supply, may have limited resources to obtain adequate health care, are more prone to sickness and

are less hopeful about the future. These types of circumstances can compromise children's development in key domains including academic achievement, psychological health (e.g., symptoms of anxiety and depression), physical health and sleep.

What are some of the benefits that children experience when raised by both parents, in split homes?

It is well known that divorce can forecast developmental difficulties for children. However, something that helps reduce risk for poor outcomes is if both parents continue to engage in parenting duties. Following divorce, it is unfortunately quite common for

fathers to live separately from their children. We know from decades of research that the increased presence of non-residential fathers in the child's life results in many benefits.

Assuming that the quality of the parent-child relationship is high, children experience many benefits from continuing to be raised by both parents. They are less likely to exhibit increased aggression, maintain lower levels of stress and heightened self-esteem. They also tend to perform better in school.

Do children experience developmental issues when raised by both parents, but in split homes?

They certainly can. Following divorce, parents commonly fight and children's exposure to destructive conflict tactics (e.g., yelling, shaming, physical assault) can be very toxic for their development (particularly symptoms of anxiety and depression). Further, it is important for parents to maintain commitment to the parenting role and to learn how to be effective as a single parent. It is common among non-residential parents to "parent" less (e.g., reduced discipline) and this can impact children.

How does separation and parental conflict affect children?

Marital conflict strikes at the core of children's abilities to feel safe and secure in the home. Children do not become desensitized or "used" to violence. Rather,

Many parents maintain the belief that using verbal and physical aggression tactics towards kids (e.g., spanking) helps children to become better people. Our findings do not support that idea.



hypersensitization occurs and children are placed at great risk for maladaptation including symptoms of anxiety and depression. In addition, children whose parents perpetrate aggression commonly use similar aggression tactics toward their peers (e.g., intimidating or hitting other children). Further, the human brain may undergo a recalibration to program itself to be more sensitive to threat cues. In a recent investigation, children were asked to view images of angry faces while undergoing a brain scan. Children from homes marked by marital aggression experienced greater activation in portions of the brain responsible for detecting threat and inducing arousal. Although such arousal may be adaptive for surviving in a violent home, it may compromise other facets of children's lives. For example, during social interactions these children often misperceive low-risk situations as overly-threatening and commonly respond in hostile and inappropriate ways.

What are some of the ways that parents can help children cope with separation/divorce?

Reducing parental marital aggression is key. In addition, maintaining a high quality parent-child relationship is important. For example, parents can help children by spending time with them, reading to them, exploring the community and interacting in warm and positive ways. Research has shown that simply having dinner with a child each night can help them cope with stress. Reducing harsh parenting tactics can also help children cope with divorce/separation. Overall,

children thrive when they feel safe and secure in the home and steps taken to help them achieve this is critical.

Other ways that parents can help children cope include ensuring that the non-residential parent stays committed to the parenting role and has the opportunity to spend time with the child (assuming that the quality of the parent-child relationship is adequate).

Further, it is not uncommon for elementary-aged children to blame themselves for the divorce. Ensuring a child that the divorce is not their fault can be very helpful in terms of helping them cope.

Overall, reducing marital conflict, ensuring that both parents stay involved, positive parenting tactics and time spent with children can greatly reduce the impact of divorce on children's development.

Based on your education and experience, what do you find to be some of the positive and negative aspects of the Suggested Guidelines that are repeatedly discussed throughout this eBook?

Two of my colleagues (in Family and Child Studies) and I had an opportunity to review the ***Suggested Guidelines***.

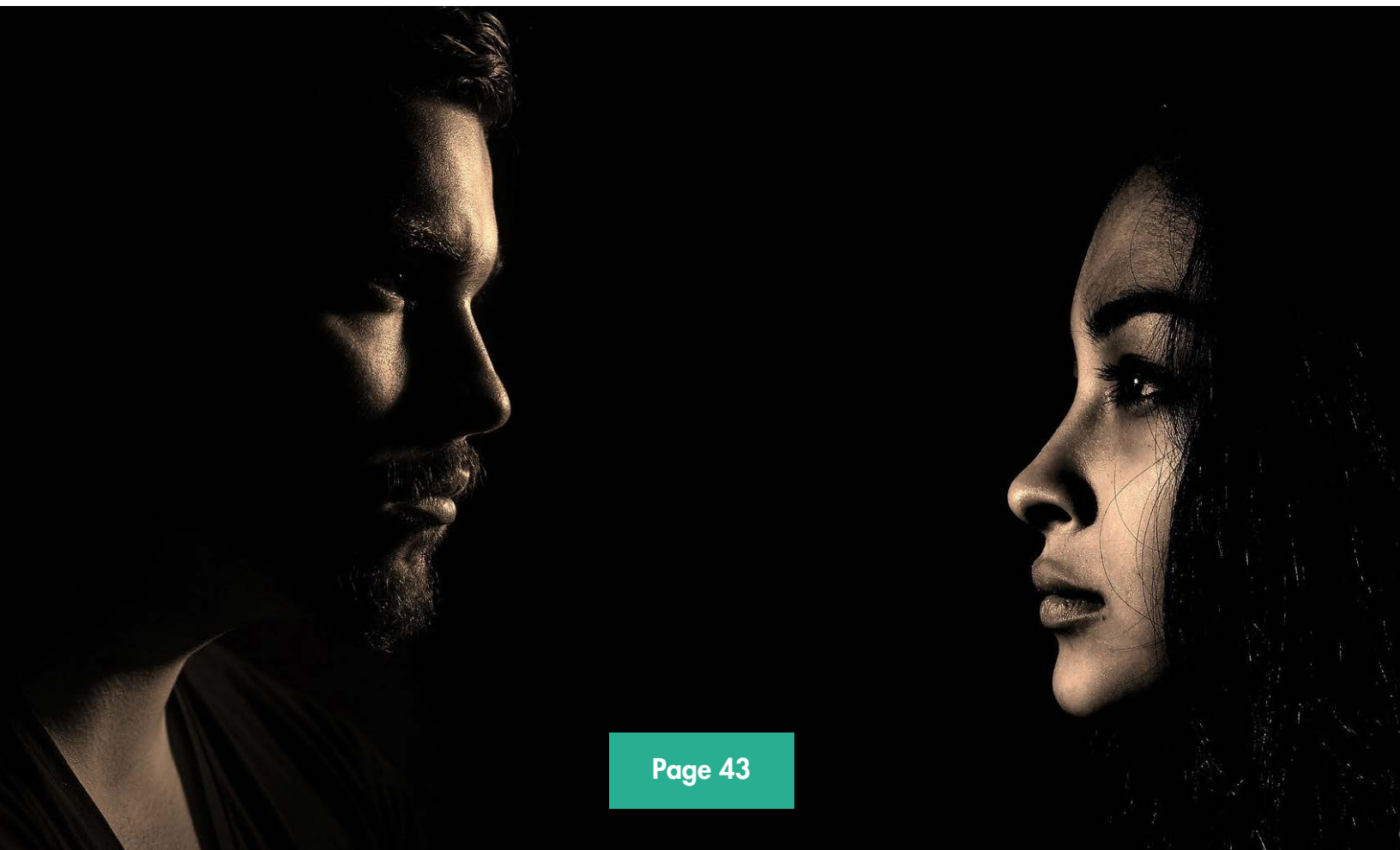
On a positive note, the Suggested Guidelines attempt to keep both parents engaged in the parenting role. As noted above, many empirical studies have demonstrated that keeping both parents present and engaged benefits children's development in positive ways.

If the Suggested Guidelines were followed, it appears that the non-residential parent (commonly the father) would have the opportunity to spend limited time with the child in the first three years of life. It is well documented that children's attachment to the parents develops in the first few years of life (particularly the first year) and an attachment considered "secure" provides many benefits to development over long periods of time. If a parent is greatly limited to engage in the parenting role (e.g., inability to soothe child, change diapers, put child to bed, serve as a warm caregiver, smile at child, play with child) then it decreases the likelihood that a strong affectionate tie will be developed. In addition, it could impact the extent to which the child perceives the parent as somebody responsible for providing physical and emotional care. In turn, the extent to which an attachment is formed between child and non-residential parent

could be impacted. Assuming that the relationship between the child and non-residential parent has the potential to be high quality, limiting exposure to the non-residential parent could be a missed opportunity for the child to develop a secure attachment early in life. It also limits opportunities for the non-residential parent to develop their new parenting role after the divorce.

I can't help but notice that your list of negative aspects, in relation to the Suggested Guidelines, are much longer than your list of positive aspects. Do you agree with the Suggested Guidelines in terms of time-sharing between split homes?

Through an attachment lens, children may benefit from the having an opportunity to develop a secure attachment with both parents. For this to be accomplished, both parents need the opportunity to practice the parenting role. Young children could benefit from a routine that includes extended visits with both parents (including overnight visits). Assuming the child shares a healthy relationship with both parents, it's a "win-win." Restricting the presence of a non-residential parent could be a missed opportunity to take advantage of something that helps children. Overall, it is difficult to make the assumption that children would always benefit from spending the majority of their time in one primary home.



CHAPTER 11:

THE CASUALTIES OF CUSTODY DISPUTES

The majority of this eBook has centered on New Mexico law and procedure regarding child custody, with the aim of providing information about the legal process that has been stripped of emotion.

Custody disputes are often emotionally charged, and can have long-term repercussions. At times, parents can get so caught up in “winning” a custody dispute that they lose sight of the ultimate losers – the children.

It is essential for parents to understand that custody battles can have lasting repercussions. The remainder of this chapter is written by an adult that recounts the harrowing experience of being thrown into a custody dispute as a child.

Too often decisions made during a divorce or separation center around getting back at an ex. Have you stopped to think about what these decisions do to your children?

I can tell you, because I lived it.

My parents separated when I was 5-years-old and what felt like a break quickly turned into years of fighting, court battles and heartache. Let's all agree that no one ever fully knows the whole story. Everyone has a side, an argument about how they were wronged, or why their way is the only right way. For your kids, none of that matters.

Here's what did matter – the impact it had on my life.

My parents' very emotional and vengeful divorce left me right in the middle and physically affected me. I would break out in hives and have major asthma attacks. Doctors couldn't pin point the problem, and the classic “Maybe she will grow out of it” advice seemed to be the only thing they could agree on. It wasn't until later in life

that a doctor pointed out that the episodes were most likely stress induced. Stress, in a 5-year-old, think about that for a minute.

So, why was I so stressed? Maybe it's because I had court ordered therapy and everything I said was then read aloud in hearings. Maybe it's because allegations of abuse caused me to be inspected by each parent at every handoff. Maybe it was the fear of God put in me at every turn that one parent was going to kidnap me and take me away.

Then there was the stress and constant feeling that I was letting one parent down each time I had to testify in hearings, or meeting privately with the judge in his chambers to talk about who I wanted to live with. While I try not to think about these periods of my life often, some aspects have been burned into my memory: The way my little shoes clacked across the dark marble floors of the courthouse; the massive table in the judge's office that looked like it could seat 100 people; the way the wind felt on my face as my dad sat with me on a concrete bench and told me that he didn't win, and that I would be moving half way across the country with my mom; the tears that rolled down my dad's cheeks as the wind blew through my hair. Decades later these memories still make me cry.

It's only now, with my own child, that I can fully understand how hurtful my parents were to each other. Both of them have blame to bear, and if you asked them, I am sure they both would say they were just trying to protect me. When that "protection" gets wrapped around being hateful to your ex during your divorce, or in the years that follow, your actions will impact your children.

Here are the top five things I would tell any parent going through a divorce or separation that involves children:

1. Don't argue in front of your kids;
2. Don't talk bad about the other parent to your child;
3. Don't make them fearful of the other parent;

Custody disputes are often emotionally charged, and can have long-term repercussions. At times, parents can get so caught up in "winning" a custody dispute that they lose sight of the ultimate losers – the children.



Have you stopped to think about what these decisions do to your children?

4. *Figure out a way to work it out if possible – no child should have to testify in court if avoidable;*
5. *Don't rush into anything, a new marriage, or moving away, just to "show" your ex.*

I hope hearing my story makes you pause before you do something to "stick it" to your ex.

I was lucky that I always knew I was loved. Every child is different and so is every divorce or separation. You never know how your actions will really impact your child in the long run. Try to focus on supporting your kids, telling them how much you love them and not letting your ex get under your skin. Trust me, as someone that has gone through this horrible process, your kids will thank you for it in the long run.

CHAPTER 12: TEN MISTAKES THAT HAUNT CUSTODY CASES



In the holiday classic — *A Christmas Carol* — The ghost of Christmas future is a terrifying spirit that guides Ebenezer Scrooge on a tour of the bleak future that Scrooge will encounter if he continues making poor life decisions.

Today I will act as the Ghost of Time-sharing Future, outlining the 10 mistakes that parents make that can haunt one's future time-sharing like a ghost in the night.

10. ESTABLISHING A WEAK TIME-SHARING SCHEDULE RIGHT AFTER SEPARATION:

I begin with this issue because it is arguably the most important on the list. It may seem counter-intuitive to award the most important issue last place, but according to the "primacy effect" one is more likely to retain information that is read first – so in this case *last* is *first*.

It's saddening how many parents that I meet go through a separation, let a few months pass, wait for their parenting issues to reach a boiling point, and then seek legal advice. The date of separation is the starting line to prepare yourself – not the date that parenting issues erupt after separation.

The time-sharing that you establish from the point of separation becomes the "status quo" in your case. This "status quo" will haunt you – for better or for worse – until a court ordered time-sharing schedule is entered.

Establish your desired time-sharing *immediately* after separation. By doing so, you are establishing a "status quo" that the courts will be hesitant to disrupt. Generally

speaking, New Mexico courts are reluctant to change status quo time-sharing because children flourish under the twin pillars of *consistent* and *predictable* time-sharing.

For any number of reasons, your custody and time-sharing case could find its way into court. Possibly the parents do not agree on the appropriate time-sharing schedule. Potentially, one parent is calling the shots and dictates when communication or time-sharing takes place. In most scenarios, the court will set an initial hearing where the facts are discussed. During this hearing, if the parents cannot agree on the appropriate time-sharing schedule, the court will likely enter a temporary order that continues the “status quo.”

At the initial hearing, when the parents cannot reach an agreement on the appropriate time-sharing, the court generally refers the parents to “Court Clinic” for mediation. During mediation, a trained mediator attempts to guide the parents towards an amicable agreement. When mediation fails, Court Clinic generally sets an “On-Call Consultation” where a court clinician interviews all of the parties and makes recommendations to the assigned judge on the appropriate time-sharing schedule.

The Clinician’s recommendations likely will gravitate towards the **Suggested Guidelines** that have been discussed throughout this book. As you have seen, the *Guidelines* prefer younger children to have one primary caregiver, with short, frequent, and predictable time-sharing with the other parent. Nevertheless, the status quo that you have developed since separation will influence the Clinician’s recommendations regarding ongoing, long-term time-sharing.

In other words, by establishing maximum time-sharing from separation you are developing a “status quo” that follows your case and influences the court’s ultimate decision. In cases where the “status quo” exceeds the suggested guidelines, the court is inclined to continue the status quo, to ensure *consistency* and *predictability*.

In situations where either no status quo is developed – or a limited status quo is develop – the court is likely to adopt a time-sharing schedule that falls under the

By establishing maximum time-sharing from separation you are developing a “status quo” that follows your case and influences the court’s ultimate decision.

Guidelines. As demonstrated by the attached *Guidelines*, this time-sharing could result in short, frequent, and predictable time-sharing, based on the child's age.

Take matters into your own hands by establishing maximum time-sharing immediately following a separation. By failing to take matters into your own hands, New Mexico courts will likely gravitate towards the *Guidelines* when determining the appropriate time-sharing schedule.

9. IMMEDIATELY MOVING OUT THE MARITAL RESIDENCE, LEAVING CHILDREN IN THE HOME:

This is a big mistake because it essentially creates a default "status quo" where the parent remaining in the home becomes the primary caregiver. In this situation, generally speaking, the parent that leaves the home accepts a "weekend," "every-other weekend," or a limited time-sharing schedule.

Often a few months pass with this limited visitation taking place – establishing a limited status quo. As time passes, the "weekend parent" becomes frustrated with being relegated to a restricted time-sharing schedule and may request additional time. Often the primary caregiver feels a sense of empowerment, refuses to budge, and otherwise calls the shots regarding communication and visits.

The "weekend parent" seeks legal advice *after* the undesirable status quo has been formed and cemented over time. A custody case is eventually opened. The status quo follows the "weekend parent" through the legal process, with a domino effect taking place.

The domino effect begins when the status quo is developed. When a case is opened, the status quo tips over and influences the court's temporary time-sharing order. The temporary order influences the court clinician's recommendations, which in turn affects the judge's ultimate decision regarding court ordered time-sharing.

8. FILING FOR CUSTODY AFTER YOUR EX HAS ALREADY LEFT NEW MEXICO:

This common issue creates jurisdictional issues that can greatly complicate your custody matter. Review Chapter 7 for more information on how jurisdiction is decided and how it can adversely affect one's case.

7. POSTING ABOUT YOUR FUN AND WILD LIFE ON SOCIAL MEDIA:

Social media posts are routinely introduced as evidence in custody matters. The pictures that you post can be used against you. The incriminating and detrimental statements that you make can be used against you.

Big Brother is watching your social media.

Big Brother is waiting for you to post something that demonstrates your instability, substance abuse issues, anger, violent temperament, erratic lifestyle, etc.

Imagine a judge presiding over you from above, looking down at you while reading your post. Keep in mind that this is the same judge that will be judging your credibility, stability, and ultimately deciding what time-sharing is appropriate.

The judge reading your “cool” post has immense discretion (power) to determine the “best interests of your child.” It is extremely difficult to *successfully* appeal and overturn a judge’s determination regarding the appropriate time-sharing.

Before you hit “send,” ask yourself: Do I want my assigned judge to read the “cool” post that I’m about to unleash into the cloud?



Big Brother is watching your social media.

6. NUMBING THE PAIN OF SEPARATION WITH DRUGS OR ALCOHOL:

Separation and divorce is routinely listed as one of the worst life events that one can encounter. Country music as we know it would no longer exist if breakups were easy, fun, and enjoyable. Breakups suck. Accordingly, at times people going through breakups will use drugs or alcohol to numb the pain.

Drug and alcohol abuse is one of the more common issues addressed in family court. Parents routinely argue that the other parent is unfit or unable to adequately care for the child based on drug or alcohol abuse.

Judges' *routinely* order parents to take a six month hair follicle test. Additionally, a PEth test is now available that examines one's enzyme levels and can detect if excessive drinking has taken place up to 21 days before the test was administered.

I cannot over emphasize the negative impact that a positive drug or alcohol test can have on one's custody case – especially with conservative judges that detest the use of mind-altering substances.

5. REACTING VIOLENTLY AND GETTING HIT WITH A TEMPORARY ORDER OF PROTECTION:

Breakups that involve custody disputes go hand-in-hand with Order of Protections (i.e. Restraining Orders). Generally, police refuse to become involved with time-sharing disputes unless a court order outlines time-sharing. Because of this fact, parents without a time-sharing order are thrust into a gray area where one parent can potentially keep the child and the police will not get involved.

Petitions for Order of Protection are routinely filed during custody disputes that lack a court order for guidance. The Restraining Order process is ripe for abuse because New Mexico courts generally error on the side of caution and enter a temporary order that grants one parent sole legal custody until a hearing is held.

By New Mexico law, the hearing must be held within ten days from the date that the *Petition* is filed. Nevertheless, this ten day requirement is routinely extended for "Good Cause Shown."

Several weeks often pass before a hearing is held regarding the baseless claim contained in the *Petition*. In the meantime, one parent is left without any contact or communication with the child.

In situations where the Special Commissioner determines that by a “preponderance of the evidence” an act of abuse occurred, the Commissioner has jurisdiction to enter a “permanent” Order of Protection. “Permanent” is an illusory word and the Order of Protection generally lasts for six months to one year.

When an Order of Protection is entered, the DV Division assumes jurisdiction for six months to enter a temporary order regarding custody, time-sharing, and child support.

As discussed above, this temporary order then forms the “status quo” that can negatively impact long-term time-sharing, once a DM case is opened with either a *Petition for Dissolution of Marriage*, or *Petition to Establish Paternity*.

Drug and alcohol abuse is one of the more common issues addressed in family court. Parents routinely argue that the other parent is unfit or unable to adequately care for the child based on drug or alcohol abuse.

4. SENDING INSULTING, THREATENING TEXT MESSAGES:

A *Petition for Order of Protection* is routinely based on harassing or threatening text messages, emails, or correspondence.

Always communicate with your ex as though a disgruntled judge is reading every word that you send. Do not send insulting or threatening text messages, letters, or emails. Never, ever, ever, joke about suicide. Never try to make your ex feel bad by insinuating that you are contemplating suicide. Keep your communications short, formal, and related to the child.

By sending emotional text messages that are loaded with expletives and threats, you are opening the door for your ex to file a *Petition for Order of Protection*. As discussed above, New Mexico courts lean on the side of caution and generally will enter a Temporary Restraining Order (TRO), which prevents contact and communication until a hearing is held. Most importantly, this TRO also routinely prevents visitation and communication with one’s child until the hearing is held.

Do not give your ex ammunition to file a baseless *Petition for Order of Protection* that can prevent you from visiting or communicating with your child until a hearing

is held. Do not give your ex ammunition to demonstrate that an act of abuse has occurred, warranting a permanent Order of Protection being entered.

Order of Protections carry a handful of adverse consequences that reach beyond one's custody case. Under federal law, one's right to own or possess a firearm is abrogated while the Order is effective. Additionally, the Order can adversely affect one's security clearances and rental leases – all while haunting one's custody case and future time-sharing.

3. FAILING TO BE LISTED ON THE CHILD'S BIRTH CERTIFICATE OR PUTATIVE FATHER REGISTRY:

Are you a father?

Was your child born outside of marriage?

If you answered yes to both of these questions then this final question could *dramatically* change your future: "Are you listed on the child's birth certificate or have you registered with the putative father registry within ten days of the child's birth?"

Under New Mexico adoption laws, a child can be adopted *without* an alleged father's consent when the alleged father has failed to register with the putative father registry within ten days of the child's birth and the alleged father is not the child's acknowledged father. See § 32A-5-19.

Additionally, biological fathers that are only the child's *alleged* father are not entitled to legal notice that another person is attempting to adopt one's biological child. See § 32A-5-27.

For these reasons, at the time of a child's birth, it is extremely important for fathers to either register with the putative father registry, or to be listed on the child's birth certificate. Failure to take these essential steps could lead to the child being adopted without the alleged father being entitled to legal notice of the adoption.

It is also essential for fathers to have ongoing communication and support for older children. Under New Mexico's adoption laws, the court can imply a father's consent to adoption in the following situations:

- The child/adoptee was left without support and communication for three months when the child is six years or under;



The Court ultimately terminated the father’s rights, finalizing the step-parent adoption.

- The child/adoptee was left without support and communication for six months if the child was over the age of six when the six month period began. See § 32A-18.

I have personally witnessed Bernalillo Children’s Court allow a step-parent to adopt a child, in a situation where the biological father failed to support *and* communicate with his six year old child for a period of six months.

In that case, the biological father had joint legal and physical custody from an existing DM case in another jurisdiction. The biological father vehemently objected to the child’s adoption. Notwithstanding these facts, Bernalillo Children’s Court implied the biological father’s consent to the step-parent adoption. When implying the father’s consent, the assigned judge stated: “My hands are tied by statute” because the father failed to support and communicate with his child for a period of six months, when the child was six years of age. The Court ultimately terminated the father’s rights, finalizing the step-parent adoption.

2. LETTING AN EX CALL ALL OF THE SHOTS WHILE WAITING TO FILE FOR CUSTODY OR DIVORCE:

Toxic relationships generally entail a degree of control or manipulation. Break the pattern of control once the relationship is ended. As discussed above, establish your ideal time-sharing schedule from the moment you separate. If your ex demands to control the situation, immediately seek legal advice and file the appropriate motion.

As time passes with your ex calling all of the shots, the roots of your weak “status quo” strengthen. Take immediate action and slash the undesirable “status quo” from the stem. The date of separation is the best time to take control. If the date of separation has already passed — the second best time to act is *now*.

1. WAITING TO GET INVOLVED WITH THE CHILDREN:

At the risk of sounding like I’m trying to be your life coach – the time to get involved with your children is *now*. New Mexico courts consider a parent’s level of involvement, bonding, and the resulting attachment when determining the child’s “best interests.”

Establish yourself as the primary caregiver, by getting involved with the following activities:

- Attend prenatal medical visits;
- Take time off from work when your child is born;
- Get up with your child for feedings;
- Bathe, potty train, and put your child to bed;
- Prepare your child’s meals;
- Help child learn numbers, letters, and colors;
- Take time off work for your child’s appointments;
- Take your child to doctor, dentist, and other appointments;
- Haircuts, clothing, school supplies, crafts, etc.;
- Participate with school functions, day-care activities, sports, extra-curricular activities; and
- Immediately become involved with your child’s life. Do not wait until your separation to become concerned and involved.

As you have seen from the discussions above, the actions that you immediately take transform into a “status quo.” Over time, this status quo gains momentum, moving forward with a force that can become difficult to change.

CHAPTER 13: SIGNS THAT YOUR EX IS BULLYING YOU



We've all been bullied at one stage in our lives. The experience is similar to breaking one's arm on the last day of school, receiving an emergency appendectomy, having your wisdom teeth extracted, or taking the Bar Exam – all painful life events that I've encountered.

Unfortunately, bullying isn't limited to oversized, grade school sociopaths slithering across the hallowed halls of New Mexico schools and playgrounds. At times bullying extends to our adult lives and involves people that we once loved.

I commonly speak with people that are being bullied by their ex. Generally this bullying happens during divorce, or when unwed parents separate and are forced to resolve issues such as custody, timesharing, and child support.

Here are three telltale signs that your ex is bullying you:

3. EXCESSIVE LITIGATION BASED ON A DESIRE TO CONTINUE A PATTERN OF CONTROL.

Not all relationships are stable and emotionally healthy. Some partners have a "Drill Sergeant Mentality" and a corresponding need to control every aspect of the other person's life. The desire to control every aspect of the other person's life often hits a high water mark of possessiveness that eventually spills over into a breakup or divorce.

The controlling person is left reeling from the breakup — grasping at straws for a sense of normalcy and a way to stay in the other person's life while perpetuating the pattern of control.

In situations where the couple is married, the parties are unable to reach an agreement on the necessary divorce paperwork. Alternatively, for unwed couples,

the parties are unable to agree on the requisite Parenting Plan issues such as custody, time-sharing, and child support. The case becomes “contested” and the parties are forced to open a court case, with the issues drifting through the necessary legal channels of the Domestic Matters Court (DM Court).

The controlling party now uses the DM Court as a means to continue the pattern of control. Possibly the party requests excessive and unnecessary documents. Potentially, the controlling person files frivolous motions and makes unreasonable requests. Occasionally, the controlling person uses a passive-aggressive strategy of actively avoiding service of process, refusing to respond to discovery requests, or otherwise dragging out the process. In other situations the controlling party refuses to accept settlement offers that align with New Mexico law, based on a desire to stretch out the case in order to remain in the other person’s mind and emotions indefinitely.

The controlling person is left reeling from the breakup — grasping at straws for a sense of normalcy and a way to stay in the other person’s life while perpetuating the pattern of control.

It has been said that the opposite of love is indifference. Some controlling partners pursue litigation with the mindset that it is better to trigger negative emotions in a former lover’s mind, rather than permit the once controlled person to drift away towards indifference and a healthy and stable relationship.

2. EMOTIONAL MANIPULATION.

Hollywood loves to portray bullies as supersized, dim-witted brutes that lumber around playgrounds torturing undersized victims with “wedgies,” bathroom swirlies, and then menacingly stealing their coveted lunch money. In reality, bullying can be accomplished through both physical and mental acts.

Mental bullying often occurs when one party uses guilt manipulation to push the other side towards a desired goal. At times this goal is to waive or reduce child support. In this situation the manipulating person makes the other side feel bad with claims such as “you’ve changed,” “you’re all about money,” “I always knew that

you were a gold digger,” “you know that I don’t make enough money to pay *that much* child support and to also support myself,” etc., etc., etc.

In other situations, one side makes the other party feel guilty based on the breakup, or because the other side refuses to reconcile. These statements are made with the intent to manipulate the other person towards an outcome that they otherwise would not have made. For unwed parents this outcome could be giving the other party more time with the child than supported by the Suggested Visitation/Time-Sharing Guidelines that are typically used by New Mexico courts. This outcome could also include agreeing to less child support than one is entitled to under the New Mexico Child Support Guidelines.

In many situations the emotional bully wants the other party to reach a quick and uniformed decision, without “wasting money on lawyers.”

- Is your ex rushing you into a decision that you intuitively feel is against your best interests?
- Does your ex want you to quickly sign court documents that could affect the rest of your life?
- Are you about to sign court documents without first talking to an *experienced* attorney?

If you answered yes to any of these questions then you may be the unsuspecting victim of emotional bullying.

1. THREATS, TAUNTS, AND INSULTS.

Fear is a powerful emotion that paralyzes positive action. Threats are fear based tools that bullies use to keep victims suspended in an undesirable place, based on the hypothetical threat of an even less desirable result.

Here are some common threats that bullies use to keep the other side from moving forward for a divorce, custody, time-sharing, child support, or any other necessary legal action:

You don’t want to take legal action against me — I have the Michael Jordan of lawyers:

This is a common threat used to scare a parent/party from filing a potential claim, or pursuing one’s legal rights – such as custody, time-sharing, or child support.


Basically this threat is used to demoralize the other person by either suggesting or outright stating that their claim will be rejected, leaving the party in a worse position.

I will be the first to admit that all lawyers are not created equally. In particular, some lawyers dive into areas of law where they are not well versed and are unfamiliar with the subtle nuances of that area of law, based on courtroom trial and error (i.e. real world experience). Nevertheless, more often than not when I hear this threat relayed from my client, it turns out that the other side is *pro se* (unrepresented), and probably has never even consulted with an *experienced* attorney.

Most of the time, the threats and fuzzy statements of law relayed by the other side do not remotely reflect the reality of New Mexico law. Long story short, don't let your ex's threats scare you into either non-action, or ineffective action. Put your ex's fuzzy and self-serving regurgitations of New Mexico law on mute and instead speak and listen to an *experienced* attorney about the specific facts that are involved with your unique case.

My family is politically connected and knows every judge in New Mexico:

I hear this threat all the time – especially in small towns across New Mexico. The first problem with this threat is that a judge must recuse herself from cases



Threats are fear based tools that bullies use to keep victims suspended in an undesirable place, based on the hypothetical threat of an even less desirable result.

involving family and friends. The next glaring problem with this threat is the clear ethical considerations that it triggers. In addition to these major hurdles, the threat also conveniently fails to mention that with most issues, judges are shackled by New Mexico law – particularly issues such as child support that are governed by statutory guidelines.

I will crush you and get sole custody if you file against me:

In lieu of ruminating on this fear-based threat, provide an *experienced* attorney with the answer to the following questions:

- What is the current status quo with visitation?
- How long has this status quo been in place?
- Who is the primary care-giver of the child?
- How old is the child?
- What are the child's desires?
- Are there any other issues that affect the "best interests of the child?"
- Is a court order in place?
- Has CYFD ever been involved with you and your child?
- Are there any physical or mental issues affecting either parent?

Ultimately, the moral of this story is to have an intelligent conversation with an *experienced* attorney rather than paralyzing non-action because of baseless, uninformed, and self-serving threats.

In the end, bullies are empowered through helpless non-action. Take the power into your own hands to see how your unique situation aligns with New Mexico law.

ABOUT THE AUTHOR



Matthew Legan Sanchez was born, raised, and educated in Albuquerque. Mr. Sanchez specializes in a wide range of family law issues affecting parents all across the state of New Mexico.

With over a decade of courtroom experience, Mr. Sanchez is armed with the battle-tested experience to stand by your side and fight for your legal rights. Mr. Sanchez has represented hundreds of hard-working New Mexicans, protecting the people that they hold dear.

Don't place your life and case into the hands of an inexperienced or ineffective attorney. Your loved ones deserve an attorney that has earned a reputation for protecting families and making the legal process as painless as possible.

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*More information and reading material
can be found at 505sanchez.com.*