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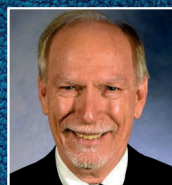
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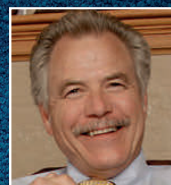
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# HIGH INCOME CHILD SUPPORT: Long Awaited Appellate Guidance<sup>1</sup>

By Amber R. Macias-Mayo and Sarah E. Bennett

In New Mexico, any domestic relations matter involving children (divorce, parentage, domestic violence, or even kinship guardianship), includes a determination of support for the child or children. In fact, all states have their own guidelines to determine child support, varying widely in amount. The New Mexico Child Support Guidelines provide a formula to determine child support for children of parties whose combined monthly income does not exceed \$30,000. What is an appropriate lifestyle for parties whose income exceeds \$30,000 per month? Should we assume that the parties will always pay a percentage of their combined income on the children's needs, or is there a cap on the amount created by the statutory formula? How many ponies are enough for a child? After years of debate among practitioners over whether the New Mexico Child Support Guidelines are intended to cap child support at the top rate, or how it should be calculated otherwise, the Court of Appeals in *Jury v. Jury*, 2017-NMCA-036, 392 P.3d 242, addressed the underlying debate, thereby revitalizing long established judicial principals.

Historically, prior to adoption of the New Mexico Child Support Guidelines, Courts had vast discretion in determining the amount of child support to be paid, or whether to grant a modification upon application. In the context of a request for increase of child support, in *Spingola v. Spingola*, 1978-NMSC-045, 91 N.M. 737, the Supreme Court of New Mexico established factors to be considered by the court in exercising its discretion. The Supreme Court provided ten criteria for consideration when reviewing child support. *Id.* ¶ 24. Although the 1988 adoption of the Guidelines largely supplanted consideration of the *Spingola* factors, controversy and litigation regarding application of the formula to high income cases blossomed after the 2008 changes to the statute.

Under *Spingola*, the district court is required to consider ten "guidelines" when exercising its discretion to determine a



proper award of child support. *Id.* ¶ 24. The factors to be considered are: 1) the financial resources of both parents; 2) the lifestyle the children would have enjoyed if the family remained intact and the parties had their current income; 3) additional advantages the parties can afford above their actual needs, but states specifically that "This does not mean providing

'luxuries or fantastic notions of style...not normal for the stable, conservative upbringing...'; 4) whether the custodial parent is able to, and so does, foster good relationships between the non-custodial parent and the children; 5) current guidelines; 6) the number of children; 7) ages of parties and the children; 8) the best education that the parties can afford; 9) whether additional children have been born; and 10) any subsequent remarriage. *Id.* These factors are not meant to be exclusive, but only to provide district courts with guidance when exercising its discretion regarding these issues. *Id.* ¶ 25. In high income cases, it was common in litigation to present economic expert testimony regarding what needs children have in New Mexico. Obviously, a formula made judicial determinations much easier.

To codify and simplify established law that parents owe a duty of support to their children, in 1988, New Mexico enacted the New Mexico Child Support Guidelines ("Guidelines"). The Guidelines are intended to protect the best interest of children by ensuring their support. The Guidelines were revised and modified in years 1991, 1995 and 2008. Until the 2008 changes, the Guidelines had a standard formula to calculate the child support obligation for high income parties.<sup>2</sup> When the Guidelines were modified again in 2008, the basic child support schedule in NMSA 1978, § 40-4-11.1(K) (2008) became applicable to parties with a combined gross income of up to \$30,000 per month. Unlike the prior guidelines, however, the 2008 Guidelines did not provide guidance for calculating child support amounts for parties with a combined gross income in excess of \$30,000. It was no longer just a straight-forward

calculation. Many practitioners contended that support was capped at the \$30,000 level; many contended the percentages of old should be applied.

Nearly a decade after the 2008 changes in the New Mexico Child Support Guidelines, the Court of Appeals provided some resolution and some assistance. In *Jury*, 2017-NMCA-036, 392 P.3d 242, the Court concluded that, absent legislative guidance, the district courts retain broad discretion in high income cases. The Court in *Jury* also emphasized that the district court has no discretion in calculating the actual income of each party (“Calculation of parties’ gross monthly incomes must conform to the child support guidelines or precedential appellate court interpretation of the child support guidelines.” *Id.* ¶ 29. However, the Court recognized that a trial court has vast discretion in determining whether increased income of a party represents a substantial change in circumstance to justify modifying child support. *Id.* ¶¶ 37-39. *Jury* eliminated any confusion that there may be a cap for high-income earners. Even when addressing the statutory presumption in § 40-4-11.4, the court must exercise discretion to ensure a fair result for all parties.

In *Jury*, the Court made clear it is “more concerned with a parent’s actual cash flow” than it is with “income represented on tax returns.” *Jury*, ¶ 30 (citing *Major v. Major*, 1998-NMCA-001, ¶ 5, 124 N.M. 436, 952 P.2d. 37). This assertion is supported by the statute’s requirement that one must use current income, or an average from the last twelve months, or the prior years’ tax return when calculating gross income for child support purposes. NMSA, 1978 § 40-4-11.1(K) (2008). No New Mexico appellate court has addressed the issue of multi-year averaging, though many other jurisdictions seem to settle on the appropriateness of three-year average. *Jury*, ¶ 31. However, *Jury* provides guidance for calculating child support when the parties’ combined monthly income exceeds \$30,000 by requiring that the district court consider: 1) the total financial resources of both parents, including their monetary obligations, income and net worth 2) life-style the children would be enjoying if the parents remained together at current income levels; 3) whether the resources available should provide additional advantages above the children’s needs. *Id.* ¶ 32. The *Spingola* factors have been revived.

*Jury* continues in the vein of *Spingola* and adopts the pre-guidelines body of child support authority, along with the opinions issued since adoption of the guidelines. When litigating these such cases, practitioners should consider evidentiary presentations to support the Court’s exercise of discretion, including the following:

1. Practitioners should expand their presentations to provide lifestyle evidence in support of their arguments in order to ensure that factors in *Spingola* are fully explored and addressed — for instance, “what life-style the children would be enjoying if the father and mother were not divorced, and the non-custodial parent had (their) level of income.” *Jury*, ¶ 32. Often, when incomes vary widely from year to year,

families adjust spending from year to year as well in order to ensure ability to meet expenses in low-income years.

2. No income averaging rules were adopted by *Jury* or any other New Mexico appellate decisions — factors such as timing of receipt of payor’s income (monthly salary versus variable annual bonus and/or distributions) and income variability and unpredictability present ample opportunity for parties to address not only what advantages the children should receive, but also the potential for imposition of unfair burdens on a payor. The *Jury* court emphasized that the district court must use discretion and, pursuant to *Spingola*, must arrive at an equitable solution for all parties.
3. Courts should consider hybrid methods applied to child support calculations – that is, if the payor’s base salary is such that it can be used to calculate a monthly combined income of \$30,000 or less, the Court should consider applying the New Mexico Child Support Guidelines to the base income amount, and then a proper percentage for the irregular and inconsistent income amounts such as bonuses, distributions and/or overtime. According to the 1994 Child Support Guidelines Review Commission, Income and Tax Subcommittee, “[b]onuses should generally be included in gross income for child support calculation purposes, with similar considerations and in similar ways as set forth” under the “overtime-income” section. Several categories fall into the “over-time income” section, one of those is “irregular” income. In considering irregular income when calculating a child support obligation, the 1994 commentary states:

If over-time has historically been irregular, but the compensation has been significant, basic monthly child support should be calculated excluding over-time, but the payor parent should be required to make additional lump-sum child support payment in the month after the over-time income is received . . .

It is important for practitioners, the judiciary and the parties alike to understand that child support is intended to support the needs of children, but also to be equitable as between the parties. If the child’s needs are being met, and the child is fortunate enough to enjoy appropriate privilege with respect to education, travel, amenities and possessions, “no child, no matter how wealthy the parents, needs to be provided more than three ponies.” *Jury*, ¶ 46.

Since this article was sent to publish, New Mexico Senate Bill 140 was approved by Mexico Legislature and signed by our Governor amending the Child Support Guidelines *inter alia* by providing a formula for how to determine child support when parties have a combined income of over \$30,000 per month. NMSA 1978, § 40-4-11.1, effective July 1, 2021, requires calculation of basic support at the highest basic support amount on the chart for number of children the parties have, plus an additional specified percentage of the combined income over \$30,000. In doing so, the statute provides guidance to the courts for an appropriate child

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# The Moralistic Fantasy of INCOME IMPUTATION

By Jane E. Granier

As a society we have collectively determined that parents should make every possible sacrifice to support their children. They should be able to tug up their bootstraps and go to work lest the cost of bringing a child into the world fall upon the taxpayers of the state.<sup>1</sup> Child support obligations are generally determined by the courts by combining parents' gross income to derive a dollar amount that is set by statute. In situations where a parent has little or no income, courts typically impute income to the underperforming parent. In New Mexico, courts consider 'potential income if unemployed or underemployed.'<sup>2</sup> The obvious problem with that is that potential income is imaginary. Try spending it.

Imputed income is based on good intentions, but it leads to a great many impossible-to-meet child support obligations. Most people will experience a bout of unemployment at some point in their lives. The national average for time spent unemployed is approximately 27 weeks as of February 2021.<sup>3</sup> Injury, illness, the need to care for elderly relatives, struggles with drug and alcohol dependency, or periodic incarceration prevent many parents from obtaining steady full-time employment. Undocumented parents also have difficulty in maintaining a steady income source without proper work authorization. The good intention to provide financial support for a child can frequently clash with reality.

Enterprising parents can and do turn to the gig economy to make ends meet. Anyone that can download an app to their smartphone can instantly work for Uber, Lyft, Airbnb, DoorDash or Grubhub. But imputing potential gig income is a messy and inexact task. It would also be a mistake to assume that this type of employment always provides a meaningful wage. For example, DoorDash currently advertises that its delivery drivers can earn between \$2.00 to \$10.00 per delivery, plus customer tips. But it is impossible to extrapolate income expectancy from this information alone. Food delivery jobs are dependent upon the local restaurant economy, so a driver in Albuquerque would certainly be better compensated than a driver in Alamogordo.



The rates DoorDash pays do not include compensation for mileage and vehicle expenses. DoorDash, also considers its drivers to be independent contractors (an industry standard), so drivers are often unpleasantly surprised to learn about the high cost of payroll and gross receipts taxes after several paychecks are spent. Ultimately many gig economy jobs become financial sinkholes when the

high cost of self-employment is factored in.

If income is imputed to an obligor parent already struggling to make ends meet, they are less likely to pay any support at all. Higher orders and tougher enforcement do not increase collections when the barrier to payment is poverty.<sup>4</sup> Orders set above 19% of an obligor's income tend to decrease the amount of support actually paid.<sup>5</sup> Unpaid support becomes an ever-increasing debt. The larger it grows, the less likely it will be paid at a future date. The largest debts are owed by the poorest of parents.<sup>6</sup> Many low-earning parents become discouraged and leave formal employment.<sup>7</sup> Many are alienated from their children and extended families by what they perceive to be an insurmountable barrier to loving relationships.

Income imputation harms custodial parents as well. They are essentially told by the state that there is a certain minimum amount of child support they are entitled to receive each month. The failure of the obligor parent to meet that minimum amount becomes a bitter and deeply personal issue. It represents the obligor's failure as a provider and failure as a human being. After all, the courts tell us that child support is a parent's "most important single obligation."<sup>8</sup>

New Mexico courts are required to impute income to unemployed and underemployed parents to the level of employment at full capacity.<sup>9</sup> The statutory guidelines offer little actual guidance to courts in evaluating the significance of the discrepancy between actual income and earning potential. The amount of imputed income entirely up to the discretion of the judge.<sup>10</sup> The current legal minimum wage multiplied by 40 (hours per week) is considered the most acceptable baseline

for imputation, regardless of achievability. This comes to \$1,820.00<sup>11</sup> per month of fantasy income a parent should use to pay a very real legal obligation.

There is relief on the horizon. At the time writing, both branches of the New Mexico legislature have approved amendments to our child support guidelines. These amendments will drastically change the rules regarding income imputation. If signed into law the following additions to NMSA § 40-4-11.1 will become effective July 1, 2021:

“D. If a court finds that a parent has willfully failed to obtain or maintain appropriate employment, the court may impute to that parent an income equal to that parent’s earning and employment potential.

- 1) The following criteria shall be used:
  - a. availability of employment opportunities for the parent;
  - b. the parent’s employment history;
  - c. the parent’s income history;
  - d. the parent’s job skills;
  - e. the parent’s education;
  - f. the parent’s age and health;
  - g. the parent’s history of convictions and incarceration; and
  - h. the parent’s ability to obtain or maintain employment due to providing care for a disabled child of the parties.

2) Minimum wage may be imputed if a parent has no recent employment or earnings history and that parent has the capacity to earn minimum wage. The minimum wage to be imputed to that parent is the prevailing minimum wage in the locality where that parent resides.

E. Income may not be imputed to a parent if the parent is incarcerated for a period of one hundred eighty days or longer. Incarceration is not considered a voluntary unemployment.”<sup>12</sup>

The new statutory language introduces an element of willfulness. The courts must first determine whether a party’s unemployment or underemployment is a deliberate action before assigning make-believe income. It will no longer be

sufficient to blindly impute minimum wage while a laid off worker is searching for a new job, or if a parent is prevented from working due to a long period of incarceration. The expanded criteria for deciding upon imputation will be of enormous benefit to struggling parents as well as to the courts tasked with assisting them. This is terrific news for New Mexican families. ■

*Jane E. Granier is an attorney for the Child Support Enforcement Division and has the great honor and pleasure of working in the Twelfth Judicial District. Her views and opinions do not reflect any official policy of the Child Support Enforcement Division.*

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#### Endnotes

<sup>1</sup> *Martinez v. Martinez* 1982-NMSC-097 ¶13.

<sup>2</sup> NMSA § 40-4-11.1 (C) (1).

<sup>3</sup> U.S. Bureau of Labor Statistics, accessed at: <https://www.bls.gov/news.release/empsit.t12.htm>

<sup>4</sup> *Executive Summary: Reforming Child Support to Improve Outcomes for Children and Families*, by Vicki Turetsky, The Abdel Report, June 2019, Volume 23, No. 5.

<sup>5</sup> *How do Child Support Order Amounts Affect Payment and Compliance?* By Mark Takayesu, 2011, Orange County Department of Child Support Services, accessed at: [https://ywcss.com/sites/default/files/pdf-resource/how\\_do\\_child\\_support\\_orders\\_affect\\_payments\\_and\\_compliance.pdf](https://ywcss.com/sites/default/files/pdf-resource/how_do_child_support_orders_affect_payments_and_compliance.pdf)

<sup>6</sup> *The Child Support Debt Bubble*, by Tonya L. Brito, UC Irvine Law Review, 2019, Volume 9, Issue 4.

<sup>7</sup> *Falling Further Behind? Child Support Arrears and Father’s Labor Force Participation*, by Daniel P. Miller and Ronald B. Mincy, Social Service Review, 86(4); 604-635, 2012.

<sup>8</sup> *Niemyjski v. Niemyjski* 1982-NMSC-062 ¶7.

<sup>9</sup> NMSA § 40-4-11.1(A), (C) (1); *Quintana v. Eddins* 2002-NMCA-008 ¶¶ 10, 16.

<sup>10</sup> *State ex rel. HSD v. Kelley* 2003-NMCA-050 ¶23 citing *Quintana*.

<sup>11</sup> \$10.50 x 40 hours x 52 weeks ÷ 12 months = \$1820.00.

<sup>12</sup> 2021 New Mexico House Bill No. 190

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## High Income Child Support: Long Awaited Appellate Guidance continued from page 4

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support amount; however, it does not resolve all the issues that arise with determining actual income and accommodating timing adjustments for when that income should be shared. The factors discussed in *Jury* and *Spingola* regarding the needs of the child remain useful to practitioners. ■

*Amber R. Macias-Mayo and Sarah E. Bennett are Shareholders at Walther Bennett Mayo Honeycutt, P.C., where they both practice exclusively in family law matters. Macias-Mayo is the current Chair of the Family Law Section of the State Bar of New Mexico, as well as Best Lawyers, 2021 Ones to Watch. Bennett is Best Lawyers 2021 Santa Fe Family Lawyer of the Year. Macias-Mayo and Bennett have worked together as a team, and individually, on child support determinations for parties whose income exceeds the former of the New Mexico Child Support Guidelines. Each is committed to helping families and fact-finders*

*resolve child support disputes in a manner that is consistent with the law and in the best interest of New Mexico’s children.*

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#### Endnotes

<sup>1</sup> This article was written and submitted for publishing prior to the enactment of New Mexico Senate Bill 140 as an amendment to NMSA 1978, § 40-4-11.1 set to take effect July 1, 2021.

<sup>2</sup> The 1991 Guidelines provided support amounts for parties with combined incomes of up to \$8,300 per month. Thereafter, a percentage of the combined income was used depending upon the number of children (1 child: 10%; 2 children: 15.5%; 3 children: 19.5%; 4 children: 22%; 5 children: 23.9%; 6 children: 25.6%). The 1995 Guidelines changed the combined income amount to \$8,000 per month, and for income that exceeded \$8,000, the percentages changed as well (1 child: 11%; 2 children: 16.1%; 3 children: 18.8%; 4 children: 20.8%; 5 children: 22.6%; 6 children: 24%).

# CHILD SUPPORT SERVICES

By Larry Heyeck

When Title IV-D was added to the Social Security Act of 1975, the primary mission of the child support program was welfare recovery.<sup>1</sup> Child support was intended to recoup from responsible parents some portion of the benefits paid out under Aid to Families with Dependent Children, the precursor to today's Temporary Assistance to Needy Families program.<sup>2</sup> The original mission was broadened by the Child Support Enforcement Amendments of 1984, and states were mandated to help both welfare and non-welfare families.<sup>3</sup>

The Child Support Enforcement Division of the New Mexico Human Services Department is the state's IV-D program.<sup>4</sup> Today, CSED works to enhance the well-being of children by locating absent parents, establishing parentage, establishing child support and medical support obligations, and enforcing those obligations.<sup>5</sup>

## What Is Child Support?

Child support is money a parent pays to help meet his/her child's needs when the parent is not living with the child. It is a parent's "most important single obligation."<sup>6</sup> The starting point for establishing the on-going child support obligation is the New Mexico Child Support Guidelines, NMSA 1978, § 40-4-11.1, that are designed to establish an adequate standard of support for children, subject to the ability of parents to pay it.<sup>7</sup> It is not dependent upon the marital relationship of the parents to each other, but is determined by the relationship of the child to the adults.<sup>8</sup> "The guidelines are not intended to reflect what the parents have in fact been spending for the care, maintenance, and education of their children. Rather, they set the presumptive figure for what parents *should* be spending."<sup>9</sup> Once child support has been ordered by the court, it continues until the youngest child attains the age of majority.<sup>10</sup>

## Who Can Receive Child Support?

A person can receive child support if he/she is the "parent, legal guardian, caretaker relative having custody of or responsibility for the child or children, judicially appointed conservator with a legal and fiduciary duty to the custodial parent of the child, or alternative caretaker designated in a record by the custodial parent. An alternative caretaker is a nonrelative caretaker who is designated by the custodial parent to take care of the children for a temporary period."<sup>11</sup> If any of these individuals receives TANF when the minor child is in the household, child support is assigned to the state.<sup>12</sup>

## What Services Can CSED Provide To Parties?

Anyone can apply for CSED services. If a parent, guardian, or caretaker receives TANF on behalf of the minor child, a CSED administrative case will automatically be opened. If no public assistance has been provided, the parent, guardian or caretaker can apply for services. These services include:



- Locating absent parents
- Establishing parentage
- Establishing court orders for child support and medical support
- Modifying existing child support orders, when appropriate
- Enforcing court orders for child support and medical support
- Working with other states, countries, and Native American tribes and tribal nations to establish and/or enforce child support obligations when one parent does not live in New Mexico or has assets in another state of sovereignty.

### › Applying for Services

Individuals can apply at: [www.hsd.state.nm.us](http://www.hsd.state.nm.us). If the household receives TANF, there are no fees to establish and collect child support. If there are no public benefits, some basic fees are charged. Fees are paid after child support has been set by the court and is being collected. Even non-custodial parents can apply for services. In those instances, CSED serves as a "bookkeeper," accounting for all payments received from the non-custodial parent,<sup>13</sup> and disbursing them in accordance with the court order, laws, and regulations.

### › Establishing Parentage

Today, it is no longer just a mother and father who can be the "parents" of a child. With the advent of assisted reproduction and the United State Supreme Court's recognition of same-sex marriage, who can be a parent has changed.<sup>14</sup> Even "paternity" is no longer simple. Under the New Mexico Uniform Parentage Act, there are definitions for "acknowledged father," "adjudicated father," "alleged father" and the "presumption of paternity."<sup>15</sup>

CSED can assist in establishing parentage. For example, if an individual is an "alleged father," a genetic test can be arranged at minimal cost. CSED will not, however, initiate an action to rescind or disestablish parentage.<sup>16</sup>

### › Modifying a Child Support Order

For a district court to modify an existing child support order, there must be a "substantial change in circumstances, materially affecting the welfare of the child[ ] that has taken place since the entry of the

prior support decree.”<sup>17</sup> There is a presumption of material change of circumstances if “application of the child support guidelines . . . would result in a deviation upward or downward of more than twenty percent of the existing child support obligation and the petition for modification is filed more than a year after the filing of the pre-existing order.”<sup>18</sup> If more than a year has passed, any party to a CSED administered case can request that CSED review the child support order for modification. After reviewing financial and other documentation, CSED will calculate the child support amount using the child support guidelines. When the review is completed, CSED will provide each party with a copy of a post-review notice.

### › Enforcing the Child Support Order

CSED utilizes administrative and judicial enforcement remedies. Administrative enforcement occurs automatically and can include the following:

- Income Withholding (IWO)
- State Tax Refund Offset
- Federal Tax Refund Offset
- Passport Denial Program
- Financial Institution Data Match (FIDM)
- Credit Bureau Reporting
- Liens
- License Suspension
- Medical Support Enforcement

Wage withholding is the most effective form of payment. In a CSED administered case, the wage withholding order is auto-generated directly to the obligated party’s employer.<sup>19</sup> Payments are made to CSED and are disbursed to the custodial party either by direct deposit or debit card. The maximum amount withheld for child support and “any other garnishment shall not exceed fifty percent of the obligor’s income.”<sup>20</sup>

CSED also collects past-due child support payments from federal and state tax refunds of parents who have been ordered to pay child support.<sup>21</sup> Cases eligible for tax refund offset are those cases receiving full services through CSED that have a delinquent child support debt and meet the tax refund offset criteria.

Another effective tool is license suspension. Failure to pay court ordered child support could result in the suspension or loss of delinquent obligor’s driver’s license, recreational license or permit and/or professional license.<sup>22</sup>

Judicial enforcement remedies require court intervention. These can include civil contempt findings and incarceration.<sup>23</sup> In 2011, the United States Supreme Court held that, before imposing civil contempt, a district court must make a specific finding of the delinquent obligor’s ability to pay.<sup>24</sup> CSED does perform “ability to pay” reviews before requesting orders to show cause as incarceration should be the last resort.

Just like everyone, CSED evolved because of the pandemic. Instead of incarcerating delinquent obligors, CSED worked with the New Mexico Department of Workforce Solutions (DWS) to develop the STEP-UP program. The delinquent obligor will meet with a DWS

employment specialist and work toward obtaining employment. This can include using DWS’ comprehensive database, developing and posting a resume, and job training opportunities. During the pandemic, DWS hosted many virtual job fairs. From CSED’s perspective, if the individual obtains employment, wage withholding orders can be issued and payments received and disbursed to custodial parties.

We encourage all practitioners to reach out to us and let us assist you in locating absent parents, establishing child support and medical support obligations, and enforcing those obligations. Together, we can help individuals support their children. ■

*Larry Heyeck graduated from the University of Arizona School of Law in 1987. Heyeck has been employed by the New Mexico Human Services Department since 2005 and has served as Deputy Medicaid Director, Deputy General Counsel and now as the Regional Managing Attorney for the Child Support Enforcement Division assisting CSED offices in Alamogordo, Clovis, Deming, Hobbs, Las Cruces, Roswell and Silver City.*

### Endnotes

<sup>1</sup> 42 U.S.C.A. §§ 601, 602, 603, 606, 651 et seq.

<sup>2</sup> In *Martinez v. Martinez*, 1982-NMSC-097, ¶ 13, the New Mexico Supreme Court stated, “[p]ublic policy dictates that the primary obligation for support and care of a child is by those who bring the child into the world rather than on the taxpayers.”

<sup>3</sup> Child Support Enforcement Amendments of 1984, P.L. 98-378, 98 Stat. 1305.

<sup>4</sup> CSED attorneys represent “only the department’s interests and no attorney-client relationship shall exist between the attorney and another party.” NMSA 1978, § 27-2-27(C).

<sup>5</sup> NMSA 1978, § 27-2-27.

<sup>6</sup> *Niemyjski v. Niemyjski*, 1982-NMSC-062, ¶ 7.

<sup>7</sup> NMSA 1978, § 40-4-11.1(B); see also, *Rosen v. Lantis*, 1997-NMCA-033, ¶ 11 (the guidelines were adopted so that the amount due would be adequate to feed and shelter children). The district court always maintains discretion in awarding child support. *Jury v. Jury*, 2017-NMCA-036.

<sup>8</sup> *Tedford v. Gregory*, 1996-NMCA-067 ¶ 24

<sup>9</sup> *Leeder v. Leeder*, 1994-NMCA-105, ¶ 11 (emphasis in original).

<sup>10</sup> *Bustos v. Bustos*, 2000-NMCA-040, ¶¶ 10-11. Parents have a common law duty to support a severely disabled child if the child was so disabled before reaching age 18. *Cohn v. Cohn*, 1997-NMCA-011.

<sup>11</sup> 45 C.F.R. § 302.38.

<sup>12</sup> NMSA 1978, § 27-2-28(F).

<sup>13</sup> Payments can now be made on-line at: <https://www.e-billexpress.com/ebpp/NMHSDCSED/Login/Index>.

<sup>14</sup> In *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), the United States Supreme Court held that laws barring marriage between two individuals of the same sex are unconstitutional. This was expanded upon in *Pavan v. Smith*, 137 S.Ct. 2075 (2017), where the court held that it applies to laws regarding children born to same-sex spouses.

<sup>15</sup> NMSA 1978, §§ 40-11A-102, 40-11A-201, 40-11A-301-314.

<sup>16</sup> 8.50.107.8(F) NMAC.

<sup>17</sup> *Perkins v. Rowson*, 1990-NMAC-089, § 19.

<sup>18</sup> NMSA 1978, § 41-4-11.4.

<sup>19</sup> NMSA 1978, § 40-4A-4.1.

<sup>20</sup> NMSA 1978, § 40-4A-4.1(E); § 40-4A-6.

<sup>21</sup> 42 U.S.C.A. § 664, 45 C.F.R. § 303.72, 42 U.S.C.A. § 666(a)(3), NMSA 1978, §§ 7-2C-1 et seq.

<sup>22</sup> 42 U.S.C.A. § 666(a)(16), NMSA 1978, §§ 40-5A-4 through 6.

<sup>23</sup> *Niemyjski v. Niemyjski*, 1982-NMSC-062.

<sup>24</sup> *Turner v. Rogers*, 564 U.S. 431, 387 S.Ct. 142 (2011).



# What's the Big Deal About Rule 1-123?

By Deian McBryde



## Rule 1-123 - Didn't He Used To Be Somebody?

Rule 1-123 NMRA is like a fading Hollywood celebrity. We know its name and have a notion of what it does, but we haven't seen it headline a movie lately and aren't sure if it's still alive. Well, the Rule *is* still alive. Maybe a little ignored but, hopefully, plotting a comeback.

## Why It's Still Important

You don't need to care unless it's interesting to lower the temperature between the parties and save clients' money so they can spend it on their kids, and if that's not important, then roll the dice! Okay, perhaps that was a *smidge* snarky. Let me try again.

*Rule 1-123 is a great way to figure out what's happening with the money.* Comprehensive enough for most marital estates and co-parenting situations, disclosures can save fees on discovery and may help to cases settle faster. Also, an honest and fair exchange of disclosures sets a tone of transparency and cooperation between parties, easing a path to settlement. All this, but only if the attorneys get engaged and do them well.

## Comments, Please

F, the inspiring part of Rule 1-123 is the commentary, which lays out the Rule's purpose. Paraphrased, the purpose of mandatory disclosure is to:

1. Decrease acrimony,
2. Decrease mistrust,
3. Emphasize fiduciary duties,
4. Help parties make honest, full, and complete disclosures,
5. Ensure disclosure of assets and their values,

6. Ensure disclosure of debts,
7. Ensure disclosure of income,
8. Lessen legal fees and costs, and
9. Encourage low-cost, efficient, and respectful solutions.

## "Shall" Is Not a Suggestion

Under the Rule, disclosures are not optional; it's the parties' DUTY:

- Domestic relations parties **SHALL** make Rule 1-123 disclosures in every division of property case or to establish or modify child support or spousal support;
- The parties **SHALL** serve preliminary disclosures within 45 days after service of the petition or motion;
- For property and debt division, disclosures **SHALL** substantially comply with Forms 4A-212, 4A-214, and 4A-215 NMRA;
- For property and debt division cases, disclosures **SHALL** include a list of documents used to complete the schedules;
- In child support and alimony cases, the parties **SHALL** serve an affidavit of disclosure with the information required in Rule 1-123(B)(2)(a) through (f) and;
- In spousal support cases, the parties **SHALL** serve an income and expense disclosure following Form 4A-212 NMRA.

## Signed? Sworn? Typed? Handwritten?

Supplemental disclosures must be sworn and served, but the parties should sign all disclosures. The approved forms require signatures.

As for handwritten forms, the answer is yes, if this complies with the purpose of the Rule; however, check the information first to make sure the forms make *full and complete disclosures* of income, assets, and debts. Recreate the disclosures in spreadsheets, check the math, divide community property correctly, and calculate equalization, and consider sending your Excel or Numbers spreadsheet with the disclosures, or even retyping them to be legible because.

## Certificates of Service and Penalties

The commentary recommends that "Certificates of service of the disclosure should be filed with the clerk pursuant to Rule 1-005 NMRA." As for compliance, the Rule itself allows for a permissive award of costs, attorney's fees, and sanctions against a delinquent party.

## Lawyers Have a Role to Play

I, like most, have received disclosure forms that, I perceive, show little care for the Rule's purpose, especially for lowering costs. I ask for disclosures but instead get formal discovery served on my client, who might have few assets and nothing to hide. Sometimes, I get a discovery packet *with* the petition, which means the straightforward *and* easy-to-complete *mandatory* disclosures are due *after* the first round of formal discovery. Sadly, even when I do get disclosures, they are usually handwritten by the opposing party and not always checked by the attorney. Only one time have I received disclosures with the required affidavit and a list of documents used to complete the schedules.

## Let's Do It!

Rule 1-123 has only been around since 2000, and many in our family law bar "grew up" without this vital tool. For newer attorneys, I know it can be discouraging to put work into careful 123 disclosures only to get something less helpful back and wonder, "Why do it if I'm the only one?"

Consider this: "Would your clients, given their resources and after being fully informed of the options, rather pay for disclosures using three short forms and a list of documents, or would they prefer to pay you to send, receive, respond to, and supplement 40 pages of discovery plus all the supporting records?" Also, "Should your clients pay for discovery if preliminary disclosures would get the job done?"

I invite you to commit to lowering costs, reducing acrimony, increasing trust, and setting our cases up for an affordable settlement by complying with mandatory disclosures.

"Ladies and gentlemen, welcome back to the family law red carpet, Rule 1-123." ■

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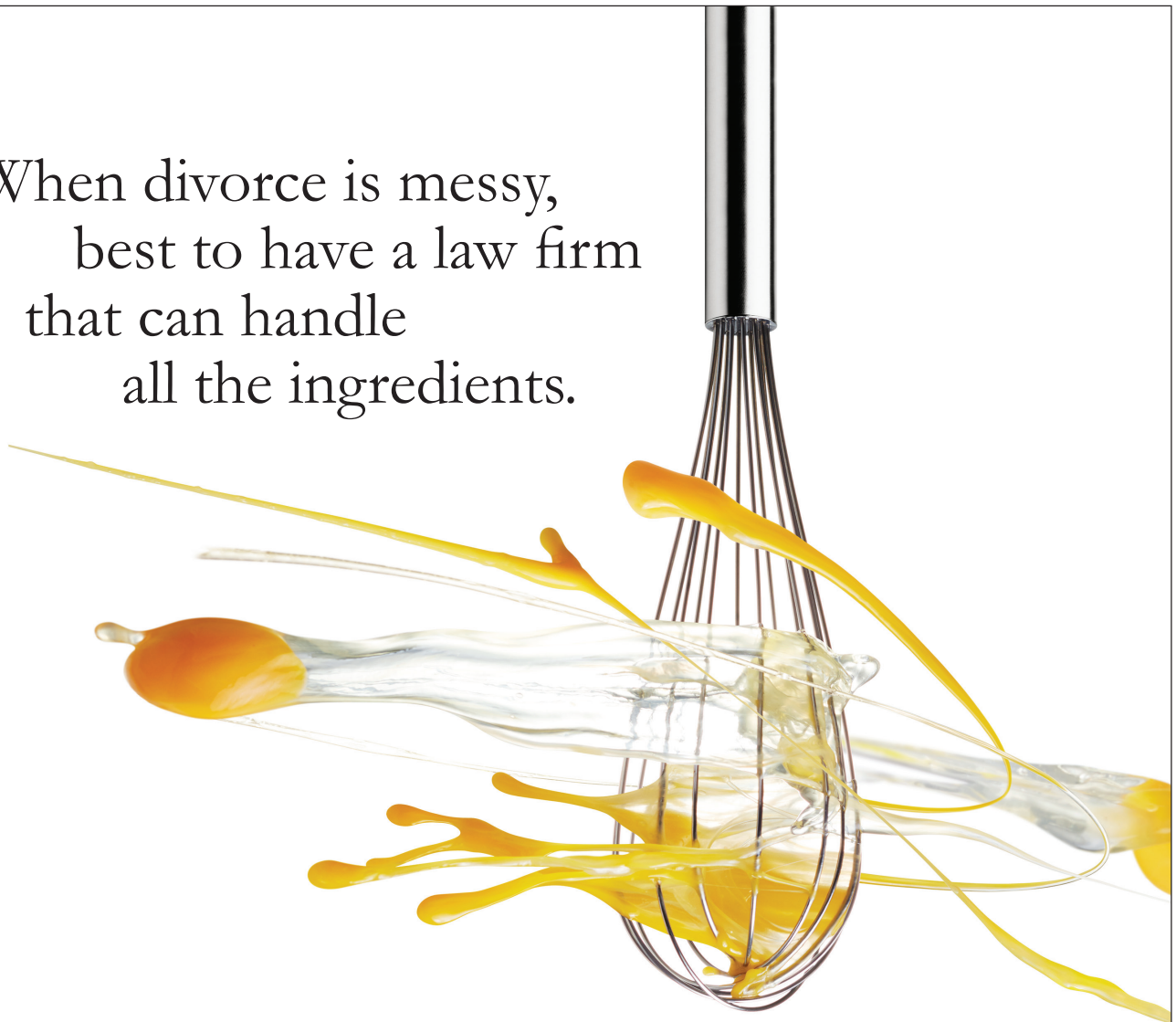
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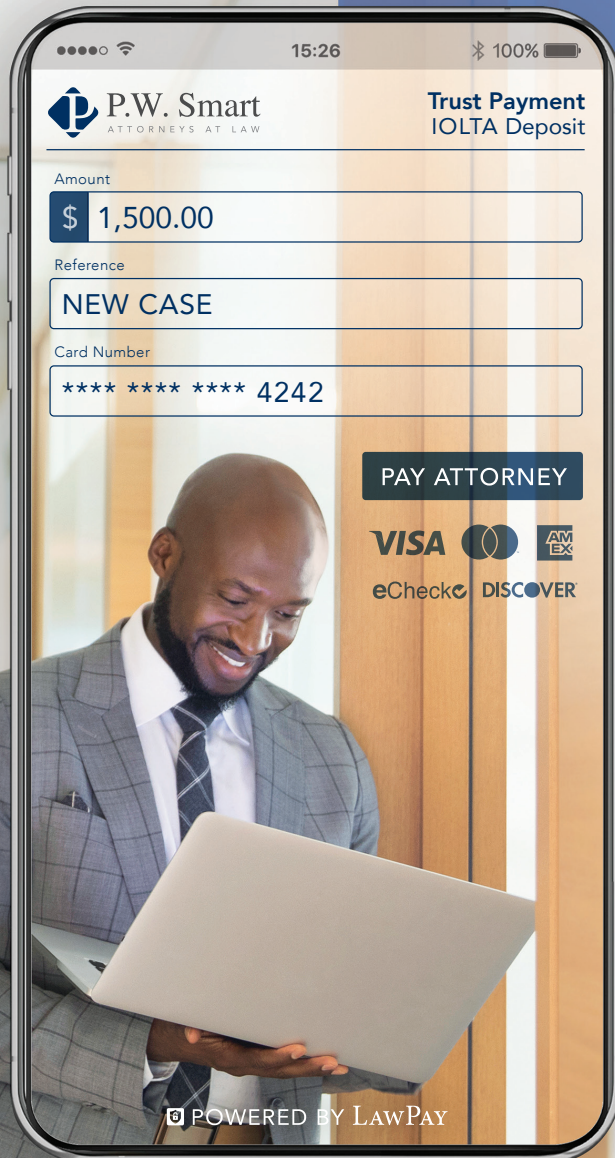
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