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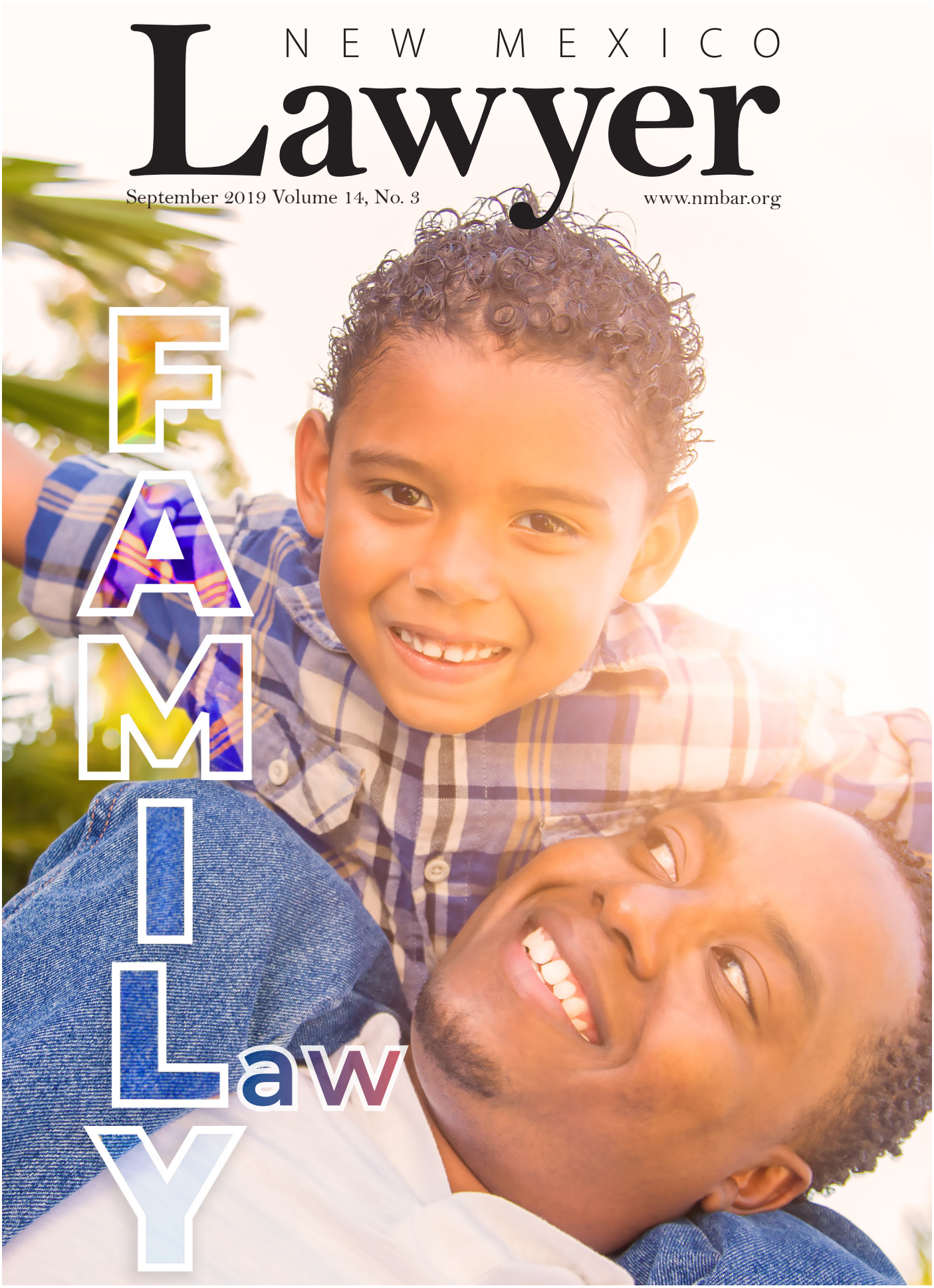

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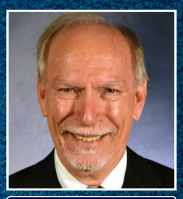

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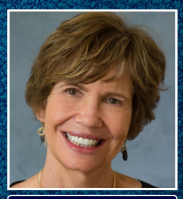

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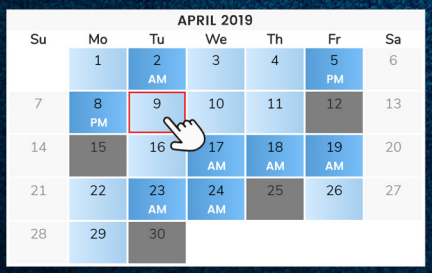

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Representing Juveniles:
Abuse/Neglect vs. Parental Custody

by Kathryn E. Terry

There are many different areas in which a lawyer can represent a child: abuse/neglect proceedings, juvenile justice cases, guardianship cases, probate cases, civil litigation cases, and parental custody cases. This article focuses on representing a child in abuse/neglect cases and parental custody cases from my experience as an attorney for children in New Mexico.

In both systems, the child's attorney can file motions and request relief. In custody cases, however, the judge has broader discretion, while in abuse/neglect cases the state has authority over the placement of the child. This decision can only be overturned by a showing of abuse of discretion. Therefore, even if a child, a child's attorney, and the judge disagree with the placement, the state's decision will stand unless it is shown that the state abused its discretion. In custody cases, the judge has complete discretion over the time-sharing schedule and physical custody of a child.

Abuse/Neglect Cases

Abuse/neglect cases involve children who have been taken into custody by the state and are in foster care, relative placement care, or another type of out-of-home placement. *See* NMSA 1978, § 32A-4-1, *et seq*. In these cases, the state is the legal custodian of the child and is responsible for the child's placement, education, scheduling and ensuring the child receives medical, dental, counseling services, and visitation with parents or other family members. All parties to an abuse/neglect case, including children, have a statutory right to counsel under the Children's Code.

For children under 14 years old, the child is appointed a guardian ad litem (GAL), an attorney who advocates for the child's best interests. The GAL ensures the child has necessary state services, safe and appropriate placement, and time with family members. The GAL also checks that social workers and other agents of the state are following stated policies and laws. While a child's wishes are important and are to be considered, a GAL advocates for the best interests of a child.

For children over 14, the child is represented by a youth attorney. If a child is under 14 at the time a case starts but turns 14 prior to the case ending, the GAL can become the child's youth attorney. In this role, the attorney is appointed to advocate for the child's wishes. This can be a difficult role when a child wants something that is contrary to his or her best interests, such as wishing to return to an abusive parent. In these situations, the attorney can use the phrase "my client has stated . . ." or "my client wants . . ." to indicate to the Court that a child wants something that is contrary to his or her best interests.

The attorney also has standing to challenge the evidence provided by the state or the parents. Additional responsibilities include meeting with the child prior to any proceeding, attending treatment team meetings if the child is in treatment foster care, attending individualized education plan meetings if the child is in special education, communicating with mental health professionals treating the child (with the child's consent if the child is over 14), reviewing medical or mental health reports for the child, representing and protecting the child's cultural needs, and advocating for a child's right under federal laws such as the Americans with Disabilities Act and Individuals with Disabilities Education Act.

Abuse/neglect cases tend to follow specific phases: custody, adjudication, judicial review, permanency, termination of parental rights, and dismissal. Each phase is dictated by federal timelines based largely on the needs and timeline of

the child. Children are now required to attend all hearings, unless there is good reason for the child not to attend. Good reason can include a therapeutic recommendation from the child's counselor that that child should not attend a hearing, a child is in school, or it would be traumatic for a child to be in the courtroom. A child 14 or older can choose not to attend hearings. At each hearing, the GAL or youth attorney reports the child's progress to the court, voices the concerns, and states the child's wishes.

Custody. In New Mexico, almost all cases begin with a plan to reunify the family and send the child home to the parents. When a child is alleged to have been abused or neglected, the state files a petition and an affidavit outlining the abuse or neglect. If the petition is granted, an ex-parte custody order is entered allowing for the state to have temporary legal custody and for out-of-home placement of the child. The first hearing that occurs is a custody hearing with expanded rules of evidence to determine whether there is probable cause to keep the child in state custody. The hearing officer or judge does not make a determination regarding the parents' actions but decides whether the child should remain in state custody for further proceedings. This hearing is required to be held ten days after the ex-parte custody order is signed. NMSA 1978, § 32A-4-18.The appointment of the child's attorney occurs at the time the custody hearing is scheduled, therefore the GAL or youth attorney has only a few days to prepare for the custody hearing. From the custody hearing, a general assessment plan is developed in which the parents and the child are ordered to attend assessments and follow recommendations.

Adjudication hearing. Sixty days after the custody hearing is held, the court is required to hold an adjudication hearing—a trial to determine if the parents abused or neglected their children. NMSA 1978, § 32A-4-29. The adjudication hearing pertains only to events that occurred from the time the state was contacted regarding potential abuse or neglect until the time of the custody hearing. The child's attorney will often take a position regarding the state's case, but the burden of proof is on the state, not on the child. By this point in the case, the GAL or youth attorney should have met with the child and interviewed foster parents, teachers, and other people close to the child. The attorney may also have observed a supervised visit between the child and the parents. The GAL or youth attorney can question and call witnesses at the adjudication hearing, but this is not required. The attorney for the child will again give a report to the court regarding how the child is doing and will let the court and the state know if there are any other services the child needs. If the court determines there was no abuse or neglect, the case is dismissed and the child is returned home. Sometimes there will still be recommendations for counseling.

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Divorce without Court

by Mary Ann R. Burmester

Divorce is hard enough without the stress of going to court and having a stranger in a black robe make binding decisions that affect every aspect one's life. Fortunately, mediation and collaborative divorce are two excellent alternates to the court divorce process. Part one discusses mediation and part two discusses collaborative divorce.

Part One – Mediation and related options:

Typically, couples want to make the divorce process as painless, quick and inexpensive as possible. Mediation can be used to settle the divorcing couple's issues before or after the divorce petition is filed. Custody and financial issues can be resolved together or separately through private mediation, court-affiliated mediation, and settlement facilitation.

Private Mediation:

Private mediation is definitely worth consideration. In private mediation the parties pay a neutral professional, who does not represent either party, to help negotiate an acceptable agreement.

> *"...mediation and collaborative divorce are two excellent alternates to the court divorce process."*

While therapists and accountants can and do serve as private mediators, it is best to use a domestic relations lawyer-mediator, especially if the couple wants the mediator to draft the settlement agreement and court pleadings, or to review and revise pro se forms completed by the couple. The couple can tap the expertise of other professionals while still using an agreed lawyer-mediator. If the parties need expertise in financial matters, they can consult an agreed accountant or divorce financial planner. An experienced child psychologist or family therapist can help the parents work through disputes concerning the children.

The private mediator must remain neutral throughout the relationship with the parties to insure a successful divorce mediation. The parties should meet together with the lawyer-mediator at the initial consultation. This prevents the potential conflict of interest that may arise if the lawyer-mediator meets separately with either spouse. Also, all communications between the parties and the mediator should be sent simultaneously. This keeps everyone on the same page and prevents the appearance of one party trying to get the mediator to take his or her side.

Private mediation can take place in one or more meetings. Participation by well-prepared parties will result in more productive meetings. Before the mediation meeting, the parties need to provide the mediator with documents necessary:

- To allocate property and debt, both community and separate;
- To address custody, if applicable, a draft parenting plan;
- To calculate child support, the allocation of time-sharing, the gross income of each parent, the cost of the child's health insurance, the work-related daycare expenses, and additional expenses such as private school tuition; and
- To evaluate the need for alimony, the average monthly income and expenses of each spouse.
- If an agreement is reached, it must be memorialized in pleadings that are submitted to the judge for review, approval and filing. The lawyer-mediator or the parties' lawyers may draft and submit these documents. The parties pay for the private mediator and their lawyers' time preparing for and attending the mediation.

Family Court Services:

Mediation through services affiliated with specific courts is different than private mediation. Court-affiliated mediation usually focusses on child custody, visitation and co-parenting issues. The mediator does not address child support, alimony, and property and debt division. The parties share the court affiliated mediation fees, allocated in accordance with their relative incomes. If an agreement is reached, the family court mediator submits it to the court.

Settlement Facilitation:

Settlement facilitation is a form of mediation that is usually ordered by the judge. It can also be agreed upon by the parties or their attorneys. A neutral professional, usually a lawyer or a

lawyer-accountant or psychologist team, serves as settlement facilitator. Settlement facilitation is usually done in one meeting, either half-day or full-day. Often, there is more arm-twisting and time pressure involved in settlement facilitation than in private mediation. For example, the parties may not be able to get a trial date set until they have engaged in the settlement facilitation process. The settlement facilitator will offer an opinion on the various resolutions proposed and on how a particular judge may rule if the case goes to trial. A good settlement facilitator provides a "reality check" for the parties.

> "When parties reach an agreement they can live with, they are more likely to honor its terms..."

As in private mediation, the parties provide financial information to the facilitator in advance. In addition, the parties may each provide a statement of what it proposes as a resolution to the issues. As in private mediation, if an agreement is reached, it must be memorialized in pleadings that are submitted to the judge for review, approval and filing. The parties pay the facilitator for his or her time. If the parties are represented, they must also pay their attorneys for representation at the settlement facilitation.

Mediation, including settlement facilitation, does not work for all divorcing couple. For example, if there is a history of imbalance of power in the relationship, the subordinate spouse may give up too much in the settlement to avoid further conflict. This often occurs when there is a history of domestic abuse. Another example is where one of the spouses knows the entire financial picture and the other does not. If there is a lack of trust or poor information sharing, one spouse may hold on to unreasonable expectations about the amount of child support, alimony and property he or she should receive in the divorce. Although mediation is not easy or inexpensive, most divorcing couples prefer to settle their disagreements through mediation, to going through the time, emotional trauma and financial expense of a trial. The couple retains more control over the outcome than when a judge makes the decisions. Each party knows what is most important to moving on, and knows what they must have and what they can live without.

Part Two – **Collaborative Divorce:**

Collaborative divorce allows couples to resolve their conflicts through a series of constructive meetings between the two spouses and a professional team. The parties enter into a contract before divorce proceedings are initiated. In the contract they commit to transparency regarding finances and to honesty about what is best for their children and for each other. As with mediation, the objective is to empower the couple to decide the outcome without resorting to the court for resolution. To that end, a team of professionals, which usually consists of a lawyer for each spouse, a neutral financial analyst, a neutral mental health professional or "divorce coach", and a parenting coach.

The team's financial analyst helps the parties focus on a financial settlement that takes into account the short and long term well-being of both parties. The team's mental health professional, or divorce coach, helps both sides reach a level of emotional understanding necessary to negotiate in good faith. This can mean working through the anger, hurt, sadness and frustration that often comes with the death of the marriage. The team parenting coach talks to both parents to find out what is really motivating their custody concerns, and to urge the consideration of their children's development over time.

There are many reasons to see the collaborative divorce process through. If the process fails, the lawyers are disqualified from representing the spouses in court and the professional team members cannot testify as experts for a single party in court. The "carrot" in collaborative divorce is the parties' financial investment in the process, its privacy, and control of the negotiations through the team effort. The "stick" is losing the team support if one party pulls out, and the financial and emotional detriment caused when the case

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Setoffs May Protect Marital Property Settlements in Chapter 13 Bankruptcy Proceedings

by Don F. Harris

A recent New Mexico bankruptcy court case has offered family and bankruptcy lawyers a new way to protect an ex-spouse owed money or property when the other ex-spouse files for Chapter 11 or 13 bankruptcy.

Many Marital Settlement Agreements ("MSAs") will create debts that flow from one ex-spouse to the other. Often those MSAs have obligations that go both ways. For instance, an MSA might require one ex-spouse to pay four credit cards and a student loan, and the other ex-spouse is to pay a lump sum property settlement, some other credit cards, alimony, and child support. Such mutual debts can function as setoffs, and these offer the most potential protection for each spouse.

A more familiar setoff arises when a bank has lent money to a borrower and the borrower has a deposit account at the same bank. If the borrower has defaulted on the loan to the bank, the bank need not allow the borrower to withdraw money from the deposit account.[1] The Bankruptcy Code treats the right to setoff the same way it treats a lien.[2] A lien, or secured claim, on a property allows a creditor to look to that property to enforce the debt. For instance, a car lender can seize the vehicle when the loan is in default. Someone with a right to setoff can, in effect, seize the money (by withholding it) owed to the party in default.

The bankruptcy code states, in relevant part:

> [T]his title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case . . . .[3]

Property settlements included in MSAs can be discharged in Chapter 13 bankruptcy cases, but not those under Chapter 7. Although a property settlement cannot be discharged by an individual in Chapter 11 either, a debtor could potentially spread out property settlement debt arising from a divorce over many years. Family and bankruptcy lawyers will often look out for property settlements after a divorce, and recognize that the debt can, potentially, be eliminated in a Chapter 13 case.

But what about setoffs in such settlements?

In re Williams, a 2018 case, addresses this issue and is potentially helpful for family lawyers evaluating setoffs created in divorce judgments.[4]

In Williams, I represented Steve Williams, whose ex-wife Tanya had filed a Chapter 13 bankruptcy. Tanya and Steve were divorced not long before the bankruptcy was filed. Their MSA required Steve to pay Tanya a monthly lump sum to include alimony and her share of Steve's military pension, as the marriage did not have enough overlapping years with the military service for the government to divide the pension. In return, Tanya was required to pay certain debts, including a Wells Fargo credit card that was in the name of both parties.

When Tanya filed her Chapter 13 petition, she stopped paying the Wells Fargo credit card. Steve continued paying the alimony

and the monthly property settlement payments. This forced Steve to also pick up the Wells Fargo tab while continuing to pay Tanya. Steve was retired and on a fixed income. He was not happy that the deal he struck in the MSA was immediately threatened by the bankruptcy filing.

The problem for Tanya was that Steve was paying her money under the same MSA that required her to pay the Wells Fargo account on Steve's behalf. This created obligations going in opposite directions, which in turn created a right to setoff.

I filed a secured claim in the bankruptcy case for Steve, and I objected to the Chapter 13 Plan for "not providing for" (i.e. ignoring) Steve's secured claim. The judge ruled in Steve's favor, and the case ultimately was converted to a Chapter 7 case. The parties settled regarding the offsetting claims.

By comparison, a family lawyer might go into state court and ask for a "credit" against alimony or property settlement payments for debts that the ex-spouse had to pay, but should not have. It is the same concept.

Williams is a very important and well-reasoned opinion. It is also helpful for family practitioners in general as it goes through the common law of setoff, an issue that can arise in family court cases involving MSAs. *Williams* does not address whether a child support obligation could be a setoff in a Chapter 13 bankruptcy proceeding, as that issue was not presented. Some state courts have held that child support cannot be set off against other debts.[5] *Williams* also does not address the interesting issue of whether a family law attorney can transform a property settlement into a Domestic Support Obligation—generally child support and alimony, not dischargeable in any bankruptcy proceeding—through artful drafting.[6]

If a Chapter 13 bankruptcy is pending, an existing MSA and the issue of setoffs should be raised first in the bankruptcy court rather than state court. It could violate the bankruptcy automatic stay to proceed to state court while a Chapter 13 case is pending.[7] Although state courts can address this issue after the bankruptcy is complete, best practice would be to ask the bankruptcy court for relief. ■

Don Harris is recognized as a bankruptcy specialist by the American Board of Certification, and he devotes a substantial portion of his practice to family law.

Endnotes

[1] *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995); 11 U.S.C § 553.

[2] 11 U.S.C. § 506(a)(1).

[3] 11 U.S.C. § 553(a)

[4] *In re Williams,* 2018 WL 3559098 (Bankr. D.N.M. 2018).

[5] *E.g., Koren v. Koren*, 279 A.D.2d 829 (N.Y.Sup.Ct. 2001).

[6] *See* 4 Collier on Bankruptcy ¶ 523.11[6] (16th ed) (label in agreement not controlling, but may help).

[7] *In re Foster*, 574 B.R. 19 (Bankr. D. Maine 2017) (ex-wife sanctioned by bankruptcy court for seeking to modify divorce orders without getting permission from bankruptcy court).

Making Babies, With and Without Sex

by Sheryl L. Saavedra, Esq. and Harold O. Atencio, Esq.

"My biological clock is TICKING LIKE THIS (foot stomping) and the way this case is going, I ain't never getting married [or having babies]! — *My Cousin Vinny.*

The options for adoption (babies created through sex) and assisted reproductive technology (babies created without sex) are changing, with advances in technology and changes in social norms. There are more single mothers choosing to parent their children. There are more women electing to delay their child-bearing years in favor of career advancement. There are more non-traditional couples who wish to raise children. Each of these changes in parental culture is taking place on a global scale. As a result, more and more individuals and couples are turning to alternative ways to create their families. This raises new issues for attorneys helping clients navigate the legal process.

Adoption:

Adoption has historically been a popular method for growing or creating a family for infertile couples and in those instances where caring for a child born to a family member becomes necessary. Today, fewer newborns are available for adoption. Birth control efforts have largely been more effective among teenagers as birth control becomes more readily available and sex education becomes more widespread. A society with fewer unplanned pregnancies is a society with fewer newborn children available for adoption.

It is also more socially acceptable for a woman to choose to raise her child as an unwed mother. Young women that opposed abortion, but were not finished with their education or financially secure, would consider placing their child for adoption in previous decades. Today, those same women are finding ways to raise their children with the help of government assistance, family assistance and plain grit.

The way adoptive parents are selected has also changed from adoption agencies selecting a potential adoptive family to birth parents selecting an adoptive family based on the attractiveness of the adoptive family's profile—usually presented online, using expensive videos. When Angelina Jolie and Brad Pitt wanted to adopt another child, they had their pick. However, a couple in their 40's with a high school education and a low paying job at Walmart might never be selected by a birth mother to adopt her child.

In New Mexico, the Children, Youth and Families Department continues to be an inexpensive resource for potential adoptive parents; however, many of the children available for adoption from CYFD are drug and alcohol exposed in utero or, if older, have been traumatized for a significant portion of their young lives. Many of the children that have been in CYFD custody will need a parent that is educated and equipped to raise a child with bonding and attachment issues or other special needs. CYFD also has a legal mandate to attempt to place children with relatives, prior to finding a non-relative adoptive placement. A whole industry of legal representation now exists to represent foster parents who want to intervene in the abuse and neglect case to advocate for a child whom they may have had in their custody for several years, sometimes since birth.

The cost of adoptions has increased by a factor of four and adoption matters are not easily litigated *pro se*. The federal

adoption tax credit, which has recently increased from a maximum of $13,810 to a maximum of $14,080 per adoption does provide some assistance to families adopting a child, but excludes step-parent adoptions. See 26 U.S.C. §23.

Second parent adoptions are another option for step-parents or where the parties simply elect to cohabitate or co-parent. Second parent adoptions can also involve any other person that serves in the role of parent or primary caretaker of a child, including a grandparent, close friend, or other relative. The second parent adoption is a way of protecting a child from an absent parent or foster care in the event of the custodial biological parent's terminal illness or death.

Delayed family creations may result in scenarios where parents are waiting longer and longer to have children, only to find that when they are ready, they are unable because of advanced age or subsequent medical conditions. Because there is a limited supply of children available for adoption nationally, potential adoptive parents may wish to consider artificial reproductive technology to create families.

Artificial Reproduction:

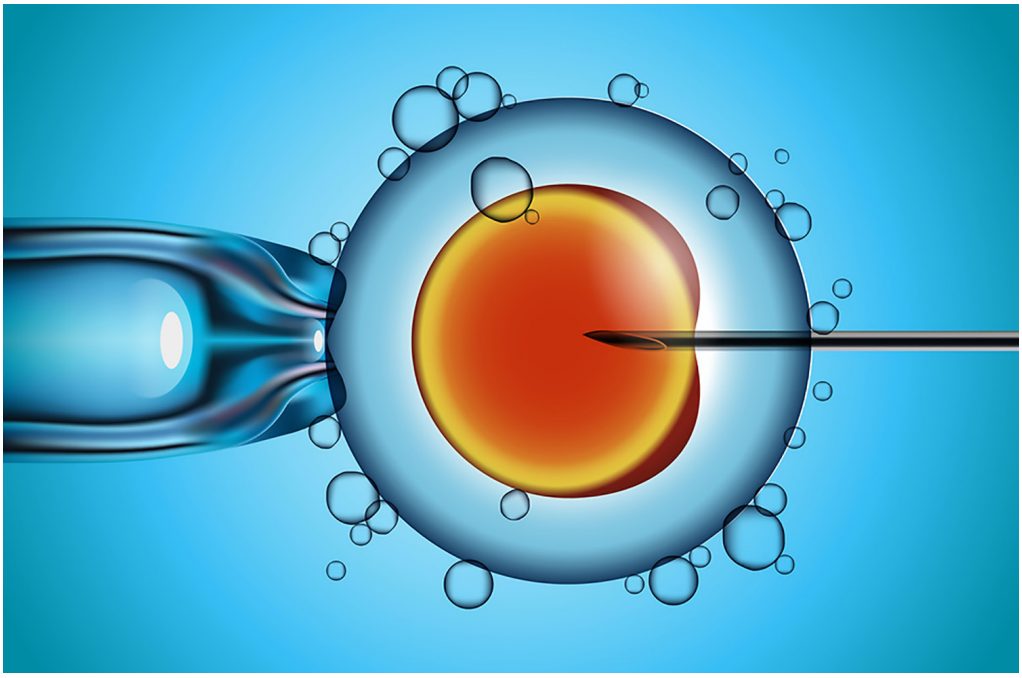
Options in artificial reproductive technology (ART) include sperm donation, artificial insemination, egg retrieval/egg donation, in vitro fertilization (IVF), intracytoplasmic sperm injection (ICSI), embryo donation, gestational carriers (rent a womb), pronuclear transfers and spindle nuclear transfer (three parent DNA). Potential parents are sometimes able to utilize their own genetic gametes, sperm or eggs if they want a child that is genetically related to them. Recently, vitrification methods to freeze human eggs have given women the ability to freeze their eggs at a time when their fertility is at its highest without the need to know who the genetic father of the child will be. Previously, only embryos had a high rate of successfully surviving the freeze and thaw necessary for long term storage.

Increasingly, individuals and couples seeking to have children are more concerned with having a child than with taking the appropriate legal steps to ensure that parentage issues are properly addressed. There have been cases in which a cooperative sperm donor gets sued for child support by the State when the same sex female couple splits up and the custodial parent obtains state financial assistance. *Mintz v. Zoernig*, 2008-NMCA-162, 198 P.3d 861. Litigation has ensued between same sex couples disputing custody of a child when both parents were raising the child that is genetically only the child of one of the parents. *Chatterjee v. King,* 2012-NMCA-019, 280 P.3d 283. On more than one occasion, a gestational carrier has refused to allow selective reduction of one or more fetuses in a multiple fetus pregnancy when requested to do so by the intended parent(s). *Cook v. Harding,* 190 F.Supp.3d 921 (C.D. Cal. 2016).

Consultations and properly drafted contracts are more important than ever. Ethical considerations can be complicated. Assisted reproduction is occasionally referred to as collaborative reproduction. This is because both the intended parent(s), the individual or individuals who intend to raise the child and the gamete donor(s) and/or the gestational carrier will begin the process with the same goal—the creation and birth of a healthy child for the intended parents to raise and support. However, the interests of the parties to an assisted reproductive contract may diverge during the pregnancy or after the birth. A misunderstanding of their rights and obligations at the beginning of the process, or a failure to consider all the ramifications of the contractual agreements, together with the fact that a pregnant woman has certain constitutionally protected rights, may result in problematic outcomes.

The cost of finding an agreeable donor, a gestational carrier and a highly qualified reproductive endocrinologist can be extreme. Gestational carrier services run between $25,000 and $40,000, in addition to her expenses. Gestational carrier companies charge between $20,000 and $25,000. The endocrinologist can charge $10,000 and up. Legal fees for counsel representing each side can be $2,000 to $6,000. As technology advances, some of the costs involved may be reduced; however, the trend has been that gestational carrier fees are increasing rather than decreasing. Intended parents or parents without financial resources often seek a donor or gestational carrier willing to volunteer, creating a whole other host of legal issues.

As adoption becomes less available, ART becomes a more viable and sought-after option. ART gives the intended parent(s) the ability to select a donor or gestational carrier rather than waiting for a birth parent to select them. The intended parent(s) can contract with a gestational carrier regarding health and safety concerns that are not possible to address in adoption. For example, a gestational carrier contract frequently restricts a carrier's right to travel in areas where Zika is a risk, what a carrier will eat, whether a carrier may engage in certain sports, and can even require drug and/or alcohol testing during pregnancy to protect the unborn child in ways that are not practicable in adoption.



Overall, ART is becoming more common and adoption less common. This is also true on an international scale. Intended parents are traveling and contracting with gestational carriers from other countries when the home state of the intended parent(s) does not permit them to enter into a contract with a gestational carrier. Ironically, in those cases, in order to avoid limitations on single or same sex intended parents, attorneys will use adoption law to secure parental rights following the birth of a child born through ART.

While adoption is more budget friendly than ART, the cost of both adoption and ART gives the wealthy an advantage. This is not to say that there are not options for those of lesser means, but those individuals and families will need to be more creative or lucky in their search for a child if they are not able to create a child through their own sexual encounters. ■

Sheryl L. Saavedra has been practicing family law for 25 years and is an attorney with Batley Powers Family Law, P.A. Harold O. Atencio owns Peak Legal Group, has been practicing Adoption and Assisted Reproduction for over 25 years and is a fellow of the Academy of Adoption and Assisted Reproduction Attorneys. Hal and Sheryl are husband and wife, practicing similarly, but separately.

Divorce without Court

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ends up in court. The incentives to stay the collateral divorce course make it an excellent option for resolving a divorce.

After the divorce is finalized, the collaborative divorce process provides the parties with the continued support of the professional team that helped craft the divorce agreements. This is a valuable resource for the parties when questions regarding parenting and financial issues arise post-divorce.

Although paying for two lawyers, a financial expert, a divorce coach and a parenting coach may sound exorbitant, the parties are actually getting the most for their money in collaborative divorce. The idea of the team is to utilize the correct skill set at the most cost-efficient price. The parties pay the professional who has the expertise to assist on each issue of contention.

Conclusion:

Mediation and collaborative divorce provide alternatives to litigating a divorce or custody case and are well worth considering. When parties reach an agreement they can live with, they are more likely to honor its terms than when the terms are imposed by a stranger in black robes. With an agreed resolution the entire family is better able to move forward to the next chapter in life. ■

Mary Ann R. Burmester has been practicing family law for more than 30 years. She practices with NM Divorce & Custody Law LLC. She serves on the board of directors of the State Bar Family Law Section and the New Mexico Collaborate Practice Group and is a fellow of the American Academy of Matrimonial Lawyers.

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Parents may take a plea to avoid a trial. These proceedings are civil, not criminal, therefore the plea agreement can only be used in further abuse/neglect proceedings and cannot be used in any criminal case. If a criminal case is pending, a parent may receive use immunity so nothing in the abuse/neglect case can be used in the criminal proceeding. From the trial or plea, the court will order a treatment plan with specific services for the child and the parents.

Judicial review. Ninety days after the adjudication hearing, the court holds an initial judicial review. This is an opportunity for the court to obtain information on whether the parents are working through their treatment plans, how the child is doing in the out-of-home placement, whether the child has moved, and whether any changes need to be made to placement, visitation, or treatment plans. The state must demonstrate that it is making reasonable efforts to reunify the child and the parents.

Permanency hearing. Six months after the initial judicial review, the court holds a permanency hearing. At this hearing, the state is responsible for recommending either reunification if the parents are making progress, or that the plan should be changed to guardianship, adoption, or a planned permanent living arrangement. If a child is with family members who are partly working their plans, but need more time, guardianship might be an appropriate option. If the parents are not working their plan and not making any progress in eliminating the causes and conditions that brought the child into custody and the child is under 17 years old, the plan is likely to be changed to adoption. The plan can be changed back to reunification if a parent begins making progress.

For a child 16 or older who does not want to be adopted, the state can create an independent living plan for the child. This involves an assessment of the child's skills and needs, along with an application for the child and the social worker to complete. In New Mexico, a child living independently can receive benefits such as Medicaid, a housing stipend, tuition for college or trade school in New Mexico, and additional supports for finding a job or enrolling in school. Some of these benefits can be available until the child is 26. The youth attorney for the child is responsible for assisting the child with the applications, making sure the appropriate appointments and assessments are done, and advising the child on the child's rights and responsibilities throughout the process.

Termination of parental rights. If a parent continues to fail to make progress with his or her treatment plan, the state can file a motion for termination of parental rights. The state has the burden of proving that it made reasonable efforts to help the parents and that the parents failed to make sufficient progress or change the concerns that led to the state taking custody of the child. In New Mexico, if the state does not file the motion for termination of parental rights and the child is over 14, the child has a right to file the motion and request attorney fees be paid by the state. If a parent does not wish to go through a trial on the motion for termination of parental rights, a parent can voluntarily relinquish his or her rights to the child.

Dismissal. Subsequent permanency hearings are held every six months until the child is returned home, adopted, or the case is otherwise dismissed. Once the adoption, guardianship, or transition to independent living is complete, the case is dismissed. A case is also generally dismissed when a child turns 18, by which point one of the above events is likely to have occurred.

Parental Custody Cases

In contrast to an abuse/neglect case, in a parental custody case a child does not have any statutory or rule-based right to an attorney. Instead, the appointment of an attorney for a child is discretionary, based on the facts, circumstances, and needs of the child. Here, a child can be appointed a GAL in a parental custody case regardless of the child's age. The GAL is required to investigate by interviewing all parents or parties involved in the case, interviewing the child, interviewing mental health professionals and any other professionals the GAL deems necessary, and reviewing any documentation the GAL deems necessary. In custody cases the GAL have more active role in making formal recommendations to the court for the best interests of the child, including legal or physical custody, time sharing, choice of school, choice of religion, extracurricular activities, or any other issue that is disputed between the parents. The GAL can be appointed for a limited purpose (determining what school the child should attend) or for more general purposes. The GAL, as an advocate for the child, often

provides suggestions and guidelines for the parents on issues such as communication.

Pursuant to New Mexico Statutes, when a child is 14 or older and the court is considering a change in custody, the court is required to consider the child's wishes. The court is still required to act in the child's best interests. In practical terms, children who are 17 and whose parents are in a high-conflict custody case are likely going to have more say in where they spend their time. Teenagers often "vote with their feet" as they get closer to turning 18. An attorney representing an older teenager can help that child voice concerns and can help the child and parents better communicate so they can improve their relationship and decrease conflict.

The appointment of a GAL is rule-based in New Mexico, not statutory-based. There are no set phases or timelines for ongoing parental custody cases, and appointments can have a specific duration or can be indeterminate. Additionally, the appointment of a GAL can occur at the beginning of a case, for example in a particularly contentious divorce proceeding, or after years of litigation. If no expiration date is included in the order appointing a GAL, the only event that would automatically trigger the end of the GAL's appointment is a child turning eighteen. If the child still requires a GAL after the expiration date set out in the order, either parent or the GAL can request that the appointment be extended. Similarly, if there is no expiration date, either parent or the GAL can request termination of the GAL's appointment.

A GAL in a parental custody case often has wide discretion and, upon the agreement of the parties, can be given arbitration authority for certain decisions. Once recommendations are made, if a parent objects to the recommendation, the GAL gives an oral report regarding the investigation and the recommendations and can be questioned by the parents or the parents' attorneys. GALs can also call witnesses and cross-examine any witnesses who are called by the parents.

In custody cases, a GAL also has the role of being a referee between the parents. GALs are usually appointed in high-conflict custody cases, when the parents cannot agree on decisions for their child. Often the parents have been through multiple professionals, including a parent coordinator, a custody evaluation, or additional mental health assessments prior to the appointment of the GAL. Sometimes the case has been pending for a long time as the judge has attempted to work out the disputes between the parties. Often, the appointment of a GAL is a last-resort option. In custody cases the GAL is an arm of the court that serves as the court's eyes and ears in helping the court determine what decisions are in the child's best interests.

Conclusion

In each system, the attorney gives the child a voice by reporting to the parties and to the court what the child wants and how things look from the child's point of view. An attorney appointed in a parental custody case may have more authority to make recommendations to the court about specific issues, whereas an attorney appointed in an abuse/neglect proceeding is more of a check and balance. In both, attorneys have an opportunity to change the outcome for a child. In custody cases, that change might be decreasing the conflict between two parents or creating a less disruptive time-sharing plan. In abuse/neglect cases, the change might be providing a better home and a more stable foundation for a child. These changes can fundamentally affect how a child develops, what opportunities the child might have in the future, and the child's mental health. Being an attorney for a child, regardless of the system, is a powerful role that comes with specific duties and significant responsibilities. ■

Kathryn Terry practices family law with a passion for the welfare of children. She served on the board of the Children's Law Section of the New Mexico State Bar for eight years

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