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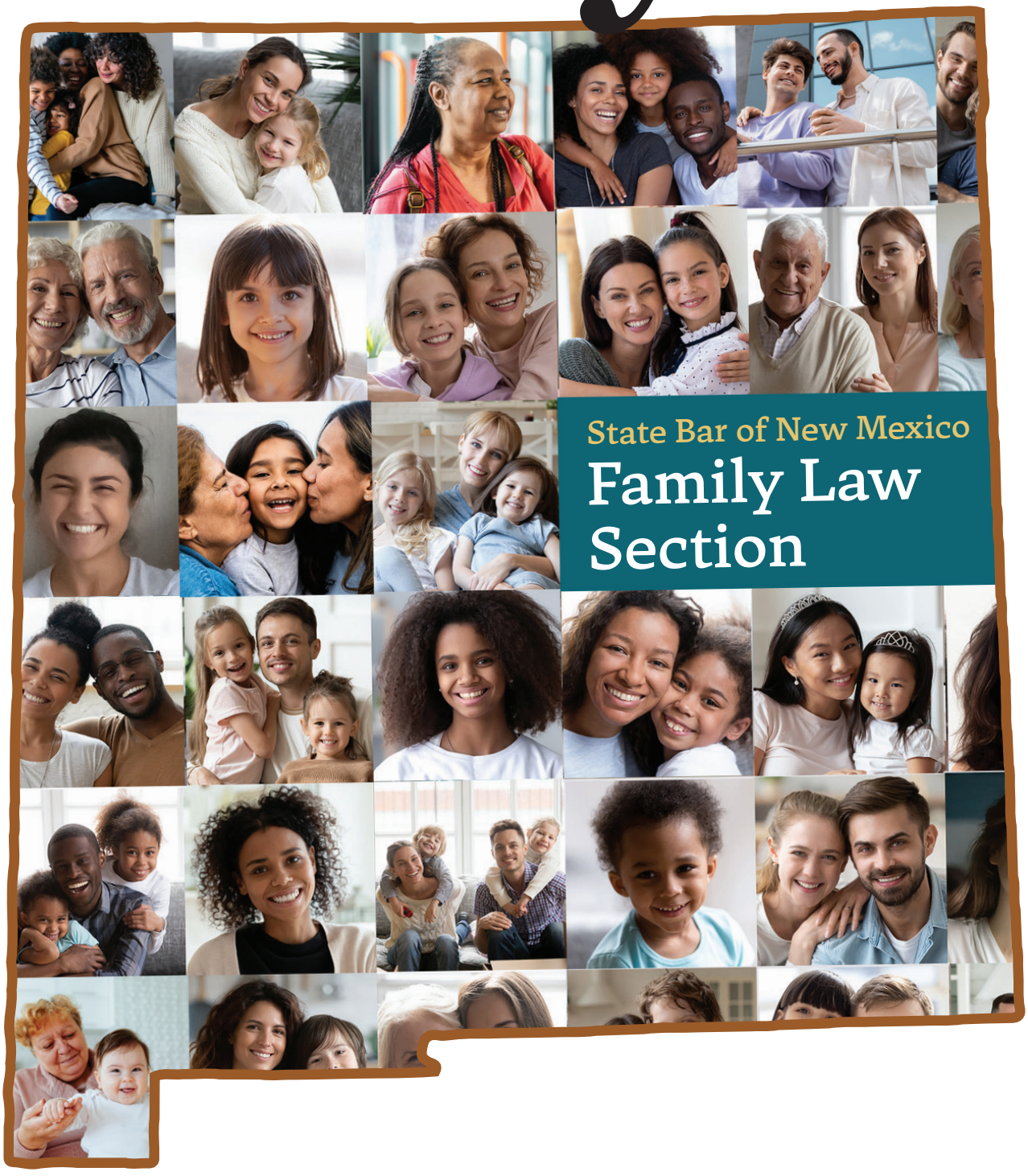

State Bar of New Mexico
Family Law Section

Navigating the Legal Landscape:

Prioritizing the Best Interest of New Mexico's Children in Family Law Cases

By Brian T. Ray, Esq.

Few principles carry as much weight and significance in the realm of family law as that of best interest. Nowhere is that clearer than in the Great State of New Mexico, with our melting pot of rich and diverse cultures that embody our landscape. The task of assessing a child's best interest in matters affecting custodial decisions is far from plain and ordinary, especially within this backdrop that often yields great contention and highly charged emotions.

Over the last decade, my practice has represented hundreds of families in custodial and family welfare matters; including children and youths and families seeking guardianship, adoption or the resolution of other custody challenges throughout New Mexico. Working these cases often involves travel throughout the state, from the winding, picturesque roads of Highway 550 with its brightly colored mesas and hoodoos, to the black basalt hills of El Malpais on the way to Alamogordo, and even the hallowed lands of our Native American Nations, Tribes and Pueblos. It's humbling to acknowledge how such an alluring land can give rise to such trying of legal challenges.

While the legal landscape varies as much as our natural surroundings, credence should be afforded to the fact that these cases are emotionally elevated. Fear, joy, shock and everything in between is often the expressed and experienced norm for the adults involved. At times, they may break down in happy tears from reuniting their family or devolve into fits of rage over a decision. There is no cash prize for "winning" or "losing" in these cases, but being able to spend time with one's family is often worth more than its weight in gold. For this reason, it is vital to keep in mind that the lives of everyone involved are significantly impacted by the decisions being made and the outcomes that follow, especially for the kids.

As attorneys, judges and other practitioners within this backdrop, we are entrusted with the enormous responsibility of safeguarding the welfare and future of the youngest members of our society who are involved in these difficult situations. Making irresponsible and cavalier decisions can lead to adverse and unintended consequences. Sometimes the decisions are simple, like whether a child can make tortillas with their abuelita on Saturdays. Sometimes they are much more contentious and nuanced, like whether a pair of siblings should have ongoing visitation with their parent who loves them dearly but also has an extant history of domestic abuse and criminal activity. How we navigate the intricacies of this standard impacts the optimality of outcomes for those we serve.

In our domestic affairs section, 40-4-9 NMSA 1978, we find the standards for the determination of child custody in dissolution matters as being "in accordance with the best interests of the child," with several considerations laid out. These include:

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

Although our legislature has deemed all these factors as cornerstones, the overarching consideration often boils down to the mental and physical health of everyone involved. This is because a child's mental and physical health is often influenced by all the other considerations. Additionally, if a parent or guardian has demonstrated that they are either unable or unwilling to maintain their own wellbeing, it's often a recipe for disaster to expect reasonable and prudent care for both their self and children without additional support.

The concepts of health and wellbeing are so crucial in assessing a child's best interest because any decisions made today will certainly have an impact on that child's identity and overall development. One example might be of a child with a mixed cultural heritage. Absent consideration to the child's interest, their connection and sense of belonging to either side's lineal heritage may be all but lost. Alternatively, if the child already lacks a connection to their cultural lineage from the onset, forcing the issue may be more of a stressor than a source of comfort. These decisions can be daunting when culture is a fluid

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The Prenuptial Agreement: It's Not Like the Old Days...

By Julie S. Rivers

Introduction

The prenuptial agreement, or as it also called – the antenuptial agreement – is no longer a document we dust off and use occasionally. In the age of Match.com and the many late-in-life marriages, the agreements between intended spouses now play a much larger role and require much more robust planning. Many of the reasons for a prenuptial agreement ("prenup") are to provide clarity for the couple's adult progeny and the couple themselves upon their marriage and eventual incapacity, death or divorce (and separation). Some examples include but are not limited to:

- Protect business
- Protect professional practice
- Anticipate putting career on hold
- Monied spouse
- Protect assets from other's creditors
- Inheritance
- Heirlooms
- Avoid expensive divorce
- Clarity for fiduciaries when incapacity or death
- Peace of mind

New Mexico has the good fortune to have the Uniform Premarital Agreement Act ("UPAA"). NMSA §40-3A-1 *et seq*. Brevity is the key for this missive so the reader can review the UPAA as well as the sparse attendant caselaw as needed.

A couple of things to keep in mind:

1. The UPAA allows for amendment and even revocation of the prenup post marriage. NMSA §40-3A-6. No consideration is required. *Id.* However, a practitioner should remember that upon marriage that post-marriage contracts between spouses is founded upon the fiduciary duty each has to the other. NMSA §40-2-2; *see also, Trigg v. Trigg,* 37 N.M. 296, 1933-NMSC-040, ¶7, 22 P.2d 119, where the Court discusses "confidential relations." That nearly 90-year-old case determined that the wife's "nagging" was considered "undue influence"! *Trigg v. Trigg,* 37 N.M. 296, 1933-NMSC-040, ¶30, 22 P.2d 119. However, the description in the case does go a bit beyond just plain nagging in the more mundane use of the term.
2. A premarital agreement ("PMA") cannot "adversely affect the right of a child or spouse to support," child access

or a party's choice of where to live or to pursue career opportunities. NMSA §40-3A-4(B).

Some Drafting Tips to Avoid the Malpractice Traps

Let's get to the heart of it and talk about drafting! Even the most experienced and talented practitioners fail to consider all aspects of life when drafting a PMA: separation, incompetency, divorce and death ("SIDD"). When a PMA does not address these four issues, the practitioner is at risk for committing malpractice.

Sometimes it helps if there is a joint trust created as part and parcel of the PMA so that SIDD considerations are addressed. If there are children from a previous marriage or other types of financial dependencies, then not addressing what occurs when one of the parties (especially the monied spouse) becomes incompetent or the parties separate for some reason can result in litigation.

Along with a needed severability clause in a PMA, it is suggested that there be language addressing how matters are addressed when the PMA terms need interpretation. Language allowing for mediation *before* court intervention proves helpful. In some circumstances, there might be language providing for the use of collaborative professionals.

There should be complete and proper characterization of income, assets and debt by the monied and nonmonied intended spouses. A PMA should contain specific language as to how income flows and what happens to the appreciation of assets. Much can be forgiven if there is a good inventory of the income,

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Protecting Vulnerable Immigrant Youth in New Mexico:

Analysis of the New Special Immigrant Juvenile Classification Act (NMSA 1978 § 40-18-1 through 40-18-4)

By Monica Newcomer Miller, Esq.

Introduction

When working with undocumented immigrants or mixed status families in the family law process, it can make all the difference to seek additional protections for foreign-born youth as part of a custody, guardianship, emancipation or similar petition. The Special Immigrant Juvenile Classification Act ("SIJCA" or "The Act") signed into law in New Mexico on April 5, 2023, provides guidance on seeking protections for these youth and children living in our state. *See* NMSA 1978 § 40-18-1 *et seq*. Based on this newest revision to the domestic relations code, undocumented youth and children living in New Mexico are now eligible to obtain "Special Findings" from state court judges that will allow them to apply for immigration status as Special Immigrant Juveniles (SIJ) up to age 21. The new law draws on federal standards for protecting immigrant children who have been abused, abandoned or neglected. It enables minors residing in the state to obtain legal protection and offers a lifeline of hope to young immigrants who have faced unimaginable challenges.

Understanding Special Immigrant Juvenile Status

In 1990, recognizing the critical need to safeguard immigrant children seeking protection, Congress created provisions leading to relief in the form of Special Immigrant Juvenile Status (SIJS). 8 U.S.C. § 1101(a)(27)(J). SIJS is a federal classification that offers a lifeline to vulnerable immigrant children who have suffered maltreatment by one or both parents. Once approved, SIJS provides access to work authorization, lawful permanent residency (a green card to remain in the U.S. permanently) and eventually, citizenship. SIJS is available to children:

- Who are under age 21 and unmarried;
- Who have suffered maltreatment and are unable to reunite with their parent(s) due to abuse, neglect, abandonment or a similar circumstance;
- Whose best interest is not served by returning to their home country or country of last habitual residence; and
- Who are dependent on a state court for care or who have been placed in the care or custody of another individual or agency.

This set of requirements is referred to as "Special Findings," or the facts that must be established to demonstrate that a child qualifies for SIJS.

Securing the Special Findings in State Court

The federal statute guiding SIJS eligibility specifically delegates the task of making these "Special Findings" to state courts. 8 C.F.R. § 204.11(c). The federal law recognizes that state courts are best suited to make findings relating to family law or child protection, as they are matters that lie within the state court's traditional expertise. With the passage of the SIJCA, New Mexico state law now aligns with the SIJ federal statute and joins 18 other states in creating state specific guidance for judges to make necessary determinations for the best interests of foreign-born children. The SIJCA lays out definitions and guidance to make each of the above Special Findings. The Act specifically defines what constitutes abuse, abandonment and neglect and clarifies that there are similar circumstances, such as the death, incarceration or deportation of a parent, that may also constitute the need for Special Findings. NMSA 1978 § 40-18-2(G). Additionally, the Act expands the definition of "Child" for purposes of the SIJCA, to include foreign-born, unmarried youth up to age 21. NMSA 1978 § 40-18-2(C).

State Courts regularly determine the best interests of children in family court proceedings and these Special Findings are no different. State Courts and the designated judges are not authorizing immigration status but rather reviewing the facts presented to determine the best interests of each specific case. Special Findings can be requested in a number of proceedings. In many cases when children are involved in custody cases or seeking placement under the Kinship Guardianship Act, the facts and basis for Special Findings can be included in the petition. This is also true in emancipation cases, juvenile delinquency proceedings, abuse and neglect proceedings[1] and adoptions. For children who are between ages 18 and 21, stand-alone petitions for dependency on the court can be filed requesting the Special Findings.

Regardless of how the request comes before the Court, a judge must review the record and decide if Special Findings are warranted. The Court will consider the petition, pleadings and submitted evidence or testimony in order to make the applicable determinations. If the child is deemed to have met the requirements, these Special Findings are incorporated into a final order. The child can use the order to then apply for SIJS at the federal level.

Conclusion

The SIJCA aligns state law with the federal requirements and provides advocates and adjudicators the necessary guidance to secure protections for foreign born children who have suffered abuse, abandonment or neglect by a parent. The Act underscores New Mexico's commitment to ensuring the safety and well-being of children in the state, including vulnerable immigrant minors.[2] ■

Monica Newcomer Miller *is a 2015 graduate of the University of New Mexico School of Law where she graduated with honors. She has over 20 years of experience working in the field of immigration as a social worker, paralegal and now lawyer. Monica is the Managing Attorney of the Children's Program at the New Mexico Immigrant Law Center where she oversees legal services for children seeking representation in the immigration process. She supported the legislative efforts in New Mexico for what is now the SIJ Classification Act and regularly provides trainings, CLEs and legal expertise on the process for obtaining Special Immigrant Juvenile Status. In addition, Monica enjoys spending time with her husband and three boys in the Land of Enchantment, specifically exploring hiking trails and hot springs.*

Endnotes

[1] Abuse and Neglect proceedings involving immigrant children are governed by the requirements of NMSA 1978 32A-4-23.1, in which CYFD must request the special findings under the listed provision.

[2] For more in-depth analysis or hands on experience with these cases consider contacting NMILC for upcoming CLEs, trainings or pro bono opportunities, in which staff attorneys will provide technical support and templates for SIJS cases.

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assets and debt by both. The inventories should be attached and incorporated into the PMA itself. Appraisals may be necessary at the time to determine, for example, the value of a business. Clients are loathe to do this task – the monied spouse should be advised in writing that skipping this step could result in compromising the PMA at some later stage and could even result in a fraud accusation, thereby undoing everyone's hard work.

Unless a lawyer practices in the field of both family law and estate planning, it is a good idea to have both an estate planner and a family lawyer working on the PMA (obviously, one is retained by the client and the other may be retained or serve as a consultant). For example, a well-established estate planner represented the monied spouse. In negotiating the PMA, the estate planner failed to address the tax implications upon separation and divorce of spousal support *even though the new tax code was in effect at the time.* That borders on malpractice.

In conclusion, all the above means that a practitioner will need to charge more for this work as it involves much more than the ol' slapping something together! Good luck out there! ■

Julie S. Rivers*, a partner at Cuddy & McCarthy, LLP, practiced primarily family law for about 20 years when estate planner, Ken Bateman, asked if she'd consider estate planning. The rest is history… With the exception of some legacy family-law cases, she solely crafts estate plans and handles probate and trust administrations with a bit of litigation thrown in for good measure.*

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concept in and of itself, but it's because of this diversity that every case deserves a careful assessment of who our children are, and what is a part of their familial identity.

The fact of the matter is that all custody cases vary in their circumstances and complexity. Decisions made in children's best interests tend to afford them care and protection and allow them to flourish. It may not always be easy to stop and take in the scenery, especially through the veil of emotions - still, our children deserve a childhood that acknowledges the beauty and natural wonder of their surroundings and heritage. We should strive to reflect on what tends to enhance and benefit the lives of the most vulnerable in our society because they too may someday walk the same paths as the adults in the room today. ■

Brian T. Ray, Esq. *is the founder and managing attorney of the Ray Law Office in Albuquerque. With nearly a decade in practice, he has built a foundation in representing children and families in guardianship, adoption, custody and Indian family law matters. He is also a regular speaker at child and family welfare conferences throughout the State of New Mexico.*

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