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SENATE BILL 203

47TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2005

INTRODUCED BY

Bernadette M Sanchez

AN ACT

RELATING TO DOMESTIC RELATIONS; ADDING REQUIREMENTS FOR THE
APPOINTMENT OF A GUARDIAN AD LITEM

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 40-4-8 NMSA 1978 (being Laws 1977,
Chapter 286, Section 1, as amended) is amended to read:

"40-4-8. CONTESTED CUSTODY--APPOINTMENT OF GUARDIAN AD
LITEM --

A. In any proceeding for the disposition of
[children] a child when custody of a minor [children] child is
contested by [any party] either parent, the court may appoint
an attorney at law as guardian ad litem, on the court's motion
or upon [application of any party] motion of either parent, to
appear for and represent the minor [children] child and serve
as an arm of the court. The expenses, costs and [attorneys']

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1 professional fees for the guardian ad litem [may] shall be
2 allocated [among] between the parties as determined by the
3 court. In no event shall the court delegate to the guardian ad
4 litem the ultimate determination of the child's best interests
5 regarding time sharing under Section 40-4-9 NMSA 1978. The
6 guardian ad litem's professional fees shall not exceed an
7 amount authorized by the court. In determining whether an
8 appointment will be made, the court shall consider all relevant
9 factors, including:

10 (1) the wishes of the parents;

11 (2) the age of the child;

12 (3) the contentiousness of the parties or
13 other dynamics affecting the child;

14 (4) the extent to which a guardian ad litem
15 will assist the court by providing factual information useful
16 to the court in determining a child's best interests; and

17 (5) the ability of the parties to pay.

18 B. A guardian ad litem appointed on or after
19 January 1, 2006 shall have the qualifications established by
20 the New Mexico supreme court.

21 C. Every order appointing a guardian ad litem
22 shall:

23 (1) state the guardian ad litem's duties with
24 particularity either as determined by the court or as by the
25 procedure set forth in Rule 21-706 of the New Mexico Rules of

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1 Evidence;

2 (2) include the duration of the appointment,
3 which shall not exceed one year unless extended by the court
4 for good cause;

5 (3) state the professional fee the guardian ad
6 litem is authorized to charge and provide for the rendering of
7 itemized monthly statements to the parties and counsel;

8 (4) specify a guardian ad litem's duties and
9 responsibilities, including:

10 (a) conducting interviews with the child
11 face-to-face outside the presence of both parents; counsel for
12 either party if the child is age six or older; and such other
13 persons at the guardian ad litem's or court's discretion; and

14 (b) submitting a written report of
15 investigation, findings and recommendations as may be directed
16 by the court, which shall be filed of record and sealed at the
17 court's discretion, with copies provided to both parents, their
18 counsel, all parties and the court;

19 (c) reporting to the court the child's
20 wishes, regardless of recommendations;

21 (5) specify that the guardian ad litem has no
22 authority to obligate the parents to pay the fees of any
23 therapist without the advance approval of both parents or the
24 court upon hearing; and

25 (6) specify that the guardian ad litem shall

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1 serve as a witness if called by the court or either party and
2 shall be subject to cross-examination.

3 ~~[B.]~~ D. When custody is contested, the court:

4 (1) shall as soon as practicable refer ~~[that~~
5 ~~issue to mediation if feasible unless]~~ the parties to domestic
6 relations mediation pursuant to the Domestic Relations
7 Mediation Act if a party asserts or it appears to the court
8 that domestic ~~[violence]~~ abuse or child abuse has occurred ~~[in~~
9 ~~which event]~~. The court shall halt or suspend mediation unless
10 the court specifically finds that:

11 (a) the following ~~[three]~~ conditions
12 ~~[are satisfied]~~ exist: 1) the mediator has substantial
13 training concerning the effects of domestic ~~[violence]~~ abuse or
14 child abuse on victims; 2) a party who is or alleges to be the
15 victim of domestic ~~[violence]~~ abuse is capable of negotiating
16 with the other party in mediation, either alone or with
17 assistance, without suffering from an imbalance of power as a
18 result of the alleged domestic ~~[violence; and]~~ abuse; 3) the
19 mediation process contains appropriate provisions and
20 conditions to protect against an imbalance of power between the
21 parties resulting from the alleged domestic ~~[violence]~~ abuse or
22 child abuse; ~~[or]~~ and 4) a lack of probable cause that domestic
23 abuse or child abuse has occurred; and

24 (b) in the case of domestic ~~[violence]~~
25 abuse involving parents, the parent who is or alleges to be the

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1 victim requests mediation and the mediator is informed of the
2 alleged domestic [~~violence~~] abuse;

3 (2) may order, in addition to or in lieu of
4 the provisions of Paragraph (1) of this subsection, that each
5 of the parties undergo individual counseling in a manner that
6 the court deems appropriate. [~~if the court finds that the~~
7 ~~parties can afford the counseling; and~~

8 ~~(3) may use, in addition to or in lieu of the~~
9 ~~provisions of Paragraph (1) of this subsection, auxiliary~~
10 ~~services such as professional evaluation by application of Rule~~
11 ~~11-706 of the New Mexico Rules of Evidence or Rule 1-053 of the~~
12 ~~Rules of Civil Procedure for the District Courts.~~

13 ~~C.]~~ E. As used in this section:

14 (1) "child abuse" means:

15 (a) that a child has been physically,
16 emotionally or psychologically abused by a parent;

17 (b) that a child has been: 1) sexually
18 abused by a parent through criminal sexual penetration, incest
19 or criminal sexual contact of a minor as those acts are defined
20 by state law; or 2) sexually exploited by a parent through
21 allowing, permitting or encouraging the child to engage in
22 prostitution and allowing, permitting, encouraging or engaging
23 the child in obscene or pornographic photographing or filming
24 or depicting a child for commercial purposes as those acts are
25 defined by state law;

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1 (c) that a child has been knowingly,
2 intentionally or negligently placed in a situation that may
3 endanger the child's life or health; or

4 (d) that a child has been knowingly or
5 intentionally tortured, cruelly confined or cruelly punished;
6 provided that nothing in this paragraph shall be construed to
7 imply that a child who is or has been provided with treatment
8 by spiritual means alone through prayer, in accordance with the
9 tenets and practices of a recognized church or religious
10 denomination, by a duly accredited practitioner of the church
11 or denomination, is for that reason alone a victim of child
12 abuse within the meaning of this paragraph; and

13 (2) "domestic ~~[violence]~~ abuse" means ~~[one~~
14 ~~parent causing or threatening physical harm or assault or~~
15 ~~inciting imminent fear of physical, emotional or psychological~~
16 ~~harm to the other parent]~~ an incident by a household member
17 against another household member resulting in:

- 18 (a) physical harm;
19 (b) severe emotional distress;
20 (c) bodily injury or assault;
21 (d) a threat causing imminent fear of
22 bodily injury by any household member;
23 (e) criminal trespass;
24 (f) criminal damage to property;
25 (g) repeatedly driving by a residence or

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work place;

(h) telephone harassment;

(i) stalking;

(j) harassment; or

(k) harm or threatened harm to

children. "