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HOUSE BILL 136

49TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2010

INTRODUCED BY

Elias Barela

FOR THE MILITARY AND VETERANS' AFFAIRS COMMITTEE

AN ACT

RELATING TO DOMESTIC RELATIONS; REQUIRING THE STAY OF CHILD CUSTODY PROCEEDINGS WHILE A SERVICE MEMBER IS UNAVAILABLE PURSUANT TO MILITARY ORDERS; PROHIBITING THE AWARD OF CHILD CUSTODY SOLELY BECAUSE A SERVICE MEMBER IS ABSENT PURSUANT TO MILITARY ORDERS; PROVIDING FOR POSSIBLE ABSENCE OF A SERVICE MEMBER IN A PARENTING PLAN.

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

Section 1. Section 40-4-7 NMSA 1978 (being Laws 1901, Chapter 62, Section 27, as amended) is amended to read:

"40-4-7. PROCEEDINGS--SPOUSAL SUPPORT--SUPPORT AND CUSTODY OF CHILDREN--DIVISION OF PROPERTY.--

A. In any proceeding for the dissolution of marriage, division of property, disposition of children or spousal support, the court may make and enforce by attachment

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1 or otherwise an order to restrain the use or disposition of the
2 property of either party or for the control of the children or
3 to provide for the support of either party during the pendency
4 of the proceeding, as in its discretion may seem just and
5 proper. The court may make an order, relative to the expenses
6 of the proceeding, as will ensure either party an efficient
7 preparation and presentation of ~~[his]~~ the party's case.

8 B. On final hearing, the court:

9 (1) may allow either party such a reasonable
10 portion of the spouse's property or such a reasonable sum of
11 money to be paid by either spouse either in a single sum or in
12 installments, as spousal support as under the circumstances of
13 the case may seem just and proper, including a court award of:

14 (a) rehabilitative spousal support that
15 provides the receiving spouse with education, training, work
16 experience or other forms of rehabilitation that increases the
17 receiving spouse's ability to earn income and become self-
18 supporting. The court may include a specific rehabilitation
19 plan with its award of rehabilitative spousal support and may
20 condition continuation of the support upon compliance with that
21 plan;

22 (b) transitional spousal support to
23 supplement the income of the receiving spouse for a limited
24 period of time; provided that the period shall be clearly
25 stated in the court's final order;

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1 (c) spousal support for an indefinite
2 duration;

3 (d) a single sum to be paid in one or
4 more installments that specifies definite amounts, subject only
5 to the death of the receiving spouse; or

6 (e) a single sum to be paid in one or
7 more installments that specifies definite amounts, not subject
8 to any contingencies, including the death of the receiving
9 spouse;

10 (2) may:

11 (a) modify and change any order in
12 respect to spousal support awarded pursuant to the provisions
13 of Subparagraph (a), (b) or (c) of Paragraph (1) of this
14 subsection whenever the circumstances render such change
15 proper; or

16 (b) designate spousal support awarded
17 pursuant to the provisions of Subparagraph (a) or (b) of
18 Paragraph (1) of this subsection as nonmodifiable with respect
19 to the amount or duration of the support payments;

20 (3) may set apart out of the property or
21 income of the respective parties such portion for the
22 maintenance and education of:

23 (a) their unemancipated minor children
24 as may seem just and proper; or

25 (b) their children until the children's

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1 graduation from high school if the children are emancipated
2 only by age, are under nineteen and are attending high school;
3 and

4 (4) may make such an order for the
5 guardianship, care, custody, maintenance and education of the
6 minor children, or with reference to the control of the
7 property of the respective parties to the proceeding, or with
8 reference to the control of the property decreed or fund
9 created by the court for the maintenance and education of the
10 minor children, as may seem just and proper.

11 C. The court may order and enforce the payment of
12 support for the maintenance and education after high school of
13 emancipated children of the marriage pursuant to a written
14 agreement between the parties.

15 D. An award of spousal support made pursuant to the
16 provisions of Subparagraph (a), (b), (c) or (d) of Paragraph
17 (1) of Subsection B of this section shall terminate upon the
18 death of the receiving spouse, unless the court order of
19 spousal support provides otherwise.

20 E. When making determinations concerning spousal
21 support to be awarded pursuant to the provisions of Paragraph
22 (1) or (2) of Subsection B of this section, the court shall
23 consider:

24 (1) the age and health of and the means of
25 support for the respective spouses;

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1 (2) the current and future earnings and the
2 earning capacity of the respective spouses;

3 (3) the good-faith efforts of the respective
4 spouses to maintain employment or to become self-supporting;

5 (4) the reasonable needs of the respective
6 spouses, including:

7 (a) the standard of living of the
8 respective spouses during the term of the marriage;

9 (b) the maintenance of medical insurance
10 for the respective spouses; and

11 (c) the appropriateness of life
12 insurance, including its availability and cost, insuring the
13 life of the person who is to pay support to secure the
14 payments, with any life insurance proceeds paid on the death of
15 the paying spouse to be in lieu of further support;

16 (5) the duration of the marriage;

17 (6) the amount of the property awarded or
18 confirmed to the respective spouses;

19 (7) the type and nature of the respective
20 spouses' assets; provided that potential proceeds from the sale
21 of property by either spouse shall not be considered by the
22 court, unless required by exceptional circumstances and the
23 need to be fair to the parties;

24 (8) the type and nature of the respective
25 spouses' liabilities;

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1 (9) income produced by property owned by the
2 respective spouses; and

3 (10) agreements entered into by the spouses in
4 contemplation of the dissolution of marriage or legal
5 separation.

6 F. The court shall retain jurisdiction over
7 proceedings involving periodic spousal support payments when
8 the parties have been married for twenty years or more prior to
9 the dissolution of the marriage, unless the court order or
10 decree specifically provides that no spousal support shall be
11 awarded.

12 G. The court may modify and change any order or
13 agreement merged into an order in respect to the guardianship,
14 care, custody, maintenance or education of the children
15 whenever circumstances render such change proper. The court
16 shall stay, in accordance with the federal Servicemembers Civil
17 Relief Act, any petition, motion or pleading to modify or
18 change any order or agreement merged into an order in respect
19 to the guardianship, care, custody, maintenance or education of
20 the child of a service member who is deployed, mobilized or
21 ordered to temporary duty and is unavailable pursuant to
22 military orders.

23 H. The district court shall have exclusive
24 jurisdiction of all matters pertaining to the guardianship,
25 care, custody, maintenance and education of the children until

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1 the parents' obligation of support for their children
2 terminates. The district court shall also have exclusive,
3 continuing jurisdiction with reference to the property decreed
4 or funds created for the children's maintenance and education."

5 Section 2. Section 40-4-9 NMSA 1978 (being Laws 1977,
6 Chapter 172, Section 1) is amended to read:

7 "40-4-9. STANDARDS FOR THE DETERMINATION OF CHILD
8 CUSTODY--HEARING.--

9 A. In any case in which a judgment or decree will
10 be entered awarding the custody of a minor, the district court
11 shall, if the minor is under the age of fourteen, determine
12 custody in accordance with the best interests of the child.
13 The court shall consider all relevant factors, including but
14 not limited to:

15 (1) the wishes of the child's parent or
16 parents as to [~~his~~] the child's custody;

17 (2) the wishes of the child as to [~~his~~] the
18 child's custodian;

19 (3) the interaction and interrelationship of
20 the child with [~~his~~] the child's parents [~~his~~] and siblings and
21 any other person who may significantly affect the child's best
22 [~~interest~~] interests;

23 (4) the child's adjustment to [~~his~~] the
24 child's home, school and community; and

25 (5) the mental and physical health of all

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1 individuals involved.

2 B. If the minor is fourteen years of age or older,
3 the court shall consider the desires of the minor as to with
4 whom ~~[he]~~ the minor wishes to live before awarding custody of
5 ~~[such]~~ the minor.

6 C. Whenever testimony is taken from the minor
7 concerning ~~[his]~~ the minor's choice of custodian, the ~~[court]~~
8 judge shall hold a private hearing in ~~[his]~~ the judge's
9 chambers. The judge shall have a court reporter in ~~[his]~~ the
10 judge's chambers who shall transcribe the hearing; however, the
11 court reporter shall not file a transcript unless an appeal is
12 taken.

13 D. With respect to any proceeding in which it is
14 proposed that custody be terminated, the court shall not
15 terminate custody unless there has been a substantial and
16 material change in circumstances affecting the welfare of the
17 child, since entry of the custody order, such that custody is
18 no longer in the best interests of the child. There shall be a
19 presumption that mere absence of a parent due to temporary
20 duty, deployment, activation or mobilization orders received
21 from the military is not in itself a substantial and material
22 change in circumstances affecting the welfare of the child."

23 Section 3. Section 40-4-9.1 NMSA 1978 (being Laws 1986,
24 Chapter 41, Section 1, as amended) is amended to read:

25 "40-4-9.1. JOINT CUSTODY--STANDARDS FOR DETERMINATION--
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1 PARENTING PLAN.--

2 A. There shall be a presumption that joint custody
3 is in the best interests of a child in an initial custody
4 determination. An award of joint custody does not imply an
5 equal division of financial responsibility for the child.
6 Joint custody shall not be awarded as a substitute for an
7 existing custody arrangement unless there has been a
8 substantial and material change in circumstances since the
9 entry of the prior custody order or decree, which change
10 affects the welfare of the child such that joint custody is
11 presently in the best interests of the child. With respect to
12 any proceeding in which it is proposed that joint custody be
13 terminated, the court shall not terminate joint custody unless
14 there has been a substantial and material change in
15 circumstances affecting the welfare of the child, since entry
16 of the joint custody order, such that joint custody is no
17 longer in the best interests of the child.

18 B. In determining whether a joint custody order is
19 in the best interests of the child, in addition to the factors
20 provided in Section 40-4-9 NMSA 1978, the court shall consider
21 the following factors:

22 (1) whether the child has established a close
23 relationship with each parent;

24 (2) whether each parent is capable of
25 providing adequate care for the child throughout each period of

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1 responsibility, including arranging for the child's care by
2 others as needed;

3 (3) whether each parent is willing to accept
4 all responsibilities of parenting, including a willingness to
5 accept care of the child at specified times and to relinquish
6 care to the other parent at specified times;

7 (4) whether the child can best maintain and
8 strengthen a relationship with both parents through
9 predictable, frequent contact and whether the child's
10 development will profit from such involvement and influence
11 from both parents;

12 (5) whether each parent is able to allow the
13 other to provide care without intrusion, that is, to respect
14 the other's parental rights and responsibilities and right to
15 privacy;

16 (6) the suitability of a parenting plan for
17 the implementation of joint custody, preferably, although not
18 necessarily, one arrived at through parental agreement;

19 (7) geographic distance between the parents'
20 residences;

21 (8) willingness or ability of the parents to
22 communicate, cooperate or agree on issues regarding the child's
23 needs; and

24 (9) whether a judicial adjudication has been
25 made in a prior or the present proceeding that either parent or

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1 other person seeking custody has engaged in one or more acts of
2 domestic abuse against the child, a parent of the child or
3 other household member. If a determination is made that
4 domestic abuse has occurred, the court shall set forth findings
5 that the custody or visitation ordered by the court adequately
6 protects the child, the abused parent or other household
7 member.

8 C. In any proceeding in which the custody of a
9 child is at issue, the court shall not prefer one parent as a
10 custodian solely because of gender.

11 D. In any proceeding in which the custody of a
12 child of a service member is at issue, the court shall not
13 prefer one parent as a custodian solely because of past absence
14 or the possibility of future absence due to temporary duty,
15 deployment, activation or mobilization orders received from the
16 military.

17 [~~D.~~] E. In any case in which the parents agree to a
18 form of custody, the court should award custody consistent with
19 the agreement unless the court determines that such agreement
20 is not in the best interests of the child.

21 [~~E.~~] F. In making an order of joint custody, the
22 court may specify the circumstances, if any, under which the
23 consent of both legal custodians is required to be obtained in
24 order to exercise legal control of the child and the
25 consequences of the failure to obtain mutual consent.

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1 ~~[F-]~~ G. When joint custody is awarded, the court
2 shall approve a parenting plan for the implementation of the
3 prospective custody arrangement prior to the award of joint
4 custody. The parenting plan shall include a division of a
5 child's time and care into periods of responsibility for each
6 parent. ~~[H-]~~ The parenting plan may also include:

7 (1) statements regarding the child's religion,
8 education, child care, recreational activities and medical and
9 dental care;

10 (2) designation of specific decision-making
11 responsibilities;

12 (3) methods of communicating information about
13 the child, transporting the child, exchanging care for the
14 child and maintaining telephone and mail contact between parent
15 and child;

16 (4) procedures for future decision-making,
17 including procedures for dispute resolution; and

18 (5) other statements regarding the welfare of
19 the child or designed to clarify and facilitate parenting under
20 joint custody arrangements.

21 H. In addition to the requirements of the parenting
22 plan provided in Subsection G of this section, when joint
23 custody is awarded to a parent who is a service member, the
24 parenting plan shall include:

25 (1) the designation of temporary alternative

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1 periods of responsibility, including arranging for the child's
2 care by others if the service member receives temporary duty,
3 deployment, activation or mobilization orders from the military
4 that limit the capability of providing adequate care for the
5 child during the service member's periods of responsibility or
6 visitation; and

7 (2) the return to the periods of
8 responsibility prior to the temporary duty, deployment,
9 activation or mobilization of the service member, or the
10 relinquishment of care for the child back to the service
11 member, within ten days of return from temporary duty,
12 deployment, activation or mobilization.

13 I. In a case where joint custody is not agreed to
14 or necessary aspects of the parenting plan are contested, the
15 parties shall each submit parenting plans. The court may
16 accept the plan proposed by either party or it may combine or
17 revise these plans as it deems necessary in the child's best
18 interests. The time of filing of parenting plans shall be set
19 by local rule. A plan adopted by the court shall be entered as
20 an order of the court.

21 [~~G.~~] J. Where custody is contested, the court shall
22 refer that issue to mediation if feasible. The court may also
23 use auxiliary services such as professional evaluation by
24 application of Rule 706 of the New Mexico Rules of Evidence or
25 Rule 53 of the Rules of Civil Procedure for the District

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1 Courts.

2 ~~[H.]~~ K. Notwithstanding any other provisions of
3 law, access to records and information pertaining to a minor
4 child, including medical, dental and school records, shall not
5 be denied to a parent because that parent is not the child's
6 physical custodial parent or because that parent is not a joint
7 custodial parent.

8 ~~[I.]~~ L. Whenever a request for joint custody is
9 granted or denied, the court shall state in its decision its
10 basis for granting or denying the request for joint custody. A
11 statement that joint custody is or is not in the best interests
12 of the child is not sufficient to meet the requirements of this
13 subsection.

14 ~~[J.]~~ M. An award of joint custody means that:

15 (1) each parent shall have significant, well-
16 defined periods of responsibility for the child;

17 (2) each parent shall have, and be allowed and
18 expected to carry out, responsibility for the child's
19 financial, physical, emotional and developmental needs during
20 that parent's periods of responsibility;

21 (3) the parents shall consult with each other
22 on major decisions involving the child before implementing
23 those decisions; that is, neither parent shall make a decision
24 or take an action ~~[which]~~ that results in a major change in a
25 child's life until the matter has been discussed with the other

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1 parent and the parents agree. If the parents, after
2 discussion, cannot agree and if one parent wishes to effect a
3 major change while the other does not wish the major change to
4 occur, then no change shall occur until the issue has been
5 resolved as provided in this subsection;

6 (4) the following guidelines apply to major
7 changes in a child's life:

8 (a) if either parent plans to change
9 ~~[his]~~ the parent's home city or state of residence, ~~[he]~~ that
10 parent shall provide to the other parent thirty days' notice in
11 writing stating the date and destination of move;

12 (b) the religious denomination and
13 religious activities, or lack thereof, ~~[which]~~ that were being
14 practiced during the marriage should not be changed unless the
15 parties agree or it has been otherwise resolved as provided in
16 this subsection;

17 (c) both parents shall have access to
18 school records, teachers and activities. The type of
19 education, public or private, ~~[which]~~ that was in place during
20 the marriage should continue, whenever possible, and school
21 districts should not be changed unless the parties agree or it
22 has been otherwise resolved as provided in this subsection;

23 (d) both parents shall have access to
24 medical and dental treatment providers and records. Each
25 parent has authority to make emergency medical decisions.

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1 Neither parent may contract for major elective medical or
2 dental treatment unless both parents agree or it has been
3 otherwise resolved as provided in this subsection; and

4 (e) both parents may attend the child's
5 public activities and both parents should know the necessary
6 schedules. Whatever recreational activities the child
7 participated in during the marriage should continue with the
8 child's agreement, regardless of which of the parents has
9 physical custody. Also, neither parent may enroll the child in
10 a new recreational activity unless the parties agree or it has
11 been otherwise resolved as provided in this subsection; and

12 (5) decisions regarding major changes in a
13 child's life may be decided by:

14 (a) agreement between the joint
15 custodial parents;

16 (b) requiring that the parents seek
17 family counseling, conciliation or mediation service to assist
18 in resolving their differences;

19 (c) agreement by the parents to submit
20 the dispute to binding arbitration;

21 (d) allocating ultimate responsibility
22 for a particular major decision area to one legal custodian;

23 (e) terminating joint custody and
24 awarding sole custody to one person;

25 (f) reference to a master pursuant to

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1 Rule 53 of the Rules of Civil Procedure for the District
2 Courts; or

3 (g) the district court.

4 ~~[K.]~~ N. When ~~[any]~~ a person other than a natural or
5 adoptive parent seeks custody of a child, no such person shall
6 be awarded custody absent a showing of unfitness of the natural
7 or adoptive parent.

8 ~~[L.]~~ O. As used in this section:

9 (1) "child" means a person under the age of
10 eighteen;

11 (2) "custody" means the authority and
12 responsibility to make major decisions in a child's best
13 interests in the areas of residence, medical and dental
14 treatment, education or child care, religion and recreation;

15 (3) "domestic abuse" means any incident by a
16 household member against another household member resulting in:

- 17 (a) physical harm;
- 18 (b) severe emotional distress;
- 19 (c) a threat causing imminent fear of
- 20 physical harm by any household member;
- 21 (d) criminal trespass;
- 22 (e) criminal damage to property;
- 23 (f) stalking or aggravated stalking, as
- 24 provided in Sections 30-3A-3 and 30-3A-3.1 NMSA 1978; or
- 25 (g) harassment, as provided in Section

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1 30-3A-2 NMSA 1978;

2 (4) "joint custody" means an order of the
3 court awarding custody of a child to two parents. Joint
4 custody does not imply an equal division of the child's time
5 between the parents or an equal division of financial
6 responsibility for the child;

7 (5) "parent" means a natural parent, adoptive
8 parent or person who is acting as a parent who has or shares
9 legal custody of a child or who claims a right to have or share
10 legal custody;

11 (6) "parenting plan" means a document
12 submitted for approval of the court setting forth the
13 responsibilities of each parent individually and the parents
14 jointly in a joint custody arrangement;

15 (7) "period of responsibility" means a
16 specified period of time during which a parent is responsible
17 for providing for a child's physical, developmental and
18 emotional needs, including the decision-making required in
19 daily living. Specified periods of responsibility shall not be
20 changed in an instance or more permanently except by the
21 methods of decision-making described under Subsection [L] M of
22 this section;

23 (8) "service member" means a member of the
24 armed forces of the United States or national guard while
25 serving on active duty;

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[~~(8)~~] (9) "sole custody" means an order of the court awarding custody of a child to one parent; and

[~~(9)~~] (10) "visitation" means a period of time available to a noncustodial parent, under a sole custody arrangement, during which a child resides with or is under the care and control of the noncustodial parent."