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SENATE BILL 396

50TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2011

INTRODUCED BY

Mark Boitano and Al Park

AN ACT

RELATING TO DOMESTIC AFFAIRS; CLARIFYING THAT ONLY A PARENT MAY
SEEK CUSTODY OF A CHILD UNLESS THERE IS A DETERMINATION OF
UNFITNESS OF THE PARENT; PROVIDING THAT A PARENT IS A NATURAL
OR ADOPTIVE PARENT OR A PERSON WITH EXISTING LEGAL CUSTODY
RIGHTS; PROVIDING THAT A NONPARENT DOES NOT HAVE STANDING TO
SEEK CUSTODY; ALLOWING FOR AN IMMEDIATE APPEAL IF STANDING IS
GIVEN TO A NONPARENT; RESTRICTING VISITATION RIGHTS TO PARENTS
AND THOSE WHO MEET STANDARDS PROVIDED BY LAW.

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

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

"40-4-9.1. JOINT CUSTODY--STANDARDS FOR DETERMINATION--
STANDING--APPEAL--PARENTING PLAN.--

A. There shall be a presumption that joint custody

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

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

20 (1) whether the child has established a close
21 relationship with each parent;

22 (2) whether each parent is capable of
23 providing adequate care for the child throughout each period of
24 responsibility, including arranging for the child's care by
25 others as needed;

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

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

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

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

17 (7) geographic distance between the parents'
18 residences;

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

22 (9) whether a judicial adjudication has been
23 made in a prior or the present proceeding that either parent or
24 other person seeking custody has engaged in one or more acts of
25 domestic abuse against the child, a parent of the child or

1 other household member. If a determination is made that
2 domestic abuse has occurred, the court shall set forth findings
3 that the custody or visitation ordered by the court adequately
4 protects the child, the abused parent or other household
5 member.

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

9 D. In any case in which the parents agree to a form
10 of custody, the court should award custody consistent with the
11 agreement unless the court determines that such agreement is
12 not in the best interests of the child.

13 E. In making an order of joint custody, the court
14 may specify the circumstances, if any, under which the consent
15 of both legal custodians is required to be obtained in order to
16 exercise legal control of the child and the consequences of the
17 failure to obtain mutual consent.

18 F. When joint custody is awarded, the court shall
19 approve a parenting plan for the implementation of the
20 prospective custody arrangement prior to the award of joint
21 custody. The parenting plan shall include a division of a
22 child's time and care into periods of responsibility for each
23 parent. It may also include:

24 (1) statements regarding the child's religion,
25 education, child care, recreational activities and medical and

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1 dental care;

2 (2) designation of specific decision-making
3 responsibilities;

4 (3) methods of communicating information about
5 the child, transporting the child, exchanging care for the
6 child and maintaining telephone and mail contact between parent
7 and child;

8 (4) procedures for future decision-making,
9 including procedures for dispute resolution; and

10 (5) other statements regarding the welfare of
11 the child or designed to clarify and facilitate parenting under
12 joint custody arrangements.

13 In a case where joint custody is not agreed to or
14 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. 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. Notwithstanding any other provisions of law,
3 access to records and information pertaining to a minor child,
4 including medical, dental and school records, shall not be
5 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. Whenever a request for joint custody is granted
9 or denied, the court shall state in its decision its basis for
10 granting or denying the request for joint custody. A statement
11 that joint custody is or is not in the best interests of the
12 child is not sufficient to meet the requirements of this
13 subsection.

14 J. 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.

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. ~~[When any 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.] A person who is not a parent of a child
8 shall not have standing to seek custody of the child nor shall
9 such a person be awarded custody of the child absent a
10 determination of unfitness of the parent. Before proceeding
11 with a custody claim of a person who is not a parent, the
12 district court shall make a determination on whether such a
13 person has standing to seek custody. If the court determines
14 there is standing, it shall enter an order that is immediately
15 appealable and all custody proceedings in the district court
16 shall be stayed until the standing question has been finally
17 decided on appeal.~~

18 L. As used in this section:

19 (1) "child" means a person under the age of
20 eighteen;

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

25 (3) "domestic abuse" means any incident by a

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1 household member against another household member resulting in:

- 2 (a) physical harm;
- 3 (b) severe emotional distress;
- 4 (c) a threat causing imminent fear of
- 5 physical harm by any household member;
- 6 (d) criminal trespass;
- 7 (e) criminal damage to property;
- 8 (f) stalking or aggravated stalking, as
- 9 provided in Sections 30-3A-3 and 30-3A-3.1 NMSA 1978; or
- 10 (g) harassment, as provided in Section
- 11 30-3A-2 NMSA 1978;

12 (4) "joint custody" means an order of the

13 court awarding custody of a child to two parents. Joint

14 custody does not imply an equal division of the child's time

15 between the parents or an equal division of financial

16 responsibility for the child;

17 (5) "parent" means a natural parent, adoptive

18 parent or person [~~who is acting as a parent~~] who has or shares

19 legal custody of a child [~~or who claims a right to have or~~

20 ~~share legal custody~~];

21 (6) "parenting plan" means a document

22 submitted for approval of the court setting forth the

23 responsibilities of each parent individually and the parents

24 jointly in a joint custody arrangement;

25 (7) "period of responsibility" means a

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1 specified period of time during which a parent is responsible
2 for providing for a child's physical, developmental and
3 emotional needs, including the decision-making required in
4 daily living. Specified periods of responsibility shall not be
5 changed in an instance or more permanently except by the
6 methods of decision-making described under Subsection [E] J of
7 this section;

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

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

14 SECTION 2. A new section of Chapter 40 NMSA 1978 is
15 enacted to read:

16 "[NEW MATERIAL] VISITATION RIGHTS.--

17 A. Visitation with a child shall be awarded only to
18 a biological or adoptive parent of the child or to a person
19 granted visitation rights by statute in accordance with the
20 provisions of the statute. Visitation with a child may also be
21 awarded to a nonparent if the court finds by clear and
22 convincing evidence all of the following:

23 (1) the legal parent consented to and fostered
24 the nonparent's formation and establishment of a parent-like
25 relationship between the nonparent and the child;

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1 (2) the nonparent and the child lived together
2 in the same household for a significant period of time;

3 (3) the nonparent assumed obligations of
4 parenthood by taking significant responsibility for the child's
5 care, education and development, including contributing towards
6 the child's support, without expectation of financial
7 compensation;

8 (4) the nonparent has established a parental
9 role sufficient to create with the child a bonded, dependent
10 relationship that is parental in nature; and

11 (5) visitation with the nonparent is in the
12 best interest of the child.

13 B. Visitation with a nonparent shall be limited to
14 occasional contact for the purpose of maintaining the
15 relationship and shall be maintained only if it does not create
16 undue conflict. In no case shall a nonparent be awarded
17 visitation that is comparable to visitation that would be
18 awarded to a parent.

19 C. As used in this section, "visitation" means a
20 period of time during which a child resides with or is under
21 the care and control of a parent or another person granted
22 visitation rights by a court."

23 SECTION 3. EFFECTIVE DATE.--The effective date of the
24 provisions of this act is July 1, 2011.