

## Atkinson Kelsey Teleseminar

*Two family lawyers from the Albuquerque New Mexico Family Law Firm of Atkinson & Kelsey discuss the legal process for divorce in New Mexico and financial issues related to divorce.*

Atkinson & Kelsey is the largest family law firm in New Mexico with seven attorneys who focus exclusively on divorce and family law. Their attorneys are among the most honored and highly rated in the state of New Mexico. The firm is able to deal with very complex divorce cases as well as less complex cases. The rates that the attorneys charge are based on the level of legal expertise required for the case.

Jon Feder is a shareholder with Atkinson & Kelsey practicing in divorce and family law including state planning and probate. He has practiced family law for more than 30 years and is a frequent lecturer before various groups regarding family law and divorce taxation. Mr. Feder is recognized as a family law specialist by the New Mexico Board of Legal Specialization. He has been court appointed mediator or facilitator in family law cases and has acted as a special master.

Tom Montoya is also a shareholder with Atkinson & Kelsey and he has practiced family law for over 30 years. He is a frequent lecturer, author and educator. He has taught more than 45 continuing education programs on family law for other lawyers. He has lobbied for more than 30 legislative enactments in family law and testified before the New Mexico state legislature over 60 times. Mr Montoya's also the Chair of the State Child Support Guidelines Committee and Past Chair of the Supreme Court Civil Procedure Domestic Relations Rules Sub-Committee, which created statewide rules of procedure for domestic relations and domestic violence cases. To say the least, Tom and Jon are two very accomplished and experienced family law attorneys.

I'm going to be talking with them today primarily about the legal process for divorce in New Mexico and financial related issues to divorce. This teleseminar is part of a four part series of teleseminars Divorce Magazine is doing with attorneys at the firm of Atkinson & Kelsey. The other teleseminars cover topics such as child custody, domestic violence, property distribution, minimizing your legal costs, etc. Please visit [divorcemagazine.com](http://divorcemagazine.com) or the [atkinsonkelsey.com](http://atkinsonkelsey.com) website to listen to other teleseminars.

**Let's get started with you, Jon. If you can tell us what is the procedure for divorce in New Mexico and how does a person begin the divorce process? Do they start filling out forms or what actually happens?**

**Feder:** Well, Dan, in New Mexico what is commonly called a divorce is actually a suit to dissolve the marriage contract. If there are attorneys involved they'll prepare the forms and go help the parties through the procedures. If the parties do not hire attorneys there are pro se forms available to litigants. Pro se means not represented by an attorney and they can find those forms at the website [nmcourts.gov](http://nmcourts.gov). Those forms are very generic and although they include everything you need, a petition, response, settlement agreement, parenting plan and the final document, they do not assist the parties in really determining what are the assets, what are the debts and what are the children issues. But they're there for filling in the blanks.

This dissolution proceeding or divorce proceeding is similar to any other lawsuit. In a lawsuit there must be what's called subject matter jurisdiction and personal jurisdiction over the defendant who in a divorce situation is called the respondent. There are no jury trials in a divorce action in New Mexico. To commence the action the petitioner or the person who wants to bring the suit files for the dissolution of marriage in the district court where either of the two parties reside.

In the petition, the relief being sought is set out so the court can determine what's before them. To start a divorce proceeding or a dissolution at least one of the parties has to be a resident in New Mexico for at least six months prior to the filing. If you've lived here only three months you can't get a divorce, but you still may be able to file what's called a legal separation, which will resolve other issues than the status of the marriage.

In the proceedings the court has to be told whether or not they have jurisdiction toward custody and visitation over the children. For that to happen, the children have to be generally residents of New Mexico for six months. Welfare's an emergency situation; the New Mexico courts can't award custody or visitation unless the children reside here. If there are no minor children involved and the respondent or defendant lives in New Mexico then New Mexico can look into the financial issues. The financial issues will include spousal support if it's appropriate and dividing what we call community assets and placing the responsibility on the parties to pay debts.

Once a petition is filed the defendant respondent has to be served with the petition by someone who's over the age of 18 and is not a party to the action. The respondent then has 30 days to respond to the petition. And during that time period things may begin.

They will divide the income between the parties and place responsibility to pay the debts between the parties. Then what's called the discovery process begins. The discovery process is asking the other side what are the assets and liabilities. There could be a request for production: "I want copies of the bank statements for the last two years because I want to know where the money went." There's a request for admissions: "Admit that you took \$10,000 out of the bank account and spent it."

Once the discovery is done then most of the courts in New Mexico will require the parties to attend what's called the facilitation, where a neutral third party attorney is brought in to meet with the parties and see if they can help them reach an agreement. The courts here have found that, more often than not, it's bad communications that cause people to go to trial versus they really do disagree as to what should happen. And then ultimately if there is no settlement, then the court will set a trial and the parties will proceed to a trial to determine the division of the property, division of the debts, awarding custody and awarding support between the parties.

**Well, Jon, that sounded pretty thorough. And I know you just summarized what has to be done. But it also reminds me, and I've been working with divorcing people and family law for 17 years, why in most cases people should consult an attorney when they're thinking about or starting the divorce process because they need to be aware of a number of elements.**

**So, Jon, there are many reasons why people divorce and one of them is because of affairs. What happens in a case where, let's say, the husband had an affair and the**

**wife says that she's going to take him to the cleaners? Is there some protection that he has or what is the likelihood of having problems due to the fact that he's had an affair?**

**Feder:** Well, they're not likely to be very tremendous. New Mexico is a true no-fault state. In other words, fault is not considered in determining any of the major factors in the case. Fault's not considered in determining custody of the children; it is awarded based upon the best interests of the children. The court's jurisdiction is awarding community property, which are assets minus the debts, equally between the parties. Child support is based upon guidelines. Spousal support, also known as alimony, is based primarily on factors that by statute are set for it.

So the affair will have little or no legal ramifications. The problems with affairs are the emotional ramifications to the spouse who considers himself or herself injured. But it's a practical matter; the courts will really not consider that in any award of property.

**Right. And if the spouse who had had the affair had spent, well, a significant or any, I guess, amount of money on the person that they had the affair with, would that be taken into consideration when dividing the assets?**

**Feder:** Only in a minor effect. If there's a huge expenditure, for example, the wife takes her boyfriend to Africa and puts him on the credit card, the court could find that that did not contribute to the community and could find that to be her own debt for doing something like that. But as the general rule of thumb, we are not a reimbursement state. We don't go back and look who spent what on what because it will be almost an impossible task for the court to unwind and determine was this an appropriate debt, was this not an appropriate debt. We're a no-fault state and the court is not going to award reimbursement except in very extreme circumstances.

**So, would that also be true where there's a stay-at-home partner in the marriage? And it comes time to divide the assets but that really doesn't have any significant bearing on dividing the assets?**

**Feder:** It has very little to no bearing on dividing the assets. Because, again, it's community property, which is property acquired during marriage through the parties labors and efforts, the court's jurisdiction is limited solely to dividing it equally between the parties.

**So, Tom, we're going to get you involved now. What happens in a case where somebody is not certain that their lawyer has a good handle on the financial aspects of their divorce? Is there something that they can or should do about that?**

**Montoya:** Yes, certainly from the very beginning there needs to be a divorce plan. So when consulting a lawyer, the lawyer needs to get a handle on the issues right away. This can be done in the initial consultation depending upon how much the client knows. But if not done then, it's accomplished shortly thereafter. The lawyer should know the procedural steps and to posture the case right away. That's the procedural aspect.

And then there's the substantive: that is, what are the issues and how is the court likely to divide them? But from the beginning there should be an approach that the client can

understand, where we're going and what we need to get to where we're going. So, there is the discovery process where financial information is either obtained from the client or from the other side. And once that is done then there needs to be a chart or divorce plan.

So, in our cases we have a community property balance sheet and a separate property balance sheet, that families should have and which usually businesses have. Once it's filled out, the balance sheet will pinpoint where the holes are, where the issues are, what needs to be understood, and what is needed in order to either present a case for a settlement or for trial.

And if there are businesses involved, the business has a balance sheet; the client needs to understand that this is needed to get a hold of the case. And once you proceed to a settlement or trial, the client should actually have as good information both procedurally and substantively as the lawyer knows, because if there is a trial the client is going to be testifying. The client will know the case just as well as the lawyer does if there is a good preparation.

**So, Tom, you've very clearly laid out what divorcing people should expect that their attorney would've put together for them. What if somebody listening to this teleseminar feels, gee, I'm not as up to date as I think I should be or as knowledgeable as I think I should be? Could or should that person seek guidance from another lawyer or what should they do?**

**Montoya:** Well, yes, it's common to have second or third opinions. But in every case there are, you know, the issues are laid out. The earlier the better, because when the issues are laid out early then everyone on our side, that would be the client and the attorney and anyone helping, possibly experts, have a direction and know where you're going. So, if the lawyer is giving blank answers, well then, there should be a second or third opinion.

**Right. So, Jon, let's go back to the question about the stay-at-home mother for a moment today, we spoke about it earlier. Does that person qualify for alimony in New Mexico?**

**Feder:** It all depends. New Mexico looks at ten different factors in setting spousal support. The 15 years, that is a mid-term marriage. The stay-at-home mom, it depends what her skills are. And the main things the court looks at are the age and health of the parties, the ability of each person to support themselves. A person that's been in a stay home marriage may need alimony for a short period of time, because beforehand they had their teaching degree but they stayed home to raise the children. And now it's 15 years later, their marriage is falling apart and perhaps all that spouse needs to do is go back to re-certify themselves as a teacher and they can become self-supporting.

They look at the current and future earnings of the parties. If you have somebody making a million dollars and somebody who can make minimum wage, then there's quite a possibility there will be spousal support. They're also going to look at what assets each party is going to receive. If it's what you may consider a small case with nominal assets but there are big incomes, then there's likelihood there's going to be alimony. But if that spouse is going to be receiving \$20 million it goes to the question

whether or not that spouse really needs to have alimony, because will the assets they receive generate sufficient income?

The courts look at the duration of the marriage, how long it is. 15 years is mid-term. We have alimony guidelines in New Mexico. It was a committee that was formed by the New Mexico Supreme Court and they issued recommendations to the courts on what should be considered and how spousal support should be handled. With short-term marriages, those under 5 years, generally there will not be any alimony claim.

Those between 5 and 20 years, then they will look at it whether it needs to be a rehabilitative support situation. That's the example I gave you before where the person needs to go back to school to upgrade their degrees to become self-supporting. They can have transitional support. If the parties are 60 years old after this 15-year marriage they may award support for 5 years or 6 years until the parties reach full social security age or when they may be eligible to start receiving retirements.

So, there are very many factors that are involved. They also look at the ability of the other spouse to pay alimony. Under the guidelines is a rule that if one party's income is under \$25,000 a year, that person will not generally be ordered to pay spousal support. Because one thing the court wants to ensure is that support is paid. Somebody earning that amount of money probably has a very poor ability to even pay support. So the court will consider the ten factors set out in the statute, and they are all weighed equally.

**Tom, I'm going to come back to you for the next question. How do you fairly assess the economic value and impact of divorce on things like employee benefits and stock options, pension plans and retirement accounts? Is there a procedure or process that you would use to assess the value?**

**Montoya:** Yes, there is. And that's a very important question that you mentioned, Dan, because oftentimes these employment benefits are some of the largest assets involved in the case. Therefore, it can be the largest issue. There is a whole range of employment benefits that can be valued and divided. It can be done by the hourly rate.

And there are other methods. There are, of course, pension plans and there are generally two types: one is a defined contribution plan and another is a defined benefit plan. The defined contribution plan is, in most cases, simply an account and it could be a 401K profit-sharing type of account. The account that has been created during marriage is divided equally. If a portion is acquired before marriage, then the account is apportioned between a separate and not divided portion and a community or joint divided portion.

It's important to understand that this is a pre-tax account. You don't want to offset a \$50,000 dollar defined contribution plan 401K against a \$50,000 account or stock that is in after tax dollars. That's not an equal division. So, you want to consider tax effects when dividing pension plans. The other is a defined benefit plan and this is what is commonly understood as a benefit payment for the life of the participant. And these are valued in understood ways. A personal value could be obtained for a defined benefit plan. And that value determined given to the employee and then the non-employee receives compensating offsetting value in the same amount. Or in the defined benefit

plan the monthly pension benefit can be split or divided when the retirement occurs or is eligible to occur.

And there are rules for dividing a benefit stream as well, and essentially what has been acquired during marriage is divided equally. Stock options were also mentioned and stock options are employment benefits, they can be very valuable. They are apportioned between what type of effort is needed to have them mature. And the effort or work that was done during marriage is divided equally. If there is still additional work or effort after divorce then that is apportioned separately. But in all of these there are tax effects to consider and the whole range of the employment benefits are at issue as I indicated.

**Jon, I'm going to go back to you now because one of the things that Tom just talked about was pension funds. And I think this ties into QDROs. Can you please tell me what a QDRO is and how is it divided in a divorce case?**

**Feder:** A QDRO stands for Qualified Domestic Relations Order. Back in the late 70's, the federal government passed some significant legislation that affected pension plans and retirements, which were previously exempt from anybody's claims. Here in the divorce circumstance, one spouse may now receive a pension earned in the name of the other spouse.

A QDRO relates to a private plan. There are different plan names. For the federal government, you may have their common retirement plans. In that area, the federal government says you can divide what's called Tier 2 benefits but not Tier 1 benefits. If you were a federal employee before 1985, it's called a civil service order.

Each state has their own pension plans and their own rules on how to divide them, because technically the federal government can't really affect those pensions. So, what a QDRO does is allow the spouse to receive one half of a retirement fund, which can be a defined contribution plan, without there being any tax effect. Then the person takes a carryover basis on the retirement—basically they receive a retirement—it's not taxable to the employee or former employee and it will be taxable by the recipient only when they take the money and start spending it. Because they have a right to rollover their share of the retirement to an individual retirement account or other appropriate retirement mechanism.

You had mentioned why should you have an attorney versus trying to do this process on your own pro se. The Domestic Relations Order is probably one of the most complicated areas of all, because every employer has a different plan and they have different terms in it. And you have to be able to understand the terms of what they are trying to divide and how you're allowed to divide it. We have a settlement week in Albuquerque and during that time period it seems I am assigned as valuable volunteer to help settle cases in that week. I'm assigned cases that have retirements so these parties can go divide the retirements.

Just because this QDRO is not entered, doesn't mean the spouse doesn't have a retirement, the not employed spouse. What it means is they have another lawsuit that's pending. So the QDRO, using in its generic term, is very important because it secures the non-employed spouse their right to the property rights in that retirement system.

**Right. And next to their house or maybe it's greater than their house, this is going to be significant amounts of money?**

**Feder:** Yeah. The retirements are, especially in New Mexico, clearly the most valuable asset in almost every case. For a state employee who's worked 25 years, that retirement may be worth \$400,000 or \$500,000 even though that employee was only making \$30,000 or \$40,000 a year. So, it is usually the most significant asset in a case where there is a retirement plan that covers an employee.

**So, Jon, what happens in a case where a couple has a substantial investment account and they're getting a divorce? Will that account simply be split in two and would there be any tax consequence to splitting an account in two?**

**Feder:** Well, the general rule is there is no tax consequence because the internal revenue code has provision 1041 which states that transfers between husbands and wives incident to a divorce are not taxable events. So when they divide those stocks, if they divide them equally and they are not selling the stocks and then receiving money, each party gets what's called carryover basis. Now, if they sell the stocks in the future they will pay capital gains tax on the sale—the difference between what they bought it for and what they sold it for. But the mere division of the stocks between the parties will not be a taxable event.

**And, Tom, in the case where a couple owns a business or a number of businesses, what is the distinction between a business valuation for divorce purposes compared to a business valuation for a third party if you were selling the business or something like that? Is there different kind of business valuations that are done in the case of divorce?**

**Montoya:** Yes, there may be. And, Dan, you have touched on obviously a very complicated and difficult area involving business cases and business valuations. The courts are faced with these issues very frequently. In New Mexico the case law says that the value of all property in a divorce case is market value. Now, there are different ideas and different interpretations as to what that means. And there are different experts that talk about different types of valuations. But that's what we're looking for.

Now, market value is a willing buyer and a willing seller. So, if there is a business involved and it is going to be sold in a divorce context, then the market will determine what the value is, and the extent to which the business is formed during the marriage will be divided equally. In most cases, neither one of them want the business sold because maybe the business is the one that generates the income that maybe needed to be divided after the divorce as well.

So, in those cases there needs to be a valuation of the business as a going concern. The complicated issues arise whether that business is controlled by one spouse or the other. You have a majority control of the shares and can determine the direction of the business, can determine the board of directors and are essentially in control. That is one aspect that affects a valuation for divorce purposes if it's not going to be sold.

**And who does the actual business valuation, Tom? Is that done by you or are there other professionals that you get involved?**

**Montoya:** Typically in the divorce case, it's going to have to involve outside professionals because the clients usually—even if they know a lot—are not very good at testifying as to the value of the business. So, in most cases you would need an expert. But not all businesses require experts though, I mean, with experience you can kind of look at the balance sheet and see whether that would justify an expert valuation. It depends upon the business itself. But the more valuable the business is, the more necessary it will be that you have an expert valuator.

The other thing you do want to look at is if there's a minority shareholder or minority member or partner. If they don't control the business, they just own stock in it or a share in it, that does affect the value. The shareholder agreement or partner agreement would have a very large impact on the valuation itself. These are all factors that need to be considered. And in most cases there is a buyout over time with interest and secured by property.

**So, would you say that working with an experienced family law attorney like yourself or Jon and the professionals that you would bring in helps ensure that the party who hasn't been involved in the business gets their fair share at the end of the day during the divorce?**

**Montoya:** I'm going to say very definitely, Dan. Now, regardless of what lawyer is hired, if there is a valuable business then the owner or the spouse is absolutely recommended to hire an experienced family lawyer to address that matter. It's a virtual necessity.

**So, what happens in the case where the person is not happy with the outcome of their divorce? Can they appeal it? Is that possible in New Mexico? Are divorce cases appealed there?**

**Montoya:** Yes. Now, as part of an appeal, I'm going to quickly go through that process. So first of all, you want to try hard to settle the case, because you control the outcome. And in spite of popular opinion even litigators, trial lawyers very much want to settle a case. Certainly in our firm we want to settle because we can control the outcome a lot better.

The cases that are tried, however, now this is going towards an appeal. A trial lawyer needs to actually have a great knowledge of an appeal. And an appellant lawyer has to have a great knowledge of trial procedures as well. So it's best to have both or access to both because to properly lay a case for appeal it has to be done at the trial court. If it's not done then it may adversely affect an appeal if the case is not laid out properly before the trial at the trial court.

An appeal is where you're dissatisfied with the outcome, as you pointed out. So, where do you go from there? Well, there are post-decree motions that can be done even after the trial, after the court ruled, there are some post-decree motions that can be filed to ask the court to reconsider or bring some matters to bear that possibly were overlooked. There are procedures for that. After that happens, then there is time for appeal.

Now, any client that is thinking about post-trial motions or an appeal, there are strict timetables on that. So, missed timetables would mean that the court order ruling would stand. With regard to an appeal, however, it's generally only legal issues that are appealed and not discretionary issues that the court makes. So the court could go one way or the other on any issue and there's evidence to support what the court did, well, that issue will not be appealable because that's the court's discretion.

So, usually appeals are where a court went wrong on a legal issue. The appellant process, however, is very lengthy so it has to be worthwhile. We do lots of appeals. Our firm has had the most reported cases in the family law area and in the state.

**So, what happens in a case where circumstances change after the divorce has been finalized, either somebody loses their job or they need to move out of state? Can those sort of things be changed after the divorce has been finalized?**

**Montoya:** I'll take a shot at that. In family law cases where there are support issues, where there are child support or spousal support, the court keeps jurisdiction of those issues until the children reach the age of majority. And in the case of spousal support until it ends. In those cases, changed circumstances can mean that there would be a change in the support payments. There are, in spousal support cases, ways to arrange the award so that it cannot be changed. But child support matters can always be changed.

Also, the court always has jurisdiction to enforce its orders even many years after the divorce, anything that is done on property that is not appealed will not be changed. So, the only things that can be changed typically are support. There is under a certain rule, Rule 60, where a court can reconsider a decision but those would have to be dealt with within a year of when the court made the decision. Courts can overturn even a property judgment or a monetary judgment if there have been certain types of actions like mistake, fraud, things of that nature.

**Tom, I might be asking the same question in a different way, but what happens if the person disagrees with the outcome of their case. Are there additional options to which you've already mentioned here?**

**Montoya:** Those would be it. The options would be within a year after the divorce and in certain cases a court can set aside the judgment for things like mistake, fraud, inadvertence, excusable neglect, things like that for a year. And there are other reasons if the court didn't have jurisdiction; that's an attack on the judgment itself, those can be successful. But for compelling reasons a court can set aside the judgment. Except for that and post-decree motions where you are bringing a matter for reconsideration to the court, once the court has ruled the only other avenue is by way of appeal.