

Denise Ready Podcast

An Albuquerque family law attorney discusses spousal support, child support, and child custody issues in New Mexico divorce.

What is the best way to resolve a high-conflict custody case?

Ready: High-conflict custody cases often involve allegations by one or both parents that may raise concerns regarding the emotional or physical safety of a minor child. Those cases can involve sexual abuse allegations or addiction allegations claiming that one party has an addiction to alcohol or another drug – often prescription pills. Domestic violence, physical abuse, or emotional abuse issues may also be raised.

The attorney's first job is to ferret out whether there is truth and foundation to the allegations, because the child needs to be protected first and foremost. If the allegations are true, you want to work with the parent who has the issues to reduce and hopefully try to remove the issues. The conflict is very difficult for the parents, but the turmoil caused by the conflict is very damaging to the child – so the goal is ultimately to reduce the conflict.

What options does a parent who is a recovering alcoholic or drug addict have regarding gaining custody now that he or she is sober? What factors will the judge take into account when considering this request?

Ready: When a party is in recovery from substance abuse addiction, the judge is going to look at several factors to be sure that the child is protected and that the parent is maintaining his or her sobriety. The first factor the judge will look at is the period of sobriety; judges are quite astute on these issues and know that recovery often comes with a relapse. Secondly, they're going to look at whether the person is attending an A.A group or outpatient treatment or counselling with a substance abuse counsellor as a support.

Often the other parent who is not in recovery will ask for additional protective measures, such as an interlock being placed on a vehicle for a period of time. There are handheld interlocks you blow into that are mobile, so you can take them into your home or workplace. Sometimes interlocks are used for a period of time to be certain that the parent is not drinking. If it is a drug issue, the court can put random drug testing in place for a period of time. If there has been a severe substance abuse problem, then the judge will look into protective measures for up to a year to be certain the person is not relapsing.

How do courts determine best interest in suits affecting the parent-child relationship?

Ready: This is a broad issue and best interest can be subjective, but the courts look for whether a parent is impaired in any way; whether the parent has an addiction; whether the parent suffers from a mental illness; and whether the parent has the ability to care for the child and meet the child's basic needs. Those are just the foundational issues. Domestic violence and abuse are also issues that the judge looks for and the parent suffering with those issues would have to prove, as with a mental illness, that they are

on their medication and that they are functioning. If it's a domestic violence issue, they would have to go through anger management and counselling as well as maintain a level of zero abuse or violence.

The best interest standard also looks at how old the child is, and parent-child bonding is very important in the jurisdiction where I practice. When the child is particularly young, the court looks at which parent is the anchor parent; which parent the child goes to when they're sick, when they're feeling upset, or when they wake up in the middle of the night; and which parent has served as the primary parental figure for the child. It used to be that the stay-at-home parent was who the child went to to meet their daily needs. Now you often see both parents in the workforce and the children being bonded to both parents more equally. Bonding is a factor that the courts will consider.

Do all custody issues need to be resolved before a divorce can be granted?

Ready: No. In the jurisdiction that I practice in, custody is in flux until the child reaches 18. You must have a temporary custody plan in place when the divorce is granted, but custody and visitation schedules can be modified up until the child is 18 – so the divorce decree can be final and custody can be ongoing.

Are both spousal and child support taxable?

Ready: The recipient of the spousal support is taxed on the spousal support that he or she receives. Child support is not taxable to the recipient.

What payments qualify as spousal support? How does the IRS determine if a payment is spousal support or child support?

Ready: We are very careful in the drafting of our documents to delineate what is spousal support and what is child support. In order for spousal support to be deductible to the person paying and taxable to the person receiving, it must end on the recipient's death. Spousal support doesn't necessarily have to be paid directly to the recipient and bills can be paid on the recipient's behalf to qualify as spousal support.

How does a judge determine the amount and duration of spousal support in New Mexico? What factors are typically taken into consideration?

Ready: Some of the statutory factors the judge uses to determine amount and duration of spousal support include the length of the marriage, lifestyle of the parties during the marriage, and the parties' earning capacities. However, the crux is the need and the ability to pay. The court will look at the reasonable monthly bills of the person who's asking for spousal support, and what is considered reasonable depends on the context of the income and the lifestyle during the marriage. Ability to pay depends on the payor: what is the earning capacity or income of the payor and what ability does that person have to pay spousal support?

What is permanent spousal support and under what conditions might a judge order it?

Ready: The judges in New Mexico do not order permanent spousal support. They order what is called indefinite support. Rarely, if ever, have I seen the words ‘permanent support’ in a judgement or decree, because spousal support is typically modifiable. You can agree to non-modifiable spousal support in a settlement document and you can agree it will be permanent and end upon the recipient's death.

However, when you're in court litigation, spousal support is modifiable. It can be indefinite in long-term marriages, but it's indefinite because you cannot predict the future circumstances of either party. If you make a permanent support award and the person who's paying gets in a car accident or becomes disabled in such a way that ends or diminishes their income, then they could go back to ask the court to modify or terminate the spousal support because the circumstances have changed. The judges don't order permanent spousal support, but will order indefinite support in certain circumstances.

Is there non-modifiable spousal support? If so, what are the pros and cons of modifiable versus non-modifiable spousal support?

Ready: Non-modifiable spousal support comes with the benefit that you know exactly what you are going to pay or exactly what you're going to receive and for what duration, so there's predictability to a non-modifiable spousal support award. The downside is that if you enter into a non-modifiable support award, it is non-modifiable even if your circumstances change. You take a risk in entering into a non-modifiable support agreement. With a modifiable agreement – although you don't have the predictability and you may end up back in court – the benefit is that if your circumstances change drastically, you can, in fact, change the spousal support award.

If the spousal support recipient is financially irresponsible, can the payor make payments to a third party for the mortgage or rent on the home in which the recipient is living and have it qualify as spousal support?

Ready: Yes, because they would be paying on behalf of the recipient spouse. This is not seen very often because judges like the recipient to be in control of his or her own funds. However, if there's an addiction and the bills are not getting paid, I could envision a judge ordering payments to the third party. The judge could also order that when the payor's name is still on the mortgage or still on a debt and their credit is in jeopardy. Upon the divorce, all bills are placed in one or the other spouse's name, rather than in joint names. If you get the house and the mortgage, you're going to be required to refinance to take the ex-spouse's name off the mortgage.

Do men ever receive spousal support?

Ready: The factors in our statute should be applied equally to men and women.

In practice, how often do men receive spousal support?

Ready: I have only seen it a handful of times – in three to five cases out of over 100 cases.

What can the spousal support recipient do to protect against the payments ending with the payor's death or disability?

Ready: You can secure your spousal support award through life insurance or by placing liens on any real estate that the payor owns in the state where the spousal support is awarded.

Do spousal support payments end if the recipient remarries or moves in with a new romantic partner?

Ready: In New Mexico, if the recipient remarries, the spousal support payments do terminate. If the payor remarries, it probably will not have an impact on the spousal support award. Regarding cohabitation, the spousal support payments will not necessarily terminate if the recipient moves in with someone. However, if bills are being shared and income is coming in from the new partner, then that would be taken into consideration as a reason to modify or possibly terminate the spousal support award.

Do child support payments end if the recipient remarries or moves in with a romantic partner?

Ready: Absolutely not. There's no impact whatsoever. You cannot take the new spouse's income into consideration under New Mexico law because unless they have adopted the child, they have no legal obligation to support the child.

How does the divorcing couple decide whether sole custody or joint custody is best for their family?

Ready: In New Mexico, there are really two types of custody. There's legal custody and physical custody. New Mexico has a presumption that joint legal custody is in the best interest of the child. Joint legal custody involves joint decision-making authority for the major decisions in your child's life, including those related to education. Is the child going to have a tutor? Is the child going to attend a public or private school? What school will the child attend? Elective medical decisions, such as orthodontic work, are to be made jointly. Any emergency decisions would be made by the parent who has the child in their care at the time.

Extracurricular activities are another decision-making authority area in New Mexico, including whether the child is going to participate in certain activities, what those activities will be, and how many. Residence is also a joint legal custody issue regarding the state that the child will reside in. Religion is a joint custody issue, involving whether the child can or cannot be baptized, whether the child can or cannot be confirmed, and what religion the child is going to be raised in, if any. The presumption in New Mexico is that both parents should have equal input in the major decisions that have an impact on the child's life.

Sole custody is seen very rarely, such as in cases where a parent is impaired by addiction. If they are not able to communicate or function, sole custody may be awarded. In severe domestic violence cases, sole custody may also be awarded. In incredibly high-conflict cases where the parties cannot agree on anything, sole custody can sometimes be awarded; however, the judges will often put in place a guardian ad

litem – an attorney for the child to help make decisions when the parents cannot agree in the major decision-making areas.

It's fantastic if the parents are able to agree on physical custody. The safety and the emotional and physical welfare of the child must be taken into consideration. If the child is older, his or her desires should be taken into consideration – particularly if they are teenagers in New Mexico. The bonding and the availability of the parent to the child depending on work schedules would also be taken into consideration.

In lower conflict cases, there are more equal time-sharing schedules for young children, because both parents are often in the workforce and have been access parents since the child was very young. These days, fathers are taking on larger and larger roles in being primary or equal parental figures for younger children.

Do the New Mexico child support guidelines take extracurricular activities into account? If not, what do the guidelines cover and what can parents do to make sure that activities or medical expenses are going to be covered?

Ready: When the guidelines were legislated in New Mexico, they stated that extracurricular activities were considered in setting the baseline child support. In our case law, they're technically not supposed to be added on top of the baseline child support award. Often in settlements and in the courtroom, the judge will allocate both parties 50/50, meaning each parent will pay for half of the agreed-upon activities.

If one parent in a joint custody situation makes a unilateral decision without the consent of the other parent to enrol the child in horse riding lessons and the other parent can't afford it, the judge will often make the parent who unilaterally enrolled the child in the activity pay for 100% of it. However, jointly-agreed upon activities or activities that the child had engaged in while the marriage was still intact are called status quo and should continue. The court will either order 50/50 allocation between the parents or they'll look at each parent's income and have them pay *pro rata*, based upon their proportionate share of the total income. The same holds true for uninsured medical, orthodontia, vision, or counselling expenses; the court will either allocate those 50/50 or based on each parent's percentage of the total income.

What happens if a parent is genuinely struggling to make child support payments? Can they be modified if there's been a change in circumstance, like a job loss or downsizing?

Ready: Absolutely. Under the New Mexico law, the buzzwords are material and substantial circumstances. If you lost your job or were laid off and you are making good faith efforts to either receive unemployment income or seek a job, you can file a motion with the court asking to modify your child support obligation based upon a change of circumstances. Or if the other parent gets a better paying job, you can go into court and ask to modify the support based upon the change in income.