

1 SENATE BILL 374

2 **55TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2021**

3 INTRODUCED BY

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10 AN ACT

11 RELATING TO DOMESTIC AFFAIRS; AMENDING A SECTION OF CHAPTER 40,  
12 ARTICLE 4 NMSA 1978 TO PROVIDE FOR A PRESUMPTION OF EQUAL TIME-  
13 SHARING BETWEEN PARENTS IN CUSTODY DETERMINATIONS.

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

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

18 "40-4-9.1. JOINT CUSTODY--STANDARDS FOR DETERMINATION--  
19 PARENTING PLAN.--

20 A. There shall be a presumption that joint custody  
21 with equal time-sharing is in the best interests of a child in  
22 an initial custody determination. ~~[An award of joint custody  
23 does not imply an equal division of financial responsibility  
24 for the child.]~~ Joint custody shall not be awarded as a  
25 substitute for an existing custody arrangement unless there has

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1       been a substantial and material change in circumstances since  
2       the entry of the prior custody order or decree, which change  
3       affects the welfare of the child such that joint custody is  
4       presently in the best interests of the child. If the court has  
5       previously entered an order determining joint legal custody but  
6       has not awarded equal physical custody of the child, and there  
7       has been no specific finding that joint custody is not in the  
8       child's best interest pursuant to the factors set forth in this  
9       section, the court shall set a hearing in a timely manner on  
10       the motion to determine whether the parties shall have equal  
11       legal and physical joint custody. In determining joint  
12       physical custody, it shall be presumed that joint physical  
13       custody means equal time-sharing. The court may make a  
14       determination for equal joint legal and physical custody on  
15       these matters without making a finding that there has been a  
16       substantial change of family circumstances. With respect to  
17       any proceeding in which it is proposed that joint custody be  
18       terminated, the court shall not terminate joint custody unless  
19       there has been a substantial and material change in  
20       circumstances affecting the welfare of the child, since entry  
21       of the joint custody order, such that joint custody is no  
22       longer in the best interests of the child.

23                   B. In determining whether a joint custody order is  
24       in the best interests of the child, in addition to the factors  
25       provided in Section 40-4-9 NMSA 1978, the court shall consider

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1 the following factors:

2 (1) whether the child has established a close  
3 relationship with each parent;

4 (2) whether each parent is capable of  
5 providing adequate care for the child throughout each period of  
6 responsibility, including arranging for the child's care by  
7 others as needed;

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

12 (4) whether the child can best maintain and  
13 strengthen a relationship with both parents through  
14 predictable, frequent contact and whether the child's  
15 development will profit from such involvement and influence  
16 from both parents;

17 (5) whether each parent is able to allow the  
18 other to provide care without intrusion, that is, to respect  
19 the other's parental rights and responsibilities and right to  
20 privacy;

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

24 (7) geographic distance between the parents'  
25 residences;

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

(9) whether a [judicial adjudication has been made in a prior or the present proceeding that either parent or other person seeking custody has engaged in one or more acts of domestic abuse] conviction for domestic violence against the child, a parent of the child or other household member [If a determination is made that domestic abuse has occurred] exists or whether a charge for domestic violence is pending, in which case the court shall set forth findings that the custody or visitation ordered by the court adequately protects the child, the abused parent or other household member.

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

D. The court shall allocate parenting time pursuant to joint custody according to the child's best interests. In allocating parenting time, the court shall presume that it is in the child's best interests to award equal time to each parent and that:

(1) the child has a right to a strong and healthy relationship with the child's parents.

(2) the child's parents have a right and responsibility to create and maintain a strong and healthy

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1        relationship with the child; and

2                (3) in the absence of domestic violence or any  
3        other factor that the court expressly finds to be relevant,  
4        proximity to and frequent contact with both parents promotes  
5        the child's healthy development.

6                E. In a child custody proceeding, the court shall:

7                (1) facilitate parental planning and agreement  
8        about the child's upbringing and allocation of parenting time  
9        and other parental responsibilities;

10                (2) continue existing parent-child  
11        relationships;

12                (3) secure the maximum involvement and  
13        cooperation of parents regarding the physical, mental, moral,  
14        and emotional well-being of the child during and after a court  
15        proceeding;

16                (4) encourage or order the child's parents to  
17        participate in programs designed to educate parents to:

18                (a) minimize or eliminate rancor and the  
19        detrimental effect of litigation in any proceeding involving  
20        children; and

21                (b) facilitate the maximum cooperation  
22        of parents in raising their children; and

23                (5) presume that, in order to maximize the  
24        opportunity for the child to maintain and strengthen the  
25        child's relationship with each parent, the involvement of both

1       parents for an equal amount of time is in the best interests of  
2       the child.

3               [D.] F. In any case in which the parents agree to a  
4 form of custody, the court should award custody consistent with  
5 the agreement unless the court determines that such agreement  
6 is not in the best interests of the child.

7               [E.] G. In making an order of joint custody, the  
8 court may specify the circumstances, if any, under which the  
9 consent of both legal custodians is required to be obtained in  
10 order to exercise legal control of the child and the  
11 consequences of the failure to obtain mutual consent.

12               [F.] H. When joint custody is awarded, the court  
13 shall approve a parenting plan for the implementation of the  
14 prospective custody arrangement prior to the award of joint  
15 custody. The parenting plan shall include a division of a  
16 child's time and care into periods of responsibility for each  
17 parent. It may also include:

18                       (1) statements regarding the child's religion,  
19 education, child care, recreational activities and medical and  
20 dental care;

21                       (2) designation of specific decision-making  
22 responsibilities;

23                       (3) methods of communicating information about  
24 the child, transporting the child, exchanging care for the  
25 child and maintaining telephone and mail contact between parent

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1 and child;

2 (4) procedures for future [decision-making]  
3 decision making, including procedures for dispute resolution;  
4 and

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

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

16 [G.] I. Where custody is contested, the court shall  
17 refer that issue to mediation if feasible. The court may also  
18 use auxiliary services such as professional evaluation by  
19 application of Rule 706 of the New Mexico Rules of Evidence or  
20 Rule 53 of the Rules of Civil Procedure for the District  
21 Courts.

22 [H.] J. Notwithstanding any other provisions of  
23 law, access to records and information pertaining to a minor  
24 child, including medical, dental and school records, shall not  
25 be denied to a parent because that parent is not the child's

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1 physical custodial parent or because that parent is not a joint  
2 custodial parent.

3 [I.] K. Whenever a request for joint custody is  
4 granted or denied, the court shall state in its decision its  
5 basis for granting or denying the request for joint custody. A  
6 statement that joint custody is or is not in the best interests  
7 of the child is not sufficient to meet the requirements of this  
8 subsection.

9 [J.] L. An award of joint custody means that:

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

12 (2) each parent shall have, and be allowed and  
13 expected to carry out, responsibility for the child's  
14 financial, physical, emotional and developmental needs during  
15 that parent's periods of responsibility;

16 (3) the parents shall consult with each other  
17 on major decisions involving the child before implementing  
18 those decisions; that is, neither parent shall make a decision  
19 or take an action [which] that results in a major change in a  
20 child's life until the matter has been discussed with the other  
21 parent and the parents agree. If the parents, after  
22 discussion, cannot agree and if one parent wishes to effect a  
23 major change while the other does not wish the major change to  
24 occur, then no change shall occur until the issue has been  
25 resolved as provided in this subsection;

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

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

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

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

(d) both parents shall have access to medical and dental treatment providers and records. Each parent has authority to make emergency medical decisions. Neither parent may contract for major elective medical or dental treatment unless both parents agree or it has been otherwise resolved as provided in this subsection; and

(e) both parents may attend the child's public activities and both parents should know the necessary

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schedules. Whatever recreational activities the child participated in during the marriage should continue with the child's agreement, regardless of which of the parents has physical custody. Also, neither parent may enroll the child in a new recreational activity unless the parties agree or it has been otherwise resolved as provided in this subsection; and

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

(a) agreement between the joint custodial parents;

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

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

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

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

(f) reference to a master pursuant to Rule 53 of the Rules of Civil Procedure for the District Courts; or

(g) the district court.

[K.] M. When [any] a person other than a natural or adoptive parent seeks custody of a child, no such person shall

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1 be awarded custody absent a showing of unfitness of the natural  
2 or adoptive parent.

3 [L.] N. As used in this section:

4 (1) "child" means a person under the age of  
5 eighteen;

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

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

12 (a) physical harm;

13 (b) severe emotional distress;

14 (c) a threat causing imminent fear of  
15 physical harm by any household member;

16 (d) criminal trespass;

17 (e) criminal damage to property;

18 (f) stalking or aggravated stalking, as  
19 provided in Sections 30-3A-3 and 30-3A-3.1 NMSA 1978; or

20 (g) harassment, as provided in Section  
21 30-3A-2 NMSA 1978;

22 (4) "joint custody" means an order of the  
23 court awarding custody of a child to two parents [Joint custody  
24 does not imply an equal division of the child's time between  
25 the parents or an equal division of financial responsibility

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~~for the child];~~

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

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

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

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

(9) "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."