

Authorities for Segment on Interviewing and Receiving Testimony from Children

11-401. Test for relevant evidence.

Evidence is relevant if

- A. it has any **tendency to make a fact more or less probable** than it would be without the evidence, and
- B. the fact is **of consequence** in determining the action.

11-601. Competency to testify in general.

Every person is competent to be a witness unless these rules provide otherwise.

State v. Noble, 1977-NMSC-031, 90 N.M. 360, 563 P.2d 1153. In determining whether a child is competent to testify, the trial court must determine from inquiries **the child's capacities of observation, recollection and communication and also the child's appreciation or consciousness of a duty to speak the truth;** it then lies within the sound discretion of the trial court to determine, from the child's intelligence and consciousness of a duty to be truthful, whether or not the child is competent to testify as a witness.

11-602. Need for personal knowledge.

A witness may testify to a matter only if evidence is introduced **sufficient to support a finding that the witness has personal knowledge of the matter.** Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to testimony by an expert witness under Rule 11-703 NMRA.

11-603. Oath or affirmation to testify truthfully.

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

13-211. Oath to witness.

Do you [and each of you] solemnly swear or affirm under penalty of law that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

5-613. Conduct of trial.

- A. Oath of witnesses. The judge shall administer the following oath to each witness: “Do you swear or affirm that the testimony you will give in this case will be the truth, the whole truth and nothing but the truth, under penalty of law?”
- B. Evidence. The Rules of Evidence, so far as they are applicable and not in conflict with these rules, shall apply to and govern the trial of criminal cases.

State v. Tabor, Court of Appeals No. 28,335, unreported opinion. Defendant claims that the district court erred when it used an “alternative” to the standard witness oath before the child testified. When the child was called to testify, the district judge asked the child if she knew the difference between telling the truth and telling a lie, if she would get in trouble if she told a lie, and if she understood that it was important for her to tell the truth on that day.

Alternative Oath for Children.

You have to tell us the truth. That means, don't tell us anything you made up. Don't tell us anything someone else made up. Just tell us what really happened. Do you promise to tell us what really happened?

40-4-9. Standards for the determination of child custody; hearing.

- A. In any case in which a judgment or decree will be entered awarding the custody of a minor, the district court shall, if the minor is under the age of fourteen,

determine custody in accordance with the **best interests** of the child. The court shall consider all relevant factors including, but not limited to:

- (1) the wishes of the child's parent or parents as to his custody;
 - (2) the **wishes of the child** as to his custodian;
 - (3) the interaction and interrelationship of the child with his parents, his siblings and any other person who may significantly affect the child's best interest;
 - (4) the child's adjustment to his home, school and community; and
 - (5) the mental and physical health of all individuals involved.
- B. **If the minor is fourteen years of age or older, the court shall consider the desires of the minor as to with whom he wishes to live before awarding custody of such minor.**
- C. **Whenever testimony is taken from the minor concerning his choice of custodian, the court shall hold a private hearing in his chambers.** The judge shall have a court reporter in his chambers who shall transcribe the hearing; however, the court reporter shall not file a transcript unless an appeal is taken.

40-4-9.1. Joint custody; standards for determination; parenting plan.

- A. **There shall be a presumption that joint custody is in the best interests of a child** in an initial custody determination. An award of joint custody does not imply an equal division of financial responsibility for the child. Joint custody shall not be awarded as a substitute for an existing custody arrangement unless there has been a substantial and material change in circumstances since the entry of the prior custody order or decree, which change affects the welfare of the child such that joint custody is presently in the best interests of the child. With

respect to any proceeding in which it is proposed that joint custody be terminated, the court shall not terminate joint custody unless there has been a substantial and material change in circumstances affecting the welfare of the child, since entry of the joint custody order, such that joint custody is no longer in the best interests of the child.

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

- (1) whether the child has established a close relationship with each parent;
- (2) whether each parent is capable of providing adequate care for the child throughout each period of responsibility, including arranging for the child's care by others as needed;
- (3) whether each parent is willing to accept all responsibilities of parenting, including a willingness to accept care of the child at specified times and to relinquish care to the other parent at specified times;
- (4) whether the child can best maintain and strengthen a relationship with both parents through predictable, frequent contact and whether the child's development will profit from such involvement and influence from both parents;
- (5) whether each parent is able to allow the other to provide care without intrusion, that is, to respect the other's parental rights and responsibilities and right to privacy;
- (6) the suitability of a parenting plan for the implementation of joint custody, preferably, although not necessarily, one arrived at through parental agreement;

- (7) geographic distance between the parents' residences;
 - (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 against the child, a parent of the child or other household member. If a determination is made that domestic abuse has occurred, 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. In any case in which the parents agree to a form of custody, the court should award custody consistent with the agreement unless the court determines that such agreement is not in the best interests of the child.
- E. In making an order of joint custody, the court may specify the circumstances, if any, under which the consent of both legal custodians is required to be obtained in order to exercise legal control of the child and the consequences of the failure to obtain mutual consent.
- F. When joint custody is awarded, the court shall approve a parenting plan for the implementation of the prospective custody arrangement prior to the award of joint custody. The parenting plan shall include a division of a child's time and care into periods of responsibility for each parent. It may also include:
- (1) statements regarding the child's religion, education, child care, recreational activities and medical and dental care;

- (2) designation of specific decision-making responsibilities;
- (3) methods of communicating information about the child, transporting the child, exchanging care for the child and maintaining telephone and mail contact between parent and child;
- (4) procedures for future decision making, including procedures for dispute resolution; and
- (5) other statements regarding the welfare of the child or designed to clarify and facilitate parenting under joint custody arrangements.

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

- G. Where custody is contested, the court shall refer that issue to mediation if feasible. The court may also use auxiliary services such as professional evaluation by application of Rule 706 [Rule 11-706 NMRA] of the New Mexico Rules of Evidence or Rule 53 [Rule 1-053 NMRA] of the Rules of Civil Procedure for the District Courts.
- H. Notwithstanding any other provisions of law, access to records and information pertaining to a minor child, including medical, dental and school records, shall not be denied to a parent because that parent is not the child's physical custodial parent or because that parent is not a joint custodial parent.
- I. Whenever a request for joint custody is granted or denied, the court shall state in its decision its basis for granting or denying the request for joint custody. A

statement that joint custody is or is not in the best interests of the child is not sufficient to meet the requirements of this subsection.

J. An award of joint custody means that:

- (1) each parent shall have significant, well-defined periods of responsibility for the child;
- (2) each parent shall have, and be allowed and expected to carry out, responsibility for the child's financial, physical, emotional and developmental needs during that parent's periods of responsibility;
- (3) the parents shall consult with each other on major decisions involving the child before implementing those decisions; that is, neither parent shall make a decision or take an action which results in a major change in a child's life until the matter has been discussed with the other parent and the parents agree. If the parents, after discussion, cannot agree and if one parent wishes to effect a major change while the other does not wish the major change to occur, then no change shall occur until the issue has been 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 home city or state of residence, he 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 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 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 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 [Rule 1-053 NMRA] of the Rules of Civil Procedure for the District Courts; or
 - (g) the district court.
- K. When any person other than a natural or adoptive parent seeks custody of a child, no such person shall be awarded custody absent a showing of unfitness of the natural or adoptive parent.
- L. As used in this section:
- (1) “child” means a person under the age of eighteen;
 - (2) “custody” means the authority and responsibility to make major decisions in a child’s best interests in the areas of residence, medical and dental treatment, education or child care, religion and recreation;
 - (3) “domestic abuse” means any incident by a household member against another household member resulting in:
 - (a) physical harm;
 - (b) severe emotional distress;
 - (c) a threat causing imminent fear of physical harm by any household member;

- (d) criminal trespass;
 - (e) criminal damage to property;
 - (f) stalking or aggravated stalking, as provided in Sections 30-3A-3 and 30-3A-3.1 NMSA 1978; or
 - (g) harassment, as provided in Section 30-3A-2 NMSA 1978;
- (4) “joint custody” means an order of the court awarding custody of a child to two parents. Joint custody does not imply an equal division of the child’s time between the parents or an equal division of financial responsibility 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 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 described under Subsection L [Subsection J] 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.