

Law You Should Know: Spousal Support (Alimony) and Premarital Agreements

Spousal Support (Alimony) in New Mexico

by Thomas Lane, Attorney at Law

There is a division in law between what we lawyers call "law" and what we call "equity." "Law" is all about rules and regulations and tangible things like property. "Equity" is simply about fairness. Equity was created to mitigate the sometimes harsh effects of a strict application of law.

Law, by its nature, is strict and relatively predictable; equity, in contrast, is fluid and somewhat unpredictable. (When people complain about the law "not being fair," they are correct-law does not consider fairness; equity does.) Law is a machine; equity is a dance.

In a New Mexico divorce, the same court hears the mixed law and equity issues. Division of property and debt is a law issue that can be largely reduced to mathematics. Child custody and support are a mixture of law and equity. Spousal support, however, is almost purely an issue of equity, of fairness-or, in more practical terms, what the judge perceives to be fair.

Because of its equitable nature, spousal support is approached through various flexible guidelines and rules of thumb, but the end result cannot be predicted or even agreed to with the same type of certainty that, for example, the ownership of a car can be. The two parties can be in complete agreement, but until the judge is convinced that the agreement is fair, the judge has the power to change the agreement and order otherwise.

The New Mexico statute that addresses spousal support is NMSA 1978, §40-4-7 (1997). Its roots in equity are reflected in the language of the statute, which states various things that a judge "may" do. The general standard is that the judge may make such an award "as under the circumstances of the case may seem just and proper."

Within this flexible framework, there are a few informal "rules of thumb" that affect spousal support considerations, though none of them control the judge's final decision:

- Duration of the marriage is a significant factor. The rule of thumb is no spousal support for a marriage of less than five years, some form of spousal support for a marriage of more than 10 years, and possible spousal support for a marriage of 5-10 years.
- Relative income of the parties is a factor. The rule of thumb is no spousal support unless one spouse makes at least 67% more than the other. (This is the "30-50" rule: 30% of the higher income compared to 50% of the lower income.)
- Earning capacity and good-faith efforts to be employed are factors, as is the relative distribution of property.

The above list is representative, not inclusive. Overall wealth of the parties can create an exception from all of the standard considerations. The statute is designed for middle-income couples, and if the marital estate is unusually large, then all of the rules of thumb are thrown out the window and the parties are left to argue things as well as they can.

One pitfall to beware of is that ongoing periodic spousal support payments create ongoing jurisdiction in the court that awards those payments. NMSA 1978, §40-4-7(B)(2). That means that, as long as the periodic payments are being made, either party may bring an action to modify the payments, and the court has the power to change the amount of the payments "whenever the circumstances render such change proper." That is a lower standard than the "significant change of circumstances" used for modifications of child support. For the above reason, this attorney and others prefer to resolve matters as completely as possible at the time of the divorce. We call it "horse trading." One party trades ownership of some property in exchange for the other waiving spousal support. An arrangement of this sort, if approved by the court, can lead to a more final resolution of the divorce.

Another pitfall involves retirement accounts. What can happen, and has happened too often, is that one party agrees to apportion part of his or her retirement account to the other as part of the spousal support. The parties then draw up what is called a Qualified Domestic Relations Order, or "QDRO," which the judge approves upon agreement of the parties. What makes QDROs notorious among lawyers is that they are not really "qualified" until the retirement plan qualifies them. Everybody, including the judge, thinks they have reached an agreement, everybody thinks the divorce is resolved, and then, however many years later, the spouse retires, the QDRO is submitted to the retirement plan, the retirement plan rejects it, and the entire case reopens.

Premarital Agreements in New Mexico

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To state the obvious, a wedding is an event, but a marriage is a process. As a legal matter, a marriage begins with the wedding and ends with a divorce or the death of a spouse. As a human matter, however, the process of marriage begins before the wedding, includes a number of people beyond the couple who get married, and has effects that continue after divorce or the death of a spouse.

Within this context, a premarital agreement is a tool for disclosure and planning. The disclosure component can help the couple know the financial implications of what they are committing to and be sure that both of them want to make the commitment. The planning component can help the couple manage their financial affairs during the marriage and prevent or reduce the conflicts that can arise upon divorce or the death of a spouse.

The easiest way to grasp what a premarital agreement can accomplish may be to begin with what it cannot do. Under the Uniform Premarital Agreement Act, NMSA 1978, § 40-3A-1, *et seq.*, adopted by New Mexico in 1995, there are five things that a premarital agreement cannot "adversely affect":

1. A spouse's right to spousal support.
2. A child's right to child support.
3. A parent's right to child custody or visitation.
4. A spouse's choice of abode.
5. A spouse's freedom to pursue career opportunities.

Except for the above, the couple is generally able to contract to any matter "not in violation of public policy."

In practical terms, this generally means property and debt. Each party swears that he or she has revealed all of his or her property and debt to the other so that the two parties can enter into their marriage on agreed to terms.

In this attorney's experience, property rarely causes problems with a marriage - debt does. What can be particularly problematic is the situation where one party brings a hidden debt into a marriage and then commingles it with the marital estate's community estate through devices such as refinancing or using community funds to pay toward it. A lot of land, for example, can start out before a marriage as separate property and separate debt, assuming a loan, and then, if community funds are used to make payments on the loan, some of the ownership of the land transfers to the marital estate, which in turn brings along an interest in the debt. Through the commingling, the other spouse becomes affected. As another example, one party might have a significant undisclosed credit card debt that the community income will become expected to pay off.

A premarital agreement would address the above type of problems by disclosing the debt and enabling the parties to agree in advance on how the debt will be paid. Neither party would be surprised by the debt, and there would not be a sense of betrayal.

Children from a previous marriage can be an additional reason to make a premarital agreement. The death of their parent can leave the children uncertain as to what property they have rights to inherit. A premarital agreement identify and characterize the various property the parties bring into the marriage, and can state in advance how the property should be disposed of at death. This can help forestall conflicts that are too common among family members when a parent and spouse dies.

For the above and other reason, this attorney recommends a premarital agreement for any couple who has previous children or any property or debt to speak of. It is not simply about planning for divorce-it is a helpful tool for planning for marriage.