

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

FLOYD H. GRANT III,

Petitioner Appellee,

Court of Appeals Number: 24445

vs.

District Court Number: DR 95-2675

LESLIE D. CUMIFORD  
(f/k/a Leslie D. Interrante),

Respondent Appellant.

**APPELLANT'S DOCKETING STATEMENT**

I. NATURE OF THE PROCEEDING

Leslie D. Cumiford, Respondent Appellant Pro Se, appeals from the final order of the district court judge that modifies custody, timeshare, and child support and that seals the hearing on the merits for purposes of protecting the emotional health of the minor child.

Specifically, with regard to the Modified Order of Custody, Timeshare, and Child Support,

Respondent Appellee appeals the following district court decisions from the order:

- A. Hank Grant (Floyd H. Grant III, Petitioner Appellee) shall pay to Leslie Cumiford (f/k/a Leslie D. Interrante, Respondent Appellant) the sum of \$1298 per month for child support of the minor child, beginning September 1, 2003. [paragraph K of the order]
- B. Abating of future child support payments by one half. [not mentioned in the order, but incorporated into the Worksheet A calculations]
- C. Any unreimbursed medical, dental, or psychological costs for the minor child shall be split between the parties with Hank Grant paying 60% and Leslie Cumiford paying 40%. [paragraph N of the order]

- D. Any outstanding fees for the Rule 11-706 Expert and the Guardian ad Litem shall be split between the parties with Hank Grant paying 60% and Leslie Cumiford paying 40%.  
[paragraph Q of the order]
- E. To ensure that the Guardian ad Litem is paid, Hank Grant shall pay Leslie Cumiford's share of any outstanding Guardian ad Litem fees owed. Hank Grant shall be allowed to deduct up to \$300 per month from the monthly child support obligation to offset the Guardian ad Litem payments made on behalf of Leslie Cumiford. [paragraph R of the order]
- F. Each party shall pay his or her attorneys fees. [paragraph W of the order]

With regard to the Order Sealing the Hearing on the Merits for Purposes of Protecting the Emotional Health of the Minor Child, Respondent Appellant appeals the district court's decision granting the Guardian at Litem's Motion Requesting that the Court Seal the Hearing on the Merits for Purposes of Protecting the Emotional Health of the Minor Child, Alex [paragraph A of the order].

## II. JURISDICTION, DATE AND ORDER OF FILING NOTICE OF APPEAL

The Modified Order of Custody, Timeshare, and Child Support was filed in the Second Judicial District Court, County of Bernalillo, on October 9, 2003. The Order Sealing the Hearing on the Merits for Purposes of Protecting the Emotional Health of the Minor Child was filed in the Second Judicial District Court, County of Bernalillo, on October 9, 2003. The notice of appeal was filed on November 7, 2003. A motion for extension of time to file the docketing statement was filed on November 21, 2003 and granted, rendering the deadline for filing of Respondent Appellant's docketing statement January 6, 2004.

### III. STATEMENT OF THE CASE

- A. The district court case, filed in June 25, 2003, began with Petitioner's Verified Motion to Modify Custody, Timesharing, and Child Support. Petitioner Floyd "Hank" Grant III argued that "Significant changes of circumstances in this matter warrant a review and modification of custody and timesharing." Respondent Leslie Cumiford (f/k/a Leslie Interrante) filed her response denying Petitioner's statement quoted above and arguing that the court's standing Stipulated Judgment and Final Decree of Custody and Child Support dated April 22, 1996 stated that prior to court action the parties shall resolve any dispute as to the periods of responsibility and regarding the child's needs by submitting the dispute to an agreed upon mediator/arbitrator. Respondent also filed a Motion to Dismiss Petitioner's Verified Motion to Modify Custody, Timesharing, and Child Support based on the dispute resolution clause of the standing Stipulated Order of April 22, 1996. Petitioner's response admitted that no mediation had taken place, but argued that Respondent's actions had "made mediation unworkable at this time".
- B. During the hearing on these matters on July 23, 2002, Respondent requested that the court dismiss the case and order the parties to mediation or arbitration. Respondent argued that "what we're supposed to be doing is updating the plan." However, the judge did not dismiss the case, and ordered the parties to undergo mediation by Frank Spring, Esq., who was also made the Guardian ad Litem in the case pursuant to the Petitioner's request at the hearing. The court asked for basic income information from both parties during the July 23, 2003 hearing. Respondent stated that she worked "part-time at Sandia Labs, and I also have a business, and the business is taking losses. It's in early startup." When asked by the judge if her salary from 1996 was in the ballpark, Respondent replied, "No, it's considerably lower."

Respondent stated her current Sandia income as “somewhere between \$2000 and \$2500 a month. And I also take losses. . . And it’s been that way for the better part of the last two years.” Petitioner stated his income as \$12,000 monthly. The court decided to use Respondent’s full-time salary of 1996 as stated in the April 22, 1996 Stipulated Judgment, in effect imputing to her a salary from six years prior to the 2002 hearing. Respondent argued that if an expected higher income from the business will later be incorporated into child support calculations, the period of time during which she is taking the financial risks to get there [in self-employment startup] should also be recognized by the court. The court stated in the hearing that Respondent could bring up this argument at a later date. She ordered Petitioner to pay 60% of the Guardian ad Litem’s fees and Respondent to pay 40% of his fees, respectively, based on Respondent’s full-time income from 1996 and Petitioner’s stated current income of 2002.

- C. By stipulation, Gayle Zieman was appointed the court’s 11-706 expert on November 20, 2002 and a custody evaluation was performed.
- D. Petitioner filed a Motion to Modify Joint Legal Custody on March 13, 2003, in which he argued that “A change in legal custody is warranted because of the heightened conflict between the parents . . .” and requesting that the court “modify the parties’ 1996 parenting plan to award [Petitioner] Hank Grant sole legal custody of Alex.” The court-appointed 11-706 expert presented his Parenting Plan to counsel on March 31, 2003, concluding that the minor child should continue to live with Respondent as his primary home, with less than 35% of his time spent at his father’s home for visitation. On April 7, 2003, Respondent attempted to conclude the case by filing a Motion to Adopt Recommended Parenting Plan, urging the court to accept the Parenting Plan. Petitioner’s response to the motion, filed on April 22,

2003, argued that testimony from the 11-706 expert was necessary, and that “A two day setting is more reasonable to hear the necessary evidence and recommendations.” Both motions were argued at a hearing on April 29, 2003, along with a large number of other motions not pertinent to this appeal. The judge asked, “If everybody is agreeing to Dr. Zieman’s recommendation, why do we need a trial?” Petitioner’s counsel replied, “No. We are agreeing that the child can go for the summer. . . based on the parents’ actions over the next couple of months, whether that’s what Dr. Zieman’s recommendation is going to continue to be . . .” During the hearing, in response to an accusation by the Guardian ad Litem that Respondent made a claim of pedophilia against Petitioner, Respondent, under oath, stated, “for the record, I never said anything about pedophilia. I don’t know where that is coming from.” The judge ordered that the 11-706’s recommendations should be followed on a temporary basis, ordered the parties to [settlement] facilitation, and set aside two days for trial in August 2003. The matter of modified joint legal custody was deferred until the trial. The Guardian ad Litem stated during the hearing that recent events necessitated an update to the recently-completed 11-706 evaluation to be adopted by the court, and that he planned to ask for a reevaluation by the 11-706 expert.

- E. Respondent filed a Motion to Increase Child Support on May 6, 2003, claiming therein that “child support has not been recalculated since 1996” and that “upon information and belief, the financial conditions of both parties have changed” since that time.
- F. The Guardian ad Litem filed an Emergency Motion to Transfer Custody on May 16, 2003, making a number of claims regarding Respondent that were later shown at trial by expert testimony and in the judge’s Modified Order of Custody, Timeshare, and Child Support not to be valid with respect to demonstrating a change of circumstances warranting a change in

custody. The motion claimed that Petitioner Hank Grant “has provided me with a log of his attempts to call [the minor child] Alex, which show very modest success,” and that “telephone communication between Alex and Hank Grant has become extremely tenuous; Hank Grant reports that is has been practically nil.” Petitioner’s response, filed on May 19, 2003, reiterated the request to the court to transfer custody. A hearing transpired on May 21, 2003 to determine whether legal and physical custody should be immediately transferred to the Petitioner. The court’s 11-706 expert testified at the hearing based on an updated report that did not include as sources either the Respondent or the child, but was based solely on input from Petitioner and the Guardian ad Litem. The 11-706 stated in the hearing that Petitioner had provided a log of telephone calls to him, and that the Guardian ad Litem stated that he was “deeply concerned about the phone calls”. No testimony, witnesses or evidence were allowed from Respondent in her defense, even though Respondent’s counsel requested such opportunity at the hearing. The court granted immediate, temporary sole physical and legal custody to Petitioner, and the child was ordered to be moved from Albuquerque, New Mexico to Petitioner’s residence in Oklahoma until the hearing on the merits on August 20, 2003.

G. On June 20, 2003, Respondent filed a Motion for Emergency Evidentiary Hearing to Remove Court Appointed Expert Witness. The judge filed a memorandum order in response on July 15, 2003, stating that issues of bias could be explored by Respondent’s counsel at the hearing on the merits and denying Respondent’s motion.

H. Petitioner filed a Motion to Excuse Parties from Pre-Trial Order Provision to Attend Settlement Facilitation with Muriel McClelland on July 15, 2003, stating therein that “The

likelihood of a successful facilitation is extremely unlikely [sic].” Respondent did not provide concurrence with the motion.

- I . On June 4, 2003, a pretrial hearing was conducted, during which several motions were also discussed. The Guardian ad Litem brought up the issue of Respondent paying only a small portion of his bill. Respondent’s counsel stated to the court that “she sends him a check every month”. Mr. Spring stated, “since she paid the original \$400. I think I have gotten maybe three checks in the amount of \$50 or \$75. So I think that it’s true that I have received something like \$175 or a couple of hundred dollars, something like that. That’s actually not what I had in mind, because I think the debt is closer to \$5000.” Clearly, Respondent was having difficulty covering the costs leading up to trial.
- J . On June 20, 2003, Respondent filed a Motion for Emergency Evidentiary Hearing to Remove Court Appointed Expert Witness. Stated therein: “He also revealed that his anger toward Respondent escalated when she was unable to pay his proposed bill in full prior to June 13, 2003, which was less than 30 days after he first informed her of the amount due.”
- K . On August 15, 2003, the Guardian ad Litem filed a Motion and Brief to Exclude Televised Media from Hearing on the Merits, stating therein that “There is a high probability that very personal and private family matters will come before the court during the hearing on the merits,” and “It is unreasonable to have this information made public for anyone to view, most of all Alex, age 8.” Attached to the motion was an affidavit from the court’s 11-706 expert, claiming that inclusion of televised media would be “emotionally detrimental to Alex”.
- L . On August 18, 2003, the Guardian ad Litem filed a Motion and Brief Requesting that the Court Seal the Hearing on the Merits for Purposes of Protecting the Emotional Health of the

Minor Child, Alex. He argued, “It is entirely appropriate for a hearing involving children to be sealed to protect the privacy and the best interest of the children involved, NMSA 32A-4-20. He cites *Thomas v. Thomas* (1999-NMCA-135, 991 P.2d 7), stating that the 11-706’s affidavit provides “strong evidence” that this case is distinguished from that one, in which the sealing of the file at the district court level was reversed at the appellate level. He asks that the Court “grant this Motion to Seal the Hearing on the Merits in a manner consistent with the restrictions provided by NMSA 32A-4-20.” Non-party KRQE entered an appearance and filed a Response to Guardian ad Litem’s Motion for a Protective Order and to Seal the Court Record of Summary Judgment Proceedings on August 19, 2003, stating therein: “GAL requests a veil of secrecy in these proceedings inconsistent with constitutional and common law principles. . . Historically, both civil and criminal trials have been presumptively open. *Richmand Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980). . . The GAL’s motion is ill-defined in simply seeking a sealing order. . . In an unnecessarily broad fashion, it seeks to shut off the trial on the merits with no supporting legal authority. . . In his motion, GAL’s only legal authority is a citation to Local Rule 2-111 which states that the court may seal a file in extraordinary cases. . . upon a showing of good cause. Short of that citation, the GAL provides no compelling legal authority for closure in this case. Nevertheless, noticeably lacking from the GAL’s request is the fundamental Rule of Civil Procedure, case law and burden of proof necessary to justify the requested sealing and closure of these proceedings. . . The burden of proving an assertion of privilege rests upon the party seeking such claim. . . In determining whether a party has made a showing of good cause for the issuance of a protective order, courts have generally applied a balancing process. . . New Mexico Rules of Civil Procedure and case law dictate that access to court proceedings is the rule and secrecy

is the exception. The GAL's motion never mentions or provides a factual or legal basis sufficient to establish the good cause necessary for the draconian measure of closing these proceedings." Both matters were heard on the first day of the hearing on the merits, August 20, 2003, just before the hearing on the merits began. Respondent's counsel stated, "we have no intention whatsoever of raising one single solitary claim about pedophilia, we have no intention whatsoever about raising a claim of DUIs, we have no intention whatsoever of raising claims that Alex was sexually abused". The Court made a ruling, embodied in the Order Sealing the Hearing on the Merits for the Purposes of Protecting the Emotional Health of the Minor Child of October 9, 2003 to seal the hearing and close the courtroom to "all persons who do not have a direct interest in this matter." The Court made a contradictory ruling embodied in the Order Denying Guardian ad Litem's Motion to Exclude Televised Media from Hearing on the Merits to allow KRQE to "attend and televise the trial on the merits", even though both motions relied on the same basis in law.

- M. Respondent filed a Motion to Redistribute Shared Costs on August 19, 2003, reminding the judge that she stated on July 23, 2002 that "she would reconsider the 40/60 income split". Respondent argued therein that she does not work part time; rather, she "works more than full time, 25 hours per week at Sandia National Labs and 25 hours per week at her company," and that "At the present time, her company is not generating revenues because as a high-tech firm, it is in the startup phase. Nevertheless, Ms. Cumiford manages a number of employees, holds office space, and submits tax returns as a C corporation." Respondent stated that "If Ms. Cumiford's expected higher income level is to be later considered for child support purposes, her current investment of time to achieve such income should also be counted as employment. She is not simply a part-time employee." Respondent requested that

the income split be modified to 80% for Petitioner and 20% for Respondent, respectively, reflecting actual 2002 incomes of both parties. Petitioner did not file a response.

N. During the hearing on the merits, Petitioner admitted during testimony that his telephone log that triggered the 11-706's reevaluation was not accurate as compared to Respondent's actual telephone records [Respondent's exhibit F] that his log was not accurate. Respondent was asked on the stand by Petitioner's counsel, "Ms. Cumiford, how many hours per week do you work at Sandia?" Respondent: "25." Petitioner's counsel: "So you're on a part-time basis at Sandia?" Respondent: "Because I have a second job." . . . Petitioner's counsel: "Would your 2001 tax return indicate full-time employment at Sandia?" Respondent: "No it does not. I'd started my company by then and I spend a considerable number of hours every week at my company. I work there as well." . . . Petitioner's counsel: "You state that you have a second job. What is your second job?" Respondent: "I am founder and President of a firm here in town. A C-corporation: SilverWeb Production Technologies." Petitioner's counsel: "And how many hours per week do you work at SilverWeb?" Respondent: "Approximately 20 to 25." Petitioner's counsel: "In 2002, what was your income from SilverWeb?" Respondent: "SilverWeb is a software firm, a high-tech startup, and typically they take two to three years to generate enough revenue to pay employees." . . . Petitioner's counsel: "In 2002, what was your income from SilverWeb Technologies?" Respondent: "I did not take an income. There was no revenues. Our product had not started selling yet. We are developing it." Petitioner's counsel: "Have you taken any income in 2003 from SilverWeb Technologies?" Respondent: "No, I have not." No evidence or testimony was provided at trial that challenged the viability of Respondent's high-technology software company. Trial evidence included Petitioner's 2002 federal income tax return [Petitioner's exhibit 9], Petitioner's pay stub [Petitioner's

exhibit 10], and Respondent's 2002 W-2 form [Petitioner's exhibit 21]. This evidence shows that Respondent's actual 2002 income was one-fifth that of Petitioner, a 20%/80% relationship.

- O. Respondent filed a Second Motion to Release Guardian ad Litem prior to the trial, and submitted evidence of his biased behavior during the trial. The Guardian ad Litem withdrew from the case in his closing statement of August 25, 2003. Petitioner claimed in his closing argument of August 25, 2003 that a substantial and material change in circumstances affecting the welfare of the child had occurred since the entry of the last [April 22, 1996] custody order. Petitioner's closing argument cited application of NMSA (1978) 40-4-11.1(C)(1), claiming Respondent was underemployed and that income should be imputed to Respondent for child support purposes, and claiming that Respondent's business venture was "non-viable", but providing no evidence to that effect. Respondent's closing argument stated that Petitioner failed to show that there has been a substantial change in circumstances to warrant a change in custody or a change in households, and that at best Petitioner showed that the parenting plan was outdated and needed to be revised. Respondent's argument called for the removal of the Guardian ad Litem and the court's 11-706 witness from the case and the redistribution of shared costs from 60% (Petitioner)/40% (Respondent) to 80%/20%, respectively based on payroll and tax return information provided at trial as evidence. Respondent argued against the imputing of income in child support calculations since Respondent is not underemployed.
- P. The judge held a hearing on August 25, 2003, after the conclusion of the trial, and having considered closing arguments in the case, made her rulings which were later adopted in the October 9, 2003 Modified Order of Custody, Timeshare, and Child Support; Order Sealing

the Hearing on the Merits for Purposes of Protecting the Emotional Health of the Minor Child; and Order Denying Guardian ad Litem's Motion to Exclude Televised Media from Hearing on the Merits. During the hearing, the judge stated that "For Ms. Cumiford I used the figure of your full time income at Sandia. It's certainly fine with me if you develop your own company, but you can't do it at the child's expense, so I do have to include that as your earning capacity. . . I'm imputing her income to her full time capacity." She further stated, "I abated Mr. Grant's child support by one half for the month of June and July." Later in the hearing the judge stated: "with regards to the payment of costs and fees . . . if you all want to have another hearing on these issues, I haven't taken evidence on them, other than what's been presented through the merits. I will respect your right to have an evidentiary hearing," and "I am going to order father to pay mother's share of the guardian fees and authorize him to deduct 300 dollars per month from her child support payment."

Q. On September 9, 2003, Respondent filed her Attorney Affidavit Regarding Attorney Fees and Costs, claiming approximately \$91,300 in allowable costs and fees. Petitioner did not file a cost and fee statement. Petitioner filed a Motion to Strike [Respondent's] Attorney Affidavit Regarding Attorney Fees and Costs on October 9, 2003, [erroneously] claiming that "the Court indicated [during the hearing on August 25, 2003] that each party should pay his or her own attorneys fees," and failing to include the judge's statements from the August 25, 2003 hearing stating that she would respect both parties' rights to have an evidentiary hearing regarding fees. The first indication in the record proper of notice of the hearing of this motion is in the September 24, 2003 Notice Vacating and Rescheduling Hearing that provided a hearing date of October 10, 2003. Without notice in the record proper, the motion was actually heard on October 3 during a meeting originally set up for the judge to "check in"

with the parties on a monthly basis in lieu of Guardian ad Litem services. During the hearing, the judge stated her intention to rule that each party pay his/her own attorney fees. Respondent objected during the hearing, reminding the judge that she stated during the August 25, 2003 hearing that she would hold an evidentiary hearing regarding costs and fees. The judge did not allow argument or evidence regarding attorney costs and fees, and summarily made her ruling that each party would pay his/her own fees without argument and without mention of any of the factors governing attorneys fees as stated in NMRA 1-127.

R. In summary, Respondent prevailed in that the judge's Modified Order of Custody, Timeshare, and Child Support stated that "There has not been a material change in circumstances since the 1996 Stipulated Judgment and Final Decree of Custody and Support of April 22, 1996 that warrants a change in legal and physical custody of the minor child from Leslie Cumiford to Hank Grant at this time." The Worksheet A, Monthly Child Support obligation attached to the order contains an imputed income for the Respondent and abates Petitioner's annual child support by a total of \$1298 (two half-month payments, one for June and one for July). All other costs are split; Petitioner pays 60% and Respondent pays 40% based on the imputed income of Respondent.

#### IV. ISSUES REPRESENTED

##### **A. Whether the Judge Abused Her Discretion in Not Considering the Factors or the Timing for Argument Provided for by Law in Her Decision Regarding Attorneys Fees.**

Petitioner filed his Verified Motion to Modify Custody, Timesharing, and Child Support, thus reopening this case [DM95-2675] after over six years of dormancy. Petitioner did so without adhering to the standing Stipulated Judgment and Final Decree of Custody and Child

Support dated April 22, 1996 ordering that prior to court action the parties shall resolve any dispute as to the periods of responsibility and regarding the child's needs by submitting the dispute to an agreed upon mediator/arbitrator, arguing in his response to Respondent's Motion to Dismiss that mediation was not likely to be fruitful. Petitioner continued to take actions and positions designed to drag out the proceedings and greatly increase the expense of litigation by demonstrating in his pleadings and motions that he refused to adopt the initial parenting plan, claiming that settlement facilitation should not be undertaken, providing an inaccurate telephone log to the Guardian ad Litem and the court's 11-706 expert after the conclusion of the first evaluation report indicating that Respondent was hindering his communication with the minor child, and petitioning the court for full custody in the middle of proceedings.

Disparity of income in this case is made falsely smaller than income records in evidence because of the court's imputing of Respondent's income in not recognizing her business. (See Issue B below.) Records in evidence at trial show that the actual disparity of income between Petitioner and Respondent is quite large, with Petitioner's income making up 80% of the combined income and Respondent's income comprising 20%. Earlier indications from the June 4, 2003 hearing and the Respondent's Emergency Motion to Remove the Court's 11-706 Expert showed that Respondent was struggling to pay the fees and costs associated with litigation. Respondent's Attorney Affidavit Regarding Attorney Fees and Costs proves that the cost of this litigation was very high, at approximately \$91,300 in allowable fees and costs. Respondent enjoyed success on the merits in this case with the ruling that "There has not been a material change in circumstances since the 1996 Stipulated Judgment and Final Decree of Custody and Support of April 22, 1996 that warrants a change in legal and physical custody of the minor child from Leslie Cumiford to Hank Grant at this time," in the Modified Order of Custody, Timeshare,

and Child Support of October 9, 2003, thus satisfying all four criteria from NMRA 1-127 regarding attorney fees in domestic relations cases.

Unfortunately, Respondent did not get the opportunity to argue this point to the court. After stating at the August 25, 2003 hearing that she would entertain argument at a later time regarding fees and costs, and acknowledging the parties' right to an evidentiary hearing regarding this issue, the judge at the October 3, 2003 hearing, hastily moved up in time from October 10, 2003 without proper notice, refused to hear argument on this issue and summarily ruled that each party should pay his/her own attorney fees. No opportunity was given to provide evidence and argument regarding NMRA 1-127. Petitioner did not file a statement of his fees and costs. However, ample support existed in the record proper for considering the factors of this rule of law. The judge made no mention of this rule or the four factors contained therein when she made her ruling or in the Order. Therefore, the judge abused her discretion by not taking these factors into account when making her ruling regarding attorneys fees, and by not allowing the parties the opportunity to give testimony or evidence after the initial order was provided.

### **Supporting Arguments**

**NMRA 1-127.** "In awarding fees, the court shall consider relevant factors presented by the parties, including but not limited to: (A) disparity of the parties' resources, including assets and incomes; (B) prior settlement offers; (C) the total amount of fees and costs expended by each party . . . (D) success on the merits."

**NMRA 1-046.** "It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefore;"

**NMRA 1-054(D)(1).** “Except when express provision therefore is made either in a statute or in these rules, costs, other than attorney fees, shall be allowed to the prevailing party unless the court otherwise directs . . .”

**NMRA LR2-302(A).** “Unless costs are awarded in the final judgment, a party seeking to recover costs pursuant to Rule 1-054 NMRA, shall file a cost bill within ten (10) days after the final judgment is filed and serve copies on all other parties. Failure to file a timely cost bill shall be deemed a waiver of the right to recover costs.” Respondent filed her Attorney Affidavit Regarding Attorney Fees and Costs on September 9, 2003, prior to the filing of the final order in this matter, and is thus eligible for an award of fees and costs. Petitioner did not file his statement of fees and costs.

**NMRA LR2-302(B).** “Within fifteen (15) days after service of the cost bill, other parties may file objections to the cost bill. Unless otherwise ordered by the court, if no objections are filed within fifteen (15) days, the costs shall be deemed reasonable and necessary and the party requesting costs shall submit a proposed order approving the costs, to the assigned judge.”

**Spingola v. Spingola, 93 N.M. 598, 603 P.2d 708 (1979).** The district court's discretion to determine an award of attorney's fees must be exercised to insure efficient preparation and presentation of a case.

**Gomez v. Gomez, 119 N.M. 755; 895 P.2d 277.** “The award of attorney fees under Section 40-4-7(A) rests within the sound discretion of the trial court. *Gilmore v. Gilmore*, 106 N.M. 788, 792, 750 P.2d 1114, 1118 (Ct. App.), cert. denied, 107 N.M. 16, 751 P.2d 700 (1988). That discretion is not unrestrained, however, see *Roberts*, 117 N.M. at 301, 871 P.2d at 397, and the trial court, in determining whether to award attorney fees, should consider various

factors, including the most important one of economic disparity between the parties. See *Foutz v. Foutz*, 110 N.M. 642, 644, 798 P.2d 592, 594 (Ct. App. 1990). We have previously held that ‘where a party lacks sufficient funds to pay attorney fees for representation incident [\*\*\*13] to dissolution of marriage or rights incident thereto, and the financial situation of the parties is disparate, it is error to deny an award of reasonable attorney's fees.’ *Sheets v. Sheets*, 106 N.M. 451, 456, 744 P.2d 924, 929 (Ct. App. 1987). However, economic disparity between the parties is not the only factor to be considered. *Gilmore*, 106 N.M. at 792, 750 P.2d at 1118. The trial court should also consider the ‘nature of the proceedings, the complexity of the issues, the relief sought and recovered, the ability of the parties' attorneys and the ability of the parties to pay.’ *Id.*”

**Roberts v. Wright, 117 N.M. 294; 871 P.2d 390.** “In *Foutz v. Foutz*, 110 N.M. 642, 798 P.2d 592 (Ct. App. 1990), [\*\*\*19] the court made clear that the discretion of the trial court to award attorney fees is not unrestrained. The trial court must consider the purpose of awarding fees, as well as the relative financial status of the parties and their ability to pay. *Id.* In this case, the parties submitted affidavits regarding their attorney fees which outlined the services rendered by the attorneys and the amount of time expended in performing these services. However, the affidavits fail to appraise the trial court of the above mentioned considerations. Thus, since the court made no findings and its order does not explain why the award of attorney fees was made, we cannot determine the basis of the trial court's decision and that he exercised his discretion “with the purpose in mind of insuring the plaintiff an efficient preparation and presentation of her case.” *Id.* at 644, 798 P.2d at 594 (quoting *Burnside v. Burnside*, 85 N.M. 517, 521, 514 P.2d 36, 40 (1973)). For this reason, we reverse

and remand this issue to the trial court to make findings in accordance with the guidelines provided in Foutz.”

**Bustos v. Bustos, 128 N.M. 842; 2000 NMCA 40; 999 P.2d 1074.** “An abuse of discretion occurs if the decision is against the logic and effect of the facts and circumstances of the case. See *Cordova v. Taos Ski Valley, Inc.*, 121 N.M. 258, 263, 910 P.2d 334, 339 (Ct. App. 1995); *Roselli v. Rio Communities Serv. Station, Inc.*, 109 N.M. 509, 512, 787 P.2d 428, 431 (1990) (‘A trial court abuses its discretion when its decision is contrary to logic and reason.’).

. . . In determining whether to award attorney fees, the district court has the latitude to consider many factors. . . Economic disparity is another important factor. See *Monsanto v. Monsanto*, 119 N.M. 678, 681, 894 P.2d 1034, 1037 (Ct. App. 1995). In fact, "a showing of economic disparity, the need of one party, and the ability of the other to pay," has been characterized as "the primary test in New Mexico for awarding attorney fees in a divorce case. . . ." *Id.* at 684, 894 P.2d at 1040, (Donnelly, J., specially concurring)”

**Schuermann v. Schuermann, 94 N.M. 81, 84, 607 P.2d 619, 622 (1980).** “It is important for trial judges to be liberal in awarding **attorney's fees** in cases where economic disparity between the parties and costs involved in pursuing the action are so great that participation becomes economically oppressive to one party. To do otherwise would have a chilling effect upon the less affluent parties [sic] ability to present his or her case.”

**Henderson v. Lekvold, 95 N.M. 288; 621 P.2d 505 .** “The trial court denied Mrs. Henderson her costs and **attorney fees**. Only through this litigation has she been able to assert a right and impose liability. *Unser, supra*, 86 N.M. at 655, 526 P.2d at 797.

Considering our disposition of the case, [\*\*\*14] we hold it would be an **abuse of discretion**

to deny her costs and **attorney fees**. We reverse on this issue as well. The trial court shall fix the **attorney fees** at both the trial and the appellate levels.”

**B. Whether the Court Incorrectly Imputed a Higher Salary to Respondent in Calculating Child Support and Payment of Related Fees**

In the court’s Modified Order for Custody, Timeshare, and Child Support and accompanying worksheet the judge made a decision to impute higher income to the Respondent. However, testimony at trial and argument in motions shows that Respondent is not underemployed. Respondent splits her full-time workweek between a part-time job with a large company, Sandia National Laboratories, and a high-tech startup company in which she is the principle officer and shareholder. The record proper shows repeated statements by Respondent, during testimony at the July 23, 2002 hearing and during the hearing on the merits in August 2003 that she works more than 40 hours per week, and that her company is a high-technology software company developing a product to sell, and that such companies typically take several years to generate income. Argument propounded in Respondent’s Motion to Redistribute Shared Costs and in Respondent’s Closing Argument for the case provided ample information regarding the viability of Respondent’s company, stating that it has employees, offices, and submits monthly tax returns. Respondent’s Closing Argument states that Respondent has maintained her employment with Sandia National Laboratories in order to supplement her income until her company begins to generate revenue, and requests that future child support and past “cost distributions” be recalculated using her actual income. Respondent argued during the hearing of July 23, 2002 that once her company generates income, she fully expects that such income will be included in the calculation for child support and that likewise, her efforts at building her company in the present time should be recognized by the court.

## **Supporting Arguments**

**NMSA 40-4-11(A).** “[The court] shall make a specific determination and finding of the amount of support to be paid by a parent to provide properly for the care, maintenance and education of the minor children, considering the financial resources of the parent;” In improperly imputing salary to Respondent, the judge did not adequately consider the financial resources of the parent, resulting in an income split among parents that attributes twice as high of a contribution to the combined income (40%) than the contribution would have been (20%) had the judge not imputed income to the Respondent.

**NMSA 40-4-11.1(A).** “the child support guidelines as set forth in this section shall be applied to determine the child support due and shall be a rebuttable presumption for the amount of such child support. Every decree or judgment of child support that deviates from the guideline amount shall contain a statement of the reasons for the deviation.” The Modified Order of Custody, Timeshare, and Child Support does not make mention of the imputing of income or the reasons for such, and neither does the attached worksheet.

**NMSA 40-4-11.1(C)(1).** “‘income’ means actual gross income of a parent if employed to full capacity or potential income if unemployed or underemployed.” Respondent provided ample testimony that she is employed to more than full capacity in working part-time at Sandia National Laboratories and running a viable high-tech startup company.

**NMSA 40-4-11.1(C)(2)(b).** “for income from self-employment, rent, royalties, proprietorship of a business or joint ownership of a partnership or closely held corporation, “gross income” means gross receipts minus ordinary and necessary expenses required to produce such income. . .” Evidence at trial included Respondent’s 2001 income tax return

showing Respondent's business, a sole proprietorship, operating at a loss on Schedule C for that particular tax year, as is typical for high-tech startup companies. Respondent testified at trial that she had no income from 2001 and 2002 from her startup company.

**NMSA 40-4-11.2** "Any deviation from the child support guideline amounts set forth in Section 40-4-11.1 NMSA 1978 shall be supported by a written finding in the decree, judgment or order of child support that application of the guidelines would be unjust or inappropriate." No such written finding exists in the Modified Order.

**Boutz v. Donaldson, 128 N.M. 232; 1999 NMCA 131; 991 P.2d 517.** "Father maintains that Mother was underemployed and that the court should have imputed a higher, potential income based on her proven capacity to earn money. See § 40-4-11.1(C)(1) ("income' means . . . potential income if unemployed or underemployed"). Mother appears to have earned less than she otherwise might have during 1996 and the four previous years because she bought a bookstore and tried unsuccessfully to make it a going concern. . . Father requested that additional income be imputed to Mother based on (1) her acknowledged potential to earn more consistent with her earning capacity . . . In rejecting these arguments, the special master specifically found that 'both parties are acting in good faith in their respective employment endeavors and both have taken reasonable steps to provide support for their children.' . . . The special master concluded that the record did not support Father's request 'to impute income to Mother that she does not earn at this time.' . . . Father attacks the court's refusal to impute income as an abuse of discretion and unsupported by the record. We disagree. Father cites no legal authority that would require the court to impute income to Mother, and we know of none. The imputation of income depends on the evidence and the sound exercise of judicial discretion. . . The trial court was within its discretion not to consider Mother

underemployed by virtue of her reasonable--yet unsuccessful--efforts to establish a profitable business, and reasonable efforts to provide a home for her children. We affirm the court's decision not to impute additional income to Mother during the time leading up to the close of her business in mid-1996. . . We conclude that the court's use of 1995 dividend earnings was error. Use of income from other than the year in question (1996) contradicted findings of both the special master and the court that 'the determination of income for purposes of computing **child support** should be based on current income as determined from the evidence presented at the hearing.' Compounding the error, the court based Mother's income projections upon more recent data from 1996. Calculating Mother's and Father's dividend earnings by different methods violates one of the express goals of the statute: 'making awards more equitable by ensuring more consistent treatment of persons in similar circumstances.' . . . . Section 40-4-11.1(B)(2); see Talley, 115 N.M. at 91, 847 P.2d at 325. . . The definition of gross income in the **child support** guidelines represents a legislative effort to estimate 'actual cash flow,' that is the amount of money that will actually be available to support the children. See Major v. Major, 1998 NMCA 1, P9, 124 N.M. 436, 952 P.2d 37 (explaining that a self-employed parent's 'actual cash flow' for **child support** purposes is the money 'reasonably available to apply toward the support of his [or her] children'). Technical definitions that run contrary to this central purpose are disfavored. See Leeder v. Leeder, 118 N.M. 603, 607, 884 P.2d 494, 497 (Ct. App. 1994)."

**Major v. Major, 124 N.M. 436; 1998 NMCA 1; 952 P.2d 37.** "In order to determine the appropriate amount of **child support**, the trial court must determine the gross income of the parents. NMSA 1978, § 40-4-11.1 (1995). In making that determination for self-employed

parents or the owners of a sole proprietorship, ‘gross income means gross receipts minus ordinary and necessary expenses required to produce such income.’

**Spingola v. Spingola, 91 N.M. 737; 580 P.2d 958.** “The court was in error in refusing to consider the guidelines along with the other facts [\*\*\*18] and circumstances bearing on the ability of the parents to furnish adequate support for the children.”

**Tedford v. Gregory, 1998-NMCA-067, 125 N.M. 206, 959P.2d 540 (Ct. App.), N.M. 958 P.2d 105 (1998).** “Trial court erred in departing from the statutory child support guidelines without first determining the amount due under the guidelines, in failing to clearly indicate how it arrived at its award, and in failing to explain its deviations from the guidelines.” The Modified Order for Custody, Timeshare, and Child Support deviates from the guidelines in its misapplication of the imputing of salary to Respondent, and fails to make mention of the deviation.

**C. Whether the Court Erred in Ordering Petitioner to Pay Respondent’s Guardian ad Litem Fees by Deducting from Child Support Payments**

The Modified Order of Custody, Timeshare, and Child Support states that the Petitioner shall pay Respondent’s share of any outstanding Guardian ad Litem fees owed. It further states that Petitioner shall be allowed to deduct up to \$300 per month from the monthly child support obligation to offset the Guardian ad Litem payments made on behalf of Leslie Cumiford. In effect, this order is a tax on child support payments that is not provided for in NMSA 40-4-11.1, effectively reducing statute-mandated support for the minor child by 23% for several years. The record proper shows that the Guardian ad Litem’s fees were relatively high. In addition, the record proper shows in argument propounded in the Respondent’s [First] Emergency Motion to

Release Guardian ad Litem, Respondent’s Second Emergency Motion to Remove Guardian ad Litem, and evidence supporting the second motion provided at trial that clear controversy exists regarding the Guardian ad Litem’s representation of the minor child and his contribution to the conflict in the case. This evidence pointed to the likelihood that Respondent would choose to dispute the Guardian ad Litem’s fees and services at the conclusion of the trial.

### **Supporting Argument**

**NMSA 40-4-8(A).** “the court may appoint an attorney at law as guardian ad litem . . .

Expenses, costs and attorneys’ fees for the guardian ad litem may be allocated among the parties as determined by the court.” This statute makes no mention of a provision to deduct from statute-mandated child support to pay the Guardian’s fees.

**NMSA 40-4-11.1(A).** “the child support guidelines as set forth in this section shall be applied to determine the child support due and shall be a rebuttable presumption for the amount of such child support.” This statute makes no provision for the payment of attorneys’ fees and costs by deduction from the opposing party’s mandated child support amount each month.

**NMSA 40-4-11.2** “Any deviation from the child support guideline amounts set forth in Section 40-4-11.1 NMSA 1978 shall be supported by a written finding in the decree, judgment or order of child support that application of the guidelines would be unjust or inappropriate.” The judge’s stated reason for deducting \$300 per month from the child support payment, to offset attorneys’ fees for the Guardian, does not pass this test.

#### **D. Whether the Court Improperly Abated Petitioner’s Summer Child Support Payments on an Annual Basis**

The Modified Order of Custody, Timeshare, and Child support explicitly states that child support payments for the months of June 2003 and July 2003 shall be abated by one half. What is not clear from the Order and attached worksheet is that child support is abated by one half in June and July annually, and incorporated in the worksheet as stated by the judge in the August 25, 2003 hearing. New Mexico statute allows the judge the discretion to abate support in this case. However, Worksheet A of NMSA 40-4-11.1 regarding child support is normally applied in situations such as the parenting plan propounded in the Modified Order – those in which the non-primary physical custody parent has the child less than thirty percent of the time. In essence, adding abatement of child support to the Worksheet A support calculation is “double dipping”, and represents yet another reduction for Petitioner from the child support amount provided for in the guidelines. The judges decisions in toto serve to dramatically reduce the amount of money available in Respondent’s home for the care and support of all three of her minor children.

### **Supporting Argument**

**NMSA 40-4-11.1(D)(2).** “‘basic visitation’ means a custody arrangement whereby one parent has physical custody and the other parent has visitation with the children of the parties less than thirty-five percent of the time.” Timesharing as outlined in the Modified Order of Custody, Timeshare, and Child Support equates to approximately 25% of the child’s time at the Petitioner’s home, well below the allowance of 35% as per this statute.

**NMSA 40-4-11.1(F)(1).** “for basic visitation situations, the basic child support obligation shall be calculated using the basic child support schedule, Worksheet A . . . The court may provide for a partial abatement of child support for visitations of one month or longer;”

**NMSA 40-4-11.1(A).** “the child support guidelines as set forth in this section shall be applied to determine the child support due and shall be a rebuttable presumption for the amount of such child support. Every decree or judgment of child support that deviates from the guideline amount shall contain a statement of the reasons for the deviation.” The Modified Order of Custody, Timeshare, and Child Support only mentions 2003 abatement of June and July child support, not the annual abatement as calculated in the attached worksheet. Neither the Order nor the worksheet provides the reasons for abatement.

**Tedford v. Gregory, 1998-NMCA-067, 125 N.M. 206, 959P.2d 540 (Ct. App.), N.M. 958 P.2d 105 (1998).** “Trial court erred in departing from the statutory child support guidelines without first determining the amount due under the guidelines, in failing to clearly indicate how it arrived at its award, and in failing to explain its deviations from the guidelines.” The Modified Order for Custody, Timeshare, and Child Support deviates from Worksheet A in annually abating child support in June and July and this fact is not mentioned in the Order or in the accompanying worksheet, although abatement for 2003 is mentioned in the Order.

**NMSA 40-4-11.2** “Any deviation from the child support guideline amounts set forth in Section 40-4-11.1 NMSA 1978 shall be supported by a written finding in the decree, judgment or order of child support that application of the guidelines would be unjust or inappropriate.” Abatement of child support in situations in which the minor child resides with the non-primary parent less than 35% of the time does not pass this test.

#### **E. Whether the Court Improperly Sealed the Hearing on the Merits**

The court allowed the Guardian ad Litem’s Motion and Brief Requesting that the Court Seal the Hearing on the Merits for Purposes of Protecting the Emotional Health of the Minor Child,

Alex, but denied his Motion and Brief to Exclude Televised Media from Hearing on the Merits. Both motions were based on the same arguments and the same affidavit from the court's 11-706 expert. Non-party-KRQE argues against the Guardian ad Litem's motion to seal the file as stated above, citing ample statutory and case law to prove his point. Respondent's counsel stated during the hearing on this matter that issues of abuse were not going to be raised, and they were not part of either party's petitions to the court.

### **Supporting Argument**

**NMSA 32A-4-20(B).** "All abuse and neglect hearings shall be closed to the general public."

This statute is taken from the New Mexico Children's Code, not from Chapter 40 pertaining to Domestic Affairs. The hearing on the merits in this case does not qualify as an "abuse and neglect" hearing.

**NMRA LR2-111.** "The court's policy is to allow public access to official court files and other records. Accordingly, no court file or other record shall be sealed from public inspection . . . In extraordinary cases the court may seal a file or other record upon a party's written motion or the court's own motion, and showing of good cause." This case fails to meet the test of "extraordinary", and the affidavit of the court's 11-706 expert failed to meet the test of a "showing of good cause" as argued by non-party KRQE.

**Thomas v. Thomas, 1999-NMCA-135, 128 N.M. 177, 991 P.2d 7, 128 N.M. 150, 990 P.2d 824 (1999).** "Husband moved to seal the record of this case, alleging that Wife 'repeatedly and continually makes outrageous, unsubstantiated allegations against [Husband] which would be libelous and slanderous if stated or published in any other forum but pleadings.' He did not offer any more detail as to what statements he was referencing, either in the trial court

or on appeal, and no hearing was held on this motion. Nor did we discover in the record any statements that would render this an "extraordinary case," as required by LR2-111, beyond the usual acrimonious divorce and custody case. The rule itself squarely places the burden on the party who wishes to seal the record, and Husband has failed to carry this burden. . .

Although there are exceptions to both the rule and the common law right, such as when competing interests outweigh the need for access to court files, we see no such reason in this case for the court to have diverged from the standard policy of allowing public access to court files. . . We reverse the trial court's order to seal the record.”

**Krauhling v. Executive Life Ins. Co., 125 N.M. 228, 959 P.2d (Ct. App. 1998).** The Court of Appeals overturned a confidentiality order while discussing the burden of showing a compelling need for such a measure.

**Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984).** “Good cause is established [by] showing that disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity.”

**McFadden v. Norton Co., 118 F.R.D. 625, 627 (D. Neb 1988).** The burden of proving an assertion of privilege rests upon the party asserting such a claim.

**Barron v. Florida Freedom Newspapers, 531 So. 2d 113 (Fla 1988).** The Florida Supreme Court rejected the argument that motions seeking closure of divorce proceedings must be given special consideration, since such proceedings are essentially private. Instead, the court held that divorce proceedings must be treated like other civil proceedings, i.e., a public event to which “the well-established common law right of access to court proceedings and records” applies.

**United States v. Hickey, 767 F.2d 705, 708 (10th Cir. 1985).** In Hickey, the Tenth Circuit acknowledged the common law right to inspect and copy judicial records, and explained that the purpose behind the right is to aid in preserving the integrity of the judicial process.

V. RECORD OF PROCEEDINGS

The entire proceedings of this case were tape recorded.

VI. RELATED OR PRIOR APPEALS

None

VII. DOCKETING FEE

A docketing fee of \$125.00 was paid to the New Mexico Court of Appeals with and this case was docketed with the filing of Respondent Appellant's Motion for Extension of Time and the Case Information Sheet on November 21, 2003.

VIII. ATTACHMENTS

Respondent Appellant's Motion for Extension of Time

Case Information Sheet

Petitioner Appellee's Motion for Extension of Time

S. Respectfully submitted,

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