

ALBUQUERQUE DIVORCE LAWYER BLOG

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Death of a Party Does Not Necessarily End New Mexico Divorce Proceedings

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Every [divorce](#), legal separation or [child custody](#) dispute is difficult for everyone involved, both emotionally and financially. Unfortunately, when a party dies during the pendency of such an action, things can get even more difficult.

Section 40-4-20 (B) of the New Mexico Domestic Affairs statutes provides that if a party to a family law matter dies while the action is pending, but prior to the Court entering a final order, then the Court shall proceed with the action as if the deceased party is still alive. The Court will appoint a personal representative to continue to represent the deceased person's interest in the family law action.

The policy enacted by Section 40-4-20 (B) may be surprising to many people because by enacting that statute the legislature departed from the long-standing common law rule that this type of family law action ended upon the death of a party. However, the fact that the relevant statute provides that a family law action shall continue, does not mean that such an action cannot be dismissed after the death of a party.

The New Mexico Court of Appeals addressed this issue in the recent case of *Trinosky v. Johnstone*, 2011-NMCA-045. In *Trinosky*, wife filed a petition for legal separation and husband filed an answer and both parties proceeded with [discovery](#). However, prior to a final order being entered by the Court, the husband died. After the husband's death, wife filed a motion to voluntarily dismiss her petition to which the personal representative of husband's estate objected based on Section 40-4-20 (B). The Court of Appeals ruled that wife's voluntary motion to dismiss would have been a valid way to end the legal separation action if husband had been alive and, therefore, was not precluded by Section 40-4-20 (B).

The *Trinosky* case involves some very specific procedural rules that will not be applicable to every case in which a party dies. What is important to take away from that case is that it reinforces New Mexico's policy that a family law action may continue until

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a final order is entered even after the death of a party. However, Section 40-4-20 (B) does not completely prevent the dismissal of such an action upon death of a party if another procedural basis for dismissal applies.

Now, as if this discussion was not complicated enough, also keep in mind that Section 40-4-20 (B) may not apply in the same manner to an ongoing child custody dispute after the court has entered a final decree of divorce, or adjudication of paternity, that includes a parenting plan or other custody order.

In sum, if you or a loved one is involved in a family law matter and a party dies, or their death is anticipated, it is very important to consult an experienced [divorce and family law attorney](#). There have been major changes in the New Mexico law in this area in recent years and experienced legal counsel can advise you as to the best way to proceed when an already stressful family law case gets even more stressful upon the death of a party.

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