

# A Family Law Primer for the Non-Family Law Practitioner

Judge Doug Thomas

This session is designed for new lawyers and those attorneys who primarily practice in areas other than family law who desire to obtain some basic knowledge of the substantive law and processes involved in a typical domestic relations case. It is particularly intended to benefit such attorneys who occasionally face the following question from a valued client, family member or friend: “Can you help me [or my child] with a simple divorce?” The session will be divided into two broad areas: (1) The substantive elements associated with typical domestic relations claims; and (2) The steps involved from the outset to conclusion of a typical domestic relations case.

## **ELEMENTS ASSOCIATED WITH BASIC DOMESTIC RELATIONS CLAIMS**

**CUSTODY OF CHILDREN** - There are two types: legal and physical. These two types can be further separated into sole, joint or split custody.

- Legal custody – deals only with decision making authority.
- Physical custody – where the child primarily resides.
- Joint custody – Parents share physical or legal custody. U.C.A. §§ 30-3-10.1 to 10.10. Parenting plans are required under a joint custody arrangement. A party requesting it must file a parenting plan with the initial pleading and the other party must file a timely response or risk default.
- Split custody – Involves multiple children where one or more children reside primarily with each parent (i.e. cannot apply where the parties only have one child).

The factors considered by the court in awarding custody are as follows:

Statutory Factors: U.C.A. § 30-3-10. The court shall consider the following:

- Best interests of the child;
- Past conduct & demonstrated moral standards of each party;
- Which parent is most likely to act in the best interests of the child, including allowing the child frequent and continuing appropriate contact with the non-custodial parent;

- the extent of bonding between the parent and child, meaning the depth, quality, and nature of the relationship between a parent and child;
- Those factors outlined in § 30-3-10.2 relating to joint custody:
  - a) whether the physical, psychological, and emotional needs and development of the child will benefit from joint legal or physical custody;
  - (b) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest;
  - (c) whether each parent is capable of encouraging and accepting a positive relationship between the child and the other parent, including the sharing of love, affection, and contact between the child and the other parent;
  - (d) whether both parents participated in raising the child before the divorce;
  - (e) the geographical proximity of the homes of the parents;
  - (f) the preference of the child if the child is of sufficient age and capacity to reason so as to form an intelligent preference as to joint legal or physical custody;
  - (g) the maturity of the parents and their willingness and ability to protect the child from conflict that may arise between the parents;
  - (h) the past and present ability of the parents to cooperate with each other and make decisions jointly;
  - (i) any history of, or potential for, child abuse, spouse abuse, or kidnapping; and
  - (j) any other factors the court finds relevant.
- An award of joint custody but no preference or presumption is created; and
- Other relevant factors.

Case law Factors. In order to determine best interests, the court should also consider and, where applicable, make appropriate findings on the following factors:

- Preference of the child;
- Keeping siblings together;
- Relative strength of the child's bond with one or both of the prospective custodians;

- Continuing previously determined custody arrangements where the child is happy and well adjusted;
- Moral character and emotional stability;
- Duration and depth of desire for custody;
- Ability to provide personal rather than surrogate care;
- Significant impairment of ability to function as a parent through drug use, excessive drinking or other cause;
- Reasons for having relinquished custody in the past;
- Religious compatibility with the child;
- Kinship, including, in extraordinary circumstances, stepparent status; and
- Financial condition.
- Primary caregiver status is a “prominent factor.” But primary caregiver status is not determinative.
- Sexual orientation and lifestyle to extent it affects parenting ability. Cohabitation with a member of the same sex should be analyzed similarly to a situation involving cohabitation with a member of the opposite sex without benefit of marriage in the presence of a minor child.
- Sexual conduct of one party.
- Instability and lack of supervision in one household.
- Evidence of sexual abuse.
- Extramarital affair of a parent to which children were inappropriately exposed.

See *Hutchison v. Hutchison*, 649 P.2d 38, 41 (Utah 1982); *Sukin v. Sukin*, 842 P.2d 922 (Utah App. 1992); *Pusey v. Pusey*, 728 P.2d 117 (Utah 1986); *Davis v. Davis*, 749 P.2d 647 (Utah 1989); *Deeben v. Deeben*, 772 P.2d 972 (Utah 1988); *Tucker v. Tucker*, 881 P.2d 948 (Utah App. 1994); *Tucker v. Tucker*, 910 P.2d 1209, 1217 (Utah 1996); *Merriam v. Merriam*, 799 P.2d 1172 (Utah App. 1990); *Erwin v. Erwin*, 773 P.2d 847, 848 (Utah App. 1989); *Linam v. King*, 804 P.2d 1235 (Utah App. 1991); *Shioji v. Shioji*, 712 P.2d 19 (Utah 1985); and *Thomas v. Thomas*, 987 P.2d 603 (Utah App. 1999).

PARENT TIME

Parent time schedules that are established and mutually agreed upon by the parents are preferred to court imposed schedules. If no agreement is reached, the parent time schedules contained in U.C.A. §§ 30-3-32 through 37 will likely apply. The parent time schedules for children younger than 5 years of age differ from the schedule that applies to children age 5 and older. See U.C.A. §§ 30-3-35 and 35.5.

## CHILD SUPPORT

Child support is governed by statute (U.C.A. Title 78B, Chapter 12) according to formulas that are based on the parents' incomes and their time spent with the children. These formulas are referred to as the Utah Child Support Guidelines. See U.C.A. §§ 78B-12-201 through 211. The formulas calculate the minimum amount of support that must be paid, although the parties may agree that higher support is required. The formulas to calculate the support are fairly straight-forward if the required child support worksheet is followed. This worksheet is a required exhibit in any court proceeding where custody is an issue. It also must be submitted to the court, along with various other documents that verify the parents' incomes, when any order that determines child support is filed (even if the order is stipulated). See U.C.A. § 78B-12-201.

The most common difficulty that arises in the calculation of child support is determining what should or should not be counted as gross income for child support, especially when small business owners mix their business and personal expenses. Gross income is defined in § 78B-12-203.

## MEDICAL INSURANCE AND UNINSURED MEDICAL EXPENSES OF CHILDREN

This issue is also governed by statute – U.C.A. § 78B-12-212. The children's portion of medical insurance expenses and uninsured medical expenses are shared equally by the parents.

## CHILD CARE EXPENSES

Statute again controls. The parents shall share equally in the work-related child care expenses of the children. U.C.A. §78B-12-214. Child care costs related to career or occupational training may be ordered by the court in the interests of justice. U.C.A. § 78B-12-215.

## ALIMONY

Alimony is governed by both statutory and case law factors. U.C.A. § 30-3-5(8) provides that:

- (a) the court shall consider at least the following factors in determining alimony:
  - (i) the financial condition and needs of the recipient spouse;
  - (ii) the recipient's earning capacity or ability to produce income;
  - (iii) the ability of the payor spouse to provide support;
  - (iv) the length of the marriage;

- (v) whether the recipient spouse has custody of minor children requiring support;
- (vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and
- (vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.

Failure of the trial court to make findings on the first 3 of these factors constitutes an abuse of discretion. See *Jones v. Jones*, 700 P.2d 1072 (Utah 1985); *Bell v. Bell*, 810 P.2d 489 (Utah 1991).

U.C.A. § 30-3-5(8) further provides:

- (b) The court may consider the fault of the parties in determining alimony.
- (c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (8)(a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.
- (d) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.
- (e) When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court may make a compensating adjustment in dividing the marital property and awarding alimony.
- (f) In determining alimony when a marriage of short duration dissolves, and no children have been conceived or born during the marriage, the court may consider restoring each party to the condition which existed at the time of the marriage.
- (g) (i) The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.
  - (ii) The court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.
  - (iii) In determining alimony, the income of any subsequent spouse of the payor may not be considered, except as provided in this Subsection (8).
    - (A) The court may consider the subsequent spouse's financial ability to share living expenses.
    - (B) The court may consider the income of a subsequent spouse if the court finds that the payor's improper conduct justifies that consideration.

(h) Alimony may not be ordered for a duration longer than the number of years that the marriage existed unless, at any time prior to termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time.

(9) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage or death of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(10) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person.

A history of regular and consistent overtime wages may appropriately be considered by the court in determining an alimony award. *Crompton v. Crompton*, 888P.2d 680 (Utah Ct. App. 1994).

#### PROPERTY AND DEBT DIVISION

Utah is an EQUITABLE DISTRIBUTION state. The court may order any property division that is fair, equitable, and necessary for the protection or welfare of the parties. *Claus v Claus*, 727 P.2d 184 (Utah 1986). The following rules generally but flexibly apply:

- Each party is presumed entitled to all of his or her separate property and approximately fifty percent of marital property. *Dunn v. Dunn*, 802 P.2d 1314, 1323 (Utah Ct. App. 1990).
- An unequal division of marital property must be supported by detailed findings of exceptional circumstances supporting the distribution. *Bradford v. Bradford*, 993 P.2d 887 (Utah Ct. App. 1999).
- If marital property is not capable of division or offset by other property, trial courts will often order the sale of the property or allow one of the parties to “buy out” the interest of the other spouse. *Id.*
- Marital property includes property acquired by either party during the marriage. *Dunn v. Dunn*, 802 P.2d 1314 (Utah Ct. App. 1992).
- Separate property generally includes premarital, gifted and inherited property and interest and appreciation on that property. *Naranjo v. Naranjo*, 71 P.2d 1144 (Utah Ct. App. 1988); *Burke v. Burke*, 733 P.2d 133 (Utah 1987).

- How property is titled is not determinative of whether it is marital or separate property. *Hoaglund v. Hoaglund*, 852 P.2d 1025 (Utah Ct. App. 1993).
- Unlike support and custody issues, property division should be modified with great reluctance in order to promote stability and allow the parties to plan for the future. *Whitehouse v. Whitehouse*, 790 P.2d 57 (Utah Ct. App. 1990). The doctrine of “res judicata” also applies to this division. *Porco v. Porco*, 752 P.2d 365 (Utah Ct. App. 1988).
- Utah law contemplates a fair and equitable, not equal, division of marital debts. *Sinclair v. Sinclair*, 718 P.2d 396 (Utah 1986).

#### ATTORNEYS FEES

Attorneys fees are authorized by statute in domestic relation cases. See U.C.A. § 30-3-3 and § 30-3-5(6). In awarding attorneys fees establishing an initial order, the court should consider:

- The requesting party’s need for financial assistance,
- Whether the requested fees are reasonable,
- The ability of the other party to pay the fees.

See *Riche v Riche*, 784 P.2d 465 (Utah Ct. App. 1989).

#### CIVIL PROTECTIVE ORDERS - U.C.A. Title 78B, Chapter 7

These elements will be briefly discussed if time allows.

#### PARENTAGE – U.C.A. Title 78B, Chapter 15.

These elements will also be briefly discussed if time allows.

### **THE STEPS INVOLVED IN A TYPICAL DOMESTIC RELATIONS CASE**

**Step 1:** Review the elements associated with various claims in domestic relations cases. You should have these elements in mind before you meet with your client to assist them in understanding what claims can be asserted on their behalf.

**Step 2:** The initial meeting with the client.

- Identify issues and obtain relevant information on each element associated with the claims and defenses that will be involved in the case.

- The Financial Declaration and its supporting materials are the key to success in all property, debt, alimony and child support issues. It will be necessary and used throughout the case.

Step 3: Become familiar with the domestic relations forms available on the court's website, [www.utcourts.gov](http://www.utcourts.gov). Most of these forms are free. A complete set of pleadings is also available through the Online Court Assistance Program (OCAP) that is designed to help self-represented parties. A nominal fee is charged if these forms are filed with the court. While these forms are not perfect, much time and effort has gone into their preparation and they are extremely useful. Spend some time at this site.

Step 4: File the Petition/Answer/Counter-Petition/Reply to Counter Petitioner as required by the Utah Rules of Civil Procedure.

- Research and know the elements of each issue when they are filed. The elements will be your guide for argument in all future court proceedings.
- Be careful to plead all issues and place the other side on notice. If you don't make a claim or affirmative defense in your pleadings, it may be barred at trial (i.e. if no alimony claim is made in the Petition, you may be barred from raising it as a trial issue).

(NOTE: Steps 5 through 10 below need not occur in any particular sequence – they simply must have occurred prior to the final pre-trial hearing).

Step 5: Motion(s) for Temporary Orders. [OPTIONAL]. These motions are designed to prevent undue hardship to the parties or their children while the litigation is pending. They last only until a final decree is entered in the case. They typically involve issues such as custody and parent time, child support, alimony, use or possession of the marital home or other major items of personal property, and debt allocation.

- They are largely based on information found in the financial declaration, its supporting documentation and in supporting affidavits. In general, verified memoranda are not as persuasive as affidavits. Keep affidavits brief.
- They typically resolved at a short hearing before a commissioner (unless that district has no commissioners)
- Evidentiary hearings only will be allowed if requested on custody issues.
- The court will not divide all of the parties' personal property on a temporary basis.

- **CAREFULLY READ AND REVIEW RULE 101 OF THE UTAH RULES OF CIVIL PROCEDURE.** This rule sets forth the time deadlines and documents needed in any hearing before a commissioner. It is also good practice to follow it in hearings before a judge.
- Timely prepare any orders which you are assigned to prepare as a result of the hearing. Utah Rule of Civ. Pro. 7 (f) (2).
- Can be brought any time between commencement of action (so long as Rule 101 requirements are satisfied) and the final pre-trial hearing, but beware of law of the case issues. The court will generally not re-visit any issue that was previously before the court on temporary orders unless a material and substantial change of circumstances has occurred that was not contemplated by the parties.
- If custody will be an issue, request custody evaluation.

Step 6: [VERY OPTIONAL]. If absolutely necessary, file an objection to the commissioner's recommended order. It must be filed within 10 days of commissioner's verbal order in court. Utah Rule of Civ. Pro. 7(g). Commissioner's recommendations are not frequently overturned.

Step 7: Get your client scheduled to attend the Divorce Orientation and Education Courses. The parties are required to attend before any divorce can be granted and the courses assist in sensitizing the parties to the needs of their children associated with the divorce. The parties usually appreciate attending these courses.

Step 8: Prepare a case management order in accordance with Rule 26 of the Utah Rules of Civil Procedure. In districts using a case manager where a case management conference is held, the order from that conference will suffice.

Step 9: Conduct Discovery.

- Written interrogatories, requests for admission, requests for production of documents, depositions, records depositions.
- Custody evaluations – Comply with custody evaluation order.
- Attend custody evaluation settlement conference – Meeting with custody evaluator and parties to see if custody issue can be resolved without a full write up of the custody evaluation report which would be presented at trial.

Step 10: Prepare for and attend mediation. The parties must attend mediation with a court approved mediator before the court will schedule trial.

- A significant majority of cases that go to mediation are resolved. Be prepared to negotiate and settle all issues in the case. As in all things, preparation is the key. Discuss your strategies and positions in advance of mediation with your client.
- A settlement can obviously be reached at any point in the case. If a case is settled, a comprehensive stipulation should be prepared that clearly sets forth the agreement so those terms in the stipulation can be carried over into the Findings of Fact and Conclusions of Law and the Decree of Divorce.

Step 11: Request a Final Pre-Trial Conference. This conference is to obtain a trial date (or at least get it on the trial judge's calendar to set a date).

- You will likely not get a trial date unless the above steps have been completed and you are actually prepared to go to trial.
- Be prepared to discuss the number witnesses that you will call at trial and the anticipated length of trial.

Step 12: Trial.

- Prepare a succinct opening statement that tells the judge where you are going.
- Have all exhibits organized, preferably in a trial notebook.
- Remember that trial is the time for the judge to weigh the parties' competing versions of the facts and determine which set is most likely to be true. It is not a debating contest. Keep cross examinations brief!
- Focus on presenting evidence that will support the findings that you want the judge to make.
- Have a strategy for dividing the many small items of personal property.
- Make clear exactly what relief you are seeking in your closing.
- Timely prepare the Findings and Decree and comply with Utah Rule Civ. Pro. 7(f) if you are asked to prepare them following the judge's decision.

Step 13: Order to Show Cause. This procedure is only for the enforcement of an existing order where one of the parties has failed to comply with the order. It typically seeks a sanction based on a finding of contempt. Accordingly, it can occur either before or after a final decree so long as there is an order in place that has been violated. This step can occur prior to a final decree if a temporary order has been violated.

- In order to find contempt, the court must find by clear and convincing evidence that the offending party knew of the order, had the ability to comply with the order and knowingly failed to comply.
- The clear and convincing evidentiary standard will nearly always require evidence to be taken.
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Step: 14: Petition to Modify and Existing Decree or Order

Requires a material and substantial change of circumstances to have occurred that was not anticipated by the parties at the time the prior order was entered. If the modification involves custody, the modification must also be in the best interests of the child. It follows the same process as the initial action as set forth above with several significant exceptions.

- **BECOME FAMILIAR WITH RULE 106 OF THE UTAH RULES OF CIVIL PROCEDURE.**
- Only child custody and support can be changed on a temporary basis pursuant to a motion for temporary orders if the requirements in rule 106 are satisfied.
- The prior decree remains in effect regarding all other issues (including alimony) until the trial on the Petition to Modify is held. These other issues cannot be modified through a Motion for Temporary Orders while the Petition to Modify is pending.
- Property division awards are very rarely modified.