

# Custody and Visitation Rights in Utah

By Harry Caston

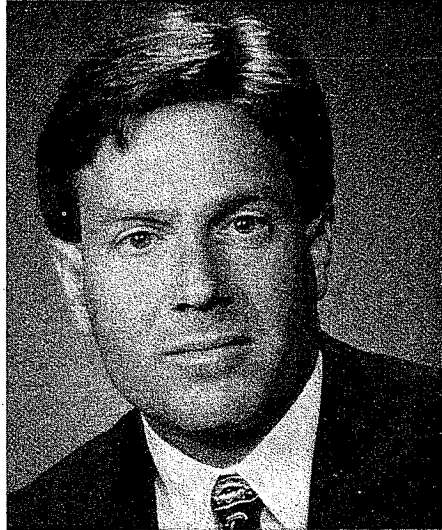
There are two types of custody arrangements: sole and joint. A sole custodian exclusively exercises parental rights, privileges, duties and powers and is responsible for the child. This responsibility includes the day-to-day care of, and the right to make all decision that affect, the child.

Joint custody, on the other hand, embraces various divisions of decision-making authority and differs from sole custody when the parties actually share the "rights, privileges, duties and powers of a parent."<sup>1</sup> Sharing may require each parent to be solely responsible for certain decisions or that both will be jointly responsible for all or at least some of the decisions affecting the children. In the latter situation, impasses can be resolved by allowing one of the parents ultimate decision-making power, or by resorting to mediation or alternative dispute resolution.

The joint legal custody provisions of the Utah Code also anticipate that one parent may be solely responsible for the children.<sup>2</sup> Although the custody arrangement would then be very similar, if not identical, to sole custody, there is great value in designating such an arrangement "joint legal custody." The value may be the avoidance of litigation and the creation of a mutually acceptable settlement. Another potential value is the reduction of bitterness between the parties and the increase of cooperation to advance the welfare of their children.

A popular misconception is that joint custody requires the child to spend equal time with each parent. Custody refers to decision-making rights and responsibilities, not time spent. Although an order of joint legal custody may provide for equal periods of physical custody, it is also possible that the child will reside with one parent and that the other parent will have visitation rights similar to a non-custodial parent.<sup>3</sup>

There are two methods to obtain an



*HARRY CASTON is a partner in the Salt Lake City law firm of McKay, Burton & Thurman where he practices in the areas of family law, and civil and criminal litigation. He received his B.S. degree from Franklin & Marshall College in Lancaster, Pennsylvania and his J.D. degree from the University of Bridgeport in Connecticut. Mr. Caston is a member of the Salt Lake County Bar Association, the Utah State Bar, and the Family Law Section Executive Committee. An avid photographer, he has eleven Utah Bar Journal covers to his credit.*

order of joint legal custody. The parties may stipulate to joint legal custody. Absent an agreement, the court may nevertheless determine that "both parents appear capable of implementing joint legal custody."<sup>4</sup> The court could order joint legal custody in disputed matters where one or neither of the parties seeks joint legal custody.

Under either of these scenarios the court must first determine that joint legal custody is in the child's best interest.<sup>5</sup> Section 30-3-10.2 lists eight factors for the court to consider in making this determination. These factors include "whether the physical, psychological and emotional needs and development of the child would benefit

from joint custody,"<sup>6</sup> whether the parents are able "to give first priority to the welfare of the child,"<sup>7</sup> and whether the parents possess sufficient maturity, willingness and ability to protect the child from conflicts that may arise between them.<sup>8</sup> As a practical matter, the court may not consider these factors where the parties have stipulated to joint legal custody. Moreover, in contested matters either or both of the parties could prevent an order of joint legal custody by convincing the court of their inability to cooperate.

## SOLE CUSTODY

Divorcing parents may not be interested in, or appropriate candidates for, joint legal custody. To evaluate a client's claim for sole custody or in trying a custody dispute, the practitioner must know what factors the court will consider in awarding custody.

Custody disputes are resolved according to factors set forth by statute and case law. Section 30-3-10(1) of the Utah Code directs the court to make an order of custody "as it considers appropriate." Do not be fooled. The trial court does not have incredibly broad discretion to award custody in any manner and for any reason it deems appropriate.

What is appropriate depends upon, and is absolutely subservient to, the best interests of the child. Section 30-3-10(1) directs the court to consider a parent's "past conduct and demonstrated moral standards." These factors are relevant only to the extent that they have an effect on, or relate to, a child's best interest. If a parent's questionable behavior has no effect on the child's best interest or upon parenting ability, the behavior would have no bearing on, and no relevance to, the custody decision.<sup>9</sup>

In determining a child's best interest the court has the discretion to consider and weigh as the court deems appropriate the child's "desires regarding the future cus-

today.”<sup>10</sup> The court is also to consider “which parent is most likely to act in the best interests of the child, including allowing the child frequent and continuing contact with the non-custodial parent, as the court finds appropriate.”<sup>11</sup>

The practitioner unfamiliar with divorce and its effects may look upon section 30-3-10(3) as an oddity. This section provides that “if the court finds that one parent does not desire custody of the child, or has attempted to permanently relinquish custody to a third party, it shall take that evidence into consideration in determining whether to award custody to the other parent.”

The uninitiated practitioner also might wonder why a person would voluntarily subject themselves to the emotional and financial costs of a custody dispute if that person did not really want custody. The somber reality is that divorce can bring out the worst in people. A parent not otherwise desirous may nonetheless be motivated to seek custody for any number of reasons, including vengeance, a misplaced pleasure in making the other party miserable, the financial benefit of child support, or the fear of being perceived as an uncaring parent. A strategically minded (but ill-advised) litigant might dispute custody just to obtain a bargaining chip.

Imagine the court’s dilemma if the parent who fared better on the statutory and case law factors did not truly desire custody. Section 30-3-10(3) relieves the court of this dilemma. The court may determine that a party’s motivation other than a true desire for custody outweighs that party’s superior performance on the statutory and case law factors.

Before reviewing the oft-mentioned case law factors, some historical perspective is required. Prior to 1986, a combination of statutory enactments and judicial precedent created and maintained a strong preference in favor of awarding custody to mothers. Fathers could obtain custody of children under ten-years of age only by demonstrating that their wives were immoral, incompetent or otherwise improper. This test was replaced by a preference in favor of mothers when all other factors were equal. A 1969 legislative enactment referenced a natural presumption that the mother was best suited to care for young children. In 1977, the Utah legislature eliminated any and all statutory presumptions in favor of mothers. Without

statutory support, the courts kept gender bias alive. Until 1986, the courts “continued to recognize the judicial preference for the mother in child custody matters where all other things are equal.”<sup>12</sup>

The judicial preference in favor of mothers was eliminated in *Pusey v. Pusey*, 728 P.2d 117 (Utah 1986), when the court declared: “We believe the time has come to discontinue our support even in dictum, for the notion of gender-based preferences in child custody cases.” This decision eliminated what had been the foremost factor in custody determinations. New factors for determining custody were needed. The *Pusey* court identified a non-exclusive list of what it referred to as “function-related factors.” These factors are: (a) the identity of the primary caretaker during the marriage; (b) the identity of the parent with greater flexibility to provide personal care for the child; (c) the identity of the parent with whom the child has spent most of his or her time pending the custody determination if that period has been lengthy; and (d) the stability of the environment provided by each parent.

---

*“Until 1986, the courts  
continued to recognize the  
judicial preference for the mother  
in child custody matters where  
all other things are equal.”*

---

In *Hutchinson v. Hutchinson*, 649 P.2d 38 (Utah 1982), the court identified two categories of function-related factors. The first category of factors relates to “the child’s feelings and special needs.” These factors are: (a) the preference of the child; (b) keeping siblings together; (c) the relative strength of the child’s bond with one or both of the prospective custodians; and (d) when appropriate, the general interest in continuing previously determined custody arrangements where the child is happy and well adjusted.

The second category of factors identified by the *Hutchinson* court “relate primarily to the prospective custodian’s character or status or their capacity or willingness to function as parents.” These factors are: (a)

moral character and emotional stability; (b) duration and depth of desire for custody; (c) ability to provide personal rather than surrogate care; (d) significant impairment of ability to function as a parent through drug use, excessive drinking, or other cause; (e) reasons for having relinquished custody in the past; (f) religious compatibility with the child; (g) kinship, including in extraordinary circumstances, stepparent’s status; and (h) financial condition.

Not all of the above factors will apply in every case. Broad discretion allows the court to determine which factors will apply and the weight each factor will receive. Given the fact-sensitive nature of divorce, the court also retains the discretion to consider any other function-related factors.

#### FINDINGS OF FACT

A custody determination will be overturned only when the court has abused its broad discretion or committed manifest injustice. Despite this broad discretion, a large number of cases have been remanded due to insufficient findings. In reviewing these cases, the offending omission is the absence of what I shall refer to as “foundational findings.” The foundational findings support the findings on the statutory and case law factors. For example, one of the statutory factors that a court may consider is which (if either) of the parents would promote continuing contact with the other parent. A finding that the court considered that particular factor and determined that one parent would likely promote continuing contact would not be sufficient — there must be a foundational finding. Perhaps the court was persuaded by certain testimony that during the pendency of the divorce, the temporary custodian did not promote contact with the other party.

To be sufficient and to avoid the unpleasant possibility of remand, the findings should include: (1) the statutory and case law factors or any other factors the court considered; (b) how each of the parties fared on these factors relative to each other; and (c) the basic foundational findings as to *why* the parties fared as they did on the factors the court considered.

#### CUSTODY EVALUATIONS

In custody disputes, the court may be aided by an expert witness. These experts

are referred to as custody evaluators. The custody evaluator examines the parties and their children and renders an opinion as to which custody arrangement would serve the children's best interest.

In other types of litigation, each party may obtain its own expert and the outcome may be a function of which party's expert is the most persuasive. Custody disputes are different. Under Rule 4-903 of the Code of Judicial Administration, each party will not have his or her own custody evaluator. Assuming that both parties reside within the court's jurisdiction, one custody evaluator will be appointed. Performance of the custody evaluation itself and the individual who performs the evaluation may be stipulated to by the parties. If the parties are unable to agree to a custody evaluation, the identity of the evaluator, or how the evaluation is to be paid for, these issues may be presented to the court by way of an order to show cause.

Rule 4-903 sets forth the minimum educational and professional requirements of custody evaluators. Social work evaluations must be performed by licensed social workers. Psychological evaluations must be performed by licensed psychologists. Psychiatric evaluations must be performed by a licensed physician who specializes in psychiatry. The educational background of the professional chosen to conduct the evaluation will depend on the issues, claims and defenses presented in a particular case. If mental fitness is an issue, the evaluation should be performed by a psychiatrist. If psychological profiles of the parties or the children are desired, a psychologist would be an appropriate custody evaluator. If mental fitness is not an issue and psychological profiles are not required, a social worker may be the appropriate choice.

Custody evaluators may vary not only in their professional and educational background, but in the manner in which they conduct the evaluation. Some evaluators, regardless of their professional qualifications, may visit the parties and their children in their homes. Other custody evaluators may only visit with the parties and their children in the evaluator's office. Some custody evaluators will contact and speak with collateral references. Some will not.

Regardless of whether the custody

evaluator is a social worker, psychologist or psychiatrist, and regardless of the custody evaluator's particular style, Rule 4-903(3) sets forth the factors that the custody evaluator must consider. These factors are practically identical to the function-related factors set forth above.

The custody evaluator is also authorized to consider "any facts that he, the parties or the court deems important." The court is not bound to follow the recommendation of the custody evaluator, nor is the recommendation entitled to any presumptive validity. The results of the evaluation do not affect or shift any burden of proof. If the evaluation is rejected, the court should state the reason for rejecting the recommendation.<sup>13</sup>

### VISITATION

The Utah State Legislature greatly advanced the interest of children of divorced parents by enacting the visitation guidelines of section 30-3-32, Utah Code Ann., et seq. The visitation guidelines recognize that the best interest of the child requires that parents are entitled to "frequent, meaningful and continuing access."<sup>14</sup> The visitation guidelines consist of three components — the minimum visitation schedule of section 30-3-35, the advisory guidelines of section 30-3-33, and the provisions that address visitation where there is no bond between the non-custodial parent and the child.

---

*"The visitation guidelines recognize that the best interest of the child requires that parents are entitled to 'frequent, meaningful and continuing access.'"*

---

The highly-detailed section 30-3-35 establishes the minimum visitation to which the non-custodial parent is entitled should the parties be unable to agree on a visitation schedule. The minimum visitation schedule applies to school-age children, ages 5-18, beginning with kindergarten.<sup>15</sup>

The advisory guidelines serve several functions. One of these functions is to augment the minimum visitation schedule. Parents are instructed to give "special con-

sideration" to allow a child to attend family functions such as funerals, weddings, reunions, religious holidays, and other important ceremonies that otherwise conflict with visitation.<sup>16</sup> Visitation may be increased or altered as required by a parent's work schedule.<sup>17</sup> Parents are instructed to permit and encourage telephone contact, and uncensored mail privileges.<sup>18</sup> Based on the presumption that parental care is superior to surrogate care, custodial parents are encouraged to allow the non-custodial parent, if otherwise willing and able, to provide childcare.<sup>19</sup> For non-custodial parents of children who have not yet reached school age, the minimum schedule is to be altered so as to provide "shorter visits of greater frequency."<sup>20</sup>

The advisory guidelines require the custodial parent to provide information to the non-custodial parent. The non-custodial parent is to receive "notice of all significant school, social, sports, and community functions in which the child is participating or being honored." Notification is to be provided "within twenty-four hours of the custodial parent receiving notice of these events."<sup>21</sup> A non-custodial parent is also to be allowed direct access "to all school reports, including pre-school and daycare reports, and medical records."<sup>22</sup> The non-custodial parent is to be immediately notified of a medical emergency.<sup>23</sup> Each parent is to supply the other parent with a current address and telephone number,<sup>24</sup> and provide notice of any change of address or telephone number within twenty-four hours.<sup>25</sup> The custodial parent is also to provide the name, address, and current telephone number of all surrogate care providers.<sup>26</sup>

Other provisions of the advisory guidelines instruct as to how visitation is to commence and conclude. The non-custodial parent is to pick up and return the child at times specified in the decree of divorce. The custodial parent must have the child ready for visitation. The custodial parent must be home when the child is returned from visitation, or make alternate arrangements.<sup>27</sup> Another provision of the advisory guidelines codifies the prohibition against withholding visitation or child support due to "a parent's failure to comply with a court-ordered visitation schedule."<sup>28</sup>

The introductory language of section

30-3-33 states that the advisory guidelines are "suggested to govern all visitation arrangements."<sup>29</sup> This language is misleading. The advisory guidelines and the minimum visitation schedule are not merely suggestions. The visitation guidelines and the minimum visitation schedule are presumed to be in the child's best interest.<sup>30</sup> The presumption may be rebutted by demonstrating the existence of any of the following factors by a preponderance of the evidence: (a) visitation would endanger the child's physical health, or significantly impair the child's emotional development; (b) substantiated allegations of child abuse; (c) absence of parenting skills or inability to provide adequate food or shelter during visitation; (d) the preference of a mature child who has decided that the visitation should not take place; (e) incarceration of the non-custodial parent; (f) or any other criteria found by the court to be relevant to the best interest of the child.

In some circumstances, an emotional bond may not have formed between a non-custodial parent and the child. For example, the parents may never have shared a common residence; or, the parents may have divorced or separated and for whatever reasons, visitation has not taken place. Where an appropriate parent-child bond has not formed between the non-custodial parent and the child, section 30-3-36 instructs the parents as well as the court to "gradually reintroduce an appropriate visitation plan for the non-custodial parent."

Section 30-3-36 remedies another common occurrence — the refusal of either parent to inform the other of travel plans that involve the child. Section 30-3-36 requires the parent traveling with the child to inform the other parent of the dates of travel, destinations, where a child or parent can be reached, and the name and telephone number of a third person who would be aware of the child's location. Section 30-3-36(3) looks unfavorably upon unchaperoned travel for children under the age of five.

Imagine a non-custodial parent's surprise when he or she appears at the custodial parent's home to pick up the child for visitation, only to find that the custodial parent and the child no longer live there. Section 30-3-37(1), as well as section 30-3-33(12), prevent such an

occurrence. A parent is to "provide reasonable, advance written notice of the intended relocation to the other parent" when that parent moves either from the state of Utah or 150 miles from an address that is set forth in the decree of divorce. Section 30-3-37 addresses other issues that arise when a party moves from Utah or 150 miles from the residence specified in the decree of divorce. In such instances, the minimum visitation schedule would become unworkable. Section 30-3-37 allows the court, either on its own motion or upon motion of the parties, to "make appropriate orders regarding the visitation and costs for visitation transportation." The factors the court may consider in reviewing visitation, and in determining the division of visitation transportation costs, are set forth in section 30-3-37(3)(a)-(d). These considerations are: (a) the reasons for the move; (b) the cost or difficulties caused by the move; (c) the ability of both parents to incur these costs; (d) "any other factors the court considers necessary and relevant." In contrast, section 30-3-37(4) states that upon motion of either party, the court "may order the parent intending to move to pay for the cost of transportation for (a) at least one visit per year with the other parent; and (b) any number of additional visits as determined by the court."

---

*"A well-respected domestic relations attorney tells prospective clients that their lives are like a sinking ship."*

---

To reconcile the provisions of section 30-3-37(3)(a)-(d), with section 30-3-37(4), I propose Caston's Rule of Visitation Costs Caused By Relocation — regardless of how the parties fare on the factors of section 30-3-37(3)(a)-(d), the party who has moved should be completely responsible for the transportation costs of at least one visit per year. On the brighter side for the non-custodial parent who has moved, section 30-3-37(5) allows uninterrupted visitation for a minimum of thirty days provided the visitation is in the best interest of the child.

## CONCLUSION

A well-respected domestic relations attorney tells prospective clients that their lives are like a sinking ship. The attorney emphasizes that regardless of how well he does his job, the client's life will, at least to some degree, always wear the effect of the divorce. His job is to minimize the damage.

Similarly, the statutes and judicial decisions discussed above serve as damage control. The statutes and decisions minimize the effect of divorce on children by divining the custodial and visitation arrangement that will be in the child's best interest.

<sup>1</sup>Utah Code Ann. § 30-3-10.1(1) (1989).

<sup>2</sup>*Id.* § 30-3-10.1(2).

<sup>3</sup>*Id.* § 30-3-10.1(4).

<sup>4</sup>Utah Code Ann. § 30-3-10.2(1)(b) (Supp. 1994).

<sup>5</sup>*Id.* § 30-3-10.2(1).

<sup>6</sup>*Id.* § 30-3-10.2(2)(a).

<sup>7</sup>*Id.* § 30-3-10.2(2)(b).

<sup>8</sup>*Id.* § 30-3-10.2(2)(g).

<sup>9</sup>*Roberts v. Roberts*, 835 P.2d 193 (Utah Ct. App. 1993).

<sup>10</sup>Utah Code Ann. § 30-3-10(1) (Supp. 1994).

<sup>11</sup>*Id.* § 30-3-10(2).

<sup>12</sup>*Nielson v. Nielson*, 652 P.2d 1323 (Utah 1982).

<sup>13</sup>*Sukin v. Sukin*, 842 P.2d 922 (Utah Ct. App. 1992).

<sup>14</sup>Utah Code Ann. § 30-3-32(2)(a) & (b) (Supp. 1994).

<sup>15</sup>*Id.* § 30-3-35(1).

<sup>16</sup>*Id.* § 30-3-33(4).

<sup>17</sup>*Id.* § 30-3-33(7).

<sup>18</sup>*Id.* § 30-3-33(13).

<sup>19</sup>*Id.* § 30-3-33(14).

<sup>20</sup>*Id.* § 30-3-33(3).

<sup>21</sup>*Id.* § 30-3-33(10).

<sup>22</sup>*Id.* § 30-3-33(11).

<sup>23</sup>*Id.*

<sup>24</sup>*Id.* § 30-3-33(15).

<sup>25</sup>*Id.* § 30-3-33(12).

<sup>26</sup>*Id.* § 30-3-33(15).

<sup>27</sup>*Id.* § 30-3-33(6).

<sup>28</sup>*Id.* § 30-3-33(9).

<sup>29</sup>*Id.* § 30-3-33 (emphasis added).

<sup>30</sup>*Id.* § 30-3-34(2).

