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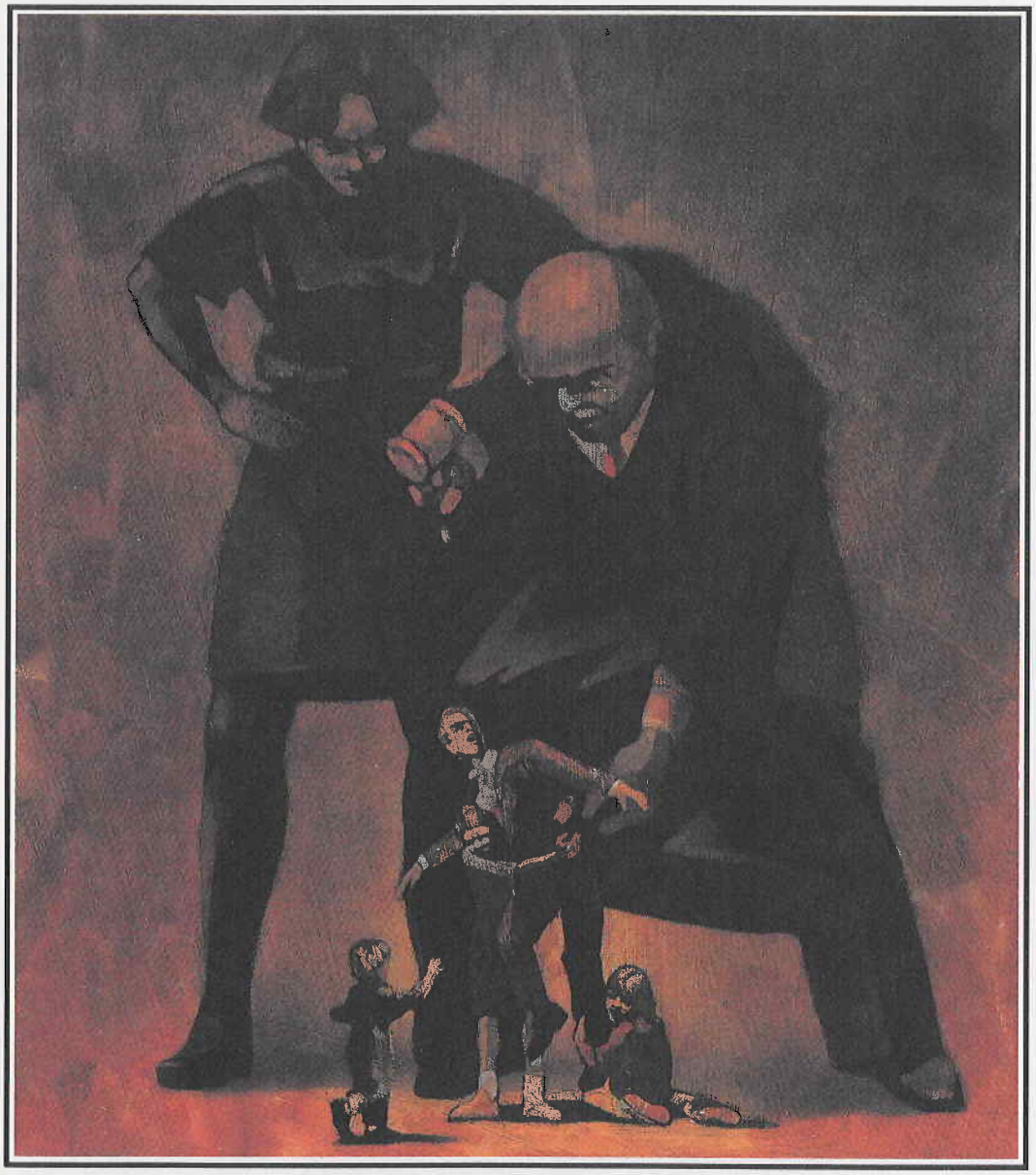

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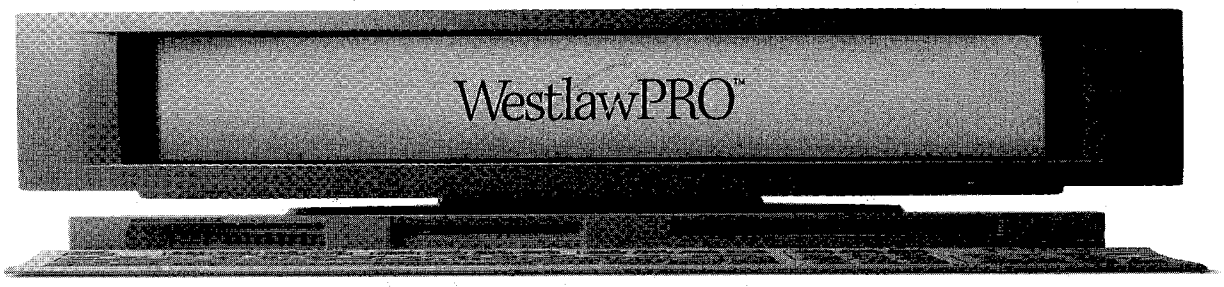

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VOIR DIRE

ISSUE OF THE UTAH BAR JOURNAL

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VOIR DIRE EDITORIAL POLICY

Voir Dire is an independent intellectual journal for lawyers who litigate cases, and judges who decide them. *Voir Dire* is published twice a year by the Litigation Section of the Utah State Bar.

Voir Dire was created to provide members of the Utah State Bar with an alternative forum to examine issues and express opinions about the adversary system. *Voir Dire* strives to be practical and concrete, lively and readable, and will not avoid controversy or unpopular viewpoints.

The Editorial Board encourages submission of manuscripts of original articles, book reviews, comments, case notes, and letters from members of the Utah State Bar concerning the adversarial process and other material of interest to attorneys who venture into the litigation arena.

All contributions must be typewritten, double-spaced electronic printouts, with all references and footnotes numbered consecutively, on 8 1/2" by 11 1/2" paper. Manuscripts should be submitted with an electronic disk to the *Voir Dire* Editorial Board, 645 South 200 East, Salt Lake City, Utah 84111.

Publishing and editorial decisions are based on the Editorial Board's judgment of the quality of the writing, the timeliness of the article, and the potential interest of the readers of *Voir Dire*. If a submission is accepted for publication, the Editorial Board reserves the right to make deletions to conform to space limitations.

No submission will be published that contains defamatory or obscene material, violates the Rules of Professional Conduct, or which may otherwise subject the Litigation Section, the Utah State Bar, the Bar Commissioners, or any employee of the Utah State Bar to civil or criminal liability.

The opinions and views expressed in *Voir Dire* are those of the authors. The Editorial Board, the Litigation Section, and the Utah State Bar do not necessarily share or endorse any particular views expressed in the materials published in *Voir Dire*.

President's Message

The Challenge to Improve

by James C. Jenkins

I decided as a young boy that I wanted to be a lawyer. It seemed to me to be a career full of variety and challenge, an opportunity to make a meaningful impact upon the lives of others, and a respectable way to earn a living. Over the years, I have heard some lawyers complain about occupational burnout. I have heard some people blame attorneys for disrupting or damaging their lives and I have heard many jokes which demean and dishonor the profession. I am probably as cognizant as anyone of all the criticisms which are lodged against our profession but I have never regretted that decision made long ago. Practicing law has been and remains one of the greatest privileges of my life.

Last month I had a simple and perhaps ordinary experience which reinforced for me the merit of my career choice. I have recently been engaged in a contract case scheduled for trial in federal court. Both parties and their counsel have been under considerable pressure to meet discovery deadlines. As part of our preparation, my partner, Tom Willmore, and I conducted depositions of some twenty witnesses over eleven days; half of that time was spent in Logan and the other half in Los Angeles. It is the kind of case where a lawyer would have ample opportunity to be disagreeable, contentious or obstructive. But that has not happened.

Shigeru Watanbe and his associate, Matthew Kanny, serve as opposing counsel. Shig and Matt are members of the Los Angeles office of the firm Kelley Drye & Warren. Although we have only been acquainted for a short time, I have been impressed with their demonstrated competence and professionalism.

During the first few days of depositions, it was discovered that because some employees of Shig's client worked in branch offices outside of Los Angeles, it would be difficult to maintain the original schedule and still comply with the court's date to cut off discovery. While Matt was in Logan, Shig called from Los Angeles to explain the problem. Instead of insisting that his witnesses could not be deposed, he offered some proposals to resolve the problem. He suggested that we could reschedule witnesses if the depositions would be held at his client's place of business. This would reduce the travel time for most of the eleven witnesses. I pointed out that my hotel reservations had already been confirmed. I had not planned to rent a car and I wasn't enthusiastic about driving the L.A. freeways to locate an alternate site. I was also worried about having access to a phone and a copy machine during the depositions. He simply said that if I would agree to accommodate his client's needs, he would take care of mine.

For the next five or six days, Matt or Shig personally drove to my hotel and transported Tom, me, and our client to the depositions and returned us each evening to the hotel. Shig made arrangements for a phone and copy machine. They each were courteous and considerate to witnesses. They were patient with my questioning and refrained from interposing unnecessary objections. They did not coach their witnesses during my examination, but allowed me to fairly determine information as I requested it, and whenever I inquired about information which could have been confidential or proprietary to their client, it was simply designated protected under a confidentiality and protective order which we had jointly negotiated, without the necessity of prior motion or court intervention.

Although the work was taxing and challenging, we were able to effectively accomplish our task and serve the respective interests of our clients without hostility and obstruction. I gained a genuine respect for Shig and Matt not only as competent attorneys but as gentlemen.

I think there is a lesson in my experience. When we fail to exercise civility and morality in our professional practice, our work then becomes unbearable. Clients are not properly served and criticism of lawyers abounds.

What a wonderful privilege it is to serve as president of this great organization. I thank Charlotte Miller, Steve Kaufman, Dennis Haslam, Paul Moxley, and Jim Clegg for the outstanding leadership and service they each provided as presidents of the Utah State Bar during the five years I have been a Bar Commissioner. Among the many accomplishments which I hope we will together achieve during this year is a goal to encourage every lawyer to be better both as a professional and as a person. The work we do is important. We can make a difference in people's lives. I invite you to write or call me with your ideas and suggestions for improvement, and I eagerly look forward to working on your behalf.

REPORT FROM THE CHAIR

You have probably noticed that this issue of *Voir Dire* is dedicated to domestic law issues. In an Executive Committee meeting, a very persuasive domestic law Commissioner enlightened the general litigators on the committee about the importance of domestic law. After our brief but informative tutorial session, we unanimously agreed that an issue of *Voir Dire* dedicated to domestic law would not only be of interest to several practitioners, but was also a necessity given several questionable practices occurring daily in the domestic courtrooms by litigators of all experience levels.

I was given my first domestic case during my first year of practice. A senior partner engulfed my doorway telling me of the torment his sister's friend in their church group was experiencing with her new husband. A simple, quick and undisputed annulment was needed. I wholeheartedly consented to help out but knew I was doomed when he left my office indicating that this would be a very good learning experience for me. He handed me the firm's domestic law handbook, authored sometime in the '70s, as my guidepost in this fortuitous "pro bono" assignment.

After spending nearly 150 billable hours, the "quick" annulment was finalized. Every facet of the lawsuit presented problems never encountered by any of the general litigators in my firm. I found myself calling several of my classmates who ultimately referred me to a network of very helpful domestic law practitioners. I gained a new respect for domestic law practice and vowed that I would never again take on a domestic case.

To my dismay, my next encounter with the world of domestic law was of a more personal note–my own divorce and custody proceedings. I began the process thinking I could represent myself and save a lot of money in the process. How tough could it be to simply divide the domestic possessions in half and set up a workable custody schedule? I soon realized that I was again way out of my league, and immediately called a domestic law guru.

In initially embracing a cavalier attitude that I could handle my own uncontested divorce, I ignored the long-term consequences of a divorce. I failed to take into account the fact that my two-year-old daughter would need financial support from both parents for another sixteen years. I didn't realize that my retirement account was no longer mine. The house was no longer easily divisible into equal parts. Most importantly, I was naive in thinking that my former spouse and best friend of ten years would amicably resolve this matter.

Needless to say, a divorce or any domestic law matter involves issues not encountered in the typical lawsuit. As litigators we all need to divest ourselves of the cavalier attitude about simple domestic law cases. Indulge yourself in the wealth of domestic law information contained in the pages to follow. Respect your fellow domestic law litigators because you never know when, or how, you will need their assistance.

****

I will step aside as chair of the Litigation Section in July, and Janet Goldstein, a solo practitioner in Park City, will lead the Section next year. During her tenure on the Executive Committee, Janet has shown remarkable dedication to the Section's future, and I am confident that she will continue to lead the section with energy and vision.

The Executive Committee worked very hard this year to bring a variety of programs to Section members. One of our many new projects is a mentor program under construction in the Litigation Section's portion of the Bar's Web page. This service, planned to begin in July, 1998, will enable Section members to e-mail questions of interest to experienced litigators for answers which will be indexed and available for all to read by accessing the page at http://www.utahbar.org/section/Lit/litcom.html. The Section will conduct its annual meeting and host a good old-fashioned BBQ in Park City on September 12, 1998. More details will be provided as the date nears.

I have been honored to serve as chairperson of the Litigation Section. Over the past year this "chair" has thoroughly enjoyed the opportunity to meet and work with many members of the Bar, including those who call the "leather wingbacks" home. As my short tenure expires, I'll head back to the comforts of my green synthetic chair behind my Steel case desk in Murray with a renewed appreciation and understanding of the benefits of involvement in the Bar.

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As this issue went to press, the Section's Executive Committee voted to cease publishing *Voir Dire*, and this issue will therefore be our last. The Bar Commission informed us that it would fund only one issue per year, and the Executive Committee determined that a single annual issue is insufficient to fulfill our commitment to provide meaningful and timely discussions of issues. I want to thank the members of the Editorial Board, both past and present, for making *Voir Dire* such an excellent publication.

Vicky Kidman

POINT/COUNTERPOINT

Final Report of the Utah Family Court Task Force: Summary of Principal Recommendations

by Tim Shea

The Utah Family Court Task Force makes its case for a family court in its final report. At its meeting in August of this year, the Judicial Council will dust off the final report, issued December 16, 1994, and consider those arguments. The arguments for and against a family court are taken up in the Point/Counterpoint portion of this series. This article serves as a summary of the major Task Force recommendations. The Task Force report is available on the Utah courts' web page: www.courtlink.utcourts.gov.

It will have been almost four years from the conclusion of the Task Force study when the recommendations are put to general scrutiny by the courts, the Bar, the public, and ultimately the Utah State Legislature. In the interim, court consolidation has been completed by merging the Circuit Courts into the District Courts in Judicial Districts 1 through 4. The CORIS computer system, perhaps the key feature in the feasibility of a family court, will have been fully implemented throughout the District Court. And the District and Juvenile Courts will have been co-located in many courthouses around the state, including, in Salt Lake County, the Sandy Courthouse, and the Matheson Courthouse.

The family court, as recommended by the Task Force, would not be a separate court at all, but rather a department of the District Court. This family department would have assigned to it the cases now within the jurisdiction of the Juvenile Court–delinquency and status offenses, child protection cases, and termination of parental rights–and the family law cases of the District Court, such as divorce, cohabitant abuse, paternity, Uniform Interstate Family Support, and all custody, support and visitation issues. The complete list of the cases recommended for assignment to the family department is found in the Task Force report. Court staff are working on estimates of the number of judges, staff, and other resources needed for the family department and for the "general department,"consisting of adult felony and misdemeanor and non-domestic civil cases. The Task Force recommends that intra-family crimes be prosecuted in the general department of the District Court.

The Task Force made no recommendations regarding the administration of particular ancillary services. The Task Force's general approach was to assume no change of the status quo. That is, the development of a family court would not

Mr. Shea is the Senior Staff Attorney for the Administrative Office of the Courts.

require those services already administered within the judiciary to be moved outside the courts. Neither would a family court require services currently found outside the courts to be administered from within. The landscape of services supporting family law is irregular and dynamic. The scene as it appeared to the Task Force has changed and likely will further change before legislation is enacted. The family court, if it is implemented, will participate in the debate regarding these services–Which are effective? How should they be administered? When are they appropriate?–but the Task Force discerned no particular "best method" of administering and providing these services.

The Task Force recommended that the family court assume a strong role in developing expertise in the nature and availability of services and coordinating whatever services are ordered in particular circumstances. Inter-agency cooperation–including the courts, state and local bureaus, and private providers–is critical to successful judicial intervention in the lives of families. Although there may be no best method of administering services, the family court appeared to be the focal point through which those services should be coordinated.

Perhaps the most controversial recommendation of the Task Force is that judges be permanently assigned to the family court. Indeed, this recommendation is contrary to the model recommended by the American Bar Association, the National Family Court Symposium, and the Utah Commission on Justice in the Twenty-first Century, all of which recommend some type of rotation of judges between the family law cases and the balance of the court docket.

The Task Force did not expressly recommend implementation of the concept of "one family/one judge." Direct calendaring, as it is called by the National Family Court Symposium, is discussed at length in the final report as one of three possible methods of calendaring cases. Rather than recommend a particular method of calendaring cases, the Task Force articulated several principles and goals of a calendaring system and of case management in general. These principles and goals form the core of family court operations.

Lawyers practicing family law may want to consider more closely the calendaring and case management principles and goals of the final report. In the end, many practitioners care more about the procedures of the court than its structure. The Utah Rules of Civil Procedure and any rules particular to divorce cases and domestic violence cases will remain in effect for civil litigation. The Utah Rules of Juvenile Procedure and the special statutes and rules governing delinquency and child protection procedures will remain in effect for those cases. The Task Force recommends a uniform set of rules for family law cases, but these may be a year more in development.

> ***"Perhaps the most controversial recommendation of the Task Force is that judges be permanently assigned to the family court."***

A lesson learned during court consolidation is to improve upon the uniformity of internal operating procedures–at least as those procedures affect the parties and the management of a case. As stated above, the internal case management functions of the family court are discussed as principles and goals. Actualization of those principles and goals needs further refinement. Internal operations should be reasonably consistent from district to district, but some variations may exist as a result of local circumstances.

Unified Family Courts: Therapeutic Power and Judicial Authority

by Stephen J. Cribari

Unified family courts have existed in this country since 1914.[1] Some states have established state-wide unified family courts, others have instituted partial unified family courts. Recently, several jurisdictions have implemented pilot projects,[2] others are studying their feasibility.[3]

Unified family courts are courts that are designed to dispense *therapeutic justice* in an effort to address the personal and social issues that drive families into court. This brief paper offers a description of unified family courts and raises questions about the expansive judicial power associated with them.

In a unified family court, exactly what is it that is "unified?"

As many jurisdictional bases as possible are unified under the authority of the family court, which should be a court of stature equal to the highest trial court in the state. At a minimum, a unified family court should hear matrimonial, domestic violence, juvenile delinquency, child protection, and family crisis cases.[4] Some unified family courts, such as Hawaii's, assume limited criminal jurisdiction.

The accelerated and coordinated provision of social services is also unified under the authority of the family court, as is coordination of collateral and ancillary matters, such as substance abuse evaluation and treatment programs for family members not directly before the court.

Unified family courts also differ from traditional courts because they are less adversarial. Wherever possible, the techniques of alternative dispute resolution, including mediation, are utilized.

And unified family courts make a deliberate effort to consolidate before the same judge all cases originating from one family. In some high population or urban areas, such as New Jersey, the one family/one judge concept has been modified to the one family/one team notion. In the one family/one team approach, judges are assigned to teams of case managers and social service providers and it is the team, not the judge, which is the constant for each family. This approach maintains a one-to-one correspondence at the level most closely associated with the family, and allows flexibility in judicial assignment.

Establishing a unified family court can be expensive. The court utilizes advanced technology for case management and tracking, and for retrieving information about litigants. The court relies on personnel trained in this technology as well as in the skills required to interact meaningfully with litigants.

Unified family courts also express a commitment by a community to do what is called *therapeutic justice:* justice that heals a family by addressing the personal and social problems that result in family law cases. Today, those problems most often involve substance abuse, or the mental and emotional problems associated with, or easily mistaken for, substance abuse problems.

Compassionate human contact can change a personality, not just behavior. Compassion–that uniquely human way in which people connect with each other–can provide an environment in which what is good in our personalities can grow. Unified family courts rely on compassion more than on the coercion-based behavior modification programs frequently associated with probation, parole and drug court diversionary schemes. Unified family courts try to create conditions wherein compassionate people can connect with people who need the benefit of a compassionate response to their human situation. This is the most therapeutic endeavor of the unified family court.[5]

Judges who sit in unified family court must have a commitment to this mission.[6] In many unified family courts, judges are required to attend annual training and education programs, and may be offered enhancements, such as increased pay, benefits, or sabbaticals, to encourage continued service in family court.

Because unified family courts address family issues, not just legal issues, unified family court judges have many opportunities to intervene in the lives of individual family members.[7] The power to decide legal issues does not traditionally include

Mr. Cribari is Project Manager of Communities, Families, and the Justice System, an initiative of the ABA Standing Committee on Substance Abuse, funded by a grant from the Robert Wood Johnson Foundation; Mr. Cribari also teaches law with the Columbus School of Law, Catholic University of America, and the Forensic Sciences Department of George Washington University, both in Washington, D.C. The opinions expressed in this article are private to the author and are not necessarily the opinions of the American Bar Association.

[1]Cincinnati, Ohio, had the first unified family court. In 1961, Rhode Island established the first statewide unified family court.

[2]For example, King County, Washington; Cook County, Illinois; Fulton County, Georgia; San Juan, Puerto Rico.

[3]For example, Maryland, North Carolina.

[4]Matrimonial cases include divorce, equitable distribution, custody, visitation, child support, and alimony matters. Domestic violence cases include issuance of protective orders (temporary and final) and contempt proceedings for violations of those orders. Juvenile delinquency cases usually are statutorily defined. Child protection cases include abuse and neglect cases, review of children in placement cases, termination of parental rights and adoption proceedings. Family crisis cases include juvenile status cases, such as truancy, runaway, and unmanageable children cases. Jeff Kuhn, Assistant Director, Administrative Office of the Courts (New Jersey) Family Practice Divsion, Remarks at the Fulton County, Georgia Family Court Pilot Project Mini-Conference (June 27, 1997).

[5]Professor Barbara Babb, of the University of Baltimore School of Law, has stated that we may have a moral obligation to dispense therapeutic justice in family cases. Professor Barbara Babb, Remarks at the Unified Family Court Conference in Markham, Illinois (July 17, 1997).

[6]The unified Family Court of the First Circuit of Hawaii has adopted a Family Court Mission Statement: "The mission of the Family Court is to provide a fair, speedy, economical, and accessible forum for the resolution of matters involving families and children."

[7]"To positively affect family members' behavior, thereby achieving a therapeutic outcome, family law remedies must reflect an integrated approach to family legal issues. This means that decision makers must consider all of the parties' related family legal proceedings, as well as all of the institutions or organizations potentially affecting the behavior of

this right to intervene, in a personal, compassionate manner, in the family or social problems that may underlie legal disputes. Thus, a unified family court invites a *de facto* increase in governmental power over the individual, because it expands the power exercised by a judge over parties and their families.

For example, faced with the question of release for a youth charged with juvenile delinquency, a unified family court judge might have a good reason to suspect that the charges are connected to a home environment in which one or both parents are substance abusers. As a condition for releasing the child to his or her parents, the judge may order substance abuse evaluation of the parents, and treatment if appropriate. In instances such as this, the power of the judge to intervene in personal lives, and individual privacy, extends beyond the person who is actually before the court and affects the privacy rights of others.

But judicial power is governmental power, and governmental power that can violate a reasonable expectation of privacy can also violate Fourth and Fourteenth Amendment rights, even in the matter of drug testing for a social good.[8] Should the violation be unreasonable, it might be unconstitutional.

The United States Supreme Court has upheld governmental intrusion into personal privacy outside the context of a specific criminal investigation. For example, random drug testing schemes have been upheld even though not based on an individualized suspicion of wrongdoing, but only where the testing was carried out pursuant to policies and regulations which were themselves constitutionally reasonable, and where the individual's expectation of privacy was diminished.[9]

The Supreme Court has also retreated from the application of the exclusionary rule in cases involving apparent violation of the Fourth and Fourteenth Amendments, when to do so would not deter government misconduct, for the reason that there was no police misconduct to deter.[10]

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"[J]udicial power is governmental power, and governmental power that can violate a reasonable expectation of privacy can also violate Fourth and Fourteenth Amendment rights, even in the matter of drug testing for a social good."

✦

In *Leon*, the police, acting in good faith, executed a warrant that was later determined not to have rested on probable cause. The error, in *Leon*, arose from the court, not the police, and the evidence was not excluded. In isolating the actions of the court from the reach of the exclusionary rule, the Court noted:

> to the extent that the (exclusionary) rule is thought to operate as a "systemic" deterrent . . . it clearly can have no such effect on individuals empowered to issue search warrants. Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them.[11]

But this would not be the case in the example of the delinquent youth and his parents, because the intrusion on the parents' privacy rights, if any, would have originated with the judge, not the police. This non-traditional judicial involvement in ferreting out what may amount to criminal conduct can raise separation of powers concerns.

American criminal justice is adversarial, whether it takes place in a criminal court or a family court. In the criminal arena, the adversarial system is a constitutional requirement,[12] not a personal prerogative, and its constitutional protections extend into the civil arena.[13] Investigative and adjudicative functions must be kept separate if their exercise is to be constitutional. If family court judges are going to exercise the power to investigate, society may want to hold them constitutionally accountable as "adjuncts to the law enforcement team," rather than as neutral and detached judicial officers.

The more judges intervene in individual lives, the more they may help the people into whose lives they intervene. But the greater the likelihood such "help" will expose criminal behavior, the greater the likelihood it will trigger a host of constitutional complications. Paradoxically, this is precisely what makes a unified family court unique. Acting for the betterment of families and society, unified family court judges intervene in personal lives in order to accomplish what families, churches, and schools have failed to do: to help develop the sensibilities of family members so that they may solve their own legal, social, and personal problems.

When the unified family court judge administers therapeutic justice, the hallmark of a unified family court, he or she becomes more than the traditional adjudicator. What exactly he or she becomes is, in the words of the Honorable Michael Town, formerly head of the family court in Honolulu, Hawaii, "a question of what the judicial/legal culture will allow."[14]

families and children, including the community, peer groups, educational institutions, and religious organizations. Judges must know the neighborhoods of the families and children whose lives the courts influence . . . ." Barbara Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775, 804 (1997) (citations omitted).

[8] *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *see also National Treasury Employees v. Von Raab*, 489 U.S. 656 (1989).

[9] *See, e.g., Vernonia Sch. Dist. 47J v. Action*, 515 U.S. 646 (1995); *Von Raab*, 489 U.S. 656 (1989); *Skinner*, 489 U.S. 602 (1989).

[10] *See United States v. Leon*, 468 U.S. 897 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); *Maryland v. Garrison*, 480 U.S. 79 (1987).

[11] *Sheppard*, 468 U.S. at 987.

[12] *See, e.g., Watts v. Indiana*, 338 U.S. 49, 54 (1949).

[13] *See, e.g., United States v. Sharpe*, 920 F.2d 1167 (4th Cir. 1990); *see also United States v. Bodwell*, 66 F.3d 1000 (9th Cir. 1995).

[14] E-mail from Judge Michael Town to Stephen J. Cribari (Feb. 1, 1998).

Utah Family Court: An Idea Whose Time Has Come

by James B. Lee

The Family Court Task Force identified nine separate recommendations for a Utah family court, including its own, since 1966.[1] Since the Task Force issued its final report, a tenth favorable recommendation, that of the Gender Fairness Committee[2] can be added to the list. With so many recommendations over such a long period by so many diverse groups, can the merits of a family court still be in dispute? Is the view that the proposal will not meet with general support still credible? With studies and recommendations, we are in only for a penny; it is time to invest a pound.

The proposed Utah family court is built upon three principles: due process; interagency cooperation; and case management. The final report provides the design, the blueprint, for each of these principles, but the design is only the start. The several players–the lawyers, judges, commissioners, probation officers and clerks of the court, the administrators, clerks, and case workers of executive branch agencies, and private service providers–provide the work force for construction and maintenance of the institution. As the debate progresses, those knowledgeable of family law will see much that is familiar, but recast with exciting potential.

Due Process

Mr. Cribari's counterpoint in this series speaks of therapeutic power and judicial authority. Authority is exercised by the will of the governed; power is taken at their expense. The legitimate authority of the family court is based on principles of due process with all that permits and entails.

The family department is limited by constitutions, statutes, rules, and case law designed, in part, to protect individuals from the power of the court. Before it can act, the family department needs a legal basis on which to act. The court needs subject matter jurisdiction over a justiciable controversy and personal jurisdiction over the parties necessary to the action. The action must be filed in or moved to the county of proper venue. There must be notice to the parties by the statement of a recognized cause of action. The parties must be afforded an opportunity to be heard. The party with the burden of proof must establish the elements of the cause of action by meeting the applicable standard of proof. And parties must have the right to appeal a decision of the trial court.[3]

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"[T]he rule of law need not interfere with the application of an equitable remedy."

✦

That having been said, the rule of law need not interfere with the application of an equitable remedy. "[D]ue process, equal protection and proportionality in sanctions are in the best interests of children."[4] Dispute mediation, victim mediation, victim restitution work programs, child visitation schedules, child support schedules, cohabitant abuse victim assistance, substance abuse counseling, anger management counseling, and many other programs are well-recognized components of family law cases. Some of these are annexed to the courts; others are developed through executive branch agencies; still others through private service providers. These components are not revolutionary. They are existing programs, many of long standing. The family court makes it possible to integrate these components into a more sensible whole.

The authority of the family court to reach beyond the formal parties to a case to govern the future conduct of parties and of their family members is provided by and regulated by statute. Currently in juvenile court, a minor's parents are personally served with summons,[5] or served by publication just as under the Rules of Civil Procedure,[6] are provided compulsory process,[7] are required to be present at hearings,[8] and are afforded an opportunity to be heard.[9] Whether parents are named parties, or merely treated in all regards as such, the authority of the court to compel compliance with "reasonable conditions" as part of an order of disposition[10] seems a sound conclusion supported by principles of due process.

By adopting a family court model, we do not adopt the civil law model of Europe. The judge does not become the investigator, nor does the court become a service delivery agency. The court maintains its independence from the parties and from those who would provide service programs to families. The adversarial infrastructure remains for those who want it. A trial governed by the Rules of Civil Procedure and by the Rules of Evidence remains a common feature. But alternatives of a less adversarial nature are also available. These procedures, newer and less formal than the traditional trial, are nevertheless governed by written statutes

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[1]Final Report of the Utah Family Court Task Force ("Final Report"), December 16, 1994, at 91-93.

[2]Gender and Justice in Utah: A Six Year Follow-up on the Utah Task Force on Gender and Justice Report, June 1996, at 34-35.

[3]Final Report at 39.

[4]Final Report at 47, n.38 (citing Barry Krisberg, *In Whose Best Interests?*, THE CHAMPION, June 1993, at 9).

[5]UTAH CODE ANN. § 78-3a-110(4).

[6]UTAH CODE ANN. § 78-3-110(13).

[7]UTAH CODE ANN. § 78-3a-110(8).

[8]UTAH CODE ANN. § 78-3a-110(4); UTAH CODE ANN. § 78-3a-112(2).

[9]UTAH CODE ANN. § 78-3a-115(3).

[10]UTAH CODE ANN. § 78-3a-118(p).

and rules. By entering into this less adversarial world, parties do not abandon themselves to the whims of a judge or of a mediator or counselor. They engage in a process designed to result in a determination of legal rights and responsibilities without the interference of the adversarial process.

The specialization called for in a family court is the ability to merge legal principles with corrective counseling, therapy, and other treatment programs. "The family court judge must know what the court may do and how it may be accomplished within the limits of the law . . . . But the judge must be advised of what is best suited in the individual case to rehabilitate the actual or redirect the potential delinquent. They will work together best in a unified system rather than in separate and very likely mutually jealous and potentially hostile organizations."[11]

Interagency Coordination

Government spends a lot of time and money intervening in the lives of families. Where it is just as easy to do so constructively as to do so ineffectively, it is hard to argue against the former approach. The constructive approach relies upon cooperation among the several agencies that may be involved and a coordination of their efforts.

Cooperation begins with the court, which is charged with responsibility to evaluate the need of a family or one of its members for a particular court order or series of orders, to coordinate those orders with any others already in place, possibly to review the progress of the participants under that order, and to adjust, or perhaps eliminate, the order as need and experience warrant. The model may be the same for all cases, but application of the model depends upon the nature of an individual case. The order might be a stipulated divorce decree governing alimony and child support and visitation, requiring very little court involvement and no service programs. The order might resolve a complex property distribution, requiring the court to determine a legal issue and possibly to enter orders for enforcement. The orders might protect a child from abuse by a parent or a parent's partner, determine visitation by grandparents, order familial or foster care custody, and sentence on criminal charges all involving the same child or siblings, requiring the court to engage in a more complex determination of legal rights and responsibilities and extensive coordination of agencies and services.

Coordination also requires the court's participation. The Task Force did not recommend services in general or that any particular program be administered within the family court. Indeed, the Task Force expressed considerable suspicion about the inflation of a single bureaucracy. The Task Force also expressed the opinion that judges, who may advocate for adequate programs and who must be familiar with the nature and extent of programs, must also maintain their independence from the administration of those programs. But the role of the judge–and by extension the court staff–to coordinate the delivery of these services in particular cases is proper.

> ***"Families do not compartmentalize their domestic legal disputes to suit the needs and the jurisdictional limits of courts or the organizational structure of bureaus."***

Families do not compartmentalize their domestic legal disputes to suit the needs and the jurisdictional limits of courts or the organizational structure of bureaus. A study conducted by the National Center for State Courts and the National Center for Juvenile Justice and reported in the Task Force's final report showed that in Salt Lake County, more than half of the families with a legal dispute had a prior or simultaneous domestic case with the same or a different court.[12] Add to this the bureaucratic maze of agencies charged with responsibility for some aspect of supervising, protecting, or serving families, and the need for the family court to coordinate the whole becomes clear.

Service providers, especially government agencies, compete with each other for budgets and other resources. That competition at the administrative level is too often manifested at the service level. Where agencies should cooperate to deliver a sound product or service to the community, too often they work at cross-purposes to the benefit of no one. Regardless of the administrative structure, however, these agencies are working under the direction of the court's order and are subject to court review.

Case Management

As designed, a Utah family court is an ambitious program. It cannot succeed without ambitious management of its cases. Because of its importance to the success of a family court, the final report of the Task Force discusses case management at length. It would not serve to restate that discussion here, but the objectives of case management are simply stated: 1) to make better use of judicial time; 2) to improve the ability of families to negotiate the legal system; 3) to ensure that court orders are suited to the needs of the family; and 4) to ensure that court orders obtain timely compliance.

Within this framework there is generous room for the parties and their lawyers to prosecute or defend a case in the manner most beneficial to them. The court's case management responsibility should dovetail with that of the parties. Although the legal interests of the parties may be adverse, the interests of the parties, the court, and of the public should be in a just, equitable and timely resolution of the dispute.

Without a strong case management component the court cannot treat routine cases routinely; cannot coordinate programs for a family; cannot lead the inter-agency cooperation necessary for successful results. Clerical support, screening,

[11]Final Report at 28 (citing Roscoe Pound, *The Place of the Family Court in the Judicial System*, 5 CRIME & DELINQ. 161, 167 (1959)).

[12]Final Report at 27.

case coordination, service coordination, scheduling, public information, training, and self evaluation are all parts of case management discussed in the final report. It is the practical stuff of success.

Conclusion

A family court will not halt juvenile crime, nor will it eliminate abuse of children or reduce the rates of divorce. A family court will not save money, nor will it reduce the need for judges or staff. A family court will provide, better than our current jurisdictional bifurcation of family law, a forum in which to resolve these legal and equitable disputes dedicated to communication among the parties and their family members and dedicated to cooperation among the agencies that serve them. A family court will challenge judges, staff and practitioners to develop innovative procedures and services designed for simplicity and effectiveness.

The judicial skills necessary to blend law and treatment are different from the expertise a judge develops in the litigation of other criminal and civil cases, but not less attainable for that difference. "A judicial system which is responsible to determine difficult issues of medical malpractice, product liability, anti-trust or psychiatric defenses to criminal charges can be reasonably expected to develop and apply the expertise of its judges and staff necessary to comprehensively resolve family law matters."[13]

[13]Final Report at 28 (citing Robert W. Page, *Family Courts: An Effective Judicial Approach to the Resolution of Family Disputes*, 44 Juv. & Fam. Ct. J. 1, 21 1993)).

PRACTICE POINTERS

The Ethical Dilemma Posed By the Child Abuse Reporting Statute

by David V. Peña

A recent Utah State Bar Ethics Advisory Committee Formal Opinion, Opinion No. 97-12, approved January 23, 1998, addresses the question of whether it is a violation of the Rules of Professional Conduct to fail to report suspected child abuse as required under Utah Code section 62A-4a-403 ("Reporting Statute").[1] The Reporting Statute provides:

> Except as provided in Subsection (2), when any person, including persons licensed under Title 58, Chapter 12, Part 5, Utah Medical Practice Act, or Title 58, Chapter 31, Nurse Practice Act, has reason to believe that a child has been subjected to incest, molestation, sexual exploitation, sexual abuse, physical abuse or neglect, or who observes a child being subjected to conditions or circumstances which would reasonably result in sexual abuse, physical abuse or neglect, he shall immediately notify the nearest peace officer, law enforcement agency or office of the division.

This statute, which specifically covers physicians and nurses and specifically excludes clergy under certain circumstances, is silent as to attorneys. Therefore, although the statute clearly abrogates doctor-patient confidentiality and preserves clergy-confessor confidentiality, it is silent as to, and actually conflicts with, attorney-client confidentiality that is required, with few exceptions, by the Utah Rules of Professional Conduct.

Unfortunately, the Advisory Opinion, which discusses the attorney-client privilege, is silent as to the law. This is because the rules established by the Bar Commission state that the Advisory Committee "shall not respond to requests . . . [f]or a legal opinion, rather than an ethics opinion."[2] But on the question of ethics, the Committee has determined that it is not a violation of the Rules of Professional Conduct for an attorney to fail to report suspected child abuse, even though the Committee recognizes that such inaction may violate the Reporting Statute.

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"[O]n the question of ethics, the Committee has determined that it is not a violation of the Rules of Professional Conduct for an attorney to fail to report suspected child abuse."

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So how can you avoid both ethics and criminal charges when you receive information about a client's possible abuse of a child? If you choose to not report the abusive conduct as the statute requires, it appears you cannot: by choosing to not report a client's suspected child abuse, an attorney can avoid ethics charges but all bets are off on whether criminal charges might be forthcoming.[3] That decision rests with the local prosecutor. The best advice is, as they say, to consult an attorney. If you choose to report a client's suspected child abuse under the reporting statute, you might be able to do so and not violate the Rules of Professional Conduct mandating attorney-client confidentiality. As the Committee's opinion clarifies, under the Rules of Professional Conduct an attorney *may* disclose confidential information in certain circumstances.

Specifically, Rule 1.6 of the Rules of Professional Conduct provides that there are times when an attorney can reveal confidential information. Rule 1.6 does not, however, *require* an attorney to disclose information. It merely permits, under certain circumstances, an attorney to divulge otherwise confidential information either with or without the client's consent. Therefore, attorneys may ethically comply with the reporting statute and report suspected child abuse, if they wish, under various circumstances.

Under Rule 1.6, you may ethically report a client you suspect of abusing a child, even in the absence of the client's consent, if you believe that making such a report is necessary to comply with the law. Thus, any attorney who believes that the Reporting Statute *requires* them to report their client may do so and not be in violation of the Rules of Professional Conduct for breaching the confidentiality requirement.[4] Additionally, if an attorney is uncertain about the Reporting Statute's applicability to attorneys, but believes that the client is likely to abuse the victim

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[1] UTAH CODE ANN. § 62A-4a-403 (1997).

[2] ETHICS ADV. OP. COMM. RULES OF PROC. § III(b)(3).

[3] Failure to report is a class B misdemeanor. *See* UTAH CODE ANN. § 62A-4a-411 (1997).

[4] UTAH RULES OF PROFESSIONAL CONDUCT RULE 1.6(b)(4).

again, the attorney can report the client under the future crimes exception to the confidentiality rule.[5] And finally, if an attorney's services have been used to perpetrate a crime, for example by helping a client gain or retain custody of a child whom the client abuses in the future, then the attorney may ethically report the client under the facilitation of a crime exception to the confidentiality rule.[6]

In addition to the exceptions to attorney-client confidentiality set forth in Rule 1.6, which are merely permissive, attorneys should be aware that under certain circumstances they may be *required* to report child abuse, though not necessarily to local law enforcement or child protective authorities. Rule 3.3 of the Rules of Professional Conduct requires candor toward a tribunal. Under this rule, attorneys have a duty to disclose information to a tribunal if it is necessary to avoid assisting a client in a criminal or fraudulent act.[7] Attorneys are also prohibited from making false or misleading statements,[8] or introducing false evidence. And, if false evidence has been introduced, attorneys must take remedial measures to correct the error.[9] Therefore, in any proceeding in which the revelation of child abuse by a client would be considered a "material fact" necessary to help a tribunal avoid aiding an on-going or future criminal or fraudulent act, such as in a child custody hearing that could result in the abuser gaining custody of the victim, the attorney must disclose the relevant information. Also, an attorney must not make a false statement of material fact to a tribunal, for example concerning the fitness of an abusive parent. And if an attorney does so, the attorney must take reasonable remedial measures to correct the misrepresentation.

If the preceding discussion about whether and when and to whom to report a client's abuse of a child makes you a bit uneasy, and it probably should, you may wish to take steps to completely avoid the issue by heeding the advice one California court delivered to physicians in that state who were subject to a similar reporting statute. The court advised physicians to warn all patients early on that the law required the physician to report any suspected child abuse.

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"[A]ttorneys arguably have an ethical duty to fully disclose to a client the ethical and legal limitations of attorney-client confidentiality."

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Attorneys would do well to consider following this advice as it relates to child abuse and other issues that an attorney believes cannot be kept confidential. In fact, attorneys arguably have an ethical *duty* to fully disclose to a client the ethical and legal limitations of attorney-client confidentiality. Attorneys should inform clients that the attorneys may not be able, for various legal and ethical reasons, to keep all information confidential, and may even be obliged to report certain information to local authorities or to a tribunal. It will then be up to the client to tell or not to tell.

[5]Utah Rules of Professional Conduct Rule 1.6(b)(1).
[6]Utah Rules of Professional Conduct Rule 1.6(b)(2).
[7]Utah Rules of Professional Conduct Rule 3.3(a)(2).
[8]Utah Rules of Professional Conduct Rule 3.3(a)(1).
[9]Utah Rules of Professional Conduct Rule 3.3(a)(4).
[10]*People v. Younghanz*, 156 Cal. App. 3d 811 (1984).

POINT/COUNTERPOINT

Cohabitant Abuse Protective Orders

by Commissioner Lisa A. Jones

News Item: A man is in Salt Lake County Jail after he apparently rammed the car his wife was driving . . . . The wife was flown to University Hospital where she was listed in critical condition late Sunday night. As she and another man were sitting at a stoplight, the husband rammed it and pushed it into the intersection where it was hit by two cars . . . .[1]

Domestic violence is a significant problem in the United States. It tracks the number of violent incidents we are seeing in which children shoot other children, parents, and teachers, gangs attack people smoking outside pizza parlors, federal buildings, universities, and court buildings are bombed, and people spray bullets in public places.

Officials believe the incidence of violence among relatives is seriously under-reported. A Justice Department study found that domestic violence in 1994 was four times the amount previously estimated. Approximately ninety-five percent of the victims of domestic violence are women, and between three and four million American women are battered each year by their husbands or domestic partners. Domestic violence remains the leading cause of death and injury to women, resulting in more injuries that require medical treatment than rape, auto accidents, and muggings combined. Regular and repeated violence occurs between spouses in ten to twenty percent of all marriages, and at least one incident of physical violence occurs in fifty percent of all marriages.

We like to believe that Utah is different from the rest of the nation, and in many ways it is. Domestic violence, however, is not one of them. One in every ten Utah women is assaulted by intimate male partners, yet in the past, only fifteen percent of all domestic assaults came to the attention of law enforcement. The dramatic increase in filings for civil protective orders in Utah demonstrates that public awareness and state statutes are changing the dynamics of domestic violence.

Of utmost importance is the effect domestic violence has on children. The likelihood of children being abused by the perpetrator of violence in the home is greatly enhanced, inasmuch as fifty percent of children in families with domestic violence will also be abused. The impact of that abuse is dramatic, in that sixty-five percent of children growing up in households with domestic violence will enter into abusive relationships as adults. According to the Governor's Commission on Women and Families' "Domestic Violence Incidence and Prevalence Study" conducted in April/May 1997, one in four Utah women witnessed domestic violence as a child, and one in eight women was abused as a child. One in five respondents claims that her children witness or

Commissioner Jones is a Commissioner of the Third Judicial District Court.

[1] SALT LAKE TRIBUNE, Apr. 27, 1998.

hear verbal abuse, and one in fourteen says her children witness or hear physical violence. Thus, approximately 144,000 Utah children witness or hear domestic violence between their parents.

To address this widespread problem, the Utah State Legislature adopted the Utah Cohabitant Abuse Act. *See* Utah Code Ann. § 30-6-1 to –14. This civil protective order statute permits the issuance of ex parte protective orders that must be heard within twenty days. A permanent protective order can enter at the hearing, dealing with provisions regarding threatening behavior, contact, restraint against property, weapons, custody, property, visitation, and any orders necessary for the safety and welfare of the petitioner and household members.

I have heard arguments regarding the abuse of this system, particularly that people try to gain advantage in a divorce action. It is a quick, pro se procedure to gain immediate custody of the children and exclusive possession of the home. As set forth in the statistics above, an estimated fifty percent of marriages have at least one incident of domestic violence. Thus, it is possible for many people to allege violence in seeking a protective order.

The majority of judges, commissioners, public interest lawyers, and volunteer attorneys who are intimately involved in this process question the premise that the protective order process is widely abused. First, only approximately forty percent of the cases filed are filed by persons who are married and would have an advantage to seek in a divorce action. Therefore, the majority of cases seen in the Third Judicial District are not divorce-bound. Second, many cases we see are not close calls–those in which it is one person's word against another's–and thus susceptible to abuse. Many cases have police reports, eye witnesses, and/or hospital records to corroborate the allegations. Finally, we should not throw out the baby with the bath water. Rule 11 of the Utah Rules of Civil Procedure addresses abuse of the civil litigation process, and merely because a procedure can be abused is no reason to abolish the procedure. The benefits of the protective order system far outweigh the possibility of abuse.

I must acknowledge, however, that there are other problems with the system. As seen above, children witness violence or could verify that the incident did not take place as alleged. But the commissioners in the Third Judicial District generally discourage the use of children's affidavits, or bringing in children as witnesses. The reasons for this should be obvious, and the long-term ramifications are also obvious. A child testifying against a parent is traumatized at best. The child is often fearful of retribution and susceptible to threats. A child does not always know what is in his or her best interest. And there is the possibility of manipulation. Thus, there are credibility issues with child witnesses, just as there are with adult witnesses, and putting children in the middle of this civil, not criminal, process could damage the children, as well as the parent/child relationship.

> ***"[The civil protective order statute provides] a quick, pro se procedure to gain immediate custody of the children and exclusive possession of the home."***

Another problem with the Cohabitant Abuse Act is its narrow definition of "cohabitant." The Legislature should broaden the definition to include dating or sexual relationships without the parties living together. I believe it is ironic that the statute protects parties who live together in violation of Utah law, but not those who legally date. There is ample evidence that domestic violence, particularly stalking, occurs in dating relationships, and the statute should protect those parties, as well.

The civil protective order procedure is far from perfect. But the laws are moving in the right direction by acknowledging the problem of domestic violence, and attempting to address it. We must continue to modify the law to address the concerns expressed, but to repeal it would have dramatic detrimental effects.

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Protective Orders in Domestic Cases: The Need to Alter the Process

by Mary Corporon

Utah's protective order system is a well-intentioned plan aimed at resolving society's serious problem of family violence. No rational person could suggest that such violence does not exist, and indeed, based on recent surveys, such violence is pervasive. Certainly, many cases brought to the court are good faith requests for protection.

But it is also unfortunately true that the protective order system is, itself, capable of being abused to an extraordinary degree by anyone inclined to do so. Worse, ex parte protective orders can take children from good parents, and hand them over to abusive ones. The system can run amock, achieving irrational form over rational substance.

Police, prosecutors, and politicians have (rightly) been humiliated by the lack of support they have historically given to domestic violence victims. But their resolve never again to be embarrassed by the spectacle of an abuse victim begging on the record for help, to no avail, (a la Nicole Brown Simpson) has caused the pendulum to swing sharply. Now, any woman who claims to have been abused likely will be believed. (The same does not seem to apply to men. One man who had been shot at, was turned away when he sought a protective order against the shooter.) This leaves the system ripe for manipulation by those seeking to gain the upper hand in a divorce or custody action.

The presumption is now heavily in favor of an applicant for an ex parte protective order, to the extent that virtually any woman petitioning for one will obtain one. I have seen protective orders issued in cases in which the applicant failed to fill out huge sections of the petition, such as the date the alleged abuse occurred, and the description of the alleged abuse. It did not matter: the protective order issued anyway. A protective order was once issued on the sole basis that the respondent had called the female petitioner a "fat cow."

If you don't like your chances of getting your ex parte order today, wait twenty-four hours. At least in Salt Lake County, the signing judge will change. In other words, you can shop until you get the judge you want to consider your order. You can shop until you find a signing judge distracted in the midst of trial.

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"The presumption is now heavily in favor of an applicant for an ex parte protective order, to the extent that virtually any woman petitioning for one will obtain one."

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The advantage to be gained in a divorce proceeding by obtaining a protective order is great. In the absence of a protective order, one is forced to file a motion for temporary relief, and schedule that for hearing in due course. A divorce litigant must endure living with an unwanted spouse in the interim. He/she must go without temporary support. He/she must pay attorney fees to file for temporary relief. He/she must suffer the opposing party to be heard on factual disputes.

If the protective order system is deployed, however, the relief is expense-free and instantaneous. The system provides attorneys and court clerks at no charge to assist petitioners in seeking relief, such as throwing out the opposing party, granting temporary custody, and awarding an expedited hearing on temporary family support. A protective order hearing can always be had within three weeks. If the calendar is "full" it doesn't matter–another hearing will still be added. On the other hand, as of April 1, 1998, when I began working on this article, the first available hearing date on the regular calendar for the Honorable Commissioner Lisa A. Jones was June 3rd, some nine weeks away.

At the protective order hearings, there is sometimes a rush to finalize the protective orders, out of "an abundance of caution" and a lack of court time to give full hearings. The de facto presumption in favor of extending ex parte protective orders is demonstrated by one example: there are pre-printed forms to do almost anything at a protective order hearing, such as continue the ex parte order or enter a protective order. The one thing there is *not* a pre-printed form to do is dismiss the ex parte order outright. Pro se respondents are especially vulnerable under this type of approach. The process goes something like this:

By the Court: Mr. X, your wife has filed a petition for a protective order. Do you understand that?

Mr. X: Yes.

Court: You don't intend to do anything to injure your wife in the future do you, Mr. X?

Mr. X: Of course not. I have never done anything to hurt her. I have never threatened to hurt her. I never would do anything to hurt her.

Court: Then you won't mind my issuing an order that says you aren't going to hurt her, would you?

Mr. X: I guess not.

Court: The protective order having been stipulated, it will issue forthwith. Next case.

The devastating impact of this kind of treatment isn't seen until later by Mr. X, when the issuance of this order is found to be a stipulation that he has actually abused or threatened his spouse, when he seeks custody of or visitation with his children. The impact isn't seen until later, when Mr. X is prosecuted for the crime of violating the protective order, for conduct

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which would, under any other circumstances, be considered laudable. I have defended criminal prosecutions against men for attending a child's soccer game (it wasn't expressly authorized by the protective order), or for handing a former wife a child support check, where the protective order authorized him to go to the home to pick up the children for visitation, but did not expressly authorize him to hand her anything. A defendant has been charged for meeting his wife in a public place at her request, to sign a joint income tax return which both agreed needed to be posted that day.

Once issued, a protective order can be an effective method of protecting an abuse victim. It can, on the other hand, also become a club by which one spouse or parent can bludgeon the other, throughout paternity, divorce or custody proceedings and efforts to enforce visitation. All prosecutorial agencies in the state have a "zero tolerance" policy in cases involving family violence and/or violation of protective orders. Essentially, if a report is made by a complaining witness, it will be prosecuted. It is apparently against police policy for the police not to present any report of a violation for prosecution. Once charged, the case will not be dismissed, owing to "zero tolerance." The result can be absurd, such as the case of the men who had full visitation who were prosecuted for attending soccer games or handing over support checks.

"Zero tolerance" is a doctrine magnified by the precept that the victim's consent is not a defense to a criminal prosecution. In Utah, there is no case law directly on point in protective order cases. *But see Washington v. Dejarlais*, 944 P.2d 1110 (Wash. Ct. App. 1997). Even if the petitioner obtaining a protective order specifically requests the respondent to violate it, there is still a crime. Under "zero tolerance" it will be prosecuted. There is no defense.

We attorneys must now warn our clients in protective order proceedings that they may not under *any* set of circumstances commit any perceived violation of the protective order. This means that, if a father goes to pick up his daughter for visitation, and the daughter, complaining that her suitcase is too heavy, wants her father to carry it to the car, he may not do so. He may not, under any set of circumstances, go to the threshold of her mother's doorway, to carry his daughter's luggage, even if mom steps out on the front porch and says: "Get over here and help your daughter with her baggage!" If he does, and is reported by mom, he will be prosecuted. If mom carries the suitcase toward the car, dad must drive away, or he must vacate the car on foot and run away, until mom returns to the home. If he does not, and a violation is reported, he will be prosecuted. There is no viable defense to the prosecution.

* * *

My parents taught me, long ago, that whining is poor form. In the spirit of not whining, I would like to offer some suggestions for how the present system could be improved:

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"Once issued, a protective order can be an effective method of protecting an abuse victim. It can, on the other hand, also become a club by which one spouse or parent can bludgeon the other, throughout paternity, divorce or custody proceedings and efforts to enforce visitation."

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1. The Legislature should fund adequate judicial and court staff to address the protective order issue.

The current protective order system was put into place by a Legislature, which imposed requirements upon the court without adding new judges or commissioners. Signing judges must work ex parte petitions in around other critical court business. Judges, though uniformly intelligent persons, find it difficult to give their full attention to more than a few things at the same time. Under the present system, signing judges must delay or forego scheduled hearings (which is unfair to citizens who have a court date), in order to review the petitions thoroughly and speak to the petitioners. In the alternative, judges must take ex parte protective orders handed up to them on the bench, review them while conducting another trial or hearing, and issue them or decline them, without ever speaking to the petitioner. I am certain it is the latter approach which results in the "you're a fat cow" ex parte orders.

The judges are not to blame for this problem. The Legislature handed them a bundle of work without the resources to address it. Sufficient additional district court judges should be hired, together with the necessary support staff, so that a signing judge for protective orders can truly devote his/her entire day to making good decisions about protective orders, without being forced, simultaneously, to listen to something else. Better yet, assign one judge to hearing petitions for protective orders for a substantial period of time, just as judges have been assigned in the past to Tooele County or Summit County rotations. This would allow the judge to direct his/her full attention to the merits of each protective order, and would simultaneously end the "judge shopping" now available.

2. Adequately fund and staff the district court commissioners.

If there were another district court commissioner or two in Salt Lake County, and adequate numbers of commissioners in all counties, no lawyer would ever be confronted with the problem posed by a client in desperate need, who cannot get a hearing for temporary child support in less than nine weeks. No one, as a solution to this problem would ever again feel compelled to say to a client: "Well, there is a way to get a hearing in three weeks instead of nine. Tell me, has your husband ever threatened you, or made you feel afraid of him?" If one could have a temporary support hearing in the same time as a protective order hearing, there would not be so many protective orders.

3. Stop the issuance of ex parte protective orders whenever possible.

Standard procedure calls for all protective orders to be issued on an ex parte basis. The fact that the accusations within the petition are not ever subject to contradiction allows the potential for abuse.

It is true that it is cumbersome for the court to offer notice to a party or to his/her attorney, and a chance for them to come to the courthouse to be heard. Due process is always cumbersome. But notice to respondents on protective orders is possible. It requires more court staff and a genuine commitment to offer protection to abuse victims while preserving the equally important principle of due process, rather than just legislative lip service to these goals.

A court presented with a protective order could inquire how to reach a respondent at work or at home. A court could inquire if a respondent were represented by counsel, and at least make the effort to contact counsel to appear in person or by telephone to respond that day. (This would require the additional judges and staff suggested in point 1.) A court could then hear from both sides before determining whether to issue an initial protective order. A more thorough hearing could be had in a few weeks.

Of course, such a policy would have to allow for the petitioner to have a protective order that same day, on an ex parte basis, if the respondent or counsel could not be reached before close of business. No abuse victim acting in good faith should be sent home without an order.

This system would assist the court in ferreting out the unjustified petitions. It would assist the court in finding those petitions that contain a hidden agenda, such as changing child custody or modifying a Utah County divorce with a Davis County protective order. It would also have the added benefit of enabling petitioners to have respondents notified of the order when the petitioners are in a public place, protected by a security check and armed guards. Under the status quo, abuse victims are at the mercy of uncompensated constables who serve protective orders as they are able, days or weeks after the fact, leaving the petitioners to be victims of the sudden rage of newly-served respondents.

4. Stop acting as though a protective order is not a big deal.

A unique kind of schizophrenia invades the court process where protective orders are concerned. On the one hand, they are issued ex parte, "out of an abundance of caution." They are finalized at a hearing on a crowded calendar, often without benefit of counsel, without benefit of an evidentiary hearing, sometimes just because "you're not planning on beating your wife in the next few months anyway." There is a mind-set that the orders are not special, and that they merely provide everyone a healthy cooling-off period.

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"The whole court system needs to experience a mind-shift about protective orders. They are a big deal."

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Once entered, however, they are presumed in domestic, civil, and criminal courts to be absolute proof that the respondent was found to have abused or threatened harm to the petitioner. They are considered *prima facie* evidence that the family involved has a history of domestic violence. The protective order becomes a precursor for contempt findings, criminal prosecution, supervised visitation, and summary judgment motions on child custody.

I have heard some judicial officers say, when presented with the horror stories of unjust protective orders, that the system worked because these ex parte protective orders were eventually dismissed, or because a defendant was victorious in a criminal trial. Only someone who has never been served with an order requiring him unjustly to stay away from his children and his home for three weeks would consider such an order to be evidence the system is working. It is extraordinarily insensitive for the system at large to reach a collective assumption that being the subject of a protective order for three weeks isn't significant. Being the subject of a criminal prosecution (even if one is victorious) is economically and emotionally devastating.

The whole court system needs to experience a mind-shift about protective orders. They are a big deal. Not one protective order should ever be issued out of "an abundance of caution." They should be issued if and only if the specific facts alleged support them, after careful scrutiny. They should be continued as permanent orders if and only if there is a preponderance of the evidence to support the claim that abuse has actually occurred, or that there has been an actual threat of harm. They should not be issued merely to punish rude or uncivil behavior.

5. Allow evidentiary hearings.

As the system is now constituted, a person can have a permanent protective order entered against him, and a criminal prosecution commenced for violation of that protective order, without ever being given an opportunity to produce evidence in a court of law that the underlying accusations are fabricated. Cross-examination, "the greatest engine for the discovery of truth," is never allowed. This must change.

If a respondent requests an evidentiary hearing on a protective order, one should be afforded. Again, this would require more judges and more staff, which would require a genuine commitment to ending domestic violence, and not just lip service.

6. Enforce the criminal law as to all crimes, and not just protective order violations.

Committing perjury is a crime in Utah. So is making false reports to the police. I am aware of no single prosecution within the State of Utah, however, for violating these criminal laws, brought against someone who made such false reports in a domestic violence setting. One prosecution against one person who made a false petition for a protective order or filed a false police report of abuse could do more to balance the system and deliver true justice than anything else suggested here.

7. Rethink the doctrine that the victim's consent is no defense to a protective order violation.

Most people are not attorneys. To the average layman, an invitation from his wife to enter a home to which he holds title, and to remain there with the consent of his wife, in the company of his children, seems reasonable behavior. It is outside the purview of most people's understanding that such behavior could be criminal. But if a protective order is in place between the husband and wife, it is at least a class A misdemeanor, even if no assaultive, abusive or uncivil behavior ever occurs.

We are constantly bombarded by the message that the divorce rate is too high. Families are important, and marriage is an important institution, to be preserved. Most marriages go through bad times: the trick to a long and happy marriage is not avoiding storms, it is weathering them.

Most of the time, the law recognizes the value of married persons working out their differences, in the best interests of their children, if that can be accomplished. The protective order system, and the "consent of the victim" doctrine stand squarely in opposition to the theory that marriages should be saved if possible.

Rest assured, I do not advocate that victims of continuing violence ought to be encouraged to return the violence. On the other hand, most marriages that break up do so with at least a little acrimony, and with some behavior that is arguably violent or threatening. For example, is the statement "you'll be sorry if you leave me," a threat? Such statements, standing alone, have been the basis for a protective order when accompanied by the listener's sworn statement that she subjectively heard it as a threat. Does this mean one spouse cannot beg the other to stay, pointing out all he/she will lose if the marriage ends?

Protective orders, at least between married persons or those with children, ought to be issued for briefer duration, with more frequent review at the early stages, to see whether the parties have counseling or could reconcile. At the very least, protective orders should be as easy to dissolve by mutual consent and without benefit of counsel, as they are to obtain ex parte.

I can hear the screams now. Women who have fallen into a pattern of abuse will be courted, will go through a "honeymoon phase," will dismiss their protective orders, and will be abused again. This may all be true. But it seems a far more dangerous proposition to suggest that women must be protected from themselves against their own judgment. If a woman wishes to resume a relationship with her husband or lover, she ought to be given credit for the ability to make this choice on her own. If the law presumes she is not

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competent to make this choice, are we not saying she is also incompetent to act as a judge, a police officer, a doctor, or a politician? If we assume that women who say they want their husbands back don't really mean what they say, are we not engaging in the same paternalistic view of women as irrational creatures who, for example, don't really mean "no" when they say "no?" Women need protection from domestic violence. They do not need to be told they cannot make decisions for themselves.

8. End the prohibitions against mutual protective orders and against considering the best interests of children.

As presently constituted, the law does not allow protective order counterclaims, nor issuance of a mutual protective order. I understand the protection afforded to abuse victims by this approach. On the other hand, this ignores the reality of the dynamic when some relationships terminate. If a mutual and simultaneous open-handed slap on the cheek occurs between two persons breaking off their relationship, and this is the only episode of violence which has ever occurred between them, why should one be afforded a protective order and the other not? Why is a mutual protective order not appropriate? Why are judges' hands tied in such a case?

The law also does not allow any child custody disposition in a protective order case, other than granting custody to the petitioner. (This is why a protective order is such an effective pre-emptive strike in anticipation of custody litigation.)

In every other area of the law where disposition of minors is concerned, the "best interests of the child" is the prime consideration. This overriding concern for children has been thrown out in the protective order arena. I understand the theory behind the present system: that someone who is found to have committed domestic violence could not possibly be an appropriate custodial parent. Nevertheless, the theory is not always borne out by actual human conduct. Should a woman who has been a victim of repeated acts of violence, who finally loses her cool and throws a plate at her husband, forfeit custody of the children for whom she has been the primary care-giver, simply because he gets to the courthouse first? Obviously not. In the hypothetical of the one-time mutual slap, should custody of minor children be determined by a literal race to the courthouse? Judges' hands should never be tied in deciding custody and visitation in the best interests of the children.

* * *

The protective order system is a laudable necessary beginning to resolving the problems of domestic violence that plague our society. It is in desperate need of funding and fine-tuning, to insure that it affords due process to the accused as well as to the accuser, and to insure that it protects the children who may be the victims of them both.

CASES IN CONTROVERSY

The Race to Fatherhood: Concerns About Utah's Voluntary Declaration of Paternity Act

by Len R. Eldridge

A young man wanted to declare paternity of his son and undertake all the joys and responsibilities of fatherhood. But when he contacted the Utah Department of Health, he discovered that someone else had filed a Voluntary Declaration of Paternity concerning his son. The Department told him there was nothing he could do.

The young man was indeed the child's natural father, and the mother had acknowledged that fact to him and his family. But the young man and the mother had separated prior to the birth of their son, and the mother subsequently returned to live with her former boyfriend. After the child's birth, the former boyfriend and the mother signed the Voluntary Declaration of Paternity, representing that the boyfriend was the child's natural father.

Under the statute in force at that time, Utah Code section 78-45e-1 to -13, the fraudulently filed Voluntary Declaration of Paternity became an amendment to the child's birth certificate. Furthermore, pursuant to the statute, the declaration became a conclusive presumption of paternity twenty-four months later. Unfortunately, the young man came to me exactly two weeks too late.

An Adoption Statute

Prior to 1975, a putative father's right to custody of his illegitimate child was superior to all others, except the child's mother. Moreover, when a putative father publicly acknowledged his paternity, the child was considered adopted by the father, and thereafter was considered legitimate from the time of its birth. *See T.R.F. v. Felan*, 760 P.2d 906, 910 (Utah Ct. App. 1988). In 1975, however, the Utah State Legislature enacted the Voluntary Declaration of Paternity Act (the "Act"), which effectively limited the time in which a putative father could assert his parental rights in cases in which the mother had relinquished her rights to the child. *See* UTAH CODE ANN. § 78-30-4(3) (repealed 1995).[1]

The Utah Supreme Court interpreted the Act as specifically designed to facilitate permanent and secure placement of illegitimate children whose unwed mothers wanted to give them up for adoption and whose unwed fathers took no steps to formally identify themselves and acknowledge paternity. *See Swayne v. L.D.S. Soc. Servs.*, 795 P.2d 637, 641 (Utah 1990). In my client's situation, the District Court found that the boyfriend had in essence adopted the child by filing the first declaration. In applying the statute, the court ruled that because my client had failed to file and register his notice of claim of paternity first, he was barred from thereafter bringing or maintaining any action to establish paternity of his child.

A Historical Perspective

Utah's leading case on this matter is *Swayne v. L.D.S. Social Services*, 795 P.2d 637 (Utah 1990). In *Swayne*, an unwed father sued an adoption agency to obtain custody of his child, which had been given up for adoption by its unwed mother. The Utah Supreme Court found that the Act required the unwed mother's consent to the child's adoption, but did not require the unwed father's consent unless he had filed an acknowledgment of paternity with the Utah Department of Health. *Id.* at 640. The Court noted that it previously had held that "there are reasonable bases for the classifications in the statute [between unwed mothers and fathers and between fathers who file and fathers who do not] and that these classifications are reasonably calculated to serve a proper governmental objective." *Id.*

Because the identity of the mother of an illegitimate child is usually readily ascertainable, an unwed mother is forced

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[1] The statute provided:

(a) A person who is the father or claims to be the father of an illegitimate child may claim rights pertaining to his paternity of the child by registering with the bureau of statistics of the division of health, Utah department of social services, a notice of his claim of paternity of an illegitimate child and his willingness and intent to support the child to the best of his ability. The bureau of vital statistics shall provide the forms for the purposes of registering the notices and the forms shall be made available through the bureau and in the offices of the county clerk in every county in this state.

(b) The notice may be registered prior to the birth of the child but must be registered prior to the date he illegitimate child is relinquished or placed with an agency licensed to provide adoption services or prior to the filing of a petition by a person with whom the mother has placed the child for adoption. The notice shall be signed by the registrant and shall include his name and address, the name and last known address of the mother, and either the birthdate of the child or the probable month and year of the expected birth of the child. The bureau of vital statistics shall maintain a confidential registry for this purpose.

(c) Any father of such child who fails to file and register his notice of claim to paternity and his agreement to support the child shall be barred from thereafter bringing or maintaining any action to establish paternity of the child. Such failure shall constitute an abandonment of said child and a waiver and surrender of any right to notice of or to a hearing in any judicial proceeding for the adoption of said child, and the consent of such father to the adoption of such child shall not be required.

(d) In any adoption proceeding pertaining to an illegitimate child, if there is no showing that the father has consented to the proposed adoption, it shall be necessary to file with the court prior to the granting of a decree allowing the adoption a certificate from the bureau of vital statistics, signed by the director, which certificate shall state that a diligent search has been made of the registry of notices from fathers of illegitimate children and that no registration has been found pertaining to the father of the illegitimate child in question.

UTAH CODE ANN. § 78-30-4(3) (1990) (repealed 1995).

to either immediately assume legal responsibility for the physical care of her child or relinquish her parental rights. Paternity, however, is more difficult to establish. Even a father who informally acknowledges responsibility for a pregnancy may later deny paternity and possibly avoid legal liability for the child's care. Thus, a reasonable basis for the different classification of unwed fathers and unwed mothers is the fact that although identification of both parents of an illegitimate child is necessary, identification of a child's mother is automatic, while identification of the father is not.

A reasonable basis also exists for the different classification of filing and non-filing fathers. The State needs to distinguish those fathers who have accepted legal responsibility for the care of their children from those fathers who have not. Whether the law utilizes the best means for accomplishing this purpose involves policy issues that lie within the prerogative of the Legislature. Nevertheless, the Court in *Swayne* was sufficiently convinced that reasonable bases exist for the classification, and that the classifications are reasonably calculated to serve a proper governmental objective. *See id.* at 641.

In 1994, the Legislature amended the Voluntary Declaration of Paternity Act, but unfortunately the changes weren't very helpful. In fact, under the 1994 amendments, the first person to file a Voluntary Declaration of Paternity with the registrar of the Department of Health is automatically presumed to be the father of the child for whom he has filed the Declaration. *See* UTAH CODE ANN. § 78-45e-1. This determination includes liabilities for the reasonable expense of the mother's pregnancy and confinement, as well as for the child's education, necessary support, and any funeral expenses. *Id.*

This first-to-file "race statute" did, however, contain a rescission clause. A signed Voluntary Declaration of Paternity could be rescinded by order of the court if challenged within twenty-four months after it was executed, upon a showing by a preponderance of the evidence that the child was not the natural issue of the declared father, and that neither declarant had relinquished the child for adoption or had his or her parental rights terminated. *See id.* § 78-45e-4. After twenty-four months, the voluntary declaration of paternity became a conclusive presumption of paternity. *Id.*

In 1997, the Legislature again amended the Act. Under the newly-enacted amendments, a signed Voluntary Declaration of Paternity may be rescinded by a signatory thereto, but only if the motion to rescind is filed 1) within sixty days of the filing of the Voluntary Declaration of Paternity, or 2) before the date of an administrative or judicial proceeding relating to the child. *See* UTAH CODE ANN. § 78-45e-4(1) (1997). In other words, one of the persons who signed the voluntary declaration of paternity, be it the natural mother or the alleged natural father, must move to have the declaration rescinded within the time frame set forth above. Because my client was not a signatory to the original declaration of paternity, he had no standing to challenge the declaration under section (1) of the Act. *See* UTAH CODE ANN. § 78-45e-4(1).

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Section (2)(a) of the Act allows a signed declaration to be challenged on the grounds of fraud, duress, or material mistake of fact, with the burden of proof on the challenger. *See id.* § 78-45e-4(2). This section does not specify whether the challenger must be a signatory to the declaration. But as a matter of statutory construction, a statutory provision must be read to be consistent with other sections of the statute. "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another." *Brickyard Homeowners' Ass'n v. Gibbons Realty Co.*, 668 P.2d 535, 538 (Utah 1983). Although to my knowledge this statute has not been challenged, its plain language suggests that section (2)(a) would be interpreted to mean that only a signatory has standing to challenge a signed declaration, even on the grounds of fraud, duress, or material mistake of fact. *See Reedeker v. Salisbury*, 952 P.2d 577, 583 (Utah Ct. App. 1998) (reiterating the established maxim that "[w]hen faced with a question of statutory construction, we look first to the plain language of the statute").

So, where does all of this leave my client, the admitted father of the child in question? All fathers, including my client, should enjoy the parental presumption that it is in the child's best interests to be in the custody of his or her natural parents. *See Hutchinson v. Hutchinson*, 649 P.2d 38, 40 (Utah 1982). This presumption recognizes "the natural right and authority of the parent to the child's custody." *In re Jennings*, 432 P.2d 879, 880 (Utah 1967).

It is true that my client never had legal custody of his son; nevertheless, he never lost his right to assert the presumption as the result of any adjudication of parental unfitness. Therefore, he should still benefit from the parental presumption. My client's relationship with his son is even protected by the federal and state constitutions. *See In re J.P.*, 648 P.2d 1364, 1372-74 (Utah 1982). These protections extend to the father of an illegitimate child. *Id.* at 1374-75; *see Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Miller v. Miller*, 504 F.2d 1067, 1075 (9th Cir. 1974).

In *Wells v. Children's Aid Society of Utah*, 681 P.2d 199 (Utah 1984), the Utah Supreme Court held that although parental rights have their origins in biological relationships, "those relationships do not guarantee the permanency of parental rights. Constitutionally protected parental rights can be lost. They can be surrendered pursuant to statute." *Id.* at 202. In *Wells*, the Court recognized a "strong interest in immediate and secure adoptions for eligible newborns," and concluded that "that interest provides sufficient justification for significant variations in the parental rights of unwed fathers,

who, in contrast to mothers, are not automatically identified by virtue of their role in the process of birth." *Id.* at 203. The Court also recognized that "fathers who have 'fulfilled a parental role over a considerable period of time are entitled to a high degree of protection,' whereas unwed fathers 'whose relationships to their children are merely biological or very attenuated' are entitled to a lesser degree of protection." *Id.* (quoting *In re J.P.*, 648 P.2d at 1375). The Court further observed that the Legislature, in adopting the Act, had "undertaken to resolve the competing interests of the newborn illegitimate child and the man who claims to be its father. The statute provides a means of promptly determining whether there is a man who will acknowledge paternity and assume the responsibilities thereof, and, if not, of speedily making the child available for adoption." *Id.*

While the Act provides an "out" for the man who claims paternity and subsequently discovers that he is not the biological father, it fails to provide a means for biological fathers to challenge the filing of the voluntary declaration by a man who claims paternity, but is not the biological father. Thus, although the State may be satisfied because a man has stepped up and taken on the responsibilities of financial child support, the child's biological father has no means of securing and protecting his parental rights. It appears that the biological father's inherent and retained parental rights are not only subordinated to the paramount "best interest of the child," but are disregarded entirely by the Act.

The *Wells* Court ruled that "[d]ue process does not require that the father of an illegitimate child be identified and personally notified before his parental right can be terminated." *Id.* at 207. So, neither *Wells* nor the current Act provide biological fathers with a right to notice or a right to challenge the filing of the Voluntary Declaration of Paternity. The father, quite simply, is left out in the cold.

A Reasonable Solution

My concerns are many, and because this is a complicated issue, my recommendations are few. I do, however, recommend that the statute be revised so as to allow putative fathers twenty-four months to file a voluntary declaration of paternity, whether or not the child has been placed in adoption, and to allow putative fathers twenty-four months within which to challenge the filing of a voluntary declaration by another man. In each case, the grounds should be limited to fraud, duress, and mistake of fact, with the burden placed on the challenger.

Parents who adopt children with no consent from the child's father should be placed on notice that the father has the right to seek custody of his child within twenty-four months of its birth. Adoptive parents should simply bear the risk of adopting a child without the father's consent. In a hearing challenging custody of a child, the courts should be required to address the best interests of the child before changing custody from the adoptive parents to the biological father.

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If the Legislature does not deem the rights of putative fathers as important as those of mothers, the courts should take it upon themselves to protect the rights of fathers of illegitimate children, to allow them an opportunity to challenge paternity of their children. I say, give my client his day in court, address the issues of the child's best interests, and determine whether the original Voluntary Declaration of Paternity was filed fraudulently. Win or lose, my client will have had his say, made his challenge, and will feel good about the system and perhaps about being a father.

THE VOIR DIRE INTERVIEW

The Commissioners Speak

Editor's Note: *What follows is a free-ranging interview conducted on March 13, 1998 by two of our Editors with all of the sitting Court Commissioners in the Third Judicial District.*

PC: Patrick Casey
LJ: Lisa Jones
ME: Michael Evans
TA: Thomas Arnett
VD: *Voir Dire* Editors

What Matters Most

VD: What is the single most important thing that someone who is not experienced in domestic law should do before appearing before a Commissioner?

TA: In my opinion, the single most important thing is to consult with an experienced domestic practitioner. It is hard for me to believe that there is any lawyer in the state that doesn't know such a person. And you just need to call that lawyer up and talk to that lawyer, find out what the unwritten rules are and the best way to proceed.

ME: [T]he practitioner may also benefit from sitting through a calendar before at least one of the Commissioners, preferably the Commissioner assigned to the case in which they will be appearing. The Commissioners' practice is very different than the general civil practice, and one thing to remember in that regard is [that] Rule 4-501 does not apply to proceedings before the Commissioners. That is the most common mistake I think we see from those who don't regularly practice in this area.

VD: What is so significant about Rule 4-501 not being applicable to practice before the Commissioners?

ME: That rule contemplates the court would rule only on the basis of the written pleadings in the time parameters set for the initial request, the response, and the final response, which time parameters are generally longer than the period of time it takes for you to get on the Commissioner's calendar. So we will see attorneys appearing on our calendar saying, "I have not been allowed my ten days to respond, or my five days to file a response to their response and so we have to continue the hearing." There is a consequence in not being prepared as they should be to argue the merits at the hearing before us.

PC: If a notice to submit is filed under Rule 4-501, our practice is to send it back with a note reminding the attorney that the rule doesn't apply and the matter needs to be scheduled for hearing. But I am sure that sometimes the notice doesn't make it back to the lawyer for one reason or another.

LJ: I think it is important to know, too, that we don't take live testimony. You either have to put affidavits in the file or bring someone who can proffer their testimony. But we hear between three and four thousand hearings a year, and we don't have time to take live testimony, so the attorneys just stand up and proffer the testimony and we make our recommendations based thereon. I have had people come up from central or southern Utah with twenty to thirty witnesses, thinking they will be able to testify, and we just don't hear them. So it is a very different practice, and they need to be aware of the differences.

PC: To follow up on Commissioner Arnett's response, a lawyer experienced in the domestic relations area will likely be familiar with statutes and case law in the field which would not be easy for the inexperienced practitioner to find. Lawyers who do not regularly practice domestic law sometimes overlook critical points of substantive law, which can be to the detriment of their client's interests.

The Problem with Ex Parte Contacts

VD: The Office of Professional Conduct indicates that a great many ethics complaints are generated out of the domestic practice, and many of those arise out of ex parte contacts, corralling the Commissioner or Judge and discussing the merits of the case with him or her. Do you have any thoughts on that?

TA: You would be amazed at how often lawyers and parties attempt to make ex parte contact, and we are very careful about it; we just won't do it. We won't pick up the phone, we won't let somebody in our office if it is on a case before us. But it is common; people try it all the time.

LJ: We get letters from dozens and dozens of attorneys who ought to know better, thinking that if they just [carbon copy] the opposing counsel at the bottom [of the letter] that somehow it is no longer ex parte because the other party knows about it after the fact. But it is a real problem. Some attorneys think they are entitled to have access because we see them more often, we are a closer knit Bar, we are very specialized, and they think they can get away with it. So it is a problem.

ME: The problem has gotten even worse with the pro se litigants. Yesterday I got a fax from a pro se party complaining, among other things, that he couldn't reach his attorney and wanted me to do something about that, as well as the merits of his case. Only had the name of the business from where he faxed it and it didn't include an address or anything else, so I couldn't have responded to him directly if I chose to. And not too long ago, somebody, me or somebody else, got e-mail from a pro se party who apparently is also a State employee and got the address that way, and said he wanted to communicate in this case with passing it back and forth.

I am concerned about the apparent frequency with which that rule is breached. [Attorneys] take it as a matter of course to be able to come in and explain to you [on an ex parte basis] why a hearing needs to be continued, or under the guise of asking a procedural question, will then try to get into the merits of the case, or at least make comments about their opposing party. . . . [W]e do all we can to prevent such contacts and make sure the attorneys are clear on that, but they seem to respond, at least through our staff, that we represent the exception rather than the rule.

VD: There seems to be a perception that the rule on ex parte contacts is slacker in the domestic area. Nothing in the rules of ethics exempts domestic practice from the prohibition against ex parte contacts.

ME: That is absolutely right, and we expect [lawyers who appear] before us to be [as ethical] as we would expect a lawyer . . . to be in any other kind of matter.

Available Resources

VD: What is somebody to do if they have been out of practice for a year or two or three, someone who typically doesn't do domestic law, and a domestic problem walks in the door. What resources are available to them? You earlier said that such attorneys need to talk to a domestic practitioner who is experienced. Aside from that, what resources are available?

LJ: I think it is most important to note that the Family Law Section is probably one of the most active sections of the Bar. And, monthly, there is a CLE [in which] we take up all of those types of issues; yearly, there is a May seminar, a day-long seminar for people to come to. So the training through the Family Law Section is really quite broad. We are always having break-out sessions at both the Mid-Year and the Annual Bar conventions for CLE purposes, and right now we are looking into starting a training program for volunteer attorneys who want to take on pro bono cases through Legal Aid or Legal Services or through the Bar to get people to have access to the Bar. There are all kinds of training . . . for volunteer attorneys [who] come into our courts for protective orders.

ME: Volunteer guardians ad litem.

LJ: [The Family Law Section] is a very active Bar. The kind of training that we offer through that really comes in handy.

TA: Actually, the Legal Aid training is already in place, and that is a training program for non-family law lawyers . . . who volunteer to do one case for Legal Aid, and it is free.

VD: And I understand that they get a valuable book of resources that they can use. They can use those cases as a basis, and they can also locate mentors through that project. They can use that process as a basis for developing some skill in the area.

TA: That is a very good point! I had forgotten about the forms. Legal Aid has put together some of the best forms around, starting back when Mike Evans was the director of the Legal Aid Society of Salt Lake. They provided all of those [forms] to the lawyers who go through this training, and [the forms] can be utilized from there on out in private divorces.

ME: [ ] Legal Services actually got federal money to fund a book that I helped draft. It was a training manual, including forms, and it has been updated on several occasions. I am not sure of the present description, if you will. But I understand that there [is] a book available, as well as some face-to-face, in-person training for those willing to accept the pro bono appointment.

VD: Another interesting thing is that years ago there was a formal mentoring program set up through the Stewart Hanson, Senior, Foundation, and no one used it. I have spoken in the course of putting this together to dozens of experienced family law practitioners. All of them said, "I would be more than happy to help, and have just never been called." It is unusual that the resource that existed just wasn't used.

VD: We are all somewhat ashamed to say that we don't know [how to do something]. But the bottom line is that the ethical rules require that an attorney be competent to perform any given task that may come before him or her, and if he or she isn't [competent] then they have an obligation not to accept that matter. It seems to me that people wouldn't think about taking on a complex securities filing matter, yet at the same time, they think nothing of taking on a domestic relations matter even though they don't practice in that area of the law.

LJ: I think one of the problems that we have for those of us who love this area of the law is, as you say, [that] a lot of people out there believe it is easy to do, and anyone can do it. Not only is this a very important area of the law in that it has an impact, a long-term impact, on people's lives, particularly children's lives. We are dealing with poverty issues with children, we are dealing with bonding issues, not seeing one of their parents. All of those kinds of issues. . . . You superimpose upon that how complex it is with regard to its impact on bankruptcies, tax law,

and all of those types of issues. It is a very complex, paper-intensive, fact-intensive area of the law. You will be [committing] malpractice if you do not know the area [but nevertheless] come in and try to practice it. It is far too complex to do, just thinking you can just run in there and do it.

VD: *One other resource I just thought about is the American Academy of Matrimonial Lawyers.*

ME: They do a day-and-a-half seminar each year on family law. [Another resource] is the Family Law Section newsletter, . . . coming out four [times] a year. It provides a lot of information to practitioners: new statutes, new rules, [ ], upcoming CLE, and all that sort of thing. If anybody is going to do this kind of law at all, I think it is worth it to pay $30 a year and be a member of the Family Law Section.

I might go back to the complexity of domestic relations matters. And Lisa is not old enough to remember this, but when I started this practice, and Tom fortunately is old enough to remember this, there were many cases where the divorce file from the complaint to the decree would be maybe ten to twenty pages total. There were times when we could get decrees entered. We used to joke about who had the record, how quickly we could get a decree entered [ ]. But almost every year, divorce matters become more complex. One problem with the old days is that the orders were simply inadequate. They were inconsistent in terms of financial awards, in terms of addressing all of the marital estate. [And that has] contributed substantially to what has now become known as the feminization of poverty. I don't think there is any question about that. [ ] We now divide retirement accounts; before that, it was never true. That in itself has become [a] very complicated and complex area of the law. We have child support guidelines that you had better be familiar with, especially if you are seeking to establish an award other than that indicated by the guidelines. We now have visitation guidelines. We have more specific requirements in terms of finding things in the custody area. I think it is fair to say there are more custody evaluations, and more detailed custody evaluations. While in the collection of child support intrastate, [the law] has changed, and requires a much deeper understanding of federal statutes and perhaps even conflict questions. So it used to be [ ] true that the area of domestic relations was less complicated, but it is no longer.

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"Some lawyers seem to think that they need to raise every possible issue and argument they can think of in the hope of prevailing by the sheer volume of their words. This is not an effective strategy."

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TA: I recall a seminar being taught out of state some years ago, and the title of it was "The Federalization of Divorce Law," and that is exactly where many of these changes have come from. It is the Feds that require the child support guidelines. It is the Feds that have a lot to do with the impact of taxes and bankruptcy law on divorce, and so on. It has become just a lot more complicated. I agree with something you said at the beginning of this meeting, and that is just the perception that anybody can walk in off the street and handle a divorce. That may have been true at one time. I am not sure I have ever agreed with that, but it is certainly no longer true.

Being an Effective Advocate

VD: *What advice would you give to lawyers on how to be more effective in your court?*

PC: My first advice would be a reminder that, because of the volume of cases that we handle, motions and arguments should be kept as simple as possible. Some lawyers seem to think that they need to raise every possible issue and argument they can think of in the hope of prevailing by the sheer volume of their words. This is not an effective strategy, and it can interfere with our ability to focus on the issues and arguments that really matter. It also tends to lengthen our law and motion calendars unnecessarily, which is inconsiderate to other lawyers (and their clients) on the calendar.

VD: *Commissioner Jones, what areas would you most emphasize for attorneys appearing in your court?*

LJ: I think probably the most important thing they could do is to talk to opposing counsel prior to coming to court. They get here, and they get here late, which happens to be my pet peeve, and then they want to stop and take the opportunity to talk. Well, I have got calendars scheduled and a lot of matters on the calendars, and so that pushes me further and further back if they haven't spoken to each other to begin with. They need to talk to opposing counsel before they get here. Most cases have a partial stipulation if they talk at all, and it is not an effective use of my time or theirs to get here cold, come in, sit down, and sit here for over an hour listening to someone else, and never go out in the hall and talk, then just get up and say, "well we are disputing all of these issues."

I think another ineffective use of lawyer talents is the lack of civility in the practice of law, and I don't believe that it is in just the domestic area. But because the emotions are running so high in the domestic area, it happens quite a bit. With the lack of civility between two attor-

neys who stand up and spend more time digging the other side or the other party, instead of focusing on what their important issues are. They are slamming the other party, they are calling them liars, they are grandstanding. And I know you have to impress your clients, I understand that part. But it does not help [the clients] at all, it does not help me at all, and quite frankly I get irritated that they are wasting my time grandstanding. I could have done it on the pleadings a lot easier than listening to them calling the [other] attorney a liar. I think it is uncivilized and inappropriate, and I'd just as soon it stop.

VD: Commissioner Evans?

ME: I will try to keep my comments under sixty minutes in this area! First of all, put everything in the pleadings. If you wait until you get to the hearing to argue, the chances are great it won't be persuasive, it won't be perhaps heard, may not be understood. Make the pleadings concise, make the relief you are requesting crystal clear, summarize lengthy exhibits, and count on the Commissioner's having read everything in the file prior to the hearing, and then don't repeat it. We are scheduled to hear five matters in an hour's time, and that is not very much time for argument. So if it is not in the pleadings and we haven't read it before-hand, we may not ever get to it.

The other thing I would like to address is recognizing that family law matters are unique in that these people are going to have ongoing relationships, sometimes for decades, depending on the age of the children or the property circumstances, and [ ] although you may win at a hearing, you created a circumstance wherein both clients will lose for years to come. So, what I am suggesting [is] that mediation be seriously considered at the onset, before the proceedings, [ ], before it is too late. And I encourage all practitioners, especially family law practitioners, to become aware [of], to understand the mediation process. I hear attorneys say with alarming frequency that [ ] "you shouldn't refer this matter to mediation because we have already been mediating." Well by definition, two attorneys discussing issues does not make a mediation. So they don't understand the process, and I think they fail to recognize the ongoing relationship of these family matters. They fail to recognize specifically that litigation is contrary, just litigation in itself is contrary to the best interest of children, who are attempting to maintain an appropriate relationship with each of their parents. So I would say consider mediation, consider it early, and don't discount it.

VD: Commissioner Arnett?

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"Make the pleadings concise, make the relief you are requesting crystal clear, summarize lengthy exhibits, and count on the Commissioner's having read everything in the file prior to the hearing."

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TA: Since I am going last, I am going to have to overlap just a little bit. Lisa talked about civility. My point would be, don't take on the emotional coloring of your client. I think you have an ethical obligation to your client to be objective and to render objective advice, and if you get yourself drawn into the emotions you are unable to do that. The second thing, and this kind of overlaps some of the things that Mike said, is to be prepared, particularly on the financial issues. So few lawyers, even among the regular practitioners, show up for a hearing fully prepared in the financial area in terms of [having a] complete list of income and expenses, [and] documentation behind that. They run the child support worksheets, and they need to do that. [But] [j]ust in the child support worksheet area, lawyers are often amazed how little difference it makes which level of income we adopt in terms of the ultimate child support, and if they would simply run two alternate worksheets, they would know that in advance and save a lot of time and money.

Civility

VD: Commissioner Casey, have you found a problem with a lack of civility among attorneys appearing before you?

PC: Yes, I have. The problem is not necessarily worse in domestic practice than I have observed in other arenas, but it seems to worsen the already emotionally charged nature of most contested divorce matters. The problem is most evident when lawyers adopt, as Tom Arnett mentioned, the emotional posture of their clients. Lawyers who are focused on resolving a conflict, rather than on winning a fight, seem to generally remain far more civil with one another. While I don't know that this can be proven, I suspect this often enhances both the quality of the result and the client's experience of the process. On the other hand, although I try very hard not to assume that a client is responsible for the shortcomings of his or her lawyer, sometimes that appearance is created, and that can hurt the client's position. Ultimately it matters very little whether a lawyer is adopting an unduly hostile or unreasonable posture because of the client's wishes or because of his or her own poor judgment. The result is the same. The credibility of both the lawyer and the client are damaged.

ME: Regarding the issues of civility, I think domestic law matters may be weakened, in that emotions run so high between parties. I think it is probably higher than [it is for] people dealing with contracts or auto accidents; you don't have a prior relationship, you

will have a later relationship. I practiced in the area for fifteen years before I took this job, and I have had clients get upset with me if I appeared to be too friendly with the opposing attorney. They were ready to fire me, or they would not take as totally unbiased the advice I had given on how to settle an issue, and that in fact led to my terminating representation of a couple of clients. [ ] People would call me and say, "I heard you are the meanest son-of-a-bitch in town and that if you are I want to hire you; if not, tell me now." They were looking for a pit bull, and if you were prepared to play that role you could have their case, and if not, they were going to look for somebody that would do so.

TA: On the civility issue, [ ] because we proceed by proffer rather than live testimony, it is always the lawyer who is giving us both the facts and the law, and so if anything, the domestic lawyer's credibility is more at issue than [it is with] any other kind of practice. I think that a lawyer who simply does what the client asks, regardless of the reasonableness, quickly loses that credibility, at least among us, and I believe among all the judges as well, and it severely handicaps that lawyer in the future in every case that lawyer is involved [in]. We remember who lies to us, we remember who takes very unreasonable positions, and it is hard not to have that affect us the next time around.

VD: Do Commissioners talk among themselves as to who these problem lawyers are?

TA: Not weekly, not daily, but hourly!

LJ: I think it is imperative for the attorney to understand that, yes, we all practice, yes we understand that we are serving our clients, but we are also, counselors at law. I get extremely irritated when it is clear to me [that] an attorney wants me to give the clients the bad news. They know how it is going to come out; it is clear how it is going to come out. Case law dictates the result, [but] they take a totally different position than they know is ever going to win, so I look like the bad guy. I don't mind looking like the bad guy, but I think they are not doing their duty as counselors to look at these clients and say, "no, I am not going to lose credibility with the court to make this argument for you, and if you want someone to do that, go find someone who doesn't care as much about their reputation as I do." I did that a lot when I was in practice. I would say, "Go find some bozo who is going to make that stupid argument to the court and lose their reputation. I am not going to." I did not have one client say, "Well, I am going to take my work elsewhere, then." They all said, "if you don't think that is a good idea, let's not do it." That is an attorney's duty, and they're not following through with that duty. They are making the legal system look very bad because it is the court that looks unreasonable, when in fact the attorney is taking an unreasonable position. The attorney's credibility with the Court is at stake.

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"We remember who lies to us, we remember who takes very unreasonable positions, and it is hard not to have that affect us the next time around."

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TA: You can always tell those attorneys because at the end of the argument they kind of just give a shrug of the shoulders before they sit down. I knew, we all knew, what was going to happen, but I had to go through the motions.

VD: A prominent lawyer of the first half of this century said, "Half of what a good lawyer should be doing is telling his client 'no.'" And perhaps we have too few lawyers these days who are telling their clients "no."

ME: We talked about the importance of family law, and reference was made to the volume [of cases]. We have referred to [ ] the long term effects of the orders we enter. We [ ] hear all the time about this jury trial, the big deal like [ ] a million dollar verdict or a two million dollar verdict, and if you look at the orders entered in family law cases for very young children with substantial marital estates, perhaps alimony awards by the time the controlling date of that order is reached, if you will, or by the time the order is no longer applicable, the dollar amount is at least as great before you even get around to the bonding issue and that sort of thing. [ ] I was on the Child Support Task Force that proposed the advisory guidelines, and our presumptive guidelines are based on that [in] large part. And the one thing that we learned [ ] that stuck with me forever is that all the input was that the status of children, or the likelihood that they would be affected adversely by their parents' divorce, all evidence suggests that that isn't true, so long as their standard of living was maintained. But if their standard of living declined, they became truant, they became alcoholic and drug abusers, they became criminals. The troubled youth that we see now, obviously we are looking at the connection with child support. . . . If the appropriate order is not entered in all areas, then it is not appropriate in any area, and it really can have long-term effects, not so much for that family, but for all of society.

TA: Many non-family lawyers don't understand how rewarding the practice of family law can be. I enjoyed the practice, I very much enjoy the job I have now. And in both jobs, that is being a family law practitioner and being a Commissioner, I felt like and I do feel like we are solving people's problems and helping them get on with their lives. In particular, we are trying to help children.

PRACTICE POINTERS

The New Requirement for Mediation in All Civil Cases

by Commissioner Thomas Arnett and Hedi Nestel

The Utah Judicial Council amended Rule 4-510, Alternative Dispute Resolution, of the Utah Code of Judicial Administration, in 1997. The amended rule provides that all civil cases, with a few identified exceptions, in the Second, Third, and Fifth Judicial Districts, are subject to mandatory alternative dispute resolution. The first application of the amended rule has been to domestic cases in the Third Judicial District. All divorce cases filed after January 1, 1998 are subject to the provisions of the amended rule. Those provisions can be summarized as follows:

1. In accordance with paragraph 6 of Rule 4-510, all divorce cases must proceed to mediation within thirty days after the responsive pleading was filed, unless the parties choose one of the three alternatives in paragraph 6(A) prior to the expiration of thirty days from the date the last responsive pleading was filed.
2. If the parties choose alternative dispute resolution and are unsuccessful in resolving the matter, then either party is entitled to certify the case as ready for trial.
3. If one or both parties choose to defer ADR consideration as set forth in paragraph 6(A)(1) of Rule 4-510, then the usefulness of mediation or arbitration must be addressed at the pre-trial settlement conference before the commissioner assigned to the case. If good cause is shown that the case is not appropriate for mediation or arbitration, the pre-trial settlement conference will proceed. If good cause is not shown that mediation or arbitration is not appropriate, then the pre-trial settlement conference will be continued without date and the case must proceed to mediation or arbitration. If either is unsuccessful, the pre-trial settlement conference may be rescheduled.
4. *Please note: requests for temporary orders are not affected by this rule.*

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"Attorneys typically do not, nor are they required to, accompany their clients to the [visitation] mediation hearing session; but if attorneys are present, their participation is limited to that of privately advising their clients and reviewing relevant documents."

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This is an abbreviated explanation of the procedures established by Rule 4-510. Practitioners should consult the rule itself, particularly as to those civil cases that will be excluded from the requirement. Nevertheless, with the exceptions identified in the rule, mandatory ADR procedures will apply to all civil cases.

The Third Judicial District Pilot Visitation Mediation Program

The Visitation Mediation Program is a relatively new pilot program in the Third Judicial District designed to resolve visitation disputes between parents through communication and cooperation. The program was enacted by the 1997 Utah State Legislature in response to a profusion of concerns from non-custodial parents that visitation rights were not being enforced. Specifically, the Legislature sought a process that would expeditiously and inexpensively resolve visitation disputes to foster a meaningful relationship between children and both parents. Accordingly, the Legislature passed Utah Code section 30-3-38, which mandates that when a parent files a motion in the Third Judicial District Court alleging that court-ordered visitation rights are being violated, the clerk of the court will refer the case to the Visitation Mediation Program. The program is being implemented through the Administrative Offices of the Courts.

A case is referred to the program by the court clerk or from an order of the court. When filing a pleading, the party is asked to fill out and attach a referral form which is available at the court clerk's office and the AOC. This referral form asks for general information about the parties and the visitation order. Once referred, the program coordinator screens the case for mediation. The mediation is scheduled within fifteen days of a referral and is assigned to a professional mediator. Attorneys typically do not, nor are they required to, accompany their clients to the mediation session; but if attorneys are present, their participation is limited to that of

Commissioner Arnett is a Commissioner of the Third Judicial District Court; Ms. Nestel is the Administrative Offices of the Courts' program coordinator for the Pilot Visitation Mediation Program being implemented in the Third Judicial District Court.

privately advising their clients and reviewing relevant documents. If the parties are able to reach an agreement during the mediation session, the mediator writes an informal Memorandum of Understanding. Parties do not sign any visitation agreement at the mediation; rather, they, or their attorneys, are responsible for drafting a formal Stipulation to be signed later and filed with the court. If the parties are unable to reach an agreement, the case is referred back to the court clerk so that a hearing date may be scheduled on the pending motion.

In addition to offering mediation services, the program is designed to connect parents with visitation services, namely, supervised visitation, neutral drop-off and pick-up, and counseling. Parents share the cost for both mediation and visitation services. Although the cost of visitation services depends on the type and duration of the services, the mediation expense is set at $75 an hour. Moreover, the program has available federal and state funds for impecunious parties.

Although the program has been operating for almost six months, policies and procedures are still being developed and the program coordinator is interested in receiving comments and concerns from participating attorneys. Notably, the program has received tremendous support from the AOC and judiciary. Likewise, attorneys are encouraged to support the program and its goals by educating clients concerning the process and benefits of mediation.

CASES IN CONTROVERSY

The "Strange Case of Utah"[1]–Common Law Marriage

by Cameron S. Denning

Prior to 1987, "common law" marriage was not recognized in Utah. Furthermore, recognition of such relations was specifically prohibited: "Marriages not solemnized by an authorized person were prohibited and declared void."[2] But in 1987, the Utah State Legislature enacted Utah Code, section 30-1-4.5, which provides:

> (1) A marriage which is not solemnized according to this chapter shall be legal and valid if a court or administrative order establishes that it arises out of a contract between two consenting parties who:
>
> (a) are capable of giving consent;
>
> (b) are legally capable of entering a solemnized marriage under the provisions of this chapter;
>
> (c) have cohabited;
>
> (d) mutually assume marital rights, duties, and obligations; and who hold themselves out as and have acquired a uniform and general reputation as husband and wife.
>
> (2) The determination or establishment of a marriage under this section must occur during the relationship described in Subsection (1), or within one year following the termination of that relationship. Evidence of a marriage recognizable under this section may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases.

In enacting a statute codifying "common law"[3] marriage, Utah departed from the national trend away from recognizing "informal" marriages. In the 1920s, a majority of the states recognized common law marriage.[4] In 1941, the number had dwindled to about eighteen.[5] And by 1996, just eleven states and the District of Columbia recognized common law marriage.[6]

The Legislature enacted the common law marriage statute in an attempt to prevent welfare fraud in situations in which two persons live together and one is employed, but the other receives public benefits.[7] The statute's effectiveness as a cost-saving measure is doubtful,[8] but it raises other questions of greater concern to practitioners.

> ***"The Legislature enacted the common law marriage statute in an attempt to prevent welfare fraud in situations in which two persons live together and one is employed, but the other receives public benefits."***

For example, what is the standard by which a party must prove that a common law marriage exists? As of what time is the analysis to be made? And when must the "determination or establishment of a marriage" be completed?

Utah courts have not yet had the opportunity to develop answers to these questions, and as the Utah Supreme Court has noted, the analysis will "necessarily proceed on a case-by-case basis."[9] But there is already an apparent conflict between Utah's appellate courts regarding the statute's requirement of a judicial or administrative ruling prior to or within one year of the relationship's termination, and practitioners should be aware of the potential problems they may encounter in attempting to establish that such a marriage existed.

The Standard of Proof

Utah's statute is silent concerning the standard of proof required to show that a common law marriage existed.[10] The language of the statute, its legislative history, and the case law make it clear that each of the five elements enumerated in the statute, as well as consent to a marriage

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[1]Utah is a "strange case" because it was the only state to establish a form of common law marriage in the twentieth century. *See* Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 Or. L. Rev. 709, 749 (1996).

[2]*Mattes v. Olearain*, 759 P.2d 1177, 1181 (Utah Ct. App. 1988) (citing UTAH CODE ANN. § 30-1-2(3) (1984)). This prohibition was first enacted on March 8, 1888. Act of Mar. 8, 1988, ch. 45, § 2(3), 1888 Utah Laws 88, 89.

[3]Utah's version of "common law" marriage is, of course, purely a creature of legislation and did not develop in the ordinary course of Utah common law. Nevertheless, "common law" marriage is the term ordinarily accepted by courts and counsel, and thus is used in this article.

[4]*See* Bowman, *supra* note 1, at 715.

[5]*See* David F. Crabtree, *Recognition of Common-Law Marriages*, 1 UTAH L. REV. 273, 275 (1988).

[6]*See* Bowman, *supra* note 1, at 715.

[7]*See* Crabtree, *supra* note 5, at 280-81. Interestingly, one impetus behind the large-scale abolition of common law marriage was the fear of fraudulent economic claims. *See* Bowman, *supra* note 1, at 732-36.

[8]*See, e.g.*, Crabtree, *supra* note 5, at 282-83.

[9]*Whyte v. Blair*, 885 P.2d 791, 795 (Utah 1994).

[10]Utah Code Annotated, section 30-1-4.5 provides only that "[e]vidence of a marriage recognizable under this section may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases."

contract, must be proven.[11] But how much proof is required to ensure that the stamp of validity is given only to "deserving" relationships?[12] The Supreme Court has articulated the need for wariness:

> Care must be given to guard against fraudulent marriage claims, especially where a declaration of marriage would reap financial rewards for an alleged spouse. When a reward is available, human nature may choose to strengthen and augment, in retrospect, the consent to marry that was only tentative before the reward became available.[13]

A few states apply a "clear and convincing evidence" standard for proving common law marriages,[14] but most states that recognize common law marriage impose only a "preponderance of the evidence" standard.[15] A review of *Whyte v. Blair*, 885 P.2d 791 (Utah 1994), the Supreme Court's only decision on the issue, suggests that proving the existence of a common law marriage under the criteria set by the statute is more difficult than might be apparent, and thus, a "clear and convincing" standard may not be necessary to ensure that the goals of justice are met.

Whyte involved a claim by an injured motor vehicle passenger for benefits under his alleged common law wife's uninsured motorist coverage. When the trial court held (for reasons more thoroughly discussed below) that Whyte was not married to the insured, and thus the benefits were unavailable, Whyte appealed.

The Supreme Court remanded the case for determination of whether a valid marriage existed at the time of the accident. In doing so, the Court discussed the common law marriage statute's requirements, and noted that each of the statutory elements must be proved.[16] "No single factor is determinative. Evidence of each element is essential. Consenting[17] parties must show cohabitation, assumption of marital rights and duties, a general reputation as husband and wife, capacity to marry, and capacity to give consent."[18] The Court noted that the five elements "can be proved or disproved with relative ease. However, whether the parties consented to be married is often disputed."[19]

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"The proponent of the marriage must show that both parties consented to be married at the moment consent was given, not at some point thereafter."

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The proponent of the marriage must show that both parties consented to be married at the moment consent was given, not at some point thereafter. In other words, there must be a present marriage agreement. "This has at times been expressed by the statement that a common law marriage must take place immediately or not at all, or alternatively, that a relationship illicit in its inception is presumed to be illicit throughout the period of cohabitation."[20] The "illicit" nature of the relationship can, however, be changed if the parties enter into a present marriage agreement.

Consent to enter into a marriage relationship may be shown by a written agreement, signed by the parties. But proof this clear and simple is unlikely under the usual circumstances. Alternatively, others "who were present when the agreement to assume all marital responsibilities was made" could testify persuasively.[21]

Perhaps most importantly, the *Whyte* decision noted that the Utah statutory scheme is unique: "Under the common law, the most customary proof of marital consent was general reputation, cohabitation, and acknowledgment. Under Utah's codification, evidence of general reputation, cohabitation, and assumption of marital rights and duties would be evidence of consent, but standing alone, would not be sufficient."[22]

Thus, separate proof of consent must be shown. The *Whyte* decision identified a "nonexhaustive list" of probative evidence used by other courts to establish consent:

> [M]aintenance of joint banking and credit accounts; purchase and joint ownership of property; the use of the man's surname by the woman and/or the children of the union; the filing of joint tax returns; speaking of each other in the presence of third parties as being married; and declaring the relationship in docu-

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[11]The statute requires proof that the marriage:

> [A]rises out of a contract between two consenting parties who:
> (a) are capable of giving consent;
> (b) are legally capable of entering a solemnized marriage under the provisions of this chapter;
> (c) have cohabited;
> (d) mutually assume marital rights, duties, and obligations; *and*
> (e) who hold themselves out as and have acquired a uniform and general reputation as husband and wife.

UTAH CODE ANN. § 30-1-4.5(1) (emphasis added).

In debate, Senator Farley stated that, to meet the bill's provisions, a person "would have to fit under absolutely (a), (b), (c), (d), and (e) [of section 30-1-4.5(1)]." Floor Debate, remarks by Senator Frances Farley, 47th Utah Leg., Gen. Sess. (Feb. 17, 1987) (Sen. Recording No. 75).

Finally, in *Whyte v. Blair*, the Supreme Court stated that no single factor is determinative, but that evidence of each statutory element is essential. *Whyte*, 885 P.2d 791, 794 (Utah 1994).

[12]In *Hansen v. Hansen*, the Utah Court of Appeals recently held the applicable standard of proof to be a preponderance of the evidence. *See Hansen v. Hansen*, No. 97-0321 (Utah Ct. App. May 7, 1998). The court based its decision on the statutory provision that common law marriage is "proved under the same general rules of evidence as facts in other cases." *Hansen*, slip op. at 4.

[13]*Whyte v. Blair*, 885 P.2d 791, 795 (Utah 1994).

[14]*See Stinchcomb v. Stinchcomb*, 674 P.2d 26 (Okla. 1983) ("[A] common law marriage must be established by evidence that is clear and convincing."). The District of Columbia requires "unequivocal proof" of common law marriage. Such claims are closely scrutinized. *Coates v. Watts*, 622 A.2d 25 (D.C. 1993).

[15]*See In re Estate of Wagner*, 893 P.2d 211 (Idaho 1995); *In re Estate of Alcorn*, 868 P.2d 629 (Mont. 1994); *Chandler v. Central Oil Corp.*, 853 P.2d 649 (Kan. 1993).

[16]Utah Code Annotated section 30-1-4.5 sets forth, in subparagraphs (a) through (e), five elements: capacity to consent; legal capacity to marry; cohabitation; mutual assumption of marital rights, duties, and obligations; and "holding out" and acquisition of a uniform and general reputation as husband and wife.

[17]Note that although section 30-1-4.5(1) sets forth five subparts, designated (a) through (e), the requirement of consent is essentially a sixth element that also must be proved. *See Hansen v. Hansen*, No. 970321, slip op. at 6 (Utah Ct. App. May 7, 1998) (recognizing that there are six statutory elements).

[18]*Whyte*, 885 P.2d at 794 (Utah 1994) (citations omitted).

[19]*Id.*

[20]*Id.* at 794-95.

[21]*Id.* at 794.

[22]*Id.* at 795.

ments executed by them while living together, such as deeds, wills, and other formal instruments.[23]

This type of evidence can also prove the other elements of common law marriage. For example, dual use of a single surname and speaking of each other as married in the presence of third parties suggests that a couple has a "general reputation" as being married. Declaring the relationship in documents also evidences "acknowledgment" of the relationship.

Nevertheless, it appears that Utah courts have been instructed to require a higher quantum of proof of the consent element than at common law. If "the two factors considered the most reliable in determining whether an intent to be married has been established"[24]–cohabitation and a general reputation in the community–must be proved separately from, and in addition to, the consent element, there must be more proof, or proof of a more probative nature, of consent. As noted above, there also must be proof of each of the other statutory elements.

Determining Whether a Common Law Marriage Exists

Determining whether a common law marriage exists might be made with reference to one of several points in the relationship. The marriage might be deemed valid only as of the date a court or administrative body enters its order. Alternatively, the date the relationship is deemed a "marriage" might be the date on which a petition for determination of common-law marriage is filed. Finally, a marriage might be said to have first existed as of the point at which all statutory criteria were met.

Section 30-1-4.5 provides that a marriage "shall be legal and valid if a court or administrative order establishes that it arises . . . ."[25] In *Whyte*, the Third Judicial District Court interpreted this to mean that a marriage is not valid *until* such order is entered.[26]

The lawsuit alleged that, as of September 5, 1991 (the date of the accident), Whyte was the common law spouse of the insured. The insurance carrier filed a motion for summary judgment. Because the statute requires determination of a marriage either during the relationship or within one year following its termination, the District Court granted the motion on the ground that the marriage was not valid until entry of a court or administrative order. Thus, the plaintiff was not the "spouse" of the insured at the time of the accident because no such order had been entered as of that time. The District Court believed there was an insufficient showing of "good cause" for entry of a *nunc pro tunc* order.[27]

> ***"[T]he determination of the existence of a common law marriage should be made by looking at the entire relationship."***

On appeal, the Supreme Court held that the "plain language" of section 30-1-4.5 "clearly directs that a court or administrative order may establish that a marriage was previously entered into and that it was lawful as of that time."[28] The Court discussed the legislative history of the statute, indicating that it was a codification of common law principles. "Under the common law and under state statutes like Utah's that adopt common law principles, the effect of a court order has always been to formally recognize a lawful marriage that began before the order was entered and existed from that time until terminated . . . ."[29] Therefore, no "good cause" need be shown for entry of an order determining that a common law marriage existed at some prior time.

It appears from the Supreme Court's analysis that the determination of the existence of a common law marriage should be made by looking at the entire relationship. If all of the criteria identified in the statute simultaneously existed at some point during the relationship, a common law marriage existed as of that moment, even though an adjudication so determining necessarily comes later.

Pitfalls

Whyte was remanded on November 2, 1994 for a determination whether a common law marriage existed on the date of the accident. The opinion is silent as to whether the relationship between the plaintiff and his alleged common law wife still existed at the time of remand.[30] If it did not, it might be impossible for "a court or administrative order" to be entered "within one year following the termination" of the relationship at issue, depending on when the parties' breakup occurred.

In *Bunch v. Englehorn*,[31] the plaintiff filed a complaint for divorce in May 1991, alleging common law marriage. The trial court dismissed the complaint at trial in June 1993. The court ruled that no court or administrative order establishing the existence of a marriage had been entered within the one-year time frame set by the statute and, therefore, the court lacked subject matter jurisdiction.[32]

On appeal, the Utah Court of Appeals agreed with the trial court. Again using the "plain language" analysis, the court affirmed the trial court's decision. The mere filing of a complaint for divorce or a petition for adjudication of common law marriage does not comply with the statutory requirements. The order determining that a common law marriage existed must be entered within one year of the date the relationship terminated.

The Court of Appeals briefly addressed the constitutional issues raised by the appellant: "If a trial court were to enter a judgment denying a common-law mar-

[23] *Id.*

[24] *Whitenhill v. Kaiser Permanente*, 940 P.2d 1129, 1132 (Colo. App. 1997).

[25] UTAH CODE ANN. § 30-1-4.5(1).

[26] 885 P.2d 791, 793 (Utah 1994).

[27] *See Whyte*, 885 P.2d at 792. As the Supreme Court explained, a *nunc pro tunc* order is entered by a court but by operation of law is treated as though it were legally entered at a prior time. A court requires a showing of good cause before entry of such an order. *See id.* at 793.

[28] *Id.*

[29] *Id.*

[30] To the best recollection of counsel for the insurance carrier, the relationship between these parties had terminated at the time of remand. Interview with Tim D. Dunn (Mar. 26, 1998).

[31] *Bunch v. Englehorn*, 906 P.2d 918 (Utah Ct. App. 1995).

[32] *See id.* at 919.

riage within one year of separation, and that judgment were reversed on appeal and the matter remanded, the parties might be denied a reasonable opportunity to comply with the plain meaning of the statute."[33] Obviously, a complaint can be filed within one year of the relationship's termination, as it would be in any other type of case with a short statute of limitations. The difference here, however, is that an *adjudication* must be made within that one year period. Such a requirement seems especially onerous because parties and counsel have little control over the court's calendar.

This conundrum was not raised in *Whyte*, nor was it addressed by the Court of Appeals in *Hansen*. It presents an important issue for practitioners, however. Filing a complaint and obtaining an adjudication within one year of a relationship's termination requires that clients be aware enough to seek legal advice in a timely manner, and that lawyers be diligent and cautious in representing clients with possible common law marriage claims. Finally, courts should make special arrangements to schedule the necessary evidentiary hearings in common law marriage cases. One solution in the divorce context is bifurcation of proceedings, which is already widely used in traditional divorce cases. The trial court could "fast track" the adjudication of the existence of a common law marriage and enter its order within the time required by the statute, reserving issues of property division, support, child custody, and the like for later hearing.

Conclusion

Utah's common law marriage statute promises to provide many "strange cases" for development by the state's appellate courts. This article is intended to alert practitioners to some of the issues that already exist. Careful analysis of the facts and circumstances surrounding a client's common law marriage claim will help to avoid future problems in practice.

[33] *Id.* at 921, n.3.

PRACTICE POINTERS

Resources and Checklists for Lawyers Unfamiliar with Domestic Practice

by Cameron S. Denning with assistance from B. L. Dart, Sharon A. Donovan, and Lori W. Nelson

Learning About Domestic Law Practice

Domestic law is a complicated area of practice. Most domestic law practitioners are happy to answer questions, but cannot do so unless they are asked. Various organizations have attempted to set up "mentoring" programs, but none was successful because of lack of participation by "mentorees."

Lawyers naturally dislike admitting that they don't know something, but as with any practice area, Rule 1.1 (Competence) of the Rules of Professional Conduct requires that when a lawyer is asked to do something beyond the scope of his or her competence, the lawyer must either refer the case to someone with experience in the field, or associate with or consult such a person. The following list of resources is intended to provide lawyers unfamiliar with the domestic practice area access to experienced family law practitioners:

- FAMILY LAW SECTION, Utah State Bar. The Section offers a monthly Continuing Legal Education session and, several times annually, a more comprehensive CLE program. Additionally, many Section members are willing to talk with practitioners about family law. The Section's chairperson is Harry Caston.
- AMERICAN ACADEMY OF MATRIMONIAL LAWYERS. The AAML is a national organization of practitioners experienced in family law. The president of the Mountain States Chapter is David "Sandy" Dolowitz.
- LEGAL AID SOCIETY. The Legal Aid Society has prepared a comprehensive set of forms that are very helpful. In conjunction with the Utah State Bar's Pro Bono program, any lawyer who agrees to represent a divorce client on a pro bono basis will be given the forms and assigned a Legal Aid Society attorney experienced in domestic law to assist in the prosecution of the case. Contact Lorrie Lima, Utah State Bar Pro Bono Coordinator, at 297-7049 for more information.

Getting Things Done in Domestic Cases

Because family law is procedurally different from other types of practice, attorneys who practice other types of law may find it difficult to get things done. The first thing to know is that there are two "tiers" of judges in family law cases–the domestic relations commissioners and the District Court judges. Most matters must be heard by or submitted to a commissioner for "recommendation" before a judge will enter an order or decree.

Additionally, certain documents must be submitted to the court in order to finalize a domestic matter. If the documents submitted are incomplete, the judge will not sign and enter the Decree of Divorce. Instead, it will be returned to the lawyer for resubmission with all required accompanying documents.

Finally, Utah Code of Judicial Administration Rule 4-501 does not apply to proceedings before domestic relations commissioners. Instead, hearings must be scheduled with the assigned commissioner's clerk, and times lines are often shortened.

Another thing to be aware of is that the mandatory mediation requirement enacted in the most recent legislative session applies to all civil cases, including domestic cases. For an exposition of the requirements of mandatory mediation, see the article in this issue by Commissioner Thomas N. Arnett and Heidi Nestel.

The following checklists will help practitioners who do not ordinarily practice domestic law to effectively navigate the two-tier system for simple matters. As noted above, we strongly recommend association or consultation with an experienced domestic lawyer even for simple matters, and it is virtually a requirement in more complicated cases.

• Stipulated Divorce

The following documents must be submitted to the domestic relations commissioner assigned to the case. The commissioner will sign and forward the appropriate documents to the assigned judge.

1. Complaint, Summons and Proof of Service or Acceptance of Service (if not already filed with the court). When you have filed the Complaint and obtained the case number and the names of the assigned judge and commissioner, use them on all subsequent pleadings and documents. You must submit a completed vital statistics form with any Complaint filed in a divorce case.

2. Stipulation, signed by both parties and their counsel. If the signer is not represented by counsel, have their signature notarized.

3. Proposed Findings of Fact and Conclusions of Law, with language that

Ms. Denning, Mr. Dart, Ms. Donovan, and Ms. Nelson are all affiliated with the Salt Lake City law firm Dart, Adamson & Donovan.

parallels the language of the Stipulation.

4. Proposed Decree of Divorce, with language that likewise parallels the Stipulation, and approved "as to form" by opposing counsel or party.

5. Affidavit of Jurisdiction (Domicile) and Grounds.

6. Certificates of attendance of Divorce Education Course from both parties, or motion and supporting affidavit as to why requirement of course should be waived.

7. Child support worksheet.

8. Most recent tax return(s) and year-to-date pay information (W-2 or recent pay stub) for both parties.

9. Affidavit setting forth reasons for waiving the ninety-day interlocutory period.

10. Motion to Waive Interlocutory Period and appropriate proposed Order.

11. Statement of Compliance.

The proposed Findings of Fact and Conclusions of Law and the Decree should have the following signature block for the Court:

RECOMMENDED: BY THE COURT:

_____ _____

Domestic Relations Commissioner District Judge

• Default Divorce

The following documents should be prepared and forwarded to the domestic relations commissioner in the same manner as for a stipulated divorce:

1. Complaint and Acceptance of Service, Appearance and Waiver. File the Complaint first, as above.

2. Proposed Findings of Fact and Conclusions of Law with language paralleling the prayer of the Complaint.

3. Proposed Decree of Divorce.

4. Certificates of attendance of Divorce Education Course from both parties, or motion and supporting affidavit as to why requirement of course should be waived, either for the defaulting party or for both parties.

5. Child support worksheet.

6. Most recent tax return(s) and year-to-date pay information (W-2 or recent pay stub) for both parties, or affidavit from non-defaulting party as to unavailability of income information from defaulting party.

7. Affidavit setting forth reasons to waive the ninety-day interlocutory period.

8. Motion to Waive Interlocutory Period and appropriate proposed Order.

9. Motion for Entry of Default.

10. Statement of Compliance.

• Adoption

Adoption matters are not referred to a domestic relations commissioner. Instead, all necessary items are submitted directly to the District Court judge for hearing and determination.

File the following documents with the court for a stepparent adoption:

1. Petition for adoption of minor child.

2. Natural Father's Consent to Adoption, Acknowledgment of Service of Summons, and Petition and Waiver.

3. Adoption Agreement and Consent to Adoption for the natural mother and for the stepfather.

4. Proposed Findings of Fact and Conclusions of Law.

5. Proposed Decree of Adoption.

For a third-party adoption, prepare the following documents:

1. Petition for adoption of minor child.

2. Natural Mother's Consent to Adoption, Acknowledgment of Service of Summons, and Petition and Waiver. The natural mother's consent must be taken in the presence of the judge.

3. Natural Father's Consent to Adoption, Acknowledgment of Service of Summons, and Petition and Waiver.

4. Proposed Findings of Fact and Conclusions of Law.

5. Proposed Order, Judgment and Decree of Adoption of Minor Child.

• Determination of Paternity

Preliminary matters, such as motions for temporary orders or for genetic testing, are decided by the commissioners. The remaining matters are submitted to the District Court judge for determination.

The following documents must be prepared:

1. Complaint for Determination of Paternity.

2. Proof of Service.

3. Motion and proposed Order for genetic tests, if necessary.

4. Motion for temporary orders, if needed, as well as appropriate proposed orders.

5. Notice of Results of Genetic Tests, if necessary.

6. Certificate of Readiness for Trial.

7. Proposed Order, Judgment and Decree of Paternity.

• Motions for Temporary Orders

Take any motions for temporary orders to the assigned domestic relations commissioner's downstairs clerk. The clerk will provide a date and time for hearing.

Temporary restraining orders may be granted on an ex parte basis, without notice to the other party, pursuant to Utah Rule of Civil Procedure 65A. As in other cases, you must make a showing of irreparable harm, and you must submit an affidavit adequately setting forth the reasons that notice should not be required.

Holme Roberts & Owen LLP

is pleased to announce that

Pattie S. Christensen
Jessica L. Harshbarger
and
E. Blaine Rawson

have become associates with the firm

Introducing More Salt Lake City Resources for Our Clients

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Greggory J. Savage
Steven P. Young

of counsel:
Honorable Frank E. Moss

special counsel:
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Banking and Financial; Commercial Law and Securities; Community Resources; Education Law; ERISA; Emerging Business; Environmental; Federal Income, State and Local Tax; Financial Restructuring, Corporate Reorganization and Bankruptcy; Health Care; Hotels and Resorts; Individuals, Trusts and Family Businesses; Intellectual Property; International; International Tax; Labor and Employment; Land Use and Public Law; Litigation; Natural Resources; Product Liability and Personal Injury; Property Tax; Public Finance; Real Estate; Religious Organizations; Sports Law; Technology Business

Holme Roberts & Owen LLP is an international law firm with offices in
Salt Lake City Denver Boulder Colorado Springs London

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Discipline Corner

SUSPENSION

On April 28, 1998, the Honorable Stephen L. Henroid, Third Judicial District Court entered an Order of Discipline: Suspension, suspending William James Denver from the practice of law for two years. The suspension shall commence from the date of the April 1, 1998, Minute Entry. Denver was suspended for violating the terms of an order of probation.

ORDER OF REPRIMAND AND PROBATION

On April 22, 1998, the Honorable Sandra N. Peuler, Third Judicial District Court entered an Order of Reprimand and Probation reprimanding David L. Sanders and placing him on probation for violation of Rules 1.2 (Scope of Representation), 1.3 (Diligence), 1.4 (Communication), 1.5 (Fees), 1.15 (Safekeeping Property (for failure to keep trust account records)), 1.16 (Declining or Terminating Representation), 3.2 (Expediting Litigation), 5.3 (Responsibilities Regarding Nonlawyer Assistants), 5.4 (Unauthorized Practice of Law), and 8.4(a) and (d) (Misconduct) of the Rules of Professional Conduct and Rule 9(b) Disability. Sanders was also ordered to attend the Utah State Bar Ethics School or an equivalent program in California where Sanders now practices. The Order was based on a Stipulation Regarding Discipline by Consent entered into by Sanders and the Office of Professional Conduct.

On December 7, 1996, the OPC received a letter from the Eighth Judicial District Court reporting that Sanders had filed an Appearance of Counsel in two criminal cases filed in the Eighth District/Vernal Department and thereafter failed to appear.

A Preliminary Hearing was scheduled for the two cases on November 8, 1996, at which neither Sanders nor his clients appeared. A Bench Warrant was issued for the defendants. Before those warrants were served both defendants appeared in court on November 12, 1996 and requested that the warrants be recalled. The defendants indicated to the court that they had not been notified by Sanders about the Preliminary Hearing date and that they had tried several times to contact Sanders, but had been unable to speak with him. On November 16, 1996, the court issued an Order to Show Cause for Sanders to appear in court on December 3, 1996, to show cause why he should not be held in contempt of court for failure to represent the defendants. On December 3, 1996, Sanders failed to appear and on December 3, 1996, the court found Sanders in contempt of court and ordered a refund to the court of the retainer fee Sanders had received from his clients. After the court found Sanders in contempt, the court instructed the clerk of the Eighth District to notify the OPC of Sanders's actions.

Sanders, in his relocation to California, abandoned his clients and failed to comply with the Eighth District Court's Orders. On August 7, 1997, the OPC requested in writing that Sanders produce his trust account records and an accounting of his use of the client's funds. Sanders has stated that he has been unable to locate his trust account records for his Utah practice.

On December 1, 1996, the OPC received a complaint from a client alleging that Sanders had been his attorney in a criminal matter and that in October, 1995, he had asked Sanders to file a notice to show cause regarding his former wife's violations of visitation rights. Sanders owed the client a refund of $1,465 for a previous matter and refunded $1,000 to the client. He retained $465 to handle the show cause matter. Sanders failed to file the necessary pleadings, and the client's wife initiated the filing. Sanders represented the client at the first hearing on January 9, 1996. The court ordered that the client's former wife provide certain documents by a subsequent hearing, to be held no later than February, 1996. Sanders failed to schedule a hearing date, although the client repeatedly asked him to do so. In September 1996, the client's former wife finally set the hearing. When the client contacted Sanders's office, he was informed that Sanders had closed his Utah office and was moving to California. Sanders had in fact moved to Orange County, California abandoning his clients. Sanders promised to refund the $465 to his client, so he could afford to hire another attorney to represent him. Sanders failed to refund the $465 timely, and the client had to appear in September and November 1996 pro se. Sanders ultimately did refund the $465 to his client.

On March 17, 1997, the OPC received a complaint from a client alleging that on March 3, 1997, the client appeared at a pretrial hearing where Sanders failed to appear. On March 17, 1997, Judge Noel called the OPC and reported that Sanders had failed to show up for the pretrial hearing, resulting in a default and the trial date being stricken. Before the pretrial hearing, the client had not spoken to Sanders for months but had been informed by Sanders's paralegal, Joe Jiminez, on the Friday before the Monday hearing, that everything was fine in her case. The client expected and assumed that Sanders would be present at the pretrial hearing.

In 1996, when Sanders moved to California, Joe Jiminez was left in charge of receiving Sanders's mail and forwarding it to him in California. On April 16, 1997, the OPC sent a letter to Sanders requesting a response to the client's allegations. In his response, Sanders stated that throughout the han-

dling of the client's matter, Joe Jiminez had all contact with the client except for a few occasions when Sanders had met her. Sanders said that he had moved to California but would return to Utah when he got notice of a hearing. The Court had sent notice to the address given to the Court as Sanders's address. Sanders said that he had relied on Joe Jiminez to forward mail to him in California.

As a condition of his probation, Sanders must remain on probation until all terms of the stipulation are fulfilled. If a Screening Panel of the Ethics and Discipline Committee votes that there is probable cause to take formal action for actions between October 20, 1997 through December 31, 1998, Sanders's probation will be revoked and he would be required to serve a one-year suspension. Within thirty days of Judge Reuler's order, Sanders must submit a declaration under penalty of perjury stating that since he will be on inactive status in Utah, he will not be representing, and is not representing, clients in Utah. Included in that declaration will be a statement by Sanders that he is not holding client funds from his practice in Utah and that he has not misappropriated client funds in Utah.

Sanders may be subject to reciprocal discipline in California, where he currently practices.

West Releases Illustrated Medical Dictionary

Invaluable Asset in Personal Injury Cases

Attorneys can increase their medical knowledge to better protect their clients' rights in personal injury cases thanks to the *Attorney's Illustrated Medical Dictionary* from West Group. This comprehensive reference features more than 30,000 definitions written in plain language that's easy to understand and use in a courtroom setting and more than 3,500 illustrations to help readers comprehend basic medical concepts more clearly.

The *Attorney's Illustrated Medical Dictionary* features a common sense pronunciation guide to support discussion of unfamiliar terms. Illustrations and definitions are color coordinated for ease of use. Readers will also enjoy the convenience of familiar features from standard dictionaries, such as synonyms, cross-references to related information and colored letter tabs for fast location of terms.

Another distinguishing feature of the *Attorney's Illustrated Medical Dictionary* is its focus; it was written to be understood by an attorney without a medical background, rather than a medical student or doctor. And its team of distinguished medical lexicographers and illustrators have created a resource free from confusing jargon and graphics that could overshadow the medical definitions. The result is a clear, concise resource that will prove invaluable in cases involving personal injury and other medical concerns.

The team of authors boasts an impressive wealth of medical knowledge. Ida G. Dox is a medical communications specialist formerly associated with Georgetown University School of Medicine; Gilbert M. Eisner is a clinical professor of medicine at both Georgetown and George Washington University; June L. Melloni is an educational consultant and evaluator of medical school programs; and B. John Melloni is co-director of the Archives of Medical Visual Resources at The Francis A. Countway Library of Medicine, Harvard University Medical School.

The *Attorney's Illustrated Medical Dictionary* is a hard bound desk reference available for $145 per copy. West also offers *Medical Information System for Lawyers*, 2d by J. Stanley McQuade, another reference that helps readers develop background knowledge of medical concepts, for $265 per two-volume set. For ordering information, call West Group at 1-800-221-9428, or visit the online catalog at *www.westgroup. com.*

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

PUBLIC NOTICE

REAPPOINTMENT OF INCUMBENT PART-TIME UNITED STATES MAGISTRATE JUDGE

The current term of the following part-time United States Magistrate Judge serving the United States District Court for the District of Utah will expire as indicated: F. Bennion Redd, Monticello, Utah, March 28, 1999. The Court is required by law to establish a panel of citizens to consider the reappointment of a magistrate judge to a new four-year term or such other term as provided by law.

The duties of a part-time magistrate judge include the conduct of preliminary proceedings in criminal cases, the trial and disposition of certain misdemeanor cases, the handling of civil matters referred by the Court, and the conduct of various pre-trial matters as directed by the Court.

Comments from members of the Bar and the public are invited as to whether an incumbent magistrate judge should be recommended by the panel for reappointment by the Court. Comments should be directed to:

Markus B. Zimmer
Clerk of Court
United States District Court
Suite 150
Frank E. Moss United States Courthouse
350 South Main Street
Salt Lake City, Utah 84101

Comments must be received no later than Friday, August 14, 1998.

Ethics Opinions Available

The Ethics Advisory Opinion Committee of the Utah State Bar has compiled a compendium of Utah ethics opinions that are now available to members of the Bar for the cost of $20.00. Sixty-nine opinions were approved by the Board of Bar Commissioners between January 1, 1988 and April 17, 1998. For an additional $10.00 ($30.00 total) members will be placed on a subscription list to receive new opinions as they become available during 1998.

ETHICS OPINIONS ORDER FORM

Quantity		Amount Remitted
_____	Utah State Bar Ethics Opinions	_____ ($20.00 each set)
_____	Ethics Opinions/ Subscription List	_____ ($30.00 both)

Please make all checks payable to the Utah State Bar
Mail to: Utah State Bar Ethics Opinions, ATTN: Maud Thurman
645 South 200 East #310, Salt Lake City, Utah 84111.

Name _____

Address _____

City _____ State _____ Zip _____

Please allow 2-3 weeks for delivery.

Supreme Court Seeks Attorney To Serve On Evidence Advisory Committee

The Utah Supreme Court is seeking applicants to fill a vacancy on the Advisory Committee on the Rules of Evidence. Each interested attorney should submit a resume and a letter indicating interest and qualifications to Brent M. Johnson, P.O. Box 140241 Salt Lake City, Utah 84114-0241. Applications must be received no later than July 31, 1998. Questions may be directed to Mr. Johnson at (801) 578-3800.

Membership Corner

CHANGE OF ADDRESS FORM

Please change my name, address, and/or telephone and fax number on the membership records:

Name (please print) _____ Bar No. _____

Firm _____

Address _____

City/State/Zip _____

Phone _____ Fax _____ E-mail _____

All changes of address must be made in writing and NAME changes must be verified by a legal document. Please return to: UTAH STATE BAR, 645 South 200 East Salt Lake City, Utah 84111-3834; Attention: Arnold Birrell. Fax Number (801) 531-0660.

Litigation Section's Trial Academy 1998 Part Four: "Expert Witnesses"

This biennial program of demonstrations and lectures by a state and federal judge and two teams of experienced attorneys is considered by many to be the most useful litigation CLE offered in the state.

Wednesday, July 22, 1998
6:00 to 8:00 p.m.
Utah Law & Justice Center
(Registration at 5:30)

The fourth session of the six-part Trial Academy will be held on July 22nd at the Utah Law & Justice Center. The subject will be "Expert Witnesses" and the faculty will lecture and demonstrate the proper techniques for a variety of issues confronting the litigator in the examination of witnesses:

- Direct examination of experts
- Cross examination of experts
- Motions in limine
- Effective trial notebooks
- *Daubert* and all that–what does it mean?
- Qualifying the expert witness
- Federal and state civil and evidence rules
- Using authoritative literature
- And more . . . .

The faculty for this session will include Rocky Anderson (Anderson & Karrenberg), Richard Burbidge (Burbidge & Mitchell), David Jordan (Stoel Rives), Judge Michael Murphy (Tenth Circuit Court of Appeals) and Judge Pat B. Brian (Third District Court). As usual, Francis J. Carney (Suitter Axland) will lead the program. It is *not* necessary to have attended the prior sessions of the Trial Academy in order to fully benefit from the program.

Two hours of CLE credit will be granted. (The program qualifies for NLCLE credit for new members.) The cost is $25 for Litigation Section members and $35 for non-members. Pre-registration is *strongly* recommended, as seating is limited and the program is usually fully attended. To register, please send your payment to UTAH STATE BAR, CLE DEPT, 645 SOUTH 200 EAST, #310, SLC, UT, 84111 or call Monica Jergensen, CLE Administrator, at 297-7024.

Volunteer Lawyers Wanted for the Domestic Violence Victims' Clinic

Volunteer lawyers are needed to participate in the Domestic Violence Victims' Clinic ("DVVC"). DVVC, which began in Salt Lake City in August, 1994, is a joint effort of the Third Judicial District Court, the Delivery of Legal Services Committee of the Utah State Bar, Utah Legal Services, and the Legal Aid Society of Salt Lake. The project's main goal is for volunteer lawyers to help pro se victims resolve domestic violence issues. DVVC volunteers have provided necessary legal assistance to thousands of people in the past four years and have become a welcome addition to our community.

Domestic violence is a problem we cannot ignore. In the Salt Lake area, the Legal Aid Society assists approximately 1,000 clients a year in obtaining protective orders under the Cohabitant Abuse Act. Legal Aid provides this assistance free of charge to anyone, regardless of income. But many more victims of domestic violence appear daily in the Third District Court attempting to obtain protective orders on a pro se basis. These litigants need help in getting through the legal process. DVVC volunteers provide this help by entering a special appearance on behalf of the victims for the sole purpose of representing victims who would otherwise be appearing on their own.

Volunteer lawyers commit to being present at the regularly scheduled protective order hearings before the Domestic Relations Commissioners in the new Matheson Courthouse. These hearings occur four times a day, 9 and 10 a.m., and 2 and 3 p.m., Monday through Thursday. Volunteers typically cover either the morning or afternoon hearings. Lawyers may volunteer as often as they choose; several volunteer once a month.

Utah Legal Services provides malpractice insurance to cover volunteer lawyers when they participate in the project. All volunteers receive training before actually participating in DVVC. **The next free training will take place on WEDNESDAY, JULY 8, from 12 noon to 2:00 p.m., at the Law & Justice Center. Commissioner Thomas Arnett and Joanna Sagers of the Legal Aid Society will conduct the training. Please register by calling Lorrie Lima at the Utah State Bar at 531-9077.**

CLE Discussion Groups Sponsored by Solo, Small Firm & Rural Practice Section

Utah Law & Justice Center
12:00 to 1:00 p.m.

July 16 – Arbitration & Mediation
Aug 20 – Title Insurance
Sept 17 – Social Security & Elderly Law
Oct 15 – Bankruptcy
Nov 19 – Foreclosure–Judicial & Non-Judicial
Dec 17 – Workman's Compensation Claims & Defenses

Reservations in advance to Amy (USB) (801) 297-7033

UNITED STATES BANKRUPTCY COURT DISTRICT OF UTAH

POSITION ANNOUNCEMENT

Position: Second Law Clerk to the Honorable Judith A. Boulden, United States Bankruptcy Judge

Starting Salary: $38,593 (JSP 11) to $46,254 + (JSP 12) or JSP 13, depending on qualifications

Starting Date: Open until filled

Application Deadline: July 17, 1998

Qualifications: 1) One year of experience in the practice of law, legal research, legal administration, or equivalent experience received after graduation from law school. Substantial legal activities while in military service may be credited on a month-for-month basis whether before or after graduation, **or**

2) A recent law graduate may apply provided that the applicant has:

a) graduated within the upper third of his/her class from a law school on the approved list of the A.B.A. or the A.A.L.S.; or

b) served on the editorial board of the law review of such a school or other comparable academic achievement.

Appointment: The selection and appointment will be made by the United States Bankruptcy Judge. Preference may be given to the applicants who have experience in the practice of law, who have taken bankruptcy related classes or who have commensurate experience, and who have computer skills. **Applicants should send resume and transcript only. Do not provide a writing sample and references until requested.**

Applications should be made to: Judge Judith A. Boulden, United States Bankruptcy Court, 350 South Main Street, Room 330, Salt Lake City, Utah 84101

EQUAL OPPORTUNITY EMPLOYER

Benefits Summary: Employees under the Judicial Salary Plan are entitled to:

- Annual grade or within-grade increases in salary, depending on performance, tenure and job assignment.
- Up to 13 days of paid vacation per year for the first three years of employment. Thereafter, increasing with tenure, up to 26 days per year.
- Choice of federal health insurance programs.
- Paid sick leave of up to 13 days per year.
- Ten paid holidays per year.
- Credit in the computation of benefits for prior civilian or military service.

Equal Employment Opportunity: The court provides equal employment opportunity to all persons regardless of their race, sex, color, national origin, religion, age or handicap.

About the Court: The United States Bankruptcy Court, District of Utah, is a separately-administered unit of the United States District Court. The court is comprised of three bankruptcy judges and serves the entire state of Utah. The Clerk's office provides clerical and administrative support for the court, which conducts hearings daily in Salt Lake City, and monthly in Ogden.

CLE CALENDAR

1998 ANNUAL CONVENTION

Date: July 1 – July 4, 1998
Place: Sun Valley Resort, Sun Valley Idaho
CLE Credit: 12 HOURS, WHICH INCLUDES 3 IN ETHICS

*Please use your official Annual Convention registration form to register for this program. If you did not receive one, please call the CLE Dept., (801) 531-9095.

ALI-ABA SATELLITE SEMINAR: LITIGATION CASE MANAGEMENT FOR LEGAL ASSISTANTS

Date: Thursday, July 16, 1998
Time: 9:00 a.m. to 4:0 p.m.
Place: Utah Law & Justice Center
Fee: $249.00 (To register, please call 1-800-CLE-NEWS)
CLE Credit: 6 HOURS

TRIAL ACADEMY IV: EXPERT WITNESSES

Date: Wednesday, July 22, 1998
Time: 6:00 p.m. to 8:00 p.m. (Registration begins at 5:30 p.m.)
Place: Utah Law & Justice Center
Fee: $25 for Litigation Section members
$35 for Non-Section members
CLE Credit: 2 HOURS CLE/NLCLE

4th ANNUAL SHAKESPEARE & CLE SERIES: EVERYTHING YOU'VE WANTED TO KNOW ABOUT LITIGATION BUT WERE AFRAID TO ASK

Date: Friday, August 14, 1998
Time: 1:00 p.m. to 4:00 p.m.
Place: Broadcast live from Southern Utah University to several sites around the state! *(Please watch your mail for a more detailed brochure.)*
Fee: $80 before July 31, 1998
$95 after July 31, 1998
CLE Credit: 3 HOURS

21st ANNUAL SECURITIES SECTION WORKSHOP

Date: Friday, August 21 – Saturday, August 22, 1998
Place: Sun Valley Resort, Sun Valley Idaho
Fee: To be determined
CLE Credit: 8 HOURS

Those attorneys who need to comply with the New Lawyer CLE requirements, and who live outside the Wasatch Front, may satisfy their NLCLE requirements by videotape. Please contact the CLE Department (801) 531-9095, for further details.

Seminar fees and times are subject to change. Please watch your mail for brochures and mailings on these and other upcoming seminars for final information. Questions regarding any Utah State Bar CLE seminar should be directed to Monica Jergensen, CLE Administrator, at (801) 531-9095.

CLE REGISTRATION FORM

TITLE OF PROGRAM — FEE

1. _____ _____

2. _____ _____

_____

Make all checks payable to the Utah State Bar/CLE — Total Due

_____
Name — Phone

_____
Address — City, State, Zip

_____ _____
Bar Number — American Express/MasterCard/VISA — Exp. Date

_____
Signature

Please send in your registration with payment to: **Utah State Bar, CLE Dept., 645 S. 200 E., S.L.C., Utah 84111.** The Bar and the Continuing Legal Education Department are working with Sections to provide a full complement of live seminars. Please watch for brochure mailings on these.

Registration Policy: Please register in advance as registrations are taken on a space available basis. Those who register at the door are welcome but cannot always be guaranteed entrance or materials on the seminar day.

Cancellation Policy: Cancellations must be confirmed by letter at least 48 hours prior to the seminar date. Registration fees, minus a *$20 nonrefundable fee,* will be returned to those registrants who cancel at least 48 hours prior to the seminar date. No refunds will be given for cancellations made after that time.

NOTE: It is the responsibility of each attorney to maintain records of his or her attendance at seminars for purposes of the 2 year CLE reporting period required by the Utah Mandatory CLE Board.

CLASSIFIED ADS

RATES & DEADLINES

Bar Member Rates: 1-50 words — $20.00 / 51-100 words — $35.00. Confidential box is $10.00 extra. Cancellations must be in writing. For information regarding classified advertising, please contact (801) 297-7022.

Classified Advertising Policy: No commercial advertising is allowed in the classified advertising section. For display advertising rates and information, please call (801) 486-9095. It shall be the policy of the Utah State Bar that no advertisement should indicate any preference, limitation, specification or discrimination based on color, handicap, religion, sex, national origin, or age.

Utah Bar Journal and the Utah State Bar do not assume any responsibility for an ad, including errors or omissions, beyond the cost of the ad itself. Claims for error adjustment must be made within a reasonable time after the ad is published.

CAVEAT — The deadline for classified advertisements is the first day of each month prior to the month of publication. (Example: May 1 deadline for June publication). If advertisements are received later than the first, they will be published in the next available issue. In addition, payment must be received with the advertisement.

POSITIONS AVAILABLE

Salt Lake Firm seeking full time Tax Attorney, recent law school graduate. Send a resume to Maud C. Thurman, Utah State Bar, 645 South 200 East, Confidential Box #45, Salt Lake City, Utah 84111.

Parsons Behle & Latimer is seeking a **real estate and finance associate.** Ideal candidate will have three to five years of significant real estate and financial transaction experience. Applicants must be a member in good standing of the Utah State Bar or be able to become a member within a 12 month period. Excellent written and verbal skills are required. Send resume to: Robyn Marrelli, Director of Human Resources, Parsons Behle & Latimer, P.O. Box 45898, Salt Lake City, Utah 84145-0893, or fax to (801) 563-6111.

Salt Lake City business and estate planning firm seeks attorney with 2-3 years business and estate planning experience. Position involves significant client contact and excellent written and verbal communication skills are required. Inquiries will be kept confidential. Please send resume and references to: Maud C. Thurman, Utah State Bar, 645 South 200 East, Confidential Box #49, Salt Lake City, UT 84111.

POSITIONS SOUGHT

ENTERTAINMENT LAW: Denver-based attorney licensed in Colorado and California available for consultant or of-counsel services. All aspects of entertainment law, including contracts, copyright and trademark law. Call Ira C. Selkowitz @ (800) 550-0058.

ATTORNEY: Former Assistant Bar Counsel. Experienced in attorney discipline matters. Familiar with the disciplinary proceedings of the Utah State Bar. Reasonable rates. Call Nayer H. Honarvar, 39 Exchange Place, Suite #100, Salt Lake City, UT 84111. Call (801) 583-0206 or (801) 534-0909.

CALIFORNIA/UTAH LAWYER . . . Attorney has offices in both Southern California and Salt Lake City. Available for court appearances and other work in California. Call George L. Wright @ (801) 322-3000.

OFFICE SPACE/SHARING

LARGE CORNER OFFICE available. Small downtown estate planning firm located in classic landmark building. Excellent decor, including wood floors and large windows. Digital phones, fax, copier, small and large conference rooms and receptionist available. Also, free exercise facilities with showers. Prefer attorney or CPA. Call (801) 366-9966.

Deluxe office space for one attorney. Avoid the rush hour traffic. Share with three other attorneys. Facilities include large private office, large reception area, parking immediately adjacent to building, computer networking capability, law on disc, fax, copier, telephone system, kitchen facilities. 4212 Highland Drive. Call (801) 272-1013.

Restored Mansion 174 East South Temple: available for lease two offices (272 square feet and 160 square feet) with conference room, reception, work room (total 414 square feet), lavatory, kitchen, storage, off-street parking. Fireplaces, hardwood floors, stained glass, antique woodwork and appointments. $1100 per month. Call 539-8515.

Exchange Place Historical Bldg., located half block from new courts complex, has 844 sq. ft. office space, includes reception area, small conference room for $975.00 month, and a 350 sq. ft. space for $380.00. Individual offices available in law firm which includes receptionist, conference room, fax, copier, and library at $500.00 to $1300.00. Parking available. Contact Joanne Brooks 534-0909.

Six attorney office has immediate space available downtown Salt Lake City three blocks from the new courthouse. Easy freeway access. Free parking. Large reception area, conference room, secretarial space, copier, fax, new phone system and break room. 254 West 400 South, Suite 320. Call (801) 539-1708 or (801) 532-0827.

Office Space/Sharing: New Deluxe office space for six attorneys in Provo Riverbottoms across from Jamestown. Share receptionist/billing

secretary, computer networking, new telephone system, fax, computer software, Westlaw, etc. Facilities include six attorney offices, two conference rooms, two file rooms, two secretarial areas, kitchen and reception area. Please contact Darwin Fisher @ (801) 373-9606.

Established association of five attorneys has an opening for another attorney. Completely furnished office, including law on disk and bound Utah Reports from Vol. 1. Close to courthouse. Low overhead. Call (801) 355-5300.

Convenient office space available for one, two or three attorneys. Share with three other attorneys. Facilities include private office, reception area, conference room, receptionist, parking adjacent to building. Fax, copier, telephone system and kitchen facilities can be available. 1121 East 3900 South, Bldg. C, Suite 200. Call (801) 262-0669.

Ideal law firm offices suites available from 1,800 – 11,000 square feet. Located in the beautifully restored Judge Building downtown. Suites offer a great location within walking distance of State and Federal Courts, free exercise facilities, on site storage and management, and very competitive lease rates. Call (801) 596-9003.

Professional office space–quiet Sugarhouse setting–great access. Shared reception and conference room–phone, voice mail, fax & copier available. $450.mo. Call: (801) 467-5300.

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SEX CRIMES/MURDER/CHILD ABUSE: Complete forensic assessment of child and adult statement evidence of witnessed criminal events. Identify weakness of investigations and areas of contamination. Bruce Giffen, M.Sc. Evidence Specialist/Trial Consultant. American Psychology-Law Society. (801) 485-4011.

LUMP SUMS CASH PAID For Remaining Payments on Seller-Financed Real Estate Notes & Contracts, Business Notes, Structured Settlements, Annuities, Inheritances In Probate, Lottery Winnings. Since 1992, www.cascadefunding.com. **CASCADE FUNDING, INC. 1 (800) 476-9644.**

APPRAISALS: CERTIFIED PERSONAL PROPERTY APPRAISALS/COURT/RECOGNIZED–Estate Work, divorce, Antiques, Insurance, Fine Furniture, Bankruptcy, Expert Witness, National Instructor for the Certified Appraisers Guild of America. Twenty years experience. Immediate service available, Robert Olson C.A.G.A. (801) 580-0418

Electronic trials, arbitrations, mediations [$500/day + expenses]; Discovery Management & Litigation Support: Scanning, OCR, Indexing, Documents to CD-Rom [approx. $1/pg.]. David Pancoast, Esq. d/b/a DataBasics. 702-647-1947 or 702-647-3757. http://www.cddocs.com.

SKIP TRACING/LOCATOR: Need to find someone? **Will find the person or no charge/no minimum fee for basic search.** 87% success rate. Nationwide Confidential. Other attorney needed searches / records / reports in many areas from our extensive databases. Tell us what you need. **Verify USA** Call toll free **(888) 2-Verify.**

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Consumer Assistance Coordinator

Jeannine Timothy
Tel: 297-7056

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Bree Strong (Mon., Tues & Thurs.)
Kim L. Williams (Wed. & Fri.)
Tel: 531-9077

Web Site Coordinator

Summer Shumway
Tel: 297-7051

Other Telephone Numbers & E-mail Addresses Not Listed Above

Bar Information Line: 297-7055

Mandatory CLE Board:
Sydnie W. Kuhre
MCLE Administrator
297-7035

Member Benefits: 297-7025
E-mail: ben@utahbar.org

Web Site: www.utahbar.org

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CERTIFICATE OF COMPLIANCE

For Years 19_____ and 19_____

Utah State Board of
Continuing Legal Education
Utah Law and Justice Center
645 South 200 East
Salt Lake City, Utah 84111-3834
Telephone (801) 531-9077 FAX (801) 531-0660

Name:_____ Utah State Bar Number:_____

Address:_____ Telephone Number:_____

Professional Responsibility and Ethics — **Required: a minimum of three (3) hours**

1. _____
Provider/Sponsor
_____
Program Title
_____
Date of Activity CLE Hours Type of Activity**

2. _____
Provider/Sponsor
_____
Program Title
_____
Date of Activity CLE Hours Type of Activity**

Continuing Legal Education — **Required: a minimum of twenty-four (24) hours**

1. _____
Provider/Sponsor
_____
Program Title
_____
Date of Activity CLE Hours Type of Activity**

2. _____
Provider/Sponsor
_____
Program Title
_____
Date of Activity CLE Hours Type of Activity**

3. _____
Provider/Sponsor
_____
Program Title
_____
Date of Activity CLE Hours Type of Activity**

4. _____
Provider/Sponsor
_____
Program Title
_____
Date of Activity CLE Hours Type of Activity**

IF YOU HAVE MORE PROGRAM ENTRIES, COPY THIS FORM AND ATTACH AN EXTRA PAGE

**EXPLANATION OF TYPE OF ACTIVITY

A. Audio/Video Tapes. No more than one half of the credit hour requirement may be obtained through study with audio and video tapes. See Regulation 4(d)-101(a).

B. Writing and Publishing an Article. Three credit hours are allowed for each 3,000 words in a Board approved article published in a legal periodical. An application for accreditation of the article must be submitted at least sixty days prior to reporting the activity for credit. No more than one-half of the credit hour requirement may be obtained through the writing and publication of an article or articles. See Regulation 4(d)-101(b).

C. Lecturing. Lecturers in an accredited continuing legal education program and part-time teachers who are practitioners in an ABA approved law school may receive three hours of credit for each hour spent in lecturing or teaching. No more than one-half of the credit hour requirement may be obtained through lecturing and part-time teaching. No lecturing or teaching credit is available for participation in a panel discussion. See Regulation 4(d)-101(c).

D. CLE Program. There is no restriction on the percentage of the credit hour requirement which may be obtained through attendance at an accredited legal education program. However, a minimum of one-third of the credit hour requirement must be obtained through attendance at live continuing legal education programs.

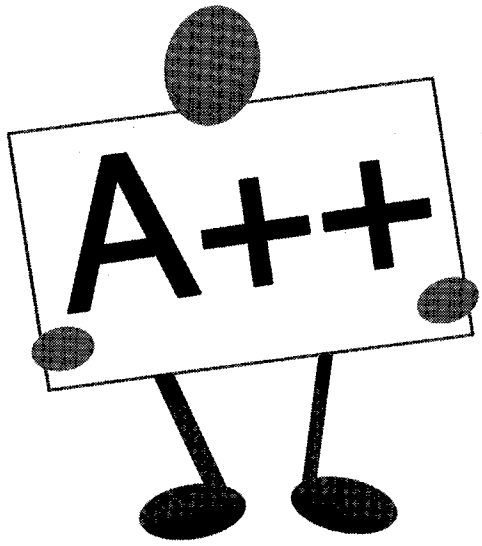
THE ABOVE IS ONLY A SUMMARY. FOR A FULL EXPLANATION SEE REGULATION 4(d)-101 OF THE RULES GOVERNING MANDATORY CONTINUING LEGAL EDUCATION FOR THE STATE OF UTAH.

Regulation 5-102 — In accordance with Rule 8, each attorney shall pay a filing fee of $5.00 at the time of filing the statement of compliance. Any attorney who fails to file the statement or pay the fee by December 31 of the year in which the reports are due shall be assessed a **$50.00** late fee.

I hereby certify that the information contained herein is complete and accurate. I further certify that I am familiar with the Rules and Regulations governing Mandatory Continuing Legal Education for the State of Utah including Regulations 5-103(1).

DATE:_____ **SIGNATURE:**_____

Regulation 5-103(1) — Each attorney shall keep and maintain proof to substantiate the claims made on any statement of compliance filed with the board. The proof may contain, but is not limited to, certificates of completion or attendance from sponsors, certificates from course leaders or materials claimed to provide credit. This proof shall be retained by the attorney for a period of four years from the end of the period of which the statement of compliance is filed, and shall be submitted to the board upon written request.



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