YOUNG LAWYERS SECTION OF THE UTAH STATE BAR

BARRISTER

January-March 1987

WHAT EVERY ATTORNEY SHOULD KNOW ABOUT DOMESTIC LAW

Commissioner Sandra N. Peuler

Commissioner Peuler

Commissioner Sandra N. Peuler gave the following address, as edited for the Barrister, *at a recent Utah Young Lawyers Brown Bag luncheon. According to Commissioner Peuler, every lawyer should be familiar with basic principles of Utah domestic law. Before being appointed court commissioner, a position Commissioner Peuler has held for over four years, she worked as a deputy Salt Lake County attorney and was in private law practice.*

I would like to discuss a few basic principles of domestic law. These principles are often overlooked, sometimes even by lawyers who practice in the area. However, at the outset, let me point out an excellent resource in this area, the Legal Services Manual. The Legal Services Manual outlines the substantive and procedural aspects of Utah domestic law, with citations to relevant Utah cases, and is available from Utah Legal Services.

DRAFTING PLEADINGS

Divorce pleadings should be drafted carefully, because so many divorce actions become default proceedings. Only if an attorney is almost certain that the divorce will be contested should the attorney proceed otherwise. In this regard, several specific areas deserve particular attention:

First, when drafting divorce pleadings, be specific concerning requests for child support, alimony, allocation of debts, custody and visitation. For instance, if an attorney in a default hearing has only requested reasonable support and reasonable allocation of debts, a judge typically will ask the attorney to redraft the pleadings, to be more specific, before considering the matter. The reason is notice—absent more specificity, the defaulting party will not have proper notice of the possible results of a default judgment.

Second, an attorney should be careful to properly allege the basis for personal jurisdiction. If the defendant resides out of state and is not served while physically present in the state of Utah, then the attorney will need to allege a basis for personal jurisdiction under Utah's long-arm statute. The Utah long-arm statute provides for jurisdiction if the client had matrimonial domicile within Utah at the time the cause of action arose, or if the cause of action leading to the divorce occurred in Utah. If either of those elements exist, the attorney will need to plead them.

Personal jurisdiction is required to obtain certain orders against a defendant for the payment of child support or alimony. Without personal jurisdiction, only certain judgments are available: (a) divorce; (b) division of property located within the state of Utah; and (c) possibly, custody. I say possibly custody because some judges will not consider custody issues in such a default proceeding. Most judges will, however, if the child resides within the state of Utah. Furthermore, if grounds for custody exist under the Uniform Child Custody Jurisdiction Act, an attorney, of course, should plead those grounds.

(continued on page 2)

INSIDE: **LAWYER SATISFACTION SURVEY AND MATERNITY LEAVE POLICIES IN SALT LAKE CITY LAW FIRMS.**

CALENDAR OF EVENTS (1987)

APRIL	
1-17	Eighth Annual Utah Mock Trial Competition (Elimination Rounds and Exhibition Rounds to follow)
25	Bob Miller Memorial Law Day Run (9:00 a.m., "This is the Place" Monument)
27	Law Week Commences (through May 2)
27-30	Law Week Lecture Series (6:30 p.m., Salt Lake Public Library, Main Branch)
MAY	
1	Law Day
1	Law Week Lecture Series (noon, Salt Lake Public Library, Main Branch)
1	YLS Office Nominations Due
1	Liberty Bell Awards Luncheon (Westin Hotel Utah)
1-2	Law Day Information Fair (Crossroads Plaza)
6	YLS Executive Council Meeting (noon, Utah State Bar Office)
16-23	National Mock Trial Competition (Washington, D.C.)
JUNE	
3	YLS Executive Council Meeting (noon, Utah State Bar Office)
JULY	
15-18	Annual Meeting of the Utah State Bar (Park City, Utah)

TABLE OF CONTENTS

Peuler

(continued from page 1)

TYPES OF MARITAL TERMINATION

Three types of decrees involving marital termination generally are recognized: (a) divorce; (b) separate maintenance; and (c) annulment. Understanding the statutory difference between the three is important, because that understanding enables the attorney to determine what will be best for the client.

As a practical matter, a decree of separate maintenance is often not beneficial, since many clients eventually want to remarry, and separate maintenance does not provide for that eventuality. If remarriage is likely, the attorney should advise the client to seek a divorce initially rather than separate maintenance.

Nonetheless, separate maintenance may be advisable for couples who may not want to live together anymore, but who do not expect to remarry. Other couples may object to divorce on religious grounds, or expect to lose insurance benefits in the event of a divorce. As a result, a decree of separate maintenance might be the best relief available.

Another possible type of relief is an annulment. An annulment, as distinct from a decree of separate maintenance, allows the client to remarry. Thus, an annulment might be appropriate relief for a client who does not desire a divorce for religious or other reasons.

However, attorneys should be aware that many annulment requests are not granted. In some cases, the judge may feel there are insufficient grounds for an annulment. Accordingly, it is good practice to plead divorce in the alternative.

An example of the need for alternative pleading arose recently. A plaintiff pleaded for an annulment on the basis that the defendant had promised before marriage he would treat her well, treat her kindly and be nice to her. The plaintiff further alleged that the defendant had broken the alleged promises. The plaintiff also pleaded that she had been induced to marry based on those promises and, therefore, she wanted an annulment. However, such allegations will not support an annulment. Consequently, if the plaintiff had not pleaded in the alternative for a divorce, she would have had to redraft the complaint to request a divorce.

With respect to the division of property, an annulment and a divorce are very similar. In either case, the court can deal with the division of property. Also, though a legal stigma used to exist for children of an annulled marriage, that stigma no longer exists. Rather, such children are deemed legitimate and the court can consider child support, visitation, and similar matters in the context of an annulment, just as in a divorce proceeding.

OTHER PLEADING REQUIREMENTS AND PRACTICE SUGGESTIONS

Two other statutory requirements must be recognized in order to properly plead a client's cause. First, an order to withhold and deliver must be entered by the court every time a child support order is entered. Accordingly, if a client has children, the complaint should pray for an order to withhold and deliver. The judges will require such a prayer as notice to the other party.

Second, the statute requires the court to allocate medical and dental costs if there are minor children involved in the marriage. Again, then, the complaint should set forth some proposal as to how to handle those costs and whether there is medical or dental insurance.

Third, though frequently ignored as a consideration, attorneys should recognize their clients are entitled to one-half of any pension or profit-sharing plan that has been accumulated by either party during a marriage. Such an asset is a marital asset and, like any other marital asset, should be dealt with in any marital dispute. Even if a pension or profit-sharing plan has not yet vested, the interest is still considered a marital asset. A case in point is *Woodward v. Woodward*, 656 P.2d 431 (Utah 1982). *Woodward* concluded not only that pension plans are a marital asset, but that if the present value of a pension plan could be determined and sufficient marital assets were available to offset an award, then the asset could be divided now. For example, if the pension has a current value of $10,000, the non-employed spouse would be entitled to one-

(continued on page 3)

Peuler

(continued from page 2)

half of that, or $5,000. Typically, that much cash is not available to either spouse, so, if possible, the $5,000 would be credited against other marital assets.

Fourth, and finally, one asset that has been the subject of much recent controversy is an educational degree. The Utah Supreme Court appears not to have ruled on whether an educational degree is a marital asset. In the Third District Court, judges apparently do not ordinarily look upon an educational degree as a marital asset. Nonetheless, the judges may deal with that issue by awarding rehabilitative alimony, so as to afford an opportunity to the spouse who has not yet received adequate education or career training to receive such education or training.

PROCEDURAL MATTERS

There are several Utah domestic law procedural matters attorneys should recognize. For instance, as court commissioner, I cannot sign a temporary restraining order in a divorce action—such orders must be signed by the judge assigned to the case.

Further, as a general rule, Third District judges will not determine child custody solely on the basis of an ex parte order, such as a temporary restraining order. Consequently, if an attorney's temporary restraining order includes an award of custody to the client, the judge may not sign the order. As a practical matter, then, if an attorney is concerned a spouse may skip town with the children, the attorney should request that the judge restrain that spouse from removing the children from Utah or from the jurisdiction of the court until the hearing. If there is concern about the safety of the children, the attorney probably should contact Protective Services or involve the Juvenile Court. In making such determinations, attorneys should consult with the client to determine what is absolutely necessary, and should remember that the hearing will take place in no more than 10 days.

MAKING PROFFERS

Ordinarily, all domestic matters are set for hearing on my calendar. My job is then to make a recommendation to the court based upon proffer of counsel. In order to do so properly, affidavits setting forth the client's position are required prior to the hearing.

My reason for handling these matters by way of proffer and affidavit is that I deal with a large volume of cases that otherwise would occupy judges' time. On my law and motion calendar there may be 10 to 35 cases set for any one afternoon. Consequently, I simply do not have time to deal with all of the cases in any other manner. Therefore, by proffer and affidavit, I at least can give some careful consideration to each case. In this connection, attorneys also should provide courtesy copies of affidavits and any related documents to me prior to the hearing, so I can become somewhat familiar with the matter.

CUSTODY SUGGESTIONS

With respect to custody disputes, one case worthy of note is *Hutchinson v. Hutchinson*, 649 P.2d 38 (Utah 1982). That case lists several factors courts consider in determining child custody. In seeking an award of temporary or permanent child custody, an attorney should deal with the factors outlined in *Hutchinson* and advise me of their pertinence to the subject dispute.

In this area, at least in the Third District, joint custody is still the exception rather than the rule. However, if an attorney has a case where joint custody might be feasible, the attorney should be careful to specify how the client plans to deal with child custody. For instance, the attorney should specify where the children will reside, the length of each residency and who makes decisions concerning the children's education, medical needs, and so forth. Obviously, joint custody will work only if the spouses get along well and are able to make joint decisions. Even where the joint custody has been stipulated to, most judges will scrutinize the arrangement very closely in an attempt to prevent future problems. So attorneys should consider the matter carefully before presenting a joint custody proposal to a judge.

In formulating a joint custody arrangement, the attorney also should consider long range plans with the client. For example, joint custody that provides for alternating six months' custody for each spouse may make sense when the child is very young. However, when the child starts school, the arrangement may begin to break down, especially if both parents do not continue to live in the same general area. Obviously, there may be other considerations not presented here.

VISITATION SUGGESTIONS

Courts generally do not limit visitation rights. In fact, most courts try to be as liberal as possible in allowing the children access to both parents. It is unusual for the court to restrict or supervise visitation permanently. Some restriction may be necessary for a limited period, but only in particular cases. Clients, then, should be advised to be realistic concerning visitation rights.

MORE ON THE ROLE OF THE COURT COMMISSIONER

As Court Commissioner, my role is to hear all domestic law proceedings initially, except for trials, before involving a judge. Virtually the only exception is when the parties get the judge's consent to hear the proceeding. However, I have neither the authority nor the inclination to allow parties to bypass the initial Court Commissioner review. Consequently, if a case may merit the immediate attention of a judge instead of the Court Commissioner, the attorney should contact the judge directly, together with opposing counsel (if there is one). A judge may consent to an initial hearing if a client who resides out of state must be present for the hearing and both counsel believe the Court Commissioner will be unable to resolve the matter.

In this connection, if a client feels that the Court Commissioner's recommendation is unfair, unreasonable, or incorrect, then the attorney has 10 days from the date of the recommendation to file written objections and ask for a hearing with the judge. Although the rehearing is technically "de novo," some

(continued on page 4)

Peuler

(continued from page 3)

judges require the party seeking to overturn the Court Commissioner's recommendation to demonstrate error in the recommendation.

CONCLUSION

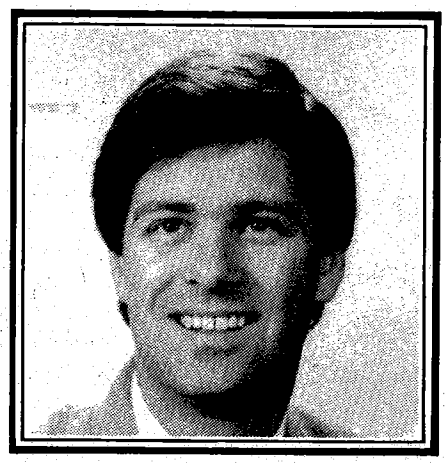
Almost everyone agrees that the courtroom is not always the best forum for resolving domestic disputes, as the court system too often falls short of providing the relief litigants feel is necessary. However, because the court is the ultimate arbiter in divorce cases, good practice demands that an attorney be conversant in the substantive areas and procedural aspects of domestic law. Whether an attorney handles only one divorce case or thousands in a lifetime of practice, the good practitioner who remains knowledgeable in those areas will be able to guide the client through the domestic process, so that the best possible result is achieved.

FROM THE EDITOR'S DESK

The *Barrister* is published by the Young Lawyers Section of the Utah State Bar. Contributions to the *Barrister* are invited, but the editors reserve the right to select the material and advertisements to be published. Please make submissions to Editor-in-Chief Guy P. Kroesche, Van Cott, Bagley, Cornwall & McCarthy, Box 45340, Salt Lake City, Utah 84145.

The response to the *Barrister* has been encouraging. We appreciate reader comments and suggestions. The *Barrister* is designed to bring you news of young lawyers' activities in Utah and to provide a forum for issues that concern young lawyers.

Guy P. Kroesche
Editor-in-Chief



PRESIDENT'S REPORT

Paul M. Durham

Are you satisfied with the practice of law? Recent national surveys show a relatively high percentage of young lawyers are dissatisfied with their professional lives. Satisfaction, of course, is a relative term. As applied to the individual's daily law practice, the satisfaction level probably fluctuates greatly from day to day (and hour to hour). Young lawyers, though, as a group, appear to experience more overall "dissatisfaction" than other lawyers. (The good news is that young lawyers eventually age out of this category.)

If you are like me, you have heard a hundred reasons for "dissatisfaction" among young lawyers in the practice, including:

1. The disillusion upon discovering that the practice is not always what the lawyer thought it would be (*i.e.*, a way to really help people, a means of changing the world, a road to riches, or a world of clearly defined rights and wrongs).

2. The conflict, complexity and pressures inherent in many areas of the practice (especially for those young lawyers who specialize in very complex cases involving very little money for clients with very limited resources to pay legal fees).

3. The frustration caused by the lack of experience in the face of a seemingly unending parade of novel legal problems.

4. The toll on family and other personal relationships caused by the consuming passions of "the jealous mistress."

5. The anxiety caused by having to keep 20 balls flying in the air at once.

6. The heavy weight of responsibility.

7. The tarnished image of the lawyer.

8. The inability to win every time.

9. The politics of a firm or department.

10. The inability of "the law" or "the legal system" to adequately solve certain kinds of problems.

11. The delivery of quality legal services being hindered by keeping and billing time, and collecting legal fees.

The practice of law can and should be a satisfying endeavor. One of the themes running through this issue of the *Barrister* is lawyer satisfaction/dissatisfaction. Often we trudge along the same road without looking up to see that, with a few adjustments, we can derive much greater satisfaction from our journey. Sometimes just thinking about it is enough to adjust our attitude—other times more concrete action is necessary. At any rate, I hope you will find some ideas in this issue to improve your own personal satisfaction level with the practice of law. Are we having any fun yet?

Young Lawyers Section
Utah State Bar
(1986-1987)
OFFICERS

Paul M. Durham, President
Van Cott, Bagley, Cornwall & McCarthy

Stuart W. Hinckley, President-Elect
Utah Attorney General's Office

Robin L. Riggs, Secretary
Office of Legislative Council

Frank R. Pignanelli, Treasurer
Gustin, Adams, Kasting & Liapis