

2019 CASE LAW UPDATE

Bart J. Johnsen

***Lay v. Lay*, 2018 UT App 137.**

The Court of Appeals affirmed the trial court's determination to not award 30-3-35.1 on a modification but remanded for further findings regarding the elimination of the Sunday overnights that the parties' Decree awarded to father. Each parent is entitled to frequent and meaningful access to their children consistent with the children's best interests. The legislature provided for an alternative schedule in 30-3-35.1. The trial court denied father's request for 35.1 and he appealed arguing that if the party seeking 35.1 demonstrates the factors listed in 35.1 the trial court must award that schedule. The Court of Appeals disagreed and analyzed 35.1 based upon the plain language that the "court may consider" that increase in parent-time. The Court of Appeals analyzed the difference between "may" and "shall" and determined that because the statute used the term "may" rather than "shall" that the trial court was allowed the discretion of whether to award the increased parent-time. The Court of Appeals remanded for further findings on the reason why the Sunday overnight was eliminated.

***Erickson v. Erickson*, 2018 UT App 184.**

The Court of Appeals affirmed the trial court's decision to deny a petition to modify custody but to grant a petition to modify parent-time. Father petitioned to modify custody from minimum time to a joint physical (presumably 50/50) based upon various allegations of a change in circumstances including a change in the school schedule of the children. Mother counter-petitioned to modify parent-time because for a number of years she picked up the children from father's house on Sunday nights, so the kids would get to school on time on Mondays. The Court of Appeals analyzed the required showing in order to pursue a petition to modify custody, specifically, that the moving party must demonstrate that the circumstances of a child or parent have materially and substantially changed since the entry of the order to be modified and that a change would be an improvement for the best interests of the children. There must be a showing of a change in circumstances before the court proceeds on the question of best interests. The change in circumstances must be related to the provision that is being sought to be modified. A change in the pick-up times on weekends, for example, does not amount to a change in circumstances to modify custody—only parent-time. The Court of Appeals reiterated (for the umpteenth time) that the change in circumstances requirement must be met even if the underlying order was stipulated. Best interests will not swallow the change in circumstances requirement.

***Xu v. Zhao*, 2018 UT 189.**

The Court of Appeals affirmed the trial court's alimony analysis that included the use of discovery sanctions, imputation of income, and equalizing expenses for each party. The trial court had imposed a discovery sanction on wife that prevented her from providing evidence regarding

her income, *i.e.*, she could not dispute husband's evidence as to her income. The Court of Appeals affirmed the trial court's use of that sanction and its finding that income from two jobs would be imputed to wife. The trial court made certain factual findings that husband then asked it to reconsider. When the trial court reconsidered some of those findings, it modified those findings in a way husband had not requested. The Court of Appeals noted that husband sought to have the Court of Appeals determine that if a party asks for reconsideration of certain facts, that the trial court must either leave that fact unchanged or only change it in the way that party asks for. They declined to make such a determination. The trial court used the same housing allowance for each party, despite wife using a lower number in her financial declaration, and the Court of Appeals affirmed that was reasonable. To award alimony, a trial court must determine the ability of a payor spouse to provide support and as such it is appropriate for the trial court to use the historical income to determine ability to pay and for the trial court to consider all sources of income that were used by the parties during their marriage to meet the needs of the marriage. Finally, the Court of Appeals noted that because different people pay different amounts to enjoy the same standard of living, it would be error for a trial court to equalize each party's line item expenses.

Dole v. Dole, 2018 UT App 195.

The Court of Appeals affirmed the trial court's determination to impute income to father based upon the testimony of a vocational assessment expert and pointed out, again, that there is no statutory requirement for a trial court to make a determination as to whether the parent being imputed income is voluntarily unemployed. Analyzing the tax exemption award based upon the statutory language, the Court of Appeals held that because there is no presumption in the statute, the trial court is left with the discretion to determine the award on a case-by-case basis. Trial courts also have broad discretion when dealing with property in a divorce and it was not error for the trial court to allow each party to reside in one residence each and the other two properties to be sold. Husband argued that the trial court was required to have all four properties to be sold to determine their true value. That argument was rejected.

Hosking v. Chambers, 2018 UT App 193.

The Court of Appeals affirmed the trial court's determination to terminate alimony based upon cohabitation by the recipient. Analyzing the requirements to demonstrate cohabitation the Court of Appeals determined that the trial court's findings of fact demonstrated cohabitation by finding the required elements. Although a trial court's determination of cohabitation is a question of law that warrants no deference on appeal, the trial court's findings clearly supported the ultimate conclusion of cohabitation.

MacDonald v. MacDonald, 2018 UT 48.

The Supreme Court affirmed the Court of Appeals' determination that alimony can only be modified upon the occurrence of substantial change in circumstances nor foreseeable at the time of the entry of the Decree. Mr. MacDonald asked the Supreme Court to find that the line of cases that required a change in circumstances "not contemplated" in the original decree be adopted as a "prior construction canon" which would adopt the cases that required language in the decree or order dealing with contemplated changes in circumstances. The Supreme Court rejected that

request by finding that the line of cases that required such a change be contemplated within the original decree was never based upon an analysis of the statutory requirement, rather they merely perpetuated prior decisions. Analyzing the statute, the Supreme Court determined that there was no other way to read the statute than whether the change in circumstances was “foreseeable” not “actually foreseen.” The Supreme Court narrowed the Court of Appeals determination by finding that the question of foreseeability is limited to the universe of information that was presented in the record at the time the trial court issued the decree.

***Armendariz v. Armendariz*, 2018 UT App 175.**

The Court of Appeals affirmed the trial court’s denial of a petition to modify alimony based upon the payor spouse’s retirement. The trial court held that his retirement was foreseeable and the provisions in the decree to termination alimony, marriage, cohabitation, or death, did not include retirement. The Court of Appeals relied on MacDonald in affirming by reiterating that events that are foreseeable at the time of the entry of the Decree cannot support a modification of alimony. Judge Harris concurred but questioned whether such a result was actually the legislature’s intention and cautioned practitioners to include retirement provisions and adjustments to support in the original decree.

***Silva v. Silva*, 2018 UT App 210.**

The Court of Appeals vacated the trial court’s rulings denying wife’s motions to set aside a default judgment and a sheriff’s sale. A party is entitled to have a default judgment set aside if that party can demonstrate that the motion is timely, that there is a basis for granting relief pursuant to one of the sub-sections of 60(b), and the moving party has a meritorious defense. Wife’s timely motion alleged excusable neglect, which is one of the subsections, which gives the trial court the ability to consider all the relevant circumstances in order to promote fundamental fairness. The trial court, however, failed to analyze whether there was excusable neglect but focused only on the propriety of the trial court’s order authorizing alternative service. Wife had provided unrefuted allegations that husband had actual knowledge of wife’s location, yet he chose to seek alternative service instead. The Court of Appeals held that if that were true then it was highly likely that her failure to respond was excusable neglect. The Court of Appeals also remanded to the trial court to consider wife’s arguments regarding her motion to set aside the sheriff’s sale after finding that the trial court’s ruling that wife was not entitled to service of notice of the sale was erroneous.

***Hartvigsen v. Hartvigsen*, 2018 UT App 238.**

The Court of Appeals affirmed the trial court’s rulings regarding alimony and its determination that husband’s pre-marital home that was transferred to joint tenancy during the marriage retained its pre-marital identity. Wife appealed the trial court’s determination to award her alimony by arguing that the trial court erred in imputing income to her as a lawyer despite her not having practiced in 19 years and determining that because her claimed monthly expenses were not supported by documentation they did not demonstrate actual needs. The Court of Appeals

analyzed the imputation of income issue by noting that the statute contemplates that a trial court may impute income higher than minimum wage by making specific findings as to the evidentiary basis for the imputation. At trial, a vocational expert testified that wife had a license to practice law in Utah and although she had not practiced for quite some time, there were entry level positions available on an annual basis. The Court of Appeals rejected wife's argument that in order to impute income to her the trial court may not speculate as to her employment but must make specific findings regarding the number of jobs versus the number of job applicants. Because imputation of income necessarily involves some level of speculation, the trial court is not required to make findings as to which specific job the person could get. Further, the statute uses the term "similar" rather than "identical" the trial court was well within its discretion to impute income based upon prevailing income of people with a similar background rather than an identical background. When determining whether pre-marital property has lost its pre-marital identity through a transfer, the court must identify the intent of a transfer. Although generally a transfer of separate property to a joint tenancy is presumed to be a gift, the transfer itself is not conclusive that it was a gift, there must be donative intent to change the property to marital. The Court of Appeals affirmed the trial court's determination that because husband testified he did not intend the transfer to be a gift (he claimed she said she would leave the marriage if he did not transfer the property) that the property retained its pre-marital identity and was awarded to husband.

***Nebeker v. Orton*, 2019 UT App 23.**

The Court of Appeals affirmed the trial court's determination to award primary custody to mother but reversed its determination to award father minimum parent-time. During the first 18 months of the child's life, he lived with mother and hardly saw father but at one point father decided that he was worried about mother's illegal activities and he took the child without her consent and kept him from mother for a number of months until finally agreeing that mother could have parent-time with the child. The trial court determined that statutory factors supported awarding mother primary custody and the Court of Appeals held that the trial court made adequate findings on each element and would not reweigh the evidence as father requested. However, the trial court erred in awarding father minimum parent-time when the parties had an arrangement that allowed for more parent-time prior to trial. The Court of Appeals remanded for the trial court to consider ways to expand father's parent-time.

***Rosser v. Rosser*, 2019 UT App 25.**

The Court of Appeals vacated the trial court's finding of husband's contempt for violating a stipulation and remanded for further proceedings. Contained in the parties' stipulation was a provision about sharing a tax obligation, however, the decree required wife to assume the tax obligation. When wife was forced to pay additional taxes based upon the decree, she asserted husband was in contempt for violating the provision of the stipulation and for his deliberate deceit. The trial court held husband in contempt. When vacating the trial court's determination, the Court of Appeals analyzed the statutory bases for a finding of contempt and discussed the requirements

for the enumerated reasons. Narrowing their discussion, the Court of Appeals focused on the only two likely reasons: (4) deceit or abuse of process of the court; or (5) disobedience of a lawful order. The Court of Appeals found that the trial court erred by finding husband in contempt by stating that the deceit contemplated in the statute requires a finding that the deceit (or fraud) must be on the court, not if it is just directed to the opposing party. The Court of Appeals then analyzed the contempt statute regarding violation of an order and held that “breach of a private agreement that has not yet been made an order of the court cannot be a violation of subsection (5) of the contempt statute.”

In re CCW, 2019 UT App 34.

The Court of Appeals reversed the juvenile court’s dismissal of mother’s petition to terminate parental rights of the father who had abandoned the children and been in prison twice for attacking mother and another woman because the court found that it was not in the children’s best interests for termination. When reversing, the Court of Appeals discussed that when grounds for termination are established it is almost always in the children’s best interests to grant the termination, however, in this case, the trial court found grounds but did not terminate his rights because the trial court discounted father’s history of domestic violence, including against mother in front of the children. The Court of Appeals determined that it was clearly error for the trial court to determine that attacking a spouse does not demonstrate an inability to fulfill parental responsibilities. Domestic violence and its effect on the victim and the minor children must be examined and considered when determining the fitness of a parent. The Court of Appeals criticized the trial court’s reasoning in dismissing the petition and remanded for further proceedings.

Marroquin v. Marroquin, 2019 UT App 38.

The Court of Appeals affirmed the trial court’s determination to utilize the value of a business evaluator and to exclude “personal goodwill” from the value of the business. Further, it was not error for the trial court to enter a judgment for one-half the determined value rather than requiring a payment plan with a due date. During the marriage, husband’s pre-marital business acquired a marital value which was contested during the trial. Each party retained a business valuation expert who testified as to what each perceived to be the value to be divided. Husband’s expert reduced the value by the personal goodwill of the husband who was the only employee of the business. The trial court found husband’s expert more credible than wife’s expert, who the trial court found had no credentials in business valuation and awarded wife judgment for one-half husband’s expert’s value. The Court of Appeals affirmed finding that the trial court has broad discretion to determine the value of the marital estate and the reduction of the value by personal goodwill was appropriate. The trial court entered a judgment which the Court of Appeals found to be appropriate.

LeFevre v. Mackelprang, 2019 UT App 42.

The Court of Appeals reversed the trial court's failure to implement the provisions of Utah Code section 30-3-35.1 despite the recommendation of a custody evaluator. The Court of Appeals analyzed the provisions of 35.1 and the factors that the parent who is asserting that he or she should have parent-time consistent with this alternative schedule must establish. After determining that father had established certain elements, the Court of Appeals discussed the most important factor which is that the increased parent-time would be in the best interests of the child. The trial court found that father presented no evidence as to the best interests, but the appeals court disagreed finding that father presented quite a bit of evidence, including the recommendation of a custody evaluator who testified that increased time would be in the child's best interests. The Court of Appeals discussed that when considering the evidence presented, the trial court is not free to ignore evidence and find that none was presented nor can the trial court decline to adopt the recommendation of an evaluator without making specific findings as to why.

Cox v. Hefley, 2019 UT App 60.

The Court of Appeals affirmed the trial court's enforcement of the parties' signed stipulation and agreement to utilize a third party neutral to determine the parties' compliance with the agreement regarding parent-time. Although mother was determined to be a vexatious litigant, she filed another petition to modify and the parties negotiated a settlement to that petition that required mother to comply with a number of requirements in order to have unsupervised parent-time. The parties negotiated and signed that agreement without at least mother's attorney's knowledge. Mother moved the trial court to strike the stipulated decree because mother's attorney had not signed it and as such it was not valid. "Litigants may enter a stipulation or settlement agreement without first obtaining the consent of—or even consulting—their attorneys." The claim that father's attorney violated the rules of professional conduct by obtaining mother's signature on a stipulation, even if that were the case, does not require setting aside a judgment. The Court of Appeals found that using a third party neutral to monitor the parties' compliance did not divest the district court of its jurisdiction, especially given that the parties' stipulation specifically stated the neutral was not authorized to make court orders.

Nave-Free v. Free, 2019 UT App 83.

At the time of divorce, the parties stipulated to an upward deviation of child support due to the ongoing medical needs of the parties' children. Subsequently, husband petitioned to modify child support and asserted that wife's income had increased, that she had remarried and moved from the former marital home and was receiving rental income, and his income had slightly decreased. The trial court denied the petition to modify and the Court of Appeals affirmed. As to the increase in wife's income, husband contented that it had increased by more than 40 per cent but the appeals court noted that his math was flawed because the trial court found that her income was less than at the time of the decree and even adding in rental income her change was not the 30 per cent required by the statute. The Court of Appeals affirmed the trial court's determination that there was not a change in the relative wealth of the parties. Finally, the Court of Appeals analyzed

the statutory language about “material changes in the medical needs of the child” and found that although the actual out-of-pocket costs for the medical needs of the children might have changed, the medical needs did not. Finding that conflating medical expenses and medical needs was a fatal error, the Court of Appeals affirmed the trial court’s determination to deny the petition to modify child support.