

2001

Jeanny Louise Davis v. Johnny Mack Davis : Brief of Appellee

Utah Court of Appeals

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James Woodall; Littlefield & Peterson.

Rosemond Blakelock.

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IN THE UTAH COURT OF APPEALS

JEANNY LOUISE DAVIS,

Petitioner/Appellee,

vs.

JOHNNY MACK DAVIS,

Respondent/Appellant.

BRIEF OF APPELLEE

Appellate No. 20010226

Priority 15

BRIEF OF APPELLEE

On Appeal from Decree of Divorce
entered in the Eighth Judicial District Court
of Uintah County, Utah
Judge John R. Anderson

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FILED
Utah Court of Appeals

JUN 21 2001

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TABLE OF CONTENTS

JURISDICTION.....	2
STATEMENT OF ISSUES.....	2
STATUTORY AND CONSTITUTIONAL PROVISIONS.....	2, 3
STATEMENT OF THE CASE.....	3
SUMMARY OF ARGUMENTS.....	5
ARGUMENT.....	7
1. The Court did not abuse it's discretion in awarding Petitioner \$1,000.00 per month as for alimony, for a period of ten years.....	7
2. The Court did not abuse it's discretion in dividing the retirement assets.	11
3. The Court did not abuse it's discretion by ordering the Respondent to pay Petitioner's attorney's fees. In addition, the Petitioner should be awarded her attorney's fees on appeal.....	13
CONCLUSION.....	14
ADDENDUM	
Utah Code Ann., Sec § 78-2a(3)(2)(i)	
Utah Code Ann., Sec § 30-3-5(1)	
Utah Code Ann., Sec § 30-3-5(7)(a)	
Utah Code Ann., Sec § 30-3-5(7)(d)	

TABLE OF AUTHORITIES

CASES:

<u>Bailey v. Bailey</u> , 745 P.2d 830 (Utah Ct. App. 1987).....	12
<u>Bell v. Bell</u> , 810 P.2d 489, 491 (Utah App. 1991).....	7,13
<u>Childs v. Childs</u> , 967 P.2d 942, 946 (Utah Ct. App. 1998)...	10, 11
<u>D'Ashton v. D' Ashton</u> , 844 P.2d 345, 355 (Ut. Ct. App 1992).....	8
<u>Gardner v. Gardner</u> , 748 P.2d 1076, 1081 (Utah 1988).....	7
<u>Hall v. Hall</u> , 858 P.2d 1018, 1027, 1027 (Utah Ct. App. 1993)....	14
<u>Jones v. Jones</u> , 700 P.2d 1072, 1075 (Utah 1985).....	7
<u>Kerr v. Kerr</u> , 610 P.2d 1280, 1384 (Utah 1980).....	13,14
<u>Marchant v. Marchant</u> , 734 P.2d 199 (Utah Ct. App. 1987).....	12
<u>Maxwell v. Maxwell</u> , 754 P. 2d 84, 86-87 (Utah Ct. App. 1990)...	12
<u>Motes v. Motes</u> , 786 P.2d 232, 243 (Ut. Ct. App. 1989).....	12
<u>Rehn v. Rehn</u> , 974 P.2d 306, (Ut. Ct. App. 1999).....	9
<u>Roberts v. Roberts</u> , 835 P.2d 193, 198 (Utah App. 1992).....	7
<u>Woodward v. Woodward</u> , 656 P.2d 431, (Utah 1982).....	12

STATUTES:

Utah Code Ann., Sec § 78-2a-(3) (2) (i).....	2
Utah Code Ann., Sec § 30-3-5(1).....	2
Utah Code Ann., Sec § 30-3-5(7) (a).....	2
Utah Code Ann., Sec § 30-3-5(7) (d).....	3

JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann., Sec § 78-2a-(3)(2)(i).

STATEMENT OF ISSUES

Pursuant to Rule 24(b) of the Utah Rules of Appellate Procedure, the Appellee's Statement of Issues and Standard of Review is agreed upon as is set forth in Appellant's Brief, page 2, and therefore, shall not be set forth separately in this Brief.

STATUTORY AND CONSTITUTIONAL PROVISIONS

A. Section 30-3-5(1), Utah Code Ann.,: "When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations and parties."

B. Section 30-3-5(7), Utah Code Ann.: (a) The Court shall consider at least the following factors in determining alimony:

(i) the financial condition and needs of the recipient

spouse;

(ii) the recipient's earning capacity or ability to produce income;

(iii) the ability of the payor spouse to provide support;

(iv) the length of the marriage;

C. Section 30-3-5(7), Utah Code Ann.: (d) The Court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.

STATEMENT OF THE CASE

The parties were married on September 4, 1964. Although they had five children, all children were emancipated prior to the parties separation. At the time of trial, Petitioner ("Jeanny") was employed by the Bureau of Land Management. Petitioner submitted to the Court a 1999 tax return (Exh. 6) and a recent pay check stub to verify her income (Exh. 5). Petitioner also testified to the accuracy of her income (Tr. 28). Petitioner earned approximately \$2,274.00 per month.

Respondent ("Johnny") was employed as a cabinet maker. Respondent testified that she earned approximately \$4,507.00 per month (Tr. 73). The Respondent did not submit to the Court any tax return. He did not submit any pay check stub, nor any other

proof of his income, except for his testimony.

That difference between the parties income is \$2,233.00 per month.

The parties divorce was bifurcated on December 17, 1999 and trial was held on July 6, 2000. At trial, the parties stipulated to a partial division of real and personal property and five issues were heard by the trial court;

- a. Petitioner's request for an eight acre parcel of the farm property awarded to Petitioner;

- b. the division of remaining retirement assets because the Respondent has liquidated his retirement assets, while the case was pending;

- c. disposition of a bank account with approximately \$10,000.00 remaining;

- d. Petitioner's alimony request, and;

- e. attorney's fees

The Court made an equitable division of the real and personal property, and did not favor either party. The Court gave the Respondent a credit in the amount of \$33,400.00 against his alimony obligation in order to equalize the real and personal property division, thus equalizing the division of the real and personal property.

The Court ordered the Respondent to pay \$1,000.00 to

Petitioner as for alimony for a period of ten years, even though the parties were married for over 35 years.

The Court awarded each party their own retirement accounts. The Petitioner was awarded a Thrift Savings Account with \$51,383.00 as the approximate balance and an anticipated pension of \$150.00 per month.

The Respondent liquidated most of his retirement funds, for ten years work, and spent the funds following the parties' separation and prior to the bifurcated divorce (Tr. 95). Respondent provided no accounting or exhibits to justify his expenditures.

The Court awarded the Petitioner \$2,500.00 in attorney's fees.

SUMMARY OF ARGUMENTS

Argument 1:

The Court did not abuse it's discretion in awarding Petitioner \$1,000.00 per month, as for alimony, for a period of ten years.

SUMMARY PARAGRAPH:

Respondent concedes both that he has the ability to pay alimony and that the Petitioner does not earn enough from her employment to meet her monthly expenses. Respondent does not agree with the amount of alimony ordered. However, the trial court examined all relevant factors and concluded that the

Petitioner was in need of alimony in the amount of \$1,000.00 per month, in order to maintain the standard of living enjoyed during the parties marriage.

Argument 2.

The Court did not abuse it's discretion in dividing the retirement assets.

SUMMARY PARAGRAPH:

The trial court properly awarded the Petitioner a greater percentage share of the retirement account than the Respondent because it considered the special circumstances existing in the parties marriage.

Argument 3.

3. The Court did not abuse it's discretion by ordering the Respondent to pay Petitioner's attorney's fees. In addition, the Petitioner should be awarded her attorney's fees on appeal.

SUMMARY PARAGRAPH:

The trial court considered the reasonableness of the Petitioner's fees, her need for an award of fees, including her ability to earn an income, as well as the Respondent's ability to earn an income and properly awarded the Petitioner \$2,500.00 in attorney's fees.

ARGUMENT

1. The Court did not abuse it's discretion in awarding Petitioner \$1,000.00 per month, as for alimony, for a period of ten years.

Respondent concedes his ability to pay alimony.

(Respondent's Brief at page 6).

Utah courts have held that "an alimony award should, after a marriage . . . and to the extent possible, equalize the parties' respective standards of living and maintain them at a level as close as possible to that standard of living enjoyed during the marriage." Gardner v. Gardner, 748 P.2d 1076, 1081 (Utah 1988); see also Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985); Roberts v. Roberts, 835 P.2d 193, 198 (Utah App. 1992); Bell v. Bell, 810 P.2d 489, 491 (Utah App. 1991).

The trial court attempted to equalize the parties respective standard of living by awarding Jeanny alimony. During the marriage both parties worked. The Court examined the issue of the standard of living during marriage and each parties' ability to earn enough to maintain the standard of living that the parties both enjoyed during marriage. The Court found that the Respondent's ability to earn money was much greater than the Petitioner's (Tr 125). The Court made this finding based upon the Respondent's testimony alone, because the Respondent presented no pay check stubs to prove how much greater his income

actually was than the Petitioner's and he presented no tax returns to prove his actual income. The Respondent admits only that he is capable of paying alimony and that ability is not in dispute. (See Respondent's Brief at page 6).

The Respondent, by failing to provide the trial court with proof as to how much greater his ability was to earn money than the Petitioner's, left the Court to rely on Respondent's testimony alone. In that regard the Court issued specific findings about the Respondent's ability to earn a living (Tr. 125).

Based upon the testimony of Respondent and the testimony and exhibits of the Petitioner, the difference in the parties income is approximately \$2,274.00 per month. (Respondent's Brief at page 3).

The trial court addressed and considered the length of the marriage and found it to be a 35 year marriage (Tr. 126).

The trial court addressed the lack of proof presented in this case by the Respondent and found that the Petitioner's testimony more credible (Tr. 126). The trial court is best able to determine the credibility of a witness. D'Ashton v. D'Ashton, 844 P.2d 345, 355 (Ut. Ct. App 1992).

Respondent admits that the Petitioner does not earn enough to meet her needs (Respondent's brief at pages 5 and 6). The issue presented on appeal then, questions whether or not the

amount ordered was an abuse of discretion. Considering that the trial court found the Petitioner's testimony and presentation to be more credible evidence than Respondent's, the trial court's alimony award to Petitioner in the amount of \$1,000.00 per month does not appear to constitute an abuse of discretion. While the Respondent presented arguments which dispute the Petitioner's financial declaration, the trial court ruled that it found Petitioner's testimony more credible. The Petitioner testified (Tr. 70) that she needed at least \$2,100.00 per month and that she netted only \$1,369.51 per month, leaving her with a shortfall of \$730.00. Respondent claims that the Petitioner's monthly needs should not include the monthly farm payment she made. Even allowing for the Respondent's argument, the trial court heard all the evidence and still found that the Petitioner was entitled to \$1,000.00 per month as for alimony for a period of 10 years.

Given the 35 year length of the marriage this was not an abuse of discretion. The total award of alimony was considered by the court when the trial court found that the Respondent should have the option of paying a one-time lump sum payment as for alimony. (See Findings of Fact, page 4, paragraph 9. Fund in Respondent's Addendum)

In Rehn v. Rehn, 974 P.2d 306, (Ut. Ct. App. 1999), the Utah Court of Appeals held:

In determining whether to award alimony and in setting the amount, a trial court must consider the needs of the recipient

spouse, the earning capacity of the recipient spouse; the ability of the obligor spouse to provide support; and the length of marriage.

The Court did examine the above listed factors; and the results are as follows;

a. the Petitioner was earning as much as she is able to at this time (Tr. 126);

b. the Respondent's ability to earn was much greater than the Petitioner's (Tr. 126);

c. there was no proof offered by Respondent that the Petitioner's financial declaration was inaccurate. There was only an argument that Respondent disagreed with her stated needs. Respondent concedes that the Petitioner does not earn enough to support herself. (See Respondent's Brief at page 6). The trial court found the Petitioner's testimony to be more credible (Tr. 126). ;

d. Respondent admits that his ability to pay alimony is conceded; (See Respondent's Brief at page 6).

e. the trial court addressed the length of the marriage (Tr. 125). The trial court addressed the factors necessary to support an award of alimony.

If the factors have been considered, "we will not disturb the trial court's alimony award unless such a serious inequity has resulted as to manifest a clear abuse of discretion."

Childs v. Childs, 967 P.2d 942, 946 (Utah Ct. App. 1998).

The Respondent admits his ability to pay alimony, and admits the Petitioner's need. Respondent has failed to assert that any serious inequity has resulted, due to the award to the Petitioner of \$1,000.00 per month in alimony for ten years, that would manifest a "clear abuse of discretion." Id.

2. The Court did not abuse it's discretion in dividing the retirement assets.

The Respondent disposed of most of his retirement accounts prior to trial (Tr. 86). Respondent was given credit for the accounts which he cashed out, which included his 401-K account with the state of Utah, in the amount of \$6,730.95 and for his account at Horace Mann annuity in the amount of \$5,765.80. These two amounts total \$12,496.75. Respondent was also awarded the amount of \$6,100.00 as for an "additional credit" against the American Express IDS account, for a total retirement credits of \$18,596.75.

The Respondent was also awarded his entire interest in the "Utah Retirement Systems Pension". (See Findings of Fact, at paragraphs 8 and 9 which is located in Respondent's Addendum to Brief). The exact amount of the award to Respondent is unclear because he presented no evidence or exhibits to document the value of his Utah Retirement Systems Pension which he was

awarded.

The Petitioner was awarded her thrift account valued at \$51,385.95. The Petitioner was awarded more than the Respondent because the trial court found that a the special circumstance existed in that the Respondent was much more capable of working and earning money than Petitioner, and additionally, that the parties 35 years of marriage was so long that the Petitioner was to a point in her life where she needed the money much more than the Respondent. (See Findings of Fact, at paragraph 10. Findings are included as Respondent's Brief, in the Addendum)

"The best method for distributing or allocating retirement benefits or their value depends on the particular circumstances," Motes v. Motes, 786 P.2d 232, 243 (Ut. Ct. App. 1989).

The trial court was clear in it's Findings of Fact that special circumstances existed: it considered 35 years of marriage and considered the Petitioner's ability to earn a living, as well as the length alimony (10 years), that the Petitioner's need for the retirement was much greater than the Respondent's.

While it is true that in Woodward v. Woodward, 656 P.2d 431, (Utah 1982), the Utah Supreme Court examined an equal split of the distributable portion of the retirement, "such a division is not mandatory." Maxwell v. Maxwell, 754 P. 2d 84, 86-87 (Utah Ct. App. 1990) citing to Bailey v. Bailey, 745 P.2d 830 (Utah Ct. App. 1987 and Marchant v. Marchant, 734 P.2d 199 (Utah Ct. App.

1987).

Therefore, the unequal split of retirement benefits by the trial court was not an abuse of discretion, given the special circumstances cited by the trial court.

3. The Court did not abuse it's discretion by ordering the Respondent to pay Petitioner's attorney's fees. In addition, the Petitioner should be awarded her attorney's fees on appeal.

The Court awarded the Petitioner attorney's fees in the amount of \$2,500.00. The Court found that the fees were reasonable (Tr. 126).

The Court found that the Respondent had the ability to earn more than Petitioner and that the Petitioner was in need of an award of attorney's fees, based upon the trial court's examination of both parties' respective incomes. (Tr. At 126). The award was pursuant to the three requirements set forth in Bell v. Bell, 810 P.2d 489, 493 (Ut. Ct. App. 1991), which set forth the need for "evidence of the receiving spouse's financial need, the payor spouse's ability to pay, and the reasonableness of the requested fees." Bell at 493.

Pursuant to Utah Code Ann. § 30-3-3 (1995), a trial court may award attorney fees in divorce and custody proceedings. The decision to award attorney fees and the amount thereof rests

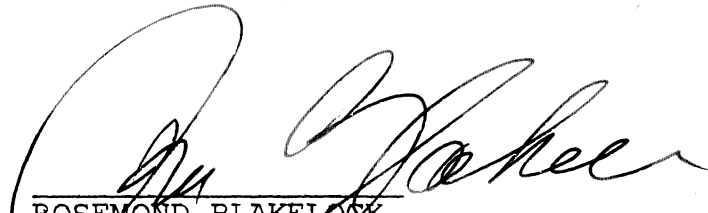
primarily in the sound discretion of the trial court. See Kerr v. Kerr, 610 P.2d 1280, 1384 (Utah 1980).

Because the Petitioner was awarded attorney's fees by the trial court, she should also be awarded attorneys' fees for her appeal, should she prevail. Hall v. Hall, 858 P.2d 1018, 1027, 1027 (Utah Ct. App. 1993).

CONCLUSION

Petitioner, Jeanny Davis, requests that trial court's decision be affirmed, as to alimony, retirement benefits distribution and attorney's fees. Petitioner requests that she be awarded her attorney's fees incurred on appeal.

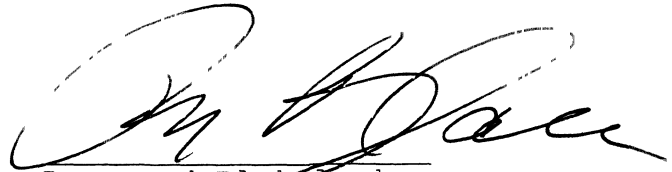
DATED this 21st day of June, 2001.


ROSEMOND BLAKELOCK
Attorney for Appellee

CERTIFICATE OF DELIVERY

I certify that I caused two copies of the foregoing BRIEF OF APPELLEE to be delivered to the following on June 21, 2001:

James Woodall
426 South 500 East
Salt Lake City, Utah 84102

A handwritten signature in black ink, appearing to read "R. Blakelock", written over a horizontal line.

Rosemond Blakelock
Attorney for Appellee

ADDENDUM

1. Utah Code Ann., Sec § 78-2a-(3) (2) (i)
2. Utah Code Ann., Sec § 30-3-5(1)
3. Utah Code Ann., Sec § 30-3-5(7) (a)
- ~~4~~. Utah Code Ann., Sec § 30-3-5(7) (d)

support staff shall be established by the appellate court administrator, and powers established by rule of the Supreme Court 1986

78-2-7. Repealed. 1986

78-2-7.5. Service of sheriff to court.

The court may at any time require the attendance and services of any sheriff in the state 1988

78-2-8 to 78-2-14 Repealed 1986, 1988

CHAPTER 2a

COURT OF APPEALS

Section	
78-2a-1	Creation — Seal
78-2a-2	Number of judges — Terms — Functions — Filing fees
78-2a-3	Court of Appeals jurisdiction
78-2a-4	Review of actions by Supreme Court
78-2a-5	Location of Court of Appeals
78-2a-6	Appellate Mediation Office — Protected records and information — Governmental immunity

78-2a-1. Creation — Seal.

There is created a court known as the Court of Appeals. The Court of Appeals is a court of record and shall have a seal 1986

78-2a-2. Number of judges — Terms — Functions — Filing fees.

(1) The Court of Appeals consists of seven judges. The term of appointment to office as a judge of the Court of Appeals is until the first general election held more than three years after the effective date of the appointment. Thereafter, the term of office of a judge of the Court of Appeals is six years and commences on the first Monday in January, next following the date of election. A judge whose term expires may serve, upon request of the Judicial Council, until a successor is appointed and qualified. The presiding judge of the Court of Appeals shall receive as additional compensation \$1,000 per annum or fraction thereof for the period served.

(2) The Court of Appeals shall sit and render judgment in panels of three judges. Assignment to panels shall be by random rotation of all judges of the Court of Appeals. The Court of Appeals by rule shall provide for the selection of a chair for each panel. The Court of Appeals may not sit en banc.

(3) The judges of the Court of Appeals shall elect a presiding judge from among the members of the court by majority vote of all judges. The term of office of the presiding judge is two years and until a successor is elected. A presiding judge of the Court of Appeals may serve in that office no more than two successive terms. The Court of Appeals may by rule provide for an acting presiding judge to serve in the absence or incapacity of the presiding judge.

(4) The presiding judge may be removed from the office of presiding judge by majority vote of all judges of the Court of Appeals. In addition to the duties of a judge of the Court of Appeals, the presiding judge shall

- (a) administer the rotation and scheduling of panels,
- (b) act as liaison with the Supreme Court,
- (c) call and preside over the meetings of the Court of Appeals, and
- (d) carry out duties prescribed by the Supreme Court and the Judicial Council.

(5) Filing fees for the Court of Appeals are the same as for the Supreme Court 1988

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary (a) to carry into effect its judgments, orders, and decrees, or

(b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer,

(b) appeals from the district court review of

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies, and

(ii) a challenge to agency action under Section 63-46a-12.1,

(c) appeals from the juvenile courts,

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony,

(e) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony,

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony,

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony,

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity,

(i) appeals from the Utah Military Court, and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings 1996

78-2a-4. Review of actions by Supreme Court.

Review of the judgments, orders, and decrees of the Court of Appeals shall be by petition for writ of certiorari to the Supreme Court 1986

78-2a-5. Location of Court of Appeals.

The Court of Appeals has its principal location in Salt Lake City. The Court of Appeals may perform any of its functions in any location within the state 1986

78-2a-6. Appellate Mediation Office — Protected records and information — Governmental immunity.

(1) Unless a more restrictive rule of court is adopted pursuant to Subsection 63-2-201(3)(b), information and records relating to any matter on appeal received or generated by the

- (d) willful neglect of the respondent to provide for the petitioner the common necessities of life;
 - (e) habitual drunkenness of the respondent;
 - (f) conviction of the respondent for a felony;
 - (g) cruel treatment of the petitioner by the respondent to the extent of causing bodily injury or great mental distress to the petitioner;
 - (h) irreconcilable differences of the marriage;
 - (i) incurable insanity; or
 - (j) when the husband and wife have lived separately under a decree of separate maintenance of any state for three consecutive years without cohabitation.
- (4) A decree of divorce granted under Subsection (3)(j) does not affect the liability of either party under any provision for separate maintenance previously granted.
- (5) (a) A divorce may not be granted on the grounds of insanity unless:
- (i) the respondent has been adjudged insane by the appropriate authorities of this or another state prior to the commencement of the action; and
 - (ii) the court finds by the testimony of competent witnesses that the insanity of the respondent is incurable.
- (b) The court shall appoint for the respondent a guardian ad litem who shall protect the interests of the respondent. A copy of the summons and complaint shall be served on the respondent in person or by publication, as provided by the laws of this state in other actions for divorce, or upon his guardian ad litem, and upon the county attorney for the county where the action is prosecuted.
- (c) The county attorney shall investigate the merits of the case and if the respondent resides out of this state, take depositions as necessary, attend the proceedings, and make a defense as is just to protect the rights of the respondent and the interests of the state.
- (d) In all actions the court and judge have jurisdiction over the payment of alimony, the distribution of property, and the custody and maintenance of minor children, as the courts and judges possess in other actions for divorce.
- (e) The petitioner or respondent may, if the respondent resides in this state, upon notice, have the respondent brought into the court at trial, or have an examination of the respondent by two or more competent physicians, to determine the mental condition of the respondent. For this purpose either party may have leave from the court to enter any asylum or institution where the respondent may be confined. The costs of court in this action shall be apportioned by the court. 1997

30-3-2. Right of husband to divorce.

The husband may in all cases obtain a divorce from his wife for the same causes and in the same manner as the wife may obtain a divorce from her husband. 1953

30-3-3. Award of costs, attorney and witness fees — Temporary alimony.

(1) In any action filed under Title 30, Chapter 3, 4, or 6, and in any action to establish an order of custody, visitation, child support, alimony, or division of property in a domestic case, the court may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action. The order may include provision for costs of the action.

(2) In any action to enforce an order of custody, visitation, child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense. The court, in its discretion, may award no fees or limited fees against a party if the court finds the party

is impecunious or enters in the record the reason for not awarding fees.

(3) In any action listed in Subsection (1), the court may order a party to provide money, during the pendency of the action, for the separate support and maintenance of the other party and of any children in the custody of the other party.

(4) Orders entered under this section prior to entry of the final order or judgment may be amended during the course of the action or in the final order or judgment. 1993

30-3-4. Pleadings — Findings — Decree — Use of affidavit — Sealing.

(1) (a) The complaint shall be in writing and signed by the petitioner or petitioner's attorney.

(b) A decree of divorce may not be granted upon default or otherwise except upon legal evidence taken in the cause. If the decree is to be entered upon the default of the respondent, evidence to support the decree may be submitted upon the affidavit of the petitioner with the approval of the court.

(c) If the petitioner and the respondent have a child or children, a decree of divorce may not be granted until both parties have attended the mandatory course described in Section 30-3-11.3, and have presented a certificate of course completion to the court. The court may waive this requirement, on its own motion or on the motion of one of the parties, if it determines course attendance and completion are not necessary, appropriate, feasible, or in the best interest of the parties.

(d) All hearings and trials for divorce shall be held before the court or the court commissioner as provided by Section 78-3-31 and rules of the Judicial Council. The court or the commissioner in all divorce cases shall enter the decree upon the evidence or, in the case of a decree after default of the respondent, upon the petitioner's affidavit.

(2) The file, except the decree of divorce, may be sealed by order of the court upon the motion of either party. The sealed portion of the file is available to the public only upon an order of the court. The concerned parties, the attorneys of record or attorney filing a notice of appearance in the action, the Office of Recovery Services if a party to the proceedings has applied for or is receiving public assistance, or the court have full access to the entire record. This sealing does not apply to subsequent filings to enforce or amend the decree. 1997

30-3-4.1 to 30-3-4.4. Repealed.

1990

30-3-5. Disposition of property — Maintenance and health care of parties and children — Division of debts — Court to have continuing jurisdiction — Custody and visitation — Determination of alimony — Nonmeritorious petition for modification.

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. The court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children;

(b) if coverage is or becomes available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children;

(c) pursuant to Section 15-4-6.5:

(i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;

- (ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current addresses; and
- (iii) provisions for the enforcement of these orders; and

(d) provisions for income withholding in accordance with Title 62A, Chapter 11, Recovery Services.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the noncustodial parent to provide child care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and dental care, and for distribution of the property and obligations for debts as is reasonable and necessary.

(4) (a) In determining visitation rights of parents, grandparents, and other members of the immediate family, the court shall consider the best interest of the child.

(b) Upon a specific finding by the court of the need for peace officer enforcement, the court may include in an order establishing a visitation schedule a provision, among other things, authorizing any peace officer to enforce a court ordered visitation schedule entered under this chapter.

(5) If a petition for modification of child custody or visitation provisions of a court order is made and denied, the court shall order the petitioner to pay the reasonable attorneys' fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted or defended against in good faith.

(6) If a petition alleges substantial noncompliance with a visitation order by a parent, a grandparent, or other member of the immediate family pursuant to Section 78-32-12.2 where a visitation right has been previously granted by the court, the court may award to the prevailing party costs, including actual attorney fees and court costs incurred by the prevailing party because of the other party's failure to provide or exercise court-ordered visitation.

(7) (a) The court shall consider at least the following factors in determining alimony:

- (i) the financial condition and needs of the recipient spouse;
- (ii) the recipient's earning capacity or ability to produce income;
- (iii) the ability of the payor spouse to provide support;
- (iv) the length of the marriage;
- (v) whether the recipient spouse has custody of minor children requiring support;
- (vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and
- (vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.

(b) The court may consider the fault of the parties in determining alimony.

(c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection

(7)(a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.

(d) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.

(e) When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court may make a compensating adjustment in dividing the marital property and awarding alimony.

(f) In determining alimony when a marriage of short duration dissolves, and no children have been conceived or born during the marriage, the court may consider restoring each party to the condition which existed at the time of the marriage.

(g) (i) The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.

(ii) The court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.

(iii) In determining alimony, the income of any subsequent spouse of the payor may not be considered, except as provided in this Subsection (7).

(A) The court may consider the subsequent spouse's financial ability to share living expenses.

(B) The court may consider the income of a subsequent spouse if the court finds that the payor's improper conduct justifies that consideration.

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

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

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

1999

30-3-5.1. Provision for income withholding in child support order.

Whenever a court enters an order for child support, it shall include in the order a provision for withholding income as a means of collecting child support as provided in Title 62A, Chapter 11, Recovery Services.

1997

30-3-5.2. Allegations of child abuse or child sexual abuse — Investigation.

When, in any divorce proceeding or upon a request for modification of a divorce decree, an allegation of child abuse or