

Domestic Relations

Hon. Hamilton Singleton
Circuit Judge, Camden

**NEW JUDGE TRAINING
JANUARY 7-9, 2009
DOMESTIC RELATIONS
HAMILTON H. SINGLETON**

I. JURISDICTION AND VENUE

- A. Jurisdiction
 - 1. Service
 - 2. Divorce
 - 3. Custody
 - 4. Child Support
 - 5. Alimony

- B. Venue

II. GROUNDS FOR DIVORCE AND DEFENSES

- A. Grounds must be proven
- B. Residency must be proven and corroborated
- C. Divorce by deposition
- D. Defenses to divorce
 - 1. Common law defenses
 - a. Collusion
 - b. Recrimination
 - c. Connivance
 - 2. Adultery—no divorce granted to adulterer(s)

III. ANNULMENT

- A. Limited grounds
- B. Grounds must be proven
- C. Time a factor

IV. DIVISION OF PROPERTY

- A. Real property
- B. Personal property

C. Pension Plans

D. Debts

V. CHILD SUPPORT

A. Child support chart
1. Net income of payor
2. Unemployed payor

B. Future income or bonuses

C. Child support and visitation mutually exclusive

VI. CHILD CUSTODY

A. Sole custody

B. Joint legal custody with primary physical custody in one parent

C. Joint custody

D. Split custody

E. Temporary custody
1. On ex parte motion
2. Upon motion after hearing

VII. ALIMONY

A. Basis for

B. Many variables

C. Types of alimony
1. Permanent
2. Term
3. Gender neutral

VIII. PATERNITY

A. Acknowledgment of paternity

B. Adjudication of paternity without scientific testing

- C. Blood tests
- D. Child support
- E. Statutory, legal custodian
- F. Children of a marriage with allegation that someone else is the father

IX. PRO SE LITIGANTS

- A. Increasing
- B. The judge as “lawyer” for pro se litigants
- C. Decrees prepared by pro se litigants

X. DOMESTIC ABUSE

- A. A.C.A. § 9-15-101, et seq.
- B. Petition form set out in statute--A.C.A. § 9-15-203(c)
- C. Parties may be married or unmarried
- D. Difficult and frustrating cases
- E. Petition may include request for ex parte order of custody
- F. Unmarried partners with children--paternity may not have been established
- G. Appointment of attorney ad litem?

XI. DOMESTIC RELATIONS ATTORNEYS AD LITEM

- A. A.C.A. §9-13-101(e); Supreme Court Administrative Order No. 15, §§ 4 & 5
- B. When appointed
- C. Circuit court’s discretion to appoint
- D. Training for attorneys ad litem who will be paid with state funds
- E. Duties of attorney ad litem
- F. State funding for attorneys ad litem

G. Domestic Relations/Probate Attorney Ad Litem Committee of the Arkansas
Judicial Council

DOMESTIC RELATIONS

Hamilton H. Singleton

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I. Jurisdiction and Venue

A. Jurisdiction

1. Service
 - a. Sheriff or court-approved process server.
 - b. Green card – Must be sent restricted delivery and must be signed by addressee. If refused, can go forward. If unclaimed, still not good service.
 - c. Warning order – Should have swearing by plaintiff that whereabouts are unknown, rather than the lawyer. Complaint and Warning Order must be sent to last known address.
2. Divorce:
 - a. Must have jurisdiction over plaintiff, but may not have personal jurisdiction over defendant. Service does not give personal jurisdiction, but must have service, either personal or by warning order. If no personal jurisdiction, can give divorce, but that is about all. You cannot divide property, assess debts, etc.
3. Custody:
 - a. If both parties live in Arkansas, no problem.
 - b. If plaintiff lives in Arkansas and defendant lives in another state, the Uniform Custody Jurisdiction and Enforcement Act applies. If there is a home state for the child(ren), that state has jurisdiction, and you must defer to that state, absent exigent circumstances. If there is no home state, several factors can be considered, but under UCCJEA, home state takes priority, unlike the former UCCJA.
 - c. Change of custody under UCCJEA. If one of the parties still lives in the state where the divorce was granted, that state has continuing exclusive jurisdiction, and you should not act unless that state declines jurisdiction. Home state is irrelevant. If both parties have left the state granting the divorce (and awarding custody), then home state of child(ren).
4. Child Support:
 - a. If you have personal jurisdiction over both parties, no problem to set, as long as have personal service.
 - b. All states have adopted UIFSA, the Uniform Interstate Family Support Act. If one of the parties still lives in the state granting the divorce and setting child support, that state has continuing, exclusive jurisdiction. You can enforce child support obligations if the order setting support is

registered in this state, but you cannot modify.

c. If both parties have left the state granting the divorce and setting child support and the party requesting a modification is an Arkansas resident, you cannot modify. The Arkansas resident wanting a modification must go to the state having jurisdiction over the other party. If a resident of another state wants a modification and the other party is an Arkansas resident, you have jurisdiction to modify. You always have jurisdiction to enforce if you have personal jurisdiction over the party who owes support, as long as the other is registered.

5. Alimony:

a. If you have personal jurisdiction over both parties, you have jurisdiction.

b. Any state which issues an alimony award has continuing, exclusive jurisdiction of the alimony throughout the obligation.

B. Venue

1. Waived if not in first pleading.

2. There is a Supreme Court case that states that venue is jurisdictional and must be accurately plead. But the parties may waive venue.

II. Grounds for Divorce and Defenses

A. Grounds must be proven, and it is not sufficient to simply state "General Indignities" as grounds. This is true even in an uncontested divorce. The Supreme Court has stated on numerous occasions that grounds must be established by factual evidence, not by conclusion.

The latest published case reversing a divorce for failure to prove grounds of general indignities is *Dee v. Dee*, 99 Ark. App. 159, 258 S.W.3d 405 (2007). The plaintiff/appellee answered "yes" to her attorney's question whether, during the course of their marriage, defendant/appellant had treated her in such a manner as to render her condition in life intolerable. No elaboration or corroboration was presented. (The defendant/appellant had waived corroboration of grounds and he did not object to the lack of evidence or move for a directed verdict based upon insufficient evidence). In reversing the divorce, the Court of Appeals said that "despite [the appellant's] waiving corroboration of grounds and [his] failing to object to the sufficiency of grounds at trial, appellee was required to offer sufficient non-conclusory proof of grounds, and she failed to do so."

B. Residency must always be proven and corroborated. If an answer is filed, grounds must be corroborated, unless waived by the other party, which must be on the

record or in the decree. If the divorce is to be granted on 18-months' separation, the separation must be corroborated and cannot be waived. The witness must have actual knowledge of the separation, i.e., he/she must have known the party for the 18-month period of separation.

- C. Deposition divorces. There is actually nothing in the statutes that authorizes this practice. The statute, Ark. Code Ann. § 9-12-306(c)(2), states: "In uncontested cases, proof as to residence and proof of separation and continuity of separation without cohabitation may be corroborated by either oral testimony or **verified affidavit of persons other than the parties.**" However, it is a common practice in some judicial districts. They are generally more work for you than actually having a hearing because you can tell lawyers what the problems are at a hearing and get them corrected rather easily. If the affidavit or deposition merely states "General Indignities" for grounds for divorce, you have it in writing in the file that the grounds for divorce have not been adequately proven. It may not ever be a problem, but if one develops into one, you look incompetent. You might want to consider that the ending of a marriage should be a significant event to people and appearing in court makes an impression on them.
- D. Common law defenses include collusion, recrimination, and connivance. Be aware that if a party is guilty of adultery, that party is not supposed to be awarded a divorce. Ark. Code Ann. § 9-12-308. This sometimes becomes a problem when the divorce itself is uncontested but there is a custody issue. If the parties start getting into issues regarding adultery during the custody proceeding, it can become a problem. If both parties are guilty of adultery, no divorce is supposed to be granted. The court can weigh fault, but if fault is equal, no divorce is supposed to be granted. Strange, but it is the law.

The previous defense of condonation was abolished by the General Assembly in 2005. Ark. Code Ann. § 9-12-325.

III. Annulment

- A. Very limited grounds:
1. Lack of capacity, either age or understanding.
 2. Obtained by force or fraud—generally still married to someone else at the time of the marriage.
 3. Impotence at time of marriage but represented otherwise. Only the aggrieved party can use. Person who is impotent cannot ask for annulment on that ground.

B. Even if agree, still must prove grounds for annulment. You would be well advised not to get in the habit of granting annulments. They will cause you problems.

C. Time is a major factor. Should be very close in time to the marriage, or as soon as it is discovered.

IV. Division of Property

A. Real Property

1. Marital property
 - a. one-half to each unless inequitable
 - b. considerations in Ark. Code Ann. § 9-12-315
 - c. court to state reasons for inequitable division
2. All other property
 - a. return to party who owned before marriage unless inequitable
 - b. court to state reasons for some other division pursuant to factors in Ark. Code Ann. § 9-12-315

B. Personal Property

1. Sell--Not very good for the parties and probably should be a last resort. The party with the most money will buy the property at a very reduced price, which punishes the poorer spouse. Sometimes the parties are so unreasonable there is no other alternative, but it should be avoided, if possible.
2. Alternative picking from one list--It is important to get a complete list, then let one of the parties go first--either the party getting the divorce, flip a coin, whatever--and then alternate. This method presupposes the parties will select the more expensive or important items first and move to lesser important items. However, it requires some cooperation or involvement of the lawyers.
3. Two lists--One party prepares two lists and the other party gets to choose the list. This can get punitive. The party preparing the lists may put something very important to the other party on a list with other items of lesser value.

C. Pension Plans

1. A common misconception is that pension plans must be divided equally. Pension plans are merely personal property and they can be offset by other personal property, as long as you have an accurate value of the plan at the time of divorce. Sometimes you don't have enough information to divide with other property, so you have to divide by QDRO. However, it is better

to award each party his/her own pension, if possible. The more you can do to make sure the parties don't have to deal with each other in the future, the better it will be. Oftentimes, only one party has a pension plan and it is a significant asset with no other assets of equal value. Then you don't have much of a choice but to divide it.

2. Try to get the QDRO at the same time as the decree. The lawyers must get the form from the plan administrator and divide according to ERISA to avoid tax consequences. Most lawyers who practice much domestic relations know how to do this, but you may have to point some in the right direction. It is better to get both lawyers to approve the QDRO before you enter it to avoid problems later.

D. Debts

You do not have to divide debts equally, and it is generally more equitable to have the party who has the ability to pay the debts to get a greater share of the debts. If a party receives an item of personal property that has a debt attached, then that party should generally receive the debt attached, as he/she has the incentive to pay it. Try to give the parties their individual debts or allocate the debts. If you say they pay one-half of each debt, you will have future problems.

V. Child Support

A. Chart has some significant provisions

1. There must be a statement of the payor's net income upon which the child support is set, and the appropriate chart amount of support must be stated. This is a very good provision for future modifications. If the order states exactly what the payor's income is and what the chart amount support is, it's much easier to modify later. If you don't set chart amount support, there must be findings and conclusions regarding why you are deviating from the chart. **THIS APPLIES TO AGREED ORDERS, TOO.** All of that information must be in agreed orders and chart amount support **MUST** be set or reasons given why there is a deviation. This is very hard to convince lawyers who will tell you, "Oh, it's an agreed order." And it is not a significant deviation that "Dad doesn't need the money" or that "Mom doesn't want to pay support." What you are looking for is whether there was some sort of blackmail in the agreement. For instance, Mom may say Dad can have custody if she doesn't have to pay child support. This is very common, and you want to make sure that is not happening. You do not have to accept agreements regarding support (or custody). You are the final

decision maker, and you actually have a duty not to accept agreed orders which are not based upon the best interest of the child. Oftentimes, the lawyers want to blame the judge, and that's fine as long as the judge gets the right amount of support set for the needs of the child(ren).

2. If the payor is unemployed, child support should be set on imputed income based upon minimum wage. Current federal minimum wage is \$6.55 an hour, effective July 24, 2008. Current state minimum wage is \$6.25 an hour.
- B. Do not use the percentages in the chart for the parties to calculate child support based upon future income or bonuses. The Supreme Court has made it very clear that this should not be done. A certain amount of child support, either weekly or monthly, should be set, based upon the evidence that you have. This has been a somewhat common practice for big income earners who receive bonuses, i.e., to set a certain amount of support and then a percentage of the bonus when received. But the Supreme Court has said not to do it, and it will cause you problems. They will fight over what was a bonus, what was profit sharing, etc. And the lawyers who drafted the decree will not be around. Take your best shot, on the evidence presented, at what the weekly or monthly average net income is and set support. The parties can always ask for a modification if income increases or decreases.
- C. The issues of child support and custody/visitation are apples and oranges. The failure of a parent to pay child support does not result in a loss of visitation. By the same token, a denial of visitation does not give a noncustodial parent the right to withhold visitation.

Lyons v. McInvale, 98 Ark. App. 433, 256 S.W.3d 512 (2007), was a custody, visitation, and child support case in which a father argued that he was justified in not paying child support because his daughter refused to visit him. The Court of Appeals concluded its opinion with the following:

We are troubled by the fact that the trial judge tied Gerald's child-support obligation to whether he received visitation. There is a line of cases, in reference to adoption, holding that the duty to pay child support is independent of the duty of the custodial parent to allow visitation, because both may be enforced by the courts....This reasoning should not be limited solely to adoption cases, and it is squarely on point in this case. If Gerald was not receiving his visitation, the answer was not to cut off child support, but to return to court.

Id. at 440, 256 S.W.3d 516 (citations omitted).

VI. Child Custody

- A. Sole Custody—Regardless of what anyone will tell you, this actually works the best for the child. The parties are divorcing. They don't like each other, and someone has to be in charge of taking care of the child(ren). Good parents will confer with the other parent. Bad parents won't, regardless of what you call it, and you are trying to keep the child out of turmoil. When you have to make a custody determination, the law requires you not to consider the sex of the parent. In most instances, the parties will agree that Mom will have custody. If you are having a custody battle, it is generally because Dad is a good, involved parent who actually wants custody, Mom is a lousy parent, or Dad is mad at Mom and wants to punish her. You have to decide which one it is. It is a future prediction of what will work best for the child(ren), and it is the hardest thing you will do.
- B. Joint Legal Custody and one parent has Primary Physical Custody—This is what parties seem to agree to the most. They probably don't actually even know what they are doing, but it sounds good. Make sure they understand that they are joint decision makers on issues regarding the children, i.e., schools, doctors, camps, etc. The issue that later develops is what happens when they don't agree. Some judges will actually make the decision when presented with the issue, or you can just make one of the parents the sole custodian to make the decisions. There really is no clear-cut answer.
- C. Joint Custody—This generally refers to joint decision making and joint physical custody, which may mean they can figure it out without court interference or that they will spend equal time with the child(ren). It has been shown that this really doesn't work too well for the child in most instances, but it's something that you will have to decide on your own when you have some more experience. Never award joint custody in a contested custody matter. Only if the parties agree and ask for it should you ever consider it. Custody is tough, but it's your job. Don't split the baby; it isn't fair to the baby. Remember that custody is a determination of what is in the best interest of the child, not what is in the best interest of the parents.
- D. Split Custody—This means putting one child with one parent and one child with the other parent. Obviously, you can have more than two children, but the siblings are split between the parents. This is generally not good for the children and should be used or approved in very limited circumstances. It can work if there is a big age

difference between the children, or if there is a problem child who is causing problems with the other child(ren).

- E. Temporary Custody—Temporary custody may be granted on ex parte motions for the temporary custody of a child(ren). Such a motion may be made when a divorce petition is filed or after a divorce decree has been entered and an emergency arises.

Jones v. Jones is a line of cases illustrating the use of ex parte orders in change-of-custody cases. The Court of Appeals affirmed a trial court's post-decree change of custody from a mother to a father based upon an ex parte motion. *Jones v. Jones*, 51 Ark. App. 24, 907 S.W.2d 745 (1995). Both the majority opinion and the dissent include good discussions of ex parte orders in custody cases. The Supreme Court granted review and reversed the Court of Appeals, changing custody back to the mother. 326 Ark. 481, 931 S.W.2d 767 (1997)(*Jones I*). A number of appeals followed. 326 Ark. 828, 933 S.W.2d 810(1996)(per curiam)(*Jones II*)(trial court ordered to reinstate original order placing custody with the mother); 327 Ark. 195, 938 S.W.2d 228(1997)(per curiam)(*Jones III*)(attorney fees); 328 Ark. 97, 940 S.W.2d 881 (1997)(per curiam)(*Jones IV*)(denial of writ of prohibition); 328 Ark. 684, 944 S.W.2d 121(1997)(per curiam)(order to show cause why Rule 11 sanctions should not be imposed).

VII. Alimony

- A. The needs of one party and the ability of the other party to pay.
- B. There are so many variables that it is one of the most difficult issues to address.
- C. Types of Alimony:
1. Permanent—Generally awarded when there is a long-term marriage, Mom stayed at home and raised the kids, and she is too old realistically to become employed in any profession in which she will earn substantial income. You have to look at what it takes to support the wife in a reasonable fashion and figure out whether the husband can pay it. If he can, he should. You can take income-producing assets into consideration, but you should not expect the wife to sell assets to live. You also should not consider any future pension income, as it belongs to both parties. You must remember that the marriage was a joint venture, and the husband is generally in his position because of the joint efforts of the parties.
 2. Term—Generally awarded for a specific period of time. This can be based upon a shorter marriage where the wife can become gainfully employed if

she is rehabilitated, especially where the husband obtained employment or education at the expense of the wife's employment or education. Term alimony is not appropriate for a long-term marriage where the wife has not worked. You can always modify or terminate permanent alimony, but you generally cannot extend term alimony.

3. Alimony is not just for a wife and can be awarded to a husband if the wife is the wage earner. It just isn't what normally happens.

VIII. Paternity

- A. An acknowledgment of paternity is a conclusive finding of paternity without court determination, Ark. Code Ann. § 9-10-120. It can be challenged only under certain circumstances, such as for fraud, duress, or material mistake of fact. Ark. Code Ann. § 9-10-115(d).
- B. When a man has been adjudicated the father or has acknowledged paternity but without scientific testing and has been ordered to pay child support, he is entitled by Ark. Code Ann. § 9-10-115 to one paternity test at any time during the period of support. If the test excludes him, the previous finding of paternity shall be set aside and the court shall: (1) find there's no future obligation of support; (2) vacate any order for unpaid support; and (3) order that any previously-paid support is not subject to refund.

In *Martin v. Pierce*, 370 Ark. 53, 257 S.W.3d 82 (2007), the Supreme Court found that Ark. Code Ann. § 9-10-115 applies only to judicial findings of paternity and acknowledgments of paternity, not to divorce decrees. An order of child support based upon a finding in a divorce decree that a child is of the marriage cannot be overturned by a paternity test excluding him as the father.

- C. Blood tests are pretty conclusive, and rarely is there a challenge after a blood test.
- D. Child support should be set according to the chart, just the same as for a child of a marriage.
- E. The mother is the statutory, legal custodian of a child born to an unmarried woman. Ark. Code Ann. § 9-10-113. A putative father may petition for custody once paternity has been established "in a court of competent jurisdiction." *Id.*

A putative father may move for custody or visitation in connection with a petition for paternity. The statutory provision says that "legal custody shall be in the

woman giving birth to the child until the child reaches eighteen (18) years of age unless a court of competent jurisdiction enters an order placing the child in the custody of another party.” *Id.*

- F. There are several conflicting cases regarding children of a marriage when there is an allegation that someone else is the father. You should read these cases very carefully when you have that issue. Remember that if it is a child of the marriage, a blood test should not be ordered just because one of the parties wants one. If they agree to it, you still don't have to order it. They can get one without a court order if they really want one. There should still be proof of non-access or impotency. Although Lord Mansfield's Rule has been abolished, it was just a rule of evidence. A child born of the marriage is still presumed to be the husband's/father's child, and you should be very careful about what is in the child's best interest when dealing with these issues.

IX. Pro Se Litigants

- A. Pro se divorces are increasing, and you are going to have to figure out how you intend to handle them. They have a right to do it, but they are required to follow the law and the rules.
- B. Just because the plaintiff did not hire a lawyer, he/she doesn't get you. You are not required to ask the questions or to make sure the elements are proven. Some judges won't do anything and some will do it all. You just have to decide where you are the most comfortable.
- C. The decree may become a major problem, especially if there are some issues that need to be addressed. Generally, if the parties have no property and no children, it can be a simple matter, although you might have to change some of the words, i.e., cross out "irreconcilable differences" and write in "general indignities." They have generally either gotten a copy of someone else's decree, which has absolutely nothing to do with them, or they have used a do-it-yourself kit, which generally doesn't comport with Arkansas law. If there is property, or especially children, the decree can become a big problem if they don't have a clue what they are doing.

X. Domestic Abuse

- A. Ark. Code Ann. § 9-15-101, et seq., is the Domestic Abuse Act.
- B. The Act sets out a petition which is to be used in substantially the form set out in

the statute. Ark. Code Ann. § 9-15-203(c).

- C. Domestic abuse/domestic violence cases are prevalent and may occur with both married and unmarried partners. The couple may live together, or they may be or have been in a present or past dating relationship.
 - D. These are difficult and frustrating cases for judges, in part because of the dynamics of abuse, which are complex. By nature, they involve emotionally charged and violent situations. And the stakes are high because the safety of a victim (and possibly children in the household) is always an issue.
 - E. An ex parte order for custody of children may be sought in a domestic abuse case when one is filing for a temporary order of protection.
 - F. With unmarried partners, there may be children born of the relationship and paternity may never have been established. In that situation, Ark. Code Ann. § 9-10-113 applies—mother is the custodian unless a court orders otherwise. It may be a source of frustration for a judge if the putative father is trying to get temporary custody or visitation at that point.
 - G. Appointment of an attorney ad litem to represent the best interests of the child(ren) may be helpful to the court in domestic abuse cases.
- XI. Domestic Relations/Probate Attorneys Ad Litem
- A. Ark. Code Ann. § 9-13-101(e) and -106; Arkansas Supreme Court Administrative Order No. 15, §§ 4 & 5.
 - B. A domestic relations/probate attorney ad litem represents the best interests of a child in a domestic relations or probate case in which custody is an issue, e.g., divorce (and pre-or post-decree custody or visitation), paternity, domestic violence, guardianship, and adoption (when disputed) cases.
 - C. The appointment of an attorney ad litem is at the discretion of the circuit court.
 - D. To be paid with state funds, a domestic relations/probate attorney ad litem must be on the list of those who have been trained and qualified by the Arkansas Supreme Court pursuant to Supreme Court Administrative Order No. 15. Sections 4 and 5 of the Order apply to domestic relations/probate attorneys ad litem. The Administrative Order requires initial education with a prescribed curriculum and

continuing legal education for each year in which qualification is maintained. The Administrative Order also sets out the responsibilities of an attorney ad litem.

- E. The attorney ad litem functions as any other attorney in the case, except that he/she represents the best interests, not the wishes, of a child. If best interests and wishes of the child differ, the attorney ad litem is obligated to communicate that fact to the court.

- F. State funding for attorneys ad litem is administered through the Administrative Office of the Courts. An attorney ad litem can be paid a maximum of \$90/hour, up to \$1,250/case, with state money, so long as the money holds out. Once a case closes, the obligation of the attorney ad litem ends. If the case subsequently is reopened, the attorney ad litem may be reappointed, at which time he/she may bill the state for the new work, again up to the maximum \$1,250. The state funding is allocated per circuit based upon divorce filings. Each administrative judge decides how to divide the money in his/her circuit. Some circuits use the money on a first-come, first-served basis and others allocate a share to each judge in the circuit. In years past, the custom has been to pool all unused money in the state and to make it available to all attorneys ad litem on a first-come, first-served basis. This pooling of funds usually occurs late in the fiscal year, around May 1. The funds must be expended by the end of the fiscal year, June 30; unused funds revert to the state.

- G. A committee of the Arkansas Judicial Council makes decisions regarding the program, including whether and when to pool the money each year. The program operates on a fiscal year, July 1 through June 30.