

Wyoming family law: the basics

Equal Justice Wyoming
November 18, 2016
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Divorce: Important Aspects to Know

- Understanding the overall process and inherent challenges
- Importance of fact gathering through client interviews
- Jurisdictional issues for varying factors in family law cases
- Negotiation skills relevant at all stages
- Staying current on case law, state law and federal implications

American Bar Association Section of Family Law, Civility Standards

- http://www.americanbar.org/content/dam/aba/migrated/family/reports/standards_civility.authcheckdam.pdf

Discretion, discretion, discretion!

- Broad discretion to judges (considerable deference)-need "manifest" **abuse of discretion** to appeal (**BEST PRACTICE: always get court reporter**)
- When the Supreme Court does not have a properly authenticated transcript before it, it must accept the trial court's findings of fact upon which it bases any decisions regarding evidentiary issues. *Knezovich v. Knezovich*, 340 P.3d 1034 (2015 WY 6).

Divorce

- "A divorce may be decreed by the district court of the county in which either party resides on the complaint of the aggrieved party on the grounds of irreconcilable differences in the marital relationship." W.S. §20-2-104
- Plaintiff must be resident of State for 60 days preceding the filing of divorce.
- Venue: Decree entered in county where plaintiff or defendant resides.

Modified "no-fault" divorce

- Must have irreconcilable differences but also includes "aggrieved party" language.
- Both parties may be aggrieved *Grosskopf v. Grosskopf*, 677 P.2d 814 (Wyo. 1984)
- Only one spouse needs to believe differences are irreconcilable
- Where each party seeks decree of divorce on grounds of irreconcilable differences, court must determine to whom the divorce should be granted, and in making that determination, the court may consider fault of respective parties, equities involved, effect of divorce upon parties and children, and all the other facts and circumstances of case, *W.S.1977, § 20-2-104*.
- Merits and conduct of parties may still be relevant for property division and custody, too.

LEGAL SEPARATION

- treated same as divorce
- custody, visitation, support, property, etc.
- contract for marriage is still intact

WYOMING DIVORCE JURIS & VENUE

- 1. Divorce
- 2. Child Custody
- 3. Financial issues
 - Child support
 - Spousal support
 - Property division
 - Attorney fees

Domicile of Members of Armed Forces

- Many courts hold SM's domicile is domicile at time of entry into Armed Forces unless SM shows "unequivocally by his or her actions an intent to abandon the initial domicile and take a new domicile."
 - *The Military Divorce Handbook*
- See also Servicemembers Civil Relief Act: civil litigation on temporary hold while servicemembers are deployed.

Jurisdiction

- Actions for which the court must have **independent** jurisdiction
 - **Paternity**-need personal jurisdiction over person whose paternity is to be determined. (see Wyoming's version of the UPA W.S. 20-2-401 et seq.)
 - **Divorce**-plaintiff must be resident of the state for 60 days immediately preceding the filing of the complaint (W.S. 20-2-107)
 - **Division of property**
 - 2013 Wyoming case **Roberts v. Locke**: "a court of equity w/juris over a person may act indirectly on that person's extraterritorial real estate by ordering the person to act or cease to act in some way in relation to the property by directing owners to take certain actions concerning property located outside jurisdiction."
 - **Child Support**-need personal jurisdiction over the obligor; generally defined as minimum contacts (see UIFSA, W.S. 20-4-139 et seq.) See also 20-4-142. Basis for jurisdiction over nonresident.
 - **Child Custody**-UCCJEA (W.S. 20-2-501 et seq.) remember to distinguish between initial custody and modification or enforcement jurisdiction of previous custody order. General rule: child must reside in state for 6 months prior to the filing of a petition in the matter. (W.S. 20-5-301)

Jurisdiction over financial aspects of divorce

- Subject matter + personal jurisdiction over both parties = authority to adjudicate the financial aspects of divorce, including property division, support, and attorneys fees. *Experiencing Family Law*, John E.B. Myers (2013)
- Need personal jurisdiction over both parties. *Kulko v. Superior Court* (436 U.S. 84, 98 S.Ct. 1690 (1978))

Property division

- Equitable, not equal; Wyoming is a "kitchen sink" or "hotchpot" jurisdiction meaning all property owned by either party at the time of divorce may be divided regardless of when or how it was acquired. W.S. 20-2-114
- No separate property in WY upon divorce, everything may be considered part of the marital res except degrees and professional licenses. *Paul v. Paul*, 616 P.2d 707 (Wyo. 1980)
- Can have a lump sum

Non marital property in equitable distribution state:

- The following generally not considered marital property: Property
 - Acquired before marriage
 - Acquired by inheritance or gift from 3rd party
 - Excluded by valid agreement or
 - Directly traceable to any of these sources

Spousal support

- Not preferred but doesn't mean not allowed; use property division when possible to equal the playing field, give one more assets
- Payor must have ability to pay and payee spouse needs it
- Can have rehabilitative alimony (for a few years)
- Modification – standard is material and substantial change of circumstances
- Termination – death will not terminate if decree states otherwise; decree must state alimony terminates upon marriage or it doesn't—otherwise try to modify
- W.S. 20-2-114

Looking for the Best Interests of the Child

- *The best interest standard represents a willingness on the part of the court and the law to consider children on a case-by-case basis rather than adjudicating children as a class or a homogeneous grouping with identical needs and situations.* (Joan B. Kelly, *The Best Interests of the Child: A Concept in Search of Meaning*, 35 Fam. & ConCil. CTS. REV. 377, 385 (1997) (noting that the lack of scientific knowledge by the decision maker may result in a custody decision based on personal experience and beliefs of the judge).)
- **BEST INTERESTS** of the children-standard in awarding custody and visitation W.S. 20-2-201(a)

Today

- Only a small percentage of families depend on the court system to make a final decision on the custody of their children--some studies suggest that it is less than two percent of all separating families.
- Only 5% of divorce cases are determined in court, leaving 95 percent to be settled by other methods.
- Most children maintain contact with both parents according to negotiated parenting plans. (FLQM 42, No. 3 (2008)).

CHILD CUSTODY CONSIDERATIONS

- Spousal and child abuse are statutorily contrary to the best interests of the child in WY but court has said abuse is but one factor of many. 20-2-201(c)
- Factors to determine best interests:
 - Quality of relationship with parents, ability of each parent to care for child, relative competency and fitness of each parent, willingness to accept responsibility of parenting, how best to maintain and strengthen a relationship, how parents and children interact and communicate with each other, ability and willingness of each parent to allow the other parent to provide care, geographic distance between parents' residences, current physical and mental ability of parents, and any other factors necessary and relevant
 - Case law factors - respect for freedom of religion, moral behavior and lifestyle of parents, etc.
- Gender - cannot base custody decision solely on gender of parent W.S. 20-2-201(b)

PREGNANCY

- 14-2-811. Proceeding before birth.
- (a) **A proceeding to determine parentage** may be commenced before the birth of the child, but may not be concluded until after the birth of the child. The following actions may be taken **before the birth** of the child:
- (i) Service of process;
 - (ii) Discovery; and
 - (iii) Except as prohibited by W.S. 14-2-702, collection of specimens for genetic testing.
- In spite of joinder statutes (W.S. 14-2-810), some courts require separate TPR actions from divorce proceedings; and
- May need separate action to determine parentage in man other than husband in divorce action.

Welfare of Children: Court's Top Responsibility

- The paramount concern of courts in divorce proceedings should be the welfare of the child.
- The court should be careful not to separate siblings, if at all possible. (*Pace v. Pace*)
- The courts should also be especially careful with allegations of sexual or physical abuse, against any of the children or against one of the parents.
- The goal of any placement of a child should be stability and permanence, which cannot easily exist in an abusive situation.

Discretion, discretion, discretion

- The court must look to the totality of the evidence and fashion a custody arrangement in the best interests of the child. West's [Wyo.Stat. Ann. § 20-2-201\(a\)](#).
- It is within the court's discretion to determine how to weigh the relevant statutory child custody factors. West's [Wyo.Stat. Ann. § 20-2-201\(a\)](#).
- Past occurrence of spousal abuse did not by itself preclude joint custody of child as between husband and wife. *Williams v. Williams*, 368 P.3d 539 (2016 WY 21).
- In determining custody in the best interest of a child, evidence of spousal abuse is only one of the factors district courts are required to consider. West's [Wyo.Stat. Ann. § 20-2-201\(c\)](#).
- A parent's role as the **primary caregiver** is a weighty factor (though not determinative) that the court must consider when fashioning a custody arrangement that is in the best interests of the child. West's [Wyo.Stat. Ann. § 20-2-201\(a\)](#).
- "Primary caregiver" in context of child custody matters denotes the parent who is primarily responsible for the hands-on, day-to-day care of the child.

Child Custody Jurisdiction

- Personal jurisdiction over both parents is *not* required to adjudicate child custody. (PKPA and UCCJEA)
- Fortunately, most parents agree on custodial arrangements and custody litigation is avoided.

Home State Jurisdiction

- Priority in **initial** child-custody proceedings (UCCJEA and PKPA)
- Where the child has lived with a parent or an acting parent for at least six consecutive months immediately before the commencement of a child custody proceeding, or
- From the child's birth until the commencement of the proceeding, if the child is less than 6 months old; or
- It is located in State that was the child's home State w/in 6 months of commencement and child's parent or person acting as parent continues to reside there even if child has been removed ("**extended home state**").
- Wyo. Stat. 20-5-301(a)(i)

JURISDICTION – UCCJEA W.S. 20-5-201 et seq.

- Primary test - home state of child (6 months)
 - If less than 6 months, where child has lived since birth If was home state within past 6 months, and child is absent from state, but parent continues to live in state, can still have juris.
- EXTENDED HOME STATE RULE
- W.S. 20-5-301(a)(i)
- If no other state has home state jurisdiction AND child and at least one parent has a significant connection with state AND substantial evidence is avail in state W.S. 20-5-301(a)(ii)
 - If all other states with jurisdiction decline

JURISDICTION – UCCJEA W.S. 20-5-201 et seq.

- Exclusive continuing jurisdiction – court that made initial child custody or visitation determination has exclusive continuing jurisdiction until court determines: 1) no one resides in state, or 2) child no longer has significant conn. w/ the state W.S. 20-5-302
- Emergency jurisdiction – court has temporary jurisdiction if 1) child has been abandoned, or 2) it is necessary to protect the child from mistreatment or abuse
- Court can decline jurisdiction – if inconvenient forum
- Enforcement of another state's order – need to register with state, with or without a simultaneous request for enforcement
 - can use UCCJEA's expedited enforcement proceeding; a warrant to take physical custody of child from court; or can use prosecutors or law enforcement to enforce

REQUIRED INFORMATION FOR CHILDREN:

First Pleading or First Response in "child custody proceeding":

(Wyo. Stat. 20-5-309 (LEXIS 2005)) Certain information is required to be given under oath for each child, unless you have a court order or are operating under another law allowing you to maintain confidentiality of addresses or other identifying information.

CHILDREN OF THE PARTIES

Applicable if the parties are the parents, either natural or adoptive, of child(ren) who are:

- Under 18 years of age;
- Between the ages of 18-20 and still in high school or a program equivalent to high school; or
- Prevented from supporting him/herself due to a mental, emotional or physical impairment.

Required Information

- Child's present address or whereabouts,
- The places where the child has lived during the last five (5) years and the names and present addresses of the persons with whom the child has lived during that period.

OTHER CASES INVOLVING CHILD(REN)

- State whether client/party has participated as a party or witness or *in any capacity* in any other proceeding (court cases) concerning the custody, allocation of decision-making, or visitation/parenting time of any of the children listed in the *Complaint* (or other child custody pleading) in this or any other state: (If yes, please be specific regarding case number, court, state and nature of case, date of child-custody determination, if any, and child(ren)'s name(s)).

OTHER PROCEEDINGS, INCLUDING PROTECTION ORDERS

- State whether you have any information of any custody proceeding that could affect the current proceeding, including proceedings for enforcement and civil and criminal proceedings relating to domestic violence, protective orders, termination of parental rights and adoptions, and if so, identify the court, the state, the case number and the nature of the proceeding and child(ren)'s name(s)

CUSTODY AND VISITATION RIGHTS OF OTHERS

- LIST: The following people are not parties in this matter, but have physical custody of the child(ren) or claim rights of parental responsibilities, legal custody or physical custody, or visitation/parenting time with the child(ren) (names and addresses of those persons).

Types of Child Custody

- Can have **legal custody** and/or **physical custody** (can be defined); can also have **joint physical custody and/or joint legal custody** (but no statutory definition for joint legal so can define anyway—including defining as both parties have access to medical and school records)
- Custody shall be crafted to promote the best interests of the children, and may include any combination of joint, shared or sole custody. W.S. 20-2-201(d)
- The court shall order custody in well defined terms to promote understanding and compliance by the parties. Unless defined another way in this Decree, "Joint Legal Custody" means that both parties have access to the records of the child(ren) including school records, activities, teachers and teachers' conferences, as well as medical and dental treatment providers and mental health records. Both parties have these rights unless the Court limits that access. W.S. 20-2-201(e)

Child custody and child support

- Shared Custody child support statute "when each parent keeps the children overnight for more than 40% of the year and both parents contribute substantially to the expenses of the children in addition to the payment of child support, a joint presumptive support obligation shall be determined by use of the tables governing presumptive child support" Wyo.Stat.Ann. § 20-2-304(c).
- Although ex-husband had children 41.6% of the year, statute came into play **only if** both parents contributed substantially to the children's expenses **in addition to** paying child support, and record did not indicate that the district court considered, much less determined, whether the parties, and particularly ex-husband, contributed substantially to the expenses of the children over and above the child support he was required to pay. **Loran v. Loran**, 343 P.3d 400.
- While child custody and support go hand-in-hand, legislature did not intend the requirements for joint presumptive child support to define shared physical custody; legislature did not choose to link the statute referring to "shared physical custody" to that providing for joint presumptive child support. West's Wyo.Stat.Ann. § 20-2-304(c). **Loran v. Loran**, 343 P.3d 400.

Child's Preference

- Child preference** – no age set, must look to factors:
 - Age of child
 - Reason for the preference
 - Relative fitness of the preferred and non-preferred parent
 - The hostility of the child to the non-preferred parent
 - Preference of other siblings
 - Whether child's preference has been tainted by parent
- Holiday v. Holiday** (Wyo, 247 P.3d 29, 2011 WY 12) When a parent does not consent to the interview of a child in chambers, the parties or the court should fashion a procedure that protects the parents' rights while minimizing the stress and trauma to the child with the balance weighing in favor of the child's best interests.

Wyoming on Joint Custody

- One of the primary indicators that shared custody will work is the ability of the parents to communicate and cooperate; this naturally requires that the parents have shared goals and philosophies on how the child should be raised.
- "Blind hope that a joint custody agreement will succeed, or that forcing the responsibility of joint decision-making upon the warring parents will bring peace, is not acceptable." **Williams v. Williams**, 368 P.3d 539.
- While ensuring that a child has a close relationship with both parents is a laudable goal, it falls well short of the good reasons needed to justify the joint custody imposed by the district court. *Id.*
- When parties have decided to divorce and lead separate lives, the court's objective is not to reconstruct a family that is no more, but to provide the framework for a new family that can best serve the children. *Id.*
- In awarding custody, courts must decide what is in the best interests of the child, and one important factor in making that decision is determining what arrangement most closely approximates the former family relationship. *Id.*
- Shared custody is not favored, and hence a district court is required to provide an explanation and place its findings on the record when it orders such a custody arrangement. **Loran v. Loran**, 343 P.3d 400

Visitation/Parenting Time

- Know local practice in your jurisdiction
 - "Standard" Visitation Orders and (Laramie County Supplemental Order)
- Most parents agree to parenting plan in their family's best interest.
- A decree in which custody and visitation are disputed must provide more detail so that the parents each understand their obligations, and so the decree may be enforced by contempt sanctions should that regrettably become necessary. *IC v. DW*, 360 P.3d 999 (2015 WY 135)

Wyoming Information

VISITATION

- denial of visitation - repeated, unreasonable failure by custodial parent to allow visitation to the other parent in violation of an order may be evidence of change of circumstances. Wyo. Stat. 20-2-204(c).
- grandparent visitation - can be granted if court finds it is in best interests of the child AND that rights of parents are not substantially impaired Wyo. Stat. 20-7-101
- caregiver visitation - primary caregivers who have taken care of the child for 6 or more months of the last 18 can petition the court for visitation Wyo. Stat. 20-7-102

MODIFICATION OF CUSTODY

- Material and substantial change in circumstances, change warrants modification AND change is in best interests of the child
- **Denial of visitation** - repeated, unreasonable failure by custodial parent to allow visitation to the other parent in violation of an order may be evidence of change of circumstances
- Person petitioning bears the burden of proof
- **Relocation**, *Arnott v. Arnott*, 293 P.3d 440, a relocation by a primary physical custodian, as well as factors that are derivative of the relocation, may constitute a material change in circumstances sufficient to warrant consideration of the best interests, overruling *Watt v. Watt*, 971 P.2d 608.

Attorney for the child/Guardian ad Litem (GAL)

- Appointed to represent the **best interests** of the child
 - May not be a fact witness
 - Report is not presented to the court, UNLESS all parties agree
 - Hybrid role in WY
 - "Even with the best trained experts, the choice would be beyond the demonstrated capacity of any existing theory," *Experiencing Family Law*, John E.B. Myers (2013)
- Currently, Wyoming Guardian Ad Litem program set up for GALs in CPS/Juvenile Court actions, not private custody proceedings.

Clark v. Alexander 953 P.2d 145 (1998)

- Contrary to the ethical rules, the attorney/guardian ad litem is not bound by the client's expressed preferences, but by the client's best interests. If the attorney/guardian ad litem determines that the child's expressed preference is not in the best interests of the child, both the child's wishes and the basis for the attorney/guardian ad litem's disagreement must be presented to the court.
- See *ABA Standards of Practice for Lawyers Representing Children in Custody Cases* (2003); Ann M. Haralambie, *The Child's Attorney: A Guide to Representing Children in Custody, Adoption and Protection Cases* (1993).

CHILD SUPPORT –

- Need in personam jurisdiction (UIFSA)
- Support is child's property
- Statutes provide a statutory presumptive amount based on both parents' income, number of children and time with each parent
- Income – any value or money regardless of source
 - net income = gross income – taxes actually paid – reasonable business expenses – health insurance paid for children – mandatory pension or ret.
 - Can deduct current support being paid but not arrears

Confidential Financial Affidavit Necessary attachments

- **Financial affidavits of the parties shall** be supported with documentation of both current and past earnings.
- Proper documentation of current earnings includes, but is not limited to, pay stubs, employer statements, or receipts and expenses if self-employed.
- Documentation of current earnings shall be supplemented with copies of the most recent tax return to provide verification of earnings over a longer period. Include copies of income tax returns for the previous two years and client's most recent pay stub(s) to show how much client has made so far this year. Wyo. Stat. 20-2-308(b).

Confidential Financial Affidavits

- **TAKE THE TIME TO DO THE MATH** and check the information! Appropriate child support is absolutely critical to both the payor and the recipient (and especially the children). This step takes time. Review both your client's and the other party's info for accuracy. Plan on 30-45 minutes for each CFA to do it correctly.
- Need necessary attachments

Overtime

- Income shall not include any earnings derived from overtime work unless the court, after considering all overtime earnings derived in the preceding twenty-four (24) month period, determines the overtime earnings can reasonably be expected to continue on a consistent basis.

Child Support –Social Security and Veteran's Benefits

- Social Security and Veteran's Benefits-count as gross income to Obligor
- However, the amount of the social security or veteran's benefit sent directly to the custodial parent shall be subtracted from the obligor's share of presumptive support.
- Can mean child support is zero.
- Can also apply previous payment retroactively. (Wyo. Stat. 20-2-304(e))

Child Support

- deviation – can't deviate down if children are on means-tested income; but can deviate based on statutory factors
 - A court must specifically set forth its reasons for deviation in the support order or divorce decree
 - The Supreme Court reviews a district court's determination to deviate downward from the presumptive child support amount for an abuse of discretion. *Delliti v. Tracy*, 362 P.3d 353
 - Don't forget how expensive child care is and consider upward deviation (easier enforcement if part of order and not a separate payment)
 - Also, consider upward deviation to account for costs of providing health care coverage under ACA
- financial affidavit – must be filed with court and served on other party
- abatement – abates by 1/3 of daily support for each day non-custodial parent has physical custody for more than 14 consecutive days
- shared custody – if each parent keeps the children for more than 40% of the year AND each contributes substantially to the expenses of the child, a joint presumptive amount may be determined by statutory formula

Child Support Orders

- **medical support** – in any action to establish or modify a child support obligation, the court orders one or both parents to provide medical support—understand the ACA requirements! **Medical support** – in any action to establish or modify a child support obligation, the court orders one or both parents to provide medical support
 - BE CAREFUL! Under ACA (a/k/a Obamacare) parent qualifying for exemption has obligation to ensure child is covered under health insurance, regardless of language in Decree. Carefully consider whether CP should take exemption for child and provide health care coverage.
- **income withholding order** – immediately entered in WY (with a few exceptions), goes to obligor's employer
- **minimum child support** – in no case shall the support obligation be less than fifty dollars (\$50.00) per month for each family unit in which there are children to whom the noncustodial parent owes a duty of support.

CHILD SUPPORT

- **Enforcement** – civil contempt; also CSE
 - **arrear**s – can lose driver's license, hunting or fishing license, or professional license until back support is paid; can also be put in jail
- **Terminates** – age 18, or until end of secondary school, or past 18 if child is incapacitated and incapable of caring for themselves
- **Modification** – if 1) 6 months after order and 20% change in amount, or 2) material and substantial change in circumstance (fewer children to support, net income of one or both has substantially changed, the financial needs of the child(ren) have increased, etc.), or 3) it has been 3 years since court reviewed child support (no need for changed circ.)

CHILD SUPPORT

- Child support payments are not dischargeable and back payments owed are not considered debts
- Child support payments are not considered income to the obligee and cannot be deducted as an expense by the obligor

CHILD SUPPORT

- **Income withholding order** – immediately entered in WY, goes to obligor's employer (limited exceptions)
- **Enforcement** – civil contempt; also CSE
 - **Arrears** – can lose driver's license, hunting or fishing license, or professional license until back support is paid; can also be put in jail
- **Terminates** – The noncustodial parent is obligated to continue to pay child support after a child turns 18 if the child is mentally or physically disabled and unable to support him or herself or if the child is not yet 21 years of age and is enrolled in high school or an equivalent program. W.S. 14-2-204: A noncustodial parent of a disabled child may petition for an adjustment in the child support if the parent can prove that the adjustment is in the best interest of the child. W.S. 20-2-316.
- **Modification** – if 1) 6 months after order and 20% change in amount, or 2) material and substantial change in circumstance (fewer children to support, net income of one or both has substantially changed, the financial needs of the child(ren) have increased, etc.), or 3) it has been 3 years since court reviewed child support (no need for changed circ.)

Intersection of the ACA and Domestic Relations Orders

- State and Federal law requires all child support orders to include a medical support order
- In any action to establish or modify a child support obligation, the court shall order either or both of the parents to provide medical support, which may include dental, optical or other health care needs for their dependent children. W.S. 20-2-401

Deduction for Dependent Child

- Basic Rule:
 - IRC provides that the parent who has child more than 50% of the time (custodial parent) claims the child
- Exception to Basic Rule:
 - Custodial parent who qualifies for the deduction can agree (or a court can order the custodial parent) to allow the noncustodial parent to claim the child as dependents for the Child Tax Exemption and the Child Tax Credit under the special rules in the IRC for children of divorced or separated parents

Dependent Deduction Triggers Insurance Responsibility

- Children are members of taxpayer household that claims dependent deduction
- Dependent deduction therefore triggers responsibility to provide health insurance – even if not residing in that household
- Also determines taxpayer's household size because can only count dependents you take deduction for

Dependent Deductions and Consequences

- Eligibility for ACA subsidies (APTC and cost-sharing) predicated on tax household
- Child deduction must be claimed to include child in household for insurance subsidies
 - Impacts parent and other children's ability to obtain insurance on Exchange.
 - Premium tax credits
 - Cost sharing reductions

Practice Implications

- Ensure coverage for child(ren) from stable private (first priority) or public sources
- Be aware that CPs and children may receive coverage from different sources
- Refer parents to new resources (if needed)
- Default to CP for coverage ("through private or public sources") if NCP coverage not accessible, affordable, stable
- Establish determinate orders



Practice Implications

- Be cognizant of tax deduction impact on health insurance obligation and IRS enforcement role
- Align tax deduction with health insurance responsibility in most cases
- Educate parents on implications of not aligning tax deduction with health insurance
- Find alternatives to cash medical orders
- Tax deduction should not be alternated year-to-year
- For custody and support modifications, review health insurance provisions.
