

Representative Gage Froerer proposes the following substitute bill:

JOINT CUSTODY MODIFICATIONS

2012 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Gage Froerer

Senate Sponsor: Wayne L. Niederhauser

LONG TITLE

General Description:

This bill creates a rebuttable presumption for joint custody in a divorce or separation action.

Highlighted Provisions:

This bill:

- ▶ creates a rebuttable presumption for joint custody in a divorce or separation action;
- ▶ provides that the presumption for joint custody may be rebutted by circumstances, including domestic violence;
- ▶ sets conditions for the court to consider in modifying a joint custody order;
- ▶ requires that parents participate in dispute resolution proceedings; and
- ▶ requires the court to make specific findings when modifying or terminating a joint custody order.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:



26 **30-3-10**, as last amended by Laws of Utah 2010, Chapter 237
 27 **30-3-10.3**, as last amended by Laws of Utah 2009, Chapter 179
 28 **30-3-10.4**, as last amended by Laws of Utah 2010, Chapter 228

29

30 *Be it enacted by the Legislature of the state of Utah:*

31 Section 1. Section **30-3-10** is amended to read:

32 **30-3-10. Custody of children in case of separation or divorce -- Custody**
 33 **consideration.**

34 (1) If a husband and wife having minor children are separated, or their marriage is
 35 declared void or dissolved, the court shall make an order for the future care and custody of the
 36 minor children as it considers appropriate.

37 (a) In determining any form of custody, the court shall consider the best interests of the
 38 child and, among other factors the court finds relevant, the following:

39 (i) the past conduct and demonstrated moral standards of each of the parties;

40 (ii) which parent is most likely to act in the best interest of the child, including
 41 allowing the child frequent and continuing contact with the noncustodial parent;

42 (iii) the extent of bonding between the parent and child, meaning the depth, quality,
 43 and nature of the relationship between a parent and child; and

44 (iv) those factors outlined in Section 30-3-10.2.

45 (b) ~~The court shall, in every case, consider joint custody but may award any form of~~
 46 ~~custody which is determined to be] There shall be a rebuttable presumption that joint legal~~
 47 ~~custody, as defined in Section 30-3-10.1, is in the best interest of the child[-].~~ **Ŝ→ except in cases**
 47a **where there is:**

47b **(i) domestic violence in the home or in the presence of the child;**

47c **(ii) special physical or mental needs of a parent or child, making joint legal custody**
 47d **unreasonable;**

47e **(iii) physical distance between the residences of the parents, making joint decision**
 47f **making impractical in certain circumstances; or**

47g **(iv) any other factor the court considers relevant including those listed in this Section**
 47h **and Section 30-3-10.2. [so long as the**

48 **party who] (c) The person who** ~~←Ŝ~~ **desires joint legal custody** ~~Ŝ→~~ **[files] shall file** ~~←Ŝ~~ **a proposed**
 48a **parenting plan in accordance with**

49 **Sections 30-3-10.8 and 30-3-10.9.** ~~Ŝ→~~ **[The] A** ~~←Ŝ~~ **presumption** ~~Ŝ→~~ **for joint legal custody** ~~←Ŝ~~

49a **may be rebutted by a showing by a**

50 preponderance of the evidence that ~~§→ [the following circumstances exist:]~~ it is not in the best
50a interest of the child. ←§

51 ~~§→ [(i) the parents were not married to each other;]~~

52 ~~[(ii) §→ [(i) ←§ domestic violence in the home or in the presence of the child;~~

53 ~~—— §→ [(iii)] (ii) ←§ special physical or mental needs of a parent or child, making joint~~
53a legal custody

54 unreasonable;

55 ~~—— §→ [(iv)] (iii) ←§ physical distance between the residences of the parents, making~~
55a joint decision

56 making impractical in certain circumstances; or] ←§

57 ~~§~~ → [~~—~~ ~~§~~ → [(v)] (iv) ~~←~~ ~~§~~ any other factor the court considers relevant, including those listed in
 57a § → this Section and ~~←~~ ~~§~~ Section
 58 30-3-10.2. ~~←~~ ~~§~~

59 ~~§~~ → [(e)] (d) ~~←~~ ~~§~~ The children may not be required by either party to testify unless the trier of
 59a fact
 60 determines that extenuating circumstances exist that would necessitate the testimony of the
 61 children be heard and there is no other reasonable method to present their testimony.

62 ~~§~~ → [(f)] e ~~←~~ ~~§~~ The court may inquire of the children and take into consideration the
 62a children's
 63 desires regarding future custody or parent-time schedules, but the expressed desires are not
 64 controlling and the court may determine the children's custody or parent-time otherwise. The
 65 desires of a child 16 years of age or older shall be given added weight, but is not the single
 66 controlling factor.

67 ~~§~~ → [(e)] f ~~←~~ ~~§~~ If interviews with the children are conducted by the court pursuant to
 67a Subsection

68 (1)(d), they shall be conducted by the judge in camera. The prior consent of the parties may be
 69 obtained but is not necessary if the court finds that an interview with the children is the only
 70 method to ascertain the child's desires regarding custody.

71 (2) In awarding custody, the court shall consider, among other factors the court finds
 72 relevant, which parent is most likely to act in the best interests of the child, including allowing
 73 the child frequent and continuing contact with the noncustodial parent as the court finds
 74 appropriate.

75 (3) If the court finds that one parent does not desire custody of the child, [~~the court~~]

75a ~~§~~ → [or] ~~←~~ ~~§~~

76 ~~§~~ → [has attempted to permanently relinquish custody to a third party, it] the court ~~←~~ ~~§~~ shall take
 76a that evidence into
 77 consideration in determining whether to award custody to the other parent.

78 (4) (a) Except as provided in Subsection (4)(b), a court may not discriminate against a
 79 parent due to a disability, as defined in Section 57-21-2, in awarding custody or determining
 80 whether a substantial change has occurred for the purpose of modifying an award of custody.

81 (b) If a court takes a parent's disability into account in awarding custody or determining
 82 whether a substantial change has occurred for the purpose of modifying an award of custody,
 83 the parent with a disability may rebut any evidence, presumption, or inference arising from the
 84 disability by showing that:

85 (i) the disability does not significantly or substantially inhibit the parent's ability to
 86 provide for the physical and emotional needs of the child at issue; or

87 (ii) the parent with a disability has sufficient human, monetary, or other resources

88 available to supplement the parent's ability to provide for the physical and emotional needs of
89 the child at issue.

90 (c) Nothing in this section may be construed to apply to adoption proceedings under
91 Title 78B, Chapter 6, Part 1, Utah Adoption Act.

92 (5) This section establishes neither a preference nor a presumption for or against [~~joint~~
93 ~~legal custody;~~] joint physical custody or sole physical custody, but allows the court and the
94 family the widest discretion to choose a parenting plan that is in the best interest of the child.

95 Section 2. Section **30-3-10.3** is amended to read:

96 **30-3-10.3. Terms of joint legal or physical custody order.**

97 (1) Unless the court orders otherwise, before a final order of joint legal custody or joint
98 physical custody is entered both parties shall attend the mandatory course for divorcing parents,
99 as provided in Section 30-3-11.3, and present a certificate of completion from the course to the
100 court.

101 (2) An order of joint legal or physical custody shall provide terms the court determines
102 appropriate, which may include specifying:

103 (a) either the county of residence of the child, until altered by further order of the court,
104 or the custodian who has the sole legal right to determine the residence of the child;

105 (b) that the parents shall exchange information concerning the health, education, and
106 welfare of the child, and where possible, confer before making decisions concerning any of
107 these areas;

108 (c) the rights and duties of each parent regarding the child's present and future physical
109 care, support, and education;

110 (d) provisions to minimize disruption of the child's attendance at school and other
111 activities, his daily routine, and his association with friends; and

112 (e) as necessary, the remaining parental rights, privileges, duties, and powers to be
113 exercised by the parents solely, concurrently, or jointly.

114 (3) The court shall, where possible, include in the order the terms of the parenting plan
115 provided in accordance with Section 30-3-10.8.

116 (4) Any parental rights not specifically addressed by the court order may be exercised
117 by the parent having physical custody of the child the majority of the time.

118 (5) The appointment of joint legal or physical custodians does not impair or limit the

119 authority of the court to order support of the child, including payments by one custodian to the
120 other.

121 (6) An order of joint legal custody, in itself, is not grounds for modifying a support
122 order.

123 (7) An order of joint legal or physical custody shall require a parenting plan
124 incorporating a dispute resolution procedure the parties agree to use;

125 (a) in accordance with Section 30-3-10.9, or as ordered by the court in accordance with
126 Subsection 30-3-10.2(5); and

127 (b) before seeking enforcement or modification of the terms and conditions of the order
128 of joint legal or physical custody through litigation, except in emergency situations requiring ex
129 parte orders to protect the child.

130 Section 3. Section **30-3-10.4** is amended to read:

131 **30-3-10.4. Modification or termination of order.**

132 (1) On the petition of one or both of the parents, or the joint legal or physical
133 custodians if they are not the parents, the court may, after a hearing, modify or terminate an
134 order that established joint legal or physical custody if:

135 (a) the verified petition or accompanying affidavit initially alleges that admissible
136 evidence will show that the circumstances of the child or one or both parents or joint legal or
137 physical custodians have materially and substantially changed since the entry of the order to be
138 modified;

139 (b) a modification of the terms and conditions of the order would be an improvement
140 for and in the best interest of the child; and

141 (c) (i) both parents have complied in good faith with the dispute resolution procedure
142 in accordance with Subsection 30-3-10.3(7); or

143 (ii) if no dispute resolution procedure is contained in the order that established joint
144 legal or physical custody, the court orders the parents to participate in a dispute resolution
145 procedure in accordance with Subsection 30-3-10.2(5) unless the parents certify that, in good
146 faith, they have utilized a dispute resolution procedure to resolve their dispute.

147 (2) (a) In determining whether the best interest of a child will be served by either
148 modifying or terminating the joint legal or physical custody order, the court shall, in addition to
149 other factors the court considers relevant, consider the factors outlined in Section 30-3-10 and

150 Subsection 30-3-10.2(2).

151 (b) ~~[The court shall make specific]~~ A court order modifying or terminating an existing
152 joint legal or physical custody order shall contain written findings ~~[on each of the factors relied~~
153 ~~upon stating]~~ that:

154 (i) a material and substantial change of circumstance has occurred; and

155 (ii) a modification of the terms and conditions of the order would be an improvement
156 for and in the best interest of the child.

157 (c) The court shall give substantial weight to the existing joint legal or physical custody
158 order when the child is thriving, happy, and well-adjusted.

159 (3) The court shall, in every case regarding a petition for termination of a joint legal or
160 physical custody order, consider reasonable alternatives to preserve the existing order in
161 accordance with Subsection 30-3-10(1)(b). The court may modify the terms and conditions of
162 the existing order in accordance with Subsection 30-3-10(5) and may order the parents to file a
163 parenting plan in accordance with this chapter.

164 (4) A parent requesting a modification from sole custody to joint legal custody or joint
165 physical custody or both, or any other type of shared parenting arrangement, shall file and serve
166 a proposed parenting plan with the petition to modify in accordance with Section 30-3-10.8.

167 (5) If the court finds that an action under this section is filed or answered frivolously
168 and in a manner designed to harass the other party, the court shall assess attorney fees as costs
169 against the offending party.