

FAMILY LAW OUTLINE

I. Relationships between Unmarried Parties

a. Agreements

- i. There are **4 different AGREEMENTS** that deal with Unmarried Parties

- 1. **Promise to Marry**

- a. Early part of the century, there was a cause of action for the breach of promise to marry on the theory this was a form of emotional distress
- b. The party breaking off the engagement could be liable for money damages because of the expense and distress suffered by the damaged party.
- c. Most jurisdictions have abolished this cause of action by statute
- d. **Therefore currently there is no REMEDY for a breach of a promise to marry.**

- 2. **Gifts (Prior to Marriage)**

- a. **A gift made in contemplation of marriage can be recovered if the marriage does not occur.**
 - i. The trick is to determine what type of gift is made in contemplation of marriage.
 - ii. The classic example is an **engagement ring**.
 - iii. On the other hand, if you give the person you are dating a sweater for a birthday, a CD for Christmas you are not **LIKELY** to get those items back.

- 3. **An Agreement between Co-Habiting Parties**

- a. **Co-Habiting** means **two parties living with each other that are engaging in sexual intercourse**
- b. Sometimes an un-married couple living together will enter into an express agreement purporting to govern their relationship.
- c. The express agreement may provide for instance for an entitlement to a portion of one party's estate, a payment for various types of services rendered, or anything that the parties wish to address.
- d. The majority of states **WILL ENFORCE an express agreement between unmarried persons.**
 - i. Why shouldn't we enforce a contract between unmarried persons?
 - Well some courts were originally troubled by the fact that the sexual element of the relationship made the agreement illicit.

- That the couple was living in sin.
 - And the consequence is that they punish the couple by NOT enforcing their agreement.
- e. Now courts will enforce the agreement **whether it is in WRITING or ORAL (assuming you can prove the agreement)**.
- i. Provided there is **SUFFICIENT CONSIDERATION for the contract other than SEX**
 - ii. If the only consideration provided is not labor in the home, a monetary award, something of economic value; but if it's merely an agreement to engage in sex then contract is basically one for prostitution.
- f. The related question comes up if such an agreement may be implied between co-habiting parties even if they never said anything about an agreement just to promote an equitable or fair solution to any subsequent economic disparity.
- i. **Minority = WILL FIND an implied agreement**
 - ii. **Majority = WILL NOT find an implied agreement**
4. **Pre-nuptial (An Agreement between Unmarried Parties in contemplation of marriage)**
- a. These agreements may address **ANY MATTERS that the couples wish to take up**.
 - b. In effect it is a way to customize your marriage to suit your wishes.
 - c. Traditionally **the agreements deal with financial issues**.
 - i. For instances, they can deal with the contingency of a subsequent divorce and set out in detail *how property may be divided, what alimony will be paid, or what child support/custody arrangements* will be made in the event of a divorce.
 - d. Pre-nuptial agreements can set out who will perform what *chores, sexual conduct within the marriage, or anything one can imagine*.
 - e. **Uniform Pre-Martial Agreement Act (UPAA)** has been adopted in half of the states.
 - i. The rules between the UPAA states and the non-states are RELATIVELY similar.
 - f. As a general rule, there are several requirements for **validity of a pre-nuptial agreement**
 - i. **Contract MUST BE FREELY MADE**

- No duress
- ii. **FULL financial disclosure**
 - Each party must disclose their assets and income information
- iii. **Fairness of contract**
 - ** Some states say that the agreement must be **SUBSTANTIALY FAIR**
 - Contract must have a provision for the financially weaker spouse.
 - In other states fairness merely **RAISES** a **PRESUMPTION** of over-reaching/duress but that presumption **can be rebutted by evidence that the weaker party received full disclosure and outside counsel review of said agreement.**
 - Under UPAA states there is no EXAMINATION of fairness, **instead the agreement will ONLY be set aside if it is unconscionable.**
 - However the UPAA does provide that if the alimony provision leaves a party dependent on public assistance the court may then disregard the agreement.
 - Then requiring the wealthier party to provide support.
- iv. **MUST be in WRITING**
- v. ** It is useful that the parties have separate counsel, *however this is not a REQUIREMENT but only a factor in determining fairness*
- g. It is **IMPERMISSIBLE to agree in ADVANCE to a divorce**
 - i. A provision that says will we get married next July and then divorce is three years is AGAINST public policy.
- h. A pre-nuptial agreement is **CONTINGENT on a subsequent marrying taking place.**
 - i. Without the marriage the agreement is unenforceable.
 - ii. However if the couple were living together before the marriage and the marriage did not take place, *the document COULD SERVE as an agreement between co-habiting parties but that would depend on the specific terms and whether or not that would be a fair interpretation of the intent of the parties.*

b. Children

- i. **Children born from unmarried women** were referred to as bastards or illegitimate children.
 1. The custom now is to refer to them as **non-martial children**.
- ii. **Non-martial child is one that was conceived and born to parents that are unmarried at the time of birth.**
 1. If the woman gets pregnant before the date of marriage, if conception occurs before marriage but the birth takes place after marriage that child is a martial child.
 2. **A baby born four months after the wedding is a martial child.**
 3. **Some states say that a child is a martial child if the parents marry at anytime even after the birth of the child.
- iii. What are the **rights of non-martial children**?
 1. They have the **same rights as a martial child**
 2. **Any discrimination against a non-martial is highly suspect under the Equal Protection Clause (intermediate scrutiny = important governmental interests that are furthered by substantially related means)**
 3. Non-martial children are entitled to support and to inherit from their mother and father just like martial children.
- iv. **Non-martial children that do not know who their father is**
 1. Paternity proceedings are not necessary when the father admits to being the father
 2. Assuming there is no admission, **when may the proceeding be filed?**
 - a. It may be **filed at any time before the child's eighteen birthday**
 - b. That is because the support obligation continues through ATLEAST age eighteen and it is timely as long as there is an obligation.
 - c. The plaintiff in the proceeding may be:
 - i. Non-martial child (acting through a guardian)
 - ii. Biological mother
 - iii. Public agency acting on behalf of the child
 3. Evidentiary issues
 - a. Majority of states require proof of paternity by **CLEAR and COVINCING evidence**
 - i. Minority of states require preponderance of evidence
 - b. Types of evidence to prove/disprove paternity
 - i. **Testimony by mother about sexual access**
 - She will testify that **she had sexual intercourse with the defendant, that no birth**

control was used and that the timing of the intercourse makes it plausible that the defendant would be the father.

ii. Blood test evidence that simply indicate its

blood group such as Type O or Type A is **ONLY ADMISSIBLE if it disproves paternity.**

- Only admissible when the defendant offers it to demonstrate that he couldn't be the father.
- **When offered by the mother or child, it is simply insufficiently probative**, because it really doesn't tell us very much to say that the baby has Type O blood and the defendant has Type O blood, when we remember that are literally hundreds of people that have Type O blood.

iii. On the other hand, **DNA testing and HLA blood testing can be ADMITTED when offered by either party to suggest or rebut paternity.**

- The HLA test must be admitted under a federal statute.

iv. **Defendant's relationship with child**

- Does the defendant visit?
- Does the defendant send gifts?
- Does the defendant send money?
- Does the defendant refer to the child as "my daughter or son"?
- Does the child refer to the defendant as father?

v. **Physical resemblance between defendant and child**

- Some states will allow the fact-finder to consider resemblance.

4. In most jurisdictions, **the records of paternity actions are kept sealed.**

c. Heart-Balm Actions

i. A number of causes of action that used to exist **to remedy emotional injury** have been abolished

ii. **Breach of Promise to Marry**

1. This used to be actionable
2. Now **if you break-up an engagement, the other party has no remedy**

iii. **Seduction of an Un-Married Female**

1. The cause of action **belonged to the father**

2. The father of an un-married woman was granted the right to sue **a man who had intercourse with his adult daughter for seduction**
 - iv. **Alienation of Affection**
 1. Cause of action **initiated by a married party against a 3rd person who had turned the spouse against him or her.**
 2. In other words, a husband might sue a wife's friend for convincing her to be alienated from her husband.
 - v. **Criminal Conversation (Adultery)**
 1. If a woman thought that her husband was having an adulterous affair **she could sue the woman with whom she was having that affair for criminal conversation and recover money damages from that woman.**
 - vi. **Jacdiication of Marriage**
 1. **Representing to the public at large, that you were married to a particular individual when in fact you were not.**
- II. **Institution of Marriage**
- a. There is a **constitutional right to marry**; state laws that purport to limit **the right to marry are subject to strict scrutiny.**
 - i. Where parties are prevented to marry by a state statute or where the right is burdened or hedged about with various conditions, you need to engage in a conventional strict scrutiny analysis.
 - ii. (1) **A compelling (necessary) state interest that (2) is narrowly tailored to achieve the interest.**
 - iii. Example: In *Zabolki*, a statute imposed a financial responsibility requirement as a pre-requisite to marriage and the Supreme Court struck it down as unconstitutional. *See also Loving v. Virginia* (statute forbidding inter-racial marriage).
 - b. **How to Get Married?**
 - i. **Capacity** - The parties **MUST** have capacity to get married.
 - ii. When determining capacity asks "**Whether you have FREEDOM from a problem that would make you ineligible?**"
 - iii. The problems are usually referred to as **impediments.**
 - iv. In order to have CAPACITY you have to be free from impediments.
 - v. **Martial Impediments**
 1. **Opposite Sex** - At the present time you have to be **TWO people of opposite sex.**
 - a. The MAJORITY of the states have passed statutes that **specify that marriage is between one man and one woman.**
 - b. Vermont has recognized a concept called "**civil unions**" for same-sex couples and under that concept same-sex couples can achieve **all of the technical benefits of a**

marriage relationship without having the name marriage applied to their status.

- i. Connecticut, Vermont, New Jersey, and New Hampshire have created **legal unions that, while not called marriages, are explicitly defined as offering all the rights and responsibilities of marriage under state (though not federal) law to same-sex couples.**
- ii. Maine, Hawaii, the District of Columbia, Oregon and Washington have created **legal unions for same-sex couples that offer varying subsets of the rights and responsibilities of marriage under the laws of those jurisdictions.**
- c. Congress has passed a statute called the Defense of Marriage Act (**DOMA**) that says **states NEED NOT give full faith and credit to same sex marriages that are entered into in other states.**
- d. In individual **who has undergone sex re-assignment surgery, a trans-gendered individual, is viewed as the post-operative gender in MOST jurisdictions.** Therefore a trans-gendered individual may marry a person of the sex in which he/she was BEFORE the surgery.
- e. Massachusetts - In *Goodridge v. Dept. of Public Health*, the Massachusetts Supreme Judicial Court found that the state may not "deny the protections, benefits and obligations conferred by civil marriage to two individuals of the same sex who wish to marry." The Court stated that the state's constitution "affirms the dignity and equality of all individuals" and "forbids the creation of second-class citizens" and that the state had no "constitutionally adequate reason" for denying marriage to same-sex couples. On the legal aspect, instead of creating a new fundamental right to marry, or more accurately the right to choose to marry, the Court held that the State does not have a rational basis to deny same-sex couples from marriage on the ground of due process and equal protection.
- f. California - In *In re Marriage Cases*, that laws directed at gays and lesbians are subject to strict judicial scrutiny and that marriage is a fundamental right under the California Constitution, thereby holding unconstitutional the previously existing statutory ban on same-sex marriage embodied in two statutes, one enacted by the Legislature in 1977, and the other through the initiative process in 2000. The Court's ruling also established that any law discriminating on the basis of sexual

orientation is constitutionally suspect, making California the first state in the United States to set such a strict standard.

2. **Incestuous** - Two parties **CANNOT be TOO CLOSELY related to each other**; no incestuous marriages allowed
 - a. Incestuous relations are also a crime in many states.
 - b. In MOST states, **an incestuous relationship requires a BLOOD RELATIONSHIP.**
 - i. Although this includes **HALF-BLOOD and WHOLE BLOOD relationships.**
 - c. **As a general rule, all ancestors, descendants, uncles, aunts, nieces, nephews and siblings are TOO CLOSELY RELATED for marriage.**
 - i. What about cousins? Here the states differ:
 - **Some states permit FIRST COUSINS to get married.**
 - **Some states forbid FIRST COUSINS to get married.**
 - d. States also differ to adoptive relationships (some states permit while other don't).
 - e. Most states **do not treat a marriage between STEP-SIBLINGS as incestuous.** (Brady Bunch children may get married to each other)
3. **Bigamy/Polygamy** - You cannot get married if you are already married.
 - a. You are considered married if your spouse from a prior marriage is **(1) STILL LIVING and (2) that marriage has never been TERMINATED.**
 - b. Many bigamous relationships result from inadvertence.
 - i. For example, in some jurisdictions there is a waiting period between when a divorce decree is entered and when it becomes effective.
 - ii. If you get married during that waiting period, you are technically still married and as a consequence the second marriage is bigamous, there is a lack of capacity.
 - c. Once the impediment of a prior marriage is removed then, in MANY jurisdictions there are doctrines that will save the second marriage (also known as the **doctrine of ratification**).
 - i. **By continuing to live together and provided that the parties acted in GOOD FAITH.**
 - d. In many states, there is an **evidentiary presumption that the LAST MARRIAGE in a series of marriages is the valid one.**

- i. This can often help **an innocent party in a bigamous relationship to secure some protectable rights.**
 - e. Another scenario that can sometimes lead to bigamy questions, is a party's spouse has been **absent for an extended period of time.**
 - i. For instance, John and Mary are married; Mary travels on a business trip to Europe; she never returns from the business trip; John has undertaken efforts to locate her; but to no avail she is missing for 2 years; John has decided to move on with his life; and he has met someone new and wishes to marry;
 - Is he lacking martial capacity? Would he be a bigamous if he got married?
 - As a general rule, in a circumstance like the one described, **you have to go to court and get a *decree of presumed death of the absent party.***
 - Exception: There is no need to get a decree **if the absence is MORE than SEVEN YEARS.** After seven years there is a presumption of death. And you can rely on the presumption **without the court decree.**
4. **Minor** - If the party is underage they may not be able to have the capacity to get married.
- a. Typically, **the age people can get married is eighteen.**
 - b. Usually, there are methods where a person younger than eighteen may get married by (1) **parental** or (2) **judicial consent.**
 - i. A very common practice is where a **16 or 17 year old gets married with parental consent.**
 - ii. Or where a **14 or 15 gets married with parental PLUS consent by a judge.**
 - iii. And in most states, **there is an ABSOLUTE age floor below which it is IMPOSSIBLE to get married and that age is 14.**
 - Under the Uniform Marriage and Divorce Act, **that floor is 16.** (This statute has ONLY been adopted in 8 or 9 states).
5. **Mental Capacity** - People who lack mental capacity cannot enter into contracts.
- a. Lack of mental capacity can be made out **either by (1) mental illness or (2) mental retardation.**

- i. In **mental retardation cases, many states will allow marriage upon approval of a court.**
 - ii. The court can inquire into *whether the individual has sufficient understanding of the responsibilities of marriage.*
 - b. Also under the heading of mental capacity (but not related to mental illness, defect or retardation) is **lack of genuine intent to enter into the marriage.**
 - i. If you don't really mean it, then you don't have the capacity to get married.
 - ii. Example: A marriage entered into SOLELY to allow a party to immigrate into the U.S.
 - Some states view it as valid, if the parties have gone through all the formal steps of a marriage
 - Or other states view it as lacking the essential intent to enter into a marriage and therefore invalid.
 - iii. Example: A party under the influence (to such a degree that he/she is unable to appreciate the nature of entering into the marriage) of drugs or alcohol.
6. **Physical Capacity** - You have to have physical capacity to have sexual intercourse.
- a. If you suffer from **an incurable physical condition that prevents you from having SAFE SEX INTERCOURSE with your partner you lack the capacity to get married.**
 - b. As a general rule, **venereal diseases would not constitute the lack of physical capacity.**
 - i. Because most venereal diseases are curable.
 - c. Most jurisdictions LIMIT this rule to physical capacity problems.
 - i. **Mental incapacity to engage in sex (an unwillingness to have sex) does not qualify as a capacity problem.**
- vi. **How to Get Married?**
1. **Ceremonial Marriage**
 - a. Ceremonial marriage has two requirements:
 - i. **A license**
 - The license requirement is **designed to permit the state government to make CERTAIN that you have the martial capacity to get married.**
 - You get the license from a state or local official

- In many states, you must submit evidence in the form of blood tests results indicating freedom from communicable diseases.
- There is usually a waiting period after the license is issued before you can actually get married.
 - 3 days is common, although it varies from state to state.
 - Not every state has a waiting period.
 - The state of Nevada is well-known for not having a waiting period.
- In many states the **requirement that you get a marriage license is not CONSIDERED mandatory in the sense that it DOESN'T AFFECT the validity.**
 - In other words, **if you fail to get the license but if you have capacity and if you go through a ceremony, the state will treat you as married.**
 - The premise here is that because the *license serves as a method of proving you have capacity and if you do in fact have capacity than absence of the license will not invalidate a ceremonial marriage.*
 - There are minorities of states, that do consider the license requirement to be mandatory and this can affect the validity of the marriage.

ii.

A ceremony

- There **are no specific forms of ceremony that are required.**
- However there MUST be some sort of ceremony; there has to be a point that the parties KNOW what they are getting themselves into.
- It is analogous to the shining moment in a contractual relationship, when there is the meeting of the minds.
- Example: If you see parties and they have never had a ceremony they are LIKELY not to be able to establish the status of ceremonial marriage; they may or may not have a common-law marriage.

- **Ceremony is defined as a solemn declaration before an officiant and one or more witnesses.**
- An **officiant can be**
 - A clergy-member of ANY RELIGION,
 - A civil officer of the type that can administer an oath (a judge or justice of the peace),
 - In some states, there are individuals whose entire mandate is to marry people
- **** Even if you go to someone WHO LACKS AUTHORITY and serves as an officiant, you will be ok if (1) the parties had good faith that the person had authority to conduct the ceremony and (2) the person had apparent authority to think the person had authority.**
- Some states will permit as part of the rules of ceremonial marriage something that is called proxy marriage.
 - **Proxy marriage - resorted to when one of the two parties is UNABLE to attend the ceremony.**
 - If a party is out of country because of military duty, the absent party will authorize, IN WRITING, a third party to act as proxy.
 - And the ceremony will take between one spouse and the acting proxy in front of the officiant and the witness(es).
- Even though parties comply with religious requirements for marriage that does not necessarily make you married under state law unless you comply with civil requirements of marriage.
 - If you married under the civil requirements of marriage, you may not also be married under the laws of your religion.
- After ceremony is completed the officiant must fill out the marriage license and file it with a public authority, to create a public record of the marriage.

2. **Common Law Marriage**

- a. Common law marriage is ONLY recognized in a dozen states.
 - i. Pennsylvania, Texas, Georgia, Colorado, Rhode Island, District of Columbia.
- b. **Common law marriage requirements:**
 - i. You need **CAPACITY** (just like for a ceremonial marriage)
 - If you **suffer from an impediment that would prevent you from getting a marriage license**, then that same impediment would prevent you from ever being in a common law marriage.
 - ii. You need **CO-HABITATION**
 - Individuals must live in the same house and
 - Must be **sexually involved**
 - iii. There needs to be an **INDICATION** that the parties expressed the intention to be married to each other in words of the present tense.
 - **Marriage is a permanent and exclusive relationship.**
 - So during the co-habitation the parties must state to each other, "From this moment on, I will consider you my spouse"
 - In effect this serves like a self-inducted ceremony.
 - It is very rare to have direct evidence of this declaration.
 - Because it is usually discussed in litigation where one party alleges no such words were spoken or one party is dead.
 - Therefore, common law marriage is proven by circumstantial evidence that the magic words were uttered.
 - **Reputation in the community** - Does everyone in town think John and Mary are married?
 - **Holding out to the community** - Did the spouses represent themselves as married to the community? (There cannot be a secret common law marriage)
 - Using a common last name
 - Opening a shared account

- Introducing each other as spouses
 - **No minimum time period required**
- iv. The issue of common law marriage frequently arises after one of the spouses has passed away.
- v. Common law marriages also are used as a **curative device to get around defective ceremonial marriages.**
 - Example: Harry is married to Alice; he then gets a divorce from Alice; but there is a problem with the divorce decree; the decree was entered by a state that lack subject matter jurisdiction; shortly thereafter, Harry goes through a ceremonial marriage to Barbara; the marriage to Barbara is invalid because its bigamous; assume two years later Alice dies; Harry and Barbara continue to live together at that point they may be able to rely on common law marriage doctrine to validate their relationship.
- vi. **As a general rule, if a couple lives in a state where that recognizes common law marriage and they enter into a valid common law marriage they will considered married REGARDLESS of where they relocate.**
 - Common law marriages will be recognized in all 50 states under the **Full Faith and Credit clause.**
- c. **Putative Spouse Doctrine**
 - i. **Any person who co-habits with another to whom he is not legally married, in a good faith belief, that he was married, is a putative spouse until knowledge of the fact that he was not legally married terminates his status.**
 - In other words, if you think you married but you are not married and you think you are married in good faith, and then you get this status of putative spouse.
 - You get the economic rights of a spouse.
 - An entitlement to property.
 - An entitlement to economic support.

- ii. Example: Harry marries Alice; Harry travels a lot on business and in the distant city hooks up with Barbara and does not disclose his marriage to her; he marries Barbara; the marriage to Barbara is not a valid marriage; Barbara is a putative spouse; if she learns in the truth 4 years later she may be entitled to a share of his assets, house or some of his stock.

- The court here would apportion alimony and assets amongst the women in the "interests of justice".

- Both the actual legal spouse and putative spouse would be entitled to those rights.

vii.

What are the consequences of marriage?

1. A marriage is created by contract, but then becomes a status.

a. In other words, the details of the party's relationship are controlled by operation of law and not by the parties' own agreement.

b. **You cannot contract to relieve you of the ordinary obligations of being a spouse.**

c. Mutual obligations are fixed by the state.

d. A marriage lasts for the life of the parties unless it is formally dissolved by judicial action.

e. There are basically **four key obligations/consequences of a marriage.**

i. **Sexual fidelity** - you are not to be sexually intimate with other person besides your spouse.

ii. **Obligation of support** - there is a financial obligation to support one another; the support in question must be "**fair and reasonable**"

- In many states, the obligation can be enforced by a judicial proceeding during the marriage without requesting any other change in status.

- In other words, if you are in a marriage and you feel that you are not being economical supported, you can file a lawsuit demanding that your spouse provide you with economic support.

- These are called **separate maintenance proceedings.**

iii. **Rights in the estates of each other**

- Example: If a married person dies without a will; there will be a right granted to the surviving spouse under intestacy laws to take a significant share of the estate; and even if the

decedent writes a will and attempts to disinherit the surviving spouse; the spouse can often demand a share of the estate through an elective share.

iv. **Hold real estate by tenancy by the entirety**

2. **Married persons can use ANY NAME they wish.**

- a. They can have different surnames from each other and give their children any surname they want.

3. **Married persons can own property as separate individuals.**

- a. You can title to assets in your own name.

4. **Married persons can have separate domiciles.**

- a. Many couples because of career/educational agendas find it necessary to live in different jurisdictions for a period of the marriage.

5. **Married persons can contract with each other or 3rd parties.**

- a. Contracts with 3rd parties are strictly the obligation of the party who signed them.

6. **Married persons can incur debts and when they incur debts it is theirs alone.**

- a. Exception: **If one spouse is acting as an agent for the other spouse, the second spouse would be responsible for the debt.**
- b. Exception: **If a spouse enters into a contract for food, clothing, shelter, or basic medical care the other spouse will liable on that contract; this is a contract for necessities.**

7. **Married persons can commit torts and crimes against each other.**

- a. Inter-spousal tort immunity has been abolished in most states.

III. **Terminating the Marriage Relationship**

a. **Annulment - relates to matters arising PRIOR to the date of the marriage**

- i. Grounds for annulment that PRE-DATE the marriage are the impediments that prevent you from getting a marriage license.
- ii. However those impediments are categorized in two groups for discussion of annulment:

1. **Void Marriages**

2. **Voidable Marriages**

3. **Three major differences between void and voidable marriages:**

- a. **First distinction:**

- i. **Void marriages are legally of no effect whatsoever**
 - ii. **Voidable marriages are binding until you get a divorce decree**
 - iii. If the marriage is void, why would anybody waste time and money going to court
 - iv. An annulment will give you a clear record of your marital status
 - If you go to apply for a loan, you will be asked if you are married because they will often demand that your spouse co-sign the loan.
 - v. Even though their marriage is void, they may have property disputes or child custody issues and may need the help of a court
 - b. **Second distinction:**
 - i. The grounds that make a marriage void are non-waivable because they implicate public policy;
 - ii. On the other hand the grounds that make a marriage voidable are waivable because they implicate equity between the two parties and no strong public policies and if the parties choose to waive the grounds it is okay.
 - c. **Third Distinction:**
 - i. A void marriage can be collaterally attacked by 3rd parties;
 - ii. But a voidable marriage can only be challenged by one of the two parties.
 - d. ** In a few jurisdictions instead of referring to all proceedings as annulments courts or statutes may give a different name to the proceeding involving a void relationship and a proceeding involving the voidable relationship.
 - i. Example: In New York, if your relationship is void you bring a cause of action called a declaration of annulaty and if your marriage is voidable you bring a cause of action of annulment.
4. **Grounds for annulment**
- a. Three grounds that **make a marriage VOID (you can just walk away and don't need to go to court):**
 - i. **Bigamy**
 - ii. **Incest**
 - iii. **Lack of mental capacity**
 - iv. If a woman unknowingly marries her uncle and discovers that fact 6 months after the relationship she is in a VOID relationship she can just leave.

v. She has grounds for an annulment if she wants to go to court; she can and she will win, the marriage will be dissolved; but she doesn't even need to go to court as a technical matter.

vi. The grounds are not WAIVABLE.

vii. The marriage can be COLLATERALLY ATTACKED by 3rd parties.

- Example: If after the death of one of the two, the other attempts to collect the other's estate, a relative can come and say their marriage was no good.

viii. **Some states add the being TOO YOUNG makes the marriage void.

b. **Five grounds that make a marriage VOIDABLE**

i. **Being under age**

- Example: If a 17 year old woman marries a 21 year old man that marriage is voidable
- The young woman CAN go to court and get her relationship dissolved but it's waivable.
- So if she remains in the relationship after she turns 18 the marriage will be valid.

ii. **Lack of physical capacity** (Impotence - is the incurable deficiency to have intercourse)

- **The law only works on the presumption that the couple HAVE NOT engaged in sexual intercourse before the wedding.**
- In many modern relationships, the impotence WOULD HAVE been discovered before the wedding.
- This impediment is waivable.

iii. **Duress (Undue influence or force that negates consent)**

- Example: A "shotgun wedding"; a man and woman are together and having sexually relations; family members find out and deem this morally wrong; the relative gets a weapon and holds a gun to the head of the man; and says "you must marry this woman and follow me to the justice of peace"; that wedding would be one that was under duress.

iv. **Fraud (One fiancé lied during their courtship; and the lie was SIGNIFICANT)**

- The fraud in question **MUST GO** to a **VITAL ELEMENT** of the marriage
- **Some states use a relaxed standard of MATERIAL FRAUD
- **Fraud can be either (1) affirmative misrepresentation or (2) concealment of a vital fact.**
- Types of fraud that have BEEN HELD to be sufficient:
 - **Misrepresentation concerning religion**
 - **Misrepresentation concerning sex or reproduction**
 - For instance about willingness to have children; biological ability to have children; the woman is pregnant with someone's else baby other than the fiancé; sexual orientation; or sexual agenda
 - Classic example of a misrepresentation **that IS NOT sufficient to render an annulment is those concerning (1) LOVE or (2) MONEY.**
 - If a fiancé lies about his net worth or repeatedly says "I love you more than the moon and the stars" those misrepresentations would not be grounds for annulment.
 - **Fraud is waivable; if you continue to live with someone after learning of the fraud you have waived the ground for annulment**
- v. **Marriages entered into jest/sham marriages**
 - People that enter into a mock ceremony will NO INTENTION to be bound
 - Marrying to get a tax advantage or to immigrate.
- c. **Four affirmative defenses for annulments**
 - i. **Laches** - prejudicial delay
 - The party complaining and seeking an annulment **MUST ACT PROMPTLY** after learning of the impediment
 - If you tardy you MAY lose your right to relief

- ii. **Statute of Limitations** (more formal time period in the statute)
 - Many jurisdictions have a S.O.L. and if you don't file within the time you will not be able to file at all.
 - iii. **Waiver**
 - **Continuing to stay in the relationship after you have learned of the impediment**
 - iv. **Equitable Estoppel (Unclean hands)**
 - If a party is guilty of misconduct, that party may be disabled from seeking an annulment
 - Example: Al marries a friend Janet, who is a French citizen, for the sole purpose of enabling her to remain in the U.S., with no intention of establishing a bona fide marriage; a few months after her status is settled Al seeks an annulment; his ground is that marriage was a sham; the court can rule that Al CANNOT get an annulment.
 - d. **Other remedies**
 - i. Most jurisdictions will allow to make property division awards (dividing up home, assets, or other wealth)
 - ii. Custody or child support order
 - iii. Alimony is RARE
 - Some states provide alimony by statute
- b. Divorce - relates to matters arising AFTER the date of the marriage**
- i. Some states call divorce "dissolution"
 - ii. Many states provide BOTH **fault and no-fault grounds for divorce**
 - 1. They are states that provide ONLY no-fault grounds like California
 - 2. And vice versa those that provide ONLY fault grounds like New York
 - iii. **Fault-Based Grounds**
 - 1. **Cruelty**
 - a. Both mental and physical cruelty are usually a ground for fault based divorce
 - b. Some states call this cruel and inhuman treatment; or cruel and barbarous treatment
 - c. With respect to **physical cruelty, we are talking about spousal abuse**
 - i. Physical striking, hitting, wounding, shooting or stabbing of a partner in marriage after the date of the wedding ceremony

- ii. Physical cruelty is a ground **if it is EITHER (1) part of a repeated pattern or (2) manifested in a SINGLE episode of significant severity.**
- d. **Mental cruelty is considerable more SUBJECTIVE**
 - i. This requires a **CONTINUING** course of **conduct**
 - ii. **Never made out by a single isolated episode**
 - iii. Mental cruelty can cover a wide range of behavior in which spouses are mean, inconsiderate or hostile
 - Verbal abuse, vulgar language, humiliation in front of 3rd parties, silent treatment, no emotional interaction, habitual drunkenness and drug addiction.

2. Adultery

- a. **Voluntary sexual intercourse with a party other than your spouse.**
- b. Rape does not constitute an act of adultery; and **therefore a victim of rape is not an adulterer**
- c. In some states, **same-sex relations do constitute adultery.**
- d. Most states require the adultery charge be corroborated.
 - i. In other words the testimony of the plaintiff BY ITSELF is insufficient.

3. Desertion

- a. **One party in a marriage packs up and moves away.**
- b. In some states, the period to constitute desertion is specified.
 - i. One year is pretty common
- c. **A mutually agreed upon VOLUNTARY separation is NOT desertion**
- d. If you leave **without an intent to return and without consent and without justification** that is a desertion.
- e. If a battered spouse leaves to seek refuge, **he or she is NOT a deserter because she has justification**
- f. Constructive desertion
 - i. **Doing other things that physically or mentally abandon the marriage.**
 - ii. Example: One spouse obtains employment in a new city; the decision to take the job was thoroughly discussed by the two parties; they both agreed to move to the new city; when moving day arrives the other

spouse refuses to move; the other spouse who remains behind could be considered to have engaged in constructive desertion.

- iii. You can constructively desertion without leaving the marital home
 - If you **refuse ALL sexually intimacy**
 - If you **refuse ALL communication**
 - If you **move out of the bedroom and into another part of the house**

4. **Non-Support (Failure to supply economic resources)**

5. **Criminal Incarceration**

- a. Requires conviction of a crime and sentencing to a term of imprisonment
- b. Usually there is a minimum statutory period specified. (i.e. 2 years)

6. **Insanity**

- a. **If your spouse develops a mental illness AFTER the date of the marriage**
- b. In some states, if your spouse is institutionalized for some set period of time

7. **Affirmative Defenses**

a. **Recrimination**

- i. **This defense is similar to "dirty hands"**
- ii. The defendant spouse who is accused of misconduct will demonstrate that the plaintiff spouse is guilty of comparable misconduct as well.
- iii. The result of the defense would basically make the wrongful parties stay together despite their misconduct.
- iv. Therefore this defense has been abolished.

b. **Condonation**

- i. **This defense is similar to a waiver**
- ii. The defendant will argue that the plaintiff
 - Learned of the misconduct
 - Forgave the misconduct
 - And then resumed co-habitation
- iii. A conditional condonation **is made contingent on the erring spouse not resuming the misconduct.**
 - **A conditional condonation does not preclude the injured spouse from raising the initial misconduct as a ground for divorce where the conditions imposed on forgiveness have been violated.**

- c. **Connivance**
 - i. **This defense is similar to entrapment**
 - ii. If the actual behavior that forms the ground for the divorce was solicited by the plaintiff then that will be a defense against the defense.
 - iii. Example: Plaintiff-wife is suing the husband for divorce because of adultery; the husband can attempt to prove that the wife arranged the adultery, by hiring a woman to seduce the husband.
 - iv. Unlike collusion, the marital wrong is actually committed in the case of connivance.
 - d. **Collusion**
 - i. **The parties have fabricated the grounds for divorce.**
 - ii. This goes back to the days of no no-fault divorce.
 - In this world, the couple that wanted a divorce really had to make up a pretend fault-based ground.
 - They would agree to lie to the court.
 - iii. If at any time one of the parties revealed the lie to the court, this became an affirmative defense.
- iv. **No Fault Based Grounds**
- 1. **Irretrievable breakdown of the marriage**
 - a. **This concept is often referred to as incompatibility or irreconcilable differences**
 - b. When the court determines that there is **no realistic possibility of reconciliation**.
 - c. There are procedurally two different ways MIGHT obtain a divorce:
 - i. When **BOTH spouses agree that the marriage has failed**.
 - This would be a **MUTUAL consent divorce**
 - Both parties files documents to the court; there may be a brief waiting period; and then the court will enter the order.
 - ii. When **ONE SPOUSE refuses to acquiesce in the divorce proceedings**
 - A unilateral no fault divorce is available PROVIDED that the party who initiated:
 - files paper alleging the breakdown

- Lives separate and apart from the spouse for a specified statutory period of time.
 - As a general rule, during the period of separation pending the grant of a unilateral no fault divorce there can be NO SEX.
 - If there is SEX, the court will reset the clock!
 - The waiting period will then commence after the sexual episode.
- d. **Summary Divorce (California and Florida)**
 - i. **Designed to provide less expense to couples whose circumstances are relatively simple.**
 - ii. It is usually available ONLY if:
 - There are **no children**
 - There is **no real-estate**
 - There is **no claim for alimony or post-divorce support**
 - iii. This usually deals with couples who are married for a short period of time
 - iv. This allows them to obtain a divorce without a divorce hearing
 - v. Or relieved of hiring a lawyer.
 - vi. Divorce by mail
- e. With respect to the period of separation that precedes the grant of a no fault divorce, there are some states, that say that the ONLY separation that can be the predicate to an irretrievable breakdown divorce is a court ordered separation and that the court ordered separation will only be granted for fault based reasons.
 - i. In states that follow that practice there is effectively no no-fault divorce
- c. **Legal Separation**
 - i. Some states call it limited divorce; or divorce from bed and board
 - ii. This is **NOT true divorce because it doesn't terminate the marriage relationship**
 - iii. It puts the marriage in a suspended animation
 - iv. It gives the **parties a mechanism to go court and get orders concerning economic matters or matters involving children**
 - v. Therefore during legal separation, **the parties MAY not enter subsequent marriages with other parties.**
 - vi. **Why would a couple opt for a legal separation instead of a divorce?**
 - 1. Religious

2. To preserve a tax status, ensuring entitlements to government benefits, guaranteeing status under a will/intestacy law
- vii. To get a formal legal separation **you usually have to assert grounds that are IDENTICAL to the grounds for divorce**
- viii. If you get a legal separation you can convert it to an absolute divorce AFTER a specified period of time.
- d. **Procedural Issues/Requirements for Dissolution**
 - i. What court do you go to?; what court has subject matter jurisdiction?
 1. Some states **require that parties use courts of general jurisdiction** (basic courts available for all civil disputes).
 2. Some states **require that parties use family or probate courts**
 3. Virtually all states require that at least one party, typically the plaintiff to be:
 - a. **Domicile**
 - i. The United States Constitution is generally understood to require domicile of one of the parties as a basis for a state court to exercise divorce jurisdiction.
 - ii. Domicile of one of the parties in the state is also often required by state statute.
 - iii. In *rem jurisdiction* is established over the marital status by virtue of the domicile of one of the parties within the state.
 - iv. Domicile generally **requires physical presence in the state plus the intent to make the state a permanent home.**
 - b. **Durational requirements**
 - i. In addition, some states impose a requirement that **one of the parties must have resided in the state for a specified period of time prior to the filing of the divorce action.**
 - ii. A one-year durational requirement was upheld as constitutional in *Sosna v. Iowa*, 419 U.S. 393 (1975).
 - c. **UMDA requires 90 days.
 4. If the plaintiff is domiciled in the forum state, the court is then free to grant a divorce or annulment REGARDLESS if they have personal jurisdiction over the defendant.
 - a. **That is because marriage is a res (a thing)**
 5. Given the **court's jurisdiction, other states MUST grant that divorce FULL FAITH and CREDIT**
 - a. Despite the fact that defendant did not participate
 - b. Despite the fact that it was merely ex parte

- c. **The ABSENT party MUST receive NOTICE for it to be valid**
6. **Where one party is domiciled in the forum, the court CANNOT enter PERSONAL ORDERS against the non-resident absent party.** Personal orders are:
 - a. Requirements to pay alimony
 - b. Engage in property division
7. If you want **personal orders**, then you have to go to a court that has **PERSONAL JURISDICTION** over the spouse; this is done:
 - a. If the other spouse is **domiciled in the forum**
 - b. If the other spouse **consents (voluntary appearance)**
 - c. If the other spouse has **physical presence in the state (Gotcha jurisdiction)**
 - d. **Long-Arm Statute** - if there was **minimal contacts** with the state; minimal contacts are:
 - i. Forum was the state in which the couple was originally married
 - ii. Couple resided in the state during some interval during their marriage
 - iii. The grounds alleged took place in the forum state
8. *****If BOTH parties enter an appearance, then the divorce is considered bilateral and EVEN IF domicile is not present, the defendant is collaterally estopped from challenging the validity of the divorce. *****
9. **There is no BINDING legal obligation on U.S. states to recognize international divorce decrees**
 - a. Each state is free to rely on its own public policy
 - b. ****If it appears that the parties have left the U.S. to evade some public policy of the home state that will be a STRONG REASON to deny recognition of the foreign divorce.**
 - i. States normally recognize foreign divorce when:
 - They are bilateral and
 - When at least one party has traveled to the foreign nation.
 - ****The state will determine if there was some legitimacy to the process**
 - Was a real hearing held?
 - ii. When these states recognize the divorce is it usually under the international law act of C.O.M.I.T.Y.
 - c. A mail ordered divorce where neither party ever traveled to the forum is not going to be recognized.

IV. **Economic Issues Concerning Marriage Termination**

- a. Many couples attempt to resolve the economic issues by entering into agreements
 - i. This is called a **separation agreement**
 - ii. **An agreement in contemplation of divorce**
 - iii. A valid separation agreement MUST be:
 1. **Freely made**
 2. **In writing**
 3. **Full disclosure of all assets held by both parties**
 4. **Agreement must be fair**
 - iv. Subject matter of the agreement can be ANYTHING; but most commonly they deal with:
 1. **Testamentary issues**
 - a. An agreement can state that each party give up their spousal elective share
 2. **Alimony**
 - a. The agreement can specify the amount to be paid, duration of payment and who pays
 - b. Or no alimony is to be paid
 3. **Division of property**
 4. **Matters of child custody**
 5. **Child Support**
 - v. Separation agreements are generally favored by courts
 1. Provisions dealing with **testamentary issues, alimony and division of property WILL be ENFORCED exactly as written**
 2. Provisions relating to **children are NOT BINDING; the court can alter as to the best interests of the children**
 - vi. **Modification of separation agreements**
 1. This will turn if there has been a merger of the agreement into the divorce decree.
 - a. **With a merger** - the agreement is said **to lose its status as an independent contract**
 - i. The terms now become part of a court decree; court decrees are subject to modification
 - ii. In effect when a separation agreement is merged into a divorce decree it is as if all the terms have been copied out from the contract into the court order and the contract itself has been destroyed.
 - iii. The terms rest in a order and are subject to relatively easy modification
 - b. **If there is no merger** - if the divorce decree does not recite a merger; then the **separation agreement retains its existence as a separate contract.**
 - i. That means it is not likely to be modifiable

- ii. Or if modifiable only on a showing of **COMPELLING CIRCUMSTANCES.**
 - iii. And any violation of the separation agreement will not be contempt of court
- vii. **Situation where both parties CANNOT negotiate a separation agreement**
 - 1. The court has the power to enter into a variety of temporary orders while the litigation is pending
 - a. Temporary orders can be crucial, in terms of making sure parties are kept in some degree of even-handed status and economic security until the case can be finally resolved.
 - b. ***Alimony pendente lite*** - The court can order alimony during the litigation.
 - c. The court can order possession of the marital assets (home and cars)
 - d. The court can order temporary custody orders.
 - e. The court can order temporary restraining orders where it is NECESSARY for the safety of the members of the family.
 - i. Many of these orders can be issued on an EXPEDIATED basis, on a minimal evidentiary showing or sometimes even without notice.
- viii. **After the litigation has concluded and if the parties do not have a separation agreement, the court will be responsible for TWO types of ECONOMIC orders:**
 - 1. **Alimony**
 - a. Most states require parties to file financial disclosure forms before the court can enter an alimony order.
 - b. **The purpose of alimony is to ensure an adequate income for a spouse who has become economically dependent during and in part because of the marriage.**
 - c. A marriage is an economic partnership; in that partnership one partner may withdraw from the workplace in order to maintain the household; that partner may become economically dependent and may not have the resources to earn an adequate income when the marriage is terminated.
 - d. **Alimony is NOT an ABSOLUTE RIGHT.**
 - e. It will not be ordered in every case; it is ONLY ordered when there is a need.
 - f. There has been a trend towards fewer and smaller alimony awards in recent years.
 - i. This is because BOTH spouses now are much more often likely to be working spouses outside the home and to have job skills to support themselves.

- g. There is another view that today that more couples often have more assets, so that alimony is less necessary because property division can ensure both spouses some degree of economic independence.
- h. **There are 3 BASIC types of alimony that the court can award:**
- i. **Lump sum alimony (Alimony in gross)**
 - This is an order that one spouse pay the other a single lump sum at the time of divorce
 - ii. **Rehabilitative alimony**
 - Periodic payments for a set period of time
 - Usually a period of time designed to enable the recipient to obtain education or job skills
 - iii. **Permanent-periodic alimony**
 - A series of periodic payments with no set date for those payments to terminate.
 - iv. U.M.D.A. is conservative with respect to the circumstances that it would allow as warranting an award of alimony.
 - It provides "alimony will only be paid, if the party seeking alimony, lacks sufficient property to provide for his reasonable needs and is unable to support himself through appropriate employment or has the custody of children that make it impossible to work"
 - In other words there must be BOTH inadequacy of property and inadequacy of job skills in order in order to get an alimony award.
- i. **Are there any gender presumptions when dealing with alimony?**
- i. **Gender based-rules** concerning alimony are **FORBIDDEN.**
 - j. **What amount should the court award with respect to alimony?**
 - i. The amount is to the discretion of the court.
 - ii. Most state statutes and the U.M.D.A. contain a list of relevant factors that courts consider in fixing the amount:
 - Financial resources and property owned by the two parties
 - Time necessary to secure education and training on the part of the recipient

- Standard of living that the couple maintained during the marriage
- Duration of the marriage
- Age, physical and emotional condition of the recipient
- Resources of the payor.
- iii. **What role should martial fault play in the determination of alimony?**
 - The U.M.D.A. specifically state that martial fault SHOULD NOT be considered in assessing the amount of alimony award
 - But some states do explicitly allow martial fault to be considered and this can often result in a denial of alimony
- k. **Can the award be modified?**
 - i. A lump sum award is not modifiable
 - ii. Periodic payments can be modified **if there is a SUBSTANTIAL CHANGE in circumstances.**
 - The change in circumstances **MUST relate to either (1) the needs of the recipient or (2) the resources of the payor.**
 - **If a payor simply quits a job and claims insufficient resources, MOST COURTS will not treat that as a change in circumstances.
 - iii. **Modification of alimony awards ONLY apply prospectively.**
 - It does not affect past due amounts to you owe; it only goes towards future payments
 - iv. If no alimony is awarded at the time of divorce, there is NOTHING to modify.
 - So an economically weak party to that former marriage will be unable to get an award later EVEN IF there is a significant change in circumstance.
 - In order to avoid that scenario, some court will award a nominal alimony award to preserve the option of modifying it in the future.
- l. Rehabilitative alimony will terminate whenever the order specifies.
- m. **Permanent alimony can also terminate, when either two circumstances occur:**
 - i. The **death of either ex-spouse** OR
 - ii. The **re-marriage of the recipient**

- In some states, if the recipient OPENLY lives with someone as if they were spouse, that would also be grounds for an automatic termination.
- In all states, having an active social and engaging in sexual intimacy is not a basis for terminating alimony.

n. **Enforcement mechanisms ensuring payment of alimony**

- i. Failure to pay alimony constitutes contempt of court
- ii. Non-payment of alimony can result in imprisonment
- iii. Courts can seize assets
- iv. Garnish wages

2. **Property Division**

a. **Equitable Distribution**

- i. The majority of states use equitable distribution as a method for property division
- ii. The court **will examine all the assets owned by BOTH spouses either independently or jointly and DIVIDE those assets up into three separate groupings:**
 - Husband's separate property
 - Wife's separate property
 - Marital property
- iii. There are a minority states that follow the equitable distribution scheme that DO NOT divide the assets into those groups but rather treat ALL PROPERTY as subject to eventual distribution.
 - In Massachusetts, all property owned by husband or wife or jointly is subject to distribution.
- iv. Under normal equitable distribution, it is always better to **IDENTIFY the separate property first.**
 - **Property acquired before the marriage** by either spouse is separate property
 - In many states, there is a tracing of assets, so if you swap some separate property for other separate property AFTER the marriage the new item is still separate property.
 - Example: You own a condo before marriage and sell the condo and use the proceeds to buy IBM stock. The stock would be considered separate property

- **Gifts or inheritances** given individually even received AFTER marriage are separate property.
- Any property that **the parties specifically agree to treat** as separate property
 - The property might agree to do that in a pre-nuptial agreement
- **Tort judgments**
 - Some states treat personal injury judgments received during the marriage as the separate property of the injured spouse.
 - Other states treat these awards as a marital asset
- **Appreciate in value of the items listed above**
 - Some states treat the appreciation in value of an asset that is separate property is **considered a marital asset as long as the appreciation took place DURING the marriage**
 - Other states treat the appreciation in value as a separate property.
- v. Everything else is marital property
 - Everything earned during the marriage by either party
 - Lottery winnings
 - Gambling winnings
 - End of year bonuses
 - Salary or overtime
 - Gifts given jointly to BOTH spouses
 - Interests in insurance policies
 - Vested pension rights
 - Intangible assets
- vi. This is true, even if one spouse works and the other stays at home.
- vii. **Professional degrees/licenses**
 - **The majority of the states DO NOT treat these degrees/licenses as assets**
 - These states end up treating the fact that one party help the other through school bearing entitlement to alimony.
 - Some courts will order reimbursement, independent of alimony, by

- the degree holder based on tuition and loss earnings. (California has a similar approach)
 - Minority states do view these degrees/licenses as assets subject to division
 - Example: If you earned a law degree after you got married; courts will calculate an economic value that is attributable to the license; and then order installment payments to be made as a property distribution settlement that would reflect the other party's fair share of that asset
 - A New Jersey court has held a "celebrity status" is an asset subject to division.
 - viii. Separate property can be converted or transformed into martial property if it is treated in a way that suggests that the owner has made a gift to the martial unit.
 - Example: If the owner of property re-titles the asset in the names of both spouses.
 - ix. The spouses KEEP their separate property and the court will divide the martial assets equitably.
 - The martial debts will also be DIVIDED equitably.
 - In deciding what is equitably, the court can decide any factors that are just and reasonable under the circumstances.
 - Age and health of parties
 - Duration of marriage
 - Contribution that each made to the family's wealth
 - Whether they have job skills
 - There is no deposition to divide the assets/debts up evenly (50/50)
 - x. Martial fault is usually not a factor in property division!
 - xi. Property division is NOT subject to modification.
 - b. **Community Property**
 - i. In community property states, **the martial assets are divided EQUALLY**
 - ii. These states DO NOT use the equitable list of factors but merely split the property in half.
- 3. **Tax Implications**
 - a. Alimony

- i. Alimony is deductible by a payor and is considered taxable income to the recipient
 - b. Property Division
 - i. Property Division is not deductible to the payor but the recipient gets the asset with a carry-over basis

V. Issues Relating to Children

If you don't wanna have them, you don't have to have them!

If you do want to have them, you can have them!

But if you have them, you have to care of them!

a. Family Planning

i. Contraception

1. If you don't want to have children, you may use contraceptives.
2. The S.C.O.T.U.S. has held that the government can regulate contraceptive devices but they cannot forbid or criminalize the use of them.

ii. Abortion

1. Prior to the viability of a fetus, states may adopt regulations protecting the health of a woman or the life of a fetus **ONLY to the extent that the regulations do not impose an undue burden on the right to an abortion.**
 - a. **What are permissible regulations?**
 - i. A rule that an abortion can only be performed by licensed doctors.
 - ii. An abortion can only be performed in certain licensed facilities.
 - iii. The physician must provide certain information about the procedure.
 - iv. A 24-hour waiting period
 - v. A parental consent requirement for minors provided there is a judicial bypass mechanism.
 - b. **What is an undue burden?**
 - i. A rule that requires spousal notification.
2. Post viability - **A state may forbid an abortion entirely.**
 - a. Except in cases where it is necessary to protect the life of the mother.

iii. Procreation

1. There is a fundamental right to procreate under the constitution (Skinner v. Oklahoma - striking down a law providing for the sterilization of habitual criminals).

b. **Raising Children**

- i. The S.C.O.T.U.S. has held that parents have considerable amount of discretion to raise the children.

- ii. There is a right to educate your children OUTSIDE the public school system
 - 1. Subject to state's definition of the state's reasonable standard
- c. **New Reproductive Technologies**
 - i. These technologies present challenging issues in family law because there is a presence of 3rd parties in - sperm donors, egg donors or surrogate mothers.
 - ii. The Uniform Status of Children of Assisted Conception Act, tries to address the issues presented by the technologies.
 - iii. **Artificial Insemination**
 - 1. A woman becomes pregnant, not through the act of sexual intercourse, but through the insemination of sperm.
 - 2. This is lawful.
 - 3. The sperm donor is NOT considered to be a parent and has no parental rights.
 - 4. If the woman is married and the husband consents to the procedure, he is the father.
 - a. In some jurisdictions, if he doesn't consent or litigates, he can establish that he is not father and avoid parental obligations.
 - iv. **In Verto Fertilization**
 - 1. An egg and a sperm cell are joined OUTSIDE the body of the woman.
 - 2. If it is done with donor sperm, then the same rules above will apply.
 - 3. The same rule, if the egg is donated.
 - v. **Surrogate Motherhood**
 - 1. **A surrogate is a woman who agrees to bear a child through some form of assisted conception such as artificial insemination or in verto for another couple.**
 - 2. **U.S.C.A.C.A. Approach**
 - a. U.S.C.A.C.A., will allow surrogate agreements if the parties:
 - i. Draw up an agreement
 - ii. Bring it to court
 - iii. Secure judicial approval in advance of the pregnancy (not delivery)
 - b. Under the U.S.C.A.C.A., the court must make certain findings:
 - i. Is the intended mother unable to have children
 - ii. Has there been a social services investigation of both the intended parents and of the surrogate mother
 - iii. Whether the agreement is voluntary
 - c. Under the U.S.C.A.C.A, it allows the surrogate the option to terminate the agreement by filing written notice with the court within 180 days after the last insemination pursuant to the agreement.

- d. If the court refuses to approve the agreement, then the agreement is VOID.
 - i. If the parties continue, the surrogate will be the LEGAL MOTHER of the child.
 - e. Under the U.S.C.A.C.A., is it legitimate to provide monetary consideration to the surrogate.
- 3. **Common Law**
 - a. Most states DO NOT follow the U.S.C.A.C.A.
 - b. In most states these agreements are VOID.
- d. **Responsibility to Take Care of Children**
 - i. **Parents are the guardians of their children**
 - 1. They are guardian of the person and property of the child
 - 2. They can act for the child in legal proceedings
 - 3. They have an obligation to protect the child's assets
 - 4. The guardian relationship continues until it is terminated
 - a. Child reaches age of majority
 - b. Court action
 - c. Voluntary surrendered
 - d. Parents become incapacitated
 - ii. **Parents are obliged to support their children**
 - 1. Support is in obligation of BOTH mother and father
 - 2. Support continues until the child reaches the age of majority or becomes married
 - a. The support will CONTINUE passed the age of majority if the child is **mentally enable to take care of themselves**
 - 3. Some states provide that the support duty includes paying for college education
 - 4. The support obligation **will terminate on the death of a parent**
 - 5. The support amount is based on
 - a. The **needs of the minor** and
 - b. The **resources of the parent** and
 - c. Any other factors that are logically relevant
 - 6. Unlike alimony and property division, **the support for a child is NOT left the discretion of the courts**
 - a. All states have guidelines mandated by federal law that specify the amount of **child support based on (1) income and (2) number of children.**
 - b. These are tables and grids.
 - iii. Court can order parents to pay for child's medical expenses, health insurance or even life insurance.
 - iv. Child support orders can result from paternity litigation, divorce, annulment or other forms of martial termination.
 - 1. When the orders are entered, they are not considered final.

2. The orders are subject to modification on a showing of CHANGED CIRCUMSTANCES.
 - a. Relating to the needs of the child or
 - b. Ability of the parent to pay
- v. **Enforcement of support**
 1. Child support orders can be sent directly to the employer of the party who is supposed to pay.
 2. Those orders will obligate the employer to withhold the support money from the paycheck and remitted directly to the child or custodial parent.
 3. Asking the court to attach assets, sell them and use the proceeds to satisfy the support obligation.
 4. Failure to pay child support is contempt of court
 5. In increasing number of states, your driver's or professional or license to do business can be suspended or revoked if you don't pay child support
 6. If the obligor has left the forum state, enforcement difficulties become much greater
 - a. There are 3 statutes that deal with inter-state enforcement of the obligation of support
 - i. **Uniform Interstate Family Support Act**, adopted by all 50 states, it provides that every state will defer to the first state that has entered a support order; subsequent states will refuse to assert jurisdiction to modify an order.
 - The ONLY exception is that the child's home state can TRUMP the first state
 - UIFSA permits the custodial parent to mail the court order to an out of state employer and the out of state employer would have to withhold and forward wages.
 - UIFSA permits the custodial parent to register the court order to the out of state court to enforce the order.
 - ii. **The Full Faith and Credit for Child Support Orders Act**, a federal statute that requires states to give out of state support order full faith and credit.
 - Prevents forum shopping
 - iii. **Child Support Recovery Act**, it makes it a federal criminal offense to willfully fail to pay past due child support to a child who lives in another state if the amount is unpaid for more than a year or if the amount is greater than \$5000.
 7. Alimony and child support obligations are NOT dischargeable in bankruptcy!

8. A custodial parent supports the child by virtue of the child staying with the parent.

e. **Custody**

i. **Jurisdiction**

1. In any case involving divorce, the divorce has jurisdiction to determine custody
2. In other situations, the traditional view is the court has jurisdiction if either parent domiciled in the state or if the minor child was present in the forum.
 - a. This view caused trouble.
 - b. Since child custody orders are not final, there is no OBLIGATION of full faith and credit, this in turn caused forum shopping, inconsistent orders and parental kidnapping.
3. **The Uniform Child Custody Jurisdiction and Enforcement Act**, every state defers to the state **that has the MOST SIGNIFICANT CONNECTION with the child**.
 - a. Usually that is the home state of the child.
 - b. Home state - is where the child lived with one parent for **at least 6 consecutive months prior to the commencement of the custody proceeding**.
 - c. If no state qualifies as a home state, ask whether if there is a state where the child and one parent have SIGNIFICANT CONNECTIONS with and where there is SUBSTANTIAL EVIDENCE of concerning the child's care, protection, training and relationships.
 - i. If all states that would have jurisdiction under those two tests decline to assert their jurisdiction then another state may take jurisdiction.
4. **Parental Kidnapping Preventive Act**, a federal statute that requires full faith and credit to be awarded to a state custody order when the state that entered it is the home state of the child.

ii. **Determining Where the Child Should be Placed**

1. There are two kinds of custody: **(1) physical and (2) legal**
2. **Physical custody is where the child lives**
3. **Legal custody is who makes the decisions about the child's welfare and upbringing**
4. Either type of custody can be EXCLUSIVE to one parent or shared JOINTLY
5. Many states have statutes that encourage joint custody on the theory that the child will benefit with having an ongoing relationship with both parents.
 - a. This is only appropriate when there is MINIMAL cooperation between the two parents.

6. Custody determinations are ALWAYS made based on the "**best interests of the child**"

- a. When determining the "**best interests of the child**", the court can rely on the arguments of the husband and wife.
- b. However, the court can appoint a counsel to represent the interests of the child.
- c. When implementing the standard, **there are number of principles that are used:**
 - i. There are no longer any gender presumptions concerning where the child will live
 - Tender year presumption - younger child are better suited when placed with their mother
 - ii. The courts now use the primary caretaker standard
 - Which parent has been primarily involved in caretaking for that child?
 - iii. The wishes of the parents
 - iv. The wishes of the child
 - Children over 12 are given more deference to their wishes
 - v. Whether the placement will foster relationships with siblings and other family members
 - vi. Child's adjustment to school, community and house
 - vii. Child's mental and physical condition
 - viii. In some states, the courts will look into religious beliefs
 - Particularly when the religion will negatively impact the health of the child.
 - ix. Supreme Court has held racial considerations CANNOT be used
 - x. Conduct unrelated to the well-being of the child CANNOT be used
 - xi. Some courts increasingly hold that a homosexual orientation is not a disqualification
 - xii. The parent who is more likely to facilitate visitation would probably get the child

7. **Can the custodial parent relocate?**

- a. The majority view does allow relocation provided that the relocation is bonafide.
 - i. It has to be motivated by legitimate consideration and not done out of spite

8. **Visitation**

- a. Where a parent is granted exclusive custody, the other parent is entitled to visitation rights
- b. Visitation is ALMOST never denied.

- i. Only denied where it would be detrimental to the welfare of the child.
- c. Visitation is NOT conditioned on the payment of child support.
- d. If a custodial parent denies visitation of a non-paying parent, the custodial parent would be in contempt of court.
- e. Where the court is concerned about visitation because of the likelihood potential harm the court can order supervised visitation.
 - i. The non-custodial parent would be accompanied by a government official (social worker)
- f. Parties other than parents sometimes request visitation
 - i. Normally grand-parents requests this court order
 - ii. But it can be other family members as well
 - iii. The court will grant the visitation IF the visitation is in the best interests of the child
 - iv. However in *Troxel*, the Supreme Court held if a parent is otherwise fit that parent's determination of the appropriateness of non-parental visitation MUST be given special weight; therefore a judge may not override a fit parent's decision regarding 3rd party visitation.
 - Note that when considering third-party visitation, the best interest standard of the child may be overridden by the constitutional rights of parents to make decisions based on the care and control of their children.

9. **Grandparents seeking custody**

- a. There is a STRONG presumption that a parent would be the appropriate custodial party and that the best interests of the child strongly lie with being in the home of a parent.
- b. A court MUST find a parent unfit before they can make a custody award to someone who is not a parent.
- c. It is NOT ENOUGH that the other MIGHT be able to do a BETTER JOB

10. **Custody awards are not FINAL**

- a. They are subject to modification
- b. Traditionally the modification could be done when there was a change of circumstances
 - i. Now states require a SIGNIFICANT change of circumstances
 - ii. The logic here is that stability is an important feature of any child's circumstances
 - iii. Constant modification of custody can be disruptive to the child

- c. Some states allow a petitioner to claim, without the need to state significant circumstance, that it would be the best interest to modify the order

11. **Enforcement of custody**

- a. Violation of a custody order is contempt of court.
 - i. Example: If you take a child from the custodial parent and hold that child that is contempt of court
- b. In most states, it is a felony to snatch a child in violation of a custody order
- c. In order to get the child back, the custodial parents has two choices:
 - i. Go to the second state, where the non-custodial parent and file the custody decree in that second state or
 - ii. Go to the second and get a writ of habeas corpus
- d. **International Parental Kidnapping Crimes Act**, a federal statute which makes it illegal to remove a child from the U.S. with intent to obstruct the other parent's right to physical custody.

f. **Termination of Parental Rights**

- i. **Voluntary** - both parents **MUST** give consent in writing that the parental rights are terminated.
 - 1. Here the parents are basically giving the child up for adoption
 - 2. Even if the father is NOT married to the mother, if the father has had some ongoing relationship with the child then the father must give up consent by voluntarily signing the consent
- ii. **Involuntary** - where the state steps in and in effect takes the child from the parents against the parents' wishes
 - 1. State **MUST** prove **parental unfitness**
 - 2. The state proves this by:
 - a. **Abandonment** - failure to support; failure to communicate; failure to interact with the child
 - b. **Neglect** - passive or affirmative
 - i. **Passive** - failure to provide adequate food, clothing or medical care to the child
 - ii. **Affirmative** - physical or sexual abuse
- iii. The state must prove its case by **CLEAR and CONVINCING evidence**.
- iv. There is NO constitutional right to counsel for indigent parties in parental termination proceedings
 - 1. But many states do provide for counsel under state statutes

g. **Adoption**

- i. In most states, there is a party that acts as intermediary between the biological parents and the prospective adoptive parents.
 - 1. The intermediary finds a suitable child and suitable prospective parents.

2. In all states, licensed agencies are permitted to act as intermediaries.
- ii. In some states, it is legal for the prospective parents to deal directly with the biological parents.
- iii. In a small minority of states, private parties may act as intermediaries such as lawyers or doctors.
- iv. Payment of money other than the medical expenses associated with child birth to the biological parents is generally forbidden.
- v. The fees of the intermediaries (which licensed or private) are closely regulated.
- vi. The first step in an adoption is terminating the relationship between the child and the biological parents.
 1. The one difficult question when addressing this issue, is whether there is a need for consent of the biological father who is not married to the mother?
 2. Consent is needed ONLY if the father has had an ongoing relationship.
- vii. Once a decree of adoption is entered, consent by the biological parents CANNOT be withdrawn.
- viii. Who can be an adoptive parent?
 1. Any adult can be an adoptive parent.
- ix. A child who is going to be adopted often MUST give consent to his adoption if the child is over a certain age.
 1. 12 is the common cut off; although a court may override a minor's refusal to consent upon a finding of good cause.
- x. An adoption must look to the creation of a true parent-child relationship.
 1. Example: There must one case where two homosexual men sought to use the adoption laws as a way to gain some of the privileges of a marriage status.
 2. The privileges of hospital visitation, automatic inheritance and various governmental benefits.
 3. So one of the men attempted to adopt the other.
 4. The court refused to allow it because it was not looking to the creation of a true parent-child relationship.
- xi. Once there are prospective adoptive parents who meet the necessary tests, then there will be home investigations and interviews to ascertain the fitness of the parents.
- xii. A court proceeding will follow; the formal standard of the proceeding will be the best interests of child
- xiii. Adoptions are FINAL
- xiv. Adoptions created the same privileges and obligations of the parties as is true of biological children
 1. A new birth certificate is usually for the child listing the adoptive parties as parents

- xv. In most states the records of adoptive proceedings are sealed and kept sealed
 - 1. A small minority states do allow an adoptive child to learn the identity of his birth father and mother