

Grace A. Luppino | Justine FitzGerald Miller

Family Law and Practice

fifth edition



Family Law and Practice

This page is intentionally left blank

Family Law and Practice

Fifth Edition

Grace A. Luppino, Esq.

Justine FitzGerald Miller, Esq.

Vice President, Portfolio Management: Andrew Gilfillan
Portfolio Manager: Gary Bauer
Editorial Assistant: Lynda Cramer
Vice President, Product Marketing: Brad Parkins
Product Marketing Manager: Heather Taylor
Product Marketing Assistant: Liz Bennett
Director, Digital Studio and Content
Production: Brian Hyland
Managing Producer: Jennifer Sargunar
Content Producer: Rinki Kaur
Manager, Rights Management: Johanna Burke

Manufacturing Buyer: Deidra Headlee
Creative Digital Lead: Mary Siener
Full-Service Management and Composition: Integra Software Services Pvt. Ltd.
Full-Service Project Manager: Gowthaman Sadhanandham
Cover Design: Studio Montage
Cover Photos: Ariel Skelle/Digitalvision/Getty Images, Monkey Business Images/Shutterstock, Rido/Shutterstock
Printer/Binder: LSC Communications, Inc.
Text Font: Times LT Pro Roman
Cover Printer: Phoenix Color

Copyright © 2020, 2015, 2012 by Pearson Education, Inc. 221 River Street, Hoboken, NJ 07030. All Rights Reserved. Manufactured in the United States of America. This publication is protected by copyright, and permission should be obtained from the publisher prior to any prohibited reproduction, storage in a retrieval system, or transmission in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise. For information regarding permissions, request forms, and the appropriate contacts within the Pearson Education Global Rights and Permissions department, please visit www.pearsoned.com/permissions/.

Acknowledgments of third-party content appear on the appropriate page within the text.

PEARSON and ALWAYS LEARNING are exclusive trademarks owned by Pearson Education, Inc. or its affiliates in the U.S. and/or other countries.

Unless otherwise indicated herein, any third-party trademarks, logos, or icons that may appear in this work are the property of their respective owners, and any references to third party trademarks, logos, icons, or other trade dress are for demonstrative or descriptive purposes only. Such references are not intended to imply any sponsorship, endorsement, authorization, or promotion of Pearson's products by the owners of such marks, or any relationship between the owner and Pearson Education, Inc., authors, licensees, or distributors.

Library of Congress Cataloging-in-Publication Data

Names: Luppino, Grace A., author. | Miller, Justine FitzGerald, author.
Title: Family law and practice/Grace A. Luppino, Justine FitzGerald Miller.
Description: Fifth edition. | Upper Saddle River, New Jersey: Pearson Education, Inc., [2020] | Includes index.
Identifiers: LCCN 2018028125 | ISBN 9780133495188 (alk. paper) | ISBN 0135186315
Subjects: LCSH: Domestic relations—United States. | Legal assistants—United States—Handbooks, manuals, etc. | LCGFT: Textbooks.
Classification: LCC KF505.Z9 L87 2020 | DDC 346.7301/5—dc23
LC record available at <https://lcn.loc.gov/2018028125>

Dedication

This book is dedicated to my family . . .
those related by blood, by marriage, and by love.

Grace A. Luppino

Dedicated to Justine, George, and Emma.

Justine FitzGerald Miller

This page is intentionally left blank

Brief Contents

Preface xix

Acknowledgments xxvii

CHAPTER 1 Introduction to Family Law and Practice 1

Part One INTRODUCTION TO PART ONE: FAMILY LAW 15

CHAPTER 2 Marriage and Marriage Alternatives 17

CHAPTER 3 Premarital and Postmarital Agreements 44

CHAPTER 4 Divorce, Separation, and Annulment 66

CHAPTER 5 Alimony, Spousal Support, and Maintenance 80

CHAPTER 6 Property and Debt Distribution 108

CHAPTER 7 Child Custody, Visitation, and Rights of Third Parties 158

CHAPTER 8 Child Support 191

CHAPTER 9 Paternity and the Rights and Responsibilities of Unmarried Parents 213

CHAPTER 10 Family Violence and State Intervention 230

CHAPTER 11 Adoption and Surrogacy Contracts 253

Part Two INTRODUCTION TO PART TWO: FAMILY PRACTICE 271

CHAPTER 12 Ethics in Family Law 273

CHAPTER 13 The Client Interview 302

CHAPTER 14 Initial Pleadings: Starting The Process 330

CHAPTER 15 Temporary Relief 365

CHAPTER 16 Discovery in the Electronic Age 398

CHAPTER 17 Separation Agreements 431

CHAPTER 18 Alternative Dispute Resolution and the Divorce Trial 447

CHAPTER 19 Postjudgment Divorce Matters 465

Appendix A Arizona and California Premarital Agreement Acts 489

Appendix B Alexander Rodriguez Petition for Dissolution of Marriage 493

Appendix C Rihanna and Chris Brown Search Warrant and Affidavit 499

Appendix D Bill Maher Palimony Complaint 504

Appendix E David Voelkert Criminal Complaint and Dismissal of Criminal Complaint 515

Glossary 525

Index 537

Contents

Preface xix

Acknowledgments xxvii

CHAPTER 1	Introduction to Family Law and Practice	1
	Family Law Theory	2
	Family Law Practice	3
	Court Systems	3 • Court Procedures 3 • Office Procedures 4
	Applying Family Law Theory to Family Law Practice	4
	The Family Practitioner's Role in the Dissolution Process	4
	The Roots and Traditions of American Family Law	5
	Marriage, Divorce, and Family Law from Colonial America to the Twentieth Century	6
	The Industrial Revolution and the Family	7
	Family Law from the Dawn of the Twentieth Century to the Present Day	8
	Family Law—Yesterday, Today, and Tomorrow	10
	High Divorce Rates	10 • Women in the Workplace 11 • Changes in How Custody Is Decided 11 • Marriage as an Economic Enterprise 11 • Relaxed Residency Requirements 12 • Streamlined and Simplified Divorce Procedures 12
	The "Modern Family"—The Wave of the Future?	13
	Concept Review and Reinforcement	13 • Key Terms 13 • Review of Key Concepts 13 • Building Your Paralegal Skills 14 • Building a Professional Portfolio 14 • Portfolio Exercises 14

Part One INTRODUCTION TO PART ONE: FAMILY LAW 15

CHAPTER 2	Marriage and Marriage Alternatives	17
	Marriage	18
	Marriage Defined	18
	Civil and Religious Marriage	18
	Covenant Marriage	19
	Louisiana Covenant Marriage Act	20
	Common Law Marriage	20
	What Is a Common Law Marriage?	21 • States That Recognize Common Law Marriage 21 • Why Choose Common Law Marriage? 23
	Same-Sex Marriage	23
	Same-Sex Marriage in the United States	23 • The Legal Battle for Recognition of Same-Sex Marriage 23 • Defense of Marriage Act 24 • Creating a Valid Marriage 29 • Marriages Performed Abroad 30
	Marriage Prohibitions	32
	Restricting Marriage between Family Members	32 • Bigamous or Polygamous Marriages 33 • Legal Prosecution of Bigamists and Polygamists 33

Marriage Alternatives 35

Domestic Partnership 35 • Civil Unions 37

Cohabitation 37

Introduction 37 • Marvin Lays Foundation for Cohabitation Remedies 39

Concept Review and Reinforcement 43 • Key Terms 43 • Review of Key Concepts 43 • Building Your Paralegal Skills 43 • Building a Professional Portfolio 43 • Portfolio Exercises 43

CHAPTER 3 Premarital and Postmarital Agreements 44

Premarital Agreements 45

Introduction 45 • Legal Requirements of a Valid Premarital Agreement 46 • Acquiring the Necessary Documentation 47 • Who Should Have a Premarital Agreement? 48 • Premarital Agreements—Post *Posner* 49 • Drafting and Executing Valid Premarital Agreements 49 • Testing the Validity of a Premarital Agreement 52 • Assessing the Client's Position regarding the Enforceability of the Premarital Agreement 54

Celebrity Premarital Agreements 55

Brad Pitt and Angelina Jolie 55 • Kim Kardashian and Kris Humphries 55 • Kim Kardashian and Kanye West 56 • Khloe Kardashian and Lamar Odom 56 • Deion Sanders and Pilar Sanders 56 • Jessica Biel and Justin Timberlake 56 • Nicole Kidman and Keith Urban 57 • Barry Bonds and Sun Bonds 57 • If I Knew Back Then What I Know Now... 57 • Camille Grammer and Kelsey Grammer 57 • Mel Gibson and Robyn Gibson 58 • Paul McCartney and Heather Mills 58

Postmarital Agreements 58

Reasons for Entering into a Postmarital Agreement 58 • Testing the Validity of a Postnuptial Agreement 59 • Know Your State Law 60

Minn. Stat. 519.11 Antenuptial and Postnuptial Contracts 61

Subdivision 1. Antenuptial contract. 61 • Subd. 1a. Postnuptial contract. 61 • Fair and Reasonable 62

Judgment Affirmed 64

Drafting Considerations 64

Concept Review and Reinforcement 64 • Key Terms 64 • Review of Key Concepts 64 • Building Your Paralegal Skills 65 • Building a Professional Portfolio 65 • Portfolio Exercises 65

CHAPTER 4 Divorce, Separation, and Annulment 66

Dissolving the Marital Union 67

Dissolution of Marriage 67 • The Dissolution Action 69 • Legal Separation 73 • Separate Maintenance 74 • Annulments 74 • Grounds for Annulment—Void versus Voidable Marriage 75

Concept Review and Reinforcement 77 • Key Terms 77 • Review of Key Concepts 77 • Building Your Paralegal Skills 78 • Building a Professional Portfolio 79 • Portfolio Exercises 79

CHAPTER 5 Alimony, Spousal Support, and Maintenance 80

History of Alimony 81

Ecclesiastical Courts 81 • Origins of the Alimony Award 81 • Alimony in Early America 82

Alimony Awards in a No-fault Setting 83

Alimony Reform 84

Determining Alimony	84
Resources for Alimony	86
Determining Spousal Need	87
Balancing Property Division, Child Support, and Alimony	88
Types of Alimony	88
Temporary Alimony	88 • Alimony Waiver 89 • Nominal Alimony 89 •
Durational Alimony	96 • Florida 61.08 Florida Statute Alimony 96
Modification of Alimony	96
Lump-Sum Alimony	97
Periodic Alimony	97
Escalation Clauses and Cost-of-Living Increase Clauses	98
Support-Related Costs—medical Insurance, Attorney’s Fees, and Life Insurance	98
Medical Insurance	98
Attorney’s Fees	99
Securing Alimony Payments with Life Insurance	99
Termination of Alimony	101
Remarriage	101 • Cohabitation 101 • Death 102
Enforcement of Court-Ordered Payments	105
Attorney’s Fees in Contempt Actions	105
Concept Review and Reinforcement	106 • Key Terms 106 • Review of Key
Concepts	106 • Building Your Paralegal Skills 106 • Building a Professional
Portfolio	107 • Portfolio Exercises 107

CHAPTER 6

Property and Debt Distribution	108
Basic Principles of Property	109
Tenancy in Common	109 • Joint Tenancy 109 • Tenancy by the
Entirety	109 • Community Property 110
Property and Debt Distribution upon Marital Dissolution	110
Marital Debts	114
The Distinction between Separate and Marital Property	114
Valuation of Assets	117
Retaining Experts for Valuation of Property	118
Effect of Premarital Agreements on Property Distribution	118
Resolving the Issue of Property Distribution: Contested or Uncontested	119
Jurisdictional Approaches to Property Distribution	119
Equitable Distribution	120
Waiver of the Right to Equitable Distribution	120
Community Property	121 • Community Property Rules and Exceptions 124 •
Treatment of the Appreciation of Separate Property during the Marriage	126
The Not-so-Obvious Assets of Marriage—Goodwill, Pensions, and Professional	
Degrees	127
Introduction	127 • Calculating Goodwill 127 • Enterprise Goodwill
versus Personal Goodwill	127 • Goodwill of Bethany Foot Clinic 128 •
Pensions	130 • Professional Degrees 135
Distribution of the Marital Debts	138
Dissipation of Marital Assets	139
But When Does the Dissipation Begin?	141
Tort Awards and Other Judgments as Marital Property	145

Bankruptcy 146

Timing the Bankruptcy Filing—before the Divorce 146 • Filing for Bankruptcy after the Divorce Is Final 147 • The Automatic Stay 147 • The Effect of Bankruptcy on Alimony, Child Support, and Property Distribution 147 • Student Loans 148 • If a Former Spouse Has Filed for Bankruptcy 149 • Added Protection in Property Settlement Agreement Clauses 149 • Tax Consequences 150 • Deducting the Cost of Getting Divorced 150 • Innocent Spouse Rule 150 • Property Division 151 • Personal Residence 151 • Retirement Plans 152 • Family Business Interests 153 • Alimony 153 • Alimony Recapture Rule 153 • Child Support and Dependent Exemptions 154 • Family Support Payments versus Separate Payments of Alimony and Child Support 155

Concept Review and Reinforcement 155 • Key Terms 155 • Review of Key Concepts 155 • Building Your Paralegal Skills 156 • Building a Professional Portfolio 157 • Portfolio Exercises 157

CHAPTER 7 Child Custody, Visitation, and Rights of Third Parties 158

A Historical Perspective on Custody 159

The Age of Paternal Dominance 159

The Tender Years Doctrine 159

The Best Interest Standard 159

Determining the Child's Best Interest 161 • Statutory Factors 162 • Psychological Parent 162 • Primary Caretaker 163

Traditional Custody Arrangements 164

Joint Legal Custody 165 • Joint Legal and Physical Custody (Shared Custody) 165 • Sole Legal and Physical Custody 165 • Split Custody 166

Rights of Access 167

Virtual Access 168 • Parenting Plans 170 • Mandatory Parenting Education Programs 171 • Child's Preference 173 • Parental Misconduct 174 • Reproductive Technology and Custody Disputes 177

Grandparents' Rights and the Rights of Third Parties to Visitation/Access and Custody 180

Third-Party Visitation/Access Rights 180

Third-Party Custody 186

Fish v. Fish, 285 Conn. 24 (Conn. 2008) 186

Jurisdictional Issues in Child Custody and Visitation Cases 187

Concept Review and Reinforcement 188 • Key Terms 188 • Review of Key Concepts 188 • Building Your Paralegal Skills 188 • Building a Professional Portfolio 190 • Portfolio Exercises 190

CHAPTER 8 Child Support 191

Child Support Guidelines: Federally Mandated Requirements 192

Determining Each Parent's Obligation for Child Support 193

By Agreement or by Court Order 195 • Utilizing Computer Software 195 • Deviation Criteria 195

Modification of Child Support Orders 198

"Shocking" Results 198 • Informal Agreements 200

Child Support Enforcement 200

Civil Enforcement 201 • Administrative Enforcement 201 • Means of Enforcement 201 • Interstate Enforcement of Child Support Orders 203

Child Support Order and the Right to Visitation 205

Additional Support Orders 205

Supporting a Second Family 205 • New Spouse or Domestic Partner's Income 206 • Nonbiological Parent's Duty to Support: The Doctrine of Equitable Estoppel 206 • *Roe v. Wade* and the Case for Men's Right to Reproductive Choice 209

Postmajority Child Support 209

Postmajority Educational Support Orders 211 • Tax Consequences of Child Support 211

Chapter Review and Reinforcement 211 • Key Terms 211 • Review of Key Concepts 212 • Building Your Paralegal Skills 212 • Building a Professional Portfolio 212 • Portfolio Exercises 212

CHAPTER 9 Paternity and the Rights and Responsibilities of Unmarried Parents 213

The Previous Status of the Children of Unmarried Parents—Illitimacy 214

Rights and Responsibilities of Unmarried Parents 214

Here Is a Sample of an Affidavit of Paternity 215 • The Absent Parent 221 • Challenges to Child Support Orders 221

Establishing Paternity 222

The Case of Mistaken Paternity 223

Concept Review and Reinforcement 228 • Key Terms 228 • Review of Key Concepts 228 • Building Your Paralegal Skills 229 • Building a Professional Portfolio 229 • Portfolio Exercises 229

CHAPTER 10 Family Violence and State Intervention 230

Introduction: Protecting Abused and Neglected Children—A Change in Perception 231

Child Protection Law: Federal and State Intervention 232

Child Abuse Prevention and Treatment Act of 1974 232 • Mandatory Reporting Laws 232 • Adoption Assistance and Child Welfare Act of 1980 234 • Adoption and Safe Families Act of 1997 235 • Investigation of a Complaint of Child Neglect or Child Abuse 235

Service Agreement Approach 235

Order of Temporary Custody 236

Efforts for Reunification of the Child with the Parents 237

Specific Steps 237 • Extension of Commitment 237 • Termination of Parental Rights 238 • Voluntary Termination of Parental Rights 238 • Involuntary Termination of Parental Rights 238 • Grounds for Termination of Parental Rights 238 • Consideration of the Child's Best Interests 239

Domestic Violence 239

Social and Legal Changes 239

North Carolina General Statutes § 50B—1. Domestic violence; definition 239 • Civil Restraining Orders and Criminal Protective Orders 241 • California's Request for Domestic Violence Restraining Order 249 • Violence Against Women Act of 1994 249 • Possession of Firearm While Subject to Order of Protection, 18 U.S.C. §922(g)(8) 250 • Representing the Parties in Domestic Violence Cases 250

Concept Review and Reinforcement 251 • Key Terms 251 • Building Your Paralegal Skills 252 • Building a Professional Portfolio 252 • Review of Key Concepts 252

CHAPTER 11 Adoption and Surrogacy Contracts 253

Adoption 254

The Legal Adoption Process 254 • Voluntary Adoption 254 • Nebraska Revised Statute § 29-121 254 • Involuntary Adoption 255

Types of Adoptions 256

Agency Adoptions 256 • Public Adoption Agencies 256 • Private Adoption Agencies 256 • Private Adoptions 257 • Stepparent Adoption 257 • Gay Adoption 259 • Open Adoption 260 • International Adoptions 262 • Tribal Adoptions 263 • Transracial and Transcultural Adoptions 263

Surrogacy Contracts 264

Concept Review and Reinforcement 268 • Key Terms 268 • Review of Key Concepts 268 • Building Your Paralegal Skills 269 • Building a Professional Portfolio 269 • Portfolio Exercises 269

Part Two INTRODUCTION TO PART TWO: FAMILY PRACTICE 271

CHAPTER 12 Ethics in Family Law 273

Overview of Basic Ethical Principles 274

Confidentiality 277 • Attorney-Client Privilege 279 • Communicating Confidential Information in the Electronic Age 279 • Double-Check 279 • The Intended Recipient: To:, Bcc:, and Cc: 280 • Reply All? 280 • E-mail Address Privacy 280 • E-mail Disclaimers 280 • Conflict of Interest 281 • Communicating with Opposing Party 283 • The *Pro Se* (Self-Represented) Litigant 285 • Competence 288 • Fees 288 • Solicitation 293 • Advertising 293 • Authorized Practice of Law 294

Unauthorized Practice of Law 295

UPL Violations 295

Concept Review and Reinforcement 300 • Key Terms 300 • Review of Key Concepts 300 • Building Your Paralegal Skills 300 • Building a Professional Portfolio 301 • Portfolio Exercises 301

CHAPTER 13 The Client Interview 302

Preliminary Practice Essentials 303

Developing a Relationship of Trust and Confidence 303 • Maintaining a High Degree of Professionalism 303 • Developing Good Listening Skills 303 • Understanding the Emotional Aspects of Family Law 304 • Referring Clients to Support Services 304

The Paralegal's Role in the Initial Screening Process 306

Preparing for the Initial Client Interview 308

The Client Interview 310

The Client's Arrival 310 • The Actual Interview 310

Obtaining Essential Information from the Client 312

Representing the Defendant Spouse 324

Preparing Releases 325

The Retainer Letter 325

Workplace Violence 327 • Reasons for High Cost of Divorce 328

Concept Review and Reinforcement 329 • Key Terms 329 • Review of Key Concepts 329 • Building Your Paralegal Skills 329 • Building a Professional Portfolio 329 • Portfolio Exercises 329

CHAPTER 14 Initial Pleadings: Starting the Process 330

Processing the Dissolution Action 331

Divorce Jurisdiction 331 • Subject Matter Jurisdiction 331 • In Personam Jurisdiction/Resident Defendant 332 • In Personam Jurisdiction/Nonresident Defendant 332 • Proper Venue 332 • In Rem Jurisdiction 333

Initial Pleadings in a Dissolution Action 333

The Pleadings 333 • The Complaint 333 • Form of the Dissolution Complaint 335 • Pre-Return Date Relief 344

Temporary Restraining Order 345

Service of Process of the Divorce Complaint 345

Responsive Pleadings to the Dissolution Complaint 347

The Appearance and the Answer 348

Special Defenses 348

The Cross-Complaint 351

The Electronic Courthouse 351

An Introduction to E-services 351 • E-Filing 354 • The Benefits of E-Filing 354 • The Basic E-Filing Process 355 • Learning the State's E-Filing Procedure 356 • E-Filers Beware: Precautions and Repercussions 356 • Federal Rules of Civil Procedure on Privacy Protection 358 • Rule 5.2. Privacy Protection for Filings Made with the Court 358 • State Rules Governing the Sealing and Redacting of Court Records 359 • Wyoming Judicial Branch Rules Governing Redactions from Court Records 359 • Excuses, Excuses... 361 • Illinois Attorney Reprimanded 362

Concept Review and Reinforcement 363 • Key Terms 363 • Review of Key Concepts 363 • Building Your Paralegal Skills 363 • Building a Professional Portfolio 364 • Portfolio Exercises 364

CHAPTER 15 Temporary Relief 365

Temporary Relief 366

Most Frequently Used Family Law Motions 367

Motion for Alimony 368 • Motion for Custody of Minor Children 375 • Motion for Child Support 375 • Motion for Visitation 376 • Motion for Counsel Fees 377 • Motion for Exclusive Possession of the Marital Residence 377 • Motion for Use of Motor Vehicle 377 • Motion for Payment of Mortgage Payments and Insurance Premiums 377 • Restraining Orders 378 • *Ex Parte* Proceedings 378

The Paralegal's Role in Facilitating Temporary Relief Matters 381

Docket Control System 382

Motions for Contempt and Modification 383

Contempt 383 • Modification 384 • Analysis 396

Concept Review and Reinforcement 396 • Key Terms 396 • Review of Key Concepts 396 • Building Your Paralegal Skills 397 • Building a Professional Portfolio 397 • Portfolio Exercises 397

CHAPTER 16 Discovery in the Electronic Age 398

Discovery Tools 399

Interrogatories 399 • Requests for Production 402 • Request for Physical or Psychiatric Examination 404 • Request for Admission 407

- Depositions 408 • Noticing of Nonparty Witnesses 409 • Motion for Disclosure of Assets 411 • The Financial Statements or Affidavits 412
- Avoiding Legal Malpractice 417

The Legal Landscape of E-Discovery 418

- When You Stoop to Snooping... 420 • E-Discovery and Professional Ethics 422 • Teddy Spy-Bear 422 • Social Networking Websites 424 • If You Want It, Ask for It 427 • Connecticut Judge Orders Parties to Disclose Passwords 427

Protecting Clients from Electronic Sabotage 428

- Concept Review and Reinforcement 428 • Key Terms 428 • Review of Key Concepts 429 • Building Your Paralegal Skills 429 • Building a Professional Portfolio 430 • Portfolio Exercises 430

CHAPTER 17 Separation Agreements 431

Preliminary Proposals 432

Creating the Separation Agreement 432

- Merger of Separation Agreement into the Court's Decree 433

Advantages of Reaching an Agreement 433

Paralegal's Role in Drafting the Separation Agreement 433

Finalizing the Separation Agreement 434

Basic Clauses and Structure of the Separation Agreement 434

- Heading 434 • Identification 434 • Recitals 435 • Irretrievable Breakdown 435 • Separation of the Parties 436 • Alimony 436 • Real Property 437 • Personal Property 437 • Custody and Access 438 • Child Support 440 • Life Insurance 441 • Health Insurance 441 • Liabilities 442 • Taxes 442 • Disclosure 443 • Representation of the Parties 443 • Miscellaneous Clauses 443 • Signature Provisions 444 • Acknowledgment 445

- Concept Review and Reinforcement 446 • Key Terms 446 • Review of Key Concepts 446 • Building Your Paralegal Skills 446 • Building a Professional Portfolio 446 • Portfolio Exercises 446

CHAPTER 18 Alternative Dispute Resolution and the Divorce Trial 447

Types of Alternative Dispute Resolution in Family Cases 448

- Settlement Conference 448 • Divorce Mediation 448 • Collaborative Law Divorce 450 • Divorce Arbitration 451 • The Paralegal's Role in Alternative Dispute Resolution 454 • The Divorce Trial 455 • Uncontested Hearing 455

Contested Hearing 457

The Paralegal's Role in Trial Preparation 459

Day of the Trial 461

- Use of Technology in the Family Courtroom 462 • Cell Phones in the Courtroom 462

- Concept Review and Reinforcement 464 • Key Terms 464 • Review of Key Concepts 464 • Building Your Paralegal Skills 464 • Building a Professional Portfolio 464 • Portfolio Exercises 464

CHAPTER 19 Postjudgment Divorce Matters 465

Nonmodifiable Terms of the Dissolution Decree 466

Exceptional Circumstances under Which Nonmodifiable Terms of the Dissolution Decree Have Been Modified 466

- Controlling Provisions of State or Federal Law and the Effect on Nonmodifiability of Changes in These Laws 467 • Statutory Provisions that Control in the Absence of a Specific Waiver 467

[Modifiable Terms of the Dissolution Decree 467](#)

- Modification of Alimony 467 • Modification of Child Support 475 •
- Substantial Change in Circumstances and Child Support Orders 476 •
- Modification of Custody and Visitation 476

[Relocation of Custodial Parent 476](#)

- Civil Contempt 479 • Criminal Contempt 480 • Child Support Enforcement Remedies 480

[Kidnapping and Crossing State Lines 485](#)

- Concept Review and Reinforcement 486 • Key Terms 486 • Review of Key Concepts 486 • Building Your Paralegal Skills 487 • Building a Professional Portfolio 488 • Portfolio Exercises 488

Appendix A Arizona and California Premarital Agreement Acts 489

Appendix B Alexander Rodriguez Petition for Dissolution of Marriage 493

Appendix C Rihanna and Chris Brown Search Warrant and Affidavit 499

Appendix D Bill Maher Palimony Complaint 504

Appendix E David Voelkert Criminal Complaint and Dismissal of Criminal Complaint 515

Glossary 525

Index 537

This page is intentionally left blank

Preface

This fifth edition of *Family Law and Practice*, is a comprehensive textbook for students in paralegal studies programs and broader legal studies programs, as well as those majoring in criminal justice, social work, and education.

Our goal remains to prepare students to enter the workplace possessing a solid knowledge of the various aspects of family law and a firm grasp of the procedural components used in a family law practice, including the documents filed with the court and the information-gathering tools utilized to resolve financial issues as well as custody and visitation dispositions. To meet our challenge, this edition includes a division of the book into two parts. With this new edition, we hope to realize our goal of first introducing the student to the principles of family law, then with this background in place, presenting a section that demonstrates how the theory is then translated into practice.

ORGANIZATION

- **Chapter 1, Introduction to Family Law and Practice** addresses issues critical to family law practice in the twenty-first century and eliminates less relevant sections. Although somewhat condensed, there is still a section providing a historical perspective on the evolution of family law and the changing views regarding marriage, the roles and responsibilities of each spouse, the status of children in the family, and, last but not least, what constitutes a family.

Part One: Family Law

- **Chapter 2, Marriage and Marriage Alternatives**, begins with a look at marriage, as we once knew it, a union between one man and one woman, and how recent legal efforts have redefined this institution in several jurisdictions. We also discuss how to create a valid marriage, the legal benefits of the marital union, and the prohibitions that make some marriages invalid. We have included a section on the legal prosecution of bigamists and polygamists along with a discussion of the hit television series, *Sister Wives*, and the legal case that arose from the attempted criminal prosecution of the cast members. The chapter ends with an overview of “marriage alternatives,” which present a different approach to relationships outside the traditional bounds of marriage. This chapter also gives updates on the status of same-sex marriage and contains a discussion of *Obergefell v. Hodges*, the U.S. Supreme Court case legalizing same-sex marriage in the United States. Because of the increase in cohabitation, with many couples opting out of traditional marriage, we have gone into detail on the legal remedies available to cohabitating couples according to the landmark decision of *Marvin v. Marvin*. In light of these changes in modern society, we have included a new section on drafting cohabitation agreements to protect the rights of unmarried couples.
- **Chapter 3, Premarital and Postmarital Agreements**, contains new information on the now generally accepted criteria for determining the validity of a premarital and postmarital agreement, as many jurisdictions have adopted some version of the Uniform Premarital Agreement Act, and on how to prepare and execute an agreement that will be legally enforceable. Other practical aspects of the chapter also include identifying which documents must be reviewed before drafting a premarital and postmarital agreement. We have

expanded the section on postmarital agreements and, to make the subject more interesting, included examples of cases where premarital agreements that were invalidated by the courts as well as a look at some of the more popular celebrity prenups.

- **Chapter 4, Divorce, Separation, and Annulment**, is devoted solely to an explanation of the three options married couples have for ending their marriages: dissolution, legal separation, and annulment. We discuss the factors that help legal practitioners differentiate whether the circumstances call for a divorce or dissolution, a legal separation, or an annulment. We also explain the advantages and disadvantages of non-fault divorce.
- **Chapter 5, Alimony, Support, and Maintenance**. In this chapter, we address the statutory factors considered by family court judges in evaluating the issue of alimony. The student learns how to identify and describe the various types of alimony, the circumstances that trigger the termination of alimony, and how and when alimony may be modified. We have also included a section on alimony reform and current efforts around the country to eliminate permanent or lifetime alimony.
- **Chapter 6, Property and Debt Distribution**. While the purpose of alimony is to provide a needy spouse with support or “maintenance,” the goal of property and debt distribution is to fairly distribute the marital assets and debts between the spouses. Property and debt division are some of the most contested issues in modern divorce cases, second only to custody disputes. We have included an expanded explanation of the difference between individual property and marital property and more intensive coverage of the “hows” and “whys” of property distribution and debt allocation in community property and equitable distribution states. We also address the issue of marital debt, because in many marriages, distribution of debts may be the only financial issue to resolve. The chapter also includes a brief introduction to bankruptcy law, changes in the federal bankruptcy law that impact divorce cases, means testing, timing the filing of the bankruptcy petition before or after the divorce, and whether alimony, child support, and property distribution may be discharged in bankruptcy. The chapter concludes with an expanded section on the tax consequences of divorce and the innocent spouse rule.
- **Chapter 7, Child Custody, Visitation, and Rights of Third Parties**, lays out the traditional and nontraditional arrangements for custody and visitation, including the requirement many states now impose on the parties to agree upon a parenting plan and present it to the court for evaluation and approval. In this chapter, we introduce the concept of “nesting” as an access alternative in which the child stays in the home while the parents are the ones who are required to move on a rotating basis. The chapter contains an update on grandparents’ rights and the emergence of a movement advocating the expansion of those rights despite the restrictions imposed by the United States Supreme Court case of *Troxel v. Granville*. This chapter also discusses the difference between the standard applied in many jurisdictions to determine either granting access/visitation or custody to grandparents or third parties. This edition also includes a discussion on parental alienation, allegations of parental sexual abuse of children, and custody disputes over extra embryos produced to facilitate in vitro fertilization.
- **Chapter 8, Child Support**, introduces information regarding the latest computerized methods of locating and keeping track of delinquent payer parents as well as more effective methods of collection of arrearages. This chapter includes a discussion on the rationale behind implementation of the child support guidelines, the purpose of deviation criteria and identification of factors a

court may take into consideration when deviating from the guidelines, the basis for modification of child support orders, and a description of the child support enforcement process. This edition includes a hypothetical child support case as well as a step-by-step calculation of the amount of child support due. It also gives the student a basic approach to addressing the child support calculation issue in their respective jurisdiction, and the resources necessary in completing this task.

- **Chapter 9, Paternity and the Rights and Responsibilities of Unmarried Parents.** This chapter addresses the multitude of issues arising from the dramatic increase of unmarried couples who either intentionally or unexpectedly become parents and choose to remain single, either as cohabitants or individually living separate lives. A new addition to this chapter is a discussion of verification of paternity actions, along with a sample form used in the court system to formally recognize paternal identity and allow the court to enter orders for paternal access/visitation, child support, and transfers of custody to the father. This chapter also includes a new sample parenting plan.
- **Chapter 10, Family Violence and State Intervention.** This chapter covers the legal issues that arise when children and spouses are victims of domestic violence and how the state intervenes. From the antiquated historical perceptions of victims to modern-day changes, this chapter includes an overview of child protection laws, the protection of abused and neglected children, civil restraining orders and criminal orders of protection, mandatory arrests, and the Violence Against Women Act of 1994 and its current amendments. The section on domestic violence also includes the various legal options paralegals must be aware of, as well as a section on how to represent both the victim and the alleged abuser in these types of cases.
- **Chapter 11, Adoption and Surrogacy Contracts.** This chapter contains a subsection on the lengthy and intricate process of stepparent adoption, and a subsection on the “second parent” adoption process through which some states confer co-parent status on the same-sex partner of an adoptive parent. The topic of open adoption is discussed extensively, and a sample open adoption agreement is provided. We have also included a section on surrogacy contracts, including the landmark case of Baby M.

Part Two: Family Practice

- **Chapter 12, Ethics in Family Law,** continues to provide the practical basis for rules of professional responsibility and examples of their practical application. Again, the paralegal’s ethical responsibilities are emphasized. Also discussed is the ever-expanding impetus to license paralegals and the recent efforts of some lawmakers to promote legislation that would extend liability for ethical breaches to the paralegal when warranted. This chapter also includes a section on the ethical considerations involving the use of technology, particularly the impact of electronic mail and the precautions that must be taken to avoid breaches of client confidentiality. This chapter addresses other practical issues impacting a paralegal’s daily work environment. For example, family courts are increasingly seeing more and more self-represented, or *pro se*, litigants; this book addresses the ethical considerations and precautions one must take when dealing with an opposing party who is representing himself or herself. The book also addresses the resources available to parties who are representing themselves, including the availability of useful and affordable “unbundled legal services.”
- **Chapter 13, The Client Interview,** begins by addressing the practical aspects of family law practice. Most family lawyers will tell you that family law is less law and more hand-holding. Here, we focus on helping the student understand the

emotional aspects of family law practice. In this chapter, the student also learns to identify the steps in the client interview and the essential information that must be obtained from a client. The importance of referring clients to appropriate support services when necessary is also stressed. Because family law is the most emotionally charged practice specialty, this chapter concludes with a section on workplace violence as well as safety tips for those working in the field.

- **Chapter 14, Initial and Responsive Pleadings.** Following the client interview and the signing of the retainer letter, the supervising attorney on the file will delegate to an appropriate staff member the responsibility of preparing the documents that must be filed with the court to initiate the divorce proceeding or other desired family-related suit. In this chapter the student learns the basics of drafting a dissolution of marriage complaint or petition for the plaintiff and the defendant's answer and cross-complaint. We have updated the section entitled **The Electronic Courthouse**, which reflects the nationwide trend toward implementing the electronic filing of documents in family matters. The chapter discusses the e-filing process, and the precautions and repercussions that must be observed when filing documents electronically. Protecting privacy is also stressed with sections on federal and state rules governing the redacting of personal information from electronic documents.
- **Chapter 15, Temporary Relief,** describes the purpose of temporary relief or *pendente lite* relief, the basic components of a temporary relief motion, and the paralegal's role in facilitating these matters. In this fifth edition, we emphasize the changes in technology that have eliminated the use of paper calendars and filing of paper motions. In this edition, we also list and define the most frequently used family law motions.
- **Chapter 16, Discovery in the Electronic Age.** The name of this chapter has been changed to reflect our fast-paced and ever-changing age of information. It is imperative for the family law professional to be aware of how technology can both aid and hinder the discovery process. We have added a section on E-discovery that deals with the process of obtaining, collecting, preparing, reviewing, and distributing information from the opposing party in a legal case that has been electronically stored. In this new edition, we have expanded how social networking websites such as Facebook are revolutionizing discovery in family-related cases. In many cases, hiring a private investigator is no longer necessary when vital information can be obtained with the click of a mouse! We also discuss the uses of self-help surveillance technology in catching a spouse in the act with spyware and GPS tracking devices and the limitations on the admissibility of such evidence in a court of law.
- **Chapter 17, Separation Agreements,** focuses on the practical skills needed in assisting the attorney in the separation agreement process. This includes not only how to draft a proposal letter for the client's review, but also how to prepare a separation agreement and the most common standard clauses. This chapter includes a section on parenting plans. These are detailed agreements regarding access to the children and some sample provisions specifying particular days, times, transportation, place of pickup and drop-off, holidays, summer vacations, and birthdays.
- **Chapter 18, Alternative Dispute Resolution and the Divorce Trial,** includes a comprehensive section on mediation and other alternative methods of dispute resolution used to diminish the instances of protracted and unpleasant litigation arising from custody and property disputes. This chapter also includes a section on how the family courts use technology and how important it is for legal professionals to become familiar with their jurisdiction's court rules surrounding this issue.

- **Chapter 19, Postjudgment Divorce Matters**, identifies the various methods used to facilitate enforcement of court orders, especially support enforcement methods and remedies. This chapter also includes a discussion of instances where courts may modify “nonmodifiable” sections of a settlement agreement.

To make this edition relevant and interesting to more students throughout the country, we have included cases, statutes, and legal forms from a variety of states.

NEW TO THIS EDITION

Chapter 2

Updated status of same-sex marriages in the United States, including the legal effect of *U.S. v. Windsor* and *Obergefell v. Hodges* on the issue.

Chapter 3

Additional cases on testing the validity of premarital and postnuptial agreements
Updated celebrity premarital agreement section

Chapter 7

Updated section on grandparents’ rights and the emergence of a movement advocating the expansion of those rights despite the restrictions imposed by the United States Supreme Court case of *Troxel v. Granville*.

Chapter 8

Streamlined child support chapter

Chapter 9

Updated court forms to include a sample parenting plan
Updated discussion on verification of paternity actions

Chapter 11

Updated section on gay adoption in light of the *Obergefell v. Hodges* decision
Updated section on surrogacy contracts

Chapter 14

Updated court form exhibits
Updated privacy protection statutes

Chapter 15

Updated court form exhibits
Modernized language from pendente lite to temporary relief

Chapter 16

Updated section on the legal consequences of the use of social networking website

Chapter 18

Expanded section on contemporary uses of technology in the family law courtroom and cell phones in the courtroom

Chapter 19

Revised section on the enforcement of family court orders, which includes a new section on civil and criminal contempt

BUILDING PARALEGAL WORKPLACE SKILLS

End-of-chapter material has been organized into three sections: *Chapter Review and Reinforcement*, *Building Your Paralegal Skills*, and *Building Your Professional Portfolio*.

- **Chapter Review and Reinforcement:** This section of activities is designed to confirm that the student understands basic terms and concepts presented in the chapter. It contains sections on the **Key Terms** and **Review of Key Concepts**, which guides the student's review by reemphasizing the main points of law covered in the chapter.
- **Building Your Paralegal Skills:** In this section the student performs activities that build the analytical and functional workplace skills that they will need in practice. First, students read and brief a relevant case—**Case for Briefing**—that showcases one of the key topics covered in the chapter. The student is then directed in **Critical Thinking and Legal Analysis Applications** to apply the legal principles learned in the case to a problem they may confront on any given day in a family law practice and determine how the law in the student's own home state would resolve the issue as applied to the same facts.
- **Building Your Professional Portfolio** presents the student with a fact scenario. Based on the scenario, the student is asked to generate a sample legal document. The goal is for the paralegal student to steadily build a family law practice portfolio throughout the course to show prospective employers during their job search.

In conclusion, we hope that our revisions, updates, and additions to this, our third edition, offer our students greater knowledge, understanding, and skill development in the area of family law and practice.

INSTRUCTOR SUPPLEMENTS

Instructor's Manual with Test Bank. Includes content outlines for classroom discussion, teaching suggestions, and answers to selected end-of-chapter questions from the text. This also contains a Word document version of the test bank.

TestGen. This computerized test generation system gives you maximum flexibility in creating and administering tests on paper, electronically, or online. It provides state-of-the-art features for viewing and editing test bank questions, dragging a selected question into a test you are creating, and printing sleek, formatted tests in a variety of layouts. Select test items from test banks included with TestGen for quick test creation, or write your own questions from scratch. TestGen's random generator provides the option to display different text or calculated number values each time questions are used.

PowerPoint Presentations. Our presentations are clear and straightforward. Photos, illustrations, charts, and tables from the book are included in the presentations when applicable.

To access supplementary materials online, instructors need to request an instructor access code. Go to www.pearsonhighered.com/irc, where you can register for an instructor access code. Within 48 hours after registering, you will receive a confirming e-mail, including an instructor access code. Once you have received your code, go to the site and log on for full instructions on downloading the materials you wish to use.

ALTERNATE VERSIONS

eBooks. This text is also available in multiple eBook formats. These are an exciting new choice for students looking to save money. As an alternative to purchasing the printed textbook students can purchase an electronic version of the same content. With an eTextbook, students can search the text, make notes online, print out reading assignments that incorporate lecture notes, and bookmark important passages for later review. For more information, visit your favorite online eBook reseller or visit www.mypearsonstore.com.

This page is intentionally left blank

Acknowledgments

We wish to thank reviewers of this book who provided many helpful comments and insights that have been incorporated into the fifth edition:

Carina Aguirre, Platt College
Laura Drake, Cincinnati State Technical and Community College
Patricia Greer, Berkeley College
Rebecca Whitcombe, College of Lake County

We would also like to thank the reviewers of the fourth edition:

Robert Diotalevi, Florida Gulf Coast University
Gary W. Tamaeker, Greenville Technical College
Karen McGuffee, University of Tennessee at Chattanooga

We wish to thank the following people for their support and encouragement in making this book a reality:

Gary Bauer, Rinki Kaur, Linda Cramer, and Gowthaman Sadhanandham at Pearson; our special thanks to paralegal Pamela Robicheau for her countless hours of legal research, editing, and preparation of the original manuscript. This book could not have been completed without her hard work, expertise, and devotion to this project.

Grace A. Luppino
Justine FitzGerald Miller

This page is intentionally left blank

Family Law and Practice

This page intentionally left blank

Chapter **one**

INTRODUCTION TO FAMILY LAW AND PRACTICE



Family law is one of the most interesting, exciting, and dynamic areas of legal practice. If you like boxing, wrestling, or any of the other pugilistic arts, you will certainly enjoy being part of a legal team that tackles the knotty problems and ever-changing cultural, social, and economic issues that affect the American family.

LEARNING OBJECTIVES

After studying this chapter, you should be able to:

1. Identify the sources of law used to resolve family matters.
2. List the procedures courts use to address disputed family law issues.
3. List the procedures law firms use within the office to handle family law cases.
4. Describe the role of societal values in the history and development of family law.
5. Describe the impact of the Industrial Revolution on the family as an economic unit.
6. Discuss the factors that precipitate changes in family law.

Figure 1-1 A paralegal who is both competent and enthusiastic can provide valuable assistance to attorneys.



Stephen Coburn/Shutterstock

Family law as a specialty evolved slowly, but now, in most jurisdictions, family law cases occupy more space on the civil court docket than does any other type of matter. This increase has occurred because of changes in our society during the past fifty years that have affected attitudes toward marriage, family, divorce, and parenting.

During the first half of the twentieth century in the United States, divorce was far less common than it is today. At the turn of the twentieth century, fewer than one in twenty marriages ended in divorce; since the mid-1970s, for every two marriages that took place in a given year, one divorce has occurred. Today, more than one-half of children under the age of eighteen are growing up in one-parent homes. As a result of this trend, many law firms devote their practice exclusively to family law; for other firms, the practice of family law comprises a large segment of the work produced. Both types of law firms increasingly employ paralegals in their family law department. These paraprofessionals, with the guidance of their supervisory attorneys, complete the myriad of tasks needed to provide thorough, effective representation to clients on family matters.

A paralegal who is both competent in and enthusiastic about family law practice can provide valuable assistance to attorneys who spend all or most of their time practicing family law. Employment opportunities for paralegals in this field of law will abound as long as individuals continue to seek attorneys to help them resolve their marital and family conflicts, and as long as there are paralegals whose training has provided them with a solid background in both family law theory and practice. The goal of this book is to provide the paralegal student, in a comprehensive and understandable manner, with just that type of theoretical and practical education.

FAMILY LAW THEORY

Family law theory provides the analytical framework for the body of substantive law used in courts to decide marital and other family-related matters. These laws determine, regulate, and enforce the obligations of marriage and parenthood. They are made by the

legislative branches of state governments and interpreted and applied by members of the states' judicial branches, as judges make decisions in the courtroom. In some instances, where there are no statutory guidelines, judges make the law. These common law and statutory decisions are not made arbitrarily, nor are they made in a vacuum without considering what is taking place in the society in which the laws will be enforced. When a law is being made, it is fashioned in a way that promotes the dominant views of the time on the proper, fair, or most enlightened way to handle the issues at hand. Legislation and judicial opinions reflect the values and attitudes of society. These values and attitudes produce the ideas that provide the theory or underlying rationale for resolving a legal issue in a particular manner. As values and attitudes change and as society acquires new information and knowledge related to various aspects of family law issues, new theories emerge and replace the earlier rationales for resolving disputes.

In the area of family law, courts and legislatures use many different approaches to address marital disputes and the issues arising from such disputes. These issues include:

- support and maintenance of family members,
- care and custody of minor children, and
- division of property upon the breakup of the marital unit.

Over time, family law theory has grown and evolved as society has changed. The history of American family law presented in this chapter demonstrates how differently family law issues have been treated during different time periods.

FAMILY LAW PRACTICE

Court Systems

The United States has a dual court system. There is a federal court system and a state court system. Each system has trial courts, intermediate courts of appeal, and courts of final appeal where the decisions of the intermediate appeal courts may be reviewed. Federal courts address violations of the federal criminal and civil statutes and violations of the U.S. Constitution. Federal courts also hear civil disputes between parties who reside in different states. State courts address violations of state criminal and civil laws and violations of the state constitution, and they may hear cases involving violations of the U.S. Constitution. State courts also hear civil disputes between parties when at least one party resides in the state.

State courts have *exclusive jurisdiction* to try disputes between parties in the area of family law. In most states, there are specialized family trial courts that decide both simple and complex family law issues. A decision of a state's family trial court may be appealed to that state's intermediate and highest appellate courts. In some rare instances, when an appeal involves a new and previously unsettled family law question that could involve a violation of the U.S. Constitution, it may go as far as the U.S. Supreme Court for resolution. For example, as will be discussed in a later chapter, the U.S. Supreme Court has heard and ruled on such issues as the rights of grandparents to visit their grandchildren when a parent opposes such contact.

Exclusive jurisdiction

A court's power to hear certain actions or classes of actions to the exclusion of all other courts.

Court Procedures

In every state and jurisdiction, the judicial system provides specific procedures for bringing disputed substantive family law issues before the court. These include procedures for:

- initiating family-related actions in a court,
- acquiring and presenting evidentiary information,
- providing temporary solutions to issues of support, custody, and visitation while a matter is pending,

- enforcing or modifying a court's orders,
- conducting alternative dispute resolution,
- processing uncontested matters by streamlining process, and
- litigating contested matters.

Every state or jurisdiction has its own particular set of procedural rules to follow in the practice of family law. These rules are part of the jurisdiction's larger body of civil procedural law that governs how private parties may enforce their substantive legal rights through the court system. In the practice of family law, knowledge of the family court's procedural rules is essential.

Office Procedures

It is equally essential to know the procedures that a law firm uses within its office to handle family law matters. Every law office has its own particular methods and practices for the following aspects of managing family law cases:

- obtaining and recording information from clients,
- setting up files,
- preparing legal documents for filing in court,
- docketing court dates,
- recording the amount of time spent working on each file, and
- billing clients for work done.

APPLYING FAMILY LAW THEORY TO FAMILY LAW PRACTICE

It is also very important to understand how family law theory is actually applied in the real world of family law practice. In many instances in a marital dispute, issues such as property division, alimony, child support, and even child custody are worked out by the parties in a manner that is consistent with the prevailing theoretical view and the substantive statutory or common law guidelines. When this happens, formal adversarial proceedings such as contested hearings on certain preliminary matters or a full-blown divorce trial are not necessary. This can happen when the parties work out an agreement to settle their differences through *settlement*, *mediation*, or *collaborative lawyering*. These forms of *alternative dispute resolution* will be discussed in Chapter 14.

Settlement

The practice of negotiating areas of disagreement and, through compromise, reaching an agreement to present to the court.

Mediation

Where the parties meet and attempt to resolve the pending issues surrounding their dissolution of marriage action with the assistance of a trained third party, either court-provided and free or privately engaged and paid.

Collaborative lawyering

A form of dispute resolution designed to bring together the respective parties, their attorneys, and other professionals with the goal of reaching an amicable settlement, thus avoiding costly litigation in family court.

Alternative dispute resolution

A method of resolving disputes between parties without resorting to a trial.

THE FAMILY PRACTITIONER'S ROLE IN THE DISSOLUTION PROCESS

The practice of family law involves as much negotiating as it does litigating. For instance, a common saying is that there are no winners in a divorce, and the children are the biggest losers. The family law practice firm that strives toward and achieves the most favorable outcomes for its clients with the least amount of emotional and financial pain to all the individuals affected provides the highest degree of service to the client. Whether the service involves the initial divorce proceeding or a subsequent need to enforce or modify the alimony, child support, or custody order, the family practice lawyer who can meet the client's objectives with the least amount of court intervention will serve a client well, both financially and emotionally.

All litigation is adversarial, by its nature, and can only escalate hostility between the adverse parties.

In a family law practice, the clients' need for legal assistance arises from discord in the most personal and intimate areas of their lives. Much attention and concern should be given to the manner in which the controversy is handled and the

Figure 1-2 With the assistance of a trained mediator, the parties attempt to resolve the issues surrounding the dissolution of their marriage.



consequences for all concerned of mishandling or insensitively handling the issues underlying the dispute. All staff members of the law office should be aware of the need to handle delicate matters with great care. With the very high divorce rate that exists today, many members of the court system and the attorneys who specialize in family law have become adept at treating all parties with respect and with an understanding of the turmoil that accompanies the breakup of a marriage.

Divorces are much easier to obtain in the new millennium than they were in the 1890s. Most of the stigma attached to divorce has disappeared, and today's communities offer many resources to help divorcing spouses and their children deal with the difficult changes taking place. Community support for families going through this type of crisis is readily available today because of our society's acceptance of divorce. This was not always the case. For many centuries and for a number of decades in the twentieth century, there was enormous pressure from social, cultural, and certain religious institutions to preserve the marital union and nuclear family at almost any cost. We now turn to a historical glimpse of the nature of marriage and divorce over time and the values and attitudes that contributed to past and present views of both marriage and divorce.

THE ROOTS AND TRADITIONS OF AMERICAN FAMILY LAW

Much of American legal tradition has its roots in the common law decisions of England. However, centuries before the creation of the English common law, ancient legal systems developed rules to govern the rights and responsibilities of spouses and other family members. These ancient rules left their mark on later legal systems. In ancient Greece, a married woman was a *chattel*, the legal property of her husband with no rights of her own. For centuries afterward, marriage was a formal arrangement in society in which women were subservient to men.

Chattel

A tangible, movable piece of personal property.

Although in various cultures, at different points in history, women did possess some legal rights, they generally occupied a legal status that was inferior to that of men. In the United States, it was not until the passage of the Married Women's Property Acts that American women were allowed to own property in their own name. For this and many other equally compelling reasons, women were often reluctant to initiate legal proceedings to end their marriages.

Marriage, for many centuries, was a very strong social institution that contributed to the stability of society. Christianity transformed marriage from a mere social institution into a sacrament, a holy union lasting for eternity—"What God has brought together, let no man put asunder." Marriage was a legally and morally sanctioned relationship between a man and a woman, functioning as one social and economic unit. Spouses were responsible for the care of each other and jointly responsible for the care and maintenance of their children, the issue of their union. However, divorce was not unheard of even in the earliest of times. In ancient times, a form of divorce took place when a woman left her husband or when a husband cast out his wife. In both instances, the husband remained in the family home and retained possession and control of the children of the marriage since they were regarded as chattel, pieces of personal property owned by the husband. In the Christian Western European civilizations of the Middle Ages, church and state were intertwined and the state enforced the doctrines of the Christian church, including the proscription against divorce.

Until the mid-1500s, there was one Christian church for all of Western Europe. This was the Roman Catholic Church with its seat of power vested in the pope in Rome. In the 1530s when King Henry VIII wished to divorce his queen, Catherine of Aragon, and marry Anne Boleyn, the Roman Catholic Church refused to give Henry VIII a dispensation to divorce and remarry. Henry VIII, as the head of the church in England, broke from Rome and established the Church of England. During the second half of the sixteenth century, several different religious groups arose in England, Scotland, Germany, and France, eventually resulting in the establishment of many new Christian sects, separate from the Church of Rome, which became branches of the Protestant movement. Originally, in the European countries where Protestantism prevailed, the church and state continued their close connection and the national religion became the prevailing Protestant denomination in the country. For instance, in Scotland, the established religion was Presbyterianism. In the American colonies settled by the Puritans, such as the Massachusetts Bay Colony, Puritanism became the state religion. In other of the thirteen original American colonies such as Virginia and the Carolinas, which were settled by Englishmen who remained loyal to the established Church of England, the Anglican religion became the official religion of the colony. However, despite the continuing connection of church and state, many of the now largely Protestant European nations and the Protestant colonies in America allowed at least what came to be called civil divorce. On the other hand, in the European countries where Roman Catholicism remained either the state religion or the religion embraced by the majority of inhabitants, civil divorce was much slower in coming. In Italy and the Republic of Ireland, civil divorce was not legally authorized until the second half of the twentieth century!

MARRIAGE, DIVORCE, AND FAMILY LAW FROM COLONIAL AMERICA TO THE TWENTIETH CENTURY

In colonial America, although marriage was regarded as a sacred union, the Puritans who had settled the New England colonies recognized and allowed divorce. They also sanctioned a form of legal separation known as "divorce of bed and board" under which the couple's sacred union remained intact but they no

longer cohabited. When a couple divorced or separated, colonial governments imposed on the husband the continuing obligation of economic support of his wife and their children.

When the thirteen original colonies broke away from England and formed a new nation, the state governments assumed the power to legally authorize and legally dissolve marriages. The new American nation provided specifically for the separation of church and state in its Constitution. There was to be no national religion, nor were any of the new states allowed to establish any one religion as the official religion of that state. Henceforth, marriage and divorce as civil matters became separated from marriage and divorce as religious issues. In the eyes of the state, marriage was now viewed as a civil contract between two parties.

Under the marriage contract, each party had obligations to the other party. When one of the parties failed to perform an obligation of the marriage, he or she had breached the marital contract. The nonbreaching party could sue for a termination of the marriage contract and for damages from the other party as compensation for the harm caused by the breach. If the nonbreaching or “innocent” party proved that the marital contract had been breached, the court could terminate the marriage and, under the civil law, both parties were free to remarry. The state, through its court system, could order the offending or breaching party to compensate the other party and enter orders for the continuing support of the minor children of the marriage.

When each state government established either legislative or common law grounds for establishing breach of the marriage contract, these were commonly referred to as the grounds for divorce. When the female spouse alleged and proved grounds for divorce, the court almost always ordered the male spouse to continue to provide financial support to his former wife and his children. In many instances, even when a husband brought and won a divorce action against his wife, if the wife had been financially dependent on her husband for subsistence, the court ordered the husband to continue to provide for her financial support. However, enforcing these obligations was not always possible. Many ex-husbands disappeared from the court’s jurisdiction, and many divorced women and their children suffered economic deprivation and frequently social isolation as well. As long as women lacked the ability to support themselves, divorce was not a practical alternative. Societal pressures from many avenues, including the church, the extended family, and the local community, were also exerted to keep the family intact.

Political and economic forces also promoted the advantages of staying married. During the eighteenth century and for a good part of the nineteenth century, the intact family was the basic economic unit of the new American nation. When the United States was mainly an agrarian society, its financial health and political strength depended on the production and sale of agricultural products from thousands of small family farms. All family members were essential to the operation of these farms. Family members, even young children, contributed to the economic advancement of their family and the nation by performing one or more of the many chores needed to keep the farm running.

The Industrial Revolution and the Family

The Industrial Revolution of the nineteenth century gave rise to the factory system in the United States and shifted the centers of economic activity from the country towns to the cities. In the early and middle years of the nineteenth century, many individuals left the family farms in the New England and Middle Atlantic states

Figure 1-3 As time went by, respectable married women were not expected to work but rather to stay home, do housework, and take care of their children.



to work in the cities. Throughout the second half of the 1800s, the large influx of immigrants from Europe added to the population of urban centers. Frequently, mothers, fathers, and even young children worked in city factories. Eventually, laws were passed to protect children from working at early ages.

Some women then began to stay at home to care for their children. When this occurred, the husband became the person primarily responsible for the family's financial support. He also usually became the family member with predominant economic power. Men had the ability to obtain credit in their own names, whereas women could only obtain credit under their husband's, father's, or brother's signature. Even married women who continued to work in mills and factories and later in offices and stores had inferior economic power because these women were frequently paid far less than their male counterparts. Single women fared no better in the workplace. In fact, except for low-paying jobs in factories or low-paying positions as domestic servants, there were few employment opportunities for women in nineteenth-century America.

As time went by, "respectable" married women were not expected to work. Even well-educated, married women who, when single, had held positions as school teachers or nursing professionals had few or no opportunities to work for pay. Many school systems prohibited married women from working as teachers; other school systems would not hire women with young children. Hospitals frequently instituted similar exclusionary policies for staff nurses.

As a result of these constraints, married women did not often consider divorce as a solution to a failing or unhappy marriage. Many women feared that they would have no means of supporting themselves or their children. Further, divorce carried a social stigma. Divorced women were not well accepted in many communities. The children of divorced mothers were often excluded from neighborhood play and not welcome in the homes of their friends who came from intact families.

Despite the many negative consequences of divorce for both women and men, and especially for children, the divorce rates rose at a slow but steady pace throughout the nineteenth century and into the early decades of the twentieth century. In the 1880s, one out of sixteen American marriages ended in divorce.

FAMILY LAW FROM THE DAWN OF THE TWENTIETH CENTURY TO THE PRESENT DAY

By 1900, there was one divorce for every twelve marriages. Undoubtedly, industrialization and urbanization played some part in this increase. These social and economic developments decreased the value of the intact family as an economic unit, while providing women a meager increase in opportunities for paid employment outside the home.

When divorce did occur during the first half of the twentieth century, courts usually ordered the husband to make weekly alimony payments and support payments for the maintenance of his former spouse and his children. Mothers were always awarded custody of children unless they were deemed in some way unfit

or unless they abandoned the children and did not seek custody. Society continued to frown on divorce. To get a legal divorce, one party had to bring a civil suit and prove one of a limited number of grounds before the court would grant a decree of divorce. Typically, most states granted a divorce if one party proved the other committed adultery, abandoned them, or was a habitual drunkard. Eventually, many states added grounds known as intolerable cruelty and mental cruelty. Even if parties agreed to divorce, one party had to sue the other party alleging one of these grounds. If the other party did not challenge the allegations, the judge would grant a divorce.

By the 1960s, attitudes toward divorce were changing. Many young people no longer feared the severe sanctions imposed by their religious faith. Also, some religious groups took a more compassionate view of couples in a bad marriage. Traditional religious institutions lost much influence over individuals and society in the 1960s when people began to question all aspects of American culture, including women's roles and women's rights, constraints on employment opportunities for women, and constraints on sexual freedom and reproductive choices.

Prior to the 1960s, *fault* played a central role both in the granting of divorce and in the determination of the amounts set for alimony awards and the distribution of marital property. For instance, a spouse who alleged and proved the ground of adultery or habitual drunkenness in a divorce proceeding not only was granted relief in the form of a divorce but also received a larger share of the marital assets, a hefty amount of alimony and child support, and almost always sole custody of the children.

Beginning in the mid-1960s and growing strong in the 1970s, public support emerged for what came to be known as *no-fault divorce*. Beginning in the 1970s, a number of state legislatures modified existing divorce laws to include the ground that the marital union or marital relationship had broken down irretrievably. This ground did not place fault for the breakdown on either party. The spouse seeking the divorce and bringing the legal action had merely to testify under oath that the marriage had broken down irretrievably and that there was no possibility of reconciliation. This change plus the many societal changes mentioned earlier resulted in many more divorces than previously.

In addition, the 1970s witnessed the beginnings of a trend toward awarding custody to fathers even when mothers were not deemed unfit. Many custody battles ensued as mothers' work schedules paralleled fathers' in terms of time spent away from home. The 1970s also saw the advent of joint custody arrangements in which parents shared the child-rearing responsibilities, and children sometimes "commuted" from one parent's household to the other's on a weekly or biweekly basis!

Divorce actions also increased dramatically in segments of the married population where individuals previously never considered severing their marital ties. Older women, frequently with the support of and at the urging of their adult children, sought divorces after decades of troubled marriages. These women demanded a fair share of what they and their husbands had acquired during the marriage. Another development arising from new social conditions dealt with health-care provisions. With the advent of comprehensive health insurance and the skyrocketing costs of health care, courts routinely ordered the noncustodial spouse, often the father, to maintain his minor children and sometimes his former spouse on his health plan—or pay her Consolidated Omnibus Budget Reconciliation Act (COBRA) premium. Women with superior health plans through their employers also sometimes were required to cover their children even if they were not the children's custodial parent. Further, with women making large salaries, men began to seek alimony from former wives and courts began awarding it to them!

Fault

The responsibility for or cause of wrongdoing or failure; the wrongful conduct responsible for the failure or breakdown of a marriage.

No-fault divorce

In order to obtain a divorce, a litigant traditionally had to prove one of the statutory fault grounds or no divorce was granted; in 1969, the California legislature enacted the first no-fault divorce, which required parties only to prove that they had irreconcilable differences and there was no hope of reconciliation; currently, all fifty states have some form of no-fault divorce provisions where one of the parties only has to allege that the marriage has broken down and that there is no hope of reconciliation in order for the court to dissolve a marriage.

The increase in the number of divorces gave rise to an increase in second and third marriages. With this higher rate of divorce and remarriage, prenuptial agreements also increased in both number and complexity. The trend toward easy and frequent divorce continued through the 1980s and 1990s. The mid-1990s saw the beginnings of social and political action to once again make divorces harder to obtain. Initially, it looked as though the laws surrounding the severing of the marital relationship would be on their way to coming full circle by the beginning of the millennium. However, this was not to be the case. So far, the efforts to tighten the granting of marital dissolutions have produced little change. Apparently, no-fault divorce remains the most desirable default option for a marriage that falters and then fails.

FAMILY LAW—YESTERDAY, TODAY, AND TOMORROW

High Divorce Rates

Tremendous changes have taken place in American family law and practice over the last half century. Divorced persons and their children are no longer stigmatized in the eyes of society. The prevailing view is that it is better for all parties involved to get divorced than remain in a bad marriage. Accordingly, the most significant change over the past fifty years has been the high divorce rate, which is currently twice as high as it was in the 1960s. It reached its peak in the 1980s and has been slowly declining. The reason for this decline, however, is related to the fact that marriage, itself, is declining. More couples are choosing *cohabitation* rather than marriage. Many of those who do marry may have a firm commitment to stay married. For the cohabitating couples, it is hard to discern the failure rate of these relationships because they are severed by mutual agreement and not by judicial intervention. However, when cohabitating couples have produced or at least conceived a child prior to ending their cohabitation, courts frequently do become involved. One or both of the unmarried parents may initiate a legal action to determine their respective parental rights and responsibilities. Therefore, even as divorce numbers decline, family courts and family law practitioners continue to be very busy with the issues confronting unmarried parents, not just initially, but throughout the eighteen years of their children's minority.

Most marriages entered into today still have only a forty to fifty percent chance of surviving. If you ask the question, "Why is there such a high divorce rate?" in legal circles, the answer is the shift from fault to no-fault divorce. In order to obtain a divorce, a litigant traditionally had to prove one of the statutory fault grounds, or no divorce was granted. Traditional fault grounds included physical or mental cruelty, adultery, desertion, confinement to a prison or mental institution for a specified period of time, commission of a felony, and intemperance. Because fault grounds were difficult to prove, parties often colluded for the sole purpose of obtaining a divorce. Where the state fault grounds included mental and physical cruelty, mental cruelty was the easiest fault ground to fabricate. The parties understood that in order to get divorced, they had to play by the state's rules, and that a certain amount of lying was necessary if the goal was to dissolve a marriage. In 1969, the California legislature enacted the first no-fault divorce, which required parties only to prove that they had irreconcilable differences and there was no hope of reconciliation. The concept of no-fault divorce spread throughout the entire United States. Currently, all fifty states have some form of no-fault divorce provisions. Statutes vary from jurisdiction to jurisdiction, so it is important for attorneys and paralegals practicing family law to be familiar with their state requirements. New York State, for example, has one of the strictest no-fault statutes in the country. New York law

Cohabitation

Unmarried parties living together as if married.

requires a one-year period of separation as well as the filing of a written, notarized separation agreement. If the parties cannot resolve matters amicably, they must file for a divorce under the fault system and allege one of the statutory fault grounds.

Women in the Workplace

Changes have also occurred in the American family with the advent of the women's movement. Prior to this era, fathers financially supported their daughters until the responsibility was passed on to husbands. In a traditional marriage, the husband was the head of the household and worked to support the family. The wife's function was to tend to the needs of the husband, home, and children. She was subordinate to her husband and dependent upon him for fulfilment of all her needs. The women's movement not only raised women's consciousness regarding the elevation of their status in society to that of men, but it also helped open doors for economic opportunity. Many women have pursued the goal of becoming financially independent by working outside the home, with some making more money than their husbands and commanding more status in the workplace. With more opportunities open to women, they are less likely to stay in unhappy marriages because they know they can take care of themselves and their children.

Changes in How Custody Is Decided

The second most significant change occurring in family law in the last fifty years concerns the custody of the minor children. With women working outside the home as many and sometimes more hours than men, granting custody to the children's mother is no longer the firm rule it once was. Courts now apply the "best interests of the child" standard to settling custody disputes. When the father is more available, both physically and emotionally, can provide a more stable home, and is more than willing to become "Mr. Mom," the courts now give Dad and the kids an opportunity to reside together while the mother usually receives liberal visitation, or *access*, as it is newly termed. Frequently, when this occurs, the parents have joint legal custody, with physical custody vested in the father.

Marriage as an Economic Enterprise

With the exception of resolving child custody and visitation issues, modern divorce law requires a shift in focus from proving fault to determining property and debt division; divorces are increasingly becoming financial accountings. For a couple with substantial assets, not only must they have attorneys representing them, but they also must rely on the assistance of accountants, pension valuation experts, appraisers, and other professionals. Those without substantial assets must learn how to live on what they have or work harder and longer to make ends meet. Most jurisdictions rely on the system of equitable distribution to divide property. Under the common law system of the past, judges looked at who actually held title to the property and determined its division in a divorce case based on who owned it. This system was extremely unfair to the traditional homemaker spouse, whose noneconomic contributions were not recognized. Many courts today look at the marital property of the parties, its value, and who has contributed to its acquisition, preservation, appreciation, or depreciation. The concept of equitable distribution assumes that marriage is an *economic partnership*, valuing not only the contributions of the employer spouse but also the efforts of the homemaker spouse.

Changes have also occurred in spousal support awards. Traditionally, wives who were married for over ten years were awarded permanent or lifetime alimony. This was because of the financial position of women. They did

not work outside the home and did not acquire Social Security or pension benefits. Without permanent alimony, a woman would become a charge on the taxpayers. The concept of alimony shifted as attitudes toward men, women, and social mores changed. Permanent alimony currently is a dying horse, and it is not awarded to a spouse unless it was a long-term marriage of over twenty years, the spouse suffers from ill health, or the spouse has been out of the workforce for so long that climbing any kind of corporate ladder is not possible. Permanent alimony was replaced by rehabilitative alimony, which afforded the wife alimony in the short term for the purpose of becoming self-sufficient. Additionally, husbands may now ask for alimony from their wives, whereas in the past, this was legally and socially unacceptable.

The reality of divorce, however, is that women usually fare much worse economically after a divorce. Women are most likely to be awarded custody of the children and must pick up the slack when the child support enforcement system fails to provide a solution. The amount of child support awarded was traditionally left up to the discretion of the trial court judge. It wasn't until the early 1990s that federal intervention prompted states to enact standard formulas to determine the amount of child support subject to strict deviation criteria. In 1984, Congress passed the ***Child Support Enforcement Amendments*** to enable mothers to collect child support and ease the social welfare burden on taxpayers. Some of these measures include federal and state income tax refund interception, wage withholding, revocation of professional licenses, and interstate enforcement. Despite these efforts, most women still find the system frustrating.

Child Support Enforcement Amendments

Federal laws passed to enable mothers to collect child support and ease the social welfare burden on the taxpayers.

Migratory divorces

People flocking to a particular jurisdiction to get divorced because of the short divorce residency requirements.

Pro se litigants

Individuals who represent themselves in legal proceedings; see *pro per*.

Summary dissolution of marriage

Simplified procedures for obtaining a divorce in cases where the parties have little or no assets, have no children, were married for a relatively short period of time, and both want the divorce; all that is required in these jurisdictions, if you meet the requirements, is the filing of official documents with the appropriate court without the assistance of attorneys.

Simplified divorce procedure

A form of low-cost divorce enacted by a number of states that is sometimes referred to as summary process or divorce by mutual consent; the parties in these states must appear before the court to dissolve their marriage.

Relaxed Residency Requirements

Changes in residency requirements in the last half century have also impacted divorce in the United States. Historically, in many jurisdictions, a prospective divorce litigant had to wait either one or two years before a divorce could be filed. The purpose behind these requirements was that the state had to have a vested interest in the marriage before the courts would intervene in the divorce. States wanted to prevent ***migratory divorces***—people flocking to a particular jurisdiction because of the short divorce residency requirements. The trend today is shorter residency requirements, making divorces easier to obtain.

Streamlined and Simplified Divorce Procedures

Another recent trend is the increased number of ***pro se litigants*** dominating the divorce dockets due to the high cost of divorce. Many jurisdictions are creating *pro se* resource centers in courthouses, posting forms and instructions online, and enlisting lawyers from the private bar to take on cases *pro bono* or at reduced rates to alleviate the burden. Paralegals, under lawyer supervision, may also assist in helping prepare documents. Courts are also simplifying and streamlining the process for uncontested divorces and requiring parties involved in contested cases to participate in alternative dispute resolution as opposed to knock-down, drag-out divorce trials. In cases where the parties have little or no assets, no children, were married for a relatively short period of time, and both want the divorce, simplified procedures are being adopted by many jurisdictions. Many states have enacted ***summary dissolution of marriage***. All that is required in these jurisdictions, if you meet the requirements, is the filing of official documents with the appropriate court without the assistance of attorneys. Another form of low-cost divorce enacted by a number of states is a ***simplified divorce procedure***, which is sometimes referred to as summary

process or divorce by mutual consent. Unlike the summary dissolution of marriage, the parties in these states must appear before the court to dissolve their marriage. The process, however, is simplified and the courts make user-friendly forms and guidebooks available.

THE “MODERN FAMILY”—THE WAVE OF THE FUTURE?

The past few decades have witnessed various departures from what in the twentieth century had come to be considered the “typical American family,” namely, a **nuclear family** consisting of a married couple—mom and dad—and their offspring. Now in the twenty-first century, more couples are choosing to become parents first and marry later—or not. Couples marrying for the second time are creating **blended families** that include the children of each spouse from a previous marriage and, frequently, a child or children the couple have had together. Same-sex couples are openly living together as legally married spouses or as **domestic partners** where the law allows. Many of these couples are parenting children as well. Now, also, more grandparents have become the **primary caretakers** and legal guardians of their children’s sons and daughters and are raising these grandchildren.

All of these changes in the nature and structure of the family present issues, actual and potential, some of which have already found their way to family court. If these trends continue, and there is no reason to believe they will not, the substantive body of family law will expand to encompass these new and interesting family forms.

Nuclear family

A term used to refer to the “typical American family,” consisting of a mother, father, and their offspring.

Blended families

A term used to refer to couples marrying for the second time where the family comprises children of each spouse from a previous marriage or relationship and children the couple have had together.

Domestic partners

A committed relationship between two persons of the same gender, who reside together and support each other, in a mutually exclusive partnership.

Primary caretaker

The individual who has taken on the main responsibility for the daily care, rearing, and nurturing of a child.

Concept Review and Reinforcement

KEY TERMS

alternative dispute resolution
blended family
chattel
Child Support Enforcement
Amendments
cohabitation
collaborative lawyering

domestic partners
exclusive jurisdiction
fault
mediation
migratory divorce
no-fault divorces
nuclear family

primary caretaker
pro se litigants
settlement
simplified divorce procedure
summary dissolution of marriage

REVIEW OF KEY CONCEPTS

1. What are some of the changes in American society over the past fifty years that have affected substantive family law?
2. Why is marriage described as an economic partnership?
3. How has the great increase in the number of women in the workforce affected courts’ decisions on alimony, child support, and custody?
4. What is meant by the term *pro se* litigant, and in how many different ways can the increase in *pro se* litigants affect a family law practice?
5. How has no-fault divorce affected our society?

BUILDING YOUR PARALEGAL SKILLS

CASE FOR BRIEFING

HOWARD v. LILLIAN, 62 A.D. 3D 187 (1ST DEPT 2009)

Critical Thinking and Legal Analysis Applications

1. You work for a high-powered family law firm in New York City. The firm's client, Mrs. Andrews, wants to bring a dissolution action alleging mental cruelty and adultery. Mr. and Mrs. Andrews have been married for twenty years and have two teenage children. Both Mr. and Mrs. Andrews have worked throughout the marriage at high-powered, high-earning jobs in advertising and public relations. During their marriage, together they have equally contributed to the accumulation of many assets, including a high-priced Manhattan co-op apartment, a country home in upstate New York, condos in Vail and Aruba, and a very large stock portfolio.

Mrs. Andrews has disclosed that during their marriage Mr. Andrews has had numerous adulterous affairs. He has fathered two children with former mistresses. He has paid large amounts of child support for these children and, in fact, although not obligated to do so, he currently pays private school tuition and summer camp expenses for each child. Mrs. Andrews has suffered enormous emotional distress, anger, and feelings of betrayal because of her husband's blatant adulterous conduct. She also claims that the marital partnership has sustained great financial loss due to the exorbitant amounts Mr. Andrews has paid in child support and "extras" for the children of his adulterous affairs. She wants a divorce settlement that provides her with at least three-fourths of the marital assets and also wants child support for her teenagers that will allow them to live as lavishly as their father's other children. Because she now earns slightly more than her husband, she is not seeking any alimony, but she certainly does not want him to receive alimony from her!

Your supervising attorney is concerned that under New York law, Mr. Andrews' conduct has not been sufficiently unconscionable to constitute the "egregious fault" that New York law seems to require to justify awarding Mrs. Andrews the bulk of the marital estate. He wants you to review New York case law, especially the recent case *Howard v. Lillian*, to see if his concern is warranted and present your conclusions in a brief interoffice memorandum. You can find this case by using one of the online legal research services the office subscribes to.

You may also use your favorite search engine, by entering "New York family law cases," and go to one of the many sites that will pop up. When you arrive at your site of choice, select the section entitled "CASE LAW" and either enter the case name: *Howard v. Lillian* or the case site: 62 A.D. 3rd 187 [1st Dept 2009].

Building a Professional Portfolio

PORTFOLIO EXERCISES

1. As you begin your portfolio, create a section for Substantive Law, with subsections for Statutory Law and Case Law. Then, either go online or to your local state law library. Find and copy your state's section on statutes relating to family law. Insert these documents into your portfolio notebook. As time goes by, you will add case law from your state on various issues.
2. As you begin your portfolio, also create a section for Procedural Law. Either online or at your state law library, find the "rules of practice" for your state. If there is a separate section for Family Law Procedure, copy that section for insertion into your portfolio.

Part **one**

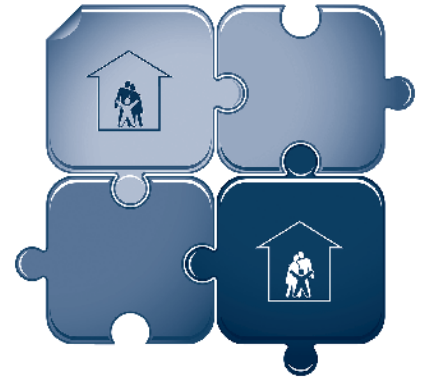
INTRODUCTION TO PART ONE: FAMILY LAW

It is essential to have a solid foundation in the principles of family law. The creation of a family through traditional marriage or marriage alternatives gives rise to a host of rights and responsibilities while the relationships are intact and when they are dissolved. The pages that follow identify the basic legal concepts underlying the creation of the family and the obligations imposed upon the adult members during its existence and which endure beyond its demise.

This page is intentionally left blank

Chapter **two**

MARRIAGE AND MARRIAGE ALTERNATIVES



We live in a time where the traditional views of marriage are facing many challenges. This chapter begins with a look at marriage as we once knew it—a union between one man and one woman—and how a United States Supreme Court decision redefined this institution. The chapter ends with an overview of “marriage alternatives,” which present a different approach to relationships outside the traditional bounds of marriage. They may include “civil unions” or “domestic partnerships,” created by courts and legislatures as legally sanctioned relationships for same-sex couples, and, in some jurisdictions, opposite-sex couples. We will also learn that many couples in the United States are opting out of legal marriage altogether, choosing to “cohabitate” or live together.

LEARNING OBJECTIVES

After studying this chapter, you should be able to:

1. Understand the different types of marriages and marriage alternatives.
2. Identify the legal benefits of marriage.
3. Understand how to create common law marriage.
4. Explain the legal effect of *Obergefell v. Hodges*.
5. Determine the requirements for creating a valid marriage.
6. Define the legal remedies available to cohabitating couples according to the landmark decision of *Marvin v. Marvin*.

MARRIAGE

Marriage Defined

Marriage

A marriage is defined as the joining together of two adult individuals in a civil contract.

The traditional definition of marriage as we have known it for centuries has been the legal union of one man and one woman. In the United States, a marriage is now defined as the joining together of two adult individuals in a civil contract called *marriage*.

CIVIL AND RELIGIOUS MARRIAGE

Civil marriage or civil ceremony

A legal status created by a state government when a state official, such as a judge or justice of the peace, performs a ceremony joining two single adults who have met the state's statutory qualifications in a marital union.

The institution of marriage is regulated on a state level, and this status confers state and federal rights and responsibilities on the married couple. Couples who wish to marry may choose either a civil or religious marriage, or both. A *civil marriage*—or a *civil ceremony*, as it is sometimes called—is a legal status created by a state government when a state official, such as a judge or justice of the peace, performs a ceremony joining two single adults who have met the state's statutory qualifications in a marital union. A civil marriage imposes various legal rights and responsibilities on the married couple.

Religious marriage

The religious solemnization of the union of two individuals according to the requirements of the particular faith in question.

A *religious marriage* is the religious solemnization of the union of two individuals according to the requirements of the particular faith in question. State statutes allow ministers, priests, rabbis, and other members of the clergy who perform the religious marriage to execute and file a couple's marriage license, thus satisfying the state's civil marriage requirements by making the marriage legal in the eyes of the law.

In addition to its role as a social and religious institution, marriage affords the couple important rights in the eyes of the law. The legal benefits of marriage include:

- Elective share protection
- Estate and gift tax exemptions benefits
- Family court jurisdiction for dissolving marital relationship and obtaining orders in the area of alimony, property and debt division, child custody, visitation, and child support
- Family leave
- The ability to file joint income tax returns for state and federal tax purposes
- Guardianship rights
- Hospital visitation rights
- Immigration benefits
- Insurance benefits
- Intestate succession protection
- Joint adoptions
- Military benefits
- Appointment as conservator for a disabled spouse
- Decision-making power for an incapacitated spouse
- Retirement benefits
- Spousal or marital communications privilege in court proceedings
- Loss of consortium claims in personal injury suits
- Right to file wrongful death lawsuits
- Possession of deceased spouse's remains at death
- Social Security, Medicare, and disability benefits
- Spousal or widow's allowance
- Stepparent adoptions
- Veterans' benefits
- Workers' compensation benefits

Figure 2-1 A religious marriage is the religious solemnization of the union of two individuals according to the requirements of the particular faith in question.



COVENANT MARRIAGE

Covenant marriage is a response to the rising divorce rate in the United States as a result of the change from fault to no-fault divorce. In addition, the U.S. Census of 2000 reveals that many couples are avoiding marriage and opting to cohabitate instead. Our society has also accepted divorce as another adult passage. Many go into marriage with the feeling that if it doesn't work out, divorce is always an option. Social stigma is no longer attached to divorce. Some feel that opposite-sex marriages are too easy to get into and too easy to terminate. Covenant marriage is an alternative type of marriage that can be summarized as requiring premarital counseling, a return to fault-based grounds in order to dissolve the marriage, counseling before going through divorce, adherence to a covenant contract, and a longer mandatory waiting period. This type of marriage is supported by religious groups who view marriage as a covenant between God and the spouses.

The end result is to reduce the divorce rate and make marriages harder to dissolve. People will be discouraged from going into marriage too quickly and divorcing too quickly. Covenant marriage is intended to reinforce the commitment to marriage. Three states have covenant marriage as an option. Louisiana was the first to enact covenant marriage in 1997, followed by Arizona in 1998 and Arkansas in 2001. Covenant marriage has not “caught on” and has not become popular even in the jurisdictions that enacted it.

Covenant marriage

An alternative type of marriage that can be summarized as requiring premarital counseling, a return to fault-based grounds in order to dissolve the marriage, counseling before going through divorce, the signing of a covenant contract, and longer mandatory waiting periods.

Louisiana Covenant Marriage Act

Under Louisiana's covenant marriage law, the couple must sign a statement of intent, recite a declaration, and provide proof of participation in a premarital course. In the event the parties wish to dissolve their marriage, they can obtain a divorce by proving the fault grounds of adultery, imprisonment for a felony, abandoning the marital home for a period of at least one year, or physically or sexually abusing a family member. If such fault grounds are not available, the parties may be divorced if they have lived separately and apart for a specified period of time. There is a provision in the law that allows couples who are already married to convert to a covenant marriage.

DECLARATION, LOUISIANA CIVIL CODE ANNOTATED; TITLE V, ARTICLE 103 AND LOUISIANA REVISED STATUTES, SECTION 9-308

We do solemnly declare that marriage is a covenant between a man and a woman who agree to live together as husband and wife for so long as they both may live. We have chosen each other carefully and disclosed to one another everything which could adversely affect the decision to enter into this marriage. We have received premarital counseling on the nature, purposes, and responsibilities of marriage. We have read the Covenant Marriage Act, and we understand that a Covenant Marriage is for life. If we experience marital difficulties, we commit ourselves to take all reasonable efforts to preserve our marriage, including marital counseling.

With full knowledge of what this commitment means, we do hereby declare that our marriage will be bound by Louisiana law on Covenant Marriages and we promise to love, honor, and care for one another as husband and wife for the rest of our lives.¹

COMMON LAW MARRIAGE

By the end of the nineteenth century, the institution known as common law marriage was recognized in most states in the United States as a legal form of marriage that carried with it all of the rights and obligations of a ceremonial and statutorily memorialized union. Common law marriages were numerous in frontier states and in rural areas where the parties were often geographically distant from the county or municipal offices that issued marriage licenses. However, common law marriages also existed in urban areas. Today, many states have statutorily abolished common law marriage. Legal proceedings that affect common law marriages are becoming increasingly rare because very few states permit or recognize the formation of a common law marriage within their boundaries. However, states that do recognize common law marriages do adjudicate their dissolution. In addition, some states do not recognize the formation of a common law marriage within the state, but will recognize as legally valid a common law marriage formed in a state where common law marriage is legal. In these states, the courts will adjudicate the dissolution of these marriages as long as other jurisdictional requirements have been met.

¹§273. Covenant Marriage; Contents of Declaration of Intent, Louisiana State Legislature.

Figure 2-2 Requirements vary from state to state, but creating a common law marriage requires more than living with someone.



Merzzie/Shutterstock

What Is a Common Law Marriage?

A **common law marriage** is a marriage created without a license or ceremony. According to popular myth, simply living with a member of the opposite gender for a period of time creates this form of marriage. Requirements vary from state to state, but creating a common law marriage requires more than living with someone.

In general, the requirements for a valid common law marriage are as follows:

- The parties must live together for a significant period of time.
- There must be a “holding out” as husband and wife. This means that they refer to each other as “my wife” and “my husband,” hold assets in joint name, file tax returns together, and so on. In many common law marriages, the female may also adopt the usage of her common law husband’s surname. For a “holding out” to exist, the couple’s actions and representations must give the general public the impression that they are married.
- The parties intend to be married.

Common law marriage

A marriage created without a license or ceremony.

States That Recognize Common Law Marriage

Alabama, Colorado, District of Columbia, Iowa, Kansas, Montana, Oklahoma, Rhode Island, South Carolina, Texas, and Utah all recognize common law marriage. New Hampshire recognizes common law marriage for inheritance purposes only. Georgia, Idaho, Ohio, and Pennsylvania recognize common law marriages created before certain dates in an effort to phase them out over time.

Love Hurts It sure does, especially when you’re trying to claim that a common law marriage exists between you and one of the stars of *The Big Chill* and *Syriana*.

SANDRA JENNINGS v. WILLIAM M. HURT

160 A.D.2d 576, 554 N.Y.S.2d 220 (1990)

APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST DEPARTMENT

SILBERMANN, J

In her amended complaint, plaintiff alleged that she and defendant had entered into a common-law marriage by virtue of having held themselves out as husband and wife in South Carolina from October 31, 1982, to January 10, 1983. After meeting in 1981, the parties began living together in New York City. On October 31, 1982, plaintiff joined defendant in South Carolina where he was filming a movie. When plaintiff became pregnant in 1982, defendant, who was married to another woman, commenced divorce proceedings with the divorce becoming final on December 3, 1982. During that same year, defendant's counsel drafted a financial agreement for the parties. The relationship between the parties in South Carolina became somewhat volatile but plaintiff alleged that during one of their arguments, defendant told her that "as far as he was concerned, we were married in the eyes of God" and that they had "a spiritual marriage." He also purportedly told her that "[w]e were more married than married people." Plaintiff's claim that she is defendant's common-law wife is based on these events. Defendant's testimony directly contradicted that of plaintiff.

The record fails to support plaintiff's claim that she is defendant's common law wife. Notably, plaintiff never mentioned the conversation regarding the "spiritual marriage" at her deposition. The record also reveals that a statement in which plaintiff allegedly signed her name as "Sandra Cronsberg Hurt" was an altered copy in which the name "Hurt" had been inserted.

In 1983, defendant filed an affidavit with the Putative Fathers' Registry in New York which acknowledged his paternity of plaintiff's child. Filing this document, designed to ensure the child's legitimacy, would have been unnecessary had the parties in fact been married. Moreover, in 1984, one year after the parties left South Carolina, drafts of a relationship agreement continued to state "whether or not the parties hereafter marry each other." Other documents introduced into evidence listed defendant as single and plaintiff as his "friend" rather than his spouse. Of the many witnesses who testified and of the numerous affidavits offered into evidence, almost all demonstrated that the parties never held themselves out as being married nor were they perceived as husband and wife.

To establish a common-law marriage in South Carolina, the proponent must establish "an intention on the part of both parties to enter into a marriage contract" (*Ex Parte Blizzard*, 185 S.C. 131, 133, 193 S.E. 633, 635). The mutual agreement necessary to create such a marriage "must be conveyed with such a demonstration of intent and with such clarity on the part of the parties that marriage does not creep up on either of them and catch them unawares. One cannot be married unwittingly or accidentally" (*Collier v. City of Milford*, 206 Conn. 242, 251, 537 A.2d 474, 479). The evidence in the instant case clearly demonstrates that there was neither a mutual intent nor an agreement to enter into a marriage contract. Consequently, there was no common-law marriage.

We further find that the Supreme Court properly denied plaintiff's motion for leave to amend her complaint to allege three new causes of action since these causes of action were insufficient as a matter of law (see, *East Asiatic Co. v. Corash*, 34 A.D.2d 432). The first proposed cause of action, to impose a constructive trust on an apartment owned by defendant, cannot stand since plaintiff failed to establish that she had a property interest in the apartment. Nor did she establish all of the necessary elements for a constructive trust (see, *Onorato v. Lupoli*, 135 A.D.2d 693).

The second proposed cause of action, relating to defendant's alleged breach of a promise to support plaintiff in the future, is too vague to sufficiently state a cause of action (see, *Dombrowski v. Somers*, 41 N.Y.2d 858). Moreover, while plaintiff

claims that this cause of action sounds in fraud, it arose directly from the breach of contract and is therefore a contract claim instead of a cause of action in fraud (*Marks v. Nassau County Assn. for Help of Retarded Children*, 135 A.D.2d 512). The third proposed cause of action, that defendant falsely promised to support plaintiff if she would have his child and give up her career, is void as against public policy (see, *McCall v. Frampton*, 81 A.D.2d 607). The law does not recognize a cause of action for sacrificing career opportunities in order to act as a “wife” (see, *Baron v. Jeffer*, 98 A.D.2d 810). Concur—Sullivan, J.P., Carro, Milonas, Rosenberger and Smith, J.J.

Source: Sandra Jennings v. William M. Hurt, 160 A.D.2D 576, 554 N.Y.S.2D 220 (1990), Appellate Division of the Supreme Court of New York, First Department, New York State Unified Court System.

Why Choose Common Law Marriage?

People may opt for a common law marriage for these reasons:

- **Convenience.** In the nineteenth century, while the frontier was being settled, parties pledged themselves to each other without benefit of clergy or state officials because they were miles away from either religious or governmental institutions.
- **Personal preference.** Some couples opposed and wished to avoid intrusion by either church or state. For instance, in the early decades of the twentieth century, many free-spirited individuals known as *Bohemians* lived in the Greenwich Village section of New York and scorned the legal and religious trappings of conventional society as bourgeois and artificial. Their common law marriages were often political or societal statements. Some Bohemians went even further with their protests and embraced living together instead of any legally binding arrangement.
- **Poverty.** Some couples simply had no money for a church wedding or for an official ceremony and the attendant costs of a marriage license and blood tests.

SAME-SEX MARRIAGE

Same-Sex Marriage in the United States

The sexual revolution brought about many social changes, one of which has been in the area of same-sex marriage. Recent headlines chronicle the successful efforts of the LGBT community for not only social acceptance and equal rights but also the right to enter into marital relationships. Despite these victories and the legal protections that ensued, many still wish to preserve the traditional definition of marriage—a union between one man and one woman.

The Legal Battle for Recognition of Same-Sex Marriage

Marriage is considered a fundamental right in our system of jurisprudence. For many years, same-sex marriage advocates argued that denying same-sex couples the right to marry on the basis of gender violated the Fourteenth Amendment and Establishment Clause of the U.S. Constitution because the state was establishing a religion (i.e., the prohibition reflects Judeo-Christian biblical views against homosexual conduct). Courts in the past rejected this argument, ruling that a legitimate

Figure 2-3 The United States Supreme Court decision of *Obergefell v. Hodges* established the nationwide right to marry for same-sex couples.



Govicinity/Shutterstock

governmental interest is served by prohibiting marriages between members of the same sex. Many courts held that states should sanction only marriages that are capable of procreating—reproducing children. A classification resulting in the denial of a fundamental right may only be upheld where it is necessary to accomplish a compelling state interest, and achieving that goal cannot be done by less restrictive means.

In 1967, the U.S. Supreme Court struck down a Virginia statute that prohibited interracial marriages. This statute and similar legislation were known as miscegenation laws and were enforced in many states. The Virginia statute at the time read as follows:

All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process. (Virginia Code Ann. 750–57)

In *Loving v. Virginia*, 388 U.S. 1 (1967), the Supreme Court held that marriage is a fundamental right that cannot be restricted by states unless there is a compelling state interest. Until recently, courts rejected the application of this holding when deciding the legality of same-sex marriage and routinely upheld laws passed by state legislatures that prohibited same-sex marriage.

Defense of Marriage Act

Defense of Marriage Act (DOMA)

A federal law passed in response to attempts on the part of gay-rights activists to require states to recognize same-sex marriages; DOMA defines marriage for federal purposes.

In May 1996, the U.S. Congress enacted the *Defense of Marriage Act (DOMA)*. The act protected the traditional definition of marriage as a union between a man and a woman in the U.S. Code and barred same-sex couples from enjoying federal benefits, regardless of how their states redefined marriage, either through statute or judicial act. Marriage was referenced in many federal laws such as tax, bankruptcy, immigration, Social Security, and military justice statutes. DOMA also ensured that states would not be forced to recognize same-sex marriages performed in other states that sanctioned such unions.