

New York Family Law

I. MARRIAGE

A. Marriage Generally

1. Definition:
Civil stauts or relationship created by the legal union as between a husband and wife
2. The relationship imposes certain duties and responsibilities toward each other and to society for their joint lives, until death or legal termination of the marital relationship.

B. Creation of Marriage

1. Legal Formalities

a. Ceremonial Marriage

- (1) A license must be obtained from a town or city clerk.
 - (a) Once obtained, the license must be delivered
To an officiant within 60 days and before the ceremony
- (b) **Exceptions:**
In case of imminent death or the possibilities of irreparable harm, may not be solemnized within 24 hours of obtaining the marriage license
- (c) Failure to obtain a license does not invalidate the marriage, except that a marriage between minors, or between a minor and an adult, may be voidable (not automatically void, but subject to being made void by the court) if the minor, or guardian of the minor, complains.
 - 1) the person celebrating the marriage, which a license has not been obtained may subject to criminal penalties
- (2) Blood tests are not required.
- (3) The marriage must be solemnized by:
Clergy member of any religion – leader of a chapter – mayor – magistrate – judge – minister
- (4) A written contract of marriage must be signed by the marrying parties and at least two witnesses within New York State, and must include the state of residence of each party and the witnesses, and the date and place of marriage.
 - (a) The contract must be acknowledged before a judge of a court of record of New York by:

The parties and witnesses in the manner required for acknowledgment in the way a real estate would be recorded

(b) NY authorizes contractual marriages when the statutory requirements are required

b. **Common Law Marriage**

(1) Definition:

A common law marriage arises:

When 2 parties live together as husband and wife for a specified period

(2) Requirements:

- (a) consent
- (b) cohabitation
- and
- (c) community reputation

(3) Generally, common law marriages are invalid if contracted in New York.

- (a) However, NY will recognize a CL marriage validly contracted at another state

(4) Burden of Proof:

- (a) Who has it?

The one who wants to assert the marriage

- (b) What is the standard of proof?

CCE according to the laws of that state

- (c) Courts are especially vigilant in the following two circumstances:

- 1) Example #1:

One of the parties is dead --

- 2) Example #2:

When the parties cohabits in a non marital relationship prior to the CL marriage

c. **Nonmarital Relationship**

(1) New York will recognize express contracts between cohabiting persons by which they agree to support each other or share property, as long as *There is consideration that supports the K other than Sex*

(a) Implied Contracts:

The New York Court of Appeals has held that:

Implied K between cohabitated parties will not be enforced – they're have to be express because of the risk of fraud

2. Limitations and Impediments

- a. There are five types of impediments to a valid marriage:
 - (1) First impediment: Age;
 - (a) **18+**
 - (b) *16-18 → written parental consent*
 - (c) If either party is under 16 but over 14: *written consent and a SC justice or family court judge*
 - (d) *under 14 → prohibited*
 - (2) Second impediment: Mental or Physical Incapacity;
 - (a) A marriage is voidable when:
The party is incapable of consenting to the marriage for lack of understanding
Examples:
Drunk – mentally ill – low intelligence
 - (b) There is an absolute right to have the marriage annulled if:
One party has been incurably mentally ill for at least 5 years
 - (3) Third impediment: **Consanguinity**:
 - (a) A marriage is void between:
 - 1) *ancestor and decedent*
 - 2) *brother and sister – even if half*
 - 3) *uncle and niece – aunt and nephew*
 - (b) Valid marriages include marriages between:
 - 1) *1st cousins*
 - 2) *relatives by adoption or marriage*
 - (4) Fourth impediment: Prior Marriage Still in Force (Bigamy)
 - (a) absolutely void if K be a person whose husband and wife is still living unless the marriage has been annulled or dissolved
 - (5) Fifth impediment: Same Sex Couples.
 - (a) *recognize it if done at other states*

3. Validity of Foreign Marriages

- a. As a general principle, a marriage that is valid according to the laws of the state in which it is contracted will be recognized in every other jurisdiction, unless the marriage is deemed to violate the public policy of the forum state.
- b. In New York, a marriage validly celebrated elsewhere will not be recognized under certain circumstances:
 - (1) If the marriage violates a prohibitory rule of New York:
If the party immediately comes and becomes domicile
 - (a) Prohibitory rules:
Young marriages – bigamy – ancestors
 - (2) Examples of marriages that are invalid in New York as violative of its public policy:

If you have 4 wives, you can't bring them here
 - (a) Note again, same sex marriages validly performed in another state are not deemed invalid in New York as violative of its public policy.

HYPOTHETICAL

Alfred and Bertha are first cousins who both reside in New York. They traveled to another state that does not allow first cousins to marry and in that other state they obtained a marriage license and got married. They then returned to New York, where they started telling people they are married and otherwise held themselves out as married. Do they have a valid marriage in New York?

NO – there is no valid license

C. Declaration of Nullity and Annulment

- 1. Void Marriages**
 - a. A marriage is void *ab initio* (from the beginning):
when it was not valid from the beginning

2. Voidable Marriages

- a. When a marriage is only voidable and not void, a petition for annulment must be brought seeking a judicial determination that the marriage be declared void.
- b. The following are grounds for voidable marriages:
 - (1) GROUND #1: **Age**
 - (a) If either party is under the age of legal consent, an annulment may be granted in the discretion of the court, which shall take into consideration all of the facts and circumstances surrounding the marriage.
 - (b) A marriage that is voidable because of age will not be annulled if:
 - 1) he was of the age when the marriage was conducted

or

- 2) anyone who attained the age of majority and still wants to stay marriage

(2) GROUND #2: Mental Incapacity or Mental Illness

- (a) the marriage is voidable when a party incapable to consent for lack of understanding
- (b) *this action can be maintained by relative that wasnts the marriage annuled*
- (c) it may be maintained by the party if he regians mental state, but if he consnets, then he cant
- (d) There is an absolute right to have the marriage annulled if one party has been incurably mentally ill for a period of five years, where the mental illness commenced after the marriage was performed.
 - 1) If the marriage is annulled because of one party's incurable mental illness:
The court can order support maintanence and care of the mentally ill spouse

(3) GROUND #3: physical incapacity

- (a) marriage may be annulled if a arty was incapable of entering

EXAMPLES:

Venerial d - disturbed

- (b) the action must be commenced within 5 years nad the incapacity

must be incurable

(4) GROUND #4: consent by force or duress

- (a) Examples of force and duress sufficient for an annulment:
 - 1) threatened prosecution
 - 2) bodily harm
 - 3) injury to property
- (b) A marriage shall not be annulled on the ground of force or duress if it appears that, at any time before the commencement of the action, the parties thereto **voluntarily cohabited as husband and wife**.

(5) GROUND #5: fraud

- (a) The fraud must consist of:
 - 1) failure to disclose
 - or
 - 2) *misrepresentation that goes to the essence of the marriage*
- (b) The spouse who claims fraud will be:
Held to a duty in order to discover the fraud within a reasonable time after the marriage
- (c) Examples of fraud that are grounds for annulment include:
 - 1) *concealment r mis rep of addition to drugs*
 - 2) *health or physical condition*
 - 3) *mental condition*
 - 4) *concealed pregnancy*
 - 5) *prior marital status*
 - 6) *the intent not to have children*

d. Burden of Proof:

- (1) If annulment is sought on the grounds of age, duress, or fraud, the party seeking the annulment has the burden of proving that there has been no cohabitation between the parties such as would bar a judgment of annulment.
- (2) However, in those cases where annulment is sought on the grounds of mental incapacity or illness or physical incapacity:

P has to prove that the incapacity continues

3. Legal Consequences of Annulment

- a. Unlike a **bigamous or incestuous** marriage, which is void *ab initio*, annulled marriages are void:
only from the time the annulity is declared by a competent court
- b. Children:
those kids are legitimate to both parents even if the marriage is annulled

- c. Property:
tenancy by the entirety are converted into tenancy in common
- d. Wills:
any disposition or appoint of property to a spouse is revoked and passes as if the spouse had predeceased
 - (1) A final decree of annulment or declaration of nullity disqualifies:
Former spouse from taking and elective share
- e. Statute of Limitations:
6 years

HYPOTHETICAL

Fred and Ethel have been married ten years. When they were married, Ethel was 15 years old. Fred thought Ethel was 18 years old at the time. Ethel did not get parental consent for the marriage. Fred discovers Ethel's actual age when Ethel turned 21 years old. Is their marriage void? Is it voidable by either Fred or Ethel?

she would have to bring the voidable claim and she can't bring it now because she is 21

D. Duty of Support

1. Under modern law, married persons may contract with each other, although a court may give a contract between spouses particular scrutiny because of the spouses' special relationship.
 - a. Contracts on business matters:
generally enforceable if they worked together in a partnership but domestic services are deemed implied

EXAMPLE:

One husband enters a contract with his wife to make dinner at home every night. A court will not enforce that. However, a chef working for a restaurant owned by a spouse could contract to make dinner every night in the restaurant.

2. An agency relationship is not: established merely due to the marriage

- a. One spouse is not empowered to:
bind the other in a K when they are entering in a lease because they are married

E. Premarital (prenuptial) agreements:

1: In General

- a. A premarital agreement may deal with such matters as:
rights in the others estate – alimony and property division in the event of divorce

- b. *K and must meet all requirements for valid Ks*

2. Creation of prenuptial agreements

- a. An agreement by the parties, made before or during the marriage, is valid and enforceable in a matrimonial action if such agreement is:

- (1) *in writing*
- (2) *subscribed aka signed*
and
- (3) acknowledged or approved in the manner required to entitle a deed

- b. The agreement may include provisions for:

- (1) testamentary distributions
- (2) division of separate marital property
- (3) amount and duration of spousal maintenance so long as they reasonable and not unconscionable
- (4) anything about the children custody and support

- c. In determining whether the provisions of the agreement are “fair and reasonable,” the court may consider the relative financial positions of the parties.

- (1) the agreement cannot contain and express provision that requires the dissolution of the marriage or how to obtain a divorce
- (2) the agreement cannot purports to relieve a spouse from liability to the support the other

REVIEW:

II. MATRIMONIAL ACTIONS

A. Jurisdiction

1. Jurisdictional requirements, as well as procedural considerations, are the same for all matrimonial proceedings, including:

2. **Domicile and Residency Requirements**
 - a. United States Constitution:
one has to be a domicile

 - b. *In rem* jurisdiction is established over the marital status by virtue of the domicile of one of the parties within the state.
 - (1) Domicile generally requires: physical presence + intent to make it a permanent

 - c. The domicile of one of the parties to a marriage is a sufficient basis for a state to render a divorce, even if:
there is no personal J over the non domiciled spouse
 - (1) If one spouse leaves home, establishes a genuine new domicile in another state, and then secures a divorce, the stay-at-home spouse's state must give: full faith and credit to the divorce as long as reasonable notice was given to the other state resident

 - (2) Where only one spouse participates in a divorce proceeding, (e.g., the stay-at-home spouse is served with notice but allows a default to be entered), the stay-at-home spouse has the right:

3. The underlying principles concerning the validity of an out-of-state divorce do not change when both spouses participate in the proceeding.

4. **Personal Jurisdiction**
 - a. Although domicile establishes *in rem* jurisdiction for purposes of granting the divorce, personal jurisdiction over the defendant is necessary for the court to enter or enforce any decrees *in personam*, including:
 - (1) Use of the long-arm statute:
Is sufficient to allow a court to enter an order *in personam* against a non resident D spouse

 - (2) In addition to proper service of process, in order to enter an *in personam* order for support, the defendant spouse must:
Have sufficient minimum contacts

B. Jurisdiction and Venue of New York Courts

1. The New York Supreme Court has subject matter jurisdiction over marital actions, but it may refer issues:
2. Residence by one party for one year immediately preceding the action is sufficient if:
 - a. either of the party were married in NY
 - b. lived as husband and wife in NY
 - or
 - c. ,. Cause occurred in NY

(1) Otherwise: 2 years residency is req
3. Continuous physical presence alone satisfies the durational requirements.
4. Proper venue: the county where one of them resides at the commencement
5. N.Y. Dom. Rel. Law § 230 confers only *in rem* jurisdiction over the marital *res* itself.
 - a. In such a proceeding, the court may dissolve the marriage, but it may not: award alimony or support or anything that have to do with children

(1) The New York Long-Arm Statute may confer personal jurisdiction in such a case.

C. Grounds for Separation or Divorce

- 1, The statutory grounds for divorce or separation are:
 - a. **Cruel and Inhuman Treatment**
 - (1) Definition:
The conduct of the D so endanger the physical or mental well being of the P as to render it unsafe or improper for the P to live with the D
 - (2) "Cruelty" in this sense generally involves:
The idea of wantonness or intent to inflict suffering
 - (3) "Cruelty" in this sense is not shown by evidence of mere disharmony and quarreling. There has to be something crazy.
 - b. **Abandonment (and Absence)**
 - (1) "Abandonment" contemplates:
A voluntary separation of one party without justification and with no intent to return

- (2) For purposes of seeking a divorce, the abandonment must have lasted:
A period of at least 1 year
- (3) This differs from abandonment as a ground for separation, which has no minimum time requirement.
- (4) Note: New York's Enoch Arden Statute allows for dissolution of a marriage on the ground of **Absence**, where a spouse has been missing for five years and is believed to be dead after a diligent search, as long as:
 - (a) *you can file for divorce as long as NY was the matrimonial domicile at the time of the disappearance*

or

- (b) the petitioner is a NY resident for at least a year or more

c. Nonsupport (ground for separation only)

- (1) Each spouse is liable for the support of the other spouse (including necessaries provided by third parties) during marriage.
- (2) This ground is available even if:
The parties are living apart by mutual agreement

d. Adultery

- (1) Definitional qualification:
Must have been voluntarily performed
- (2) Consequently, defenses to an accusation of adultery include:
 - (a) rape
 - (b) insanity
 - (c) mistake of fact

e. Imprisonment

- (1) This ground refers to the confinement of a spouse in prison for three or more consecutive years.
- (2) confinement in a mental hospital is not imprisonment
- (3) the incarcerated spouse cannot seek grounds for divorce because they are in prison, it's the free person only

f. Separation Pursuant to Decree or Agreement

- (1) After the parties have been separated for at least one year pursuant to a decree or separation agreement, the plaintiff is entitled to a divorce.
 - (a) a divorce granted under this section is called a conversion divorce
 - (b) this means that they can extricate themselves by a bad marriage

g. No-Fault (effective October 15, 2010)

- (1) Where the marital relationship has broken down irretrievably for a period of **at least six months**, and one party attested to this under oath, judgment of divorce shall be granted as long as the following ancillary issues have been resolved by the parties, or determined by the court and

incorporated into the judgment of divorce:

- (a) *,the economic issues of equitable distribution of the marital property*
- (b) *,payment or waiver of child support*
- (c) *,payment of child support*
- (d) *,payment of legal or expert fees*

and

- (e) *custody or visitation of the infant child*

2. The Statute of Limitations for Divorce and Separation

- a. For divorce, there is a **five-year statute of limitations** where the divorce ground is:
 - (1) cruel or inhuman treatment
 - or
 - (2) imprisonment
- b. For separation, there is a five-year statute of limitations where the separation ground is:
 - (1)
 - or
 - (2)
- c. For any other ground for divorce or separation, there is no Statute of Limitations.

HYPOTHETICAL

Mary and Joseph have been married for ten years. For the past five years, Joseph has refused to have sex with Mary and he has, in general, tried to avoid speaking to Mary. Although she was troubled by the state of her marriage, Mary only recently decided that the situation was bad enough that she should take serious action, and has now decided that she would like to file for divorce. Does Mary have a more promising argument for getting a divorce on grounds of cruelty or abandonment?

D. Separation Agreements

1. Creation of Separation Agreements

a. A separation agreement is valid and enforceable if such agreement is:

- (1) writing
- (2) signed
- and
- (3) acknowledged or approved in the manner

b. The agreement may include:

- (1) a contract to make:
 - (a) testamentary provision
 - or
 - (b) *waiver to right to elect against the will*
- (2) provisions for:
The ownership division of a separate property
- (3) provisions for:

maintenance

(4) provisions for:

Children custody care education care

c. A separation agreement may be set aside if:

- (1) the product of fraud duress or lack of capacity
- .
- (2) Unlike arms-length contracts with strangers, separation agreements between spouses involve:
Fiduciary relationships and requires utmost duty of care the

2. Validity

a. In determining whether the provisions of the agreement are "fair and reasonable," the court may consider the relative financial positions of the parties.

(1) Such agreements cannot require:

The dissolution of the marriage or ground for divorce

(2) The agreement may not cause:

A financial weaker party a public charge

b. One attorney representing both parties does not invalidate the agreement, although it does subject it to strict scrutiny.

c. A valid separation agreement bars an action for separation and alimony but it does not bar a subsequent action for divorce.

(1)
d. corroboration with intent to reconcile destroys the agreement

any party who accepts the benefit may not challenge its validity

4. Merger, Incorporation, and Modification

a. Merger: the parties may choose to merge the separation agreement into a divorce decree: and the terms will not be changed unless its fraudulent or the like
(1) If the agreement is merged
It is no longer enforceable as a K obligation

b. Incorporation:
it survives the divorce and it can be incorporated by reference

c. Modification: The court in its discretion may order the payor to increase alimony beyond the amount he is obligated to pay under the contract, but only if: the court in its discretion may increase the alimony beyond the availability to pay if there is a danger of becoming a public charge

E. Defenses

1. Misconduct

a. In any action for separation:
the D may allege the misconduct of the P

b. In an action for divorce:
the misconduct of the P is no defense with the exception of adultery
(1) D is limited in denying the charge

2. Defenses to Adultery

a. The following defenses are available in a separation or divorce action based on adultery:

(1) **Procurement or Connivance**
(a) No separation or divorce may be granted if:
The spouse consented to the adultery of the other spouse

(2) **Condonation**
(a) Adultery is not a ground for separation or divorce if:
There has been voluntary cohabitation with knowledge of the offense

(3) **Recrimination**
(a) Separation or divorce will be denied if:
The P has also been guilty of adultery under the same circumstances

if D is innocent – both are having adultery

(b) In such a case, both parties are barred from obtaining relief on this ground.

HYPOTHETICAL

Harriet files for divorce against William, claiming that William committed adultery. William admits that he committed adultery, but says that, after he committed adultery, he apologized to Harriet and she forgave him and continued to live with him. Can Harriet still obtain a divorce on the grounds of adultery?

no because this is a condnation

F. Rights During Pendency of Divorce Proceedings; Legal Effects of Final Judgment

1. Before Final Judgment

- a. While any marital action is pending, the court can make temporary orders:
for the custody and support of kids and alimony
 - (1) *temp possession of the marital home*
- b. Temporary alimony may be directed despite the fact that the parties continue to reside in the same abode.
 - (1) The granting of temporary alimony:
Is not dependent on the showing of the reasonable probability of success

(2) The spouse must make a showing of:
Necessity before any temp alimony will be awarded

- c. If a spouse dies before the entry of judgment:
the divorce action abates and the survived spouse will not get equitable distribution

2. Final Judgment

- a. Once a divorce is decreed:
either party may marry again
- b. Final decree converts:
tenancy by the entirety into t in common

REVIEW:

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BAR EXAM APPLICATION

Question 1

Applicants were asked to analyze issues arising from a husband seeking a divorce outside of New York, in State X, and the wife's attempt to nullify the State X judgment of divorce and to obtain a divorce in New York on the grounds of abandonment. The husband then sought to dismiss wife's complaint, and the court upheld the State X judgment of divorce and dismissed wife's request for a divorce on the grounds of abandonment:

Was the ruling of the court correct?

Applicants must consider whether an *ex parte* divorce granted in another state is entitled to full faith and credit in New York.

Yes, as long

From the July 2005 bar exam

III. EFFECTS OF MARITAL DISSOLUTION

The key concepts or concerns to study here are:

Equitable Distribution;

Spousal Support,

Child Support

Child Custody

A. Equitable Distribution and Division of Marital Property

1. Equitable Distribution Defined and Explained

Fair or reasonable distribution

2. Marital Property vs. Separate Property

a. **Separate Property** of either spouse is not:
remains separate

(1) Separate property includes:

- (a) property acquired before marriage
- (b) property inherited or given as a gift
- (c) compensation for personal injuries
- (d) any property that acquired in exchange for separate value of property

Exception: To the extent the increase in value (or appreciation) of separate property is due to the contributions or efforts of the other spouse, then that portion of the increase in value (or appreciation) is marital property.

- (e) property that is described as separate property in a written agreement

b. **Marital property** should:

should be equitably distributed considering the circumstance

(1) Marital property defined:

Property acquired by **one or both during** the marriage and **before** starting the divorce, separation or matrimonial action

(2) Specific issues:

(a) **Pension Benefits**

1) matyred benefits occurred after marriage and before matrimonial

2) The matrimonial court may order distribution to one spouse of an equitable portion of that part of the present value of the other spouse's pension rights earned during marriage or may provide that upon maturity of the pension rights, the recipient pay a portion of each payment received to the former spouse.

(b) **Professional Degrees and Licenses**

1) A professional license or degree obtained during marriage represents;

2) The status of a license or degree as marital or separate property turns on when:

The work was completed rather than when the license or degree was completed and not just awarded

(c) **Professional Practice**

1) If the professional spouse has a substantial practice:
The value is subject to equitibae distribution

(d) **Artistic or Athletic Skills**

1) special skills of a spouse that has measurable value

2) skills of an artist, entertainer or athelete are distributed upon sufficient proof of value

(e) **Inherited and Commingled Property**

1) When inherited or gifted property is placed in a joint account and used to purchase a joint asset:

3. When a spouse's separate property appreciates in value during a marriage, how should that appreciation in value be classified for purposes of equitable distribution?

a. Any increase in value due to the indirect (or direct) contributions of the nontitled spouse:

it is part of the increase in value

1) Examples of "indirect contributions"

- b. If the increase in value is due to passive appreciation, such as market forces:
it's a market thing – no equitable claim to the increase in value

4. **Factors Affecting Distribution**

- a. the court must consider the following factors but may accord them any weight deemed appropriate, absent an abuse of discretion.

- (1) the income and property and each party at the time of marriage and commencement of action

- (2) duration of marriage and age of party

- (3) need of a custodial parent to occupy the house

- (a) The court has the power to decide the questions of title and occupancy of the home without regard to:
Who owns title

- (3) *Loss of inheritance and pension rights upon dissolution of the marriage*

- (5) any award of maintenance;

- (a) court may balance maintenance and property together

- (6) an equitable claim of direct or indirect contribution made to the acquisition of marital property by the party not holding title;

- (a) Can a court consider the nonmonetary contributions to the marriage by a homemaker spouse?

- yes**

- (7) the liquid or non liquid status of the property

- (a) If assets cannot easily be sold or sold only with a penalty:

EXAMPLE:

If one of the spouses holds stock in a closely held corporation, the court

will value the stock and then compensate the spouse who doesn't get to keep the stock by giving them some other type of asset.

- (8) the probable future financial circumstances of each party;
- (9) the difficulty of evaluating the business
- (10) *economic desirability of keeping property interest or asset intact*
- (11) the tax consequences to each party;
- (12) wasteful decipation o

EXAMPLE:

Spouse made a significant withdrawal and threw the money away on gambling, frivolous gifts, etc.

- (13) any transfer or encumbrance made in contemplation of marital dissolution

EXAMPLE:

I wanted to shelter money and hide it so I make a withdrawal and put it into a separate account or gave it to my sister.

- (14) any other factor that the court expressly finds to be just and proper.
- b. Fault is ordinarily not to be a factor in equitable distribution.
 - (1) adultery alone is not sufficient to effect ED
 - (2) criminal attacks can effect ED

HYPOTHETICAL

Fred and Ethel married in 2000. At the time, Fred owned a rental property worth \$100,000. During the five years that they were married, the value of this property increased to \$200,000. \$50,000 of the increase is attributed to a renovation that was suggested, designed, and supervised by Ethel. The remaining \$50,000 of the increase was due to increases in the real estate market in general. In 2005, Fred and Ethel divorce. Is any or all of the property subject to equitable distribution?

some but not all

6. Distributive Awards

- a. What if an equitable distribution is appropriate but would be impractical or burdensome, or where the distribution of an interest in a business, corporation, or profession would be contrary to law, what can a the court do?
 - (1) can be period of time

B. Spousal Support

1. Financial Disclosure

- a. In all matrimonial actions and proceedings in which support is in issue, there is a compulsory financial disclosure by both parties of their respective financial states.

2. Maintenance

- a. While a court cannot grant a divorce or other matrimonial relief without making provision for the distribution of marital property, an award of maintenance: is extra if the division does not work

- b. In determining the amount and duration of maintenance, the court must consider the following factors and set out in the decision the factors considered and the reasons for the decision:
 - (1) income and property including ED

- (2) the duration of the marriage and the age and health of both parties;
 - (3) present and future earning capacity
 - (4) ability of a party seeking maintenance to become self supporting

- (5) reduced or lost lifelong earning capacity of the party seeking

- (6) presence of kids

- (7) the tax consequences to each party;
 - (8) the contributions and services by the homemaker

- (9) the wasteful dissipation of marital property by either spouse;
- (10) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration; and
- (11) any other factor that the court expressly finds to be just and proper.

- c. Courts may consider marital fault in maintenance determinations; but: doe not preclude and award of maintenance

3. **Modification or Termination**

a. **Grounds for Modification**

- (1) The court may annul or modify any alimony, maintenance, or child support award with respect to future payments when:
There has been substantial change in the circumstances
- (2) either party may move for modification
- (3) What might count as a sufficient change in circumstances to justify a change in a support award?
Decline in income
- (4) A person who willfully commits a felony subjecting him to a prison term may be denied a modification of child support payments and relief from the accrual of such obligations while serving his sentence.
- (5) Where a party's income has not changed, the fact that he has remarried and is supporting the second spouse's children from a previous marriage does not constitute changed circumstances warranting a reduction in his support payments.
- (6) Other grounds for reduction of maintenance include:
 - (a) ; *a change in custody of the children*
 - (b) reduction in income due to outside forced
 - (c) loss of employment – where you have sought employment

b. **Grounds for Termination**

- (1) remarriage
- (2) cohabitation
- (3) death of the payor

- (a) However, remarriage or cohabitation does not terminate liability for amounts in arrears

(4) The death of the payee.

REVIEW:

BAR EXAM APPLICATION

Question 2

A husband and wife were married while the wife was in medical school. During that time, the husband worked as a restaurant manager. The couple had orally agreed that once the wife had become a doctor, she would support him while he went to law school. The husband's father died, and left him a substantial inheritance, which the husband planned to use to pay for law school. Before the husband began law school, but just as the wife finished her residency and was embarking on a career as a neurosurgeon, the couple divorced.

Which of the marital assets are subject to equitable distribution?

C. Child Support

1. Natural Parents

a. Parents are liable for the support of their child or children under 21 years of age, unless the child is 18 or older and has become emancipated or is financially independent:

(1) One or both parents are liable to:
Care maintenance education

(2) The court's decree may:
Make provision for the kids out of the property

(3) The child has a right to:
Most adequate level according to the financial abilities if the parents

c. Calculation

(1) The court makes a child support award based on the **combined parental income (CPI)**, defined as the sum of the income of both parents.

(a) In determining the CPI, the court considers the following sources of income:
1) gross income
2) *investment income*
3) and other sources including:
Employment benefits – fellowship – pension – annuity – public assistance - gifts

(2) Deductions are made from income, including:

(a) *maintenance to other spouse*
(b) *alimony to present spouse*

(c) *anything by agreement*

(4) For the first \$80,000 of combined parental income (effective January 31, 2010, this “cap” was raised to \$130,000), the court awards a percentage of the income according to the following formula:

(a) One child: 17 percent;
(b) Two children: 25 percent;
(c) Three children: 29 percent;
(d) Four children: 31 percent;
(e) Five or more children: no less than 35 percent

(5) The amount calculated is prorated in the proportion each parent's income contributes to the combined parental income.

(a) If the combined parental income exceeds the “cap” amount, the court applies the appropriate child support percentage to the excess or uses the following statutory factors to determine a just and appropriate support obligation:

- 1) the financial resources of each parent and the child;
- 2) *what kind of kids are being supported – look at special needs*
- 3) *standard of living he enjoyed before the dissolution*
- 4) the tax consequences to the parties;
- 5) *the parents support*
- 6) *educational needs of the parent*
- 7) *the amount of income of both parents*
- 8) *needs of the non custodial parent*
- 9) extraordinary expenses incurred by the noncustodial parent in exercising visitation, where the child is not on public assistance; and
- 10) any other relevant factor.

HYPOTHETICAL

Homer and Marge, a married couple, have two children. After the relevant deductions are taken, Homer earns \$40,000/year; and Marge earns \$20,000/year. If they divorce and Marge gets custody of the children, how much child support should Homer pay Marge?

25%

2. Stepparents

- a. A person will not be held liable for support of a child adopted by his or her spouse after the spouses began living apart pursuant to a legally cognizable separation agreement or decree, as long as: the spouses remain separate after the adoption
- b. Generally, stepparents who have not adopted the child are: generally secondary liable

3. **Emancipation**

a. The General Rule:

a child who has abandoned the home against the parents will

b. Exception:

court will require the parents to pay if the kid is a welfare recipient

4. **Modification of Child Support**

a. Provisions for child support are modifiable at any time.

(1) even in the absence of provisions or support in a divorce or separation decree, the party is not released

(2) compliance with a decree --

b. Where it is asserted that the child is not receiving adequate support, it is not necessary to demonstrate that the change in circumstances was unforeseen to justify an increase.

c. Interference with or withholding of visitation rights by the custodial parent does not constitute a defense to the enforcement of a child support order or decree, or grounds for the cancellation of arrears for child support.

HYPOTHETICAL

Yetta claims that Wyatt is the father of her child, Pat. Which of the following claims, if true, would be relevant to establishing that Wyatt is not liable to provide support to Pat?

- (a) Wyatt and Yetta are not and have never been married.
- (b) Before Yetta and Wyatt had sexual intercourse, Yetta told Wyatt that she was taking birth control pills.
- (c) **Wyatt denies that he is Pat's father and no order of filiation has been issued as to Pat's paternity.**
- (d) Yetta has refused to allow Wyatt to visit Pat.
- (e) All of the above.

D. Child Custody

1. Physical custody concerns:

Its about where the kid will reside

2. Legal custody concerns:

Right to make decisions about the child

3. Parental Custody Rights

a. natural parents have a superior rights over any other person

(1) Even the natural father of a nonmarital child:

b. In a custody contest between a natural (or biological) parent and a person who is not a natural (or biological) person the issue of the child's best interests is not reached unless it is first established that:

(1) the natural parent:

Surrendered the child

(2) the natural parent:

Abandoned the child

(3) the natural parent:

Unfit

(4) the natural parent:

or

(5) there are other extraordinary circumstances.

4. Appointment of Guardian

a. Upon the death of either the father or the mother, the surviving parent of an unmarried child under the age of 18 may:

5. Child Custody Proceedings

a. Best Interest of the Child Standard

(1) the court may use its discretion in determining custody according to the Best Interest of the Child

(a) Factors include:

1) *the existence of a prior agreement*

2) *quality of the home environment*

- 3) *parental guidance – financial status*
- 4) *the individual needs of each kid*
- 5) the child's expressed preference, considering the age and maturity of the child and the potential for influence having been exerted on the child;
 - a) *wishes of the kid are considered*
 - b) *court may have a confidential interview regarding the wishes*

6) *close family relationships*

- 7) *mental health of the parents*
- 8) *parents credibility conduct life style achievements personal associates stability morality*

9) *past parental performance*

and

10) *totality of the circumstances.*

- (2) Joint custody may be awarded where it is in the best interests of the child.
 - (a) However, joint custody will be denied if:
A judge found hostility would prevent coordination for the interest of the child
- (3) The fact that a parent was the guilty party in the divorce action may curtail his right to custody but does not abrogate it.
 - (a) the offending parent may be given custody if it is in the best interest of the child
- (4) A non-parent may be awarded custody in unusual circumstances.

b. **Visitation**

- (1) The primary consideration is: the best interest of the child
- (2) The noncustodial parent should be granted reasonable visitation rights unless:
 - (a) In a proceeding to compel support of a dependent:
Courts have the power to make reasonable provisions to visitation by the person obligated to provide support
 - (b) Siblings
Can seek visitation

(3) Biological strangers to a child

Will not be granted rights over the objection of the parents – including grandparents

c. **Modification**

(1) Where there has been a sufficient change in circumstances, a transfer in custody from one parent to the other may be warranted if it is in the best interests of the child.

(a) subsequent physical disability of the parent does not change in custody

(b) custody has been transferred when there is prove that it effects the child – it occurs only where in the best interest of the kid or crazy change and we look to see if it effects the best interest of the child

(c) In determining the “best interest of the child”, the court does not consider the parent’s status but the parent’s parenting.

(2) What might a court do if a parent interferes with noncustodial visitation?

d. **Orders of Protection**

(1) The court may issue an order of protection setting forth reasonable conditions of behavior to be observed for a specified time by any party.

(2) Such an order may require any party to:

(a) stay away from the home of the child or any other party;
(b) *regulations of visitation*

(c) *require the parents from abstaining from a certain conduct*

(d) *consider how we give proper attention to the child*

(e) *you can require any party to refrain from acts that tend to make the home in a proper place*

(f) pay the reasonable counsel fees involved in obtaining or enforcing the order.

(3) A protective order may be made in the final judgment, or in orders before or after final judgment. The order may remain in effect during the minority of the child.

REVIEW:

IV. THE PARENT - CHILD RELATIONSHIP

A. Paternity

1. Legitimacy

- a. Definition/Explanation:
 - a child born of married parents is a legit child of both parents
 - (1) This includes
 - (a)void and voidable marriages
 - and
 - (b)marriages that would be annulled
- b. Children conceived before the commencement of an action for divorce are presumed to be the legitimate children of the husband and wife.
- c. For a child born or conceived while the parties are married, the fact that the husband is not the father must be proved by clear and convincing evidence before the presumption of legitimacy is rebutted..

2. Commencement of Suit

- a. Proceedings to establish the paternity of a child may be brought:
 - during the pregnancy or after the birth
- b. Proceedings to establish the paternity of a child may not be brought:
 - after he reaches the age of 21 – unless it had been acknowledged by writing

3. Proof of Paternity

- a. The court, on its own motion or on the motion of any party, may:
 - order the father to submit to DNA tests
- b. In the past, blood tests were used to determine whether someone could be excluded from being the biological father of a child; but today:
 - DNA tests can be admissible unless timely objection has been made

(1) *if the test shows a paternity for more than 95%, then there is a rebuttable presumption*

- c. Although courts now rely on scientific tests that provide an answer to the paternity question that comes with a high level of mathematical certainty or confidence:

4. Rights of Support and Inheritance of Children Born Out of Wedlock

- a. If the Family Court finds paternity in a paternity suit, it will issue an order of filiation, which may include:
 - (1) *provision for custody and parent until the child reaches 21*

- (2) reasonable expenses of the pregnancy
- (3) *necessary expenses that the mother incurs when she goes to recovery*
- and
- (4) funeral expenses of the child
- b. A father whose paternity of a child has been established may not assert, as a defense to his support obligation:
the deliberate misrepresentation that she can't have kids
- c. A child born to an unmarried mother is the "legitimate" child of the mother and that child and child's issue can inherit from the mother and from the maternal kindred.
 - (1) A child born out of wedlock will also inherit from the father and the paternal kindred if:
 - (a) *a court makes an order of filiation*
 - (b) *father acknowledged the kid and file it with dept of social*
 - (c) *paternity is established by CCE and open and notoriously acknowledged the kid*
 - or
 - (d) *DNA*
- d. In New York, an unacknowledged nonmarital child can recover damages for:
Wrongful death and workers comp

B. Adoption

1. Who can adopt?

Any single adult – married couple

a. Minors:

(1) The general rule: cannot adopt

(2) But minor spouses can adopt.

- 2. New York courts have refused to allow adoptions where the parties did not intend to have a parent-child relationship but intended that the adoption be utilized in place of a marriage, will, or business contract.
- 3. In any adoption proceeding, the court must be satisfied about the best interest of the child

4. Consent:

- a. If the child is under 18, consent is required of:
 - (1) both parents or the surviving parent
 - (2) mother of non marital

- (3) ; *person or agency*
and
- (4) in the court discretion

b. The natural mother may revoke her consent to an adoption.

5. **Notice**

a. Notice must be given to:
a person whose consent is required

b. The notice must contain:
time date place purpose

c. The notice must inform recipient:
Constitutes a denial in the interest in the child

6. Once a child is adopted, what happens?

All rights with the biological family is terminated

C. Termination of Parental Rights

- 1. The preference for custody to lie with the natural parents may be overcome by "extraordinary circumstances," including:
 - a. *abandonment for 6 months or more*
 - b. *permenant neglect*
 - c. *severe or repeated abuse*
 - and
 - d. *mental illness rendering the P unfit*
- 2. If such "extraordinary circumstances" are found to exist:
Best interest of the child will control

BAR EXAM APPLICATION

Question 3

A husband and wife had a baby. Both parents worked full-time, and the maternal grandmother provided child-care. The baby frequently spent the night at her grandmother's home, and was very attached to her grandmother. When the child was three years old, her mother died. One year later, her father remarried. The grandmother continued to provide child-care for the child, and the child frequently spent the night at her grandmother's home. The father's new wife, however, did not like the way the grandmother criticized her for being excessively strict with the child, and insisted that the father cut off all contact with the grandmother, which he did. Fearing that the new wife was alienating the child from her maternal family, the grandmother sued for custody of the child.

What is the likely result?

Unless the father is unfit