Family Law Outline

I. Introduction

II. Entering Marriage

*****LICENSE and CEREMONY. BUT, courts are generally forgiving.

A. Minimum Age

- Usually State Statute, otherwise common law, either way 18 unless child gets parental permission AND COURT Permission (to prevent abuse or a marriage that is not in the child’s best interest).
- 16 or 17 (depending on the state) can get a waiver from the Court when parents wont consent.
- Inconsistency among the states. North Carolina relaxes law on 16-year-olds, while New Jersey is wearier of child abuse.
- You can ratify a marriage that was made under aged if you live with the person past the age of majority.

B. Consent

- Incest Prohibition: The difference among the states, cousins, some states allow second cousins, others do not, none allow first cousins. Any attempt is a void marriage.

- Consent Requirement:
  - CAPACITY—minimal standard, ability to comprehend what a marriage is. You can temporarily not have the capacity at the time of the marriage, but you can go back and satisfy it later, AND
  - ACTUALLY CONSENT—look to capacity, the rulings are very fact sensitive.

- Actual Consent: That means the parties cannot be under duress, joking, or trick each other through fraud—regarding the “essentials of marriage,” which vary by state.
  - YES ESSENTIALS
    - Misrepresentations about fertility
    - Lies about willingness to have sex.
    - Lies about willingness to have children.
    - Lies about religion.
  - NOT ESSENTIALS
    - Lies about money.
    - Statutes in the community.
    - Violence (history)—BUT courts will look at whether or not a reasonable person would have still married even if they knew the lie going into marriage…. So courts differed greatly.

- Void Marriages: Marriages that offend very strong public polices; because of the state’s overriding policy objection, such marriages are considered to be absolutely void even
without a request for annulment (void ab initio). So offensive to public policy that it never existed. Thus, divorce law does not apply.

- **Voidable Marriages**: marriages, by contract, that offend less strident public polices relating to marriage formation. A voidable marriages is considered legally valid unless and until one arty goes to court to have it annulled. You can sober up and validate the marriage.

  → Underage, lacks physical capacity, or was induced by fraud or duress, but remember that the lines between void and voidable are getting fuzzy due to bad lawyering.

- **Mental Capacity**: Courts have held that to give valid consent to a marriage, a party must be capable of “understanding the rights, duties, and responsibilities of marriage at the time of the marriage contract.”

  → A party might lose mental capacity temporarily “because of the influence of alcohol, drugs or other incapacitating substances.”

  → A party who enters marriage without capacity to consent but later regains mental competence can then validate the marriage by ratifying the decision to marry.

- **Mutual Assent**: to effect a valid marriage, competent parties must demonstrate their mutual assent to be married. With mixed success, parties sometimes seek to avoid an attempted marriage by claiming that it was undertaken in jest or without a serious thought.
  - Britney Spears’ 55-hour marriage annulled.
  - But, there is a Georgia case from 1930 where the Court held that since there was no fraud, and even thought it was all a joke, it had to be enforce.

- **Fraudulent Inducement**: A party’s consent to marriage is legally ineffective if induced by fraud. However, the fraud must relate to “the essence of the marriage.” The essentials of the marriage, vary from case to case, depending upon the values and priorities of the individuals involved. This understanding is similar o the way courts define “marital fraud” under the common law of torts and some federal criminal and securities law.

  → A fact is material if it would likely affect the conduct of a reasonable person concerning the transaction in question.

  → Other jurisdictions, however, have defined “the essentials of marriage” in narrower terms. Where a man falsely led his fiancée to believe that he was “a well educated millionaire with expertise in real-estate and finance,” for example, a CA appellate court held that “the fraud . . . as a matter of law, was not of the type that constitutes an adequate basis for granting an annulment.” ALSO, character, health, wealth, and external conditions do not consist Ute such fraud to annul a marriage.

C. **Formalities**

- **License**

- **Solemnization**—In MI, no particular form, but they most solemnize before an official leader of ceremony, and witness that they take each other as husband and wife. Some states allow proxy. Who can officiate?? A judge, public official, tribal authority, religious authority. LOTS OF DEFFERENCE TO PRIVATE DECISION MAKING.
Applications For Marriages Usually Require...

1. The full names of the parties and the sex of each party;
2. Their post office addresses and county and state of residence;
3. Their full ages
4. If either party has previously been married, the party’s married name, and the date, place and court in which the marriage was dissolved or annulled or the date and place of the death of the former spouse;
5. If either party is a minor, the name and address of the minor’s parents or guardian;
6. Whether the parties are related to each other, and, if so, their relationship;
7. Address of the bride and groom after the marriage to which the local registrar shall send a certified copy of the marriage certificate;
8. The full names the parties will have after marriage and the parties’ SSID.

**Persad v. Balram (2001):** π, wife, sought annulment, or if the parties were married, a divorce. They had a huge Hindu marriage or “prayer” ceremony with 150 guests where they exchanged vows and rings. It was a 2-hour ceremony performed by Mr. Persad, who was ordained Hindu priest, but was not licensed in the state to officiate marriages. **Were the parties married?? YES! Why? “If it walks like a duck, looks like a duck, sounds like a duck, then it is a duck.”** It had all of the factors of a marriage, and even though the priest was not licensed, the presumption that they were married is too much for the π to overcome with evidence that they were never married.

- They were old enough, properly consented, and the parties clearly intended to marry, so even though they failed to obtain the license, their marriage is not invalid.
- ALSO, as long as the parties believed that the person officiating is properly licensed, then the fact that they are not officially licensed it will not invalidate the marriage.
- Ceremony is what truly shows the intent of the parties, the law is forgiving of people who do not have a proper license, but NOT FORGIVING when there is no ceremony.

***Presumption in the law that the marriage is valid. So, the longer that the parties are married, the stronger the presumption is.***

- **Qualified Officiate:** Anyone can become one—Universal Life Church sells minister hood for a small price, then you just pay the state for a license.
- **Marriage By Proxy:** some states (MT) allow this for people, usually military people who cannot be at their weddings.
- **Licensing Defects:** Some states do strictly require a marriage license.
- **Premarital Waiting Periods and Counseling:** Most states require a short waiting period (typically 72 hours) between the issuance of a marriage license and the marriage ceremony. Some states will waive that if the couple has already gone through qualified counseling.
• **Registration:** The official obtains the license, sees to it being filled out, and sees that it is properly submitted with the state.

• **Health Screening:** At one time, states scrutinized persons' health to determine their suitability for marriage. BUT TODAY we do not force parties to do that.

• **Annulment:** Equitable Action, a limit is unclean hands, annulment is used to void the marriage in order to prevent the economic consequences of divorce.

D. **Common Law Marriage:** No solemnization or license and ... *(only allowed in 12 states).* EXTREMELY FACT SENSITIVE. General rule is that if you get the marriage in one of the 12 states that allow it then it is enforceable in the rest of the states.

- (1) Living together (not completely necessary, but helps prove 2), and
- (2) Holding themselves out as married with *(MOST IMPORTANT)*
- (3) The mutual intention to be married.

- Common law marriage is a present agreement. BUT present agreement is NEVER enough.
  - Opportunity for insurance fraud.
  - Divorce—disputes as to the marriage.
  - Divorce issue, as to secret common law marriages when someone tries to obtain divorce.

- Agreement (present) that we are husband and wife right now. AND, that they hold each other out to the public as husband and wife.
  - COURTS infer the first part based upon the second part (if they hold each other out, then we can assume that they had a present agreement to e husband and wife).
  - Also, no bigamy. If a party has a real marriage, then they cannot have a common law marriage.

- **Present Agreement to Marry:** Some jurisdictions require a strong proof of the parties’ mutual interactions, out of concern for the danger of fraudulent or unsubstantiated claims, most demand that the elements of common-law marriage be proven by “clear and convincing evidence.”

- **Holding out as Married:** In addition to capacity to marry and present agreement, states also require evidence that the parties “held themselves out,” or established a community “reputation,” as a married couple.

  ***Typically understanding of neighbors, business associates, and family members, filing statues on tax returns, real estate deeds or leases, loan applications, and other official docents, use of common names, and intermingling of financial affairs.***

  **** *In Re Estate of Hunsaker* (1998) π, wife, sought to prove her common law marriage in order to inherit from her deceased husband. The relationship met all three elements.

  1. Was met, because Anne was divorced from her prior husband prior to her common law marriage with Maurice, and Maurice was not married.

  2. Was also met, because Anne had an engagement ring and wedding band given to her by Maurice, they lived together, and they told people that they were married, and they had the grandfather clock etc.
3. Was met, they lived together for 9-years, and through public repute, the sign in the front of the house and the answering machine, and they called the house they lived in together in their home. Maurice’s brother Richard stated that Anne was Marcie’s “surviving spouse.”

***Renchaw v. Heckler NY does not have common law marriage, but they spent 8 overnights in PA, and PA has common law marriage, so they were married for SSID.

***COMPARED to Putative Spouse, which is not a spouse at all.

- **Rationales to NOT recognize Common Law Marriage:**
  - Debases marriage. Encourages vic.
  - We need to be free from marriage, so that people who only want to cohabitate can.
  - Difficult to predict how a court will rule—bad record keeping, difficult record keeping.
  - More Difficult to litigate.

- **Rationales to HAVE Common Law Marriage:**
  - Why not, let them have their legitimacy without forcing them to go through with the ceremony that they do not want to have.
  - Benefits should not be denied just because they do not have proper paperwork.
  - Huge difference in the economic impact of what happens upon death of a person in a long term relationship—issues of inheritance.

**E. Putative Spouses:** Provides an equitable remedy for an innocent spouse who has relied in good faith on a mistaken belief that in the validity of the marriage. **However, it does not validate the defective marriage.** The attempted marriage remains void, but the doctrine provides for relief that may closely resemble the relief the party would have received if the attempted marriage had ended in divorce. **Burden on the party trying to prove it.** Pure heart empty head, good faith

****If the jurisdiction does not have this, THEN the parties are left to whatever relief the jurisdiction affords cohabitating, non-marital partners (like Palimony in the Marvin v. Marvin case!!! SEE BELOW).

*Williams v. Williams* (2004) Richard and Marcie got married. Marcie thought she was fully divorced from her previous husband John when she did. Years later it was revealed that she was actually still married to John. Richard wants an annulment. Richard wins his annulment because the marriage was always void since bigamy is illegal. However, Marcie can recover under the Putative Spouse doctrine for property division (but not alimony) because... **Under the putative spouse doctrine, when a marriage is legally void, the civil effects of a legal marriage flow to the parties who contracted to marry in good faith.**

***TWO ELEMENTS (putative spouse): It is an equitable doctrine, you are not the legal spouse of the other person, but this does allow the Court to give equity by analogizing to the marriage and divorce proceedings of the court.

(1) A proper marriage ceremony was performed, and
One or both of the parties had a good-faith belief that there was no impediment to the marriage and the marriage was valid and proper “good faith” defined as “honest and reasonable belief that the marriage was valid at the time of the ceremony.” Good faith is presumed.

**F. Same Sex Marriage:** There is a fundamental right to marriage recognized by the Supreme Court in *Loving v. Virginia* (1968)—interracial marriage case; *Zablocki v. Redhail* (1978)—fathers who are in child support arrears; *Turner v. Safley* (1987)—People in prison; and it cannot be deprived to people of the same sex—*Obergefell v. Hodges* (2015) which looked at 4 principles and traditions.

1. The right to personal choice regarding marriage is inherent in the concept of individual autonomy.
2. The right to marry is fundamental because it supports a two-person union unlike any other in its importance.
3. The right to marry safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.
4. The right to marriage is a keystone of our social order.

**Obergefell v. Hodges** (2015) Court held that (1) state laws prohibiting gay marriage are unconstitutional, and (2) that states must respect gay marriages of all states (strikes down DOMA).

**G. Polygamy:** No state authorizes polygamy. But, all states allow you to divorce and remarry as many times as you want, which, may allow you to do so anyway. We have a lot of difficulty to justify the limits on polygamy.

**III. Social & Economic Rights & Obligations**

**A. Legal Status and Gender**

- **Blackstone (1765):** “By marriage, the husband and wife were one person in law: that is, they very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband.”

**B. Family Names:** NOT automatic upon marriage, while children generally receive their father’s last name (even required in some jurisdictions). Court’s will only change a non-marital child’s name if it is in the child’s best interest.

**C. Work and Family:** Title VII of the 1964 civil rights act protects women in the workplace, while the ERA failed, RGB brought cases to the Supreme Court creating intermediate scrutiny for sex discrimination.

- Women still earn less than men.
- Only 12% of public believes a mother should work full time while raising a child, while 40% say part time work is best, and 42% say no work is best.
• FMLA of 1993 seeks to make caregiving a gender neutral topic.
• In 1970 only 4% of women out earned their husbands, in 2012 it was 22%
• PROBLEM: when all of these women go from their unpaid caregiving roles, back into a paid position the workforce, what happens to all of the caregiving roles that they used to have??? WHO IS DOING THAT WORK? Women... still.

D. Interposal Support Obligations:

• Traditional View: The Necessities Doctrine—that the husband had a duty to support his wife and the wife had a responsibly to take care of domestic services. The doctrine allows the wife to buy necessities from a third party using her husband’s credit. If the husband refused to pay, the creditor could use the husband for the debt. The traditional necessaries doctrine provided merchants and other creditors with a guarantee that they could collect payment for goods or services purchased by a wife.
• Today: the doctrine is (1) not enforceable when the party being sued cannot pay, and (2) is gender neutral—IL law: husband and wife are joint and severable liable, NV law: The wife is only responsible when the husband has no property. SEPERATION exception—desertion does not need to provide necessities.

***McGuire v. McGuire (1953) π, wife, is suing her stingy husband for not providing her with various necessities despite his ability to pay for them. But because the couple is still living together, the court refused to interfere with the marriage. Thus, if you really can’t stand it, then you have to divorce or separate from the spouse.

E. Spousal Property Distribution Upon Death

• In community property states, regardless of what the will provides, the surviving spouse is entitled to one-half of the property accumulated during the marriage.
• In common law states, widow dower, the surviving spouse is entitled to a life interest in one-third of real property, or curtesy, through which a widower acquired a life interest in all of his wife’s real property if children were born into the marriage.

IV. Divorce

PROMISES for Historical Reference
(1) Inescapable ⇒
(2) Escapable IF good reason (fault) $$ consequences; ⇒
(3) Escapable if BOTH want out (any/no reason) $$ consequences; ⇒
(4) Escapable if ONE wants out (any/no reason) $$ consequences; ⇒
(5) Escapable if ONE wants out (any/no reason) NO $$ Consequences.

A. Fault Based Grounds: Adultery, desertion, physical cruelty, mental cruelty, indignities.
⇒Vindicate the righteous and punish the wicked.
1. **Physical Cruelty:** required acts of bodily harm or threats of bodily harm, substantial enough to be considered intolerable.

***Das v. Das (2000)*** “A Court of Equity should not hesitate to grant relief, especially where the facts indicate a probability that violence might be repeated.”

2. **Mental Cruelty:** Sometimes called “indignities” requires a showing of “habitual, continuous, permanent and plain manifestation of settled the alienation, and estrangement on the part of one spouse, sufficient to render the condition of the other intolerable.

3. **Adultery:** The oldest of all fault grounds is straightforward. All forms of sexual contact between person of any gender—not just intercourse—generally qualify.

***ALLOWED TO USE CIRCUMSTANTIAL EVIDENCE.***

*Spence v. Spence* (2005) Wife accuses husband of sleeping with the neighbor. **Wife thus has burden of proof** [(by clear and convincing evidence)](https://www.law.cornell.edu/wex/clear_and_convincing_evidence). **Adultery:** Must prove adulterous inclination and a reasonable opportunity to satisfy that inclination. The fact that someone saw what they thought to be the husband’s car next to the neighbor’s all night, and saw him leaving neighbor’s in a robe, or saw him feeding the ducks with her etc. was not enough to satisfy the requirement because they both insisted that they have a close friendship and there is no evidence to suggest that there is anything more than the close friendship that they claim to have. **SAME CASE,** wife also accuses husband of **Habitual, Cruel and Inhuman Treatment:** which is proven by a preponderance of the credible evidence…. Only evidence was bickering over family finances. **Mere arguments are not enough.**

4. **Desertion:** Typically defined as the willful abandonment of cohabitation for a sufficient period of time, usually lasting at least one year. The other requisite element is intent by the offending spouse to abandon. Some jurisdiction even allowed it when the spouses are still living in the same home (but refusing to have sex, and living a separate life). **Constructive Desertion (abandonment),** by making the marital home so intolerable, that a divorce had to happen. But, fairly intolerable is not easily defined.

**DEFENSES TO FAULT BASED CLAIMS!!!**

1. **Recrimination:** Affirmative defense predicated on the claim that both spouses were guilty of off-setting faults.
2. **Provocation:** Available to a respondent who claims his own faulty conduct was reasonably provoked by the petitioner’s. The petitioner’s provoking conduct need not be so bad that it qualifies as a free-standing fault ground of its own. But the provoking conduct must be bad enough to make the respondent’s faulty reaction proportionate to the provocation.
3. **Connivance:** (similar to the entrapment defense in criminal law) bars relief if the party seeking the divorce is found to have participated in manufacturing the fault upon which
divorce is sought the typical scenario is where one spouse engineers the other’s adultery by arranging and encouraging a tryst with another partner.

4. **Condonation**: The fault ground raised in the divorce has already been forgiven by the respondent and therefore cannot be invoked to dissolve the marriage. The slate has already been wiped clean by knowing forgiving and resuming normal spousal activity.

***In re Marriage of Hightower (2005)*** The wife found out about the adultery in 1995-98 counseling. Therefore, she cannot use it as a fault ground in a divorce in 2000 because she went back to a normal spousal relationship with her husband. HOWEVER, if the husband commits the adultery again, then it he loses condonation. ALSO, it was VOLUNTARY.

5. **Collusion**: Spouses conspire to manufacture grounds for a divorce. Court can bring this up on its own, but no need for it today because there is no-fault divorce (this goes back to pre no-fault when the parties had to come up with an excuse to get divorced).

B. **No-Fault Grounds**
   - No-fault divorce requires a judicial finding that the marriage is “irretrievably broke” and the satisfaction of a waiting period while living “separate and apart.”
   - In most States this is an alternative to fault-based divorce.
   - In 18 states, no-fault is the ONLY form of divorce.
   - **Pure No-Fault**: Allows unilateral no-fault divorce, without a substantial waiting period.
   - **Hedged (limited) No-Fault**: Substantial waiting period for unilateral No-fault, Mutual No-Fault might not be long waiting, usually short. Still has the fault option for parties that want it.

***Controversy is over unilateral no-fault. States that don’t want it, fight it by placing a substantial waiting period upon the parties in order to obtain it.***

- **EXCLUSIVE NO FAULT REGIMES:**
  - **UMDA**: 6-month separation, or serious martial discord (one or both parties).
    - Requires the parties to live apart for 60 days
    - Requires the CORUT to make a finding of irrevocable differences BUT it does this by having BOTH party state this under oath... If one party denies this, then the Court considers all relevant factors, including the circumstances that gave rise to filing the petition and the prospect of reconciliation, and shall make a finding whether the marriage is irretrievably broke; or continue the matter for further hearing not fewer than 30 nor more than 60 days later or as soon thereafter as the matter may be reached on the Court’s calendar, and may suggest to the parties that they seek counseling.
      - Irretrievable breakdown = No reasonable prospect of reconciliation.

- **Mixed Fault/No-Fault regimes—Pennsylvania**
Still follows UMDA’s recommendation, but added back in fault based grounds for a fault based alternative.
Still have unilateral no fault, but instead of waiting time is 2-years.
Also, for the 6 fault based grounds, there is no waiting time.
Mutual no-fault is 90 days instead of 2-years.

***Frey v. Frey (2003)*** Pennsylvania couple is divorcing. Husband claims that separation starts on August 6, 1999 when he stopped sleeping in the same room as his wife and lived a separate life, wife claims that separation did not start until October 2001 when husband moved out of house. Divorce Code defines “separate and apart” as “complete cessation of any and all cohabitation, whether living in the same residence or not.” Thus, the phrase “separate and apart” means separate lives NOT separate roofs. Regardless of if they’re still having any sex, the fact is that they are living separate lives.

***But some sates do require separate dwellings.***

- **Intention to end the Marriage:** Even where the parties indisputably live “apart,” they may not be considered “separated” unless their removal is accompanied by a subjective intention to dissolve their marriage. “The separation must be ‘coupled with an intention on the part of at least one of the parties to live separate and apart permanently, and this intention must be shown to have been present at the beginning’ of the separation period.”

- **Factors in determining the parties’ intention to separate:** determination of whether and when the parties have lived separate and apart without cohabitation is a fact-based inquiry, requiring examination for all the circumstances before the Court.” Outcome often turns on careful attention to their interaction, such as whether they continued to attend social outings together, or continued to act jointly in financial matters.

- **Effect of Reconciliation attempts on the Separation Period:** Mere Casual cohabitation between the parties, after the separation, unaccompanied by resumption of normal married life. . . is not sufficient to show a reconciliation or an agreement to live and cohabit together again on a permanent basis as husband and wife.

- **Irretrievable Breakdown:** Either or both of the spouses are unable or unwilling to cohabit and there are no prospects for reconciliation.

Richter v. Richter (2001) Husband objects to wife’s attempt to dissolve the divorce claiming that (1) there is no irrevocable breakdown, and that (2) the statute is unconstitutionally impinging on the right of the parties to contract (which he believes marriage to be). Both of those assumptions are wrong, irrevocable breakdown only requires one spouse, and a marriage is not a contract in the traditional sense of the law—it does not for property or object of value, nor does it confer upon one rights which may be enforced in a court of law. This is divorce on demand (unilateral no fault).
• **Arguments Against No-Fault Divorce**: Creates divorce on demand, which increases divorce rate, and has not solved either problems that it set out to solve.
  
  (1) No-fault would reduce conflict, as spouses would no longer be forced to assign legal blame for the marriage’s end, and
  
  (2) No-fault would enhance respect for the law, as couples longing for a divorce would no longer have to commit perjury, lodge false accusations of adultery to get one.

• **Arguments for Keeping No-Fault Divorce**: Fault comes too late in a bad marriage, by that point there has been damage to the parties that did not need to happen.

• **Covenant Marriage**: Louisiana amended its marriage laws to give couples the choice of entering into a standard marriage with usual rules, or a “covenant marriage” subject to a different and more restrictive set or rules for dissolution—proof of specific fault or satisfaction of an extended separation period (2-years). BUT no one does it (3%).

C. **Annulment**: A declaration recognizing that the marriage attempted by the parties never came into existence at all because of a fatal impediment at the time of formation.

• **Grounds for Annulment**: to obtain an annulment, petitioner must show that the marriage suffers from a serious defect dating back to its inception rendering it “void” or “voidable.”
  
  ➔ **VOID**: Violate core marriage prohibitions, like bigamy or polygamy.
  
  ➔ **VOIDABLE**: Offend somewhat less stringent public polices, typically including the prohibitions involving person who marry too young, without the proper mental or physical capacity, or under the inducement of fraud.

• **Effects of Annulment**: An annulment clears the way for the parties to marry other persons, but traditionally could also result in very harsh consequences. No economic or social protections that come with marriage. Could leave a destitute and defrauded wife with no claim for alimony. A child come become retroactively illegitimate.
  
  ➔ BUT, courts evolved to allow children to remain legitimate statues,
  
  ➔ ESTOPPEL could impose some of the economic consequences of divorce
  
  ➔ The Putative Spouse Doctrine Mitigates these economic consequences.

_Splawn v. Splawn_ (1993) Wife discovers husband was technically married when he married her (although he did not know that or commit bigamy on purpose). Family court order equitable distribution of assets, wife does not think that is appropriate due to the bigamy. But the Court holds that it can do that since they did not find it necessary to punish the husband for the accident. In fact, she knew for years without acting (it was only wanting the divorce that brought this action).

D. **Legal Separation**: “Limited Divorce” In some states today, divorce from bed and board has been supplanted by or exists alongside the action for “separate maintenance.” Both actions are essentially similar in that they seek to formalize marital property and support the rights where a married couple intends to remain married while living separate and apart. **KEY—you are still married. AND** in some states there is a distinction that there is
a legal separation when the parties file for divorce and the time before the divorce decree is entered.

V. **Division of Marital Property at Dissolution**

**ANALYSIS:**

1. **Identify Property.** What property is available for the souses to divide? [?]
2. **Value the property.** ($)
3. **Distribute the Property.** (^)

- **Identification:** What is in the pot?? All property acquired during the marriage EXCEPT gift or inheritance. S, separate property acquired before the marriage is excluded from the marital distribution, same with gifts, and inheritance.
- **Value:** Depending on how much stuff there is to divide, you may need experts, and it may have to be sold.
- **Distribute:**
  - **Community Property States:** have to divide own the middle. They have their half interest in all of the community properties. BUT, some states give judges more discretion, though **unequitable distribution** (fair). Default (presumption) is that fair means equal. **8 States from the French/Spanish Systems...** most notably CA and TX.
    - **During Marriage:** really strong sharing scheme. All property acquired by either spouse, except property acquired by gift or inheritance is community marital property.
    - **Labor is done on behalf of BOTH:** Individual labor is on the behalf of the community marriage. Individual contributions are seen as mutual, co-contributions.
    - **At divorce:** still the same identification of property purchased during the marriage, everything in the marriage except gifts and inheritance are going to be identified for division.
  - **Common Law States:** Will always be the equitable distribution (fair). Default (presumption) is that fair means equal. THIS IS DIFFERENT THAN COMMUNITY PROPERTY, because what is going to be fair here, is not dividing an equal interest in the community property, but rather the martial property. This is effectively the same, but fair is something different in common law jurisdictions, because is it fair to take away someone’s house after thy have had it in their name for 30 years???
    - **During Marriage:** Ownership is determined by TITLE. There is individual property. The wife had a right to coverture, and the husband had a right to title of everything.
    - **At Divorce:** No Common law state still applies title theory at divorce.
  - **Marital Property:** Majority states look to what he community property states do during divorce, but they call it martial property. Only put things into the pot that belong there, like the added value to your home during the marriage.
Hotchpot “Kitchen Sink” Cases: EVERYTHING goes into the pot (because you throw everything and the kitchen sink at it). Burden shifting scheme, it is assumed everything is marital property unless you can prove otherwise and take it out of the pot.

**ALI is most similar to an Equitable Distribution Regime.**

**Property can go from separate property to marital property (transmuted). It is even possible to go the other way (as a gift).**

However, EXCHANGE PRINCIPAL: there is no transmutation if you take separate property and you exchange it for new property that occurs during the same marriage. **IN THE ALI.**

- Transmutation: 2 ways
  1. **Commingling:** so that the separate property is untraceable. Just as a practical matter, you cannot identify the separate property.
  2. **Gift:** it could be argued that you did this on purpose to donate your separate property to the marital property pot.

- Must have express intent
- Could also happen by taking the separate property, and then put joint title on it.
- Commingling, traceable or not but there needs to be some other evidence that you did it with the intent to make a gift.

Most couples do not have assets to divide…. Especially the young and minorities.

- PROPERTY—one-time division of RIGHTS to the property (actually receiving it later). Civil order that can be re-litigated if there were acts of fraud.

- ALIMONY—maintenance, spousal support. PAYMENTS out of FUTURE income, modifiable. Not dischargeable in bankruptcy and it is taxable. Is not taxable for the payer, but is taxable upon the payee.

- CHILD SUPPORT—for children rather than the spouses. Dischargeable when the child reaches an age. Taxable upon the payer, not taxable upon the payee.

**A. Charactering Assets as Martial or Separate**

Nack v. Edwards Nack (2007) Husband wanted all of his assets to be classified as non-marital (cars, stock, investments, and farm equipment). The parties had a prenuptial agreement that made a list of private assets like one his cars, and specified that there would be no creation of marital property. However, the Court held that his stock was transmuted to marital property when it was comingled with his wife in their joint accounts, and even though he traced it back the court did not agree. **Similarly, with the other assets, the Court held that putting the language into the prenuptial agreement (that they were not to make marital property) is not**
good enough, the parties have to live their lives that way too, and they did not live their lives as if they had all separate property, thus it is not enforceable (that provision).

- **Tracing:** If you can trace commingled property back to you, then it is NOT marital. But some courts reject this ability.

  ***In most jurisdictions, commingling and transmutation share the underlying rational that merging separate property into joint property “creates a rebuttable presumption of a gift to the marital estate.”***

**B. Appreciation of Separate Property During Marriage:** Most States distinguish between ownership of separate property and ownership of any appreciation in the value of the separate property during the marriage.

*Middendorf v. Middendorf* (1998) Wife argues that she should receive half of the increased value of husband’s business that he co-owns with his brother from the divorce. Husband argues that whatever increase in the value of the business (the half that he owns) is strictly his own labor and thus separate property. Court holds that a passive increase in value (like inflation, or owning something that you have no control over like stock) then it is NOT marital, BUT BUT BUT if the increase in value is from your labor (business skills) then it is marital. This was marital.

***THIS IS THE MAJORITY RULE, minority rule is that passive or active labor becomes marital property.***

***ALI principal is that everything becomes martial property over time because you being to rely on it being there (like the house, or a retirement fund).***

**C. Contribution of Homemakers:** In the past you could not make a value for this because homemaking is a gift. BUT marital labor makes homemaking and workforce labor equally marital.

**D. The New Property:**

- Blackstone defined property as the right to use, control and disposition which one may lawfully exercise over particular things or objects.
- Some states have gone to a broader approach, where they consider future rights... every valuable right and interest, corporeal or incorporeal, tangible or intangible.
- **How about Professional Licenses, Degrees, and Earning Capacity????**

*O’Brien v. O’Brien* (1985) Husband and wife were teachers, husband decided to go back to school to become an MD, wife supported them during this time (and had to give up the opportunity to get a certification). She covered 76% of those costs, and then after becoming a doctor he wants a divorce. Court awards her 40% of the increased value in her husband for having his MD. WHY??? Because she could not get child support (no children), no alimony (no need), and no property
distribution (they didn’t have anything). BUT that would not be fair since she put all that money and opportunity cost into him while he was in school.

***THIS CASE DOES NOT say that medical licenses are property, let alone marital property. HOWEVER, the wife represents investment in the economic partnership of the marriage and that the produce of the party’s joint efforts, the professional license, should be considered marital property. ****NY IS THE ONLY STATES THAT SAYS THIS!!!

REMEMBER, in a property distribution case you must:

1. Get the payer to get life insurance with the payee as the beneficiary, and
2. Secure the obligation, something in the decree that if the husband does not pay the wife can take his car, house, boat, etc.

WHY?? BECAUSE this is dischargeable in a bankruptcy.

***Key: if you have a right to property, that came up during the marriage, then you have a right to the distribution in divorce.

- **Deferred Compensation:** Even though you have not received it yet, you will still get it later when it comes about. BUT BUT BUT, be careful, if you only get part of the pension rights before the marriage, then it won’t all be marital property.

- **Contingent:** For example, you don’t know if you’re going to get a payout or not, but you do know that you have a right to a percentage of something someday possibly is something that can become marital property. DOES NOT NEED TO BE DISTRIBUTED AT DIVORCE, just the rights.

- **Can a Pension be marital property??** YES, get a QDRO—ERISA tries to protect an employees pension, by restricting with an anti-assignment clause. But a Qualified Domestic Relations Order (QDRO) will make the pension trust fund pay out to the payee. = TWO CHECKS (avoid collection problems).

  → Government employees have a special version.

- **SSID.** At least 10 years, and up to half, usually an equalization.

- **Good Will in a Business:** The more that the business is worth, in a fire sale, what is it worth in addition to the stuff inside. Minority rule is that no such thing exists.

**E. Equitable Distribution:** distribution of property upon the termination of a marriage should be treated as nearly as possible, like the distribution of assets incident to the dissolution of a partnership (UMDA 1970). TWO FACTOS:

1. Not use fault based grounds.
2. Be fair (because need and contribution are contradictory).

*Ketterle v. Ketterle* (2004) In a Kitchen Sink Jurisdiction, wife was divorcing her Nobel prize winning husband. Wife received more than half of the property because husband has huge future earning potential (including huge contributions that will be made to his retirement). Wife is left with no vocational skills and mental illness. So, because the husband will have much more wealth in the near future, it is fair to give the wife more than half of the wealth now.
***All Sates allow you to look back into economic fault (usually capped at the last year). Some states allow you to look back at marital fault.

F. **Debts and Bankruptcy**—treat like an asset, and allocate it. EXCEPT student loans.

- **Dissipation of Assets**: If a spouse that wastes marital funds, that *can* be a factor. But in a long marriage, this is difficult (so we should put a cap on it—ALI suggestion). WHY?? Because it is too messy to look back 20 years about their spending habits, AND if you really didn’t like it then you should have divorced them sooner.
- **Fraud**: Like a spouse hiding assets to avoid destruction. It will always reopen the case. Lawyers can save their butts by putting in a clause that all property found later will just be split 50/50.
- **What happens when you’re a cosigner on an asset that goes to the other spouse??** Both are still liable to the creditor, so if your former spouse should have been making payments, and now your credit is hit, you have an action against your former spouse but not that’s it. Creditor still hurts you.
- **What about marital debts??** General Rule—Community Property States: All or virtually all, of the community property of married people is available for creditors of either spouse to seize in order to satisfy any debt incurred by either spouse during the marriage. Obviously not true for common law property states.
- **Debts belong to both, generally, except student loans**

*Phegley v. Phegley* (2011) Husband tries to discharge his support obligation to his wife in bankruptcy because it is maintenance and not child support. However the court holds that spousal support is not dischargeable in bankruptcy (just like child support).

VI. **Alimony**

A. **Overview**

Reform: ALI—anti-marital fault position.
1. Presumption for Alimony if there is both: minimum length of marriage, and minimum disparity. And then there is a formula based upon these factors. (half the number of years and a percent of the difference).
2. A series of presumptions—a common child with a minimum amount of time and a minimum disparity. Disparity times a percentage (based upon he past childcare period).
3. Earning Capacity loss. Fulfil a moral obligation, one spouse took on a parenting role, and deserves to be compensated.

B. **Justifications**
Partnership: Views marriage as analogous to a partnership, with an agreement to share profits, assets and debt, could proved a basis for income equalization. “When partnership contributions generate value, i.e., enhance the ability of the partnership to generate future income, a departing partner is entitle to a share of that value. Partners who elect to continue what was once a shared effort are thus required to compensate a departing partner.

C. Eligibility and Quantification

Final Awards:
(1) **Rehabilitative Alimony**: “transitional” or “short term” is provided for a define period while the recipient seeks to become “self-supporting.” The period varies, depending on the type of “rehabilitation” the recipient needs, such as education or training.

(2) **Reimbursement Alimony**: the spouse whose financial contributions during the marriage directly enhanced the other spouse’s earning capacity is awarded compensation. Usually only available where “one party supported the other through an advanced education, anticipating participation in the fruits of the earning capacity generate by that education.

(3) **Bridge-the-gap (or limited-duration) alimony**: FEW STATES, “provides necessary funds to ‘bridge the pay’ between married and single status—that is, to meet identifiable, short-term, support needs that are not expressly rehabilitative in nature.”

(4) **Permanent, Indefinite or Periodic Alimony**: The spouse receives support for an undefined duration, awarded in periodic installments, to take effect from the final order of dissolution until either party’s death or the recipient’s remarriage. Courts award this type of payment after determining that the dependent spouse, because of age, illness or disability, “cannot reasonably be expected” to become self-supporting, or the resulting difference in the parties’ respective standards of living would be “unconscionably disparate.”

(5) **“Lump-sum” alimony**: Single payment. In non-litigious divorces, often an attractive option, permitting immediate financial settlement. Sometimes make rehabilitative (like paying for someone’s college education) due immediately in a lump sum. OR sometimes when a periodic support just isn’t possible.

*Parisien v. Parisien* (2010) Wife took the larger share of the marital property in the divorce, had a job, etc. Yet was awarded permanent alimony. Husband argues that this is not fair. However, court upholds the decision because the wife has a disability and she does not make as much as he does nor will she be able to save for retirement (she has less workable years left because of her condition).

D. Forms

- Types of Alimony **TWO BIG CATEGORIES**
(1) **Indefinite-term**: no definition of term, but never permanent, because it has the ability to end (freely modifiable) on many different factors (remarriage, death, sometimes mere cohabitation, not to mention modification based upon unexpected changes).

(2) **Fixed-Term**: Will us how long, and it not always but generally have a purpose.
   - **Pendente lite**: Usually during the marriage, in-between the filing and the decree.
   - **Rehabilitative Alimony**: How long is the duration of the thing that they’re doing (like school, or something), that is how long they get alimony for.
   - **Reimbursement Alimony**: “you put your spouse through medical school, and now you are getting divorced right after, that does not seem fair, but there is no property to distribute, so here you go.”
   - **Other Alimony**: The Court will think that it is the fair thing to do, what is the reason? There is no reason, the Court is free to do whatever, the idea is that it might take some start up time to get back on his or her feet, some transition time, for an interim period.

***This broad discursion hampers the negotiations, because there is no shadow of the law with which to operate in.***

*In Re Marriage of Reynard (2003)* Wife scarified her career potential (she had a degree) to be a homemaker and support her husbands ambition (he ran for public office). But because she has no debts while her husband has the mortgage and all marital debts, the court did not give her alimony despite his incredibly larger income because they felt that she should become self supporting.

**E. Enforcement**

1. **Means of Enforcement**: The court that created the alimony agreement can retain jurisdiction over disputes. And can hold someone in contempt of court for not paying.
2. **Private Enforcement**: TWO MEHTUDS: (1) establish a separate trust for alimony awards, (2) requiring the payer spouse to obtain life insurance.
3. **Enforcement for Military Personnel**: MUST have a 10-year marriage to qualify, but the military will take the alimony portion of the paycheck and distribute it accordingly.
4. **Attachment of Wages**: Courts may also enforce an alimony award by attaching a portion of the payor’s earnings, just as it can attach wages for past due child support. If the employer fails to comply, it will be liable for contempt and may be forced to pay the withheld balance.

**F. Modification and Termination**

- Courts recognize the need for modification, but they also make clear that changes in financial situation or physical health do not by themselves guarantee a right to modification. Burden of proof to prove the change in circumstance was involuntary or in good faith.
- Death of either party will always end alimony.
• Remarriage does not matter who you marry (or what their income is) will end alimony in the USA (bad rational).
• Often, cohabitation will be seen as equivalent to remarriage (some states only if the cohabitation improves the economic situation of the payee spouse).

Martindale v. Martindale (2005) Mother wanted to modify alimony award to get an extension of her rehabilitative alimony because instead of going to work she is staying home with a child who developed a disability since the divorce. Court held for her.
Father makes three arguments.
1. Evidence showed that the Mother had rehabilitated herself, because she had become recertified to teach school again, and had taken a job at a clinic, and with the youngest in the First Grade, she could take on a full time position, as they agreed to do in the MDA. HOWEVER, she is unable to work due to the demands of the children, especially the unforeseeable learning disabilities. THUS, she reasonably cannot work 40 hour weeks.
2. Evidence shows that Mother’s alleged inability to rehabilitate herself was due to unforeseen circumstances, but the court should only award “upon a showing of a substantial and material change.” HOWEVER, it is reasonable to believe that the disabilities do cause a substantial and material change.
3. Father asserts that if Mother is not rehabilitated, it is because she did not make a reasonable attempt to rehabilitate herself.
   The Mother did take all necessary action to rehabilitate herself, including obtaining her teach license again, and if not for the need of the children for her to be home more often, would be working 40 hours/week.

Garcia v. Garcia (2002) UTAH. Ex wife begins cohabitating with another woman. Ex husband wins termination because the court determines that it is a homosexual relationship (even though the state does not allow homosexual marriage or condone homosexual sexual acts).

G. Taxation

• It is taxable!!! Deducted from the payor’s income tax, and added to the payee’s income tax.
• 1984, Congress clarified this...
  (1) Payments must be received under an order of divorce or “separation instrument,” which includes written separation agreements as well as court decrees of support.
  (2) Payments must be made in cash or the equivalent (i.e. alimony does not include a property award);
  (3) Payments must end at the payor’s death;
  (4) The parties cannot file a joint tax return; and
  (5) Payments cannot include child support.

• I.R.C. § 71 (2006)
**FIRST**, a “recapture rule,” designed to prevent frontloading of alimony payments, applies when payments in the first year exceed payments in subsequent years by a specific statutory amount ($15,000). The Rule requires “a recalculation and inclusion in income by the payor and deduction by the payee of previously paid alimony to the extent that the amount of such payments fails short of the amount of payments during a prior year by the specified amount…

**SECOND**, rules prevent spouses from disguising child support as alimony. If a payment characterized as alimony is reduced such as a child’s reaching a certain age, marrying, or leaving school, then such payment will be treated as child support.

- ***It is possible that the tax code ends up incentivizing couples to have larger alimony and lower child support or less property distribution.***

VII. **Child Support**

A. **Overview**—it takes about $235k to raise a child to 18. 17 million kids get child support in the USA (25% of all kids). 1996 reform cuts TNAF by placing more burden on child support.

B. **The Obligation**

- You have an obligation to all of your biological children, REGARDLESS of marital status.

*State ex Rel. Hermensmann v. Seyer* (1993) Babysitter 17, get pregnant from the 13-year old boy that she watches, and gives birth to a child. She gets state assistance for the child, and even though she is charged for her criminal sexual misconduct, the state agency that is giving her money to raise the child sues the father for not paying child support (even though he is the victim of rape). And sure enough he loses and has to reimburse the state for part of the contributions that the state made to the mother of the baby.

1. Because he was a minor under the age of 16 at the time of the conception, he was legally incapable of consenting to sexual intercourse and therefore cannot be held legally responsible for the birth of his child.  
   **HOWEVER,** the KS Parentage Act specially contemplates minors as fathers and makes no exceptions for minor parents regarding their duty to support and educate the child.

2. He asserts that it is not sound public policy for a court to order a youth to pay child support for a child conceived during the crime of indecent liberties with a child when the victim was unable to consent to sexual intercourse.  
   **HOWEVER,** as a matter of public policy, the interest of the child to be supported is greater than the interest in preventing children (like Shane) from being molested by their babysitter. (Because $$$ > than the marginal impact this would have for child molesters, which, lets be honest, would not have prevented them from having sex).

3. He asserts that the district court erred in finding he and Colleen were jointly and severally liable for the child support. He argues that, as Colleen was the perpetrator of the crime of statutory rape, she alone should be held responsible for the consequences of the act.
HOWEVER, nowhere does the law in this state suggest that the mother’s “wrongdoing” can operate as a setoff or bar to father’s liability for child support.

***THE COURT WILL ALWAYS PROTECT THE CHILD

BLEND ED Families...

A. The Support Obligations of Persons Other Than Biological Parents

(1) Stepparents: Some states, have statutes requiring stepparents to support stepchildren who live in their households, through the support obligation is usually more limited than the obligation the law imposes on a biological or adoptive child. BUT USUALLY NO SUPPORT IS OBLIGATED.

(2) In loco parentis: (in the place of the parent) doctrine, a person who assumes parental obligations is treated as a parent for some purpose.... The doctrine has wide application in the area of child support...

(3) Promissory estoppel or equitable estoppel can also impose a support obligation on persons who promise support, treat the child as their own, or discourage contract between the noncustodial biological parent and the child. RARE THOUGH.

(4) Adoptive Parents: Legal equivalent of biological parenthood. BUT THAT DOES NOT END CHILD SUPPORT. (I mean it usually does, but it does not have to end, only the court ends child support).

(5) Grandparents: Not obligated to pay for grand children EXCEPT some states do force grandparents to pay WHEN their child is still a minor and caring for a child.

(6) Children’s support for their parents: Adult children must support their elderly parents only where a “filial responsibility” statute imposes the obligation, through adult children often informally rived financial support and personal care. About 30 states have these statutes.

**THERE is no duty for a stepparent to support a stepchild in their home. NO LEGAL obligation at common law, but there are some state statues that do provide that, at least while they are in the home with the stepparent.

***Grandparents have no duty to their grandchildren. HOWEVER, most state statues say that when a minor has a child the grandparents are required to support the grandchild until the child reaches majority then the child is responsible for their child.

***30 states have a statute that require children to pay for their parents (but parents are last on the list). State can enforce the obligation when the state is paying for the expenses.

• But what about post secondary education (college)??? Court wants to make sure that the child has the same opportunities as if his parents never divorced.

Pamela T. v. Marc B. (2011) Child wants to go to Syracuse, mother wants child to go and for parents to split costs. Father wants kid to go to SUNY which is half the price. Court decides that the kid should be able to go to Syracuse because that is where he most likely would have gone if
his parents were still together. BUT father only has to pay 40% since mother makes considerably more than him.

- **But what about Adult Children with Disabilities??** Child has right to be supported.

*Hastings v. Hastings* (2003) Child with disabilities sues to get support even though he is over 18. Court decides that child is still a dependent due to his disability and thus the parents are responsible to pay for what he needs (within their means), and in this situation that means that the father has to take on continued child support. Child had common law right to be supported by parents due to disability (some states say yes, some say no, some states say the disability has to occur before 18).

C. Federalization

- **TWO MODELS FOR SUPPORT GUIDELINES**
  1. **Incomes Shares Model (2/3 of states):** The Parent’s income is combined to replicate total income of an intact family, and the basic child support obligation is percentage according to each parent’s income. Determines the child support order amount by applying a state determined percentage to obligor income.
  2. **Percentage of the Obligor’s Income Model:** (POOL model).
     - Three step process:
       1. The court subtracts from each parent’s net income a “primary support allowance that leaves the parent sufficient income to maintain subsistence.
       2. The court applies the resulting amount to the child’s primary support needs to the extent that either parent still has income available, an additional percentage is applied to the child support obligation.
       3. Each Parent can deduct what they need, then the rest is factored for support.

***Underlying idea, is to figure out “continuity of expenditure” figure out how much that would have been spent on children irrespective of the divorce.***

D. **Guidelines**

- VERY BROAD: Remember, we are looking for any way to make sure that the child will be taken care of. CHILD CARE IS PARAMOUNT.
- We can even impute income to the Unemployed or underemployed parent.
  1. The ability to work, including such factors as age, occupation, skills, education, health, background, work experience and qualifications;
  2. The willingness to work exemplified through good faith efforts, due diligence, and meaningful attempts to secure employment, and
  3. An opportunity to work which means an employer who is willing to hire.

****Courts can issue a seek-work-order and expose the obligor to citation for civil contempt of court if they do not follow through.***
• **Deviation:** The guideline amount is a rebuttable presumption of being correct. HOWEVER, it can be deviated when there is a written or specific finding on the record that the guidelines amount would be unjust or inappropriate in a particular case, as determined under criteria established by the state.
  
  ➢ You need a good reason to have a private agreement that deviates lower than the guideline because it is likely to be thrown out by the judge because it is always in the child’s best interest to be supported.
  
  ➢ **Should we lower support when there is increased parenting time by the payor spouse??** Debatable. Remember, there used to be a binary reality where the mother always had custody and fathers always paid support. Now that fathers take on more time shouldn’t they pay less? I don’t think so because the mother’s costs don’t really change—mortgages, car payments, etc. and the offset costs of meals is so minimal that it probably does not matter (because the father does not HAVE to be rewarded for going above his legal duty). ALSO, this puts kids in the idle of the controversy. They have a lot of power over where they go—now there is a finical reason to try to sway their opinion.

• **Limits:**

  (1) **Low-income Obligors:** Some State statutes have rebuttable presumptions that indigent obligors pay $0, others have just the opposite that there is a rebuttable presumption that indigent obligors pay the lowest amount until they can prove otherwise. ***The idea is that indigent obligors might not be adequately represented in court so they may need the presumption to be in their favor to prevent the accumulation of arrearages that they’ll never pay off. HOWEVER, we also don’t want to make it too hard to prove ability to pay…

  (2) **High-Income Obligors:** Support guidelines usually do not know how to account for incomes in excess of $170k/year. You cannot just extrapolate a support figure based upon the trend in the chart because you don’t continue to spend the same % of income on your children at excessively high income levels. 

  *Smith v. Stewart* (1996) Father argues that the court cannot make an award in excess of the highest level of support on the chart, but the court holds that the child is entitled to part of the “fruits of one parent’s good fortune after a divorce.” But the court does agree with the father that you need to use a lower % of income as you go up because you only spend so much on your children. So it was remanded to come up with a more appropriate %.

(4) **Modification**

• **“Change of Circumstances” Standard:** The provisions of any decree respecting maintenance or child support may be modified ONLY upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable.

• **1986 Bradley Amendment:** Requires states to maintain laws which (1) provide that an unpaid, court-ordered child support installment constitutes a vested right when due, (2) prohibit retroactive modification of vested child support arrearages, and (3) consider
past-due child support installment as a final judgment, (4) extend full faith and credit to enforcement of judgments for past-due child support. 

In re Marriage of Nelson (1997) Father had his support obligation lowered while he was a student in law school. When he graduates it goes up with his income, but he argues that this is unfair because the wife had a substantial increase in her income and his was modest, and he has extreme indebtedness from law school to pay off. HOWEVER, “retirement of indebtedness is expressly made a lower priority than the needs of children.” Even though his indebtedness is all for worthwhile reasons and even though he lives a modest life, the court cannot get in the way of the proper payment for child support under the guidelines.... THUS, Student Loans do not sufficiently make an argument for unique situation to prevent obligation going up with your income. Debts can wait, children cannot.

➢ Lottery Winnings: The whole winning (not just the after tax) is now your income for the year.
➢ Personal Injury Recoveries: Is income under some state’s guidelines.
➢ In-Kind Payments: Spending money on the child outside of your support DOES NOT ALLOW YOU TO reduce your payment. The payee parent makes decisions not the payor parent.
➢ Inheritances: Even if the state does not define inheritances as income, it can still move a support award up because it is like a gift for this purpose.
➢ Inter vivos gifts: Gifts that the payee spouse receives are not income.
➢ Commissions, overtime pay, and other remuneration from Employment: Is income for this purpose Unless it is merely speculative.
➢ Courts must take Cost of Living (COLAS) into account.
➢ Excessive Parenting: A parent who is unemployed or underemployed and is citing the issue that they are spending more tie with the child and want less child support obligation accordingly. Some states call this excessive parenting, and want the parent to work more/spend less time with the child and work more.

• Imputing Income on Modification:
In Re Marriage of Pollard (2000) Mother wants to end her support obligation to her children living with their father because she is now a homemaker for her children with her new husband. Court holds that it is unfair to allow her to walk about from her support obligations. Voluntary unemployment or underemployment will not allow a parent to avoid his or her financial obligation to children who are subjects of the order. THUS, her income is imputed to whatever it would be if she was full time in the workforce.

• THREE VIEWS FOR REDUCTION FOR NEW CHILDRE
1. Reduce because you have more children to pay for.
2. Don’t reduce, because “first in time, first in right.”
3. ALL, compromise, new children are a defense to an increase, but not a reason for a decrease.

(5) Enforcement

• Civil Enforcement: Originally it was the parent seeking the support to enforce the support order, but since the 1970s the court gets involved—garnish paychecks and tax returns
when parent is in arrears. Also leans on personal property, real property and income withholding. 1998, Child Support Performance and Incentive Act—more power to the courts to enforce the orders.

- **You can still go down the private route with bounty hunters.**
- **THREE EFFECTIVE WAYS:**
  1. Drivers license suspension (most effective)
  2. Booting the car.
  3. Jail—for contempt of court for failing to comply with a court order.

**VIII. Privatization**

**A. Overview**

- **BEFORE:** Prenuptial agreement
- **DURING:** Postnuptial, or post-martial agreement (CANNOT BE CONTEMPLATING DIVORCE!)
- **AFTER:** Separation Agreements.
- **ALSO**—marital contracts, which govern the marriage, but the court does not enforce them, rather they can be used to show intent during divorce.

**REMEMBER CONTRACTS:**

1. Offer and Acceptance
2. Consideration
3. Writing If necessary (which it always will be for martial contracts).

- **Living-together Agreement:** Court will look closely to make sure that it is not a contract for sexual services.

**ALWAYS LOOK FOR Process, Substance, and Facts.**

- **Process**
  - Clue that this was NOT a voluntary agreement.
  - Fraud
  - Duress
  - Factors that do not come up in regular contracts that will come up here: pregnancy, wedding ceremony, ect.
  - Disclosure
  - Income, wealth, debts, etc., at the time the agreement was entered.
  - States disagree on the specificity, but adding a disclosure form will always satisfy it.

- **Substance**
  - Timing
  - At execution—used to create a sense of urgency (like the day of the wedding).
  - At time of divorce—for change of circumstances.
➢ Standard to review the standard. FAIR (instead of shock the conscious in normal contract law).
   ❖ Were the terms unconscionable?
   ❖ BUT there are more factors where than regular contracts, because they want to see how the agreement is being use, like unforeseeable changes of circumstances...
   ❖ WHY??? Starry eyed, lack of thinking the marriage could never end in divorce, not an arms length transaction because one spouse might have significantly more resources than the other.

- Facts to be looking for
  ➢ Circumstance at execution
  ➢ Terms
  ➢ Circumstances at enforcement.

B. Premarital Agreements

(1) UPAA
- Not Enforceable IF:
  ➢ (1) Not voluntarily or
  ➢ (2) unconscionable or without full disclosure
  ➢ (which means you can have an enforceable agreement that is voluntary, fully disclosed, but unconscionable)

(2) Non-UPAA, Hollett and Marlen

Hollett (NH)
- Not Enforceable when...
  ➢ (1) Not voluntary (disclosure too).
  ➢ (2) Unconscionability, or
  ➢ (3) Did circumstances change in away that was unforeseeable. If so, would enforcement be unfair.

***Confidentiality recognition—makes the court take a more intrusive view of the whole process of who the agreement was made... this mean that the part that wants to enforce the agreement has an extreme responsibly to disclose everything. Upmost fairness—full disclosure, act affirmatively.

Mallen (GA)
- Not enforceable: Required to prove
  ➢ (1) Fraud, duress, nondisclosure.
  ➢ (2) Unconscionability at exestuation.
  ➢ (3) Unenforceable change, and then does it look fair.
***NO confidentiality recognition, which mean that confidentiality does not start until marriage starts, not before, so the court does not look too far into what happened when the parties went to make the agreement, and it is on you to figure out this information yourself about what the other spouses has, and general knowledge is good enough. Burden on lower income spouse.

[3] ALI—wants to make enforcement predictability more... predictable.

**IMPORTANT!!!!!!!!!!!!!!!**

§7.04 Procedure Required.
1. Writing
2. Enforcer must show VOLUNTARY: informed consent and NO duress.
3. Rebuttable presumption that the agreement was voluntary entered if the enforcer shows certain facts.
   (a) Executed at least 30 days (state could pick different day) before the marriage, and
   (b) Both parties were advised to obtain counsel, and had the opportunity to obtain independent counsel, and
   (c) If there is no independent counsel, then the prenuptial agreement has to be written in plain language. INFORMING US: what rights that you are giving up (at divorce vs what you would otherwise have at divorce), that the spouse is in an adversary position.

*** NOT MEETING (a)-(c) does NOT make the enforcement impossible, rather, it just takes away the enforcers rebuttable presumption,
4. STARNS SKIPED IT
5. Disclosure. You need to disclose property and income and debts, but they have the safe harbor from which allows you to just honestly fill out information and not worry about violating disclosure.

§7.05(2) Substantive Requirements
1. IF Unconscionable at execution, then it is unenforceable!
2. Second Look, ONLY if the resister shows:
   (a) More than 10-years have passed (but the parties can change the year, it is a fill in the blank, with 10 as a default/recommendation). OR
   (b) A child born of the marriage (past execution of the agreement). OR
   (c) Change in circumstances:
      i. Substantive impact, AND
      ii. Parties did not anticipate the change OR the impact.

***Check and see if the second look would cause a **substantial injustice**. The area that we are looking for is the are in-between fair and a **substantial injustice** to the enforcing party.

***These forms do NOT take a stand on whether or not the state recognizes the confidential relationship before the marriage. A majority of states do see it that way, but it is not required by UPAA.

**Specific Factors in Evaluating the Validity of Premarital Agreement’s**
1. Voluntariness of an Agreement—Heightened Scrutiny
- Timing is important, day of or before a wedding could be a per se rule against allowing them to be used.
- More specifically, look to the weeding planning process, if it place a significant burden on the process to the point of duress.
- Informing a spouse that they should seek counsel, or providing it for them is good enough....
- Courts look to combination of the factors.

2. Financial Disclosure
- Courts usually do not require a full written financial disclosure, but they do require that the spouse be fully informed generally of all the assets and income.
- Better just to list it.

3. Review for “Substantive Fairness” or “Unconscionability”
- Middle Ground... Terminate the agreements when 10 years pass, children born, and substantial change of circumstance (regardless of foreseeability).

- Protecting the children: Premarital agreement cannot adversely affect the right to child support. However, they can be tools used to set up the contributions that each parent will make (so, if the parents agree to something that goes above and beyond a normal child support obligation then the court will hold you to it).
  - So, parents can be more generous, but not less generous than what the law requires.
  - Post Majority Support: Absent an enforceable contract, courts have the authority to require parents to support a child lonely until majority or emancipation.
  - College Expenses: A court can do little to undo a college expense provision, even if it is poorly worded, or the parents are not in a situation to afford to flow through

- Waiving Spousal Support: Court’s used to be hostile to prenuping your way out of alimony because it was seen as shirking on your duty to support, BUT modern courts moved away from fairness standard, and allow parties who are fully informed about their decision to make it.

- Non-monetary Contract Terms: You cannot force someone to have kids or be in a religion even if you contracted to it in the prenup. PERIOD.

C. Postnuptial Agreements: Parties can, when not considering divorce, create a postnatal agreement—treated just like a prenuptial agreement in the court at divorce. There must be consideration, but normally all you need under K law is a peppercorn, but it seems that in postnuptial agreement the court makes it much more difficult.

*Bratton v. Bratton* (2004) Wife becomes concerned that as soon as husband finishes med school he will leave her. She wants a postnuptial agreement to protect her in the even of a divorce. Husband argues that he was under duress to sign the agreement to prevent marital discord, AND the court holds that the wife lacks consideration (she was sacrificing her job, but the agreement was for an incredible amount of alimony).
• **Consideration**: Under the majority in this case, it seems clear that consideration can only be monetary actions, not non monetary actions (like homemaking). SP, if a woman wants to bargain with her homemaking duties, she cannot in this forum, THAT’s NOT FAIR!!!

• **Coercion**: Threat to divorce if the parties do not conclude a postnuptial agreement is coercive, rendering any result unenforceable as involuntary, But, the court’s will allow parties to threaten to not marry someone without signing the prenup, and that is seen as ok? ISN’T that unfair!!

• **Penalties for Marital Misconduct**: Parties should be able to add in penalties for fault, especially since most jurisdictions have gotten rid of fault defaults, because if the parties really want to have it then it should not be an issue.

*In Re Marriage of Friedman (2002)* Wife was an attorney, husband was a broke entrepreneur who was dying of leukemia. The signed an agreement so that his debts would not affect her in his death. He miraculously lives, his business takes of, then they divorce. Now she wants part of his business. Court held that she knew what she was getting herself into.

• **Procedural Safeguards for Postnuptial Negotiations**: Depends on the jurisdiction, some scrutinize more so than prenuptial agreements, some less.

• **Reconciliation Agreements**: Following marital strife, and separation, a couple can have an agreement to get back together before divorce. BUT they need to be reviewed for voluntariness, disclosure and fairness.

• **COURTS could enforce terms while the parties are still married**—but they don’t because they don’t want to get involved in people’s marriages.

**D. Separation Agreements –NOT ON THE FINAL**

**IX. Child Custody**

A. **Evolving Standards**: Absolute right of the father → Judge has absolute right to decide → Tender Years doctrine (young children with the mother, then boys with the father, girls with the mother) → Best Interests of the children standard → Psychological parent doctrine → ALI’s approximation standard.

**REMEMBER**: Divorce is very stressful for all children, but long term effects on an individual child correlate with the child’s individual resilience and support system.

**THREE FACTORS that can help children adapt**

1. Reduction of parental conflict,
2. Presence of a well-functioning custodial parent,
3. Regular contact with the non-custodial parent.

B. **Best Interest Factors**: happiness and welfare of the child. Vary greatly by state, primary caretaker is usually a weighty factor.
Painter v. Bannister (1966) Father allows the maternal grandparents of his son to take him in and care for him while he mentally/emotionally recovers from losing wife and daughter in a car accident. Now wants his son back, but grandparents won’t comply. No evidence that he would be a bad parent, but the grandparents can offer the child (subjectively) a better life because they have more money and a better rapport in the community. This case would not comply with the Troxell case that came later.

- **Primary Caretaker:** No state solely relies on this, but it is a proxy for the child’s best interest. Because you assume that the primary caregiving (1) takes better care, (2) has the better relationship with the child, and (3) represents continuity the best.
  1. Preparing and planning of meals
  2. Bathing, grooming and dressing
  3. Purchasing clearing and care of clothes
  4. Medical care
  5. Arranging for social interaction among peers
  6. Arranging for babysitting daycare etc.
  7. Putting child to bed at night
  8. Disciplining
  9. Education in religious or culture social order
  10. Teaching elementary skills like reading writing and math.

C. **The Psychological Parent** Four Principals

  1. The psychological parent model, which they acknowledge was difficult to define (but claims that there is only one parent);
  2. The child’s need for continuity of “relationships, surrounding the environmental influence.”
  3. Emphasis on the child’s sense of time, characterized by urgency and the need for quick resolution of legal disputes; and
  4. Because of the limits of law as a predictor of future behavior and development replacing the “best interests” standard with the “least detrimental alternative” the “specific placement and procedure for placement which maximizes, in a according with the child’s sense of time and on the basis of short-term predications given the limitations of knowledge, his or her opportunity for being wanted and maintaining on a continuous basis a relations with the least one adult who is his or her psychological parent.

- Child’s best interest wins over parental equity. So a parent who had been working in the marriage to support the family, will still have to work even though they wanted to have a more caretaker role going forward.

- **§402. Best Interest of Child**
The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:
(1) The wishes of the child’s parent or parents as to his custody;
(2) The wishes of the child as to his custodian;
(3) The interaction and interrelationship for the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best interest;
(4) The child’s adjustment to his home, school, and community; and
(5) The mental and physical health of all individuals involved.

The Court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

***The idea is to avoid gender based evidence, but you can still get it in, you just have to present it carefully—like the child needs to be breastfed...

• Home environment, health Issues, and Gender Roles

*Blevisn v. Bardwell* (2001) Couple met at an air force base, have child, get married, get divorced, wife has to give husband temporary custody in order get her job back. She got her job back and remarried. In the meantime, the husband had to move home to take care of elderly father. Father has large home, big family, and money. Wife has little money, small apartment, and constantly gets remarried, and has no local family. However, court decided that the custody was temporary, therefore the was no presumption for him, and she won best interest (since he was a smoker and his time was consumed taking care of father).

****Americans with disabilities act does not apply to child custody cases.

• Allegations of Immorality

*Zepeda v. Zepeda* (2001) Couple met in college, get married, husband has job that requires him to work long hours, wife stays home with child, but gets sexually bored. She begins online sexting people, and even has one come over for actual adultery. They divorce, and the father insists that he should get custody because wife is immoral. Court holds that there must be a nexus between the immoral behavior and the harm to the child in order for it to be considered.

⇒ But, unless we have extreme facts, how are we going to KNOW?? AND by the time we know that the bad behavior has had an effect, it is too late....

⇒ What about adultery??: Only when it is so outrageous that it is child neglect, or the child is aware and upset by this, but not when it is discrete.

⇒ Considerations for Finding a “Demonstrable Effect.” If the child has a negative effect upon learning of the issues, it can be used as evidence.

⇒ Nexus can be made to virtual world WHEN THE PARENT EXPOSES THE CHILD, or the child has a demonstrable effect.

• Domestic Violence

*Wissink v. Wissink* (2002) There was DV, the father abused the mother. Father wants custody of the child. Court notes that aside from the DV against the mother the father is a perfect father, in fact, the child prefers to go with the father who is extremely involved in her upbringing. TROUBLING... The daughter insisted the DV never existed, even though she participated in it.
Some states it is a rebuttable presumption that the DV means child stays with victim, but in New York it is per se rule that child cannot go with the abuser.

→ All 50 states require DV to be considered, 22 are rebuttable presumption that they cannot have custody.

→ Best practice would be to interview the parent and child together to see how they interact. AS well as ask teachers ect about the child and parent relationships.

- **Race**

*Palmore v. Sidoti* (1984) White parents of a 3-year-old get divorced. Mother goes on to move in with black boyfriend. Father sues for custody because of the mother’s change in circumstance. Court holds that mother is not neglectful.

D. **Approximation Model:** requires a judge to make a historical approximation instead of reading a crystal ball to see what is going to be best for the child in the future. ALSO, whatever the parents choose to do in the past is assumed to have been best interest of the child and should be the best interest for the future, because we assume that the parents always do what is in the best interest of the children.

- There is a minimum amount of parental time that you are entitled to regardless of how little you had during the marriage. YOU GET 6-DAY/month irrespective of what you had during the marriage.
- Keep siblings together.
- Protect the child from gross disparity in quality of emotional attachment between each parent and the child or in each parent’s demonstrated ability to availability to meet the child’s needs
- Appropriate to consider in light of the circumstances as a whole, including the reasonable expectations of the parties, the extent to which they could have reasonably anticipated the events that occurred and their significance, and the interests of the child;
- To avoid an allocation of custodial responsibility that would be extremely impractical.

E. **Child’s Preferences:** States vary, but they usually give 14-17 year-olds some discretion about where they live. Otherwise, they will usually give them a good reason why they are not going with their preference.

- **Pros of Asking the child.**
  - Happy child, or at least voice heard (empowerment, self-determination).
  - Child has information that has not been presented in court.
  - Deference to private ordering
  - Helps us figure out who the child has the closest bond with.

- **Cons of Asking the Child.**
  - Process Risk: the process that we use to ask the child, could hurt the child’s relationships with parents.
  - Child gets caught up in the middle: cognitive dissonance, no preference, no winning.
  - Outcome risk—you don’t get the parent you wanted or the child does get what they want and now feels bad.
- Information Risk: The child might be misinformed and this would lead to the judge being misinformed.
- ALSO, who is in the room?!??! Parents, lawyers, no one, what about due process? Recording?!? GAL?

F. **Role of Attorneys—Three approaches**

1. Would have the lawyer represent the child’s wishes
2. Not appoint counsel at all.
3. Would have the lawyer engage outright in the representation of the child’s interests.
   ***MOST STATES go with number 3.

G. **Joint Custody:** While Joint legal custody is the new norm, joint physical custody is too difficult, and has been found to be bad for parents.

*In Re the Marriage of Hansen* (2007) Parents had joint physical custody of the children after divorce, but they also disagreed about time spent with each other’s families, time spent going to church, etc. The court ended up using the best interest of the child standard to award primary physical custody to one of the two parents.

***The parent’s have to get along, have similar parenting philosophies, co-parents, put the children first, put their personal differences aside for the best interest of the children, and not have conflict.

**HYPO:** Typical divorce, father breadwinner who wants primary and mother homemaker who also wants primary, both willing to try to co-parent.

- **Best Interest Standard:**
  - Joint legal—yes
  - Joint physical—no, continuity and the fact that the mother is a full time stay at home mother will end up with primary custody, but there will be liberal visitation for the father.

- **ALL principals**
  - Joint legal—Yes, presumption
  - Joint Physical—No past care → future case, and the fact that he can take more time off in the future is irrelevant.

- **Iowa Statute**
  - The mother would still have physical custody because she as been the primary parent under the four factors, however, Iowa will consider the fact that father can take more time off.

***We’re at a point of transition, from physical custody → 1980s 50/50 split of joint custody → to modern shared responsibility continuum.

WE’RE MOVING AWAY from labels, and just share the roles.
H. Post-Divorce Disputes

***REMEMBER there are no winners, only losers, tragically the children.

- Each parent is going to think that they’re the proper one for the child to live with and be heartbroken when they are not, and possibly as a defense mechanism, they will treat the other spouse poorly or think poorly of them... this can have consequences for the child.

- **Collapse of Joint Parenting**

  *Nicita v. Kittredge* (2004) Parents had joint parenting scheme, but they had issues over religion, the mother’s relocation, paying for therapy, and other issues that led to hostility between the parents. The Court ended up finding that the children needed to have primary day to day decisions made by one parent, the mother, however the father needed to be allowed to take the children to his church, and the parents had to agree to a communication scheme and not let their disputes involve the children anymore.

I. Visitation

**UMDA §407 Visitation**

- A parent not granted custody of a child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child’s physical, mental, moral or emotional health.

- The court may modify an order granting or denying visitation rights whenever the modification would serve the best interests of the child; but the court shall not restrict a parent’s visitation rights unless it finds that the visitation would endanger seriously the child’s physical, mental, moral or emotional health.

9A U.L.A. 398

Generally, fit non-custodial parents are entitled to visitation, which serves children’s best interests by promoting healthy child development.

- **Denial of Visitation (UNCOMMON)**

  *Usack v. Usack* (2005) 20-year marriage ends with the wife cheating. Husband is enraged and turns the children against the mother. Children refuse to see her. She seeks something to get the father to do something about it. The court (SUPRE RARE) decides to withhold his child support until the children are willing to spend time with the mother, or until a finding that he is doing his best to foster a good relationship with the mother.

**UPA:** lives with the child during its first two years of life and openly hold out the child as his or her own. “Parent” includes adult: 9 states.

  (1) lives with the child from birth to age 2 (intentional limitation to prevent person who is not always there, also from a practical purpose, child will probably think of that person as the biological parent anyway).

  (2) Holds child out as their own.

J. **De Facto Parents**
Delaware Example: *De Facto* parent if:

1. Consent of parent to parent like requirement; and
2. Parental responsibly; and
3. Time sufficient to bond with the child (which is really proven by the existence of a bond).

**ALI:** Helped raise the child since birth and takes on full parental responsibilities.

→ **Parent by estoppel (not usual):** TWO SCENARIOS

1. Mom marries X when she is pregnant, and holds him out to the world as the child’s dad (he is not the biological child, but he is led to think he is until much later on). Mom holds X out to be the parent of the child, and now she is estopped from making the claim that X is not the parent, even if he turns out to not be the biological child.
2. X was thinking he was the biological Dad, he finds out that the mother deceived him, but he decides that he wants to keep parenting, then X becomes estopped from terminating his parenting responsibilities. (He has to walk away immediately according to ALI and most states to prevent estoppel).

→ **De Facto Parent:** If you qualify as a *de facto* parent, then you should not get the majority of the custodial responsibility. SO, you’re not going to get more parenting time than the bio parent.

- Significant period of time (2-years).
- Lived with the child
- Money not primary reason for becoming *De Facto* parent.
- Parental agreement to bond.
- Regularly performed car (half or as much as the legal parent).

**C.M.G. v. L.M.S.** (2010) homosexual couple adopt a child from Kazakhstan. But, the country will not allow them to adopt. So only one adopts, but they treat the child as if both were the mother. But there is another relationship going on, and so one moves out, still wants to have parenting time.

1. **Has had the support and consent of the child’s parents who fostered the formation and establishment of a parent-like relationship with the child and the *de facto* parent;**
   
   L withdrew her consent after more than a year of the formation and establishment of the parental relationship between C and the child, and in the wake of the parties separation, does not negate the fact that she did consent. **FAVORS C being *de facto* parent.** There is ample evidence of this during the 14 months that they lived together and raised A together. MOREOVER, there is a journal of the events leading up to A’s adoption which include L referring to C as A’s “mommy.”

2. **Has exercised parental responsibly for the child as that term is defined in Section 1101 of this Title; and**
   
   C successfully established that she exercised parental responsibly for A. She changed dippers, at meals, took care of A etc. Also, has a college fund for A, and continues to include her as a member of her family (including treating her as a child and having her interact with new child and new spouse as step child). **FAVORS C being *de facto* parent.**

3. **Has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.**
   
   C acted in a parental role for a sufficient length of time, whether that time was fourteen months or six years (argument if it should only count the time that they spent in same
house or time spent in visitation arrangement, but nevertheless it would be the same result either way). FAVORS C being de facto parent.

K. Modification Court’s retain jurisdiction over a child custody case until the child reach the age of majority. Court’s do not like changing an arrangement because it disrupts whatever stability the child has achieved since the original divorce.

- To modify the court must find...
  1. That circumstances have changed substantially since the original decree was entered; and
  2. That the change in custody will serve the best interests of the child.

L. Relocation Traditionally, parents had the right to relocate. But more recently it has been seen as an infringement of the non-primary parent’s right to exercise his or her parenting rights. THUS, the court now has to find that the move is in the child’s best interest even though this seems like an infringement of the primary custodian’s right to travel. The idea is that the rights cancel out and all that is left is best interest factors.

Fredman v. Fredman (2007) Mother and Father live in FL, father uses his parenting time, takes kids to see his family constantly, etc. Mother got remarried and her husband can only find work in TX, where she claims will be a bigger house and come income. Court finds that is in the child’s best interest to stay in FL where they have done well in school and enjoy father’s family.

- Preponderance of the eventide that the move is in the child’s best interest.
- If the move is being performed to thwart the relationship the child has with the non-custodial parent, then the court might find cause to preen the move (good faith requirement).

M. International Relocation

1. Cultural Problem: We need to protect the children for culture shock which might be bad for them i.e. won’t let a parent take a girl to a country where they require mutilation of female genitals.

2. Distance Problem. Most foreign nations are very far away so how do we secure parental rights for non custodial parents?

3. Jurisdictional Problems: Orders from a state are supposed to be continued to litigated in that state, but now there are going to be people living in different countries attempting to have custody battles through the state where the divorce occurred.

N. Parental Kidnapping Children who are absconded by their own parents during custody disputes represents the second largest category of how children go missing (behind runaways). In country, we have laws in all 50 states that give full faith and credit to state that issued the original order. Out of country and The Hague is triggered.

Convention on the civil Aspects of International Child Abduction, 1980
• Procedural, expeditious return of children, and restore whatever custodial arrangement was in effect before the wrongful abduction of the child.

• Courts should NOT engage in the Best interest of the child, instead, they should JUST respect the custodial arrangement, and the country that is supposed to have the child makes the Best Interest of the child determination.

• ALSO applies to wrongful removal. When a parent refuses to respect the agreement with the state of habitual residence. WHAT IS THAT?? The place that the child calls home. BUT not defined in the convention itself.

• In order to be wrongfully removed, you have to be in violation of the custody agreement of the state that the child is of habitual residence.

→ So, the parent who absconds with the child is the violator, and as long as they try to take the child to a country that has signed the agreement, then the country that the parent took the child to will force the child to be returned to USA (or vice versa).

• HAGE IS TRIGGERED, when child is wrongfully removed from the state of habitual residence AND the parent that now has the rights violated was actually exercising those rights.

• ONLY APPLIES TO CHILDREN UNDER 16

• You go to the Central Authority (in USA that is the State department, and they start the legal case.

• TRY TO GET THIS DONE IN 1-YEAR. Because if you don’t then the child could become settled and The Hague could all of a sudden not apply. NOT MAKE IT NOT APPLY, just make it less likely that you’ll win. AND, that is only the commencement of the action. SO, if you wait more than a year to commence the action, then you are risking the likelihood that the child will now be settled into the new country (at which point you lose by default, regardless of how wrong this may seem... like a case of hiding). Keep in mind, it is difficult to settle a child in an environment when you are hiding them.

• Goal is to get an EXPEDITANT return the child to where the state from which the child was wrongfully taken, and prevent the new state from litigating.

DEFENSES TO RETURN OF THE CHILD

• Custody rights are not being exercised.

• If the other parent consented.

• Grave risk of harm to the child—a court is not going to return a child if there is a grave risk of harm to the child should the child be returned... this is physical or psychological harm—putting the child in harm.

• The Child’s preference—as a basis for the court’s authority to determine that it is not appropriate to return the child. OF COURSE, the child has to be of age and maturity.

• Article 20, returning the child would violate some fundamental human rights of the country being asked to return the child (if a child is in USA, and we are being asked to return the child to a country with female genital mutilation).

***The Hague is silent on this action being done for avoiding Domestic Abuse... This is a problem...

Three categories:
(1) When the abuser was abusing the child, then it would be a grave risk of harm to return the child.
(2) When the abuser abuses the spouse who ran with the child, then some court’s will return the child because this is not a grave risk of harm to the child, but other court’s will find this to be a grave risk of harm.
(3) When the abuser abuses the spouse in front of the parents, Court’s are much more likely to find this to be a grave risk of harm to the child.

Cuellar v. Joyce, 9th Cir. (2010) American father and Brazilin mother have child. Father decides that he does not want the child in Panama because he does not think she will be properly cared for. Father absconded by tricking mother into bringing child to Australia and then leaving for USA with child and all passports. Father tries to argue that child was in danger in Panama because of falling off at construction cite and not having proper medical care in Panama. AS well as his ability to provide better life. Court holds that Panama does have necessary medical professionals, and cannot hold that better life is deciding factor because it will always give first world upper hand. ***REMEMBER under article three all the court has to do is find that the mother is a habitual resident o Panama, that the child was unlawfully taken from Panama, and that the mother was exercising parenting at the time the child was taken, thus without looking at best interest, the court should expeditiously return the child to panama, UNLESS the living conditions are so bad or neglectful that it was necessary to remove the child (emergency).

Defenses under the convention: Four affirmative defenses-
(1) The child has become well settled in her new environment (one-year-rule);
(2) The parent filling the petition for return was not actually exercising custody rights at the time of the wrongful removal or the parent had consented or acquiesced to the removal or retention;
(3) Returning the child would pose a grave risk to the child or otherwise place her in an intolerable situation; and
(4) Returning the child would violate the fundamental principles of the returning state relating to the protection of human rights and fundamental freedoms....

YOU NEED TO KNOW:
(1) What does it take to trigger The Hague, and is it met???
(2) Look for the defenses (the most litigated one will be the grave risk of harm to the child defense).
(3) It is set up to have expedient return, try not to look at Best Interest, UNLESS one year rule.

X. Non-martial Families—Cohabitation
   A. Contract-based Agreements

Marvin v. Marvin (1976) Parties had an express contract that Lee would take care of his girlfriend. Thus, when they broke up she was entitled to a remedy in equity. HOWEVER, the court made it clear that the consideration for the contract could NOT be sex, but rather looked to the martial like relationship.
**MARVIN IS STILL GOOD LAW.**

Parties who live together, and who do not have an express contract, intend (or expect the court to) treat each other in separation in good faith.

→ Cohabitation does not have to be in writing, some states require a writing. Is that a good thing? Well, if you impose a writing requirement, then you will never have an agreement for long term cohabitants (because the nature of cohabitation is to be unofficial).

***Remember three contracts (express, implied in fact, implied in law).***

→ Marvin was an express K, but there could have been an implied in law to prevent unjust enrichment.

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**Notorious Footnote 25:** Our opinion does not preclude the evolution of additional equitable remedies to protect the expectations of the parties to the non-marital relationship in cases in which existing remedies prove inadequate; the suitability of such remedies may be determined in later cases in light of the factual setting in which they arise.

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**Marvin**

- Express K
- Implied K
- Equitable Remedy

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**ALI**

(1) Domestic Partners if for significant period and share: (burden on party trying to prove the partnership existed—like when the relationship ends, and you want the property rights that you would have if you had actually been married).

a. Primary residence; and

b. Life together as couple.

(2) Common household with common children for continuous period (2-3 years), ARE Domestic Partners. (per se—it is a dispositive conclusion, there is no rebutting it).

(3) Common household for continuous period (2-3 years) PRESUMED Domestic Partners (even there are no mutual children). (rebuttable presumption).

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**What is a common household??** A place that the couple shares where they live, or live with other family members. However, if you live with roommates, then there would have to be a showing that the couple take care of things (like finances) as a couple.

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*Devaney v. L’esperance*, (2008) Couple had an on again off again relationship but it was never martial like. Failed the second prong under the ALI.

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**B. Non Contract-based Agreements**

ALI, Analysis and Recommendations (2002)

§ 6.03 Determination that Persons Are Domestic Partners
(1) Two persons, not married, regardless of sex, share a primary residence and a life together as a couple for a significant amount of time. You are Domestic Partners IF for a Significant period(?) you share a primary residence, AND a life together as a couple.

(2) They are domestic partners when they have maintained a common household, with their common children, for a continuous period that equals or exceeds the duration (cohabitation parenting period). Common household with their children for continuous period (state-by-state, recommend 3-years). YOU ARE DOMESTIC PARTNERS.

(3) People are assumed to be domestic partners when they are not related by blood or adoption and have maintained a common household, for a continuous period that equals for exceeds a duration. A common household, you’re not related to the other person by blood, and you share that common household for a continuous period (state-by-state, recommend 3-years). Only a (rebuttable) PRESUMPTION of being domestic partners.

(4) People maintain a common household when they share a primary residence only with each other and family members; or when, if they share a household with other unrelated persons, they act jointly, rather than as individuals, with respect to management of the household. Common household is shown if there is a primary residence was just with the other person, or some other family members. IF THERE ARE OTHERS IN THE HOUSE, then you have to show that the couple acted jointly in the management of household.

*** (6) If a claimant argues that there is a domestic relationship and they cannot satisfy §(2) or §(3), then they have the burden to show that there was a primary residence and a life together (which is essentially §(1)).

***(7) Whether persons share a life together as a couple is determined by reference to all the circumstances, including...

§6.04 Domestic-Partnership Property Defined.
(1) Treat property the same as martial property unless otherwise provided for in this section.
(2) The domestic-partnership period.
   (a) Starts when the domestic partners began sharing a primary residence, unless either partner shows that the parties did not begin sharing life together as a couple until a later date, in which case the domestic-partner period starts on that later date, and
   (b) Ends when the parties ceased sharing a primary residence.
   For the purpose of this Paragraph, parties who are the biological parents of a common child began sharing life together as a couple no later than the date on which their common child was conceived.

*Fleming v. Spencer*, (2002) A meretricious (committed intimate partnership) relationship is a stable, martial-like relationship in which both parties cohabit knowing that a lawful marriage does not exits. To determine whether such a relationship exists, courts look at five factors:

(1) Continuous cohabitation;
   - They lived together continuously from 1983 when Spencer first moved into her cottage, until 1991 when Spencer left for work related reasons (having both moved
to the Sultan property). They lived together continuously until 1997 (because leaving for work and school does not count as breaking continuous).

(2) Duration of the relationship;
   - 15-year relationship only interrupted for work and education related reasons.

(3) Purpose of the relationship;
   - Friendship, companionship, intimacy, and mutual support. THUS, marital like.

(4) Pooling of resources; and
   - Joint bank accounts, commingled their earnings, paid bills together, submitted joint income tax returns, and paid off the real estate contract with joint earnings and remodeled the house three times, the latest for Fleming’s child care business.

(5) Intent of the parties.
   - The quitclaim deeds, making each other beneficiaries, ect. made it so that they basically have a common law marriage, but the meretricious relationship all parties to dissolve their property without having to obtain a formal recognition of a common law marriage and then go through a divorce.

***Court decides if the relationship exists on a case by case basis.***

Here, it is a rebuttable presumption that property obtained during the cohabitation is treated like marital property of the couple.

**Spencer argues** that he acquired the Sultan property before the meticulous relationship began, and that Fleming gave him full title before it ended, therefore, should not be treated like marital property in the dissolution.

**However,** The court has determined that the parties commenced their meretricious relationship in 1983, which was before the property was acquired... BUT MORE IMPORTANTLY title alone does not rebut the presumption of common ownership...

XI. **Domestic Violence**

   A. **Obtaining and enforcing civil Protection Orders**

   *Schultz v. Schultz* (2010) You only need to prove that the DV happened beyond a preponderance of the evidence in order to obtain an order for protection.

   *Town of Castle Rock v. Gonzales* (2005) Police have discretion as to whether or not to carry out the mandate of the order (at least you cannot sue the police for any damages when anything bad happens).

**Battered Woman’s Syndrome**

THREE PHASE CYCLE:

1. **A tension-building phase,** when the batterer commits relatively minor abusive acts and the victim attempts to placate the batterer to prevent further violence;
2. **An acute-battering phase,** when the batterer’s violence escalates and the victim may be severely beaten; and
3. **A loving contrition phase,** during which the batterer becomes remorseful, pleads for forgiveness, and typically promises that he will never again abuse the victim.

XII. **Jurisdiction**—Difference rules for these different aspects.
A. **Divorce**—No personal jurisdiction necessary. Subject Matter Jurisdiction if you live there for the statutory period.

B. **Custody**—

Uniform Child and Custody Jurisdiction & Enforcement Act (1999)—A Subject Matter Jurisdiction issue only.

→ Adopted by all 50 states.

***There are 4 ways to initial Initial Jurisdiction:***

1. Home State Jurisdiction
2. Significant Connection Jurisdiction
3. Last Resort Jurisdiction
4. Temporary Emergency Jurisdiction

***True Home State gets preference, if there is no true home state, then go to extended home state jurisdiction, which can count as home state jurisdiction.***

→ **IF,** for whatever reason (like inconvenient forum) we can’t go to the home jurisdiction, then we go to the Significant Connection Jurisdiction.

- "**Home State**" means the State in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the State in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned person is part of the period.

- Initial Child-Custody Jurisdiction: A court of this state has jurisdiction to make an initial child custody determination only if....

  It is the EXTENDED home state jurisdiction of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in that state.

  ****Gives the parent who stays in what was the home state a six-month period to file a petition to keep jurisdiction from when the other parent leaves the state with the child.****

- Significant Connection Jurisdiction. If a Court does not have jurisdiction under (1), or a Court of the home State of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate form

  (A) The child and the child’s parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence, and

  (B) Substantial evidence is available in this State concerning the child’s care protection, training, and personal relationships.
- **LAST RESORT Jurisdiction**: All courts having jurisdiction (home state and significant connection) decline the case and give it to this other state instead.

- **Temporary Emergency Jurisdiction**: In an EMERGENCY situation, any state can create a temporary order for the child.

**PKPA**: if a custody order is issued by a state that had jurisdiction under the UCCJEA, then it has to be respected by all other states (full faith and credit).

### C. Support

**Uniform Interstate Family Support Act—CHILD SUPPORT AND ALIMONY**

**§201. Bases For Jurisdiction Over Non-resident**

(a) In a proceeding to establish or enforce a support order or to determine parentage, a tribunal of this State may exercise personal jurisdiction over a nonresident individual or the individual’s guardian or conservation if: (1-8 are various ways to establish personal jurisdiction—long arm statute).

**§205. Continuing, Exclusive Jurisdiction to Modify Child-Support Order.**

(a) The issuing State shall exercise continuing, exclusive jurisdiction to modify its support order if the order is the controlling order and...

1. The issuing State has continuing exclusive power, SO LONG AS ANYONE is still in your state.
2. AND, the parties might agree to let the issuing state keep jurisdiction even if the state no longer has either of them.

(b) The issuing State CANNOT keep continuing jurisdiction if:

1. All parties have agreed to move jurisdiction to another state.
2. The order is no longer the controlling order.

If everyone is gone, what happens.

- QUESTION: where have they gone???
- Well, either they moved to different states or the same state.
- IF they moved to the same state, §613 says that the new state they moved to has jurisdiction.
- IF they moved to DIFFERENT states, §611 says that the petitioner has to be a non-resident (you have to go to the other side’s home turf in order to bring an action). DETER the petitioner from moving to a state with guidelines that you like (prevent forum shopping).