

Effective Legal Office Administration

Lesson 9 – Family Law

WORKBOOK



Family Law – Overview

- Marriage
 - Annulment
 - Divorce
- Child Custody
 - Support Agreements
- Uniform Interstate Family Support Act

Marriage

- What is Marriage?
 - It is at once a contract, a social relationship, and a religious institution.
- In the US., marriage is a civil contract, which gives states jurisdiction over marriage
- Both state and federal regulations govern family law
- To be a valid marriage, the following requirements must be met:
 - Competency – both parties must be competent to marry
 - Mutual present agreement – both parties must intend, in good faith, to enter into a true and complete marriage relationship, not a sham
 - Opposite gender – originally, the parties must have been of opposite gender; however, this requirement has been changed in several states



Before the Marriage

- The Engagement:
 - An engagement is a **contract** to marry:
 - Offer: Will you marry me?
 - Acceptance: Yes, I will.
 - Consideration: Pretty, sparkly diamond (or other item of value).
 - In many states, it used to be possible to bring a cause of action for Breach of Contract to Marry, when one party broke the engagement prior to the wedding.
 - The nationwide trend is to abolish this cause of action, it's perceived as sexist, paternalistic and outdated.
- The Ring:
 - What happens to the ring when a couple breaks an engagement?
 - It should be returned.
 - Old trend was to determine fault
 - New trend is to return the ring because it is a conditional gift, courts don't want to have to assess who caused the break up

Before the Marriage

- Prenuptial agreements:
 - Are respected in the same way as any other contract
 - Absent fraud, misrepresentation, or duress, the prenuptial agreement should be treated like any other contract
- In addition to the primary elements of any contract, the prenuptial agreement should contain the following characteristics:
 - Procedural Fairness:
 - Full disclosure
 - Voluntariness (Timing)
 - Substantive Fairness:
 - Are the terms fair, is one party giving up much more than the other?
 - A court will not invalidate a prenuptial agreement simply because the property division is unequal!

Before the Marriage

- Who has the right to marry?
 - Essentially, everyone.
 - States may regulate, but these regulations cannot infringe upon the right of individuals to marry.
 - *Turner v Safley* (1987): The ability to marry is a fundamental right of U.S. citizens which is protected by the Constitution.
- Exceptions:
 - Bigamy –
 - A person may not be married to more than one person at a time.
 - Family –
 - Those related by either blood or marriage may not marry one another (depending on the state)
 - Age –
 - Those younger than the age of consent for marriage may not marry without parental consent. (age depends on the state)

Marriage

- For a couple to be legally married, they must apply for a license and once issued, they must submit themselves to an appropriate authority to conduct either a civil or religious marriage ceremony
- The requirements for who is legally authorized to conduct a marriage will vary from state to state:
 - Clergy
 - Judges
 - Elected officials (mayors, magistrates, justices of the peace)

Marriage

- Common Law Marriage – an agreement between a man and woman to enter into the marital relationship without the benefit of a legally recognized ceremony. Based solely on their agreement to be married.
- To be valid, four requirements must be met:
 - The couple must cohabit
 - The couple must present itself to others as a married couple
 - The couple must live together for a proscribed period of time
 - The amount of time required will vary from state to state
 - The couple have the legal capacity to enter into a contract
- Most states do **not** recognize a common law marriage. If a common law marriage has been recognized in one state, it should be recognized in other states as well.

Annulment

- Annulment – the legal process by which a marriage is invalidated retroactively to the date of the inception of the marriage
- In an annulment, it is as though the marriage never existed
- This has major legal repercussions since none of the rights that are vested in a marriage exist after an annulment
- Many states have statutes setting forth the grounds for annulment. In those states without a statute, the court may use its equitable powers to annul a marriage.

Annulment

- Grounds for annulment – the grounds must exist prior to the marriage
- The usual grounds for annulment are:
 - Fraud that goes to the essence of the marriage
 - the court determines if the marriage would have taken place without the fraud.
 - Examples of fraud - misrepresentations regarding fertility or religious beliefs
 - Duress
 - the duress must have been perceived by the complaining party at the time of the marriage and must have been sufficient to prevent a party from acting freely
 - Ex. Gun to your head

Divorce

- Divorce –
 - the legal separation of spouses, accomplished by the judgment or decree of a court and either totally dissolving the marital relationship
- Many states have courts dedicated specifically to family law in which divorces are handled.
- Many of these courts have specific procedures that must be followed to obtain a divorce; usually it is more cumbersome to obtain a divorce when there are children are involved.



Divorce

- Grounds for Divorce – all states have passed laws governing the grounds on which a divorce will be granted.
- Several states have a provision that allows for either a Fault based Divorce or a No Fault Divorce.
- In a Fault based divorce – grounds (reasons) must be alleged in order for the divorce to be granted
- Possible grounds include:
 - cruel and inhumane treatment, includes psychological cruelty
 - adultery
 - desertion or abandonment
 - constructive desertion-made it so difficult they had to leave.
 - insanity

Divorce

- Typical fault grounds for divorce include:
 - Cruel and inhumane treatment
 - Abandonment or desertion of the plaintiff by the defendant for a period of one or more years
 - Confinement of the defendant in prison for a period of three or more consecutive years after the marriage of plaintiff and defendant
 - Adultery
 - The spouses have lived apart pursuant to a decree or judgment of separation granted by a court for a period of one or more years after the granting of such decree or judgment
 - The spouses have lived separate and apart pursuant to a written Separation Agreement for a specified time

No Fault Divorce

- Fault and No Fault Divorce – in many states, the courts have eliminated the need to meet a stated grounds for divorce; instead, allowing for a divorce based on “irreconcilable differences”
- Irreconcilable differences defined: the inability of the parties to agree or compromise
- Some states have totally eliminated the fault based divorce while other have kept it and allow different remedies for fault based divorce
- A no fault divorce also may have requirements that must be met,
 - Generally, the couple must be living separate and apart for a period of time (how long depends on the jurisdiction)

Child Custody

- When a couple with children decides to separate, the court will make a determination about who should have physical and legal custody of the children, and will order monetary support for the children from the noncustodial parent.
- Courts will normally determine child custody based on the best interests of the child. State statutes normally establish criteria that courts use to evaluate the best interests of the child.
- Some common factors are:
 - The age of the child
 - The physical and mental health of the child
 - The parent's fitness to care for the child, including parent's emotional stability
 - The financial situation of the parents
 - The input of the child (usually requires child to be of certain age)

Child Custody

- Modifying custody agreements – when modifying a custody agreement, courts are more stringent. For an initial custody determination, the court presumes both parents are fit. To modify the original order, the court will require the moving party to show a substantial change in circumstances that prompts the change while still providing stability to the child.
- Joint custody – courts are able to award joint custody, which has become a common practice
- There are two types of joint custody:
 - Joint legal custody
 - Joint physical custody
- Legal Custody – means you have decision making responsibility
- Physical Custody – means you have sole residential responsibility only. Without joint legal custody, physical custodian would make all decisions about upbringing

Child Custody

- Joint legal custody – allows each parent to have an equal say in matters regarding childrearing, such as school choice and religion
- Joint physical custody – allows each parent to share in the actual day-to-day living arrangements
- To provide stability, courts will often grant joint legal custody to both parents and physical custody to one parent. The noncustodial parent will be granted visitation rights to allow the relationship between the child and parent to continue.
- Pros and Cons of joint custody:
- Pros:
 - increases chance child will have a relationship with both parents
 - eases pain of loss because child still gets to see both
 - father more likely to pay child support if child is still involved in his life
- Cons:
 - can create instability for child being raised in two different settings
 - goodbyes are hard, child may be used as pawn, forces two people who don't get along to work together
 - prolongs adversarial feelings.

Support Agreements

- Both parents have an obligation to support their children.
- The normal support guidelines will specify each parties obligations; however, it is normally the noncustodial parent that must provide supplemental funds to the custodial parent.
- In a shared or joint custody situation, the court will generally order the higher-earning spouse to make a payment to the lower-earning one.
- If the children have an independent source of funds, such as a trust, the court may consider this income. However, the parents will still have an obligation to contribute to the support of the children.

Support Agreements

- Child support statutes and guidelines provide specific guidance as to what may be included in the calculations.
- In addition, the court may take into account other relevant factors, such as:
 - The financial resources of the child
 - The financial resources of the custodial parent
 - The standard of living previously enjoyed by the child
 - The physical and emotional condition of the child
 - The child's education needs
 - The financial resources and needs of the non-custodial parent



The Attorney's Role in a Divorce

- An attorney in a divorce proceeding who expects to be paid by the opposing party has a duty to control excessive demands on his time by the dependent spouse.
- Lawyers may not ethically represent one spouse in a divorce action against the other spouse after the lawyer previously represented both spouses.
 - Depending on jurisdiction, it may be permissible for the lawyer to do this after he obtains the informed consent of the non-represented spouse.

Uniform Laws

- There are two statutes the courts can use to settle custody disputes if the parents live in different states
 - The Uniform Child Custody Jurisdiction Act (UCCJA)
 - The Parental Kidnapping Prevention Act (PKPA)
- The UCCJA has been adopted by all states and the District of Columbia. It sets ground rules in each state for determining which state has jurisdiction to issue a decree.
- The PKPA is a federal statute that regulates how states will carry out their federal constitutional duty to afford full faith and credit to the custody determinations of other states.

Family Law – Review

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Questions

and

Answers

Review Questions:

1. Marriage is a social relationship and a religious institution, but in the U.S., the courts also regard marriage as a:
 - A. Crime
 - B. Tort
 - C. Contract
 - D. Mistake
2. True or False: It is possible for a bride to sue her fiancé if he breaks off the engagement.
 - A. True
 - B. False
3. What authority determines whether a couple is qualified to get married?
 - A. The State
 - B. The Federal Government
 - C. The Mayor
 - D. The Minister
4. If a couple decides to be married, but doesn't want to go through the effort of getting a license and having a ceremony, this is called:
 - A. Civil law marriage
 - B. Criminal marriage
 - C. Conciliatory marriage
 - D. Common law marriage
5. True or False: A divorce is the legal termination or end of a marriage, but an annulment is the legal declaration that a marriage never existed.
 - A. True
 - B. False
6. The two main types of divorce are:
 - A. Your Fault divorce or My Fault divorce
 - B. His Fault divorce or Her Fault divorce
 - C. Fault divorce or No Fault divorce
 - D. Fault divorce or Accidental divorce

7. The court will determine the outcome of a child custody case based on what standard:
 - A. The Best Interests of the Child
 - B. The Tender Years Doctrine
 - C. The Mothers Touch Doctrine
 - D. The No Fault Doctrine

8. If you work in a family law office and a client calls you asking for a divorce consultation appointment, but you know that last year, your attorney represented the couple in both the purchase of a house and the sale of their business, how should you respond:
 - A. Refuse to schedule the appointment
 - B. Advise the client to call another attorney and then make a recommendation
 - C. Schedule the appointment, send the attorney a note about the prior representation and pull the files for him to review before the appointment
 - D. Just schedule the appointment, no further action is necessary

9. True or False: If two parents live in different states, they are unable to settle a custody dispute until one of the parents moves into the other parent's state.
 - A. True
 - B. False

10. True or False: Physical custody and legal custody are the same thing? Answer:
False. Physical custody relates to where the child will live and legal custody relates to which parent will have responsibility for making decisions about the child's life (where they go to school, who the pediatrician is, etc.).
 - A. True
 - B. False

Answer Key:

1. C
Marriage is a social relationship, religious institution and a contract all at the same time. As far as the courts are concerned, marriage is a civil contract which is subject to state laws that are allowed to regulate it to a certain extent.
2. A
True. Like the marriage, the engagement is a contractual agreement between the couple, and if a bride were to suffer damage (for example she has paid a non-refundable deposit on the venue and the dress) she could have a cause of action against her fiancé and sue him for compensatory damages.
3. A
The state has the authority to regulate marriage, and therefore each state has rules determining who may obtain a marriage license and whether a couple is competent to marry.
4. D
Common law marriage, which has been outlawed in most states, occurs when a couple declares themselves to be married by calling each other 'husband' or 'wife' but doesn't have any marriage license and never had an actual marriage ceremony. There are certain criteria that the couple will have to prove in order to have their common law marriage recognized, and these criteria will vary from state to state.
5. A
True. An annulment may be awarded in cases where one of the parties lied about certain things to convince the other party to marry them.
6. C
Fault based divorce is where the party seeking the divorce must explain to the court why they want the divorce and what behavior caused the divorce. A No Fault divorce is available in some states, this is where the couple or one of parties can ask the court to grant the divorce just because they want it, without having to explain the reasons why.
7. A
The courts who handle family law cases and determine child custody will always be motivated to do whatever they believe to be in the Best Interest of the Child or children involved.

8. C

Depending on the state, a lawyer is not permitted to represent one party in a divorce if they have previously represented the couple together. In some states, it's okay for a lawyer to handle the divorce, so long as both parties agree. If you find yourself in this scenario, it would be a good idea for you to schedule the appointment and let the attorney make the determination about whether this is permissible in your state. To help him decide, pull the files so that he can review them and then give you further instructions.

9. B

False. The Uniform Child Custody Jurisdiction Act (UCCJA) and The Parental Kidnapping Prevention Act (PKPA) can be used by the courts to determine the best outcome of a child custody case when parents are living in different states.

10. B

False. Physical custody relates to where the child will live and legal custody relates to which parent will have responsibility for making decisions about the child's life (where they go to school, who the pediatrician is, etc.).