Family Law in America
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Divorce

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Abstract and Keywords

This chapter discusses divorce, both as a termination of marriage and the recognition of new relationships between divorcing spouses and their children. Topics covered include divorce procedure, child custody, and divorce and decision-making.

Keywords: family law, divorce law, termination of marriage, child custody

Introduction

American divorce laws and procedure have undergone enormous changes during the past half century and seem to be stable in the beginning of the present century. The reasons for the changes are complex. Essentially, they have a great deal to do with changes in the nature of marriage and the social and legal acceptance of formal and informal alternatives to marriage, both of which have been discussed in an earlier chapter. Equally important have been the changes in cultural norms, particularly with regard to societal attitude toward divorce, population movement from one area of the country to another, shifts in the political climate as a result of the impact of various of the civil rights movements—children's rights, women's rights, and father's rights—and changes that have occurred in the legal profession, access to legal representation, court structure, and the availability of alternative methods of dispute resolution especially with the use of negotiation and the wider acceptance of mediation.[1]

Divorce can be seen as both the legal termination of the husband and wife relationship as well as the legal, social, and psychological reorganization of that relationship and the parent-child relationship established through the marriage. The reason for the word ‘reorganization’ is that the divorced couple may have a continuing relationship, although altered, because of the post-divorce property and child custody arrangement. Alimony and the assignment of property may continue the adult relationships, but on a level different from marriage. The judicial award of a child’s custody to one parent or another changes the **(p. 77)** relationship from what it was during marriage. During marriage, the mother and father were the child’s natural and joint legal custodians. Within certain legal boundaries, their relationship to their child was basically self-defined. The petition, for divorce not only restricts the personal autonomy of the couple, but also limits their relationship with their children at least until they reach their majority. With divorce comes the loss of individual freedom and the addition of judicial regulation.

It should be noted, however, that conflicts in the great majority of divorce cases are resolved in lawyers’ offices where negotiation between lawyers takes place in an informal setting without adherence to rules of evidence. The cases reach the courts only for judicial affirmation of the resulting agreement.

At first glance a negotiated settlement may seem to be beneficial to the parties who have managed to avoid the time and costs of a lengthy court battle. If both the husband and wife are represented by equally qualified counsel who negotiate against the background of the law as found in statutes and in the cases, then the result may very well be fair. But is that likely? I believe that divorce is one area of legal practice where the oral legal tradition may play as important, perhaps even more important, a role in negotiating a divorce settlement than official law found in statutes and cases. By that I mean that the oral tradition is very much a part of law practice and lawyers tend to advise clients on the basis of their experience, perhaps more than on what they read in statutes or cases. For example, a lawyer might advise his female client to accept a small sum in lieu of alimony because of his belief that particular judges do not award any alimony to marriages of less than two years. That fact may not be found anywhere except in the lawyer’s mind. Or, a lawyer might advise his male client not to seek custody but to accept a reasonable visitation schedule because of his belief that a particular judge does not award a female infant to a father. Again, that fact may be found nowhere but in the lawyer’s mind and may

indeed be contrary to the law's statement of excluding any presumptions in custody laws. Interestingly enough, it is the oral legal tradition that laymen often believe to be 'the law' and rely on for making their own decisions about their case. There are, therefore, two systems at work in divorce sometimes supporting each other, sometimes running parallel and sometimes modifying or contradicting each other. One is the oral tradition or the unwritten law. The other is the official law, which judges refer to in making their decision. It is the latter system that is the subject of this chapter.[2]

(p. 78) Divorce Procedure

Fault

Until the introduction of no-fault divorce, American divorce procedure had been, and in instances where the action, is for a fault divorce still is, based on the adversarial model. This model assumes protagonists: each party, free of fault, suing the other in court. American law has never adopted a transactional approach to divorce, which would allow a husband and wife to enter into a private divorce agreement without any official involvement (like a judge or a court clerk) at all.[3] With the adversarial model came a body of law based on English equity principles.[4] For example, under a fault system, among other limitations, divorces could not be consensual and a divorce could be defended and defeated because of the conduct of the plaintiff (the moving or petitioning party). Defenses to a divorce included connivance (consenting to or being involved with the ground for divorce, particularly adultery), collusion (agreement by the couple to commit the act, which will support the ground for divorce), and condonation (forgiveness for the wrong). In addition, if both plaintiff and defendant were guilty of fault, theoretically, unless changed by statute, neither could get a divorce under the doctrine of recrimination, later modified to comparative rectitude.[5] These defenses supported the old English adages: one must do equity to receive equity and one must come into court with clean hands. Divorce actions have been described as resembling those for torts. In order to recover in tort one must show that one was not at fault or has not contributed to the wrong.

When a fault-based system of divorce was the exclusive method of obtaining a divorce, evidence for formally proving grounds, for example, cruelty, desertion, or adultery was critical. If the ground was not proven, no divorce could **(p. 79)** be granted. Because of the strict requirements for cruelty and adultery, the grounds were often difficult to prove unless there was secret collaboration with the defendant. In the case of adultery, which was the

only ground for divorce in New York until *1967*,[6] it was not uncommon for a spouse to fake an adultery scene. The situation was so bad in New York that as early as 1945, the Committee on Law Reform of the Association of the Bar of the City of New York recommended divorce reform to the state legislature. *A* portion of the report read: 'We … urge a liberalization of the divorce laws tinder proper legal sanctions. We do so in the hope that we may thus eliminate what has come to be recognized as a scandal, growing out of widespread fraud, perjury, collusion, and connivance which now pervade the dissolution of marriages in this State.'[7]

In states where there were a number of divorce grounds and a judge wanted to grant a divorce but was not presented with persuasive evidence, the judge might interpret the ground for divorce broadly. For example, a judge could interpret the ground of cruelty, which customarily required some evidence of physical force, to mean emotional or mental distress without any physical manifestations such as a slap or a punch. The result was that divorce cases were often considered illustrations of two processes occurring at the same time. On the level that could be observed in court there was the formal process of a divorce case: lawyers and litigants going through the motions of a civil law suit. On another level there was private understanding between lawyers and litigants that there would be a certain amount of lying and perjury. Because of this, divorce practice was considered to be low level, and judges assigned to hear divorce cases were often thought to be part of the legal charade, thus not very competent or persons with little respect for the legal system.[8]

Fault-based divorce, the model that existed in the United States for years and still exists (in some instances side by side with no-fault) in thirty-three states,[9] **(p. 80)** affected not only grounds for obtaining a divorce but also influenced the assignment of children and property.[10] It was hard to separate the evidence for proving a ground like cruel and abusive conduct or adultery from the litigation over who was assigned custody of what child and how much a spouse would have to pay in alimony unless the procedure was bifurcated. Appellate case law is filled with cases denying a spouse custodial rights in the first instance or after a modification hearing on the basis of moral turpitude.[11]

In the 1960s and early 1970s, the legal profession and state legislatures came to realize the deplorable state of divorce laws and practice.[12] Respect for divorce law and procedure, if there ever really was any, had declined. Reform was needed not only in terms of changing substantive laws, like

grounds for divorce, but also with regard to the process of divorce. The thought was that the law should not mask deception but should, as far as possible, reflect reality. It was at that time that the Governor's Commission in California found that the fault-based divorce laws in effect in California were no longer viable and should be replaced with laws that allowed a divorce without a showing of fault. Thus, in 1969 California became the first state to implement a divorce law without any fault-based grounds for divorce. Although, due to strong resistance from some segments of society, only a few states have entirely done away with fault as a basis for divorce, by 2001 all fifty states have enacted some type of no-fault provisions as part of their divorce laws.[13]

Residency

At the same time that no-fault divorce laws were being enacted, a major procedural reform was taking place: changes in residency laws. Prior to 1970 it was **(p. 81)** not uncommon for a state to have a one- or two-year residence requirement before a person could file for divorce. The idea behind such residence requirements is that a state should have an interest in the status of marriage before it allows its courts to be used for dissolving a marriage. In addition, residence requirements provide a certain amount of time to consider divorce. Further, for practical reasons, long residence requirements, like two years, act as a deterrent to divorce and reflect a policy of marriage being a serious undertaking, not easily dissolved.[14] Nevada had the dubious distinction of being the 'divorce mill' state and the 'road to Reno' became another way of saying 'the road to divorce'.[15]

Reducing the length of time a person must live in a state before he or she may petition for a divorce is a reflection of that state's view of marriage and divorce. It stands to reason that the longer the residence requirement the more likely it is that the state takes marriage as a serious institution worth preserving. In addition, a long residency requirement discourages persons who have not lived in the state for a certain length of time from seeking a divorce there. The theory, rightly or wrongly, is that a state has an 'interest' only in marriages of its domiciliaries. The general view has been that a divorce action should not be like a transitory tort action—allowing the damaged party (plaintiff) to sue the wrongdoer (tortfeasor) wherever he or she can be found in a state that has no contact with the marriage at all. No state takes that position, although the statutory trend seems to be clearly in the direction of shortening the time necessary to live in a state before one can sue for a divorce.[16] As more and more states either relax their grounds

for divorce, adopt grounds similar to those in sister states, or enact a liberal no-fault system, the need to leave a state or travel to a foreign country to obtain a divorce—what the law terms (with negative connotations) migratory divorce—becomes less and less important.

As fewer couples seek divorces in jurisdictions that are not their marital domicile, the less there is litigation over the recognition of a sister state's divorce **(p. 82)** decree. Two famous cases, *Williams v. North Carolina* I[17] and *Williams v. North Carolina* IT,[18] dealt with the question of the extent to which a divorce decree issued in one state (where only one spouse was before the court and the other spouse was given notice of the divorce hearing), not the marital domicile, must be given full faith and credit in another state. In *Williams I*, a bigamy case, the U.S. Supreme Court held that a divorce decree that was obtained in a state (Nevada) where one of the spouses was domiciled for purposes of divorce is entitled to full faith and credit in the couple's marital domicile (North Carolina). The case was remanded to the North Carolina courts to determine the issue of domicile. In *Williams v. North Carolina II*, the U.S. Supreme Court held that North Carolina should respect Nevada's finding that it had jurisdiction over the Williams's divorce. However, this did not mean that North Carolina could not examine the matter itself and reach its own judgment on whether Nevada's jurisdictional requirements were met. That is what North Carolina did, and it found that Nevada was without jurisdiction. Throughout the case, the justices emphasized the importance of domicile. The result of the *Williams* cases is that a divorce can be granted in one state (Nevada) and be legal there. However, that same divorce need not be recognized in the marital domicile of the divorcing parties (North Carolina).[19] It should be emphasized, however, that if both parties to a marriage appear personally in another state and participate in obtaining a divorce there, neither can attack the divorce.

In the *Williams* cases, only one party to the marriage, Mr. Williams, was present in Nevada. That kind of *ex parte* proceeding can give the court jurisdiction to terminate only the marriage. Without personal jurisdiction over both spouses, a court cannot either impose or limit obligations (like alimony)[20] or restrict rights (like issuing a custodial order restricting the rights of the absent parent).[21]

No-Fault Divorce

It is an oversimplification to say that once a no-fault system of divorce is in place, the idea of fault is abandoned. Many states and the Uniform, Marriage

and Divorce Act do specifically state that the division of marital property should be assigned 'without regard to marital misconduct'.[22] But, words like 'unfitness' in child custody matters or 'conduct of the parties' (as it affects the marital assets), 'dissipation of assets', 'misuse or mismanagement of marital **(p. 83)** assets' may be a mask for the concept of 'fault'. However, the idea is the same. In addition, some states specifically mention that a court may consider fault in determining alimony and child custody.[23] Also, an abused spouse who was awarded a no-fault divorce, if allowed under state law, might have preserved her right to seek a tort action for assault and battery after her divorce unless she specifically waives that right in a divorce settlement.[24]

It is important to note that there are two kinds of no-fault divorce statutes: those that allow one of the spouses to contest the claim that the marriage is 'irretrievably broken' or that the spouses are 'incompatible', and those that do not allow any contest. In the first kind, if one spouse claims that her marriage is 'irretrievably broken' and her husband claims it is not, the wife must prove her allegation by what amounts to factors that might have been satisfactory to show a fault ground.[25] Where there is no contest, one spouse's allegation of 'incompatibility' might be sufficient for a judge to grant a divorce. The pure no-fault model—that which does not provide for a contest—basically allows one spouse to leave the marriage at will. It also minimizes the role of the judge.[26] But it must be emphasized that no-fault in this context only operates to terminate the marital relationship. It does not affect the assignment of property or the custody of children, both of which are separate issues.

There has been a great deal of discussion in the academic literature as to the effect of no-fault divorce on the divorce process and on society as a whole. It is generally believed that no-fault divorce has decreased the acrimony and hostility between the spouses and civilized the process.[27] There is no more need for **(p. 84)** charades. Two questions have been raised with regard to the social implications of no-fault divorce. The first concerns the rate of divorce: Has the advent of no-fault divorce increased the divorce rate? A second question is whether a pure no-fault divorce economically favors one spouse over another.

Professor Morrison has written:

> During the decade from 1950 to 1960, the rate of divorce was considerably lower than would have been expected based on the historical trend. But this period of high marital stability

> did not last. In the late 1960s the rate of divorce made a sharp ascent which continued through the late 1970s. Like the 1950s downturn that preceded it, this surge was more radical than what would have been predicted from the trend line over time. Given that during this span of fifteen years divorce rates more than doubled from 17 per 1,000 single women ages 15 to 54 in 1963 to 1965 to 40 in 1978 to 1980, it is not surprising that this pattern was dubbed the 'Divorce Revolution'. Observers attribute the rise in divorce rates during this period to several things, including the sexual revolution, the availability of modern contraception to control fertility via artificial means, and the legalization of abortion, each of which may have increased marital infidelity. *Moreover, both the introduction of no-fault divorce lams and the increased labor market involvement of women (and hence their improved economic independence) may have made it easier for couples to sever their marital ties. The rate of divorce began to level off in the 1970s and actually declined during the 1980s. More recently, the divorce rate has remained high, but steady*,[28] (emphasis added)

As to whether no-fault divorce favors one spouse or another, again it can be said that it is not absolutely clear because most of the research on divorce trends was published in the 1980s. One researcher has maintained that at least in California, divorced women are economically worse off than their divorced husbands, perhaps because judges, using their discretion, have awarded inadequate support orders.[29] Another study concludes that the effects of no-fault on **(p. 85)** the economic condition, of divorced women 'were either modestly benign or neutral'.[30]

While no-fault divorce may not have a major adverse effect on women, this does not mean that the same can be said about divorce itself.[31] There seems to be no dispute in the literature about divorce's negative impact on women.[32] The reasons for this latter phenomenon have much to do with the fact that the social and financial position of the wife who usually has custody of the children tends to be frozen at the time of divorce, while the husband's position is more fluid. In other words, a working husband may have his alimony and child support payments calculated on the basis of his salary for his existing job at the time of divorce. There may or may not be consideration of his future finances such as his working overtime, receiving a promotion, or taking a second job.[33] If any of these eventualities do occur

and a divorced wife needs additional support for herself and her child, she must seek a modification of her alimony decree and child support order on the basis of 'changed circumstances', defined as events that have occurred following the divorce decree that have materially altered the status quo.

If a divorced wife chooses to work outside the home after divorce, she may find that her years out of the commercial workforce have put her in an economically disadvantageous position compared with men and women who did not leave the labor force to raise children.[34] Divorced husbands do not **(p. 86)** necessarily have the same experience. In fact men who stayed in the workforce throughout their marriage may have more opportunities to increase their income by taking advanced training in their particular career and being promoted. In addition, more divorced men tend to remarry than divorced women.[35] These men may benefit financially from their new wives. These wives may be making the major financial contribution to their husband's second marriage because of the husband's financial obligation to his first family, which many judges feel is the husband's primary obligation.[36] This is especially true if the new wives are professional women in the commercial world.[37]

Distribution of Economic Resources

With the inclusion of no-fault divorce in American law, the emphasis in a divorce case has shifted from determining and proving fault grounds for divorce to determining what are marital assets and how should they be assigned. For the most part the economic aspects of divorce constitute the main concern in divorce negotiation in lawyers' offices and the major time in litigation. Divorce that involves a couple with substantial financial resources has become complex. In order to prepare such a case, lawyers must hire not only accountants but experts in special types of valuations, such as those who specialize in valuing the position (including benefits and advancement possibilities), which a spouse holds and the industry in which a spouse's business is located.[38] The reason for **(p. 87)** this change in. divorce practice and litigation, is,, as has been discussed earlier, that marriage is now considered a special economic partnership in which each spouse may have contributed to and have an interest in the other spouse's business or career.[39]

Property Distribution

Two kinds of marital property systems have existed side by side in the United States: the common law system and the community property system. [40] The common law property system is based on evidence of title. In other words tinder the common law property system the motto; ‘He who holds title takes the property’ has a ring of truth to it. Under the community property system, found in. nine states in the western and southwestern part of the country, the distribution of marital property (accumulated during marriage) upon divorce is theoretically based on. the principle that each spouse owns an undivided one-half interest in each community property item. While four of the community property states seem to conform to the fifty-fifty split (assuming there has not been a prenuptial agreement that assigns property according to a different formula), the other five incorporate equitable distribution principles (that is, a judge considers the equities of a case), which may result in. a different formula than an equal split.[41]

In the last twenty years there has been a major decline in the number of states that either by statute or case law adhere to the old common law property system. Now, the prevailing method of assigning marital property upon divorce is called ‘equitable distribution’. Basically equitable distribution has changed the **(p. 88)** nature of the judicial inquiry when making an assignment of property. Instead of asking the question: Who holds title? The questions asked are; What is considered marital property and what is considered separate property regardless of title? When and how was the property in dispute acquired: while the parties were single or before marriage but while the couple was living together, during the marriage, or after the separation? Who has contributed to the enhancement of its value or who has depreciated the property? When should it be valued (e.g. at the time of separation, initial court petition for divorce, or the time of the divorce trial) and what is its value? Who should value it, the parties themselves or experts? If the property was acquired by gift or inheritance, should it be considered separate? If either of the parties enhanced the value of the gifted or inherited property during the marriage by keeping the property in good repair or rehabilitating the property, were those activities sufficient to change its nature from separate (if that was the case) to marital? The key word to equitable distribution is ‘contribution’: and the ultimate question is: Who should be assigned the property?

A whole body of law has developed to give courts guidance in determining whether assets are separate or marital. Courts have come up with three

concepts: tracing, commingling, and transmutation. Tracing of assets consists of determining the source of the asset, that is whether the asset was acquired through inheritance, gift, or by the use of marital funds. Commingling takes place when separate funds are brought into the marriage but are mixed with other assets so as to be untraceable. Transmutation of an asset is the term used to describe the change in character of the property from separate to marital or from marital to separate, usually accomplished by use, gift, or contract.[42]

But the fundamental assumption of equitable distribution is the fact that the marriage is an economic partnership in which there is a shared enterprise. In some respects the modern American marriage is an investment in a relationship, which at times pays off by being successful. That success has been measured by its bringing mutual happiness to the couple, being productive in the sense that joint aspirations have been realized, and that it has been of a long duration. **(p. 89)** At other times the marriage turns out to be unsuccessful for many reasons and results in a divorce.

Over a decade ago, marital property was thought of as mainly tangible items like a house, an automobile, or a painting and salary, cash in the bank, and investments. Today, the definition of marital property goes beyond these items to include less obvious ones like, for example, pensions (vested and non-vested),[43] deferred income, unused vacation or sick leave payments, stock options, interests in a spouse's business, including its good will and a spouse's reputation, celebrity status, or career,[44] income from a patent, a law suit, and **(p. 90)** royalties from the present or future sale of books.[45] Disability benefits and personal injury awards or causes of action, for personal injury may or may not be marital property. Ordinarily, if the disability benefit or personal injury award related to payment for disfigurement or compensation for pain and suffering, and is not related to lost wages, the benefit or award is usually considered separate property. A cause of action may be marital or separate depending on the substance of the action and whether recovery is too speculative.[46] Recovery from a cause of action for sexual harassment, for example might be personal property if the damages relate to pain, suffering, and humiliation. The important point is that for the most part in equitable distribution states, marital property consists of assets earned (sometimes gifts and inheritance acquired during marriage and remain in their original form are separate, depending on the facts or a statutory exclusion) during the marriage and while the couple live together, whether the assets are fully realized during the marriage or

after divorce.[47] It should also be noted that debts can be marital if they were incurred for joint benefit during the marriage.[48]

Professional degrees and licenses present special problems. One state, New York, by statute, considers a professional license marital property if it was obtained during the marriage.[49] Generally, however, a professional degree or a professional license is not considered marital property subject to division because it does not conform, to the traditional definition of property. A professional degree or license is personal to the holder, and cannot be bought, sold, mortgaged, or transferred. Judges consider the degree or license as having enhanced the earning capacity of the person holding the degree or license, and **(p. 91)** thus a factor in the determination of alimony generally,[50] or 'reimbursement alimony'. In addition to alimony, a supporting spouse could also seek restitution for repayment of her expenses (such as tuition), or if there was some sort of implied or expressed contract that could be proven, she could have an independent breach of contract cause of action. The major problem with seeking recovery in any action, including quasi-contractual relief, rather than a property division or alimony award is overcoming the presumption that spouses contribute to each other's lives, including the payment of educational debts, with a donative intent and not with the expectation of being reimbursed.

The uncovering and consideration of marital assets have a great deal to do with the changes that have occurred in society. For most Americans today (although this may be changing because of the present economic conditions and downsizing of companies) one's job—the workplace—generates one's property, not one's family (by way of inheritance).[51] Thus, instead of accumulating **(p. 92)** wealth in investments in land and in stocks and bonds, and inheriting money from relatives, most Americans derive their present and future assets (especially their pensions and other retirement benefits) and status from their employment. In addition, economic contributions to the marital enterprise are not limited to those directly created by employment outside the home (such as a salary) but by contributions made within the home itself. Thus, in the context of a divorce, a value may be placed on a wife's (or husband's) household services, which include caring for the marital house and raising children. The percentage of the marital property awarded to a spouse who performs household services during the marriage and does not work outside of the home varies according to the facts of the case.[52] One state considers homemaker services only to the extent that they contributed to 'the acquisition, preservation and maintenance, or increase in value of marital property'.[53] Considering the value of a wife's home-

maker services for purposes of determining her contribution to the marital enterprise is a major change in the law. It must be remembered that under the common law, a wife's duty was to perform such services. *A* husband's promise to compensate his wife for those services or to consider their value for determining her share of marital property in a way would violate notions of pre-existing duty, a firmly established doctrine that would deny recovery in contract law.

The nature and provision of equitable distribution statutes vary from state, to state although the Uniform Marriage and Divorce Act provides a framework for most of the statutes.[54] Basically state statutes contain a list of factors **(p. 93)** that a court must consider in order to properly determine the assignment of property.[55] By enacting such legislation, one goal was to provide guidance to judges. A second was to provide some uniformity in decisions. Although at first blush stating factors that must be considered for making an assignment of marital property might seem to be a method to limit judicial discretion, the history of the application of state statutory provisions has not proved this to be the case. In other words, even though judges are governed by statutory provisions, there is still wide discretion in interpreting statutory factors and applying them to a particular set of facts. One commentator has gone so far as to label equitable distribution as 'discretionary distribution of property'.[56]

The factors that are considered in the assignment of property are not weighted equally. Nor does an equitable distribution provision provide a formula. The statutes merely state that certain factors are to be considered, thus allowing the judge to set his or her own priority of importance. Some attempts have been made to create either a presumption of equal division or a fifty-fifty starting point for division. A handful of state statutes contain a presumption that marital property will be divided equally.[57] As a check on judicial discretion, some states require judges to make specific findings explaining their award. These findings not only present lawyers with reasons for the division, but also provide a basis for appeal.

We have had nearly a quarter of a century experience with some form of equitable distribution. Has the existence of statutory factors reduced judicial discretion? What trends can be discerned? Equitable distribution legislation has limited judicial discretion to some extent, but has certainly not eliminated it.[58] A review of the statutes and case law suggests that absent statutory guidance, courts are generally more likely to divide property equally in the case of long-term marriages (fifteen years and longer) and,

conversely, less likely to presume equal division for short-term marriages (one to three years).[59]

(p. 94) The assignment of property upon divorce is only part of the economic consequences of divorce. Alimony and child support are additional financial considerations. Both have undergone major changes in the last thirty years.

Alimony

As stated earlier, before the passage of the Married Woman's Property Acts in the mid-nineteenth century in the United States, a woman's property became her husband's upon marriage. A husband, then, had the duty to support his wife during marriage. Upon divorce that duty continued under the legal term, 'alimony'. It was customary to say that alimony was based on a balance between the husband's ability to pay and the wife's needs.[60] Today, however, alimony may be awarded to a husband as well as a wife.[61] The amount of an alimony award was based on the station of life that the wife enjoyed during her marriage and to some extent the value of the property she lost control over and which the husband acquired upon marriage.[62] Alimony can be awarded periodically, which can be modified if there are changed circumstances, as a lump sum or as a lump sum paid out periodically, which normally cannot be modified (unless the modification is mutually agreed upon), since the lump sum is a debt. If the alimony was determined by agreement, the method of payment is ordinarily determined by the parties themselves, depending on the financial circumstances of the debtor and the tax consequences.

Unlike today's equitable distribution laws, which include factors for judges to consider in assigning property,[63] and before the enactment of laws based on the Uniform, Marriage and Divorce Act,[64] there were no standardized statutory guidelines. The result was that judges used their own discretion in making awards. Discretion could mask biases for which the only procedure to question the discretion was through appellate review that might be both time-consuming **(p. 95)** and costly.[65] At that time, no thought was given to the now accepted idea that a wife may have contributed something of value to the economic well-being of the family (as she did in the past, although this is often lost sight of, by bringing her own property into the marriage) by her household services or by giving up certain opportunities in the commercial workforce and that the husband's payment of alimony was really repaying what was really owed to the wife. In other words, today

alimony is considered to be a wife's entitlement, not a privilege that may or may not be judicially recognized.

In reading appellate cases decided over thirty years ago and earlier, it is not unusual to find cases where a wife who divorced her husband after ten years of marriage (during which time she did not work outside the home) received alimony for the rest of her life. Why was lifetime alimony awarded in the past, but uncommon today? One thought is that if a wife never worked outside the home, she would not have qualified for any benefits like a private pension or social security. Thus, if she were divorced without any financial support from her husband and unable to find a job, she would become a 'public charge'.[66] Perhaps, in those old cases (before thirty years ago) alimony could have been thought of as a substitute for a pension or social security except that instead of a pension or government social security check, a wife would receive one from her former husband. Another view is that alimony serves as severance pay paid out in a lump sum or in installments. If one viewed alimony either as a government benefit or severance check, one would have to think of the marriage relationship as similar to that of an employer and employee with the husband acting as the employer.

Alimony is the economic link that continues a relationship between divorced spouses especially in the case of periodically paid alimony. That is to say, if a husband has a duty to pay alimony, he is forced to have some kind of relationship with his former wife. In other words, he has to communicate with her, even if it is by mailing her a check. If the divorced husband remarried, that fact alone **(p. 96)** does not ordinarily discharge his alimony obligation. He has to consider his first wife (and first family if he had children) in all his economic planning. Permanent alimony means that a divorced wife can passively receive her former husband's alimony without any effort to reduce her financial dependency on him. As attitudes toward the role of men and women in marriage as well as the definition of marriage itself changed so has the concept of alimony.

Today long-term, permanent alimony is an unusual outcome of a divorce except in the case of a very long marriage (of twenty years or more) where the wife is of an age, e.g. 50 years old, when she has been out of the commercial workforce for so long that she is now unemployable or is not in good health. In its place is short-term alimony (for a few years in order to help a wife through the difficult period of post-divorce adjustment) or rehabilitative alimony.

Rehabilitative alimony is a phenomenon derived from the application of judicial discretion in alimony cases.[67] The thought is that divorced wives should actively attempt to reduce the husband's alimony obligation by developing skills to become employable.[68] In a way, conceptualizing rehabilitative alimony in this way suggests the idea of mitigation of damages in contract law—that is that a contracting party should try to reduce the amount owed her under a contract. In the case of divorce, it would mean that the divorced wife would have to eventually seek employment and if the wife needed additional education to obtain a position, the husband would support his divorced wife in order to secure the education.[69] In a way, rehabilitative alimony is designed to take into account **(p. 97)** the spouse's (usually the wife's) lost opportunities for either education or employment advancement.

Whether alimony as maintenance terminates when a wife remarries is not necessarily automatic, unless there is a state statute that requires the termination or the parties themselves agreed to remarriage as the event that ends alimony. Further, if alimony was established as a special method for long-term payment of a debt or for compensation for the wife's contribution to her husband's career or for other reasons, the wife's remarriage may be irrelevant. Parties do have some flexibility in their settlement agreement regarding the conditions that will affect the amount and duration of alimony. However, these conditions are subject to judicial review, which would occur if the husband sought a modification of the alimony provision because of his interpretation of the agreement.

Agreements about alimony can be the vehicle in which a husband can control his wife's conduct after a divorce. The issue of control was raised in *Gottsegen v. Gottsegen*,[70] where a settlement agreement included two provisions that were the basis of the litigation before the Supreme Judicial Court of Massachusetts. The provisions read as follows: (l)'[i]n the event of the wife's remarriage (as hereinafter defined) at any time prior to the fifth … anniversary of the date of execution hereof, the husband's support obligation … shall thereupon terminate and be substituted by an obligation to pay the wife, or for her benefit, for her support and maintenance $30,000, at the rate of $833.33 per month for three years'; (2) The 'remarriage of the wife shall, for purposes of this Agreement, be deemed to include her cohabitation with the same unrelated man with whom the wife has a romantic relationship for more than two … consecutive months.'[71]

(p. 98) When the divorce was first heard in the Massachusetts Probate Court in. 1981, the probate court judge granted the divorce *nici* (not final)

and included the cohabitation clause in the divorce judgment. In 1983 and after the divorce judgment became final, the plaintiff wife filed a complaint for civil contempt,[72] against the defendant husband for failing to fulfill his financial obligation. The defendant husband denied that he was in contempt of the divorce judgment and in fact counterclaimed to request to declare that his former wife's cohabiting with another man for a two-month period constituted 'remarriage' within the meaning of the agreement.

In an opinion that traced the history of alimony in the Commonwealth of Massachusetts, Justice Ruth Abrams restated the conventional view that alimony is based on reaching an equitable balance between the needs of the dependent spouse and the ability of the supporting spouse to pay. She held that the divorce judgment that incorporated the agreement empowered the judge to modify the financial provision of the agreement if the recipient spouse's economic circumstances had materially changed. The mere fact that Mrs. Gottsegen 'cohabited' with another man did not warrant a judge's discontinuance of the alimony award. Had Mrs. Gottsegen proven that the man with whom she was cohabiting had supported her, a different result might have been obtained.

The case is interesting because of the discussion of the cohabitation clause that was ordered to be struck from the divorce judgment. The important point in the case is that the agreement was merged into the decree, thus allowing the judge to examine the provision and determine its fairness under the judge's discretionary powers.

If the agreement had not been merged with the decree but had maintained all of its contractual characteristics (this can be accomplished by a provision that states that the agreement will not be merged and has been approved by the judge at the time of divorce), the anti-cohabitation clause still might have been struck, but for reasons relating to the enforcement of contracts.[73] One attack **(p. 99)** might have been to argue for the unconscionability of the provision, because it restricted a wife's freedom of association. Another, less general, would be that unless the agreement contained additional consideration for the burdensome anti-cohabitation provision (like a higher alimony amount than would have been expected), the provision would fail for consideration reasons. Indeed, such a provision not attached to any mention of the cohabitant's providing the wife with support might be considered overreaching on the part of the husband, since it provides him with a benefit that is unrelated to the purpose of the agreement. In other words, the anti-cohabitation clause provides the husband with more than he bargained for.

Child Support

Child support has been revolutionized.[74] It is no longer a simple matter of a negotiated settlement in a lawyer's office or a judge's own determination of what constitutes an adequate amount of money to support a child. In the past, court-ordered child support tended to greatly undervalue the true costs of raising children. Today, child support is governed by standardized guidelines to which judges must conform or express reasons for their deviation.[75]

(p. 100) Prior to 1984 when the U.S. Congress passed the Child Support Enforcement Amendments, child support orders very often bore no relationship to the cost of supporting a child, were not complied with after a few years, and were not zealously enforced. For example, child support obligors, mostly fathers, failed to fulfill their support obligation at the rate of $4 billion annually. In addition, half of the divorced custodial parents did not have a support order to enforce.[76] With no other means of support, divorced women turned to departments of public welfare to assist them in raising their fatherless children. This placed an unusually severe financial burden on public welfare agencies and ultimately the taxpaying public. In order to reduce divorced women's (as mothers) dependency on public funds, the federal government's Child Support Enforcement program provided creative ways of forcing fathers to comply with court orders and ultimately supporting their families. For example, specific enforcement remedies include wage withholding, imposition of bonds, securities or other guarantees, liens on real and personal property, and interception of federal and state income tax refunds.

Even with the new legal machinery in place and support laws on the books by way of child support guidelines, recent data indicates that a large number of children were still not receiving support from the parent with the obligation.[77] The explanations for the custodial parent's failure to pursue a support order or the obligor's failure to meet his obligation are said to include reasons like a mother's seeking support from the father is futile, or a mother's desire not to communicate with a former husband, or a father's feeling that the order is unfair.[78] In cases of non-support, if the mother sought assistance from the welfare department and the department provided assistance to the mother, the department would seek reimbursement from the delinquent father if the father could be found and he had funds. Of course, if the current economic conditions persist and parents with support obligations are unable to find employment, non-support of children will

continue to be a major social problem as well as a drain on public welfare funds.

(p. 101) In the present economic climate, judges have a difficult time arriving at an economic balance between the divorced spouses when there just are not enough finances to support the reorganized family. Attempts are made to preserve some assets like the family home. And in most cases where possible and economically practical the spouse who will be raising the children usually is assigned title to the home.[79] Further, child support obligations may not necessarily be abruptly stopped in some states when a child reaches 18 if he or she is in college.[80]

There are two recurring problems in child support. With serial marriages so prevalent coupled with fathers who abandon their financial responsibility for their children, the question of the liability of stepfathers becomes important. The fact pattern that would give rise to the question of liability would concern a man who marries a woman with an infant. Upon his wife's remarriage, the father fails to fulfill his child support obligation, and the wife's new husband, the child's stepfather lives with the child and assumes the obligation. After five years of marriage, the couple divorces and the stepfather refuses to support his stepchild for whom he has been the de facto father. If the state has no statute making a step-parent liable for support if he stood in a *loco parentis* relationship with the child or if there is no statute and a judge took a particularly narrow view of parental financial responsibility, he or she might very well determine that the step-parent has no financial obligation to the child. Another judge might apply the doctrine of *in loco parentis* or the doctrine of estoppel to such a fact pattern. She might decide that since the father voluntarily assumed the role of a parent for five years, took financial responsibility for the child, and the mother relied on that conduct, the step-parent should have some obligation for child support.[81]

The second problem, associated with serial marriages, is the responsibility of a father for the support of his children from his first and second marriages. The alternative approaches are to consider the child of the father's first marriage as **(p. 102)** his primary obligation. This seems to be the generally accepted position and the position taken by the American Law Institute.[82] The second alternative is to equalize the financial obligation for all the father's children. This would mean that when the father married his second wife who bore him a child, the obligation to his child from his first wife would have to be adjusted, most likely downward. This may not be possible from a procedural point of view, since the first family may not be before the court.

There is also the position that when a man remarries, and his second wife knows of his child support obligation, she enters the relationship with her eyes open and should not be surprised at the amount of her husband's disposable income. The fact pattern that would give preference to children of a father's first marriage over those of his second marriage, which has also ended in divorce, is to deduct the support obligation to the children of his first marriage in figuring his income for determining the amount of child support for his second family. But there is always that underlying thought that a father's children, no matter born of the first, second, or third marriage, are all his responsibility and should be treated equally. The father divorced the children's mother, he did not divorce them.

Child Custody

Judicial Discretion and Codification

As stated earlier, negotiation is the most common way of resolving divorce conflicts. Most divorces are uncontested and judges review and approve divorce agreements more than they conduct trials. There is no way of knowing how and why custodial arrangements are settled. The reasons may relate to the financial condition of the spouses and the need to reach an agreement quickly and out of court; they may relate to the talents and power of persuasion of lawyers or perhaps to the individual personalities of the spouses and how they perceive their post-divorce lives.

Before the trend toward codifying standards and setting statutory guidelines for judges to follow in child custody cases within state divorce laws, the award of a child to one parent or another was based on a judge's interpretation of the standard, 'the best interests of the child', which may have been included as a statement in a state divorce statute or found in case law. That standard had no uniform definition, and its application was both contextual and case-specific. For example, the application of the standard would be different, even in terms of the burden of proof, in cases involving termination of parental rights, adoption, interpretation of contracts concerning child custody, or divorce. Application of the standard would also be different depending on who the claimants were and their relationship to the child. While the standard may have **(p. 103)** been indeterminate and speculative, it served as a convenient and useful justification for a decision that may have been reached on another level. For example, even though a state may have abrogated the maternal preference rule or the tender years presumption,[83] the application of either gave a procedural and substantive

advantage to the mother and discriminated against the father. A judicial decision to award an infant to the mother could be made not because of the rule or the presumption, but because it was in 'the best interests of the child'.

During the 1970s there was a movement by state legislatures to enact detailed child custody statutes, which had the effect of limiting judicial discretion when interpreting and applying the best interests of the child standard.[84] These laws which are now in effect mandate judges to use certain statutory standards. The Uniform Marriage and Divorce Act, a model proposal for many state statutes, enumerated factors, focusing mainly on the child, his wishes, and his relations and relationships with others, for a judge to consider in a child custody dispute.[85] In contrast to this straightforward approach, some state statutes now **(p. 104)** include elaborate schemes requiring lawyers to prepare detailed parenting plans.[86] To lawyers, the effect of such statutes has been to require thought, planning, and organization of evidence in the preparation of a child custody case. These statutes have the result of trying to put order in the trial, and in many instances, forcing judges to spend time reviewing documents and studying plans; upon reaching a decision, the judges must also make findings of fact with reasons for their decisions. The requirement of writing a trial opinion, which relates evidence to the statutory factors and which states reasons for a decision has a positive result. Expressions of bias may be minimized or at least open to scrutiny. Additionally and ideally, the likelihood of a trial judge's decision being reversed on appeal for abuse of discretion or for being unsupported by the facts is considerably diminished.[87]

The Primary Caretaker Preference

The 1980s saw the emergence of the concept of the primary caretaker preference in child custody disputes, a concept which captured the interest of family law scholars, judges, and law reformers.[88] The primary caretaker is defined as the person who before the divorce managed and monitored the day-to-day **(p. 105)** activities of the child and met the child's basic needs; feeding, clothing, bathing, and arranging for the protection of his or her health. It is assumed that the primary caretaker would continue in that role after the divorce. This standard for a custodial disposition seemed to single out continuity of care, a standard proposed by Joseph Goldstein, Anna Freud, and Albert J. Solnit in their book, *Beyond the Best Interests of the Child*, to trump all other consideration.[89]

In a law review article that has been instrumental in advocating the primary caretaker rule and providing insight in divorce negotiation, Chief Justice Neely of West Virginia, wrote that such a rule spells 'mother'.[90] After reviewing the research in the field and using his own experience as a lawyer and judge, he concluded that mothers are 'more likely than fathers to feel close to their children'. But his major arguments supporting the primary caretaker presumption were rooted in his mistrust of negotiation in divorce, of the divorce process itself, and of the use of experts. He believed that if the presumption was established the likelihood of using child custody litigation as a bargaining chip in negotiation would be diminished. In addition, he stated that having the presumption minimizes elaborate and time-consuming custody trials where a costly battle of experts dominates the litigation, and women are disadvantaged because they lack the finances to underwrite lengthy and complex litigation. He also believed that determining who is the primary caretaker is a simpler task than delving into the elaborate factors used to determine who was and will be a good parent. For him, the answer is basically: mother.

The primary caretaker presumption has been attacked by asking some critical questions. Why should the primary caretaker presumption be considered the exclusively reliable means of choosing a custodian? In other words, is past conduct—the maintaining and monitoring of day-to-day activities of the child—the only true test for choosing who should be the child's custodian? Is there a rational connection between the presumption and the nurturing activities of the custodian? Does the presumption emphasize quantity of care at the expense of quality of care? Does 'primary caretaker' define the strongest bond between parent and child? Will the presumption really deter litigation and promote fairer negotiations between parents? If the presumption is established and known, will it promote co-parenting, a desirable social goal? Since today more and more parents are both working outside the home so that they must utilize various forms of day care, does this not pose difficulties in identifying the primary caretaker? Moreover, with the current economic situation causing changes in parental roles because of loss of employment, the primary caretaker **(p. 106)** may not necessarily be the mother.[91] In order to answer any of these questions, the judge must make an inquiry into the particular facts of the case and examine the quality of the parent-child relationship.

The primary caretaker presumption once again focuses custody disputes on custodians rather than on the child. It also fuels political fires by declaring even before a case is heard that one parent has the advantage. If that parent

is the mother, one might ask whether the primary caretaker presumption is ‘a thinly disguised form of the tender years presumption’.[92] If this is the case, will there be a return to the ugly disputes concerned with the unfitness of the primary care-taker? Will there be a resurgence of the old arguments for gender neutrality?

The Best Interests of the Child

Where a state statute does not include any presumptions but states that ‘the best interests of the child’ standard should guide decisions along with the consideration of other factors like the child’s preference,[93] how should that standard be applied? Stated another way, what questions should a judge ask in a divorce case and what evidence should she obtain to help her reach a decision? Elsewhere I have written about the initial inquiry in a custody dispute in divorce. I emphasize ‘initial’ because once a custody award has been made and **(p. 107)** a child is living with one parent, a different inquiry would be necessary. In other words, in a motion for a modification, consideration of attachments and how a new arrangement will affect those attachments may be critical. I approach the ideal placement in terms of values being promoted through the application of ‘the best interests of the child’ standard.[94] Underlying these values is the principle that parents should promote a positive relationship with both. Stated another way, neither parent should try to alienate the child from the other, since child development research supports the position that children thrive best when they have a positive relationship with both parents.

The values that I see as pouring content into ‘the best interest of the child’ standard can be formulated into asking two basic questions: (1) what placement and with whom can a child, with major consideration to the child’s age and level of maturity, be provided with an environment (family unit, broadly defined, and community) in which he is wanted and where he is safe, secure, and accepted; (2) what adult or adults can provide the child with continuity of a relationship or relationships[95] where affection, stimulation, and nurturing is **(p. 108)** present along with the necessary financial support,[96] either actual or potential, so that the child will thrive intellectually and become a moral, ethical, respectful,and responsible adult? If a priority must be set, the paramount values are safety, and physical and emotional health. Other values, like intellectual achievement, morality, and ethics flow from a child’s emotional and physical well-being promoted in a supportive environment.[97] The individual factors that illustrate each of these values depend on the case and the context of the dispute. The mechanisms

by which these factors are gathered, and who should provide the facts, also depend on each case. For example, mental health specialists, teachers, friends, the parents themselves as well as the child whose custody is in dispute, depending on the child's age and comprehension, are ordinarily the people to whom a judge turns to provide her with the information to make a decision.

The Lawyer for the Child and the Guardian ad Litem

Unlike juvenile delinquency and child protection proceedings where representation is mandated under the federal law,[98] no such mandate exists in divorce. However, independent counsel for children can play a useful role in both the negotiation of custody agreements as well as in the litigation of a contested case and in hearings for modification,[99] especially in petitions for relocation.[100] The reason for independent representation is that the interests of children and **(p. 109)** the interests of the parents in divorce may not be the same. In negotiation, the independent lawyer can represent only the child's interests, especially with regard to such important matters as to what kind of custodial arrangement is desirable and what amount of support is adequate, especially with regard to fulfilling a child's educational goal beyond high school. Often the idea of independent representation for a child comes later in the divorce process when a judge, recognizing the intensity of the custodial dispute, recommends that the children be independently represented. The belief is that the child needs his or her own wishes to be heard and the child's own lawyer can provide that voice.

The appointment of a guardian ad litem (GAL) serves a different function. The guardian ad litem is appointed by a judge to make an independent investigation of the facts of a case. The GAL might be a lawyer who has training in child development and psychological issues, or a mental health professional, like a social worker or a clinical psychologist. Sometimes, in addition to the investigation, a judge will ask the GAL to recommend an appropriate custodial disposition that will advance the child's best interests. In performing her investigation, the GAL ordinarily spends as much time as is necessary with the child whose custody is in issue in order to learn about the child's primary attachments. The GAL also would interview people (recommended by each parent) who interact with the child and the parents, such as teachers, pediatricians, clergy, neighbors, and friends. If the GAL is not a mental health professional, she might seek the assistance of a psychologist to perform psychological tests or a child psychiatrist who may be able to learn more about the child than the GAL can. The difference

between an attorney for the child and a GAL is, as stated earlier, that the attorney represents the child whereas the GAL represents the GAL's opinion as to the child's best interests.

A Child-Focused Inquiry

It should also be said that the focus of child custody cases should be on the child interests. Such a focus would include an inquiry into the extent to which continuity of care with one or both parents who themselves are emotionally stable promotes those interests, as well as continuity with the community (including family, friends, and school) in which the child was being raised before the divorce, continuity of religion or racial identification, if those are issues, not on the rights of those seeking custody. Emphasis on rights to a child tends to analogize children as property, which is an outdated concept. That being said, if an issue is raised about the lifestyle of the claimant, the inquiry should be on the question of whether the lifestyle has a negative or positive impact on the values being promoted.[101] A fundamental goal for a judge who must make a custodial **(p. 110)** decision is the security of the decree. By that I mean that a judge should be convinced that she has listened to the evidence, perhaps if appropriate considering the child's age and level of maturity, interviewed the child in her chambers, and received some idea of the child's preference or at least the child's feelings about the divorce and the issues that affect him or her. The interview, **(p. 111)** which is usually at the judge's discretion., may be in the presence of counsel for the parents or with their permission in private with a stenographer recording the event. Whether the written record of the interview becomes a part of the official court record may depend on individual state statutes. On the basis of all the evidence, the judge should reach a fair and balanced decision that will find acceptance with the claimants. The successful decree is one that is lasting and not subject to the disappointed claimant's filing motions for a rehearing, modification,or request for a contempt citation.

Alternative Custodial Dispositions

Matters dealing with the custody of children are mostly settled by the spouses' lawyers either in their offices or at the beginning of or midway through the litigation. The final agreement defines each parent's relationship to his or her child and spells out the specific responsibilities of each. Lawyers may use any terminology to describe the arrangement, or merely categorize the whole issue as 'custodial arrangement'.

The conventional custodial arrangement was for one parent to be named the legal custodian and guardian with whom the child lived and who usually had a whole range of rights, which basically allowed her to make all the decisions about the child's day-to-day life. The non-custodial parent usually had defined rights including a visitation schedule. At the divorce hearing, if the judge found the custody agreement that had been worked out by lawyers suitable and in the child's best interests, the judge would approve it.

Joint or Shared Custody

Joint custody (or as some jurisdictions label it 'shared custody') became an alternative disposition to custody to one parent and visitation to another and was advanced in part in the late 1970s by fathers who thought that they had been excluded from serious consideration as a primary custodian in child custody cases.[102] The arrangement can either be agreed upon by the couple and reflected in a custody agreement or judicially imposed upon a couple as a decision in a contested case. At first some judges felt they were not authorized to award joint custody, even if agreed upon, because of its not being included in any state statute or because of the lack of judicial precedent. This has changed, and now almost all states authorize or refer to joint or shared custody as a possible dispositional alternative. A few states express a statutory preference for the disposition by making it a presumption.[103]

(p. 112) Today joint custody generally means that both mother and father are jointly responsible for making decisions about their child. They are equally responsible for the upbringing of the child who has an ongoing relationship with both of them. In a certain sense, a joint custody agreement or disposition is an attempt to re-create the intact family. It is obvious that joint custody requires unusually cooperative and financially sound parents and a child who is agreeable to the arrangement to make it succeed. The child's participation in the decision to work out a joint custody arrangement is extremely important and is often overlooked.

Various kinds of joint custodial arrangements have developed. Joint legal custody might mean that both parents have the legal authority to make decisions about the child, but the child lives with one parent but visits the other on certain days of the week. This arrangement might have been identical to the old method of custody to one parent and visitation to the other, except that in a joint custody arrangement as stated earlier, both parents are legally responsible for making decisions about their child's life.

Another arrangement is joint physical and legal custody, which means that the child lives with each parent for certain period of time. This physical arrangement would require, of course, two homes.

The findings of empirical research on joint custody have resulted in a new look at the disposition, especially as to whether in fact joint custody is truly joint and whether it lessens conflict.[104] Some feminist writers have felt that an award of joint custody may reflect a minimization of the role a mother has played in rearing her children. These writers have called for major changes, some recommending the revival of the maternal preference rule and others for statutory enactment of the primary caretaker standard.[105] Joint custody may not have fulfilled the strong expectations that it was desired to meet —including equal child-rearing responsibilities. Good intentions by lawyers, judges, and litigants are not enough for a successful disposition. The realities of everyday living can prove to be extremely difficult in a divorced family where each of a child's activities may need joint parental approval, whereas in an intact family one parent can and ordinarily does act on behalf of both parents. In addition, any number of unforeseen factors and events can enter into the equation for success. Perhaps one of the most important unforeseen facts is that human relations are not frozen. Time and events prompt change. Spouses remarry; they relocate with the new spouses, children mature, resulting in their having different needs and a different relationship with adults.

(p. 113) Continuity of a Relationship with Both Parents: Relocation

The conventional rule in child custody is that unless there has been a custodial agreement allowing the custodial parent to leave the jurisdiction with her child and that agreement has been approved by the court, a spouse who wishes to move with her child must first notify the non-custodial spouse that she is seeking court approval for the move and give him an opportunity to be heard in a court proceeding. The reason for the judicial approval is that in domestic relations matters, courts jealously guard their jurisdiction, and do not want to lose it. Ordinarily, the parent who has sole custody and seeks to relocate, over the objection of her former husband, has the burden of proving that circumstances have changed since the initial award. She would file a motion for a hearing to permit her to move. The focus of the hearing would be to determine what affect the changed circumstances would have on the initial award. Conversely, if a non-custodial father hears that his former wife is planning on moving out of the jurisdiction, and he would like to prevent the move, he may file a motion for a modification of the

custody decree to change custody from his former wife to him, again on the basis of changed circumstances.[106] If the initial award was joint custody of the child, the hearing may require a court to engage in a full hearing on custody similar to the original hearing. Indeed, the issue in relocation cases is generally whether the judicial inquiry is limited to the changed circumstances issue, whether, as in joint custody, it is wider and looks at the whole matter of the child's interests, or whether there should be any presumptions or preferences for continuation of the person with custody.

Relocation cases pose difficult legal and painful emotional problems for both children and parents. Since there has not been any solid national empirical data or longitudinal studies on the effects of relocation on a child's adjustment so as to predict the outcome of a child's moving from one location to another, psychologists have had to rely on their clinical practice, using basic principles of child development to generalize on the issue. As in custody generally, the child's age, developmental needs, and quality of the attachments to both parents, and to siblings, relatives, and friends are important considerations. Relocation **(p. 114)** cases, however, present the additional comparative inquiry into the social and educational opportunities available to the young child in both locations. Further, if the custodial spouse has remarried and wishes to relocate to be with her new husband, an examination of the child's relationship with that new spouse and his children if they are to be involved in the child's life, would be appropriate. The extremely difficult problems are presented when a spouse, in good faith, wishes to relocate for reasons relating to career advancements or to be close to her family who will act as a support system for her during the postdivorce period. One can see how one can be sympathetic to the move because it would benefit the custodial spouse in any number of ways including the spouse's emotional well-being and a potentially financially secure parent, both having a positive influence on a child's welfare. These benefits have to be weighed against the impact the move would have on the quantity and quality of the contact the non-custodial spouse would have with his child as well as the ease with which the noncustodial spouse could continue his relationship with his child at a distance.

For adolescents, relocation may present issues different from those considered in the initial custody award.[107] Relocation cases may pose equal protection issues if one parent's sex is preferred over another. Some parents have argued that a court's denial of a parent's motion to relocate interferes with that parent's constitutional right to travel. If the choice is between that constitutional right and the best interests of the child in a divorce setting

where children are so vulnerable, the best interests test seems to trump a parent's constitutional right to travel.[108]

To bring about some uniformity in the relocation cases and avoid a case by case approach, some states have enacted legislation to guide judges in making these decisions.[109] These statutory guides range from standards that limit the **(p. 115)** custodial parent and give great weight to the rights of the non-custodian to those that permit the custodial parent greater freedom to relocate. Some include a presumption that custody should continue with the primary caretaker. The trend in state statutes is toward greater flexibility and allowing the relocation. Case law has also reflected the range, with New York as an example.

A case that illustrates the old restrictive view of New York is *Elkus v. Elkus*.[110] In that case Mrs, Elkus, whose professional name is Frederika von Stada, the famous international opera singer, who had been awarded joint custody in her divorce from Mr. Elkus, remarried and wished to move to California to be with her new husband who could not relocate. The lower court allowed her request to relocate, and her husband appealed to a New York appellate court (not the highest court in New York). The appellate court reversed the holding, stating that the facts in the case neither conformed to the 'exceptional circumstances' standard nor would the move be in the best interests of the children. The court was not sympathetic to the opera singer's reducing her concert schedule that would have taken her away from her children, hiring a housekeeper, nor was the court impressed with her support for Mr. Elkus's visiting the children in California. To the court, the move would create a substantial hardship on the father and his relationship with his children who did not want to move. It would also remove the children from the environment to which they had adapted so well. There was, in the words of the New York court, no 'compelling reason or exceptional circumstances to justify relocation to California'.

Four years after *Elkus*, the Court of Appeals of New York, the highest court in New York, decided *Tropea v. Tropea*[111] in which it took a broader approach, and set down standards for that state's lower courts to follow in relocation cases. Interestingly enough, that court cited *Elkus* for the narrow proposition that a 'spouse's remarriage or wish for a "fresh start" can never suffice to justify a distant move'.[112]

The court in *Tropea* criticized the lower courts in setting up an analysis in relocation cases that seemed to emphasize the impact the move would have on the non-custodial parent so that he would not have regular access to his

child, If the move would not deprive the non-custodial parent of his visitation rights, the court need not make further inquiries into the custodial parent's motive for moving. If the move would disrupt the non-custodial parent's access to his child, then the custodial parent must show the exceptional circumstances that would justify the relocation.

The New York Court of Appeals found the analysis too mechanical and difficult to apply. It took a broader approach and placed emphasis on the child. To that court, the factors judges should make an inquiry into are: (1) each parent's reasons for moving or opposing the move; (2) the child's relationship with both parents; (3) the impact the move would have on the child's relationship with the **(p. 116)** non-custodial parent; (4) the extent to which both the custodial parent's and the child's lives will be economically, emotionally, and educationally advanced by the move; and (5) the feasibility of preserving the relationship between the child and the non-custodial parents through reasonable visitations. Ultimately, using the preponderance of the evidence standard, the court should determine whether the move would further the child's best interests.[113] Basically, the approach taken by the New York Court of Appeals allows the removal if it is in the best interests of the child and sufficient recognition is given to the impact the move will have on the non-custodial spouse's maintaining contact with his child.[114]

In the same year that *Tropea* was decided, the Supreme Court of Colorado decided *In re the Marriage of Francis*.[115] In that case the custodial mother wished to relocate from Colorado to New York where she could pursue a twoyear program that would train her to become a physician's assistant. No other school had accepted her, making the move a necessity to pursue a career anticipated by the couple. In fact a clause in the separation agreement provided that the husband support his wife in her career goal. By moving, she would be depriving the child's father of his joint custodial rights. Eelying on its state statute that emphasized the importance of the stability of a child's relationship with the primary caretaker, the court adopted a presumption in favor of the custodial parent. In so doing, Colorado joined states that tip the scale in favor of the custodial parent unless the non-custodial parent can show that the move would be detrimental to the child or that the custodial parent's motives are questionable.[116] In a certain sense the approach taken by Colorado and other states reflects the value of continuity of care so long as that continuity has been positive and breaking it would be seriously detrimental to the child's well-being.

(p. 117) Unilateral Removal of the Child from the Jurisdiction

The issue of removal that has been discussed concerned parents who seek a judicial modification of their custody decree so that they can move to another state with their child. Once a child moves from one state to another, the question is which state has jurisdiction over the case. Ordinarily, if a child moved from the home state to another, the home state would continue to have jurisdiction over the case and the second state would also have jurisdiction. Before the adoption of the Uniform Child Custody Jurisdiction Act, any number of states could assert jurisdiction if, for example, the child and one parent were present in the state, regardless of the circumstances surrounding the move to the second state. Since the second state did not have to recognize the original custody order, which was not necessarily final and could be modified, theoretically the judge in the second state could revisit the question of custody, notify the absent parent, and make a new determination. This state of affairs led to great uncertainty and confusion about the integrity of the custody decree. And that uncertainty had the effect of providing the child and his custodial parent with insecurity. In addition, the availability of alternative jurisdictions to hear custody cases was almost an open invitation to parental kidnapping.

In light of this state of affairs, the Commissioners on Uniform State Laws promulgated the Uniform Child Custody Jurisdiction Act (UCCJA) in 1968, which by 1984, all states adopted, and which was designed to address the problem of multiple jurisdiction over child custody cases. In 1997 the Commissioners promulgated the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (1) to harmonize the provisions of state child custody laws with the federal Parental Kidnapping Prevention Act (PKPA); (2) to clarify the provisions of the UCCJA that have met with conflicting interpretations in state courts; and (3) to expand the enforcement of custody decrees issued by state courts and foreign countries.[117]

The UCCJA was created to ensure that only one state assumes jurisdiction over a single custody case at a time. However, the Act allows certain exceptions to a second state assuming jurisdiction. For example, a second state can assume jurisdiction if it is significantly connected with the child and one parent, there is substantial evidence in that state, and assuming jurisdiction would be in the **(p. 118)** best interest of the child. Another reason for assuming jurisdiction is in a situation where a child has been abandoned. Additionally, there is an exception if no other state has jurisdiction to hear the case or a state court has refused to hear the case.

The Commissioners stated its nine general purposes in Notes to § 1:

> (1) to avoid jurisdictional competition and conflict between states in custody matters;
> (2) to promote cooperation, between courts of various states;
> (3) to assure that litigation concerning the custody of the child takes place in the state with which the child and his family have the closest connection;
> (4) to discourage continuing litigation over child custody;
> (5) to deter abductions of children by their parents;
> (6) to avoid litigation of a case in their states;
> (7) to facilitate the enforcement of custody decrees;
> (8) to promote the exchange of information and mutual assistance between states;
> (9) to make the laws of the states which adopt the Act uniform.

In 1980 the Federal Congress passed the Federal Parental Kidnapping Prevention Act, which provides that one state must give full faith and credit to custody decisions of the rendering state. In addition, the federal courts, usually not the forum for family law cases, can take jurisdiction over these interstate custody disputes.

In 1985 the U.S. Senate approved the Hague Convention on the Civil Aspects of International Child Abduction. The aim of that Convention was to facilitate the return of abducted children from the United States to a foreign country.[118]

Continuity of a Relationship with Others

How important is it for a child of divorce to continue to have a relationship with an adult with whom the child has had a strong attachment? This is the question posed by step-parents and grandparents. There is no issue if the divorcing parents agree to continue the relationship, but if the custodial spouse interferes with the relationship the child has with his or her step-parent or grandparent, what rights do these people have?

It had been the custom to technically treat a step-parent, even if he or she were a de facto parent, and grandparents as strangers in so far as having any custodial rights in divorce cases.[119] Neither had standing to raise the issue of **(p. 119)** their visitation rights in litigation. Unless a judge relied on.

his residual equity powers to do justice and promote the best interests of the child, or interpreted a visitation statute broadly to include a non-parent, a step-parent would be without rights.[120]

Grandparents differ from step-parents or de facto parents in that they are biologically (if there is a blood tie) or legally (if the child was adopted) related to the child. Yet for years they, too, were considered legal strangers. It took a massive effort on the part of grandparents to convince state legislatures that they should have standing to assert their rights to visitation with their grandchildren.

The major legal problem grandparents faced was the fundamental principle in. American law, based on a series of U.S. Supreme Court cases that protect the liberty interests parents have in the care, custody, and control of their children.[121] In American law, parents are the lawful custodians of their children, and unless the state can show that the parents are unfit, family privacy should be protected. Thus, the tension is between grandparents desiring standing to assert their rights to have a relationship with their grandchildren versus the rights of parents to determine for themselves the persons with whom their children can associate.

This conflict, although not in the divorce context, finally reached the U.S. Supreme Court in *Troxel v, Granville*.[122] The case arose in the State of Washington, which had a statute that allowed ‘any person to petition a superior court for visitation rights at any time and authorizes that court to grant such visitation rights whenever visitation may serve the best interests of the child’.[123] In *Troxel*, the dispute was between paternal grandparents who wished to increase their visitation schedule with their dead son’s illegitimate children and the mother of those grandchildren who refused their request. The mother did not want to terminate the visits, but limit the visitation to one short visit a month and special holidays. In a lower court ruling the grandparents were successful in obtaining the schedule they desired, but they lost in their first appeal because the court stated that the grandparents did not have standing. That court did not address the constitutionality of the Washington visitation statute.

(p. 120) The grandparents appealed that decision to the Supreme Court of Washington, which held that the visitation statute was unconstitutional because it unduly interfered with parental decision-making. That decision was appealed to the U.S. Supreme Court, which affirmed the state supreme court’s decision. Justice O’Connor, writing for a plurality of the Court, with other justices filing concurring and dissenting opinions,[124] held

that the visitation provision as applied to the mother of the children was 'breathtakingly broad'. The statute, as applied, did not afford the mother's decision any weight including a presumption of validity, thus giving the judge too much power in making his decision. Justice O'Connor wrote that the effect of the statute was basically to disregard the rights of a fit parent when a third party seeks to gain visitation rights to her child. For those reasons, Justice O'Connor wrote that enforcing the statute violated the due process rights of the mother, since allowing the grandparents visitation rights interfered with her fundamental liberty in raising her children. Justice O'Connor made it a point to state that the Court was putting the broad language of the Washington visitation statute to the constitutional test. It was not deciding 'whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation'.[125]

Justice Scalia's dissent presented a major departure from the opinions of the other justices. He expressed a fundamental disagreement with them and questioned the present value of the historic parental rights cases in stating that the Washington visitation law was no burden to a fundamental constitutional right.

To Justice Scalia, the right to raise a child is not a constitutional right enforceable by the courts, but is 'among the "unalienable Rights" with which the Declaration of Independence proclaims "all men … are endowed by their Creator." And in my view that right is also among the "othe[r] [rights] retained by the people" which the Ninth Amendment says the Constitution's enumeration of rights "shall not be construed to deny or disparage."[126]

Because of the seven separate opinions in *Troxel*, it is difficult to determine its future application.[127] It appears that one reading of the case is that family **(p. 121)** privacy is protected, at least with regard to a court ordering visitation by any third parties. Another interpretation is that a plurality of the justices favors a constitutional presumption in favor of parental judgments about the child's best interests. However, that presumption is reputable by case-specific factors.

What effect the case will have on the fifty grandparent visitation statutes remains to be seen? What is important in any analysis of the impact of *Troxel* will be the context in which grandparents seek visitation rights. For example, is the context an intact family, namely an attempt by grandparents to seek visitation rights while their children are living together with their parents; is the context divorce in which grandparents seek to visit their children over

the objection of one or both of the divorcing couple; or are the grandparents seeking visitation rights after the death of one of the child's parents who was the grandparent's child; is the request to visit the illegitimate child of their own son? Also important is the precise wording of the grandparent visitation statute. No matter what context, the basic question concerns the rights of parents to raise their children without interference from third parties, even grandparents. With that question often come two others: whether there must be a showing of parental unfitness before any interference and whether the best interests of the child are served by allowing the third party visitation.

Following *Troxel*, the Supreme Court of Iowa was faced with a case that questioned the constitutionality of the Iowa grandparent statute under its state constitution. In the case of *Santi v. Santi*,[128] parents in an intact family denied grandparents visitation rights under a statute that allowed grandparents to petition a court to visit their grandchildren if the grandparents have established a substantial, relationship with their grandchild and the visitation would be in the best interests of the grandchildren.[129] The statute was broad and was not **(p. 122)** limited to situations where the parents were divorced. The Iowa court first pointed out that the law in the state protected the liberty interest in fit, married parents to oppose visitation by third parties, and that it would review its grandparent visitation statute under the strict scrutiny standard under the Iowa state constitution. The strict scrutiny standard requires that the parental liberty interests implicated by the statute be narrowly tailored to serve a compelling state interest. Under the strict scrutiny standard, the court held that fostering close relations between grandparents and grandchildren was not a compelling state interest to justify intruding into the privacy of an intact family. To the court, its statute failed to require a threshold finding of parental unfitness before proceeding to the best interest analysis. For these reasons the court found the Iowa statute unconstitutional. One interesting discussion in the case was its comments about an *amicus curiae* brief submitted by a retired persons organization (presumably comprised of many grandparents) who argued for the importance of strengthening extended family bonds. To this reasonable argument, the court responded by saying something equally reasonable: that imposing a court-ordered grandparent visitation hardly results in strengthening extended family bonds. Indeed, one might add that intra-family and intergenerational litigation might exacerbate differences.

Many of the cases that have been decided by state supreme courts since *Troxel* have not been concerned with divorce, but with the visitation rights of

grandparents in cases where they seek to visit their grandchildren who may be living with one parent. In a number of the cases, the child is illegitimate and is either living with the child's biological mother or father who refuses to allow the child's grandparent to visit with the child.

As a general rule, state supreme courts have held that the status of grandparent does not give that person standing by itself. Rather, the grandparent or third party must prove that he or she has had a parent-like relationship with the child, that the child will be harmed by the lack of the grandparent's visitation, and that the visitation is in the child's best interests. State statutes that include those factors seem to be held constitutional under state constitutions. The most important point that dominates the cases is the court's respect for parental autonomy and the protection of children from harm.[130]

(p. 123) Divorce and Decision Making

Summary Dissolution

Throughout this chapter I have referred to lawyers and judges as the major decision-makers in the divorce process. This is so because, as stated previously, lawyers advise their clients on their prediction of outcomes, and those predictions play an important role in their client's decisions on whether to settle or proceed to trial. Divorce uses a judicially managed adversarial model in a court setting for determining an outcome. The adversarial process has been subject **(p. 124)** to major criticisms in. divorce because it has been thought of as creating antagonists.

A question that is asked is whether the judicially managed adversarial model is appropriate for divorce? On the one hand, as we have seen, the economic considerations raised when the divorcing couple has complicated financial interests may resemble the dissolution of a business partnership. Such issues may require the formalism of court procedure with strict adherence to rules of evidence. On. the other hand, child custody cases raise major psychological issues where court procedures and rules of evidence may actually hinder the search for a resolution that is in the best interests of the child.

Because the legal costs of divorce, like other civil matters, have increased dramatically due to such factors as attorney's fees and the costs of hiring experts, there has been a consumer demand to both simplify the divorce

procedure and to make divorce available without using a lawyer. In response to that demand, some states[131] have enacted legislation providing for summary dissolution of marriage, a form of divorce that does not require the parties to make a court appearance or to use a lawyer (although they may still do so), but merely to file a form with the appropriate government body. The legislation addresses uncomplicated divorce. Thus, as a general statement, it may be said that summary dissolution provisions apply to cases in which the parties have been married for a short length of time, have limited assets, have no children, and mutually desire a divorce. It should be emphasized that summary dissolution is a formal method of terminating a marriage because public documents must still be completed and officially iled and approved. (Indeed, no American jurisdiction permits a private, informal, unregulated contract of divorce.) But unlike the conventional formal adversarial model managed by a judge who makes the decision, it is the parties themselves who are the principal actors and decisionmakers,not lawyers or judges.

Summary Process and Divorce by Registration

A development related to summary dissolution is the simplified divorce procedure. A simplified divorce procedure (called summary process or divorce by mutual consent in some jurisdictions), unlike summary dissolution, requires a court appearance. However, the divorce is granted on the basis of mutual consent of the parties, rendering the court appearance a mere formality. Such a process also lessens or eliminates the need to procure a lawyer. Some form of simplified divorce procedure has been adopted by seventeen states.[132]

(p. 125) Surprisingly, there has been little commentary or analysis concerning summary dissolution or simplified divorce. Therefore, it is difficult to assess how many couples have used these procedures with or without legal counsel. However, the advantages of summary dissolution and simplified divorce are clear. They decrease the costs of obtaining a divorce by streamlining the divorce process and by rendering it less time-consuming both for the divorcing couple and court personnel. These procedures may be an attractive model for many states to adopt if the costs of divorce continue to rise out of the reach of an increasing number of people.

In complex divorce cases—those in which the custody of children is in dispute and where complicated property issues are to be resolved—divorce by registration or summary dissolution procedures may be inappropriate. A

major question is how can complex cases be resolved in the most efficient and civilized manner?

Mediation

There is no question that people tend to respect decisions in which they have had some input, or at least the opportunity to be heard and to have presented their views. This is true when concerned with complying with laws on a broad scale or decisions on a personal level. Applying this principle to divorce means that spouses who jointly participate in the decisions about their children and about their finances are more likely to comply with those decisions than are those who have a decision imposed upon them without their having had an opportunity to participate in the process of formulating the decision.

In contrast to decisions imposed by lawyers and judges, mediation promotes party self-determination and decision-making by consent. Although mediation has been a major method of resolving disputes in the labor and employment fields as well as in family counseling settings, its use in divorce on such a large scale is only about thirty years old. Its focus in divorce is on resolving a variety of family issues, which become crucial for a divorce but may continue to exist in some form or another after a divorce decree is issued. Therefore, unlike mediation in many other settings, mediation in divorce must take into account that the parties may continue to have a relationship after the divorce judgment.

The mediation process facilitates the effectuation of a formal agreement in a relatively informal atmosphere, using a neutral third party as mediator. The mediator, in helping the parties to come to an agreement, may help clarify issues, suggest possible accommodations and alternatives, assist the divorcing **(p. 126)** couple to develop their own parental, financial, and property agreements, and help promote decision-making within the family. Mediation differs from courtroom litigation in that it is not adversarial in nature. Instead of each party retaining a lawyer who advocates for them, the parties speak for themselves and there is usually only one neutral mediator.

There are several other advantages to the mediation process with an experienced mediator. It may be less expensive and more expeditious than protracted courtroom litigation. Mediation may be a more humane process than an adversarial proceeding and, in some instances, may be better able to discover and address the emotional issues that may be having a negative

effect on resolving practical legal problems. Lawyers (especially those who specialize in litigation) in an adversarial proceeding are often accused of actually reinforcing conflict between the parties and creating obstacles to settlement. In some instances this may be true. Because mediation is non-adversarial, many technical legal issues, like procedure and rules of evidence, are set aside, and this may cause some problems.

The leading writers in the field suggest that mediation between people of unequal bargaining power tends to lead to agreements reflecting that inequality.[133] Therefore, mediation is particularly appropriate for parties who have already achieved some independence and have relatively equal bargaining power, but may be less appropriate for parties of unequal bargaining power.

The concept of divorce mediation has not yet gained universal acceptance by the general public because many divorcing couples seek lawyers first, and the lawyer's initial response may be to rely on traditional litigation strategies. Generally, the highest level of participation is found in compulsory mediation programs such as those found in California, which, in 1980, made such mediation mandatory for contested custody and visitation issues. Since then a number of states have authorized courts to assign, mediation in contested cases.[134] **(p. 127)** Voluntary mediation programs do not attract a substantial number of participants. This has been attributed to the legal community's somewhat neutral attitude toward mediation, and the public's lack of information about mediation as an alternative to the adversarial process. However, researchers find that those who undergo the mediation process achieve a more successful outcome both in the short term and the long term than their adversarial counterparts.[135] Because parties are often more satisfied with the agreements, which they, themselves, have forged through mediation, they are more likely to follow the terms of those agreements than court-imposed settlements. That being said, mediation may not be appropriate for divorcing couples who during their marriage were unable to reach agreements about domestic matters especially dealing with finances and child-rearing. It may also not be appropriate for a couple, one or both of whom have unresolved emotional problems, or who are ambivalent about the divorce, or who are litigious.[136]

When mediation was first suggested as an alternative conflict resolution mechanism, it was criticized by some lawyers who saw it as an intrusion by non-professionals. It was said that just at a time when divorce was becoming highly complicated because of the newness of equitable distribution, lay

people were becoming involved with decision-making in the divorce process. How can a non-lawyer know the complexities of marital property law when lawyers themselves may be unaware of the answers?[137] Such criticism has waned only within the last decade as mediation has matured into a conventional method of resolving disputes and a mediation industry has developed in the metropolitan areas of the country. Lawyers themselves can be mediators (although they may not act as lawyers in the case, if they are) and non-lawyers can be trained in the complexity of the law so as to assist spouses properly.[138]

Some states have built into their divorce system procedural stop lights in order to attempt to resolve disputes along the way toward an actual trial. For example, in Massachusetts some probate courts have established pre-trial conferences that have the effect of trying to reach consensus on divorce matters. These pre-trial conferences, led by the judge who will hear the case with lawyers and their clients present, are not meant to mediate the dispute, but are designed to give the judge a fair assessment of where the parties are in their negotiation. The judge can then attempt to have the lawyers reach an agreement on all or certain issues, thus minimizing the length of a trial.

(p. 128) The Future of Divorce

Although fault and no-fault divorce exists in the United States, there is some thought being given to whether the states should abandon no-fault divorce and return to a fault-based divorce system. On one hand, there is a feeling that divorces should be prevented or at least made difficult because of the belief that divorce results in a number of social ills including juvenile delinquency.[139] Just over thirty years ago, the late Professor M.ax Rheinstein responded to conclusions of this sort by writing that it was not divorce that caused social ills, but marriage breakdown. He wrote, ‘If we are concerned about the good of society, we must focus our attention, on the prevention or minimization of the incidence of factual marriage breakdown rather than upon stemming the tide of divorce.’[140] Professor Rheinstein’s advice would support programs and services like marital counseling, which are probably more available now and used more often than when he wrote about divorce in the late 1960s and early 1970s. Some legislatures are constantly reviewing substantive laws and procedures in order to improve them by making the laws more realistic and the process more efficient.

No-fault divorce is now a part of American law. There seems to be no returning to the past when divorce was difficult to obtain because of our

reliance on English law that reflected a culture and customs of a different time and place. With no formally established national church in the United States where we have a more heterogeneous population than in Great Britain, we are not held hostage to a single religious dogma, although some states in the United States have been dominated by particular religious groups who have influenced divorce legislation. If the immediate past history of divorce is any indication of the future, future reforms may take the direction of further relaxing substantive and procedural divorce laws. I do believe, however, that the requirement of the presence of at least one spouse at the divorce hearing will not be abandoned. In other words, it is hard to imagine that divorce by proxy or divorce by mail either in the United States or in a foreign country, like renewing a license or a passport, will become attractive alternatives because of our fundamental belief in marriage and family as serious American institutions requiring personal attention and the investment of time and concern. Divorce by registration or summary procedure—the wave of the future—requires the presence of both parties and the involvement of some official who reviews documents and issues a divorce.

(p. 129) Divorce by the conventional adversary method is expensive. Although it is difficult to quantify because of the lack of national data, reports from judges suggest that at the present time courts are seeing an inordinate amount of litigants pursuing their cases themselves, that is, acting as their own attorneys— *pro se*.[141] This presents difficulties for the court system (because *pro se* cases do not move through the system in an orderly fashion as compared to cases handled by lawyers) and for the judges who, according to judicial ethics, must be neutral and are not allowed to act as counsel to litigants, yet are confronted with the reality that the litigants need assistance. Institutional responses for *pro se* cases are varied. One is to refer the litigants to lawyers who are willing to represent them at a reduced rate. A court in one state features a video that runs continuously and provides litigants with basic information about divorce procedure. Some courts have volunteer lawyers (in the court building) not to represent litigants but to be available to them as consultants or aids. A project in Massachusetts involves utilizing retired partners of law firms to assist litigants with limited means to obtain a divorce.

Just as important as it is to litigants with uncomplicated divorces to provide them with inexpensive and timely divorces, it is vital to those going through a complex divorce to provide a setting that reduces, to the extent possible, the anxiety of getting a divorce. The hope is that family courts can fulfill

that function, although the establishment of family courts in each state has been diminished because of the current economic slump. Family courts as conceived by thoughtful reformers would provide a milieu that is conducive to the informal processes, like mediation, that are important in divorce if the goal is to humanize the process.[142] The tension that exists in divorce is that, on one hand, the economic and child custody aspects of divorce are extremely complex requiring the use of traditional procedural mechanisms for discovering facts. On the other hand, there is a desire to simplify, expedite, and reduce the financial and emotional costs of the divorce process by utilizing as many alternative conflict resolution methods as are appropriate. Additionally, family courts can serve as a community-based institution that coordinates all legal matters dealing with the family in a holistic manner. That is, it can provide necessary social and psychiatric services that may be incident to the divorce on the site of the court. It can be the institution to which divorced spouses as well as children of divorce can turn for future services such as post-divorce counseling.

It is difficult to come to any other conclusion but that divorce is an emotional experience that can leave lasting scars on husbands, wives, and children. The **(p. 130)** goal of any divorce law whether in the assignment of property or the award of custody is to promote fairness and justice, which the parties themselves feel have been achieved. The goal of divorce process, including negotiations in a lawyer's office, mediation in an informal setting, and formal procedure in a court, should be to lessen that scarring process in a humane system.

Notes:

(1) Various aspects of these changes are discussed in the following works: Jerome A. Barron, *The Constitutionalization of American Family Law: The Case of the Right to Marry, in* Cross Currents—Family Law and Policy in the United States and Engi and 257–78 (Sanford N. Katz, John Eekelaar & Mavis Maclean eds., 2000) thereinafter Cross Currents]; Ira Mark Ellman, *Divorce in the United States, in* Cross Currents, at 341–62; Grace Ganz Blumberg, *The Financial Incidents of family Dissolution, in* Cross Currents, at 387–404; Barbara Bennett Woodhouse, *The Status of Children: A Story of Emerging Rights, in* Cross Currents, at 423–40; Walter J. Wadlington, *Marriage: An Institution in Transition and Redefinition, in* Cross Currents, at 235–56; Walter O. Weyrauch, & Sanford N. Katz Frances Olsen, Cases and Materials on family Law—Legal Concepts and Changing Human Rh Vkonsilll'S 1–2, 157–

61, 309–10, 483–84 (1994): Sanford K. Katz, *Introduction, in* Negotiatng, To Settlement In Divorce Xiii–Xxvii (Sanford N. Katz ed., 1987).

(2) I am grateful to Walter O. Weyrauch for sharing his insights with me on the theoretical, implications of the oral legal tradition as they relate to official law in family law. For an illuminating analysis and discussion of the interrelationship between oral tradition and official law generally, see Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 Nw. U. L. Rev. 1498 (1996)and Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy, 49* Duke L.J. 1.405 (2000).

(3) This is not to say that some people assume the) are divorced because they desert their spouses or go through certain motions or sign legal documents in a lawyer's office thinking they are legally divorced. Legally they are not divorced. In a 1961 law review article the late Professor Henry If. Foster coined the phrase 'common law divorce', which he defined as 'the private termination of marriage, independent of judicial action, which may be relied upon by the parties as carrring with it a privilege to remarry'. There is no such doctrine as 'common law divorce' in American law. *See* Henry H. Foster, *Common Law Divorce*, 46 Minn. L. Rev. 43, 58–62 (1961).

(4) For a history of the law of divorce procedure, see Homer H. Clark, Jr., The Law of Domestic Relations In The United States 405–19 (1987). For a discussion of equity in American colonial history, see Stanley N. Katz, *The Politics of Laic in Colonial America; Controversies over Chancery Courts and Equity Law in the Eighteenth Century, in* Perspectives in American History 258–72 (Doland Fleming & Bernard Bailyn eds., 1971).

(5) The defense of recrimination has been abolished in the United States. *See* Sanford N. Katz & Marcus G. Raskin, *The Dying Doctrine of Recrimination in the United States of America*, 35 Can. Bar Rev. 1046 (1957).

(6) The Divorce Reform Act of 1966changed the law to broaden the grounds. The Act became effective on September 1, 1967. *See* New York Law 1966 Ch. 244, § 15.

(7) This passage is cited in Richard H. Weis, *New York; The Poor Man's Reno, 35* Cornell L. Rev. 303–04 (1950).In his article Mr. Wels discussed 'the mockery and the fraud attendant upon divorce proceedings' in New York.

(8) Mr. Wels wrote:

> Our present laws [referring to the laws of New York] from a lawyer's viewpoint, are bad because of the corrupting effect which their administration has had upon our courts. The keystone of our Western democracy is the integrity and honesty of our courts, and the knowledge that any citizen who has been aggrieved will obtain just and honest dealing there. Our divorce practice has become an evil in that it has corrupted and degraded those courts.
>
> *Id*. at 326.

(9) These states are; Alabama, Alaska, Arkansas, Connecticut, Georgia, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia.

(10) Twenty-eight states still consider marital fault when determining alimony awards. They are: Alabama, Arizona, Connecticut, Florida, Georgia, Idaho, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. The source for this information is: Linda D. Elrod & Robert G. Spector, *Family Law in the Fifty States 2000–2001*, 35 Fam. L.Q. 577, 617 (2002).

(11) A case that illustrates this point is *Jarrett v. Jarrett*, 400 N.E.ld 421 (Il1. 1979), where the Illinois Supreme Court held that a divorced mother who lived with a man to whom she was not married was denied custody of her child because of her immoral conduct. To the Illinois Supreme Court, such conduct 'debases public morality'. Mrs. Jarrett appealed the decision to the U.S. Supreme Court, which denied certiorari. However, Justices Brennan and Marshall dissented. *See Jarrett v. Jarrett*, 449 U.S. 927 (1980), *infra* note 101.

(101) In discussing Illinois's conclusive presumption that a divorced mother who fornicates with a man to whom she is not married is unfit to continue to have custody of her child, Justices Brennan (who was joined by Justice Marshall) wrote in his dissent in the U.S. Supreme Court's denying a writ of certiorari in *Jarrett v. Jarrett*, 449 U.S. 927 (1980);

> Nothing in the record or in logic supports a conclusion that divorced parents who fornicate, for that reason alone, are unfit or adversely affect the well-being and development of their children in any degree over and above whatever adverse effect separation and divorce may already have had on the children.
>
> …
>
> Moreover, not only is there no basis for conclusively presuming that [the mother's] cohabitation would adversely affect her children sufficiently to justify modification, but also any such conclusion is unequivocally rejected by the record which affirmatively shows that the 'children were healthy, well adjusted, and well cared for. '… There was no evidence of actual harm; nor was there evidence, statistical or otherwise, to suggest that the children's current exposure to their mother's cohabitation might result in harm to them that might become manifest only in the future. Surely, in any event, it is no more likely that divorced mothers who fornicate are unfit than are unwed fathers. Thus, this case squarely presents the question whether the Due Process Clause entitles [the mother] to a meaningful hearing at which the trial judge determines, without use of conclusive presumption, whether violation of the fornication statute adversely affects the well-being of the children.

The American Law Institute's Principles of the Law of Dissolution prohibits decisionmaking based on race, ethnicity, sex, or religious practices of the child or parent, sexual orientation of a parent, extramarital sexual conduct of a parent (unless it can be shown to harm the child), or the parents' relative earning capacities or financial circumstances. *See* Principles of the Law of Family Dissolution, *supra* note 23, at § 2.12.

Professor Lynn Wardle argues for a rebuttable presumption in child custody and visitation cases that parental infidelity *causes* harm to a child. *See* Lynn D. Wardle, *Parental Infidelity and the 'No-Harm' Rule in Custody Litigation*, 52 Cat'h. U. L. Rev. 81 (2002).

With regard to using race as a determinative factor in child custody decisions, the U.S. Supreme Court has held in *Palmare v. Sidoti*, 466 U.S. 429 (1984),that it violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. However, the facts in *Palmare* are

important to consider, and the application of the case may be limited. The facts did not present a conflict between an interracial couple where the issue was whether the child should be awarded to one parent or another, but concerned a modification of a child custody decree brought by a white father against the white mother because of changed circumstances: the mother's living with a black man, then marrying hire and thus raising the white child in an interracial setting. The lower Florida court chose to base its decision on the fact that the white child would be socially stigmatized by living in the interracial family. There was some reference in the lower court's opinion to the mother's morality in first living with a man without being married to him. To the U.S. Supreme Court, the government has a 'substantial' interest in protecting a child's welfare. However, the possible effects of racial prejudice did not justify the transfer of the child from a fit mother to her father, and therefore the Florida court's consideration of biases that a child may face was not a permissible judicial inquiry.

(23) For a full discussion and state by state analysis of the impact of fault on property and alimony in most of the states, sec Principles of tiif Law of Family Dissolution; Analysis and REcommlsdations 67–85 (Amcr. Law Inst. 2002).

(12) The reform movement, especially in California, is discussed in Herma Hill Kay, Beyond No-Fault; New Directions, in Stephen D. Sugarman & Herma Hill Kay, Divorce Reform at the Crossroads 6–36 (1990).

(13) The states that have enacted no-fault as the exclusive method for obtaining a divorce are: Arizona, California, Colorado, Delaware, Florida, Hawaii, Iowa, Kentucky, Michigan, Minnesota, Montana, Nebraska, Oregon, Washington, Wisconsin, and Wyoming. The source for this information is: Elrod & Spector, supra note 10, at 620.

(14) The same can be said for grounds of divorce. For example, in writing about New York divorce law when adultery was the only ground for divorce, Mr. Wels wrote:

> In establishing adultery at the time [in 1787] as the sole ground for divorce, the Legislature then intended to make divorce as difficult as possible for the purpose of preserving the family unit. For many years this result was attained, and the statute exercised a severe restraint upon divorce actions.
>
> *See* Wels, *supra* note 7, at 306.

(15) Nelson M. Blake, The Road to Reno (1962).In the 1940s Arkansas, Idaho, and Florida had a reputation of 'key[iegl their laws to the revenue of the divorce trade, [seeking] such traffic to compensate for the lack of real gold mines within their boundaries'. *See* Wels, *supra* note 7, at 304.

(16) A chart (Number 4) that lists the durational residency requirements of most states (*6* weeks to 1 year) can be found in Linda Elrod & Robert G. Spector, *A Review of the Year in Family Lam; Redefining Families, Reforming Custody Jurisdiction, and Refining Support Issues*, 34 Fam. L.Q. 656 (2001).

(17) 317 U.S. 287 (1942).

(18) 325 U.S. 226 (1945).

(19) *The* Williams cases, including a chronology of the cases and the impact of the cases on the persons involved, are discussed in Weyrauchet al., *supra* note 1, at 1010–14.

(20) *See* Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957).

(21) *See* May v. Anderson, 345 U.S. 528 (1953).

(22) *See* Uniform Marriage and Divorce Act § 307 (Alternative A & Alternative B), i.e. *see* Appendix.

(24) Because a separate action for tort that occurred during the marriage, like assault, battery, intentional infliction of emotional distress or fraud, still exists in many states, lawyers often include a provision in the property settlement agreement that prohibits any and all separate actions arising out of the marriage from being brought following the divorce.

(25) An illustration of this point is the Florida case of *McClelland v. McClelland*, 318 So. 2d 160 (Fla. Dist. Ct. App. 1975), where the District Court of Appeals permitted the wife to plead adultery as the cause of an irretrievably broken marriage,

(26) This was emphasized in the Florida case of *Ryan v. Ryan*, 277 So. 3d 266 (Fla. 1973), where the Supreme Court of Florida wrote that a judge is more than a ministerial officer in divorce cases. To the Supreme Court of Florida a judge must make a 'proper inquiry' in order to determine whether a marriage is irretrievably broken (the no-fault basis for divorce in Florida).

(27) Deborah L. Rhode and Martha Minow wrote that although decreasing acrimony and hostility between the parties was a worthy goal, the early reforms in no-fault divorce did not pay sufficient 'attention to vulnerable groups'. They stated;

> Early no-fault reforms gave no special attention to the concerns of particularly vulnerable groups such as displaced homemakers with limited savings, insurance, and employment options; families with inadequate income to support two households (a problem disproportionately experienced by racial minorities); or couples with no children, no significant property, and no need for a formal adjudicative procedure. Nor was child support central to the reform agenda; it appeared only as a side issue, buried within custody and other financial topics. Reformers also neglected the impact of post divorce property divisions—such as the forced sale of the family home—on dependent children. And what was most critical, no-fault initiatives omitted criteria for assessing the outcomes of divorce, outcomes affecting not only the parties and their children but subsequent marriages, stepfamilies and public welfare responsibilities.

Deborah L. Rhode & Martha M. Minow, *Reforming the Questions, Questioning the Reforms*, in Divorce At The Crossroads, *supra* note 12, at 196.

(28) Donna Ruane Morrison, *A Century of the American Family*, in Cross Currents, *supra* note 1, at 64–65.

(29) Lenore J. Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in Amfrica 366 (1985).Weitzman's research received early praise, but then was highly criticized. For example, Herbert Jacob wrote:

> Weitzman does not distinguish between the effects of no-fault and the new property division rules because an equal division rule was adopted along with no-fault in California, where she obtained most of her data.... Another problem is that... the Weitzman ... analyses focus almost entirely on asset division, alimony, and child support.... There are good reasons, however, to surround a discussion of these resources with caveats, because they may reflect changes in the property

division and child support statutes as well as the impact of no-fault.

Herbert H., *Another Look at No-Fault Divorce and the Post Divorce Finances of Women, 23* Law & Soc'y Rev. 95, 96–97 (1989).

(30) *Id*. at 111.

(31) In his full discussion of the legal and sociological aspects of fault and no-fault divorce, and a thoughtful presentation of the arguments for not reviving fault in divorce, Professor Ira Mark Ellman writes that the 'claim that no-fault divorce hurt women financially is probably wrong. On balance there seems little empirical evidence in its support.,,' Professor Ellman believes that the change in divorce laws has not had a major impact on divorce rates. *See* Ellman, *supra* note 1, at 341–50.

(32) *See* Morrison, *supra* note 28.*See also* Suzanne M. Bianchi & Daphne Spain, American Women in Transition (1986).

(33) Some judges do, however, consider not only the husband's earnings, but his earning capacity in setting alimony and child support orders. If the husband has made a pattern of 'over-time' or a having a second job, and the family had lived on the additional money, a judge would consider that additional income in calculating the husband's financial obligation. Some men consider that approach as unfair, claiming it basically interferes with the husband's ability to change his way of life or his job. The judicial response has been that the family relied on the additional income. In a way, the result suggests the application of the estoppel principle.

(34) There is a distinction between working in the home and working outside of the home in the 'commercial workforce'. Whether a person (usually the wife and mother) works in the home or out of the home, it is still 'work'. The difference is that working at home is devalued in our society while working outside the home or in the commercial world is not. *See* Rhode & Minow, *supra* note 27, at 193–94.

(35) *See* Andrew J. Cherijn, Marriage Divorce Remarriage 29 (1981).

(36) *See* discussion of child support, *infra*,

(37) A 1995 Harris survey showed that more than half the employed single and married women in the United States supply at least half of their household's income. *See* Tamar Lewin, *Women Are Becoming Equal*

Providers, N.Y. Times, May 11, 1995, at A27. The article went on to state that the findings of the Bureau of Labor Statistics revealed that in 1993 married women who were working full time 'contributed a median of 41 percent of the family's income'. A 2003 report of the U.S. Census conducted in March 2002 revealed that of the 282.1 million residents in the United States 51 percent were women of whom 12 percent of women 65 and older live in poverty compared with 7 percent of men. It continued that women were more likely to be widowed than men. It also stated that men reach the highest salary brackets compared with women. For example, according to the report about 20 percent of men earned $50,000 to $75,000 a year compared with 12 percent of women. *See Census Study Finds That Men Earn the Most, Women Are Becoming Equal Providers*, N.Y. Times, March 25, 2003, at A13.

(38) Divorce cases are much more complicated now than they were thirty years ago. The growth of state statutes and uniform acts that set standards for equitable distribution and child custody and the enormous amount of reported cases have required lawyers to do more legal research, collect a great deal of information about their clients and present complex material to a court. Lawyers who are not current in the latest reported cases and statutory modifications in their jurisdiction as well as judicial and statutory trends in the country can expect malpractice actions filed against them if their failures result in loss of money for their clients. In *Smith v. Lewis*, 530 Eld 589 (Cal. 1975), for example, the Supreme Court of California held that a lawyer was negligent in failing to assert his client's community interest in her husband's retirement benefits. The failure to consider the retirement benefits had a direct bearing on. the outcome of the assignment of property to the wife, since the husband's retirement benefits were the only significant asset available to the community. The question of whether a lawyer was negligent or not is usually determined by a jury who may be sympathetic to the wives who are more likely than men to be the victims of their lawyer's ignorance. The reason for this is that women who have a limited amount of money to spend on the divorce may not be able to finance complicated discovery matters in uncovering a husband's hidden assets. Or they may be forced to hire inexperienced lawyers who may miss out on claims that would have been raised by more experienced lawyers.

(39) See text accompanying note 50 *infra*.

(50) See Downs v. Downs, 574 A.2d 156 (Vt. 1990),where the Supreme Court of Vermont in what it labeled the 'diploma dilemma' held that where a wife

had sacrificed her own career opportunities to advance her husband's, she should be compensated through a just maintenance award. In *Mahoney v. Mahoney*, 453 A.2d 527 (Nj. 1982),the Supreme Court of New Jersey held that a way of compensating a wife for supporting her husband while he obtained his MBA. was through 'reimbursement alimony'. The court went on to limit its holding and basically define 'reimbursement alimony'. Such alimony would be available to one spouse who supports his or her spouse through professional school having had mutual and shared expectation that their marriage will materially benefit through the advanced education. Both *Downs* and *Mahoney* include full discussions of the professional degree and license as marital or separate property.

(40) For a discussion of both systems, see Mary Ann Glendon, the Transformation of Family Law 116–47 (1989).

(41) The five community property states referred to are: Arizona, Idaho, Nevada, Texas, and Washington. The four are California, Louisiana, New Mexico, and Puerto Rico. For a discussion of the principles of community property, see W. S. Mcctanahan, Community Property Law in the United States 531–36 (1982).

(42) In *Quinn v. Quinn*, 512 A.2d 848 (R.I. 1986), the Supreme Court of Rhode Island applied these terms to a case in which a portion of the total price of the marital domicile had been purchased with money from the husband's inheritance. This resulted in the property being transmuted from separate to marital property by the intent of the parties and by the placement of the title to property in joint tenancy. The court used notions of equity and fairness to offset the husband's argument that the placing of the names of the couple on the title to the property was for convenience and nothing more. Further, the court stated that the couple's investments made during the marriage involved commingling of inherited and non-inherited funds. These funds were exchanged for other property, which became marital property. The court went on to state that the husband's inherited furniture that had been brought into the marital home and used during the thirty-year marriage was marital property, while the furniture that had not been taken out of storage retained their inherited and separate nature. Inherited jewelry that the husband had given to his wife, who possessed the jewelry at the time of divorce, was considered the wife's by virtue of the husband's gift to her.

(43) In *In re Marriage of Grubb*, 745 P.2d 661 (Colo. 1987), the Supreme Court of Colorado held that the husband's contribution and his unmatured right to the employer's contribution (to the extent that the employee/

employer contributions were made during the marriage) are marital assets that can be distributed upon divorce. The court rejected the argument advanced by the husband that the vested but unmatured pension rights were a mere 'expectancy' until such time as a right actually matures.

Valuing pension plans for purposes of the assignment of marital property is highly technical. Two methods have been proposed: (1) assigning a percentage of the present actuarial value of the pension; or (2) making the apportionment to the non-retiring spouse elective if, as and when the person receives the pension benefits. The advantages of the first method are (1) that by determining a figure for the present actuarial value of the pension and paying the amount allows the parties to enjoy a 'clean break' in their financial relationship; (2) the employee spouse is left with an unencumbered pension plan; (3) a court is relieved of the responsibility of supervising any payments; and (4) at the time the pension is to be paid, the recipient is the contributing spouse, not a non-employee.

Some states prohibit the assignment of any portion of a pension. For example, in Massachusetts, under M.G.L. ch. 32, §9, assignment of retirement funds in general is prohibited. However, the provision does expressly allow for such an assignment to satisfy a support order under the M.G.L. ch. 204, § 34, the Massachusetts property distribution statute.

With regard to disability benefits, as contrasted with retirement benefits, there is a split of authority. A number of courts have held that disability benefits should be considered marital assets and thus able to be divided in some equitable fashion between the parties. Other courts look to the nature of the disability benefit and consider some portion of the disability payments as marital property. Some courts have characterized disability benefits as separate property to be considered only in awarding alimony and child support, An illustration of this third position is *Thompson v, Thompson*, 642 A.2d 1160 (R.I. 1994),where the Rhode Island Supreme Court held that a disability pension (based on an injury that the husband suffered in 1975, approximately nine years before the divorce) that had been paid to the husband during the marriage was not a marital asset subject to equitable distribution, but could be 'considered as a source of income to the disabled spouse from which alimony and child support can be paid'.

For a full discussion with formulae for the assignment of pensions and employee stock options in divorce, see J. Thomas Oldham, Divorce, Separation and the Distribution of Property § 7.10–11 (2002).*Also see*

Elizabeth Barker Brandt, *Valuation, Allocations, and Distribution of Retirement Plans at Divorce: Where Are We?*, 35 Fam. L.Q. 469 (2001).

(44) A recent illustration of this principle is the case of *Elkus v. Elkus*, 572 N.Y.S.2d 901 (A.D. 1 Dept. 1991),in which the New York Supreme Court (Appellate Division) held that Mr. Elkus, the husband of Metropolitan Opera star Frederica von Stade, had a property interest in Ms. von Stack's operatic career.

(45) For a discussion of intellectual property as marital property, see Ann Bartow, *Intellectual Property and Domestic Relations: Issues to Consider When There Is an Artist, Author, Inventor, or Celebrity in the family*, 35 Fam. L.Q. 383 (2001).

(46) *See* Brett R. Turner, Equitable Distribution of Property 388–94 (2d ed. 1994)

(47) Timing is important. The critical period is during the marriage and while the couple reside together. For example, if after separation and before a divorce one spouse invests his or her own separate money in some venture that proves to be successful, the fruits of that investment would ordinarily be separate property. On the other hand, if an asset was completed during the marriage, like a piece of art, sculpture, or a novel, but sold after the divorce, the proceeds from the work would ordinarily be marital, since it was produced during the marriage.

(48) *See* Turner, *supra* note 46 at 455–67.

(49) See O'Brien v. O'Brien, 489 N.E.2d 712 (1985),where the Court of Appeals of New York held that a husband's medical license was marital property within the meaning of its equitable distribution law. The court interpreted its statute, Domestic Relations Law § 236(b)(1)(c), which defined marital property to include 'all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or commencement of a matrimonial action, regardless of the form in which title is held' to include a professional license.

(51) Professor Mary Ann Glendon was one of the first scholars to bring this phenomenon to the attention of others. *See* Mary Ann Glendon, the New Family and the New Property (1981).In 1981 she wrote that employment ties (the employer's inability to fire an employee without cause) were more secure because of family ties (because of no-fault divorce where a

spouse may leave another spouse without cause). Professor Glendon's observations were truer in the 1970s and early 1980s than they would be today. Over the past two decades the employment bond itself has loosened considerably. The employment relationship today appears little more stable than the marital relationship itself. The fastest growing area in the employment sphere is multiple job holding and contingent employment arrangements. On this phenomenon, see Thomas C. Kohler, *Individualism. and Communitarianism at Work*, 1993 BYU L. Rev. 727.Professor Kohler wrote:

> It may be that instability increasingly characterizes many of the significant relationships among Americans: employment relationships in the U.S. now last an average of 4.5 years, while the average marriage lasts but seven. Trends are not wholly clear, but the average length of both may be on the way down.

Id, at 736.

Professor's Kohler's statement that the average marriage lasts seven years is supported by divorce epidemiologists who write: 'Currently, most people who divorce do so early in their marriage so that half of the divorces occur by the seventh year of marriage.' *See* Patricia H. Shiono & Linda Sandham Quinn, *Epidemiology of Divorce*, 4 The Future of Children 15, 18 (No. 1 Spring 1994).

(52) Lawrence J. Golden, Equitable Distribution Of Property 262–65 (1983).*See also* Brett R. Turner, Supplement To Equitable Distribution Of Property 248–49 (1990).

(53) *Sec* W. Va. Code § 48–2-32 (1996), cited and discussed in Mark Hitman, Pali M. Kurtz Elisabeth S. ScottFamily Law" Casus, text Problems 276 (3d ed. 1998).The authors have written:

> If that requirement were really applied as written, the homemaker would not often do well. While it may be easy to show that the homemaker wife contributed greatly to her husband's comfort or happiness. It is less easy to show that her services yielded a significant contribution to … 'the acquisition, preservation and maintenance, or increase in value of marital property.' Married men do earn more, on average, than do bachelors, but that is not necessarily because having a wife increases a man's earning potential. One can just as plausibly hypothesize that men with better earnings prospects

> have more success in attracting a wife, or that certain traits help a man both in courting women and in earning money …
>
> It thus matters greatly whether a ‘homemaker’ statute is read to create an irrebuttable presumption that the homemaker’s economic contribution is equal, or merely to create an opportunity for the homemaker to try to show how her services contributed to the parties’ assets.

(54) The Uniform Marriage and Divorce Act is reproduced in the Appendix.

(55) These factors include; duration of the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or an addition to maintenance, and the opportunity of each for future acquisition of capital assets and income. Statutes also state that consideration should be given to the contribution or dissipation of each party to the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and as the contribution of a spouse as a homemaker or to the family unit. Uniform Marriage and Divorce Act, § 307,Alternative A. *See* Appendix.

(56) *See* Glkndon, *supra* note 51, at 228.

(57) See Turner, *supra* note 46, at 554-64.

(58) *See* Ellman, Kurtz & Scott, *supra* note 53, at 278–86.

(59) Indeed, the length of a marriage is one of the factors that judges must consider in making an equitable assignment of marital property. *But see* Turner, *supra* note 46, at 586–88,For recent cases comparing the duration of marriage with the percentage of the marital estate awarded to each spouse, see Turner, 2001 Supplement, *supra* note 52, at 702–04.

(60) The reporters of the ALI’s Principles of the Law of Family Dissolution suggest an alternative approach to determining an alimony award based on need is to think of such an award as ‘compensatory payment’ or ‘compensator)7 award’, which is based on compensation of losses occasioned by the marriage and its breakup. *See* Principles of the Law of Family Dissolution, *supra* note 23, at 785–804.

(61) The U.S. Supreme Court held in *Orr v. Orr*, 440 U.S. 268 (1979),that the Alabama alimony statute that imposed an alimony obligation on husbands,

but not wives, was an unconstitutional denial of a husband's equal protection under the U.S. Constitution.

(62) *See* Clark, *supra* note 4, at 619.

(63) Massachusetts sets out factors, based on the Uniform Marriage and Divorce Act, to be considered in its statute.*See* M.G.L. ch. 208, § 34.

(64) Although only eight states—Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington—have enacted all or parts of the Uniform Marriage and Divorce Act, that Act has been the model for other statutory schemes. By 2003 Wisconsin was the only jurisdiction to enact the Uniform Marital Property Act, see W.S.A. SS 766.001 to 766.97.

(65) Appellate review of alimony, judicial assignment of property, and child custody decisions is usually based on the abuse of discretion. Unless a state court system has an expedited review process whereby a spouse can get a hearing and a decision on a disputed judicial ruling within days and then resume the trial, appealing a trial court's decision is likely to be impractical. It is because of the inability to obtain appellate relief quickly, the cost of an appeal and the statistical unlikelihood of a reversal that trial judges have enormous power and their rulings during trial and their ultimate judgment are usually final.

(66) The words, 'public charge', often used in appellate cases during the first quarter of the twentieth century are totally out of date. In the last half of the past century, one could use the phrase 'a candidate for public assistance'. In 2003 in the United States, however, the availability of public welfare funds to support unemployed and unemployable destitute women without children is completely unavailable unless the woman is mentally or physically disabled, which, if substantiated with the proper documentation, would qualify her for special government-sponsored funds.

(67) *See* Walter O. Weyrauch, Sanford N. Katz American Family Law in Transition 319–20 (1982).

(68) The 1963 Supreme Court of Washington case of *Dakin v*. *Dakin*, 384 R2d 639 (Wash. 1963),illustrates this point:

> The record shows that the plaintiff [wife] has no children to support or care for; that she was 53 years of age at the commencement of this action; that she was extremely nervous

> and upset at the time of the trial; but, otherwise she is an able-bodied woman; that, because of her past condition, she has been unable to maintain steady employment; that she attended teacher's college for two years and taught school for four years thereafter; that she has had considerable experience as a social worker, although no formal training.
>
> It is the policy of this state to place a duty upon the wile to gain employment, if possible.
>
> ...
>
> ... We think that [the plaintiff] should be encouraged to rehabilitate herself and that, within a reasonable period, she may become self supporting. Although she may have been nervous and upset prior to her decree of divorce, there is no evidence which indicates this condition is of a permanent nature. Except for this condition, she appears to be an able-bodied woman capable of future employment. We conclude that alimony should be awarded which is adequate for the purpose of providing for her during her transitional period.

(69) An early case that illustrates this point is *Morgan v. Morgan*, 81 Misc. 2d 616, 366 N.Y.S.2d 977 (1975).This New York case involved a wife who had financially helped to put her husband through law school. After divorce, the wife wanted to enter medical school. Her husband refused to support the endeavor. The trial court judge wrote:

> In my opinion,... under these circumstances, the wife is also entitled to equal treatment and a 'break' and should not be automatically relegated to a life of being a well-paid, skilled technician laboring with a life-long frustration as to what her future might have been as a doctor, but for her marriage and motherhood.
>
> I am impressed by the fact that the plaintiff [wife] does not assume the posture that she wants to be an alimony drone or seek permanent alimony. Rather she had indicated that she only wants support for herself until she finishes medical school in 5 1/2 years (1 1/2 years more in college and 4 years in medical school) and will try to work when possible. In this

> regard, she merely seeks for herself the same opportunity which she helped give to the defendant [husband].
>
> Accordingly, I am directing that the defendant shall pay a total sum of $200 weekly for alimony and child support ...

The trial court judge's decision was appealed. On appeal the alimony award of $100 was reduced to $75 a week. The case is reprinted and discussed in Weyrauch et At,, *supra* note 1, at 95–98, 113–15.

(70) 492 N.E.2d 1133 (Mass. 1986).

(71) M at 1135.

(72) Civil contempt is the customary remedy the court uses for a party who violates a court order. It differs from criminal contempt in that in civil contempt when the defedant conforms to the decree he can be released from prison. It is often said that in civil contempt the defendant holds the keys to his cell in his pocket, which means that he, himself, can determine when, he wishes to be released, namely by conforming to a judicial order.

(73) An agreement that is merged with the judgment becomes part of the judgment. The remedy for failing to fulfill a provision is civil contempt. If the agreement is not merged, but maintains its independent status, the remedy would be breach of contract. A breach of contract may not be desirable in many cases, particularly with regard to custody agreements. What would be more desirable would be a suit for specific performance.

That equitable remedy of specific performance is often inappropriate in family law matters because judges, adhering to equitable principles, are very reluctant, perhaps unwilling, to order anyone to perform a personal act. For example, it would be unlikely that a judge would specifically order a father to follow a provision in a custody agreement that required him to conform to a visitation schedule or to show affection for his children. Another unlikely order would be to enforce an antenuptial agreement that had a provision that would require a divorced parent to raise a child in a particular faith (possibly unenforceable because of vagueness) or order a divorced spouse to obtain a religious divorce. Judges are inclined not to cross the line between religion and state. However, some courts might cross that line and enforce an agreement requiring a parent to cooperate in the religious education (clearly defined) of his or her child. For a collection of cases holding both ways, see Homer H. Clark, Jr., & Ann Laquer Estin Domestic

Relations—Cases and Problems, 1052–53 (2000).Some courts have found ways to enforce promises between adults in an antenuptial agreement or in the religious marriage contract itself. For example, in *Aviizur v. Avitzur*, 446 N.E.ld 136 (N.Y. 1983),*cert, denied* 464 U.S. 817 (1983). The New York Court of Appeals (with a dissent) did uphold a provision in a Ketubah (Jewish marriage contract) in which the husband promised to cooperate in obtaining a 'get' (Jewish divorce). In holding that the provision did not violate the First Amendment, the highest court in New York stated that it was not ordering the husband to obtain a get, but enforcing a promise. The court analogized the provision to a promise to arbitrate, which courts ordinarily enforce. The case had an impact on the New York Legislature, which passed the 'Avitzur' statute, requiring a divorcing couple to show that they have taken the appropriate steps to remove any barriers to remarriage. That would include cooperating with a request to obtain a religious divorce. *See* N.Y. McKinney's DOM. Rel. Law § 253 (Supp. 1984–85). *See* also *Goldman v*. *Goldman*, 554 N.E.2d 1016 (III. App. 1990),where an Illinois Appeals Court ordered specific performance of the Ketubah that bound the husband to obtain a Jewish divorce.

(74) For a full legal discussion of child support with cases, statutory references, and formulae, see Principles of the Law of Family Dissolution, *supra* note 23, at 410–643.

(75) For a full discussion of the guidelines and a state by state analysis of their application, *See* Laura W. Morgan, Child Support Guidelines—Interpretation and Application (1996).

(76) *See* Robert M. Horowitz, *The Child Support Enforcement Amendments of 1984*, 36 Juv. And Fam. Court. 1 (1985).

(77) Ellman, Kurtz & Scott report:

> Despite the law's assignment of support responsibilities to both parents, empirical data indicates a significant proportion of children do not receive support from an absent parent. According to the most recent Census Bureau data based on a 1992 survey, only 54% of the 11.5 million parents living with children under 21 whose other parent was not living in the household reported having either a decree or an agreement for child support.... While approximately 69% of divorced parents reported an award or agreement, fewer than half (44%) of

> separated parents and barely one-quarter (27%) of never-married parents reported an order or agreement.
>
> *See* Ellman, Kurtz & Scott, *supra* note 53, at 573.

(78) *Id*. at 573–75.

(79) Golden writes,

> Frequently, the marital home (if classified as marital property) will be awarded to the custodial parent. This is so even though the other spouse may have strong family or sentimental ties to the residence. Many states specifically list the desirability of awarding the marital home to the custodial parent as a factor for the court to consider in making the final equitable distribution.

See Golden, *supra* note 52, at 201.

(80) Linda Elrod & Robert G. Spector list the following states as supporting child support obligation to continue education: Alabama, Arizona, California, Connecticut, Delaware, Florida, Indiana, Iowa, Kentucky, Massachusetts, Michigan, Mississippi, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, Wisconsin. *See* Elrod & Spector, *supra* note 16, at 657.*See also* All § 3.12, which provides that child support rules should include support for postsecondary education and vocational training. *See* Principles OF the Law of Family Dissolution, *supra* note 23, at 513.

(81) *See id*.

(82) *See id*, at § 3.14(3).

(83) The tender years presumption and the maternal preference rule coexisted with the best interests of the child standard and were incorporated in state statutes and case law. The presumption could be rebutted by proof of the mother’s unfitness. Unfitness might be difficult to prove as well as being an undesirable legal strategy between a mother and a father who would most likely have a post-divorce relationship through their children. Because the presumption and preference by their very definition denied both parents an equal opportunity to claim custody, most states have either abolished the presumption by statute or the presumption and preference

have been judicially abandoned. Some state supreme courts found that the tender years presumption violated the state's Equal Rights Amendment and others that it violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *See* Ann M. Haralambie, 1 Handlling Child Custody, Abuse and Adoption Cases 233–38 (1993); Homer H. Clark, Jr, The Law Of Domestic Relations in The United States 786–849 (2d 1988).

(84) For a discussion of how judicial discretion is controlled through presumptions and statutory guidelines, see Weyrauch Et Al., *supra* note 1, at 838–43.

(85) Section 402 of the Uniform Marriage and Divorce Act reads: Section 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. ((1)) the wishes of the child's parent or parents as to his custody;
2. ((2)) the wishes of the child as to his custodian;
3. ((3)) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
4. ((4)) the child's adjustment to his home, school, and community; and
5. ((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.

Since the 1970s, when only sixteen states statutorily mandated judges to consider a child's preference in custody disputes, thirty-two states have included some reference to the child's preference, depending on the child's age. Of prime importance is the child's age. Statutes range from mere consideration to increased weight as the child matures to granting controlling weight to the child's preference. See Kathleen Nemechek, *Child Preference in Custody Decisions: Where We Have Been, Where We Are Now, Where We Should Go*, 84 low A L. REv. 437, 445 (1998); Randi L. Dulaney, *Children Should Be Seen and Heard in Florida Custody Determinations*, 25 Nova L. Rrv. 815, 821, 823 (2001).

(86) *See, e.g.*, Wash. REV'. Code. Ann. § 26.09, 181 (West Supp. 1991).

(87) In *Pikula v. Pikula* 374 N.W.2d 705, 712 (Minn. 1985),Justice Wahl wrote:

> The inherent imprecision heretofore present in our custody law has, in turn, diminished meaningful appellate review. We have repeatedly stressed the need for effective appellate review of family court decisions in our cases, and have required specificity in writing findings based on the statutory factors.... We are no less concerned that the legal conclusion reached on the basis of those findings be subject to effective review. We recognize the inherent difficulty of principled decision-making in this area of the law. Legal rules governing custody awards have generally incorporated evaluations of parental fitness replete with ad hoc-judgments on the beliefs, lifestyles, and perceived credibility of the proposed custodian.... It is in these circumstances that the need tor effective appellate review is most necessary to ensure fairness to the parties and to maintain the legitimacy of judicial decision-making.

(88) *See, e.g*., Katharine L. Mercer, *A Content Analysis of Judicial Decision-Making—How Judges Use the Primary Caretaker Standard to Make a Custody Determination*, 5 Wm. & Mary J. Women & L. 1 (1998); David Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 Mich. L. Rev. 477 (1984); Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. Chi. L. Rev. 1 (1987); Martha Fineman, *Dominant Discourse, Professional Language and Legal Change in Child Custody Decisionmaking*, 101 Harv. L. Rev. 727 (1988).

(89) *See* Joseph Goldstein, Anna Freud & Albet J. Solnt, Beyond the Best Interests Of The Child 31–34 (1973): Joseph Goldstein, Anna Freud, Albert J. Solnit & Sonja Goldstein, In The Best Interests Of The Child 66–67 (1986).

(90) *See* Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 Yale L. & POL'Y REV. 168, 180 (1984).

(91) The issues raised in these questions are discussed in Bruce Ziff, *The Primary Caretaker Presumption: Canadian Perspectives on an American Development*, 4 INT'L J.L. & FAM. 186 (1990).For lull exploration of the arguments for and against the primary caretaker preference and citations to cases and statutes to the preference, see Gary Crippen, *Stumbling Beyond Best Interest of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's tour Year Experiment with the Primary Caretaker Preference*, 75 Minn. l. REv. 427 (1990); Haraiambie, *supra* note 83, 238–39.

(92) *See* Homer H. Clark, Carol Glowinsky Domestic: Relations: Cases and Problems 1075 (4th ed. 1990).Justice Wahl answers this question in the negative. Writing in *Pikula v. Pikula*, *supra* note 87, at 712 n. 2,she stated:

> The primary parent preference, while in accord with the tender years doctrine insofar as the two rules recognize the importance of the bond formed between a primary parent and a child, differs from the tender years doctrine in significant respects. Most importantly, the primary parent rule is gender neutral. Either parent may be the primary parent; the rule does not incorporate notions of biological gender determinism or sex stereotyping. In addition, the rule we fashion today we believe will encourage co-parenting in a marriage unlike the tender years doctrine which, for fathers, meant that whatever function they assumed in the rearing of their children would be deemed irrelevant in a custody contest. In 1990, the Minnesota Legislature abolished the primary caretaker presumption. *See* Minn S STAT § 518.17 (1) (a) (1990).

(93) For example, § 46b–56 of the Connecticut Statute provides, in relevant part:

> (b) in making or modifying any order with respect to custody or visitation, the court shall be guided by the best interests of the child, giving consideration to the wishes of the child if he is of sufficient age and capable of forming an intelligent preference, provided in making the initial order the court may fake into consideration the causes for dissolution of the marriage or legal separation.

(94) *See* Sanford N. Katz, *Foster Parents versus Agencies: A Case Study in the Judicial Application of 'The Best Interests of the Child' Doctrine, 65* Mich. L. Rev. 145, 154–69 (1966).

(95) I use the word 'relationship' and 'relationships[1] not 'continuity of cart'[1], because I do not wish to totally embrace the primary caretaker presumption. A child can have a positive relationship with a non-resident adult as well as with more than one adult. This includes the non-custodial parent.

It is also very important to consider a child's relationship with relatives, especially siblings, grandparents, aunts, uncles, and cousins, and friends as well as with the community in which he and his family of origin identifies.

Relationships can change over time and the positive aspect of modification of a custody decree is that if a child's needs change a custody decree can be modified to reflect that change. This is particularly true during the adolescent period when these children make strong attachments to friends and also may need a closer relationship to the parent of the same sex because of the belief that that parent can better understand the whole range of physical, emotional, and intellectual changes that are occurring in the adolescent. For a full discussion of the adolescent's interactions with parents, and how adolescents view their parents based on the results of the authors' empirical studies, see James Younfss & Jacquneline, Smollar, Adolescent Relations With Mothers, Fathers, And Frilnds (1985)..

When the custody of an infant (under 3 years old) is in dispute, an inquiry into the attachment relationships the infant has with his or her parents is crucial in making a decision. In reporting on the research in child development that has an impact on child custody decisions, Joan B. Kelly and Michael E, Lamb state that infants benefit from regular interaction with both of their parents to promote their attachments. They also write that the parent's interaction should occur in all phases of the infant's day to day activities. They emphasize the need for both parents to be involved in the infant's life. Divorce, of course, causes insecurity in the infant-parent attachments. Lessening the insecurity is a difficult task and calls for supportive and cooperative parents post-divorce. Lessening the insecurity should be one of the goals a judge tries to advance in making a child custody decision. See Joan B. Kelly & Michael H. Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, 38 Fam. & Conciliation CTS. REV. 297–311 (2000).

(96) By financial support I am not proposing that a judge weigh the relative economic strengths of the claimants and award custody to the parent who is more affluent. In divorce, child support is separate from the assignment of custody. What is important is that the parent (or another adult) who is awarded custody take financial support seriously and if necessary pursue a parent delinquent in his child support obligation.

(97) In attempting to define 'the best interests of the child', I have been influenced by the work of Joseph Goldstein, Albert Solnit & Anna Freud, Beyond the Best Interests OF the Child (1973).They introduced three concepts, which have become part of the child custody legal vocabulary: continuity of care, the psychological parent, and the least detrimental

alternative. For a discussion of these concepts in an appellate case, see *Seymour v*. *Seymour*, 433 A.2d 1005 (Conn. 1980).

(98) In *In re Gault*, 387 U.S. 1 (1967),the U.S. Supreme Court held that children have a right to counsel in delinquency cases. Under the federal Child Abuse Prevention and Treatment Act as amended in 1996, representation for children is required in child protection cases. *See* 42 U.S.C.A. $ 5106a(b) (2) {A) (ix) (West Supp. 1999). The Act is discussed in Chapter 4.

(99) Some states require that a period of time elapse before a motion to modify a custody decree. The Uniform Marriage and Divorce Actsets a two-year period unless the child's health or safety is being threatened. *See* Uniform Marriage and Divorce Act *$* 409 (a) in the Appendix.

(100) Wallerstein and Tanke strongly advocate that children should be heard in removal cases. *See* Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move; Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 Fam. L.Q. 305, 322–23 (1996).

(102) For a discussion of joint custody, see Joan Kelly, *The Determination of Child Custody*,in The Future of Children, *supra* note 51, at 121.

(103) For a detailed discussion and list of state statutes as well as an analysis of cases on joint custody, see Haralambie, *supra* note 83, at 260–61.

(104) *See* Robert Mnookin et al, *Private Order Revisited—What Custodial Arrangements are Parents Negotiating*,in Sugarman & Kay, *supra* note 12, at 37–74.

(105) For a discussion of the feminist approach, see Katharine T. Bartlett, *Feminism and Family Law*, 33 Fam. L.Q. 475, 483 (1999); June R. Carbone, *A Feminist Perspective on Divorce*,in The Future of Children, *supra* note 51, at 183.

(106) Joan B. Kelly and Michael E. Lamb have written that the focus in relocation cases should be on the child, not the parents. They propose that decision-makers inquire into the costs and benefits of the move, heavily weighing the strength of the child's relationship with each parent. They point out that courts should consider the following: 'the age and developmental needs of the children, the quality of parent-child relationships, the psychological adjustments of the parents, the likely effects of moving on the children's social relationships, as well as the cultural and educational

opportunities in both locations.' They underscore the effect of a move on very young children and the need for those children to continue to have meaningful contact with both parents, delaying the move if that is necessary. *See* Joan B. Kelly & Michael E. Lamb, *Developmental Issues in Relocation Cases Involving Young Children: When, Whether, and How?*, 17 J. Fam Psychology 193, 202 (2003).

(107) In writing about relocation decisions, Judith Wallerstein and Tony J. Tanke stated that adolescents should be treated differently from younger children. For reasonably mature adolescents who are well-adjusted, they wrote that:

> stability may not lie with either parent, but may have its source in a circle of friends or particular sports or academic activities within a school or community. These adolescents should be given, the choice, if a choice is to be made, as to whether they wish to move with the moving parent. It should also be made clear to them that their decision can be changed, if parents can arrange this.... It would seem appropriate to their age and development that mature adolescents be encouraged to exercise their free choice about whether they wish to live, provided parenting and supervision are available in both homes, and the arrangements are otherwise feasible.

See Wallerstein & Tanke, *supra* note 100, at 322–23.

(108) For balancing a parent's right to travel with the child's best interests see: Everett v. Everett, 660 So. 2d 599 (Ala. Civ. App. 1995); Holder v. Polanski, 544 A.2d 852 (N.J. 1988); Watt v. Watt, 971 R2d 608 (Wyo. 1999).

(109) Many of these statutes and cases interpreting them are discussed in Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 Fam. L.Q. 245 (1996).

(110) 588 N.Y.S.lci 138 (App. Div. 1992).

(111) *See* Tropea v. Tropea, 667 N.E.2d 145 (1996).

(112) *Id*. at 151.

(113) *Id*. at 152.

(114) The ALT Principles rakes a realistic position on the complicated issue of relocation. The Principles define relocation of a parent as constituting ‘a substantial change in circumstances … only when the relocation significantly impairs either parent’s ability to exercise responsibilities the parent has been exercising or attempting to exercise under the parenting plan.’ In order to guide judges in making a decision about relocation, the Principles recommend that the judge take into account the extent to which the relocating party is the primary caretaker or the parent who has been exercising the clear majority of custodial responsibility, the nature of the move, whether the move is valid and in good faith, the impact the move will have on the child, and the extent to which the move will interfere with the non-custodian’s rights. The thrust of the Principles seem to allow relocation, especially in light of what the Principles state as one of the primary purposes of modern divorce is ‘to allow each party to go his or her own way’. *See* rinciples Of The Law OF Family Dissoluction, *supra* note 23, at § 2.17(a).

(115) 919 P.2d 776 (1996).

(116) These states include: California, Montana, Minnesota, South Dakota, Tennessee, Washington, Wisconsin, and Wyoming. See Principles Of The Law Of Family Dissolution, *supra* note 23, at 371–84.

(117) For a discussion of the early history of the UCCJA, the application of the full faith and credit clause to custody decrees, and civil and criminal remedies available to the custodial spouse when her child has been abducted, see Sanford N. Katz, Child Snatching—the Legal Response to the Abduction of Children (American Bar Association, 1981).For a full discussion of the basis for custody jurisdiction, the UCCJA, UCCJEA, and the Federal Parental Kidnapping Prevention Act (PKPA),with citations to cases that have interpreted the acts, see Russell J. Weintraub, Commentary on the Conflict of Laws 327–40 (4th ed. 2001).For an analysis of the major provisions of the UCCJA, see Ellman, Kurtz & Scow, *supra* note 53, at 758–97.The UCCJA, UCCJEA, and the PKPA can be found in the Appendix.

(118) For a full discussion and analysis of the Hague Convention, see Linda Silberman, *The Hague Children’s Conventions; The Internationalization of Child Law*,in CROSS Currents, *supra* note 1, at 589–617.

(119) As we have seen, step-parents may or may not have child support obligations. *See* accompanying text to note 81.

(120) *But see, e.g.*, Colo. Rev. Stat. Ann. § 14-10-123(1) (c) (2000); Conn. Gen. Stat. Ann. § *46*b–*59* (West 1995), which states that 'any person may be awarded visitation'. Or. Rev. Stat. § 109.119 (1999), which states that any person who has 'maintained an ongoing personal relationship with substantial continuity for at least one year, through interaction, companionship, interplay and mutuality' may petition for visitation.

(121) These historic cases are: Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Prince v. Massachusetts, 321 U.S. 158 (1944); Stanley v. Illinois, 405 U.S. 645 (1972); Wisconsin v. Yoder, 406 U.S. 205 (1972); Parham v. J.R., 442 U.S. 584 (1979); Santosky v. Kramer, 455 U.S. 745 (1982); Washington v. Clucksberg, 521 U.S. 702 (1997).

(122) 530 U.S. 57 (2000).

(123) Wash. Rev. Code Ann. § 26.10.160(3) (West 1997).

(124) Briefly and in summary, Justice Souter, while concurring in the judgment, would have affirmed the Supreme Court of Washington's decision, holding the statute to be facially unconstitutional. Justice Thomas, also concurring in the judgment, agreed that the statute had been applied unconstitutionally, but felt that the Court should have stated the appropriate standard of review for the rights in question, which to him was strict scrutiny. Justice Stevens dissented from the decision, asserting that the statute had a legitimate sweep and that nothing in the Court's precedent indicated that a third party should have to show harm before a court can award visitation. Justices Kennedy and Scalia dissented. Justice Kennedy argued that a showing of harm should not be required before a court can award visitation rights to a third party, and asserted that the best interests of the child standard is the most appropriate tool in domestic relations law when dealing with visitation proceedings. The major point of Justice Scalia's dissent is discussed in the text above.

(125) 530 U.S. at 74.

(126) *Id*. at 91.

(127) Professor David Meyer has analyzed the case and produced a chart that compares all the opinions and provides the general statements, based on the number of judges who agree on each issue. *See* David D. Meyer, Lochner *Redeemed: Family Privacy after* Troxel *and* Carhart, 48 UCLA L. Rev.

1125, 1143 (2001).Professor Meyer points out that only Justice Souter and Justice Thomas considered the Washington statute facially unconstitutional, and Justices O'Connor, Rehnquist, Ginsburg, Breyer, Souter, and Thomas, either expressly or impliedly, found the statute unconstitutional as applied to the parent, the mother, in the case.

See *also*, Jerome A. Barron, C. Thomas Dienes Wayne Mccormack& Martin H. Redish, Constitutional Law: Principles and Policy—Cases and Materials 515–16 (6th ed. 2002).

(128) 633 N.W2d 312 (Iowa 2001).

(129) The Iowas statute reads as follows:

> The grandparent or great-grandparent of a child may petition the district court for grandchild or great-grandchild visitation rights when any of the following circumstances occur;
>
> …
>
> 7. A parent of the child unreasonably refuses to allow visitation by the grandparent or great-grandparent or unreasonably restricts visitation. This subsection applies to but is not. limited in application to a situation in which the parents of the child are divorced and the parent who is the child of the grandparent or who is the grandchild of the great-grandparent has legal custody of the child.
>
> A petition for grandchild or great-grandchild visitation rights shall be granted only upon a finding that the visitation is in the best interests of the child and that the grandparent or great-grandparent had established a substantial relationship with the child prior to the filing of the petition.

See Iowa Code § 59835 (7).

(130) In *Blixt v. Blixt*, 774 N.E.2d 1052 (Mass. 2002),the Supreme Judicial Court of Massachusetts found its grandparent visitation statute, M.G.L. ch. 119, § 39D to be constitutional. That statute reads as follows;

> If the parents of an unmarried minor child are divorced, married but living apart, under a temporary order or judgment of separate support, or if either or both parents are deceased,

> or if said unmarried minor child was born out of wedlock whose maternity has been adjudicated by a court of competent jurisdiction or whose father has signed an acknowledgment of paternity, and the parents do not reside together, the grandparents of such minor child may be granted reasonable visitation rights to the minor child during his minority by the probate and family court department of the trial court upon a written finding that such visitation rights would be in the best interest of the said minor child; provided, however, that such adjudication of paternity or acknowledgment of paternity shall not be required in order to proceed under this section where maternal grandparents are seeking such visitation rights. No such visitation rights shall be granted if said minor child has been adopted by a person other than a stepparent or such child and any visitation rights granted pursuant to this section prior to such adoption of the said minor child shall be terminated upon such adoption without any further action of the court.

In *Blixt* the maternal grandfather sued bis daughter and the father of his daughter's illegitimate child for visitation rights to his grandchild. The child's parents who were living with their child objected to the visitation. The mother filed a motion to dismiss her father's action on the grounds that the visitation statute was unconstitutional on its face because it violated the Fourteenth Amendment and its Massachusetts counterpart, and also violated the equal protection provisions of the state and federal constitutions. The Family and Probate Court granted the mother's motion to dismiss, finding the statute unconstitutional. The case went up to the Supreme Judicial Court of Massachusetts.

The Supreme Judicial Court, however, held that its statute was constitutional. To a majority of the court, the mother was not denied due process or equal protection. The court first differentiated the Massachusetts statute and its limitation to the broadness of the Washington statute in *Troxel*. The court mentioned the context in which this case arises (illegitimate child living with the child's biological mother and father). The court also stated 'that the Massachusetts statute satisfied strict scrutiny because the court's interpretation narrowly tailors it to further the compelling State interest in protecting the welfare of a child who has experienced a disruption in the family unit from harm'. The court's construction of the statute requires that a parental decision concerning grandparent visitation be given presumptive

validity, and that such presumption assumes the fitness of the parent. To rebut the presumption that a parental decision concerning grandparent visitation is valid, grandparents must prove by a preponderance of the crucible evidence that the failure to grant visitation will cause the child significant harm, thus affecting the child's health, safety, or welfare. The court stated that if grandparents do not have a pre-existing relationship with their grandchild, they must prove that the visitation is nevertheless necessary to protect the child from significant harm.

(131) *See, e.g.*, California (Cal. Fam. Code § 2400), Colorado (C.R.S. 14-10-1203), Indiana (Burns Ind. Code Ann. § 31-15-2-13), Iowa (Iowa Code § 598.8), Minnesota (Minn. Stat. § 51.8.195), Nevada (Nev Stat. 125.181), and Oregon (Or. Rev. Stat. § 107.485).

(132) See, *e.g.*, Alaska Stat. $ 25.24.220(B); Are. Rev Stat. § 25–316; Del. Code Ann. tit. 13, *$* 1517; Fla. Stat. Ann. § 61.052; Ga. Code Ann. § 19-5-10(a); Haw. Rev. Stat. § 580–42(a); Idaho Code § 32–716;750 Ill. Comp. Stat. 5/453; Ky. Rev. Stat. Ann. § 403.170; Mass. Gen. Laws Ann. ch. 208, § lA; MIss. Code Ann. § 93-5-2; Mont, Code Ann. *$* 40-4-130 to 133; Neb. Rev. Stat. Ann. *$* 42-361; Ohio Rev. Code Ann. § 3105.63; Tenn. Code Ann. § 36-4-103; Wash. Rev. Code Ann. § 26.09.030(1);and Wis. Stat. $ 767.12 (2).

(133) For a discussion of mediation in divorce and decedents estates conflicts, see Ray D. Madoff, *Lurking in the Shadow; The Unseen Hand of Doctrine in Dispute Resolution*, 76 S. CA. L. REV. 161 (2002).*See also* H. Jay Folberg, *Divorce Mediation—The Emerging American Model, in* The Relslution Of Family Conflict 193–232 (John M. Fekelaar & Sanford N. Katz eds., 1984).

(134) In some states, mediation is a prerequisite to a hearing in cases of contested custody and visitation issues. *See, e.g.*, CAL CIV. Coi)f § 4607 (West 1983 & Supp. 1990); DhL. Fam. CT. C.R. (I6)(a) (1); Ml. REV. STat. Ann. tit. 19, § 752 (West 1981 & Supp. 1990); N. C. *GEN*. Stai § 50-13.1 (1989) (mediation required if custody or visitation issue involved); Or. REv. Siai. Ann. §§ 107.755–795 (Butterworths 1990). Other states permit the court to order mediation. *See, e.g.*, ALASKA STAT. § 25.24.060 (Michie 1983); FLA Stat. Ann. § 44.101 (Harrison Supp. 1989); ILL. Rev. STAT. ch. 40, 607.1(c) (4) (Smith-Hurd 1980 & Supp. 1990); Iowa Code Ann. §§ 598.41, 679.1–.14 (West 1987 & Supp. 1990); Kan. StAT. Ann. §§ 23–601 to -607 (1989); La. Rrv. Stat. Ann. S§ 9:351– :356 (West Supp. 1990); MICH. COMP Laws § 552.505 (West 1988 & Supp. 1990); Minn. Siai. Ann. § 518.619 (West 1990); Moni. Code Ann. §§ 40-4-215, 301 (2002); K.H. Rr, Siai. Ann. *$* 328-C (Butterworths Supp. 1989); N.M. Siai. Ann. § 40-12-5 (1988); R.I. Gen. Laws § 15-5-29 (1988); Tex. Civ.

Prac. & Rem. Code Ann. SS 152.001-.004 (Vernon 1985); Wash. Rev. Code Ann. § 26.09.015 (West Supp. 1990); Wis. Stat. § 767.11(3) (West Supp. 1990).

(135) *See* H Jay Folberg and Ann Milne, Divorce Mediation—Theory and Practice 431-49(1988).

(136) For a discussion of these issues and other alternative methods of resolving conflicts in divorce, see Janet R. Johnston, igh-Conflict Divorce,in >The Future of Children, *supra* note 51, at 165, 176-78.

(137) *See, e.g.*, Smith v. Lewis, *supra* note 38.

(138) See Jay Folberg & Alison Taylor, Mediation (1984).

(139) This is manifested from time to time when legislatures either refuse or are reluctant to reduce the periods between the time a divorce decree is issued and when it is final. For example, in. Massachusetts 90 days must elapse between the time a decree is granted and when it becomes final. (See M.G.L. eh. 208, § 21). Attempts at reducing the period have been unsuccessful. The reason for the time period is supposedly to give the spouses time to reconcile. It is generally believed (although there are no definitive studies to prove the point) that such a goal is unrealistic.

(140) *See* Max Rheinstein, Marriage Stability, Divorce and the Law 5–6 (1972).

(141) The author has derived this information from his participation in judicial education both in the Commonwealth of Massachusetts and with the Council of Juvenile and Family Court Judges, a national organization that holds educational programs for judges from many states.

(142) See Sanford N. Katz & Jefrey A. Kuhn, Recommendations For A Model Family Court (National Council of Juvenile and Family Court Judges, 1991).