

# **Chapter Three**

## **Family Law**

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## INTRODUCTION

THE GOVERNMENT HAS ALWAYS HAD AN INTEREST IN MARRIAGE AND FAMILIES. State legislatures have passed many laws regulating the requirements for getting married and for obtaining a divorce. In addition, today's laws also affect couples who live together outside of marriage.

It is hard to give simple answers to many of the legal questions that a person may have about marriage, parenthood, separation, or divorce, because the laws change and vary from one state to another. In addition, judges in different states with identical laws may decide cases with similar facts in different ways.

This chapter describes the laws and court rulings common to most states. If you have other questions, contact a lawyer in your state. You may wish to contact a specialist. Many lawyers (particularly in urban areas) work only on family law or make it a large part of their general practice. Lawyers specializing in family law also may refer to themselves as specialists in "domestic relations" or "matrimonial law."

## MARRIAGE

### Requirements of Getting Married

#### **Q. Legally, what is marriage?**

**A.** Most states define marriage as a civil contract between a man and woman to become husband and wife.

The moment a man and woman marry, their relationship acquires a legal status. Married couples have financial and personal duties during marriage and after separation or divorce. State laws determine the extent of these duties. As the United States Supreme Court said about marriage in 1888: "The relation once formed, the law steps in and holds the parties to various obligations and liabilities."

Of course, marriage is a private bond between two people, but it is also an important social institution.

Today, society also recognizes marriage as:

- a way to express commitment, strengthen intimate bonds, and provide mutual emotional support;
- a (comparatively) stable structure within which to raise children;
- a financial partnership in which spouses may choose from a variety of roles. Both spouses may work to support the family, the husband may support the wife, or the wife may support the husband.

As our society becomes more complex, there is no longer a short answer to the question "What is marriage?" Definitions and opinions of the proper functions of marriage continue to change. The women's rights movement and gay rights movement have changed some people's ideas of marriage and created new forms of relationships, including <sup>A</sup>domestic partnerships<sup>@</sup> and <sup>A</sup>civil unions<sup>@</sup> for same-sex couples. Marriage will remain, but it will also continue to evolve.

#### **Q. What are the legal requirements for getting married?**

**A.** The requirements are simple, although they vary from state to state. In general, a man and woman wishing to marry must obtain a license in the state in which they wish to be married,

usually from a county clerk or a clerk of court. The fee usually is low.

Some states require the man and woman to have blood tests for venereal disease--but not for AIDS--before the license is issued. Some states do not require this test if the two have already been living as husband and wife. If the test shows that a would-be spouse has a venereal disease, certain states may not issue a license. Other states will allow the marriage if the couple knows the disease is present.

In some states a couple must show proof of immunity or vaccination for certain diseases. A few states demand a general physical examination.

If one or both of the parties have been married before, the earlier marriage must have been ended by death, divorce, or annulment.

Parties who wish to marry must have the "capacity" to do so. That means the man and woman must understand that they are being married and what it means to be married. If because of drunkenness, mental illness, or some other problem, one of parties lacks "capacity," the marriage will not be valid.

Close blood relatives cannot marry, although in some states, first cousins can marry. Of those states that allow first cousins to marry, a few states also require that one of the cousins no longer be able to conceive children.

Most, but not all, states require a waiting period, generally one to five days, between the time the license is issued and the time of the marriage ceremony.

**Q. At what age may people marry?**

**A.** In most states, a man or woman may marry at age eighteen without parental consent. Most states also allow persons age sixteen and seventeen to marry with consent of their parents or a judge.

**Q. When does a couple truly become married?**

**A.** Most states consider a couple to be married when the ceremony ends. In a few states, lack of sexual relations may allow a spouse to have the marriage annulled (see below). In most states, however, non-consummation does not affect the validity of the marriage. In all states, the proper official must record the marriage license. Recording the marriage license acts as proof that the marriage happened.

**Q. Is a particular type of marriage ceremony required?**

**A.** A marriage ceremony may be religious or civil. The person or persons conducting the ceremony should indicate that the man and woman agree to be married. A religious ceremony should be conducted under the customs of the religion, or, in the case of a Native American group, of the tribe. Most states require one or two witnesses to sign the marriage certificate.

**Q. Who may conduct a marriage ceremony?**

**A.** Civil ceremonies usually are conducted by judges. In some states, county clerks or other government officials may conduct civil ceremonies. Religious ceremonies normally are conducted by religious officials, such as ministers, priests, or rabbis. Native American ceremonies may be presided over by a tribal chief or other designated official. Contrary to some popular legends, no state authorizes ship captains to perform marriages.

**Q. Are common-law marriages allowed?**

**A.** In most states, no. In times past, particularly the frontier days, it was common for states to

consider a woman and man to be married if they lived together for a certain length of time, had sexual intercourse, and held themselves out as husband and wife, even though they never went through a marriage ceremony. Today, only about one-fourth of the states recognize common-law marriages. In order for there to be a legal common-law marriage, the couple must clearly represent themselves to others as being husband and wife; merely living together is not enough to create a marriage.

In states that recognize a common-law marriage, the partners have the same rights and duties as if there had been a ceremonial marriage. Most other states will accept as valid a common-law marriage that began in a state that recognizes common-law marriage.

A legal common-law marriage may end only with a formal divorce.

**Q. Does the law recognize same-sex marriages?**

**A.** No. As of the year 2000, no state has passed a law recognizing homosexual marriages<sup>®</sup> per se. If two members of the same sex were to go through a marriage ceremony, the courts would not consider the marriage to be valid, and, in the event the parties split up, they could not seek a legal divorce. The Vermont legislature has enacted a statute that allows same-sex couples to form civil unions<sup>®</sup> to give same-sex couples the same benefits and protections as opposite-sex couples who enter into marriages. The law is being challenged in the courts by persons opposed to same-sex unions. The Vermont Supreme Court has already ruled, however that same-sex couples should have the same rights as opposite-sex couples.

A decision by the Hawaii Supreme Court in the 1990s made it appear that Hawaii would become the first state to authorize same-sex marriages. The state, however, amended its constitution to preclude such marriages.

**Q. What is a domestic partnership?**

**A.** Some cities have passed laws providing for "domestic partnerships" which can be used by homosexual couples and by heterosexual couples who are living together without being married. To become domestic partners, the couple usually must register their relationship at a government office and declare that they are in a "committed" relationship. Domestic partnerships provide some--but not all--of the legal benefits of marriage. Some of the common benefits are the right to coverage on a family health insurance policy, the right to family leave to take care of a sick partner (to the same extent a person would be able to use family leave to care for a sick spouse), bereavement leave, visiting rights to hospitals and jails, and rent control benefits (to the same extent a spouse would retain reduced rent if his or her partner died).

**Q. Does a woman's last name change when she gets married?**

**A.** Only if she wants to change it. In the past, some people assumed that a woman would change her last name to her husband's name when she married. Now society recognizes a woman's right to take her husband's name, keep her original name, or use both names. The general rule is that if a woman uses a certain name consistently and honestly, then that is her true name.

**Invalid Marriages**

**Q. What if someone thinks he or she has a genuine marriage but it turns out to be invalid?**

**A.** Sometimes people who live as a married couple learn that their marriage is not legal. For example, one supposed spouse may have kept a prior marriage secret, or both may have thought incorrectly that an earlier marriage had ended in divorce or the death of a spouse. Or a marriage may be invalid because it is between close relatives, underage persons, or people incapable of entering into the marriage contract because of mental incompetence.

In some states the putative (supposed) spouse doctrine offers some protection if the parties went through a ceremonial marriage. A putative spouse may be entitled to the benefits and rights of a legal spouse for as long as she or he reasonably believes the marriage to be valid. In states that do not accept the putative-spouse doctrine, people who mistakenly believe they are married usually have the same status as unmarried couples who live together.

Sometimes people discover that their marriage is invalid only when filing for divorce. After a long union that a couple believed was a valid marriage, a court may refuse to declare the marriage invalid and require a divorce to end the marriage.

**Q. What other legal rules affect invalid marriages?**

**A.** Sometimes the law treats an invalid marriage as valid if one person tricked the other into thinking they are married. If so, a court might not allow the deceiver to declare the marriage invalid. In legal terms, the court "estops" the deceiver from denying that the marriage exists. In addition, a court may find that the doctrine of laches (long delay) prevents even the innocent party, who originally did not know about the invalid marriage, from having the marriage declared invalid if he or she did nothing for a long time after learning that the marriage was not valid.

**Premarital Agreements**

**Q. What is a premarital agreement?**

**A.** A premarital or antenuptial agreement is a contract entered into by a man and woman before they marry. The agreement usually describes what each party's rights will be if they divorce or when one of them dies. Premarital agreements most commonly deal with issues of property and support--who is entitled to what property and how much support, if any, will be paid in the event of divorce.

**Q. Why do people enter into premarital agreements?**

**A.** Sometimes persons intending to marry use premarital agreements as a way of clarifying their expectations and rights for the future. Another reason for making such agreements is to try to avoid uncertainties about how a divorce court might divide property and decide spousal support if the marriage fails. A man or woman who wants a future spouse to enter into a premarital agreement often has something he or she wants to protect, usually money. One or both partners may want to avoid the risk of a major loss of assets, income, or a family business in the event of a divorce. For people marrying for a second or third time, there might be a desire to make sure that a majority of assets or personal belongings are passed on to the children or grandchildren of prior marriages rather than a current spouse.

**Q. What does the less wealthy spouse give up by signing a premarital agreement?**

**A.** The less wealthy spouse is agreeing to have his or her property rights determined by the agreement rather than by the usual rules of law that a court would apply on divorce or the death of the wealthier spouse. As will be discussed later, courts have certain rules for dividing

property when a couple divorce. In some states (such as California), courts automatically divide equally the property acquired by the husband and wife during the marriage. In more states, courts divide property as the court considers fair, and the result is less predictable; the split could be fifty-fifty or something else. If one spouse dies, courts normally follow the instructions of that person's will, but the surviving spouse usually is entitled to one-third to one-half of the estate regardless of what the deceased spouse's will says. If the husband and wife have signed a valid premarital agreement, that agreement will supersede the usual laws for dividing property and income upon divorce or death. In many cases, the less wealthy spouse will receive less under the premarital agreement than he or she would receive under the usual laws of divorce or wills.

**Q. Why would the less wealthy spouse sign a premarital agreement if he or she would receive less under the agreement than under other laws?**

**A.** The answer to that question depends on the individual. Some people prefer to control their fiscal relationship rather than to leave it to state regulation. They may want to avoid uncertainty about what a court might decide if the marriage ends in divorce. For some, the answer may be "love conquers all"--the less wealthy person may just want to marry the other party and not care much about the financial details. For others, the agreement may provide ample security, even if it is not as generous as a judge might be. Still others may not like the agreement, but they are willing to take their chances and hope the relationship and the financial arrangements work out for the best.

**Q. What is necessary to make a valid premarital agreement?**

**A.** Laws vary from state to state. In general, the agreements must be in writing and signed by the parties. In most states, the parties (particularly the wealthier one) must disclose their income and assets to each other. This way the parties will know more about what they might be giving up. In some states, it may be possible to waive a full disclosure of income and assets, but the waiver should be done knowingly and it is best if each party has a general idea of the other's net worth.

The agreements also must not be the result of fraud or duress. An agreement is likely to be invalid on the basis of fraud if one person (particularly the wealthier one) deliberately misstates his or her financial condition. For example, if a man hides assets from his future wife so that she will agree to a low level of support in case of divorce, a court probably would declare the agreement invalid. Similarly, if one person exerts excessive emotional pressure on the other to sign the agreement, a court also might declare the agreement to be invalid because of duress.

**Q. When should the agreement be signed?**

**A.** Most states do not set a specific time at which premarital agreements must be signed. Generally, it is better to negotiate and sign the agreement well before the wedding, to show that each person has considered it thoroughly and signed it voluntarily. If the wealthier person shows the agreement to the prospective spouse only one day before the wedding, a court may later find that agreement invalid because of duress. While a last-minute premarital agreement is not automatically invalid, timing may be a significant factor in determining whether the agreement is valid.

**Q. Must the parties to a premarital agreement be represented by lawyers?**

**A.** No, but lawyers can help make sure that the agreement is drafted properly and that both

parties are making informed decisions. The lawyer for the wealthier party usually prepares the initial draft of the agreement. The less wealthy party does not need to have a lawyer in order to have a valid agreement, but the agreement is more likely to be enforceable if that person's interests are represented and some back-and-forth negotiations take place.

**Q. Do premarital agreements need to provide for a certain amount of support?**

**A.** No, the law does not set a specific amount. In some cases, a court may decide that an agreement is enforceable even if it leaves one spouse with no property and no support from the other party. If, when the marriage ends, the less wealthy party does not have marketable job skills or is not able to work, a court would be likely to refuse to enforce an agreement denying support. Some states will enforce an agreement to provide no spousal support, so long as waiver of support does not leave the less wealthy party so poor that she or he is eligible for welfare.

Many courts will apply broader notions of fairness and require support at a level higher than subsistence. Some states provide that the support cannot be "unconscionably" low. That is a vague term that means different things to different courts.

Many lawyers think it is a good idea for premarital agreements to contain an "escalator clause" or a "phase-in provision" that will increase the amount of assets or support given to the less wealthy spouse based on the length of the marriage or an increase in the wealthier party's assets or income after the agreement is made.

**Q. May premarital agreements decide future issues of custody and child support?**

**A.** No. A court may consider a premarital agreement the parties have reached regarding child custody or support, but the court is not bound by it. Broadly speaking, courts do not want parties to bargain away rights of children, particularly before children are even born. (A later section of this chapter on child support will discuss child support guidelines.)

## **Duties of Marriage**

**Q. Are one or both spouses required to work outside the home?**

**A.** No. While the husband and wife are married and living together, a court is not going to get involved in private family decisions of who works and who does not. That's left to the husband and wife to sort out. Today, more than half of married women—including women with preschool-age children—work outside the home. A husband or wife cannot, as a matter of law, force his or her partner to work.

**Q. If the wife and husband separate or divorce, can a court require them to work outside the home?**

**A.** No, not directly. If a wife and husband separate or divorce, a court still cannot directly order one or both of them to work. The court can, however, declare that one or both parties owe a duty of financial support to the other party or to the children. A duty of financial support means that person who is supposed to pay support must come up with the money somehow -- usually from work or from savings. If the person who is supposed to pay support does not pay the money and does not have a good excuse why the money has not been paid, that person could be held in contempt of court. The possible penalties for being held in contempt of court include payment of fines and incarceration. Payments of child support and alimony will be discussed

later.

**Q. Are there legal remedies if a husband or wife refuses to have sexual relations with his or her spouse?**

**A.** In some states, the refusal to have sexual relations with a spouse is a specific ground for divorce or annulment of the marriage. In other states, refusal to have sexual relations could be considered a ground for divorce because it is an "irreconcilable difference" or "mental cruelty." A court, of course, would not order a person to have sexual relations with his or her spouse. In fact, in many states, a spouse who forces sexual relations with a partner can be charged with rape under the state's criminal laws.

**Q. What is loss of consortium?**

**A.** Loss of consortium refers to the loss of companionship and sexual relationship with one's spouse. (The concept also can apply more broadly to the loss of companionship and affection from other family members such as a child or parent.) In personal injury actions, plaintiffs may seek monetary damages for loss of consortium in addition to payment for other losses such as medical expenses, lost wages, and physical pain and suffering. For example, if a man is injured in an auto accident caused by a negligent driver and the man is unable to have sexual relations with his wife for two years because of the accident, both the husband and wife may seek damages for that loss.

**Q. May wives and husbands sue each other?**

**A.** Yes. They can sue each other, of course, in connection with a divorce. They also usually can sue each other in connection with financial deals in which one may have cheated the other. A growing number of states also will allow one spouse to sue the other for deliberate personal injuries, such as those suffered in a beating. Some husbands and wives may try to sue each other in connection with an auto accident in which one of them, as the driver, accidentally causes injury to the other, who was a passenger. In effect, the person suing may be trying to collect money from an insurance company rather from the person's spouse. Many states do not allow such lawsuits.

**Q. Can a husband or wife testify against each other in court?**

**A.** Yes. Husbands and wives routinely testify against each other in divorce cases. There is an old rule of law in many states that husbands and wives cannot testify about communications between themselves made during the marriage. Although the rule may be applied in some circumstances, it generally does not apply if the husband and wife are involved in a lawsuit against each other.

## **Living Together Outside of Marriage**

**Q. Can two people live together without being married?**

**A.** Of course. The Census Bureau reports that such arrangements are quite common. Some zoning laws do prohibit more than three unrelated persons from living together in one house or apartment, but two unrelated people generally can live together anywhere they want. A few states still have laws on the books prohibiting "fornication"--sexual relations between a man and woman who are not married--but such laws are virtually never enforced. Some states also have

laws against "sodomy" which, among other things, prohibit sexual relations between people of the same sex. Those laws are rarely enforced if the conduct is private, consensual, and between adults (although in 1986, the United States Supreme Court in a divided decision did uphold a Georgia law criminalizing private sexual relations between two men.)

**Q. May two people who are living together enter into agreements about sharing expenses or acquiring property?**

**A.** Yes. The law allows people to enter into many types of contracts. If two people want to agree about who will pay what and how they will share in property that they might acquire, such an agreement can be valid and enforceable by courts in most states. From a legal standpoint, it is best to make the agreements specific and in writing. An oral agreement might be enforceable, but it is more difficult to prove. Each party to the agreement should give some benefit to the other party, such as agreeing to pay a certain portion of expenses. If an agreement looks as though it is only creating a gift from one party to the other with the recipient giving nothing in return, the agreement might not be enforceable.

**Q. Will a court enforce an agreement by which one unmarried partner agrees to keep house and the other promises financial support?**

**A.** Probably not. To begin with, such agreements rarely are in writing, so they are hard to prove in court. Second, to the extent that one person is promising financial support to the other, that promise usually is contingent on a continuation of the relationship. If, for example, one partner says, "I'll take care of you," the statement may be too vague to be enforceable; if it means anything, it probably means something along the lines of "I'll support you financially as long as we are living together." So, if the couple breaks up, a court probably would not find an enforceable promise for continued support.

There is a potential third problem: if a court thinks an agreement amounts to providing financial support in exchange for sexual relations, the court will not enforce it. Such an agreement is uncomfortably close to a contract for prostitution.

Courts are more inclined to enforce agreements for tangible items, such as payments of expenses or rights to property. A promise of housekeeping services or emotional support for a partner may be sincere, but it is much more amorphous than a promise to pay half the phone bill or share the proceeds of a condominium sale.

## **MONEY MATTERS DURING MARRIAGE**

### **Ownership of Property**

**Q. Which spouse owns what property in a marriage?**

**A.** Most property that is acquired during the marriage is considered marital or community property. For example, the wages earned by both husband and wife during the marriage are considered marital property. If one or both spouses buy a house or establish a business during the marriage, that usually will be marital property, particularly if the house or business is purchased with the husband's and wife's earnings.

Separate property is property that each spouse owned before the marriage. It also includes inheritances and gifts (except perhaps gifts between spouses) acquired during marriage. During the marriage (and afterwards), each spouse usually keeps control of his or her separate

property. Each spouse may buy, sell, and borrow money on his or her separate property. Income earned from separate property, such as interest, dividends, or rent are generally separate property. However, in some states that recognize community property, these profits may become marital property.

Separate property can become marital property if it is mixed with marital property. If, for example, a wife owned an apartment building before the marriage and she deposited rent checks into a joint checking account, the rent money probably would become marital property, although the building is likely to remain the wife's separate property as long as she kept it in her name. If the wife changed the title on the building from her name alone to the names of both herself and her husband, that probably would convert the building into marital property. In addition, if one spouse put a great deal of work into the other spouse's separate property, that could convert the separate property into marital property, or it could give the spouse who contributed the work a right to some form of payback. A later section in this chapter will discuss how courts divide marital property in a divorce.

### **Q. May a couple own property together?**

**A.** Yes. In community property states, this occurs automatically. Ten states—Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin, as well as Puerto Rico—use the community property system. These jurisdictions hold that each spouse shares equally the income earned and property acquired during a marriage. This is true even if one spouse supplied all the income. In the other states, spouses probably share property under one of the following three forms of co-ownership:

- **Joint Tenancy.** A form of ownership that exists when two or more people own property that includes a right of survivorship. Each person has the right to possess the property. If one partner dies, the survivor becomes the sole owner. Any two people—not just spouses—may own property as joint tenants. A creditor may claim the debtor's interest in joint tenancy property.
- **Tenancy by the Entirety.** Allowed only in some states, this is a type of co-ownership of property by a husband and wife. Like joint tenancy, it includes a right of survivorship. But a creditor of one spouse may not "attach" (seize) the property. Each party usually must consent to the sale of the property. Divorce may result in a division of the property.
- **Tenancy in Common.** This form of co-ownership gives each person control over his or her share of the property, and the shares need not be equal. The law does not limit tenancy in common to spouses. A tenancy in common has no right of survivorship; when one spouse dies, his or her share passes to the heirs, either by will or state laws.

Tenancy rules vary from one state to another. Some tenancies are complex and must be created in a precise manner, otherwise the courts may not enforce them.

For more information on the various forms of ownership, see the chapters in this book on [home ownership](#) and [buying and selling a home](#).

## **Debts and Taxes**

### **Q. Is a husband or wife responsible for debts incurred by the other?**

**A.** That depends on the nature of the debt as well as where the couple live. If both husband and wife have co-signed for the debt, both will be responsible for paying it. For instance, assume the husband and wife apply together for a charge card. If both sign the application form and promise to pay the charge bills, both will be responsible for paying off the balance to the credit

card company or store, even if only one of them made the purchases and the other disapproved. Similarly, if a husband and wife co-sign on a mortgage for a home, both of them are potentially liable to the mortgage company, even if one of them no longer lives in the home. In community property states, a husband and wife may likewise be responsible for debts incurred by the other.

**Q. Is a husband or wife liable for the debts of the other without co-signing for the debt?**

**A.** That again depends on the nature of the debt and where the couple lives. Some states have "family expense statutes" that make a husband or wife liable for expenses incurred for the benefit of the family, even if the other spouse did not sign for or approve of the expense in advance. Still other states impose this family expense obligation by common law without a statute. Thus, if the wife charged groceries at a local store or took the couple's child to a doctor for care, the husband could be liable because these are expenses for the benefit of the family. On the other hand, if the wife runs up bills for a personal holiday or the husband buys expensive coins for his coin collection, the other spouse normally would not be liable unless he or she co-signed for the debt. Again, in community property states, a husband or wife is generally obligated for the debts of the other.

**Q. Is one spouse responsible for debts the other spouse brought into the marriage?**

**A.** Not in most states. In states that do not recognize community property, such debts belong to the spouse who incurred them. But in community property states, a spouse may, under special circumstances, become liable for the other spouse's premarital debts. [See the chapter on consumer credit.](#)

**Q. Do a spouse's credit rights depend on marital status or the other spouse's financial status?**

**A.** The law forbids denying credit on the basis of marital status. See the chapter on consumer credit.

**Q. Which spouse is responsible for paying taxes?**

**A.** If each spouse's name appears on a state or federal personal income tax return, both parties signing the return are liable for the taxes. If a couple files jointly, the Internal Revenue Service generally holds each one responsible for the entire debt. A spouse who files as **A**married filing separately<sup>®</sup> is not responsible for the other's debt.

**Q. Do the tax laws penalize married couples?**

**A.** That depends on the tax bracket of each person. If one has a high taxable income and the other a relatively low taxable income, they will generally pay less income tax if they are married and filing a joint return than they would pay if single and filing as single persons. They also will pay less by filing a joint return than by filing separate returns (as married persons). For couples in which both wife and husband have a high income, the total tax will be higher for those who file jointly.

Years ago, there were stories about financially well-off married couples who would go to the Caribbean each December, obtain a divorce, file tax returns as single persons for that year to save money, and then remarry in the new year. Such a practice could be regarded as tax fraud. In any case, the savings are not as great as they were in years past.

**Q. May one spouse make a tax-free gift to the other spouse?**

**A.** A person may give his or her spouse any amount of money without paying federal gift taxes if the spouse is a U.S. resident. However, it must be an outright gift or set up as a proper trust. Most, but not all, state laws have done away with taxes on gifts between spouses. But the same is not true with respect to gifts to other family members. Gifts to children or other relatives may be taxable if they exceed a certain amount per year.

**Doing Business Together**

**Q. May husbands and wives go into business together?**

**A.** Certainly. Wives and husbands can be business partners, just as any other two people, whether related or not. They could set up a corporation and both be owners and employees of the corporation; they could form a partnership; or one could own the business and employ the other. Wages and benefits can be paid, just as they would for any other employee. If wages and benefits are being paid to a spouse or child, the amount usually should not be more than what is reasonable or a fair market value. If artificially high payments are made, the business could get into trouble with the Internal Revenue Service.

**Q. Is a wife or husband liable for the other's business debts?**

**A.** Usually, no--unless the husband or wife had co-signed on the debt or they reside in a community property state. It is common, however, for institutions that lend money to small businesses to want personal guarantees of payment from the owner of the business, and not just from the business itself. In the event the debt is not paid, lenders would like as many pockets to reach into as a possible. If the owner of the business owns a home, the lender may want to use the home as collateral for the business loan. That means that the spouse of the business owner may be asked to sign a paper allowing use of the home as collateral. Thus, the home could be lost if the business cannot pay off its debts. As long as a spouse does not co-sign for the business debts, the spouse normally will not be liable for business debts incurred by his or her mate. An exception may exist in community property states.

**Q. May a couple file jointly for bankruptcy?**

**A.** Yes. Bankruptcy provides relief for people who have more debts than they can pay. [See the chapter on bankruptcy.](#)

**Q. Must a working spouse provide a pension for a dependent spouse?**

**A.** The law does not specifically require this, but most pension plans provide for it. Also, depending upon the type of pension plan, a dependent spouse is given certain rights under federal law regarding the working spouse's pension benefits. [See the chapter on "The Rights of Older Americans."](#)

**Domestic Violence**

**Q. What are legal remedies for domestic violence?**

**A.** State legislatures and courts have been paying increasing attention to domestic violence. Many states have elaborate laws designed to protect spouses from domestic violence by their

spouses or other family members. In many states, protection also is available for people in dating relationships that have become abusive. A common remedy is for a court to issue a "protective order" ordering the alleged abuser to stop abusing or harassing someone else. In addition, the orders often will order the abuser to stay away from the spouse, the spouse's home, or place of work. If the person continues to abuse his or her spouse (or another person protected by the order), the abuser can be charged with a criminal violation of the order in addition to being charged with other offenses, such as battery.

**Q. What kind of actions are considered domestic violence.**

**A.** Domestic violence statutes in most states apply not only to physical attacks, but also to other types of conduct. Some examples of conduct that could be considered domestic violence: creating disturbance at a spouse's place or work, harassing telephone calls, surveillance and threats against a spouse or family member (even though the threat may not have been carried out).

**Q. Do protective orders actually protect the victim of domestic violence?**

**A.** In many cases, yes. Studies have shown that issuing a protective order or arresting a person who commits an act of domestic violence does reduce future incidents of domestic violence. When perpetrators of domestic violence see that the police and court system will treat domestic violence seriously, many persons who commit domestic violence may be deterred from future violence. But orders of protection are not guarantees of protection or safety. For some individuals with intense anger or rage, no court order will stop their violence, and a court order might even add to the rage. Newspapers periodically carry stories of women murdered by their husband or boyfriend despite numerous arrests and orders of protection. The legal system cannot offer perfect protection, although it can reduce violence.

**Q. Where does one turn for help in cases of domestic violence?**

**A.** In a crisis situation, a call to the police is a good place to start. Many people complain that police do not take accusations of domestic violence seriously. That can be true in some circumstances, but on the whole, police are treating domestic violence situations more seriously, and police officers are receiving increased training on the subject. The local state's attorney or district attorney also may be able to offer some help. An increasing number of hospitals, crisis intervention programs, and social service agencies have programs to help victims of domestic violence. Agencies offering help in cases of domestic violence might be found in the Yellow Pages under "Domestic Violence Help," "Human Services Organizations," or "Crisis Intervention."

## **CHILDREN**

### **Decision to Have Children**

**Q. Who makes the decision to become a parent?**

**A.** The Supreme Court in Roe v. Wade and other cases has declared that the decision of whether or not to have a child is a very personal one and that the decision is protected by the right of privacy under the United States Constitution. This means that individuals who wish to have a child cannot be barred from doing so (unless perhaps they are incarcerated). Individuals

who do not wish to have a child have a legal right to obtain and use contraceptives.

**Q. What if one spouse wants children and the other does not?**

**A.** This is a significant emotional issue that, of course, can be very difficult. If one member of the married couple wants a child and the other does not, that could be a basis for a divorce. A disagreement on such a fundamental issue could be an "irreconcilable difference" under the no-fault divorce laws of most states. In states that have grounds for divorce based on someone being at fault, a disagreement on the question of whether to have children could be viewed as "mental cruelty," and thus a basis for ending the marriage.

Beyond divorce, remedies are limited. The courts cannot force a pregnant woman to stop the pregnancy, nor does the law require a wife to have her husband's permission for an abortion.

## **Abortion**

**Q. What is the current status of abortion law?**

**A.** As of the year 2000, women still have a right to an abortion. In the 1992, the U.S. Supreme Court in the case of Planned Parenthood v. Casey reaffirmed its 1973 decision in Roe v. Wade that women have a constitutional right to seek an abortion during the early stages of pregnancy. States, however, do have a right to regulate how abortions are performed and states may ban abortions after the fetus is viable (able to live outside the womb) unless the mother's life or health is endangered. The scope of regulation and funding of abortions by the government varies from state to state. In Casey, the Supreme Court held it was permissible for states to impose a 24-hour waiting period on obtaining abortions and to require a minor to have consent of one parent or a judge for an abortion.

## **Childbirth**

**Q. Are there any rules prohibiting parents from having their children born at home?**

**A.** No, at-home births generally are an option for parents. The mother should have good prenatal care, and she should make sure the health care provider believes the delivery will not pose significant risks to the mother or child. If the delivery is risky for the mother or child, it is much better to use a hospital. Some states allow nurse-midwives to deliver children at the parents' home or at a birthing center. Other states allow nurse-midwives to practice only at hospitals or under the direct supervision of a physician.

**Q. If the delivery is at a hospital, may the father or a sibling be present?**

**A.** At most hospitals, the father may be present at birth. Hospitals often prefer that the father and mother have gone through some training before the delivery. Parents should check with their hospitals about other rules and about whether siblings would be allowed in the delivery room.

## **Rights and Responsibilities of Parents**

**Q. What are the rights of parents?**

**A.** Parents have a right to direct the care, control, and upbringing of their children. This gives

them the power to make various decisions, including where to live, what school to attend, what religion to follow, and what medical treatment to obtain.

Normally the state may not interfere in these decisions. Only in life-threatening or extreme situations will the courts step in to overrule parents. For example, when a child might die without the medical care that the parents refuse to provide, a judge may make the child a ward of the court and order that the care be provided. Parents have been prosecuted for withholding medical treatment from seriously ill children. This is true even in situations where parents act out of religious belief.

There may be certain medical procedures, however, that the law allows "mature minors" to decide upon for themselves, even if their parents disagree. For example, parents have no absolute veto power over a minor's decision to use contraceptives or to obtain an abortion.

Parents also have the legal authority to control their children's behavior and social lives. Children have a duty to obey their parents' reasonable rules and commands. Parents may discipline or punish their children appropriately. They may not, however, use cruel methods or excessive force; that constitutes child abuse.

### **Q. What are the legal rights of children?**

**A.** Children have a unique status under the law. This chapter cannot explain this special status fully. However, it can point out a few of the major differences between the rights of adults and children.

Most important, children have a right to be supported by their parents. At minimum, this means food, shelter, clothing, medical care and education.

The law defines children as unmarried persons under the age of majority--usually eighteen--who have not left home to support themselves. The law protects children from abuse and neglect. It also entitles them to the protection of the state. Children may be removed from their home if it is necessary to ensure them a safe, supportive environment. This removal may be temporary or permanent.

The law allows children to sue. However, in most instances an adult legal representative must begin the suit.

Children accused of committing crimes are subject to the juvenile courts of their state, not the regular criminal justice system. (In some states, children accused of serious crimes who are above a certain age—such as thirteen—may be tried in court as adults.) Juvenile courts entitle children to only some of the due process safeguards that adults receive. In return, these courts have more freedom to deal with juveniles in an effort to rehabilitate them.

### **Q. How long do parents' legal obligations to their children continue?**

**A.** Parents are legally responsible for their children until they reach the age of majority (usually eighteen), marry, or leave home to support themselves. In some states, divorced parents may be obliged to pay for a child's college education or trade school. In addition, a parent's duty to support a disabled child might continue for the child's entire life.

### **WHO CONTROLS THE MONEY CHILDREN EARN OR INHERIT?**

Generally, parents do not have unlimited, direct control over their children's money. If children earn or inherit money, that money must be used for the children's benefit. Some states require the appointment of a guardian under court supervision if a child has substantial funds. Unless a court appoints someone else, parents are the guardians of their children's money. The parents

are legally responsible for managing the money properly and using it for their children's needs.

**Q. Are parents financially responsible for the acts of their children?**

**A.** The law on this varies from state to state. Some states make parents financially responsible for damage caused by their children, but the states may place limits on the amount of liability. In Illinois, for example, parents or guardians may be required to pay no more than \$2,500 for the "willful or malicious acts" of minor children who harm another person or property.

Generally, if a child has an auto accident while driving a parent's car, the parent's auto insurance policy will cover the loss to the same extent it would if the parent had been driving the car (although parents usually have to pay higher insurance premiums to cover young drivers).

**THE DUTIES OF ADULT CHILDREN TOWARD THEIR PARENTS**

Adult children normally have no responsibilities toward their parents. In return, their parents have no duties toward them. However, there are exceptions. In some states, children must support parents who otherwise would be on welfare. The children can avoid paying support if they can show that the parents did not care for them when they were underage. In some states, children may have to contribute to the support of parents in a state hospital or mental institution. However, the children's ability to pay--not the actual costs of the care--usually determines how much they must pay.

**Adoption**

**Q. How does one adopt a child?**

**A.** Adoption laws vary from state to state. For adopting a child who is not related to the adoptive parent or parents, there generally are two types of adoptions: agency adoptions and private adoptions.

**Q. What is an agency adoption?**

**A.** As the name implies, the parents work through a licensed agency. The agency often supervises the care of biological mothers who are willing to give up their children, and it assists in the placement of children after birth. Agencies screen adoptive parents--often extensively--before the adoption proceeds. Some agencies have long waiting lists of parents. Some agencies also specialize in placing children born in foreign countries.

**Q. What is a private adoption?**

**A.** Private adoptions bypass the use of agencies and they may help bypass the long waiting lists as well. The process may begin when people who seek to adopt a child contact an attorney who specializes in adoptions. The attorney may work with physicians who are aware of women willing to give up children for adoption. Sometimes would-be parents will place ads in newspapers seeking women who are willing to place their babies for adoption.

In most states, adoptive parents are allowed to pay a biological mother's medical expenses and certain other costs during the pregnancy. But adoptive parents are not allowed to pay the biological mother specifically to give up the child. The law treats this as a "black market adoption," the buying and selling of children, and it's a crime in every state.

**Q. Is court approval necessary for an adoption?**

**A.** Yes. Court approval is needed for both agency and private adoptions. Many states also require that the adoptive parents be approved by a social service agency.

**Q. Can a biological mother revoke her consent to adoption?**

**A.** Yes, but there are limits on her right to revoke consent. In most states, a biological mother who initially consents to a child's adoption before birth, may revoke that consent after birth. In other words, the mother's consent usually is not final or binding until a certain period of time after birth. In most states that time period is relatively short, such as two to eight days. If a biological mother consented to adoption during the proper period of time after birth, it is much harder for her to revoke her consent. Following an after-birth consent, a biological mother generally may revoke her consent only if she can show that there was fraud or duress. Fraud could be found if the adoption agency or attorney lied to her about the consequences of what she was doing. Duress might exist if a person at the adoption agency threatened the biological mother with humiliation if she did not sign. A biological mother's change of heart normally is not enough by itself to revoke an after-birth adoption consent. Although a mother may feel emotionally drained and under stress after birth of a child that she plans to give up for adoption, that type of stress usually is not enough to revoke an adoption unless the person or agency that obtained the mother's consent used harsh tactics to obtain her consent.

**Q. Is the biological father's consent necessary?**

**A.** Generally, yes—at least if the biological father is known. He should be notified of the birth and pending adoption so that he may consent or object. If the father is not known, the adoption may proceed without his consent (although adoptive parents can feel safer about the validity of their adoption if the biological father has been notified and agreed to it). If a biological father is not notified, he may later contest the adoption if he acts within a certain period of time after the child's birth or adoption. (Six months is a typical time period, although the period varies between states.)

**Q. What is a "related adoption"?**

**A.** A "related adoption" is one in which a child's relatives, such as grandparents or an aunt and uncle, formally adopt a child as their own. This might occur if the child's biological parents are deceased or are otherwise unable to care for the child.

**Q. What is a stepparent adoption?**

**A.** A stepparent adoption is one in which a child's biological parent marries someone who wishes to adopt the biological parent's child and is able to do so.

**Q. What happens if the child's other biological parent does not agree to the adoption by the stepparent?**

**A.** If a biological parent does not consent to the adoption of a child, the child cannot be adopted by another person unless a court first finds that the biological parent is unfit.

**Q. What is the definition of an unfit parent?**

**A.** Parental unfitness is determined by state law. Normally, an unfit parent is one who has failed to have regular contact with a child or to contribute to his or her support. A parent is also unfit if he or she has been abusive or has otherwise failed to provide adequate care for the child.

**Q. What happens if a stepparent adopts his spouse's child and the parents later divorce?**

**A.** A divorce does not affect the legality of the adoption. The stepparent continues to have all the rights and responsibilities of a biological parent, including a right to seek custody or visitation and a duty to support the child.

**Q. Can a single person adopt a child?**

**A.** Yes, although some agencies strongly prefer to place a child with a married couple. Other agencies--particularly those dealing with children who might be hard to place--are willing to place a child with a single person. Single-parent adoptions usually are possible in private adoptions.

**Q. Can lesbian or gay couples adopt a child?**

**A.** Yes, in some states, such as New York and California, gay and lesbian couples are able to adopt a child.

**Q. What is an "open adoption"?**

**A.** An "open adoption" is one in which the adoptive parents agree to let the biological mother (or biological father) have some continued contact with the child after the adoption. This contact might be periodic visits or an exchange of pictures and other information between the adoptive family and the biological parent or parents. The nature of the contact often is specified in the adoption agreement. Open adoptions have become more common as more birth mothers have become involved with choosing which adoptive family will receive their child. But open adoptions are a relatively new phenomenon, and in many states it is not certain whether an open adoption agreement is enforceable by the birth mother.

**Q. Who has access to adoption records?**

**A.** In most states, court adoption records are sealed and can only be opened by court order (although Oregon allows all adopted children access to their adoption records). Procedures and standards for opening records vary by state. Increasingly, states require that certain non-identifying information, such as the medical history of the biological family, be made available to the adoptive parents at the time of adoption. Some states also have registries where parties to the adoption can agree to a later exchange of information, including names and addresses.

**Q. What is the legal status of an adopted child?**

**A.** An adopted child has exactly the same rights as one born to his or her parents. Similarly, adoptive parents have the same obligations to the child as they would to one born to them.

**Q. What about medically assisted pregnancies?**

**A.** As medical science advances, there are a variety of ways in which individuals who wish to become parents can be helped to do so by medically assisted means, including artificial insemination and in vitro fertilization. These medical procedures have legal implications that vary by state. Generally, however, if both husband and wife consent to artificial insemination or in vitro fertilization, the rights and duties of the husband, wife, and child will be the same as if the child had been naturally conceived.

**Q. What is surrogate parenthood?**

**A.** In this arrangement, a woman agrees, with or without payment, to bear a child for another couple. This usually occurs when the wife cannot conceive or carry a child to term. In nearly all cases, through artificial insemination, the husband's sperm fertilizes an egg belonging to either the wife or the surrogate mother. This makes the husband the biological father of the child. The surrogate mother agrees to give up all parental rights at birth. Then the wife of the biological father legally adopts the child. A few states outlaw this arrangement when the surrogate mother receives payment. Other states are considering laws that would restrict it. Persons contemplating such an arrangement should seek legal advice before entering into such an arrangement.

**Paternity**

**PATERNITY AND MODERN SCIENCE**

Paternity cases increasingly use scientific evidence. The blood tests used during much of the last century were useful only up to a certain point. They might prove that a man was not the father of a certain child, but could not prove that he was the father. New tests that sample the DNA (genetic material) of the child and the supposed father are nearly 100 percent accurate in proving or disproving paternity.

**Q. May an unmarried mother legally force the father of her baby to support the child?**

**A.** Yes. Both parents, married or not, have a duty to support the child. If the father admits paternity, the mother should have him sign a statement to that effect. Then, if necessary, it will be easier to force the father to help support the child. If he does not admit to being the father, the mother may file a paternity suit against him. If this civil action succeeds, the court will require the father to provide support. Sometimes the court also will require the father to pay for the mother's pregnancy and childbirth expenses.

**Q. If a court decides that a man is a child's father, how much will he have to pay in support?**

**A.** The law requires unwed parents to support their children the same as married parents. Child support guidelines, which have been enacted in all states, will determine the amount of support. As with children born to married parents, the obligation of support usually lasts until the child is an adult. If a father refuses to support his child, a court may garnish his wages, seize his property or bank accounts, revoke his driver's license or professional license, and perhaps even send him to jail.

**Q. What may a husband legally do if his wife bears a child that is not his?**

**A.** The law presumes that a married woman's child is her husband's. He must support the child unless he can prove in court that he is not the father. Some states assume the husband is the father no matter what proof he presents. These states do not allow a husband to disprove paternity of a child born during the marriage.

**Abuse and Neglect Laws**

**Q. What is child neglect?**

**A.** State laws make it a criminal offense for parents and legal guardians to fail to meet children's basic needs, including food, shelter, clothes, medical treatment, and supervision. Such failure constitutes child neglect.

**Q. What persons and what types of actions are covered by child abuse laws?**

**A.** It is a crime for adults to abuse children in their care. Such adults include parents, foster parents, legal guardians, other adults in the home, family members, and baby-sitters. Supervising adults may not go beyond reasonable physical punishment. For example, adults who beat children so severely that they require medical treatment have violated these laws. Child abuse laws involve not only physical abuse (such as beatings or starvation), but other types of cruelty, such as sexual molestation and subjecting a child to extreme public humiliation.

A person may be guilty of child abuse that he or she did not personally commit if that person had legal responsibility for the child and failed to protect the child from the abuser.

**TAKING CHILDREN AWAY FROM THEIR PARENTS**

Whether or not a criminal case is brought, the state may remove children from the custody of their parents if there is reason to believe the parents are physically, sexually, or emotionally abusing one or more of the children. The state also may remove the children if the parents are unable or unwilling to provide adequate care, supervision, and support.

**Q. Who has a duty to report suspected child neglect and abuse?**

**A.** The law compels a wide range of people who have contact with children to report suspected child abuse or neglect. Such people include doctors, nurses, teachers, social workers, and childcare providers . A person who is required to report suspected neglect or abuse may face civil or criminal penalties for failure to do so. In addition, states often encourage the reporting of suspected abuse by others such as neighbors and family members through special hot lines. The laws of most states encourage persons to make reports of abuse by granting them immunity from defamation suits by the accused parents if they make the report in good faith. Some states keep central lists of suspected child abuse cases. This helps identify parents, for example, who take their children to different hospitals in order to conceal the evidence that they have repeatedly abused their children.

**Q. If the law takes children away from their parents, is the removal temporary or permanent?**

**A.** The goal usually is to reunite the family after correcting the problems that led to the removal. This, however, is not always possible. For example, if the parents make little or no effort to improve the children's care, then the state may ask a court to end all parental rights. If this happens, the legal bonds between parents and children are completely and permanently cut, and another family may adopt the children.

**SEPARATION, ANNULMENT AND DIVORCE**

Sometimes marriages do not succeed. Despite the efforts of husband and wife, and perhaps the help of counselors and clergy, there is nothing to do but end the relationship. And, as the state was involved in creating the marriage, so too it becomes involved in dissolving it.

## **Separation and Separate Maintenance**

### **Q. What is a legal separation?**

**A.** A "legal separation" means that the husband and wife are living separately, and they have formalized the arrangement by a court order or a written agreement between themselves. The order or agreement usually will state that the parties are living separately, and it will specify what support, if any, one spouse will pay the other. If the husband and wife have minor children, the agreement or court order usually specifies arrangements regarding custody or visitation.

A legal separation is not the same as a divorce. A separation recognizes the possibility that the couple might reunite. In any case, its terms can be modified by the parties or the court when the couple divorce. Most importantly, persons who are legally separated may not remarry. They must wait until a divorce is final before marrying again.

### **Q. Does a person have to be legally separated before obtaining a divorce?**

**A.** No. In most states a couple can proceed straight to a divorce without first seeking a legal separation. While waiting for the divorce, the couple might live separately (without a formal agreement) or, in some states, they could even live together pending the final divorce.

### **Q. Is there an advantage to a legal separation?**

**A.** That depends on the needs of the parties. A legal separation offers a structure for the parties while they are waiting for a divorce (or while they are considering a divorce). If one spouse is paying support for the other spouse or for the children, the spouse receiving the support may want the terms put in writing. Similarly, one or both parties may want a fixed schedule of who will be with the children at what times. If these terms are part of a written agreement or court order, the parties know what to count on, and a party can go to court to seek enforcement if the other does not abide by the agreement or order.

### **Q. Are there any tax advantages to a legal separation?**

**A.** Yes, potentially. If one spouse is paying support for the other, the payer can deduct that money from his or her income for tax purposes. The payment will then be considered taxable income to the recipient. If the payer is in a higher tax bracket than the recipient, this will reduce the couple's combined tax liability. In any case, it will reduce the payer's taxes and raise the recipient's. To obtain such a deduction, the parties must be legally separated by written agreement or court order. The deduction is not available for those who have an informal separation.

### **Q. Why would a spouse who is receiving support agree to this arrangement if it results in more taxes for her or him and a tax advantage to the other spouse?**

**A.** The tax advantage to the payer may encourage paying support in the first place and it may result in a greater amount of support. Some couples and their lawyers may calculate a tentative amount of support that would be paid without any tax benefit to the payer. Then they calculate the tax benefit of creating a deduction for the payer and income for the recipient. They split the tax savings by increasing the level of support. The increased support usually exceeds the added taxes the recipient will pay, and the payer will have less money out-of-pocket for the year because of the tax savings.

**Q. Are there psychological advantages of a legal separation?**

**A.** For some people, yes. Some men and women may want to separate but are not sure they want to go through a divorce. The separation might be a "trial separation"--relieving some immediate pressures while the husband and wife sort out what they want to do with their lives. And a formal legal separation may provide some structure, security, and financial advantages during the period of separation.

**Annulment**

**Q. What is an annulment?**

**A.** An annulment is a court ruling that a supposed marriage was never valid. The most common ground for annulment is fraud or misrepresentation. For example, one person may have not disclosed to the other a prior divorce, a criminal record, an infectious disease, an inability to engage in sex or have children. Annulment may also be granted for bigamy, incest, or marriage to an underage person.

**Q. How common are annulments?**

**A.** They are uncommon because divorces are easy to obtain and the bases for an annulment are narrower than the bases for a divorce. One party may prefer an annulment, however, in order to avoid some obligations that a court might impose in a divorce. Also, in a few states, spousal support that terminated because of the recipient's second marriage may be reinstated if the second marriage is annulled.

**Divorce**

**Q. What is a divorce?**

**A.** A divorce--referred to in some states as a "dissolution of marriage"--is a decree by a court that a valid marriage no longer exists. It leaves both parties free to remarry. It usually provides for division of property and makes arrangements for child custody and support.

**Q. May a couple get a divorce without lawyers?**

**A.** Most states permit do-it-yourself divorces. But the complexities of property division and taxes may make it advisable for both parties to have expert legal and financial advice.

**Q. Are most divorces contested?**

**A.** No. Although divorces may be emotionally contentious, most divorces (probably more than 95 percent) do not end up in a contested trial. Usually the parties negotiate and settle such things as property division, spousal support, and child custody between themselves, probably with attorneys' help. Sometimes parties reach an agreement by mediation, with a trained mediator who tries to help husband and wife identify and accommodate common interests. The parties then present their negotiated or mediated agreement to a judge. Approval is virtually automatic if the agreement is fair.

If parties are unable to agree about property, support, and child custody, they may ask the court to decide one or more of those matters. One spouse may sue the other for divorce, alleging certain faults or offenses by the defendant. But this has become far less common than it once was. Most divorces now are no-fault divorces.

**Q. What is a no-fault divorce?**

**A.** It is a divorce in which neither person blames the other for breakdown of the marriage. There are no accusations, no need to prove "guilt." A common basis for a no-fault divorce is "irreconcilable difference" or "irretrievable breakdown." As those terms imply, the marriage is considered to be over, but the court and the legal documents do not try to assign blame. Another common basis for no-fault divorce is the parties living separate and apart for a given period of time, such as for six months or a year, with the intent that the separation be permanent.

**Q. Why does the law provide for no-fault divorces?**

**A.** No-fault divorces are considered a more humane and realistic way to end a marriage. Husbands and wives who are divorcing usually are suffering enough without adding more fuel to the emotional fires by trying to prove who did what to whom. The laws of no-fault divorce recognize that human relationships are complex and that it is difficult to prove that a marriage broke down solely because of what one person did. However, some critics of no-fault divorces are concerned that an economically dependent spouse may not be adequately protected when it is comparatively easy for the other spouse to obtain a divorce.

All states have some form of no-fault divorce, but most states also retain fault-based grounds as an alternative way of obtaining a divorce. Some spouses want the emotional release of proving fault by their mates. Courts are not a very good forum for such personal issues, and the accuser is usually less satisfied than he or she expected to be.

**Q. What are grounds for obtaining a divorce based on fault?**

**A.** States that allow fault-based divorce vary somewhat on the allowable grounds. Many states permit divorce for adultery, physical cruelty, mental cruelty, attempted murder, desertion, habitual drunkenness, use of addictive drugs, insanity, impotency, and infection of one's spouse with venereal disease. Spouses in the mood for revenge probably could come up with a multi-count complaint.

**Q. Will use of fault grounds affect other aspects of the divorce?**

**A.** That depends on the state. In some states, fault may be taken into consideration in deciding property and spousal support, even if the divorce is granted on no-fault grounds. For example, in some states fault will be considered if it directly causes waste or dissipation of marital assets. In many states, the fault of a party in causing a breakdown of the marriage is not supposed to be a factor in dividing property or deciding spousal support. In other states, however, a spouse who commits adultery may not be able to receive spousal support. In custody cases, the marital fault of a party usually is not supposed to be considered unless that fault caused a harmful impact on the child. For example, a discrete extramarital affair normally would not be a major factor in deciding custody. But an affair or series of affairs that placed the child in stressful situations could be a factor in deciding custody.

**Q. May a woman resume her unmarried name when she divorces?**

**A.** Yes, that is her option. She may resume her unmarried name or keep her married name. If she is changing her name, she should notify government agencies and private companies that have records of her name. Examples of places to notify: Internal Revenue Service, Social Security Administration, Passport Agency (within U.S. State Department), Post Office, state tax agencies, driver's license bureau, voter registration bureau, professional licensing agencies,

professional societies, unions, mortgage company, landlord, banks, charge card companies, telephone company, other utilities, magazines, newspapers, dentists, and schools and colleges that the woman attended or that her children attend. It can be useful to have the divorce decree state that the wife will resume her unmarried name, but generally it is not necessary to do so in order for a woman to make a valid name change.

## **Property**

### **Q. In divorce cases, how often do judges decide who gets what?**

**A.** Judges rule on major contested issues in only a relatively small number of cases. As noted earlier, probably more than 95 percent of divorce cases are not decided by the court. Instead, the parties—often with help from attorneys—have reached an agreement between themselves which they present a judge for approval. If the agreement is fair, approval usually is granted after a short hearing.

Nonetheless, the rules of law that a judge would use to decide a contested case influence the settlements that the parties reach. If it is predictable that a matter would be decided in a certain way, it is seldom worth taking the issue to trial. In many cases, the cost of pursuing a disputed property issue at trial will exceed the possible monetary gain of a victory in court.

### **Q. How do judges decide disputed property issues?**

**A.** Laws vary from state to state. As a starting point, many states allow parties to keep their "nonmarital" or "separate" property. Nonmarital property includes property that a spouse brought into the marriage and kept in his or her own name during the marriage. It also includes inheritances received and kept separate during the marriage. It also may include gifts received by just one spouse during the marriage. Some states permit division of separate as well as marital property when parties divorce, but the origin of the property is considered when deciding who receives the property. After allocating separate property, the court divides marital or community property.

### **Q. What is marital or community property?**

**A.** Marital or community property is defined somewhat differently by different states, but it generally includes property and income acquired during the marriage. Wages earned during the marriage would be marital property. A home and furniture purchased during the marriage usually would be marital property.

### **Q. What if the property obtained during the marriage is in the name of one party only?**

**A.** That too usually will be marital property if it was paid for with marital funds such as wages. For example, if a wife buys a car during the marriage and pays for it with her wages, the car is marital property, even though it is in her name only. A pension also is usually marital property, even though it may have been earned by the labor of only one spouse during the marriage. A pension can be a very significant piece of property. The pension and the family home often are the most valuable assets acquired by a couple during the marriage. (If a pension was completely earned before the marriage, it probably would be nonmarital property.) Marital or community property can be divided by the court between the parties.

### **Q. How does a husband or wife keep nonmarital property separate and thus less likely to be lost in a divorce?**

**A.** The main way to keep nonmarital property separate is to keep it in one's own name and not mix it with marital property. For example, if a wife came into a marriage with a \$20,000 money market account and wanted to keep it as nonmarital property, she should keep the account in her own name and not deposit any marital funds in the account. She should not, for instance, deposit her paychecks into the money market account, because the paychecks are marital funds and the deposit could turn the whole account into marital property.

Another example: If a husband inherits some stock from his mother during the marriage and he wants to keep it as nonmarital property, he should open his own investment account and should not use the account for any investments that he and his wife own together.

If a husband or wife decides to use some nonmarital funds for a common purpose, such as purchasing a home in joint tenancy, that money normally will become marital property. The nonmarital property will be viewed by the courts of most states as a gift to the marriage. The property distribution laws have many intricacies and variations between states; understanding them usually requires a lawyer's help.

### **Q. How do courts divide marital or community property?**

**A.** Again, the answer varies from state to state. A few states, such as California, take a rather simple approach. They believe property should be divided equally because they view marriage as a joint undertaking in which both spouses are presumed to contribute equally, though often in different ways, to the acquisition and preservation of property. All marital property will be divided fifty-fifty, unless the husband and wife had a premarital agreement stating otherwise. (Premarital agreements were discussed earlier in this chapter.) Most states, however, apply a concept called "equitable distribution."

### **Q. What is "equitable distribution"?**

**A.** That means a court divides marital property as it thinks is fair. States applying principles of equitable distribution also view marriage as a shared enterprise in which both spouses usually contribute significantly to the acquisition and preservation of property. The division of property could be fifty-fifty, sixty-forty, seventy-thirty, or even all for one spouse and nothing for the other (although that would be very unusual). Under equitable distribution, courts consider a variety of factors and need not weigh the factors equally. That permits more flexibility and more attention to the financial situation of both spouses after the divorce. However, it also makes the resolution of property issues less predictable. Here are some examples of factors that are considered by states applying principles of equitable distribution.

- (1) Nonmarital property. If one spouse has much more nonmarital property than the other, that could be a basis for giving more marital property to the less wealthy spouse.
- (2) Earning power. If one spouse has more earning power than the other, that could be a basis for giving more marital property to the spouse with less earning power.
- (3) Who earned the property. That can be a factor favoring the party who worked hard to acquire or maintain the property.
- (4) Services as a homemaker. Courts recognize that keeping a home and raising children are work. In addition, those services often enable the spouse who is working outside the home

to earn more money. Thus, services as a homemaker are a factor in favor of the homemaker. Some courts also apply a related concept of considering whether one spouse had impaired her or his earning capacity because of working as a homemaker. That factor also would favor the homemaker-spouse.

- (5) Waste and dissipation. If a spouse wasted money during the marriage, that could count against him or her when it comes time to divide property. This factor is sometimes labeled "economic fault," and may be considered even by courts that do not consider other kinds of fault.
- (6) Fault. Non-economic fault, such as spousal abuse or marital infidelity, is considered in some states, but many states do not consider it relevant to property division.
- (7) Duration of marriage. A longer marriage may be a factor in favor of a larger property award to the spouse with less wealth or earning power.
- (8) Age and health of parties. If one spouse has ill health or is significantly older than the other, that factor could favor a larger award to the sicker or older spouse.

**Q. Who is likely to get the house?**

**A.** That depends on the facts of each case. If the parties have children and can afford to keep the house, even though they will be living separately, the law usually favors giving the house to the spouse who will have custody of the children most of the time. If the parties cannot afford to keep the house, it may be sold and the proceeds divided (or perhaps given to one party).

In some cases, there is a middle-ground approach: The spouse who has primary custody of the children will have a right to live in the house for a certain number of years. At the end of that time, that spouse will buy out the other spouse's interest or sell the house and divide the proceeds.

**Q. What if the parties have a negative net worth--owing more money than they have?**

**A.** In that uncomfortable but common situation, the court (or the parties by agreement) will divide whatever property they have and then allocate the responsibility of each party to pay off particular debts.

**Alimony/Maintenance**

**Q. What is alimony or maintenance?**

**A.** Alimony or maintenance--sometimes also referred to as "spousal support"--is money paid from one spouse to another for day-to-day support of the spouse with fewer financial resources. Sometimes alimony also can be used to pay back a debt. For example, if one spouse paid to put the other spouse through college or graduate school, alimony might be used to pay back the spouse who provided financial support for the education.

**Q. When do courts award alimony?**

**A.** At one time, courts commonly ordered husbands to pay alimony to their former wives until the ex-wives married again or died. Today, alimony is ordered by a court on the basis of one spouse's need or entitlement and the other spouse's ability to pay. Although most alimony

payments are made from men to women, it is possible that a well-off woman could be required to pay support to her economically dependent husband. Maintenance is awarded less often now because there are more two-income couples and fewer marriages in which one person is financially dependent on the other. A person who pays support may deduct it from his or her income for tax purposes; the one who receives it must pay taxes on it (unless the parties agree otherwise).

**Q. What is rehabilitative support?**

**A.** A common type of spousal support is rehabilitative support. It is intended to provide a chance for education or job training so that a spouse who was financially dependent or disadvantaged during marriage can become self-supporting. Rehabilitative maintenance is designed to help make up for opportunities lost by a spouse who left a job (or did not pursue a career) in order to help the other spouse's career or to assume family duties. It also may be awarded to a spouse who worked outside the home during the marriage, but sacrificed his or her career development because of family priorities. Rehabilitative support is usually awarded for only a limited time, such as one to five years.

**Q. What is permanent support?**

**A.** Courts award permanent spousal support to provide money for a spouse who cannot become economically independent. The most common reason for ordering permanent maintenance is that the recipient, because of advanced age or chronic illness, will never be able to maintain a reasonable standard of living without the support. When deciding the amount of permanent support, courts often use the same criteria as for dividing property.

Although it is called permanent support, the support can change or cease if the ability of the payer or the needs of the recipient change significantly. It ends if the recipient remarries, and it may end if the recipient lives with someone else.

**Q. If one spouse supports the other through graduate or professional school, does the supporting spouse have a right to be compensated for increasing the earning capacity of the other spouse?**

**A.** Some courts offer compensation when neither property distribution nor traditional spousal support is appropriate. For example, one spouse may have supported the other through graduate or professional school. The supporting spouse may have expected that both would benefit from the educated spouse's enhanced earning capacity, but the marriage ended before any material benefits were earned.

The supporting spouse does not need rehabilitation because that spouse has worked during the entire marriage, and there is no significant property to be distributed because marital resources went to the educational effort. In cases such as this, the courts may award compensation, usually as periodic payments, to the supporting spouse. The amount paid may be based upon the contributions of the supporting spouse to the educational expenses and general support of the spouse who leaves the marriage with an advanced degree, or it may be based upon a portion of the increased earnings of the educated spouse. The courts may change or end such payments if the expected increased earnings do not occur, but the payments are not ended by remarriage of the recipient. This type of payment sometimes is often called "reimbursement alimony" or "alimony in gross."

**Q. Does the law help newly divorced spouses who must now get their own health**

## **insurance?**

**A.** Yes. A federal law passed in the 1980s requires most employer-sponsored group health plans to offer divorced spouses of covered workers continued coverage at group rates for as long as three years. The divorced spouse of a worker must pay for the coverage, but the coverage is available.

## **Custody**

### **Q. What is child custody?**

**A.** Child custody is the right and duty to care for a child on a day-to-day basis and to make major decisions about the child. In sole custody arrangements, one parent takes care of the child most of the time and makes major decisions about the child. In joint custody arrangements, both parents share in making major decisions, and both parents also might spend substantial amounts of time with the child. Joint custody will be described in more detail later in this section.

### **Q. How do courts decide custody?**

**A.** If the parents cannot agree on custody of their child, the court decides custody according to "the best interest of the child." Determining the best interest of the child involves consideration of many factors.

### **Q. Do mothers automatically receive custody?**

**A.** No. Under the laws of almost all states, mothers and fathers have an equal right to custody. Courts are not supposed to assume that a child is automatically better off with the mother or the father. In a contested custody case, both the father and mother have an equal burden of proving to the court that it is in the best interest of the child that the child be in his or her custody. There are a few states (mostly in the South) that have laws providing that if everything else is equal, the mother may be preferred; but in those states, many fathers have been successful in obtaining custody, even if the mother is a fit parent.

### **Q. How have the laws changed in deciding custody disputes between mothers and fathers?**

**A.** The law has swung like a pendulum. From the early history of our country until the mid-1800s, fathers were favored for custody in the event of a divorce. Children were viewed as similar to property. If a husband and wife divorced, the man usually received the property--such as the farm or the family business. He also received custody of the children. Some courts viewed custody to the father as a natural extension of the father's duty to support and educate his children.

By the mid-1800s, most states switched to a strong preference for the mother--sometimes referred to as the "Tender Years Doctrine." Under the Tender Years Doctrine, the mother received custody as long as she was minimally fit. In other words, in a contested custody case, a mother would receive custody unless there was something very wrong with her, such as she abused the child or suffered from mental illness or alcoholism. The parenting skills of the father were not relevant. This automatic preference for mothers continued until the 1960s or 1980s, depending on the state. Then principles of equality took over, at least in the law books of almost all states.

### **Q. Are judges prejudiced in favor of mothers or fathers in deciding custody cases?**

**A.** Although judges are supposed to be neutral in custody disputes between mothers and fathers, many observers believe some judges are biased. Some judges, based on their background or personal experience, may have a deep-seated belief that mothers can take care of children better than fathers and that fathers have little experience in parenting. Conversely, some judges may believe that fathers automatically are better at raising boys--particularly older boys. Judges with such biases may apply these views when they decide custody cases, although they are supposed to base decisions on the facts of each case and not on automatic presumptions. As a group, judges are less biased in deciding custody cases today than in times past, although some bias still exists.

**Q. What is the most important factor in deciding custody?**

**A.** That will vary with the facts of each case. If one parent in a custody dispute has a major problem with alcoholism or mental illness or has abused the child, that could be the deciding factor. If neither parent has engaged in unusually bad conduct, the most important factor often is which parent has been primarily responsible for taking care of the child on a day-to-day basis. Some states refer to this as "the primary caretaker factor." If one parent can show that he or she took care of the child most of the time, that parent usually will be favored for custody, particularly if the child is young (under approximately eight years old). Use of this factor promotes continuity in the child's life and gives custody of the child to the more experienced parent who has shown the dedication to take care of the child's day-to-day needs. If both parents have actively cared for the child or if the child is older, the factor is less crucial, although it is still considered.

**Q. May a child decide where he or she wants to live?**

**A.** The wishes of a child can be an important factor in deciding custody. The weight a court gives the child's wishes will depend on the child's age, maturity, and quality of reasons. Some judges do not even listen to the preferences of a child under the age of seven and instead assume the child is too young to express an informed preference. A court is more likely to follow the preferences of an older child, although the court will want to assess the quality of the child's reasons. If a child wants to be with the parent who offers more freedom and less discipline, a judge is not likely to honor the preference. A child whose reasons are vague or whose answers seem coached also may not have his or her preferences followed.

On the other hand, if a child expresses a good reason related to the child's best interest--such as genuinely feeling closer one parent than the other--the court probably will follow the preference. Although most states treat a child's wishes as only one factor to be considered, two states (Georgia and West Virginia) declare that a child of fourteen has an "absolute right" to chose the parent with whom the child will live, as long as the parent is fit.

**Q. How does a judge find out about the child's preferences?**

**A.** Often judges will talk to the child in private--in the judge's chambers rather than in open court. In some cases, the judge may appoint a mental health professional, such as a psychiatrist, psychologist, or social worker, to talk to the child and report to the court.

**Q. If a parent has a sexual relationship outside of marriage, how does that impact on a court's decision on custody?**

**A.** That depends on the law of the state and the facts of the case. In most states, affairs or nonmarital sexual relations are not supposed to be a factor in deciding custody unless it can be

shown that the relationship has harmed the child. If, for example, one parent has had a discreet affair during the marriage, that normally would not be a significant factor in deciding custody. Similarly, if after the marriage is over, a parent lives with a person to whom he or she is not married, the live-in relationship by itself normally is not a major factor in deciding custody. In the case of live-in relationships, the quality of the relationship between the child and the live-in partner can be an important factor in a custody dispute.

If the parent's non-marital sexual relationship or relationships have placed the child in embarrassing situations or caused significant stress to the child, then the relationship would be a negative factor against the parent involved in the relationship. In a few states, courts are more inclined to automatically assume that a parent's nonmarital sexual relationship is harmful to the child. As with the issue of a preference for mothers in custody cases, the issue of a parent's sexual conduct can be one in which individual judges may have personal biases that influence their decisions.

**Q. If a parent is homosexual, what impact does that have on custody?**

**A.** The impact varies dramatically from state to state. Courts in some states seem more willing to assume harmful impact to a child from a parent's homosexual relationship than from a heterosexual relationship. On the other hand, some states treat homosexual and heterosexual relationships equally and will not consider the relationship to be a significant factor unless specific harm to the child is shown. A homosexual parent (or a heterosexual parent) seeking custody will have a stronger case if he or she presents evidence that the child does not witness sexual contact between the partners and that the child likes the parent's partner.

**Q. If one parent is trying to undermine the child's relationship with the other parent, how does that affect custody?**

**A.** Most states declare a specific policy favoring an ongoing, healthy relationship between the child and both parents. If one parent is trying to undermine the child's relationship with the other parent, that is a negative factor against the parent who is trying to hurt the relationship. If other factors are close to equal, a court may grant custody to the parent who is more likely to encourage an open and good relationship with the other parent.

**Q. If one parent is religious and the other is not, may the court favor the more religious parent?**

**A.** Normally, no. Under the First Amendment to the United States Constitution, both parents have a right to practice religion or not practice religion as they see fit. A judge is not supposed to make value judgments about whether a child is better off with or without religious training or about which religion is better. If a child has been brought up with particular religious beliefs and religious activities are important to the child, a court might favor promoting continuity in the child's life, but the court should not favor religion *per se*. In some cases, a parent's unusual or non-mainstream religious activities may become an issue, but, normally, a court should not consider a parent's unusual religious practices in deciding custody or visitation unless specific harm to the child is shown.

**Q. Can custody decisions be changed?**

**A.** Yes. A court may always change child custody arrangements to meet the changing needs of the growing child and to respond to changes in the parents' lives. A parent seeking to change custody through the court usually must show that the conditions have changed substantially since

the last custody order. The parent also must show that changing the custody arrangement would be better for the child. Sometimes the parent must show that not changing custody would be harmful to the child.

## **Visitation**

### **Q. If a parent does not receive custody, how much visitation is he or she likely to receive?**

**A.** That will vary with the desires of the parents and the inclinations of a judge. A common amount of visitation, however, is: every other weekend (Friday evening through Sunday); a weeknight (for dinner); half of the child's and winter and spring breaks; alternate major holidays; and several weeks in the summer. If parents live far apart and regular weekend visitation is not feasible, it is common to allocate more summer vacation and school holidays to the noncustodial parent. For parents who do not like the term "visitation" or "custody," it is possible to draft a custody and visitation order that leaves out those terms and just describes the times at which the child will be with each parent.

### **Q. Under what circumstances may the custodial parent deny the other parent visitation?**

**A.** The parent with custody must have a good reason to deny the other parent visitation. For example, if the noncustodial parent has molested the child, is likely to kidnap the child, or is likely to use illegal drugs or excessive amounts of alcohol while caring for the child, a court probably will deny visitation or restrict visitation. If visitation is restricted, visitation might be allowed only under supervision, such as at a social service agency or in the company of a responsible relative.

## **Joint Custody**

### **Q. What is joint custody?**

**A.** Joint custody--sometimes referred to as "shared custody" or "shared parenting"--has two parts: joint legal custody and joint physical custody. A joint custody order can have one or both parts.

### **Q. What is joint legal custody?**

**A.** Joint legal custody refers to both parents sharing in major decisions affecting the child. The custody order may describe the issues on which the parents must share decisions. The most common issues are school, health care, and religious training (although both parents have a right to expose the child to his or her religious beliefs). Other issues on which the parents may make joint decisions include: extracurricular activities, summer camp, age for dating or driving, and methods of discipline. Many joint custody orders specify procedures parents should follow in the event they cannot agree on an issue. The most common procedure is for the parents to consult a mediator. Mediation will be discussed later in this chapter.

### **Q. What is joint physical custody?**

**A.** Joint physical custody refers to the time the child spends with each parent. The amount of time is flexible. The length of time could be relatively moderate, such as every other weekend with one parent; or the amount of time could be equally divided between the parents. Parents who opt for equal time-sharing have come up with many alternatives such as: alternate two-day

periods; equal division of the week; alternate weeks; alternate months; alternate four-month periods; and alternate six month periods. If the child is attending school and spends a substantial amount of time with both parents, it usually is best for the child if the parents live relatively close to each other. Some parents, on an interim basis, have kept the child in a single home and the parents rotate staying in the home with the child.

**Q. Are courts required to order joint custody if a parent asks for it?**

**A.** No. In most states, joint custody is an option--just as sole custody is an option. Courts may order joint custody or sole custody according to what the judge thinks is in the best interest of the child. In some states (ten in 1999), legislatures have declared a general preference for joint custody. That usually means the courts are supposed to order joint custody if a parent asks for it, unless there is a good reason for not ordering joint custody. The most common reason for not ordering joint custody is the parents' inability to cooperate. Courts are concerned that a child will be caught in the middle of a tug-of-war if joint custody is ordered for parents who do not cooperate with each other. Parents who do not cooperate also will have trouble with sole custody and visitation, but the frequency of conflicts may be somewhat less since they will need to confer less often on major decisions and the logistics of a joint physical custody arrangement.

**Q. What are the pros and cons of joint physical custody?**

**A.** Supporters of joint physical custody stress that it is in the best interest of children to protect and improve their relationship with both parents. They believe shared custody is the only way to make sure that the children do not "lose" a parent because of the divorce. Critics fear that shared-time parenting is unworkable and worry about instability and potential conflict for the child. The success of joint physical custody may depend on the child. Some researchers have said that children who are relatively relaxed and laid back will do better with joint physical custody than children who are tense and become easily upset by changes in routine. Because joint physical custody usually requires keeping two homes for the child, joint physical custody often costs more than sole custody.

Parents probably should avoid locking in any parenting plan forever. Rather, they should plan to review the custody arrangement as the children grow and the children's needs change.

**Child Support**

**Q. How do courts set child support?**

**A.** Under federal law, all states must have guidelines by which courts determine child support. The guidelines were established because variations in the amounts of support set in similar circumstances were considered to be too wide and because child support, in many cases, was considered to be too low. The guidelines are formulas that consider the income of the parties, the number of children, and perhaps some other factors. The formulas are based on studies of how much families ordinarily spend for child raising. The formulas try to approximate the proportion of parental income that would have been spent for support of the child if the family had not been divided by divorce. Courts plug numbers into the formula and come up with an amount of support that should be paid for the child or children. The parties can argue that because of special circumstances, a court should order more or less support than the guideline amount.

**Q. When working with guideline formulas, how are the parents' incomes determined?**

**A.** States use the parents' net income or gross income. Gross income is the parents' income from

all (or almost all) sources, including wages, investments, and other sources). Net income is equal to gross income minus federal and state income taxes, Social Security tax, Medicare tax, health insurance, and perhaps union dues.

For self-employed persons, the determination of income may be complex. Courts will allow deductions of reasonable business expenses before determining net income. But courts may disallow unusually high business expenses and depreciation that reduce income artificially without hurting the parent's cash flow. Thus, certain expenses that are deductible for tax purposes may not be deductible from income for the purpose of setting child support.

**Q. How much child support should a noncustodial parent expect to pay?**

**A.** That question is difficult to answer precisely because guidelines vary between states and because courts may depart from the guidelines. But some examples can be given.

**Q. What is an example of a guideline for child support based on the income of only the noncustodial parent?**

**A.** Here is the "percentage of obligor's income" guideline which was in effect in Illinois in the year 2000:

Number of children	Percent of supporting party's net income
1	20%
2	25%
3	32%
4	40%
5	45%
6 or more	50%

Under this guideline, if a noncustodial parent ("supporting party") had a net income of \$40,000, the annual level of child support would be \$8,000 for one child; \$10,000 for two children; \$12,800 for three children, etc.

**Q. What's an example of a support formula based on the incomes of both parents?**

**A.** Support guidelines based on the incomes of both parents often are referred to as "income shares models." Under these guidelines, the court first adds the net income (or in some states, the gross income) of both parents. Then the court consults a long table--or computer program--which assesses the total obligation of support as a percentage of the combined incomes and the number of children. Generally, the percentage drops as the combined incomes rise, on the assumption that financially well off parents need to spend a smaller portion of their incomes on their children than parents who are less well-off. The court multiplies the combined incomes by the percent figure and obtains a dollar amount that the child or children are considered to need for support. Then the responsibility to pay that support is divided between the parents in proportion to each parent's incomes.

Here is an example using Colorado's child support schedules. Assume a father and mother have two children and a combined annual gross income of \$60,000--\$40,000 earned by the father and \$20,000 earned by the mother. The schedules put the guideline amount for support at \$11,508 per year (\$959 per month). Since the father earns two-thirds of the parties'

combined income, he would pay two-thirds of the children's support (\$7,672 a year) and the mother would pay one-third (\$3,836). If one parent had primary custody of the children, the other probably would make a cash payment to that parent. The parent with primary custody probably would not make a cash payment as such, but would be assumed to be spending that amount on the children. Alternatively, the parents might set up a checking account for the children's expenses and both would deposit their respective shares into the account.

**Q. What are reasons for ordering more support than the guideline amount?**

**A.** This will vary from state to state and will depend, in part, on what expenses the guidelines include and do not include. But some common reasons for giving support above the base guideline amount include: child-care expenses, high medical or dental expenses of the child that are not covered by insurance, and voluntary unemployment or underemployment of the parent who is supposed to pay support. Expenses for summer camps and private schools also might be a basis for setting higher support levels, particularly if private schools or summer camps were part of the family's lifestyle during the marriage.

**Q. What are reasons for setting support below the guideline amount?**

**A.** Again, this can vary from state to state, but common reasons for setting support below the guideline amounts include support obligations from earlier marriages and large debts to pay off (particularly if the debts are related to family expenses). If the support guidelines are based on the income of only the noncustodial parent and if the custodial parent has an unusually high income, then the noncustodial parent can argue that the custodial parent's income is a reason for setting support below the guidelines. Also, if the guidelines do not have a cap or maximum level of income to which they apply, the high income of the noncustodial parent is a basis for setting support below the guidelines. For example, using the Illinois guidelines described earlier, if a noncustodial parent has three children and an annual net income of \$200,000, that parent can argue that the children do not need the \$64,000 per year that the guidelines call for.

**Q. What is the effect on child support if the parents have joint custody of the children?**

**A.** That depends on the nature of the joint custody arrangement. If the parents have joint legal custody (by which they share in making major decisions regarding the child), that will have little effect on child support. If the parents have only joint legal custody, one parent still has primary custody of the child and handles payments of most of the child's day-to-day expenses. The custodial parent's expenses for the child have not been reduced by the joint custody arrangement. If the parents have joint physical custody and the child spends a substantial amount of time with each of parent, support might be set at less than the guideline amount since both parents are likely to handle day-to-day expenses for the child. (Parents, however, will need to coordinate payments on major expenses such as camp, school, clothing, and insurance).

**Q. Is child support paid while the child is with the noncustodial parent for summer vacation or long breaks?**

**A.** In most cases, yes. Courts figure that many major expenses for the benefit of the child--such as rent, mortgage, utilities, clothes, and insurance--have to be paid whether the child is with the custodial parent or not. So, usually, a full support payment is due, even if the child is with the noncustodial parent. On the other hand, the parties themselves (or the court) are free to agree on payments in different amounts during vacation periods when the child is with the noncustodial parent. The lower amount for vacation periods with the noncustodial parent might reflect savings

to the custodial parent for food expenses or childcare.

**Q. Do divorced parents have to pay for their child's college expenses?**

**A.** That depends on the state and the parties' agreement. Courts in some states will require parents to pay for a child's college expenses (assuming the parents can afford it and the child is a good enough student to benefit from college). Courts in other states note that married parents are not required to pay for their child's college expenses, and, therefore, divorced parents are not required to do so either. Regardless of the state's law on compulsory payment of college expenses, the mother and father can agree as part of their divorce settlement to pay for these costs. Courts usually will enforce those agreements.

**Q. How is child support enforced if a parent does not pay?**

**A.** The state and federal governments have a variety of techniques for enforcing payments of child support. The most common is a wage deduction, by which the employer sends a portion of the parent's wages to a state agency which then sends the money to the parent who has custody of the child. A federal law requires that after 1994, all child support orders must provide for an automatic wage deduction unless the parties have agreed otherwise or unless a court waives the automatic order. The state also can intercept the federal and state tax refunds of persons who have not paid support. Liens can be placed on property, such as real estate and automobiles. A parent who has not paid support can be held in contempt of court, which may result in a fine or a jail term. In addition, a parent who has not paid support can lose his or her driver's license or professional license. State's attorneys or district attorneys may help with collection of child support, though their efficiency varies from district to district.

Child support enforcement is a matter of increasing federal concern. Under the Child Support Recovery Act of 1992, it is a federal crime to willfully fail to pay child support to a child who resides in another state if the past-due amount has been unpaid for over one year or exceeds \$5,000. Punishments under the federal law can include fine and imprisonment.

A parent may not reduce child support payments without a court order: the unpaid amounts will accumulate as a debt, even if a court later decides that there was a good reason for the reduction.

**Q. To what extent is child support not paid?**

**A.** The Census Bureau reports that only about half of the parents entitled to receive child support receive the full amount that is due. About one-quarter of parents to whom support is due receive partial payments, and the other one-quarter receive nothing at all. The Census Bureau estimates that each year, about \$10 billion dollars in court-ordered child support is not paid. In addition to that, there are several million mothers who have not obtained orders of child support for their children. A high proportion of those women had children out of wedlock.

**Q. What legal remedies are available if a child is abducted by a parent?**

**A.** Abduction of a child by a parent is a crime under federal law and the laws of most states. Local police, state police, and in some cases the FBI can help in locating missing children. Parents who abduct their children also can be forced to pay the expenses incurred by the other parent in trying to find and return the child. To recover such expenses, a parent usually would need the help of a private attorney.

**Grandparents and Stepparents**

**Q. What are grandparents' rights to visitation?**

Although all states have statutes allowing grandparents to seek visitation with their grandchildren, in June 2000, the United States Supreme Court issued a ruling that will make it more difficult for grandparents to obtain court-ordered visits with their grandchildren. In the case of *Troxel v. Granville*, Justice Sandra Day O'Connor, writing for a divided Court, held: "[S]o long as a parent adequately cares for his or her child (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." The scope of the Supreme Court's decision is uncertain. The Court certainly believed that parents should be given more deference on decisions with whom the child will associate than was provided by the Washington State law. The Court, however, left open the possibility that some grandparents would be entitled to obtain court-ordered visitation. Such visitation might be allowed, for example, if the grandparents can show that they had a particularly strong relationship with their grandchildren, such as perhaps when the grandparents had raised the grandchildren for a number of years before primary custody of the children returned to the parents.

**Q. May courts award grandparents custody of their grandchildren?**

A. Yes, but usually only if neither parent wants the children or if the parents are unfit. Courts examine such factors as the grandparents' age, health, and ability to care for the children. Courts will not deny grandparents custody because of their age, as long as they are healthy.

Some custody disputes between grandparents and parents arise when the grandparents have been raising their grandchildren for a considerable length of time under an informal arrangement. The grandparents may have become the "psychological parents" of the grandchildren by the time the parent or parents seek to regain custody. In this circumstance, courts in many states will allow the grandparents to retain custody, even if the parents are fit.

**A STEPPARENT'S DUTIES AND RIGHTS**

The responsibilities of a stepparent depend on state law. A stepparent usually is not liable for a spouse's children from another marriage, unless the stepparent has adopted the children. Until then, the children's biological parents are liable for their support. Some states, however, make stepparents liable for the stepchildren's support as long as the stepparent and stepchildren are living together.

A stepparent who does not adopt a spouse's children normally may not claim custody of them if the marriage ends in divorce, although some states allow a stepparent to seek visitation and even custody. Stepchildren usually do not share in the estate of a stepparent, unless the stepparent has provided for the stepchildren in a will. However, unmarried stepchildren under eighteen may receive supplemental retirement benefits or survivor's benefits under Social Security.

**Mediation**

**Q. What is mediation?**

A. Mediation is a process in which the parties to a divorce (or some other dispute) try to resolve their disagreements outside of court with the help of a mediator. The mediator cannot force a settlement, but tries to assist the parties to clarify their interests and work out their own solution.

In divorce actions, mediators often are involved in custody and visitation disputes. They also can handle property disputes, support disputes, and other issues. If the parties resolve their disagreements through mediation, the attorneys for one or both of the parties still may be involved in finalizing and approving the agreement.

**Q. Is mediation mandatory in divorce actions?**

**A.** That depends on the rules of the local court. Many courts do require mediation of custody and visitation disputes--the mother and father must talk with a court-appointed mediator to try to resolve the problem before putting their case before a judge. The mediator cannot force a resolution, but the parties can be told to try mediation before coming to court.

**Q. What is the professional background of divorce mediators?**

**A.** Most mediators are either mental health professionals or attorneys. Many mediators, particularly those associated with court mediation services, have degrees in social work or psychology. Private mediators (which the parties may choose to hire) often are attorneys, although many are mental health professionals. Mediators who are mental health professionals are not serving as therapists, and mediators who are attorneys are not serving as attorneys. Instead, they are professionals who are trying to help two (or more) people work out their differences.

**Q. What are the advantages of mediation?**

**A.** Mediation often is cheaper and quicker than taking a case before a judge. A good mediator also can help the parties build their problem-solving skills, and that can help them to avoid later disputes. Most people who settle their cases through mediation leave the process feeling better than they would have felt if they had gone through a bitter court fight.

**Q. What are the disadvantages of mediation?**

**A.** Mediation can be a problem if one or both parties are withholding information. For example, if the purpose of mediation is to settle financial issues and one party is hiding assets or income, the other party might be better off with an attorney who can vigorously investigate the matter. Mediators usually are good at exploring the parties' needs, goals, and possible solutions, but mediators do not have the legal resources of an attorney to look for hidden information.

Another problem with mediation can arise if one party is very passive and likely to be bulldozed by the other. In that situation, the mediated agreement might be lopsided in favor of the stronger party. A good mediator, however, will see to it that a weaker party's needs are expressed and protected. Some mediators may refuse to proceed with mediation if it looks as though one side will take improper advantage of the other.

Some professionals think that mediation is not appropriate if the case involves domestic violence. One concern is that mediation will just give a forum in which the abuser can harm the victim again. Another concern is that victims of physical abuse are not able to adequately express and protect their own interests. However, other professionals believe that disputes in families with a history of domestic violence still can be mediated, particularly if the abused party is not significantly intimidated by the other party.

Finally, if mediation does not succeed, the parties may have wasted time and money on mediation and still face the expenses of a trial.

**SIDEBAR: What Happens When One Spouse Dies?**

If the spouse left a will--which is almost always a good idea--his or her property should be distributed according to his wishes. But if the will makes no provision for the surviving spouse, a court may invalidate the will and assign at least some of the deceased person's assets to the survivor.

If there is no will, the property will be distributed according to the laws of the state, with a certain percentage to the surviving spouse, a certain percentage to surviving children, and perhaps some for surviving parents, brothers, and sisters.

See the chapter on Estate Planning. *End Sidebar.*

## Where to Get More Information

### Adoption

Every state has a state adoption officer. These officials usually have offices in the state capital. The state government information operator can help you locate the officer for your state. For information about agency adoptions, contact the Child Welfare League of America, 440 1st Street NW, Third Floor, Washington, DC 20001. Its telephone number is 202-638-2952. FAX 202-638-4004; website, [www.cwla.org/](http://www.cwla.org/)

You also may wish to contact the National Council for Adoption, 1930 17th Street NW, Washington, DC 20009. Its telephone number is 202-328-1200; fax 202-332-0935; website, [www.ncfa-usa.org/](http://www.ncfa-usa.org/)

For information on independent adoption, check with your state, county, or city bar association. Ask if independent adoptions are legal in your state. Also ask if the bar association will refer you to lawyers who handle independent adoptions.

### Battered Spouses

Many communities offer shelters for battered spouses and their children. Details on these shelters are available from the police, crisis intervention services, hospitals, churches, family or conciliation courts, local newspapers, or women's organizations. A resource is the National Coalition Against Domestic Violence, P.O. Box 18749, Denver, CO 80218. The telephone number of this national information and referral center is 303-839-1852, fax: 303-831-9251, website, [www.ncadv.org/](http://www.ncadv.org/)

The local or state chapter of the National Organization for Women (NOW) also should be able to provide information to help battered spouses. Website, [www.now.org/](http://www.now.org/)

### Child Support

Every state has Child Support Enforcement Units that help custodial parents establish and enforce child support orders and locate absent parents. (These offices are sometimes called IV-D Offices because they are required by Chapter IV-D of the Social Security Act.) You can locate the offices by looking under county or state government listings in the telephone book or by asking the state government switchboard. Another resource is the Federal Office of Child Support Enforcement, which can help parents find their state's enforcement officers. Access

website [www.acf.dhhs.gov/programs/cse/index.html](http://www.acf.dhhs.gov/programs/cse/index.html); there's the national electronic child support resource system website at [www.ocse.acf.dhhs.gov/necsrspub/](http://www.ocse.acf.dhhs.gov/necsrspub/)

## **Divorce**

Most local public libraries offer books written about divorce. Ask the librarians for help.

Another source of family law attorneys is the **American Academy of Matrimonial Lawyers**. The academy is a private organization. It has about 1,500 members. In order to become a member of the academy, a lawyer needs to have devoted 75 percent or more of his or her practice to family law for a period of at least ten years. Written or oral examinations are required along with recommendations from judges and other lawyers. Membership in the academy does not automatically guarantee that the lawyer is good, but it does mean the lawyer has substantial experience in family law.

A person looking for a referral to a member of the American Academy of Matrimonial Lawyers can contact the academy at 150 N. Michigan Avenue, Suite 2040, Chicago, Illinois 60601; telephone: 312-263-6477; fax, 312-263-7682; e-mail, [office@aaml.org](mailto:office@aaml.org); Web site [www.aaml.org](http://www.aaml.org) The academy also has chapters in many states.

## **Mediation**

A source for information on mediation is the Academy of Family Mediators, 5 Militia Drive, Lexington, MA, 02421; telephone: 781-674-2663; fax 781-674-2690; website [www.igc.apc.org/afm/](http://www.igc.apc.org/afm/) The academy lists family mediators in every state by training and experience. Local courts (including the court clerk's office) also may have information regarding mediation services.

## **Missing Children**

Various agencies can offer help in finding children who are missing. They include: Missing Children Help Center, 410 Ware Boulevard, Suite 710 Tampa, FL 33619-4457; Telephone: 813-623-KIDS or 800-USA-KIDS (toll-free); website, [www.800usakids.org/](http://www.800usakids.org/)

or

National Center for Missing and Exploited Children, Charles B. Wang International Children's Building, 699 Prince Street, Alexandria, VA 22314-3175; telephone: 800-843-5678 (toll-free), website [www.missingkids.com/](http://www.missingkids.com/)

## **Pensions**

One resource on pensions is the U.S. Department of Labor. The address is: Pension and Welfare Benefits Administration, U.S. Department of Labor, Division of Technical Assistance

and Inquiries, Room N5658, 200 Constitution Avenue, NW, Washington, DC 20210, website, [www.dol.gov/dol/pwba/](http://www.dol.gov/dol/pwba/); copies of their publications can be ordered by calling their toll-free brochure request line at 1-800-998-7542

The Pension Rights Center informs employees of their rights involving pensions. This private organization also offers booklets that explain related topics. Write to: Pension Rights Center, 918 16th Street, NW, Suite 704, Washington, DC 20006. Or call 202-296-3776, fax: 202 -833- 2472, website, [www.aoa.dhhs.gov/AOA/dir/210.html](http://www.aoa.dhhs.gov/AOA/dir/210.html)

### **Social Security**

Your local Social Security Administration office can provide information and literature on benefits. You can find its address and telephone number in your local telephone directory--usually under "U.S. Government." website: [www.ssa.gov/](http://www.ssa.gov/)

### **Taxes**

The basic resource on federal income taxes is the Internal Revenue Service (IRS.). You can find your regional office in the phone book under "U.S. Government." You also may wish to contact an accountant or a tax lawyer.

Free publications on family taxes available from the IRS include Community Property and the Federal Income Tax (Publication 555), Tax Information for Divorced or Separated Individuals (Publication 504), and Tax Rules for Children and Dependents (Publication 929). They--and much more--are online at [www.irs.gov/](http://www.irs.gov/)

### **Women's Issues**

For questions about your rights or a referral, contact the Legal Defense and Education Fund of the National Organization for Women (NOW), 395 Hudson Street, New York, New York 10014, telephone (212) 925-6635, fax 212 226-1066, email [lir@nowldef.org](mailto:lir@nowldef.org); Also, access [www.nowldef.org/](http://www.nowldef.org/); their publications and resources are on page [www.nowldef.org/html/pub/index.htm](http://www.nowldef.org/html/pub/index.htm).

[Click here to go to Chapter 4](#)