

I. Courtship

A. Before Marriage

1. Prenuptial (Antenuptial) Agreements

- a. *Definition* – made by people who are engaged to be married (agreements in contemplation of marriage)
- b. *Enforceable*, provided:
 - (i) *Express agreement*
 - NY will not find an *implied K* – in California, there’s something called ‘palimony,’ but we don’t have that here
 - (ii) *Consideration other than sex* (e.g., if you take care of the children, I’ll pay you 10K a month for the rest of your life), because prostitution is illegal
- c. *Content* – can address any topic that the people want it to address
 - (i) Usually they address economic issues in the event of a subsequent divorce,
 - (ii) Address children, family chores (e.g. inheritance rights, distribution of property, maintenance, child care, custody, & support)
- d. *Requirements*
 - (i) *Freely made* – no duress, just like any K
 - (ii) Must be in *writing, signed & acknowledged* – because of the statute of frauds
 - (iii) *Can NOT agree to*:
 - (a) *A divorce* (e.g. “in 3 years, H promises to divorce W”) – that’s void as against public policy
 - (b) *Cannot agree to commit acts to make a grounds for divorce* (I agree to commit adultery)
 - (c) *Relieve liability to support the other spouse* – resulting other spouse to be a *public charge* (Waiver of alimony is not unconscionable, unless it results in spouse becoming a public charge)
 - (iv) *Can NOT be unconscionable* – same as in any commercial K – there’s a specific test for waiver of support/alimony (*automatic unconscionability* if it sets the amount of post-divorce support too low)
- e. If the marriage fails to take place, the parties are discharged, BUT, once marriage occurs, an otherwise valid antenuptial agreement survives (i.e., it survives a subsequent annulment or divorce)

2. Non-marital children (kids born to unmarried couples)

- a. *Definition* – children conceived or born out of wedlock are not marital children unless the parents thereafter become married (rights of marital & non-marital children are almost always same)
- b. *Non-marital children have the same rights as marital children*:
 - (i) Non-marital child & his issue inherit from his mother & her kindred – inherit from father if he’s determined to be the father
 - (ii) Recover damages for the wrongful death of his father or mother
 - (iii) *Workers compensation benefits* – can share in his father’s WorkersComp benefits
 - (iv) *Public assistance* – state can not deny welfare or public assistance
 - (v) *Same support obligations*
- c. **Filiation proceeding (paternity suit)** – litigation when the identity of the father is ambiguous; litigated in the *Family Court*; can litigate up to the child’s 21st birthday (purpose for child’s rights of inheritance). Can be commenced by mother, guardian, or even father sometimes
 - (i) Burden of Proof – clear & convincing evidence
 - (ii) Mother’s testimony of sexual access to the father need not be corroborated
 - (iii) D’s evidence of sexual access between mother & other men MUST be corroborated
 - (iv) DNA/genetic testing evidence is admissible when offered by either party – if greater than 95% probability, that’s a rebuttable presumption (only way to rebut is to show total inability of access)

3. Causes of action before marriage

- a. **“Heart balm” Actions Abolished** – NY state used to have a series of causes of action brought for emotional hurt arising out of romantic relationships
 - (i) *Breach of promise to marry* – if you broke an engagement, you could get sued
 - (ii) *Seduction of an unmarried female* – cause of action used to belong to the father of unmarried female
 - (iii) *Alienation of affections* – suing someone that made spouse hate you (e.g., father-in-law convinces W that H is a horrible person, & H can sue father-in-law for turning W against him)
 - (iv) *Criminal conversation* – emotional distress for adultery (sue someone sleeping with your spouse)
 - (v) *Jactitation of marriage* – boasting of a non-existent marriage
 - NOTE: Not only are these causes of action abolished – *it’s a felony to file one of these claims*
- b. **Actions not abolished**
 - (i) *Deceit* – if you arrange a fraudulent wedding so you can go to bed with them
 - (ii) *Recover gift made solely in consideration of marriage* – allowed if gift were *given in contemplation of marriage* (cannot get back other gifts); thus can get back engagement ring

B. Getting Married

1. *Ceremonial Marriage*, which requires:
 - a. *License* – NY has abolished the general blood test requirement (concerns capacity to marry – *capacity* problems will prevent infants from getting married - Capacity for marriage by same sex couples is unsettled in NY)
 - (i) *Waiting period* – need to wait 24 hours
 - (ii) *License expires in 60 days*
 - (iii) *Failure to get a license, or irregularities* – does NOT affect the validity of the marriage
 - b. *Ceremony* – defined as a *solemn declaration before an officiant & 1 witness* (customary to have 2 witnesses)
 - (i) Who can officiate – anyone important, including (i) clergy of any denomination, (ii) anyone empowered to administer oaths (judges, mayors, governors, clerks, etc.)
 - (ii) *No specific form of ceremony* – traditional wedding vows aren't required
2. *Contractual Marriage* – requires a license & a written K signed by both parties
 - a. Usually, 2 parties are in different locations when they marry (e.g., one in military or in hospital, etc.), &
 - b. Each party goes before a judge & signs the marriage k, which must be acknowledged like a deed
3. *Marriages at sea* – recognized in NY if valid under the law of the shipowner's domicile
4. *NY does not recognize common law marriages* – but, NY recognizes as married a couple that entered into marriage in another state where common law marriage is recognized (Penn. allows such marriages)

C. Being Married

1. Basic Obligations
 - a. *Obligation of Sexual Exclusivity – Monogamous Relationship*
 - b. *Duty of Economic Support* – married couples have a mutual & reciprocal obligation to support each other
 - (i) Defined as a ***duty to provide fair & reasonable support*** – based on resources of each party - normally calculated by the means of the wealthier spouse
 - (ii) *“Means” test v. “needs” test* – different ways to determine the extent of support owed. Needs test – you must support your spouse enough to prevent her from becoming a public charge.
 - (iii) *Separate maintenance* (spousal support) – if one spouse isn't supporting the other (*in Family Court*)
 - (iv) *Formal legal separation* – some support is given, but the adequacy is contested (*in Supreme Court*)
 - (v) ***Agreements during marriage to liquidate entitlement to support – unenforceable***
 - (a) Courts will not enforce an agreement to liquidate support rights into a cash payment
 - (b) NOTE: *lump sum payments* ARE enforceable, & the court will look at the facts to see if the money has been dissipated & a spouse is in danger of becoming a public charge
2. Married people are treated like single people, & retain their separate legal identities in almost every way
 - a. Contract – can K independent of each other (e.g. one spouse's K not bind other spouse or property)
 - b. Torts – responsible for their own torts (no vicarious liability)
 - c. Criminal liability – independent of each other
 - d. Adoption of husband's name is optional – can have different domiciles
3. *Debts*
 - a. Creditor can recover for *necessaries* provided to the other spouse
 - b. Creditor can recover under *agency relationship* – within the scope of the spouse's authority
 - c. *Antenuptial debts* – husband is liable for wife's antenuptial debts only that acquired from her
 - d. *Postnuptial debts* – husband is liable for wife's postnuptial debts that the wife incurred for her support (a court is likely to find a wife similarly liable for husband's debts)

II. Termination of Marriage

A. Types of Matrimonial Actions – 5 separate causes of action to terminate a marriage

1. **Declaration of Nullity** – things that would lead to nullification of a marriage license; marriage is **void**
 - a. Rationale for nullification:
 - (i) *Clarity of the record* – like when you apply for a loan, the loan officer needs proof
 - (ii) *Need Court's Assistance - Matters of child custody/support*
 - b. Grounds for voiding marriage (2 grounds):
 - (i) *Bigamy* – can NOT marry if already married (lack capacity); must be single
 - (ii) *Incest* – can NOT marry blood relatives - Marrying by incest is a crime in New York.
 - (a) *Ancestors* (mother or grandmother), (ii) *descendants* (daughter or granddaughter), (ii) *siblings*, full & half, (iii) *lateral relatives up or down 1 generation* (aunts, nieces)
 - (b) MAY marry 1st cousins, & step-siblings
 - c. NOTE: when an impediment causing a marriage to be void is removed (e.g., spouse from previous valid marriage dies), the marriage becomes merely *voidable*, & thus subject to *ratification*
2. **Annulment** – used when there was a capacity problem but the marriage is merely *voidable*
 - a. *Void & voidable* relationship:
 - (i) Void relationship – relationship has no legal standing whatsoever
 - (a) Grounds that make a relationship void *can NOT be waived* by the parties

- (b) Can be collaterally attacked by 3rd parties
- (ii) Voidable relationship – married but need an annulment to terminate the marriage
 - (a) *Can stay marriage*, because strong public policy isn't implicated, only equity is
 - (b) Can be challenged by *only spouses* themselves
- b. Grounds for annulment (6 grounds):
 - (i) **Non-Age** (i.e. Under Age)
 - (a) *Persons 16 ~ 17* – can get legally married with parental consent
 - (b) *Persons 14 ~ 15* – written approval & consent by Supreme/Family Court, & parental consent
 - (c) *No one under 14 may marry*
 - NOTE: *waived* if you get married when you're 17, but cohabit after age 18
 - (ii) **Lack of mental capacity** – want of knowledge (e.g. mental illness, not lucid, developmental disabilities etc.); *waiveable only if the person becomes lucid and remains in the relationship*
 - (iii) **Duress** – a marriage under coercion (e.g. shotgun weddings) – *waivable if you continue to co-habitate*
 - (iv) **Fraud** – misrepresentation or concealment of significant/material information before marriage (most important ground for annulment); 3 common fact patterns:
 - (a) **Misrepresentation concerning religion** – lies about what religion he belongs to, how strict/casual your belief system, intentions of kids' religious training (*waivable*)
 - (b) **Misrepresentation regarding sex or procreation** – if you lie to the partner about your ability/willingness to have kids, sexual orientation, sexual agenda, sexual history (former prostitute), that's considered material & there's grounds for an annulment (*waivable*)
 - (c) **Misrepresentation regarding income/wealth** – NOT significant enough to justify an annulment, because the law takes the view that people don't enter into a marriage for money
 - NOTE: S/L is 3 years, which is shorter than the usual 6 years
 - (v) **Lack of physical capacity** – an *incurable* (temporary inability to performance isn't enough) physical condition that prevents *safe & normal sexual intercourse*
 - (a) Nothing to do with one's ability to procreate – it's about intercourse
 - (b) It is presupposed that couple has not been intimate prior to the marriage
 - (c) Must be able to have safe sex
 - (d) NOTE: no jury trial
 - (vi) **5 years of incurable mental illness** – if after the marriage, 1 spouse loses his mental faculties
- c. Procedure
 - (i) *Grounds must be always corroborated* – testimony of either spouse alone insufficient.
 - (ii) *Always entitled to jury trial* – except for *lack of capacity*
 - (iii) *Statute of limitations* for annulment of voidable marriages is 6 years – except for *fraud* (3 years)

3. Legal Separation

- a. Definition – doesn't terminate the marriage, but rather the court adjudicates child-custody & other issues, while maintaining formal marriage (i.e. if you have sex with another during legal separation, it is adultery)
- b. Rational for choosing separation – (i) chance of reconciliation; (ii) think divorce is wrong; (iii) tactical & strategic reasons (e.g. preserving rights under a will, filing a joint tax return)
- c. Grounds for Separation (5 grounds):
 - (i) **Cruel & inhuman treatment** – physical or mental abuse (any form of psychological degradation or embarrassment) that endangers the well-being of the P spouse. Must be unsafe or improper for the parties to continue to cohabit.
 - (a) Subjective ground – whether the P spouse *can* put up with it (sensitivity is taken into account)
 - (b) Not an absolute defense that P continued to cohabit with D after the abuse
 - (ii) **Abandonment**: 4 elements here
 - (a) *Voluntary departure* by 1 spouse from the other
 - (b) Departure must be *without consent*
 - (c) Departure must be *without justification*
 - (d) *NO intent* to return (inferred from length of absence or surrounding circumstances)
 - (e) NOTES: no S/L; no jury trial
 - *Any period is long enough* (as long as there's intent)
 - **Constructive abandonment** – abandoning spouse need not leave the house (e.g. H changes locks of house; refusal for sexual intimacy, however, refusal to wear negligee is not constructive abandonment)
 - (iii) **Adultery** – act of sex / deviant sex voluntarily performed with another (not spouse), while married
 - (a) *Special defenses*:
 - **Recrimination** – similar to the equitable idea of “dirty hands”; off-setting wrong (if H accuses W of adultery, W can say that H had adultery too)
 - **Condonation** – waiver (e.g. knowledge + forgiveness + resumed sexual relations)
 - **Connivance** – form of entrapment (e.g. adultery was actually arranged by P, who set up D)
 - **S/L** – within 5 years of discovering the offense
 - (b) *Evidentiary pleadings limitations*:
 - *D's answers need not be verified* (all other answers must be verified & sworn to)

- Spouses can ONLY testify as to 3 things:
 - Prove the existence of the marriage
 - Spouse can testify to disprove/deny the adultery
 - P can testify to disprove a defense (e.g., that there wasn't connivance)
 - (c) Spouse CANNOT testify to the adultery (even if you walked in and saw it) – need to prove by:
 - 3rd party testimony (the other participant in the adultery)
 - *Circumstantial evidence* – (i) *opportunity* (e.g., they were alone together) & (ii) *disposition* (e.g., they were attracted to each other – prove by love notes, flowers, etc.)
 - (d) *Evidence of prostitutes & private detectives* MUST be corroborated
 - (iv) **3 Consecutive years of imprisonment**
 - (v) **Failure to Support** – separation only
- 4. Divorce**
- a. No-Fault divorce – not recognized in NY
 - b. Ground for divorce (4 grounds)
 - (i) *Cruel & inhuman treatment*
 - (ii) *Abandonment* – but here it had to last at least 1 year when you file for divorce (contrast w/ Separation-any time)
 - (iii) *Adultery*
 - (iv) *3 Consecutive years old imprisonment*
 - c. **Conversion Divorce** – divorce only
 - (i) Types
 - (a) **Court-ordered separation** – apart for at least 1 year; at the end of the period, can *convert their* separation into a divorce; OR
 - (b) **Separation agreement** – if both parties agree to separation agreement, apart for at least 1 year; can convert into a divorce (Note: if there was no fault, then you can't get a separation agreement)
 - Conversion divorce will NOT be granted if:
 - Material provision of the separation agreement is breached; or
 - Separation agreement was void as a result of fraud, duress, or incapacity
 - (ii) **Separation agreement** must be (i) written, (ii) acknowledged, (iii) freely made (no duress), (iv) must file with court in the county where you're seeking the divorce (NOT in Family Court), & (v) **must not violate statutory public policy provisions (e.g. altering or dissolving support obligations)**
 - (a) Must not co-habit with intent to reconcile or else the agreement is rescinded (even a brief reconciliation)
 - (b) NOTE: *reconciliation*
 - Does NOT abrogate the separation decree, *but it does abrogate a separation agreement*
 - **If H & W reconcile, the prior separation agreement is voided & can NOT be revived**
 - Casual isolated cohabitation (i.e. random sex) without the intent does NOT affect eligibility for a conversion divorce
- 5. Dissolution** (“enoch arden”)
- a. When spouse disappeared – need to demonstrate that spouse has been *missing without tidings* for 5 years
 - b. Requirements:
 - (i) *Must make a diligent search*
 - (ii) *Publish a request that spouse return for 3 consecutive weeks in an English-language newspaper*
 - (iii) *Must live in NY for a year, or NY must be the matrimonial domicile* at time of disappearance
 - c. *No collateral remedies* – will not get support, child custody, etc., because the effective result of this decree is that your spouse is dead (get all the property, get the kids, etc.)

B. Procedural Matters

1. Actions are brought in Supreme Court
 - a. *Family court* does NOT have jurisdiction over (i) divorces, (ii) separations, or (iii) annulments,
 - b. Family court has *concurrent jurisdiction* with Supreme Court in *support proceedings*, except when specified by court (e.g. Supreme Court in a post-divorce support modification specifies that the decree will only be modified by the Supreme Court)
2. *Jurisdiction* – 1 spouse must be domiciled in NY, because a marriage is an intangible thing
3. **Durational residence requirements** – because it's very easy to get domicile (get a driver's license, voter registration, etc.), there are a number of residency requirements, to avoid forum shopping:
 - a. **None** – if both parties reside in NY, & grounds occur in NY, there's immediate access to NY courts (no minimum residency period)
 - b. **1 year requirement** – if only 1 party resides in NY & *plus factor*:
 - (i) Married in NY; (ii) some point they lived in NY as spouses, or (iii) grounds occurred in NY
 - c. **2 years requirement** – if you don't have a plus factor, & only 1 spouse lives in NY
4. *Personal service of process* is required, unless the court allows another (process cannot be served personally by one who is a party to the action)
5. Pleadings must be verified (sworn to), except for a complaint alleging adultery
6. *Trial*

- a. *Summary judgment* – no boomerang effect (i.e., can't be granted in favor of the nonmoving party)
 - b. *Compulsory financial disclosure*
 - c. *Jury trials* are required, except
 - (i) NO jury for annulment based on physical incapacity (too humiliating)
 - (ii) NO jury for separation
 - d. *Records are confidential* for 100 years
7. *Ethical rules:*
- a. *Must give certain documents to your client in a matrimonial/family law matter* – must be (i) statement of client rights & duties, (ii) a *written retainer agreement* & (iii) closing statement
 - b. *Cannot take as security for your fee in a family law case a mortgage for somebody's home*
 - c. *Lawyer shall not begin a sexual relationship with client* during the representation (but, you can continue one that you already have, & it's limited to domestic relations cases)

III. Economic Issues

A. Maintenance (i.e. alimony) – based on the needs of the party applying

1. Applicant has the burden of showing need, & it's irrelevant how much money the other party has – applicant must show *inability to support herself*
 - a. Court can consider anything it deems appropriate, including marital misconduct or marital fault; factors
 - (i) **Fault**; duration of marriage & standard of living
 - (ii) Age & health; job skills; earning capacity; educational achievement
 - b. Gender classification – eliminated (unconstitutional) in alimony & spousal rights statutes
2. *Temporary maintenance* – may be granted if circumstances warrant (e.g. genuine need of financial support)
 - BUT, if the parties have entered into a *separation agreement* that provides for maintenance, a court may NOT order temporary maintenance *unless* the agreement is *breached or set aside by the parties*
3. *Counsel fees* – may be awarded in an action to compel payment of sum of money required to be paid in a matrimonial judgment (like *arrears* in maintenance)
4. **Modification** – can petition to change a maintenance award; must prove a **substantial change in circumstances**
 - a. *Separation decree can survive the divorce decree – no modification unless there's extreme hardship*
 - b. *If divorce decree says that the separation decree merges, separation decree is erased*
5. **Termination**
 - a. Usually terminates at death
 - b. **Separation agreement can trump the normal rules associate with death**
 - c. If recipient remarries or lives openly with another person as if they were spouses, maintenance will stop
6. If maintenance not paid, we can attach your property, lock you up.

B. Equitable Distribution of Property

1. 1st step is to go through all the property owned by the couple & see which property is (i) H's separate property, (ii) W's separate property, & (iii) which is *marital property*
2. **Separate property** is defined as
 - a. Property *acquired prior* to marriage (e.g., W inherited a necklace before the marriage, Totten trusts)
 - b. *Legacies or gifts* that the spouses received as *separate individuals*
 - c. *Expressly agreed* to be treated as personal property
 - d. *Personal injury compensation* – any money you recovered in a tort claim
 - e. *Passive Appreciation in value* of items in the above 4 categories (*unless* it's attributable to the other party's actions)
 - NOTE: being a homemaker & parent *can* be active participation in the appreciation of an asset if it allow the other spouse to work & make the asset more valuable
3. **Marital asset** (*everything else the couple acquires*) – this is true even if only 1 works outside the home, or how the property is titled (e.g., whose name is on the bank account or on the land's deed)
 - a. Salary, wages, fees, pension rights, income earned by either party, & anything that money was used to purchase
 - b. Stock options, appreciation in value due to spouse's active participation
 - c. Property acquired by either spouse *during marriage* – including H's business started during the marriage
 - d. **Educational degrees or professional licenses** are considered marital assets – court will value it (enhanced increment), & give the other spouse other assets worth that amount
4. **Dividing Marital Asset**
 - a. Factors are similar to maintenance BUT *marital fault is NOT considered* for equitable distribution (unless super egregious)
 - **Compare, fault CAN be considered for maintenance**
 - b. FACTORS: Same as maintenance: Age & health; job skills, likelihood of having custody, etc
 - c. Court can (i) order a sale of major assets (e.g., a house), (ii) distribute the assets in kind, or (iii) mix & match
 - d. Distributive award – money paid out from dividing marital assets
 - e. In marriages of long duration, we tend towards a 50-50 distribution, but it is entirely discretionary with the court.

IV. Children

A. Having children

1. *Artificial insemination* & other procedures – husband & wife must give written consents; child deemed the marital, natural offspring of the married couple (sperm donor is not considered the father)
2. *Surrogate parenting* – K where surrogate mother must turn over child to couple VOID (against public policy)
3. *Adoption* – any adult can petition to adopt (single adult; married couple; married minor can adopt his/her spouse's child; married but separated adult can adopt as a quasi-single parent)
 - a. Requirements:
 - (i) Must seek to establish a *genuine parent-child relationship*
 - (ii) *Consent*:
 - (a) *Adoptee must consent if over 14*
 - (b) *If adoptee is under 18* – the biological parents have to consent and anybody with legal capacity –
 - b. Consent Legally Unnecessary
 - (i) *Surrender children to the state*: 'giving child up' for adoption
 - (ii) *Parents are mentally incapacitated and lack the ability to care for the child*
 - (iii) *Abandoned his/her biological child* – no consent required (means that you go 6 months or more without contact)
 - (iv) *Neglect* – Parents conduct poses an imminent danger to the child and behavior falls below the minimum degree of care of a reasonable parent acting under similar circumstances. (*requires 1 year with insubstantial contact???*)
4. *Placement*:
 - a. Judge or surrogate must examine the adoptive parents, home, & the child – if the adoptee is younger than 18, the parties must participate in a 3-month trial residence of the child in the adoptive home. Then a hearing (which is usually a formality) to finalize the adoption in court.
 - b. NY tries to engage in religious matching where possible
 - c. *Foster parents* who have cared for the child continuously for more than 12 months may apply for adoption & will be given preference as against other applicants
5. Termination of parental rights proceeding – requires clear and convincing evidence of abandonment, neglect, mental incompetency or abuse.

B. Support (not heavily tested)

1. Every parent has an obligation of support to a child through age 21 – point they're considered "*emancipated*"
2. *Custodial v. non-custodial parents*
 - a. When a child lives with a parent, child support is paid in the routine conduct of a everyday life
 - b. Child support is an issue with *non-custodial parents*, most typically: (i) *the parent post annulment/divorce who didn't get custody* & (ii) *father of nonmarital parent*
3. *Judicial award amount* – all states have guidelines to calculate the amount of child support – can be *modified*
4. *Modifying the support obligations in a separation agreement* – must show (i) child support amount is inadequate, & (ii) unforeseeable chance in circumstances. Can be made by payor (ie. payor laid off) or recipient. (kid needs braces)
5. *Voluntary impoverishment* – NOT sufficient to have alimony reduced
6. *Child may bring a support proceeding in Family Ct*
7. *College education* – generally, parent has no duty to provide child a college education, BUT, such a duty may be imposed by the court which considers: (i) child's academic ability, (ii) parents' financial ability, & (iii) parents' standard of living (including their own education)
8. NOTE: Family court judge MAY interview a child away from the parents, but MUST make a *stenographic record* of the interview; it's *reversible error* on appeal if the judge keeps no record, because without a record there's no basis to review the judge's decision

C. Custody & Visitation

1. Standard – "*best interests of the child*"; factors such as:
 - a. Wishes & desires of the *parties*
 - b. Wishes & desires of the *children* – especially if kid is over 14, (care whether the kid has a preference)
 - c. *Age, Health, Physical, mental & environmental circumstances* of the parent
 - d. *History of domestic violence, anger management issues*
 - e. *New relationships parents are in* (father dating a stripper)
 - f. *Placement that will sustain relationships with extended family*
 - g. *Gender* does NOT count – no presumption in favor of mother, but consider primary caregiver
 - h. Parents are presumed to be better for the child than non-parents (aunt, grandmother, etc.) unless shown to be unfit or if there are extraordinary circumstances (child has lived with grandparents for at least the past 2 yrs).
2. Visitation – same standard of "*best interests of the child*"
 - a. If don't get custody, visitation is a core prerogative of parenthood – only denied if visitation would be harmful to child's welfare
 - b. Relocation of child must be in the best interests of the child by a preponderance of the evidence
 - c. Custodial parent has a veto power over visitation by other relatives (*Parents have a due process right to raise their children and that includes preventing visits to grandparents*)
 - d. *Child support payments & arrears are unaffected by denial of visitation*

V. Conflict of Laws

A. Sister State Marriages

- General Rule, Valid where contracted, then valid here. NY will recognize another state's marriage unless it violates a strong public policy (i.e. permitted siblings to get married)

B. Sister State Divorces

1. Bilateral Divorce
 - a. Full faith & credit – Valid in NY – neither party can challenge it because both parties participated in it
 - b. *Res judicata* – if no property issue, cannot bring it to NY
2. *Ex Parte Divorce*
 - a. Treat it as prima facie valid if the D was served with process – US Supreme Court has held that a state in which 1 spouse is domiciled may grant a divorce even though the other spouse is not domiciled in that state & is not personally before the divorcing court
 - b. BUT collateral attack based on lack of Petitioner's domicile in the forum are allowed
3. *Estoppel against collateral attack* – certain persons will be estopped from making such an attack because of their relationship to the earlier proceedings:
 - a. *Constitutional estoppel* (bilateral divorce – where court has jurisdiction over both spouses)
 - (i) Person seeking to collaterally attack a divorce judgment need not be one of the spouses – he may be any interested party (e.g., a child)
 - (ii) Such collateral attack will NOT be allowed, however, if the 3rd person is a *privy of any party who might be estopped*
 - b. *Equitable estoppel* (ex parte divorce) – person is precluded from attacking the validity of the divorce if
 - (i) Himself procured an ex parte divorce,
 - (ii) Who participated in obtaining an ex parte divorce for another whom he has subsequently married, or
 - (iii) Who has relied on his spouse's ex parte divorce by remarrying
4. *Foreign Countries Divorces*
 - a. Bilateral divorce – YES (honor under the doctrine of *comity*)
 - b. *Ex parte divorce* – Not honored

C. Support Orders

1. Uniform Interstate Family Support Act (UIFSA) – adopted in all 50 states and D.C.
 - a. Every state will defer to the home state where the child receives support
 - b. Can mail the order to the out of state employer who is obligated to withhold the support \$ and remit to the spouse/child
 - c. The non-home-State will use compulsory process (attachment, garnishment) to obtain payment
 - d. State that makes original judgment has continuous jurisdiction – need to modify at original jurisdiction
2. Full Faith & Credit for Child Support Orders Act (FFCCSOA) – requires each state to enforce the child support orders of sister states (who had proper jux and both parties had an opportunity to be heard)
3. Child Support Recovery Act – Federal crime if you fall 1 yr or \$5,000 behind in child support payments

D. Out of State Child Custody

1. Uniform Child Custody Jurisdiction Act (UCCJA) – requires all states to defer to the child's home state
 - Court of another states may NOT modify a decree of custody UNLESS (i) the original court didn't have jurisdiction or has declined to exercise jurisdiction, or (ii) the "modifying" court has jurisdiction
2. Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA) – developed to replace the UCCJA
 - Case where 2 states each have a significant connection with a party, but there is no "home state," – jurisdiction lies in the state where an action is 1st filed
3. NOTE: both statute delineate that all child custody must defer to the home state, which has a continuous jurisdiction

DOMESTIC RELATIONS – ESSAY QUESTIONS

I. QUESTION – 10 (& NY PRACTICE)

- A. Whether the grounds of *cruel and inhuman* treatment exists – in a divorce action
 - 1. In a divorce action – *P’s complaint is required to plead the nature of circumstances of the D spouse’s alleged misconduct, and the time and place of each act complained must be specified.*
 - 2. *Cruel and inhuman* treatment – conduct by the D spouse which so endangers P’s physical or mental well being as to render it unsafe or improper for P to cohabit with D
- B. Whether cohabitation is a defense in a divorce action for cruel and inhuman treatment
 - 1. In itself is NOT a defense here
- C. Whether *personal injury claims* earned during marriage are martial property subject to “equitable distribution”
 - 1. Equitable distribution (action after Jul. 19, 1980) – martial property distributed equitably considering the circumstances of the particular case
 - 2. *Martial Property – all property acquired during marriage by either or both and before either the execution of a separation agreement or the commencement of a matrimonial action*
 - 3. *Compensation for personal injuries* are NOT martial property
- D. Whether advances during marriage are martial property subject to “equitable distribution”
 - 1. Advances are martial property because they were acquired as a result of work performed during marriage

II. QUESTION – 32

- A. Whether State X had jurisdiction to award a divorce
 - 1. State where either party to a marriage is *domiciled* has power to grant a judgment of divorce
- B. Whether State X had the jurisdiction to terminate support
 - 1. *Right to support* – are under the doctrine of “*divisible incidents of divorce*”; personal to each party and cannot be affected UNLESS the court has jurisdiction over the person entitled to the support
 - 2. Separation agreement is presumed to be incorporated and survives a divorce decree unless the agreement specifically directs a merging of the decree (stand by itself notwithstanding that it is read into the decree)
 - a. Court may only modify separation agreement if party shows *extreme hardship*
- C. Whether H’s support obligations will be affected if W committed adultery
 - 1. *Adultery in and of itself is not enough to warrant modification of support* (when a party *holds out as H & W*, then court may annul or modify support)
- D. Whether W is entitle to counsel fees in her action to compel payment under the matrimonial judgment
 - 1. YES – counsel fees may be awarded in an action to compel payment of any sum of money required to be paid by a matrimonial judgment

III. QUESTION – 58

- A. Whether property inherited by one spouse, but then conveyed to both spouse as tenants by the entirety, should be considered martial property
 - 1. Initially a separate property – but becomes martial property when one spouse conveyed the property as tenants by the entirety
- B. Whether spouse who inherited the property should be given credit for its original value
 - 1. NO – increase in the value of separate property of one spouse, due to direct or indirect contribution of the other spouse, will become martial property
- C. Whether separation agreement was entered into freely and with full disclosure
 - 1. SA are valid if (i) freely made, (ii) not violate public policy, (iii) parties are/become separated
 - 2. SA governed by contract principles – defense include mistake, misrepresentation, and fraud (need utmost good faith in contracting)
- D. Whether a support provision can be modified
 - 1. **Inadequate** – custody and support provision can annulled, amended, or modified on notice of motion; child is not bound by the terms of the parents separation agreement (court must consider child’s best interest)
 - 2. BUT modification for reasons other than inadequate – party seeking change must demonstrate **unforeseen and unreasonable changes in circumstances warranting modification**

IV. QUESTION – 94

- A. Whether W had a cause of action against H for annulment
 - 1. Fraud allows annulment – e.g. one fraudulently promises to convert to the religion of the spouse to induce that spouse to enter into the marriage
 - 2. If H had planned on converting when they were married but *later* changed mind – not fraud because the parties *voluntarily* cohabited with knowledge of the facts constituting fraud
- B. Equitable Distribution – has authority when relief granted is (i) divorce, (ii) dissolution; (iii) annulment; (iv) null
- C. Whether W is entitled to *temporary maintenance*
 - 1. In pendency of an action – allowable if *genuine need of financial support*
 - 2. BUT if there is a SA which complied with court can NOT temporary maintenance

- D. Cohabitation of one incident will not abrogate the SA since there is no proof of an intention to abandon the agreement, to reconcile, or to permanently resume the marital relationship
- E. Whether child support can be increased – allowable if *unforeseen and unreasonable change*

V. QUESTION – 79

- A. What must be shown to justify an award of *temporary maintenance*
 - 1. May order to meet the reasonable needs of a party in such amount as justice requires – provided with sufficient funds to meet her needs pending the disposition of the matrimonial action
 - 2. Primary factor – *financial need of the applicant*
 - 3. Court is incorrect in denying temporary maintenance on the ground that party had not shown the probability of success
- B. Whether provision in the divorce decree terminating child support upon emancipation (prior to 21) was self-executing
 - 1. Generally are not self-executing – party should make a prompt motion for reduction based upon claimed emancipation of child (no unilateral or automatic reduction of child support)
 - 2. Hearing should be held to determine if, in fact child is emancipated and, if so, whether party’s child support should then be reduced
- C. Whether spousal support can be modified for cohabitation
 - 1. Need “holding our” as H & W – cohabitation alone is insufficient
 - 2. Consider whether *substantial change in circumstances*

VI. QUESTION – 100 (& REAL PROPERTY)

- A. Whether an *equitable property distribution on divorce may be modified* (whether partition of tenants in common which is contrary to a court decree which sets forth a property distribution is allowed)
 - 1. Court may make any award concerning the possession of property as justice requires
 - 2. ***Property distribution awards are NOT modifiable***
 - 3. Moreover, where exclusive use and possession of the parties’ marital premises is awarded, the other is precluded from seeking partition of the premises since the other spouse is neither in present, actual nor constructive possession of the premises
 - 4. ***Equitable property distribution on divorce concerning the marital residence may NOT be modified!***

VII. QUESTION – 47

- A. Whether separation agreement survived for purposes of a conversion divorce after H & W resumed their marital relationship
 - 1. With a duly executed separation agreement, can obtain *conversion divorce* if parties show they continuously lived apart for more than 1 year (occasional cohabitation is insufficient to rescind agreement)
 - 2. BUT intention to reconcile and resume married life together voids the separation agreement, the agreement is not revived
- B. Whether court has subject matter jurisdiction and spouse seeking divorce satisfied the durational requirement
 - 1. SMJ – basis for matrimonial divorce is presence of property within state; satisfied IF one party is domiciled in the state
 - 2. Duration Requirement
 - a. *None* – if both parties reside in NY, & grounds occur in NY, there’s immediate access to NY courts
 - b. *1 year* requirement – if only 1 party resides in NY & *plus factor*:
 - (i) Married in NY; (ii) some point they lived in NY as spouses, or (iii) grounds occurred in NY
 - c. *2 years* requirement – if you don’t have a plus factor, & only 1 spouse lives in NY
- C. Proper service on D in a *ex-parte* divorce action
 - 1. Proper service is made if made on – (i) *defendant*, (ii) *appointed attorney*, or (iii) *court order*
- D. Ex-parte jurisdiction – court can only grant the ex parte divorce decree and may not affect the incidentals to the marriage (e.g. rights to support and maintenance are personal and cannot be cut off by a court that lacks in personam jurisdiction over the party seeking to enforce those rights)
- E. Whether a party entitled to a maintenance award when the divorce decree granted in another state does not provide for support and the party is not in danger of becoming a public charge
 - 1. Court will consider the case in light of the Equitable Distribution Law and will award maintenance according to the reasonable needs of the parties – ex parte decree from another state will not abrogate rights to support
 - 2. Court will need to have personal jurisdiction to both parties to grant a award

VIII. QUESTION – 8 (& DOMESTIC RELATIONS / COMMERCIAL PAPER)

- A. Whether a judge may interview a minor in chambers without putting the conference on the record
 - 1. Family Court Act empowers a judge to take the unsworn testimony of a minor – because the best interest of the child are at stake, the judge may take the child’s testimony in camera, even over the objections of both parties
 - 2. The only record that need to is a *stenographic record* of the interview – the lack of record is reversible error ONLY if, on appeal to the appellate division from a judgment or order of the court
 - 3. Thus judge’s action of not getting a record is not improper in and of themselves, UNLESS, upon appeal to the appellate division, a stenographic record of the in camera interview was not produced, the judges’ actions do not amount to reversible error
- B. Whether the standard to be applied in a hearing to determine whether parental rights should be terminated is “the best interests of the child”
 - 1. Here, the case is dealing with *rights of the parents* – it can be terminated by a showing of (clear can convincing evidence):

- a. Abandonment – failure to visit for a period of 6 months (though they can)
 - b. Inability to care for the child due to mental illness or retardation
 - c. Permanent neglect – failure to substantially and repeatedly maintain contact with or plan for the future
 - d. Severe or repeated child abuse
2. Termination of parental rights should be contrasted with denial of custody – custody may not be denied absent a showing of some unfitness or extraordinary circumstances

IX. QUESTION – R-1 (& PROFESSIONAL RESPONSIBILITIES)

- A. Whether parties executing a separation agreement can obtain a valid conversion divorce – *see above* (need to be filed prior to commencement of a divorce action)
- B. Whether a party may request blood testing to determine the paternity of a martial child and deny the spouse’s paternity
 1. Can be motioned or ordered by court –
 2. BUT no such test is to be ordered, upon a written finding by the court that it is not in the best interests of the child on the basis of *res judicata*, equitable estoppel, or the presumption of legitimacy of a child born to a married woman
 3. Courts are more inclined to impose equitable estoppel to protect the status of child in an already recognized and operative parent-child relationship
- C. What standard to be applied when a custodial parent petitions the court for approval to geographically relocate with a child and the relocation will substantially affect the non-custodial parent’s visitation rights
 1. Standard – *preponderance of evidence that the proposed relocation will serve the best interests of the child*

X. QUESTION – 52

- A. Whether parties executing a separation agreement can obtain a valid conversion divorce – *see above* (need to be filed prior to commencement of a divorce action)
- B. Whether W’s counterclaim for divorce based on adultery is proper
 1. Based on counterclaim after the date of separation is improper in an action for divorce based upon a separation agreement, unless the separation agreement has been rescinded
 2. Grounds of adultery – necessary to allege *opportunity, inclination, and intent to commit adultery*
- C. Whether family court has jurisdiction to modify the support terms of a Supreme Court
 1. Family Court does NOT have jurisdiction for divorces, separations or annulments
 2. Family Court has concurrent jurisdiction in support proceedings (except where the divorce decree is issued by the Supreme Court and contains a clause specifying that the decree be enforced or modified ONLY in the Supreme Court)
- D. Whether Family Court has discretion to modify support orders
 1. Family Court Act enables the court to modify by assessing
 - a. There has been change of circumstances warranting the increase
 - b. Modification is in the best interest of the child

XI. QUESTION – 53 (& NY PRACTICE)

- A. Whether the court had jurisdiction over H and the divorce action
 1. D must be properly served
 2. There must be a statutory basis for jurisdiction – meaning compliance with *durational requirement*
 - a. A court in any matrimonial action may exercise personal jurisdiction over the D regardless of whether the defendant is a non-resident or domiciliary of the state – if the party seeking support complies with the durational requirement
- B. Whether a party’s testimony alone is sufficient to prove annulment
 1. Annulment based on fraud – 3 years S/L (begins to run from the date of the discovery of the facts constituting fraud by the defrauded party)
 2. For evidence – need other satisfactory evidence of facts (party’s testimony is insufficient as a matter of law)
- C. Elements of abandonment

1. Willfully and voluntarily abandoned	3. without intent to return
2. without justification	4. for a period of more than one year before suit
- D. Whether savings account constituted martial property or separate property
 1. Bequeathed property is separate property not subject to equitable distribution (regardless of date of receipt)
 2. Totten trust accounts – remains the property of the creator until the creator dies without having revoked the disposition (P has no right to the proceeds of the second account)

XII. QUESTION – 61

- A. Whether *lump sum settlement of support* obligations is enforceable
 1. NY recognizes no general ban on lump sum settlements of support obligations – except in the case that the spouse has dissipated the lump sum and is in danger of becoming a public charge, then the court will invalidate the agreement and enforce a duty to support
 2. NY generally applies general contract principles to separation agreements – to the extent that the agreements do not contradict public policy
- B. Whether the judge may take a child’s testimony over her parents’ objections
 1. Yes where the best interests of the child are at stake

2. But court cannot take a child's wishes as the exclusive determination factor
- C. Whether the interests of the child required a change in custody
 1. Interests of the child are paramount – agreement regarding custody will be given “due regard” but is not controlling (absent a compelling reason, the courts will not alter custody agreements)

XIII. QUESTION – 66

- A. Whether claim for abandonment may be sustained as a matter of law (*see above*)
- B. Whether State X had jurisdiction to decree the divorce
 1. A divorce decree is entitled to full faith & credit if the rendering court had jurisdiction to grant the decree
 2. Court has jurisdiction if it has jurisdiction over at least one of the spouses and the other is notified
- C. Whether court may modify the custody decree of a sister state court
 1. PKPA – mandates full faith and credit given to child custody determinations of other states
 2. UCCJEA – may modify UNLESS
 - a. It appears that the court that rendered the decree did not or does not now have jurisdiction, and
 - b. The modifying court has jurisdiction
 3. General jurisdiction lies in the home state of the child (lived with parent at least 6 months)
 4. If no state has jurisdiction – a state may exercise jurisdiction in certain circumstances (e.g. emergency)

XIV. QUESTION – 74

- A. Whether breach of a separation agreement is a valid ground for a judgment of separation
 1. Neglect or refusal of the D-spouse to provide for the support of P-spouse, is ground for separation
 2. Spouse's failure to pay amount due under the separation agreement entitles the other spouse either
 - a. Affirm the agreement and bring an action on the agreement; OR
 - b. Treat the breach as a repudiation, which terminates the agreement, and reassert statutory rights
- B. Whether the ground of living separate and apart for more than one year can be satisfied under a separation decree
 1. Conversion divorce – requires either (i) separation decree; or (ii) separation agreement
 - a. Reconciliation does not abrogate the separation decree (ONLY nullifies a separation agreement)
 - b. Separation decree can be altered or revoked by the court only
- C. Whether the business is marital property to be distributed under the equitable distribution law
 1. All property acquired by either spouse during marriage is marital property for ED – that the judgment of separation did not deal with the business does not preclude the court from ED

XV. QUESTION – 83 (& NY PRACTICE)

- A. Whether court had long-arm jurisdiction
 1. Allows exercise of long-arm jurisdiction over a non-resident party if (i) *party to be affected had, at some time in the recent past, a connection with NY*, & (ii) the party seeking support is a resident of or domiciled in the state at the time the claim is made
 2. Sufficient connections are (i) NY was the matrimonial domicile of the parties at or about the time of their separation; (ii) the defendant abandoned the plaintiff in NY, or (iii) the claim accrued under the laws of NY or under an agreement executed in NY
 3. If NO personal jurisdiction – there can be no action for awarding maintenance
- B. Whether court had subject matter jurisdiction (marital status) – see above for duration requirement to satisfy
- C. Whether adultery is a ground that may be considered when determining maintenance or property distributions
 1. Maintenance – fault can be considered (but unlikely that marital fault, in and of itself, unless egregious, would be upheld as a standard to deny a spouse maintenance entirely)
 2. Distribution – fault can NOT be considered