**1/19/12 – I. WHAT IS A FAMILY?**

What is a family?
My definition: A group of people, united by blood, marriage, or emotional bonds.
Lots of other people: adoption/financial/choice

**Kavanagh – Rewriting the Legal Family**
Who counts as a family member?
Biodad, biomom, and siblings, according to the law.
Foster children: nope.
Who else is here, that we should figure out if they count or not:
Mother's female partner, Lisa – no legal standing

Why limit the number of parents to 2?

Kavanaugh – Models of family

| | Exclusivity model | Care-based model |
|---|---|---|
| Pros | Clarity – you are either a legal parent or a legal stranger.<br>Easier to make decisions with fewer people. | Gives decisionmaking power to those who know the child well, and that the child knows well. |
| Cons | Excludes people with great deal of emotional attachment, who may know the child well<br>Actual parents may not be in the picture, so there's no reason they should have decisionmaking authority.<br>Dissuades 3rd parties from establishing relationship with child, if they know that the parents can terminate it. | Can be difficult to make determinations |

**Braschi v. Stahl Associates Co. (NY 1989) – p. 15 –** male partner determined to be family for the purpose of not evicting him from rent-controlled apartment upon partner's death.

Who is a family member?

Pros and cons of court's approach:

| | |
|---|---|
| Pros | Allows for recognitions of loving relationship, even if there is no legal union |
| Cons | Will create gray areas – this couple was together 11 years. What if they were together 11 months? |

**Village of Belle Terre v. Boraas (US 1974) – p. 28 –** *The state police power, through zoning ordinances, is not limited to the elimination of unhealthy conditions; it can create zones where family and youth values and quiet neighborhoods can grow and prosper. Town allowed to restrict single-*

*family dwellings to one or more persons related by blood, adoption, or marriage, and prevent college students from cohabiting.*

Family = one or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of servants. A number of persons, but not exceeding 2 living and cooking together as a single housekeeping unit though related by blood, adoption or marriage shall be deemed to constitute a family

Didn't want to exclude unmarried couples, but don't want large groups of unmarried people

**1/24/12**

**Penobscot Area Housing Dev Corp v. City of Brewer (ME 1981) – p. 32 –** *A group of retarded individuals living in the same quarters is not a "family" for zoning purposes.*

Family = single individual doing own cooking, living upon premises as separate housekeeping unit or elective body of persons doing own cooking and living together as a separate housekeeping unit in a domestic relationship based upon birth, marriage or other domestic bond.

Intended to have group home for six retarded persons – would have 2 staff members that didn't necessarily reside at the home – persons would be paid (court doesn't explicitly mention that) Staff would serve on a rotating basis – therefore, a central authority figure was absent from the plan. This distinguished several cases that the plaintiffs tried to cite to.

**Borough of Glassboro v. Vallorosi (NJ 1990) – p. 34 –** *Ten college students living, cooking, cleaning, sharing chores WAS considered a family unit for statute purposes.*

Family = "one or more persons occupying a dwelling unit as a single non-profit housekeeping unit, who are living together as a stable and permanent living unit, being a traditional family unit *or the functional equivalent*."

Ten unrelated college students living in one house – often cooked for each other, ate in groups, shared chores, yard work, etc – common checking account paid for bills

**Moore v. City of East Cleveland (US 1977) – p. 1118 –** *Grandmother living with two grandsons who were not brothers to each other IS ok – city cannot create laws enforcing extremely narrow definitions of family.*

**Schneider – The Channeling Function in Family Law (1992) – p. 47** -
Family law channels individuals into certain family forms:
Marriage – there are 300 benefits in NY (and 1100 nationwide) that attach to marriage – see Baker v. State on page 10 for a starter list.
- -tax benefits
- -logistical ease
- -laws making divorce more difficult

Parenthood as a married couple
- -don't have to establish paternity – it is presumed
- -in some cases, can only legally have sex within marriage.

How does the law channel individuals into marriage and marital parenthood?

-inhibits divorce
-disfavors other institutions
-protects spouse upon divorce or death of spouse
-gives marriage aura of legitimacy
-fewer rights for unmarried fathers
-hurdles for nonmarital children seeking to inherit
-presumption of paternity
-grant married parents exclusives right to decide who has access to children

Federal Healthy Marriage Initiative – gov't initiative to encourage marriage
-federal grants for healthy marriage promotion activites

have these been effective?
-probably don't make a difference for wealthier people who were going to get married anyway – it's really targeted at poor people, and encouraging them to get married.
→we have no evidence that these programs are working.
-lots of feminist groups said that you would encourage dependent relationships

current trends in marriage:
marry later
increase in cohabitation
increase in nonmarital births
class, race differences

SHOULD the law channel individuals into marriage?
-better for the children, certainly

Why do individuals marry? Aside from the legal benefits
Why focus on marriage?

Regan – Alone together – Law and the meanings of marriage

Reasons for decline in divorce rate:
Pamela Paul: How divorce lost its groove

## 1/26/12 – <u>II. MARRIAGE</u>

### A. FAMILY PRIVACY

**McGuire v. McGuire (NE 1953) – p. 146** – *No support payments can be granted where the parties continue to live together as husband and wife. State doesn't want to intrude too deeply into*
P married D knowing that he was extremely frugal. D provided P with only meager amounts of money and P was often forced to work individually to pay for needs. P brought a suit to recover maintenance and support money.

Why didn't wife just leave?
She doesn't want to divorce him, she just wants the court to grant her, say, indoor plumbing
Also, the era – divorce was more frowned upon
Maybe concerned about losing her property from a previous marriage

If state wants to encourage marriage and discourage divorce, why doesn't it grant her some sort of remedy?
-they don't want to intrude into the privacy of marriage
-especially don't want to intrude into household expenses
why doesn't court want to get involved in an ongoing marriage?
-don't want people going into court every time they have disputes – slippery slope – money is one thing, but what other marital duties are there that the court may want to not get involved in?

she could have gotten a legal separation – "divorce from bed and board"

was this doctrine of marital privacy good for the family as a whole?
-bad in terms of domestic violence – courts would, until the 70s or 80s, stay out of these cases for the most part
-puts married people at a disadvantage compared to cohabiting people

**Griswold v. CT (US 1965) – p 238 –** *Laws restricting the use of or dissemination of information about contraception by or to married couples violates the constitutional right of privacy.*
State law penalized those who used anything for the purpose of preventing conception
-they say they are trying to discourage illicit (i.e. unmarried) sex

nowhere in the constitution does it say that you have the right to privacy – if that's not in the constitution, what is the "textual comport" for finding that the law is unconstitutional?

Also mention the 3rd and 1st amendments as emphasizing the "penumbra" of privacy created

White's Concurrence – the law which prohibits giving married couples contraceptives does not advance, in any way, the state's goal of preventing illicit sex. This statute is too broad. He seems like he's saying it would be OK if it were narrower.
Privacy interest is only created by marriage – no privacy interest for just one person?

**Eisenstadt v. Baird (US 1972) – p. 241 –** *A law treating married and unmarried people differently regarding contraceptive devices is unconstitutional.*
Baird was arrested for distributing contraceptives after lecture at BU to group of students on contraception.
Extends right of privacy down to unmarried people – no justifiable reason for treating married people and unmarried people differently. You can't do that.
Counterargument – everybody is treated equally – anybody can get married!

Law prohibited giving contraceptives to unmarried persons

**Lawrence v. TX (US 2003) – p. 243 –** *EPC of 14A protects freedom to engage in private conduct among homosexual and heterosexual partners alike.*
Two men arrested after cops bust into their house, after a false report of a weapons disturbance, and find them having sex. Arrested for deviate sexual intercourse with a member of the same sex -
Law basically criminalizes homosexual sodomy
Purpose? Morality?

Court admits that it got it wrong in Bowers

So, what exactly is the holding in Lawrence?
State cant' go inside the home or any other private setting to block activity between two consenting adults? (not exactly – prostitution can still be outlawed)

**1/31/12 – B. THE FUNDAMENTAL RIGHT TO MARRY**

Why should the state have the ability to regulate marriages?

Legitimate state interests –
prevent marriage to minors
protection of children
health
reflecting moral values
etc

**Loving v VA (US 1967) – p. 59 –** *The freedom to marry or not marry a person of another race resides with the individual and cannot be infringed by the state.*
A black woman and a white man fled to DC to get married to avoid VA's prohibition on interracial marriage. returned to VA, found guilty, granted suspended sentence if they left state.
Statute criminalizes the marriage of whites to non-whites.
Non-white races are allowed to marry other non-white races
Whites can also marry people who are 1/16 or less Native American

State's argument that the statute applies equally to blacks and whites – this isn't the case at all

Who makes the call on what race somebody is?
-birth certificate?
-clerk?

State's reasons for maintaining statute: (see page 60 para. 2 and 3)
-maintaining racial purity
-traditionally, marriage left to states, without federal intervention, according to 10th amendment.
-we don't know if interracial marriages are actually harmful or not, but since the evidence is mixed, the legislature's judgment should be respected. (this will be seen again in Hernandez, next week).

State says that it applies to blacks and whites equally so it's ok – we know this isn't true

Equal protection clause is violated – what else?

Why does the court find that this restriction violates the due process clause?
-depriving fundamental right to marry on "so unsupportable" a basis as racial classification

**Zablocki v. Redhail (US 1978) – p. 62 –** *A state statute denying a fundamental right to marry must be supported by important state interests and be closely tailored to effectuate such interest in order to be constitutional. Merely being behind on child payments is NOT a sufficient reason to deny right to marry.*
Court applies what looks like strict scrutiny. Why?
It "directly and substantially interferes" with a fundamental right – the right to marry. In such cases, they will apply strict scrutiny.

Here, basically, Redhail will never be able to marry – based on his earnings, kids will always be on public assistance.

This statute is overbroad – "clumsy"
Doesn't consider that marriage may actually improve financial systems

Restrictions on incestuous/plural marriages – are these restrictions subject to strict scrutiny?
Standard – does the restriction substantially interfere with your right to marry?
Some people say for incest, no it doesn't interfere – others say, if the right to marry means the right to marry the person of your choosing, then incest prohibitions damage this right and should be subject to strict scrutiny

Is this an EP case or a DP case?
Lower court struck law on EP, but higher court always discusses DP

**Turner v. Safley (US 1987) – p. 71 –** *The constitutional right to marriage is not removed in the prison context.*
Statute required MO inmates to get permission from superintendent of prison in order to marry, where permission is to be given only if there are compelling reasons to do so (generally only pregnancy or birth of illegitimate child).
State argued that prisoners didn't have a fundamental right to marry
(SC says that they have the right to marry, but still no right to conjugal visits)
what standard of review do they use? They say intermediate review –
they don't use strict scrutiny
rejects strict scrutiny – why?
-maybe because prisoners could still marry if there were a compelling reason

bottom of p 72 – <u>regulation is not reasonably related to the state's penological interests</u>

**Keeney v. Heath (7th Cir 1995) – printout –** *Correctional officer being forced to choose between marrying an inmate and keeping her job WAS constitutional* – in view of security and disciplinary concerns.

**2/2/12 – C. RESTRICTIONS ON WHO MAY MARRY**
**TRADITIONAL RESTRICTIONS**
**A. INCEST**
**Singh v. Singh (CT 1990) – p. 83 –** *Marriage between half-niece and half-uncle void as incestuous* – English law forbid half-blood incest just as much as whole-blood incest. Don't have to listen to CA marriage b/c of FF&C – "repugnant to public policy"

**Back v. Back (IA 1910) – p. 89** – *A man may validly marry the daughter of his ex-wife if the first marriage is legally terminated prior to the second marriage.*

**Kershaw, Shaking off the shame (printout)**- cousin marrying is losing its stigma, slightly, because some people are fucking morons, and because the data shows it's not as bad as originally thought in terms of offspring genetics.

VOID v VOIDABLE marriages:
Ab initio = it's just voided. Don't even need to go to court to get it voided.

| Void *ab initio* | Voidable – may be annulled, after court appearance. Valid until determined otherwise. |
|---|---|
| Incest<br>Bigamy<br>Same sex<br>Mental illness/incapacity (sometimes) | Age<br>Physical incapacity<br>Mental illness/incapacity (sometimes)<br>Fraud<br>Coercion/dures<br>intoxication |

**B. AGE**

**Moe v. Dinkins (NY 1981) – p. 95 -** *A state law requiring minors to get parental permission before marrying must be rationally related to state interests. Court holds that such a rule is, so it's ok.*
Reasons for such a rule:
-protection minors from immature decisionmaking
-prevent unstable marriages
Parental consent helps avoid these problems.

Why is there a different age minimum for boys and girls to marry? Boys is 16, girls is 14?

Girls can get pregnant
Gender stereotypes – women don't need an education as much b/c they will not be the primary breadwinner, so they can get married earlier

Requirement for minors to get permission from parents to marry – why?
Parents have right to raise children as they see fit
Parents (ideally) have kid's best interest in mind

Is the restriction a direct and substantial interference with marriage? If so, we apply strict scrutiny. However – they applied rational review, because the burden was light or moderate at best.
-they can still marry with parental permission
-even without parental permission, can still get married in a few years.

Assumption is that parents always act in the best interests of their children – even though this was NOT the case here, it's still a very difficult presumption to rebut. Must show that the parent is NOT AT ALL motivated by the child's best interests, not just that the parent is considering their own interests first. Usually requires physical harm to rebut this presumption.

**3. RESTRICTIONS ON PROCEDURE**

**Rappaport v. Katz (SDNY 1974) – p. 132 –** *Federal courts should not get involved in supervising marriage forms and procedures in city clerks' offices, which are an area fundamentally of state concern.*
NYC law required gender-appropriate clothing and exchange of at least one ring. SDNY said that this isn't something they want to create a federal/state conflict over.

This is not enough of a violation of the fundamental right to marry to get involved.

Requirements:
Marriage license
Witnesses
Blood tests (minority, but historically was tradition).

## 4. POLYGAMY

**Bronson v. Swensen (UT 2005) – p. 99 –** *The right to privacy and other individual constitutional rights do not protect polygamist marriage.*
**-**no fundamental right to marry

**Brown v. Herbert (Sister wives) complaint** – UT doesn't' prosecute polygamy unless there is a relation to some other crime
Note – they are not asking UT to grant legal recognition to their marriages; They just want to be left alone, with one legal marriage and other spiritual marriages

**In re Steed ( ) – supp 1 –** *can't remove kids from polygamy situation just because there is polygamy. Must be actual danger*

**Sanderson v. Tryon (UT 1987) – p. 105 –** *A finding that one parent practices polygamy is not sufficient to deny her custody. It is a factor to consider, though.*
Two children were born lo Sanderson (P) and Tryon (D) during their polygamous relationship. A third child was born shortly after P left the relationship to marry Bowles, another polygamist. D abandoned polygamy after P left him. P took the children with her and brought a child custody .suit. Both parties moved for summary judgment.

## 2/9/12 – MARRIAGE EQUALITY
## 5. SEX/GENDER

6 States have marriage equality. 2 have legislation pending

CA's road to marriage equality – see slides.
1999 – DP act, granting all benefits of marriage
2000 – prop 22 – only marriage between man/woman recognized in CA
May 2008 – prop 22 violates fundamental right to marry
May-nov 2008 – 18,000 same sex couiples marry
Nov 2008 – majority of CA voters approve prop 8, saying that marriage is between a man and a woman
Strauss v Horton – CA 2009 – upholds prop 8, but holds that marriages already performed were valid
May 2009 – prop 8 challenged in fed court
Aug 2010 – perry v. Schwarzenegger – says prop 8 violates 14th amendment DPC and EPC.
Feb 2012 – perry v brown -9th cir finds that prop 8 violates against gays/lesbians in violation of federal EPC. EPC prohibits taking away from one group a previously recognized right absent a legitimate reason.

What did the proponents of prop 8 say? (this was NOT the state – they were not defending prop 8.)
-children's welfare
-providing a stable home environment for procreation
-allowing gay marriage will mean that schools will teach children that they can marry people of the same sex
-"accidental procreation" argument – because heterosexuals can procreate accidentally, they need an incentive to get married.
-courts shouldn't decide, legislature should decide.

-people have already decided.
-same sex couples are less dependent on each other for financial reasons

NY passes NY Marriage Equality Act, July 2011
-same sex marriages are valid. They are to be treated the same as opposite-sex marriage.
-there is a religious exemption, however – religious institutions aren't required to perform same-sex marriages.

**Goodridge v. Dep't of Pub. Health (MA 2003) – p. 109 –** *The MA constitution forbids the creation of second-class citizens and therefore may not deny the protections, benefits and obligations of civil marriage to same-sex couples wishing ot marry.*
-doesn't even fail a rational basis
-marriage has always been a secular institution
-better laws for marital children, not fair to deprive them

**Hernandez v. Robles (NY 2006) – printout -** *the New York Constitution does not compel recognition of marriages between members of the same sex. Whether such marriages should be recognized is a question to be addressed by the Legislature.*

-Why read Hernandez v. Robles?

Why no violation of DP or EP under NY constitution?
-depends on how narrowly or broadly you define the right? "right to marry someone of the same sex" is not a fundamental right, compared to "right to marry somebody you love"
How does majority distinguish Hernandez from Loving?
Why doesn't the majority apply Zablocki's "direct and substantial interference" test?

Concurrence, on page 6 – does not think there is a fundamental right at issue:

NJ problem – NJ has civil unions with all of the same benefits of marriage
State will say - no reason to have "title" of marriage, because no benefits of marriage are being denied.
-no fundamental right to marry
-

DOMA – 1996 – states don't need to give credit to other states' gay marriages

**2/14/12**

**Kantaras v. Kantaras (FL 2004) – printout –** *in Florida Statutes, the term 'sex' should refer to "immutable traits determined at birth." FL court says that a post-op woman-to-man cannot marry a woman according to the law, so they declare the marriage void ab initio.*

Transgender post-op woman-to-man married woman.
Could woman-to-man marry a man?

We don't really have a satisfactory answer yet. It looks too much like a same sex marriage for some courts to be comfortable with it, yet.

Minority rule: New Jersey, cited in Kantaras:
MT v. JT – husband sought annulment on ground that his wife was a male to female transsexual. Court rejected this argument. Says that after transgender surgery, if person fully functions sexually as their new gender, they can marry legally as a member of their new gender.

## 6. COERCION AND FRAUD

**Lester v. Lester (NY 1949) – p. 135 –** *Antenuptial agreements which purport to invalidate the marriage are unenforceable.*
Husband has two arguments about why this marriage should be declared null and void:

1. Agreement before marriage saying that marriage is taking place because of threats against him and herself by the wife
2. Agreement during marriage saying that the marriage ceremony was null and void.

Why do these fail?

1. Court says that the marriage was valid, and even these agreements do not change the validity of the marriage.

Even though marriage is a contract that requires consent…

Marriage is a contract between 3 parties – 2 people getting married, and the state. Parties must comply with whatever conditions the state imposes.

Second argument – he was under duress (see p 139)
Court says – he was with her for 10 years. It's slightly unbelievable that you would be under duress for that long.

**Johnston v. Johnston (CA 1993) – p. 138 –** *In order to get an annulment of marriage on the basis of fraud, the fraud must go to the essence of the marital relation.*
*"The concealment of incontinence, temper, idleness, extravagance, coldness, or fortune inadequate to representations cannot be the basis for an annulment."*
You can get a divorce very easily in CA – why fight for an annulment?
-probably because property was involved.

When she met him, and before marriage, she was unaware of his drinking problem. She knew he was unemployed, but did not know that he would refuse to work after marriage. She said their sex life was unsatisfying. He stopped shaving and bathing after marriage.
She says he misrepresented himself in order to get married.

Court says – this is NOT enough to get an annulment. "The concealment of incontinence, temper, idleness, extravagance, coldness, or fortune inadequate to representations cannot be the basis for an annulment."

Fraud does not go to the very essence of marriage, so there is no annulment.
Infertility is not sufficient grounds for annulment, alone:
However, something can be grounds if somebody made a misrepresentation, without which the other party would not have married them

Question, then: what is the essence of marriage?
What if somebody lied about being previously married, even if the previous marriages have been properly ended?
Example – one woman told husband she had been married once, they get married, he finds out she has been married 5 times – court says this is insufficient to warrant annulment

Chastity
Permanence
What about her representing that she wants to have children, but once they're married, she says she doesn't want to have a kid?
This DOES cut to the essence of marriage.

Courts are much more likely to grant annulments when marriages are short and when there are no children. Once you annul a marriage with children in it, the children become illegitimate, with legal handicaps

Criminal record – UT finds that lying about a criminal record goes to the essence of marriage (even though other states have not found this)

Life expectancy – couple divorces, he then tells her that he has a terminal illness and will die soon. They remarry, 3 years later he is still alive, somehow. She files for annulment based on fraud. (basically saying that she only married him because he was going to die soon) Does this go to the essence of marriage?

**Kober v. Kober (NY 1965) – printout –** *Jewish woman who married man who was secretly a former SS member, and anti-semetic, COULD seek annulment for fraud.*
Couple gets married. Turns out that he was not only a member of the SS, he was virulently anti-semetic. Demanded that she not associate with any of her Jewish friends.
What is the standard that court uses to determine fraud? Must have been material, and if it had not been practiced, one party would not have agreed to marriage

How does this compare to Johnston?
Must look at intent/mindset of parties, rather than what the court determines is essential – maybe harder to determine than Johnston standard. We are trying to determine if there is consent.

**2/16/12**

Essence of marriage, continued – see slides
Rhinelander v. Rhinelander – guy said his wife misrepresented her racial ancestry

Bigamy – last in time presumption (p 108) – DC says presumption is that most recent marriage is valid.
Courts don't like to invalidate marriages – had to come up with rule where you have two spouses each claiming to be spouse of decedent.
-must come in with evidence that the second marriage was invalid

Recap: restrictions on marrying slide

**D. COMMON LAW MARRIAGE:**

What is it? Compare to cohabitation
Live together for so long, and hold themselves out as married – have joint accounts, share finances
Does there need to be a contract?
There don't need to be witnesses – how do you prove marriage, then? Witnesses at later times can say that one person or both held themselves out as married.
Factors showing intent to be married? Calling other person your spouse shows an intent to be married; we can't read your mind, so we will assume you intended to be married if you say the other person is your spouse.
Intent determined by duration of relationship? There's no magic amount of time that creates a common law marriage.
What factors are crucial, and which are merely persuasive?
Intent
ELEMENTS
-Present intent and agreement by parties able to marry
-continuous cohabitation
    -for how long?
    -compare to formal marriage
    -where?
        -even if your own jurisdiction doesn't recognize common law marriage, you may be common-law married by spending some time in other states
-reputation in community as married/public declaration

Why have most states abolished it? Should all states abolish? (more to this slide)
FF&C (but see Missouri)
**In re Estate of Love (GA 2005) – p. 141 –** *A common law marriage may be found when a M and a W cohabitate and hold themselves out as husband and wife, such that society views them as such.*
Lower court's jury said that there was a common law marriage. CoA affirms.
Preponderance of the evidence standard (other jurisdictions have
Evidence for: testimonial evidence showing they called themselves H and W

Evidence against: docs existed showing that couple didn't consider themselves husband and wife

There is no such thing as common law divorce – once you're in a CLM, don't simply get to leave the marriage for any reason you want – must satisfy the divorce requirements in your jurisdiction. CLM is easier to get into, but just as difficult to leave.

Putative spouse doctrine – parties are not married, no CLM (not recognized in all jurisdictions)
A **putative marriage** is an apparently valid marriage, entered into in good faith on the part of at least one of the partners, but that is legally invalid due to a technical impediment, such as a preexistent marriage on the part of one of the partners. Unlike someone in a common-law, statutory, or ceremonial marriage, a putative spouse is not legally married. Instead, a putative spouse believes himself or herself to be married in good faith and is given legal rights as a result of this person's reliance upon this good-faith belief.
-good faith belief that formal marriage is valid (even though it isn't, for some reason)
-quasi-marital property
-support/maintenance
    -jurisdictional split
    -see annulment statute

Hypo 1:

Putative spouse doctrine protects Caro in this situation (?) – except maybe Victor doesn't have a good faith believe that his first marriage has been terminated. Chances are that this is the case, and court would probably find that he didn't have a good faith belief (unless he signed a divorce paper and she never filed them).

Hypo 2: ship captain marriage
Is this a common law marriage? It might be; they intended to be married. You don't need to specifically seek to enter a common law marriage, just a common law marriage.
Definitely covered by putative spouse doctrine.

What about bigamy question?

**E. TRADITIONAL MODEL OF MARRIAGE AND CHALLENGES TO IT**

**1. GENDER**

**Graham v. Graham (MI 1940) – p. 151 –** *A contract between persons contemplating marriage to change the essential incidents of marriage is illegal.*
Contract was for her to pay him 300 dollars a month, and him to travel with her. As traditionally (see below), this was illegal.
Traditional marriage:
-Husband chooses domicile
-H has duty to support
-W couldn't have own career/way to support self
-alimony was an extension of this.

Why doesn't court let people contract around the traditional marriage duties?
-would create endless bickering and controversy
-makes institution less significant
-eliminates flexibility of marriage

**Bradwell v. IL (US 1873) – p. 154** – *Woman not allowed to be admitted to bar, because she was a woman. Most women are married and therefore have to tend to the home; can't make exception for unmarried woman.*

**2/21/12**

Why can't you delegate marital duties?

**Borelli v. Brusseau (CA 1993) – printout –** *Can't make a contract with spouse where consideration is caring for the spouse; you already have this duty.*
H was in hospital with stroke. Entered oral agreement providing certain things to W if she took him back to home and cared for him, rather than stay in the hospital. She performed her promise but he did not perform his, as his will did not leave her all the things she was promised.
Court: she isn't entitled to these things. Can't contract around the duty to care for husband; she had that duty already. No consideration.

Dissent: this is stupid. If she threatened to leave, and he offered these things in order to induce her to stay, that would be allowed; why should couples on the verge of separating, or already separated, have expanded contracting rights?

"respect, fidelity and support"
Can't have a prenup that allows people to have intimate relations outside the marriage – can't contract around that element of marriage because it's one of the essential elements of marriage

Is this a traditional or modern marriage?
Traditional – there are certain duties, and you can't get around them.

**Nevada Dept. of HR v. Hibbs (US 2003) – p. 196 –** *Congress had the constitutional authority to allow an individual to sue a state in federal court pursuant to FMLA provisions.*
**Statement of the Case:** Respondent Hibbs, is seeking damages as well as injunctive and declaratory relief under the FMLA of '93, claiming his employer's wrongful termination while he was caring for his ailing wife denied him his rights under the family-leave provision.

**Issue/s:** Whether Congress acted within its constitutional authority when it sought to abrogate the State's immunity for purposes of the FMLA's family-leave provision.

**Facts:** FMLA of 1993 gives eligible employees 12 weeks of unpaid leave annually for any number of reasons including the onset of a serious health condition of a family member or spouse. In April and May of '97, Hibbs sought leave under the FMLA to care for his ailing wife, recovering from important surgery; he was granted his 12 weeks, which allowed for intermittent use, but exhausted his leave and was terminated for not returning to work by November of '97.

**Reasoning/Application:** FMLA seeks to eliminate gender-based discrimination in the workplace; statutory classifications that distinguish b/w sexes is subject to strict scrutiny and must serve important governmental objectives and the discriminatory means employed must be substantially related to achievement of those objectives to withstand such scrutiny. The persistence of the States unconstitutional discrimination justifies Congress' passing of the prophylactic legislation. There is a disparity of private sector employees who receive maternity as opposed to paternity leave, with the latter being given only half as much. This leads to the stereotyped beliefs that allocation of family duties remain with women and therefore men don't need as much time off.
Congress also had evidence of state laws and policies that were being applied in a discriminatory way; it was aware of the problems that arise when discretion for granting leave is given entirely to one supervisor, unequal treatment is inevitable. By setting a minimum leave standard, the FMLA sought to ensure that gender stereotypes in the workplace would reduce employers incentives to engage in discrimination .

State argument – they are challenging the statute – say that his 14th amendment rights have not been violated – You can't sue us because we're immune under the 11th amendment
Congress can enact this, however, because state can consent to be sued (state says, no, we didn't consent) – but, congress can subject state to liability if when it enacts statute, it is clear that state can be sued if what congress is trying to do is prevent discrimination under the 14th amendment.

What about employers that didn't provide leave for either gender for caring for children? This is probably discrimination in application, even if not in the rule. Women are much more likely to take time off.

Maybe before the FMLA, there was an incentive to not hire women because they would take more time off.

Why are so few men taking leave?

-traditional gender roles (tension between laws/norms)
-if it's unpaid, usually the woman makes less, so it's less of a hit to income if the women leave

FMLA is working to some extent; not going to eliminate gender gap with one law and 30 years.

Some people argue that leave should be paid, and that leave should be mandatory

**Hirshman Article (supp 43) –** Rich white women, even when educated, often quit the workforce to take care of children.

**Nguyen v INS (US 2001) – printout –** *When child is born abroad to one citizen parent and one non-citizen parent, it is OK for the law to impose greater requirements for acquisition of citizenship for the child when the citizen parent is the father.*

When child is born abroad to one citizen parent and one non-citizen parent, law imposed greater requirements for acquisition of citizenship for the child when the citizen parent is the father.
-blood relationship established
-father had US nationality at time of birth
-father agrees in writing to support kid financially until age 18
-while kid is less than 18, a. kid is legitimate, b. father acknowledges paternity in writing, and c. paternity established by court.

SC says: this is justified.
-importance of assuring that a biological relationship exists
-Importance of assuring that a father/child relationship exists, apart from the biological one.

## 2. PRE-NUPS

Only 3-5% of couples have a prenuptual agreement – why? Likelihood of divorce is relatively high. This is the only way to get out of the state-enforced rules.
-awkward
-don't think their marriage will end ("optimism bias")
-if you marry young and don't have assets, it doesn't seem worth it to do prenup

Why DO people do prenups? (get slides from ANGEL)
-avoid litigation
-protect assets
-elective share
-protect family business/heirlooms
-alter presumption of gift to marriage
-protection against spouse's creditors including children from prior relationship
-protect children from prior relationship
-child's college expenses – may be disagreements on who should pay for the education
-avoid conflict during marriage

Nine states don't allow people to waive right to support via prenup, even though they can waive right to property: why?
If people don't get support, they might be a public charge

UPAA – p. 215 – premarital agreements

Can contract anything as long as it doesn't contravene public policy
p. 211 –
domicile will be decided by H in consideration of best interests of H's career (basically forcing her to come with him)
f. housekeeping – W will maintain household
-what is there that H can do, legally, to enforce this?
→courts don't like to get involved in ongoing marriages (like the wedding attire case – court says we don't care to get involved, basically)

So many of these provisions are not enforceable, so, why do they get put into prenups?

Up until the 70s, many states did not enforce prenups
"Antenuptial or Anti-nuptual?"
-encourage divorce?
-only 3-5% have prenups. Why so few?
People aren't acting entirely in their best interests
-divorce higher or lower?
-divorce rate IS higher for couples with prenups – but, there is no indication that this higher rate is caused by having prenups. Prenups are more common in 2nd and 3rd marriages, as are divorces.

Requirements and Limits
-must be in writing under UPAA
-no consideration required (the marriage itself is consideration) (contrast with a during-marriage agreement, which would require consideration)
-generally don't need independent counsel (even though you should)
-can't do less for the child than the law provides
-can't negotiate custody of a child through a prenup – courts will use the best interests of the child.

Voluntary:
-Fraud
-justifiable reliance – Porreco (PA 2002)
-prenup agreement is unenforceable due to fraud b/c ring was fake? Court says – she should have done her own due diligence
-"just a formality – I'll always take care of you" (Mallen v. Mallen (GA 2005))
Husband convinces her to sign prenup – court says "you're an idiot. You signed it. You had the chance to consult a lawyer"
-harmful to women?
-eve of wedding/church parking lot
-videorecording signing – show that there was no duress

Full and Fair disclosure
-or independent knowledge
NY v CA view
Dealing at arm's length (CA – must do due diligence, you are not married yet so there is no fiduc. Relationship) v. fiduciary relationship (NY)
-and (NY) or (other states) fair and reasonable
-paternalistic?
-compare Edwardson and Simeone
-fairness factors – see Edwardson

Unconscionablity
At execution
-i.e. Simeone
-UPAA but only if no full and fair disclosure
At enforcement
-contrary to standard contract principles
-public charge exception
-illness
-standard of living far below that enjoyed before marriage
-long marriages
-children

Postnuptial/Midmarriage agreements
-Pacelli v. Pacelli
-should postnups be enforceable
-same rules as prenups?
-bargaining power?
-coercive
-rebuttable presumption of
-fair and just at execution and enforcement
-burden of proof

**Edwardson v. Edwardson (KY 1990) – p. 201 –** *A prenup disposing of property and maintenance upon divorce is valid if made after full disclosure and if it is not unconscionable at the time enforcement is sought.*

**Simeone v. Simeone (PA 1990) – p. 204 –** *A prenup entered into after full disclosure is binding, regardless of whether or not it was reasonable or understood by both parties.*
On eve of wedding, husband's attorney gave W a prenup to sign, which she did, w/o presence of her own counsel. Parties disagreed as to whether she knew of agreement in advance. Held: agreement was OK. Women are not to be considered idiots, and are bound by things they sign.

**Pacelli v. Pacelli (NJ 1999) – printout -** *A mid-marriage agreement for divorce is valid if it is fair and equitable at the time of its enforcement.*
Agreement was signed kind of under duress by W in order to save marriage.

Prenuptual agreement problem (look on Angel)

**2/28/12**

## 3. TORTS

**Hoye v. Hoye (KY 1992) – printout –** *Common law tort of intentional interference with marital relation abolished.*
Husband had affair. Wife claimed damage from mistress, claiming "intentional interference with the marital relation."
Historically, women were kind of chattel – therefore, having an affair and "taking" her away was a kind of theft, meaning this was a tort.

The cause of action was extended to wives, however, to create the common law tort of intentional interference with the marital relation
(also note criminal conversation and alienation of affection)

There have been some cases in NC recently where similar cases resulted in million plus in damages
What are you compensating, exactly?
Loss of companionship?
Some are punitive

Two old causes of action:
Inducing a wife to leave her husband by fraud, violence, or persuasion: has evolved into the tort of alienation of affections
-purpose: repay husband for loss of wife's services
Criminal conversation – requires an adulterous relationship, but no physical separation of the husband and wife
-purpose – vindicate husband's property rights in wife's person, and punish D for defiling P's marriage.

Majority of states have abolished these causes of action, but they remain on the books in ~20% of states. Long arm jurisdiction extends reach, though.

## 4. CRIME IN THE FAMILY

### DOMESTIC VIOLENCE

Video on abusive relationship:

Why do women stay/not report violence?
-they might get arrested too, don't want records
-love
-dependence

3 different techniques for dealing with marital rape –
Remove exemption
Specify that marriage to victim is not a defense.
Separate offense

Recently: there has been an increase in arrests for domestic violence among very young people – not clear if this is a real increase or if it's just being discovered more frequently

Traditionally – there was no law barring chastising wife
"three licks rule" – husband could discipline wife with something no bigger than his thumb, and only 3 times
When wives tried to sue husband for assault and battery – even in jurisdictions where wives could sue, those claims were always dismissed b/c of doctrine of family privacy
One court said "this is like children fighting in the schoolyard – you don't arrest them, you just tell them to knock it off and separate them"

Marital rape is still not treated at the same level of stranger rape/date rape
Different hurdles that a wife must overcome

There still very few prosecutions for marital rape, unless the wife ends up severely injured or something

**People v. Humphrey (CA 1996) – p. 289 –** *Evidence of Battered Woman Syndrome is relevant to both the reasonableness and the subjective belief for the necessity of self-defense and a jury may consider the evidence for both prongs.*
Battered women's syndrome
Defendant had been abused as a child, had been in several abusive relationships, and in her current relationship her husband had periodically beat her and threatened her. At one point, a day after he shot at her, she sensed the situation was worsening and shot him. A defense of perfect self-defense requires defendant have an actual and reasonable belief of the need for self-defense, and this is a defense for murder and manslaughter. Imperfect self-defense only shows an actual belief but not a reasonable one, which is a defense for murder but not for manslaughter. *Should expert testimony of Battered Women's Syndrome be considered not only for actual belief, but for reasonableness of the belief?* **Held** Yes, because to consider how a reasonable person would act, one must consider the situation from the defendant's point of view, and evidence of the psychology of a battered person is relevant not only for the jury to consider if the defendant had such a belief, but if it was reasonable for someone in that situation to have that belief. (This is not, however, changing "reasonable person" to "reasonable battered woman.")

**3/1/12**
**R. v. Malott (Canada 1998) – p. 295 –** *Battered woman evidence must be introduced for the purpose of explaining the reasonableness of her actions, not for the purpose of explaining why she stayed with her abuser.*

**MPC 213.1 Rape.** A male who has sexual intercourse with a female not his wife is guilty of rape if:
(a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kid-napping, to be inflicted on anyone; or
(b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or
(c) the female is unconscious; or
(d) the female is less than 10 years old.
Rape is a felony of the second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties, in which cases the offense is a felony of the first degree.

**CO v. MM (MA 2004) – p. 310** – *The court must apply the express statutory factors in determining the appropriateness of an abuse prevention order.*
Four factors:
1. Length of time of the relationship
2. Type of relationship (relevant for this case: "substantive dating relationship")
3. Frequency of the interaction of the parties
4. If the relationship has been terminated by either person, the length of time elapsed since the termination.

Abuse prevention order: civil court order intended to provide protection from physical or sexual harm caused by force or threat of harm from a family or household member. In other words, a 209A order is designed to keep an abuser from hurting you anymore.

**Turner v. Lewis (MA 2001) – p. 314 –** *Paternal grandparent of a child whose parents were never married is related by blood to the child's mother for purposes of the abuse protection statute.*
Mother attacked paternal grandmother, who had custody of the child.
Persons with a child in common are considered family, regardless of whether they have married or cohabitated. Statute should be flexible.

**Ba v. US (DC 2002) – p. 318 –** *Temporary consent to contact while a civil protection order is in effect does not vitiate the order when consent is revoked.*
Ex GF got CPO against ex BF. They attempted to reconcile and even lived together. She revoked consent and kicked him out. Later, he went to her home and was arrested. The prior consent was held not to have invalidated the CPO.

**3/6/12 – DIVORCE**

Fault grounds:
-Cruelty
    -compare Benscoter (divorce denied) with Hughes (divorce granted)
-Adultery
    -Arnoult v. Arnoult
-Willful Desertion/Abandonment
    -Crosby v. Crosby
    -Constructive desertion/abandonment
    -Also a defense. Hughes hypo

If all states have no-fault divorce now, why do people bother pleading these fault grounds?
-may be easier to get divorce with a fault pleaded.

CRUELTY
**Benscoter v. Benscoter (PA 1963) – p. 359 –** *Cruelty as a ground for divorce is established through evidence of a course of conduct, rather than sporadic episodes.*
No complaints during a 15 year marriage, until 3 months before the hearing. Evidence that H was seeing another woman and only wanted a divorce because W had MS.

**Hughes v. Hughes (LA 1976) – p. 360 –** *A divorce may be granted on the basis of mental cruelty, not just physical.*
H cursed his wife on many occasions and declared that he did not love either his wife or his daughter.
-kids out of house, so more likely to grant divorce
-corroborating evidence
-W in Hughes brought the cruelty claim – courts like to protect the "weaker party"
-continuing course of conduct

ADULTERY
**Arnoult v. Arnoult (LA 1997) – p. 361 –** *A prima facie case of adultery can be made where the only evidence presented is the testimony of hired investigators.*
Any testimony from only one investigator should be corroborated, but a prima facie case can be made out by showing facts or circumstances that lead fairly and necessarily to the conclusion that adultery has been committed.

DESERTION

**Crosby v. Crosby (LA 1983) – p. 363 –** *A statute requiring a wife to abide by the domicile decisions of her husband is unconstitutional, and alimony cannot be denied based on its violation.*
W was denied alimony because she refused to follow her husband's decision to change domiciles. LA statute required her to. Statute found unconstitutional.

Definition of cruelty – "actual personal violence or a reasonable apprehension thereof, or such a course of treatment as endangers life or health and renders cohabitation unsafe."

In NY – high proof for satisfying cruelty standard
Other courts – not as much

Varies very much according to judge

Was seeking separation from bed and board
-legal separation
    -usually similar or identical to grounds necessary to divorce, except requires fault

Why would you want a legal separation and not a divorce?
-religious, moral, societal reasons, etc.

Why does court grant divorce in hughes but not in benscoter?
Hughes – wife is seeking
Benscoter – husband is seeking

Benscoter – husband also having affair, not an innocent party

Why do we require that the spouse seeking a divorce be innocent?

Benscoter – woman had MS
If you let him divorce wife, you put the burden on the state to care for her

Hughes – daughter also testified against husband
(you see this a lot)

One option: go to a state where there are laxer divorce laws – "migratory divorces" – Nevada, for example, is a divorce mill – live there for 6 weeks to establish residency
-other countries, too – Mexico, you can stay for 36 hours
Alabama, 36 hours

What happens when you get back to your home state?
-often, home state won't recognize it – FF&C clause doesn't mean that home state can't determine if couple was properly domiciled in other state

Adultery – how do you prove adultery?
-usually don't catch anybody in the act
-often other circumstantial evidence – texts, seeing them out in public together (private investigators)

NY state laws define adultery (170)

Why is post-separation adultery bad?

Why does husband in Arnoult file for divorce b/c of post-separation adultery after they had already filed for a no-fault divorce?

-Many states say that if you are in the wrong in a divorce, you cannot receive support from spouse after divorce – even if spouse would be indigent, state would rather support you than force spouse to do so
-social ramifications
    -"it's not my fault this marriage failed"
        -no fault divorce has led people to be more adversarial on other grounds – custody disputes have drastically increased.
-vindictiveness

Desertion:
-must lack intent to return to sexual relations

Constructive desertion – analogous to constructive eviction in property cases

Suppose spouse moves out of the house and then files for divorce on grounds of constructive desertion – conditions were so bad in house that she had no choice but to leave

Courts have recently allowed people to sue for stuff within the divorce filing

Grounds for divorce: NY DRL 170
-cruel and inhuman treatment
-abandonment 1 yr
-imprisonment of defendant 3 years
-adultery
-legal separation (1 yr, requires fault)
-separation agreement (1 yr)
-effective Oct 12, 2010 – irretrievable breakdown (min 6 mos.)

Compare with NJ:

**3/8/12**

and RI: "gross behavior and wickedness"
MS: "revolting"

TRADITIONAL DEFENSES:
**Rankin v. Rankin (PA 1956) – p. 364 –** *To obtain a divorce on the basis of indignities, it must appear from the evidence that the plaintiff was the injured and innocent spouse.*
    -As both spouses had inflicted physical and emotional abuse on the other, neither was innocent, so neither should be granted a divorce.

If you have breached the marital contract, you don't get to complain that your spouse is also in breach of the contract

Rankin v. Rankin: "the fact that married people do not get along well together does not justify a divorce"

In NY, old rules: if both were adulterers, they were stuck together. If both were cruel, they'd let them divorce.

Other states: look at who was MORE at fault
Or, maybe (like in NJ) – could award BOTH parties divorce on ground of cruelty.

Taub v. Taub – wealthy NY couple, wife files for divorce on grounds of cruelty
NY is one of 3 states with jury trials, if desired, for divorces

Wife alleged many instances of abuse, children testified against each other

Filed in 2005; while case was pending, court ordered them to divide their townhouse – they set up a wall

If your spouse is cruel, you have an incentive to not be cruel back, so that you can exit the marriage

Even if the marriage has done away with the doctrine of recrimination, it still comes in; courts will still consider it.

**DEFENSES:**
-CONNIVANCE
**Sargent v. Sargent (NJ 1920) – p. 367 –** *A spouse providing the other spouse with the opportunity and inducement to commit adultery cannot obtain a divorce when such is committed.*
Husband filed for divorce b/c wife was having affair with chauffer – never fired guy, never warned wife not to sleep with him.
– husband allowed adultery to happen
-court rules he didn't do enough to stop it (probably would not have same result today) – husband "left her unprotected", old-style gender roles.

-CONDONATION
**Willan v. Willan (UK 1960) – p. 368 –** *Condonation of cruelty eliminates it as a viable ground for divorce*
Husband files for divorce for cruelty because wife uses violence to force him to have sex
Court says no. you engaged in this sexual relationship purposefully.
(some states – if after you learn of your spouse's adultery, you still have sex with them, you can't file for divorce based on adultery, because you have condoned it)
-discourage or encourage reconciliation?
Encourage: you've already forgiven them partially, might as well try more
Discourage – if people know of doctrine in advance, won't even give reconciliation a shot
-collusion
Fuchs v. Fuchs
**Fuchs v. Fuchs (NY 1946) –** *A party who collusively allows a default judgment of divorce to be entered against him may set the judgment aside and litigate the case on its merits.*
In exchange for full child custody, W allowed default judgment in divorce to be entered against her.
State has interest in marriage so a collusively entered divorce is an attempt to abrogate State's right to regulate divorce.

-INSANITY (NY)

-why a defense?

-why NOT a defense, in most places?

-it's like you're marrying a different person than you expected?

**Anonymous v. Anonymous (NY 1962) – p. 373 –** *Insanity, as a defense to a divorce action, must be proved by the D by a preponderance of the evidence, overcoming a presumption of sanity.*

**NY DRL § 170**

An action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds:

(1) The cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant.

(2) The abandonment of the plaintiff by the defendant for a period of one or more years.

(3) The confinement of the defendant in prison for a period of three or more consecutive years after the marriage of plaintiff and defendant.

(4) The commission of an act of adultery, provided that adultery for the purposes of articles ten, eleven, and eleven-A of this chapter, is hereby defined as the commission of an act of sexual intercourse, oral sexual conduct or anal sexual conduct, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant. Oral sexual conduct and anal sexual conduct include, but are not limited to, sexual conduct as defined in subdivision two of section 130.00 and subdivision three of section 130.20 of the penal law.

(5) The husband and wife have lived apart pursuant to a decree or judgment of separation for a period of one or more years after the granting of such decree or judgment, and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such decree or judgment.

(6) The husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded, for a period of one or more years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such agreement. Such agreement shall be filed in the office of the clerk of the county wherein either party resides. In lieu of filing such agreement, either party to such agreement may file a memorandum of such agreement, which memorandum shall be similarly subscribed and acknowledged or proved as was the agreement of separation and shall contain the following information: (a) the names and addresses of each of the parties, (b) the date of marriage of the parties, (c) the date of the agreement of separation and (d) the date of this subscription and acknowledgment or proof of such agreement of separation.

(7) The relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath. No judgment of divorce shall be granted under this subdivision unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce.

**NO FAULT DIVORCE**

Why no fault?

-problems with fault

It's not clear that there is always one person at fault

Overly formulistic

If you can't establish fault, you could be stuck in a really bad marriage

Creates extra animosity

Domestic violence went up in cases where there was no no-fault divorce (?)

-benefits of no-fault

-Governor's report

<u>Pure no-fault</u>

<u>Mixed</u>

<u>Pure fault</u>

Some feminists didn't like the unilateral no-fault system NY added, why?
-allows men to easily dump wives

Irreconcilable differences: CA
-fault almost always inadmissible (except in child custody cases, where one party's fault has had a clear adverse effect on children)
-compare with recommendation of the Governor's Commission on the Family

UMDA
Marriage irretrievably broken if:
-lived sep and apart for 180 days
-serious marital discord adversely affects attitude of 1+ partner toward marriage
-no reasonable prospect of reconciliation
-fact-finding authority/counseling

**3/13/12**

Connivance – *before* the fact
Condonation – *after* the fact

**HYPOS**

1. L and J marry in NY and live there for 18 years. In 2011, L has affair and J moves to CA. After a year in CA, J files for divorce on adultery grounds.
   -CA court won't grant it – doesn't care about adultery
2. While in CA, J has sex with other woman while still married to L. L files for divorce on adultery grounds.
   -NY will not grant divorce, based on defense of recrimination

As long as the filing spouse is living in a jurisdiction, the other spouse does not need to live/have commited some offense in that jurisdiction for court to be able to grant divorce.

**Covenant Marriage**
Only in 3 jurisdictions – compare with "standard" marriage requirements
-parties enter into pre-marriage contract that makes it more difficult for them to leave marriage (like longer period of separation).
-Also requires pre-marriage counseling, and counseling in the event things get rocky.
-grounds for divorce are limited
-fault – parties agree that fault will likely play a huge role. The party whose fault it is will pay a heavy financial penalty.

-why so rare? Only in 3 states, and only used by a small percentage of the population anyway
-lot of effort and money
-people inclined to do it are also more likely to stay together anyway(?)
--sometimes encouraged by churches
Pros/cons?

One million children per year experience their parents divorcing – first couple years are emotionally not great for children. Thought that anything that makes parents think before divorcing

Note that UMDA does not mention fault in property division – will be done state by state.

**UMDA § 302. [Dissolution of Marriage; Legal Separation]**

(a) The court shall enter a decree of dissolution of marriage if:

(1) the court finds that one of the parties, at the time the action was commenced, was domiciled in this State, or was stationed in this State while a member of the armed services, and that the domicile or military presence has been maintained for 90 days next preceding the making of the findings;

(2) the court finds that the marriage is irretrievably broken, if the finding is supported by evidence that (i) the parties have lived separate and apart for a period of more than 180 days next preceding the commencement of the proceeding, or (ii) there is serious marital discord adversely affecting the attitude of one or both of the parties toward the marriage;

(3) the court finds that the conciliation provisions of Section 305 either do not apply or have been met;

(4) to the extent it has jurisdiction to do so, the court has considered, approved, or provided for child custody, the support of any child entitled to support, the maintenance of either spouse, and the disposition of property; or has provided for a separate, later hearing to complete these matters.

(b) If a party requests a decree of legal separation rather than a decree of dissolution of marriage, the court shall grant the decree in that form unless the other party objects.

**Comment**

Subsection (a) lists the three findings that a court must make before it has jurisdiction to enter a decree of dissolution of marriage: first, it must find that one party to the marriage has established an appropriate connection with the state; second, it must find that the marriage is irretrievably broken; and finally, to the extent it has jurisdiction to do so, it must have considered and passed on the issues of custody, support, maintenance, and property disposition. If the court lacks jurisdiction to act upon any of the matters listed in subsection (a)(3), without acting upon that matter, it may enter a decree of dissolution of marriage. Thus, if the court is acting upon the petition of one spouse only and the other spouse is not subject to the personal jurisdiction of the court, the court lacks jurisdiction to decide issues relating to maintenance, *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 1 L.Ed.2d 1456, 77 S.Ct. 1360 (1957); *Estin v. Estin*, 334 U.S. 541, 92 L.Ed. 1561, 68 S.Ct. 1213 (1948), or the distribution of property not before the court, see *Fall v. Eastin*, 215 U.S. 1, 54 L.Ed. 65, 30 S.Ct. 3, 23 LRANS 924, 17 Ann.Cas. 853 (1909); and may not have jurisdiction, acting alone to decide issues relating to support, consult the Uniform Reciprocal Enforcement of Support Act, or child custody, *May v. Anderson*, 345 U.S. 528, 97 L.Ed. 1221, 73 S.Ct. 840 (1953), consult the Uniform Child Custody Jurisdiction Act. In such a case, the court has jurisdiction only to dissolve the marriage and it may enter its decree of dissolution after making the findings set forth in subsection (a)(1) and (2).

The 90 day period of subsection (a)(1) is intended to be continuous and to apply both to domiciliaries and to members of the armed services. It may be started at any time, but it must exist at the commencement of the action and it must have been maintained for 90 days next preceding the findings by the court. Obviously, dependent upon circumstances, it may commence, effectively, sometime before the initiation of the action. One who has just entered the forum state may commence the proceeding immediately, thus enabling the court to enter such temporary orders as are necessary to protect the rights of the parties. Since the test is domicil, the party need not remain physically present throughout the 90 day period, so long as he has acquired no new domicil. Similarly, a member of the armed forces might be outside the boundary lines, if he remained

"stationed" therein. A showing that either party satisfies, the 90-day requirement is sufficient; hence a petitioner may utilize fulfillment of the 90 day period by the respondent.

Subsection (a)(2) embodies the basic shift from fault to no-fault grounds for dissolution of the marriage which is the primary object of this part of the Act. Many terms might have been used to characterize the concept. "Irretrievably broken" was chosen because this has become a term of common use in the literature of divorce reform, and so has gained a significant meaning upon which judges may rely for guidance. It is closely related to the standards recently adopted in California ("irremediable breakdown") and in Iowa ("breakdown of the marriage relationship ... no reasonable likelihood that the marriage can be preserved") and equates to the doctrinal result attained under the concept of incompatibility, *Newman v. Newman*, 391 P.2d 902 (Okla.1964) ("irremediable rift ... such a conflict of personalities as to destroy the legitimate ends of matrimony and the possibility of reconciliation"). Two guidelines are set up for evidence sufficient to support a finding that the marriage is irretrievably broken: (i) that the parties have lived separate and apart for more than 180 days next preceding the commencement of the proceeding for dissolution; (ii) that there exists "serious marital discord adversely affecting the attitude of one or both of the parties toward the marriage." These provisions satisfy the desire of those who wish to have specific guidelines to assist the court in determining what is irretrievable breakdown. At the same time, the second provision retains all the judicial discretion to weigh all the evidence bearing upon the death of the marriage which was envisioned in the original draft of this section as approved by the Conference in St. Louis in 1970.

Subsection (a)(3) prescribes that the court must find specifically either that the conciliation provisions of Section 305 do not apply or that they have been met. This guards against overlooking the Act's policy to encourage conciliation procedures in situations where there is promise of success.

The phrase, "considered, approved, or provided for," in subsection (a)(4) is intended to confer upon the court the authority to refuse to make any award, if the evidence justifies an outright denial, as well as the authority to make such allotment as the facts require. To avoid any doubt, the court is authorized expressly to provide for a later hearing to complete action on these matters, if necessary. Probably this would be within the general scope of judicial authority in most states.

Subsection (b) means that the court may not grant a decree of legal separation over the objection of one of the parties. In cases where both parties are before the court, if one party requests a decree of legal separation and the other party requests a decree of dissolution, the court lacks jurisdiction to enter a decree of legal separation. If only one party is before the court and the court lacks personal jurisdiction over the other party, the court may enter a decree of legal separation at the petitioner's request. A similar provision is found in the California Family Law Act of 1969, California Civil Code section 4508(b).

**UMDA § 305. [Irretrievable Breakdown]**

(a) If both of the parties by petition or otherwise have stated under oath or affirmation that the marriage is irretrievably broken, or one of the parties has so stated and the other has not denied it, the court, after hearing, shall make a finding whether the marriage is irretrievably broken.

(b) If one of the parties has denied under oath or affirmation that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to filing the petition and the prospect of reconciliation, and shall:

(1) make a finding whether the marriage is irretrievably broken; or

(2) continue the matter for further hearing not fewer than 30 nor more than 60 days

later, or as soon thereafter as the matter may be reached on the court's calendar, and may suggest to the parties that they seek counseling. The court, at the request of either party shall, or on its own motion may, order a conciliation conference. At the adjourned hearing the court shall make a finding whether the marriage is irretrievably broken.

(c) A finding of irretrievable breakdown is a determination that there is no reasonable prospect of reconciliation.

**Comment**

This section, with others, embodies a new approach to dissolution of marriage. It provides that the only basis upon which a marriage may be dissolved is that a court has found that the marriage has broken down irretrievably. The traditional grounds for divorce, which assumed that one party had been at fault by committing an act giving rise to a cause of action for divorce, are abolished. The legal assignment of blame is here replaced by a search for the reality of the marital situation: whether the marriage has ended in fact. The public policy embodied in this section was recognized in *DeBurgh v. DeBurgh*, 250 P.2d 598, 601, 39 Cal.2d 858, 863-44 (1952) (Traynor, J.): "when a marriage has failed and the family has ceased to be a unit, the purposes of family life are no longer served and divorce will be permitted." California, Iowa, and other states have adopted the non-fault approach to marriage dissolution proposed by this section.

This section makes the determination of whether the marriage is irretrievably broken, in all cases, a matter for determination by the court, "after hearing," which means "upon evidence." *Shields v. Utah Idaho Central R.R. Co*., 59 S.Ct. 160, 305 U.S. 177, 83 L.Ed. 111 (1938); *Juster Bros. v. Christgau*, 7 N.W.2d 501, 214 Minn. 108 (1943); *State ex rel. Ellis v. State Road Com*., 131 S.E. 7, 100 W.Va. 531 (1925). In procedural terms, it distinguishes two types of cases. In the group of cases covered by subsection (a), the only evidence presented to the court supports the allegation of the petition that the marriage is irretrievably broken. Either both parties have so stated whether in the petition or by oral or written testimony before the court, or one party has done so without objection from the other. In this group of cases, the court must make a finding, after hearing, whether the marriage is irretrievably broken. The Conference concluded, even as to this category of cases, that the determination of breakdown should be a judicial function rather than a conclusive presumption arising from the parties' testimony or from the petition. This decision accords with the position taken in California and in Iowa. The alternative of adjournment, provided by subsection (b) for cases in which there is a dispute as to whether the marriage is irretrievably broken, is not available in these cases. In most cases falling under the terms of subsection (a), it is anticipated that the court will find that the marriage is irretrievably broken because there will be no evidence before the court that might support a contrary finding. In rare cases, however, the court may not find the evidence credible. In such cases, the court normally will permit the parties to produce other evidence that the court may find persuasive. For this purpose, normal practice will permit the parties to request that the hearing be continued for a short time. Power to continue is implicit in the power to hear.

Subsection (b) covers the situation in which the parties are in dispute as to whether their marriage is irretrievably broken. In these circumstances, the court is directed to consider the factors relevant to marital breakdown, including the petitioner's reasons for seeking a dissolution of the marriage and the prospect that the parties may achieve a reconciliation, and to decide forthwith or at an adjourned hearing whether the marriage is irretrievably broken.

Because the defense of recrimination and other concepts associated with fault are abolished by the Act (sections 303(e) and 503), the court may not refuse to find that the marriage has broken down irretrievably merely because of petitioner's conduct during the marriage. If the court decides

to adjourn the matter as provided in subsection (b)(2), it may suggest that the parties seek counseling during the period of adjournment. The waiting period must be no shorter than thirty days and, if possible in light of the court's calendar, no longer than sixty days after the previous hearing. The court must make its final decision as to whether the marriage is irretrievably broken at the adjourned hearing. The section does not contemplate more than one adjourned hearing, although certainly a hearing not completed at one session may be continued. The power of either party, or of the court, to require a conciliation conference, is in aid of the policy to encourage conciliation, and, in appropriate cases, resort to counseling, without invoking the controversial tool of compulsory counseling.

Section 305 intentionally makes no distinction between childless marriages and those with minor children. If the parties establish that their marriage has broken down irretrievably, the court is not authorized to make a contrary finding because of the impact of a dissolution of the marriage upon the minor children. Under former law, if the parties established the existence of a ground for divorce and no defenses existed, the court lacked jurisdiction to deny the divorce simply because of its views about divorce or the impact of divorce on minor children. There is no intention to change this rule. The court's power in this regard is limited to seeing that provision has been made for the custody and support of minor children as contemplated by Section 302(a)(3).

Because it is expected that the parties themselves will be the primary source of evidence as to irretrievable breakdown, the Act has eliminated any requirement of corroboration.

The Conference took no position as to whether a family court should be established as an adjunct to the Act, because it felt that the subject was one in which uniformity was not essential, and, indeed, that uniformity by statute would be impossible, in view of differing state constitutional provisions. The Act does not forbid the creation of a family court, or the use of a family court division within a court having jurisdiction over divorce and related subjects.

Subsection (c) insures that the court, in finding irretrievable breakdown, will consider whether there is any *reasonable* prospect of reconciliation. The remedy for a determination of any relevant fact issue, contrary to the evidence, is afforded by the usual channels of appeal.

**Private Contractual Agreements**

**B. NO-FAULT DIVORCE**

**In re Marriage of Dennis D. Kenik – (IL 1989) – p. 380 –** *The requirement that parties seeking dissolution of marriage live "separate and apart" does not mean separate residences.*
"Separate and apart" for 2 years before a divorce means "separate lives" not separate residences.

**Massar v. Massar (NJ 1995) – P. 388 –** *The enforceability of negotiated provisions in agreements between spouses is subject to review on a case by case basis to determine if the application of the provision is fair and just, according to the circumstances of the particular case.*
Signed agreement to not seek dissolution for any reason other than 18 mo. continuous separation. W filed for divorce 6 mo later for extreme cruelty. Held: the initial agreement was fine, and she knowingly and voluntarily waived her right to seek divorce.

-Why enforce separation agreement? (but see Hangar)

-husband agreed to vacate the marital home once wife signed agreement that she could only file a no-fault divorce after living separate and apart for 18 months.
-wife files for divorce on cruelty grounds 6 months after signing agreement.

Court says: can't file that. The agreement was clear and enforceable – there was consideration (husband leaving home) in exchange for the not suing.

**Diosdado v. Diosdado (CA 2002) – p. 391 –** *A contract between a H and W providing for liquidated damages if one is sexually unfaithful is unenforceable.*
After husband cheats, couple signs agreement that if one party cheats, he/she will leave marital residence immediately, and will pay for court costs for litigation related to this incident.
Court says: not enforceable. Goes against policy reasons for having no-fault divorce. CA is a pure no-fault

-These sorts of agreements are often post-nups – done when one party cheats, and they sign this agreement instead of separating.

-In fault-based jurisdictions, can result in one party receiving almost nothing after separation.

-These clauses are considered to encourage divorce b/c huge potential payout discourages reconciliation.

TORTS AND DIVORCE
-Twyman
-ellman & sugarman
-external or internal standard?
-how do juries decide?

(go back and look at Hoye v. Hoye – torts v. 3rd party)

**Twyman v. Twyman (TX 1993) – p. 393 –** *An action for intentional infliction of emotional distress may be joined with a divorce suit.*
Holding: court adopts the tort of intentional infliction of emotional distress, and hold that such a claim may be brought in a divorce proceeding.

Required elements of this claim:
1. D acted intentionally or recklessly
2. Conduct was extreme and outrageous, and
3. Actions caused P to suffer severe emotional distress.

Case was remanded to determine if IIED was present.

Prof: 'we all inflict emotional distress on our loved ones'
-are we going to let juries go into a marriage and evaluate the emotional distress?
-even if you don't have a jury trial in a divorce, if you're bringing in a court claim, you have a right to a jury trial for a tort claim

Most of rest of semester – look at consequences of child custody, distribution of property, jurisdiction, etc

## IV. CHILD CUSTODY AND PARENTING TIME

### A. CUSTODY

#### 1. BEST INTEREST STANDARD

If you were creating the perfect child custody statute, what would it look like?
-financial power
-child's preference
-child's comfort

-time with the child
-primary caregiver
-stability
-age of child
-presence of siblings
-support network
-mental/physical health

(UMDA only has 5 factors – many other states have 14, including "any other relevant factor")

**UMDA § 402. [Best Interest of Child]**

The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

(1) the wishes of the child's parent or parents as to his custody;

(2) the wishes of the child as to his custodian;

(3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;

(4) the child's adjustment to his home, school, and community; and

(5) the mental and physical health of all individuals involved.

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

**Comment**

This section, excepting the last sentence, is designed to codify existing law in most jurisdictions. It simply states that the trial court must look to a variety of factors to determine what is the child's best interest. The five factors mentioned specifically are those most commonly relied upon in the appellate opinions; but the language of the section makes it clear that the judge need not be limited to the factors specified. Although none of the familiar presumptions developed by the case law are mentioned here, the language of the section is consistent with preserving such rules of thumb. The preference for the mother as custodian of young children when all things are equal, for example, is simply a shorthand method of expressing the best interest of children-and this section enjoins judges to decide custody cases according to that general standard. The same analysis is appropriate to the other common presumptions: a parent is usually preferred to a nonparent; the existing custodian is usually preferred to any new custodian because of the interest in assuring continuity for the child; preference is usually given to the custodian chosen by agreement of the parents. In the case of modification, there is also a specific provision designed to foster continuity of custodians and discourage change. See Section 409.

The last sentence of the section changes the law in those states which continue to use fault notions in custody adjudication. There is no reason to encourage parties to spy on each other in order to discover marital (most commonly, sexual) misconduct for use in a custody contest. This provision makes it clear that unless a contestant is able to prove that the parent's behavior in fact affects his relationship to the child (a standard which could seldom be met if the parent's behavior has been circumspect or unknown to the child), evidence of such behavior is irrelevant.

**3/14/12**

Factors in custody awarding

BIC – best interests of the child (?)
TYP – tender years presumption
PCP – primary care provider
ALI
JLC/JPC (joint legal/physical custody)

Courts will consider evidence of domestic violence – goes to moral fitness of the parties

Work schedules – the time that they have available for the child
Stability of parent's life
-related – stability of home environment

Ability to financially support the child:
Why is this a factor when we expect that the non-custodial parent will pay child support?
-many people don't actually pay the child support.
-some don't want to, some can't.
-standard of living is often much more tied to the custodial parent.

Age of child:
-often means young children (tender years)

continuity of care
-important that child not bounce from one home to another

Religion

Bond between the parent and child

Race
-really only comes into play in cases involving mixed-race marriages

Parents' new relationships/support system

Day care

Any other factor
-Holland – "dirty house"
-home, community, and schooling/school records of the child
It's very hard to appeal a custody determination – it's a "abuse of discretion" standard

No require that courts give more weight to one factor/equal weight to all

Only thing is that in the case of domestic violence, this is often dispositive

1. FITNESS

**In re marriage of Carney (CA 1979) – p. 525 –** *A physical handicap that affects a parent's ability to participate with his children in purely physical activities may not by itself be used to deny custody.*
In 1972, after separation, H got custody of kids. In 1976, he was paralyzed from neck down. W petitioned for custody.

Held: this couldn't suffice as a reason to change custody. Paralysis was not shown to contravene children's best interest.

-no impact on mental functions
-role as parent isn't only physical
-"children are more resilient than the court below gave them credit for"

2. WEIGHING MULTIPLE FACTORS

**Hollon v. Hollon (MS 2001) – p. 532 –** *A custody ruling should consider factors related to the "best interest" of the child, and a finding should be made on each factor.*

W, after separation, alleged to be having lesbian affair.

Eleven factors to consider in determining the best interests of the child:

1. Age/health/sex of child
2. Primary caretaker before separation
3. Parent with the best parenting skills and the willingness to be the primary caretaker
4. Parents' employment
5. Parents' health and age
6. Relationship between parent and child
7. Parents' moral fitness
8. Home/school/community record of the child
9. If age appropriate, the child's preference
10. Parents' stability of home and employment
11. Other relevant factors

Here, W was found to be preferred parent:

a. Tender years doctrine – weakened but still in effect
b. Tim did not express interest in being primary caretaker until homosexuality allegations arose
c. Time was not current on child support, nor did he visit regularly
d. Tim had odd schedule
e. Physical/mental age/health balanced
f. Zach was too young for preference, but had lived with mom since separation
g. Etc (see p. 83 of companion book)

These last 2 cases – court focused too exclusively on one factor. Can't do that.

3. RACE AND ETHNICITY

**Palmore v. Sidoti (US 1984) – p. 538 –** *A natural mother cannot be divested of the custody of her child merely because of her remarriage to a person of a difference race*

Fact that mother was remarrying a black man was NOT valid reason to award custody to father, even accounting for difficulties child might face. Private biases and their prejudicial impact cannot be made to determine judicial decisions.

**Jones v. Jones (SD 1996) – p. 540 –** *The court may properly consider race in a custody determination as the issues relate to a child's ethnic heritage and the more appropriate parent to address that heritage.*

Custody award to Native American father was OK, even where it was in part because of his culture, and his desire to share his culture with his children.

-Palmore does not require that race be ignored
-children had Native American features.

GENDER

Most jurisdictions have abolished any explicit gender bias in awards of custody, but typically mothers still win physical custody in about 80% of cases.
Why?
-Tender Years Presumption
-mothers are more often the primary caregivers.

RELIGION
**Kendall v. Kendall (MA 1997) – p. 549 –** *When demonstrable evidence of substantial harm to the children has been found, a divorce judgment limiting the childrens' exposure to religious indoctrination does NOT burden the parent's right to practice religion under the Free Exercise clause of the state/fed constitution.*
H became member of fundie church, marriage deteriorated, W (ortho jew) filed for divorce and sought to limit exposure to H's religion.
This is constitutional: "a diversity of religious experiences may, in particular circumstances, disturb a child to its substantial injury, physical or emotional, and will have a like harmful tendency for the future." Exposure to father's belief that they would go to hell would cause emotional distress.
Can courts consider a parent's religion when determining the custody of the child?
-don't want to alienate child from other parent
-must be substantial harm
(alienation is NOT a requirement, just the substantial harm)
In determining whether there IS substantial harm, look at physical/emotional harm, also consider the alienation.
2 fundamental rights at work:
1st amendment
14th amendment – right to raise children as parents see fit

**Shepp v. Shepp (PA 2006) – supp 51 –** *A court may prohibit a parent from advocating religious beliefs, which, if acted upon, would constitute a crime. However, it may do so only where it is established that advocating the prohibited conduct would jeopardize the physical/mental health/safety of the child, or have a potential for significant social burdens.*
H and W married in 1992, converting to Mormonism. Divorced in 2001. H was excommunicated b/c he believed in polygamy.
Lower court awarded joint custody but banned father from speaking to young daughter about polygamy.

THE CHILD'S PREFERENCE
**McMillan v. McMillan (PA 1992) – p. 554 –** *Although the child's wishes are not controlling in custody decisions, such wishes do constitute an important factor that must be carefully considered in determining the child's best interests.*
Child's steadfast refusal to live with father had to be considered.

**Ford v. Ford ( ) – printout –**

**3/20/12**
ALTERNATIVE APPROACHES
TENDER YEARS PRESUMPTION
**Pusey v. Pusey (UT 1986) – p. 566 –***The custody order should no longer be based on an arbitrary maternal preference.*
Tender Years presumption has been found unconstitutional in some states.
Factors should include:

Primary caretaker
Person better able to care for children b/c of flexible employment
Relationship between parent and child

PRIMARY CARETAKER PRESUMPTION
**Garska v. McCoy (VA 1981) – p. 569 –** *A child's best interest is served by awarding custody to the primary caretaker parent regardless of sex.*
Primary caretaker will most likely have developed the more stable relationship with the child, so awarding custody the other way would be disruptive.

JOINT CUSTODY
**Squires v. Squires (KY 1993) – p. 574 –** *Parental cooperation is not a precedent to a joint custody order if such an order is in the child's best interest.*
In spite of hostility between parents, court thought joint custody was best option, weighing both pros and cons. Present hostility does not necessarily indicate future hostility.

PAST DIVISION OF PARENTAL RESPONSIBILITY
**Young v. Hector (FL 1989) – p. 579 –** *A custody decision must be based on substantial competent evidence and may not take into account legally impermissible factors such as gender bias.*

**ALI 2.08 – Allocation of custodial responsibility (p. 588)**
custody should be awarded "so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation or … before the filing of the action." The exceptions to this guideline are

(a) that the award of custody should align with any "uniform rule of statewide application";
(b) that the award should respect the "firm and reasonable preferences" of a child of a certain (undefined) age;
(c) that siblings should remain together if "necessary to their welfare";
(d) that the award should reflect any "gross disparity" in the child's attachment to the parents or in the parents' abilities to "meet the child's needs";
(e) that the award should reflect any prior agreement between the parties; (f) that the award should not create an "extremely impractical" custodial situation;
(g) that the award should address a parent's decision to relocate to a distance away; and
(h) that the award should "avoid substantial and almost certain harm to the child. "

**ALI 2.09 – Allocation of significant decisionmaking responsibility – p. 590**
in the absence of parental agreement, the court should allocate responsibility for making significant life decisions on behalf of the child, including decisions regarding the child's education and health care, to one parent or to two parents jointly, in accordance with the child's best interests. Factors to consider in making this allocation include

a. the allocation of custodial responsibility under §2.08,
**b.** the level of each parent's participation in past decisionmaking on behalf of the child.
c. Wishes of the parents; and
d. Level of ability and cooperation the parents have demonstrated in past decisionmaking on behalf of the child.

MODIFYING CUSTODY
**§ 409. [Modification]**
(a) No motion to modify a custody decree may be made earlier than 2 years after its date,

unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral, or emotional health.

(b) If a court of this State has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, the court shall not modify a prior custody decree unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interest of the child. In applying these standards the court shall retain the custodian appointed pursuant to the prior decree unless:

(1) the custodian agrees to the modification;

(2) the child has been integrated into the family of the petitioner with consent of the custodian; or

(3) the child's present environment endangers seriously his physical, mental, moral, or emotional health, and the harm likely to be caused by a change of environment is outweighed by its advantages to him.

(c) Attorney fees and costs shall be assessed against a party seeking modification if the court finds that the modification action is vexatious and constitutes harassment.

**Hassenstab v. Hassenstab (NE 1997) – p. 596 –** *The party seeking modification of child custody bears the burden of showing that a material change in circumstances has occurred.*
xH argued that xW's homosexual relationships were a change in circumstances warranting modification. Court said that sexual activity by a parent is governed by a rule that there must be a showing that the minor child was adversely affected by such activity or damaged in some way by the activity. b/c there was no evidence on such harmful effect, there was no change in circumstances.

**3/22/12**

**Wetch v. Wetch (ND 1995) – p. 599 –** *A trial court must consider pre-divorce conduct on a change of custody motion if the original custody order was by stipulation of the parties.* (p. 98 of casebriefs)
Court had not had an opportunity to examine the pre-divorce conduct, so there was no res judicata issue. So long as the custodial parent is not attempting to thwart the rightful visitation rights of the other parent, the court should seriously consider the need for the parent to move.

RELOCATION
**Baures v. Lewis (NJ 2001) – p. 605 –** *In a removal action, the custodial parent must establish the prima facie case with* ***a good faith reason*** *for the move and demonstrating that the* ***child will not suffer*** *from the move.*
In today's increasingly mobile society, removal may actually be necessary for the parent.
To counter good faith, non-custodial parent can show, for example, that the educational opportunities in the new location are not as good, or the change in visitation will adversely affect the child.

**Maynard v. McNett (ND 2006) – supp. 63 –** *A parent with joint legal/physical custody may not be granted permission to move with the parties' child, unless the district court first determines that the best interests of the child require a change in primary custody to that parent.*
A custody arrangement must be given a great deal of deference.
FOUR FACTOR TEST for determining whether a move is in the best interest of the child:

1. Prospective advantages of the move in improving the custodial parent's and child's quality of life;

2. The integrity of the custodial parent's motive for relocation, considering whether it is to defeat/deter visitation by other parent;
3. The integrity of noncustodial parent's motives for opposing the move
4. potential negative impact on noncustodial parent's relationship w/ child.

## 2. PARENTING TIME (VISITATION)

**§ 407. [Visitation]**

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

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

**Eldridge v. Eldridge (TN 2001) – p. 613 –** *A trial court may properly restrict noncustodial parental visitation rights in the presence of a nonspouse if the restrictions are in the child's best interests and the appellate court should affirm the trial court absent a finding of error.*
Trial court awarded mother unrestricted overnight visits with daughter, despite father arguing against this b/c of mother's homosexual relationship. Court of appeals reversed for abuse of discretion in failing to restrict homosexual lover's presence during child's visits. TN SC reversed again.

**Zummo v. Zummo (PA 1990) – p. 618 –** *A court may not restrict a parent from exposing his children to his religious practices unless the activity substantially threatens to harm the children, and the restriction is by the least intrusive means possible.*
H and W agreed to raise kids jewish. After divorce, H wanted to take kids to church, and W sought court order preventing him from doing so. Court held that as W couldn't show that exposure to multiple religions created a substantial threat of harm, she couldn't block it. The court could, however, require H to make sure kids were in Hebrew school.

**Troxel v. Granville (US 2000) – p. 621 –** *A parent has a fundamental right in the care, custody, and control of his or her child.*
Mother prevented late husband's parents from seeing child. Court said, sure, you can do that, because courts are assholes, and (see above).

**STEPPARENTS**
**Kinnard v. Kinnard (AK 2002) – p. 630 –** *Courts should evaluate custody disputes between a third party and a bio parent with the "detriment to the child" standard, and not the "best interests of the child" standard.*
H had child from previous relationship. Stepmother sought custody after divorce. Court awarded custody b/c child would have huge psychological damage if stepmother was removed from life. Stepmom stood in loco parentis to daughter.

**Simons By and Through Simons v. Gisvold (ND 1994) – p. 633 –** *A biological parent's custodial rights trump a psychological parent's custodial rights absent a finding of detriment to the child if the psychological parent is denied custody.*

Stepmother sought custody of stepchild after H died. Bio mom also sought custody. Bio mom wins: Court found there would be no detriment to the child if bio mom was awarded custody. "best interests" didn't enter into it.

**Quinn v. Mouw-Quinn (SD 1996) – p. 635 –** *Courts may grant stepparent visitation when such visitation is in the child's best interests and under extraordinary circumstances.*
Daughter had known no other father. Would be highly detrimental to deny daughter visitation w/ father while half-brothers were visiting with him.

**UNMARRIED PERSONS**
**Fathers**
**Stanley v. IL (US 1972) – p. 638 –** *All parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody, and denying such a hearing to a particular classification of parents is violative of the EPC.*
After mother's death, IL declared 3 children to be wards of the state, despite fact that father was never shown to be unfit.

**Lehr v. Robinson (US 1983) – p. 641 –** *Due process does not require that notice be given in all cases to a biological father of the pendency of an adoption proceeding concerning the child.*
Bio father was absent. Failed to place name on NYS putative father registry, which would have entitled him to notice of any adoption proceeding concerning the child. As there was no emotional connection, the father/child connection did not warrant constitutional protection. Right to notice was weak, and he could have used the registry.

**Michael H. v. Gerald D (US 1989) – p. 73 –** *the interest established solely by biological parenthood plus an established parental relationship is not a liberty interest accorded substantive due process protection.*
Facts are complicated.

**COUPLES**
**VC v. MJB (NJ 2000) – p. 649 –** *When the legal parent willingly encourages any third party not related by blood or adoption to develop a psychological parent relationship with the child, visitation will be awarded to that psychological parent, unless visitation is shown to cause physical or emotional harm to the child.*
MJB was bio mom, in lesbian relationship with VC. At separation, VC sought joint custody and visitation. Held: she should get JC and visitation: VC developed relationship with kids w/ MJB's approval, and acted as a co-parent.
DE FACTO PARENTHOOD STANDARD: Four prongs that petitioner must prove:

1. the bio or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child
2. petitioner and child lived together in same household;
3. petitioner assumed the obligations of parenthood by taking significant responsibility for the child's care, education and development, without expectation of payment; and
4. petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

**Titchenal v. Dexter (VT 1997) – p. 657 –** *A court may not consider a claim for visitation pursuant to its parens patriae equitable powers absent statutory authority.*
Lesbian couple. D adopted Sarah. T didn't think that they both could adopt her, so they didn't. When they broke up, D refused to let T be involved in Sarah's life. Held: without a legal relationship

between T and anybody, T had no standing. Just because they didn't believe that T could also adopt Sarah is no excuse. De facto parents already have rights.

**DE FACTO OR PSYCHOLOGICAL PARENTS – SEE ALI/VCvMJB**
**ALI 203 – definitions – p. 661**
**ALI 2.18 – p. 663**

**3/27/12 somehow not absent**

Custody and visitation exercise
Tiger and Lara:
Assume we are in a jurisdiction that has done away with presumption of legitimacy
if tiger is not the legal father, there are still equitable doctrines that could give him parental rights
-parent by estoppel
See ALI 203(1)(b) – Owen is NOT a parent by estoppel
-de facto parent (ALI)
See ALI 203(1)(c) - he MIGHT be a de facto parent
-de facto parent (VC v. MJB)
-detriment to child standard
-must show that they have been a psychological parent to the child, and child will suffer harm if child can no longer live with this person, OR if legal parent is unfit (like Lara being an alcoholic [many courts would not allow evidence of drinking because Lara had not had a drink in 18 months – see Halberstab {???}])

Owen:
Same minus presumption of L
Remember, different de facto section than for Tiger
203(1)(b)(iv) – different b/c he never had good faith belief that child was his
Did he have the consent of both legal parents? Definitely had Lara's consent; was Tiger a legal parent? Did he consent? Not so clear.

Holning (biological father) – wants visitation:
?
No de facto, no estoppel
MAYBE a detriment to child standard?
DPC? (no.)
EPC? (no.)
For unmarried fathers, test is biology PLUS. No DPC or EPC process.
He is SOL because he failed to assert parental responsibility (under Lehr)

Magdalene (grandmother)
Many states have a grandparental visitation statute
Under Troxel, what standard will court use?
Special weight will be given to PARENT's determination of the best interests

We apply the "best interests of the child" standard

does NY use the de facto parent doctrine? If so, which one?

Without the presumption of legitimacy, Tiger is a legal stranger

Can he be a de facto parent

Caretaking functions – must have had *at least* as much caretaking duty as primary parent
Assume that Owen has – what does this get him?
Visitation
MJB – visitation (but there was a reason for the visitation)

VC – if you apply the best interest standard and everything is the same, then biological parenthood may tip it, but things are rarely equal

Note: NY does not recognize de facto parenthood as a blanket doctrine

**DIVISION OF PROPERTY:**
**Two potential issues**

1. Classifying the property
    a. Marital? Separate?
2. How to distribute the property (equitably, NOT equally)
    What factors will the court consider? (UMBA)

Some states, you don't bother classifying it – EVERYTHING gets distributed (Vermont, for one)

MARITAL V. SEPARATE PROPERTY (UMDA 307)
Alternative A: for CL states
Divide all property (hotchpot) regardless of when/how acquired – minority approach
Alternative B: envisioned for community property states which have always distinguished separate & community property
Both disregard marital misconduct (even though according to the cases, courts seem to consider it – cruelty, adultery, etc)

COMMUNITY PROPERTY V. CL STATES
Community property
During marriage, shared mgmt of any property acquired by either spouse. At divorce, divide the community property justly/equitably.
CL states: title system → → equitable dist. system.
Deferred marital property (MP) system. During the marriage, each spouse has right to manage and transfer property titled in his or her name. at divorce, divide MP equitably.
Name on title DOES matter – don't need spousal permission to sell, DURING the marriage. During divorce, or shortly before, not so much, and you may have an issue. While the marriage is going well, you control it, though.
At divorce: the two systems function similarly

**3/29/12 – DIVISION OF PROPERTY (cont'd)**

In 80% of cases – judges don't award alimony

What is MP? ALI principles (ALI 4.03) – p. 698 -

Property acquired during marriage except for:

1. Inheritances and gifts from third parties
    a. Comport with spouses' expectations?

b. Those of donor?
2. Property received in exchange for separate property
3. Property acquired during domestic partnership before marriage

Other considerations:
-premarital contributions
-presumption that marriage begins on date of ceremony, but…
Majority approach – ignore premarital contributions
Minority approach – "if use of that date would be inequitable, court may use another date to determine what would be equitable"
-if there was a long pre-marriage period, this may be considered
-in contemplation of marriage
-if you bought a house while engaged, this is in contemplation of marriage, and your intent was obviously to treat this as marital property
-court may find that a marital partnership may start prior to marriage
-prenups and postnups
-property acquired after separation, before divorce decree?
-jurisdictional split
Majority – any property you have acquired after separation but before divorce decree, this is separate property.
Minority – the property you acquire in that period still counts as marital property

Why do we divide marital property? Why not just give it to whoever earned it?

P. 710, note 4: "it is impossible to give a precise definition to 'equitable distribution'".

CAN SP BECOME MP?
-commingling
-improved with marital funds (i.e. other spouse's earnings)
-pay mortgage with your earnings, which are marital funds
-pay for remodeling " " , "
-marital labor (see ALI 4.05, p 699)
(innerbichler)
"a portion of any increase in the value of separate eproperty is marital property whenever either spouse has devoted substantial time during marriage to the property's management or preservation."
-why are fruits of either spouse's labor MP?
-should spouse who put in the work keep the appreciation?

Suppose you buy condo for $500k – put in $50k and labor, condo is now worth $700k

Calculate the increase: ALI 4.05(b), comment – allocation method
1. Quantum meruit – values the labor input by reference to prevailing compensation rates, and attributes all remaining gain to capital
–only $20k = MP
2. Attribute any increase in value exceeding the rate of return on passive investments to marital labor and treat as marital property (suppose you would have made $10k gain on passive investment)
-$140k = MP (THIS IS THE ALI'S PREFERRED APPROACH)

How much was the labor worth? What if you had simply paid a contractor? Fair market value of labor was $20k?

**[§ 307. [Disposition of Property]**

(a) In a proceeding for dissolution of a marriage, legal separation, or disposition of property following a decree of dissolution of marriage or legal separation by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court, without regard to marital misconduct, shall, and in a proceeding for legal separation may, finally equitably apportion between the parties the property and assets belonging to either or both however and whenever acquired, and whether the title thereto is in the name of the husband or wife or both. In making apportionment the court shall consider the duration of the marriage, and prior marriage of either party, antenuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and the contribution of a spouse as a homemaker or to the family unit.

(b) In a proceeding, the court may protect and promote the best interests of the children by setting aside a portion of the jointly and separately held estates of the parties in a separate fund or trust for the support, maintenance, education, and general welfare of any minor, dependent, or incompetent children of the parties.]

***Alternative B***

**[§ 307. [Disposition of Property]**

In a proceeding for dissolution of the marriage, legal separation, or disposition of property following a decree of dissolution of the marriage or legal separation by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's separate property to that spouse. It also shall divide community property, without regard to marital misconduct, in just proportions after considering all relevant factors including:

(1) contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;

(2) value of the property set apart to each spouse;

(3) duration of the marriage; and

(4) economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for a reasonable period to the spouse having custody of any children.]

**Innerbichler v. Innerbichler (MD 2000) – p. 700 –** *In a dissolution, all property is found to be marital unless traced to a non-marital source, then assigned a value, and all marital property must be equitably divided.*

Marital property does NOT include property that is:

i. acquired before the marriage;

ii. acquired via inheritance or gift from third party;

iii. excluded by valid agreement; or

iv. directly traceable to any of these sources.

-property that is non-marital can become marital, however.

→When a party petitions for a monetary award, the trial court must first follow a three-step procedure:

1. For each disputed item of property, determine if marital or nonmarital.
2. Determine the value of all marital property.
3. Decide if the division of marital property according to title will be unfair (if so, create monetary award to rectify)

Eleven statutory factors to determine monetary award:

1. Contributions, monetary and not, of each party to well being of family
2. Value of all property interests of each party
3. Economic circumstances of each party at the time the award is to be made
4. The circumstances that contributed to the estrangement of the parties
5. The duration of the marriage
6. The age of each party
7. The physical/mental condition of each party
8. How specific marital property was acquired
9. Contribution by parties to acquisition of real property held by parties as tenants in the entirety
10. Alimony
11. Any other factor.

FMV of business before marriage: $153k
14 years later: FMV = $8.3 million. H owns 51%
-is all of the increase attributable to H's labor (marital labor)?
-husband says no. court disagrees with him - says he was the driving force, even if other people were involved

Dividing the MP: Innerbichler v Innerbichler

Why did W get ½?
-H must pay award over 5 years
→marital fault – adultery
→economic fault – gambling
→marital funds were invested in SeaMats and Trams

Standard of review

Why alimony too, if she's already getting half? She's getting a pretty solid amount of alimony, here.
-adultery
-less educated – didn't have the same earning potential
-she is the custodial parent

We'll pick up with the source of funds approach
For Tuesday – read up to/including nairu and nairu
For Wednesday, finish alimony, do NOT read unmarried partners

**Thomas v. Thomas (GA 1989) – p. 706 –** *In making an equitable distribution of property, the court must first determine which property is marital and then equitably distribute only that property while protecting the spouse's non-marital contribution pursuant to the source of funds rule.*
THREE APPROACHES

-Inception of title – the status of property as separate or marital is fixed at the time it is acquires, and despite later contributions by other spouse, remains separate
    -pros and cons
-source of funds – the property is considered both separate and marital in proportion to the contributions (monetary and otherwise) separately and jointly provided
    -pros and cons
-transmutation of property – separate property is converted to marital property whenever there is any contribution of marital property
    -pros and cons

Which best reflects spouse's expectations?

To divide the property – apply the equitable distribution factors – p. 697

Husband would be reimbursed for his contributions (courts usually just split it 50/50)

Court must first determine that $6400 is marital property

Transmutation of property – "separate property is converted to marital property whenever there is any contribution of marital property"

Court IS going to consider that the wife contributed 75k toward the property, and the husband only contributed 6400.

ALI has a presumption that after 30 years, everything should be divided.

Source of funds approach – look at relative contributions of funds (individual/marital) and use this to create a ratio that divides appreciation

This is a different case because it was such a short marriage – often, after 10 years, courts will presume everything should be split evenly.

**Ferguson v. Ferguson (MS 1994) – p. 709 –** *A spouse who has made a material contribution toward the acquisition of property which is titled in the name of the other may claim an equitable interest in such jointly accumulated property incident to a divorce proceeding.*
→unfair to not take into account the spouse's non-financial contributions.
Guidelines for equitable distribution method of division of marital assets – SEE PAGE 711 FOR MORE DETAIL

1. Contribution to accumulation of the property, including economic, stability of relationship, and education of spouse
2. Disposal of marital assets
3. Market value and emotional value of assets
4. Value of assets not subject to distribution
5. Tax consequences
6. Extent to which property can be used to eliminate periodic payments and other sources of friction
7. Needs of parties for financial securities
8. Other factors

Why consider a homemaker's contribution?

Guiding principles:
-need
-status
-rehabilitation
-contribution
-partnership

Only about 22 states consider marital fault when dividing marital assets.

WHAT IS PROPERTY?
**Postema v. Postema (MI 1991) – p. 713 –** *In a divorce, one's spouse's advanced degree should be taken into account in the property distribution. Here, do restitution instead of present value – short marriage, easy to calculate. Look at sacrifices she made*.
Couple got married as H entered law school. Divorced as he graduated. Held: Both spouses sacrifice with the expectation that the degree will benefit both parties.
Must look at value of W's investment in assisting H in earning degree, NOT the value of the degree.
-*was the degree the product of a concerted family effort?* Merely getting a degree does not mean that it was, in fact, the product of a concerted family effort.
-*how to value?*
-*how to divide?*
-*why reject alimony approach?* (value of degree doesn't dissipate after marriage)
-what is court seeking to compensate?
-*compare MI, NY, NJ*
MI – minority – treat degree as marital property
NY – minority – treat degree as marital property
-approach not adopted by any other state – also says that they won't reimburse, but will figure out what the degree is actually worth – how much would you have earned throughout your life with/without degree
Distributive – look at other property owned, use this to even – pay in installments
This is NOT alimony – alimony can be modified on changed circumstances and ends upon remarriage.
One case – doctor was going to quit job and work for Doctors without Borders – court says it doesn't matter, still have to pay.
Says that spouse contributed because she expected that she would eventually have a better life.
NJ – majority – doesn't treat degree as MP but WILL consider contributions
Even if degree isn't MP, states will consider the costs contributed toward other spouse

*Why is a degree considered property?*
-fruits of labor
-???

**Elkus v. Elkus (NY 1991) – p. 719 –** *Marital property is determined by the nature of the contribution to its value, and not by its status as a licensed or otherwise tangible existence.*
During marriage, H greatly helped W in advancing her opera career, via management, critiques, etc., which went from nothing to 600k/year during marriage. Held: this was marital property. W's innate talent does not negate the effort that H put into making her successful.

Opera singer career – 10 year marriage
-is enhanced value of a career and/or celebrity status marital property?

-different from degrees/license?

-fame is fleeing, degrees are not (NY is NOT sympathetic to this aspect, treats it as marital property)

Other states use alimony to remedy.

MP = property acquired during the marriage "regardless of form in which title is held"

Postema did restitution - reimbursement

Elkus did increased value – return on investment

Difference: longer marriage in Elkus

Easier to calculate Postema's contribution

In Elkus, dedicated whole life to wife, so tougher to calculate that.

**4/4/12 – FINANCIAL MISCONDUCT**

**Siegel v. Siegel (NJ 1990) – p. 722 –** *The contribution of each party to the acquisition or dissipation of the marital property is to be considered in determining the equitable distribution.*

Casino gambling losses incurred pre-complaint, but after marriage was irreparably fractured

Held: the loss belongs to the gambler and is NOT distributed 50/50 between parties.

Note difference between this and law degree – after debt incurred from law degree, he keeps the benefit of the law degree – there is no "benefit" here.

Debt incurred from maxing out credit cards to buy clothes for children – this is marital debt.

Same thing but buying shoes for yourself – NOT marital debt.

Statute in Siegel: p. 723, 2nd paragraph – "the contribution of each party to the acquisition, dissipation, preservation, depreciation, or appreciation in the amount or value of the marital property…"

How could this NOT be dissipation?

If she was aware during marriage that he was gambling? If she gambled with him? Tacit consent?

**Gershman v. Gershman (CT 2008) – supp 96 –** *Poor business decisions do not constitution dissipation. A harmful or selfish expenditure of marital assets undertaken for a nonmarital purpose is required before one spouse can be found to have dissipated marital assets.*

Standard for dissipation

1. Financial misconduct
    a. E.g. concealed, conveyed, wasted marital assets
2. Motivated by purpose unrelated to marriage (i.e. a paramour)

Temporal element?

Examples:

Court says that they're not going to audit every transaction during marriage - look at financial state at time of separation, but won't look back

PENSIONS AND OTHER DEFERRED INCOME

Laing v. Laing

Vested v. non-vested

-every jurisdiction agrees – if you have a vested asset where you will definitely receive pension at some age, then this is marital property. Doesn't matter that you can't touch it yet.
Valuation
-present value
-reserved jurisdiction
-award non-ee spouse percentage of ee spouse's contributions plus interest
Problems
QDRO
**Laing v. Laing (AK 1987) – p. 724 –** *A spouse's nonvested pension rights are properly characterized as marital property*
Two approaches:
Present value approach: court factors contingencies and does a "reduce to present value" calculation. Paid in lump sum
Reserved jurisdiction: court orders a fraction of actual payouts to be given to spouse.
Court chooses the reserved jurisdiction approach – creates financial security. Easier to calculate.
OTHER DEFERRED INCOME
**Niroo v. Niroo (MD 1988) – p. 727 –** *Anticipated post-dissolution commissions earned during the marriage constitute divisible marital property.*
Renewal commissions on insurance policies sold by spouse during marriage but accruing after dissolution ARE marital property. The fact that some work will have to be done on them after marriage doesn't negate the fact that majority was done during marriage. He is not unfairly burdened by what is required to claim these benefits.

**ALIMONY**
**UMDA 308 – maintenance (p. 731) -**
Alimony is NOT solely H paying W – limiting alimony to Ws is a gender-based classification, not legal – anybody can get it.

-conceptual bases
-reasons for maintenance in an era of equitable distribution and no fault divorce
NEED
-goals of alimony
Provide support
Keep a financially weaker spouse from becoming homeless

Legal assistant/partner divorce

35 yo legal assistant (40k/yr) married law firm partner (600k) 10 year marriage, no children, no MP.
After divorce – is legal assistant (now 60k/year) entitled to alimony?
See UMDA 308:

Why should spouse be entitled to same standard of living?
What if marriage was very short?

Is it fair to award alimony for very short marriages?

In cases of domestic violence, it's important to provide support for former spouse whose ability to work may have been negatively affected by former spouse's emotional/physical abuse

NY says – are there minor children in the home, or is there an adult child with a disability such as that they need full-time care, or is the person seeking alimony taking care of an elderly parent or something in a way that makes them not reasonably able to seek work

NY has 20 alimony factors
UMDA has fewer (kind of) – see list on page 731

When paying alimony – you get to deduct it, but recipient pays income tax on it (UNLESS it is for child support – often, for tax reasons, parties will negotiate an amount of child support that will include the alimony payment

A few that are not in UMDA but other states consider
-premarital contribution

**Types of alimony:**
-permanent
-limited duration
-rehabilitative alimony – short term award awarded to let other spouse get (back) to self-sufficiency
-reimbursement alimony (postema) – more like a property interest. Even if you die, your estate pays it.

**In re Marriage of Wilson (CA 1988) – p. 732 –** *In a dissolution judgment, the court may order a party to pay any amount for the support of the other party for any period of time as the court may deem just and reasonable considering all the statutorily stipulated circumstances of the respective parties.*
Civil code 4801 lists 8 factors for determining spousal award:

1. Earning capacity of each spouse
2. Needs of each party
3. Obligations/assets of each party
4. Duration of marriage
5. Ability of supported spouse to engage in gainful employment w/o detriment to children in care
6. Age/health of parties
7. Standard of living of the parties
8. Other factors.

H can pay alimony, W is disabled – why only 5 years?
Only married for 6 years, no kids – not going to order lifetime support.

**4/17/12**

**Clapp v. Clapp (VT 1994) – p. 735 –** *Family court has broad discretion in determining maintenance amount, and will be reversed only if there is no reasonable basis to sustain the award.*
Marriage is 25 years.
ACTUAL need is not important, it's RELATIVE need.
H argued that court could not award maintenance unless P's reasonable needs are not met by income – court says, shut up.
Permanent alimony
Self-sufficient, so why alimony?
Wife was earning 45k/year, husband 137k

Wife awarded 60% of marital assets, and $2k/month
Marital standard of living
Contributions
    -determine value
Income equalization
    -compare to delozier
Fair?
Type of alimony? Permanent, reimbursement?

Court tries to adopt a formula for determining the amount of alimony – this is much more common now

2 reasons why court decides to award alimony:
-she cannot support herself at the standard of living she enjoyed during marriage
-court wants to reimburse her for her contributions made during marriage – primary childcare/household responsibilities

Why didn't court just award her more of the marital assets, but no alimony?
-alimony is generally modifiable
-can't count on property to generate income in the same way that you can count on somebody's earnings

Income equalization:
H makes 100k
W makes 50k
Combined – 75k/avg
So, H would have to pay 25k/year to equalize

What's the problem with this approach?
-kind of punitive – very significant burden on husband
-doesn't take into account increases in her income
-disincentivizes both parties from increasing salary

They DO use an income equalization approach, but it's used to determine the appropriate alimony, and is not permanent or unmodifiable, UNLIKE the approach that was rejected in Delozier.

How is this different than Alicia kelly's approach? Than Delozier approach?

Alimony norms: what is fair? (NYT article)

**Kelly, Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life (p. 737)**
Kelly's proposal – compare to Clapp?
Should law presume equal contributions?
Does Kelly's partnership theory reflect the expectations of most married couples?
-she says that couples think that they contribute equally? Do they actually?

She suggests having income equalization for half the years of marriage – income equalization would change year by year (not clear how this would work)

Why doesn't she advocate having court determine financial value of non-financial contributions?
-it's not practical. Tough to assign dollar value to housework/financial/family support.

MA has adopted rules similar to Kelly's proposal

ALI 5.04 – **Compensation for Loss of Marital Standard in Living (p. 746)**

ALI 5.05 – **Compensation for Primary Caretaker's Residual Loss in Earnings Capacity (p. 749)**

UMDA 316 – **Modification And Termination Of Alimony (p. 752)**
-"changed circumstances so substantial and continuing as to make the terms unconscionable"
-terminate upon death or remarriage (exception for child support)

**Graham v. Graham (DC 1991) – p. 753** – *An increase in the non-custodial parent's ability to pay, by itself, CAN constitute a material change in circumstances sufficient to justify an increase in support.*
Ex H's salary increased dramatically.
A material change in either the parent's income or in the needs of the children or the other spouse may be the basis for modification of the support order.
Increase in obligor's ability → → increase in alimony and child support, even though NEEDS of the obligee are unchanged (or changed very little, in this case)

**D'Ascanio v. D'Ascanio (CT 1996) – p. 756 –** *A settlement agreement by the parties to modify the alimony agreement upon cohabitation of wife with another is valid and should be respected by the court.*
Agreement said that alimony would be reduced by ½ if wife cohabited. She did, and court reduced alimony by only 100/wk. Held: the agreement was valid, and the court's discretion WAS limited by this agreement. This would not work for CHILD SUPPORT, though, because the kid has the right to the money.

**UNMARRIED PARTNERS**

**Cohabitation: A changing environment (slides)**

Should individuals who cohabit be able to walk away with no obligations to the other person?
-if so, under what circumstances?

**4/19/12**

What is palimony?
-contract claim
-based on express/implied contract
-some states recognize express, some recognize implied, some don't recognize at all
-some don't rec b/c it discourages marriage.

"division of financial assets and real property on the termination of a personal live-in relationship wherein the parties are not legally married"
Contract – express or implied, between 2 cohabitants

**Marvin v. Marvin (CA 1976) – p. 769 –** *Where cohabitation is expressly or impliedly founded on a sharing-of-property basis, the non-acquiring partner has an interest in property acquired during cohabitation.*
Unmarried couple cohabitates for 6 or so years. She gave up career as entertainer to devote full time as "companion, homemaker, housekeeper and cook". She says they had an oral agreement to share earnings.
-fact that there was a sexual relationship does not destroy the ability of the parties to contract.
-she changed her name, which is a little weird.

Remember: palimony is just a contract claim

argument against palimony:

discourages marriage
counter: possibility of avoiding alimony also discouraged marriage
seems like a contract for prostitution
counter:
what are terms of "implied" contract?
Evidentiary issues

arguments for:
usually weaker party is the financially disadvantaged one
two roommate strangers can enter into agreement, why should it be different just because two people are in an intimate relationship
avoid putting older women on public assistance
some states only honor written, express agreements

Evidentiary issues:
What is the value of the claim?
In typical palimony agreement – usually no written agreement, or unclear terms. "I will always take care of you" etc.
What is consideration? What is amount?
Often, one party is dead – can't testify as to what things mean. Or, they are broken up, and party will deny existence of contract
"I will always take care of you" – does this create a contract? Is there consideration?
NJ used to say that her committing herself to the relationship created a contract – cooking, cleaning, accompanying to social functions (basically: acting like a wife)
Varies by jurisdiction whether this is sufficient

Value of promise?
Legal answer: "who the fuck knows"

Maybe other party didn't marry BECAUSE he didn't want these financial obligations in the first place?

**Norton v. Hoyt (RI 2003) – p. 776 –** *A broken promise to marry and to initiate divorce proceedings cannot support a claim for promissory estoppel, because it is against public policy.*
Loooong relationship between woman and married man. Man kept promising to divorce his wife, and didn't. Woman quit job b/c man said he would support her. Didn't.
Not every jurisdiction recognizes palimony agreements.

-claim for support against cohabitant (who is married to another)
-why not bring a palimony claim?
Promissory estoppel
-clear and unambiguous promise
-reasonable and justifiable reliance
-detriment to promise
Two promises
-Promise to leave wife is NOT an actionable claim – no tort for breach of promise to marry (in most states)
-She shouldn't have focused on promise to marry – should have focused on promise to support her for life. She relied on the latter, not the former.

Fair outcome? Public policy?

**ALI 6.03 – p. 779– domestic partners** (not actually law anywhere)
DPs are two persons of same/opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple.

**ALI 6.06 – p. 781** – compensatory payments to domestic partner
-domestic partner is entitled to compensatory payments on the same basis as a spouse…
-exception: no claim by DP based on care of a child who is not the child of the other DP
-contract v status approach
-opt-in v. opt-out regime

**VI. CHILD SUPPORT**
**A. STANDARDS AND MODIFICATION**
-historical context
-need for guidelines
-role of fed'l gov't
For a while there was no interstate enforcement mechanism
Fed gov't: said that every parent had duty/responsibility to support their child, whether marital or non-marital
-must be some sort of formula
Guiding principles

Historical problems: see slide.

1984 Child Support Amendments & Family Support Act of 1998
-judges required to apply guidelines, developed by their states. Allowed for automatic wage garnishment for payment.

Only about 60% of child support awarded is actually paid. This is bad. Gov't spends a lot of money trying to force payment.

Guidelines: See page 782-83
Policy goals:
-keep both parents involved. (1/3 of fathers are in little or no contact with their kid after divorce, number is even higher for children not born in a marriage)
-allow kids to enjoy same lifestyle they did when the parents were married

Models:
**Income shares** (NY and NJ, majority) – percent of parents' combined income allocated in proportion to each parent's income plus child care, extraordinary medical or educational expenses
-we assume the custodial parent makes their contribution by feeding/clothing/housing child
**Percentage of Income** (minority)– look at NCP's income only. Can be flat or graduated, with % increasing with higher income. Add child care, etc
**Melson formula** (only 3 states) –reserves basic level for parents, apportions rest of the income for children's basic needs (including child care, medical exp). Portion of remaining income (if any) allocated to add'l child support

**4/24/12**

**ONE QUESTION ON EXAM WILL INVOLVE A WHOLE BUNCH OF CHILD SUPPORT CASES**

Focus on income shares and %age of income approaches. Don't worry about Melson formula, so much.

DEVIATING FROM THE GUIDELINES
UMDA:
-financial resources of the child
- " " the custodial parent
-standard of living the child would have enjoyed if the parents were still together
(as evidenced by Marriage of Bush)
-physical & emotional condition of child and educational needs
-financial resources and needs of non-custodial parent
-DON'T take debt into account, or other liabilities, initially. Court can consider these, however.
Court must set forth in writing why they are deviating from the guidelines

Courts also consider:
-age and health of child/parent
-earning ability of each parent, including custodial responsibilities
-responsibility of each parent for court-ordered support of others
-reasonable debts/liabilities of each child/parent

NY also considers:
-nonmonetary contributions that parents make
-extraordinary expenses incurred by NCP in exercising visitation or during extended visitation, provided that CP's expenses are substantially reduced as a result thereof.

Deviating from the guidelines:
**Schmidt v. Schmidt (SD 1989) – p. 784 –** *Child support obligation shall be established in accordance with the obligor's net income and number of children affected, unless specific findings permit deviation from these guidelines.*
%age of income model. Father made 1250/month, child support set to 250/month once father had one kid.
3 kids total: Father had 1 kid, mother had 2. Court says this cancels out, and leaves mother with 1 kid. Father says this is unfair: they should determine the amount he would pay for supporting 2 kids, and subtract the amount that mother would pay for 1 kid. Court agrees, remands to see if

there are any specific findings that would allow for deviation from guidelines (like time spent on farm, which provides certain necessities which would otherwise be personal expenses).

Problems with guidelines?
-unfairly tie judges' hands?

**Marriage of Bush (IL 1989) – p. 788 –** *Trial court may vary from guidelines by setting a figure for child support below the guideline amount when dictated by the income of both parents and taking into account the lifestyle the child would have enjoyed absent the dissolution.*
-model applied? %age of income
-award amount (20% to trust) was NOT appropriate, given NCP's high income. Would have resulted in kid getting 30k a year, higher than average income.
-compare with Sean Combs – he was paying 30k/month for one kid and 21k/month for another. Mother of latter said she should get 30k. court says 21k is fine.
Does any kid deserve 30k a month?

We said that a child should enjoy the standard of living he would have enjoyed – is the court deviating from that?
Standard of living kind of takes into account the CP's income, even if it's not supposed to
Also note: just because parents make a lot of money doesn't mean they will spend it all.

Guidelines max out at a certain income level, so courts have to use discretion at very high levels.

Modification and termination of child support:
-material/sufficient change in circumstance or
-UMDA 316 (p. 752) – <u>higher standard</u> – "changed circumstances so substantial and continuing as to make the terms unconscionable"
-terminate by emancipation of the child but not by death of the obligor
-minority approach.

**Child support exercise:**
Not obligated to support child once child is over 18 (Solomon v Findley) BUT the agreement became part of the divorce decree, so maybe it's still valid?

First: figure out what support obligations he has, and then figure out what defenses he has

$65k in arrears – enforcement action
Can he get out of this? Reduce it?
He would argue that the stepfather stepped in and supported kid, so equitable estoppel prevents him from paying. This won't matter for arrears, though, if it works at all.
Can't argue that there was an implied change in award because they accepted less. Mother can't waive the CHILD'S right to more money by accepting it.

Show that original agreement was too high? Executed fraudulently?
This is almost never going to work. Agreement was signed, it wasn't unconscionable, it's valid.

Argue that he agreed to pay only in-state tuition and not full private school tuition?

Arrears are not dischargeable in bankruptcy. He's got to pay them.
May be wage garnishment.

Aquiles can't afford attorney
Can he deduct amt he gives Alex's mother from his gross income? (no)
-Alex's college expenses
-stepfather liable?

Child support enforcement – CS recovery act of 1982 (see Wisconsin v Oakley and turner v rogers slide)

From Turner:
70% of child support arrears are owed by parents earning less than 10k/yr
Less than ½ of CPs receive full amount due, 24% get nothing

Can be probationary condition where you can't procreate

One way to organize answer – enforcement action (tell him the parade of horribles)
Petition for modification, based on change in circumstances – if he doesn't get amount modified down, arrears will only go up
-earns less – can't pay 1400/mo
-has another family to support, plus another child

Court could find that even though he's earning 40k, he could be earning more – voluntarily underemployed?

College expenses: Curtis, Johnson, and Solomon.

**Solomon v. Findley (AZ 1991) – p. 791 –** *A provision for post-majority educational support does not merge into the dissolution decree, but remains independent and enforceable as a contract claim.*
S and F divorced, and F agreed to provide educational funds for daughter through college or age 25, whichever came first. S tried to enforce it by showing that daughter hadn't received funds; court says that since child was over 18, she was beyond its jurisdiction. Then filed a breach of contract action, which was dismissed b/c it was part of the child support.
HELD: this can be pursued in a separate contract action, which will allow it to be pursued after child is 18.

**Curtis v Kline (PA 1995) – p. 794 –** *A state law which distinguishes between children of married and divorced, separated or unmarried parents for the purpose of authorizing a court to order the parents to provide equitably for the post-secondary educational costs of the child is unconstitutional under the EPC of the 14A.*
Act 62 authorized a court to order divorced, separated or unmarried parents to provide equitably for the educational costs of their children, even after they reach 18 years of age. As the need for money for such education does not exist SOLELY because of the family's "non-intact" status, the law is not constitutional.
Standard of review: rational basis
Why does it fail? Treats children of together and divorced parents differently. This different treatment is not warranted.
-dissent: divorce puts kids at a disadvantage. Law tries to correct this disadvantage.

MODIFICATION OF CHILD SUPPORT

**Ainsworth v Ainsworth (VT 1990) – p. 798 –** *Expenses for a second family may enter into the determination of child support for the preexisting family, even where the second family consists of a spouse and stepchild.*
M and W divorce. M remarries woman with a son. W filed for increased support. Held: it would be inequitable to increase the support in view of M's duties to new family.
Model applied?
Should expenses for second family affect determination of child support? (yes)
Can't use it to change the gross income calculation, BUT the court DOES have discretion to take other family's expenses into account (like college expenses)
Resources of second spouse. Relevant?

**Little v Little (AZ 1999) – p. 804 –** *A non-custodial parent's voluntary decision to leave his or her employment to become a fulltime student DOES NOT AUTOMATICALLY constitute a sufficient change in circumstances to warrant a downward modification of the parent's child support obligations. Good faith in making change is not sufficient.*
"responsibilities of begetting a family many times raise havoc with dreams"
Man left air force position and enrolled in law school. Held: trial court can impute income to somebody who is not working, if they can/should be working, but are working below their full earning potential.
Factors considered:

1. Negative impact would have been substantial, for kids
2. Speculation to assume that H would have earned more money after school
3. Record doesn't reflect that H sought employment near children
4. H financed education through loans, so still could have paid
5. Applicant failed to act in good faith and instead endeavored to further his own ambition (???)

NURTURING PARENTS
**Bender v Bender (PA 1982) – p. 807 –** *A parent's decision to remain at home with a young child, the nurturing parent doctrine, is not an automatic exception to the support obligation.*
H had custody and was getting child support from W. W remarried and got pregnant, and then stayed home with new baby, not working. W wanted to avoid paying support b/c she was home nurturing child. Court says: NOPE
A court should consider a parent's desire to stay home to nurture minor children and, in appropriate cases, excuse such nurturing patent from contributing support payments. There is NO absolute rule excusing them from support. They consider earning capacity, not actual earnings.

**Miller v Miller (NJ 1984) – p. 809 –** *A stepfather does not have any responsibility to support his former stepchildren UNLESS equitable estoppel applies – he has represented to mother that he will support them, AND he has interfered with the biofather's relationship.*
Stepfather had actively interfered with biofather's supporting/contacting his children. Then, stepfather and mother divorced. Biofather is easy to find.

UNMARRIED PARENTS
**Johnson v Louis (IA 2002) – p. 815 –** *No postsecondary support obligation for nonmarital children. Children of unmarried parents are not discriminated against by having court-ordered support pursuant to a different statute than that support ordered after dissolution of marriage.*
L and J, never married, had son. J sought to modify support order to force L to provide for son's college education.

Support orders for children of unmarried parents were under a different statute than that of divorced parents
Court notes that son was in same position as children in intact marriage – the other statute existed b/c of loss of intact family. Son never had intact family (burn).
Distinction between marital and nonmarital children

**WI v. Oakley (WI 2001) –** *Man who intentionally avoided paying child support for 9 children with 4 different women COULD be barred from procreating as part of his probation; statute is OK if it is narrowly tailored to meet the state's compelling interest and reasonably related to rehabilitation.*
Oakley was convicted of not paying child support, and intimidating witnesses in a child abuse case against him. Allowed to avoid prison b/c he needed to work, by being put on probation, with above a component of the probation, unless he could demonstrate an ability to support new child while still supporting old one.

**Turner v. Rogers (US 2011) – printout -** *The Due Process Clause of the 14th Amendment, while it does not require a state to provide counsel at civil contempt proceedings to indigent individuals, even if incarceration is a possibility, does require some safeguards to prevent the erroneous deprivation of liberty.*
South Carolina's Family Court enforces its child support orders by threatening with incarceration for civil contempt those who are (1) subject to a child support order, (2) able to comply with that order, but (3) fail to do so. We must decide whether the Fourteenth Amendment's Due Process Clause requires the State to provide counsel (at a civil contempt hearing) to an *indigent* person potentially faced with such incarceration. We conclude that whereas here the custodial parent (entitled to receive the support) is un-represented by counsel, the State need not provide counsel to the noncustodial parent (required to provide the support). But we attach an important caveat, namely, that the State must nonetheless have in place alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question, whether the supporting parent is able to comply with the support order.

**4/26/12**

What about cases where there is no contract, and Alex' s mother and Aquiles don't have any sort of agreement on college expenses?
Mother can ALWAYS go after aquiles for child support. She hasn't been because he's voluntarily been paying
Could she go after him for some share of college expenses, even though Alex is over 18? –(Johnson v. Louis – no postsecondary support obligation for unmarried parent)

Could stepfather be liable?

**JURISDICTION**
For each issue – address recognition, choice of law, and jurisdictional issues (SMJ, PJ) before the merits
-different jurisdictional rules for:
- Divorce
- Child custody
- Property and support

The same state that has jurisdiction to determine custody may not have jurisdiction to do the divorce.

People move around more, which makes confusing jurisdictional situations more common

RECOGNITION OF MARRIAGE
General rule: marriage valid where solemnized or executed is valid everywhere.
Repugnant to public policy exception (FF&CC, 28 USC 1738)
DOMA (28 USC 1738C) – amendment to FF&CC

MINI/STATE DOMAs
**Wilson v. Ake (FL 2005) – printout –** *The USC does not protect a person's right to enter into a same sex marriage.*
Two lesbians got married in MA, moved to FL. FL did not have to recognize the marriage

IS DOMA UNCONSTITUTIONAL?
Ps argued that congress can't, by statute, override Constitution
Argued that it violated FF&CC and EPC. Didn't work.

DOMA sec 3 – says that in any federal action, marriage means only a legal union between 1 man and 1 woman

Pres. Obama is not going to defend DOMA – determined that it is unconstitutional. Will enforce it until it is repealed or found unconstitutional by judiciary, however.

DIVORCE JURISDICTION
Domicile – durational residency requirement
Some states: 36 hours. Other states: 1 year.
Now every state has no-fault divorce so moving is not as common
Some people legitimately have reasons to move, however, other than avoiding the divorce laws.
Policy reasons
Sosna v iowa – justice delayed or denied?
**Sosna v. IA (US 1975 ) – p. 418 -** *A durational residency requirement is constitutional in that appellant was not permanently foreclosed from obtaining a divorce and the State's interests in the requirement are legitimate.*
Appellant moved from New York to Iowa and one month later brought suit for divorce in Iowa. Appellant's husband challenged the jurisdiction of the Iowa court.

**5/1/12**

Law of the forum – can only apply law of the forum, not the home state, or where the alleged crime (like abuse) occurred.
FF&C & ex parte decrees
-States are supposed to give credit to other states' divorce decrees.
Williams v NC I and II
Two people, married to others, reside in NV for 6 weeks so that they can divorce. They then marry, return to NC, and are charged with bigamy.
NC was trying to prevent people from getting around the law of their state. Says that they never had intent to stay in NC, so there was no domicile.
Compare to bilateral decrees

USUALLY, if both spouses go to NV and get residency for a divorce, home state won't bother challenging, because spouse can't go back and claim they didn't want divorce (unless you're NC and feel like making a point, I guess)
Prof is lecturing because this material is dry and boring and not lent to discussion.
Williams I – once a divorce is effective in a state, it must be given FFC.
Williams II – other states can inquire as to whether other state actually had jurisdiction. Can't say that the other state's rules are bad, however.

**CUSTODY JURISDICTION**

Which country/state has SMJ?
-UCCJEA (state) (all states except MA have adopted)
-creates FF&C power for child custody decrees, to prevent forum shopping – normally, FF&C only applies to final orders, and child custody orders are never "final"
-Parental Kidnapping Prevention Act (PKPA) (federal)
-Hague Convention on the Civil Aspects of International Child Abduction (International treaty) - requires country to which children are taken to be a signatory, to have any effect
-International child Abduction Remedies Act (ICARA) (implementing legislation)

First thing: must decide if state has subject matter jurisdiction (personal jurisdiction is NOT required)

CUSTODY JURISDICTION:
UCCJEA
Initial Custody determination:
-home state (kid has lived with parent for >6 mo immediately prior to custody proceeding)
-child has significant connections with the state and at least one parent lives there and court has access to substantial evidence concerning child's care, protection, training, and personal relationships (only if no home state or home state declined SMJ)

Home state jurisdiction?
Father lives in NY
Child born in NY, lived there until age 5
Couple broke up – mom moves w/ child to CT, live there for past 18 mo. Father still lives in NY
Does NY court have SMJ under UCCJEA?
See p. 1193 - a court of this state has jurisdiction to make an initial child-custody determination *only* in the following situations:
(a) This state is the *home state* of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.
Also: the child's "home state" is defined as the state in which a child lived with a parent *"for at least 6 consecutive months immediately before the commencement of a child-custody proceeding."*

So: No, NY does NOT have home state jurisdiction over child.
Let's assume that child has been living in CT for past 4 months: father files a petition, still lives in NY.
NY is still the home state: child lived there w/in last 6 mo, and one parent still lives there.
What if father files petition in NY, but he has moved to PA?
NY has no interest in this case anymore.
CT is not the home state b/c not lived there for 6 months.
PA is not the home state either: kid has never even been there

So: there is no home state. The state that can exercise jurisdiction is the one that qualifies under the second one, above:
(see p. 1193)

What if at same time, father moves to PA, mother and child move to CT, and mother files petition in CT
CT doesn't really have connection, PA doesn't at all, and nobody lives in NY
CT will exercise jurisdiction here, because SOMEBODY has to.

**CUSTODY JURISDICTION MODIFICATION**:
A state cannot modify custody order issued by another state exercising SMJ in accordance with UCCJEA unless:

-initial state determines it lacks SMJ
-child and parents no longer reside in state which issued custody order.

Ex: father still lives in NY
NY properly exercises SMJ and awards father jurisdiction
2 years go by: child/mother have been living in CT for 28 months
By now, CT is the home state
Mother wants to file a petition in CT b/c it is now the home state
HOWEVER, b/c NY has custody order issued, NY has continuing exclusive SMJ over this order, and is the only state that can modify this order if father remains in NY
NY CAN, however, determine that it no longer has SMJ, at a certain point, at which point CT can gain SMJ

ONLY RESPONSIBLE FOR UP TO THE UCCJEA, NOT THE HAGUE OR OTHER STUFF AFTER

**Foster v. Wolkowitz (MI 2010) – 1191 printout –** *the statutorily-required presumptive award of custody given to a mother when an acknowledgment of parentage (AOP) is executed pursuant to the Acknowledgment of Parentage Act IS NOT an "initial custody determination" under the UCCJEA*

Acknowledgement of Parentage – AOP grants mother initial custody of nonmarital child, "without prejudice to the determination of either parent's custodial rights…this grant…shall not…affect the rights of either parent in a proceeding to seek a court order for custody or parenting time [visitation].

-by executing AOP, parents consent to PJ re: custody and support. Consent and SMJ?
Why does it matter whether the AOP is an initial custody determination?
If it is, other states can't modify it, subject to UCCJEA
If it's the initial custody determination, then IL is the home state even though child has moved back to MI, and father's petition for custody in IL has SMJ

Federal PKPA
If you understand UCCJEA, you understand PKPA.
Difference: PKPA was enacted by congress when states had not adopted UCCJEA. Still important in MA, though.
**Thompson v. Thompson (US 1998) – printout -** *the federal Parental Kidnapping Prevention Act (PKPA) DOES NOT furnish an implied cause of action in federal court to determine which of two conflicting state custody decisions is valid.*
CA and LA had conflicting orders for father/mother

If father can get child to MI, can get MI to issue an order
Lesson: when you have conflicting orders, there's not much you can do
In reality, parents often use the law of "grab and run"