**Part 1: Who is recognized as a family?**

1. Definition of “Family”
   1. *Moore v. City of East Cleveland*
      1. Family: “close relatives [who] draw together to participate in the duties and satisfactions of the common home... for mutual sustenance and to maintain or rebuild a secure home life”
      2. Zoning ordinances that narrowly define “family” to effectively force residents to live in those specific family patterns violate the Constitution.
   2. *Braschi v. Stahl* *Associates*
      1. Family: the term should find its foundation in the reality of family life. The factors to be considered should demonstrate a level of emotional and financial commitment and interdependence characteristic of the typical family.
      2. The term family as it is used in relation to rent-control non-eviction provisions includes two adult partners in a long-term relationship who exhibit emotional and financial commitment and interdependence.
2. Right to Privacy
   1. The right to privacy, although not explicitly stated in the Bill of Rights, is a penumbra, formed by certain other explicit guarantees. As such, it is protected against state regulation that sweeps unnecessarily broad. (*Griswold v. Connecticut*)
   2. Unmarried people have the same rights as married people to possess contraceptives. (*Eisenstadt v. Baird*)
   3. Legislation that makes consensual sodomy between adults in their own dwelling criminal violates due process. (*Lawrence v. Texas*)

**Part 2: Marriage Requirements**

1. Historically, broad social consensus concerning basic social values allowed legal regulation of marriage formation to be kept to a relatively compact list of “rules”: consent, be at least a certain minimum age, not already be married to someone else, and not have a close familial relation with the intended partner
2. Two developments have contributed significantly toward “deregulation” of marriage
   1. Fundamental transformation of the understanding about the central purposes of marriage
   2. Recognition in the past half-century of significant constitutional limitations on government power over family life
3. Consent to Marry
   1. Void v. voidable
      1. Void: considered absolutely void, regardless of the request of parties (ex: lack of consent, fraud)
      2. Voidable: parties must elect to void marriage, valid unless and until parties request (ex: impotency)
   2. A court can annul a marriage after the death of one party to the marriage, as long as the facts support the reason for the annulment. (*In re Estate of Santolino*)
   3. Mental consent: party may lose mental capacity temporarily because of the influence of alcohol, drugs or other incapacitating substances
   4. Mutual assent: parties sometimes seek to avoid an attempted marriage by claiming that it was undertaken in jest or without serious thought
4. Marriage formalities
   1. States require marriage license and solemnization
   2. Uniform Marriage & Divorce Act (p. 155-156) ­– Marriage
5. Right to Marry
   1. Race: A state law restricting the freedom to marry solely because of racial classification violates the Equal Protection Clause. (*Loving v. Virginia*)
   2. Polygamy: The word “marry” as used in the bigamy statute, includes both legally recognized marriages and those that are not state-sanctioned. (*State v. Holm*)
   3. Minimum Age
      1. Most states have statutes prescribing the minimum age for marriage, in a few states it is still a matter of common law
      2. Generally minimum age of 18 years old, 16-17 years old with parental or judicial consent, and less than 16 years old in exception circumstances with parental and judicial consent
   4. Incest: Prohibited in every state since colonial times, but “close family relationship” differs widely in definition among the states
6. Same-Sex Marriage
   1. Civil marriage is the voluntary union of two persons as spouses, to the exclusion of all others. (*Goodridge v. Department of Public* *Health*)
   2. Indiana’s statutory limitation of marriage to opposite-sex couples does not violate the Indiana Constitution. (*Morrison v. Sadler*)
   3. Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license. Indeed, the evidence shows Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples. Because California has not interest in discriminating against gay men and lesbians, and because Proposition 8 prevents California from fulfilling its constitutional obligation to provide marriages on an equal basis, Proposition 8 is unconstitutional. (*Perry v. Schwarzenegger*)
   4. DOMA is not directed to any identifiable legitimate purpose or discrete objective, and its classification violates the Constitution. (*Gill v. Office of Personnel Management*)
   5. DOMA is unconstitutional. (*Commonwealth of Massachusetts v. Dep’t of Health and Human Services*)

**Part 3: Common-Law Marriage, Putative Spouse Doctrine, & Cohabitation**

1. Common Law Marriage
   1. Historical Reasons
      1. Shielding the public coffers from the potential claims of needy women
      2. Avoiding branding children their children with the legal status
      3. Allowing judges to effect the potentially threatening nature of non-marital domestic relationships by labeling them marriages
   2. States that permit common-law marriage: AL, CO, DC, IA, KS, MT, OK, RI, SC, TX (NH/UT limited circumstances)
   3. The party asserting that a common-law marriage exists has the burden of proving: (1) that the parties were competent to enter into the marriage; (2) that the parties assumed a marital relationship by mutual consent and agreement; and (3) that the parties confirmed their marriage by cohabitation and public repute. (*In re Estate of Hunsaker*)
2. Putative Spouse Doctrine
   1. Equitable remedy when an innocent spouse has relied in good faith on a mistaken belief in the validity of the marriage
   2. The putative spouse doctrine is adopted, and common-law community property principles apply by analogy to the division of property acquired during a putative marriage. However, the doctrine does not permit an award of spousal support in the absence of bad faith, fraud, or statutory authority. (*Williams v. Williams*)
3. Cohabitation
   1. The state’s laws concerning divorcing couples do not govern the distribution of property acquired during a non-marital relationship. The courts should enforce express contracts between non-marital partners except to the extent that the contract is explicitly founded on the consideration of sexual services. In the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties. (*Marvin v. Marvin*)
   2. Decisions concerning cohabitation are best left to the legislative branch. (*Hewitt v. Hewitt*)
   3. A party is not entitled to relief based upon contributions during cohabitation without subsequent marriage absent an express agreement. (*Bright v. Kuehl*)
   4. ALI Recommendations (p. 271-273) – Determinations That Persons Are Domestic Partners

**Part 4: Parent & Child Relationships**

1. Establishing Parenthood
   1. Common law: Married husband and wife are presumed to be the father and mother of a child born into the marriage
   2. Exceptions: proof of impotence, sterility, or non-access to his wife for the relevant time period
   3. At English common law and in colonial America, non-marital children had no legally recognized relationship with either biological parent, and the parents had no recognized familial relationship with the child
   4. History of Supreme Court decisions with fathers’ rights (p. 284-285)
   5. California’s presumption of legitimacy for children born within a marriage is constitutional. (*Michael H. v. Gerald D.*)
2. Putative Father Registries
   1. Where a man believes he is or may be a child’s father, registry statutes place the burden on him to register (usually with state department of health or similar agency) if he wishes to claim paternity and receive notice of a prospective adoption
   2. Once the man receives notice, he may seek to establish paternity and assert his right to veto the adoption
   3. Most men never learn of the registry’s existence, those who know about them may not know where to register
3. Uniform Parentage Act (p. 304-305) – Establishment of a Parent-Child Relationship/Limitation: Child Having Presumed Father
   1. Adopted by 19 states
   2. Promulgated in 1973 and reflected Supreme Court rulings that banned discrimination based on illegitimacy in a variety of circumstances, revised in 2002 and now reflects scientific developments in parentage law (genetic testing)
4. Determining Maternity
   1. Woman who gives birth to child has been presumed to be mother, but artificial reproductive technologies complicate things
   2. The Uniform Parentage Act recognizes both genetic consanguinity and giving birth as a means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child – that is, she who intended to bring about the birth of a child that she intended to raise as her own – is the natural mother under California law. (*Johnson v. Calvert*)
   3. When parties in a lesbian relationship decide to bear children through IVF, both the woman who provides her ova and her partner who bears the children are the children’s parents. (*K.M. v. E.G.*)
5. Disestablishing Paternity
   1. Consideration for contracts = sex, so not enforceable!
   2. Contraception is a non-delegable duty, so sexual partners are strictly liable for the support of any child they engender by voluntarily engaging in sexual activity. (*Wallis v. Smith*)
   3. Tricked fatherhood (p. 323)
   4. Parental estoppel (p. 324)

**Part 5: Financial & Domestic Responsibilities Between Spouses**

1. Common Law/Blackstone
   1. Husband and wife are one person in law
   2. Man cannot grant anything to his wife, enter into covenant with her, may not bequeath her anything by will, she cannot bring suit in her own name
   3. Husband was liable for acts of his wife, could “correct” her
2. Inter-spousal Support
   1. Common law: husband was required to support the wife and had corresponding right to her “domestic services,” to enforce obligation wife might seek to force husband to provide her with money and might use the “necessaries doctrine” to induce third parties to extend credit to her
   2. In order to sustain a maintenance judgment, the parties must be living separate and apart. (*McGuire v. McGuire*)
3. Necessaries Doctrine
   1. Allowed wife to buy necessities from a third party using her husband’s credit
   2. If the husband refused to pay, creditor could sue husband for the debt
   3. May creditors were unwilling to extend credit to women because in practice
      1. Definition of what was “necessary” depended on the family’s social position and was limited by the husband’s ability to pay
      2. Creditor had to rely on husband’s credit, not the wife’s, credit and it was difficult to know going into court whether the doctrine would apply
   4. The doctrine of necessaries in Indiana is: (1) Each spouse is primarily liable for his or her independent debts; (2) Typically, a creditor may look to a non-contracting spouse for satisfaction of the debts of the other only if the non-contracting spouse has otherwise agreed to contractual liability or can be said to have authorized the debt by implication under the laws of agency; (3) When there is a shortfall between a dependent spouse’s necessary expenses and separate funds, the law will impose limited secondary liability upon the financially superior spouse by the doctrine of necessaries. (*Bartrom v. Adjustment Bureau, Inc.*)
4. Spousal Property Distribution upon Death
   1. Community property states: (regardless of will) surviving spouse is entitled to ½ of the property accumulated during the marriage
   2. Common law states: surviving spouse may be left out of the will entirely
      1. Dower: widow is entitled to life interest in 1/3 of her husband’s real property
      2. Curtesy: Widower acquired life interest in all of his wife’s real property if children were born into the marriage
      3. No longer exist in most jurisdictions
      4. All-non community property states have replaced them with the statutory elective share, allows a surviving spouse to elect to receive 1/3 or depending on the state, ½ of the estate of the deceased spouse
      5. Elective share typically applies to all property, not just real estate, it is gender neutral, and it provides full ownership, not just a life estate
   3. Wills and protection of children (majority rule)
      1. A parent may disinherit a minor or adult child for no reason, no matter how young the child is, and even if disinheritance leaves the child with no means of support;
      2. Like the testator’s other financial obligations, a legally enforceable obligation to pay child support must be satisfied before distribution of assets under the will; and
      3. A child support order survives the parent’s death and is not extinguished by it
5. Family & Medical Leave Act (FMLA) 1993
   1. Entitles eligible employees to take up to 12 weeks unpaid leave from work for medical reasons related to a spouse, child, or parent
   2. Eligibility depends on whether the Act covers the individual’s employer (does not reach private employers with less than 50 employees at any one workplace, but does apply to all public agencies, and to both public and private elementary and secondary school)
   3. See summary p. 203-204
6. Parental Discrimination Act (PDA)
   1. Prohibits employers from treating pregnant employees differently from non-pregnant employees
   2. See summary p. 205

**Part 6: Domestic Violence, Marital Rape, & Intra-Family Torts**

1. Domestic Violence
   1. Definition: Pattern of attempts to exercise coercive control over an intimate partner
   2. Protective restraining orders in the civil justice system are now available in every state
   3. Many states have amended their custody statutes to make domestic violence a significant factor in custody decisions, affect property child custody actions/distribution/maintenance
   4. Policies requiring police officers to arrest batterers are increasingly common
   5. Prosecutors’ offices have become increasingly likely to prosecute domestic violence cases
2. Civil Protection Orders
   1. Court orders that bar an individual who has committed an act of intra-familial violence from further harmful contact with the victim
   2. Temporary *ex parte* order without notice to the batterer, emergency injunctive relief restraining the batterer from inflicting further violence on the victim
   3. Longer term, permanent orders are entered only after the abuser has had notice and an opportunity to be heard
3. Criminal Justice Response: Arrest/Prosecution
4. Domestic Violence & the Workplace
   1. 3rd parties ≠ have duty to protect others from criminal acts
   2. The general rule is that an employer is not liable to its employees for criminal acts committed by third persons against an employee. There are three elements to establish a duty that would be this cause of action: (1) the particular criminal conduct must have been foreseeable, (2) the defendant must have possessed “specialized knowledge” of the criminal activity, and (3) the criminal conduct must have been a probability. (*Carroll v. Shoney’s Inc.*)
5. Marital Assault & Rape
   1. Historically, man was legally incapable of raping his wife (traditional belief that marriage constitutes blanket consent to sexual intercourse by both spouses)
   2. MPC preserves this traditional marital exemption
   3. 24 states and DC have abolished marital immunity for sexual offense
6. Intra-Family Torts
   1. Historically, courts barred almost all tort actions within the family
   2. Courts and legislatures have suggested that conduct between family members should sometimes be judged by different and more forgiving standards than conduct between people with no familial relationship
   3. Even if workable standards of family misconduct can be discerned, it is debatable whether the expansion of tort litigation within the family is consistent with policies favoring “no-fault” divorce
   4. The inter-spousal immunity doctrine should be abrogated for all intentional torts. (*Bozeman v. Bozeman*)
   5. Neither the policy considerations commonly raised nor the law of this state support a conclusion that an action for intentional infliction of emotional distress based upon conduct occurring in the marital setting should be barred or subject to any heightened threshold for establishing outrageousness. (*Feltmeier v. Feltmeier*)
   6. Generally, a spouse may not initiate a cause of action for intentional infliction of emotional distress predicated upon conduct arising during the marriage of the parties and raise that tort claim in the divorce proceeding. (*Hakkila v. Hakkila*)

**Part 7: Grounds for Divorce**

1. Fault-Based Divorce
   1. Fault Grounds
      1. Physical Cruelty
         1. An absolute divorce may be granted due to cruelty or excessively vicious conduct. (*Das v. Das*)
         2. Cruelty: acts of bodily harm, or threats of bodily harm, substantial enough to be deemed reasonably intolerable
      2. Mental Cruelty: Showing of “habitual, continuous, permanent and plan manifestation of settled hate, alienation, and estrangement on the part of one spouse, sufficient to render the condition of the other intolerable”
      3. Adultery: In order for a court to grant a divorce on the ground of adultery, a party must prove his or her claim by clear and convincing evidence, which must demonstrate both an adulterous inclination and a reasonable opportunity to satisfy that inclination. (*Spence v. Spence*)
      4. Desertion
         1. Willful abandonment of cohabitation for a sufficient period of time, usually lasting at least 1 year
         2. Intent by the offending spouse to abandon
   2. Fault-Based Bars & Defenses
      1. Recrimination: affirmative defense predicated on the claim that both spouses were guilty of off-setting faults
      2. Provocation: Available to respondent who claims his own faulty conduct was reasonably provoked by the petitioner’s
      3. Connivance: Bars relief if the party seeking the divorce is found to have participated in manufacturing the fault upon which divorce is sought
      4. Condonation
         1. Faulty ground raised in the divorce has already been forgiven by respondent and therefore cannot be invoked to dissolve the marriage
         2. Question of intent and is to be shown by words and deeds that reflect full, free, and voluntary forgiveness
         3. Courts look to a combination of factors to determine condonation, including an expression of forgiveness, the fact of cohabitation, the length of time the parties cohabitated after the injured spouse learned of the matrimonial offense, whether the cohabitation was the result of necessity, and whether the parties continued to have sexual relations. (*In re Marriage of Hightower*)
      5. Collusion: Spouses conspire to manufacture grounds for a divorce
2. No-Fault Divorce
   1. Exclusive No-Fault Regimes
   2. Mixed Fault/No-Fault Regimes
   3. Living Separate and Apart
      1. Uniform Marriage & Divorce Act (p. 440) – No-Fault Divorce
      2. The phrase “separate and apart” means the existence of separate lives not separate roofs, and “cohabitation” means more of a marital relationship. (*Frey v. Frey*)
3. Questioning No-Fault
   1. Criticisms: raised the divorce rate, reduced the economic security of women and children, condoned misconduct within marriage, and encouraged hasty entry into marriage by ensuring easy exit
   2. See Yes/No (p. 453-457)
4. Annulment
   1. Declaration recognizing that the marriage attempted by the parties never came into existence at all because of a fatal impediment at the time of formation
   2. Petitioner must show that marriage suffers from a serious defect dating back to its inception rendering it “void” or “voidable”
   3. Effect: many states have regularized relief by enacting statutes that expressly authorize courts to provide alimony or property distribution in cases of annulment

**Part 8: Property Distribution**

1. Property Regimes During Marriage
   1. Title theory/separate property: the spouse who holds title to each asset retains ownership of it
      1. At times resulted in unfair distributions, especially in traditional family where most property was titled in the name of the husband
      2. Joint tenancy: each tenant is the owner of the whole estate and of an undivided part of the estate, at the death of one joint tenant the surviving tenant or tenants continue as owners of the whole estate, surviving spouse become the owner of the whole without any need for probate/estate taxes
      3. Tenancy by the entirety: reserved for married couples, surviving tenant receives ownership of the entire estate, entirety is protected from partition except by mutual consent or operation of the law
      4. Tenancy in common: each tenant has an equal right to possession, but no right of survivorship, spouse could bequeath his or her share to a third party
   2. Community theory: community property is distinguished from separate property (which includes property acquired by either spouse before marriage, or during the marriage by gift, bequest, or devise)
      1. AZ, CA, ID, LA, NV, NM, TX, WA (CA, LA, and NM require division of all community property into equal shares)
      2. During the marriage, neither spouse may dispose of community property without the consent of his or her spouse
2. Division of Marital Property
   1. Three steps to dividing property that the couple shares by virtue of being married
      1. Identifying and characterizing each asset as marital or separate;
      2. Valuing each asset that is marital; and
      3. Distributing all divisible assets equitably or equally, or in the alternative, ordering a monetary award from one spouse to another to adjust their financial positions in accordance with the court’s position
   2. Equitable Distribution
      1. Marriage is a partnership enterprise to which both spouses make valuable contributions, entitling each spouse to a fair share of property acquired during the marriage regardless of how it is titled
      2. 42 states and DC are equitable distribution jurisdictions at divorce, but apply title theory during the course of the marriage
   3. Community Property
   4. Hotchpot or “Kitchen Sink”: all assets belonging to either spouse separately or to both spouses jointly are thrown into the pot and are up for grabs
   5. ALI Principles (p. 475) – Definition of Marital and Separate Property
   6. Characterizing Assets as Marital or Separate
      1. An asset’s initial character as either separate or marital may change over the course of a marriage
      2. In order to trace the separate portion of hybrid property, a party must prove that the claimed separate portion is identifiably derived from a separate asset. (*Nack v. Edwards Nack*)
   7. Appreciation of Separate Property During the Marriage
      1. When *either* spouse makes a labor, money, or in-kind contribution that *causes* an increase in the value of separate property, that increase in value is deemed marital property. If the evidence had indicated that the appreciation of the separate property is not due to the input of either spouse, then its increase in value is passive appreciation and remains separate property. (*Middendorf v. Middendorf*)
      2. States differ on whether appreciation is marital property, depending if it is passive or active
      3. States vary on the dates they use for valuation (date of separation, date of trial, date on which decree issues, date of the final decree in the event of the remand)
   8. Contributions of Homemakers
      1. Equitable distribution of all marital assets in title jurisdictions is the primary acknowledgement of homemaker contributions to the marital estate
      2. Assigning a dollar value to the contributions of homemakers is difficult
   9. “New” property
      1. New York: A professional license is marital property subject to equitable distribution. (*Holterman v. Holterman*)
      2. Examples
         1. Pension plan: marital asset, but future is not normally east to predict from present value
         2. Stock options: marital property to the extent that they constitute deferred compensation for work performed during the marriage
         3. Business goodwill and other small business issues: difficult to value a closely held business, business goodwill is difficult to measure with any precision
         4. Shares in closely-held corporation: spouses frequently claim a right to a portion of the company’s value, especially where a corporation is owned by the shareholder’s family
         5. Personal injury (disability pensions and tort recoveries): depends on how recoveries are characterized, pain/suffering= personal property of the individual who suffered the injury, economic losses = marital property, consortium = separate property of uninjured spouse
         6. Lotteries: lottery prize won during marriage is generally considered property acquired during a marriage subject to equitable distribution
   10. Debts: liabilities accumulated during a marriage are also marital property subject to division (indebtedness creating through borrowing, business debts, and obligations under contracts or judgments)
3. What Distribution is Equitable?
   1. In a proceeding for the division of marital assets, a trial court’s valuation must have been against the logic and circumstances before it to reach the appropriate level of abuse of discretion. (*Trost-Steffan v. Steffan Part I*)
   2. All marital property must be divided and the trial court should presume that an equal division of the marital property is just and reasonable. This presumption may be rebutted when a party introduces relevant evidence, including (1) the contribution of each spouse to the acquisition of property, regardless whether the contribution was income producing, (2) the extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift, (3) the economic circumstances of each spouse at the time the disposition of property is to become effective, (4) the conduct of the parties during the marriage as related to the disposition or dissipation of their property, and (5) the earning or earning ability of the parties are related to a final division of property and final determination of the property rights of the parties. (*Bloodgood v. Bloodgood*)

**Part 9: Child Support**

1. Source of the Obligation
   1. The issue of consent to sexual activity under the criminal statutes is irrelevant in a civil action to determine paternity and for support of the minor child of such activity. (*State ex rel. Hermesmann v. Seyer*)
   2. Trickery and intent don’t matter
   3. Marital and non-marital children = treated the same
   4. Parental misconduct doesn’t matter
   5. See p. 596-599 for Support Obligations of Persons Other Than Biological Parents
2. Extending the Obligation Past Minority
   1. Support During Post-Secondary Education
      1. Common law: imposed no general obligation on parents to support their children’s pursuit of higher education past majority
      2. Marital settlement agreements and child support and visitation agreements often recite the parents’ respective obligations to support the children’s higher education
   2. Support for Disabled Adult Children
      1. States differ to their answer of whether parents should be subject to an ongoing legal duty to support adult children whose disabilities prevent them from supporting themselves
      2. See *Hastings v. Hastings* p. 602-603
3. Determining the Child Support Amount
   1. Need for Guidelines
      1. Historically, courts considering child support amounts had little guidance from statutes, and provided no criteria for determining awards
      2. Currently, states must establish criteria for determining where the presumptive award amount would be unjust or inappropriate in a particular case, and reexamine and revise their guidelines at least once every 4 years
   2. Guideline Methods
      1. Income shares model (2/3 of the states)
         1. Combines both parent’s incomes (gross v. net income differs by state)
         2. Percentage of income that must be paid in child support decreases as parent’s income increases, and a straight calculation of income shares does not apply for parents with high combined income levels
         3. Child support obligation is apportioned to each parent in proportion to his or her relative income levels
         4. Adjustments may be applied for physical custody, other dependents, any imputed income, other existing child support, educational expenses, and transportation expenses related to visitation
      2. Percentage of the obliger’s income model (13 states)
         1. Based on noncustodial parent’s income and determines that parent’s support obligations based on the number of children to be supported
         2. Gross v. net income differs by states
      3. Melon formula (DE, HI, MT)
         1. Primary support allowance
         2. Providing for child’s primary support needs
         3. Standard of living allowance
4. What is “income”?
   1. Guidelines Definition
   2. Imputing Income
      1. Fact-specific
      2. Earning capacity: ability to work, willingness to work, and opportunity to work
   3. Seek-Work Orders: directing obligor parent to search for employment to produce or add to income
5. High income Obligors
   1. States tend to cap annual parental incomes, courts differ in their treatment even within the same state
   2. The family court has discretion to consider an award above the guideline maximum based on the factors laid out in the applicable law. (*Smith v. Stewart*)
6. Critiques of the Guidelines (p. 622-624)
7. Modification
   1. Uniform Marriage & Divorce Act = Strictest standard (modification of maintenance or child support may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable)
   2. “General Change of Circumstances”
   3. Although special circumstances permit an adjustment up or down when necessary to do justice between the parties, the guidelines specify the priorities to be considered in fixing support orders. (*In re Marriage of Nelson*)
8. Imputing Income on Modification
   1. A parent may not avoid a child support obligation by voluntarily remaining unemployed or underemployed. In setting child support, the trial court must take into consideration all factors bearing upon the needs of the children and the parents’ ability to pay. If a noncustodial parent seeks to reduce his child support obligation because he chooses to stay at home with children from a new marriage, income should be imputed. (*In re Marriage of Pollard*)
   2. Other reasons to impute income to obligors: further education, relocation, early retirement, new spouse’s income, voluntary change of employment, parental fault, self-employment

**Part 10: Maintenance**

1. Alimony: usually available only to the wife, meant to provide her with the support she would have continued to receive had she remained married
   1. Awarded infrequently, to the “innocent” spouse based on the other spouse’s breach of the marital obligation
   2. Currently, gender neutral alimony statutes that permit either the husband or the wife to receive an award
2. There is no requirement that parties to a divorce must have equalized net disposable incomes. (*In re Marriage of Reynard*)

**Part 11: Child Custody & Parenting Time**

1. Contemporary Interpretations of the Best Interests of the Child
   1. Uniform Marriage & Divorce Act (p. 700) – Best Interest of Child
   2. American Law Institute (p. 701-702) – Allocation of Custodial Responsibilities
      1. Origin: based on positive correlation between past caretaking roles and the parents’ preferences, promotes continuity and stability for children and encouraging cooperative rather than adversarial resolution of custody
      2. Criticism: fails to achieve gender equality because so many families continue to follow traditional gender roles
   3. As long as the trial court’s decision is supported by substantial competent evidence and is not based upon legally impermissible factors such as gender bias, it must be affirmed on appeal. (*Young v. Hector*)
   4. During a divorce proceeding, the trial court has two options for allocating parental rights and responsibilities: (1) designate one parent as the residential parent and legal custodian who bears the primary rights and responsibilities for care of the children, or (2) issue a shared-parenting order requiring the parents to share all or some of the aspects of the physical and legal care of the children. (*Arthur v. Arthur*)
2. Domestic Violence
   1. Most states either include domestic violence as a factor in the best interests standard or provide that evidence of domesticviolence creates a rebuttable presumption against awarding custody to the abusive parent
   2. Family courts must consider the effects of domestic violence upon the best interests of the child, especially as it pertains to the effect of such violence on the children. (*Wissink v. Wissink*)
   3. (*Trost-Steffen v. Steffen II*)

The relevant factors that a court shall consider include:

(1) The age and sex of the child.

(2) The wishes of the child’s parent or parents.

(3) The wishes of the child, with more consideration given to the child’s wishes if the child is at least 14 years of age.

(4) The interaction and interrelationship of the child with:

(A) The child’s parent or parents;

(B) The child’s sibling; and

(C) Any other person who may significantly affect the child’s best interests.

(5) The child’s adjustment to the child’s:

(A) Home;

(B) School; and

(C) Community.

(6) The mental and physical health of all individuals involved.

(7) Evidence of a pattern of domestic violence by either parent.

(8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

* 1. Nexus test/demonstrable impact on the child

1. Child’s Preference (p. 754-766)
2. Joint Custody
   1. Legal v. Physical
   2. *Nicita v. Kittredge*
      1. [see the crazy list of orders on pages 793-795]
      2. When there is a total collapse in joint parenting, the original orders in the judgment of dissolution must be modified in order to minimize contacts between the parties and to minimize any opportunities the parties may have to battle with each other, all to the detriment of their children.
3. Visitation
   1. Uniform Marriage & Divorce Act (p.803) – Visitation
   2. Third Party Visitation: The Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a “better” decision could be made. (*Troxel v. Granville*)
   3. De Facto Parents: To demonstrate the existence of a parent-like relationship with a child, a petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner’s formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed the obligations of parenthood by taking significant responsibility in the child’s care, education, and development, and (4) that the 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. (*V.C. v. M.J.B.*)

**Part 12: Private Ordering**

1. Marriage = Status 🡪 Contract
   1. Three Forms of Agreements Affecting Marriages
      1. Premarital agreements: executed by prospective spouses
      2. Post-nuptial agreements: existing spouses who are not currently contemplating divorce
      3. Separation agreements: negotiated in contemplation of agreed-upon marital separation or dissolution, or incident to divorce litigation
   2. Meant to reduce the chance and cost of potential litigation by defining a couple’s property and non-property rights, by clarifying the intended allocation of marital assets, and by planning for property distribution at the death of a spouse or of the marriage
   3. Seek to avoid or alter the effect of statutory marital property and spousal support laws, but CANNOT bind a court on child-related issues
   4. Living-Together Agreement: unmarried parties may contract with each other to resolve issues relating to property rights, inheritance rights and support
2. Premarital Agreements
   1. Uniform Premarital Agreement Act (p. 865-866) – Content/Employment
   2. American Law Institute (p. 867) – Procedural Requirements
   3. Elements Required for Valid Premarital Agreements
      1. There are three factors to be considered in determining the validity of a prenuptial agreement: (1) Was the agreement obtained through fraud, duress, or mistake, or through misrepresentation or nondisclosure of material facts? (2) Is the agreement unconscionable? (3) Have the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable? (*Mallen v. Mallen*)
      2. A prenuptial agreement is presumed invalid unless the party seeking the invalidation of the agreement proves that (1) the agreement was obtained through fraud, duress, or mistake, or through misrepresentation or nondisclosure of a material fact; (2) the agreement was unconscionable; or (3) the facts and circumstances have so changed since the agreement was executed as to make the agreement unenforceable. (*In re Estate of Hollett*)
   4. Specific Factors in Evaluating the Validity of an Agreement
      1. Voluntariness of an Agreement
      2. Financial Disclosure
      3. Review for “Substantive Fairness” or “Unconscionability”
3. Alternative Dispute Resolution
   1. Negotiation: disputants meet in an effort to resolve their differences without pursuing a final court decision, can happen before the suit is filed, after filing, during trial, and even while an appeal is pending
      1. Time that it takes for a court to hear the case
      2. Uncertainties inherent in judicial application of statutory standards steeped in discretion
      3. Emotional and financial strains of domestic relations litigation
   2. Mediation: “facilitated negotiation,” parties present all or part of their dispute before a third party neutral mediator, who helps the parties identify the issues, reduce misunderstandings, vent emotions, clarify priorities, find points of agreement, and explore new areas of compromise and possible solutions
      1. Parties may settle some or all of the issues during family mediation
      2. Traditionally mediation was based on the parties’ private agreement to mediate
      3. Studies indicate that:
         1. Mediation results in more joint legal (but not more joint physical) custody arrangements than adversarial processes;
         2. Mediation and litigation yield no difference in child support amounts;
         3. Mediated property agreements do not differ significantly from agreements reached in negotiation or litigation, but mediation clients view their agreement as fairer;
         4. Men and women in mediation reported more satisfaction with their spousal support agreements;
         5. Mediated agreements are much more detailed and specific than layer-negotiated or litigated agreements;
         6. Parties comply with mediated agreements at a higher rate than with agreements reached in the adversarial process;
         7. Client satisfaction with the mediation process and mediated outcomes is quite high;
         8. Male and female mediation clients emerge more satisfied than comparison groups who pursued traditional adversarial divorce;
         9. Participants generally give mediators high marks for their impartiality, sensitivity, and skill;
         10. After custody mediation, parties experience small but often short-lived increases in cooperation and improvement in their communications;
         11. Mediation does not affect in a statistically meaningful manner parents’ or children’s initial psychological adjustment to divorce
   3. Arbitration: parties agree to submit a dispute to a private decisionmaker (a single arbitrator or an arbitral panel) who renders a binding decision after hearing each side’s witnesses and other evidence
      1. Only the court may grant a divorce and enter the decree, but parties may agree to arbitrate one or more of the incidents of the divorce
      2. Parties may sign an arbitration agreement before they seek divorce, when they separate while the divorce is pending, or even after the court enters the divorce decree
      3. Speedier, costs of decision-making process are greatly reduced, reduces time in which children are victims of the stress/tension occasioned by lack of certainty as to the outcome
      4. Generally not allowed to have final word on child custody, visitation, or support
   4. Collaborative Law (p. 963-967)