

DOMESTIC RELATIONS
12 February 1998

I. PRE-MARITAL ISSUES

◆ **Gifts Prior to Marriage**

- Gifts Given in contemplation of Marriage MAY be recovered if the marriage did not in fact occur (like engagement rings, but not ordinary birthday-type gifts)

◆ **Contracts Between Engaged People: Ante-Nuptial Agreements**

- **Valid Ante-nuptial Agreements Require**
 1. *A Writing* (the Statute of Frauds Applies)
 2. *Freely Made with FULL DISCLOSURE of FINANCES by both Parties*
 3. *FAIR & REASONABLE provision for the Less wealthy spouse*
- Valid ONLY if the Marriage takes place; if the wedding is called off, the agreement is VOID

II. MARRIAGE

- To have a VALID Marriage, must go through the Ceremony of Marriage:
Requires **2 Things**

1. ***License***

- **Blood Test**: require the future newlyweds to be Free from **syphilis & rubella**
- **Legal Capacity to Marry**: There are **4** types of Incapacity which will deny the granting of a marriage license
 - *Sanity*
 - *Youth (too young)*
 - *Too Closely Related*
 - *Already Married*

2. ***Solemnization (Ceremony)***

- **Waiting Period**: must wait **AT LEAST 3 Days** after receiving the marriage license before having a wedding ceremony
- **Time Limit**: a marriage license will expire after **60 days** unless there is a ceremony; Ergo, the Ceremony must be between 3 and 60 days after receipt of the ceremony
- **Officiant**: can be virtually anybody, clergy or persons authorized to Administer Oaths or Military Officers or Ships Captains
 - Lack of Authority in the Officiant or Imperfection of the license will NOT void the Marriage
- ***Common Law Marriage*** is NOT Recognized in MA; however, MA will recognize a common law marriage of a couple from another state who move into MA

III. MARITAL RELATIONS

- Spouses **RETAIN separate legal identities**
- Spouses may commit crimes, torts, contracts, etc. v one another
- They are Substantially Independent people
- Spouses are NOT liable for each others Obligations except
 1. *Debt incurred in the Procurement of Necessities by one spouse will create liability in the other spouse*
 2. *Debt incurred by 1 Spouse Acting as an Agent Will Bind the Principal-spouse*
- The **ONLY** way that Marriage changes a Spousal Legal Status is that Spouses have the **financial duty to support one another** (reciprocal duties)
- If fail to support one another, the injured spouse may pursue a remedy in **District Court**
- If fail to support the spouse and desert, that is a **prosecutable crime**

IV. DIVORCE & ANNULMENT

Annulment

- Annulment is Backward Looking. It relates to the Problems/Grounds that pre-date the marriage that was not discovered until too late in the marriage
- Grounds for Annulment are called **Impediments**. These are pre-existing grounds which impede a valid marriage from ever occurring.
- There are **2** main Categories of **impediments**: Void & Voidable

<u>VOID</u>	<u>VOIDABLE</u>
Legal nullity. Like marriage never existed. Does Not Require a court order, but usually obtain one for other purposes. 1. Record of it, 2. Property/children	Legally binding marriage until get a court order granting the annulment
NOT Waivable	WAIVABLE
May be COLLATERALLY ATTACKED by a 3 rd Party (like a will contest)	May only be Attacked by the PARTIES to the Marriage
<ol style="list-style-type: none"> 1. Bigamy 2. Incest 3. Extreme Youth 	<ol style="list-style-type: none"> 1. Lack of Mental Capacity 2. Duress 3. Fraud

VOID Grounds for an Annulment

1. Bigamy

- Problems of *VANISHED Spouse*: if the Spouse has been MISSING for **more than 7 years**, the spouse is *presumed dead*. If the spouse has been missing for **less than 7 years**, must obtain a Court Order before may Re-marry (else BIGAMY & VOID Grounds for an Annulment)
- Note; Divorce decrees are NOT instantaneous. There is the **Nisi** period. Must wait for the whole **Nisi** period before re-marrying. However, if marry during **nisi**, can re-validate the marriage after the divorce becomes final

2. Incest

- May Not Marry: *ancestors* (parents, grandparents), *descendants* (children, grandchildren), *lateral relatives out to 1 degree* (siblings, aunt/uncle, niece/nephew)
- May marry 1st cousins
- Also included in incest are relations based on *affinity* (in-laws) as well as *co-sanguinity* (blood relations)

3. Extreme Youth

- Legal age is **18**, otherwise, the marriage is VOID
- However, if marry pre-18, though Void, may Re-affirm the marriage by staying in the relationship

VOIDABLE Grounds for an Annulment

1. Lack of Mental Capacity

- Either due to *mental disease or disorder* or Retard OR ON **DRUGS or Severe Alcohol** at time of Wedding Ceremony

2. Duress

- For Example: a **shot-gun wedding** is under duress. However, they are Waivable & Voidable

3. Fraud

- Typical Fact Pattern: 1 Party lies by an Affirmative Misrepresentation during Courtship. Key issue is whether the Lie was related to an *Essential Aspect of the Marriage*. Mostly involve the following:
 - *Religion*
 - *Sex, Procreation, & Related matters*
 - *MONEY & FINANCES are NOT GROUNDS FOR Annulment*, i.e., these are non-material aspects of the marriage

Divorce

- Divorce problems occur after the wedding (unlike annulment)
- MA has both Fault-based & No-fault Divorces

Grounds for Fault Based Divorce (7)

1. *Adultery*

- VOLUNTARY Sexual Intercourse by a SPOUSE with Another Person who is NOT a Spouse (Rape of a married woman is NOT adultery)

2. *Cruel & Abusive Treatment*

- Both Physical & Mental Cruelty
- Must be more than occasional, non-serious abuse (no one time incidents will be grounds for a fault based divorce)

3. *Desertion*

- An UNJUSTIFIED Abandonment of the Marriage for a Period of at least **one continuous year**
- Must be unjustified: victims of domestic violence have a justified reason for abandoning the marriage for one year
- Also, must be continuous; a series of benders over a 3 year period does not count

4. *Physical Impotence*

- 1 Party is PHYSICALLY UNABLE to have SAFE SEXUAL INTERCOURSE
- Includes STDs: Sex means Coitus

5. *Drug or Alcohol Dependency*

- Drug or Alcohol Abuse must be **voluntary, gross & confirmed**

6. *Non-Support*

- Neither a divorce nor support order?

7. *Imprisonment for 5 or more Years*

- Self-explanatory

Fault-based Defenses (5)

1. *Condonation*

- "I condone it"
- Usually occurs in Adultery
- Defendant argues that the Plaintiff has forgiven the Adultery. Requires a showing of:

a.) **knowledge**

b.) **resumption of co-habitation**

2. *Collusion*

- Essentially a Fraud on the court
- Both parties fabricate an allegation of fault in order to have grounds for divorce (no longer relevant since there is no-fault divorce)

3. *Connivance*

- A form of Entrapment
- Usually occurs in Adultery: hire somebody to seduce the spouse

4. *Insanity*

- Like Criminal law; Defense to CRUEL TREATMENT usually
- There was abuse, but attributable to some mental disease or defect

5. *Re-crimination*

- Like the Equity Principal of DIRTY HANDS
- Usually occurs in adultery: Say so what if I did, the other spouse did it too
- MA has **eliminated this defense**: But if have the fact pattern, with off-setting adultery, say re-crimination could be a defense, but it is no longer valid in MA

No-fault Divorce

- Technically, it still requires a formal adjudication proceeding; ergo, need GROUNDS to plea. Called **IRRETRIEVABLE BREAKDOWN**
- Undisputed No-fault Divorce
 - 1 party files a complaint alleging *Irretrievable Breakdown*, and the other party does not contest
 - Must Prepare a **Separation Agreement** (negotiated between the parties)
 - Submit BOTH the Complaint & Separation Agreement to the court
 - Court then SITS on it for **30 days**. Then enters a **Judgment Nisi**, which becomes **FINAL** after the elapse of another **90 days**
 - Ergo, the elapsed time between filing for divorce and final judgment is **120 days (4 months)**. If re-marry during the NISI period, that is **BIGAMY**
- Contested No-fault Divorce
 - File the Complaint. If Contested, there will be **at least 6 month delay** & then a **hearing**. If court finds an *irretrievable breakdown*, the court will enter **judgment nisi** for a period of **90 days**
 - Ergo, total elapsed time is **9 months**

Divorce Procedure

- Where: Filed in the **Probate Court**
- Requirements: MA courts Must have JURISDICTION; either
 1. *ONE party LIVES in MA for at least 1 YEAR*
 2. *ONE party is a BONA FIDE RESIDENT of MA and the Grounds for Divorce Occurred in MA*
- Service of Process
 - Strong Preference for **Personal Service**, but may use the **long arm statute**; the Trigger for LAS is whether the Defendant Spouse has lived in MA for at least 1 of the last 2 years
 - If Meet The residency requirements, don't really need PJ over the Defendant Spouse to grant the Divorce
 - DIVORCE is a legal thing, like property; so even if the defendant spouse is not at the hearing, can have a Divorce granted in MA: BUT for any Collateral Issue, will need PJ (like Alimony, Property Division, Economic Orders, etc.)

V. MONETARY ISSUES

◆ Alimony

- Payment made after the dissolution of marriage to support a spouse (extension of the marital duty to support)
- May either be Periodic or Lump Sum
- Awarded based on NEEDS of Spouses
- Marital Misconduct is NOT a BAR to Receiving Alimony in MA
- How much: it is an Equitable Decision made by the court based on any one of a number of factors including education, age, skills, income earning ability, accustomed lifestyle, etc.
- The Alimony Decision is SUBJECT to MODIFICATION based upon a **material change in circumstance**
- The Duration is for as long as the court orders
- Automatic Termination upon death of either party (HOWEVER, in MA Re-marriage is NOT an automatic termination of alimony, but it may be grounds for a material change to subject the alimony award to modification)
- Alimony is usually limited to divorce cases & not annulments

◆ Property Division

- Part of Divorce or Annulment where take all the assets of the couple and determine who gets what
- **MA Property Division**: All property held by either spouse is subject to Distribution upon property divisions (≠ California)
- Court will exercise Equitable Discretion in making its decision
- Factors for Property Division INCLUDE:
 - *Present & Future Needs of Dependent Children*
 - *Contribution of Each Spouse to the Acquisition, Preservation or Appreciation of Property*
 - *Contribution of the Homemaker to the Family Unit*
- Either in-kind or Forced Liquidation Order with a Split of the proceeds
- Couples who want a no-fault divorce do not want the court to order alimony or property division. Therefore, they will use self-help via a **Separation Agreement** (remember, a **Separation Agreement** Applies ONLY to no-fault, uncontested divorces, however, any couple may try to come up with one, but unlikely if contest other issues they'll agree on a **Separation Agreement**)
- ALL **Separation Agreements** Require COURT APPROVAL; note, the court may order modification to the agreement if it is NOT FAIR or REASONABLE
 - **Enforceability of Separation Agreements** depends on the type:
 - **Merged Separation Agreement**: If the Divorce Decree recites that the Separation Agreement has been MERGED into the Divorce decree, then the Separation become part of the court order (divorce decree), and may be subject to SUBSEQUENT MODIFICATION
 - **Non-Merged Separation Agreements**: If the Divorce Decree does NOT merge the Separation Agreement into it, then the Separation Agreement RETAINS its status as a separate agreement: may be Modified ONLY upon a showing of something GREATER than **material change in circumstance**; Except. The part of the Separation Agreement which deals with kids is ALWAYS MODIFIABLE under a mere change of circumstance

VI. CHILD SUPPORT

- Usually arises with a single mother
- Father: if child born to a married woman, presumption that the husband is the father; but OTHER men alleging to be the father may establish paternity by filing litigation: STANDARD = Clear & Convincing Evidence
- Child Born to UNMARRIED WOMAN (used to be called bastard, then illegitimate, now referred to as *out-of-wedlock or non-marital*)
- EITHER the mother or the child may sue any man alleged to be the father in a paternity suit; may be brought at ANY TIME prior to the Child's 18th birthday. Why litigate paternity? To establish Child Support
- Child Support: BOTH biological parents have a duty to support the child until the child turns 18 (or 21 if the kid is still dependent and lives at home or 23 if the kid is pursuing a Bachelor Degree-not grad. School)
 - If the Child is Incapacitated, the parents have a duty to support him for life
 - In situations involving an in-tact nuclear family, the court is loath to intervene
 - Child Support is really only a Judicial issue in Marital Separation cases or Out-of-Wedlock Births
 - Usually, there is 1 custodial & 1 non-custodial parent; the non-custodial parent will be ordered to periodically pay child support payments to the custodial parent.
 - The AMOUNT of Child Support is FIXED by guidelines; depend on the number of kids and the income of the non-custodial parent; however, for real wealthy non-custodial parent, off the guideline, kid has a right to share in the wealth of the parent
 - Child Support orders may be MODIFIED based on a material change in circumstance (talent for music by kid, or loss of non-custodial parent job)
 - To change the Amount, must PETITION the court (can't self-help)
 - Non-payment of Child Support will lead to a huge Court imposed remedy, which might include: *Seizure of Assets, Attachment of Wages, Holding someone in Contempt (for violating a court order, ergo jail)*
 - Problems:
 - If the OBLIGOR leaves the jurisdiction & stops paying child support. Remedies include the **MA Uniform Interstate Family Support Act**; when MA custodial parent stops receiving payment, she should petition the court and a MA agency will go to the jurisdiction in which resides the non-custodial, non-paying parent to file a petition there. The Jurisdiction sheriff will then go seize the non-custodial, non-paying parent and transmit either assets or parent to MA

VII. CHILD CUSTODY

◆ Types of Custody

1. Physical
2. Legal
 - a.) Exclusive
 - b.) Shared

◆ Court Standard on Child Custody Cases: THE BEST INTERESTS OF THE CHILD

◆ Subsidiary Court Consideration leading to the Best Interest of the Child

1. *Wishes of All Parties Involved (mom, dad, kids)*
 2. *Age & Health of Parents*
 3. *Family Dynamic: Extended Family Access*
 4. *Whether Any Domestic Violence: in fact, may be reversible error to enter a custody decision without an on the record consideration of domestic violence*
- The Non-custodial Parent is Entitled to **Visitation**; If worried about safety, court may order supervised visitation. Sometimes, non-parents may petition for visitation rights and that is fine
 - Conflicting Interstate Custody & Parental Kidnapping
 - Most states subscribe to the **Uniform Child Custody Jurisdiction Act**
 - All court will defer to the state with the greatest connection to the child
 - On Exam, if IN DOUBT, & facts involve a Kid, just say IN THE BEST INTEREST OF THE CHILD

VIII. ADOPTION

◆ Law: ANY ADULT is Free to Adopt Anyone who is YOUNGER than he AND who has NO PARENT of the SAME SEX

- If the prospective adoptee has a living parent of the same sex as the prospective adoptor, must SEVER that parental bond. **2 Ways to Sever Parental Rights**
 1. **Voluntary Relinquishment**
 - Usually Done at the TIME Of BIRTH; give the child up for adoption
 2. **Involuntary Termination Proceeding Initiated by the State**
 - Principle Grounds for the Involuntary Termination of Parental Rights
 - A.) **ABANDONMENT** (usually father of non-marital child)
 - B.) **NEGLECT of ABUSE**
- After the Adoptee has severed any Parental rights, she is free to be adopted
- However, if the ADOPTEE is > **12 years old**, the prospective adoptee MUST CONSENT (i.e., the teen has Veto power over being adopted)
- Also, the STATE Department of Social Services MUST consent to the Adoption (after conducting an investigation into the parents)
- The Final Determination of any adoption is made by a JUDGE; STANDARD: **the best interest of the child**
- Consequence: Creates FULL Parent-Child Relation between Adopter and Adoptee (including Wills, Intestacy, etc. an adopted child = natural child)

IX. CONFLICT OF LAWS

◆ **Out of State Divorce**

Bi-lateral (both parties participate) MA must give FULL faith & credit to the divorce

Uni-lateral (ex parte) MA must give Full Faith & credit if the PARTICIPATING party was **legitimately domiciled** in the FORUM

◆ **Foreign Country Divorce**

Bi-lateral: Will be granted *DEFERENCE* depending on the Equities of the situation – case by case

Uni-lateral: will NOT be recognized in MA

◆ **Child Custody**

- See Earlier § **Uniform Child Custody Jurisdiction Act**

◆ **Child Support**

- There is a Federal Statute: **Full Faith & Credit for Child Support Orders Act**

- MA grants Full Faith & Credit to out of state support orders provided the Obligor had an Opportunity to be Heard

X. MISCELLANEOUS

- Domestic Relations is becoming Increasingly Federalized to Avoid Conflict & Venue Shopping
- **MA Abuse Prevention Law**: Emergency Relief in violent family circumstances. Victims get court protection; may get TRO's without NOTICE to Defending party (Defendant has hearing within 10 days)
- **MA Anti-Stalking Law**: in Book