

## **Para 201-You & the Law**

### **Chapter 3 –Family Law**

**Wednesday- 9/2/09**

#### **I. Marriage:**

##### **A. Requirements: state laws govern: civil contract to:**

- 1) Express commitment**
- 2) Provide stable structure to raise children**
- 3) Establish financial partnership**

**--need license from state**

**--some states require blood tests/proof of vaccination/physical exam**

**--parties must have capacity to marry**

**--may be waiting period after license issued**

##### **B. Age: generally must be 18; most states allow persons 16 or 17 to marry only with parents' consent or judicial approval**

##### **C. Ceremony: may be religious or civil; most states require 2 witnesses to sign marriage certificate; could be conducted by judge, gov't official, religious official**

##### **D. Common law marriages: some state recognize (1/4), but most don't**

##### **E. Same-Sex Marriages: As of 7/21/09, 6 states allow: Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, & Maine; 7 foreign countries also grant full marriage rights (Netherlands, Belgium, Canada, Spain, South Africa, Norway, Sweden)**

**--some states have reached this point via statutes, some via court cases**

**--in California, the Cal Supreme Court held (May 2008) that state's ban on same-sex marriages violated the state's constitution; in November 2008, Cal voters, through Proposition 8, amended the Cal constitution to ban same-sex marriages & that was recently upheld by the Cal Supreme Court**

**--because of federal law known as DOMA (Defense of Marriage Act), same-sex marriages validly celebrated in those states that allow them will not be recognized for any federal law purpose such a tax status, immigration, Social Security, etc.**

**--Civil union/domestic partnership recognized by New Jersey, California, Oregon, Washington, District of Columbia, Nevada**

**--Some states provide limited benefits to same-sex partners of state employees only: Alaska, Arizona, Illinois, Montana, Rhode Island & New Mexico**

**--Some cities have adopted ordinances providing limited rights for same-sex couples: New York, Boston, Philadelphia, San Francisco**

**--29 states have state constitutional provisions prohibiting same-sex marriages: includes among others, North Dakota, South Dakota, Wisconsin, California**

**--practically what that means is that the state courts don't have the power to change these provisions**

**--in Minnesota, there is a statutory ban on same-sex marriages but not a constitutional ban and predictions are that Minnesota will be one of the next states to legalize same-sex marriages**

**--see p. 4 of Chapter 3 outline for definition of "domestic partnership"-provides some of the benefits of marriage like health insurance coverage, family leave, hospital visiting rights**

**II. Invalid Marriages: marriage may not be legal b/c one party is already married, under-aged, mentally incompetent, too close a relative (1<sup>st</sup> cousins) etc.**

**III. Premarital Agreements:**

**--contract between man & woman before they marry that settles each person's rights if they divorce—i.e. property division, support**

**--smart in second marriages or when one partner has substantial property & the other has nothing**

**--must be in writing; full disclosure of assets**

**--should be negotiated well before wedding and not presented on that day or could be allegation of duress**

**P. 3**

**--parties to premarital agmts don't have to be represented by atty but better if they are to avoid later challenges**

**--some agreements have "escalator clauses/phase-in provisions" which increase assets and support as marriage passes certain time limits**

**--premarital agreements may not cover child custody or child support**

**IV. Duties of Marriage: upon divorce one party may have the duty to support the other partner, and, of course, any children**

**V. Sexual Relations & Loss of Consortium:**

**--in some states, refusal to have sexual relations with spouse is grounds for divorce or annulment**

**--in some states forced sex could result in rape charges**

**--loss of consortium: loss of sexual relations/companionship is a separate claim for the partner of the injured plaintiff in personal injury lawsuit**

**VI. Lawsuits against one another: obviously in divorce cases**

**--some states allow suits for personal injuries from domestic violence**

**--spouses can testify against one another in divorce & custody cases but there is a marital privilege in other situations**

**VII. Co-habitation/Living together**

**--some states have laws prohibiting unmarried couples from living together but never enforced**

**--update the sodomy information in your outline: U.S. Supreme Court overruled its 1986 decision in 2003 in the case of Lawrence v. Texas, 539 U. S. 558**

**--watch agreements regarding sharing expenses and acquiring property b/c it could result in taxable gifts (\$13,000 is cap in 2009)**

**--courts are unlikely to enforce co-habitation agreements like "I'll take care of you" when couples break up**

**VIII. Money Matters During Marriage:**

**A. Most property acquired during marriage is considered marital or community property**

**--separate property is what each spouse owned before the marriage but that can become marital property if commingled**

**--Types of property ownership:**

- 1) Joint tenancy: 2 or more persons own property jointly and upon the death of one joint tenant, his/her share passes automatically to the survivors**
- 2) Tenancy by the Entirety: joint tenancy between H & W**
- 3) Tenancy in Common: co-ownership but each owner has control over his/her share; i.e. can gift it, sell it, or leave it by Will**

**B. Debts & Taxes:**

**--if H & W have co-signed for debt, both are responsible (i.e. mortgage, credit cards, etc)**

**--if H & W file joint income tax returns, each is responsible for the entire debt**

**--spouses may gift each other unlimited amounts during life or leave one another unlimited amounts at death**

**C. Doing Business Together:**

**--H & W could form corporation, partnership and could be asked to sign a personal guarantee for loans**

**--H & W can file for bankruptcy jointly**

**IX. Domestic Violence:**

**--Remedies: Order for Protection (OFP) or restraining order**

--covers physical attacks but also harassing behavior (showing up at ex's work, repeated phone calls)

--Rape & Abuse Crisis Centers for Fargo or Moorhead can assist victim through the system to obtain OFP

**X. Children:**

**A. Abortion status: 1973 U.S. Supreme Court decision of Roe v. Wade held that a woman had the constitutional right to seek abortion during early pregnancy**

--states do have the right to regulate how abortion process unfolds

--Casey case: U.S. Supreme Court held it is permissible for states to impose 24-hour waiting period and to require minors to obtain parental consent or judicial approval (called judicial by-pass statutes)

**B. Parents: have the right to care & control of their children and only in life-threatening situations will the State intervene**

--recall the Minnesota case this spring or summer where the court ordered chemotherapy for minor child with leukemia and parents defied the order by removing the child from the state at first

**C. Children's Rights:**

--right to be supported by parents until majority age (usually 18)

--right to home environment free from abuse or neglect

--right to be tried in juvenile court for crimes (exceptions in some states for serious crimes committed by juveniles of certain age—usually 13)

--parents may also be financially responsible for damage caused by their children: i.e. in Illinois, \$2500 cap on parents' liability for "willful & malicious acts" of minor children

**D. Adoption:-two types:**

- 1) **Agency:** licensed agency screens adoptive parents, places children for adoption
- 2) **Private:** could be facilitated through attorney, doctor, parties themselves and adoptive parents may pay biological mother's medical bills and costs BUT cannot "buy" the child

--court must approve both types

--biological mother may revoke consent within limits (usually 2 to 8 days)

--generally, if biological father is known most states require his consent & if he is not notified, he has a period of time within which he can contest the adoption (usually 6 months)

**E. Unfit Parents:** defined by state law: has failed to provide support or have regular contact with child OR may have abused or neglected child

**F. Gay & lesbian parents are allowed to adopt in come states(N.Y., Cal.) but not in others**

--Florida ban is now being appealed in the Florida Court of Appeals

**\*\*Open adoption:** adoptive parents permit biological parents to have continued contact with child

**\*\*Adoption records:** usually sealed and can only be opened by court order in most states; some states allow access for medical history info

**\*\* Medically Assisted Pregnancies:** *in vitro* or artificial insemination:

--if both H & W consent, child is treated as naturally born to them

**\*\*Surrogacy:** woman agrees to bear child for another couple-sometimes using H's sperm so he would be biological father & his wife would have to adopt the child later

**\*\*Paternity test via DNA nearly 100% accurate:**

**--once paternity established, father has duty to support child**

**--child support guidelines have been adopted in every state but may vary from state to state**

**--if payor doesn't pay, can garnish wages, intercept tax refunds, revoke driver's license or professional license**

**\*\* Abuse & neglect:**

**1) Neglect: failure to meet child's need for food, shelter, clothes, medical treatment, supervision**

**2) Abuse: beyond reasonable physical punishment and may include mental cruelty, sexual abuse**

**--If one parent allows the other parent to abuse the child, that parent has failed to protect the child which could be grounds for termination of parental rights**

**--Removal of child from family can be temporary or permanent but the goal is to keep families together**