

William P. Statsky

California Supplement to Accompany

Family Law

Fifth Edition

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DELMAR LEARNING

Australia Canada Mexico Singapore Spain United Kingdom United States



CONTENTS

1	Introduction to Family Law and Practice	1
2	Ethics and Malpractice in Family Law	4
3	Compiling a Family History	9
4	Premarital Agreements and Cohabitation Agreements	10
5	Traditional Marriage and the Alternatives	12
6	Annulment	14
7	Divorce Grounds and Procedure	16
8	Spousal Support, Property Division, and the Separation Agreement	21
9	Child Custody	26
10	Child Support	28
11	Tax Consequences of Separation and Divorce	30
12	The Legal Rights of Women	31
13	Illegitimacy and Paternity Proceedings	33
14	The Legal Status of Children	35
15	Adoption	36
16	The New Science of Motherhood	39
17	Torts and Family Law	40

In this supplement, a page reference follows each head (Statsky-000). This page reference correlates with William Statsky's textbook, Family Law, Fifth Edition.

This supplement is not a practice guide. It should not be relied on to answer legal questions concerning actual client situations. Statements of statutes are not complete or verbatim; they are excerpts or summaries, and are paraphrased unless an exact quote is indicated by quotation marks. The legal assistant or practitioner must consult primary and secondary sources of California law concerning specific client situations.

1

INTRODUCTION TO FAMILY LAW AND PRACTICE

Many of the concepts and issues in this chapter are equally applicable in California. The student should become familiar with a California law library by completing the California-specific assignments in this chapter.

FINDING FAMILY LAW IN CALIFORNIA

Primary Authority (*Statsky 16–18*)

Constitution

The California Constitution can be found in *West's California Annotated Codes* (West Group), hereinafter "West's California Codes," and in *Deering's California Codes Annotated* (Lexis Publishing), hereinafter "Deering's California Codes."

State Codes

Statutes adopted by the California legislature are codified in codes divided into subjects. The Family Code, Civil Code, Probate Code, Welfare and Institutions Code, Government Code, Penal Code, Code of Civil Procedure, and Evidence Code, among other codes, contain laws relevant to family law practice. If a practitioner is unsure which code contains the relevant laws, s/he should consult an index for all codes. Both West's California Codes and Deering's California Codes include annotated codes and indexes. The annotations include case law citing the statutes and legislative history.

Court Rules

California Rules of Court (CRC) are adopted by the Judicial Council of California. The Family Law Rules are part of the CRC (CRC 1200 et seq.). The Family Law Rules control all proceedings under the Family Code. See CRC 1205-06. The CRC are published as "Court Rules" in West's California Codes and as "Rules of Court" in Deering's California Codes.

Each county Superior Court publishes local rules, which can be found in county law libraries or obtained from the Clerk of the Superior Court. In some cases, a judge issues his/her own standing orders, which can be obtained from the judge's courtroom clerk or the county law library.

Rules Governing Professional Conduct

Laws governing attorneys and paralegals are located in the Business and Professions Code. Rules governing attorneys are found in the Rules of Professional Conduct, published by the

State Bar of California in the “California Compendium on Professional Responsibility,” which also includes ethics opinions of the State Bar and local bar associations.

Judicial Council Forms

The Judicial Council of California publishes forms to be used in many types of civil actions, including family law actions. See West’s California Judicial Council Forms (January 2002 Edition). Use of the Judicial Council forms is mandatory for many family law procedures. Other forms are optional. This usually can be determined from the form itself or from the CRC.

State Court Opinions

The official reports of the California Supreme Court are published by the Bancroft-Whitney Co. as “California Reports” (1st through 4th series). The official reports of the California Courts of Appeal are published by Bancroft-Whitney as “California Appellate Reports” (1st through 4th series). The unofficial reporter is “California Reporter,” published by West Publishing Co. Official advance sheets are published by Bancroft-Whitney Co. Cases not yet published in advance sheets may be located online using LEXIS.

Secondary Authority (*Statsky 18–23*)

Witkin, Bernard, *Summary of California Law*, 9th ed. (Bancroft-Whitney Co., 1987), including Volume 10 (Parent and Child) and Volume 11 (Husband and Wife and Community Property), is a good starting point for researching California law. In addition, Witkin, Bernard, *California Procedure*, 4th ed. (West Group, 1997) is a resource for court procedures, duties of attorneys, jurisdiction, etc.

Digests

See *West’s California Digest*, 2nd ed. (West Publishing Co.).

Encyclopedia

See *California Jurisprudence*, 3rd ed. (Bancroft-Whitney Co., 2001).

Practice Manuals

Family law practice manuals include Hogoboom, William P., et al., *California Practice Guide: Family Law* (The Rutter Group, 2001) and Kirkland, Kathryn, et al., *California Family Law Practice and Procedure*, 2nd ed. (Matthew Bender, 1994). Both manuals are looseleaf publications, which are updated regularly.

Legal Periodicals

The *California Bar Journal* and *California Lawyer* address matters of professional responsibility and other topics.

Other Resources

The California State Bar maintains an ethics hotline at (800) 238-4427. Local county bar associations, which are voluntary associations, maintain referral services to attorneys practicing in various fields of law.

Family Law Online (*Statsky 24–26*)

The websites for California state courts and agencies are linked to www.ca.gov.

California Court System

Each county has a Superior Court, which is the court of general jurisdiction. In larger counties, the Superior Courts have more than one geographic division. Superior Courts have a Family Law or Family Court Services division and a Juvenile Division.

Courts of Appeal

There are six appellate districts, each with one or more geographic divisions. Appeals from the Court of Appeal are to the California Supreme Court.

Child Welfare Agencies

Each county has an agency responsible for abused and neglected children. The agency may be known as the Department of Social Services, Department of Human Services, Child Protective Services, etc. The county departments are overseen by the California Department of Social Services (CDSS).

Child Support

California has established a state Department of Child Support Services to coordinate child support enforcement. Previously, child support enforcement was the responsibility of the District Attorney's office in each county.

SUPPLEMENTAL ASSIGNMENTS FOR CHAPTER 1

1. Visit the law library in your county to locate the primary and secondary sources discussed previously.
2. Contact the Clerk of the Superior Court in your county to learn the names of the judge or judges assigned to the Family Law Division.

2

ETHICS AND MALPRACTICE IN FAMILY LAW

ETHICS (*Statsky 28*)

The California State Bar is an integrated bar association. An attorney cannot practice law in California unless s/he is an active member of the State Bar.

The standards of professional responsibility for attorneys are set forth in the Business and Professions Code and in the California RPC. The Rules were adopted by the State Bar with the approval of the California Supreme Court, and they are binding on attorneys. The rules govern many issues relevant to family law, including confidentiality, conflicts of interest, fees, and solicitation of business.

The State Bar and many county bar associations publish ethics opinions, which give guidance to attorneys on specific ethical issues.

Fees (*Statsky 29–30*)

The fee agreement must be in writing if it is anticipated that fees will be greater than \$1,000. Cal. Bus. & Prof. Code Sec. 6148(a) (West's 1997, as amended). An attorney may not charge an unconscionable fee. RPC 4-200(A). Contingency fees are disfavored in family law cases. See *Krieger v. Bulpitt* (1953), 40 Cal.2d 97, 251 P.2d 673, 674. The court has the authority to order one party to pay the other party's attorney fees in family law cases. See Cal. Fam. Code Sec. 2030, 2255 (West's 1994, as amended).

Confidentiality of Information (*Statsky 31–32*)

Both attorneys and paralegals have a duty of confidentiality under California law. "It is the duty of an attorney . . . to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Cal. Bus. & Prof. Code Sec. 6068(e) (West's 1997, as amended). "A paralegal is subject to the same duty as an attorney . . . to maintain inviolate the confidentiality, and at every peril to himself or herself to preserve the attorney-client privilege, of a consumer. . . ." Cal. Bus. & Prof. Code Sec. 6453 (West's 1997, as amended).

The attorney-client privilege and exceptions are found in the California Evidence Code, Sec. 950 et seq. "There is no privilege . . . if the lawyer reasonably believes that disclosure . . . is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm." Cal. Evid. Code Sec. 956.6 (West's 1995, as amended).

Work product is protected from discovery. See Cal. Civ. Proc. Code Sec. 2018 (West's 1982, as amended).

Conflict of Interest (*Statsky 32–38*)

The RPC includes rules for handling conflicts of interest between clients, and rules governing the relationship between the attorney and the client or others involved in the legal matter.

An attorney must not accept representation of more than one client in a matter in which the interests of the clients *potentially* conflict, unless the attorney obtains the informed written consent of both clients. See RPC 3-310 (C) (1). This “joint representation” problem is common in family law practice. Suppose Henry and Wanda agree to divorce and agree on division of property, custody, and spousal and child support. Henry and Wanda contact Latisha Lawyer and ask her to jointly represent them. While there is no actual conflict between Henry and Wanda at present, there are many potential conflicts. Before Latisha can represent Henry and Wanda, she must write a letter disclosing the potential conflicts and must obtain the written consent of both of them. See *Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 146-48, 65 Cal.Rptr. 406, 413-14.

One result of joint representation is that neither client can claim the attorney-client privilege in a proceeding between the two clients. Normally, anything a client tells an attorney is privileged, meaning that an opposing party cannot force the attorney to reveal a client’s communication. See Cal. Evid. Code Sec. 950 et seq. (West’s 1995, as amended). However, when two clients consult a lawyer on a “matter of common interest,” neither of them may claim the attorney-client privilege in a civil proceeding between them. See Cal. Evid. Code Sec. 962 (West’s 1995, as amended). Not only could Henry compel Latisha to testify in court as to Wanda’s statements, but Latisha has a duty to inform Henry of anything significant that Wanda tells Latisha. See Cal. Bus. & Prof. Code Sec. 6068(m) (West’s 1997, as amended). This is an example of a potential conflict of interest that Latisha must disclose to the clients.

An attorney must not accept *or continue* representation of more than one client in a matter in which the interests of the clients *actually* conflict, unless the attorney obtains the informed written consent of both clients. See RPC 3-310 (C) (2). Suppose that Henry and Wanda have agreed on 50-50 custody of their children, but then Wanda is offered a job in another state and wants to take the children with her. Now the potential conflict is actual. Latisha Lawyer cannot continue to represent both Henry and Wanda unless she writes a *new* disclosure letter and each client gives a *new* written consent.

An attorney must not represent a new client in a matter adverse to an old client (former or current) if the attorney obtained confidential information from the old client that is material to the new matter, unless the attorney obtains the informed written consent of the old client. See RPC 3-310 (E). Suppose Wanda decides to retain her own attorney for the divorce, and Henry asks Latisha to represent him. However, years earlier, Latisha had prepared a will for Wanda. At that time, Latisha and Wanda had an attorney-client relationship. If Latisha obtained confidential information from Wanda that is relevant to the divorce proceeding, then Latisha cannot represent Henry in the divorce proceeding unless Wanda gives her informed written consent.

An attorney must not represent A in the matter of A versus B, and at the same time represent B in an unrelated matter, unless the attorney obtains the informed written consent of both clients. See RPC 3-310 (C) (3). The attorney owes a duty of loyalty to each client. Suppose, during the divorce proceedings in which Latisha represents Henry, Wanda asks Latisha to represent her in an unrelated matter. If Latisha represented Wanda in the unrelated matter, Henry might be concerned that Latisha would “go easy” on Wanda during the divorce matter. Latisha cannot agree to represent Wanda unless Latisha obtains the informed written consent of both clients.

In most cases, a conflict of interest on the part of one attorney is “imputed” to the whole law firm. See *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc* (1999), 20 Cal.4th 1135, 1153-1154, 86 Cal.Rptr.2d 816, 829. Under RPC 3-310 (C) (3), if Henry does not

consent to Latisha representing Wanda in an unrelated matter while Latisha is representing Henry in the divorce proceeding, not only Latisha but every attorney in her law firm may be disqualified from representing Wanda. Under RPC 3-310 (E), if Wanda does not consent to Latisha representing Henry in the divorce proceeding because Latisha obtained confidential information while preparing Wanda's will, then not only Latisha but every attorney in her law firm may be disqualified from representing Henry in the divorce proceeding.

A paralegal may create a conflict of interest for a law firm because the paralegal obtained confidential information while working for a different law firm. A paralegal may be "screened" from the case by an "ethical wall." (In general, an attorney cannot be screened by an ethical wall.) If a paralegal who worked for the firm representing Henry gets a job in the firm representing Wanda, the firm may continue to represent Wanda only if the paralegal can be effectively screened from any contact with the case. See *In Re Complex Asbestos Litigation* (1991), 232 Cal.App.3d 572, 595-96, 283 Cal.Rptr. 732, 745-46.

In some situations, the attorney should not represent either the husband or wife. For example, "The attorney of a family-owned business . . . should not represent one owner against the other in a dissolution action." *Woods v. Superior Court* (1983), 149 Cal.App.3d 931, 936-37, 197 Cal.Rptr. 185, 189.

Another set of rules govern the attorney's relationship with the client, other parties, and opposing counsel. In these cases, the attorney must make a disclosure to the client, but the client's written consent is not necessary.

Rule 3-300 addresses business transactions between attorney and client and situations in which an attorney acquires a financial interest adverse to the client.

An attorney must not represent a client with whom the attorney has had a legal, business, financial, professional, or personal relationship, unless the attorney provides a written disclosure to the client. A similar rule applies if the attorney has had a relationship with another party or a witness. See RPC 3-310 (B).

An attorney must not continue to represent a client with whom the attorney has sexual relations if the sexual relations cause the attorney to perform legal services incompetently or otherwise damage the client's case. This rule does not apply to spouses or ongoing relationships that began before the attorney-client relationship. See RPC 3-210 (B), (C); Cal. Bus. & Prof. Code Sec. 6106.9 (West's 1997, as amended).

Two attorneys who are married to each other must not represent opposing parties, unless the attorneys inform the clients in writing. The same rule applies to two attorneys who are intimate partners, parent and child, etc. See RPC 3-320.

Safekeeping of Property (*Statsky 38*)

An attorney must keep clients' funds in a trust account separate from the attorney's funds. See RPC 4-100.

Withdrawal (*Statsky 38-39*)

Once an attorney is representing a client, the attorney may withdraw only for specified reasons. If the matter is pending before a court, permission of the court is required before an attorney may withdraw. See RPC 3-700(c).

False Statements/Failure to Disclose (*Statsky 39*)

"It is the duty of an attorney . . . never to seek to mislead the judge . . . by (a) . . . false statement of fact or law." Cal. Bus. & Prof. Code Sec. 6068 (d) (West's 1997, as amended).

Communication with the Other Side (*Statsky 39*)

While representing a client, an attorney shall not communicate about the subject of the representation with another party if the attorney knows that the other party is represented by another lawyer in the matter, unless the attorney has the permission of the other lawyer. See RPC 2-100 (A). This rule is not intended to prevent the parties themselves from communicating about the subject of the representation. See Discussion to RPC 2-100.

To understand the application of RPC 2-100, suppose Hilda and Herb are planning to divorce. Herb retains Larry Lawyer to file a divorce petition and to negotiate a division of property. Can Larry contact Hilda to negotiate this issue? It depends on whether Larry knows that Hilda is represented by another lawyer in this matter. If Hilda is represented by Barbara Barrister in connection with a workers' compensation claim, and has not retained an attorney to represent her in the divorce proceeding, then Larry can contact Hilda. If Larry learns that Barbara is representing Hilda in the divorce proceeding, then Larry must communicate with Hilda through Barbara. If Barbara gives Larry permission to speak directly with Hilda, Larry may do so. This rule does not prevent Hilda and Herb from negotiating directly with each other.

Nonattorney Assistants (*Statsky 40*)

Under recent legislation, paralegals are subject to standards set forth in the Business and Professions Code. A paralegal must meet educational requirements; work under the supervision of an attorney; refrain from the unauthorized practice of law; and maintain the confidentiality of clients. It is unlawful for a paralegal to perform legal services except under the supervision of an attorney. A paralegal is liable for damages caused by his/her failure to follow these standards. See Cal. Bus. & Prof. Code Sec. 6450 et seq. (West's 1997, as amended).

Solicitation and Advertising (*Statsky 40–41*)

The RPC makes a distinction between "solicitation" (seeking clients by personal or telephone contact) and "advertising" (informing the general public that an attorney is seeking clients). In general, an attorney may not solicit clients unless the attorney has a family or personal relationship with the prospective client. An attorney may advertise for clients as long as the advertising is not deceptive, does not promise results, etc. RPC 4-100.

It is a crime to solicit business for a lawyer in the vicinity of a hospital, jail, courthouse, etc. See Cal. Bus. & Prof. Code Sec. 6150 et seq. (West's 1997, as amended).

Unauthorized Practice of Law (*Statsky 41*)

It is a crime for anyone who is not an active member of the State Bar to practice law in California. Cal. Bus. & Prof. Code Sec. 6125, 6126 (West's 1997, as amended).

A paralegal must not provide legal advice; represent a client in court; select, explain, draft, or recommend the use of any legal document to any person except the attorney who supervises the paralegal; contract with, or be employed by, any natural person other than an attorney to perform legal services; or otherwise engage in conduct that constitutes the unlawful practice of law. Cal. Bus. & Prof. Code Sec. 6450(b) (West's 1997, as amended).

OTHER WRONGDOING (*Statsky 42*)

An attorney must not threaten criminal, administrative, or disciplinary proceedings in order to gain an advantage in a civil action, including a family law proceeding. See RPC 5-100. For example, attorney for Wife may not tell Husband that Wife will report Husband's illegal drug use to the police if Husband does not agree to pay spousal support.

PARALEGALS (*Statsky 45*)

An attorney is liable for damages caused by a paralegal working under the attorney's supervision. Cal. Bus. & Prof. Code Sec. 6452(b) (West's 1997, as amended).

SUPPLEMENTAL ASSIGNMENTS FOR CHAPTER 2

1. Read the model rules of conduct for paralegals published by the National Association of Legal Assistants (<http://www.NALA.org>) and the National Federation of Paralegal Associations (<http://NFPA-INFO@paralegals.org>).
2. Read the California law governing paralegals, Cal. Bus. & Prof. Code Sec. 6450 et seq.
3. Find out whether your county law library has ethics opinions published by your county bar association, and look for an ethics opinion related to a family law situation.
4. Contact the Legal Aid Society in your county and ask what free or low-cost legal services are available to low-income families with family law issues.
5. Find out whether the county bar association in your area has a family law section, and whether that section sponsors meetings or continuing education that are open to paralegals.
6. Wife consults your office about her rights in the event Husband divorces her. While you are conducting an intake interview, Wife bursts into tears and asks you, "Can he really get custody of the children?" How should you handle this situation to avoid engaging in the unlawful practice of law?
7. Husband, a client of your firm, tells you that he intends to murder his estranged wife. What can you, and the attorney for whom you work, do?
8. Lovey and Dovey Newlywed ask your office to draft wills in which each leaves all his/her property to the other. What steps must your office take before agreeing to draft wills for both? What potential conflicts of interest can you identify?

3

COMPILING A FAMILY HISTORY

Some California counties offer a voluntary Family Conciliation Court (FCC) pursuant to Cal. Family Code Sec. 1800 et seq. FCC is available for couples wishing either to explore reconciliation or to agree on the terms of a marital settlement. FCC counselors conduct investigations and make referrals and recommendations. If the parties reach an agreement, they may put it in writing, and the judge may order them to comply with it. See Cal. Fam. Code Sec. 1800 et seq. (West's 1994, as amended).

Counties that do not offer FCC may offer voluntary mediation services to couples considering divorce.

FAMILY HISTORY CHECKLIST (*Statsky 55*)

The interview checklist is useful in California.

Note that California is a community property state (see Chapter 8). Therefore, it is important to determine when property was purchased; the source of the income used to purchase the property; whether property was obtained by gift or inheritance, to one or both spouses; and other factors to be discussed in Chapter 8 of this supplement.

SUPPLEMENTAL ASSIGNMENTS FOR CHAPTER 3

1. Draft an interview checklist to obtain basic information about community and separate property.
2. Find out whether the Superior Court in your county offers FCC and/or voluntary mediation.

4

PREMARITAL AGREEMENTS AND COHABITATION AGREEMENTS

PREMARITAL AGREEMENTS (*Statsky 68*)

Premarital agreements are governed by the Family Code, Sec. 1600 et seq. and must be in writing.

A premarital agreement cannot waive the duty that each spouse has to support the other spouse while they are married and living together. See Cal. Fam. Code Sec. 4300-4302 (West's 1994, as amended); *Marriage of Higgason* (1973) 10 Cal.3d 476, 485-488, 110 Cal.Rptr. 897, 903-05, disapproved on other grounds in *Marriage of Dawley* (1976) 17 Cal.3d 342, 352, 131 Cal.Rptr. 3, 9.

"The right of a [minor] child to support may not be adversely affected by a premarital agreement." Family Code Sec. 1612 (b).

Courts may enforce a premarital agreement concerning child custody, subject to the court's power to determine the best interest of the child. See *Dunkin v. Boskey* (2000), 82 Cal. App. 4th 171, 188-190, 98 Cal.Rptr. 44, 55-57.

Following the California Supreme Court's decision in *In re Marriage of Bonds* (2000), 24 Cal.4th 1, 99 Cal.Rptr.2d. 252, the California legislature made it harder to enforce a premarital agreement against a party who was not represented by an attorney at the time the agreement was signed. One section of the current law protects a spouse who has waived spousal support; another section addresses whether the premarital agreement in its entirety is enforceable.

A waiver of spousal support in a premarital agreement is unenforceable if the party seeking support was not represented by independent counsel at the time of the agreement, or if it is "unconscionable" at the time of enforcement. See Cal. Fam. Code Sec. 1612 (c) (West's 1994, as amended).

A premarital agreement is unenforceable if it was involuntary. In addition, the agreement is unenforceable if it was unconscionable at the time it was signed, if the party now objecting to the agreement was not provided with disclosure of the other party's property or obligations, did not voluntarily waive this disclosure in writing, and did not have adequate knowledge of the other party's property or obligations. See Cal. Fam. Code Sec. 1615 (a) (West's 1994, as amended).

An agreement is "voluntary" only if the party objecting to the agreement had independent counsel, or was advised to seek independent counsel and waived that right in writing; had a seven-day waiting period between being presented with the agreement and signing it; was fully informed of the meaning of the agreement and the rights s/he was giving up, in a language in which s/he was "proficient"; received a document memorializing the explanation; and signed a document declaring that s/he received the required information. See Family Code Sec. 1615 (c), as amended.

COHABITATION AGREEMENTS (*Statsky 90*)

In *Marvin v. Marvin* (1976) 18 Cal.3d 660, 665, 134 Cal.Rptr. 815, 557 P.2d 106, the court held: “(1) The provisions of the Family Law Act do not govern the distribution of property acquired during a nonmarital relationship. (2) The courts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services. (3) 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. The courts may also employ the doctrine of quantum meruit, or equitable remedies such as constructive or resulting trusts, when warranted by the facts of the case.”

“Meretricious” consideration means prostitution. See *Della Zoppa v. Della Zoppa* (2001) 86 Cal.App.4th 1144, 1150-51, 103 Cal.Rptr. 901, 905.

Same-sex unmarried cohabitants may make enforceable agreements under the same theories as opposite-sex couples. See, e.g., *Whorton v. Dillingham* (1988) 202 Cal.App.3d 447, 452, 248 Cal.Rptr. 405, 408, fn 1.

Putative Spouse Doctrine (*Statsky 94*)

See the discussion of protection for a putative spouse in Chapter 6, Annulment.

SUPPLEMENTAL ASSIGNMENTS FOR CHAPTER 4

1. Maria and Roberto decide to live together without marrying. Both have recently completed law school, and Maria is pregnant. Roberto joins a law firm. He and Maria agree that she will stay home and care for the baby, and he will support the family until the baby is at least one year old. One month after the baby is born, Roberto moves out. Did Maria and Roberto have an enforceable cohabitation agreement? Under which theory or theories?
2. Adam and Eve decide to marry and start a family. They agree that neither one will need spousal support after their youngest child reaches age six. Draft an enforceable premarital agreement. What formalities are necessary to ensure that a court would enforce the agreement?

5

TRADITIONAL MARRIAGE AND THE ALTERNATIVES

LEGAL ISSUES PRIOR TO MARRIAGE (*Statsky 104*)

Breach of Promise to Marry (*Statsky 104–106*)

California's heart balm statutes abolished causes of action for breach of promise to marry and fraudulent promise to marry. See Cal. Civ. Code Sec. 43.4 (West's 1997, as amended).

Gifts (*Statsky 111–114*)

A gift cannot be revoked (except for a gift made in view of impending death). See Cal. Civ. Code Sec. 1148 (West's 1997, as amended).

Void Versus Voidable Marriage and Putative Spouses (*Statsky 117, 127–128*)

See the discussion in Chapter 6, Annulment.

COMMON LAW MARRIAGE (*Statsky 123*)

There is no common law marriage in California. A valid marriage requires a license and solemnization. See Cal. Fam. Code Sec. 300 (West's 1994, as amended). However, a common law marriage legally created in another state is recognized in California. "A marriage contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state." See Cal. Fam. Code Sec. 308 (West's 1994, as amended).

SAME-SEX RELATIONSHIPS (*Statsky 128*)

Sexual relations between consenting adults of the same sex are lawful in California. California has no law against sodomy.

California voters have approved a "Defense of Marriage Act" (Proposition 22), which states: "Only a marriage between a man and a woman is valid or recognized in California." Cal. Fam. Code Sec. 308.5. (West's 1994, as amended).

California permits same-sex and elderly couples who have a common residence, share expenses, and provide for each other, to register as domestic partners. The partners may file a Declaration of Domestic Partnership with the California Secretary of State. The state law pre-

empties local domestic partnership ordinances. See Cal. Fam. Code Sec. 297 et seq. (West's 1994, as amended).

The purpose of the Domestic Partner Registration Law is to “enable domestic partners to make medical decisions for incapacitated loved ones, adopt their partner’s child, use sick leave to care for their partner, recover damages for wrongful death, and allow the right to be named a conservator of a will.” Historical and Statutory Notes, Cal. Fam. Code Sec. 297 et seq. (West's 1994, as amended), signing message of Governor Davis regarding Stats.2001, c. 893 (A.B. 25). These rights are codified in various parts of the California codes.

SUPPLEMENTAL ASSIGNMENTS FOR CHAPTER 5

1. Find two California statutes that recently have been amended to extend rights to domestic partners.
2. Find a California case recognizing a common law marriage contracted in another state.

6

ANNULMENT

ANNULMENT, DIVORCE, AND LEGAL SEPARATION

(Statsky 150)

California law distinguishes between marriages that are “void from the beginning” and marriages that are “voidable.” A void marriage is invalid from the beginning, but a voidable marriage is valid until it is annulled. See *In Re Gregorson’s Estate* (1911) 160 Cal. 21, 26, 116 P. 60.

A marriage is “void from the beginning” if it was incestuous or bigamous. See Cal. Fam. Code Sec. 2200, 2201 (West’s 1994, as amended).

A marriage is incestuous if it is between parent and child, brother and sister, uncle and niece, aunt and nephew, or “ancestor and descendant.” See Cal. Fam. Code Sec. 2200 (West’s 1994, as amended).

A marriage is bigamous if a person marries someone else while the original spouse is still living, and the original marriage was not dissolved or annulled before the date of the second marriage. See Cal. Fam. Code Sec. 2201 (West’s 1994, as amended).

If a spouse is missing and presumed dead, the “surviving” spouse remarries, and the missing spouse later turns out to be alive, the second marriage is not void, but it is voidable. See Cal. Fam. Code Sec. 2201 (West’s 1994, as amended).

Other voidable marriages that may be annulled include a spouse under 18 without permission to marry; unsound mind; force; fraud; and incapacity to consummate the marriage. The right to annulment may be lost if the spouses continue to live together as husband and wife. See Cal. Fam. Code Sec. 2210 (West’s 1994, as amended).

The textbook explains two tests for fraud: the easier test for the party seeking to annul the marriage is that the lie was “material” to the marriage, and the more difficult test is that the lie related to the “essence” of the marriage. California follows the “essence” test. The fraud “must go to the very essence of the marital relation. . . .” *Marriage of Johnston* (1993) 18 Cal.App.4th 499, 502, 22 Cal.Rptr. 253, 255. For example, if a spouse knew s/he could not have children, and concealed that fact, it would be grounds for annulment on the basis of fraud. See *Vileta v. Vileta* (1942), 53 Cal.App.2d 794, 796, 128 P.2d 376.

The procedure for annulling a void or voidable marriage is to file a petition for nullity of marriage using Judicial Council Form 1281. See Cal. Fam. Code Sec. 2250 (West’s 1994, as amended).

If one or both spouses in a void or voidable marriage had a good faith belief that the marriage was valid, a court may treat the “innocent” spouse as a “putative spouse.” The court may award the innocent spouse his/her share of property that otherwise would have been community property (see Chapter 8). When such property is awarded to a putative spouse, it is called “quasi-marital property.” See Cal. Fam. Code Sec. 2251 (West’s 1994, as amended).

Similarly, a court may award spousal support payments to a putative spouse. See Cal. Fam. Code Sec. 2254 (West’s 1994, as amended).

A putative spouse has standing to sue for wrongful death. See Cal. Civ. Proc. Code Sec. 377.60 (West’s 1982, as amended).

A putative spouse also may have inheritance rights and rights to death benefits such as workers' compensation. See, e.g., *Estate of Leslie* (1984), 37 Cal.3d 186, 197, 207 Cal.Rptr. 561, 568; *Estate of Sax* (1989) 214 C.A.3d 1300, 1306-1307, 263 Cal.Rptr. 190, 193-194; *Brennfleck v. Workers' Compensation Appeals Board* (1970) 3 Cal.App.3d 666, 672-675, 84 Cal.Rptr. 50, 52-55.

An annulment does not "relate back" to the date of the marriage if this would be unfair to people who were not parties to the annulled marriage. For example, spousal support obligations of the first spouse are not revived because a second marriage is annulled. See *Sefton v. Sefton* (1955) 45 Cal.2d 872, 874, 291 P.2d 439, 441.

Finally, the rights of children do not depend on the marital status of the parents. See Cal. Fam. Code Sec. 2253 (custody) and Sec. 3900 et seq. (child support) (West's 1994, as amended).

SUPPLEMENTAL ASSIGNMENTS FOR CHAPTER 6

1. Talk to a family lawyer in your community. How common is a proceeding for annulment (nullity) compared with a proceeding for dissolution? What are the advantages and disadvantages of each procedure?
2. Ann and Bill divorce, Bill pays spousal support to Ann, Ann marries Carl, Bill is relieved of his support obligations because of the remarriage, and then the marriage of Ann and Carl is annulled. Does Bill have to start paying support again?
3. Review the statutes governing annulment to learn who has standing to bring an action for nullity and what statutes of limitations apply.
4. George told Martha that he was a widower. Martha married him, and later learned that George's first wife was still alive. Martha filed a petition to nullify her marriage to George. Was their marriage void or voidable? Would Martha be considered George's "putative spouse?" Would the property accumulated during their marriage be divided between George and Martha as quasi-marital property?

7

DIVORCE GROUNDS AND PROCEDURE

■ GROUNDS FOR DIVORCE (*Statsky 179*)

A divorce in California is called a *dissolution*. A marriage may be dissolved without proof of fault.

There are two grounds for dissolution or legal separation:

“Irreconcilable differences, which have caused the irremediable breakdown of the marriage.” Cal. Fam. Code Sec. 2310 (a) (West’s 1994, as amended).

“Incurable insanity.” Cal. Fam. Code Sec. 2310 (b) (West’s 1994, as amended).

Criminal Conversation (*Statsky 187*)

California’s “Heart Balm Act” abolished the tort of “criminal conversation.” See Cal. Civ. Code Sec. 43.5 (West’s 1997, as amended).

Separation (*Statsky 190–191*)

Legal separation may be based on the same grounds as dissolution (irreconcilable differences or incurable insanity). A petition for dissolution can later be filed by spouses who are legally separated. One difference between dissolution and separation is that a court cannot order legal separation without the consent of both spouses, unless one spouse defaults (does not respond to the petition for legal separation). See Cal. Fam. Code Sec. 2310, 2345, 2347 (West’s 1994, as amended).

■ SEPARATE MAINTENANCE (*Statsky 191*)

The term *spousal support* is used in California. See Chapter 8.

■ INTRODUCTION TO DIVORCE PROCEDURE (*Statsky 192*)

A couple may agree to file a petition for summary dissolution without a trial or hearing. Requirements include a marriage of five years or less; no children; no real property; a written agreement dividing up assets and liabilities; and limits on the value of property. By using this procedure, the parties give up rights to spousal support, appeal, etc. The Judicial Council provides a brochure in English and Spanish explaining the summary dissolution procedure. See Cal. Fam. Code Sec. 2400 et seq. (West’s 1994, as amended); CRC 1270 et seq.; Judicial Council forms CRC 1295.10 et seq.

JURISDICTION (*Statsky 197*)

Kinds of Jurisdiction (*Statsky 198–199*)

Subject Matter Jurisdiction

The Superior Courts have subject matter jurisdiction over proceedings under the Family Code. Cal. Fam. Code Sec. 200 (West's 1994, as amended).

In Rem Jurisdiction

The Superior Courts of California have in rem jurisdiction to adjudicate the status of a marriage if one spouse is domiciled in California. See *Marriage of Zierenberg* (1992) 11 Cal.App.4th 1436, 1444-45, 16 Cal.Rptr.2d 238, 243; *Marriage of Gray* (1988) 204 Cal.App.3d 1239, 1251, 251 Cal.Rptr. 846, 852. A spouse is domiciled in California if s/he resides in California with the intent to remain. See *Smith v. Smith* (1955), 45 Cal.2d 235, 239, 288 P.2d 497.

Personal Jurisdiction

The petitioner spouse automatically submits to the court's personal jurisdiction by filing the petition, but personal jurisdiction over the respondent spouse must be based on a statute and consistent with the due process requirements of the U.S. Constitution. Under California's "Long Arm" statute, the courts of this state can assert jurisdiction on any basis consistent with the U.S. Constitution. See Cal. Civ. Proc. Code Sec. 410.10 (West's 1982, as amended). Therefore, as long as the constitutional requirements of due process are met (see textbook), California Superior Courts can assert personal jurisdiction over a spouse who does not reside in California. However, a parent who comes to California to participate in a child custody proceeding does not become subject to the jurisdiction of the state court for other purposes solely because s/he is attending the custody proceeding. See Cal. Fam. Code Sec. 3409(a) (West's 1994, as amended).

Venue (*Statsky 203*)

A petition for dissolution may be filed in the county where either spouse has resided for the three months immediately preceding the filing of the petition. A petition for annulment or separation may be filed in the county where either spouse resides at the time of the petition. See Cal. Civ. Proc. Code Sec. 395(a) (West's 1982, as amended).

Residence

At least one spouse must have resided in California for six months with the intent to remain, and in the county where the petition is filed for the three months preceding the filing of the petition. See Cal. Fam. Code Sec. 2320 (West's 1994, as amended); *Marriage of Dick* (1993) 15 Cal.App.4th 144, 153, 18 Cal.Rptr.2d 743, 746.

Pleadings (*Statsky 204–206*)

A proceeding for dissolution, legal separation, or annulment is commenced by filing a petition in court using Judicial Council Form 1281. See Cal. Fam. Code Sec. 2330 (West's 1994, as amended). A family law summons (Judicial Council form CRC 1283) must be filed at the same time. The general civil summons cannot be used.

The petition makes statements of facts and asks for specific relief, such as dissolution, custody, child support, etc.

The spouse who files the petition is called the petitioner. The other spouse is called the respondent.

All pleadings under the Family Code must be verified (signed under oath by the party). See Cal. Fam. Code Sec. 212 (West's 1994, as amended).

The petition and summons are filed in Superior Court. The filing fee can be determined by contacting the office of the Clerk of the Superior Court. For rules concerning facsimile filing, see CRC 2001 et seq. and local court rules.

The petition and summons must be served on the respondent in order to assert the court's jurisdiction over him/her. This is called service of process. Procedures for service of process are found in Cal. Code Civ. Proc. Sec. 413.10 et seq. (West's 1982, as amended).

Service of the summons automatically imposes temporary restraining orders (TROs) on both parties. They are prohibited from removing minor children from the state, disposing of or transferring property, or changing insurance coverage without court order or permission of the other party. The orders are printed on the summons. See Cal. Fam. Code Sec. 231-235, 2040 (West's 1994, as amended); CRC 1216 (c).

The following are possible responses to the petition by the respondent.

Motions—The respondent may attack the petition on procedural grounds. See generally the California Code of Civil Procedure.

Response—The respondent may file a response to the petition, using Judicial Council form CRC 1282. The response indicates areas of agreement and disagreement with the petition.

Appearance in uncontested proceeding—The respondent may choose not to contest any matters. The respondent may file Judicial Council form CRC 1282 50, titled "Appearance, Stipulations, and Waivers." See CRC 1241.

Default—If the respondent fails to file a timely response to the petition, the respondent is in default. Petitioner may request entry of default (Judicial Council form CRC 1286 et seq.) and then default judgment (Judicial Council form CRC 1288 et. seq.).

Before either a default judgment or a judgment in an uncontested proceeding can be entered, the petitioner must offer proof supporting the relief requested in the petition. After this "prove up" hearing, the court may enter judgment granting the dissolution, awarding custody, ordering child support, etc. See Cal. Fam. Code Sec. 2336(a) (West's 1994, as amended); CRC 1237, 1241.

If the proceeding is contested, the court will hold a trial (see Trial).

Guardian Ad Litem (*Statsky 207*)

See Cal. Civ. Proc. Code Sec. 372 et seq. (West's 1994 as amended) and Judicial Council form CRC 1296.50.

Waiting Period (*Statsky 207*)

There can be no final judgment of dissolution until six months have passed from the date the petition for dissolution was served on the respondent, or the date the respondent "appeared"

(filed a response or “Appearance”), whichever came first. See Cal. Fam. Code Sec. 2339(a) (West’s 1994, as amended).

Discovery (*Statsky 207, 209*)

Discovery is governed by the Civil Discovery Act of 1986, Cal. Civ. Proc. Code Sec. 2016 et seq. (West’s 1982, as amended).

The Judicial Council provides family law form interrogatories (Judicial Council form CRC 1292.10).

Each party must file preliminary and final declarations of disclosure. See Cal. Fam. Code Sec. 2100 et seq. (West’s 1994 as amended) and Judicial Council forms CRC 1292.05 et seq.

Preliminary Orders (*Statsky 210*)

The court may make orders pendente lite (during litigation) for spousal and child support and protection of the financial interests of the parties. See, e.g., Cal. Fam. Code Sec. 2334(b), 2337, 3600 et seq. (West’s 1994, as amended).

TRIAL (*STATSKY 212*)

In a contested dissolution proceeding, the court will hold a trial governed by the usual rules for civil trials, including the Code of Civil Procedure, the Evidence Code, the CRC, and local rules. However, the CRC family law rules (CRC 1200 et seq.) prevail over contrary statutes. CRC 1206.

The court may grant a separate and earlier trial on the issue of the status of the marriage, leaving questions of support, custody, and property division to be resolved after the marriage is dissolved. If one spouse moves to have the status of the marriage tried before the other issues, the court may order that spouse to maintain existing health insurance coverage for the other spouse and children, and to take other steps to protect the economic interests of the children and the other spouse. See Cal. Fam. Code Sec. 2337 (West’s 1994, as amended); Judicial Council form CRC 1286.75.

Eavesdropping and secret recording may violate the California Invasion of Privacy Act, Cal. Penal Code Sec. 630-637.2 (West’s 2000, as amended). “Evidence collected by eavesdropping in violation of Penal Code Sec. 630 et seq. is inadmissible in family law proceedings.” Cal. Fam. Code Sec. 2022(b) (West’s 1994, as amended).

ALTERNATIVE DISPUTE RESOLUTION (*Statsky 213*)

The judge may order ADR as part of a case management plan. See Cal. Fam. Code Sec. 2450, 2451 (West’s 1994, as amended). In addition, the court may order arbitration if the community estate (see Chapter 8) is worth \$50,000 or less. See Cal. Fam. Code Sec. 2554(a) (West’s 1994, as amended).

An Office of the Family Law Facilitator is available in each Superior Court to help low-income families who cannot afford legal representation resolve issues of child support, spousal support, and health insurance. See Cal. Fam. Law Code Sec. 10000 et seq. (West’s 1994, as amended).

ENFORCEMENT OF DIVORCE JUDGMENT (*Statsky 219*)

See enforcement of judgments (Cal. Civ. Proc. Code Sec. 680.010 et seq.), civil contempt (Cal. Civ. Proc. Code Sec. 1209 et seq.), attachment (Cal. Civ. Proc. Code Sec. 481.010), garnishment (Cal. Civ. Proc. Code Sec. 706.010 et seq.), levy (Cal. Civ. Proc. Code Sec. 488.600 et seq.), executions (Cal. Civ. Proc. Code Sec. 699.010 et seq.), and receivership (Cal. Civ. Proc. Code Sec. 564 et seq.)

SUPPLEMENTAL ASSIGNMENTS FOR CHAPTER 7

1. Review all Judicial Council forms for dissolution, disclosure, etc.
2. Find out if the Family Law division of the Superior Court in your county has local rules or standing rules of the judge for dissolution procedures.
3. Find out what ADR procedures are used in the Family Law Division of the Superior Court in your county.
4. Review the Judicial Council brochure and forms for summary dissolution.
5. Draft an intake interview to obtain the information necessary to prepare a petition for dissolution.

8

SPOUSAL SUPPORT, PROPERTY DIVISION, AND THE SEPARATION AGREEMENT

SEPARATION AGREEMENTS (*Statsky 227*)

In California, the marital separation agreement (MSA) sets forth the parties' rights upon dissolution, legal separation, or annulment. The MSA characterizes assets and debts as community or separate, divides assets and debts, grants custody and visitation rights, and sets forth spousal and child support obligations. In most cases, the agreement must be in writing. See Cal. Civ. Code 1624 (West's 1997, as amended).

ALIMONY (*Statsky 253*)

Alimony is called spousal support in California.

While spouses are married and living together, they owe each other a mutual duty of support, and may bring an action to enforce this duty. See Cal. Fam. Code Sec. 4300 et seq. (West's 1994, as amended).

The court has discretion to order spousal support payments during litigation and as part of a judgment of dissolution or legal separation. See Cal. Fam. Code Sec. 3600 et seq., 4320 et seq. (West's 1994, as amended).

Whether an award of spousal support is appropriate is based on the standard of living established during the marriage, the needs of each party, and the ability of each party to pay. The judge must consider the following factors:

- (a) The extent to which the earnings capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account
 - (1) The marketable skills of the supported party; the job market for those skills; the time and expense required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment.
 - (2) The extent to which the supported party's present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties.
- (b) The extent to which the supported party contributed to the attainment of an education, training or career position, or a license by the supporting party.

- (c) The ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living.
- (d) The needs of each party based on the standard of living established during the marriage.
- (e) The obligations and assets, including the separate property, of each party.
- (f) The duration of the marriage.
- (g) The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.
- (h) The age and health of the parties.
- (i) Documented evidence of any history of domestic violence.
- (j) The immediate and specific tax consequences to each party.
- (k) The balance of the hardships to each party.
- (l) The goal that the supported party shall be self-supporting within a reasonable period of time, generally one-half the length of the marriage. (This "one half" guideline does not apply to marriages of long duration as described in Section 4336.)
- (m) The criminal conviction of an abusive spouse. (There is a presumption that an abusive spouse should not receive spousal support. See Cal. Fam. Code Sec. 4325.)
- (n) Any other factors the court determines are just and equitable.

See Cal. Fam. Law Code Sec. 4320 (West's 1994, as amended).

The court may order that spousal support be stepped-down (reduced) over time.

After a final judgment, the court does not retain jurisdiction to extend the duration of spousal support, or otherwise change a spousal support order, unless the parties were in a "marriage of long duration." See Cal. Fam. Code Sec. 4336(a) (West's 1994, as amended). There is a rebuttable presumption that a marriage of ten years or more was a marriage of long duration for purposes of retaining jurisdiction. See Cal. Fam. Code Sec. 4336(b) (West's 1994, as amended).

PROPERTY DIVISION (*Statsky 257*)

"A husband and wife may hold property as joint tenants or tenants in common, or as community property, or as community property with a right of survivorship." See Cal. Fam. Code Sec. 750 (West's 1994, as amended).

Income earned during marriage, and property purchased with that income, are community property, regardless of which spouse earned the income. "Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property." See Cal. Fam. Code Sec. 760 (West's 1994, as amended). Example: Bud and Bonnie are married, save up for a down payment, and buy a house. Both work and contribute to the mortgage until their child is born; then Bonnie stays home while Bud works to pay the mortgage. The house is community property.

Quasi-community property is property acquired by a spouse while domiciled outside California that would have been community property if the spouse had been domiciled in California. Property acquired in exchange for quasi-community property is quasi-community property. Quasi-community property is divided between spouses as part of the community estate in the case of divorce. See Cal. Fam. Code Sec. 63, 125, 2500 et seq. (West's 1994, as amended).

The term “community estate” includes both community property and quasi-community property.

Property owned before marriage, property received as a gift (before or during marriage), and property inherited (before or during marriage) are separate property. “Separate property of a married person includes

- (1) All property owned by the person before marriage.
- (2) All property acquired by the person after marriage by gift, bequest, devise, or descent.
- (3) The rents, issues, and profits of the property described in this section.” Cal. Fam. Code Sec. 770(a) (West’s 1994, as amended).

See also Cal. Const. Art. I, Sec. 21 (West’s 1996, as amended).

Example: Ben buys a car before he marries Alice. After Ben and Alice marry, Ben’s aunt dies and leaves a house to Ben. Ben rents out the house and puts the rental income in a bank account identified as his separate property. The car, house, and bank account are Ben’s separate property.

“The earnings and accumulations of a spouse . . . while living separate and apart from the other spouse are the separate property of the spouse.” Cal Fam. Code Sec. 771(a) (West’s 1994, as amended).

Compensatory damages received for personal injuries are community property in most cases. See Cal. Fam. Code Sec. 780-782 (West’s 1994, as amended). Example: Marie is injured in a car accident and receives a settlement of \$50,000. In most cases, the settlement is the community property of Marie and her husband.

Spouses may agree in writing to “transmute” (change) community property to separate property or vice versa. For instance, the equity in the home Husband owned before marriage is his separate property. Husband and Wife may enter into a marital agreement to make all the equity in the home community property. This change affects Wife’s rights to a share of the home in the event of divorce or death. Wife may give Husband something in return for this agreement, but such “consideration” is not required. In most cases, a marital agreement must be in writing. See Cal. Fam. Code Sec. 850 et seq. (West’s 1994, as amended).

Upon dissolution, the court divides the community estate of the parties equally unless they agree otherwise.

All property acquired during marriage is presumed to be community property. The party who disagrees with this presumption may prove that the property is separate property, using the following evidence: a written agreement of the parties, or a clear statement in the deed or other documentary evidence of title showing that the property is separate property. See Cal. Fam. Code Sec. 2581 (West’s 1994, as amended). Example: After Sue and Bob married, Sue inherited \$5,000 from her grandmother, and Bob received a gift of \$1,000 from his uncle. They deposited these sums in a savings account in both their names and made a mental note that \$5,000 belonged to Sue and \$1,000 belonged to Bob. Bob and Sue have “commingled” their property, and there is insufficient evidence to rebut the presumption of community property.

Now suppose that Sue placed her inheritance in a separate savings account at first, but then used the money toward a down payment on a family home. If Sue and Bob divorce, Sue may be able to “trace” the down payment to a separate property source and be reimbursed for the amount she contributed to the purchase of the home. See Cal. Fam. Code Sec. 2650(b) (West’s 1994, as amended).

In dividing property, “the court may award an asset of the community estate to one party . . . to effect a substantially equal division of the community estate.” See Cal. Fam. Code Sec. 2601 (West’s 1994, as amended). Example: Norman and Maxine have \$50,000 in equity in their home and a total of \$50,000 in savings and investments. The court may award the home to Norman and the other assets to Maxine.

If one spouse was injured during the marriage, received compensation, and the compensation was not commingled with other community assets, the court will assign that compensation to the injured spouse in most cases. See Cal. Fam. Code Sec. 2603 (West's 1994, as amended).

Pensions (*Statsky 266–269*)

Retirement benefits earned during marriage are community property. See Cal. Fam. Code Sec. 2610 et seq. (West's 1994, as amended); *In re Marriage of Gilmore* (1981) 29 Cal.3d 418, 422, 174 Cal.Rptr. 493, 495. The court may make necessary orders to ensure that each party receives his/her share of benefits, including death or survivor benefits. For example, the court may order a spouse to elect a survivor benefit annuity, or may order the retirement plan to make payments directly to a spouse. See Cal. Fam. Code Sec. 2610 (West's 1994, as amended).

Once the spouse who earned the pension is eligible to retire and receive pension benefits, the other spouse is entitled to receive his/her share, even if the employee spouse chooses not to retire. See *In re Marriage of Gilmore*, 29 Cal.3d at 424-25, 174 Cal.Rptr. at 496-97.

A spouse may bargain away pension rights in exchange for other assets. See *In re Marriage of Crook* (1992) 2 C.A.4th 1606, 1612, 3 Cal.Rptr.2d 905, 908.

Pension benefit rights that were earned by working for a public agency in California must be divided according to the statute governing each pension plan. Examples of public pension plans include the State Teachers Retirement System (STRS), governed by Education Code Sec. 22650 et seq. and Sec. 27400 et seq.; the Public Employees Retirement System (PERS), governed by Government Code Sec. 21290 et seq.; and other plans covering county employees, university professors, state court judges, etc.

Degrees (*Statsky 269–271*)

A degree is not "property" subject to division in California, but the spouse who received the education may be required to reimburse the community estate for community contributions to that spouse's education. An example of a community contribution is payment of tuition or repayment of student loans. The unpaid part of a student loan is assigned to the spouse who went to school. The court may reduce the amount of reimbursement if the result of the education is less need for spousal support, if the community made contributions for both spouses to go to school, or if the community already has benefited from the spouse's education. There is a rebuttable presumption that the community benefits after ten years. See Cal. Fam. Code Sec. 2641 and Law Revision Commission Comment – Enactment (Revised Comment) (West's 1994, as amended).

DEBTS (*Statsky 277*)

The court divides liabilities (debts) as well as assets. The court "characterizes" debts as separate or community, and confirms or assigns them to the parties. See Cal. Fam. Code Sec. 2550-2556 (West's 1994, as amended).

Debts incurred before marriage are assigned to the spouse who incurred the debt. Debts incurred while the parties were married and living together are divided equally in most cases. Debts incurred after separation but before dissolution are assigned to the spouse who incurred the debts, except that debts for the "necessaries of life" may be assigned according to the parties' needs and abilities. See Cal. Fam. Code Sec. 2620-2627 (West's 1994, as amended).

WILLS (*Statsky 279*)

The final decree of dissolution or nullity revokes any provision that one spouse made for the other in a will, unless the will expressly provides otherwise. See Cal. Prob. Code Sec. 6122 (West's 1991, as amended); Cal. Fam. Code Sec. 2024 (West's 1994, as amended).

SUPPLEMENTAL ASSIGNMENTS TO CHAPTER 8

1. Sara owned a house before her marriage to David. The pre-marriage equity in the house is Sara's separate property. David does a great deal of maintenance on the house. Sara and David write an agreement in which David agrees to continue maintaining the house, and Sara agrees to change ownership of the house to community property, and carries out the formalities to do so. Has Sara transmuted the property? What section of the Family Code applies? How will this action affect Sara's property rights in the event of a divorce?
2. Harry worked to pay nursing school tuition of \$5,000 for one year for his wife, Sally. Sally took out a student loan of \$5,000 for her second year of school. Harry and Sally have repaid half of the student loan from their earnings when they decide to divorce. Only two years have passed since Sally completed nursing school, but, before going to nursing school, she was a homemaker dependent on Harry for support. Which party will be assigned to pay the unpaid balance of the student loan? Will the community be entitled to reimbursement? How much reimbursement? Has the community benefited yet from Sally's education? Can Sally make an argument that the community should not be reimbursed? On what basis?
3. Sam and Sarah buy a home in Massachusetts and intend to stay there. However, Sam's company transfers him to California. Sam and Sarah sell the home and put the proceeds in the bank. They return to California, rent an apartment, and then decide to divorce. What is the term applied to the proceeds of the sale of the home? How will the proceeds be divided upon divorce?
4. Read a sample Marital Settlement Agreement in a practice guide at the law library.

9

CHILD CUSTODY

KINDS OF CUSTODY (*Statsky 301*)

Joint legal custody means that both parents will share the right and responsibility to make decisions about the health, education, and welfare of a child. Sole legal custody means that one parent will have that right and responsibility. Joint physical custody means that each parent will have significant periods of physical custody. Sole physical custody means that a child will reside with and be under the supervision of one parent, subject to the power of the court to order visitation. See Cal. Fam. Code Sec. 3003-3007 (West's 1994, as amended).

CONTESTED CUSTODY (*Statsky 306*)

California has adopted the Uniform Child Custody Jurisdiction and Enforcement Act. See Cal. Fam. Code Sec. 3400 et seq. (West's 1994, as amended).

The mother and father are equally entitled to custody. See Cal. Fam. Code Sec. 3010 (West's 1994, as amended). The court may not give preference to a parent because of the parent's sex. See Cal. Fam. Code Sec. 3040(a)(1) (West's 1994, as amended).

There is no legal preference between joint and sole custody unless the parents agree on joint custody. See Cal. Fam. Code Sec. 3040(b), 3080 (West's 1994, as amended). The court may grant joint legal custody without granting joint physical custody. See Cal. Fam. Code Sec. 3085 (West's 1994, as amended).

In making a determination about the best interest of the child in a custody proceeding, the court considers numerous factors, including the child's health, safety, and welfare; the nature and amount of contact with both parents; any history of abuse by one parent against the child or against the other parent; and other factors it finds relevant. See Cal. Fam. Code Sec. 3011 (West's 1994, as amended).

Allegations of child abuse or domestic violence, including sanctions against a parent who makes a false accusation, procedures for investigation, and protections for the child, are covered in Cal. Fam. Code Sec. 3027-3028, 3030-31, 3044, 3100, 3118 (West's 1994, as amended). See also the California Penal Code and Welfare and Institutions Code.

If a child is mature enough, the court will consider the child's preference concerning custody. The court will decide whether to call the child as a witness. See Cal. Fam. Code Sec. 3042 (West's 1994, as amended).

The court must grant reasonable visitation rights to the noncustodial parent unless this would not be in the best interests of the child. Under some circumstances, the court may require that the visit be supervised by a third person. See Cal. Fam. Code Sec. 3100 (West's 1994, as amended).

The court may appoint an investigator or evaluator to help determine the best interests of the child. See Cal. Fam. Code Sec. 3110 et seq. (West's 1994, as amended) and CRC 1257.

All custody disputes are subject to court-ordered mediation. The mediation service is provided by the court. See Cal. Fam. Code Sec. 3170 et seq. (West's 1994, as amended). The court

may require any party to participate in counseling, generally at the party's own expense. See Cal. Fam. Code Sec. 3190, as amended (West's 1994, as amended).

The court may appoint private counsel to represent the interests of the child in a custody or visitation proceeding. See Cal. Fam. Code Sec. 3150 et seq. (West's 1994, as amended).

California law provides an opportunity for grandparents, stepparents, and others to seek visitation rights. "In the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child." Cal. Fam. Code Sec. 3100(a) (West's 1994, as amended). In particular, the court may grant reasonable visitation to a stepparent (Cal. Fam. Code Sec. 3101) or to a grandparent (Cal. Fam. Code Sec. 3103) if this would be in the best interests of the child. Recently, California courts have interpreted these statutes in light of *Troxel v. Granville* (2000) 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (see text, p. 321-322), and have denied court-imposed visitation for grandparents. See, e.g., *In re Marriage of Harris* (2001), 92 Cal.App.4th 499, 112 Cal.Rptr.2d 127.

Procedures for locating a missing child are covered in Cal. Fam. Code Sec. 3130 et seq. (West's 1994, as amended).

The Judicial Council has developed forms for use in custody proceedings. See CRC 1278 et seq., as amended, and Judicial Council Form CRC 1296.80.

SUPPLEMENTAL ASSIGNMENTS FOR CHAPTER 9

1. Review the Judicial Council forms for use in custody proceedings.
2. Read the Uniform Child Custody and Enforcement Act, Family Code Sec. 3400 et seq.
3. Find and read a California case applying the *Troxel* decision, 120 S. Ct. 2054.
4. Find out how mediation procedures are used in custody proceedings in the Superior Court in your county.

10

CHILD SUPPORT

CHILD SUPPORT (*Statsky 351*)

California has adopted the Uniform Reciprocal Enforcement of Support Act and the Uniform Interstate Family Support Act. See Cal. Fam. Code 4800 et seq. and 4900 et seq. (West's 1994, as amended). California has adopted all Uniform Family Support Act forms for use in support actions. CRC 1276 et seq., as amended.

The mother and father have an equal duty to support their child. Cal. Fam. Code Sec. 3900 (West's 1994, as amended). The duty continues until a child reaches age 18, or until age 19 if the child is still in high school. See Cal. Fam. Code Sec. 3900, 3901 (West's 1994, as amended). The duty also applies to an incapacitated adult child. See Cal. Fam. Code Sec. 3910 (West's 1994, as amended).

The parents may stipulate (agree) to an amount for child support, subject to certain requirements. See Cal. Fam. Code Sec. 3850, 4065(a) (West's 1994, as amended).

Procedures for obtaining and modifying support orders are found in Cal. Fam. Code Sec. 3600 et seq. and Sec. 4000 et seq. (West's 1994, as amended). See also CRC 1275 et seq. and Judicial Council form CRC 1296.80.

Procedures for enforcing support orders are found in Cal. Fam. Code Sec. 4500 et seq. (West's 1994, as amended).

California has adopted uniform statewide guidelines for determining the amount of child support. See Cal. Fam. Code Sec. 4050 et seq. (West's 1994, as amended). The formula for computing child support is found in Cal. Fam. Code Sec. 4055 (West's 1994, as amended). The courts use computer software to determine the amount. See CRC 1258. The formula is based on the parents' disposable income and the percentage of time each child spends in the custody of each parent. Disposable income means gross income minus certain deductions. See Cal. Fam. Code Sec. 4059 (West's 1994, as amended). A parent experiencing extreme financial hardship for health or other reasons may claim a hardship deduction. See Cal. Fam. Code Sec. 4059, 4070-4073 (West's 1994, as amended). The court has discretion to modify the result of the formula based on several factors, including an agreement of the parents, the special needs of a child, the low income of the noncustodial parent, the deferral of sale of the home, etc. See Cal. Fam. Code Sec. 4055(b)7 and 4057 (West's 1994, as amended).

The income of a new spouse usually is not considered in making a support order. See Cal. Fam. Code Sec. 4057.5 (West's 1994, as amended).

Requirements to maintain health insurance for children are covered in Cal. Fam. Code Sec. 3750 et seq. (West's 1994, as amended). When determining disposable income in order to apply the child support formula discussed above, the amount a parent is paying for health insurance is deducted from the parent's gross income. In this manner, the child support formula takes into account a parent's contribution for health insurance when calculating the amount of support the parent owes. See Cal. Fam. Code Sec. 4059(d) (West's 1994, as amended).

The court may defer (delay) the sale of the family home as a form of child support. This is called "deferral of sale." See Cal. Fam. Code Sec. 3800 et seq. (West's 1994, as amended).

A county may seek support on behalf of a child. See Cal. Fam. Code Sec. 4002 (West's 1994, as amended). If a county is providing public assistance to a child, payment of child support may be made to the county. See Cal. Fam. Code Sec. 4200 et seq. (West's 1994, as amended).

Effective in 2000, California created a Department of Child Support Services to coordinate child support collection efforts, and directed each county to establish a Department of Child Support Services. See Cal. Fam. Code Sec. 17000 et seq. (West's 1994, as amended). Previously, the District Attorney had primary responsibility for child support enforcement. The District Attorney's role now is to prosecute cases of violation of Cal. Penal Code Sec. 270 (West's 2000, as amended) (criminal penalties for failure to support children).

SUPPLEMENTAL ASSIGNMENTS FOR CHAPTER 10

1. Review the formula for determining child support (Family Code 4050 et seq.).
2. Read the Uniform Reciprocal Enforcement of Support Act (Family Code Sec. 4800 et seq.) and the Uniform Interstate Family Support Act (Family Code Sec. 4900 et seq.)
3. Read the procedures for obtaining and modifying support orders (Family Code Sec. 3600 et seq. and 4000 et seq.; CRC 1275 et seq.; Judicial Council form CRC 1296.80).
4. Read the procedures for enforcing support orders (Family Code Sec. 4500 et seq.).
5. Contact the Department of Child Support Services in your county to ask about current enforcement procedures.

11

TAX CONSEQUENCES OF SEPARATION AND DIVORCE

THE CONSEQUENCES (*Statsky 382*)

Family Code Sec. 4320 directs the court to consider tax consequences when determining an award of spousal support. Family Code Sec. 2337 addresses tax consequences when one party requests a separate trial on the status of the marriages.

Under California's "Proposition 13" property tax law (Cal. Const. Art. 13A, Sec.1 (West's 1996, as amended)), property is reappraised when it changes ownership. A transfer of real property to a spouse or former spouse as part of a dissolution proceeding is not considered a change of ownership for this purpose. Cal. Rev. & Tax. Code Sec. 63(c) (West's 1998, as amended).

SUPPLEMENTAL ASSIGNMENT FOR CHAPTER 11

1. Review the tax aspects of dissolution in a practice manual at the law library.

12

THE LEGAL RIGHTS OF WOMEN

NAME (*Statsky 400*)

In a proceeding for dissolution or nullity, but not for legal separation, the court shall restore a party's birth name upon request of the party. See Cal. Fam. Code Sec. 2080 (West's 1994, as amended).

CREDIT (*Statsky 401*)

Discrimination on the basis of sex in credit matters is unlawful. See Cal. Civ. Code Sec. 1812.30-35 (West's 1997, as amended).

EMPLOYMENT (*Statsky 403*)

Discrimination on the basis of sex in employment is unlawful under the Fair Employment and Housing Act. See Cal. Const. Art. 1, Sec. 8 (West's 1996, as amended); Cal. Gov't Code Sec. 12940(a) (West's 1995, as amended).

REPRODUCTIVE RIGHTS (*Statsky 404*)

The right to privacy guaranteed by the California Constitution (Art. 1, Sec. 1 (West's 1996, as amended) requires the state Medi-Cal program to pay for elective abortions for low-income women. See *Committee to Defend Reproductive Rights v. Myers* (1981), 29 Cal.3d 252, 172 Cal.Rptr. 866, 625 P.2d 779.

THE BATTERED WIFE (*Statsky 408*)

Family Code Sec. 6200 et seq. and CRC 1257.2 address domestic violence. Judicial Council forms CRC 1295.90 and DV-100 are used to obtain restraining orders.

MARITAL RAPE (*Statsky 414*)

Rape of a spouse is a crime. See Penal Code Sec. 262 (West's 2000, as amended).

SUPPLEMENTAL ASSIGNMENTS FOR CHAPTER 12

1. Read the section of the Fair Employment and Housing Act concerning employment discrimination (Gov't. Code Sec. 12940).
2. Review the Judicial Council forms concerning domestic violence. Contact the Clerk of the Superior Court in your county to ask about procedures for obtaining a restraining order.

13

ILLEGITIMACY AND PATERNITY PROCEEDINGS

ILLEGITIMACY (*Statsky 421*)

The rights and duties of parents and children do not depend on the parents' marital status. See Cal. Fam. Code Sec. 7602 (West's 1994, as amended).

Inheritance (*Statsky 422*)

A provision in a will for the testator's "children" will be interpreted to include children born out of wedlock unless the will expressly provides otherwise. See Cal. Prob. Code Sec. 21115 (West's 1991, as amended).

Support (*Statsky 422*)

All parents, whether married or not, have a duty to support their minor children. See Cal. Fam. Code Sec. 3900 et seq. (West's 1994, as amended); *Davis v. Davis* (1968) 68 Cal.2d 290, 66 Cal.Rptr. 14, 437 P.2d 502.

Wrongful Death (*Statsky 422*)

A child has standing to sue for the wrongful death of a parent regardless of the parent's marital status. See Cal. Code Civ. Proc. Sec. 377.60 (West's 1982, as amended).

Workers' Compensation (*Statsky 422*)

A dependent child's status does not depend on the marital status of the parent. Cal. Lab. Code Sec. 3501(a) (West's 1989, as amended).

Artificial Insemination (*Statsky 423–424*)

If a woman is artificially inseminated by the semen of a man other than her husband, under the supervision of a doctor, with the written consent of her husband, then the husband, and not the semen donor, is considered the natural father of the child. See Cal. Fam. Code Sec. 7613 (West's 1994, as amended); Cal. Penal Code Sec. 270 (West's 2000, as amended).

Paternity (*Statsky 425–436*)

In general, the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage. See Cal. Fam. Code Sec. 7540 et seq. (West's 1994, as amended). However, genetic testing results may be introduced in some circumstances to prove that the husband is not the father. See Cal. Fam. Code Sec. 7540-7541 (West's 1994, as amended). The Uniform Act on Blood Tests to Determine Paternity, Family Code Sec. 7550 et seq., includes procedures for obtaining and using genetic tests. Paternity also may be established by voluntary declaration of the parents. See Cal. Fam. Code Sec. 7570 et seq. (West's 1994, as amended).

Under the Uniform Parentage Act, Fam. Code Sec. 7600 et seq., a man is presumed to be the father of a child if he and the child's mother have been married and the child is born during the marriage or within 300 days after the marriage is terminated; if he marries the mother after the child's birth and is named as the father on the child's birth certificate, with his consent; if he marries the mother after the child's birth and is obligated to support the child, either by court order or voluntary written promise; or if he receives the child into his home and openly holds out the child as his natural child. These presumptions of paternity may be rebutted by clear and convincing evidence. There are special provisions for marriages subject to annulment, children born abroad, and children conceived because of rape or unlawful intercourse with a minor.

Jurisdiction and venue are covered in Fam. Code Sec. 7620.

Standing to bring an action is covered in Fam. Code Sec. 7630 et seq.

SUPPLEMENTAL ASSIGNMENTS FOR CHAPTER 13

1. Find a case discussing the scientific basis of genetic testing.
2. Read the Uniform Parentage Act, Fam. Code Sec. 7600 et seq.

14

THE LEGAL STATUS OF CHILDREN

AGE OF MAJORITY (*Statsky 439*)

The age of majority is 18. Cal. Fam. Code Sec. 6500 (West's 1994, as amended).

PROPERTY AND EARNINGS (*Statsky 422*)

The parents of a minor child have a right to his/her earnings but do not have the right "as such" to control the child's property. See Cal. Fam. Code Sec. 7500 et seq. (West's 1994, as amended).

EDUCATION (*Statsky 443*)

Education is compulsory between age 6 and 18. See Cal. Educ. Code Sec. 48200 (West's 1994, as amended).

NEGLECT AND ABUSE (*Statsky 443*)

See the Welfare and Institutions Code. Foster home placement is covered in Cal. Fam. Code Sec. 7950 et seq. (West's 1994, as amended).

DELINQUENCY (*Statsky 446*)

See the Welfare and Institutions Code, the Penal Code, and CRC 1400 et seq. concerning juvenile delinquency.

SUPPLEMENTAL ASSIGNMENTS FOR CHAPTER 14

1. Contact the Child Protective Services agency in your county and ask about procedures for reporting suspected child abuse or neglect.

15

ADOPTION

WHO MAY BE ADOPTED? (*Statsky 454*)

Adoption of unmarried minors is covered in Fam. Code Sec. 8600 et seq. Adoption of adults and married minors is covered in Fam. Code Sec. 9300.

WHO MAY ADOPT? (*Statsky 455*)

Unmarried persons may adopt. See *Department of Social Welfare v. Superior Court* (1969), 1 Cal.3d 1, 5, 81 Cal.Rptr. 345, 459 P.2d 897.

A stepparent may adopt the child of his/her spouse. See Cal. Fam. Code Sec. 9000 et seq. (West's 1994, as amended). A domestic partner may adopt the child of his/her spouse in the same manner as a stepparent. See Cal. Fam. Code Sec. 9000(b).

Before the domestic partner law was enacted, the California Department of Social Services permitted an unmarried partner to adopt the child of his/her partner as a "modified independent adoption" or "second parent adoption." In *Sharon S. v. Superior Court* (2001), 93 Cal.App.4th 218, 113 Cal.Rptr. 107, cert. granted, 2002 Cal. LX 459, 2002 Cal. App. LX 817, the Court of Appeals disapproved such adoptions. The Supreme Court will review this decision.

Procedures for a foster caregiver to adopt a child are found in Fam. Code Sec. 8730-36.

ADOPTION PROCEDURES (*Statsky 458*)

The petition to adopt a child is Judicial Council form ADOPT-200.

KINDS OF ADOPTIONS (*Statsky 451*)

Agency Adoptions (*Statsky 451–452*)

Procedures for relinquishing a child to an adoption agency are covered in Fam. Code Sec. 8700 et seq. The relinquishment is final in most cases. If the birth parent has chosen a specific adoptive parent or parents, this is sometimes called an "identified" adoption. If the adoption does not proceed with the identified adoptive parent(s), the birth parent has the right to revoke the relinquishment within a specified time.

Independent Adoptions (*Statsky 452–453*)

A birth parent who gives consent for the adoption of a child has 30 days to revoke consent in most cases. See Cal. Fam. Code Sec. 8814, 8814.5, 8815 (West's 1994, as amended). This rule ap-

plies to independent adoptions, not agency adoptions. *In Re Bridget R.* (1996) 41 Cal.App.4th 1483, 49 Cal.Rptr.2d 507, modified on denial of rehearing, review denied, cert. denied, 117 S.Ct. 693, 519 U.S. 1060, 136 L.Ed.2d 616, cert. denied, 117 S.Ct. 1460, 520 U.S. 1181, 137 L.Ed.2d 564.

Consent (*Statsky 461–462*)

In general, a child who has a “presumed father” (see the Uniform Paternity Act, Fam. Code Sec. 7600 et seq.) may not be adopted without the consent of both birth parents. See Cal. Fam. Code Sec. 8604. However, the consent of a birth parent is not necessary if that parent’s rights have been terminated, if the parent has relinquished the child to an adoption agency, or in some other circumstances. See Cal. Fam. Code Sec. 8606. Procedures for identifying the natural father, notifying him of adoption proceedings, and terminating his rights are covered in Fam. Code Sec. 7660 et seq.

Involuntary Termination of Parental Rights (*Statsky 464–465*)

Procedures for terminating parental rights are covered in Cal. Fam. Code Sec. 7840 et seq. Grounds for terminating parental rights include abandonment, neglect, abuse, unfitness, or incapacity. See Cal. Fam. Code Sec. 7800 et seq.

The definition of abandonment includes leaving a child in the custody of another person without providing support or with only “token” support, with only “token” communication or no communication, and with the intent to abandon the child for six months. A child may be declared “abandoned” under these circumstances if the parent has placed the child for adoption, and has not refused to give consent for adoption, or has refused to give consent but has not taken reasonable action to obtain custody of the child. See Cal. Fam. Code Sec. 7800 et seq.

California has adopted the Interstate Compact on the Placement of Children. See Fam. Code Sec. 7900 et seq.

CONSEQUENCES OF ADOPTION (*Statsky 474*)

After adoption, the adopted child and the adoptive parents have the legal relationship of parent and child with all rights and duties of that relationship. Cal. Fam. Code Sec. 8616.

CONFIDENTIALITY (*Statsky 475*)

An adoptee age 21 or over may ask the adoption agency or the Department of Social Services for the name and address of the birth parent. The birth parent may give or withhold consent to release this information. See Cal. Fam. Code Sec. 8702(b), 9203.

SUPPLEMENTAL ASSIGNMENTS FOR CHAPTER 15

1. Review the legislative history of legislation shortening the time for a birth parent to revoke consent to 30 days in an independent adoption.
2. Read the Supreme Court decision in the *Sharon S.* case when it becomes available.
3. Identify one adoption agency that takes custody of relinquished children for the purpose of agency adoptions, and one attorney or other professional who facilitates independent

adoptions in your area. Ask about the procedures used. Does the adoption agency allow “identified adoptions?” What are the advantages and disadvantages of these different kinds of adoptions for the prospective adoptive parents? For the birth parents? For the child?

4. Review the Judicial Council petition for adoption.

16

THE NEW SCIENCE OF MOTHERHOOD

Genetic testing cannot be used to prove that a woman's husband is not the father of her child if the woman conceived using a "surgical procedure" with her husband's consent. See Cal. Fam. Code Sec. 7541(e)(3).

SURROGACY CONTRACTS (*Statsky 488*)

The husband and wife who contract for the services of a surrogate using donor eggs and/or donor sperm are the "intended parents." They, not the surrogate or the donors, have the rights and responsibilities of parents. See *In re Marriage of Buzzanca* (1998) 61 Cal.App.4th 1410, 72 Cal.Rptr.2d 280, review denied.

SUPPLEMENTAL ASSIGNMENTS FOR CHAPTER 16

1. Obtain and read a sample surrogacy contract from a practitioner or practice guide.

17

TORTS AND FAMILY LAW

INTRAFAMILY TORTS (*Statsky 505*)

There is no immunity between husband and wife for either intentional or negligent torts. See *Self v. Self* (1962), 58 Cal.2d 683, 26 Cal.Rptr. 97, 376 P.2d. 65; *Klein v. Klein* (1962), 58 Cal.2d 692, 26 Cal.Rptr. 102, 376 P.2d 70. There is no immunity between parent and child for negligent torts, but there may be immunity for exercise of parental authority. See *Gibson v. Gibson* (1971), 3 Cal.3d 914, 92 Cal.Rptr. 288, 479 P.2d 648.

WRONGFUL LIFE (*Statsky 510*)

A child who is born with a severe defect because of a negligent diagnosis can recover only special or pecuniary (out-of-pocket) damages, not general damages for pain and suffering. See *Turpin v. Sortini* (1982), 31 Cal.3d 220, 182 Cal.Rptr. 337, 643 P.2d 954.

CONSORTIUM (*Statsky 512*)

Either husband or wife may recover for loss of consortium. *Rodriguez v. Bethlehem Steel Corp.* (1974), 12 Cal.3d 382, 115 Cal.Rptr. 765, 525 P.2d 669.

Unmarried cohabitants do not have a right to sue for loss of consortium or negligent infliction of emotional distress. *Elden v. Sheldon* (1988) 46 Cal.3d 267, 279, 250 Cal.Rptr. 254, 262. An unmarried cohabitant cannot sue for wrongful death (*Garcia v. Douglas Aircraft Co.* (1982) 133 Cal.App.3d 890, 893, 184 Cal.Rptr. 390, 391-92) unless registered as a domestic partner (see Cal. Code of Civ. Proc. Sec. 377.60(a)).

OTHER TORTS (*Statsky 514*)

California's Heart Balm Statutes abolished the causes of action for alienation of affection, criminal conversation, enticement of spouse or child, and seduction of a person over the age of consent. See Cal. Civ. Code Sec. 43.5.

VICARIOUS LIABILITY (*Statsky 516*)

Instead of using the "family purpose doctrine," California makes the owner of an automobile liable for the torts of anyone driving with the owner's permission, up to \$15,000 per injured person or \$30,000 per incident. See Cal. Vehicle Code Sec. 17150 et seq., as amended, 16020 et seq., as amended.

Parents are not vicariously liable for the torts of their child except in the following situations. A parent is liable if s/he knows of prior misconduct of the child. See *Singer v. Marx* (1956), 144 Cal.App.2d 637, 644, 301 P.2d 440. A parent is liable up to \$25,000 for the willful misconduct of a child. See Cal. Civ. Code Sec. 1714.1, as amended. A parent who signs a minor's driver's license is liable up to \$15,000 per injured person or \$30,000 per incident. See Vehicle Code Sec. 17707, 17709(a), as amended. A parent who allows a child access to a firearm is liable up to \$30,000 per injured person or \$60,000 per incident. See Civil Code Sec. 1714.3, as amended.

In most cases, "the community estate is liable for a debt incurred by either spouse before or during marriage" while the spouses are living together. See Cal. Fam. Code Sec. 910. However, "[t]he earnings of a married person during marriage are not liable for a debt incurred by the person's spouse before marriage . . . (if) the earnings . . . are held in a deposit account in which the person's spouse has no right of withdrawal and are uncommingled with other property in the community estate. . . ." Cal. Fam. Code Sec. 911.

If one spouse causes injury or damage, the other spouse is not liable simply because they are married. If one spouse is liable for causing damage, the liability shall be paid first out of the community estate and second out of that spouse's separate property, if the damage was caused while the spouse was performing an activity for the benefit of the community. If the damage was not caused while the spouse was performing an activity that was for the benefit of the community, then the liability shall be paid first out of the spouse's separate property and second out of the community estate. See Cal. Fam. Code Sec. 1000.

In general, one spouse's separate property is not liable for a debt incurred by the other spouse before or during marriage. See Cal. Fam. Code Sec. 913. However, a spouse's separate property may be liable for debts incurred by the other spouse during marriage to purchase "the necessities of life." See Cal. Fam. Code Sec. 913.

An obligation to pay child or spousal support that did not arise out of the current marriage is treated as a debt incurred before the current marriage. See Cal. Fam. Code Sec. 915.

SUPPLEMENTAL ASSIGNMENTS TO CHAPTER 17

1. Danielle saved up \$10,000 before she married Richard. Richard saved up \$5,000 before he married Danielle. Richard and Danielle then saved up another \$10,000 after they were married. While driving to the store to buy groceries for the family, Danielle ran a red light and injured Julie. Julie obtained a judgment for \$25,000. Richard and Danielle had only \$15,000 insurance coverage. Could Julie look to the couple's savings for the additional \$10,000? If the damages were greater than the available community property, could Julie look to Danielle's separate property?
2. Now suppose Danielle was driving the car from a meeting with her investment advisor concerning her separate property to a meeting with her ex-husband to discuss concerns about their grown daughter. Was Danielle's activity for the benefit of the community? Would the damages be paid first out of her separate property or the community property?
3. Would Richard's pre-marriage savings account be liable in either case?
4. Jill loved Jack, but was concerned about his tendency to run up credit card debt. Jill married Jack but opened a checking account in her name only and deposited only her paycheck into it. Is Jill's checking account liable to Jack's creditors?
5. Peter and Janet were married, had children, and divorced. Peter incurred a child support obligation. Peter then married Cyndi, who had invested in a mutual fund before marriage. Is Cyndi's investment liable for Peter's child support obligation?

6. Don saved up \$5,000 before he married Barbara. After marriage, Barbara ran up \$5,000 in credit card debt for clothes. Can the credit card agency collect the debt from Don's savings account?
7. Suppose that Don was the breadwinner and failed to give Barbara money to buy food, clothing, and medicine for herself and the children. Over a period of time, Barbara incurred \$5,000 in credit card debt for these necessities. Is Don's pre-marriage savings account liable?