



# FAMILY LAW

THE ESSENTIALS

THIRD EDITION

William P. Statsky

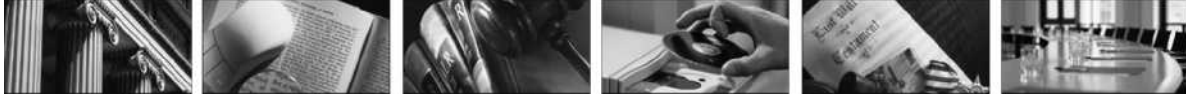
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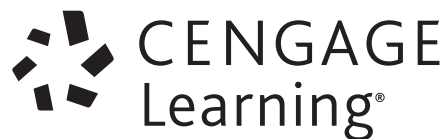
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William P. Statsky

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For my own domestic relations:

*Pat, Jess, Gabe, Randy, Carlie, Ava, Hailey, Myles, Kaia,  
Ryder, Joe, Brenda, Rich, Milosc, Moxie, and Rainy*

# By the Same Author

For more on publications by William Statsky, see:

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*The California Paralegal: Essential Rules, Documents, and Resources.* Clifton Park, N.Y.: Delmar Cengage Learning, 2008 (with S. Sandberg)

*Case Analysis and Fundamentals of Legal Writing, 4th ed.* St. Paul, MN: West Group, 1995 (with J. Wernet)

*Essentials of Paralegalism, 5th ed.* Clifton Park, N.Y.: Delmar Cengage Learning, 2010

*Essentials of Torts, 3d ed.* Clifton Park, N.Y.: Delmar Cengage Learning, 2012

*Family Law 6th ed.* Clifton Park, N.Y.: Delmar Cengage Learning, 2013

*The Florida Paralegal: Essential Rules, Documents, and Resources.* Clifton Park, N.Y.: Delmar Cengage Learning, 2009 (with B. Diotalevi & P. Linguist)

*Inmate Involvement in Prison Legal Services: Roles and Training Options for the Inmate as Paralegal.* Chicago: American Bar Association, Commission on Correctional Facilities and Services, 1974

*Introduction to Paralegalism: Perspectives, Problems, and Skills, 7th ed.* Clifton Park, N.Y.: Delmar Cengage Learning, 2009

*Legal Desk Reference.* St. Paul, MN: West Group, 1990 (with B. Hussey, M. Diamond, & R. Nakamura)

*The Legal Paraprofessional as Advocate and Assistant: Training Concepts and Materials.* New York: Center on Social Welfare Policy and Law, 1971 (with P. Lang)

*Legal Research and Writing: Some Starting Points, 5th ed.* Clifton Park, N.Y.: Delmar Cengage Learning, 1999

*Legal Thesaurus/Dictionary: A Resource for the Writer and Computer Researcher.* St. Paul, MN: West Group, 1985

*Legislative Analysis and Drafting, 2d ed.* St. Paul, MN: West Group, 1984

*The New York Paralegal: Essential Rules, Documents, and Resources.* Clifton Park, N.Y.: Delmar Cengage Learning, 2009 (with R. Sarachan)

*The Ohio Paralegal: Essential Rules, Documents, and Resources.* Clifton Park, N.Y.: Delmar Cengage Learning, 2008 (with K. Reed & B. Moore)

*Paralegal Employment: Facts and Strategies for the 1990s, 2d ed.* St. Paul, MN: West Group, 1993

*Paralegal Ethics and Regulation, 2d ed.* St. Paul, MN: West Group, 1993

*The Pennsylvania Paralegal: Essential Rules, Documents, and Resources.* Clifton Park, N.Y.: Delmar Cengage Learning, 2009 (with J. DeLeo & J. Geis)

*The Texas Paralegal: Essential Rules, Documents, and Resources.* Clifton Park, N.Y.: Delmar Cengage Learning, 2009 (with L. Crossett)

*Rights of the Imprisoned: Cases, Materials, and Directions.* Indianapolis, IN: Bobbs-Merrill Company, 1974 (with R. Singer)

*What Have Paralegals Done? A Dictionary of Functions.* Washington, D.C.: National Paralegal Institute, 1973



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# Preface

Say it isn't true. A recent *New York Times* story reported that a well-known divorce attorney was giving out pens to prospective clients that said, "Sue Someone You Love." This is not the image the legal profession wishes to project to the public. Yet newspapers, magazines, blogs, and talk shows do seem to give the impression that our society is in a litigation frenzy: "Son Sues to Divorce His Mother," "Wife Demands Half of Husband's Medical Practice in Divorce Settlement," "Surrogate Mother Refuses to Turn Over Baby," "Live-In Lover Seeks Palimony," "Facebook Divorces on the Rise."

Our goal in this book is to sort through the headlines to find an accurate picture of the state of family law today and the role of the attorney–paralegal team within it. We are living in an era of great change in the practice of family law. The primary focus of the family-law practitioner is no longer adultery and who gets the kids.

No-fault divorce has made marriage relatively easy to dissolve. The women's movement has helped bring about major shifts in determining what property can be split after a divorce and how to split it. Same-sex marriage is no longer a distant maybe. The country has declared war on the "deadbeat" parent who fails to pay child support. Major new enforcement mechanisms have been designed to find these parents and make them pay. To the surprise of many, courts have come to the aid of some unmarried fathers seeking to undo the adoption of their children. Science and technology have unleashed new concepts of motherhood and parentage. The law has not been able to keep pace with the scientific revolution taking place in the test tube and in the womb.

In short, there is a lot to talk about! It's a fascinating time to study family law.

## CHAPTER FORMAT

Each chapter includes features designed to assist students in understanding the material:

- A Chapter Outline at the beginning of each chapter provides a preview of the major topics discussed in the chapter.
- Chapter Objectives, also at the beginning of each chapter, present a more detailed listing of the themes and skills covered in the chapter.
- Exhibits and tables are used extensively to clarify concepts and present detailed information in an organized chart form.
- Assignments that ask students to apply concepts to particular fact situations are included in the chapters.
- Key terms are printed in boldface type the first time they appear in the chapter. A list of key terms also appears at the end of each chapter

to help students review important terminology introduced in that chapter.

- Each key term is also defined in the margin next to the text to which the terms are relevant.
- Following each project assignment there is an exercise called Ethics in a Family Law Practice, which asks the student to read a fact situation and identify ethical problems that may exist.
- A Summary at the end of each chapter provides a concise review of the main concepts discussed.
- Each chapter has Review Questions covering the major themes in the chapter.
- Helpful Websites are added at the end of each chapter to provide additional materials on the topics of the chapter.

## CHANGES IN THE THIRD EDITION

New chapter features include:

- Chapter Objectives. At the beginning of each chapter there is an outline of the themes and skills covered in the chapter.
- Review Questions. A comprehensive list of questions that review all the major topics covered in the chapter.

In addition to updating the law, new coverage in each chapter includes the following:

- Chapter 1. A major section on the constitutional underpinnings of many of the changes that have occurred in family law.
- Chapter 1. The impact of social media (e.g., Facebook) on the practice of family law.
- Chapter 1. Paralegal roles outside the traditional law office, such as government paralegals in child-support cases and freelance paralegals offering family-law services.
- Chapter 2. Postnuptial agreements.
- Chapter 2. The ethical dilemma a family-law attorney can face when a client wishes to sign a disadvantageous premarital agreement.
- Chapter 2. The distinction between procedural and substantive fairness in premarital agreements.
- Chapter 3. The major state and federal constitutional issues in same-sex-marriage cases.
- Chapter 3. Antinepotism policies as a restraint on marriage.



- Chapter 4. New immigration rules on sham marriages, sometimes called green-card marriages.
- Chapter 5. Historical background on divorce law and procedure.
- Chapter 5. Strategic and substantive roles of fault principles in no-fault cases.
- Chapter 5. The relationship between religious law (e.g., Islamic sharia) and civil family law in our courts.
- Chapter 6. The defense of mutual mistake in challenges to separation agreements involving funds in the Madoff Ponzi scheme.
- Chapter 6. The divisibility of public pensions.
- Chapter 7. Virtual visitation in child-custody cases.
- Chapter 8. The liability of stepparents and coparents for child support.
- Chapter 8. The three-pony rule in the calculation of child support.
- Chapter 8. The right of an indigent to state-paid counsel in child-support cases.
- Chapter 10. The sexual-harassment suit against President (then Governor) Bill Clinton.
- Chapter 10. The law requiring accommodations for women who need to express breast milk at work.
- Chapter 10. The controversy surrounding mandatory-arrest and mandatory-prosecution laws in domestic-violence cases and the defendant's right of confrontation in such cases when the victim refuses to testify.
- Chapter 11. The constitutional status of nonmarital children.
- Chapter 11. How a court resolves conflicting presumptions of paternity.
- Chapter 11. Paternity by estoppel.
- Chapter 11. Different requirements for citizenship of a nonmarital child born abroad to a citizen mother as opposed to a citizen father.
- Chapter 12. Free-speech and search-and-seizure constitutional rights of students.
- Chapter 13. Adoption of embryos.
- Chapter 14. The octomom and abuse of infertility treatments.
- Chapter 14. Posthumous birth and posthumous conception.
- Chapter 15. Domestic tort claims brought in divorce actions.
- Chapter 15. Tortious interference with custody.
- Chapter 15. Intrafamily crimes.
- Appendix. Computer-generated reports in divorce cases.

## TEACHING AIDS AND SUPPLEMENTS

The text is accompanied by the following support materials designed to assist students in learning and instructors in teaching.



### Paralegal CourseMate

*Family Law: The Essentials*, Third Edition, has a Paralegal CourseMate available.

Paralegal CourseMate includes:

- \* an interactive eBook, with highlighting, note-taking, and search capabilities
- \* interactive teaching and learning tools, including:

- Quizzing
- Case studies
- Chapter objectives
- Flashcards
- Weblinks
- Crossword puzzles
- PowerPoint® presentations
- And more!

\* Engagement Tracker, a first-of-its-kind tool that monitors student engagement in the course.

To learn more about this resource and access free demo CourseMate resources, go to [www.cengagebrain.com](http://www.cengagebrain.com) and search by this book's ISBN (9781285420592). To access CourseMate materials that you have purchased, go to [login.cengagebrain.com](http://login.cengagebrain.com), enter your access code, and create an account or log into your existing account.

### Instructor Companion Site



The Online Instructor Companion Site provides the following resources:

#### Instructor's Manual

The Instructor's Manual and Test Bank by the author of the text have been greatly expanded to incorporate changes in the text and to provide comprehensive teaching support. The Instructor's Manual provides answers to many of the text assignments and all of the end-of-chapter review questions. The test bank includes a variety of questions in multiple choice, true/false, short answer, fill-in, and matching. A test bank answer key is also included.

## PowerPoint Presentations

Customizable PowerPoint® Presentations focus on key points for each chapter. (Power-Point® is a registered trademark of the Microsoft Corporation.)

## Cengage Learning Testing Powered by Cognero is a flexible, online system that allows you to:

- author, edit, and manage test bank content from multiple Cengage Learning solutions
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To access additional course materials, please go to login.cengage.com, then use your SSO (single sign on) login to access the materials.

## SUPPLEMENTS AT A GLANCE

SUPPLEMENT:	WHAT IT IS:	WHAT'S IN IT:
<b>Paralegal CourseMate</b> 	Online interactive teaching and learning tools and an interactive eBook. Go to <a href="http://login.cengage.com">login.cengage.com</a> to access.	Interactive teaching and learning tools, including: <ul style="list-style-type: none"> <li>• Quizzing</li> <li>• Case studies</li> <li>• Chapter objectives</li> <li>• Flashcards</li> <li>• Weblinks</li> <li>• Crossword puzzles</li> <li>• PowerPoint® presentations</li> <li>• Interactive eBook</li> <li>• Engagement tracker</li> </ul>
<b>Online Instructor Companion Site</b> 	Resources for the instructor accessible via Cengage Single Sign On.	<ul style="list-style-type: none"> <li>• Instructor's Manual with answers to most test assignments and test bank with answer key</li> <li>• Computerized Testbank in Cognero, with many questions and styles to choose from to create customized assessments for your students</li> <li>• PowerPoint® presentations</li> </ul>

Please note that the Internet resources are time-sensitive and URL addresses may change or be deleted.

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## CHAPTER OUTLINE

### FAMILY LAW IN THE TWENTY-FIRST CENTURY

Equality of the Sexes: The Struggle Continues  
Increased Federalization of Family Law  
Contract Dimension of Family Law  
Science and Law  
Deregulation of Sexuality

### THE NEW TERMINOLOGY OF FAMILY LAW

### SCOPE OF FAMILY LAW

### OVERVIEW OF CONSTITUTIONAL LAW

Introduction  
Challenging State Government Action as a Violation of the Fourteenth Amendment  
Challenging Federal Government Action as a Violation of the Fifth Amendment  
Challenging State Government Action as a Violation of the State Constitution

### PRACTICING FAMILY LAW IN THE AGE OF ELECTRONIC EXHIBITIONISM

### PARALEGAL ROLES IN FAMILY LAW CASES

### OTHER FAMILY LAW ROLES

Freelancers in Family Law  
Government Paralegal  
Court Appointed Special Advocate (CASA)

## CHAPTER OBJECTIVES

After completing this chapter, you should be able to:

- Identify the major themes of family law in the twenty-first century.
- Understand how the practice of family law interacts with other areas of the law.
- List the major terminology changes in family law.
- State the tests used by a court when a family law is challenged as a violation of due process or equal protection.
- Understand the impact of social media on the practice of family law.
- List the variety of roles paralegals can have in various family-law offices and settings.

## FAMILY LAW IN THE TWENTY-FIRST CENTURY

**Family law** is the body of law that defines relationships, rights, and duties in the formation, ongoing existence, and dissolution of **marriage** and other family units. Marriage is the cornerstone of family law and for centuries this law has been relatively unchanged. Not so in recent decades. The world of our grandparents was dramatically different from today's world:

[U]ntil a generation ago there was a social consensus as to what marriage meant. Marriage was permanent and monogamous; children were automatic, essential, and central; husbands earned money and made decisions; wives stayed home taking care of house, children, and husband. The legal system reinforced the social norms for marriage. Now the clarity and unity of the domestic picture is gone. Only a small percentage of American families still have all the characteristics associated with the traditional nuclear family ideal. In place of a single socially approved ideal we have compelling demands for autonomy and privacy, and multiple models of intimacy: single parents, working wives, house husbands, [same-sex marriage], living-together arrangements without marriage, serial marriage, stepchildren, [and surrogate parents]. The changes are legion, and their message is clear: the destruction of traditional marriage as the sole model for adult intimacy is irreversible.<sup>1</sup>

### family law

The body of law that defines relationships, rights, and duties in the formation, ongoing existence, and dissolution of marriage and other family units.

### marriage

The legal union of two persons as spouses with designated rights and obligations to each other.

Indeed, we live in a society that sometimes appears to be in a state of perpetual change. One scholar maintains that “marriage has changed more in the past 30 years than in the previous 3,000.”<sup>2</sup> A recent survey came to the provocative conclusion that 39 percent of Americans feel that marriage is obsolete.<sup>3</sup> Another survey found that just under half of young Americans do not believe that the government should be in the business of issuing marriage licenses.<sup>4</sup> According to Justice Scalia of the U.S. Supreme Court, a “cultural war” is underway as society debates whether we have gone too far, or not far enough.<sup>5</sup>

Courts and legislatures have not always been able to fit traditional family-law principles into this environment of debate and change. New principles have been—and still are—needed. One of the central themes in this book will be how family law has evolved in response to the shifting boundary lines in how people choose to live together.

Five important developments in family law are a product of this turmoil. They have shaped our recent history and will continue to play major roles in the twenty-first century. The following is an overview of these developments.

## Equality of the Sexes: The Struggle Continues

There was a time in our history when a wife could not make her own will or bring a lawsuit in her own name. Without the consent of her husband, there was relatively little that she could do. Two centuries ago, the greatest legal scholar of the day, Blackstone, declared that “the very being or legal existence of a woman was suspended during the marriage, or at least was incorporated and consolidated into that of her husband.”<sup>6</sup> Indeed, in the eyes of the law, the husband and wife were one person, and that person was the husband. Carried to its logical extreme, this rule, called the **unity of person**, meant that a wife could not sue her husband (the suit would be the equivalent of the husband suing himself) and that a husband could not be convicted of raping his wife (the conviction would be for the equivalent of the husband raping himself).

Much progress has been made in abandoning a theory of the law based on male dominance. To a large extent, the law has equalized the legal status of husbands and wives. Some changes, however, have had unintended consequences that have served to perpetuate inequality. For example, no-fault divorce (which we will study in Chapter 5) gave both spouses an equal right to end a marriage without having to prove adultery, cruelty, or other marital misconduct. Yet some have argued that this reform removed a substantial bargaining chip for wives on the issues of money and custody, particularly in the case of long-term marriages. A husband did not have to bargain so hard to get out of the marriage if a divorce was now relatively easy to obtain. Also, for many couples, the standard of living of the ex-husband increases after divorce, while that of the ex-wife decreases.<sup>7</sup> Some feminists say that “equality” has actually led to a diminution of women’s rights. A Columbia law professor and author of *The Illusion of Equality* has argued that “[e]quality is being applied with a vengeance against women.”<sup>8</sup>

Furthermore, it is important to keep in mind that reforms in the law do not always translate into changes in human behavior. Not that long ago, for example, a court was asked to interpret a marital agreement between Mr. and Mrs. Spires that contained the following provisions:

*Mrs. Spires:*

- may not withdraw any money from the bank without Mr. Spires’s express permission
- may not “attempt to influence the status/intensity” of any relationship that Mr. Spires may have “with other individuals outside of the marriage unless the husband verbally requests input from the wife”
- may not “dispute” Mr. Spires in public “on any matter”
- must “conduct herself in accordance with all scriptures in the Holy Bible applicable to marital relationships germane to wives and in accordance with the husband’s specific requests”

### unity of person

The now-rejected rule that the legal identity of a wife is subsumed into the legal identity of the husband. Also called *doctrine of oneness*, *spousal unity rule*.

- must maintain a sexual relationship that “remains spontaneous and solely with the husband”
- must “carry out requests of the husband in strict accordance, i.e., timeliness, sequence, scheduling, etc.”
- may not receive any loan or gift without first obtaining Mr. Spires’s permission.<sup>9</sup>

The date the parties entered this agreement was not 1791 or 1891, but 1991. Although the court eventually declared the agreement to be unenforceable, the fact that such a case had to be litigated close to the beginning of the twenty-first century suggests that not everyone in society accepts the legal principle of equality between the sexes. Fortunately, most do accept it. Nevertheless, anyone engaged in the practice of family law must be prepared to find serious discrepancies between the laws on the books and the reality of how people conduct their lives. These discrepancies will continue to generate considerable business for family-law practices.

## Increased Federalization of Family Law

Our legal system is a system of shared powers between the federal government and state governments. This division of powers is called **federalism**. Most of family law is created by state governments. When parties want a divorce, for example, they go to a state court, not to a federal court. Yet the federal legislature (Congress) can pass laws and the federal courts can issue rulings on the federal constitution (the U.S. Constitution) that have a significant effect on state family law. Here are some examples:

- Federal income tax laws on the deductibility of alimony
- Federal bankruptcy laws on when alimony debts can be forgiven (discharged)
- Federal laws on the legality of abortion
- Federal laws protecting the rights of children of unmarried couples
- Federal laws governing child-custody disputes when the parties are in different states
- Federal laws on the enforcement of child support

When a federal law brings about a change in an area of law once controlled mainly by state law, we refer to the change as the **federalization** of that area of law. Federal statutes of Congress leading to changes in the state law of child support are perhaps the most extensive example of federalization to date.

When a change in the law occurs through interpretations of the U.S. Constitution by the U.S. Supreme Court and by other federal courts, we refer to the change as the **constitutionalization** of that area of law. A major example is the ruling of the U.S. Supreme Court that a state law discriminating against illegitimate children is a violation of the Equal Protection Clause of the U.S. Constitution.

State family law has not been swallowed up by federalization or constitutionalization. The bulk of family law today is still written by state legislatures and state courts. Under our system of federalism, however, this predominant state power over family law is shared with the federal government. Critics have argued that the federal government’s role in family law is too extensive and that too many areas of family law have been taken over by federalization. As the role of the federal government continues to increase, we can expect continued controversy over the delicate balance between federal and state law governing family relationships.

## Contract Dimension of Family Law

A great deal of family law is governed by the **status** of the participants. *Status* is a legal term that means a bundle of legal rights and obligations that

### federalism

The division of powers between the federal government and the state governments.

### federalization

Changes in state law that result from (a) laws written by the federal legislature (Congress) and (b) interpretations of the U.S. Constitution by federal courts.

### constitutionalization

Changes in state law that result from interpretations of the U.S. Constitution by the U.S. Supreme Court and other federal courts. (See the glossary for another meaning.)

### status

A person’s legal condition in which a bundle of rights and obligations are imposed by law, often without regard to the consent or contract desires of the person involved.

are imposed by law, often without regard to the consent or contract desires of the persons involved. For example, once parties are married, they cannot agree on their own to dissolve their marriage so that they can marry someone else. Spouses cannot divorce themselves. They need a court order of divorce. Nor can they agree that either or both will have additional spouses. A basic requirement of the law is that people have one spouse at a time. The parties cannot agree (contract) between themselves to divorce on their own or to turn their relationship into a multiple marriage by adding more spouses. The *status* of marriage would trump such contractual desires. Phrased another way, such contracts are unenforceable because of the duties and obligations imposed by the status of marriage.

Yet there is still considerable room for the parties to enter agreements (contracts) about their marriage so long as they do not tamper with basic rights and obligations that are central to the status of marriage. In fact, a relatively recent major development in family law has been a substantial increase in the capacity of parties to enter enforceable contracts that help define their rights and obligations. When we study **premarital agreements**, for example, we will see a greater willingness of the courts to allow the parties to enter contracts that define important components of the marriage they are about to enter, particularly in the area of finances. To an increasing degree, marriage is viewed as an economic partnership that is subject to some mutual modification, rather than as an eternal union of love benevolently presided over by the husband. Again, there are limits on what parties can accomplish by contract. Courts will not approve (enforce) everything the parties agree to do.

It is sometimes said that in every marriage there is a third party—the state—that imposes rights and obligations on the spouses. This is still true, although we have begun to see more flexibility in what the parties are allowed to do by contract. This trend is even greater in family units created as alternatives to marriage, as we will see when we study contract cohabitation and domestic partnership.

### premarital agreement

A contract by persons about to be married that can cover (1) financial and related matters once the marriage occurs and (2) spousal support, property division, and related matters in the event of death, separation, divorce, or annulment. Also called *prenuptial agreement* (“prenup”), *antenuptial agreement*.

## Science and Law

Scientific breakthroughs have created substantial challenges for family law. Nowhere is this more evident than in the modern science of motherhood. New ways to create babies have given us the reality of multiple parents: “Reproductive technology has made it possible for one person to supply an egg, another to fertilize it, a third to gestate it and a fourth and fifth to be deemed the parents.”<sup>10</sup> This reality has forced legislatures and courts to redefine traditional areas of the law and to confront new categories of disputes. For example, who is the legal parent when a surrogate mother changes her mind about turning the baby over to the couple that provided the embryo for the child? In Chapter 14, we’ll see how the courts have grappled with this question.

## Deregulation of Sexuality

At one time society imposed severe restrictions on intimate conduct. The law contained numerous examples of crimes related to sexuality, such as the sale of contraceptives, homosexual conduct between adults, and abortion. Although all restrictions on sexuality have not been eliminated, they have been substantially reduced when adults are involved. In the dramatic case of *Lawrence v. Texas* that decriminalized private homosexual conduct between adults, the U.S. Supreme Court said that “[l]iberty presumes an autonomy of self that includes . . . certain intimate conduct.”<sup>11</sup> Although there is a segment of society that wants to maintain—and indeed, increase—government regulation of sexual behavior and other “intimate conduct,” the law is moving in the other direction.

As family law continues into the twenty-first century, these are some of the major themes that will continue to demand the attention of courts and legislatures, and, therefore, will be part of the family-law practices where attorneys and paralegals serve the needs of clients.

## THE NEW TERMINOLOGY OF FAMILY LAW

One of the consequences of changes in family law over recent decades has been the creation of new terminology to describe some of the participants and procedures that make up family law. Here are some examples:

*New Terminology (older terms in parentheses)*

- dissolution (divorce)
- spousal support (alimony)
- maintenance (alimony)
- nonmarital child (illegitimate child, out-of-wedlock child, bastard)
- caregiver (custodian)
- parenting plan, parenting schedule, parenting time, parenting functions, parental responsibility, legal decision-making authority, residential schedule (custody, visitation, access to the child)

Some of the changes in terminology are cosmetic. Others have a more substantial purpose, such as emphasizing responsibilities rather than rights, downplaying morality, and toning down rhetoric that can contribute to the hostility that some family-law disputes can engender. A major goal is to move away from terminology that encourages parties to view themselves as “winners” or “losers” so that there can be a greater focus on an amicable resolution of conflict, particularly when children are involved.

Not all states use the new terminology. Indeed, you are likely to find that some states use both the old and the new terminologies at the same time. This is inevitable as courts apply prior decisions (**precedents**) to current facts. The prior decisions, of course, use the old terminology. In this book, we will be examining both the old and the new terminologies.

### precedent

A prior decision covering a similar issue that can be used as a standard or guide in a later case.

## SCOPE OF FAMILY LAW

To work in an office where family law is practiced, you need compassion, flexibility, skill, and, above all, an ability to handle a wide diversity of problems. Although many cases are straightforward, some are not. A veteran attorney observed that a family-law practice requires everyone “to become an expert in many fields of law and not just one.”<sup>12</sup> In this sense, the specialty of family law requires one to be a generalist.

Let’s examine this diversity using an example. Assume that you are a paralegal working for Karen Smith, an attorney in your state. One of the clients of the office is Susan Miller. The attorney receives the following e-mail message from Ms. Miller:

2/7/13

*Karen Smith:*

*I am leaving the state in a week to live with my mother in your state. She will help me move everything so that we can start a new life. I must see you as soon as I arrive. Yesterday my husband called from his business. He threatened me and the three children. I will bring the twins with me. I don’t know where my oldest boy is. He is probably with his father getting into more trouble.*

*Susan Miller*

The checklist on the next page lists many of the questions that are potentially relevant to the case of Susan Miller. Most of the technical terms in this list will be defined in subsequent chapters. Our goal here is simply to demonstrate that the scope of the law covered in a family-law practice can be very broad.

One final word before we begin the overview. Some state bar associations have **specialty certification** programs for attorneys who practice family law. At least one state (Texas) also has a certification specialty for paralegals in family law.<sup>13</sup> Certification requires meeting designated qualifications, such as experience in the specialty and passing an exam in the law of the specialty. Most attorneys

### specialty certification

Recognition of competency in a particular area of law.

and paralegals, however, do not have specialty certification, either because the state does not offer it or because of a perception that it is not needed.

### Areas of Law Often Covered in a Family Law Practice: The Example of *Miller v. Miller*

#### *Criminal Law*

- Has Mr. Miller committed a crime? What kind of threats did he make? Did he assault his wife and children? Has domestic violence been committed?
- Even if her husband has committed a crime, would it be wise for Ms. Miller to ask the district attorney to investigate and prosecute the case?
- Has Mr. Miller failed to support his family? If so, is the nonsupport a state or federal crime?
- Is there a danger of future criminal acts by Mr. Miller? If so, what can be done, if anything, to prevent such acts from occurring? Can Ms. Miller obtain a restraining or protective order to keep her husband away?
- Is Ms. Miller subject to any penalties for taking the twins out of state?

#### *Divorce/Separation/Annulment Law*

- Does Ms. Miller have grounds for a divorce, annulment, or legal separation against Mr. Miller?
- Does Mr. Miller have grounds for any of these actions against his wife?

#### *Child Custody Law*

- Does Ms. Miller want sole physical and sole legal custody of all three children? Is she the biological mother of all three? Is Mr. Miller their biological father? Are there any paternity problems? Will Mr. Miller want custody? What is the lifestyle of the parent or parents seeking custody? Is joint physical custody or joint legal custody an option?
- If Ms. Miller does not want a divorce, annulment, or legal separation, how can she obtain custody of the children?
- Does Ms. Miller want anyone else to be given temporary or permanent custody of any of the children (e.g., a relative)? Could such a person make a claim for custody *against* Ms. Miller?
- If she wants custody, has Ms. Miller jeopardized her chances of being awarded custody by taking the twins out of state?
- Which custody law applies: The custody law of the state where Mr. Miller lives, the state where Ms. Miller has now moved to, or the state where the children live? (This is a *choice-of-law* issue.)

#### *Support Law*

- Is Mr. Miller supporting his wife? Is she supporting him?
- Is Mr. Miller supporting the three children? Is Ms. Miller supporting them? Do the children have any special medical or school needs? If so, are these needs being met?
- Are the children now covered under Mr. Miller's health insurance policy at work? Is Ms. Miller covered? Is there a danger that the policy will be changed? Who has the authority under the policy to change the beneficiaries? Can such a change be prevented?
- Can Ms. Miller obtain a court order forcing Mr. Miller to support her and the children while she is deciding whether she wants to terminate the marital relationship?



- If Ms. Miller files for divorce, annulment, or legal separation, can she obtain a temporary support order while the case is in progress?
- If Ms. Miller files for divorce, annulment, or legal separation and loses, can she still obtain a support order for separate maintenance against Mr. Miller?
- Does Mr. Miller have assets (personal property or real property) against which a support order can be enforced? Is there a danger that he might try to hide these assets? Is there a danger he might try to give the assets to persons he controls, for example, by transferring title to their names? If so, can this be prevented?
- If Mr. Miller cannot be relied upon for support and Ms. Miller cannot work, does Ms. Miller qualify for public assistance such as Temporary Assistance for Needy Families (TANF)?
- Is Mr. Miller supporting any other children from a previous relationship? If so, how would this affect his duty to support the three children he has with Ms. Miller?

#### *Contract/Agency Law*

- In his business, has Mr. Miller entered contracts for which Ms. Miller could be liable if he fails to perform the contracts?
- While she is living apart from her husband, can Ms. Miller enter contracts with merchants for the purchase of food, clothing, furniture, medical care, prescriptions, transportation, and other necessities (called “necessaries”) and make *him* pay for them? Can she use his credit?
- Can Mr. Miller obligate Ms. Miller on any of his current or future debts?
- Has Ms. Miller ever worked for Mr. Miller or otherwise acted as his agent?
- Has Mr. Miller ever worked for Ms. Miller or otherwise acted as her agent?
- Have the Millers’ children (particularly the oldest child) entered any contracts under their own names? If so, who is liable for such contracts? Can they be canceled (disaffirmed)?

#### *Real Property Law and Personal Property Law*

- Do either or both of the Millers own any real property (e.g., land)? If so, how is the real property owned? How is title held? Individually? As tenants by the entirety? As community property?
- Who provided the funds for the purchase of this property? Were the funds earned during the marriage or did any of the funds come from monies either of the Millers brought into the marriage?
- What rights does Ms. Miller have in Mr. Miller’s separate property?
- What rights does Mr. Miller have in Ms. Miller’s separate property?
- What is Mr. Miller’s income? Can his wages be garnished?
- Does Mr. or Ms. Miller have a pension plan from prior or present employment? Can one spouse (or ex-spouse) obtain rights in the pension plan of the other spouse (or ex-spouse)?
- What other personal property exists (e.g., cars, bank accounts, stocks, bonds, furniture)? Who owns this property? What funds were used to obtain the property?

#### *Corporate Law/Business Law*

- What kind of business does Mr. Miller have? Is it a corporation? A partnership? A sole proprietorship? Is this business marital property that can be divided upon divorce?
- What are the assets and liabilities of the business?

*Bankruptcy Law*

- Is there a danger that Mr. Miller or his business might go into bankruptcy? If so, how would this affect Ms. Miller's rights to support and to her share of the marital property? How would it affect Mr. Miller's duty of child support?
- What happens if Ms. Miller files for bankruptcy? How would it affect financial obligations, if any, that she has to Mr. Miller?

*Tort Law*

- Has Mr. Miller committed any torts against Ms. Miller (e.g., assault, fraud, conversion, intentional infliction of emotional distress)?
- Has Ms. Miller committed any torts against Mr. Miller?
- Can one spouse sue another in tort?
- Have Millers' children (particularly the oldest) damaged any property or committed any torts for which the parents might be liable?

*Civil Procedure Law*

- If a court action is brought (e.g., for divorce, custody, separate maintenance), what court would have jurisdiction? A court in this state? A court in the state where Mr. Miller resides?
- How can service of process be made?
- If Ms. Miller sues and obtains a judgment in this state, can it be enforced in another state?

*Evidence Law*

- What factual claims will Ms. Miller be making (e.g., that Mr. Miller has hidden money or other assets that should be used to support the family)?
- What testimonial evidence (oral statements of witnesses) exists to support Ms. Miller's claims?
- How much of this evidence is admissible in court?
- What documentary evidence should be obtained (e.g., marriage license, birth certificates, records of purchases)?
- Whose depositions should be taken?
- What claims will Mr. Miller make against Ms. Miller? What evidence is he likely to use to support these claims? What objections can be made to this evidence?

*Juvenile Law*

- Can a dependency or child-neglect petition be brought against Mr. Miller? Against Ms. Miller?
- Why is Ms. Miller upset about her eldest son? Has he committed an act of delinquency or other status offense?
- Is the Millers' oldest child a person in need of supervision (PINS), a child in need of supervision (CHINS), or a child in need of protection and services (CHIPS)?

*Tax Law*

- Have Mr. Miller and his wife filed joint tax returns in the past?
- Are any refunds due (or money owed) on past returns?
- In a property settlement following a divorce or separation, what would be the most advantageous settlement for Ms. Miller from a tax perspective?

- What arrangement might Mr. Miller seek in order to obtain the best tax posture for him? What is negotiable? What will he be willing to give up to obtain his tax objectives? Will he, for example, cooperate in allowing Ms. Miller to have sole physical custody and sole legal custody of the children in exchange for her cooperation in ensuring that his alimony payments are deductible?

#### *Estate Law*

- Do the Millers have their own wills? If so, who are the beneficiaries? If there is no divorce, can Mr. Miller leave Ms. Miller out of his will entirely?
- Who receives the Millers' property if they die without a will while they are separated or after a divorce?
- Does Mr. Miller have life insurance policies on which Ms. Miller or the children are beneficiaries? If so, can he change the beneficiaries? Can such a change be prevented?

#### *Social Security*

- When will Mr. Miller be eligible for social security? Can Ms. Miller be eligible for social security through his earnings if she is not eligible independently?
- How do social security benefits affect support obligations?

#### *Professional Responsibility/Ethics*

- Is Mr. Miller represented by counsel? If so, can an attorney or paralegal representing Ms. Miller contact Mr. Miller directly, or must all communications to him be made through his attorney? If he is not yet represented, are there limitations on what Ms. Miller's representatives can and cannot say to him?
- If Ms. Miller can find her eldest son, can she simply take him away from her husband when the latter is not present? If this would be illegal, what is the ethical obligation of an attorney whose client is about to do something illegal?

#### *Miscellaneous*

- Can Mr. Miller be forced to pay attorney fees that Ms. Miller will incur in her legal disputes with him?
- Can Ms. Miller be forced to pay Mr. Miller's attorney fees?

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The purpose of this book is to examine questions such as these that could arise in a client's case.

## OVERVIEW OF CONSTITUTIONAL LAW

### Introduction

Family law consists of a vast array of rules found in the statutes of the legislature and in the **common law** opinions of the courts. The rules cover (a) what can and cannot be done in family relationships and (b) the steps that must be followed to do what is allowed. The rules can range from age requirements on who can enter the status of marriage to residency requirements on when a court can hear a paternity case. Eventually, almost every rule is challenged by persons who believe that the rule wrongly restricts what they want to do because, they assert, the restriction is unconstitutional. The argument is that the restriction violates the federal (U.S.) Constitution, the state constitution, or both constitutions.

#### **common law**

Judge-made law in the absence of controlling statutory law or other higher law. (See glossary for additional meanings.)