

The Modern Family in the Law of the United States – Lecture 2

By: María Mercedes Pabón

Professor of Law, Loyola University New
Orleans College of Law

Louisiana, USA

Lecture 2 – What we will cover

- Thank you again to Prof. Tekla Papp, János Dúl for the kind invitation and to you students for your attention!
- Dissolution of marriage, including property distribution and child custody.
- The rights of grandparents and other third parties to custody and visitation of children.
- Cooperative parenting agreements
- Surrogacy and assisted human reproduction,
- Rights of spouses, cohabitants and children to inherit family property by will and by intestacy
- Questions?

Family Law in the U.S. recap

- “One of the law’s most important and far-reaching roles is to govern family life and family members. Family law decides how family relationships are created and dissolved, and what legal rights and responsibilities come with marriage, parenthood, and other family bonds.
- Family law permits and enforces a wide variety of economic exchanges within the family. Spouses [and sometimes cohabitants] are free to enter into legally valid agreements specifying with great variety, creativity, and detail how they will distribute property, earnings, and other economic assets between themselves.”
- Marriage is a fundamental right under U.S. Constitution, so state cannot abridge without justification. Zablocki, Loving

Restrictions upon Divorce

- Boddie v. Connecticut (1971)
- Is there a fundamental right to divorce?
 - US SUPREME COURT HOLDING: If law allows people to divorce, should also make it available to indigent people BUT
 - » The U.S. Supreme Ct does not go so far as to say that there is a fundamental right to divorce.
- Sosna v. Iowa (1975)
 - Issue: Are waiting periods for divorce constitutional?
 - US SUPREME COURT HOLDING: Yes, because spouses will eventually be able to divorce and remarry. Just temporarily delaying.

What is divorce?



Do you recognize some of these words?



Dissolving Marriages

- Used to be fault based, now it is consent of the parties but still adversarial
- All valid marriages can be dissolved, subject to some requirements. Or can be annulled or declared void.
- Overall Requirements- residency requirement, jurisdiction, waiting periods
- Issues of Property – Historically married women lost property, but Married Women’s Property laws gave back
- Community Property or Marital Property to be divided equitably in common law states?
- Issues of Child Custody, Child Support all vary very much by states
- Child Support is payment from non custodial parent to child

Typical Divorce Issues

- Should divorce be granted? (More prevalent under fault-based divorce)
- Dissolution of bond of marriage –Was there even a marriage? this is where can raise defense for transgender spouse.
- Distribution of property / joint assets
 - (1) Classification=what of the property is subject to distribution?
 - » Question 1: Separate versus marital property?
 - » Question 2: Is there any separate property that the Court will distribute?
 - (2) Valuation=how do you value property that is not cash dollars?
 - (3) Distribution=What is an equitable distribution given certain factors?
 - » Principles for determining distribution (for property and support below) include: need, status, rehabilitation, contribution, partnership.
- Payment of Spousal Support (alimony)- statutory, temporary, permanent. Less common now.

Alimony

Alimony, or spousal support, refers to the obligation of an individual to provide their spouse with financial support after a separation or divorce.



Premarital Contracts

- Their validity comes into play at divorce
- In a community property state (where your spouse acquires $\frac{1}{2}$ of your property as you earn it) you can contract this away and can be enforced.
- Alimony (spousal support) can also be contractual.
- Premarital contracts allowed as long as there is full and fair disclosure (e.g. no duress).
 - » BUT there are limits to what court will enforce
 - Enforce business contracts between spouses.
 - Enforce contracts about assets.
 - Contracts about child-support and visitation are not necessarily honored. These provisions can be evidence of parties' intentions.
 - Child support rarely waived by contract.

Child Custody

- Tender years doctrine
- Primary Caretaker standard
- Joint custody with primary custodian
- Best Interest of the Child “BIC”
- **LA CIVIL CODE ART 134 – Factors in determining the child’s best interest**
- The court shall consider all relevant factors in determining the best interest of the child. Such factors may include:

Factors

- (1) The love, affection, and other emotional ties between each party and the child.
- (2) The capacity and disposition of each party to give the child love, affection, and spiritual guidance and to continue the education and rearing of the child.
- (3) The capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs.
- (4) The length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment.
- (5) The permanence, as a family unit, of the existing or proposed custodial home or homes.
- (6) The moral fitness of each party, insofar as it affects the welfare of the child.

Factors

- (7) The mental and physical health of each party.
- (8) The home, school, and community history of the child.
- (9) The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference.
- (10) The willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party.
- (11) The distance between the respective residences of the parties.
- (12) The responsibility for the care and rearing of the child previously exercised by each party.

Grandparents and other third parties

– *Troxel v. Granville* (2000)

- » Washington statute granted 3rd party visitation petitions to any person, even over custodial parent's objection, if found to be in BIC.
- » US Supreme Court : Statute violated the right of FIT parents to make decisions concerning the care, custody, and control of their children. "The liberty interest at issue in this case -- the interest of parents in the care, custody, & control of their kids -- is perhaps the oldest of the fundamental liberty interests "
- » Dissent: Children are parties w/ interests & rights too. These rights should be decided in the BIC, which may be to allow and consider 3rd party visitation.

Cooperative parenting agreements these are typical in unmarried couples

- **Benefits of having agreements**

- Speed / efficiency / reduced cost

- Less anger

- Better for children

- Reduces court's docket

- Get on with your life, less draining

- If you are an agent in the terms of your own agreement, you're more likely to follow it

- Other aspects

Surrogacy and assisted human reproduction

- This is a cutting edge area of the law.
- Some states make surrogacy contracts enforceable, while others forbid or even criminalize it. In California, surrogate mother contracts are enforceable, at least where both the egg and sperm are donated by persons other than the surrogate who bears the child.
- In the state of Louisiana, the in vitro fertilized egg is a juridical person.

Rights of spouses, cohabitants children

- to inherit family property
- by last will and testament (other than Louisiana and Puerto Rico) there is complete freedom of testation in other states.
- by intestacy (no will) then issue of who is/are heirs and entitled to take, subject to spousal share. Usufruct in La. and P.R.
- Typically cohabitants not able to inherit unless written into will.

Questions?

