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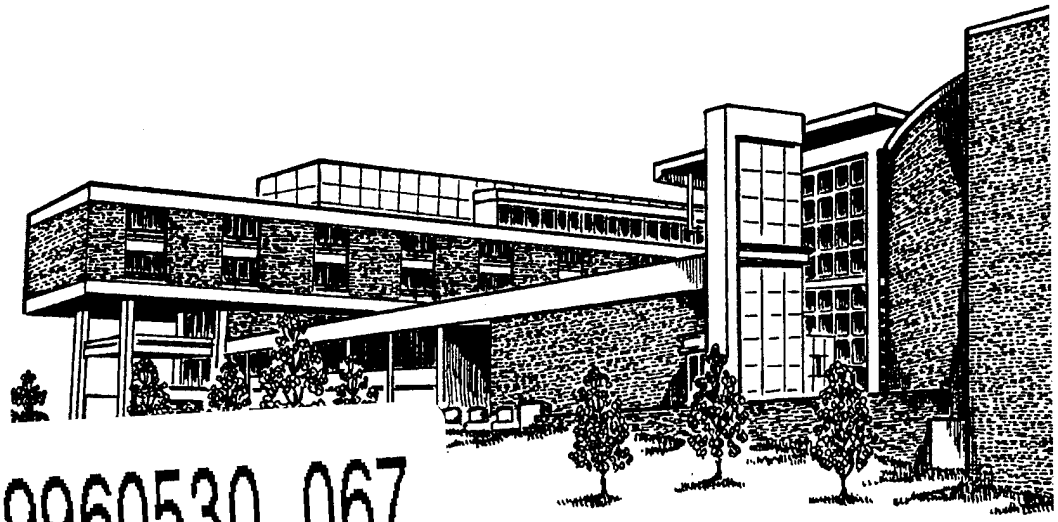

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JA 263	Legal Assistance Family Law Guide
JA 265	Legal Assistance Consumer Law Guide
JA 267	Uniformed Services Worldwide Legal Assistance Office Directory
JA 268	Legal Assistance Notarial Guide
JA 269	Legal Assistance Federal Income Tax Information Series
JA 271	Legal Assistance Office Administration Guide
JA 272	Legal Assistance Deployment Guide
JA 274	Uniformed Services Former Spouses' Protection Act - Outline and References
JA 275	Model Tax Assistance Program
JA 276	Preventive Law Series

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CHAPTER 1

MARRIAGE

Outline of Contents

A. Introduction

B. Pre-Marriage Considerations

1. Antenuptial Agreements

2. Recognition of Marriages

3. Military Recognition of Marriage

4. The Validity of Marriage In the Context of Military Criminal Prosecution and Administrative Actions

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C. Categories of Marriage

1. Formal Marriages

a. Ceremonial

b. By Proxy

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a. Common Law

b. Putative Marriages and Marriages by Estoppel

c. Quasi-Contractual "Marriages"

A. INTRODUCTION

"It takes three to make a marriage--a male, a female and a state." J. GOLDSTEIN & J. KATZ, FAMILY AND THE LAW 9 (1964). These words capture a fundamental characteristic of marriage. It is an institution both public and private in nature. Its public dimension arises from the state's interest in structuring and maintaining the family as a societal unit:

> The law without explicitly defining family, assumes that "family" is essential to the evolution and growth of society. This assumption rests on another assumption: that family, like law itself, is one of the basic processes for the control of human behavior.... [T]he law shapes and is shaped by the family.

Id. at 1. Perceived as a public institution, marriage has been extolled as "the foundation of the family and of society, without which there would be neither civilization nor progress." Maynard v. Hill, 125 U.S. 190, 211 (1888).

But marriage has its private side as well. It is a product of voluntary choice by two individuals. The right to marry, including the right to choose one's partner in marriage, is "one of the 'basic civil rights of man,' fundamental to our very existence and survival." Loving v. Virginia, 388 U.S. 1, 12 (1967), quoting Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942). When marriage is viewed in this private dimension, it acquires the trappings of contract law.

Consequently, a tension exists between marriage as a regulated public institution and marriage as a creature of private contract. This tension underlies many salient issues of family law facing military and civilian lawyers. See generally W. WADLINGTON, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS 1-3 (1984). The outcome of each issue may depend upon whether the public or private dimension is accorded greater significance. Thus, in deference to the private aspect of marriage, a state may allow the parties to terminate a relationship upon showing nothing more than "irreconcilable differences." In contrast, the state, invoking its power to regulate marriage as a public institution, may restrict the parties' choices of certain marriage partners--such as close relatives or members of the same sex. On other issues, illustrated by the long-standing controversy over common law marriages, the states may disagree because they view differently the proper balance between public and private values.

B. PRE-MARRIAGE CONSIDERATIONS

1. Antenuptial Agreements. To the extent that marriage is contractual, the parties have some liberty to shape their rights and obligations by agreement before entering the relationship.

> The relationship contemplated by parties in modern forms of antenuptial agreements is not dissimilar from that of other long-term contracts, such as partnership, cotenancy, and sometimes employment. Since the parties to a possible future marriage deal with each other on an assumed level of equality and equal bargaining power, their agreement, if it leads to marriage at all, tends to reflect financial and personal expectations like sexual preferences, whether to remain childless, when and how many children to have, and choice of career and domicile.

W. WEYRAUCH & KATZ, AMERICAN FAMILY LAW IN TRANSITION 1-2 (1983).

Although some couples contemplating marriage may seek a written agreement on such personal matters as sexual preferences and child planning, most will focus upon the economic ramifications of marriage. Some of the issues they usually address include the following: identification and protection of pre-marital (or "separate") property; proposed uses of marital (or "community") property; responsibilities for paying joint and individual debts incurred before or during the marriage; allocation of authority to manage the household budget, family businesses and investments; and the duty to provide financial support for each other and for children resulting from the marriage.

Because the scope and objectives of antenuptial agreements vary widely, they have not yet evolved to a point of stability where they can be readily reduced to standardized formats. Therefore, it can be difficult to draft an antenuptial agreement with any feeling of certainty that a court will enforce it. See, e.g., In Re Noghrey, 215 Cal. Rptr. 153 (Cal. 1985) (an antenuptial contract in which the husband promised to provide for his wife in the event of divorce was held unenforceable or violative of public policy for encouraging divorce). In view of the evolving state of this area of the law, this Guide does not provide sample clauses for antenuptial agreements. However, practitioners who are asked to advise clients regarding antenuptial agreements may find useful guidance in the Family Law Reporter and reported cases for the local jurisdiction. In all instances, the practitioner should caution the parties that their private freedom of contact may be circumscribed by public policy on some points, such as parental support of children.

2. Recognition of Marriages. Practitioners may encounter inquiries regarding the likely validity of a proposed marriage, particularly where the parties intend to marry in one jurisdiction but to maintain a domicile, or to establish residency, in another jurisdiction. The general rule is set forth in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS, at § 283(2):

> A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which has the most significant relationship to the spouses and the marriage. [Emphasis added.]

In those cases where the state considering the validity of a marriage has a public policy reason to oppose it, the applicable law is determined by choice of law principles. The Restatement Second, at section 6, sets forth guidelines for determining which of two jurisdictions has the "most significant relationship" to the parties and to the subject matter. These guidelines include the relevant public policies of each jurisdiction, the protection of justified expectations, and the desirability of attaining certainty, predictability and uniformity of results among various jurisdictions.

3. Military Practice Note--Recognition of Marriage

Financial Management Regulation, Vol. 7A, discusses Department of Defense policy concerning the validity of marriages in general, and the services generally follow the civilian practice of recognizing a marriage that is valid under the laws of the jurisdiction where it was contracted. Ceremonial marriages are presumed valid, but when a marriage's validity is contested, a decision as to validity will be based on the facts and circumstances of the particular case. Similar guidance on validity of marriages appears in AR 37-104-4 (Military Pay and Allowances Policy and Procedures Active Component).

If marriages are irregular in form, such as the types of marriage discussed below, validity will not be presumed, and the military will employ a greater degree of scrutiny to determine if the parties are in fact married.

The issue of a marriage's validity typically arises in the context of applying for increased Basic Allowance for Quarters (BAQ) or other military-related benefits (such as health care) which accrue to the "lawful spouse" of a service member. While a valid marriage generally is a prerequisite for military benefits based on being married, under some circumstances benefits which have been received as a result of invalid marriage may be retained. See, e.g., 37 U.S.C. § 423 ("Validity of Allowance Payments Based on Purported Marriages").

The determination of validity of questionable marriages or relationships is done by the service representative at DFAS. Paragraph 30233f(3) of DODFMR Vol. 7A lists the various service directors and addresses. For determinations in the Army, submissions are sent to Army Director, DFAS-IN, Indianapolis, IN 46249-0855. Questions regarding marriages generally arise after the fact; that is, the soldier may have married a person who was not divorced from a prior spouse, and the soldier may have received increased BAQ for a substantial period of time. If finance officials later discover the impediment to the marriage, the soldier is in danger of having large sums collected from his pay as recoupment of his BAQ benefits. If he is found to have entered the marriage in good faith, however, the money will not be collected.

There is one other administrative mechanism through which the federal government will rule on the validity of a marriage. In cases of "doubtful relationship" where a soldier has applied for increased BAQ, the Finance and Accounting Officer may submit a Request For An Advance Decision to the Comptroller General through finance channels. This is done in all cases involving request for increased BAQ where the claim is based on a common law marriage, or in any case that involves a divorce granted by a foreign country.

4. The Validity of Marriage in the Context of Military Criminal Prosecution and Administrative Actions.

Except in the regulation of certain overseas marriages, which is discussed below, the military does not prescribe any marriage requirements or procedures. The validity of a marriage can, of course, come up in many contexts in the rendering of legal assistance, but it can also be brought into question by a court-martial with respect to bigamy. For example, United States v. McDonald (32 C.M.R. 689 (1962)) involved a disputed remarriage that allegedly occurred in early January 1960, but "[a]s to this remarriage, the accused testified that he was intoxicated during the first week in January 1960 and had no knowledge of going through a marriage ceremony with his ex-wife."

While the military will defer to state law on whether a valid marriage exists, within the context of a military criminal prosecution, it is military law which defines the parameters of the offense of adultery, and not the law of the state in which the alleged adultery occurred. See United States v. Johanns, 17 M.J. 862 (A.F.C.M.R. 1983). For a comprehensive discussion of the history of adultery as a military offense, see U.S. v. Hickson, 22 M.J. 146 (C.M.A. 1986).

5. Military Regulation of Overseas Marriages.

General references (Although rescinded in January 1996, both of the following regulations provide useful policy perspective which may be incorporated into MACOM guidance.):

a. Army Reg. 600-240, "Marriage in Overseas Commands," 1 June 1978.

b. Army Reg. 608-61, "Application For Authorization to Marry Outside the United States," 16 October 1985.

Soldiers tend to marry foreign nationals more than do civilians; for example, a 1989 article in the Washington Post cited the fact that out of about 32,000 troops in Korea, 2400 marry Korean women each year. Many of these soldiers decide to marry in the foreign jurisdiction. For a number of reasons, the Armed Forces once imposed certain requirements on soldiers wishing to marry overseas (these requirements do not apply to soldiers who return to the United States to marry a foreign national).

On the whole, the regulation of soldiers' marriages to foreign nationals overseas were paternalistic. They reflected a belief that the soldier should be protected, at least to some extent, from making a hasty or ill-considered decision. In addition, the issues of immigration and naturalization faced by a soldier in such a marriage led to a regulatory program requiring permission from the MACOM commander.

AR 600-240 and AR 608-61, the regulations setting out the details of the overseas marriage requirements, were rescinded in January 1996. Although no longer mandated by regulation, the counseling requirements and opportunities set out in those regulations still make sense and would greatly benefit the soldier and the command. While the commander no longer must grant permission for the soldier to marry, commands should still look for opportunities to disseminate the information that underlies the spirit of the old program.

Admission to the United States is not automatic for an alien marrying a soldier. Therefore, information regarding the potentially complex immigration and naturalization problems remains vital to soldiers overseas contemplating marriage to a foreign national. In addition, "social" counseling regarding the legal responsibilities and obligations of marriage is important to soldiers.

Soldiers must comply with all marriage requirements of the country in which they plan to marry. Although applications for authorization to marry are no longer mandated, soldiers and civilian personnel serving with, employed by, or accompanying the Armed Forces outside the United States should be encouraged to avail themselves of the consultative services the military can offer on the legal, moral, and procedural problems involved in overseas marriages, and the United States law on immigration and naturalization.

C. CATEGORIES OF MARRIAGE

The following paragraphs briefly discuss the various methods of contracting a marriage. Chapter 4 of this guide provides more detailed information on the requirements imposed by each state.

1. Formal Marriages.

a. Ceremonial. Marriages in this category are contracted during formal ceremonies conducted by religious or civil officials designated authorized by the local jurisdiction to join people in wedlock. In the United States, a license to marry often must be obtained by the parties prior to the ceremony. Although irregularities in the procedural and formal components of a ceremonial marriage will not necessarily invalidate the marriage, as a minimum the parties must have the legal capacity and each must voluntarily assent to the marriage for it to be valid.

b. By Proxy. A proxy marriage is a ceremonial marriage contracted through an agent (or agents) acting on behalf of one or both parties. For example, a soldier who is stationed overseas and is unable to return to the United States might use this mechanism to wed a person in the United States. Some states do not authorize proxy marriages within their borders, but almost all states recognize proxy marriages that were performed in other jurisdictions that do permit them.

Military Practice Note

While proxy marriages may be convenient and effective, soldiers should avoid them if possible. Proxy marriages create "doubtful relationships" for finance purposes, and therefore the soldier may experience delays in receiving an increase in BAQ and travel authorization while the case is reviewed. Moreover, survivor benefits hinge on the validity of the marriage, and tragic results can arise if deficiencies in the marriage are discovered only after the soldier has died.

The same can be said for common law marriages, marriages completed by telephone, and other variations from the norm of a ceremonial marriage with both parties present. They will be valid

for military purposes if they are valid under the law of the jurisdiction where contracted (unless the marriage violates basic principles generally recognized in American law, such as the prohibition against brothers marrying their sisters), but the administrative burden of proving their validity can be cumbersome and time consuming. Moreover, the possibility of defects in the process is increased, and so is the possibility that latent defects will not be discovered until it is too late to correct the error.

2. Informal Marriages

a. Common law. A common law marriage is nonceremonial. It occurs when a man and a woman, each with legal capacity to marry, engage in conduct which the law regards as sufficient to infer the existence of a marriage in fact. The states recognizing the formation of common law marriages within their borders require a present intent on the part of each party to enter into a marriage. In addition, most jurisdictions require that the parties openly cohabit as a married couple. Finally, a number of jurisdictions also require that the parties hold themselves out to the world as husband and wife. As for the advisability of entering a marriage through this mechanism, see the preceding military practice note.

If recognized as valid, the status achieved by a common law marriage is identical to that accorded to a valid ceremonial marriage. Consequently, parties contemplating a common law marriage should be advised that the relationship, once established, cannot be terminated merely by ceasing to cohabit. Rather, the common law marriage can be terminated only through a formal, legal dissolution.

b. Putative Marriages and Marriages by Estoppel. Even if the relationship between a man and a woman fails to satisfy statutory or common law requirements, in extreme cases a court may postulate a marriage for limited purposes in order to alleviate an intolerable injustice that otherwise would be visited upon a party who relied in good faith upon the existence of the marriage. Thus, for example, in Hupp v. Hupp (235 S.W. 2d 753 (Tex. Civ. App. 1950)), a Texas appellate court upheld a "putative" marriage of twelve years' duration in order to allow the putative wife to take, as against a former spouse, from the putative husband's estate. Marriages by estoppel similarly belong in the realm of legal fiction. The parties are treated as if they were married--although in reality they were not--in order to protect one "spouse" from injury caused by reliance upon a representation by the other "spouse" concerning his or her capacity to marry.

c. Quasi-Contractual "Marriages." Some jurisdictions have upheld the validity of a contractual agreement between a man and woman to live together in one household (with or without the benefit of sexual relations) and to share their earnings, assets, and responsibilities in a manner analogous to marriage. See, e.g., Marvin v. Marvin, 18 Cal. 3d 660 (1976). Judicial recognition of contractual cohabitation is particularly significant in those jurisdictions which do not recognize common law marriages (e.g., California). The validity of such arrangements is premised entirely upon contract law. Provisions involving the performance of sexual services are void as against public policy; but in the jurisdictions recognizing these arrangements, such partial invalidity does not negate the remainder of the "contract." Controversy regarding these relationships illustrates the tension, mentioned at the outset of this chapter, between marriage as a contract and marriage as a regulated public institution.

CHAPTER 2

TERMINATION OF MARRIAGE

Outline of Contents

A. Annulment

1. Jurisdiction
2. Grounds
3. The Void/Voidable Distinction

B. Divorce

1. Requisites of Valid Decrees
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      (1) Jurisdiction Over the Marital Status
         (a) Domicile
         (b) Residence
         (c) Foreign Countries
         (d) Challenges to Jurisdiction
      (2) Jurisdiction Over the Parties
         (a) Jurisdiction Regarding Children
         (b) Bifurcated Proceedings
         (c) Continuing Jurisdiction
   b. Grounds for Divorce
2. Contents of Decrees
   a. Matters Between the Spouses
      (1) Spousal Support
      (2) Division of Property
   b. Children

(1) Child Support

(2) Child Custody and Visitation

3. Post-Divorce Considerations

a. Records

b. Remarriage

As noted at the beginning of Chapter 1, it takes three--a male, a female and a state--to make a marriage. Unless death intervenes, the same three ordinarily are required to terminate a marriage. Because marriage is both a regulated public institution and a creature of private contract, the parties--or at least one of them--must seek to end the relationship and the state must sanction its demise.

The marriage may end with a decree of annulment, holding the marriage void from the outset. Alternatively, the marriage may end with a decree of divorce, recognizing the original validity of the marriage but dissolving the relationship and prescribing the obligations of the parties and the status of their property in the future. When counseling clients, practitioners must address the threshold choice between annulment and divorce. They also should consider the interim option of separation discussed in the next chapter.

A. ANNULMENT

Where no children are involved, it may be possible for a spouse to annul the marriage--particularly one of short duration--rather than suing for divorce. Annulment might be chosen as a means of terminating a marriage for social and religious reasons, for easier residence requirements in some jurisdictions, or, occasionally, for greater speed in effecting the termination of the marriage.

1. Jurisdiction. The most commonly accepted statement of jurisdiction required for an annulment is set forth in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 76 (1971):

> A state has power to exercise judicial jurisdiction to nullify a marriage from its beginning
>
> (a) under the circumstances that would give the state jurisdiction to dissolve the marriage by divorce or

(b) if the respondent spouse is personally subject to the judicial jurisdiction of the state, and it is either the state where the marriage was contracted or the state whose local law governs the validity of the marriage. . . .

2. Grounds for Annulment. The commonly available grounds for annulment, and the frequency with which they are employed, have been summarized in a 1966 report of the Project of the Governor's Commission on the Family in California, cited in W. WADLINGTON, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS 125-126 (1984):

> Annulment is presently granted upon six grounds: incapability (i.e., non-age); prior valid marriage still existing ("innocent" bigamy); unsound mind; fraud; force; and physical incapacity. These grounds relate to impediments or defects theoretically existing before the marriage which prevent the marriage's valid formation, as opposed to divorce grounds which relate to post-marriage occurrences. They apply to voidable marriages; in other words, the marriages subject to these defects are nevertheless good until annulled.
>
> Additionally, two classes of marriages are denominated void ab initio: those which are knowingly bigamous, and those which are "incestuous" (i.e., within the prohibited degrees of consanguinity and affinity). Void marriages are not technically annulled, but are subject to a declaration of nullity sought by either party. Thus, failure to take legal action confers no validity upon a void marriage, while it has this effect upon a voidable marriage.
>
> Annulments comprise less than 5% of all severance actions; 35% of them are grounded on bigamy, nearly 47% on fraud. It appears that the courts in reality try to subsume a breakdown of marriage standard under the annulment grounds much as they attempt to subsume it under the divorce grounds; the ground of fraud in annulments is used in much the same way as the ground of extreme cruelty in divorce cases.

Although antimiscegenation statutes in some states may still purport to prohibit interracial marriages, and may at one time have afforded an additional ground for annulment, such statutes no longer are effective. Loving v. Virginia, 388 U.S. 1 (1967). Moreover, although fraud is a ground for annulment in most jurisdictions, not all misrepresentations qualify as a basis for annulment. Only misrepresentations vital to the marriage, or relating to some essential purpose of the marriage, are proper grounds for annulment.

3. The Void/Voidable Distinction. When a person enters into a marriage with knowledge of facts that would render the marriage voidable, as opposed to void, the individual generally is held (by courts in states recognizing this distinction) to be estopped from later securing an annulment for misrepresentation based upon those facts. Conversely, if the parties have cohabited after a ground for annulment has been removed or alleviated, such conduct may prevent a later annulment upon that ground.

The substantive law and procedures applicable to annulment vary considerably among the states. Practitioners asked to advise clients on this method of terminating a marriage are urged to consult the statutes and applicable case law directly.

Military Practice Note

Military practitioners must also be aware of what effects annulment may have on soldiers, former family members of soldiers, and widows and widowers. When a soldier's marriage is annulled, the military finance office may seek to recoup any increased Basic Allowance For Quarter (BAQ) that the soldier has received because of the alleged marriage. The soldier can request a determination that he or she entered the marriage in good faith (and that therefore the recoupment action should not occur), but the ultimate decision lies with finance officials. (See Chapter 1 for a discussion of findings of good faith in purported marriage cases).

Legal assistance attorneys also advise spouses who seek to terminate their marriage to a soldiers. Some of these soon-to-be former spouses face a similar problem; if they seek an annulment, upon what basis can they claim military benefits? Just as the soldier who obtains an annulment runs the risk of a recoupment of past BAQ at the "with dependents" rate, the former spouse who would otherwise be qualified for benefits, but who obtains an annulment, may risk losing those benefits.

The basis for this lies in a policy interpretation of the Uniformed Services Former Spouses' Protection Act (10 U.S.C. § 1408). Under this interpretation, former spouses who otherwise qualify for commissary, exchange, and medical privileges on the basis of their marriage to soldiers lose those benefits upon remarriage. Subsequent divorce or widowhood does not reinstate eligibility. (See Dep't of the Army Message 151530Z Jan 85, subject: Additional Guidance on Extending Benefits and Privileges to Unremarried Former Spouses (URFS), para. F reprinted in The Army Lawyer, Mar. 1986 at 71.) The Army, however, has specified that a former spouse whose eligibility for benefits ceases because of

remarriage, but who has the subsequent remarriage terminated by an annulment, may have some benefits reinstated. (See Dep't of the Army Message 281800Z Feb 86, subject: Clarification On Extending Benefits and Privileges to Unremarried Former Spouses (URFS).)

Similarly, an annulment may have an effect on Survivor Benefit Plan annuity payments. Under the Survivor Benefit Plan a widow or widower who has been named as the SBP beneficiary loses the annuity if he or she remarries before age 55. (Remarriage after age 55 does not terminate entitlement.) If the second marriage is terminated by death of the second spouse or by divorce, benefits are reestablished from the date of the second spouse's death or the date of divorce. If, however, the subsequent marriage is terminated by an annulment, the entitlements are reinstated back to the date on which they were originally lost (the date of the second marriage). See 37 Comp. Gen. 188 (1958), 54 Comp. Gen. 600 (1975) and 59 Comp. Gen. 725 (1980).

B. DIVORCE

This discussion of divorce focuses on a complete dissolution of the marriage. Lesser forms of "divorce"--such as divorce a mensa et thoro, divorce from bed and board, and limited divorce--are more akin to separation and are discussed in the next chapter.

1. Requisites of Valid Decrees.

a. Jurisdiction. Jurisdiction in a divorce case involves two distinct elements. (1) Jurisdiction over the marital status generally rests with the state where either spouse is domiciled (a status involving more than present residence). (2) Jurisdiction over rights and duties incident to the divorce rests with a state that has in personam jurisdiction over both parties, usually by service of process on the parties within its borders. A state of domicile may grant a divorce, but any purported attempt in the divorce decree to grant alimony and child support, or to settle all property rights, may not be binding on a spouse over whom the state had no personal jurisdiction. Decisions tying jurisdiction to domicile have been criticized, see WADLINGTON, supra, at 633-41, but they remain controlling authority in many states.

(1) Jurisdiction Over the Marital Status.

(a) Domicile. Domicile of either party traditionally has been the basis for jurisdiction over the marital status in divorce proceedings. When it is established that one of the spouses is a domiciliary of the state in which the divorce

action is brought, the court has met the constitutional prerequisite to terminate the marriage, even if only one spouse appears at the hearing (note, however, that state laws may be more restrictive; see the discussion of residence below). Determining the domicile of the parties may not always be a simple matter, particularly if one or both have made frequent moves or are the children of a military person who also has frequently moved pursuant to military orders.

Recently, some courts have opined that domicile is not an absolute prerequisite to conferring jurisdiction to grant a divorce if the state otherwise has sufficient contacts or interests in the particular marital relationship. However, in view of the opinion still prevailing in most states that full faith and credit will not be given to a divorce decree rendered by a state in which neither of the parties was a domiciliary, the most prudent course of action is to sue for divorce only in the state of domicile of one of the parties.

(b) Residence. Nearly all states, the District of Columbia, Puerto Rico, and the Virgin Islands prescribe a minimum period of time of residence in the state preceding the filing of divorce action, and a few also have county residence requirements. The requirement of residence is in addition to the requirement of domicile, but residence for the statutory period may raise a rebuttable presumption of domicile under the law of the state. A spouse who contemplates suing for divorce in a particular state merely because it grants "quickie" divorces (i.e., requires only a short period of residence, or none at all, and grants a final decree of divorce without any waiting period after the hearing), may run a risk of nonrecognition in other states.

Military Practice Note

Several states have enacted so-called "serviceman's divorce statutes." Under these laws, a military member will be deemed to have met the jurisdictional requirements for divorce if he or she was stationed in the state, pursuant to military orders, for a specified time (usually six months or one year) preceding the filing of suit. Some of the statutes purport to substitute such residence for domicile. Others simply provide that such residence creates a rebuttable presumption or domicile.

A military member absent from his or her home state in the line of duty might be unable to comply with a physical presence requirement for obtaining a divorce in that home state. Fortunately, many states, by legislation or case law, have deemed the military person's residence to continue if his or her absence was due to military duty.

(c) Divorces in Foreign Countries. Divorce decrees obtained outside the United States and its possessions and territories do not invoke the protection of the full faith and credit clause of the United States Constitution. State courts may recognize the validity of a foreign country divorce based on the concept of "comity," however. Foreign decrees are subject to challenge not only on the basis of improper jurisdiction, as defined by the state reviewing the decree, but also on a wide range of other factors, such as contrary public policy of the reviewing state, fraud, and denial of due process to one of the parties.

The probability that a jurisdiction of the United States will recognize a divorce obtained in a country which does not require an established domicile is doubtful. The method chosen to accomplish the divorce may be the deciding factor. The methods utilized fall into three categories: bilateral divorces, ex parte (or unilateral) divorces, and mail order divorces.

(i) Bilateral divorces. Under this method, the plaintiff personally appears in the court of the foreign country so that the court may acquire in personam jurisdiction and the defendant appears either in person or through an attorney duly appointed under a power of attorney. Such a bilateral divorce accomplished in the then "quickie" jurisdiction of the State of Chihuahua, Mexico, was recognized as valid on the grounds of comity by the State of New York. See Rosentiel v. Rosentiel, 16 N.Y.2d 64, N.Y.S.2d 86, 209 N.E. 2d 709 (1965). And notwithstanding the lack of domicile-based jurisdiction, the doctrines of estoppel, laches, unclean hands, and other equitable defenses have been relied upon to prevent a spouse from challenging a divorce when he or she had made a personal appearance in the foreign proceeding. See also Perrin v. Perrin, 408 P.2d 109 (3rd Cir. 1969).

(ii) Ex parte divorces. For this divorce, only the plaintiff appears personally in the foreign court. The defendant is served by mail or by publication and does not appear either personally or by an attorney. The non-party spouse and/or third parties almost always are allowed to challenge such a decree in any U.S. jurisdiction, based on a lack of domiciliary jurisdiction as well as on the grounds mentioned in (i) above.

(iii) Mail order divorces. In this alternative, neither party appears in person at the trial. The parties are represented through counsel. Such decrees generally have no validity, even with reference to comity, in U.S. jurisdictions.

(d) Challenges to Jurisdiction. If both parties appeared in the divorce proceeding in another state and had an opportunity to litigate the issue of the court's jurisdiction,

then a finding of domicile by that court will be accorded full faith and credit by all other states as against all parties, regardless of how questionable the finding of domicile appears. But a decree of divorce rendered in one state can be collaterally attacked elsewhere by a defendant who has not appeared in the proceeding, where proof can be offered that the court rendering the decree actually had no jurisdiction. Williams v. North Carolina, 325 U.S. 226 (1945); Williams v. Williams, 317 U.S. 287 (1942).

If the defendant was personally served in the jurisdiction, although he was not a resident, and if he had an opportunity to litigate the jurisdictional issue of domicile, most courts adopt the view that the determination would be entitled to full faith and credit, as between the parties, regardless of whether the defendant actually appeared and contested the issue of domicile. Sherrer v. Sherrer, 334 U.S. 334 (1948). A more restrictive view may be taken, however, if the spouses acted in collusion to perpetrate a fraud on the court. Moreover, third parties, such as the state, when prosecuting a bigamy action upon remarriage of one of the parties, may not be bound by an erroneous finding of domicile.

(2) Jurisdiction Over the Parties. Besides terminating the marriage, a divorce decree usually provides for transfers of property, spousal support, child support and custody of children. Such provisions may not be fully enforceable outside the state in which the decree was rendered unless the court issuing the decree had personal jurisdiction over the defendant, either (a) by personal service within the jurisdiction, (b) by substituted service in accordance with local rules if the defendant is a domiciliary, or (c) by the defendant's appearance in court (in person, by an attorney, or by other means, if such an appearance subjects the defendant to the jurisdiction of the court under local practice). However, if the subject property is located within the state, it might be made subject to the quasi in rem jurisdiction of the court even though personal jurisdiction had not been acquired.

(a) Jurisdiction Regarding Children. Jurisdiction to provide for the needs of children generally depends upon whether the state has sufficient basis to assert an interest in a child's welfare, and whether the court would be able to enforce its orders. All states have adopted at least major portions the Uniform Child Custody Jurisdiction Act (UCCJA). The Act is intended to avoid jurisdictional conflict between states in matters of child custody so that custody decrees will be rendered in states that are best situated to evaluate and protect the best interests of the child. The state best situated is the one having the closest connection with the child; this generally will generally be the child's "home" state. In the absence of a qualifying "home state," the statutory scheme confers jurisdiction upon the state where significant evidence essential to an informed custody order is most readily

available. In addition to the UCCJA, the provisions of the Federal Parental Kidnapping Prevention Act (28 U.S.C. § 1728A) should be consulted to determine which state should exercise jurisdiction.

(b) Bifurcated Proceedings. Due not only to the desire of the parties to dissolve the marriage bonds as soon as possible, but also to the need for extended discovery and evidentiary hearings in complex cases, courts in some states will grant motions to bifurcate the issues. A decree of divorce, together with an order concerning custody of the children and limited child or spousal support may be issued, with judgment reserved on other issues until a later date. In fact, provisions of the Child Support Enforcement Amendments of 1984 provide that when child support is at issue, support obligations should be determined through expedited process and other issues such as custody and property division should be reserved for final hearing.

(c) Continuing Jurisdiction. The courts retain continuing jurisdiction over matters such as child custody and visitation, child support and spousal support. It is prudent to review the most recent court order pertinent to your client's case before providing advice on these subjects.

Military Practice Notes

The fact that a person is in the military service does not preclude a spouse from obtaining a divorce. However, if the military member is named as a defendant, the court may, in its discretion or by request, stay the proceedings or take the other protective actions as provided in 50 U.S.C. Appendix Sections 520, 521, and 523-525 (the Soldiers' and Sailors' Civil Relief Act). Normally, a stay is requested if the member feels the marital breach can be healed upon his or her return from duty, if personal interests cannot be protected without his or her presence in court, or if the spouses cannot agree on the terms of a written marital settlement. The best method for requesting a stay is to have a member of the chain of command notify the court that the member's military duties preclude his or her appearance (for a stated, and reasonable, period of time). Or, the soldier may send an informal letter (not a legal document) to the clerk of the court or the judge, pointing out the fact of military service and his or her consequent inability to appear as directed. Alternatively, a legal assistance attorney may contact opposing counsel, pointing out the protections required by the SSCRA.

In cases where the soldier may have a defense against a default judgment if it is rendered, or where the court's jurisdiction over the member is questionable, the legal assistance attorney should not sign any letter

or document that is sent to the court. Such actions have been construed by some judges to constitute a personal appearance by the member (through counsel), thus nullifying some of the other protections of the SSCRA and also strengthening the court's jurisdictional claims. Remember also that at best the relief under the SSCRA is a stay, rather than a bar, to divorce proceedings. The distinction is important because some personnel are of the erroneous opinion that a divorce action may not be instituted against a military member.

The Soldiers' and Sailors' Civil Relief Act also provides that the court must appoint an attorney to invoke a soldier's SSCRA rights before any default judgment is entered against the member. See 50 U.S.C. App. § 520(3).

After a decree has been entered by a state court, the Department of the Army will treat it as valid if it appears to be regular on its face. If the decree of judgment imposed an obligation on a military member, it is considered prima facie evidence of the matters set forth therein. When a decree or judgment appears to be regular on its face, the advice to be furnished the client often will be limited to suggestions on how to set aside or amend the decree.

Foreign-nation divorce decrees, even though they appear to be valid, create a substantial doubt as to whether the marriage actually has been terminated. Until such substantial doubt is resolved by a decision of a court of competent jurisdiction in the United States, authorized or increased allowances previously given on the basis of such prior marriage will be suspended. See 55 Comp. Gen. 533 (1975).

b. Grounds for Divorce. All states now have some form of "no fault" divorce, based on such "neutral" grounds as incompatibility, irreconcilable differences, or physical separation for an extended period of time. In addition, many states still permit a traditional divorce for grounds based upon the fault of one of the parties.

If fault is alleged, some states require the allegation to be proven with evidence beyond a mere admission by the defendant. The most common fault-related ground still in use is mental cruelty. While constant statements or admissions of wrongdoing, together with numerous acts and expressions of lack of affection or marital interest, may be sufficient evidence to establish the ground of mental cruelty, similar evidence will not necessary establish other grounds (e.g., such as adultery) to which the opposing spouse may testify. The grounds for divorce in the various states, and in the

District of Columbia and the territories, must be determined on an individual basis. See Chapter 4 for state law summaries.

2. Contents of Decrees.

a. Matters Between the Spouses.

(1) Spousal Support. In most states the divorce court may provide for support of a spouse during and after the divorce proceeding. Such an obligation ordinarily continues until modification by the court, remarriage of the spouse receiving support, or the death of either spouse. The parties by agreement may provide that the support obligation will survive these events. Spousal support is usually modified by the court only upon proof that a substantial change of financial circumstances has occurred. Further, even though statutes may provide for termination of support upon remarriage of the recipient or death of either party, such statutes in some states may not be self-executing. A court order will be required to extinguish the obligation. Spousal support (occasionally called "maintenance") is now gender-neutral and ordinarily is awarded on the basis of need. See Orr v. Orr, 440 U.S. 268 (1979) (holding gender-based alimony statutes unconstitutional).

Some clients erroneously believe that support payments under a decree may be reduced or terminated unilaterally, without court action, upon the occurrence of some event that provides a justification for modifying the payments. However, the military member should not make any unilateral pro rata reduction. Instead, he or she should seek a modification in court. It should be kept in mind that several states impose fixed and purportedly unalterable support obligations.

Military Practice Note

Pursuant to AR 608-99, a solider must provide adequate and continuous support for legal dependents, including his or her spouse. "Adequate" is defined as the amount (a) specified in a court order; (b) agreed upon by the parties; or (c) the interim support requirement as specified in the regulation in the absence of an agreement or a court order. The interim support requirement is based on the BAQ entitlement at the with-dependents rate for the soldier's pay grade, but AR 608-99 specifies that the Variable Housing Allowance (VHA) is not includable with the BAQ in determining the minimum support requirement.

As in the case of other dishonorable failures to pay just debts, a military person who refuses, without legal justification, to pay spousal support and/or child support may be subject to court-martial for violations

of Article 92, 133, and 134 of the Uniform Code of Military Justice, or to administrative discharge under the misconduct provisions of AR 635-200.

(2) Division of Property. The property of the spouses may be divided by the court or by a property settlement agreement. An increasing number of states use an "equitable division" approach for the division of marital assets, providing that the distribution should be equal unless the court finds that justice otherwise requires. The division of property also entails allocating primary responsibility for payment of debts.

Lawyers should aid their clients in identifying and characterizing marital property, as well as in negotiating satisfactory property settlement agreements. Possible trade-offs between immediate distributions of property and long-term payments of spousal support may be weighed.

Until recently, unequal divisions of marital (or "community") property could be treated as sales or exchanges, triggering potential income tax liability. However, the federal Deficit Reduction Act of 1984, at 26 U.S.C. § 1041, has virtually eliminated recognition of gain or loss in divorce-related property transfers between spouses (unless one of the spouses is a nonresident alien). Section § 2516 of title 26 further provides that property transfers incident to settlement agreements are deemed to have been made "for a full and adequate consideration," negating any gift tax consequences.

Military Practice Note

Certain kinds of property are subject to government-imposed restrictions which must be considered in any division. By virtue of the Uniformed Services Former Spouses' Protection Act (10 U.S.C. § 1408), this may include the spouse's rights relating to retirement benefits. All states recognize the possibility of dividing military disposable retired pay in a divorce given the right circumstances. Division of disposable retired pay is not an automatic right. (Puerto Rico remains a territory that does not treat military retired pay as marital property.)

(3) Children.

(i) Child Support. Child support, or payments made for the maintenance and care of children of the marriage, continue under most state laws for each child until he or she reaches majority, marries, dies, is otherwise emancipated, or until further order of the court. Remarriage of the custodial spouse does not affect the other spouse's child support obligation, but a change in circumstances, especially financial, may justify a

modification by the court. The extent and amount of a divorced parent's obligation to support his or her children will be determined by the court.

Some statutes dealing with termination of child support may not be self-executing. Frequently, an order may be nonseverable and provide for a lump sum as support for several minor children. A military member should not unilaterally reduce payments when one of several children reaches majority. A further order of the court should be obtained.

In some states the children conceived by a woman during marriage may be rebuttably or conclusively presumed to be the children of her husband. However, if the children were conceived during a period when the spouses were not cohabiting, the presumption usually will be rebuttable only, or may be eliminated entirely.

Military Practice Note

Even in the absence of a court order, a soldier is required to support his or her children pursuant to AR 608-99.

(ii) Child Custody and Visitation. It is often said that no other area of the law gives rise to as much emotional conflict as disputes over child custody. Civil and criminal consequences may follow if one parent impulsively assumes custody in violation of a court order. Here is a summary of seminal concepts governing this subject.

(iii) Traditional Jurisdiction to Award Custody. Usually, although not invariably, the court that issues a divorce decree also resolves the child custody and support issues. In the past, jurisdiction over custody often was based solely on the child's physical presence in the state at the time proceedings were initiated. This rule created much hardship where the parties have been separated by a great distance, and it rewarded spouses who unilaterally took children away from the other parent. Today, however, the Uniform Child Custody Jurisdiction Act has substantially limited court's authority to issue custody decrees based on physical presence.

(iv) Uniform Child Custody Jurisdiction Act. All states have enacted statutes that are patterned after, or adopt, the Uniform Child Custody Jurisdiction Act (UCCJA) to avoid the disruption, impact and damage caused by forum shopping and/or child snatching by parents. The UCCJA establishes guidelines to determine which court should exercise its jurisdiction over a child. It provides for interstate court communication and a means of ordering a parent and child to go to another, more appropriate jurisdiction to litigate the custody issue.

(v) Forms of Custody Awards. The conventional form of custody has been to award one parent the right to have the child reside with him or her while the other parent receives a right of reasonable visitation. Traditionally, the law often has favored the mother as the custodial parent for young children by assuming that such a custody award promotes the best interests of the child. Many states have abolished this presumption, although in most cases it still is the mother who receives custody.

Increasingly, the states are accepting shared or joint custody arrangements. Shared or joint physical custody employs alternating periods of sole physical custody, with or without visitation rights. For example, the child may live with the mother for six months and then the father for six months each year. Joint legal custody awards both parents equal rights concerning the raising of the child but typically does not involve shared physical custody. Currently, there is considerable judicial reluctance to make such awards unless both parents are in agreement and of sufficient sophistication to make it work amicably. In fact, some states specifically require parents to agree before joint custody will be awarded.

(vi) Third party visitation. In some jurisdictions a third party, such as a grandparent, may be joined or may join as a party litigant and be granted visitation rights, consistent with the best interests of the child. During prolonged absences of one parent away from the child, such third party visitation may be of vital importance in maintaining an influence on the child by the family of the absent parent.

(vii) Visitation. The non-custodial parent's right of visitation may be stated in the decree in broad language as "right of reasonable visitation" or may be stated in great detail. Often it is preferable to recite in the decree that the noncustodial parent shall have "such reasonable visitation as the parties may agree, but if they fail to agree, then the following: [set forth a specific schedule]." This minimizes the need to obtain judicial interpretations of "reasonable" visitation.

Military Practice Note

In counseling soldiers on visitation matters, legal assistance attorneys should keep in mind that at some point the soldier will be transferred from the locale where the child is located and where the visitation arrangements may have been negotiated. Issues such as who pays the transportation costs of the child, how long the child remains with the noncustodial parent on summer visitation, and who has the child on what holidays, which did not seem important before the transfer, may become the subject of intense emotional debate. These issues must be anticipated and addressed.

3. Post-Divorce Considerations.

a. Records. When a divorce is granted, the spouses should be advised to make proper changes in personal and business records. Particular attention should be given to changing (1) life insurance policy beneficiaries; (2) wills; and (3) tax withholding elections. Care must be exercised, however, to ensure such changes do not violate requirements in the court decree or settlement agreement. For example, a spouse may be required to maintain the former spouse and/or children as beneficiaries of life insurance as part of a negotiated settlement agreement or a court order.

Military Practice Note

Military members also should amend military personnel forms relating to marital status, dependency, designation of beneficiaries, and other pertinent matters. Of particular importance are the Serviceman's Group Life Insurance beneficiary designation form and DD Form 93, the Emergency Data Card. Cases abound in which a divorced spouse has collected insurance proceeds although the marriage relationship was dissolved for a number of years and the obvious intent of the insured was to make a second spouse the beneficiary.

b. Remarriage. When restrictions are imposed in a divorce decree or by statute, specifying the time before remarriage is permitted or prohibiting remarriage without permission of the court, the attempted remarriage of a person within such time is unwise and may create serious problems. If a second marriage is contracted within the divorcing state in violation of the decree's prohibition, the marriage usually is void. If an individual goes to another state to remarry in violation of the restrictions, but retains domicile in the state granting the divorce, most states would hold the marriage invalid to the same extent as would the state of domicile. However, if the person makes a bona fide change of domicile to the state in which the remarriage occurs, the remarriage might be recognized, except possibly in the state which granted the divorce.

Military Practice Note

Cases have been reported in which a military member honestly, but mistakenly, believed he or she had been divorced from a previous spouse. The mistake may have been based upon correspondence with the other spouse or with the military attorney. To avoid difficulties arising from such mistakes, the member should be advised to secure a copy of the decree of the final divorce and to receive qualified legal advice on any restrictions on remarriage, prior to entering into a subsequent marriage.

CHAPTER 3

SEPARATION: SUBSTANTIVE LAW AND FORM OF AGREEMENT

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A. INTRODUCTION

1. **Separation and Limited Divorce**. The topic of separation occasionally overlaps, and is confused, with the subject of

divorce. Indeed, legal separation occasionally is called divorce a mensa et thoro or divorce from bed and board. When used in this sense, it denotes a form of limited divorce. Statutes in approximately half the states provide for limited divorce or its equivalent. A limited divorce decree not only authorizes the spouses to live apart but also may impose a continuing obligation upon one spouse to support the other in an amount fixed by a court. In most states, the support obligation ceases upon death of the supporting spouse. Conversely, the supporting spouse has no obligation to the other spouse except to pay the amount provided in the decree.

In court-ordered separations or limited divorces, domicile is not usually required to make the decree valid, so long as there is personal jurisdiction over the parties. However, because many legal separation and limited divorce decrees eventually ripen into total dissolutions of the marriage, it is wise to provide for an ultimate property settlement and to assure that the court has, or will have, proper jurisdiction to enter the eventual decree.

Limited divorces and separations differ in one significant respect. Limited divorces permit one spouse to refuse, without adverse legal consequences, an offer of reconciliation by the other. In some jurisdictions, if reconciliation occurs, it will terminate the decree, at least as to payments of spousal support. In contrast, many jurisdictions provide that under a court-imposed separation involving separate maintenance, a good faith offer of reconciliation by the spouse paying support imposes upon the recipient spouse a duty explicitly to accept or to reject the offer. If the offer is rejected, the supported spouse is deemed to have deserted the supporting spouse, affording a basis for divorce. In such cases, total dissolution usually follows and the question of spousal support is addressed in that new context.

Military Practice Note

Even though a limited divorce decree may require a soldier to support his or her spouse, the spouse will not be treated as a dependent for the purposes of authorized or increased quarters allowances and other rights. See DOD Pay and Allowances Entitlements Manual, para. 30224a(5). Nonetheless, AR 608-99 expressly requires soldiers to comply with all provisions of court orders, including spousal and child support obligations, and the obligation generally may apply even in the absence of a provision in an order. In some cases, however, decrees that are silent about support may excuse the soldier from the requirements otherwise imposed by the regulation.

The Comptroller General has recognized that a properly executed separation agreement is legally sufficient as a statement of the parties' legal

obligations for purposes of determining entitlement to a Basic Allowance for Quarters, even though the agreement was not issued or sanctioned by a court. 62 Comp. Gen. 315 (1983).

2. **The Role of Voluntary Agreements.**

a. **General.** As opposed to legal separations and limited divorces, which are court-ordered, voluntary separation agreements are simply exercises of the private power to contract. They do not necessarily imply the eventual dissolution of the marriage; rather, they may simply be forms of "postnuptial agreements" arising from circumstances that have forced the parties temporarily to live apart. Such circumstances often arise in military life. For that reason, voluntary separation agreements may play a larger part in military domestic relations practice than they play in many civilian practices.

b. **Impact of Contractual Nature of Separation Agreements.** Under general contract law principles the parties may agree as to what state law governs. State courts, however, often reserve the right to construe such agreements. This can have an impact where military personnel are concerned. The mobile nature of military personnel and the importance of state law considerations are best illustrated by Morton v. Morton, 332 S.E.2d 736, 76 N.C. App. 295 (1985).

Morton involved a military retiree and his ex-wife who separated in Maryland in 1977 and executed a separation agreement there. It contained mutual releases in which each party released the other from all obligations. The caption of the document, however, was styled "In North Carolina Guilford County." Mrs. Morton sued for divorce in North Carolina and asked for a share of Morton's military retired pay. Morton contended that the release language of the separation agreement controlled. The court held that the separation agreement executed in Maryland was valid in Maryland but not valid in North Carolina because it was not acknowledged by both spouses before a certifying official (such as a notary public) as required by North Carolina law.

The general rule is that the law of the place where the contract is executed governs the validity of the contract (lex loci contractus), which is based on the presumed intent of the parties. But North Carolina recognized an exception to the general rule. The express or implied contrary intent of the parties rebuts the parties' presumed intent. The North Carolina court held that there was an implied intent on the part of the parties to apply North Carolina law.

3. **Drafting Separation Agreements.** Military attorneys often find themselves in the position of drafting separation agreements for only one party. Frequently the unrepresented party indicates

a desire to waive the right to see an attorney. Military attorneys are directed by TJAG Policy letter 85-11, Subject: Legal Assistance Representation of Both Spouses, 30 December 1985 (reprinted in The Army Lawyer, February 1986 at 4) to establish a system whereby conflicting clients can receive legal assistance by referral to another office. Military attorneys are to actively assist the conflicting client in obtaining an appointment with another office. If the unrepresented party still declines legal assistance, it is good practice to include a provision in any resulting separation agreement that the unrepresented spouse had the opportunity to see other counsel and expressly waived that right by executing the agreement.

Beyond that, as the drafting attorney, great care must be exercised in all other particulars. See Trenholm v. Trenholm, 701 S.W.2d 209 (Mo. App. 1985), for a case in which a wife's partition action for sale of the marital home was dismissed. The wife's attorney drafted the agreement and the husband was unrepresented. The agreement gave the husband the exclusive right to decide when the home would be sold, although upon sale the proceeds were to be divided.

B. KEY ELEMENTS

Post-nuptial agreements between spouses are regulated in many states by statute. Most jurisdictions permit voluntary agreements between spouses concerning support and the adjustment of property rights provided certain conditions are met. Some judicial checkpoints for these contracts are: (1) requirement of a valid marriage; (2) capacity of the parties to contract; (3) existence of a continuing separation; (4) good contractual consideration; (5) legality of purpose; (6) fair provisions for the wife; and (7) reality of consent of one spouse (usually the wife) in conjunction with full disclosure on the part of the other spouse (usually the husband). For a contract of this type to be valid in some states, it must be clear that the separation is the result of more than mere volition of the parties. For example, in Nebraska, grounds for separation or divorce must exist at the time of the execution of the agreement. Idiosyncracies of Louisiana law stipulate that the agreement either be incorporated in the decree of divorce or be made after the judicial separation of the parties. A Louisiana agreement would be of doubtful enforceability prior to the granting of a divorce and subsequent ratification of the contract by the parties.

1. **Valid marriage.** A valid marriage forms the foundation of a lawful separation agreement and may be shown in the contract by including the place and date of the event. A marital relationship imposed by common law could be shown by a recital of the dates, occasions, and jurisdictions under which the required legal indicia of marriage were maintained.

2. **Contractual capacity**. The capacity of the parties to contract is an essential ingredient for the creation of a separation agreement. This was a significant problem in jurisdictions where the disability of a husband and wife to contract with each other was recognized. Most states now permit a husband and wife to make a property settlement by virtue of a statute specifically authorizing them to do so, or by a statute giving either spouse the general power to contract with the other. Although minors may have the capacity to contract, they also have the ability to avoid certain contracts, and a separation agreement may be voidable, depending on state law, at the option of the spouse who entered into it while underage. However, in many states, marriage confers full contractual capacity on otherwise underage persons.

3. **Physical separation**. An agreement by the spouses to physically separate at an indefinite time in the future may render the agreement void as against public policy because it is seen as promoting marital discord. An orderly and satisfactory resolution of the marital property problems facilitates separation and/or divorce. Often there is an oral understanding between the parties that one of them will seek a divorce. But, overt encouragement of separation or divorce may fatally taint the agreement. The majority rule on physical separation requires that the parties must either be living apart or must be planning to do so at the time of the agreement. A recital that the parties are not living together is sufficient. Courts rarely look into the grounds for separation. It often is wise to mention in the agreement that the difficulties and differences necessitating separation are based on the health and welfare of the parties in addition to considerations of their wishes and happiness.

4. **Consideration**. Separation agreements, like other contracts, must be supported by consideration. For example, the consideration offered by the wife is her promise to live apart from her husband, and not pursue her right to support or other property interests in a legal action. The husband furnishes as his consideration the promise to liquidate his duty of support of his wife (which was a legal, but unliquidated duty, until the making of the agreement) by certain fixed payments to her. Spouses rarely are excused from these agreements by reason of lack of consideration. Courts may use this factor to upset an agreement in which one spouse appears to have made a bad bargain.

5. **Legality of contractual purpose**. The legality of purpose requirement goes once more to the public policy proscription concerning the encouragement of separation and divorce. Agreements containing clauses in which the parties agree to procure a divorce, or agree not to defend on, or use certain defenses, are invalid in many jurisdictions because they are collusive and work a fraud on the courts. There is a split of authority on the validity of an

agreement conditioned on the granting of a divorce. A majority of courts permit such a condition if it is a mere inducement to get a divorce and does not have a direct tendency to dissolve the marriage. An agreement is not automatically invalid even though it is to take effect only upon divorce: (a) if it is to terminate by a certain date should the parties still be married then; (b) if payments to the wife are to be placed in escrow and paid over after divorce; or (c) if certain property is to be conveyed to the wife in the event of divorce, although one might suppose that clauses such as these would render the agreement illegal. If the purpose of the contract is illegal (i.e., it directly promotes divorce) the entire contract must fall. If only part of the agreement is unlawful (e.g., it purports to waive the child's right to support) then the contract generally remains in effect except for an invalid child support provision. Due to the conflict in the courts regarding the validity of clauses which condition the contract in some way upon divorce, provisions of this type should be avoided.

6. **Fair Provisions**. The requirement of fair provisions for the wife is related to the voluntariness of her consent and the husband's fulfillment of his duty to disclose his assets. (To date, this problem has always concerned the wife. Depending on the circumstances, this requirement could apply to a husband.) Unless the terms of a separation agreement are outrageous or the agreement itself is a result of fraud, over reaching, or duress, the courts tend to accept whatever arrangements have been made by the parties in the agreement. Because these domestic agreements are not ordinary contracts, the amount of unconscionability or unfairness needed to overturn them is small and includes the pressure of economic necessity or the occurrence of personal attacks on the wife. Because the parties may have to live with this agreement for some time, extreme settlements, although pleasing to the party they favor, may ultimately result in a failure of performance on the part of the nonfavored party.

7. **Fiduciary Duty**. Society has a great interest in marriage. This can be seen in the fact that, while marriage is a civil contract created by mutual consent, mutual consent alone cannot terminate it. Once contracted, the legal status of marriage, with its concurrent rights and obligations, is independent of the will of the parties. Courts zealously guard the fiduciary relationship which exists between spouses, and utmost good faith is a basic element for contracts between a husband and wife. The integrity of this standard is particularly important in a separation contract where an unwise decision made as a result of misleading information could cause hardship for one of the parties for many years, in addition to defeating society's interest. Often, the wife, as the seeker of support, is considered to be in a relatively weaker position. Therefore, most courts deem the husband to be the dominant party in the negotiations in the absence of contrary evidence. As a result, the husband's conduct is subjected to much higher scrutiny than the wife's, almost as if he

were a trustee and his wife a beneficiary. The presumption against the husband will be strong if the parties are hostile, or if relations between the parties have been settled and they are dealing at arm's length or through their lawyers.

C. SPOUSAL SUPPORT PROVISIONS.

1. **Disclosures**. A separation agreement may be subject to interpretation at a later date. Therefore, the instrument should disclose all significant representations or facts upon which it is based. If the spousal support provision is subject to modification, the basis for determining the initial amount of support should be stated in the agreement. This establishes a foundation for any future action to determine whether a change of circumstances has occurred which would justify modification of the original level of support.

A clause wherein each party represents and warrants that he or she has made full and complete disclosure of all assets and income should be considered. When representing a spouse with substantially larger income and assets, an agreement should specifically state that the spouse with lesser income has not relied on any representations made by the more affluent spouse concerning that spouse's economic status, but has relied on his or her own investigation.

If appropriate, a promise to make future disclosures such as copies of tax returns may be considered for inclusion in the agreement. Careful thought must be given to its structure so as to ensure future compliance. Disclosure provisions often are placed in the preamble or introduction to the separation agreement.

2. **Amount**. Counsel representing a party with minimum income or earning capability should seek a provision requiring the spouse with substantially greater income and/or assets to pay spousal support. Determination of the amount of spousal support to be paid depends on the needs of the spouse seeking support, the supporting spouse's ability to pay, the length of the marriage, the value of the marital property, the parties' personal assets, and their ages and accustomed standard of living. If one or both parties waive spousal support, the agreement should include all pertinent factors considered for the waiver to minimize the possibility of judicial non-acceptance of the agreement. Some states do not permit a wife to waive her right to future support.

3. **Duration**. The duration of, and grounds for the termination of, spousal support payments should be specified in the document or predicated on the application of state law. In most jurisdictions, should the agreement so provide, payments can continue after the death or remarriage of a spouse. When the agreement fails to provide otherwise, spousal support usually

ceases upon remarriage of the supported spouse or the death of either spouse. But see Smock v. Smock, 12 Fam. L. Rptr. 1040 (Nov. 26, 1985) for a case in which a Kentucky court held that periodic payments labeled as maintenance were not terminable on the recipient's remarriage. The court looked beyond the language of the agreement to find that the payments represented a property division. If the payment is to receive tax treatment as alimony, the agreement must specify that there is no further liability for payments upon the death of the payee spouse.

4. **Effect of Bankruptcy**. A spouse's bankruptcy does not generally terminate support duties under a separation agreement as it may other contractual obligations. Support obligations owed to spouses, former spouses or children are excepted from discharge under 11 U.S.C. § 523(a)(5). Careful drafting, however, is required, as was demonstrated in Tilley v. Jessee, 789 F.2d 1074 (4th Cir. 1986). There, the court found that a promissory note given in exchange for property as a part of a separation agreement, was dischargeable in bankruptcy. It was argued that the note had the character of maintenance and support. The court, however, found that the separation agreement was structured to distinguish between the property settlement and alimony as separate issues. However, where a spouse or former spouse has assigned the support to a third party, such as a state public assistance agency, the obligation is dischargeable in bankruptcy. See 11 U.S.C. § 523(a)(5).

5. **Modification**. Modification of spousal support payments under a separation agreement usually is predicated on a provision in the contract which permits modification. The agreement can either specify certain events which trigger modification, or allow for modification in the discretion of the court.

6. **Enforcement**. The spouse receiving support should seek the inclusion of a provision for the enforcement of spousal support requirements. In particular, this provision should provide for attorney's fees for action or arrearages, and interest on arrearages. If the separation agreement is not merged or incorporated as part of the final decree, it cannot be enforced through contempt proceedings. However, equity traditionally has been used to enforce the payment of support or maintenance in separation agreements. See Schlemm v. Schlemm, 158 A.2d 508 (N.J. 1980) and Gibson v. Gibson, 270 S.E.2d 600 (NC 1980). See also Section G, Modification and Merger, infra, this Chapter.

D. CHILD SUPPORT, CUSTODY, AND VISITATION

1. **General consideration**. No agreement between the parents ever binds the courts regarding the support, custody, visitation rights, or the educational program of a child. Not only is the child not a party to the agreement, but the state has a paramount

interest in ensuring that the support, custody, and visitation provisions touching upon the children of its citizens can be altered to take changed circumstances into account. An increase in support money or a modification of the custody or visitation rights may be essential to the child as he or she grows older. On the other hand, courts usually do ratify reasonable provisions that the parties agree upon.

2. **Child support**. The amount of child support is based on the care and welfare of the child and the respective parent's financial situation, and today this amount usually is established by child support guidelines that nearly all states have promulgated. The right to support belongs to the child, at least to the extent a parent cannot waive the right to support from by the other parent, but the custodial parent generally has the right to determine how the money will be used. Additionally, when arrearages accrue and later are enforced, the money goes to the custodial parent, even if the child has been emancipated.

3. **Custody and visitation**. The form of the custody and visitation provision depends on the type of custody arrangement agreed upon by the parties or ordered by the court (i.e., joint custody, sole custody with visitation, etc.). No matter what form of custody is agreed upon, clarity and detail are the key elements of an effective child custody and visitation provision. The agreement should explicitly state all of the conditions agreed upon concerning living arrangements, decision-making, developmental concerns, visitation rights, and other factors involving any children. Because of the transient nature of a military career, a military spouse should obtain a clause specifically dealing with removal of the child upon relocation, orders or modification of visitation rights because of overseas duty, and responsibility for costs incurred in transporting a child for visitation purposes.

Military Practice Note

The military service is increasingly populated by married couples who are both on active duty. Special consideration must be given when drafting separation agreements pertaining to them. See, e.g., In re McCoy, 62 Comp. Gen. 315 (1983). There the Comptroller General opined that a properly executed separation agreement is legally sufficient as a statement of the parties' marital separation and resulting legal obligations for purposes of determining eligibility for Basic Allowance for Quarters, even though the agreement was not issued by or sanctioned by a court. The opinion combined two cases, one involving an Air Force couple in the U.S. and the other an Army couple in Europe.

E. DIVISION OF PROPERTY

1. **Real property.** Incompletely drafted provisions concerning distribution of real property upon separation of the marital parties have resulted in substantial litigation. See, e.g., Trenholm v. Trenholm, 701 S.W.2d 209 (Mo. Ct. App. 1985) where a wife brought a partition action to sell the marital home. The couple's separation agreement, however, gave the husband the exclusive right to sell (although the proceeds were to be divided). The court held that the separation agreement controlled and the partition action could not go forward. The agreement should contain specific information concerning:

a. How title is held (e.g., joint tenancy, etc.);
b. The equitable interests of the spouses;
c. Manner of agreed disposition (sale, ownership to wife, etc.);
d. Agreed time of transfer;
e. Form of deed;
f. Assumption of encumbrances; and
g. Any responsibilities of the parties to take actions to complete transfer.

2. **Personalty.** Division of personal property is less complicated. The parties can either list the property each is to receive or specify that each shall retain the personalty in their respective possession. The latter method relieves all concerned of the burden of preparing an extensive list of the spouses' personal property. If any such property is security for a debt, responsibility for paying the debt must be satisfied, usually by the party in possession of the property.

F. INCOME TAX CONSIDERATIONS

1. **Filing Status:**

(a) Joint Returns. Because of our graduated tax rates and other features of the federal income tax system, most married parties benefit by filing a joint tax return. To be eligible to file a joint return, the parties must be married and must be willing to cooperate by signing the return. Marital status is determined as of the last day of the tax year (I.R.C. § 6013(d)(1)(A) and I.R.C. § 143). Married parties retain their married status until there is a final divorce decree or final decree of separate maintenance issued (I.R.C. § 6013(d)(2)). In many jurisdictions, interlocutory divorce decrees are issued and do not become final for an appreciable period of time. The parties are considered married and eligible to file a joint return until the final decree is issued. (Joseph Peruisich, T.C. Memo 1970-120).

Military Practice Note

Frequently, couples in the military anticipate waiting a substantial period before obtaining a divorce decree. Because of this, the parties should give careful consideration to including a provision requiring the parties to cooperate in filing a joint return. As mentioned, the rate of tax on the combined incomes is generally less if the parties file jointly. Additionally, if the parties file separately while married and one spouse itemizes, the other must also itemize, even though the tax consequences for the non-itemizer can be quite severe. There are other adverse results which arise from married parties not filing jointly. Specifically, they lose the deduction for two-earner spouses (I.R.C. § 221), and they may lose the earned income credit (I.R.C. § 42). Accordingly, the parties should consider filing jointly. The major risk in filing jointly is that the spouses become jointly and severally liable for all tax due on the joint incomes. Thus, a taxpayer can be held liable for a former spouse's under-reporting of income during the period of separation (and resultant penalties) if a joint return was filed. Additionally, a practical problem arises regarding division of refunds and allocation of refunds and taxes that may be due. Nevertheless, if the parties can cooperate, it will likely be in their best interests to file jointly as long as they are eligible to do so.

b. Married Filing Separately. As a general rule, if married parties do not file jointly, they must file as married filing separately (I.R.C. § 1(d)). When the parties file as married filing separately, each becomes responsible for reporting only his or her own income and for claiming his or her own deductions and credits. Additionally, the parties pay taxes in the highest tax table.

c. Married Living Apart. More advantageous tax rates are provided for a married person who can file using the married living apart status (I.R.C. § 143(b)). To qualify, the individual must be married at the close of the tax year, must file a separate return, and must provide over one-half of the costs of maintaining a household which, for over one-half of the year, constitutes the principal home for a child who qualifies as a dependent for tax purposes (or would qualify but for a waiver of the dependency exemption under I.R.C. § 152(e)). Additionally, the other spouse may not have been a member of the house during the last six months of the tax year.

d. Head of Household. Single individuals, including those who were married but now have a final decree of divorce or

separate maintenance, may be eligible to use the head of household tax table if they meet the test provided in I.R.C. § 2(b). In general terms, this requires that the individual not be married at the close of the tax year and that the individual have paid more than one-half the cost of keeping up a home for the individual and a dependent. A taxpayer also may qualify for head of household filing status if he or she maintains a home (not necessarily the taxpayer's home) for parents and claims the parents as dependents for tax purposes.

2. **Alimony/Spousal Support:** A key consideration in drafting a separation agreement involves proper characterization of payments as either alimony, as child support, or as a distribution of property. The basic rules are simple. An alimony payment is deductible by the payor and is included in the income of the recipient. Child support is not deductible by the payor nor is it included in the income of the recipient. When there is a significant difference in the annual income of the parties, the characterization of the payment can make a dramatic difference in the parties' total tax liability. In other words, changing the character of a payment from child support to alimony may result in permissible income shifting between the parties and overall tax savings. If the parties choose, this savings then can be allocated between them however they wish. Thus, the attorney should give specific attention to properly characterizing the nature of the payment to ensure that it receives the intended tax treatment.

For a support payment to be treated as alimony, it must meet the following requirements of I.R.C. § 71:

Cash. The payment must be in cash or cash equivalent. This precludes alimony treatment for transfers of tangible property or for rendering of services.

Required by a divorce or separation instrument. For the payment to be treated as alimony it must be required by the separation agreement or court order. Thus, any payment which is intended to be treated as alimony must be called for by the agreement. Voluntary payments made in addition to those required by the separation agreement, or paid before the agreement, will not be deductible by the payor as alimony. Payments made because they are required by AR 608-99 also will not be deductible.

Paid to the spouse. Generally, to be treated as alimony the payment must be made to the spouse. Thus, as a general rule, payments to third parties will not be treated as alimony. The exception to this rule is for payments which are required to be made to a third party by the terms of the separation agreement or court decree (or by subsequent ratification by the spouse). This can be important when, as part of the alimony payments, the parties intend that a payment be made directly to a third party creditor, such as to the lender for a car loan. If that is the parties'

intent, the separation agreement should specify that the appropriate portion of the alimony payment is to be made directly to the third party.

These are the most crucial technical requirements for obtaining alimony characterization of a payment. Additional rules can cause the otherwise qualifying payment to lose alimony treatment, however. First, a payor cannot claim a deduction for support payments if the agreement or order requiring the support includes a statement that payments will not be treated as alimony and will not be deductible by the payor nor included in the income of the payee. Thus, for purposes of denying alimony treatment to a payment, the parties can authoritatively specify the tax treatment of the payment in the agreement. The reverse, however, does not hold true. The parties cannot direct, in the agreement, alimony treatment to a payment which does not otherwise qualify for alimony treatment.

Second, payments made pursuant to a divorce decree or separate maintenance order while the parties remain members of the same household generally will be denied alimony treatment. The temporary regulations permit the parties to deduct the payment if it is made while the parties are living together, but while they are preparing to live apart. This means that the payment will be deductible if one of the parties moves out within one month of the payment. Parties who are merely separated under a written separation agreement, as opposed to being fully divorced or legally separated, can deduct alimony payments even though living together at the time the payments are made.

Third, if the parties are married and file a joint return, they will not be permitted to deduct alimony payments made.

Two rules limit the parties from deducting as alimony payments, those payments which, in reality, are a distribution of property. The first of these, the minimum term rule, **only applies to decrees issued before 1987.** The second rule designed to preclude alimony deductions for property transfers is the recapture rule, which applies to orders issued after 1985. Actually, there are two recapture rules; one applies to divorce decrees and agreements that became effective in 1985 and 1986 while the second rule applies to decrees and agreements entered into on and after January 1, 1987. The first rule provides that to the extent total alimony payments in any of the first 6 years declines by more than $10,000 from the total paid in any prior year, the difference in excess of $10,000 will be recaptured as ordinary income to the payor (and the payee will be permitted a deduction in income for the amount recaptured). This admittedly complicated rule requires the parties to make an adjustment on the current years' taxes for "excess" alimony paid in a prior year.

For example, assume that the separation agreement called for alimony payments of $20,000 in year 1 and $5,000 in year 2. Because the payments in year 2 are less than those in year 1 by an amount in excess of $10,000 ($20,000-5,000 = 15,000), the difference in excess of $10,000, which is $5,000 (15,000 - 10,000 = 5,000) must be recaptured. In this example, the payor would recapture $5,000 as ordinary income in year 2 (and the payee would be given an income deduction of $5,000). Each year the total alimony payments must be considered against each prior year's payments (for the first 6 years). It is possible that a given year's payments might trigger recapture against more than one prior year's payments. Once there has been a recapture, the payment against which the recapture occurred is adjusted to reflect the recapture. In the example given, $5,000 was recaptured in year 2 against the $20,000 payment in year 1. So, in the future, year 1's payment will be considered to be $15,000, rather than $20,000, to reflect the $5,000 recapture.

The current recapture rule is equally complex. It focuses on the first 3 years of payment rather than the first 6, and it provides that if alimony payments in year 1 exceed the average of the payments in years 2 and 3 by more than $15,000, then the payor must recapture the excess over $15,000 as ordinary income in year 3 (and the payee can deduct the recaptured amount from income in year 3). Additionally, the rule also provides that if payments in year 2 exceed the payments in year 3 by more than $15,000, then this excess payment also must be recaptured by the payor.

For example, suppose a separation agreement calls for alimony payments of $90,000 in year 1, $80,000 in year 2, and nothing after that. The average for years 2 and 3 is $40,000 (i.e., ($80,000 + $0) / 2 = $40,000), and the payments in year 1 ($90,000) exceed this by more than $15,000. Thus, the payor would have to recapture $35,000 as ordinary income (i.e., ($40,000 + $15,000) - $90,000 = $35,000) in his or her taxes for year 3. The second step requires a separate analysis of years 2 and 3. Here, the payment for year 2 exceeds the payment for year 3 by more than $15,000 (i.e., $80,000 - 0 = more than $15,000), so the payor also would have to recapture an additional $65,000 ($80,000 - $15,000) in year 3 as ordinary income. Initially it would look as if the payor could deduct a total of $170,000 as alimony payments in years 1 and 2, but in fact he or she would have to recover $100,000 of that (i.e., $35,000 + $65,000) as ordinary income in year 3. If the same $170,000 had been spread more evenly over all 3 years (e.g., $56,666 each year, or $60,000/$55,000/$55,000, etc.), there would have been no recapture.

The recapture rules and the old minimum term rule are somewhat complex, but fortunately legal assistance attorneys rarely will encounter them. For new separation agreements (and court orders), the rule will not apply unless alimony payments in year 1 exceed the average of payments in years 2 and 3 by more than $15,000 or

unless payments in year 2 exceed payments in year 3 by more than $15,000. Legal assistance attorneys rarely draft agreements that require alimony payments even of $15,000 per year, let alone payments that are substantially in excess of this amount.

3. Child Support. The last limitation on characterization of a payment as alimony is really found in the definition of child support. To the extent that a payment constitutes child support, it will not be deductible as alimony. Thus, as in the past, if a support provision in a separation agreement specifically fixes an amount as child support, it will be treated as child support and will not be deductible by the payor as alimony. For example, if an agreement indicates that the husband will pay $200 per month in spousal support and $300 per month in child support, the husband would be permitted to deduct only $200 per month. The $300 per month payment is expressly fixed as child support and would not be deductible. This has been the state of the law for some time. The Tax Reform Act of 1984 made a significant change concerning support provisions which lump both alimony and child support together.

If an agreement provides for a total support payment of, for example, $500 per month for both spousal and child support, but also specifies that the payment will be reduced by $300 per month when the child reaches age 18, under the current law, only $200 of the payment will be treated as alimony. The $300 per month will be treated as child support. Thus, to the extent that a support payment is to be reduced based upon a contingency related to a child, such as marriage, emancipation, or reaching a specified age, the amount of the payment reduction will be treated as child support, and not as alimony. Under the Supreme Court case of Commissioner v. Lester, 366 U.S. 299 (1961), a taxpayer could deduct the full combined payment. The Tax Reform Act of 1984 reversed Lester, and now taxpayers may only deduct the amount which is clearly alimony, not the portion of the total payment which would be later reduced upon a contingency related to a child. The temporary regulations caution against creative draftsmanship, indicating that an alimony deduction will also be denied if the reduction is based upon a contingency arguably related to a child.

4. Dependency Exemption for Children. Another significant decision for the parties concerns which of them will receive the dependency exemption for a given child. The dependency exemption, I.R.C. § 151, can amount to a significant offset against income, when there are several children involved.

As a general rule, the custodial spouse gets the dependency exemption unless that parent makes an express waiver of the exemption. The waiver can be made on an annual basis, for a specified number of years, or permanently. The waiver must be made on IRS Form 8332 or an equivalent form. Importantly, IRS expects the waiver to be made on a separate form and not just within the separation agreement or court order.

When negotiating a separation agreement, the attorney should give strong consideration to which party should receive the dependency exemption. Generally, the greatest tax savings will be achieved by giving the exemption to the spouse in the higher income tax bracket. Though this is true, if the noncustodial spouse is the one in the higher bracket, the custodial spouse should receive fair exchange for transferring the exemption to the noncustodial spouse. Additionally, consideration should be given as to whether the waiver is to be made annually, permanently, or for a number of years. Making the waiver annually gives the custodial spouse a form of self-help to ensure that support payments are received. Because the noncustodial spouse must attach the waiver to the tax return each year when claiming the exemption, the custodial spouse can refuse to deliver it to the noncustodial spouse until payments are made. Obviously, from the standpoint of the noncustodial spouse, it would be better to obtain a permanent waiver so that it could be duplicated each year and attached to the tax return avoiding the difficulties of obtaining it annually from the custodial spouse.

A last point concerning the dependency exemption: the amount of child support has no bearing on which party is entitled to claim the child as a dependent. The parties may wish to negotiate more payments as alimony and less as child support to maximize tax benefits. Note, however, that while this is true from a pure tax standpoint, agreeing to unreasonably low child support payments may not be wise since state divorce courts may not accept the agreement and since provisions concerning child support always remain subject to court modification.

5. Property Transfers. A significant aspect of negotiating and drafting separation agreements involves dividing property between the parties. Previously, the tax aspects of transfers of property between spouses were extremely significant, since the transfer could potentially invoke recognition of capital gains to the transferor. The Tax Reform Act of 1984 somewhat simplified the considerations by indicating that some transfers would be given gift treatment. However, the tax considerations of property transfers are still significant, and the attorney drafting or reviewing a proposed agreement should discuss with the client the tax aspects of various provisions of the agreement.

The Tax Reform Act of 1984 changed the law to indicate that all transfers of property after 18 July 1984 between spouses, or between former spouses if incident to divorce, would be given gift treatment. Thus, anytime the transfer is between parties who are still married, the transfer will be treated as a gift. Additionally, if the parties are divorced at the time of the transfer, it will still be treated as a gift if the transfer is made "incident to divorce." Temporary regulations indicate that

a transfer will be "incident to divorce" if it occurs within one year of divorce, or if it occurs within six years of divorce and is made pursuant to a divorce or separation instrument.

Because the transfer is treated as a gift, there will be no recognition of gain or loss as a result of the transfer. The transferee will receive the property with the "carry over" basis, the basis in the hands of the transferor. While this gift treatment does mean that the transferor need not worry about recognition of gain or loss on the transfer, and therefore would seem to simplify the planning at the time of the divorce, it does not mean that the parties should disregard the tax significance of what is occurring. For example, if the property to be transferred has appreciated significantly since its acquisition, the recipient of the property should realize that if the property is later sold, the seller will be responsible for any gain, based on the difference between the amount received and the basis in the hands of the transferor. Additionally, this would include responsibility for recognizing as ordinary income any amounts to be recaptured because of past accelerated depreciation or investment tax credits taken. Importantly, therefore, if there is any likelihood that the property will later be sold or transferred, the recipient should be fully aware of the potential tax liability from a sale.

When valuing the property as part of an equal division of assets, the attorney should calculate the potential shrinkage in actual value of the property due to a subsequent sale and resulting tax liability. For example, assume that the husband has stock with a basis of $1,000 and a current value of $11,000. The parties propose that the stock be transferred to the wife as part of the property distribution. Rather than valuing the stock at the market value of $11,000, if the wife anticipates having to sell the property, she should value it at the after tax-value. In other words, the value of the stock should be discounted by the tax she would have to pay on the gain. If she sold the stock, the wife would have to recognize a gain of $10,000 [$11,000 (fair market value) - $1,000 (carryover basis from husband)]. If the wife were in a 15 percent tax bracket, the result would be an additional $1,500 in tax. Thus, the wife should value the stock not at $11,000, the fair market value, but at $9,500, the value after discounting for the potential tax liability.

The tax significance should also be considered when the property to be transferred has declined in value. If the property were to be transferred, there would be no recognition of the loss. This might be a foolish move if the transferor is in a higher income tax bracket than the transferee. The transferor would be better off to sell the property, recognize the loss for tax purposes, and transfer the proceeds of the sale to the spouse.

Military Practice Note

Legal assistance attorneys frequently have clients who are (or are married to) nonresident aliens. One significant exception to the rule granting gift treatment to transfers involves transfers to a nonresident alien spouse. If the transfer is to a nonresident alien spouse, the transfer will not be given gift treatment. Rather, the transfer will result in recognition of any gain and resulting capital gains tax.

The most significant aspect of property transfers concerns the family residence. The gift tax treatment discussed above applies. The parties should consider these additional tax aspects of any transactions concerning the residence. First, I.R.C. § 1034 permits owners of a primary residence to sell the residence and rollover any gain into a new, more expensive residence, within the replacement period, and defer any tax on the gain. Using this rollover provision generally is important to taxpayers. It is possible for the married parties to sell the home, divide the basis, and both rollover their respective portions of the gain into new homes, but problems arise if the parties retain joint ownership and only one of them intends to live in the home. At some point the home will be sold, and the issue is whether the party who has not lived in the home will be able to claim that the home is a "primary residence" for purposes of the section 1034 rollover. It is likely that the party who no longer lives in the home will be held to have abandoned the home as a primary residence, and, therefore, will not be able to rollover any gain into a new residence, but, rather, will have to pay tax on the gain.

A similar issue involves the I.R.C. § 121 exclusion of up to $125,000 of gain on the sale of a primary residence. Taxpayers age 55 or older are generally permitted to exclude, on a one-time basis, up to $125,000 of any gain on the sale of their primary residence. The section 121 exclusion depends on the home being classified as a primary residence, however, and a similar issue as with the section 1034 rollover arises when one of the parties is no longer living in the home when it is sold. Additionally, when parties are married, both spouses must join in the election to exclude the gain. If the parties do elect to exclude the gain, both are forever precluded from making a second election; thus, the decision as to whether to sell the home at the time of the divorce and take the one time exclusion, is an important one. The election to use the section 121 exclusion can only be made once. Even if the gain is less than $125,000, the parties cannot at some later date elect to exclude the balance of the $125,000 ceiling. If a sale would realize far less than the full $125,000 that is excludible, and if the parties both intend to replace the home, it probably would be wiser to sell the home upon divorce, have each reinvest the appropriate amount of the proceeds into a new home, and each rollover their respective gains under section 1034. Legal

assistance officers should refer to IRS Publication 523 for more information on sale of residences.

G. MODIFICATION AND MERGER

1. **Modification**. Modification of a separation agreement may be provided for in the agreement itself. In the absence of a modification clause, most state courts will not modify a separation agreement except for those provisions affecting children, and, possibly, spousal support. Modification can be provided for by explicit delineation of the terms governing modification or by authorizing a court, in its discretion, to modify the agreement. Most agreements provide that no alteration or modification of the contract shall be effective unless it is in writing and signed by both parties.

2. Merger. Courts normally will not incorporate, or "merge," the provisions of the agreement into the decree of divorce if the parties have stated in the contract that they do not agree to judicial merger of the agreement. The election to merge the agreement, or portions of it, into the judgment can have several important consequences. First, a merged agreement can be modified on the same basis as any other judgment; that is, the agreement itself ceases to exist as a contract between the parties. Additionally, certain types of provisions in the agreement may become enforceable through contempt proceedings. If there is no merger, the agreement retains its status a contract between the parties. A court generally cannot modify the terms of the agreement, and violations of the agreement can be remedied only through an action for breach of contract.

H. LEGAL EFFECT AND DURATION

1. **Legal Effect**. A valid separation agreement binds the parties, is enforceable upon them, and usually is not abrogated by divorce or modified by a support decree without the consent of the parties.

Parties to a separation agreement are, of course, required to comply with applicable marital laws until they are divorced. Community property status is unchanged by the mere physical separation of the spouses, but even in these states a husband and wife may terminate the community property regime by agreement at any point during the marriage. In some equitable distribution jurisdictions, property acquired after the date of separation is separate property.

A general release of all claims and rights against the other spouse is valid in most states. A release should cover after-acquired property and statutory interests in estates as well not

only presently-owned assets. In addition to the release, the agreement should include a clause in which the parties agree to execute all papers, deeds, and other documents which are necessary to put the agreement into practice. If the agreement is to be incorporated into the decree, it may be helpful to include a provision authorizing the court or some officer thereof to execute documents if the other party wrongfully refuses to do so. Clauses which require the parties to make mutual wills for the benefit of third persons (such as the children) should be avoided. Because divorce automatically revokes will provisions for former spouses in many jurisdictions, a new will should be executed following separation and/or divorce to prevent the unfortunate and often unexpected results which occur when an estate passes by intestacy.

2. **Duration.** The duration of separation agreements depends primarily on the provisions included by the parties. Should the agreement so provide, it could be terminated by the death or adultery of a spouse, reconciliation of the spouses, or by the commencing of a divorce action. Cohabitation or the resumption of marital relations may dissolve the contract as a matter of law in some jurisdictions. Careful and explicit draftsmanship should avoid problems in this area.

When the clauses of a separation agreement are held to be independent of each other, the court will award damages only for the breach of a given provision, instead of excusing the performance of the other party, as would be the case were the clauses are dependent. The courts appear reluctant to hold obligations under these agreements conditional, so that if a condition is intended, it should be expressly stated. A general conditional provision often has been held to have no legal effect on anyone's duties.

PART II - FORM OF AGREEMENT

A. Introduction and Directions for Use. The form provisions provided in this chapter were selected because they will, in various combinations, meet the needs of many military personnel seeking legal separation. The legal assistance attorney using this chapter to formulate a client's separation agreement must be mindful of the potential problems inherent in form provisions. No form provision can be expected to fulfill every need. This is particularly true when the provision must reflect the agreement between two adverse parties. Although the provisions included here will meet some needs as they are written, their primary function is to provide an initial step in the process of selecting and drafting effective separation agreements for legal assistance clients. The final document must always represent a careful assessment of the client's desires and needs, including a complete evaluation of all tax matters. Only a word-by-word analysis of what each provision does, and does not do, will allow the drafter to produce a correct instrument.

B. Standard Provisions. The clauses in this section can be used to form a complete separation agreement, or they can be lifted out and used individually, as needed. Section C contains other special provisions. The provisions included and their order of appearance are as follows:

I. Preamble
II. Separation Of The Parties
III. Child Custody And Visitation
IV. Child Support
V. Spousal Support
VI. Division Of Personal Property
VII. Division Of Real Property
VIII. Marital Debts
IX. Life Insurance
X. Emancipation Event
XI. Acceptance And Mutual Release
XII. Release Of Estate Rights
XIII. Military Privileges
XIV. Tax Matters
XV. Prior And Subsequent Agreements
XVI. Additional Instruments
XVII. Subsequent Divorce
XVIII. Counsel Fees
XIX. Waiver Of Rights Under The Soldiers' And Sailors' Civil Relief Act
XX. Enforcement
XXI. Binding Effect

XXII. Notices
XXIII. Entire Agreement
XXIV. Governing Law
XXV. Execution
XXVI. Acknowledgment

In addition to the above clause, attorneys should consider adding provisions that address the division of military retired pay. This subject area, to include sample clauses, is discussed in depth in JA 274, The Uniform Services Former Spouses' Protection Act.

MARITAL SEPARATION AGREEMENT

I. PREAMBLE

THIS AGREEMENT, made and entered this _____ day of _____, 19_____, by and between _____, hereinafter referred to as the Wife, and _____, hereinafter referred to as the Husband.

WITNESSETH:

A. MARRIAGE

WHEREAS, the parties hereto were married on the _____ day of _____, 19_____, in _____, and have been and are now Husband and Wife;[1]

[1] A valid marriage establishes the basis of a legal separation agreement and should be shown in the agreement by including the place and date of the event. A common law marriage can be shown by a recital of the dates, occasions, and jurisdiction under which the marriage was contracted.

B. CHILDREN

WHEREAS, _____ children have been born as issue of this marriage, to-wit: _____, born _____, 19_____, and _____, born _____, 19 _____, and there are no other children born or conceived of this marriage;

OR

WHEREAS, no children have been born or conceived of this marriage;

C. PHYSICAL SEPARATION

WHEREAS, in consequence of [disputes and unhappy differences] [certain events], the parties have [voluntarily] separated on or about the _____ day of _____, 19_____, with the intention of permanently terminating the marital relationship, and are currently living separate and apart from each other without expectation of resuming marital relations;[2]

[2] Provision acknowledges the intentions of the parties to seek permanent dissolution of their marriage.

OR

WHEREAS, [Circumstances have forced the parties to live separate and apart] or [Unhappy differences have arisen between the parties] and the relations between them are and have been of such a character as to render their separation a matter of necessity for the health, welfare, and happiness of both, on account of which the parties have separated and now live separate and apart and intend to live separate and apart from each other for the rest of their natural lives;[3]

[3] Unlike the provision accompanying footnote 2, this provision only acknowledges the intentions of the parties to live separate lives, as a result of circumstance or preference. It does not express any intention concerning a subsequent divorce and should be used in jurisdictions which permit property settlement but do not allow agreements in contemplation of divorce.

D. AGREEMENT

WHEREAS, both parties have arrived at mutually agreeable provisions to settle, adjust, compromise, and determine (for all time) the custody of their minor children, all rights of support and maintenance by either party against the other by reason of their marriage, and all property (including a fair and equitable division of all community property) and other rights and obligations existing between the parties arising out of their marital relationship;

OR

WHEREAS, the parties intend this agreement to be an

amicable settlement by contract of all property and other rights and obligations arising out of their marital relationship[4] and not as an inducement for, or agreement to procure, a divorce;

[4] Provision disclaims that the agreement is for a divorce. This clause should be used with the provision accompanying footnote 3 in jurisdictions which do not allow agreements in contemplation of divorce.

E. CONSIDERATION

NOW THEREFORE, in consideration of the promises, the considerations hereinafter mentioned, the mutual promises herein made and of acts to be performed by them, the parties have agreed and by these presents do agree as follows:[5]

[5] Separation agreements, like other contracts, must be supported by consideration.

II. SEPARATION OF THE PARTIES

A. SEPARATE LIVES

The parties may and shall at all times hereafter live and continue to live separate and apart for the rest of their natural lives. Each shall be free from interference, authority, and control, direct or indirect, by the other as fully as if he or she were single and unmarried. Subject to the provisions of this agreement, each may reside at such place or places as he or she may select. The parties shall not molest each other or compel the other to cohabit or dwell with him or her by any legal or other proceedings for restitution of conjugal rights or otherwise.[6]

[6] Provision should be used with provisions accompanying footnotes 3 and 4 for the reasons stated in those footnotes.

OR

The parties mutually and voluntarily agree, with the intention of terminating the marriage, to continue to live separate and apart in separate places of abode, without any cohabitation, as they have since _____.

B. RECONCILIATION

It is the parties' intention that a reconciliation, either temporary or permanent, shall in no way affect the provisions of this agreement having to do with the settlement and disposition of their property rights in their respective realty,

if any, and personalty, unless a new agreement is entered into in writing mutually revoking and rescinding this agreement and entering into a new one.

OR

Any reconciliation by the parties, however temporary, thereby revokes all provisions of this agreement having to do with the settlement or disposition of property rights in their respective realty, if any, and personalty.

C. RIGHT OF DIVORCE RESERVED

Nothing contained in this agreement shall be construed as a waiver by either of the parties of any ground for divorce which either of them may now or hereafter have against the other, the same being hereby expressly reserved.

III. CHILD CUSTODY AND VISITATION

A. NO CHILDREN

The parties represent that no children have been born or conceived as issue of this marriage.

B. SOLE CUSTODY WITH VISITATION

(Wife) (Husband) shall retain custody and control over the minor children of the parties, namely: _____. The parent retaining custody shall be referred to herein as the custodial parent. The parent relinquishing custody shall be referred to as the noncustodial parent. The custodial parent agrees to consult with the Noncustodial Parent on such matters as major medical treatments and selection of schools for the (child)(children) to promote the best interests of the (child)(children). The custodial parent shall exercise final determination over these matters. The noncustodial parent shall have the right to visit the children (contingent upon (him)(her) being current in the hereinafter required child support payments)[7]

[7] Provision favors custodial parent.

at all reasonable times and places) (designate exact terms, i.e., two weekends each month). The noncustodial parent (may)[8]

[8] Provision favors noncustodial parent.

(shall have the privilege)[9]

[9] Provision favors custodial parent.

during these times, to take the children home or on outings and excursions, and (with the custodial parent's prior consent) visit the children in their home. The noncustodial parent shall be responsible to pick up the children and ensure their return. (If either parent shall move from the locale where the children resided at the time of this agreement, then said parent shall be responsible for the cost of transporting the child for the purpose of visitation). (The noncustodial parent shall be responsible for the cost of transporting the child for the purposes of visitation). (The noncustodial parent shall be responsible for costs of transporting the children for visitation purposes). (Proper advance arrangements shall be made by the noncustodial parent with respect to the exercise of these visitation rights).

C. JOINT CUSTODY

The custody of the minor (child)(children) of the parties, namely, _____, shall be shared jointly by Husband and Wife. The parties agree that although the (child)(children) may reside with (Husband)(Wife), both parties shall exercise joint care and control of the (child)(children) and both parents may visit said minor (child)(children) (at any and all reasonable times and places) (specify terms . . .). The parties hereto represent and agree that the welfare of the (child)(children) shall be the major factor governing all aspects of custody and visitation rights and it is further understood that nothing contained herein shall constitute an abandonment of the said (child)(children) by either of the parties. The parties agree to consult one another with regard to any and all major decisions affecting the health, education, and welfare in the best interests of said (child)(children).

D. SPLIT CUSTODY OF SEVERAL CHILDREN.

Wife shall retain custody and control over _____. Husband shall retain custody and control over _____. Both parties agree to consult with the other on such matters as surgery, major medical treatments and selection of schools for the children. Both shall have the right to visit the children (at all reasonable times and places) (specify terms . . .).

IV. CHILD SUPPORT

A. AMOUNT

1. Basic Provision.

The noncustodial parent agrees to pay to the custodial parent (to be used solely for the benefit of such (child)(children) the sum of $_____ per month (or such increased amount as determined by a court of competent jurisdiction)[10]

[10] No agreement between the parents ever binds the courts concerning child support. However, provision may permit custodial parent to seek modification of child support based on the agreement.

per child for the support and maintenance of each of the (minor) children: (Name children) commencing on the first day of _____, 19 _____, so long as the (child)(children) reside and live with the custodial parent. Such child support payments shall continue until (such (child)(children)) reach the age of eighteen (18 years), marry, die, enter the armed forces, or are otherwise emancipated)[11]

[11] Provision favors noncustodial parent.

(the occurrence of the emancipation event as stated in this agreement) (each of such children are twenty-one(21) years of age or in the event that such (child)(children) are in school (as a (full-time) student) the support payments for such child shall continue to age twenty-two (22) years of age, or until the child is no longer attending school.)[12]

[12] Provision favors Custodial Parent.

2. Automatic Adjustment Based on Consumer Price Index, with Escalating Provision for Defraying Expenses of Older Children.

At a more sophisticated level, parties may wish to consider automatic adjustments of the child support amount in response to the increased cost of supporting older children and to changes in the purchasing power of the dollar. Use the Basic Provision above, but modify it to specify:

"The monthly support for each child shall automatically adjust on April 1 of each year by the percentage change in the Consumer Price Index (CPI) during the preceding calendar year, as reported by the U.S. Bureau of Labor Statistics. The party receiving support payments shall obtain the applicable CPI report and furnish a copy to the payor before April 1 each year. In addition to such annual adjustments, the monthly payment for each particular child shall be increased by $____ per month, commencing the month following that child's _____ (e.g., 14th) birthday, in order to defray the additional expenses of caring for older children."

Note: CPI reports may contain national data and data relating specifically to particular geographical regions of the country.

Counsel should examine a sample CPI report and provide in the agreement an adequate description of the data to be used.

B. MODIFICATION

The parties further acknowledge that the child support required by this agreement is (only) subject to modification by a court of competent jurisdiction (upon a showing of a substantial change of circumstances)[13]

[13] Provision favors Noncustodial Parent.

(in the best interests of the children).[14]

[14] Provision favors Custodial Parent.

To assist the court in any subsequent action concerning child support, the amount of child support stated herein was predicated on the present income of the parties at the time of this agreement of $_____ per month (gross) for Husband and $_____ per month (gross) for Wife.

C. MEDICAL CARE[15]

[15] See also Special Provisions, Section C, this Chapter and IIIB of this section.

The custodial parent will, as necessary and to the maximum extent possible, seek treatment at U.S. Armed Services hospitals for any medical problem for (herself or himself, so long as she or he is entitled to such services) any children in his/her custody. (The custodial parent shall pay the first $100.00 and one-half the excess over $100.00 annually for necessary medical and dental services, hospital care, and medicines for the (child)(children) which are not available at armed services hospitals; and) the noncustodial parent shall pay the balance of the cost of necessary medical and dental services, hospital care and medicines, provided that the custodial parent notifies the noncustodial parent prior to incurring such expenses, except that notice shall not be required in an emergency situation. (As an exception, the total subsistence charges incident to inpatient treatment at a military medical facility or at a civilian hospital under CHAMPUS coverage shall be paid by the custodial parent.)

D. POST-SECONDARY EDUCATION

(Husband)(Wife)(Parties) agree(s) that the differences of the parties in no way effect(s) (his)(her)(their) affection for the (child)(children) and (he)(she)(they both) agree(s) to assist

the (child)(children) with the reasonable expenses of vocational or academic education beyond secondary schooling, whenever necessary and appropriate, in the same manner as if the parties had continued to live together: provided such child is in legitimate and diligent pursuit of such education (not to exceed the attainment of a bachelor's degree)(until age 25).

V. SPOUSAL SUPPORT

A. WAIVER

The parties agree to and do hereby waive all claims for spousal support of any kind from the other.

OR

Wife, (acknowledging that her income and assets are substantially less than that of Husband), agrees to receive no spousal support under this agreement. However, Wife reserves the right to petition a court of competent jurisdiction for an award of periodic and/or lump sum spousal support in the future.

OR

Husband agrees to and does hereby waive all claims to spousal support from Wife, both periodic and lump sum.

B. AMOUNT

(Husband)(Wife) agrees to pay to (Wife)(Husband) for support and maintenance the sum of $_____ per month (describe length of support period, i.e. twelve (12) months) (until further order of the court). There will be no further liability for spousal support payments upon the death (or remarriage) of the (Husband)(Wife).

C. TAX TREATMENT

The parties agree that the support payments will not be treated as alimony for purposes of I.R.C. §§ 71 and 215, and that the payments will not be deductible by the (Husband)(Wife) and will not be treated as gross income to the (Wife)(Husband).[16]

[16] This provision denies alimony treatment to the spousal support payments. Thus, payments will not be deductible by the payor and will not be included in the recipient's gross income.

D. DURATION

Upon the death of the spouse providing support, all spousal support (and child support) payments shall cease, and all claims for future support shall be released.[17]

[17] Provision terminates the support obligation upon the death of the supporting spouse.

OR

All spousal support (and child support) payments provided herein shall constitute an obligation of the estate of the (spouse providing support) and this agreement as to the payment of spousal support shall be binding upon said spouse's heirs, executors, administrators, successors and assigns.[18]

[18] Provision extends the support obligation to the estate of the supporting spouse. CAUTION: Inclusion of this provision would cause all of the spousal support payments to lose alimony treatment. Thus, none of the payments would be deductible by the payor.

VI. DIVISION OF PERSONAL PROPERTY

(Respective possession)

The parties have already divided their personal property, formerly located in the marital domicile and otherwise, to their mutual satisfaction. It is expressly agreed between the parties that each of them shall retain possession of and title to and shall have and enjoy independently of any claim or right of the other party, as his or her own property, that tangible and intangible property which is in their respective possessions as of the signing of this agreement, the same as though he or she were unmarried.

OR

(Separate schedules)

Each party shall have as their own property all of their own personal clothing, books, and effects. Husband shall have as his own property all of the personalty enumerated in the attached Schedule A, which is incorporated by reference. Wife shall have as her own property all of the personalty enumerated in the attached Schedule B, which is incorporated by reference.

OR

(Enumeration of items)[19]

[19] The enumeration of items method can be combined with a respective possession clause to designate only certain items by name and divide the remaining property to the party in possession.

The parties have agreed to divide their personal property to their mutual satisfaction. Henceforth, each of the parties shall own, have and enjoy independently of any claim or right of the other party, all items of personal property of every kind, nature and description and wheresoever situated, as provided herein:

1. Automobile: The _____ automobile now titled in the name of the (Husband)(Wife) (both the Husband and the Wife) and of an agreed value of _____, which is free and clear of all liens, shall be the property of the (Husband)(Wife).

or

The _____ automobile now owned by the parties titled in the name of the (Husband)(Wife) (both the Husband and the Wife) and of an agreed value of _____, subject to an existing lien with a balance due of _____ and payable at the rate of _____ per month with _____ payments remaining shall be the property of the (Husband)(Wife), who assumes liability for and shall make payments on the lien note when due and hold the other harmless therefrom.

2. Personal Effects: All items of personal effects such as, but not limited to, clothing, jewelry, luggage, sports equipment, hobby collections and books, but not including furniture or any property, personal or otherwise specifically disposed of pursuant to this agreement, shall become the absolute and sole property of that party who has had the principal use thereof or to whom the property was given or for whom it was purchased, and each party hereby surrenders such interest he or she may have in any such tangible personal property of the other.

3. Intangible Personal Property (other than life insurance): All stocks, bonds, cash, and sums on deposit in checking and savings accounts (owned by either or both parties) shall be divided as soon after execution of this agreement as practicable in the following manner:

a. Bank Accounts: All sums on deposit in checking accounts (name of owner, account number and bank location) and savings accounts (name of owner, account number and bank location) owned by either or both of the parties in excess of outstanding checks drawn thereon prior to midnight on _____, shall be divided so that Wife receives _____ and Husband receives _____ of these sums as soon after the execution of this agreement as

practicable. Sums which either party has withdrawn from such accounts since midnight on _____ shall be charged as partial distribution to the withdrawing party except to the extent that the proceeds of such withdrawals have been used by the withdrawing party to pay obligations of the other party and except as agreed upon by the parties.

b. Stocks and Bonds: Wife shall receive and retain as her sole and separate property the following stocks and/or bonds in the amounts indicated (list stock number and cost basis). Husband shall receive and retain as his sole and separate property the following stocks and/or bonds in the amounts indicated (list stock number and cost basis).

c. Cash: All cash owned by either or both parties as of the date of the agreement shall be divided equally.

OR

All cash in the possession of each party shall be and is hereby confirmed as the separate property of the person with possession.

d. Furniture and Other Tangible Property: All furniture and other tangible personal property not disposed of pursuant to other paragraphs of this agreement shall be divided equally according to value between the parties. Air conditioners and other removable large appliances shall be considered to fall within this sub-section.

VII. DIVISION OF REAL PROPERTY

A. NON-OWNERSHIP

The parties acknowledge and warrant to each other that they do not own or possess any interest, either individually or jointly, in any real property.

OR

B. INTER-SPOUSAL TRANSFER

(Husband)(Wife) agrees to execute a deed conveying to (Wife)(Husband) as and for her/his sole and separate equitable estate all of his right, title and interest in and to the (improved) real property described as _____, (their residence). (Wife)(Husband) agrees to assume and to pay the amount due and secured upon said premises and to hold (Husband)(Wife) harmless therefrom.

C. SALE

Both parties hereto acknowledge that they are the owners (form of ownership) of their residence located at _____, and agree to list this property for sale with a mutually agreeable real estate broker and to sell said property for or in excess of its fair market value and to divide the proceeds of this sale, after deduction for expenses of sale including realtor fees (equally) (describe agreed percentage of splitting proceeds) between them, which division is acknowledged by the parties as the fair evaluation of the interest of each in and to said property. The parties agree to execute the required documents of sale for or in excess of the fair market value of said home. In any dispute regarding the fair market value of said property, an appraisal by a mutually agreeable land appraiser shall be binding upon both parties. The parties agree to execute a general warranty deed conveying this property to purchasers.

D. ONE PARTY POSSESSION WITH SUBSEQUENT SALE

(Husband)(Wife) (owns) (parties are joint owners of) certain real property located at _____ and _____. The home located at _____ shall be treated as follows:

1. (Wife)(Husband) shall have the exclusive right from and after the date of this agreement personally to occupy the "home" without paying any remuneration therefor to the (Husband)(Wife). While occupying the "home," the (Wife)(Husband) shall pay all charges, mortgage payments, taxes and assessments thereon.

2. In the event (Wife)(Husband) ceases personally to occupy "home" and in any event, no more than _____ years from the date of this agreement, Wife shall exercise the option either to:

a. Sell the "home" at the fair market value and to pay over one-half the net proceeds, as hereinafter defined, to the (Husband)(Wife); or

b. Take title to the "home" in her sole name and pay over to (Husband)(Wife) a sum equal to one-half of the difference between the then appraised fair market value of the "home" and the balance either then due on the currently existing liens on the "home" or balance which would be due thereon if all payments subsequent to the date of this agreement had been made on time, whichever is the lesser sum. The appraised market value for the purpose of this paragraph shall be determined by an independent

appraiser to be selected by mutual agreement between Husband and Wife, or, if they are unable to agree on the selection of such an appraiser, by an appraiser selected by the persons suggested as appraisers by Husband and Wife. The cost of such appraisal shall be divided equally between the parties.

c. If (Wife)(Husband) elects to sell the "home," the net proceeds thereof, subject to division pursuant to subparagraph b above, shall mean the gross sales price in the contract of sale less balance then due on currently existing liens on the home, any real estate broker's commissions, attorney's fees, advertising costs, transfer and sales and documentary taxes and other closing costs exclusive of prorated taxes and interest payable by the seller, the cost of any capital improvements made by (Wife)(Husband) following the date of this agreement (less reasonable depreciation), and the actual cost of any fixing up expenses, repairs, maintenance, and non-capital improvements (Wife)(Husband) may make to the "home" during the 90 days immediately preceding the date on which the sales contract was made and actually paid not later than 30 days after the date of sale. However, (Wife)(Husband) shall not incur any such capital expenditures or improvement in excess of $500.00 without the prior written consent of (Husband)(Wife).

d. The following items now located at the "home" are to be considered a part of the "home" and not items of furniture or tangible personal property within the meaning of paragraph 5 of this agreement: rugs, fireplace equipment, drapes, blinds, and garden tools. The (Wife)(Husband) may have the use of the large appliances such as range, refrigerator, washer and dryer as long as she/he occupies the "home" under this agreement. If the items mentioned in the two preceding sentences are not subsequently sold as part of the "home," they shall be divided as provided in paragraph 5.

e. There shall be no major alteration of the real estate or the building without the express written consent of the (Husband)(Wife) or his/her representative. A major alteration shall be that which, when completed, costs more than (specify amount . . .).

E. OTHER REAL ESTATE

Other real estate located at _____ _____ shall be sold and the proceeds after expenses of sale shall be paid (one-half to Husband and one-half to Wife) (describe agreed division of proceeds). Husband and Wife shall have the option over all other persons to purchase the property upon payment of one-half the fair market to the non-purchasing spouse, but (Husband's)(Wife's) option shall have priority over that of (Wife)(Husband).

VIII. MARITAL DEBTS

A. RESPONSIBILITY

Both parties agree that they have not at the time of this agreement and will not in the future incur any debts or make any contracts for which the other shall be liable and each further covenants to save the other, or their estate, free, harmless and indemnified of and from all such debts and liabilities.

OR

(Husband)(Wife) shall be solely responsible for the following presently outstanding debts of the parties and children:

_____

_____

_____.

Each party shall hold harmless and indemnify the other against any and all liability in connection with those bills that he or she is obligated to pay under the terms of this agreement.

B. SET OFF

If either party shall be requested to pay any legally binding debts or parts of such debts of the other party or a child for which he or she is not liable under the terms of this agreement, that party may pay such debts and charge the payment against support payments.

C. FUTURE DEBTS

The parties hereto agree that no further debts will be contracted in the name of the other party, and to hold the other harmless in the event of a breach of this paragraph. The parties further agree that neither party shall charge or cause or permit to be charged to or against the other any purchase or purchases which either of them may hereafter make, and neither shall hereafter secure or attempt to secure any credit upon or in connection with the other, or in his or her name, and each of them will promptly pay all debts and discharge all financial obligations which each may incur for himself or herself.

IX. LIFE INSURANCE

The parties acknowledge that certain life insurance policies are in force on the lives of the parties with the other as beneficiary. The parties hereby agree that the party in possession

of a policy or policies may do with such as he/she in his/her sole discretion deem proper including, but not limited to, the termination of said policies, or the designation of another beneficiary.

OR

(Husband)(Wife) agrees to irrevocably designate (Wife)(Husband) as beneficiary on the life insurance policies currently existing on his/her life and to continue to pay the premiums thereon so long as he/she is required to make spousal support payments under the terms of this agreement.

OR

(Husband)(Wife) agrees to pay the premiums and to maintain in full force and effect insurance on his/her life payable to the (Wife)(Husband) in a net amount of _____ and insurance on his/her life payable to children, share and share alike, in a new amount of _____. The designation of (Wife)(Husband) as beneficiary under the _____ (company and policy number) policy and the children as the beneficiaries under the _____ (company and policy number) policy shall be irrevocable, and (Husband/Wife) agrees to execute the necessary instruments to make such irrevocable designation. (Husband)(Wife) shall not encumber or borrow against such policies without prior written consent of (Wife)(Husband).

X. EMANCIPATION EVENT

With respect to a child, an emancipation event shall be deemed to occur upon the earliest happening of any of the following:

A. Reaching the age of (twenty-one)[20]

[20] Provision favors custodial parent and children.

(eighteen)[21]

[21] Provision favors noncustodial parent.

years or the completion of four academic years of college education, whichever occurs first, except in the case of a handicapped child;

B. Marriage;

C. Death;

D. Entry into the Armed Forces of the United States,

(however, if the child is discharged from the service before his/her twenty-first birthday, an emancipation event will not have been deemed to occur except for the period of actual service in the armed force;)[22]

[22] Provision favors custodial parent.

E. Engaging in full-time employment other than during vacation and summer periods;

F. Engaging in part-time employment, if not a student.

An emancipation event shall be deferred beyond the eighteenth birthday of the child only if, and for only as long as, that child pursues a college education with reasonable diligence and on a normally continuous basis,but in no event shall emancipation be deferred beyond the (number) birthday of the child. College education does not include (part-time) (evening only) education. In the event of such deferral, the noncustodial parent at his/her option, may pay the support provided for herein, as may be later modified, direct to the child and/or directly to the educational institution for the benefit of the child.

For the purposes of this agreement, a handicapped child shall mean one who is physically or mentally incapable of continuous self-support, as opposed to unwilling to support himself or herself at the age of eighteen years and thereafter. During the period of time the handicapped child is engaged in full or part-time employment, the obligation of the noncustodial parent for child support shall be reduced by the amount of the handicapped child's net income; but upon the termination of such employment, the noncustodial parent's obligation shall continue in full effect.

XI. ACCEPTANCE AND MUTUAL RELEASE

Each of the parties receives the property set apart to them and the undertakings hereof in full and complete settlement and release of all claims and demands of every kind, name, or nature against the other party hereto, including all liability now or at any time hereafter existing or accruing on account of support, maintenance, spousal support, dower, courtesy, or other allowances, either statutory or arising at common law, incident to the marriage relation; and after this settlement, Husband and Wife shall require nothing whatever of the other, except as herein provided, as though the marriage relation between them had never existed.

XII. RELEASE OF ESTATE RIGHTS

Wife agrees that the estate of Husband, after payment of the consideration herein mentioned to Wife, shall belong to the person

or persons who would have become entitled thereof if the Wife had died during the lifetime of Husband; and Wife further agrees that she will not contest any will of Husband to be probated, and will allow administration upon his personal estate to be taken out by the person or persons who would have been entitled to do so had Wife died during the lifetime of Husband. Husband agrees that the estate of Wife including the consideration herein mentioned, shall belong to the persons who would have become entitled thereto if Husband had died during the lifetime of Wife; and Husband further agrees that he will not contest the will of Wife to be probated, and will allow administration upon her personal estate to be taken out by the person or persons who would have been entitled to do so had Husband died during the lifetime of Wife. Each party releases to the other and to the heirs, executors, administrators and assigns thereof all claims to or rights of, dower, courtesy, or inheritance, descent, distribution, election, or alimony (except that accruing under provisions of this agreement) in and to all property, real or personal, of the other, whether now owned or hereafter acquired. Each party renounces any claim or right to petition for letters of administration or to act as representatives of the other's estate even though there be no dissolution of marriage.

XIII. MILITARY PRIVILEGES

A. CHILDREN'S ENTITLEMENTS

It is further mutually agreed by and between the parties that consistent with existing regulations of the United States Army, (Husband)(Wife) hereby specifically agrees to cooperate fully in furnishing any and all assistance in obtaining and maintaining all benefits due to the minor child(ren) of the parties, namely, _____, by reason of (his)(her)(their) status as (a) military dependent(s). (Husband)(Wife) further specifically agrees to take whatever action is necessary to obtain any and all service-connected benefits for the minor child(ren), including, but not limited to, post exchange benefits, commissary benefits, education benefits, medical treatment benefits or any other benefits the minor child(ren) (is)(are) able to derive by reason of military dependent status, consistent with the regulations of the United States Army.

B. MEDICAL CARE

It is further mutually agreed by and between the parties that (Wife)(Husband) will comply to the maximum extent possible with the provisions of any military service health program for the care of the minor child(ren). (Wife)(Husband) specifically agrees to maintain all records and receipts required by said program and to prepare whatever forms are required for obtaining reimbursement

for medical and/or dental care and treatment for the minor child(ren). (Wife)(Husband) shall obtain identification cards, and take all other actions necessary to assure that the children enjoy full access to, and benefits from, any government operated, funded or reimbursed medical or dental care program for which dependents of present and former service members are eligible under the law. A copy of this Agreement, or of an abstract containing this paragraph, shall constitute the (Wife's)(Husband's) direction and request to the administrator of any such program to enroll the children as participants.

C. SPOUSAL ENTITLEMENTS

(Husband)(Wife) will continue to sponsor (Wife)(Husband) in order to keep (her)(him) entitled to all military privileges provided under (U.S. Army)(NATO-SOFA)(USAREUR) Regulations as long as (Wife) (Husband) continues to qualify as a dependent and for the benefits. In the event a final decree of divorce or dissolution of marriage is entered as between the parties, (Wife)(Husband) agrees to return to (Husband)(Wife) all (her)(his) military privilege cards in (her)(his) possession. (Husband)(Wife) agrees to continue to sponsor the minor child(ren) as (his)(her) dependent(s) for all military benefits until the child(ren) no longer qualif(ies)(y) for dependent status under law or military regulations.

D. TRANSPORTATION

(Husband)(Wife) will arrange for transportation of the (Wife)(Husband) and child(ren) and all their property in accordance with military regulations to a place to be designated by (Wife)(Husband), which transportation shall be at no expense to them. (Wife)(Husband) agrees to use (her)(his) best efforts to not exceed (Husband's)(Wife's) weight allowance. The excess weight allowance shall be borne by (Husband)(Wife). The military sponsor agrees to execute all necessary documents in a timely manner (including DD Form 1299, Application For Shipment/Storage of Personal Property) to enable (Husband)(Wife) to secure release of such property.

XIV. TAX MATTERS

A. ANNUAL RETURNS

The parties agree to file joint federal and state income tax returns for the year _____, and for any subsequent year during which they shall be Husband and Wife and entitled under the applicable laws and regulations to file joint returns, provided that such filing results in a lesser combined tax than would result

from separate filing. Each party shall pay that proportionate share of the tax due as shall be attributable to his or her respective earnings or income and each shall indemnify and hold harmless the other against any liability for his or her own proportionate share of said tax. Any refund that is realized as a result of a joint return shall be divided (proportionately)(equally) between the parties.

OR

The parties agree to file separate federal and state income tax returns for the year _____, and for all subsequent years. Any tax refund from said returns shall be the sole property of the party filing the separate return.

B. DEPENDENCY EXEMPTION

The parties agree that the (Husband)(Wife) is hereby entitled to the dependency exemption for the child(ren) for any calendar year in which (he)(she) provides the child support required by this agreement. The (Husband)(Wife) agrees to make a permanent waiver of the dependency exemption for the child(ren) by signing an IRS Form 8332 and providing same to the (Husband)(Wife).[23]

[23] Provision favors noncustodial parent by having the custodial spouse make a permanent waiver of the dependency exemption.

OR

Provided that no arrearage in the payment of child support exists, the (Husband)(Wife) shall be entitled to claim _____ as a dependent for tax purposes in any year in which separate tax returns are filed[24]

[24] Provision favors custodial parent by requiring an annual waiver of the dependency exemption and conditioning the waiver on full payment of child support.

and the (Wife)(Husband) agrees to sign an IRS Form 8332 and deliver same to the (Husband)(Wife) by the first day of February of the year following the year for which the dependency exemption is to be claimed.

C. DISCLOSURE

For the purpose of giving effect to this agreement, each party agrees to send the other on or before _____ of each year beginning with 19____, a copy of his or her respective federal income tax return, including appended schedules.

D. INDEMNIFICATION

(Husband)(Wife) agrees to hold (Wife)(Husband) harmless from any claim, damage, or expense arising out of any deficiency assessment made against a joint return due to the error, neglect or malfeasance of (Husband)(Wife) (in the preparation of the return).

XV. PRIOR AND SUBSEQUENT AGREEMENTS

The parties hereto hereby cancel, annul and invalidate any and all prior property settlements by them at anytime heretofore made. All modifications of this agreement shall be of no effect unless expressed in writing and signed by both parties.

XVI. ADDITIONAL INSTRUMENTS

Each of the parties shall promptly execute and deliver such deeds, title documents, releases, assignments, identification cards, applications for dependent identification cards, medical policies, applications for benefits, or other written instruments as may be required from time to time to carry into effect fully the terms and conditions of this agreement according to the true intent and meaning thereof.

XVII. SUBSEQUENT DIVORCE

In the event that an action for divorce is instituted at anytime hereafter by either party against the other in this or any other state or country, the parties hereto agree that they shall be bound by all the terms of this agreement and that this agreement shall not be merged in any decree or judgment that may be granted in such an action but shall survive same and shall be forever binding and conclusive on the parties, but nothing herein shall be construed to prevent the decree of judgment in any such action from incorporating in full or in substance the terms of this agreement.

XVIII. COUNSEL FEES

(The parties agree to divide equally) (The party initiating the suit agrees to pay) all court costs in connection with any divorce action which may be instituted at any time in the future between the parties hereto. Each party will pay his or her own attorney's fee. Each party hereby releases the other from any further obligations to pay any other or further counsel fees for each other or on each other's behalf in connection with any matter,

except for the costs of the enforcement of the terms of this agreement in the event of one party's non-compliance, in which case the non-complying party shall be responsible for all reasonable expenses incurred in enforcement.[25]

[25] Provision separates the responsibility for court costs from the obligation for attorney's fees. This allows the parties to split the court costs while remaining responsible for their respective attorney's fees. It also permits the recovery of attorney's fees from a party in noncompliance with the agreement.

However, if any suit or action is brought to declare or to enforce the rights of one of the parties under this agreement, the court may in its sound discretion award attorney fees and costs to the prevailing party; and the court shall make such an award if the suit or action is brought successfully to enforce a child or spousal support obligation.

Although this is not an agreement to obtain a divorce, it is understood that the parties will be responsible for their own counsel fees and costs in any subsequent divorce action or other proceeding brought by either party.[26]

[26] Provision maintains separate responsibility for all costs and fees, including expenses to enforce the agreement.

OR

Although this is not an agreement to obtain a divorce, in the event that divorce proceedings are filed, it is understood that (Husband)(Wife) will pay the counsel fees for (Wife)(Husband) for such proceedings not to exceed the amount of $_____. Thereafter (Wife) (Husband) will be responsible for her/his own counsel fees in any divorce proceeding brought by either party. (Husband)(Wife) also agrees to pay all court costs for any future divorce action.[27]

[27] Provision requires one party to pay a portion of the other party's expenses in a subsequent divorce action.

XIX. WAIVER OF RIGHTS UNDER THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

(Both parties)(Husband)(Wife) hereby agree(s) to waive any and all rights (they/he/she) may have under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, in any subsequent action for divorce instituted by (Wife)(Husband) provided that the terms of the divorce decree will not contradict, change, add or delete from any of the terms of this agreement in any manner whatsoever. (Husband)(Wife) (Parties) realize(s) that this waiver will allow a default judgment of divorce to be entered

against (him)(her)(either of them) in accordance with the terms of this agreement.

XX. ENFORCEMENT

(Wife)(Husband) agrees that she/he will not contact either directly or indirectly, the armed forces or commanding officer of (Husband)(Wife) with respect to the enforcement of this agreement as long as there is compliance with the terms of this agreement.

XXI. BINDING EFFECT

All covenants, promises, stipulations, agreements and provisions contained herein shall apply to, bind and be obligatory upon, the heirs, executors, administrators, personal representatives and assigns of the parties herein.

XXII. NOTICES

For purposes of this agreement, all notices or other communications given or made hereunder shall, until written notice to the contrary, be given or mailed to Wife at _____, and Husband at _____. (Each may have more than one.)

XXIII. ENTIRE AGREEMENT

Both the legal and practical effect of this agreement in each and every respect and the financial status of the parties have been fully explained to both parties by legal counsel of each party's independent choice, and both parties acknowledge that the agreement is fair and is not the result of an fraud, duress or undue influence exercised by either party upon the other or by any other person or persons upon either, and they further agree that this agreement contains the entire understanding of the parties, there being no representations, promises, warranties, covenants or undertakings other than those expressly set forth herein.

XXIV. GOVERNING LAW

This agreement shall be interpreted in accordance with the laws of the State of _____.[28]

[28] Provision establishes the controlling state law for any subsequent action for enforcement or interpretation of the agreement. See also the text in Part I.

XXV. COUNSEL

Each party represents and acknowledges that they have been represented by counsel or have consulted with counsel or have been given the opportunity to consult with counsel prior to the execution of this agreement and have read and fully understand each and every provision of the agreement.

XXVI. EXECUTION

The parties have been advised and are aware that this agreement shall not be binding on either party unless it is duly executed by both parties.

IN WITNESS WHEREOF, I have at _____, this _____ day of _____, 19 _____, set my hand and seal to this separation agreement consisting of _____ ( ) typewritten pages, this included, the preceding pages hereof bearing my initials.

_____
(HUSBAND'S SIGNATURE)

ACKNOWLEDGMENT

(Civilian notary)

STATE OF _____)
COUNTY OF _____)

On this _____ day of _____, 19_____, before me, a Notary Public in and for the _____, personally appeared _____, known to me to be the person whose name is subscribed to the foregoing separation agreement, and acknowledged to me that he voluntarily executed the same for the purposes therein contained.

Witness my hand and official seal on the day and year first above written.

_____
(Signature of Notary Public)

My Commissions Expires:

_____

(Alternative military notary format)

STATE OF _____)
COUNTY OF _____)

or

WITH THE UNITED STATES
ARMED FORCES IN _____)

On this _____ day of _____, 19_____, before me, the undersigned officer of the United States Army, granted the general powers of a Notary Public under 10 U.S.C. § 936 and appropriate state laws, personally appeared _____, known to me to be the person whose name is subscribed to the foregoing separation agreement, and acknowledged to me that he voluntarily executed the same for the purposes therein contained.

Witness my hand on the day and year first above written. (By statute, no seal is required).

_____
(Signature of Officer)

_____
(Printed Name, Rank, Title, and Branch)

IN WITNESS WHEREOF, I have at _____, this _____ day of _____, 19 ____, set my hand and seal to this separation agreement consisting of _____ ( ) typewritten pages, this included, the preceding pages hereof bearing my initials.

_____
(WIFE'S SIGNATURE)

ACKNOWLEDGMENT

(Civilian notary)

STATE OF _____)
COUNTY OF _____)

On this _____ day of _____, 19_____, before me, a Notary Public in and for the _____, personally appeared _____,

known to me to be the person whose name is subscribed to the foregoing separation agreement, and acknowledged to me that she voluntarily executed the same for the purposes therein contained.

Witness my hand and official seal on the day and year first above written.

_____
(Signature of Notary Public)

My Commissions Expires:
_____

(Alternative military notary format)

STATE OF _____)
COUNTY OF _____)

or

WITH THE UNITED STATES
ARMED FORCES IN _____)

On this _____ day of _____, 19_____, before me, the undersigned officer of the United States Army, granted the general powers of a Notary Public under 10 U.S.C. § 936 and appropriate state laws, personally appeared _____, known to me to be the person whose name is subscribed to the foregoing separation agreement, and acknowledged to me that she voluntarily executed the same for the purposes therein contained.

Witness my hand on the day and year first above written. (By statute, no seal is required).

_____
(Signature of Officer)

_____
(Printed Name, Rank, Title, and Branch)

C. SPECIAL PROVISIONS

1. Special Spousal Medical Coverage Clauses.

NOTE - Clauses a through d were drafted by Mr. Willard H. DaSilva, a New York practitioner who is a past president of the American Academy of Matrimonial Lawyers, New York Chapter.

a. Minimal Coverage.

The Husband during his lifetime agrees to furnish at his own expense Blue Cross, Blue Shield and major medical insurance (or their equivalent) for the benefit of the Wife until the earlier of her death or remarriage, as "remarriage" is hereinbefore defined in this agreement.

b. Clause Placing Dollar And Time Limitations On Husband's Obligation.

The Husband agrees during his lifetime to furnish at his own expense Blue Cross, Blue Shield and major medical insurance (or their equivalent) for the benefit of the Wife until the earliest happening of her death, her remarriage (as "remarriage" is hereinbefore defined in this agreement) or the fifth anniversary date of this agreement, provided however that the Husband's liability therefor does not exceed the sum of $1,200 in any calendar year and with the understanding that in the event that said premiums shall exceed the sum of $1,200 in any calendar year, the Wife shall bear said excess cost.

c. Clause To Provide For Broad Coverage To Spouse.

The Husband during his lifetime agrees to furnish at his own expense Blue Cross, Blue Shield and major medical insurance (or their equivalent) with the broadest coverage available and with the minimum deductible provision for the benefit of the Wife until . . .

d. Clause To Continue Existing Private Coverage.

The Husband during his lifetime agrees to furnish at his own expense medical insurance with benefits which are presently available to the Wife under the existing policy until . . .

e. General Medical Coverage Provision.

_____ agrees to maintain in full force and effect (his)(her) group hospitalization coverage with _____, policy no. _____, for the benefit of

_____, and the minor child(ren) and to pay all necessary dental, medical, hospitalization, and major medical expenses should they be required.

2. Special Military Medical Provisions.

a. CHAMPUS Deductible Only.

(Husband)(Wife) agrees to pay the annual CHAMPUS deductible but will not be responsible for any other costs incurred which are in excess of CHAMPUS coverage.

b. CHAMPUS Deductible and Excess Medical Costs.

(Husband)(Wife) agrees to pay the annual CHAMPUS deductible and any other costs incurred which are not reimbursed by CHAMPUS, whether for in patient or out patient care.

c. Clause Requiring Custodial Spouse to Use Military Medical Treatment Facilities, If Available.

When obtaining medical care on behalf of the parties' minor children, the custodial spouse agrees to use military medical treatment facilities, if at all possible. If civilian facilities are used, custodial spouse agrees to timely seek CHAMPUS reimbursement and/or agrees to assist the noncustodial military parent in completing any necessary CHAMPUS forms. If military facilities are available and the custodial spouse, in a nonemergency, fails to use them, the noncustodial military spouse will not be liable for any expenses incurred.

3. Attorney Representation Provisions.

a. Both Parties Represented by Counsel.

Both parties represent and acknowledge that they have been represented by counsel and have consulted with counsel prior to the execution of this agreement and have read and fully understand each and every provision of this agreement.

b. One Party Not Represented By Counsel.

(Wife)(Husband) acknowledges that (Wife)(Husband) has been represented by counsel in negotiating this Agreement. (Wife)(Husband) further acknowledges that (he)(she) has been offered the opportunity and strongly encouraged to consult with an attorney and expressly waives such consultation. (Wife)(Husband) has read and fully understands each and every provision of this Agreement.

4. Transfer of Automobile.

The (Husband)(Wife) hereby assigns to the (Wife)(Husband, free of all liens and encumbrances, and releases and relinquishes unto (him)(her) any and all right, title, and interest in and to a _____ automobile belonging to the parties and now in the possession of _____. Both parties agree to execute any bill of sale, registration certificate, or other document necessary to transfer full and complete title to said automobiles as aforesaid.

5. Release of Interest in Realty.

_____ hereby releases and relinquishes any and all right, title, interest, equity, and estate in and to the property now held by the parties as tenants by the entirety and situation at _____, and (he)(she) agrees, upon request of _____, to execute his warranty deed conveying interest. [Under the current law, it will probably be necessary to sell such property or for one spouse to buy out the other.]

6. Survivor Benefit Plan Provision.

(Husband)(Wife) hereby agrees to designate (Husband)(Wife) as the beneficiary of (his)(her) Survivor Benefit Plan and agrees to provide the appropriate military finance center retired pay office with any necessary forms or other information to accomplish this designation.

7. Military Retired Pay Provisions.

a. Fractional or Percentage Share.[29]

[29] This provision gives the former spouse the benefit of subsequent Cost of Living pay increases.

The parties hereby agree that the nonmilitary spouse is awarded (specify fraction, e.g., "1/2" or specify percentage, e.g., "50%") of the military member's disposable military retired pay as his/her separate property. If the nonmilitary spouse qualifies for a direct payment from the appropriate finance center, the military member/retiree agrees to provide any necessary forms or other information necessary to accomplish this designation. (The military finance center is hereby directed to initiate a direct payment from (husband's)(wife's) retired pay.)

b. Set Dollar Amount.[30]

[30] This provision safeguards any subsequent Cost of Living pay increases for the retiree (unless the spouse has the order modified

each time a raise is received).

The parties hereby agree that the nonmilitary spouse is awarded _____ ($_____) of the military member's or retiree's disposable military retired pay as his/her separate property. If the nonmilitary spouse qualifies for a direct payment from the appropriate military finance center, the military member/retiree agrees to provide any necessary forms or other information necessary to accomplish this designation. (The military finance center is hereby directed to initiate a direct payment from (husband's)(wife's) retired pay.)

c. Share Based On Rank At Time of Divorce.[31]

[31] This clause denies the former spouse the benefit of increased pay for a member who is promoted after the divorce.

The parties hereby agree that the nonmilitary spouse is awarded (specify fraction, e.g., "1/2" or percentage, e.g., "50%") of the military member's or retiree's disposable military retired pay as his/her separate property, based upon the military member/retiree's rank and pay level at the time this agreement is executed. If the nonmilitary spouse qualifies for a direct payment from the appropriate military finance center, the military member/retiree agrees to provide any necessary forms or other information necessary to accomplish this designation. (The military finance center is hereby directed to initiate a direct payment from (husband's)(wife's) retired pay.)

ALABAMA

STATUTES:

I. Marriage - ALA. CODE §§ 30-1-3 to 30-1-18 (1989 & Supp. 1994).

II. Divorce - ALA. CODE §§ 30-2-1 to 30-2-55 (Divorce & Alimony) (1989 & Supp. 1994).

- ALA. CODE §§ 30-3-1 to 30-3-61 (Child Custody & Support) (1989 & Supp. 1994).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Under 18 and not previously married requires personal or written consent of parent or guardian and a $200 bond. § 30-1-5. Consent must be given personally or in writing with proof of execution. § 30-1-4. No person under 14 may marry. § 30-1-4. Marriage not void due to lack of parental consent. They are however, voidable while one of the parties is under age.

(2) License Fee - Ten dollars ($10). § 12-19-90(32). License is issued by probate judge and is good for 30 days.

(3) Waiting Period - None, except 60 days following a divorce. § 30-2-10.

(4) Solemnization - Any licensed minister or judge may perform marriage. A marriage license is required before marriage can be solemnized. § 30-1-7 to 30-1-9.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Common law marriages are recognized. White v. Hill, 58 So. 444 (Ala. 1912); Herd v. Herd, 69 So. 885 (Ala. 1915); Hudson v. Hudson, 404 So. 2d 82 (Ala. Civ. App. 1981); Waller v. Waller, 567 So. 2d 869 (Ala. Civ. App. 1990). See also, § 30-1-4, § 30-1-9.

(2) Marriage by Proxy - No statutory provision/not authorized.

(3) Marriage by Contract - No statutory provision/not authorized.

PROHIBITED MARRIAGES: Incestuous marriages are also prohibited. § 13A-13-3. However, before it is annulled, an incestuous marriage will not be deemed illegitimate. § 30-1-3. Bigamous marriages are prohibited. § 13A-13-1.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: No statutory provision, but it is within the equity powers of the court with respect to contracts. Taylor v. Taylor, 31 So. 2d 579 (Ala. 1947). Grounds developed by jurisprudence. Insanity of one party at time of marriage; fraudulent intent not to perform marriage vows; incest; lack of parental consent; underage spouse (14); bigamous marriage; under influence of intoxicants/drugs; fraud; duress; mistake and force.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - One party must be a bona fide resident of this state for 6 months next before the filing of the complaint, which must be alleged in the complaint and proved. § 30-2-5. Two-year residency is required if divorce is sought upon ground of nonsupport. Husband and wife must have been separated during this time. § 30-2-1(a)(12). Venue is in the county of residence prior to separation. § 30-2-4

(2) Military Provision - Persons in federal service and spouses living in the state are deemed residents for initiating civil actions in the state's courts. § 6-720.

(3) For out-of-state defendants (resident or nonresident) by personal service or certified mail (return receipt requested showing name, date, and address) may be used with restricted delivery. ARCP Rule 4.2(b). The effective date of such service is the date of delivery. ARCP 4.2(b)(1)(B). Publication in a newspaper at least once a week for 4 successive weeks may be used in an action concerning marital status, if the certified mail service is not effective and an affidavit is filed with the court. Effective date of service by publication is the date of last publication. ARCP Rule 4.3.

(4) Answer - Within 30 days after date of service. ARCP 12(a).

(5) Verification - Defendant is not required to verify the answer by oath. § 30-2-7.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Irretrievable breakdown; lack of physical capacity; adultery; voluntary abandonment from bed and board for one year; imprisonment in a state penitentiary for 2 years where sentence is 7 years or longer; commission of a crime against nature before or after marriage; addiction to certain drugs or habitual drunkenness after marriage; complete incompatibility; confinement to a mental hospital for 5 successive years or insanity; wife pregnant at time of marriage without husband's knowledge or agency;

violence or reasonable apprehension thereof against spouse; or wife separated from bed and board without support for 2 years while residing in Alabama. § 30-2-1.

(2) Defenses - Recrimination is a defense to divorce on grounds of adultery. Recrimination includes condonation and consent. § 30-2-3. Misconduct of plaintiff and mutual consent are defenses to voluntary abandonment.

(3) Period of Separation - Not required, unless when a divorce from bed and board is converted to a divorce from the bonds of matrimony, then the period is 2 years. § 30-2-1(12).

SEPARATION:

(1) Acknowledged Legal Status - A divorce from bed and board may be granted when requested. Grounds are either cruelty or any other ground listed under divorce. § 30-2-30.

(2) Effect of Separation Agreement on Divorce Decree - No statutory provision. Courts may adopt or reject provisions of separation agreement as it may deem proper. Brothers v. Vickers 406 So. 2d 955 (Ala. Civ. App. 1981).

(3) Allowance - In case of divorce from bed and board, court has same power to make allowance to either spouse out of estate of other spouse and to provide for custody and education of children as in cases of divorce from bonds of matrimony. § 30-2-31.

TIME REQUIRED BEFORE REMARRIAGE: Sixty (60) days except to one another. § 30-2-10.

ALIMONY AND CHILD SUPPORT:

Alabama amended its alimony statutes after they were held unconstitutional (equal protection) in Orr v. Orr, 440 U.S. 268 (1979). They now provide as follows:

(1) Pending suit for divorce, the court may make an allowance for support of either spouse, suitable to the condition in life of the parties, for not longer than necessary for prosecution of the suit. § 30-2-50.

(2) Alimony may be awarded to either spouse where that spouse's estate is not sufficient for his or her support. Judge may not take into consideration property acquired before marriage or by inheritance or gift if the property remained separate. § 30-2-51.

(3) Alimony has as its sole object the support of the spouse and is not considered a property settlement. Ex parte Thompson, 210 So. 2d 808 (Ala. 1968).

(4) Alimony may be made in gross out of the spouse's estate, payable presently or as directed, or it may be made as for continuous maintenance, payable in monthly or other installments, or by a combination of these methods. Ex Parte Thompson, 210 So. 2d 808 (Ala. 1968). To constitute alimony in gross, the time and amount of payment must be certain and the right to receive the payments vested and not subject to modification. Boley v. Boley, 589 So. 2d 1297 (Ala. Ct. App. 1991).

(5) Award of one-half the family home is considered as part of alimony in gross. Weeks v. Weeks, 260 So. 2d 396 (Ala. App. 1972).

(6) Where husband promised in the separation agreement to pay all amounts owing creditors, such payments were not considered alimony. Such payments were not to the other spouse and were not for necessaries. Thompson, supra.

(7) Award within sound judicial discretion of trial judge--see Dowdy for a clear case of abuse of discretion. Dowdy v. Dowdy, 473 So. 2d 1091 (Ala. Civ. App. 1985).

(8) Considerations/Factors in determining amount of alimony or equitable distribution of property are: earning ability of parties; future proposal; age; health; duration of marriage; accustomed standards of living; source, value and type of property; and conduct of parties related to marriage.

(9) Alimony may be terminated upon proof of remarriage or cohabitation by the recipient. § 30-2-55.

(10) Father must furnish necessaries for the child, including medical care. Osborn v. Weatherford, 170 So. 95, (Ala. App. 1936).

(11) Child Support Guidelines - The Alabama Supreme Court pursuant to its rule making authority adopted advisory Child Support Guidelines in accordance with the Child Support Enforcement Amendments of 1984 (P.l. 98-378). The guidelines are based on the income sharer model developed by the National Center for State Courts. Attorneys for petitioners and respondents are required to submit a child support guideline form and income affidavit in each action to establish or modify child support. The Child Support Guideline form sets forth the combined family income, basic child support obligation as determined from the Schedule of Basic Child Support Obligations and any adjustments. A portion of the adjusted total child support obligation is then ascribed to each parent

based on percentage share of family income. The guidelines and implementation procedures are located at Rule 32, Rules of Judicial Administration, Alabama Rules of Court 1988. See National Center for State Trusts, Child Support Guidelines, March 1992.

(12) Alabama has adopted mandatory wage withholding for purposes of compelling the payment of child support. § 30-3-61.

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution.

(2) Fees Awarded - Attorney fees allowed based on discretion of trial court. Rockridge v. Rockridge, 448 So. 2d 378 (Ala. Civ. App. 1984) (citing 8 factors to consider in arriving at nature of legal resources).

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: Not adopted. Original URESA adopted in 1951. §§ 30-4-80 to 30-4-98.

DETERMINATION OF CHILD CUSTODY: Upon granting a divorce, court may give custody and education of children to either mother or father "as may seem right and proper, having regard to the moral character and prudence of the parents and the age and sex of the children." Where the wife has abandoned the husband, the husband is to have custody of the children after they are 7 years old, if he is a suitable person. § 30-3-1. In cases of voluntary separation, the court may award either father or mother custody of the children, having regard to the prudence, ability, and fitness of the parents, and the age and sex of the children. § 30-3-2. The paramount consideration is the best interest of the child.

GRANDPARENTS VISITATION RIGHTS: May be awarded. § 30-3-4.

UNIFORM CHILD CUSTODY JURISDICTION ACT: Adopted. §§ 30-3-20 to 30-3-44.

CRIMINALIZATION OF CHILD SNATCHING: Any person who detains or conceals child from lawful custodian is punishable for the offense by confinement not more than 10 years nor less than 1 year and a day. §§ 13A-6-45, 13A-5-6(3).

TREATMENT OF MILITARY PENSION: Military pension is divisible as of August 1993 when the Alabama Supreme Court held that disposable military retirement benefits accumulated during the course of the marriage are divisible as marital property. Vaughn v. Vaughn, 634 So. 2d 533 (Ala. 1993). Kabaci v. Kabaci, 373 So. 2d 1144 (Ala. Civ. App. 1979), and cases relying on it that are inconsistent with Vaughn, are expressly overruled. Note that Alabama has previously awarded alimony from military retired pay. Underwood v. Underwood,

491 So. 2d 242 (Ala. Civ. App. 1986) (wife awarded alimony from husband's military disability retired pay); Phillips v. Phillips, 489 So. 2d 592 (Ala. Civ. App. 1986) (wife awarded 50% of husband's gross military pay as alimony).

ADOPTIONS: See Alabama Adoption Code (effective January 1, 1991) §§ 26-10A-2 to 26-10A-38.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: ALA. CODE title 6, §§ 6-6-370 to 6-6-484 §§ 5-19-15 (Mini Code Garnishment) (1975 & Supp. 1992).

(1) Withholding order shall be included in any court order or decree to vest when appropriate out of income due or to become due the obligor at each pay period. § 30-3-62.

(2) Wages can be garnished for child support and alimony.

(3) Garnishment permitted in either law or equity.

PROCEDURES:

(1) Can garnish money or other property in the hands of the government owed to or owned by the defendant. § 6-6-370.

(2) A person may receive process of garnishment provided that no garnishment shall issue prior to a final judgment; unless a showing of extraordinary circumstances. § 6-6-390.

(3) The garnishment must issue out of the court where judgment was rendered. Pepperell Mfg. Co. v. Ala. Nat'l Bank, 75 So. 2d 665 (Ala. 1954).

(4) Process of garnishment is served on garnishee requiring answer within 30 days. § 6-6-393.

(5) Required documents are an affidavit for garnishment on judgment and a writ of garnishment. §§ 6-6-391 and 6-6-393.

(6) Garnishee must answer under oath within 30 days or a conditional judgment can be entered. § 6-6-450.

(7) No notice is required of a non-resident. Ga. & A. Ry. v. Stollenwerck, 25 So. 258 (Ala. 1899). Notice is required of a resident. § 6-6-394.

(8) The garnishment lien attaches when service of summons is made on garnishee, at least 5 days before judgment against garnishee. Archer v. Whiting, 7 So. 53 (Ala. 1889).

(9) Pre-process interrogatories are not required.

(10) Payment is made to registrar of county where garnishment issued. The garnishment is continuing until judgment is paid. Orrox Corp. v. Orr, 364 So. 2d 1170 (Ala. 1978).

(11) Alabama law permits garnishment of up to 40% of disposable earnings for child support. The child's parent or guardian or, if the child is a public charge, the Department of Pensions and Security may file a motion for an order of garnishment or a petition for a continuing wage garnishment. The motion or petition, which must be verified, must state that the responsible parent is under court order to provide child support and is delinquent in the support. It must also provide the responsible parent's employer's name and address and the amount of his/her weekly disposable earnings as well as the amount to be garnished, which may not exceed 40% of disposable earnings.

The petition, or the motion and a motion to join the employer as a third-party garnishee, must be served on both the employer and the responsible parent.

Following a hearing, the court may enter an order of garnishment which will set forth sufficient findings of fact to support the action by the court and the amount to be garnished for each pay period.

(12) Garnishment under the Mini Code/Alabama Consumer Credit Act (§§ 5-19-1 et seq.) will be the same as garnishment under Article 9 of Title 6 of the Alabama Code (§§ 6-6-370 et seq.). See § 5-19-15.

STATE EXEMPTIONS:

(1) A 75% wage exemption (60% for child support) exists for residents of the state. § 6-10-7.

(2) A personal property exemption of $3,000 in addition to certain specified items, is allowed for wages. § 6-10-6 Supp. 1988.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) Garnishee is not required to notify the defendant.

(2) Garnishee has no right to contest the original judgment or amount of the judgment against the defendant. Garnishee can contest the propriety of service of process and the sufficiency of the required legal documents.

Alabama

ALASKA

STATUTES:

I. Marriage - ALASKA STAT. §§ 25.05.011 to 25.05.391 (1995).

II. Divorce - ALASKA STAT. §§ 25.24.010 to 25.24.910 (1995).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Person 16, but under 18, must have written parental consent. Person 14, also must have court approval. § 25.05.171. Person under 18 who is a member of armed forces on active duty does not need parental consent. § 25.05.011.

(2) License Fee - No statutory provision.

(3) Waiting Period - License may be issued upon expiration of three (3) days after receipt of application. The waiting period can be waived by the licensing official if it would result in undue hardship. § 25.05.161. Oath must be taken stating marriage meets legal requirements and must also state other pertinent information. § 25.05.091.

(4) Solemnization - Any clergyman, judicial officer or commissioner, commissioned officer of Salvation Army, or religious society in accordance with customs of such society may perform marriage. § 25.05.261.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Marriage without license contracted after 1 Jan. 1964 not recognized. § 25.05.061.

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Not recognized.

PROHIBITED MARRIAGES: All marriages between parents and children, ancestors and descendants, brothers and sisters, first cousins, second cousins, in short, marriages between persons more closely related than the fourth degree of consanguinity are prohibited. Bigamous marriages prohibited. § 25.05.021. Any prohibited marriage is void. § 25.24.020.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Non-age, mental incapacity, consent obtained by force, fraud, or duress, unless the defect is cured and

the parties thereafter freely cohabit as husband and wife; and failure to consummate marriage (continuing at the commencement of action). § 25.24.030.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - Satisfied if marriage was solemnized in state and plaintiff is resident. § 25.24.080. If marriage was not solemnized in state, defendant's residency will inure to benefit of plaintiff for purpose of bringing divorce action. § 25.24.090.

(2) Military Provision - Member of armed forces stationed within state for period of at least 30 days is deemed a resident for purpose of divorce. § 25.24.900.

(3) Service of Process - Nonresident may be personally served outside state or by publication or as directed by court when personal service is unsuccessful. ARCP4.

(4) Answer - Required within 20 days of personal service and 30 days of publication.

(5) Verification - Petition must be verified. Dissolution petition only must be verified ARCP Rule 90.1. Divorce complaint is subject only to ARCP Rule 11 constraints.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Failure to consummate marriage, adultery, conviction of felony, willful desertion (1 year), incompatibility, cruelty, habitual drunkenness, incurable mental illness, and drug addiction. § 25.24.050. In addition, dissolution of marriage may be granted for "irremediable breakdown" if the spouses have agreed to child custody, support, and property rights. § 25.24.200. Dissolution on the grounds of "irremediable breakdown" on the petition of the spouse is also possible without agreement on child custody, support, and property if one party cannot be located and served. § 25.24.200.

(2) Defenses - In a divorce action for adultery, the following defenses are available: procurement; connivance; express/implied forgiveness; if plaintiff also guilty of adultery and there has been no procurement, connivance or forgiveness by defendant; and there is a 2 year limitation after discovery of such acts to bring on action. § 25.24.120. Express forgiveness and procurement also are defenses to action based on desertion, drunkenness, cruelty, or incompatibility. §§ 25.24.130. If ground

for divorce is conviction of felony, then express forgiveness, procurement, and failure to bring action within two years are defenses. § 25.24.130.

(3) Period of Separation - Not a prerequisite for divorce.

MEDIATION: At any time within 30 days after a complaint or cross complaint in a divorce action is filed, a party can request a want to order mediation. § 25.24.60.

DISSOLUTION: Alaska has enacted a streamlined procedure to dissolve marriage when the parties agree that the marriage is irremediably broken and there are no disputes as to property division or child custody. § 25.24.200.

SEPARATION:

(1) Acknowledged Legal Status - No statutory provision.

(2) Effect of Separation Agreement on Divorce Decree - No statutory provision.

TIME REQUIRED BEFORE REMARRIAGE: No waiting period. § 25.24.180.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT:

(1) Pending the outcome of the divorce, the court may award a sum sufficient to cover costs of bringing or defending the action, spousal maintenance, including medical expenses, costs of caring for minor children, and providing for the freedom of each spouse from control of the other. The court also may order either party to refrain from disposing of property while the action is pending. § 25.24.140.

(2) The court may order payment by either or both parties of an amount sufficient to care for their children. § 25.24.160(1).

(3) The court may order payment of maintenance as necessary for either party. § 25.24.160(2).

PROPERTY DISTRIBUTION: Method - Equitable distribution without regard to marital fault. § 25.24.160(6).

UNIFORM INTERSTATE FAMILY SUPPORT ACT: ALASKA STAT. §§ 25.25.101 to 25.25.903.

Alaska

DETERMINATION OF CHILD CUSTODY:

(1) No parent entitled to a preference. § 25.20.060(b).

(2) Judicial Approach - Legislative intent to provide frequent and continuing contact with both parents. Shared custody is possible if the court determines that it would be in the child's best interest. In deciding what is in the child's best interest, the court will consider the child's needs and preference, the stability of the home environments of both parents, the child's education, advantages of both environments, the optimal time for the child to spend with each parent, recommendations of a neutral mediator, evidence of domestic violence or abuse, substance abuse, and other factors the court deems appropriate. § 25.20.090.

GRANDPARENTS VISITATION RIGHTS: Permissible if in child's best interests. §§ 25.20.060 and 25.24.200(a)(2).

UNIFORM CHILD CUSTODY JURISDICTION ACT: ALASKA STAT. §§ 25.30.010 to 25.30.910.

CRIMINALIZATION OF CHILD SNATCHING: Removal of child from custodian without legal right is a misdemeanor. Removal from state is a felony. §§ 11.41.320-370.

TREATMENT OF MILITARY PENSION: Divisible as marital property. Doyle v. Doyle, 815 P.2d 366 (Alaska 1991). See § 25.24.160.

COMPLIANCE WITH CHILD SUPPORT ENFORCEMENT AMENDMENTS: See § 25.24.160, which permits a court to order the parties to arrange with employers for an automatic payroll deduction each month or each pay period (if pay period is other than monthly) for child support. See also Chapter 27 (§ 25.27.010-900) for child support enforcement agency procedures.

GARNISHMENT AND WAGE ASSIGNMENT:

STATUTE: The court may order the parties to arrange with their employers for automatic payroll deduction each month or each pay period for the payment of maintenance and child support. § 25.24.160.

PROCEDURES:

(1) Superior court can garnish when amount is more than $35,000 and district court when amount is under $35,000. § 22.15.030. When a claim for relief does not exceed $5,000.00, the district judge or magistrate may hear the action as a small claim, unless important or unusual points of law are involved. § 22.15.040.

(2) The procedure can act prospectively if amount is certain. See A.R.C.P. Rule 89.

(3) Service of process will be made by a person specifically appointed by the court. § 09.40.025.

(4) Writ of attachment is authorized. § 09.40.010.

(5) Although state law requires garnishee to answer within 24 hours of service, federal law provides for 30 days. § 09.40.060.

(6) Pre-process interrogatories are not generally required.

(7) Notice to debtor is required, unless grounds for ex parte writ can be established. See A.R.C.P. Rule 89.

(8) A pay order stating the mode of payment is generally required.

STATE EXEMPTIONS:

(1) Twenty-five percent (25%) of individual's disposable income or amount which exceeds $350 per week or $1400 per month, whichever is less, is subject to execution. However, execution on wages based on a judgment for arrearages in support of any person is not subject to any state limitation, but federal limitations apply if the individual debtor is a nonresident. § 09.38.030.

(2) No discretional or jurisdictional exemptions.

(3) No statutory distinction is made between garnishment of current earnings and retired pay.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) Garnishee is not required to raise defenses on behalf of defendant.

(2) Garnishee has no statutory right to challenge legal process and request for accounting or to waive technical and jurisdictional defects.

NOTE: When the state is holding monies, such as tax refunds, due some person who is indebted to the state for public assistance provided to that person's children, the state may use "set-off" to satisfy the public assistance indebtedness.

Alaska

ARIZONA

STATUTES:

I. Marriage - ARIZ. REV. STAT. ANN. §§ 25-101 to 25-129 (1991 & Supp. 1994).

II. Divorce - ARIZ. REV. STAT. ANN. §§ 25-301 to 25-381.24 (1991 & Supp. 1994).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Under 18 requires parental consent. Under 16 requires parental consent and court approval. Either parent may give parental consent; however, if separated, consent by the parent with whom the minor resides is required. § 25-102.

(2) Medical Examination - None required.

(3) License Fee - $12.00. § 12-284.

(4) Waiting Period - No waiting period.

(5) Solemnization - Duly licensed or ordained clergymen, judges of courts of record, police court judges or justices of peace. Duly licensed or ordained clergymen includes ministers, elders or others who by custom, rules or regulations of religious societies or sects are authorized or permitted to solemnize or officiate at marriage ceremonies. § 25-124.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Generally not recognized. However, recognized if valid under law of place where contracted. § 25-112. See Mission Ins. Co. v. Industrial Commission 114 Ariz. App. 170, 559 P.2d 1085 (1976).

(2) Marriage by Proxy - Not recognized. § 25-125.

(3) Marriage by Contract - Not recognized. § 25-111.

PROHIBITED MARRIAGES: All marriages between parents and children, ancestors and descendants, brothers and sisters, uncles and nieces, aunts and nephews, first cousins, and persons of the same gender. § 25-101 and 25-125.

UNIFORM MARRIAGE AND DIVORCE ACT: ARIZ. REV. STAT. ANN. §§ 25-311 to 25-339.

Arizona

GROUNDS FOR ANNULMENT: Any ground rendering marriage void is available to grant an annulment of marriage. § 25-301; see Hodge v. Hodge, 118 Ariz. 572, 578 P.2d 1001 (1978).

PREMARITAL AGREEMENT: Written pre-marital agreement, signed by both parties is enforceable, subject to enumerated exceptions. § 25-201. Arizona has adopted the Uniform Premarital Agreement Act. §§ 25-301 et seq.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - One of the parties must be domiciled for ninety (90) days prior to filing a petition for dissolution of marriage. § 25-312.

(2) Military Provision - A member of armed forces satisfies jurisdictional requirements when being stationed in state for 90 days prior to filing the petition for dissolution of marriage. § 25-312.

(3) Service of Process - Nonresident defendant may be personally served outside of state, by mail when address known, or by publication.

(4) Answer - Required within 20 days of service of process in state, 30 days outside state. Civ. 12[a], 4[e].

(5) Verification - Petition must be verified. Civ. 11[c]; § 25-314.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Irretrievable breakdown. § 25-312.

(2) Defenses - Marriage not irretrievably broken. § 25-314.

(3) Period of Separation - 60 days after service of process or the date of acceptance of process. § 25-329.

(4) Filing Fee - $60.00. § 12-284.

SEPARATION:

(1) Acknowledged Legal Status - Parties may request a decree of legal separation rather than divorce in order to promote an amicable settlement of disputes. § 25-317.

(2) Effect of Separation Agreement on Divorce Decree - Incorporated by the court unless unconscionable or pertaining to custody, support or visitation. § 25-317.

TIME REQUIRED BEFORE REMARRIAGE: No waiting period. § 25-325.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT:

(1) Court may grant maintenance to either spouse in amount and duration as it deems just. § 25-319.

(2) Court may order either or both parents to pay support based on all relative factors including: the financial resources and needs of the child; the financial resources and needs of the custodial parent; the standard of living the child would have enjoyed had the marriage not been dissolved; the physical and emotional condition of the child, and his educational needs; the financial resources and needs of the noncustodial parent; and excessive or abnormal expenditures, destruction, concealment or fraudulent disposition of community, joint tenancy and other property held in common; the duration of visitation and related expenses. § 25-320.

(3) Costs and attorney's fees can be recovered in the maintenance of actions to enforce payment of support maintenance and child support. It must be ordered by the court and can be paid directly to the attorney. § 25-324. See also Johnson v. Johnson, 22 Ariz. App. 69, 523 P.2d 515 (1974); Bickel v. Bickel, 17 Ariz. App. 29, 495 P.2d 154 (1972).

PROPERTY DISTRIBUTION:

(1) Method - Community property. § 25-318.

(2) Fees Awarded - Court may award attorney's fees and costs.

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: ARIZ. REV. STAT. ANN. §§ 12-1651 to 12-1691.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method. § 25-331.

(2) Jurisdiction - § 25-331; Best interests of child control. Domestic violence is presumptively contrary to the best interests of the child. § 25-332; Procedure - § 25-232.

GRANDPARENTS AND GREAT-GRANDPARENTS VISITATION RIGHTS: The court may grant visitation rights in some instances when such rights are in the child's best interest. § 25-337.01.

Arizona

UNIFORM CHILD CUSTODY JURISDICTION ACT: ARIZ. REV. STAT. ANN. §§ 8-401 to 8-424.

CRIMINALIZATION OF CHILD SNATCHING: Crime of custodial interference committed if person without legal right takes child from custody of person with legal right to child. Custodial interference is a Class 6 felony unless person taken is returned voluntarily without harm, prior to arrest, in which case it is a Class 1 misdemeanor. § 13-1302.

TREATMENT OF MILITARY PENSION: Divisible as community property. See, e.g., Edsall v. Sup. Ct. of Az., 693 P.2d 895 (Ariz. 1984); DeGryse v. DeGryse, 661 P.2d 185 (Ariz. 1983); Flynn v. Rogers, 834 P.2d 148 (Ariz. 1992). See ARS § 25-318 and note 143.

COMPLIANCE WITH CHILD SUPPORT ENFORCEMENT AMENDMENTS OF 1984: See §§ 25-320 to 25-324, particularly § 25-323.01 and § 25-323.02 for provisions concerning wage assignments.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: ARIZ. REV. STAT. §§ 12-1571 to 12-2455 (1956 & 1990 Supp).

(1) Garnishment procedures are available to a party who has a judgment for past due child support or spousal maintenance. AZ now requires payment of child support, in all cases, by assignment of periodic earnings or other entitlements. § 25-323. The court has discretion to order payment of spousal maintenance by assignment. Sanchez v. Carruth, 568 P.2d 1078 (Ariz. App. 1977). Execution may issue for the collection of past due installments of a support judgment for the amount of the past due installments. Bruce v. Froeb, 488 P.2d 662 (Ariz. App. 1971).

(2) Assignment of wages applies to both child support and spousal maintenance obligations. §§ 12-2454 and 25-323.

PROCEDURES:

(1) The superior courts may issue both remedies of garnishment and assignments. Clerk of the court can issue a writ and summons of garnishment directed to the sheriff, constable or officer authorized by law to serve process in the county where garnishee is alleged to be, commanding the sheriff to summon the garnishee to appear before the court to answer under oath.

(2) The assignment is accomplished by the judge ordering the obligor to assign, or ordering such assignment directly against any present or future employer.

(3) Any judgment, order or decree whether arising from a dissolution, divorce, separation, annulment, custody determination, paternity or maternity determination, or from Uniform Reciprocal Enforcement of Support Act proceeding regarding support which provides for alimony, spousal maintenance or child support, may be enforced as a matter of right by lien, attachment or garnishment. An affidavit regarding all payments in default under support order along with a copy of such underlying support order, has to be filed with the Clerk of the Superior Court, along with the writ. § 12-2455.

(4) In Arizona, installments for child support and spousal maintenance become vested when they become due. Baures v. Baures, 478 P.2d 130 (Ariz. App. 1970).

(5) Obligor must be in arrears of at least one month in any 12 month period at the time of filing petition before an ex parte assignment of wages can be ordered. The assignment may be ordered for both arrears and currently accruing support obligations. § 25-323.01.

(6) An assignment may be ordered for both arrears and currently accruing support obligations. § 25-323.01.

(7) Rule 4(c) of the Arizona Rules of Civil Procedure states that service of all process shall be made by a sheriff, deputy, or any other person not less than 21 years of age who is not a party or attorney in the action, provided that such other person is specially appointed by the court. However, in the case of San Fernando Motor, Inc. v. Fowler, 498 P.2d 169 (Ariz. App. 1972), the court stated that under § 12-1574 only the sheriff or constable may undertake the function to summon the garnishee. The court distinguishes Gonzales v. Whitney, 367 P.2d 668 (Ariz. 1961), by stating that the court did not believe Gonzales affected the requirement of § 12-1574. Nor did the court believe that Ariz. Civ. Proc. Rule 4(c), which provides that a summons in a civil action shall be issued by the Clerk of the Superior Court, extends to the clerk the power to summon a garnishee before a court in a garnishment proceeding. NOTE: The government's position has been the most liberal interpretation; i.e., that service can be made by a sheriff, constable, or clerk of the court. However, under no circumstances can an interested party or attorney summon the garnishee.

STATE EXEMPTIONS:

(1) One-half of the disposable earnings of a debtor for any pay period is exempt from process. § 33-1131(c). Disposable earnings includes wages, salary and pension or retirement program.

(2) The assignment of wages statutes, § 12-2454(B) and § 25-323.B, expressly state that an assignment ordered under these sections does not apply to amounts exempt under § 33-1131(c).

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) It is the duty of the garnishee to furnish a copy of its answer upon the party applying for the writ when the name of the attorney for garnishee is endorsed upon the writ. § 12-1580.

(2) Garnishee must comply with a judgment requiring the garnishee to deliver to the sheriff such property that the garnishee is holding in accordance with the summons and answer to the court.

The following summary was reviewed in July 1995 by MAJ Ralph H. Allen, 4003d USAG, Ft. Smith, Arkansas; Corps of Engineers Attorney, Little Rock, Arkansas 72203, Telephone Number: (501) 324-5555, FAX: (501) 324-6581.

ARKANSAS

STATUTES:

I. Marriage - ARK. STAT. ANN. §§ 9-11-101 to 9-11-705 (1987 & Supp. 1993).

II. Divorce - ARK. STAT. ANN. §§ 9-12-101 to 9-12-320 (1987 & Supp. 1993).

MARRIAGE REQUIREMENTS:

(1) Age - Males age 18 and females age 18 may marry without parental consent. Males under 18 and females under 18 require consent of parent or guardian. No male under 17 or female under 16 may be married unless female is pregnant, parents consent, and probate court approves. Marriages not in compliance with these restrictions are voidable. §§ 9-11-102 to 9-11-105.

(2) Medical Examination - Not required.

(3) License Fee - Clerk's fee plus a bond of $100, which is refunded when the license is returned. §§ 9-11-203, 9-11-206, 9-11-210.

(4) Waiting Period - License may be issued at the time an application is made. § 9-11-203, 9-11-205.

(5) Solemnization - The state governor, any state judge of a court of record, justice of the peace, ordained minister or priest, mayor or official appointed by the Quorum court may perform marriage. § 9-11-213. Additionally, the clerk of the congregation of the Religious Society of Friends (Quakers), or his designee in the event of his absence, may solemnize marriage in accordance with the traditional marriage rite of the Religious Society of Friends. § 9-11-213(b)(2).

(6) Recording - In the office of the clerk of the county court within 60-days of applying for license. Immediate notice then applies on all real estate of Parties in that county.

(7) Military Provision - Upon the filing of a written petition with the clerk, a county court may waive the requirements of parental consent and the posting of a bond of $100. § 9-11-211.

Arkansas

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - May not be contracted within the state, but recognized if valid in the state or country where contracted, where parties then actually resided. § 9-11-107.

(2) Marriage by Proxy - No statutory provision.

(3) Marriage by Contract - No statutory provision. But see §§ 9-11-101, 301-305.

PROHIBITED MARRIAGES: All marriages between parents and children, grandparents and grandchildren, brothers and sisters of the half as well as the whole blood, uncles and nieces, aunts and nephews, and first cousins are void. § 9-11-106.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Any marriage where a party was incapable of consent for lack of age or understanding or incapable from physical causes from entering into the marital state, or where force or fraud was used, is voidable. § 9-12-201.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - One party must be a resident of this state for 60 days before filing suit and 3 months before final judgment. Residence means actual presence. A party is considered domiciled if the residency requirements are proven. § 9-12-307.

(2) Military Provision - No statutory provision. But see Ark. Const. art. 3, sec. 7, which provides that no member of the armed forces can acquire residence from the mere fact of being stationed on military duty in the state. The military member must have residence apart from that military service to meet the durational residence requirements of the state. See also Mohr v. Mohr, 206 Ark. 1094, 178 S.W.2d 502 (1944).

(3) Service of Process - When defendant is out of this state, a copy of the complaint certified by the clerk, with a summons annexed thereto, may be sent by registered or certified mail (return receipt) or by personal delivery. No personal judgment shall be rendered against a defendant constructively summoned who did not appear in the action, unless the "defendant was, at the time he was served or at the time the cause of action arose, a domiciliary of this State." § 16-58-119.

(4) Answer - Within 20 days after the date of service in state; 30 days outside state. RCP 12.

(5) Verification - Not required. However, either party may file interrogatories which shall be answered on oath and have the same effect. § 9-12-304.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - impotency, willful desertion for 1 year without cause, former wife or husband living, conviction of a felony or other infamous crime, habitual drunkenness for 1 year or cruel or barbarous treatment, adultery, living separate and apart for 18 months without cohabitation, living separate and apart for 3 years without cohabitation because of insanity, and failure to support. ARK. STAT. ANN. § 9-12-301.

(2) Defenses - Condonation of spouses' indignities, cruelties and drunkenness if known before marriage. See Williamson v. Williamson, 212 Ark. 12, 204 S.W.2d 785 (1947). "Reasonable cause" for desertion, Ledwidge v. Ledwidge, 204 Ark. 1032, 166 S.W.2d 267 (1942). Adultery or other grounds complained of have been occasioned by the collusion of the parties or done with the intent to procure a divorce, the complainant was consenting thereto, or both parties have been guilty of the adultery or such other offense or injury complained of in the complaint. § 9-12-308.

SEPARATION:

(1) Acknowledged Legal Status - No statutory provision.

(2) Effect of Separation Agreement on Divorce Decree - A written property settlement may be incorporated into the final decree. ARK. STAT. ANN. § 9-12-313.

TIME REQUIRED BEFORE REMARRIAGE: No statutory provision.

RECOGNITION OF FOREIGN DIVORCES: Valid § 9-11-107.

ALIMONY AND CHILD SUPPORT:

(1) The court may award alimony to either the husband or the wife. § 9-12-312.

(2) Child support orders shall be made after reference to the family support chart in the Domestic Relations Handbook of the Arkansas Bar Association. § 9-12-312(a)(2).

(3) The court may enforce written agreements between husband and wife in contemplation of separation, divorce, divorce decrees, orders for alimony, and maintenance by sequestration of defendant's property -including equitable garnishment. § 9-12-313.

(4) Attorney's fees related to the divorce action can be enforced against the spouse, as well as the attorney's fees necessary in the enforcement of alimony, maintenance and support provided for in the divorce decree. § 9-12-309. NOTE: In Jerry v. Jerry, 235 Ark. 589, 361 S.W.2d 92 (1962), the court held that the ex-husband had to pay ex-wife's attorneys' fees in connection with a child support hearing after the divorce was granted.

(5) Effective 1 January 1994, all child support orders, absent or finding of good cause, will be enforced through mandatory wage withholding all orders entered before 1 January may utilize mandatory wage withholding. § 91-14-218.

PROPERTY DISTRIBUTION:

Method - Equitable distribution. There is a presumption that there should be a 50-50 division of marital property, unless such a division is deemed to be inequitable by the court in view of the nine criteria enumerated in § 9-12-315.

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: §§ 9-14-301 to 9-14-344.

DETERMINATION OF CHILD CUSTODY:

Statutory Method - Custody awarded without regard to sex of parent and solely in "accordance with the welfare and best interest of the children." § 9-13-101.

GRANDPARENTS VISITATION RIGHTS: Court may grant visitation rights to grandparents provided that it is the best interest of the child. § 9-13-103.

UNIFORM CHILD CUSTODY JURISDICTION ACT: §§ 9-13-201 to 9-13-227.

TREATMENT OF MILITARY PENSION: Divisible as marital property. Womack v. Womack, 698 S.W.2d 306, 16 Ark. App. 139, 698 S.W.2d 306 (1985), following Day v. Day, 281 Ark. 261, 663 S.W.2d 719 (1984).

COMPLIANCE WITH CHILD SUPPORT ENFORCEMENT AMENDMENTS OF 1985: See §§ 9-14-201 to 9-14-236.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: ARK. STAT. ANN. §§ 16-110-101 to 16-110-415 (1987 & Supp. 1987).

(1) All duties of support, including the duty to pay arrearages, are enforceable and subject to garnishment. § 9-14-309.

(2) Plaintiff shall post a bond equal to double the amount of the garnishment for garnishment issued before judgment. § 16-110-401(b). NOTE: A prejudgment garnishment against wages was held unconstitutional in Trans-World Acceptance Corp. v. Jaynes Enterprises, Inc., 255 Ark. 752, 502 S.W.2d 651 (1973).

(3) There are statutory provisions concerning wage assignments and deductions. § 9-14-102.

PROCEDURES:

(1) Support actions are under the chancery court jurisdiction. § 9-14-201.

(2) Judgment of arrearages is necessary.

(3) Garnishment writs must be served on defendant. § 16-110-402.

(4) The complaint for support shall be verified. § 9-14-311.

(5) Defendant's wages for a 60-day period, or the wages exempted by the Arkansas Constitution, whichever are less, are exempt from garnishment. § 16-66-208.

(6) Garnishment order requires garnishee to appear and answer on the return day of the writ. § 16-110-401.

(7) Garnishee shall file his answer to the garnishment, under oath, on the return date. § 16-110-404.

(8) There is no mode of payment provision.

(9) Garnishment binds pay accrued as of date of service. § 16-110-415.

(10) If the debtor consents in writing, the garnishment binds pay accrued as of date of service and continues until the judgment and costs are paid or until expiration of the payroll period immediately prior to 3 calendar months after date of service, whichever occurs first. § 16-110-415.

(11) Plaintiff can contest garnishee's answer before the court or jury. § 16-110-405.

STATE EXEMPTIONS:

(1) Single defendant has a $200 personal property exemption from attachments. Ark. Const. art. IX, § 1.

(2) Married or head of household defendant has a $500.00 personal property exemption from attachment. Ark. Const. art. IX, § 2.

(3) Defendant has a $25 per week net wage exemption from garnishment. § 16-66-208(b)(1).

(4) No statutory distinction is made between current earnings and retired pay.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

Garnishee must present a written consent for a 3-month garnishment period, rather than a garnishment affecting the pay period. §§ 16-110-415(b)(1).

CALIFORNIA

STATUTES:

Note: The California Civil Code Sections that pertained to Family Law were repealed and are now contained in the "Family Code." Disposition tables are contained in the supplement to the Civil Code. This change became operative on January 1, 1994. (Updated through 1994 and Supp. 1995).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Under 18 requires written parental consent and court approval. § 302. If there is no parent capable of consenting, court may approve. § 303.

(2) Medical Examination - Standard serological test for syphilis. Also, female must be tested for rubella immunity, unless over 50 or surgically sterilized. § 4300. Exception for persons already living together as husband and wife. § 4213. Certificates provided by other states or U.S. Armed Forces will be accepted for military personnel provided examination was within 30 days. § 4303. AIDS testing must be offered. § 4300(c) and (d).

(3) License Fee - $29.00. Other county - optional fees can bring total to $34.00. See Gov't Code, §§ 26840, 26840.3, 26840.7, and 26840.8.

(4) Waiting Period - None.

(5) Persons under the age of 18 must undergo premarital counseling. § 304.

(6) Solemnization - Any of the following may solemnize: a) Judge, retired judge, commissioner or retired commissioner of civil marriages, by any judge or magistrate of the United States, assistant commissioner or retired commissioner of a California court of record or justice court; b) any clergyman; c) commissioners and deputy commissioners of civil marriages if designated by County Board of Supervisors; d) county licensed officials of non-profit religious institutions §§ 400-420.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Recognized only if entered into before 1895. Out-of-state common law marriages are recognized if valid in state where contracted. § 308.

(2) Marriage by Proxy - Not recognized.

(3) Marriage by contract - Not recognized.

PROHIBITED MARRIAGES: All marriages between parents and children, ancestors and descendants, brothers and sisters, uncles and nieces, aunts and nephews. Also bigamous marriages are void. §§ 2200 and 2201.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Under age of consent, bigamy, incest, mental incapacity, fraud, force, and continuing and apparently incurable physical incapacity. §§ 2200, 2201, 2210.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency)- Decree of divorce may not be entered unless one of the parties has been a state resident for six months and a resident of the county in which the proceeding is filed for three months next preceding filing of petition. § 2320.

(2) Military Provision - No statutory provision.

(3) Service of Process - Personal or substituted service allowed anywhere; service may be made outside the state by registered or certified mail; upon a proper showing of inability to locate, the court may order service by publication. Code of Civil Procedure §§ 415.10, 415.20, 415.30, 415.40, and 415.50.

(4) Answer - Within 30 days of service of process.

(5) Verification - Required.

(6) Printed court forms must be used.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Irreconcilable differences or incurable insanity. Fault abolished. § 2310.

(2) Defenses - None other than lack of jurisdiction.

(3) Period of Separation - Not a prerequisite for divorce.

SEPARATION:

(1) Acknowledge Legal Status - Party may petition court for decree of legal separation. Both sides must agree that such a decree may be entered, unless the case proceeds by default.

(2) Effect of Separation Agreement on Divorce Decree - Court will follow any property division agreed upon. § 2550.

TIME REQUIRED BEFORE REMARRIAGE: No statutory waiting period. Dissolution may not be entered until six (6) months following service of action on Respondent or his/her appearance, whichever is earlier. This period may be extended by the court for good cause shown. § 2339.

RECOGNITION OF FOREIGN DIVORCES: California has adopted the Uniform Divorce Recognition Act. §§ 2090 et seq. If both parties are domiciled in California when the divorce is commenced, a divorce from another jurisdiction will not be recognized.

UNIFORM PREMARITAL AGREEMENTS ACT: §§ 1600 et seq.

ALIMONY AND CHILD SUPPORT:

(1) Child support is defined as any amount necessary for the support, maintenance, and education of a child. Primm v. Primm, 299 P.2d 231 (Cal. 1956). The amount of support may be modified at any time, upon motion and a showing of changed circumstances. § 3651. See § 4055 (providing uniform guidelines for determining the dollar amount of support). Once a year, an increase or decrease of not more than ten percent (10%) of the existing order may be applied for by either party in the absence of changed circumstances. This process is known as the Simplified Procedure for Modification of Support Order. §§ 3680-3694.

(2) Spousal Support (alimony is defined as any amount one party is ordered to pay for the support of the other for any period the Court determines to be "just and reasonable" based on the standard of living established during the marriage. § 4330). In making its order, the court is required to consider a number of factors. § 4320. See also §§ 2641, 3557, and 3592. Except on written agreement of the parties, the obligation to pay support and maintenance continues until death of either party or remarriage of the supported spouse.

(3) Family Support ("Lester Doctrine") may be ordered pursuant to the agreement of the parties. § 3586.

(4) Attorney's fees, costs, and interest are properly awarded as an element of child support and spousal support enforcement. §§ 270, 2030-2034.

California

PROPERTY DISTRIBUTION:

(1) Method - Community property. Division will be equal, with certain limited exceptions, unless parties agree otherwise. § 2550.

(2) Fees Awarded - Court may award attorney's fees and costs. §§ 2030-2034.

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: Code of Civil Proc. §§ 4800 et seq.

UNIFORM CIVIL LIABILITY FOR SUPPORT ACT: §§ 241-254.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - § 3020. Presumption that joint custody is in best interest of a child. §§ 3040-3043.

(2) Judicial Approach - Parents viewed as equally qualified.

GRANDPARENTS AND STEPPARENTS VISITATION RIGHTS: Court may grant grandparents and stepparents visitation rights if they petition in a dissolution action, or if the parent through which they are related is deceased. §§ 3102, 3100(a). Otherwise, the cases are in conflict. Compare In Re Robert D., 151 Cal. App. 3d 391, 198 Cal. Rptr. 801, hearing denied (1984), with White v. Jacobs 198 Cal. App. 3d 122, 243 Cal.Rptr. 597 (1988).

UNIFORM CHILD CUSTODY JURISDICTION ACT: §§ 3400 et seq.

CRIMINALIZATION OF CHILD SNATCHING: The following acts are felonies or misdemeanors, depending on the sentence adjudged:

(1) Any person, not having the right to custody, who maliciously takes, entices away, detains, or conceals from the person entitled to the child's lawful charge. (Penal Code § 278);

(2) Any person who, in violation of a custody order, takes, retains, detains, or conceals a child with the intent to deprive another of his or her custody rights. (Penal Code § 278.5(a));

(3) Any person who causes a child to be transported out of California with the intent to deprive another of his or her custody rights in violation of a custody order. (Penal Code § 278.5(b));

(4) Anyone who has a right to physical custody or visitation who detains, conceals, takes, or entices away a minor child with the intent to deprive another person of his or her custody or visitation rights. (Penal Code § 278.5(c)).

TREATMENT OF MILITARY PENSION: Divisible as community property. § 2610, Notes 31-39.

COMPLIANCE WITH CHILD SUPPORT ENFORCEMENT AMENDMENTS OF 1984: See §§ 4600 et seq. for mandatory wage assignment provisions.

GARNISHMENT AND WAGE ASSIGNMENTS: CAL. FAMILY CODE §§ 4600 et seq. (1994 & Supp. 1995).

Wages are garnished by the issuance of a Writ of Execution and of an Earnings Withholding Order and service of them on the garnishee's employer. Code of Civil Procedure §§ 706.010-706.052. Both are obtained by the creditor by presenting written applications under penalty of perjury, on court provided forms. The Writ and Earnings Withholding Order must then be served on the employer by the levying officer in the county where the levy is to be made (Marshal or Sheriff) or by any registered process server. A garnishment may be attacked by a motion to quash the Writ or by filing a Claim of Exemption with the levying officer.

WAGE ASSIGNMENTS

Wage Assignment orders may be used to collect both arrearages and the prospective payments of child support and spousal support (alimony). See §§ 5230 et seq.

STATE EXEMPTIONS

That portion of earnings which are exempt under federal law (15 U.S.C. 1673(a)) are exempt from both wage garnishments and assignments. Code of Civil Procedure § 706.050.

California

COLORADO

STATUTES:

I. Marriage - COLO. REV. STAT. §§ 14-2-101 to 14-2-113 (Uniform Marriage Act) (1987 & Supp 1994).

II. Divorce - COLO. REV. STAT. §§ 14-10-101 to 14-10-133 (Uniform Dissolution of Marriage Act) (1987 & Supp 1994).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent; between ages 16-18, consent of parents or judge required. Persons under 16 require both parental consent and judicial approval. § 14-2-106.

(2) Medical Examination - Not required by statute.

(3) License Fee - Seven dollars ($7). Plus an additional ten dollars ($10) to be credited to Colorado Children's Trust Fund. § 14-2-106(1)(a), and additional cost in accordance with CRS 25-2-121.

(4) Waiting Period - None.

(5) Solemnization - Any judge, magistrate, retired judge, by a public official whose powers include solemnization of marriages, by the parties to the marriage, or in accordance with any mode of solemnization recognized by any religious denomination or Indian nation or tribe, may perform marriage. § 14-2-109.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Recognized. See, "Common Law Marriage in Colorado," 16 Colo. Law. 252 (1987); Crandall v. Resley, 804 P.2d 272 (Colo. App. 1990).

(2) Marriage by Proxy - If a party to a marriage is unable to be present at solemnization, he may authorize in writing a third person to act as his proxy. § 14-2-109(2).

(3) Marriage by Contract - No statutory provision.

PROHIBITED MARRIAGES: All marriages between parents and children, ancestors and descendants, brothers and sisters, uncles and nieces, aunts and nephews, (except as to marriages permitted by the established customs of aboriginal cultures) and a marriage entered into prior to the dissolution of an earlier marriage of one of the parties, except a currently valid marriage between the parties. § 14-2-110.

Colorado

UNIFORM DISSOLUTION OF MARRIAGE ACT: COLO. REV. STAT. §§ 14-10-101 to 14-10-133.

GROUNDS FOR ANNULMENT: Lack of capacity to consent at time solemnized, under-age (not cured by consent of parents or court), fraud, jest or dare, duress and impotency (unknown to other party at time of marriage). Also, any prohibited marriage. § 14-10-111. See, "Annulments in Colorado," 22 Colo. Law. 2249 (1993).

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - One of the parties must be domiciled in Colorado for 90 days next preceding commencement of action. § 14-10-106.

(2) Military Provision - Caveat: Mere presence of person in Colorado under orders is insufficient for jurisdictional purposes. However, soldiers may establish domicile after 90 days. Viernes v. Dist. Ct., 509 P.2d 306 (Colo. 1973).

(3) Service of Process - Personal service required unless shown that respondent unavailable in which case court shall order notice by publication. Also, copy of process must be mailed to defendant's last known address. § 14-10-107 (4)(a).

(4) Answer - Within twenty (20) days after date of service if personally served in Colorado. Otherwise thirty (30) days.

(5) Verification - No statutory provision.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Irretrievable breakdown of marriage is grounds for divorce. §§ 14-10-106, 14-10-110.

(2) Defenses - Abolished, except for defense that marriage is not irretrievably broken. § 14-10-107.

(3) Period of Separation - Not prerequisite for divorce.

(4) 90 days or more have elapsed since Court acquired jurisdiction over Respondent. § 14-10-106(1)(a)(III).

SEPARATION:

(1) Acknowledged Legal Status - Court may grant decree of legal separation. § 14-10-106(2).

(2) Effect of Separation Agreement on Divorce Decree - Terms of separation agreement (except for custody, support or parenting time of children which are subject to review by the Court even if not unconscionable) are binding upon Court unless court finds separation agreement is unconscionable. § 14-10-112. See, In re Sinkovich, 830 P.2d 1101 (Colo. App. 1992) (dealing with the husband's military pension).

TIME REQUIRED BEFORE REMARRIAGE: No waiting period.

RECOGNITION OF FOREIGN DIVORCES: Generally - full faith and credit. §§ 13-53-102, 14-11-101.

ALIMONY AND CHILD SUPPORT:
See: "Determining Benefits for Former Spouses of Military Personnel," 19 Colo. Law. 1073 (1990).

(1) Amount and duration of maintenance determined by court without regard to marital misconduct. § 14-10-114(2).

(2) Either or both parents may be ordered to pay support based on factors such as the financial resources of child, resources of custodial parent, the standard of living the child would have enjoyed had the marriage not dissolved, and the physical and emotional needs of the child. § 14-10-115. Amount of support based upon statutory guidelines. Deviation from guidelines only where applicable inequitable. § 14-10-115(3) (a).

(3) Colorado law allows for the recovery of reasonable costs and attorney's fees in the maintenance of actions to enforce payment of alimony and child support. § 14-10-119.

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution. § 14-10-113.

(2) Fees Awarded - Court may award attorney's fees and costs.

UNIFORM INTERSTATE FAMILY SUPPORT ACT:
COLO. REV. STAT. §§ 14-5-101 to 14-5-1006.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Parents viewed as equally qualified. § 14-10-124(3).

(2) Judicial Approach - Parents viewed as equally qualified. Best interests of child control.

Colorado

GRANDPARENTS VISITATION RIGHTS: Court may grant reasonable visitation rights to either maternal or paternal grandparents. § 19-1-117.

UNIFORM CHILD CUSTODY JURISDICTION ACT: COLO. REV. STAT. §§ 14-13-101 to 14-13-126.

CRIMINALIZATION OF CHILD SNATCHING: Any person who removes a child under the age of 18 from the custody of a parent, or who violates a court order in an attempt to deprive a parent of custody, is guilty of a Class 5 felony. It shall be a defense that the alleged offender believed his or her conduct was necessary to protect the child or that the child, if over 14 years old, was taken at his own instigation. § 18-3-304.

TREATMENT OF MILITARY PENSION: Military pension - when vested marital property. In re Marriage of Grubb, 745 P.2d 661 (Colo. 1987); In re Gallo, 752 P.2d 47 (Colo. 1988). But see, In re Booker, 833 P.2d 734 (Colo. 1992).

COMPLIANCE WITH CHILD SUPPORT ENFORCEMENT AMENDMENTS OF 1984: See §§ 14-14-101 to 14-14-112, Colorado Child Support Enforcement Act, particularly § 14-14-105 (Continuing Garnishment) and § 14-14-107 (Mandatory Wage Assignment).

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: Colo. Rules Civ. Proc. 69 and 103; COLO. REV. STAT. § 14-10-118 (1987 & Supp. 1994). §§ 13-54.5-101 et seq.

(1) Garnishment in Colorado is covered under Rule 103 of the Rules of Civil Procedure (C.R.C.P.). Colorado recognizes that garnishment is a statutory remedy in derogation of common law and that it must be strictly construed. See State v. Elkins, 270 P. 875 (Colo. 1928). This remedy cannot be extended beyond its scope in the form of equitable relief nor can it be supported by implication or analogy. See Norchester v. State Farm Mutual Automobile Insurance Co., 473 P.2d 711, 712 (Colo. 1970).

(2) Colorado permits continuing garnishment for the collection of child support arrearages or for child support debts. §§ 14-10-118, 14-14-107.

PROCEDURES:

(1) The District Courts of Colorado may issue both remedies of garnishment and assignments. The writ of garnishment is issued by the judge, clerk, or designated agent of the court. The assignment is accomplished by the judge ordering the obligor to make an assignment and the obligor assigning his wages. If the

obligor fails or refuses to execute assignment, the clerk of the court shall execute the same in lieu and instead of the obligor. R.C.P. Rule 70.

(2) Mature, unpaid alimony or support installments due under a divorce decree automatically become final judgment. See Beardshear v. Beardshear, 352 P.2d 969 (Colo. 1960), and Talbot v. Talbot, 394 P.2d 607 (Colo. 1964).

(3) Continuing garnishment is only for collection of arrearages of child support. § 14-14-105. Section 14-14-107, wage assignment, indicates it is for current support, for child support, maintenance where combined with child support, child support debts or maintenance. However, § 14-10-108, which is the original wage assignment statute, refers to both support or maintenance.

(4) C.R.C.P. Rule 103 states that a writ of garnishment may issue without issuance of a writ of execution after judgment. Rule 103, Section 1(c).

(5) C.R.C.P. Rule 103(d) and Rule 4 clearly authorize service of a writ of garnishment by a party other than a sheriff.

(6) The wage assignment is binding on the employer or other payor of the funds 2 weeks after service upon him/her of notice that an assignment has been made. § 14-10-118.

(7) The rules specifically provide a form affidavit and forms for different types of writ of garnishment with interrogatories.

(8) The method orders the debtor to execute an attached wage assignment and deliver it to the Office of the District Attorney within 10 days of the date of the order. In the event the debtor fails or refuses to execute and deliver the attached wage assignment, the order usually provides that the clerk of the court or its deputy pursuant to Rule 70, C.R.C.P., is appointed by the court to execute the wage assignment in place of the debtor. The garnishee must answer the writ as set forth in the writ itself as of date of service. There is no need to appear unless answer is traversed. Continuing garnishments for child support require answer to the court. § 14-14-105.

(9) Wage assignments do not require an answer from employer.

(10) If the garnishee has monies due or owing to the debtor not exempt by federal law, he/she must deliver it to the court.

(11) Wage assignments are usually paid as directed by the court order.

(12) Rule 5, C.R.C.P., and 13-5435-106, 107, places the plaintiff under a duty to provide the debtor with copy of the writ. Of course, under 42 U.S.C. § 659(d), the government is required to notify the debtor as to garnishments and wage assignments.

STATE EXEMPTIONS:

(1) A garnishee is not required to set up or plead any exemption for or on behalf of the defendant except the exemptions under federal law.

(2) Where the spouse ordered to pay support is also supporting a spouse and children other than those mentioned in the order, 50% of such individual's disposable earnings shall be subject to the order. If the individual is not supporting an additional spouse and child, then 60% of such individual's disposable earnings shall be subject to the order. In either case, an additional 5% will be added if the garnishment or wage assignment is designed to enforce an order that is 12 weeks or more in arrears. § 13-54-104(3)(III)(b)(I)(A&B).

(3) The exemptions listed in § 13-54-102 apply to all writs of attachment, execution, and garnishment, except those writs which result from a judgment for arrearages for child support. § 13-54-106.

(4) The nature of exemption requires a written claim setting forth the grounds of such claim of exemption. § 13-55-101 and § 13-54.5-108.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

The garnishment itself does not create special duties running from the garnishee to the debtor.

The following summary was reviewed in May 1995 by Major Jonathan J. Klein, IMA Trial Counsel, 24th Inf Div (M), Fort Stewart, GA 31314; Mailing Address: 1445 Capitol Avenue, Bridgeport, CT 06604, Telephone Number: (203) 330-1900, FAX: (203) 330-1526.

CONNECTICUT

STATUTES:

I. Marriage - CONN. GEN. STAT. ANN. §§ 46b-21 to 46b-37 (1986 & Supp. 1990).

II. Dissolution of Marriage, Legal Separation and Annulment - CONN. GEN. STAT. ANN. §§ 46b-40 to 46b-87 (1986 & Supp. 1992).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Under 18 requires written consent of parent or guardian. No person under 16 may be married without court approval. § 46b-30.

(2) Medical Examination - Blood tests for syphilis and rubella immunity (for females less than 50 years old and capable of pregnancy) and, if the blood test is positive for syphilis, a physical examination, are required within 35 days before issuance of the license. Immunization against rubella is not required, but the applicant must be informed of the test results and of the consequences of lack of immunity with respect to pregnancy. § 46b-26.

(3) License Fee - No statutory provision.

(4) Waiting Period after Receipt of Application - none, other than the blood tests and the physical examination, if needed. Only the probate court can grant an exception to the blood test/physical examination requirements when public policy or physical condition of one of the applicants requires that the marriage be celebrated without delay. § 46b-27.

(5) Solemnization - Any judge, retired judge, family support magistrate, state referee, justice of the peace, or ordained or licensed clergyman, "so long as they continue in the work of the ministry," may perform marriage. § 46b-22.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Not recognized.

(2) Marriage by Proxy - No statutory provision.

(3) Marriage by Contract - No statutory provision.

Connecticut

PROHIBITED MARRIAGES: A man may not marry his mother, grandmother, daughter, granddaughter, sister, aunt, niece, stepmother, or stepdaughter. A woman may not marry anyone having the same degree of relationship. § 46b-21.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: An annulment may be granted in all cases where a marriage is void or voidable under Connecticut law or where performed. § 46b-40.

PROCEDURAL REQUIREMENTS FOR DISSOLUTION OF MARRIAGE:

(1) Jurisdiction (Residency) - One party must be a resident of this state for 1 year next preceding filing of the complaint or the date of the decree, or one party must have been a domiciliary at the time of the marriage and must have returned to the state with the intention of permanently remaining before the filing of the complaint, or the cause for the divorce must have arisen after either party moved into the state. § 46b-44(c).

(2) Military Provision - A person in the armed forces who was a resident of this state at the time of entry is deemed to have continuously resided in this state during the time served in the armed forces. § 46b-44(d).

(3) Service of Process on nonresident party - Where defendant resides out of or is absent from the state, or the whereabouts of the defendant is unknown, the judge or clerk of court may make such order of notice as he/she deems reasonable. After notice has been given and proved to the court, the court may hear the case, or, if it sees cause, order further notice. The court may exercise personal jurisdiction over a nonresident party as to the matter concerning temporary or permanent alimony or support of children only if: (1) the nonresident party received actual notice as described herein; and (2) the requesting party meets the residency requirements; and (3) this state was the domicile of both parties immediately prior to their separation. § 46b-46.

(4) Answer - Within 15 days after return date or after decision on motion to dismiss, request to revise complaint or motion to strike.

(5) Verification - No statutory provision.

SUBSTANTIVE REQUIREMENTS FOR DISSOLUTION OF MARRIAGE:

(1) Grounds - Irretrievable breakdown, incompatible with separation for 18 continuous months, adultery, fraud, desertion for 1-year, 7-year absence, habitual intemperance, intolerable cruelty,

conviction of an infamous crime and 1 year in prison, mental illness with confinement in a hospital for 5 years. § 46b-40.

(2) Defenses of Recrimination and Condonation - Abolished. § 46b-52.

(3) Period of Separation - From the date of filing for divorce, ninety (90) days with conciliation procedures or 6 months without such procedures. §§ 46b-53; 46b-67.

LEGAL SEPARATION:

(1) Acknowledged Legal Status - Party may request decree of legal separation rather than dissolution. § 46b-40(c), (d) and (e).

(2) Effect of Separation Agreement on Divorce Decree - If the court finds the agreement fair and equitable, it will be incorporated into the decree. § 46b-66. The parties and not the attorneys must execute the agreement. One spouse is not liable for the debts of the other during a period of separation if the spouse who is liable for support has provided reasonable support.

TIME REQUIRED BEFORE REMARRIAGE: No waiting period to remarry is required after decree of annulment or dissolution is entered. Ninety days after return date in dissolution actions - not applicable to annulment actions - must lapse before final decree is entered. § 46b-67.

PARTICIPATION IN COURT-SPONSORED PARENTING EDUCATION PROGRAM: Required where minor child involved. § 46b-69b.

RECOGNITION OF FOREIGN DIVORCES: A certified copy of foreign matrimonial judgment may be filed in the Connecticut court in which enforcement of the judgment is sought together with a certificate that such judgment is final, has not been modified, altered or amended and that its enforcement has not been stayed or suspended. The certificate must also set forth the name and last known address of the other party to the judgment. The Foreign Matrimonial Judgment then becomes a judgment of the court before which it is filed providing it does not contravene the public policy of the State of Connecticut. The party filing a judgment must notify the other party within 5 days of the filing. § 46b-71.

ALIMONY AND CHILD SUPPORT:

(1) Court may assign a definite portion of either party's estate to the other party when in the judgment of the court it is the proper mode to carry the decree into effect. § 46b-81.

(2) Alimony, support and use of family home or dwelling unit may be ordered pendente lite and before final decree or at the time of final hearing. § 46b-83.

(3) Temporary alimony is invariably periodic, but may include orders for the payment of rent, utilities, mortgage payments, taxes and assessments on real property, and medical, dental, and hospital costs or the cost of insurance to cover the same.

(4) Permanent alimony may include provisions for all the above on a periodic basis or may be ordered in a lump sum amount. § 46b-82.

(5) Child support for minor children of a marriage (under age of 18) may be ordered to be paid by either party. Support may be ordered for adopted children. Support usually includes provisions for the payment of medical and dental costs or insurance for the same. § 46b-84. Support also can be ordered for children born out of wedlock. § 46b-171.

(6) Child support invariably established pursuant to Child Support and Arrearage Guidelines issued by Commission for Child Support Guidelines, pursuant to § 46b-215a.

(7) Alimony and child support may be modified upon a showing of a substantial change of circumstances of either party, which may include the recipient spouse cohabitating with another. § 46b-86. Family Support Magistrates Division created to hear and determine matters involving child and spousal support, including petitions for enforcement of foreign support orders and motions for modification of existing support orders. §§ 46b-231, 46b-232.

DETERMINATION OF CHILD CUSTODY:

(1) Best interests of the child control. The court may consider the wishes of the child if the child is of sufficient age. § 46b-56.

(2) Statutory presumption that joint physical and/or legal custody is in the best interests of the child if the parents have agreed to such a custody arrangement. § 46b-56a. Parents are presumptively entitled to custody over non-parents. § 46b-56b

GRANDPARENTS VISITATION RIGHTS: The court may grant visitation rights to any person, including a grandparent, if in the best interests of the child. §§ 46b-59, 46b-56(a).

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution. § 46b-81. The court has the authority to order a transfer of title to real property upon entering a decree of annulment, dissolution or separation and, if the order is violated, may pass title itself by decree. § 46b-66a.

(2) Fees Awarded - Court may award attorney's fees and costs. § 46b-62.

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: 1950 Act adopted. CONN. GEN. STAT. ANN. §§ 46b-180 to 46b-211 (West).

UNIFORM CHILD CUSTODY JURISDICTION ACT: CONN. GEN. STAT. ANN. §§ 46b--90 to 46b-114 (West).

CRIMINALIZATION OF CHILD SNATCHING: Parental kidnapping is defined in Connecticut as Custodial Interference in the First and Second degree. First degree custodial interference is a Class D felony, punishable by imprisonment from 1 to 5 years. § 53a-97 (offense) and § 53a-35a (punishment). Second degree custodial interference is a Class A misdemeanor. § 53a-98.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: CONN. GEN. STAT. ANN. § 52-362 (1991 & Supp. 1992).

Withholding of earnings for levy on wages for the enforcement of a support order is available after a judgment order has been entered and the judgment debtor fails to obey such order. §§ 52-362(b) and 46b-69. The obligator must be delinquent at least in an amount equal to 30 days' obligation.

PROCEDURES:

(1) If within 15 days of service or notice of delinquency, the obligor fails to pay amounts past due, or to request a hearing, his earnings may be subject to a withholding order. § 52-362(d).

(2) The person to whom support is payable may apply to the court issuing such order or to any judge thereof for relief. The pleading is usually designated as "Application" or "Motion" for order of garnishment.

(3) The court or Family Support Magistrate Division shall then issue an order forthwith, without a hearing, directing that execution issue. § 52-362(d).

(4) The withholding order shall secure payment of past and future support obligations. It is a continuing lien and levy on the obligor's earnings until the support order is fully satisfied or modified. § 52-362(f).

(5) The withholding order takes priority over all nonsupport executions. Two or more executions may be levied concurrently under the provisions of this section, provided the total levy shall not exceed the maximum permitted under federal or state law, whichever is applicable. § 52-362(h).

(6) Obligors owing $1,000 or more in past due child support will be subject to having information regarding the debt reported to all participating consumer credit reporting agencies. § 52-362d.

STATE EXEMPTIONS:

Statute exempts $135 of disposable earnings per week from execution, or the limitations of 15 U.S.C. § 1673 apply, whichever is less. § 52-362(f).

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) No statutory duty to file pleading other than a disclosure of goods or effects of the defendant, as stated in § 52-330 regarding garnishment of other debts. However, employer is required to pay over the nonexempt wages as of the date of service of the writ, which is of a continuing nature.

(2) The employer must notify the Family Support Magistrate Division when the obligor terminates employment and must provide the obligor's last known address and the names and address of the new employer, if known. § 52.362(l).

The following summary was reviewed in August 1995 by Major H. Kemp Vye, HQ DEARNG, Wilmington, First Regiment Road, Wilmington, DE 19808-2191, Telephone Number: (302) 324-7011, FAX: (302) 324-7196.

DELAWARE

STATUTES:

I. Marriage - DEL. CODE ANN. tit. 13, §§ 101 to 151 (1993 & Supp. 1994).

II. Divorce and Annulment - DEL. CODE ANN. tit. 13, §§ 1501 to 1523 (1993 & Supp. 1994).

III. Desertion and Support - DEL. CODE ANN. tit. 13 §§ 501-524 (1993 & Supp. 1994).

IV. Child Protection from Domestic Violence - DEL. CODE ANN. tit. 13 §§ 701A to 711A (Supp. 1994)

MARRIAGE REQUIREMENTS:

(1) Age - Male under 18 and female under 16 may not marry. Female under 18 requires parental consent or judicial consent. Age limitations not a bar to marriage where party is parent or prospective parent. Title 13, § 123.

(2) Medical Examination - None.

(3) License Fee - Ten dollars ($10). Title 13, § 108.

(4) Waiting Period - 24 hours for residents, 96 hours for nonresidents. Title 13, § 107.

(5) Solemnization - Any clergyman or minister of any recognized religion, clerks of the peace, mayor of City of Wilmington, or religious society in accordance with customs of such society may perform marriage in the presence of at least two reputable witnesses. Title 13, § 106.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Not recognized in Delaware, but if validly contracted in another state, will be recognized. Cook v. Carolina Freight Carriers Corp., 299 F.Supp. 192 (D. Del. 1969).

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Not recognized.

PROHIBITED MARRIAGES: All marriages between parents and children, ancestors and descendants, brothers and sisters, uncles and nieces, aunts and nephews, and first cousins. Title 13, § 101. Also bigamous marriages. Title 11, § 1001.

DELAWARE DIVORCE AND ANNULMENT ACT: 1974 Act adopted with substantial changes. Delaware Code Ann. tit. 13, §§ 1501-1523.

GROUNDS FOR ANNULMENT: Non-age, mental or physical incapacity, unknown sexual incapacity, consent obtained by fraud or force, marriage entered in jest or dare, venereal disease, a confirmed user of a narcotic drug, habitual drunkenness, or marriage prohibited by law. Title 13, §§ 101, 1506.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - One party must have resided in state for 6 months next preceding commencement of action. Title 13, § 1504.

(2) Military Provision - A member of armed forces who has been stationed 6 months next preceding commencement of action satisfies jurisdictional requirement. Title 13, § 1504.

(3) Service of Process - Nonresident defendant may be served by mailing or publication upon showing that defendant unavailable for personal service. If out-of-state address known, mailing must accompany publication. Title 13, § 1508.

(4) Answer - Within 20 days of service of process. Title 13, § 1511.

(5) Verification - Petition must be signed by party. Title 13, § 1507.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - No fault with irretrievable breakdown as basis. Irretrievable breakdown characterized by voluntary separation, separation caused by respondent's misconduct or mental illness, or incompatibility. Title 13, § 1505(a) and (b).

(2) Defenses - Failure to establish the marriage of the parties, marriage not irretrievably broken, lack of jurisdiction, separation not caused by respondent's misconduct. If action based upon respondent's misconduct, defenses of condonation, connivance, recrimination, insanity, and lapse of time are available. Title 13, § 1505(c) and (d).

(3) Period of Separation - Six (6) months except that divorce on grounds of respondent's misconduct requires no separation period. Title 13, § 1503(7).

SEPARATION:

(1) Acknowledged Legal Status - No statutory provision.

(2) Effect of Separation Agreement on Divorce Decree - No statutory provision.

TIME REQUIRED BEFORE REMARRIAGE: No statutory waiting period.

RECOGNITION OF FOREIGN DIVORCES: Full faith and credit given to decree of annulment or divorce by court of competent jurisdiction in another state, territory or possession of United States. Title 13, § 1521.

ALIMONY AND CHILD SUPPORT:

(1) The duty to support a child under the age of 18 years, whether born in or out of wedlock, rests primarily upon the child's parents equally. Duty ends when the child receives a high school diploma or attains age 19, whichever event occurs first. Title 13, § 501.

(2) Duty of support means an obligation imposed or imposable by law to provide support for a child, spouse or former spouse, including an unsatisfied obligation to provide support. Title 13, § 601(3).

(3) Alimony may be awarded to respondent divorced on account of incompatibility or mental illness, who is dependent upon petitioner for support, but only during the continuance of such dependency. Title 13, § 1502(5).

(4) Either party in a divorce or annulment action may obtain temporary alimony. Title 13, § 1509(b)(1).

(5) Alimony means support or maintenance decreed by the court in favor of a spouse as enforcing such spouse's right to marital support. Brown v. Brown, 42 Del. 157, 29 A.2d 149 (Del. 1942).

(6) Expenses designated as support includes costs of prenatal and postnatal medical, hospital and other expenses incident to the birth of a child. Title 13, § 513(a)(3).

(7) Petitioner's reasonable counsel fees and litigation fees incident to the support enforcement are part of spousal support. Title 13, § 513(a)(5).

(8) Defendant may be ordered to permit (as per element of support) the spouse and/or children to use designated personal property and/or fixtures, even though title is in defendant's name. Title 13, § 513(a)(11).

(9) Plaintiff may be granted use of defendant's personal property while divorce or annulment proceedings are pending. Title 13, § 1509(b)(5).

(10) Courts can order automatic wage withholding in all case involving child support. Title 13 § 513(b).

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution. Title 13, § 1513(a).

(2) Fees Awarded - Court may award attorney's fees and costs. Title 13, § 1515.

UNIFORM INTERSTATE FAMILY SUPPORT ACT:
Effective July 1, 1995. Title 13, §§ 601-691.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Where parents live apart, the court may award custody to either of them and neither shall benefit from presumption of being better suited. Title 13, § 722.

(2) Judicial Approach - Best interests of child control. In determining a child's best interest, the Court shall consider many factors: wishes of child's parent(s); wishes of the child; the child's adjustment to his home, school, and community; and the mental and physical health of all individuals involved. Title 13, § 722.

GRANDPARENTS VISITATION RIGHTS: Court may grant reasonable visitation rights to maternal or paternal grandparents.

UNIFORM CHILD CUSTODY JURISDICTION ACT: DEL. CODE ANN. tit. 13, §§ 1901 to 1925.

CRIMINALIZATION OF CHILD SNATCHING: Delaware defines parental kidnapping as Interference with Custody. It is a Class A misdemeanor (punishable by fine not exceeding $2,300 and no more than 1 year confinement) unless the person who interferes with custody causes the removal of the child from Delaware, in which case it is a Class G felony (punishable by sentence of up to 2 years and such fine as the court may direct). Title 11, § 785 (offense), Title 11, § 4206 (punishment for misdemeanors), and Title 11, § 4205 (punishment for felonies).

TREATMENT OF MILITARY PENSIONS: Divisible as marital property.

ESTABLISHING AND ENFORCING CHILD SUPPORT ORDERS: DEL. CODE ANN. tit. 13, §§ 513 and 516.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: DEL. CODE ANN. tit. 13, §§ 507, 513 and 516 (1993 & Supp. 1994).

(1) Continuing orders for alimony and child support are proper. Title 13, § 513(a)(1).

(2) Wages for current alimony and child support can be garnished. Where the duty of support has been determined to exist, the court may order the defendant to pay a certain sum periodically into the Division of Child Support Enforcement or the custodians, etc. Title 13, § 513(a)(1).

PROCEDURES:

(1) The family court has exclusive original jurisdiction over child support, medical support, separate maintenance actions, and the division of marital property and marital debts. Title 13, § 507.

(2) The family court has the power to enforce, modify or terminate any support order entered by the Superior Court. Title 13, § 508.

(3) Proceedings shall be brought in the county wherein the respondent resides or is found or in the county wherein the petitioner resides if respondent does not reside there or cannot be found in the State of Delaware. Title 13, § 508(2).

(4) Proceedings shall be instituted by verified petition with the name, address (when possible) and circumstances of respondent; shall identify the divorce decree with certified copy attached; and shall provide other pertinent information. Title 13, § 508(3).

(5) Proceedings, including garnishment, may be instituted by a petition in which petitioner alleges that defendant owes petitioner a duty of support and has failed or refused to provide such support. Title 13, § 511.

(6) The support obligor is given 10 days to answer after service of the writ of attachment. Title 13, § 513(b)(3). NOTE: Federal law (30 days) prevails.

(7) The support order may direct support payments by respondent into the court, to a dependent, his or her guardian, custodian, or trustee, in lump sum or periodical payments. Title 13, § 513(a).

(8) At any time before trial upon the petition for support enforcement and upon notice to the defendant, the court shall conduct a hearing and may enter an interim order, pending final judgment, for the support of a dependent. Title 13, § 512.

(9) After notice to defendant and a hearing on the rule to show cause, the court may conclude the defendant has violated a child or spousal support order and may hold defendant in contempt and may attach defendant's wages. Title 13, § 516(a).

ATTACHMENT EXEMPTIONS: Title 13, § 513(B)(7). Attachments for support obligations are exempt from statutory limitations. Liberty Loan Corp. v. Mayor of Wilmington, Del. Supr., 460 A.2d 525 (1983).

RESPONSIBILITIES AND LIABILITIES OF OBLIGOR'S EMPLOYER:

(1) Attachment for support has priority over any other attachment, except federal tax liens. Attachment is limited by 15 U.S.C. § 1673(b). Attachment of unemployment compensation shall not exceed 50 percent of the weekly payment. Title 13, § 513(b)(7).

(2) Employer shall deduct the specified sum from the wages due the obligor-employee, and deliver said deduction to the Division of Child Support Enforcement or the obligee, as directed by the Court. Title 13, § 513(b)(8).

(3) Employer is primarily liable for payment upon notice of order. Criminal and civil sanctions may be imposed for failure to comply. Title 13, § 513(b)(9) and (10).

DISTRICT OF COLUMBIA

STATUTES:

I. Marriage - D.C. CODE ANN. §§ 30-101 to 30-121 (1993 & Supp. 1994).

II. Divorce - D.C. CODE ANN. §§ 16-901 to 16-923 (1989 & Supp. 1994).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Age 16 with parental consent. §§ 30-103 and 30-111.

(2) Medical Examination - Standard serological test for syphilis. § 30-117.

(3) License Fee - $2.00. § 15-717.

(4) Waiting Period - License may be issued upon expiration of 3 days after receipt of application. § 30-109.

(5) Solemnization - Any minister of a "religious society" authorized by any judge of the Superior Court of D.C. may perform a marriage. In addition, any judge, clerk, or deputy clerk authorized by a judge may perform the ceremony. A marriage may also be solemnized by any judge or justice of any court of record without a minister and in a manner prescribed and practiced by a "religious society". § 30-106.

(6) Return of documents solemnizing marriage must be within 10 days to clerk's office of Superior Court by person solemnizing marriage. § 30-112. Penalty of $50 may be imposed for failure to make return. § 30-113.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Recognized. Matthews v. Britton, 303 F.2d 408 (D.C. Cir. 1962).

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Not recognized.

PROHIBITED MARRIAGES: All marriages between parents and children, ancestors and descendants, brothers and sisters, uncles and nieces, aunts and nephews, step-relations, in-laws, and bigamous marriages. § 30-101.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

District of Columbia

GROUNDS FOR ANNULMENT: Mental incompetence, physical incapacity, bigamy, consent obtained by force, fraud or duress, and nonattainment of age of legal consent, §§ 16-904(d), 30-101, and 30-103. Also, any reason listed under "Prohibited Marriages." § 30-101.

FOREIGN MARRIAGES: Marriages prohibited in the District and entered into in another jurisdiction by persons domiciled in the District may be decreed to be void as if celebrated in the District. § 30-105.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - One party must be a resident of the District for at least 6 months preceding commencement of action. § 16-902.

(2) Military Provision - Member of armed forces qualifies as resident upon residing in District for 6 months prior to commencement of action. § 16-902.

(3) Service of Process - Nonresident defendant may be served by publication when shown that he is outside of state and cannot be found. §§ 13-336, 337.

(4) Answer - Within 20 days of service of process. Rule 12, D.C. Superior Court - Domestic Relations Proceedings.

(5) Verification - No statutory provision.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - No fault divorce granted on basis of separation for 1 year involuntarily or 6 months by mutual consent. § 16-904(a).

(2) Defenses - No statutory provision.

(3) Period of Separation - See, (1) Grounds, supra.

SEPARATION:

(1) Acknowledged Legal Status - Court may grant decree of legal separation from bed and board. § 16-904(b).

(2) Effect of Separation Agreement on Divorce Decree - No statutory provision. Separation agreement valid despite subsequent divorce. Mahler v. Mahler, 302 A.2d 737 (App. D.C.), reh. denied, 305 A.2d 520 (D.C. App. 1973).

(3) Separation Agreements (if not made in contemplation of future possible reparation) will be enforced if provision for spousal support is reasonable and fair. Shaw v. Saxman, 46 App. D.C. 526 (App. D.C. 1917).

TIME REQUIRED BEFORE REMARRIAGE: Must wait until time for noting appeal has expired and if appeal has been entered, waiting period extends to final disposition of appeal. § 16-920.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT:

(1) Alimony is defined under District law as the allowance paid to the spouse for her maintenance. Wheeler v. Wheeler, 188 F.2d 31 (D.C. Cir. 1951). Federal law does not include specific need payments within the definition of alimony and none are stated here.

(2) Child Support - § 16-916 sets forth guidelines for determining the dollar amount of child support. Court may order payment by father or mother of sufficient funds for support of minor children either before or after entry of final decree and will retain jurisdiction of cause for future orders in that regard. Awards are made pursuant to child support guideline. Attorney fees and court costs may be awarded by court. §§ 16-911, 16-912, 16-914, 16-916.

(3) Court may require payment of alimony during pendency of action. § 16-911.

(4) Pendente lite award of money for conduct of the case, including counsel fees, may be granted during pendency of suit to spouse, whether plaintiff or defendant. § 16-911.

(5) Court may order payment of permanent alimony. §§ 16-912, 16-913. Jurisdiction of cause is retained to enter further orders where alimony has been granted. § 16-914. There is no statutory provision for the termination of alimony upon remarriage. If spouse obtains a foreign ex parte divorce, then, upon personal service of that spouse in the District, the other spouse may obtain a decree for maintenance and support money. § 16-916.

(6) Attorneys fees, costs and interest are properly awarded as an element of child support and alimony. § 16-911(a)(1).

(7) Arrearages of 30 days or more and support payment trigger a requirement for automatic wage withholding. § 30-507.

District of Columbia

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution. § 16-910.

(2) Fees Awarded - Court may award attorney's fees and costs.

(3) In absence of valid antenuptial or postnuptial agreement, or of decree of legal separation disposing of the property of spouses, upon entry of final divorce decree, each party is assigned his/her sole and separate property acquired prior to marriage and his/her sole property acquired during marriage by gift, devise, or descent. All other property acquired during marriage is distributed regardless of whether title is held individually or jointly. This property shall be distributed in an equitable manner after considering such factors as: duration of marriage, age, health, occupation, employability, assets, debts, provisions for custody of minor children, etc. § 16-910.

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: Not adopted. Earlier act appears at §§ 30-301 et seq.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Best interests of child shall be primary consideration. § 16-911(a)(5).

(2) Judicial Approach - Parents viewed as equally qualified. Best interests of child control. Bazemore v. Davis, 394 A.2d 1377 (App. D.C. 1978).

GRANDPARENTS VISITATION RIGHTS: No statutory provision.

UNIFORM CHILD CUSTODY JURISDICTION ACT: Adopted. § 16-4501.

CRIMINALIZATION OF CHILD SNATCHING: §§ 16-1021 to 16-1026.

TREATMENT OF MILITARY RETIRED PAY: Since a pension constitutes property, to the extent that the right to such property was acquired during the marriage, the pension should be deemed "marital property" subject to distribution. See Barbour v. Barbour, 464 A.2d 915 (D.C. App. 1983).

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: D.C. CODE ANN. §§ 16-501 to 16-577 (1981 & Supp. 1990).

The traditional remedy of the District of Columbia is a writ of attachment. Service of process compels the garnishee to withhold monies as of the date of service through satisfaction of the writ. Service impresses the garnishee with a lien unless the

garnishee receives written notice of any court proceedings attaching the attachment or the judgment on which it is based. §§ 16-572 and 16-573.

PROCEDURES:

(1) Unpaid installments of child support and alimony become judgments by operation of law. Thus, the obligee need not reduce amounts due and owing to judgments. A mere decree of dissolution is sufficient. The obligee then proceeds by affidavit to cause an attachment to issue. The attachment is served on the garnishee.

(2) The superior court has presumptive jurisdiction over the subject matter. In the enforcement effort (not to be confused with the foundational judgment), the court is not required to exercise in personam jurisdiction over the obligor.

(3) The remedy is ancillary. Therefore, the remedy is only as valid as the underlying judgment.

(4) Service of process must be accomplished in accordance with federal law and regulation.

(5) The garnishee must file an answer to interrogatories within 10 days after service. The answer must be in response to interrogatories propounded. § 16-552(a). The answer of garnishee is conclusive unless properly traversed. A traverse is accomplished by filing a motion for recovery of judgment. The answer of the garnishee and the traverse frame the issues and no other pleadings are required. The burden is on the obligee to prove all elements of the garnishee's liability by a preponderance of the evidence. Traverse as used herein includes all denials of the garnishee's answer by the obligee by whatever name. § 16-556.

(6) The garnishee has the duty to surrender the money in its hands to the plaintiff. This procedure will discharge the garnishee for that amount so far as the obligee is concerned. Payment discharges the liability of the garnishee to the plaintiff. § 16-573.

(7) There is no constitutional requirement that obligors be given post-judgment notice of an enforcement effort. Endicott Johnson Corp. v. Encyclopedia Press, Inc., 266 U.S. 285 (1924).

STATE EXEMPTIONS:

(1) The District of Columbia has a jurisdictional exemption which saves to the obligor 50% (50% subject to seizure is gross, not net). §§ 16-577 and 16-572. NOTE: Federal exemption is inapplicable.

(2) The garnishee need not raise discretionary exemptions and; therefore, none are stated.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

Garnishee is not obligated to raise defense on behalf of the defendant employee. Nothing else in the statute or annotations appears to place a duty on the garnishee to protect the defendant-debtor's rights to an exemption.

FLORIDA

STATUTES:
I. Marriage - FLA. STAT. ANN. §§ 741.01 to 741.30 (1986 & Supp. 1995).
II. Divorce - FLA. STAT. ANN. §§ 61.001 to 61.20 (1985 & Sup. 1995).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Under 18 requires written consent of parent or guardian. § 741.04. No person under 16 may be married without court approval except where they are parents of, or are expecting a child. §§ 741.04 and 741.0405.

(2) Medical Examination - None required.

(3) License Fee - $68.50. §§ 741.01 and 741.02.

(4) Waiting Period - None (and no clerk shall issue a license more than 30 days after an application is received. § 741.041.)

(5) Solemnization - Any regularly ordained minister or clergyman, judicial officer, clerk of a circuit court, or notary public may perform marriage. § 741.07(1). Special provision is made for Quaker/Friends marriages. § 741.07(2).

(6) Sex - One party must be male, and the other female. § 741.04.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Not valid within the state after 1 January 1968, but recognized if valid in the state where contracted. § 741.211.

(2) Marriage by Proxy - No statutory provision.

(3) Marriage by Contract - No statutory provision.

PROHIBITED MARRIAGES: All marriages between a person and his/her sister/brother, aunt/uncle, niece/nephew or between persons related by lineal consanguinity are prohibited. § 741.21.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: No statutory provision.

Florida

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - One of the parties must reside 6 months in Florida before the filing of the petition. § 61.021.

(2) Military Provision - Absence from the state solely because of military duty, after residency established, is of no consequence. Any person in any branch of the Armed Forces of the U.S., and their spouse, if living within state, shall be prima facie resident for maintaining any action. § 47.081.

(3) Service of Process - A copy of the petition together with a copy of summons shall be served on the respondent. § 61.043.

(4) Answer - Within 20 days after date of service.

(5) Verification - Not required.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Irretrievable breakdown or adjudication of mental incompetence for 3 years. § 61.052.

(2) Defenses - Abolished. § 61.044.

(3) Period of Separation - No statutory provision. However, no final judgment can be entered until 20 days after the original petition is filed; but this can be waived to avoid injustice. § 61.19.

SEPARATION:

(1) Acknowledged Legal Status - No dissolution of marriage from bed and board. § 61.031. A party may petition for alimony and child support without petitioning for dissolution of marriage. § 61.09. When separated, a party may petition for an adjudication of his or her obligation to maintain his or her spouse and minor children, including a determination of child custody and visitation. § 61.10.

(2) Effect of Separation Agreement on Divorce Decree - No statutory provision.

TIME REQUIRED BEFORE REMARRIAGE: No statutory provision.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision. But see § 741.211 Notes of Decisions.

SIMPLIFIED DISSOLUTION PROCEDURE: A simplified procedure is available when the parties have no children and they have reached

agreement on division of property and payment of their joint obligations. Parties should check with the clerk of the circuit court in their county of residence. Fla. R. Civ. P. Rule 1.611.

ALIMONY AND CHILD SUPPORT:

(1) Alimony can be awarded to either party. § 61.08.

(2) Alimony may be permanent or rehabilitative, periodic or in lump sum (or both). The court may consider the adultery of a spouse and shall consider all relevant economic factors in determining a proper award of alimony, including the parties' standard of living, the duration of their marriage, age and physical/emotional condition of the parties, financial resources, time necessary for a party to acquire education/training to find appropriate employment, and the contribution of each party to the marriage, including homemaking services, child care, and education and career building of the other party. § 61.08.

(3) Child support may be required of either parent as is equitable from the circumstances of the parties and the nature of the case. It is payable until a child reaches the age of 18 or is otherwise emancipated. Each child support order shall contain a provision for health insurance when such insurance is reasonably available. § 61.13(1).

(4) A determination of alimony and child support obligations may be obtained without petitioning for dissolution of marriage. §§ 61.09 and 61.10.

(5) F.S. Section 415.503 defines child abuse and neglect in such a manner as to make criminal failing to supply a child with adequate food, clothing, shelter, or health care. F.S. Section 856.04 makes criminal the willful withholding of support from a wife by her husband or from a child by a parent.

PROPERTY DISTRIBUTION: Method - Equitable distribution. § 61.075.

ATTORNEY'S FEES AND COSTS: Court may award attorney's fees and costs. § 61.052(3).

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: FLA. STAT. ANN. §§ 88.011 to 88.371 (Harrison).

DETERMINATION OF CHILD CUSTODY: Best interests of the child control. The father is to be given the same consideration as the mother without regard to the age of the child. § 61.13(2)(b)1. Unless found to be detrimental to the child, the parents shall share parental responsibility for the child, with primary physical residence awarded to one party. § 61.13(2)(b)2.

GRANDPARENTS VISITATION RIGHTS: Court may award visitation rights to grandparents. § 61.13(2)(b)2.c.

UNIFORM CHILD CUSTODY JURISDICTION ACT: FLA. STAT. ANN. §§ 61.1302 to 61.1348.

CRIMINALIZATION OF CHILD SNATCHING: A person who knowingly takes or keeps a child from that child's parent or lawful custodian is guilty of interference with custody, a first degree misdemeanor. § 787.03. It is a felony to remove a child from the state in violation of a court order, or with criminal intent to remove a child from the state or conceal the location of a child during the pendency of a child custody action. § 787.04.

TREATMENT OF MILITARY RETIRED PAY: Military pension benefits should generally be considered as assets subject to equitable distribution or as source for payment of alimony to the extent benefits accrued during marriage. See DeLoach v. DeLoach, 552 So. 2d 324 (Fla. App. 1st Dist. 1989). Now specifically addressed in § 61.076.

COMPLIANCE WITH CHILD SUPPORT ENFORCEMENT AMENDMENTS OF 1984: See § 61.181 for the mandatory income withholding procedures.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: FLA. STAT. §§ 61.12, 68.03 and 77.01.

(1) Post-judgment garnishment is recognized. Additionally, the chapter of Florida Statutes § 61.12, dealing with dissolution of marriage specifically provides that the orders of the court of this state for alimony, suit money, or child support are enforceable by way of attachment or garnishment including the wages of a head of a family resident in this state.

(2) In respect to the regular writ of garnishment, the garnishee is liable with respect to all amounts owed from the time of the service of the writ upon him until the time he or she files the answer. Earnings which accrue to the primary debtor during this period must be suspended and included in the answer. § 77.06.

(3) The Supreme Court of Florida in Ray Lein Construction, Inc. v. Wainwright, 346 So. 2d 1029 (1977) found the pre-judgment garnishment provision § 77.031, unconstitutional. The legislature revised the statute and it was not held unconstitutional in the one reported case [Cerna v. Swiss Bank Corp., S.A., App. 3 Dist., 503 So. 2d 1297 (1987)]. The law now provides that before a judgment

may be obtained by the plaintiff against the defendant, a writ of garnishment shall be issued by the court or by the clerk on order of the court.

(4) There is no specific statutory grant of special process for state agencies to enforce support orders. However, § 409.245 specifies that the Division of Family Services of the Florida Department of Health and Rehabilitative Services will not accept an application for aid to dependent children unless the applicant has instituted a civil action for such support if such right of action exists. The Division of Family Services is specifically authorized to assist the applicant in such a prosecution, either by referral to a legal aid society or if no society exists through the use of the state attorney. This statute also authorizes the payments of court costs for those applicants for aid to dependent children who cannot afford payment of court costs.

(5) A continuing writ of garnishment may be used for alimony as well as child support, and is in effect from time of service until the order has been satisfied. § 61.12. The continuing writ of garnishment is effective at the time of service to suspend wages due at that time. It continues to suspend wages on a continuing basis until the continuing writ of garnishment, and the order for writ of garnishment are satisfied. The garnishee is liable for future wages which will be earned beyond the date of the answer of garnishee, and the continuing writ of garnishment will garnish not only current, but also future, child and spousal support.

(6) Sequestration is provided by § 68.03. In a chancery action where the defendant is out of state, the plaintiff may secure sequestration of defendant's property in Florida which is in the hands of any other defendant.

PROCEDURES:

(1) The state circuit courts are the courts of general jurisdiction in civil and criminal cases. The circuit courts have exclusive original jurisdiction in all cases of equity including juvenile matters (except traffic offenses). The circuit courts are organized into judicial circuits which usually encompass several counties. The court sits at each county seat.

(2) To commence a post-judgment garnishment, it is necessary to have in existence a court order requiring child support or alimony. Unpaid installments due on a support order automatically become judgments by operation of law.

(3) Plaintiff must deposit $100 with court prior to issuance of garnishment. All expenses of garnishee to include attorney's fees are paid from this fee. Excess expenses are taxed as cost and

garnishee is given judgment against party against whom cost are taxed for this deficiency. Plaintiff may recover his fee unless cost are taxed against him. § 77.28.

(4) In cases with arrearages, the plaintiff files with the court which rendered the judgment an unverified "motion" stating the amount of the judgment and that the movant does not believe that the defendant has in his possession visible property on which a levy can be made sufficient to satisfy the judgment. § 77.03.

(5) When court ordered child or spousal support is not paid, the plaintiff may obtain an order of contempt to enforce the support obligation. However, if the support order is not a present obligation and the plaintiff reduces the support arrearage to final money judgment, then a contempt order may not issue as the character of the defendant's obligation has changed. The contempt process cannot be used to enforce the payment of ordinary debt.

(6) After the plaintiff has filed his motion for garnishment and in appropriate cases has filed the necessary bond and surety, the method of service of process of an actual garnishment writ is the same as provided for in the service of any other legal process within the State of Florida. The sheriff is directed to serve the writ upon an authorized representative of the garnishee. Fla. R. Civ. P. Rule 1.070. NOTE: Congress has established the methods by which the United States will accept service on itself in this type of case. 42 U.S.C. § 659(b). Service by certified mail is good service and to this extent supersedes the personal service rule of Fla. R. Civ. P. Rule 1.070.

Customarily the clerk of court will serve the writ by certified mail upon the designated agent.

(7) Although there is no statutory requirement that the underlying documentation accompany the writ of garnishment or the continuing writ of garnishment, attorneys customarily send certified copies of the judgment for arrearage, motion for writ of garnishment, and order for writ of garnishment.

(8) The garnishee must serve an answer on the plaintiff within 20 days of the service of the writ upon garnishee. The writ itself indicates the statutory time period concerned. Fla. R. Civ. P. Rule 1.907. The garnishee's answer must state whether or not the garnishee is indebted to the defendant at the time of the answer or at the time of the service of the writ or any time in between. The answer must also set forth the amount of tangible or intangible property of the defendant in the garnishee's possession or control at the time of the answer, at the time of the service of the writ or at any time in between; and also whether the garnishee knows of any other person who is indebted to the

defendant, or who may have property of the defendant in his possession or control. § 77.06. NOTE: In the Fourth Judicial Circuit of Florida a formal answer is required, however, the other judicial circuits will accept an answer in letter form.

(9) The primary debtor (defendant) must file a motion to dissolve the writ within 20 days of notice, whether by publication or otherwise, setting forth any defense he or she might have to the plaintiff's motion for garnishment. § 77.07.

(10) If the plaintiff is not satisfied with the garnishee's answer concerning what amounts of money are owed the defendant or what personal property is in the hands of the garnishee, he must serve a reply on the garnishee within 20 days denying those allegations in the answer of the garnishee of which he disapproves. Failure of the plaintiff to file such a reply is a judicial admission that the garnishee's answer is true. § 77.061.

(11) The actual effect of garnishment naturally depends on two factors: the amount of the judgment which is sought to be collected by the plaintiff and the amount due the defendant which is in control of the garnishee. Since only certain earnings, which are owed at the date of service and continuing until the answer is filed, are subject to the writ, the effect of the Florida garnishment statute is to impound only so much pay as is due during the period from service of the writ until the answer is filed. A subsequent procedure would have to be initiated for each subsequent garnishment. After the issuance of the pay-in order (judgment against garnishee), the garnishee should pay the suspended pay in the garnisheed fund.

(12) Upon service of the pay-in order for a continuing writ of garnishment the employer should commence making periodic payments to the court ordered payee and continue in accordance with the order of the court.

(13) The plaintiff serves notice of the writ of garnishment on the defendant debtor in the same manner as that provided for the service of any other legal process within Florida (the sheriff makes personal service of the notice), except that since the garnishment action is quasi in rem, service by regular mail or in some cases by publication is authorized if the debtor is not in the state or cannot be found at his usual place of residence. F.R.C.P. 1.070. See also Payton v. Swanson, 175 So. 2d 48 (1965).

STATE EXEMPTIONS:

(1) § 222.11 provides that no money or other thing due to the "head of family" residing in Florida, for personal labor or services of that head of a family, shall be the subject of

garnishment or attachment. Head of a family is broadly defined. (Disposable earnings in excess of the first $500 per week can be garnished with the consent of the "head of family.")

(2) § 61.12 removes this exemption in the case of garnishment or attachment to enforce a court order for alimony, suit money, or child support. However, if past due arrearages are reduced to a judgment, they are no longer an "order for alimony, suit money, or child support," and thus the exemption of § 222.11 is applicable. Costa v. Costa, 285 So. 2d 665 (1973) and Noyes v. Cooper, 216 So. 2d 799 (1968).

(3) Since there are no state statutory limitations on the amount which may be garnisheed, only the federal exemptions apply. 15 U.S.C. 1673(a).

(4) There is no indication in the Florida statutes or case law that military retired pay would be entitled to any special exemption.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) Garnishee is not obligated to raise defenses on behalf of the defendant employee. Nothing else in the statute or annotations appears to place a duty on the garnishee to protect the debtor-defendant's right to an exemption.

(2) Since the procedure of garnishment requires at least constructive notice by publication on the debtor-defendant, it would appear clear that the duty to notify the defendant of the action rests upon the plaintiff rather than on the garnishee.

(3) When a garnishment suit is brought against a party, the garnishee occupies the same position as if sued by the principal debtor. It follows that any defense, which the garnishee could interpose to defeat a recovery against him if the proceeding had been directed against him by the defendant, may be interposed by him to prevent judgment against him as garnishee. Defenses available to the garnishee under this rule include the defense that the claim against him is barred by the statute of limitations, or the failure to give a required notice. As to the garnishee, the plaintiff stands in the shoes of the defendant and can assert only the rights of such defendant. There is, however, one exception to the rule that the garnishing creditor can avail himself only of the legal rights of his debtor against the garnishee. Where, by fraud and collusion between the judgment debtor and the garnishee, the debtor's funds are transferred to the garnishee to be held for the benefit of the transferor with the intent to defraud creditors,

garnishment will lie notwithstanding the fact that the judgment debtor by reason of his own fraud may not be able to sue the transferee. 3 Fla. Jur. Garnishments § 120.

(4) When the government is served with garnishment writs on the same defendant from different sources, it would appear to be necessary to get all of the parties in one forum to determine priorities. Consequently, the only time when interpleader would be appropriate is when the garnishee has knowledge of two competing claims and cannot clearly determine who has a priority. In such cases, he should file his interpleader action to be sure that a court determines the priority issues. Jax Ice & Cold Storage Co. v. South Florida Farms Co., 91 Fla. 593, 109 So. 212 (1926).

(5) Garnishee must disclose to the garnishee or plaintiff by answer what monies or property the garnishee has in his possession which belong to, or are due to, the defendant-debtor from the time of the service of the writ until the time of the filing of the answer. The garnishee is responsible for all such sums or property so disclosed in his answer or adjudicated to the defendant in those cases where the defendant files a reply and a trial determines a different sum is due than that which is indicated by the garnishee's answer. § 77.06(2).

The garnishee is discharged upon surrendering the property to the court if there has previously been a judgment for the plaintiff in the main action. § 77.082.

(6) Garnishment has been held to give rise to an equitable lien in Florida. The equitable lien is effective when the garnishee is served with a writ of garnishment.

(7) If the garnishee will not surrender the property belonging to the defendant, provided that he has the power to do so, and which he has admitted is in his possession, the court may allows levy on the garnishee's own property for the unpaid amount of plaintiff's judgment against defendant. § 77.13.

Florida

GEORGIA

STATUTES:

I. Marriage - GA. CODE ANN. §§ 19-3-1 to 19-3-68 (1991 & Supp. 1994).

II. Divorce - GA. CODE ANN. §§ 19-5-1 to 19-5-17 (1991 & Supp. 1994).

III. Annulment - GA. CODE ANN. §§ 19-4-1 to 19-4-5 (1991 & Supp. 1994).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Under 18 requires consent of parent. No persons under 16 may be married unless they are parents of, or expecting, a child. §§ 19-3-2, 19-3-37. The judge of the probate court must notify the parents of any male or female 17 years of age or younger who applies for a marriage license if parental consent is not required under §§ 19-3-2, 19-3-36. § 19-3-38.

(2) Medical Examination - A medical examination must be given for venereal disease, sickle cell anemia, and rubella within 30 days of the issuance of the license. § 19-3-40(b). Exceptions may be granted in cases of pregnancy and when both applicants are aware that a syphilitic infection has been rendered noncommunicable. A physician's statement is required to qualify for the pregnancy exception. A physician's certificate is required for the syphilis exception. § 19-3-40(c).

(3) License Fee - No statutory provision.

(4) Waiting Period - None. § 19-3-35.

(5) Solemnization - Any judge, city recorder, magistrate, minister, or other person of a religious society so authorized by that society, may perform marriage. § 19-3-3(c). However, a marriage is not invalid for want of the authority in the minister, judge, city recorder, or magistrate to solemnize the same. § 19-3-42.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Recognized. Stewart v. Price, 81 S.E.2d 28 (Ga. 1954); Kersey v. Gardner, 264 F. Supp 887 (M.D. Ga. 1967); Metropolitan Life Insurance Co. v. Lucas, 761 F. Supp. 130 (M.D. Ga. 1991); Georgia Osteopathic Hospital v. O'Neal, 403 S.E.2d 235 (Ga. App. 1991). See, § 19-3-1 O.C.G.A. (note).

(2) Marriage by Proxy - No statutory provision.

(3) Marriage by Contract in Opposition of Free Choice - Void. § 19-3-7.

PROHIBITED MARRIAGES: All marriages between a man and his daughter, stepdaughter, sister of the whole or half blood, grandchild, or niece and if any of those persons are related by blood or by marriage. A woman shall not marry her corresponding relations. § 19-3-3.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: No statutory grounds specified except marriage declared void by law See § 19-3-5 for requirements for void marriages. Annulments may not be granted in instances where children are born or to be born as a result of the marriage. If grounds for annulment exist, party is not barred from seeking divorce instead. §§ 19-4-1, 19-4-2.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - Plaintiff must be a resident of this state for 6 months before the filing of the petition for divorce. § 19-5-2. Williams v. Williams, 177 S.E.2d 481 (Ga. 1970).

(2) Military Provision - A person who has been a resident of a military reservation in Georgia for 1 year may bring an action for divorce in a county adjacent to that reservation. § 19-5-2.

(3) Answer - The respondent may at any time before trial file with the court a written demand for a detailed statement of the facts on which the grounds in the petition are predicated. The respondent shall file an answer within the time required by the petition and process. § 19-5-5(c).

(4) Verification - The written petition must be verified by the plaintiff. § 19-5-5(a).

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Prohibited degrees of consanguinity, mental incapacity at the time of marriage, impotency at the time of marriage, force, duress, or fraud, pregnancy of the wife by a man other than the husband at the time of marriage unknown to the husband, adultery, willful desertion for 1 year, conviction of an offense involving moral turpitude and a sentence in a penal institution for 2 years or longer, habitual intoxication, cruel treatment, incurable mental illness, habitual drug addiction, irretrievable breakdown. The court may not grant a divorce for irretrievable breakdown until 30 days from service of process to

the defendant. § 19-5-3(13). Practice Note: The majority of divorces granted are based upon a petition which alleges that the marriage is "irretrievably broken". This section permits divorce without allocation of fault. Anderson v. Anderson 230 S.E.2d 272 (Ga. 1976); superceded by Davidson v. Davidson, 257 S.E.2d 269 (Ga. 1979).

(2) Defenses - Collusion, consent, both parties guilty of like conduct, voluntary condonation, and cohabitation subsequent to the acts complained of with notice thereof. § 19-5-4.

(3) Period of Separation - No statutory provision. However, if parties are separated and no divorce is pending, alimony may be awarded. § 19-6-1(a).

SEPARATION:

(1) Domicile of a married person not presumed to be that of spouse. § 19-2-3.

(2) Effect of Separation Agreement on Divorce Decree:

A party voluntarily, by contract or other written agreement, may make adequate provision for the support and maintenance of such party's spouse, consistent with the means of such party and the former circumstances of the spouse, which shall be a bar to the right of the spouse to permanent alimony. § 19-6-8.

TIME REQUIRED BEFORE REMARRIAGE: No statutory provision. However, remarriage cannot be prohibited by the court. § 19-5-17. See also § 19-5-12, which sets out form of final decree granting right to remarry.

RECOGNITION OF FOREIGN DIVORCES: Alimony and child support provisions in foreign decrees against Georgia residents without in personam jurisdiction are not enforceable even though divorce within same decree may be. § 19-6-27(a).

ALIMONY AND CHILD SUPPORT:

(1) Both temporary and permanent alimony are allowances out of one party's estate made for the support of the other party when living separate. Alimony is awarded in accordance with the needs of the one party and the ability of the other party to pay. § 19-6-1(a) (cc).

(2) Attorney's fees may be granted as a part of the expenses of litigation. An attorney may bring an action in his own name to enforce this grant of fees. § 19-6-2.

(3) When permanent alimony is granted, the party liable for such alimony ceases to be liable for any debt or contract of the other spouse. § 19-6-6. This section does not apply to a separation agreement not addressing alimony. Beals v. Beals, 416 S.E.2d 301, 303 (Ga. 1992).

(4) As alimony, a husband has been required to pay the wife's monthly house payments and utility bills. Chambless v. Chambless, 105 S.E.2d 221 (Ga. 1958). See also Joyce v. Joyce, 225 S.E.2d 25 (Ga. 1976).

(5) Award of store, property, and inventory was a division of property and not considered alimony. Morris v. Morris, 250 S.E.2d 459 (Ga. 1978).

(6) Final decree will set forth in what amount and from which party minor children are entitled to support. The decree will also set forth the manner in which such support is to be paid. When support is awarded, the party required to pay the support is not liable to third parties for necessaries, embraced in the verdict or decree that are furnished the children. Support, absent a finding of special circumstances, is established payment to published guidelines. § 19-6-15. However, liability for support includes medical expenses. West v. West, 185 S.E.2d 763 (Ga. 1971).

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution. See Coleman v. Coleman, 240 S.E.2d 870 (Ga. 1977) and § 19-5-13.

(2) Fees Awarded - Court may award attorney's fees and costs. § 19-6-2.

UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT:
1958 Act passed. §§ 19-11-40 to 19-11-81. Recent technical amendments have updated terminology used in §§ 19-11-53, 19-11-58, 19-11-59 and 19-11-80.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Either parent, if not in default, shall be entitled to custody. § 19-9-1(a). Court may look into the circumstances of the parties in determining custody. A requirement that any parent who is involved in a case under § 19-9-1 must notify the other parent of any address change at least 30 days before the anticipated change of residence. § 19-9-1(c)(3).

(2) Judicial Approach - Natural parents are treated equally. However, the party not in default shall be entitled to custody. A child of 14 years may select the parent with whom the child desires to live unless the parent selected is determined to be unfit. The court may issue an order granting temporary custody to the selected parent for a trial period not to exceed six months regarding the custody of a child who has reached 14 years of age where the judge hearing the case determines such a temporary order is appropriate. § 19-9-1(a).

GRANDPARENTS VISITATION RIGHTS: Court may grant visitation rights to grandparents upon proof of special circumstances which make such visitation rights necessary to the best interests of the child. § 19-7-3. There is no presumption in favor of visitation by any grandparent. An original action for grandparent visitation may be filed only once every two years and may not be filed when another custody action is pending concerning the child. § 19-7-3 (c).

UNIFORM CHILD CUSTODY JURISDICTION ACT: GA. CODE ANN. §§ 19-9-40 to 19-9-64.

CRIMINALIZATION OF CHILD SNATCHING: A person who knowingly takes or keeps a child from a lawful custodian commits custodial interference which is a misdemeanor: 1st offense, no more than a $500 fine and 5 months imprisonment; 2d offense, no more than a $1,000 fine and 12 months imprisonment; 3d and subsequent offenses punishable as a felony with up to 5 years imprisonment. § 16-5-45.

TREATMENT OF MILITARY RETIRED PAY: Marital property subject to equal division insofar as acquired during the marriage. Courtney v. Courtney, 344 S.E.2d 421 (Ga. 1986). See also Stumpf v. Stumpf, 294 S.E.2d 488 (Ga. 1982).

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: GA. CODE ANN. § 18-4-20 (1991 & Supp. 1993).

(1) Wages, including retired pay, can be garnished for child support and alimony. § 18-4-20(a)(2).

(2) Georgia has a statutory provision for continuing garnishment. §§ 18-4-110, 18-4-111.

(3) Wages and property of the defendant held by the employer (garnishee) are subject to garnishment. § 18-4-20(c).

(4) Wage assignment is expressly permitted. § 19-11-20.

Georgia

PROCEDURES:

(1) Garnishment permitted whenever a money judgment is ordered by a court of Georgia or by a federal court sitting in Georgia. § 18-4-60.

(2) Where defendant has defaulted on a court ordered support payment, there is a "judgment on the merits." Georgia Farm Bldgs., Inc. v. Willard, 597 F. Supp. 629 (N.D. Ga. 1984).

(3) A summons of garnishment can be served by registered or certified mail, return receipt requested. § 18-4-64. (See also 42 U.S.C. § 659.)

(4) Re-summons of garnishment may issue from time to time until judgment is paid. § 18-4-63.

(5) Garnishee's answer is due to the court no sooner than 30 days and no later than 45 days after service of process is received and must be accompanied by money or other evidence of property belonging to the debtor subject to garnishment, if it is held by the garnishee. §§ 18-4-62, 18-4-66, 18-4-84. If an answer is not filed, a default judgment can be entered against the garnishee after the expiration of the 15-day period immediately following said 45-day period for the amount claimed. § 18-4-90. A copy of the answer must be served on plaintiff or his attorney. Plaintiff must traverse the answer within 15 days or garnishee is discharged. §§ 18-4-83, 18-4-85.

(6) No pre-process interrogatories.

(7) Notice to garnishee-debtor should be by personal service. Service of notice of garnishment must be made at place of residence for purposes of obtaining the original judgment by registered or certified mail on nonresidents and when place of residence is concealed. § 18-4-64.

(8) Forms sufficient for filing seven answers must be served along with the summons. If an answer is not filed at least once every 45 days, the garnishee is automatically in default, and a default judgment can be entered for the amount claimed to be due on the judgment. §§ 18-4-113, 18-4-118. See also § 18-4-66.

(9) Except for the sections requiring that answers be made every 45 days, the methods, practices, and procedures for continuing garnishment are the same as for any other garnishment.

STATE EXEMPTIONS:

(1) The lesser of 25% of disposable weekly earnings or the amount by which such earnings exceed 30 times the federal minimum hourly wage is the maximum portion of wages that may be garnished. § 18-4-20(d).

(2) There are no discretional and jurisdictional exemptions.

(3) There is no statutory distinction between active duty and retired pay.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) No defense is required to be raised by garnishee-creditor. The defendant-debtor can challenge the existence of the judgment or the amount claimed. § 18-4-65(a).

(2) Garnishee-creditor apparently can refuse to honor the garnishment only where the service of process was defective or the appropriate legal documents were not submitted.

Georgia

GUAM

STATUTES:

In 1994, Guam combined many previously widely dispersed laws into Title 19, Personal Relations. This title is current through Pub. L. No. 21-148. In 1990, Guam adopted amendments to conform its rules of civil procedure with the 1987 amendments to the Federal Rules of Civil Procedures. (1992).

I. Marriage - Personal Relations, Ch. 3, §§ 3101 to 3212 (1994).

II. Divorce - Personal Relations, Ch. 8, §§ 8201 to 8218 (1994).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Persons between ages of 16 and 18 require written parental consent. Females between ages 14 and 16 must obtain consent of parents and a judicial order. § 3102.

(2) Medical Examination - None required.

(3) License Fee - Fifteen dollars ($15) for application of marriage license. § 3202.

(4) Waiting Period - License may be issued upon expiration of 5 days after filing of application and is valid for 60 days. § 3202.

(5) Solemnization - Any clergyman, the Governor of Guam or his substitute, or judges of district court or superior court, or Director of Revenue and Taxation or Director of Administration may perform marriage. § 3204.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Not recognized.

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Not recognized.

PROHIBITED MARRIAGES: All marriages between parents and children, ancestors and descendants of every degree, brothers and sisters (including half brothers and sisters), uncles and nieces, aunts and nephews, and bigamous marriages. §§ 3104, 3105.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

Guam

GROUNDS FOR ANNULMENT: Party to incestuous or void marriage may have marriage declared void in Superior Court; other grounds include non-age, mental incompetence, previous marriage which is still in force, consent obtained by fraud or force, impotence at time of marriage. §§ 3301, 8101.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - Plaintiff must have been a resident in Guam for 90 days preceding commencement of action. § 8318. Physical presence in Guam for 90 days preceding commencement of the action gives rise to a conclusive presumption of required residence. § 8319.

(2) Military Provision - A person assigned with the U.S. military to a unit based on Guam or a ship home ported in Guam for at least 90 days satisfies jurisdictional requirements. Note: McAllister v. McAllister, Dom. Case No. 1263-87 Superior Court (1988) held that §§ 8318-8319 were contrary to the Organic Act of Guam because they were not laws of "Local Application." Rather, they encouraged persons not residents of Guam to seek divorces there.

(3) Service of Process - Nonresident defendant may be served by publication upon showing that defendant resides outside state. Mailing of notice must accompany publication when address known. Guam Civ. Proc. Rule 4.

(4) Answer - The time specified in the summons or such further time as may have been granted. Guam Civ. Proc. Rule 12.

(5) Verification - No statutory provision.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Adultery, extreme cruelty, willful desertion, willful neglect, habitual intemperance, conviction of felony. § 8203. NOTE: Desertion, neglect or intemperance must continue for 1 year. § 8218.

(2) Defenses - Connivance, collusion, condonation, recrimination, limitation and lapse of time. § 8301.

(3) Period of Separation - See Grounds, supra.

SEPARATION:

(1) Acknowledged Legal Status - A husband and wife may agree in writing to an immediate separation and to make provision for the support of either of them or of their children. § 6105. The mutual consent of the parties is sufficient consideration. § 6106.

(2) Effect of Separation Agreement on Divorce Decree - No statutory provision.

TIME REQUIRED BEFORE REMARRIAGE: Judgment final 1 year from entry of interlocutory judgment. Thereafter parties free to remarry. §§ 3105, and 8321, 8322.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT:

(1) When an action for dissolution of marriage is pending, the court, in its discretion, may require the husband or wife to pay as alimony any money necessary to enable the wife, or husband, to support herself and her children, or to support himself and his children, or prosecute or defend the action. § 8402.

(2) In actions for dissolution of marriage the court may, during the pendency of the action, at the final hearing, or at any time thereafter during the minority of any of the children of the marriage, make such order for the care, education, maintenance, and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same. § 8403.

PROPERTY DISTRIBUTION:

(1) Method - Community property. §§ 8411 and 6110.

(2) Support Awarded - Court may grant support during pendency of action in order to enable spouse to prosecute or defend action. § 8402.

UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: Only 1954 Act adopted. Guam Civ. Proc. Code §§ 1500 to 1531.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Custody should be awarded to either parent according to the best interest of the child. § 8404.

(2) Judicial Approach - Best interests of child control. Court, on its own motion, may hear evidence concerning child custody issues. § 8404.

Guam

GRANDPARENTS VISITATION RIGHTS: Court may grant reasonable visitation rights to any interested person when in best interests of child. § 8404.

UNIFORM CHILD CUSTODY JURISDICTION ACT: Not adopted.

CRIMINALIZATION OF CHILD SNATCHING: Title 9, Crimes and Corrections, § 22.40 (1990).

ADOPTIONS: §§ 4201-4221.

GARNISHMENT AND WAGE ASSIGNMENTS: §§ 20401 et seq.

ALIMONY AND CHILD SUPPORT:

(1) When an action for dissolution of marriage is pending, the court, in its discretion, may require the husband or wife to pay as alimony any money necessary to enable the wife, or husband, to support herself and her children, or to support himself and his children, or prosecute or defend the action. § 8402.

(2) In actions for dissolution of marriage the court may, during the pendency of the action, at the final hearing, or at any time thereafter during the minority of any of the children of the marriage, make such order for the care, education, maintenance, and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same. § 8403.

HAWAII

STATUTES:

I. Marriage - HAW. REV. STAT. §§ 572-1 to 572-29 (1993 & Supp. 1994).

II. Divorce - HAW. REV. STAT. §§ 580-1 to 580-75 (1993 & Supp. 1994).

MARRIAGE REQUIREMENTS:

§ 572-1. In order to make a valid marriage contract, which shall be only between a man and a woman, it shall be necessary that:

(1) The respective parties do not stand in relation to each other of ancestor and descendant of any degree whatsoever, brother and sister of the half as well as to the whole blood, uncle and niece, aunt and nephew, whether the relationship is legitimate or illegitimate;

(2) Each of the parties at the time of contracting the marriage is at least sixteen years of age; provided that with the written approval of the family court of the circuit within which the minor resides, it shall be lawful for a person under the age of sixteen years, but in no event under the age of fifteen years, to marry, subject to section 572-2;

(3) The man does not at the time have any lawful wife living and that the woman does not at the time have any lawful husband living;

(4) Consent of neither party to the marriage has been obtained by force, duress, or fraud;

(5) Neither of the parties is a person afflicted with any loathsome disease concealed from, and unknown to, the other party;

(6) The man and woman to be married in the State shall have duly obtained a license for that purpose from the agent appointed to grant marriage licenses; and

(7) The marriage ceremony be performed in the State by a person or society with a valid license to solemnize marriages and the man and the woman to be married and the person performing the marriage ceremony be all physically present at the same place and time for the marriage ceremony.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Not recognized. See Op. Att'y Gen. 73-5.

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Not recognized.

PROHIBITED MARRIAGES: All marriages between parents and children, ancestors and descendants, brothers and sisters, uncles and nieces, aunts and nephews. Also, bigamous marriages, non-age, consent obtained by fraud, force or duress, impotency at time of solemnization, loathsome disease unknown to other party. § 572-1.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Non-age, bigamous marriage, consent obtained by fraud, force or duress, impotency, lack of mental capacity, or loathsome disease at time of solemnization or marriage within prohibited degrees of kinship. § 580-21. See Prohibited Marriages, supra.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - One party must be domiciled or physically present in this state for at least 3 months preceding commencement of action, and three months in the jurisdiction where filing. § 580-1.

(2) Military Provision - Person residing on any military base within the state shall not be prohibited from meeting residency requirement. § 580-1.

(3) Service of Process - If defendant is without the state, court may authorize service by certified or registered mail. If address unknown court may authorize service by publication. § 580-3.

(4) Answer - Within 20 days of service of process. § 580-2.

(5) Verification - Petition must be signed and sworn to by party. § 580-2.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - No fault, irretrievable breakdown, or 2 years living separate and apart under a decree of separation from bed and board entered by any court of competent jurisdiction. §§ 580-41 and 580-42.

(2) Defenses - No statutory provision. § 580-42.5. (But see Grounds, supra.)

(3) Period of Separation - Two (2) year period of separation required. § 580.41(3).

SEPARATION:

(1) Acknowledged Legal Status - Party may seek decree of separation from bed and board for up to two years if the marriage is temporarily broken. § 580-71.

(2) Effect of Separation Agreement on Divorce Decree - No bar to subsequent divorce. § 580-71.5.

TIME REQUIRED BEFORE REMARRIAGE: Although there is no waiting period, there is a waiting period of about 14 days between the final hearing and the issuance of the final divorce decree signed by the judge and filed in the Circuit Court. § 580-52.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT:

(1) Hawaii statutes provide for temporary alimony. §§ 580-9 and 580-12. Alimony is defined as periodic spousal support.

(2) All parents and guardians shall provide to the best of their abilities for the support, etc., of their children. § 577-7.

(3) The Court must rely on CHILD SUPPORT Guidelines Worksheet to compute child support, except when exceptional circumstances dictate a departure. § 576 E-15.

(4) Health insurance, medical bills, etc., are not specifically classified as support, but are items to be considered by the court in determining the amount of child support or alimony.

(5) Courts may order automatic assignment of future income. § 571-52-2.

(6) Income withholding for child support obligations is mandatory. § 576 E-16.

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution.

(2) Fees Awarded - Court may award attorney's fees and costs.

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT:
HAW. REV. STAT. §§ 576-1 to 576-42.

Hawaii

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Best interests of child control. § 571-46(1).

(2) Judicial Approach - Parents viewed as equally qualified. Best interests of child control. Joint custody is possible. § 571-46(1).

GRANDPARENTS VISITATION RIGHTS: Court may grant visitation rights when not detrimental to best interests of child. § 571-46.3.

UNIFORM CHILD CUSTODY JURISDICTION ACT: HAW. REV. STAT. §§ 583-1 to 583-26.

CRIMINALIZATION OF CHILD SNATCHING: A relative who knowingly takes or entices a person under 18 years old from one who has the right of custody commits "custodial interference," a felony punishable by 5 years imprisonment. § 707-726.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTES: HAW. REV. STAT. §§ 571-52 and 652-1 (1985 & Supp. 1992).

(1) Section 652-1(b) which provides for post-judgment garnishment of wages, has a continuing effect to hold a portion of wages (as set out in § 652-1(a)(4) and other debts due at the time of service. Following the garnishee's answer, the court will issue a "pay-in" order. The order generally continues in effect until the underlying judgment is satisfied. § 652-4.

(2) Wages can be garnished for recovery of a judgment to a child support or alimony arrearage. § 652-1. See Case Note Service on garnishee is sufficient notice to nonresident defendant. 22 H. 321. See also §§ 571-52.

(3) Section 571-52 allows the court to issue an order of wage assignment, which is based on an initial contempt citation. This court-ordered wage assignment is known as a Garnishment Order. Upon the service of this Garnishment Order the employer is to continuously withhold and deliver the court-ordered amount from the wages of the employee until further order of court.

(4) This court-ordered wage assignment can apply to current child support and alimony. Where the obligor is delinquent for a period equal to one month, the court may order an assignment of future earnings in an amount adequate to insure that future payments are satisfied. § 571-52. The court order must allow for an automatic assignment of wages for the support of minor children. § 571-52.2.

PROCEDURES:

(1) The Circuit Courts of Hawaii have original jurisdiction in all criminal and civil cases. The Circuit Court has a Family Court Division which is authorized to hear suits involving domestic relations matters. Garnishments and wage assignments can originate from such courts. The state also has a system of lesser courts of limited jurisdiction which are called District Courts. These courts also have a Family Court Division which would be authorized to issue garnishments and wage assignments.

(2) In the case of post-judgment garnishments and orders of wage assignment, the in-personam jurisdiction of the court would be established at the time that the decree of divorce, judgment, or court order for support was issued. In the case of a court-ordered wage assignment, the employee-debtor would be given personal notice of the hearing for contempt at which the underlying decision and order is issued. Pre-judgment garnishment procedures, § 652-1.5, require the plaintiff to give the defendant personal notice of the hearing thereby achieving "in personam" jurisdiction of the court. At the hearing, the court determines if the garnishee process shall be granted.

(3) A judgment of arrearage is the general basis upon which the Garnishee Summons is issued. In special circumstances the court may issue pre-judgment garnishments of wages, § 652-1a and § 652-1.5, but the court is required to have a prior hearing to determine if all the requirements are met before issuing the Garnishee Summons. The pay-in order of the court is issued after the decision on the principal cause of action creates the debt. In the case of court-ordered wage assignments, a judgment of arrearages is not required.

(4) In the case of garnishments, § 652-1, and court-ordered wage assignments, § 571-52, service of a true copy of the process must be made by personal service or by certified mail. If the garnishee is located within the state, then service is accomplished by personal service or by leaving a copy of process at the last known abode.

(5) The statutes do not indicate that any underlying documentation must accompany the Garnishee Summons or Order of Wage Assignment. Generally, attorneys in Hawaii send underlying documentation with the process and are willing to send whatever underlying documentation is required to qualify the process under 42 U.S.C. § 659 and related statutes.

(6) If upon disclosure, made under oath by the debtor, it appears that the garnishee is indebted to the defendant, but that

the debt is not payable and will not become due until some future time, then such judgment as the plaintiff may recover shall constitute a lien upon the debt. § 652.10. The garnishee may make a personal appearance on the return date and provide full disclosure. In the case of wage assignments, no formal answer is required. § 571-52.

(7) After the issuance of the pay-in order, the garnishee should pay the garnishee fund and then make periodic payments in accordance with the pay periods of the employee; and he or she should continue to make such payments until the pay-in order is satisfied.

(8) Upon service of the wage assignment the employer should commence making periodic payments to the court-ordered payee and continue in accordance with the order of the court.

(9) There is no statutory provision concerning pre-process interrogatories.

(10) The garnishee has the duty to notify the employee of the garnishment or wage assignment, and should notify the employee of any claim of exemption that the employee may plead.

STATE EXEMPTIONS:

(1) As to regular garnishment, there is a statutory schedule of wage exemptions: 5% of the first $100 of monthly wages; 10% of the second $100 of monthly wages; and 20% of monthly wages in excess of $200 are subject to garnishment. § 652-1.

(2) In the case of court-ordered wage assignments, there are no statutory exemptions provided by the state; therefore, the exemptions provided in the Consumer Credit Protection Act, 15 U.S.C. § 1673, apply.

(3) There is no statutory provision concerning discretional or jurisdictional exemptions.

(4) The state legislature amended the court-ordered assignment of wages statute, HRS § 571-52(d), by inserting language clarifying that such order would apply to retired military pay from the United States Government.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

Garnishee is not obligated to raise defenses on behalf of the defendant-employee; but in cases of pre-judgment garnishment, the garnishee may defend the principal. § 652-2.

The following summary was reviewed in April 1995 by LTC Jeffrey K. Smith, 87th LSO (Boise), Salt Lake City, Utah; Mailing address: Ada County (Boise) Prosecuting Attorney's Office, Boise, Idaho 83702, Telephone Number: (208) 364-2127, FAX: (208) 364-2132.

IDAHO

STATUTES:

I. Marriage - IDAHO CODE §§ 32-201 to 32-209 (1983 & Supp. 1992).
II. Annulment - IDAHO CODE § 32-204 (1983).
III. Divorce - IDAHO CODE §§ 32-601 to 32-616 (1983).
IV. Community Property - IDAHO CODE §§ 32-712, 713 (1949).

MARRIAGE REQUIREMENTS:

(1) Statutory framework. See IDAHO CODE § 32-201 to 209. The Uniform Marriage and Divorce Act has not been adopted in Idaho.

(2) Elements of marriage. "Marriage is a personal relation arising out of a civil contract, to which the consent of the parties capable of making it is necessary. Consent alone will not constitute a marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties, or obligations." § 32-201.

(3) Medical Certificate. None. However, each applicant for a license is required to complete a confidential questionnaire concerning the applicants potential exposure to the AIDS virus. Moreover, each applicant shall certify to the county recorder that he or she has read the educational pamphlet or has had the educational pamphlet read to them. § 32-412A.

(4) Persons eligible to marry. Any single male or female eighteen years of age or older, who is competent to give consent and capable of consummating marriage, is eligible to marry. Persons less than eighteen years old must have written consent from parents or guardians, and those under age sixteen must have court authorization as well. § 32-202.

(5) Waiting period for license: None, §§ 32-202, 403.

ALTERNATIVE MARRIAGE FORMS:

(1) Statutory. A marriage license must be obtained from the county recorder. § 32-401. Following issuance of the license, the marriage may be solemnized by any clergyman, judge or justice, the governor, or a mayor. § 32-303. The fee for a license is $11.00. §§ 32-408, 31-3205.

(2) Common law. Idaho, recognizes "common law" marriages. The essential elements of marriage, consent and solemnization, may be proven by any competent evidence. I.C. § 32-203. "When a couple cohabit, hold themselves out as being married, a presumption of marriage arises which, if disputed, must be overcome by clear and convincing evidence. . . ." Metropolitan Life Ins. Co. v. Johnson, 103 Idaho 122, 645 P.2d 356 (1982). See also Freiburghaus v. Freiburghaus, 100 Idaho 730, 604 P.2d 1209 (1980).

PROHIBITED MARRIAGES: Incestuous marriages (those between parents and children, ancestors and descendants of any degree, brothers and sisters of half or whole blood, uncles and nieces, aunts and nephews), marriages between first cousins, and polygamous marriages are prohibited regardless of the legitimacy of the relationship. §§ 32-205, 206, 207.

The Idaho Code does not authorize marriages by proxy or by contract.

GROUNDS OF ANNULMENT AND/OR VOIDABLE MARRIAGES: Marriages may be annulled and/or voidable if one of the parties was under the age of legal consent, mentally incompetent or physically incapable; if the marriage was obtained by force, duress, or fraud; if the marriage was polygamous; or if one of the parties has an unsound mind. §§ 32-204, 501. Annulment does not affect the legitimacy of, or duties to support, any children of the marriage. §§ 32-503, 504.

FOREIGN MARRIAGES: Marriages in other states or countries are recognized in this state if valid under the laws of those jurisdictions. § 32-209.

DIVORCE:

(1) Statutory framework. See IDAHO CODE §§ 32-601 to 32-616 ("grounds and defenses"), §§ 32-701 to 32-718 ("divorce actions"), §§ 32-801 to 32-805 ("divorces for insanity"), §§ 32-901 to 32-920 ("community property"), and §§ 32-1101 to 32-1126 ("child custody jurisdiction"). Idaho has not adopted the Uniform Marriage and Divorce Act but has adopted the Uniform Child Custody Jurisdiction Act and the Revised Uniform Reciprocal Enforcement of Support Act.

(2) Procedural requirements.

a. Jurisdiction (residency) - Plaintiff must have been a resident of this state for six full weeks preceding commencement of action. § 32-701.

b. Military application - A member of armed forces who has lived in the state for more than six weeks prior to filing the divorce action satisfies this residency requirement, even though he was subject to transfer during that time. See Bezold v. Bezold, 95 Idaho 131, 504 P.2d 404 (1972).

c. Service of Process - When a defendant is a nonresident, or has departed from the state, the court clerk may order publication of summons. If the address of the defendant outside the state is known, the clerk may order personal service outside the state. Idaho R. Civ. P. Rule 4.

d. Answer - A divorce complaint, like any other civil complaint, must be answered within twenty days of service of process. Idaho R. Civ. P. Rules 4, 7.

e. Verification - Although pleadings must be signed, there is no requirement that they be verified. When an attorney signs a pleading he represents that there is good ground to support it. Idaho R. Civ. P. Rule 11.

(3) Substantive Requirements.

a. A marriage, whether established statutorily or recognized as common law, may be dissolved only by death or by divorce decree entered by a court of competent jurisdiction. § 32-601.

b. Grounds for divorce. Irreconcilable differences, adultery, separation for five years, extreme cruelty, willful desertion, willful neglect, habitual intemperance, felony conviction, permanent insanity, and irreconcilable differences. §§ 32-603 to 32-616, 32-801.

c. Defenses. Collusion, condonation, recrimination, or limitation lapse of time. §§ 32-611 to 615.

(4) Legal Separations. The court may, in its discretion, on the motion of either party enter a decree of legal separation, providing for custody of children, division of property, payment of debts, payment of child support, and payment of spousal support. § 32-704.

(5) Foreign divorces. Valid divorces decreed in other states are entitled to full faith and credit. E.g., Cormana v. Naron, 217 P. 597 (Idaho 1923).

(6) Remarriage. There is no statutory waiting period.

(7) Property. Idaho is a community property state. Each party receives, upon divorce, his or her separate property. The community property is divided equally in value unless the court finds "compelling reasons" to divide it unequally. § 32-712.

ALIMONY AND CHILD SUPPORT:

(1) Alimony (spousal maintenance). When a divorce is decreed, the court may order maintenance if it finds a spouse lacks sufficient property and is unable to support himself or herself. § 32-705.

(2) While a divorce action is pending, the court may require either spouse to pay support to enable the other spouse to support him or her and the children or to prosecute or defend the action. § 32-704.

(3) Either party or both may be compelled to provide maintenance for the children and support for the other spouse. § 32-706.

(4) Attorneys' fees and costs are collectible as support. § 32-704.

CHILDREN:

(1) Custody. The court shall award custody, including joint custody, according to the best interests of the child, §§ 32-717, 717B. Interstate custody disputes are governed by the Uniform Child Custody Jurisdiction Act. §§ 32-1101 to 32-1126. "Child snatching" is not the subject of a specific criminal statute, but in some circumstances might come within the general kidnapping statute. § 18-4501.

(2) Visitation. The best interests of the child govern visitation. E.g., Larkin v. Larkin, 85 Idaho 610, 382 P.2d 784 (1963). The court may grant visitation rights not only to parents but also to grandparents who have established substantial relationships to the child. § 32-1008.

(3) Support. Either parent or both parents may be ordered to provide child support according to their resources the child's needs, and the Idaho child support guidelines regardless of marital misconduct. § 32-706. The amount provided for pursuant to the support guidelines is presumptively correct. (Null and void, July 1, 1995). § 32-706A. Support shall be paid through the clerk of the district court unless the court directs otherwise. § 32-710A. Support obligations may be enforced through the Revised Uniform Reciprocal Enforcement of Support Act (RURESA). §§ 7-1048 to 7-1089.

TREATMENT OF MILITARY RETIRED PAY: Divisible as marital property. Griggs v. Griggs, 107 Idaho 123 (1984).

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: IDAHO CODE §§ 8-501 to 8-540, 11-207(2)(a) (1949 & Supp. 1992).

Where the court has ordered a parent to pay child support, the court may order the parent to assign such sum to an officer of the court from future salary or wages for the support and maintenance of the minor child. The order shall be binding on the employer upon service until further order of the court. § 8-704.

PROCEDURES:

(1) The district courts have jurisdiction over domestic relations proceedings. § 32-715.

(2) The plaintiff may make application to have defendant's property attached as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay said judgment. § 8-501.

(3) The writ of attachment shall be directed to the sheriff to attach defendant's property for the amount stated in the complaint. § 8-504.

(4) The garnishee, upon service of the writ with notice therein provided, may discharge himself by paying or delivering to the officer all debts owing by him to the defendant, all property of the defendant in his hands, or a portion of either sufficient to discharge the claim. § 8-510. NOTE: No pay-over order is necessary.

(5) The plaintiff must file an application for a writ of attachment supported by an affidavit specifying the amount of the indebtedness. § 8-502.

(6) The garnishee must turn over to the officer defendant's property under its control at the time of service. §§ 8-508, 8-510.

(7) Written interrogatories to the garnishee at the time of the service of the Notice of Garnishment require an answer as to the amount of money owed by the defendant that is in the garnishee's hands and the amount owed the defendant at the time of service. §§ 8-511, 8-512.

(8) The garnishee has 5 days to answer interrogatories. § 8-512. NOTE: Federal law prevails - 30 days to answer.

(9) No pay-over order is required.

(10) The sheriff shall personally serve the defendant with a copy of the writ of attachment, or if he cannot be found, the writ shall be mailed to his last known address or left at the place of abode with person of suitable age. § 8-506B.

STATE EXEMPTIONS:

There are no garnishment exemptions for court-ordered support of any person. § 11-207(2).

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

There is no statutory reference to the garnishee's obligation to raise defenses on behalf of the defendant, or concerning the garnishee's standing to challenge legal process or waive technical defects and jurisdictional matters.

ILLINOIS

STATUTES:

Illinois Marriage and Dissolution of Marriage Act--Illinois Compiled Statutes, 750 ILCS 5/101 to 5/802 (1994 & Supp. 1995).

I. Marriage--750 ILCS 5/201 to 5/306 (1994 & Supp. 1995).

II. Dissolution and Legal Separation--750 ILCS 5/401 to 5/413 (1994 & Supp. 1995).

III. Property, Support, and Attorney Fees--750 ILCS 5/501 to 5/516 (1994 & Supp. 1995).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Under 18, but not less than 16, requires both parents' or custodian's consent or court approval. 750 ILCS 5/203.

(2) Medical Examination - None required, but clerk must give a medical brochure to applicants. 750 ILCS 5/204. If a woman is pregnant, or has given birth to an illegitimate child a license is issued regardless of whether or not the applicants have a venereal disease, if the male applicant provides an affidavit affirming that he is the father of the illegitimate or unborn child, 750 ILCS 5/205.

(3) Waiting Period - License becomes effective 1 day after date of issuance unless court orders license effective when issued. 750 ILCS 5/207.

(4) Solemnization - Any clergyman, judge, public official empowered to perform marriages or any authorized member of a religious denomination, Indian Nation or Tribe or Native Group in accordance with customs of such society may perform marriage. 750 ILCS 5/209.

Solemnization of marriage not invalidated by the fact that the person solemnizing it was not legally qualified to do so, if either party to the marriage believed him qualified to do so.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Not recognized if contracted after 30 June 1905. 750 ILCS 5/214.

(2) Marriage by Proxy - Not explicitly recognized.

(3) Marriage by Contract - Not recognized.

PROHIBITED MARRIAGES: All marriages between parents and children, ancestors and descendants, brothers and sisters, uncles and nieces, aunts and nephews, first cousins younger than 50 unless a

certificate signed by a licensed physician stating that a party to the proposed marriage is permanently and irreversibly sterile is presented to the county clerk, and bigamous marriages. 5/212.

UNIFORM MARRIAGE AND DIVORCE ACT: 750 ILCS 5/101 to 5/802 (1994 & Supp. 1995).

GROUNDS FOR "DECLARATION OF INVALIDITY OF A MARRIAGE": Lack of capacity to consent at time of solemnization due to mental incapacity or infirmity, drug addiction, alcoholism, or consent induced by force, fraud or duress, physical incapacity to consummate marriage (and at the time of solemnization, the other party did not know of the incapability), lack of parental consent (participant(s) under 18), and prohibited marriages are all circumstances under which a marriage will be declared void. 5/301.

PROCEDURAL REQUIREMENTS FOR DISSOLUTION:

(1) Jurisdiction (Residency) - One of the parties must be domiciled in state for 90 days next preceding commencement of action. 5/401.

(2) Military Provision - Member of armed forces stationed in state for 90 days next preceding commencement of action also satisfies jurisdictional requirement. 5/401.

(3) Service of Process - Within 30 days of filing dissolution petition, defendant may be personally served outside state or served by publication in compliance with the Illinois Supreme Court Rules. 750 ILCS 5/411(a).

(4) Answer - Within 30 days of service of process. 5/411(b).

(5) Verification - Petition for dissolution must be verified. 5/403(a).

(6) Simplified Procedures exist for no-fault, no children/ limited property divorce. 5/451 to 5/457.

SUBSTANTIVE REQUIREMENTS FOR DISSOLUTION:

Illinois has provisions for dissolution based on the fault of one spouse and also on no fault provisions. There is also a statute granting a Judgment of Legal Separation.

(1) "Fault" Dissolution Provision, 750 ILCS 5/401(a)(1):

1. Grounds - Impotency, bigamy, adultery, willful desertion (1 year), alcoholism (2 years), drug addiction (2 years),

attempted murder of spouse, physical or mental cruelty, convicted of felony, infected spouse with venereal disease. 5/401(a)(1).

2. Defenses - Condonation is a defense, except when it occurs after filing a petition and after court has acquired jurisdiction over respondent. 5/403.

(2) "No Fault" Provisions. 5/401(a)(2).

That the spouses have lived separate and apart for a continuous period in excess of 2 years and irreconcilable differences have caused the irretrievable breakdown of the marriage and the court determines that efforts at reconciliation have failed or that future attempts at a reconciliation would be impracticable and not in the best interests of the family; provided that if the spouses have lived separate and apart for a continuous period of not less than 6 months next preceding the entry of the judgment dissolving the marriage, as evidence by testimony or affidavits of the spouses, the requirement herein of living separate and apart for a continuous period in excess of 2 years may be waived upon written stipulation of both spouses filed with the clerk of the court. 5/401(a)(2).

(3) Legal Separation. 5/402.

1. Any person living separate and apart from his/her spouse without fault, may bring an action for reasonable support and maintenance while they live apart. 5/402.

2. This proceeding for legal separation does not affect the marital status of the parties, but either party may concurrently or later, file an action for dissolution under 5/401, 5/402(c).

3. Effect of Separation Agreement on Divorce Decree - Binding on court unless unconscionable or pertaining to custody, support or visitation. 5/502(b).

TIME REQUIRED BEFORE REMARRIAGE: No waiting period.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT:

(1) Court may require either party to pay temporary maintenance and expenses of the other party, including attorney's fees. 5/501, 504 and 508. In a proceeding for dissolution of marriage or legal separation, or declaration of invalidity of marriage, the court may grant a temporary or permanent maintenance order for either spouse in such amounts and for such periods of

time as the court deems just without regard to marital misconduct, considering: (a) financial resources of party seeking maintenance; (b) time needed for employment training of party seeking maintenance; (c) standard of living established during marriage; (d) duration of marriage; (e) age, physical, and emotional condition of both parties; and (f) ability of spouse from whom maintenance is being sought to meet his own needs while paying maintenance; (g) and, the tax consequences on the parties. 5/504. Maintenance was formerly known as alimony.

(2) In a proceeding for dissolution of marriage or legal separation or declaration of invalidity of marriage, the court should order either or both parents to pay child support, without regard to marital misconduct, after considering: (a) financial resources of child; (b) financial resources and needs of custodial parent; (c) standard of living child would have enjoyed if marriage had not been dissolved; (d) physical and emotional condition of child and his educational needs; and (e) financial resources and needs of non-custodial parent. Presumptively, the basis of the decision is the amount calculated through application of the child support guidelines. 5/505. Under family expenses provisions of the Husband and Wife Act, parents are liable for medical expenses of their minor children. Graul v. Adrian, 32 Ill. 2d 345, 205 N.E.2d 444 (1965).

(3) Awarding marital home to wife as gross alimony in lieu of periodic alimony was not an abuse of discretion. Knox v. Knox, 31 Ill. App. 3d 816, 334 N.E.2d 891 (1975).

(4) Unless circumstances so warrant, all maintenance and support will be paid through the Clerk of Court. 5/507.

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution. 750 ILCS 5/503.

(2) Fees Awarded - Court may award attorney's fees and costs. 5/508. (Requires notice and hearing.)

UNIFORM INTERSTATE FAMILY SUPPORT ACT: 750 ILCS 22/100 to 22/999.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Best interest of child. 750 ILCS 5/602. Considerations include wishes of the child's parents, wishes of the child, interaction of child with parents, child's adjustment to home, school, and community, mental and physical health of all involved, physical violence or threat thereof, the occurrence of ongoing abuse, willingness of each parent to

facilitate a close relationship with the other parent and child. 5/602(1)-(8). Most courts require mediation in contested custody matters.

(2) Judicial Approach - Court shall determine custody in accordance with the best interests of child. A court or administrative body of this State may modify a support order of another state only if that other state no longer has continuing, exclusive jurisdiction of the proceeding in which the support order was entered. The order must be registered under Section 609 of the Uniform Interstate Family Support Act and may be modified only if permitted under Section 611 of the Uniform Interstate Family Support Act.

(3) On motion of either party, or the court's own motion, joint custody will be considered and may be ordered if in the child's best interest. 5/602.1.

GRANDPARENTS VISITATION RIGHTS: Court may grant visitation to grandparents and/or great grandparents if it is in the best interests of the child. 5/607(b).

FOSTER PARENTS: The Court may grant standing to any foster parent if the court finds that it is in the best interest of the child for the foster parent to have standing and intervenor status.

UNIFORM CHILD CUSTODY JURISDICTION ACT: 750 ILCS 35/1 to 35/26.

CRIMINALIZATION OF CHILD ABDUCTION: Any person who intentionally violates any terms of a valid court order awarding sole or joint custody...or conceals, detains, or removes child without consent of lawful custodian is guilty of child abduction. 720 ILCS 5/10-5.

TREATMENT OF MILITARY RETIRED PAY: Divisible as marital property.

PARENTS' VISITATION RIGHTS: A parent not granted custody of child is entitled to reasonable visitation rights unless possibility of endangering child's physical, mental, moral, or emotional health exists. 5/607.

TERMINATING PARENTAL RIGHTS BY STATE: For purposes of this Act, failure to make reasonable progress toward the return of the child to the parents may be defined as failure to complete the service plan established to correct the conditions that were the basis for the removal of the child from his or her parents as required under Section 8.2 of the Abused and Neglected Child Reporting Act within 12 months after the adjudication under Section 2-3 or 2-4 of the Juvenile Court Act of 1987.

Illinois

Illinois adopted a new adoption procedure effective 01/01/95 that establishes statutory forms for consent, etc., that defines the rights of "punitive" fathers, procedure for surrender of a child and transfers the standard away from preserving the biological family to what is in the "best interest of the minor child". (Not the biological parents).

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: ILL. REV. STAT. ch 110, §§ 12-701 to 12-719 (1993 & Supp. 1995). All other Illinois statutes involving garnishment have been repealed.

Upon entry of an order for support on or after Jan. 1, 1984, the court shall enter a separate order for withholding which shall not take effect unless the obligor becomes delinquent in paying the order for support, or the obligor requests an earlier effective date; except that the court may require the order for withholding to take effect immediately. 5/706.1(B)(1).

PROCEDURES:

(1) Garnishment is a statutory proceeding in which there is no presumption of jurisdiction, but compliance with the statutory requirements, must be demonstrated. La Salle Opera House Co. v. La Salle Amusement Co., 289 Ill. 194, 124 N.E. 454 (1919).

(2) 30-day lapse of past due support is required. 5/706.1(C).

(3) Notice of delinquency and affidavit should be served on garnishee. 5/706.1(E)(1).

(4) An affidavit stating that the plaintiff believes a debt is due to the judgment debtor for wages, and written interrogatories must be submitted to the clerk of the court. 735 ILCS 5/12-805 (1992).

(5) The answer required is the completion of the submitted interrogatories. 5/12-808. Creditor may submit a copy of the judgment to the clerk. 5/12-805. Interrogatories must be answered by employer within 84 days. 5/12-808. A conditional judgment can be taken against employer for the amount due from the judgment debtor for failure to answer. 5/12-807 (1990).

(6) When a finding is against the employer and in favor of the judgment debtor, a deduction order is entered and payment is due. 5/12-811 (1990).

(7) No pre-process interrogatories are required.

(8) No deduction orders shall be entered in favor of the judgment creditor unless affidavit filed by judgment creditor certifies that a copy of the wage deduction notice has been mailed to the judgment debtor and employer's answer provides summary of computation used to determine amount of non-exempt wages. 5/12-811 (1990).

STATE EXEMPTIONS:

(1) Benefit and refunds payable by pension or retirement funds or systems and any assets of employees held by such funds or systems, and any monies an employee is required to contribute are not subject to a deduction order. 5/12-804.

(2) Benefits or refunds payable by pension or retirement funds or systems and any assets of employees held by such funds or systems, and any monies an employee is required to pay to such funds or systems are exempt and are not subject to garnishment. 5/12-704.

NOTE : Since military members do not contribute to a retirement fund, and since federal laws and regulations permit garnishment of military retired pay, it is felt that the Illinois law is not applicable to military retired pay.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) Garnishee does not have to defend the debtor. Any set-offs or adverse claims can be presented by employer. 5/12-810(b).

(2) In a wage deduction proceeding, the trial court, the responding employer or the judgment debtor may challenge the validity of the underlying judgment. Felton v. Shead, 6 Ill. App. 3d 123, 285 N.E.2d 162 (1972).

ADDITIONAL INFORMATION:

Illinois has adopted a codified statute system, requiring renumbering of all statutes. The new system is reflected in the statutory cites in this article.

Illinois

The following summary was reviewed in August 1995 by MAJ Bjarne R. Henderson, IMA, HQMTMC, Falls Church, VA; Work Address: c/o NICTD, 33 East U.S. Highway 12, Chesterton, IN 46304, Telephone Number: (219) 926-5744, FAX: (219) 929-4438.

INDIANA

STATUTES:

I. Marriage - IND. CODE ANN. §§ 31-7-1-1 to 31-7-11-7 (1987 & Supp. 1994).
II. Divorce - IND. CODE ANN. §§ 31-1-11.5-1 to 31-1-11.5-28 (1987 & Supp. 1994).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Under 18 requires verified written consent of both parents, guardian, or court approval. One parent may approve if legal custody awarded to same or if other parent deceased, abandoned child, incompetent, or whereabouts unknown. Reason for approval by only one person must be presented to court. Special approval factors for circumstances when one or both persons are under 18 and are or about to become parents. §§ 31-7-1-5 to 31-7-1-7; 37-7-2-1 to 31-7-2-3.

(2) Medical Examination - No medical examination is required. A certification is required for a female under age 50 that she has been inoculated for rubella. If no certification can be obtained a blood test is required. § 31-7-4-2.

(3) License Fee - $18.00 for the license if one party is a permanent resident of Indiana. If neither party is a permanent resident of Indiana, the fee is $60.00. Blood test costs charged by hospitals vary.

(4) Solemnization - Any bishop, minister, priest, judge, rabbi, imam of a mosque, or clerk of a city, town, or circuit court may perform marriage. § 31-7-5-1. A mayor of a city may perform the marriage within that municipality. The clerk of a city or town may perform the marriage within the county in which the city or town is located.

(5) Proof of Identity - Each applicant must provide evidence of date and place of birth, e.g., certified birth certificate, judicial decree, drivers license, or other written evidence satisfactory to the clerk. § 31-7-3-4.

Indiana

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Not recognized after January 1, 1958. § 31-7-6-5.

(2) Marriage by Proxy or Contract - No statutory provision.

PROHIBITED MARRIAGES: All marriages between persons of same sex, incestuous relationships, closer relation than second cousins (old age exception), one party mentally incompetent at the time of the solemnization, and all bigamous marriages are prohibited or void. Indiana also will not recognize an out of state marriage of two Indiana citizens where the marriage was entered into with the intent to evade Indiana's application or sobriety requirements. §§ 31-7-1-2, 31-7-1-3, and 31-7-6-2 to 31-7-6-4.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Bigamous and other marriages where one party has a husband or wife living, mentally incompetent, or is nearer in kinship to the other party than second cousin (old age exception) are void. §§ 31-7-6-2 to 31-7-6-4. Marriage where one party is under age, or where fraud was committed, or if either party was mentally incompetent at time of marriage. §§ 31-7-7-1, 31-7-7-2, and 31-7-6-4.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - One party must be a resident of this state for six months and a resident of a county for three months next preceding commencement of action. No petition shall be heard until 60 days after the filing of the petition. §§ 31-1-11.5-6 and 31-1-11.5-8.

(2) Military Provision - A party may reside on a military installation within the state for six months next preceding commencement of the action to satisfy the residency requirement. § 31-1-11.5-6.

(3) Service of Process - A copy of the petition together with a summons shall be served upon the other party to the marriage. This may be done by certified mail (return receipt). If this is ineffective, service may be made by publication. The summons shall be published 3 times in a newspaper authorized by law to publish notices, the first publication promptly and the next 2 at least 7 and not more than 14 days after the prior publication. § 31-1-11.5-5; Trial Rule 4.13. The petition may not be heard until 60 days expire from the date of the publication of the first notice.

(4) A responsive pleading is not required. Cunningham v. Cunningham, 430 N.E.2d. 809 (1982). However, one may be filed. § 31-1-11.5-4(d).

(5) Verification - Verification is required. § 31-1-11.5-4(a).

(6) Final Hearings - final hearing shall be conducted no earlier than 60 days after the filing of the petition. § 31-1-11.5-8.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Irretrievable breakdown of marriage, felony conviction subsequent to marriage, impotency at the time of marriage, and incurable insanity for 2 years are the only causes for a dissolution of marriage. § 31-1-11.5-3.

(2) Defenses or Period of Separation - No statutory provisions.

SEPARATION:

(1) Commenced by filing verified petition. § 31-1-11.5-4(c). Same residence and venue requirements apply as in divorce. § 31-1-11.5-6. At least one of the parties shall have been a resident of the state or stationed in the military within that state for 6 months prior to commencement of the action.

(2) The hearing on the petition may be held anytime after 60 days from the filing of the petition.

(3) A separation decree may be entered for a period not to exceed 1 year if the court finds that conditions of the marriage render it intolerable for both parties to live together, but that the marriage should be maintained and neither has filed for divorce.

(4) Either party may file a petition for dissolution of marriage in the court in which legal separation proceedings are pending, even after a separation decree has been entered. § 31-1-11.5-9.

(5) A separation decree may include orders normally applicable to divorce proceedings, except that it may not include a spousal maintenance provision that extends beyond the period of legal separation. § 31-1-11.5-9.

TIME REQUIRED BEFORE REMARRIAGE: No statutory provision.

Indiana

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT:

(1) The parties may agree in writing to the maintenance of one by the other. § 31-1-11.5-10. The court may order spousal maintenance, apart from an agreement, in the following three instances:

(a) If the court finds a spouse to be physically or mentally incapacitated to the extent that the spouse's ability to support himself or herself is materially affected, then maintenance may be ordered during said incapacity;

(b) If the court finds a spouse lacks sufficient property to provide for his or her needs and that spouse is the custodian of a child whose physical or mental incapacity requires the custodian to forego employment, then maintenance may be ordered for a period of time as the court deems appropriate;

(c) The Court may order rehabilitative maintenance for a spouse for a period of time not to exceed three (3) years from the date of the final decree, after considering the educational levels of each spouse and any interruption in education or training during the course of the marriage, as a result of homemaking or child care responsibilities, and employment and earning capacities, and future education and training expenses necessary for a spouse to find appropriate employment. § 31-1-11.5-11(e)(1)(2)(3).

(2) Temporary Maintenance, Support, Custody or Restraining Order - Either party may make such a motion as long as it is accompanied by an affidavit setting forth the factual basis or the motions and amount of relief sought. § 31-1-11.5-7 (1987 and Supp. 1993).

(3) The court may make no provision for spousal maintenance except where it finds that a spouse is physically or mentally incapacitated to such an extent that the ability of such spouse to support himself or herself is materially affected, the spouse is the custodian of an incapacitated child, or the spouse requires rehabilitation maintenance to become employable. Rehabilitation maintenance may last for a maximum of 3 years. § 31-1-11.5-11. The parties may also agree in writing to the maintenance of one by the other. § 31-1-11.5-10.

(4) Child support may be ordered against either parent based on the following factors:

(a) financial resources of the custodial parents;

(b) standard of living the child would have enjoyed if the marriage had not been dissolved;

(c) physical and mental condition of the child and the child's educational needs; and

(d) financial resources and needs of the noncustodial parent.

(e) The Indiana Supreme Court has established child support guidelines which prescriptively determine the amount of child support owed. Practice tip: Obtain a copy of and follow the most current guidelines if client's support agreement is to be enforced within Indiana.

(f) Child support order may include, where appropriate, sums for education, including college, and special medical or dental expenses, and fees mandated under Title IV-D of the Social Security Act. As part of the support order, the court may set aside a portion of the property of either party. § 31-1-11.5-12. A child support order may also include basic health and hospitalization insurance coverage for the child. § 31-11.5-12.1. The court may, upon request, order interest charges of not more than 1-1/2% per month to be paid on any delinquent child support payment. § 31-1-11.5-12(f). The court shall enter a child support income withholding order but the same will not be activated until the obligor requests it or an arrearage occurs. §§ 31-1-11.5-13(f), 31-2-10-7 and 31-2-10-8.

(5) The duty to support a child ceases when the child reaches his 21st birthday unless:

(a) The child is emancipated prior to his 21st birthday, in which case the child support, except for educational needs, terminates; however, an order for educational needs may continue in effect until further order of the court;

(b) The child is incapacitated, in which case child support continues during the incapacity or until further order of the Court, or

(c) The child is at least 18 years old and has not attended a secondary or post secondary school for the prior 4 months and is not enrolled in such a school and is, or is capable of, supporting himself through employment, in which case child support terminates upon the Court finding these conditions exist.

However, if the court finds that the conditions set forth in (c) exist, but that the child is only partially supporting himself, or herself, or capable of only partially supporting himself or

herself, the Court may order that support be modified instead of terminated. § 31-1-11.5-12(d)(1)(2)(3). For purposes of determining if a child is emancipated under (a), if the court finds that the child: (1) has joined the armed forces; (2) has remarried; or (3) is not in the care or control of either of his parents; the court shall find the child emancipated and terminate the child support. § 31-1-11.5-12(e). See Brokaw v. Brokaw, 398 N.E.2d 1385 (1980).

(6) Payment of Support Orders - § 31-1-11.5-13 - Court shall require that support payments be made through the clerk of circuit court as trustee for remittance to the person entitled to receive payments, unless court has reasonable grounds for approving another method of payment.

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution. § 31-1-11.5-11.

(2) Fees Awarded - Court may order a party to pay a reasonable amount for the cost of maintaining or defending any divorce proceedings and for attorneys' fees. § 31-1-11.5-16.

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: See IND. CODE ANN. §§ 31-2-1-1 to 31-2-1-39 (1987 and Supp. 1994).

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Best interests of child control. Special consideration will be given to the wishes of children fourteen years of age or older. §§ 31-1-11.5-21; 36-6-6.1-11.

(2) Judicial Approach - Natural parents are treated equally. Best interests of child control.

(3) Child custody may be modified only upon a showing of changed circumstances so substantial and continuing as to make the existing custody order unreasonable. § 31-1-11.5-22(d).

GRANDPARENTS VISITATION RIGHTS: Visitation rights may be granted by the Court when it is determined to be in the best interests of the child. § 31-1-11.7-3. The visitation rights may be sought by either maternal or paternal grandparent if: (1) the child's father or mother is deceased; or (2) the marriage of the child's parents has been dissolved or (3) child is born out of wedlock. Special rules apply where marriage is dissolved in another state or the child is born out of wedlock. § 31-1-11.7-2(b) and (d).

UNIFORM CHILD CUSTODY JURISDICTION ACT: §§ 31-1-11.6-1 to 31-1-11.6-25 (1987 and Supp 1994).

CRIMINALIZATION OF CHILD SNATCHING: § 35-42-3-4 provides that a person who knowingly or intentionally removes another person who is under 18 years of age to a place outside Indiana, when the removal violates a child custody order, commits interference with custody -- a Class D felony ($10,000 maximum fine + 6 months to 3 years confinement). If the person removed is under 14 years of age and the removal is by a person who is not the person's parent or guardian, the offense escalates to a Class C felony ($10,000 maximum fine + 2 o 8 years confinement). If the removal is conducted while armed with a deadly weapon or results in serious bodily injury to another person, the offense escalates to a Class B felony ($10,000 maximum fine + 6 to 20 years confinement).

A person who knowingly or intentionally, with intent to deprive another person of custody or visitation rights, takes and conceals or detains and conceals a person under 18 years of age commits interference with custody -- a Class C misdemeanor ($500 maximum fine and not more than 60 days confinement). If the offense is in violation of a court order, the offense escalates to a Class B misdemeanor ($1,000 maximum fine and not more than 180 days confinement). The court may also impose costs against the detainee.

COMPLIANCE WITH CHILD SUPPORT ENFORCEMENT AMENDMENTS OF 1984: IND. CODE ANN. §§ 31-2-10-1 to 31-2-10-23, and §§ 31-2-11-1 to 31-2-11-12, which deal with Child Support Income Withholding Orders.

ADOPTIONS: IND. CODE ANN. §§ 31-3-1-1 to 31-3-1-13. See also: §§ 31-3-3-1 to 31-3-3-3 (Aid for Adoption of Hard to Place Children; §§ 31-3-4-1 to 31-3-4-32 (Indiana Adoption Medical History); §§ 31-3-4.5-1 to 31-3-4.5-7 (Access to Adoption Information); and §§ 31-3-5-1 to 31-3-5-6 (Interstate Conduct on Adoption Assistance). Practice Note: IC 31-3 has been modified to no longer require paternal consent under certain circumstances. Review your fact situation against the language of this chapter if your client is an unmarried father attempting to contest adoption decision by mother.

CHILD SUPPORT INCOME WITHHOLDING ORDERS - May be activated so that payors will be ordered to pay clerk of court established amount. § 31-2-10-7.1. Written notice must be sent to obligor. Court now required to implement or activate an income withholding order in every child support case unless: (1) parties submit an alternative written arrangement, or (2) court determines good cause exists not to require an immediate withholding order.

Indiana

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: IND. CODE ANN. §§ 24-4.5-5-101 to 24-4.5-5-106 (1991 & Supp. 1993), §§ 34-1-11-1 to 34-2-11-49, §§ 34-1-44-1 to 34-1-44-8; (1986 & Supp. 1993); Indiana Rules of Trial Procedures 69(E).

(1) Wages can be garnished for child support and alimony. Garnishment shall not exceed 50% of disposable earnings when the individual is also supporting a spouse or child not subject to a support order. Absent such additional child or spouse, garnishment shall not exceed 60% of disposable earnings. Indiana's law also allows a 5% increase of maximum amounts to be garnished depending upon the length of the pay period subject to garnishment. §§ 24-4.5-5-105.

(2) Indiana garnishment for child support is continuing until the judgment is paid in full.

(3) Indiana's wage deduction law permits an assignment of wages if (1) in writing, (2) signed by the employee personally, (3) agreed in writing by the employer, and (4) delivered to the employer within 10 days after its execution. § 22-2-6-2. The assignment is revocable at any time by the employee upon written notice to the employer. The assignment is valid only for purposes specified in the statute.

PROCEDURES:

(1) Jurisdiction is based on the fact that the government is paying wages or retirement to the defendant. § 24-4.5-5-102. However, see Ferguson v. Ferguson, 634 N.E.2d 506 (Ind. App. 1994).

(2) A judgment must be entered prior to the attachment. § 24-4.5-5-104.

(3) The judgment creditor may then execute on the judgment by filing in the court where the judgment was rendered a verified motion or affidavit alleging that the judgment creditor owns a judgment that the creditor has that the judgment debtor be ordered to appear before the court to answer as to his nonexempt property; and that any person named as a garnishee will have nonexempt property or an obligation owing together judgment debtor subject to execution and that the garnishee be ordered to appear and answer concerning the same or answer interrogatories submitted with the motion.

(4) If a motion is filed meeting those requirements, the court shall ex parte and without notice order the judgment debtor and the garnishee to appear for a hearing, or to answer the interrogatories attached to the motion, or both.

(5) The motion, along with the court's order, stating the time for the appearance and hearing, or the time for the answer to interrogatories submitted with the motion, shall be served upon the judgment debtor as a party to the case, and service shall be made on the garnishee under Indiana Trial Rule 4, as a new party to the law suit. The date fixed for appearance and hearing, or answer to the interrogatories, shall be not less than 20 days after service. No further pleading shall be required and the case shall be heard and determined and property ordered applied toward the judgment in accordance with statutes allowing proceedings supplementary to execution. Indiana Trial Rule 69(E). A bond may be required. A garnishee defendant who believes that it has a proper defense to the action may file a responsive pleading, and if not filed, the defense is waived. American Underwriters, Inc. v. Curtis (1981), 427 N.E.2d 438.

(6) Once the plaintiff is awarded a judgment, the nonexempt portion of the defendant's wages must be withheld and paid to the sheriff or into the court until the amount of the judgment is paid.

STATE EXEMPTIONS:

(1) Judgment debtor may designate real property, personal property, or both as exempted property. § 34-2-28-2.

(2) The maximum part of the disposable earnings of an individual for any work week which is subjected to garnishment to enforce the payment of 1 or more judgments, may not exceed (a) 25% of his disposable earnings for that week; or (b) the amount by which his disposable earnings for that week exceed 30 times the Federal minimum hourly wage in effect at the time the earnings are payable; whichever is less. In the case of earnings for a pay period other than a week, the earnings shall be computed upon a multiple of the Federal minimum hourly wage equivalent to 30 times the Federal minimum hourly wage. § 24-4.5-5-105(2).

(3) There is no statutory distinction between garnishment of current earnings and retired pay.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) A garnishee is merely a custodian of funds and property. He has discharged his full duty when he has let the law take its course between the original litigants. Nevian v. Poschinger, 55 N.E. 1033; 23 Ind. App. 695 (1900).

(2) Garnishee can challenge service and a defective writ.

(3) There is no duty imposed upon the garnishee to give notice to the defendant. Citizens Nat'l Bank of Grant County v. Harvey, 339 N.E.2d 604 (1976). However, see Indiana Rules of Trial Procedure 5 and 69(E).

The following summary was reviewed in January 1995 by CPT David James Hanson, 3d COSCOM, Des Moines, Iowa 50315, Telephone Number: (515) 284-6042; civilian office: P.O. Box 126, Fayette, Iowa 52142, Telephone Number: (319) 425-3397.

IOWA

STATUTES:

I. Marriage - IOWA CODE §§ 595.1 to 595.19 (1993).

II. Dissolution of Marriage - IOWA CODE §§ 598.1 to 598.35 (1993).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Persons 16 or over but less than 18 must have written parental consent and court approval. § 595.2.

(2) Medical Examination - Requirement for medical examination was repealed in 1982.

(3) Waiting Period - License may be issued upon expiration of 3 days after receipt of application. § 595.4.

(4) Solemnization - Any judge or magistrate, and a person ordained or designated as a leader of the person's religious faith. § 595.10.

ALTERNATIVE MARRIAGE FORMS:

(1) Marriage by Proxy - Not recognized.

(2) Marriage by Contract - Not recognized.

PROHIBITED MARRIAGES: All marriages between parents and children, ancestors and descendants, brothers and sisters, uncles and nieces, aunts and nephews, first cousins, stepparents and children, in-laws, bigamous marriages and those involving mental incompetents. § 595.19.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Mental illness or retardation or impotence at time of solemnization, non-age and any other reason a marriage would be considered void. § 598.29. See Prohibited Marriages, supra.

Iowa

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - Petitioner must have been resident of state for 1 year next preceding commencement of action. County of residence should be specified. § 598.6.

(2) Military Provision - No statutory provision.

(3) Service of Process - Notice may be served by publication after filing affidavit that personal service cannot be perfected on defendant in Iowa. Publication must be accompanied by mailing copy of notice to defendant's last known address.

(4) Answer - Within 20 days of publication of notice or personal service. Iowa R. Civ. P. Rule 60. However, no judgment of dissolution may be entered until at least ninety days have elapsed since personal jurisdiction over both parties is obtained.

(5) Verification - Petition must be verified by petitioner. § 598.7.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - No fault on basis of irretrievably broken marriage. § 598.17.

(2) Defenses - No statutory provision.

(3) Period of Separation - None. § 598.17.

SEPARATION:

(1) Acknowledged Legal Status - Spouse may petition court for a decree of separate maintenance. § 598.28.

(2) Effect of Separation Agreement on Divorce Decree - No statutory provision.

TIME REQUIRED BEFORE REMARRIAGE: No waiting period. NOTE: Ninety (90) days between service of original notice and final decree required. § 598.19.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision. But see Uniform Child Custody Jurisdiction Act, Iowa Code Chapter 598A, whereby foreign child custody judgments must be acknowledged.

ALIMONY AND CHILD SUPPORT:

(1) Child support is thoroughly congruent with the federal definition; however, the state law does provide for specific need payments. § 598.1(6). Provisions for setting amounts (by mandatory "guidelines," see Iowa Rules of Court) and collection of child support are set forth in § 598.21(4), (8) and (9), and § 598.22 and .22A.

(2) Alimony is defined by Iowa courts as "a stipend paid in lieu of the other spouse's obligation for support" and my be used to remedy inequities in a marriage and to compensate a spouse who leaves the marriage at a financial disadvantage. In re Marriage of Geil, 509 N.W.2d 738 (Iowa 1993). Federal law does not include specific need payments within the definition of alimony and none are stated here.

(3) Attorney's fees, costs and interest are properly awarded to enable a party to prosecute or defend the action. § 598.11. See also § 598.24 - attorneys fees are payable in contempt proceedings to enforce support orders or other elements of a dissolution decree.

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution.

(2) Fees Awarded - Court may award attorney's fees and costs.

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: §§ 252A.1 to 252A.12.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - On application of either parent, court shall consider joint custody. There is a statutory presumption favoring joint custody. § 598.41. Best interest of the child is the basis of consideration.

(2) Judicial Approach - Court can order custody mediation counselling if in the best interest of the child. Court is to follow enumerated factors in determining custody. § 598.41.

GRANDPARENTS VISITATION RIGHTS: Court may grant visitation right when in best interests of child. § 598.35.

UNIFORM CHILD CUSTODY JURISDICTION ACT: Iowa Code §§ 598A.1 to 598A.25.

CRIMINALIZATION OF CHILD SNATCHING: A parent of a child living apart from the other parent who conceals the child or causes the child's whereabouts to be unknown to a parent with visitation rights commits a serious misdemeanor. § 710.6. Any relative of a child acting in violation of a custody order by taking and concealing child from lawful custodian is guilty of a class "D" felony.

COMPLIANCE WITH FAMILY SUPPORT ACT OF 1988: See § 598.22 for assignment of earnings provisions, application of Iowa Child Support Guidelines (promulgated by Iowa Supreme Court Rule).

ADOPTIONS: §§ 600.1 to 600.25 (Adoptions) and §§ 600A.1 to 600A.9 (Termination of Parental Rights).

GARNISHMENT, WAGE ASSIGNMENTS and CONTEMPT:

STATUTE: IOWA CODE §§ 598.23, .23A (1993), 642.1 to 642.23 (1993).

(1) The traditional remedy of Iowa is a garnishment. § 642.1. Service of the process compels the garnishee to withhold monies as of the date of service and impresses the garnishee with a personal liability. § 642.13.

(2) The State of Iowa also prescribes a wage assignment which may be used specifically to collect support. The remedy is secured upon motion of the ex-spouse or the prosecutor and is in the form requiring the obligor to assign. The assignment is effective against the employer. § 598.23.

(3) A child support obligee who willfully disobeys the order my be cited by the court for contempt, and punished by incarceration in the county jail for up to thirty days for each offense. As alternatives to jail the court may order the obligee to: post cash bond in amount up to 12 months' worth of support payments; assign trust income or future salary, wages, social security benefits, etc. (The court may also modify visitation or custody of children under § 598.23(2)(b)).

PROCEDURES:

(1) Unpaid installments of child support and alimony become judgments by operation of law. Thus, the obligee need not reduce amounts due and owing to judgments. A mere decree of dissolution is sufficient. The obligee then proceeds by affidavit to cause execution to issue. The execution is then delivered to the sheriff and a notice is served on the garnishee. Whittier v. Whittier, 237 Iowa 655, 23 N.W.2d 435 (1946).

(2) The district court has presumptive jurisdiction over the subject matter. In the enforcement effort (not to be confused with the foundational judgment), the court is not required to exercise in personam jurisdiction over the obligor.

(3) The remedy is ancillary. Therefore, the remedy is only as valid as the underlying execution and judgment. Walters v. Walters, 231 Iowa 1267, 3 N.W.2d 595 (1942).

(4) Service of process must be accomplished in accordance with federal law and regulation. The Iowa law further imposes a requirement that the notice be served by the sheriff.

(5) The answer must be in response to propounded interrogatories. § 642.6. The answer of garnishee is conclusive unless the plaintiff controverts them, which can be accomplished by pleading, § 642.11, and giving notice to garnishee. § 642.12. The answer of the garnishee and contradictions of the plaintiff frame the issues and no other pleadings are required. The burden is on the plaintiff to prove all elements of the garnishee's liability by a preponderance of the evidence. If the garnishee refuses to answer fully and unequivocally all interrogations, he shall be notified to appear and answer as above provided, and he or she may be so required to appear and answer in any event, if the plaintiff so notifies him. § 642.6.

(6) The garnishee always has the option of surrendering the money owed to the defendant in hand to the sheriff. § 642.10. This procedure will discharge the garnishee for that amount so far as the obligee is concerned.

(7) Interrogatories are authorized by law; however, these maybe propounded only to a party in the action. Thus, the limitation will have to be ignored (on the assumption that a potential garnishee is a nominal party) or the agency will have to be made a party.

(8) There is no constitutional requirement that obligors be given post-judgment notice of an enforcement effort. However, state law requires the obligor (garnishment debtor) to be given 10 days' notice of the garnishment proceeding before a judgment may be entered against garnishee. Failure of notice is jurisdictional and renders the process served on the garnishee void. Notice on the garnishment debtor is to be served in the same manner as the original notice to the garnishee. § 642.14.

(9) The most common method of child support enforcement in Iowa is the wage assignment. § 598.22. An assignment of periodic earnings is created by court order, which order may be obtained ex parte by the support obligor if the obligee is found to have

previously failed to pay any child support coming due. The assignment is binding on any employer, trustee or other payor of funds. The assignment may be up to fifty percent of the obligee's periodic income, but no more than is permitted by 15 U.S.C. § 1673(b).

(10) Any support orders issued by the Iowa Department of Human Services, "Child Support Recovery Unit," will be enforced by "immediate income withholding." This order is issued to employers, who are obligated to treat the child support amount due in the same manner as they handle personal income tax withholding.

KANSAS

STATUTES:

I. Marriage - KAN. STAT. ANN. §§ 23-101 to 23-132 (1988 & Supp. 1994).

II. Divorce - KAN. STAT. ANN. §§ 60-1601 to 60-1618 (1994).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Under 18 requires consent of either parent or of a guardian. § 23-106.

(2) Medical Examination - None.

(3) License Fee - Registration fee of $40.00. § 23-108a.

(4) Waiting Period - License may be issued upon expiration of 3 days following date of application. § 23-106.

(5) Solemnization - Any currently ordained clergyman or religious authority of any religious denomination, any licentiate of a denominational body, and any judge of a court of record may perform marriage. § 23-104a, b.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Recognized. § 60-1609.

(2) Marriage by Proxy - No statutory provision.

(3) Marriage by Contract - No statutory provision.

PROHIBITED MARRIAGES: All marriages between parents and children, ancestors and descendants, brothers and sisters (including half brothers and sisters), uncles and nieces, aunts and nephews, first cousins, and bigamous marriages. § 23-102.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: A void marriage (see the prohibited marriage categories above) is a marriage that is voidable because it was induced by fraud or induced by a mistake of fact; a lack of knowledge of a material fact or any other reason justifying rescission of a contract of marriage. §§ 60-1602; 23-102.

Kansas

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - Plaintiff must have been resident of state for 60 days immediately preceding filing of petition. § 60-1603.

(2) Military Provision - A member of armed forces stationed within state for 60 days satisfies jurisdictional requirement and may file a petition for divorce in any county adjacent to their duty station. § 60-1603(b).

(3) Service of Process - Nonresident defendant may be served by mail or publication. § 60-307.

(4) Answer - Not more than 20 days after service in the jurisdiction or 41 days from date notice first published.

(5) Verification - Petition must be verified. Answer must be verified if it contains a cross petition set up. § 60-1604(a).

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Incompatibility, failure to perform a material marital duty or obligation and incompatibility by reason of mental illness or incapacity. § 60-1601.

(2) Defenses - No statutory provision.

(3) Period of Separation - No statutory provision.

SEPARATION: If the parties have entered into a separation agreement, which the court finds to be valid, just and equitable, the agreement shall be recorded in the divorce decree. § 6-1610(b)(3).

TIME REQUIRED BEFORE REMARRIAGE: Neither party may remarry until the divorce is final. Parties are permitted to contract a shorter time period.

RECOGNITION OF FOREIGN DIVORCES: A decree rendered in another state, in conformity with the laws thereof, will be given full faith and credit. § 60-1611.

ALIMONY AND CHILD SUPPORT:

(1) Child support extends to age 18 unless the parent or parents agree, by written agreement with court approval, to pay beyond 18 years. § 60-1610(a).

(2) Child support may be pendente lite or permanent, and is thoroughly congruent with the federal definition; the state law does consider specific needs of the child. § 60-1610.

(3) Attorneys fees, costs, and interest are properly awarded as an element of child support and alimony. § 60-1607.

(4) Effective 1 July 1993, all new and modified orders of child support will be subject to enforcement by income withholding at the discretion of the court entering the order. § 23-4-107.

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution. § 60-1610(b)(1).

(2) Fees Awarded - Court may make such interlocutory order providing for attorney's fees and expenses of suit, as will insure efficient preparation of suit. § 60-1610(b)(4).

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: KAN. STAT. ANN. §§ 23-451 to 23-491.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Joint custody preferred, but best interests of child control. § 60-1610(a)(4).

(2) Judicial Approach - Best interests of child control.

GRANDPARENTS AND STEPPARENTS VISITATION RIGHTS: Court may grant reasonable visitation rights when in best interests of child. § 60-1616(b).

UNIFORM CHILD CUSTODY JURISDICTION ACT: KAN. STAT. ANN. §§ 38-1301 to 38-1326.

CRIMINALIZATION OF CHILD SNATCHING: Interference with parental custody may be a Class A misdemeanor or a felony.

TREATMENT OF MILITARY RETIRED PAY: Military retired pay is divisible as marital property.

COMPLIANCE WITH CHILD SUPPORT ENFORCEMENT AMENDMENTS OF 1984: § 60-1613(b) - any assignment remains binding on the employer, trustee, or other payor of the earnings or income. The payor shall withhold from the earnings or trust income, payable to the person obligated to support, the amount specified in the assignment, and shall transmit the payments to the district of the trustee or the person specified in the order.

Kansas

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: KAN. STAT. ANN. §§ 60-701 to 60-725 (1994).

(1) The traditional remedy of Kansas is an order of garnishment. Service of the process compels the garnishee to withhold monies during the pay period in which the writ is served. § 60-717. Service impresses the garnishee with personal liability.

(2) The State of Kansas also prescribed a continuing order which may be used specifically to collect support. The remedy is secured upon motion of the ex-spouse or the district attorney, and upon service operates to require the garnishee to pay over on a recurrent basis. The remedy may be used only to collect support, and must contain the following specific findings: that the obligor receives substantial periodic payments; and that the obligor is in arrears for not less than 1 year. § 60-721.

(3) The State Senate of Kansas has introduced a bill which allows for mandatory income withholding to be included in all support orders. Senate Bill 51 (1985).

PROCEDURES:

(1) Unpaid installments of child support and alimony become judgments by operation of law. Brieger v. Brieger, 197 Kan. 756, 421 P.2d 1 (1966). Thus, the obligee need not reduce amounts due and owing to judgments; a mere decree of dissolution is sufficient. The obligee then proceeds by affidavit to cause an order to issue. The order is served on the garnishee.

(2) The district court has presumptive jurisdiction over the subject matter. In the enforcement effort (not to be confused with the foundational judgment), the court is not required to exercise in personam jurisdiction over the obligor. § 60-717.

(3) The remedy is ancillary. Therefore, the remedy is only as valid as the underlying judgment.

(4) Service of process must be accomplished in accordance with federal law and regulation. The law further imposes a requirement that process be served by the sheriff or one specially appointed to make service. § 60-303. NOTE: The clerk may make the appointment.

(5) The garnishee must file an answer within 10 days after service upon garnishee of an order of garnishment issued to attach any property, funds, credits or indebtedness belonging to, or owing, the defendant, other than earnings; within 40 days after service upon a garnishee of an order of garnishment issued to

attach any earnings due and owing the defendant. The answer must be sworn and must touch upon the indebtedness of the garnishee for the pay period. The answer must be substantially in the statutory form. § 60-718. The answer of garnishee is conclusive unless properly traversed. A traverse is accomplished by filing a reply to the answer. The answer of the garnishee and the traverse frame the issues and no other pleadings are required. The burden is on the obligee to prove all elements of the garnishee's liability by a preponderance of the evidence. "Traverse" as used herein includes all denials of the garnishee's answer by the obligee by whatever name.

(6) The garnishee must withhold monies and await the further order of the court. § 60-718. Payment within 10 days after service upon order discharges the liability of the garnishee from liability on the same claim to the obligor.

(7) Interrogatories are authorized by the law of Kansas; however, these may be propounded only to a party to the action. Thus, the limitation will have to be ignored (on the assumption that a potential garnishee is a nominal party), or the agency will have to be made a party.

(8) There is no constitutional requirement that obligors be given post-judgment notice of an enforcement effort. Endicott Johnson Corp. v. Encyclopedia Press, Inc., 266 U.S. 285 (1924). State law requires no post-judgment notice.

STATE EXEMPTIONS:

(1) The state has no jurisdictional exemption which saves to the obligor a certain amount. Therefore, the federal exemption is applicable.

(2) Garnishee need not raise discretionary exemptions.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

The garnishee must raise defenses and objections which are jurisdictional. The garnishee may, but is not required to, raise non-jurisdictional defenses. § 60-720. There is no specific standing for the garnishee to request an accounting. See also Farmco, Inc. v. Explosive Specialists, Inc., 684 P.2d. 436 (1984).

Kansas

The following summary was reviewed in January 1995 by Major Gerald E. Wuetcher, HHC, 100th Division (IT), Louisville; Post Office Box 615, Frankfort, KY 40602-0615, Telephone Number: (502) 564-3940, FAX: (502) 564-7279.

KENTUCKY

STATUTES:

I. Marriage - KY. REV. STAT. ANN. §§ 402.010 to 402.270 (1984 & Supp. 1994).

II. Divorce - KY. REV. STAT. ANN. §§ 403.010 to 403.630 (1984 & Supp. 1994).

III. Domestic Violence and Abuse - KY. REV. STAT. ANN. §§ 403.710 to 403.785 (1984 & Supp. 1994).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental or lawful custodian's consent. § 402.020(4). With parental or lawful custodian's consent, there is no age limit. § 402.210. In cases involving pregnancy and no parental consent, district court judge has discretion. § 402.020(4).

(2) Medical Examination - Code provides "examining physician" can require sickle cell anemia test. § 402.320.

(3) License Fee - $24.00. §64.012.

(4) Waiting Period - No statutory provision.

(5) Solemnization - Any clergyman, minister of the gospel or priest of any denomination, justice of the peace, judge, or religious society in accordance with customs of such society may perform marriage. § 402.050.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Not recognized unless the validity is created in another state where such marriage is legal and recognized. § 402.040(3).

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Not recognized.

Kentucky

PROHIBITED MARRIAGES:

No marriage is valid if it is contracted between persons who are nearer of kin to each other by consanguinity (of the whole or half-blood) than second cousins. § 402.010. Also, marriage to the mentally disabled, bigamous marriages and those not meeting age requirements. § 402.020.

UNIFORM MARRIAGE AND DIVORCE ACT: §§ 403.110 to 403.350.

GROUNDS FOR ANNULMENT:

(1) The party lacked capacity to consent to the marriage at the time the marriage was solemnized, either because of mental incapacity or deformity or because of the influence of alcohol, drugs, or other incapacitating substances, or the party was induced to enter into a marriage by fraud or duress, or by fraud involving the essentials of marriage; or

(2) The party lacks the physical capacity to consummate the marriage by sexual intercourse, and the other party did not at the time the marriage was solemnized know of the incapacity; or

(3) The marriage is a prohibited one. § 403.120(1).

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - One of the parties must have resided in state for 180 days next preceding filing of petition. § 403.140(1)(a).

(2) Military Provision - A member of armed forces stationed in state for 180 days next preceding filing of petition also satisfies jurisdictional requirement. § 403.140(1)(a).

(3) Service of Process - Nonresident defendant may be constructively served by warning order of clerk of court upon showing that defendant unavailable for personal service.

(4) Verification - Petition must be verified. § 403.150(2).

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Irretrievable breakdown of the marriage relationship is the sole basis for dissolution of marriage. §§ 403.110(5) and 403.150(2).

(2) Defenses - Abolished. § 403.150(5).

(3) Period of Separation - Parties must live apart for 60 days. § 403.170(1). Living apart shall include living under the same roof without sexual cohabitation.

SEPARATION:

(1) Acknowledged Legal Status - Party may request divorce from bed and board. § 403.050.

(2) Effect of Separation Agreement on Divorce Decree - Binding on court unless unconscionable or pertaining to custody, support or visitation. § 403.180(2).

TIME REQUIRED BEFORE REMARRIAGE: No waiting period.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT:

(1) Court may grant an order for maintenance for either spouse if it finds that the party seeking maintenance lacks sufficient property to provide for his or her reasonable needs and is unable to support himself or herself through appropriate employment. The amount of maintenance is based on the following: (a) the financial resources of the respective parties and each party's ability to meet his own needs; (b) the time necessary for the party seeking maintenance to receive sufficient training to enable that party to obtain appropriate employment; (c) the standard of living established during the marriage; (d) the age and condition of the party seeking maintenance, and (e) the duration of the marriage. § 403.200.

(2) To arrive at a just amount of alimony and support payments in a divorce case, factors to be considered include financial worth and earnings of husband-father and standard of living family has been accustomed. Walden v. Walden, 486 S.W.2d 57 (1972).

(3) The court's order of child support is based presumptively on the state's child support guidelines. § 403.211. Either parent may be ordered to pay support and "extraordinary" circumstances can justify deviations from the guidelines § 403.211.

(4) Application of child support guidelines to circumstances of the parties at the time of the filing of a motion or petition for modification of the child support order which results in equal to or greater than 15% change in the amount of support due per

month shall be rebuttably presumed to be a material change in circumstances. Application which results in less than 15% change in the amount of support due per month shall be rebuttably presumed not to be a material change in circumstances. § 403.213.

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution. Marital misconduct is not a factor to consider. § 403.190.

(2) Fees Awarded - Court may award attorney's fees and costs after considering finance resources of both parties. § 403.220.

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: K.R.S. §§ 407.010 to 407.480.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Joint custody permitted, but best interests of child control. § 403.270.

(2) Judicial Approach - Parents viewed as equally qualified. Best interests of child control.

GRANDPARENTS VISITATION RIGHTS: Court may grant visitation rights when in best interests of child. K.R.S. § 405.021.

UNIFORM CHILD CUSTODY JURISDICTION ACT: §§ 403.401 to 403.630.

CRIMINALIZATION OF CHILD SNATCHING: § 509.070. A person is guilty of custodial interference when knowing that he has no legal right to do so, he takes, entices, or keeps from lawful custody any mentally disabled or other person entrusted by authority of law to the custody of another person or to an institution. Custodial interference is a Class D felony, unless the person is voluntarily returned by defendant.

TREATMENT OF MILITARY RETIRED PAY: Divisible as marital property. § 403.190 expressly defines marital property to include retirement benefits.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: Ky. Rev. Stat. §§ 205.720 to 205.800 (1991 & Supp. 1994); §§ 425.501 to 425.526 (1994).

Where a judgment is obtained for child support and alimony, garnishment is authorized. § 425.501.

PROCEDURES:

(1) Jurisdiction is based on the fact that the government is paying wages or retirement pay to the defendant. § 425.501.

(2) A final judgment is required. § 425.501.

(3) Service is by delivering a copy of the summons on the garnishee. Along with the order of garnishment served on the garnishee, an additional copy shall be provided which the garnishee must deliver to the judgment debtor or mail to him at his last known address. § 425.501.

(4) Order of garnishment is required. Affidavit is filed with the clerk of the court where judgment was entered, showing date and amount of the judgment and the person or persons holding property of the defendant. Order of garnishment is then obtained directing the sheriff to require him to summon the garnishee. There is no requirement that the affidavit be given to the garnishee. § 425.501.

(5) An answer is required of the garnishee disclosing the sum owed to the defendant and whether or not any other type of property exists in the possession of the garnishee. Statute also authorizes a default judgment against garnishee upon his failure to answer. Answer pertains to the wages or property held at the date of service and during those succeeding periods which may be designated by the order. §§ 425.506 and 425.511.

(6) Payment of money held at the date of service until the date of answer is normally paid to the county clerk and submitted with answer except where local rules require payment to the attorney, such as in Jefferson County, Kentucky. Under § 425.506(1), the garnishment order creates a lien on all non-exempt earnings earned during the pay period in which the order was served on the employer and during those succeeding pay periods which may be designated by the order.

(7) Each garnishee summoned shall appear in person or by the affidavit of garnishee, disclosing sum owing by him to defendant and whether due or not, and the property of the defendant in the possession of under the control of the garnishee. § 424.511.

(8) A copy of garnishment or attachment order shall be delivered to employee, a copy shall be retained by employer, and a copy shall be returned to court.

(9) Pre-process interrogatories for garnishment or attachment are not required.

(10) A copy of the order of garnishment is required to be mailed to the judgment debtor by the garnishee. Schmidt v. Forehan, 549 S.W.2d 320 (1977).

(11) The Cabinet of Human Resources shall require a parent in appropriate cases to give security, post bond, or give some other guarantee to secure payment of overdue support. § 205.767. Cabinet shall provide advance notice to obligor regarding delinquency of the support payment and the requirement of posting security, bond, or guarantee.

(12) In cases deemed appropriate, the Cabinet of Human Resources shall request a state income tax intercept to satisfy delinquent child support. § 205.769.

STATE EXEMPTIONS:

(1) The garnishment may not exceed twenty-five percent (25%) of disposable earnings or the amount by which disposable earnings exceed 30 times the federal minimum hourly wage. § 427.010. However, there are no exemptions for any order for the support of a person, (§ 427.010) or child support. §§ 427.010, 427.045.

(2) There are no statutory discretional or jurisdictional exemptions.

(3) There is no statutory distinction between retired pay and active duty pay.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) Garnishee is not required to raise defenses for the defendant.

(2) Garnishee may contest improper service of process and insufficiency of legal documents.

The following summary was reviewed in August 1995 by Lieutenant Colonel Richard T. Simmons, Jr., Trial Defense Services, USALSA, Falls Church, Virginia; One Galleria Boulevard, Suite 1400, Metairie, Louisiana 70001, Telephone Number: (504) 936-6500; FAX: (504) 836-6565.

LOUISIANA

STATUTES:

I. Marriage - LA. CIV. CODE ANN. arts. 86 to 100 (1952 & Supp. 1993).

II. Marriage (General Principals) - LA. REV. STAT. ANN. §§ 9:201-245 and LA. REV. STAT. § 40:40 (1993 & Supp. 1995).

III. Dissolution of Marriage - LA. CIV. CODE ANN. arts. 101 to 161 (1952 & Supp. 1993).

MARRIAGE REQUIREMENTS:

(1) Medical Examination - None required.

(2) License Fee - $15.00. LA. REV. STAT. § 40:40(6).

(3) Waiting Period - Minimum of 72 hours must elapse from time license issued to time of solemnization. LA. REV. STAT. § 9:241.

(4) Solemnization - Any clergyman, priest, minister, rabbi, clerk of the Religious Society of Friends, judge or justice of peace may perform marriage. LA. REV. STAT. § 9:202. Two (2) witnesses required. LA. REV. STAT. § 9:244.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Not recognized. Common law marriages of another state, if valid there, are recognized in Louisiana. Parish v. Minvielle, 217 So. 2d 684 (1969).

(2) Marriage by Proxy - Not recognized. LA. CIV. CODE art. 92.

(3) Marriage by Contract - Not recognized.

PROHIBITED MARRIAGES: All marriages between ascendants and descendants, collaterals within the fourth degree, whether of the whole or of the half blood, unless both parties are over 55 years of age. LA. REV. STAT. § 9:211. The impediment exists whether related by consanguinity or by adoption. Persons related by adoption, in the collateral line within the fourth degree may marry

with court approval. LA. CIV. CODE art. 90. Bigamous marriages and marriages by persons of the same sex are also prohibited. LA. CIV. CODE arts. 88 and 89.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Lack of marriage ceremony, marriage by procuration, violation of an impediment; underage, bigamy, same sex, and within prohibited degrees of kinship. LA. CIV. CODE art. 94. A marriage is relatively null if lack of free consent, without confirmation after recovering liberty. (Vices of consent include mistake of person, fraud, duress and mental incapacity). LA. CIV. CODE art. 95.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - Petitioner must have been domiciled in state prior to the time cause of action accrued and at time action is filed. If one or both of the spouses are domiciled in the state and, except as otherwise provided by law, if spouse has maintained a residence in the state for six months, then domicile is established in this state. LA. CODE CIV. PROC. art. 10(7) (rev 1991).

(2) Military Provision - For status jurisdiction see LA. CODE CIV. PROC. art. 10. See also LA. CIV. CODE art. 40.1. A person not domiciled elsewhere in this state who is serving in the armed forces of the U.S. and has been stationed in this state for at least six (6) months and has resided in the parish where action has been filed, for at least 90 days preceding filing of such action, is considered to be a domiciliary of the state. LA. CIV. CODE art. 40.1.

(3) Service of Process - Nonresident defendant may be served by certified or registered mail, or by actual delivery by an individual designated by the court or by one authorized by the law of the place service is to be made. LA. REV. STAT. § 13:3204.

(4) Answer - Within 30 days of service of process. LA. REV. STAT. § 13:3205.

(5) Verification - No statutory provision.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - The only grounds for immediate divorce in Louisiana are:

a. Adultery.

b. Conviction of felony and sentence imposed is either death or imprisonment.

c. Living separate and apart for 6 months with no reconciliation. LA. CIV. CODE art. 102.

(2) Defenses - Defense of reconciliation statutorily provided. Condonation is recognized by case law.

DIVORCE:

(1) Upon submission of proof that the petitioner is domiciled in the parish, and that other spouse is presumed dead, the court may authorize petitioner spouse of military personnel presumed dead to contract another marriage. LA. REV. STAT. § 9:301.

(2) In addition to any hearing otherwise authorized by law to be held in chambers, the court by local rule, and only in those instances where good course is shown, may provide that only with mutual consent. Civil hearings before the trial court in divorce proceedings may be held in chambers. Such hearings shall include contested and uncontested proceedings and rules for spousal support, visitation, injunctions, or other matters provisional and incidental to divorce proceedings. LA. REV. STAT. § 9:302.

(3) Child support shall terminate automatically when child reaches age of majority. Order for child support may continue with respect to any unmarried child who attains the age of majority as long as the child is a full-time student in a secondary school, has not attained the age of 19, and is dependent upon either parent. The major child shall be the proper party to enforce an order or judgment of child support which is continued beyond the age of majority pursuant to this subsection. LA. REV. STAT. § 9:315.22.

(4) An order for child support or alimony is retroactive to the filing date of the petition for child support or alimony granted in the order. LA. REV. STAT. § 9:310.

(5) An award for support shall not be reduced or increased unless the party seeking the reduction or increase shows a change in circumstances of one of the parties between the time of the provision award and the time of the motion for modification of the award. A judgment for past due support shall not of itself constitute a change in circumstances of the obligor sufficient to reduce an existing award of support. LA. REV. STAT. § 9:311.

(6) For good cause shown, a court may, on its own motions or upon the motion of any party, require the posting of a bond or other security by the obligor to insure compliance with a child visitation order. LA. REV. STAT. § 9:342.

(7) A divorce shall be granted upon motion of a spouse when either spouse has filed a petition for divorce and upon proof that 180 days have elapsed from the service of the petition and that the spouses have lived separate and apart continuously since filing of the petition. LA. CIV. CODE art. 102.

(8) A divorce shall be granted on the petition of a spouse upon proof that: (1) the spouses have been living separate and apart continuously for a period of six months or more on the date the petition is filed; or (2) the other spouse has committed adultery; or (3) the other spouse has committed a felony and has been sentenced to death or imprisonment at hard labor. LA. CIV. CODE art. 103.

TIME REQUIRED BEFORE REMARRIAGE: No waiting period.

RECOGNITION OF FOREIGN DIVORCES: If personal jurisdiction in foreign state over parties, decree is valid under Louisiana law and foreign court can rule upon community property settlement. Liebendorfer v. Gayle, 217 So. 2d 37 (1968), cert. denied, 396 U.S. 863 (1969).

ALIMONY AND CHILD SUPPORT:

(1) Alimony has been described in article 230 of Louisiana Civil Code as ". . . what is necessary for the nourishment, lodging, and support of the person who claims it. It includes education, when the person to whom the alimony is due is a minor in high school, and is dependent on either parent.

(2) Alimony can be awarded pendente lite, or permanently upon divorce, to either spouse. Alimony pendente lite can be awarded to the spouse who has insufficient income for maintenance pending suit for separation from bed and board, or divorce. The judge may allow the defendant or plaintiff a sum proportionate to the needs of the claimant spouse and the means of the other spouse. Fault is irrelevant as to alimony pendente lite. LA. CIV. CODE art. 111.

(3) Alimony after divorce can be awarded to a spouse who has not been at fault and has insufficient means for support. The court may allow that spouse up to one-third of the other spouse's income for alimony. In the case of mutual fault, no permanent alimony is allowed. In determining alimony the claimant spouse is entitled to, the court shall consider his or her earning capability in light of all the circumstances. Alimony may be revoked if it becomes unnecessary and terminates if the spouse to whom it has been awarded remarries. LA. CIV. CODE art. 112.

(4) The court may award alimony in lump sum in lieu or in combination with permanent periodic alimony when circumstances require it or make it advisable, and the parties consent thereto. In determining whether to award lump sum alimony, the court shall consider the needs of the claimant spouse and the financial condition of the paying spouse. In awarding lump sum alimony in lieu of or in combination with permanent periodic alimony, the court shall consider the criteria enumerated in Paragraph A of this Article, except the limitation to one-third of the paying spouse's income, in determining entitlement and amount of alimony. LA. CIV. CODE art. 112.

NOTE: The permanent alimony ceiling of one-third does not affect any child support award. Alimony and child support are separate considerations. There is no statutory ceiling on child support. Furthermore, if a spouse has to sue to make past due alimony or child support executory, or in an action to enforce visitation rights, attorney's fees are recoverable. LA. REV. STAT. § 9:375.

(5) When a spouse has not been at fault and has not sufficient means for support, the court may allow that spouse out of property and earnings of the other spouse, alimony which shall not exceed one-third of his or her income. Alimony shall be revoked if it becomes unnecessary and terminates if the spouse to whom it is awarded remarries. LA. CIV. CODE art. 112.

(6) Alimony shall not be denied on the grounds that one spouse obtained a valid divorce from the other spouse in a court of another state or country, which had no jurisdiction over the person of the claimant spouse.

(7) Benefits provided to one entitled to support other than cash payments are not directly considered to be support; they are supposed to be taken into consideration at the time of the original decree for alimony or support is entered.

(8) Support of children is a duty of both husband and wife that provides for support, maintenance and education. This duty is not affected by divorce or separation. LA. CIV. CODE arts. 224 and 227.

(9) Garnishments based on child support decrees take priority over all other garnishments rendered prior or subsequent to the child support garnishment.

(10) Guidelines to determine child support in LA. REV. STAT. § 9:315 are to be used in any proceeding to establish or modify child support filed on or after October 1, 1989. The court may deviate from these guidelines if their application would not be in the best interest of the child, or would be inequitable to the parties.

(11) Calculation of basic child support obligation is to be based on verified income statement showing gross income and adjusted gross income. LA. REV. STAT. § 9:315.2.

(12) Calculation of total support obligation is to be determined by adding together the basic support obligation amount, net child care costs, cost of health insurance premiums, extraordinary medical expenses, and other extraordinary expenses. LA. REV. STAT. § 9:315.8.

(13) See LA. REV. STAT. § 9:315.14 for schedule of support to determine basic child support obligation.

(14) With the approval of the judge of the district wherein the divorce proceedings took place, a person against whom a judgment for alimony was rendered may substitute a special mortgage or bond in favor of the person to whom the alimony is to be paid in place of the judicial mortgage resulting from the recordation of the judgment in the mortgage records. LA. REV. STAT. § 9:321.

(15) In a proceeding for divorce, a spouse may obtain an injunction restraining or prohibiting the disposition on encumbrance of community property until further ordered by the court. LA. REV. STAT. § 9:371.

(16) (a) When family residence is the separate property of either spouse, after the filing of a position for divorce or in conjunction therewith, the spouse who has physical custody or has been awarded temporary custody of the minor children of the marriage may petition for, and a court may award to that spouse, after a hearing, the use and occupancy of the family residence and use of community movables or immovables pending the termination of the marriage. (b) When the family residence is community property, after the filing of a petition for divorce or in conjunction therewith, either spouse may petition for, and a court may award to one of the spouses, after a hearing, the use and occupancy of the family residence and use of community movables or immovables to either of the spouses pending further order of the court. LA. REV. STAT. § 9:374.

(17) Any person who is judicially separated before January 1, 1991, may obtain a judgment of divorce if there has been no reconciliation between the spouses for a period of six months or more from the date the judgment of separation from bed and board

was signed. If an appeal is taken from a judgment of separation from bed and board, a suit for divorce pursuant to this section may not be commenced until the judgment becomes final. (This section is in effect until January 1, 1992). LA. REV. STAT. § 9:383.

(18) When the person who gives or receives alimony is replaced in such a situation that the one can no longer give, or that the other is no longer in need of it, in whole or in part, the discharge from or reduction of the alimony may be sued for and granted. LA. CIV. CODE art. 232.

(19) If the person, whose duty it is to furnish alimony, shall prove that he is unable to pay the same, the judge may, after examining into the case, order that such person shall receive in his house, and there support and maintain the person to whom he owes alimony. LA. CIV. CODE art. 233.

PROPERTY DISTRIBUTION:

(1) Method - Community property unless spouses governed by prenuptial agreement or contract entered into within one year of moving to Louisiana.

(2) Fees Awarded - Court may award attorney's fees and costs.

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT:
La. Children's Code arts. 1301-1342.

DETERMINATION OF CHILD CUSTODY: LA. CIV. CODE arts. 131-136.

(1) Statutory Method - Statutory preference:

(a) If the parents agree who is to have custody, the court shall award custody in accordance with their agreement unless the best interest of the child requires a different award.

(b) In the absence of an agreement, or if the agreement is not in the best interest of the child, the court shall award custody to the parents jointly; however, if custody in one parent is shown by clear and convincing evidence to serve the best interest of the child, the court shall award custody to that parent. LA. CIV. CODE art. 132.

(2) Judicial Approach - Best interest of the child:

If an award of joint custody or of sole custody to either parent would result in substantial harm to the child, the court shall award custody to another person with whom the child has been

living in a wholesome and stable environment, or otherwise to any other person able to provide an adequate and stable environment. LA. CIV. CODE art. 133.

(3) See art. 134 for factors in determining child's best interest. They include emotional ties between parties and child capacity to give love, capacity to provide food, need for continuity, moral fitness, and mental and physical health of parties, home, school, community record of child, preferences of mature child, willingness and ability of each of the parents to facilitate and encourage a close and continuing bond between child and other parent, and the distance between the respective residences of the parties.

(4) Visitation - a parent not granted custody or joint custody of a child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would not be in the best interest of the child. Art. 132.

GRANDPARENTS VISITATION RIGHTS: If one of the parties to a marriage dies subsequent to divorce, parents of decedent may have reasonable visitation rights. La. Children's Code arts. 617, et seq.

UNIFORM CHILD CUSTODY JURISDICTION ACT: LA. REV. STAT. ANN. §§ 13:1700 to 13:1724.

CRIMINALIZATION OF CHILD SNATCHING: Interference with custody is the intentional taking, enticing, or decoying away of a minor child by a parent not having a right to custody, with the intent to detain or conceal such child from the parent having a right to custody pursuant to a court order or from a person entrusted with the care of the child by a parent with custody pursuant to a court order. The offense is punishable by a fine of not more than $5,000 or imprisonment for 60 months or both. LA. REV. STAT. § 14:45.

TREATMENT OF MILITARY RETIRED PAY:

1. Military Retirement Pay Is Divisible Under the State's Community Property Regime.

2. Swope v. Mitchell, 324 So. 2d 461 (La. 1975); Little v. Little, 513 So. 2d 464 (La. Ct. App. 1987)(nonvested and unmatured military retired pay is marital property); Jett v. Jett, 449 So. 2d 557 (La. Ct. App. 1984); Rohring v. Rohring, 441 So. 2d 485 (La. Ct. App. 1983). Note also Campbell v. Campbell, 474 So. 2d 1339 (Ct. App. La. 1985)(a court can award a spouse a share of disposable retired pay, not gross retired pay, and a court can divide VA disability benefits paid in lieu of military retired pay).

3. Sherrill v. Sherrill, 639 So. 2d 794 (La. App. 2 Cir. 1994). (If a final decree of divorce, dissolution, annulment or legal separation was issued **before** June 26, 1981, or **after** January 1, 1983, courts may treat disposable retired or retainer pay as community property.)

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: LA. REV. STAT. §§ 13:3913 to 13:3928 and 46:236; LA. CODE CIV. PROC. ANN. art. 1265 (1968 & Supp. 1993).

(1) Garnishment or wage assignment may be used to satisfy a money judgment for support arrearages. § 13:3913. See also American Universal Ins. Co. v. Coleman, 121 So. 2d 265 (1960).

(2) One writ and one set of interrogatories is sufficient. It shall not be necessary that additional writs or interrogatories be issued for the garnishment to vest.

(3) Upon entry of any order for support on or after October 1, 1985, the court shall enter a separate order for an income assignment which shall be effectuated pursuant to the provisions of this Section when the person ordered to pay support becomes delinquent in payment of an amount equal to at least one month's support obligation pursuant to the order of support, except that the person ordered to pay support may request or the court may require the order for withholding to take effect immediately or upon any delinquency. LA. REV. STAT. § 46:236.3.

(4) A person ordered to pay support becomes delinquent if an amount equal to at least one month's support obligation on the day after the support payment is due and the total amount due equals or exceeds one month's support obligation. LA. REV. STAT. § 46:236.3.

PROCEDURES:

(1) Plaintiff must obtain a judgment in district court to determine amount of arrearage prior to garnishment, LA. REV. STAT. § 13:3921, unless wage assignment.

(2) Court will then issue either a writ of fieri facias ordering execution of the judgment, or initiate attachment proceedings.

(3) Plaintiff will then file and cause to be served on garnishee a petition alleging indebtedness of garnishee to defendant. Also served along with petition is a list of interrogatories regarding the alleged indebtedness. LA. REV. STAT. § 13:3923.

a. Upon failure to answer the interrogatories, judgment may be rendered against garnishee for full amount of the unpaid judgment plus interest and costs. Barnett Home Appliance Corp. v. Guidry, 224 So. 2d 134 (1969).

b. Garnishee has 15 days to make answer to interrogatories. LA. REV. STAT. § 13:3924. However, federal statute permits United States Government to file answer within 30 days.

(4) Delivery to the sheriff of withheld personal property of the defendant will probably be ordered by the district court.

(5) Sheriffs and constables are expected to provide service to all parties within the state; service by registered mail is provided for non-resident parties who owe support to a former wife or a child now residing in the state. LA. REV. STAT. § 13:3201(b). See also, Holder v. Holder, 374 So. 2d 749 (1979).

(6) When person ordered to pay support becomes delinquent in payment of an amount equal to at least one month's support obligation pursuant to the order for support, the person for whom support has been ordered or the Department of Social Services may serve on delinquent person a verified notice of delinquency and a form petition to stay service. LA. REV. STAT. § 46:236.3.

(7) Notice of delinquency shall be by prepaid certified mail, return receipt requested. LA. REV. STAT. § 46:236.3.

(8) Person ordered to pay support may prevent an income assignment order from being served on payor if, within 10 days after service of notice of delinquency, he files a petition to stay service with the clerk of the court. LA. REV. STAT. § 46:236.3.

(9) In order to serve an income assignment order upon a payor, person for whom support has been ordered or Department of Social Services, shall, ten days after service of the notice of delinquency, file with the clerk of court, an affidavit, with a copy of the delinquency attached thereto, stating that the notice of delinquency has been duly served, the date on which it was served, and the method. LA. REV. STAT. § 46:236.3.

(10) Total amount withheld shall be forwarded within 10 days to the person ordered to receive the support. LA. REV. STAT. § 46:236.3.

(11) Attorney's fees shall be awarded to the prevailing party. LA. REV. STAT. § 46:236.3(D).

(12) Court shall terminate assignment upon proof of full payment of past due and current support. LA. REV. STAT. § 46:236.3(G).

STATE EXEMPTIONS:

As an exemption from seizure Louisiana provides for a seventy-five percent (75%) exemption of disposable earnings for any week; but in no event shall this exemption be less than thirty times the Federal minimum hourly wage. LA. REV. STAT. § 13:3881.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) Pursuant to Louisiana law, the garnishee is under no duty to inform the primary debtor of the action taken against him.

(2) No provision noted for the garnishee to answer for or put forward defenses on behalf of the primary debtor.

(3) If garnishee is served with interrogatories, he or she must respond to all inquiries involving the current status of defendant debtor, including compensation information. LA. REV. STAT. § 13:3924.

ALIMONY AND CHILD SUPPORT:

Garnishments based on child support decrees take priority over all other garnishments rendered prior or subsequent to the child support garnishment. LA. REV. STAT. § 13:3928.

Louisiana

MAINE

STATUTES:
I. Marriage - ME. REV. STAT. ANN. tit. 19, §§ 1 to 122 (1964 & Supp. 1994).
II. Divorce - ME. REV. STAT. ANN. tit. 19, §§ 661-752 (1964 & Supp. 1994).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Under 18 requires written parental consent. Under 16 requires parental consent and court approval; however, judicial consent implied if judge fails to act within 10 days. § 62.

(2) Medical Examination - None required; repealed 1985.

(3) License Fee - Ten dollars ($10).

(4) Waiting Period - License may be issued upon expiration of 3 days after receipt of application. Waiting period may be waived with judicial approval. § 61.

(5) Solemnization - Any clergyman, judge, justice, Maine lawyer, notary public, or religious societies of Bahai and Quakers may perform marriage. §§ 1 and 121. Presence of two witnesses required.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Not recognized.

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Not recognized.

PROHIBITED MARRIAGES: No man may marry his mother, grandmother, daughter, granddaughter, sister, brother's daughter, sister's daughter, father's sister or mother's sister. No woman may marry her father, grandfather, son, grandson, brother, brother's son, sister's son, father's brother or mother's brother. § 31. No person impaired by mental illness or mental retardation may marry if he lacks sufficient understanding or capacity. Title 19, § 32.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

Maine

UNIFORM PREMARITAL AGREEMENT ACT §§ 141-151 (1987) - Parties to agreement may contract with respect to: rights and obligations of each of the parties; right to buy, sell, use property; disposition of property; spousal support; making of will; death benefit; choice of law; other matters. Agreement is void 18 months after parties become parents or guardians, unless written amendment is signed stating that the agreement remains in effect or is altered. § 146.

GROUNDS FOR ANNULMENT: Incest, mental illness, mental retardation, bigamy, non-age, fraud, or a sentence to life imprisonment are grounds for annulment. §§ 631 to 635.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency)

(a) Plaintiff must reside in state for 6 months prior to commencement of action; or

(b) Plaintiff is a resident and parties were married in Maine; or

(c) Plaintiff is a resident and parties lived in Maine when cause of divorce accrued; or

(d) Defendant is a resident. ME. REV. STAT. ANN. 19 § 691(2).

(2) Military Provision - A member of the armed forces and spouse stationed for 6 months prior to commencement of action satisfies jurisdictional requirements. § 691(2)(D).

(3) Service of Process - Nonresident defendant may either be personally served or served by registered mail. Court may order service by publication upon showing that defendant's whereabouts are unknown.

(4) Answer - Within 20 days of service of process.

(5) Verification - Required if residence of defendant is unknown.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Adultery, impotence, extreme cruelty, desertion (3 years), alcoholism, drug addiction, non-support, cruel and abusive treatment, irreconcilable differences, confinement to mental institution (7 years). § 691(1).

(2) Defenses - Recrimination, condonation, and denial of irreconcilable differences, in discretion of the court. § 691(1).

(3) Period of Separation - No statutory provision.

SEPARATION:

(1) Acknowledged Legal Status - Court may grant decree of separation upon showing of desertion or parties have lived apart for 60 days. § 581.

(2) Effect of Separation Agreement on Divorce Decree - No statutory provision.

TIME REQUIRED BEFORE REMARRIAGE: No waiting period, but appeal period must have expired or have been waived by both parties.

RECOGNITION OF FOREIGN DIVORCES: Divorce decreed out of state according to the law of that place shall be valid, unless purpose of going out of state was to obtain a divorce for causes which occurred in Maine or which do not authorize a divorce in Maine. § 663.

ALIMONY AND CHILD SUPPORT:

(1) Alimony is defined as court ordered installment payments from one spouse to another. The amount is determined by the responsible spouse's ability to pay, and the needs of the other spouse. 19 § 773.

(2) Food, shelter, clothing, suitable training to fit a child for a vocation in life, and hospital and medical bills can be considered collectible as child support even though they were not mentioned in the original divorce decree or support order.

(3) Child support is considered as being maintenance for the care of the minor child or children. It includes food, shelter, clothing, and suitable training to fit the child for the vocation in life to which his or her natural or special talents may be adaptable. § 752.

(4) A spouse is liable for his or her spouse's attorney fees subject to the judicial discretion of the trial court. Dolan v. Dolan, 259 A.2d 32 (Me. 1969); 19 § 722.

(5) Child support is presumptively established by application of state guidelines for child support. § 311.

Maine

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution. § 722-A.

(2) Fees Awarded - Court may award attorney's fees and costs. §§ 693 and 722.

UNIFORM INTERSTATE FAMILY SUPPORT ACT: ME. REV. STAT. ANN., title 19, §§ 421 to 429. (Replaced the Revised Uniform Reciprocal Enforcement of Support Act which was repealed in 1995.)

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Discretion of court. § 752.

(2) Judicial Approach - Best interests of child control.

(3) Mediation on the issue of child custody is mandatory (ME. REV. STAT. ANN. 19 § 752(4)), and by judicial practice on all other issues except the divorce itself.

GRANDPARENTS VISITATION RIGHTS: Court can award. § 752.

UNIFORM CHILD CUSTODY JURISDICTION ACT: ME. REV. STAT. ANN. tit. 19, §§ 801 to 825.

CRIMINALIZATION OF CHILD SNATCHING: Class C felony. ME. REV. STAT. ANN. 17-A § 303.

TREATMENT OF MILITARY RETIRED PAY: § 774-A.

SUPPORT ORDER - Order for child support may run against the father or the mother, in whole or in part, or against both, irrespective of the fault of the mother or the father in the divorce action. For divorces ordered after January 1, 1990, the order for child support may run until the child graduates, withdraws, or is expelled from secondary school, or reaches 19 years old, whichever occurs first after the child reaches 18. 19 § 752.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: ME. REV. STAT. ANN. 14 § 2601, 19 §§ 500 to 516 and §§ 722-722A (1964 & Supp. 1994), Me. Rules of Civ. Proc. 4B (1964 & Supp. 1992).

(1) Garnishment by use of "trustee process" may be used to secure payment of a judgment, except for actions of replevin, malicious prosecution, slander by writing or speaking, and assault and battery. Rule 4B.

(2) Arrearages for child support and alimony are normally collected by bringing a motion for contempt which may result in a jail term and/or an order to the debtor's employer to make direct payments. 19 § 771.

(3) Up to fifty percent (50%) of the disposable pay (including military retirement pay) may be garnished to satisfy claims for child support and alimony. 19 § 774A.

PROCEDURES:

(1) Maine Revised Statutes Annotated, Volume 7, tit. 14, § 2601 (1964) vests jurisdiction in both the superior court and the district court to issue garnishments under the "Trustee Process."

(2) Support arrearages must be reduced to judgment before proceeding under the "Trustee Process."

(3) Maine Rules of Civil Procedure 4B(c):

> The trustee summons may be procured in blank from the clerk and shall be filled out by the plaintiff's attorney . . . . The plaintiff's attorney shall deliver to the officer making service the original trustee summons upon which to make his return of service and a copy thereof for service upon the trustee. The trustee summons shall be served in like manner and with the same effect as other process.
>
> No trustee summons may be served unless attachment on trustee process for a specified amount has been approved by order of the court.

(4) Maine Rules of Civil Procedure, Rule 4B(c), also provides:

> An action in which trustee process is sought may be commenced only by filing the complaint with the court, together with a motion for approval of attachment on trustee process. The motion shall be supported by affidavit or affidavits meeting the requirements set forth in Rule 4A(h). Except as provided in subdivision (h) of this rule, the motion and affidavit or affidavits with notice of hearing thereon shall be served upon the defendant in the manner prescribed in Rule 4 at the same time the summons and complaint are served upon him.

(5) Maine Rules of Civil Procedure, Rule 4B(d).

> A trustee shall serve his disclosure under oath within 20 days after the service of the trustee summons upon him, unless the court otherwise directs. The proceeding after service of the trustee's disclosure shall be provided by law. When the trustee presents himself for examination, notice thereof shall be served upon the attorney for plaintiff, and upon motion the court shall fix a time for the disclosure to be made.

(6) Court determines mode of payment after garnishee files answer. 14 § 3127. May include installment payments from a source not exempt from attachment. Maximum earnings subject to garnishment are not to exceed: 50% of earnings when supporting a spouse or child other than those who are the subject of the order; 60% of earnings when not supporting such individual or spouse.

(7) Promptly after the service of the trustee summons upon the garnishee, a copy of the trustee summons with the officer's endorsement thereon with the date or dates of service shall be served upon the defendant. 14 § 3122.

(8) Disclosure subpoena - a judgment creditor, for the purpose of determining the ability of the judgment debtor to satisfy the judgment, may subpoena the judgment debtor by disclosure subpoena to appear before a judge of the District Court. 14 § 3122.

(9) Service Disclosure of Subpoena - disclosure subpoena shall be served on an individual judgment debtor by an officer at least 10 days prior to hearing. 14 § 3123.

(10) Installment Payments - upon a disclosure hearing, when it is shown that judgment debtor is receiving or will receive money or earnings from a source other than a source exempt from attachment, court may order judgment debtor to make installment payments to judgment creditor. 14 § 1327.

(11) Orders to 3rd Parties to Hold and Answer - upon a disclosure hearing, when it is shown that there is a reasonable likelihood that a 3rd party has possession or control of property in which judgment debtor may have an interest, or that 3rd party may be indebted to judgment debtor for other than earnings, court may approve service on 3rd party of an order to hold and answer. Answer must be within 20 days of service of order. 3rd party shall file answer required in order, and serve copies of answer on creditor and debtor. 14 § 1327-A.

(12) Hearing on Motion - within 20 days of service of answer, judgment debtor or creditor may request a hearing on extent of judgment debtor's interest in the property listed.

(13) Factors in Determining Amount of Installment Order - court may take factors into consideration which it deems material and relevant. 14 § 3128.

STATE EXEMPTIONS:

(1) Title 14, § 2602(6) partially exempts wages by reason of any amount due from him to the principal defendant as wages for his personal labor or that of his wife or minor children. Moreover, wages of minor children and of women are not, in any case, subject to trustee process on account of any debt of parent or husband.

(2) Maine exempts 75% of an employee's disposable earnings. 14 § 3127(1)(A).

(3) Further, with regard to a garnishment other than trustee process, a defendant's wages of less than 40 times federal minimum hourly wage per week are not subject to garnishment. 14 § 3127(1)(B).

(4) Orders to Withhold and Deliver initiated by the Department of Human Services are not limited by any exemptions other than that prescribed by the federal law. However, the Department of Human Services has voluntarily elected to grant a 50% exemption.

(5) Under Maine law, there is no statutory distinction between garnishment of current earnings or retired pay. Both current wages and compensation for past services are subject to garnishment.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) There is no statutory requirement that garnishee raise defenses on behalf of the defendant.

(2) Garnishee has standing to raise certain challenges or defenses to various jurisdictional and other defects which would result in an invalid or improper garnishment.

Maine

MARYLAND

STATUTES:

I. Marriage - MD. FAM. LAW CODE ANN. §§ 2-101 to 2-503 (1991 Repl. Vol. & Supp. 1994).

II. Divorce - MD. FAM. LAW CODE ANN. §§ 7-101 to 7-106 (1991 Repl. Vol. & Supp. 1994).

III. Alimony - MD. FAM. LAW CODE ANN. §§ 11-101 to 11-111 (1991 Repl. Vol. & Supp. 1994).

IV. Child Support - MD. FAM. LAW CODE ANN. §§ 12-101 to 12-105 (1991 Repl. Vol. & Supp. 1994).

See also Md. Code of Civ. Proc. Rules 1 to 2-321 (1995).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Over 16 and under 18 with parental consent or a physician's certificate that female is pregnant or has given birth. Under 16, with parental consent and physician's certificate that female is pregnant or has given birth. § 2-301.

(2) Medical Examination - None required.

(3) License Fee - Application fee of ten dollars ($10). Additional fees may be required depending on county in which issued. § 2-404.

(4) Waiting Period - License may be issued upon expiration of 48 hours after receipt of application. § 2-405(d).

(5) Solemnization - any official of a religious order or body authorized by the rules and customs of that order or body to perform a marriage ceremony; any county clerk; or any deputy clerk designated by the county administrative judge or the circuit court for the county.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Not recognized, unless valid in state where contracted.

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Not recognized.

PROHIBITED MARRIAGES: Marriages within three degrees, or within first degree of collateral consanguinity prohibited. All marriages between parents and children, ancestors and descendants, brothers and sisters, uncles and nieces, aunts and nephews. Also, a man may not marry his stepmother, stepdaughter, grandfather's wife, grandson's wife, mother-in-law, wife's grandmother, wife's granddaughter, or daughter-in-law. (A woman may not marry same relations in alternative.) § 2-202. Only marriages between men and women are valid. § 2-201.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Marriage within prohibited degrees of kindred, bigamy can be annulled. See Prohibited Marriages, supra.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - If grounds for divorce occurred outside of the state, one party must have resided within state for 1 year next preceding application for divorce. § 7-101(a). See also, Courts and Judicial Proceedings, Title 6, Annotated Code of Maryland.

(2) Military Provision - No statutory provision.

(3) Service of Process - Nonresident defendant may either be served personally or by certified mail. Md. Code of Civ. Proc. Rule 2-121.

(4) Answer - Defendant must answer within 30 days after the return date, except where service made out of state but within the U.S., in which case defendant has 60 days. Rule 2-321.

(5) Verification - None required unless complaint requires verification of answer.

(6) Corroboration - Court may not enter decree of divorce on uncorroborated testimony of the party who is seeking the divorce. § 7-101(b).

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

Limited Divorce: (MD. FAM. LAW CODE ANN. § 7-102.) (does not allow remarriage).

(1) Cruelty of treatment of complaining party or minor child.

(2) Excessively vicious conduct.

(3) Desertion.

(4) Voluntary separation if living apart with no reasonable hope of reconciliation.

Absolute Divorce: (MD. FAM. LAW CODE ANN. § 7-103).

(1) Adultery (no time limit).

(2) Desertion - If 12 months without interruption before filing, deliberate and final, no reasonable expectation of reconciliation.

(3) Voluntary separation - if, 12 months without interruption before filing and no reasonable expectation of reconciliation.

(4) Felony conviction - with 3 year sentence, or in determinate sentence and served 12 months.

(5) Two year separation - 24 months separate and apart without interruption prior to filing.

(6) Insanity - if insane person confined 3 years before filing and 2 physicians determine incurable.

SEPARATION:

(1) Acknowledged Legal Status - Party may petition court for a "limited divorce," formerly termed a divorce from bed and board. § 7-102.

(2) Effect of Separation Agreement on Divorce Decree - Court may modify prior agreements, but is bound to follow an agreed final disposition as to alimony. § 11-101(c).

TIME REQUIRED BEFORE REMARRIAGE: No waiting period after decree of absolute divorce.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT:

(1) In cases where a divorce is decreed, alimony may be awarded to either spouse. § 11-101.

(2) Alimony is a money allowance payable under a judicial decree by one spouse at stated intervals to the other spouse for their support and maintenance during their joint lives or until remarriage of the other so long as they live separately. Alimony must terminate on the remarriage of the recipient or the death of either party and must be payable under the terms of a judicial

decree. LaChance v. LaChance, 28 Md. App. 571, 346 A.2d 676, (1975); Grove v. Frame, 285 Md. 691, 402 A.2d 892 (1979). Payments which do not meet these criteria are not alimony even though described as alimony. See also Brown v. Brown, 278 Md. 672, 366 A.2d 18 (1976).

(3) Court may award attorney fees where it appears that the spouse's income is insufficient for his or her own needs. § 11-110.

(4) In a proceeding for a divorce, alimony, or annulment of marriage, the court may award alimony pendente lite to either party. § 11-102.

(5) The court may order and enforce an allowance for the support of the children. §§ 12-101 to 12-105. Either party's liability for child support includes counsel fees and costs where counsel is engaged to protect a child's interest. Paine v. Paine, 267 A.2d 356 (1970). Medical care also is embraced within scope of the statutory provision that father and mother are jointly liable for a child's support. In re Smith, 16 Md. App. 209, 295 A.2d 238 (1972).

(6) Support in accordance with the statutory guidelines is presumed to be the correct amount. See §§ 12-201 to 12-204.

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution.

(2) Fees Awarded - Court may award attorney's fees and costs in any proceeding bearing upon custody, support or visitation of child. §§ 12-103, 11-110.

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT:
MD. FAM. LAW CODE ANN. §§ 10-301 to 10-340. See also §§ 10-106 to 10-219.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - If the Court has reasonable grounds to believe that a child has been abused or neglected, the Court shall determine whether abuse or neglect is likely to occur if custody or visitation rights are granted to the abusing party. Unless the Court specifically finds that there is no likelihood of further child abuse or neglect, the Court shall deny custody to that party and may approve visitation only if supervised. § 9-101.

(2) Judicial Approach - Best interests of child paramount consideration in determining child custody.

GRANDPARENTS VISITATION RIGHTS: May be granted if in best interests of child. § 9-102.

UNIFORM CHILD CUSTODY JURISDICTION ACT: MD. ANN. CODE §§ 9-201 to 9-224.

CRIMINALIZATION OF CHILD SNATCHING: Unlawful for noncustodial individual to abduct or detain a child under 12 years of age from the lawful custodian. Offense is a misdemeanor if the child is not taken outside the state. If the child is taken outside the state, it is a felony. Where the child is outside the state and out of the custody of the lawful custodian for more than 30 days, the penalty increases substantially. §§ 9-301 to 9-307.

ADOPTION: MD. FAM. LAW CODE ANN. §§ 5-301 to 5-415.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: MD. COMM. LAW CODE ANN. §§ 16-101 to 16-701 and §§ 15-601 to 15-606 (1983 & Supp. 1992). MD. FAM. LAW CODE ANN. §§ 10-101 to 10-340 (1991 Repl. Vol. & Supp. 1994); Md. Code of Civ. Proc. Rules 2-641 to 2-648 (1995).

(1) A continuous order is authorized for the enforcement of spousal or child support by a lien on earnings. MD. FAM. LAW CODE ANN. §§ 10:202-203. Lien is terminated upon a petition of the defaulting party where 12 months payments have been made and arrearages are paid or where employer could not deliver check for 3 months because of bad address. MD. FAM. LAW CODE ANN. § 10-126.

(2) Wages can be attached for child support and alimony. MD. FAM. LAW CODE ANN. §§ 10-120 to 10-126; 10-201 to 10-207.

(3) Deduction from Obligor's Earnings - On receipt of a copy of an earnings withholding order, an employer shall, beginning with the next pay period after receipt of the order:

(a) deduct amount of withholding from obligor's earnings on a regular basis; and

(b) send deducted net amount directly to support enforcement agency or recipient within 10 days after day on which earnings are to be paid to obligor. § 10-126.

Maryland

PROCEDURES:

(1) Jurisdiction is based on the fact that the government has wages of defendant. Rule 2-646.

(2) At the time of filing a complaint, or while the action is pending, a plaintiff may be entitled to attachment before judgment, and may request a writ of attachment for garnishment of property or credits of defendant. Rule 2-115.

(3) Service of process on garnishee is required. Rule 2-646(d).

(4) Upon the issuance of a writ of execution, the sheriff shall furnish a copy of the writ and a schedule of payments to any person found by the sheriff to employ the judgment debtor. The sheriff shall also promptly mail a copy of the writ and schedule to the judgment debtor's last known address. Rule 2-642(d).

(5) The answer was once called a confession of assets. The law has changed. The judgment debtor has a right to contest the garnishment of wages by filing a motion asserting a defense or objection. Rule 2-646(c)(4).

(6) Upon answer by judgment debtor, payment can be made to the court. Rule 2-646(i).

(7) No pre-process interrogatories are required, but plaintiff may serve interrogatories on garnishee if desired. Rule 2-646(h).

(8) If the garnishee fails to answer interrogatories within 30 days after date of service, the court may enter a judgment against the garnishee for contempt and may require garnishee to pay reasonable attorney's fee and costs. Rule 2-646(h) and 2-645(h).

(9) A tax refund intercept may be ordered by the State Comptroller against any obligor who is more than $150.00 in arrears of support payments. MD. FAM. LAW CODE ANN. § 10-113.

(10) The Maryland Child Support Enforcement Administration shall notify the obligor of any assignment. MD. FAM. LAW CODE ANN. § 10-113(b).

(11) Assignment amount shall be enough for spousal or child support and may include a part of the arrearage. MD. FAM. LAW CODE ANN. § 10-122(e).

STATE EXEMPTIONS:

(1) Commercial Law Code 15-601.1 provides an exemption as follows: $145.00 multiplied by the number of weeks in which such wages due were earned or seventy-five percent (75%) of such disposable wages, whichever is greater. A different exemption is applicable to the counties of Caroline, Worchester, Kent, and Queen Anne, which is seventy-five percent (75%) or 30 times the federal minimum wage, whichever is greater. However, in U.S. v. Williams, 279 Md. 673, 370 A.2d 1134 (1977), it was decided that statutory exemptions do not apply for the support of a person. Therefore, the federal limitations apply.

(2) In all cases, the above exemptions do not apply to child or spousal support. The fed. exemptions apply. Blum v. Blum, 295 Md. 135, 453 A.2d 824 (1983).

(3) There are no discretionary or jurisdictional exemptions, and no difference between retired and active duty pay. Except exemptions from garnishment do not apply to federal military retirement pay where obligation is for alimony. U.S. v. Williams, 279 Md. 673, 370 A.2d 1134 (1977).

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) The garnishee may file a pleading asserting a defense for the debtor and his own defense. Rule 2-646. Garnishee has no duty to plead defenses for defendant. Albert v. Albert, 78 Md. 338; 28 A. 388 (1894).

(2) The garnishee or defendant may file a motion to quash or file a pleading setting forth defenses. Rule 2-646(e).

(3) The garnishee must send the judgment defendant's deducted monies directly to the recipient or the support enforcement agency, as designated in the court order within 10 days after the day on which the earnings are paid to the obligor. MD. FAM. LAW CODE ANN. § 10-126(a)(2).

(4) Amount of Earnings Withholding - The amount shall be enough to pay support and arrearage included in payments required by court order. § 10-121.

(5) Service - When court receives request for service of earnings withholding order, court shall send to obligor by certified mail a copy of earnings withholding order and notice that order will be served on employer and will include arrears. § 10-124.

Maryland

DOMESTIC VIOLENCE: Temporary ex parte protective orders authorized. §§ 4-501 to 4-516.

PATERNITY PROCEEDINGS: §§ 5-1001 to 5-1048.

PARENTAL SUPPORT: Any adult child who has a destitute parent in Maryland and who has or is able to earn sufficient means, must provide the parent with food, shelter, care, and clothing. §§ 13-101 to 13-109.

The following summary was reviewed in July 1995 by CPT Paul M. Sushchyk, 94th RSC, Fort Devens, MA; Mailing Address: Berg & Laipson, 34 Mechanic St., Worcester, MA 01608, Telephone Number: (508) 754-6888, FAX: (508) 752-0130.

MASSACHUSETTS

STATUTES:

I. Marriage - MASS. GEN. LAWS ANN. Ch. 207, §§ 1 to 58 (1987 & Supp. 1993).

II. Divorce - MASS. GEN. LAWS ANN. Ch. 208, §§ 1 to 46 (1987 & Supp. 1993).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Under 18 requires parental consent unless no competent parent or guardian in Commonwealth, in which case court order required. Ch. 207, §§ 7, 24 and 25.

(2) Medical Examination - Examination for syphilis. Also, female must be tested for rubella immunity. Medical examination must be made within 30 days of filing notice of intention of marriage. Ch. 207, § 28A.

(3) License Fee - Marriage certificate two dollars ($2). Ch. 262, §§ 34 - 42.

(4) Waiting Period - Notice of intention to marry must be made not less than 3 days before marriage. Ch. 207, § 19.

(5) Solemnization - Any clergyman, justice of the peace, or religious society in accordance with customs of such society may perform marriage. Ch. 207, §§ 38 and 39.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Not recognized.

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Not recognized.

PROHIBITED MARRIAGES: All marriages between ancestors and descendants, brothers and sisters and in-laws. Also, bigamous marriages and those involving a person under age of consent, or mentally incompetent. Ch. 207, §§ 1 - 4.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: All marriages between ancestors and descendants, brothers and sisters, and in-laws. Also, bigamous marriages and those involving a person under age of consent or mentally incompetent. See Prohibited Marriages, supra. Ch. 207, § 8.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction - To be divorced in Massachusetts, either:

(a) The parties must have lived together as husband and wife in Massachusetts and either one party must have lived in the state when the cause of action for divorce occurred or the cause of action must have occurred in Massachusetts. Ch. 208, § 4, or

(b) The plaintiff must have lived in the state for one year immediately preceding the commencement of the action for divorce, or, the plaintiff must have been domiciled in the state at the time of commencement of the action and the cause of action must have occurred in Massachusetts. Ch. 208, § 5.

(2) Military Provision - No statutory provision.

(3) Service of Process - Nonresident must be personally served unless plaintiff shows defendant cannot be found or resides outside the Commonwealth, in which case court may order service by publication. If defendant's address known, mailing of notice must accompany publication. Ch. 227, §§ 1 and 7.

(4) Answer - Within 20 days after date of service. If defendant doesn't appear within 21 days after day specified, then the plaintiff may have the case assigned for trial. See Rule 41, Domestic Relations Procedures Rules.

(5) Verification - Complaint and answer may be signed by either parties or their attorney; verification is not required. See Rule 11, Domestic Relations Procedures Rules and Ch. 208, § 1A.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Adultery, impotency, utter desertion (1 year), intoxication, drug abuse, cruelty, non-support, confinement for life or at least five years in jail, and irretrievable breakdown of marriage as basis for divorce. Ch. 208, §§ 1, 1A, and 1B, § 2.

(2) Defenses - No statutory provision.

(3) Period of Separation - Parties must be living apart for not less than 30 days before a divorce action can be commenced. This requirement may be waived. Before a divorce for irretrievable breakdown can be granted, the parties must have been separated for 1 year. §§ 1A and 1B. Ch. 208, § 6B.

SEPARATION:

(1) Acknowledged Legal Status - Court may without entering a judgment of divorce, order the action continued, and make orders relative to, temporary separation. Ch. 208, § 20.

(2) Effect of Separation Agreement on Divorce Decree - Notarized separation agreement and affidavit of irretrievable breakdown executed by parties is required in divorce action on ground of irretrievable breakdown. Ch. 208, § 1A. A divorce files under Ch. 208, § 1B may proceed as a 1A divorce, if a separation agreement, affidavit and motion to amend grounds is filed. The Court may require the submission of a joint 1A petition.

TIME REQUIRED BEFORE REMARRIAGE: After judgment has become absolute, either party may marry again as if the other were dead. Ch. 208, § 24. The judgment of divorce becomes absolute upon passing of the Nisi period of ninety days. The Nisi period allows for the parties to reconcile if they so desire. See Ch. 208, § 21. If the parties reconcile during the Nisi period, they must move the Court to dismiss the action.

RECOGNITION OF FOREIGN DIVORCES: Foreign decree is recognized unless obtained by resident of Massachusetts for cause arising while a resident of Massachusetts.

ALIMONY AND CHILD SUPPORT:

(1) Child support is defined as necessaries, which includes not merely food, clothing, lodging, etc., but such articles as are suitable to maintain (the obligee) according to the property and conditions in life. Ch. 208, § 28. Coe v. Coe, 313 Mass. 232, 46 N.E.2d 1017 (1943). A court shall require that a child be afforded health coverage available to the support obligor. § 28.

(2) There is specific statutory authority for attorney fees. Ch. 208, §§ 17 and 38.

(3) The Court may order temporary payments to either party during the pendency of divorce proceedings in the form of alimony. Ch. 208, § 17. The Court may also order temporary payments for support, maintenance and custody and support of the minor children. Ch. 208, § 20.

(4) Payments ordered by a court after rendering of divorce may consist of child support and/or alimony. In addition to or in lieu of a judgment to pay alimony and/or child support, the court may assign to either husband or wife all or any part of the estate of the other, including but not limited to, all vested and nonvested benefits, rights and funds accrued during marriage, and which shall include, but not be limited to, retirement benefits, military retirement benefits if qualified and to the extent provided by federal law, pension, profit-sharing, annuity, deferred compensation and insurance. Ch. 208, § 34.

(5) Where an order for child support or alimony enters, the court will make a determination if health insurance coverage is available from the obligor through a group policy extended by his/her employment or organization. Uninsured medical expenses of the minors are the express responsibility of the parents. Ch. 208, §§ 34, 17, 20, and 28.

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution. Ch. 208, § 34. A number of factors are utilized to determine distribution.

(2) Fees Awarded - Court may award attorney's fees and costs. Ch. 208, § 38.

(3) Property subject to distribution: All property, regardless of origin, may be subject to equitable distribution. Factual analysis using factors delineated in Ch. 208, § 34 must be conducted.

DETERMINATION OF CHILD SUPPORT: Either or both parents may be ordered to pay support based upon needs of child. Ch. 208, § 28. Amount of support to be paid is determined by guidelines established by the probate court and is paid by the non-custodial parent. The judge of probate does not have much discretion to vary from guidelines so established and is required to make findings of fact where he does in fact vary from the guidelines.

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: Ch. 273A, §§ 1 to 17.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Best interests of child control. Both parents have equal right to custody. Shared (joint) legal custody is mandated by the statute, absent emergency conditions, and the parties are required to submit a shared custody plan to the court. Ch. 208, § 31.

(2) Judicial Approach - Court has a right to modify the plan and retains the right to make an order "at any time" relative to child custody. Ch. 208, § 31.

GRANDPARENTS VISITATION RIGHTS: Under Massachusetts law, the grandparents of an unmarried minor child may be granted "reasonable visitation rights" following divorce or death of either or both parents. Ch. 119, § 39D.

UNIFORM CHILD CUSTODY JURISDICTION ACT: Adopted. Ch. 209B, §§ 1 to 14.

CRIMINALIZATION OF CHILD SNATCHING: A relative who without lawful authority takes or entices child from lawful custodian is punishable by up to 1 year in prison or a fine of up to $1,000 or both. Endangering child while interfering with custody is punishable by up to 5 years in prison or up to $5,000 or both. Ch. 265, § 26A.

ADOPTION: Ch. 210, §§ 1-14.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: MASS. GEN. LAWS ANN. Ch. 223, §§ 51 to 59 (1985 & Supp. 1991); Ch. 246, §§ 4B to 30 (1985 & Supp. 1991).

(1) Trustee process for child support and alimony must be based on a order of court issued pursuant to Ch. 208, § 36A. See Ch. 246, § 4A and Ch. 223, § 59.

(2) Continuing wage assignment orders are proper for child support and alimony and are typically granted, with payments being made through the Department of Revenue; the Child Support Enforcement Unit (MassDOR CSEU) is tasked with the responsibility of enforcing child support order, in-state and out-of-state and will represent out-of-state petitioners under URESA.

(3) The URESA Statute (Ch. 237A) provides the district court with a method of enforcing out-of-state support orders. The party seeking relief must petition his/her district court which will petition the district court of the obligee's domicile for enforcement of the order of support. The district court will summon the obligee, examine him and order payment of a reasonable amount of support. Ch. 273A, § 10.

Massachusetts

PROCEDURES:

(1) Massachusetts Probate Court and any other state court, where permissible, have jurisdiction to hear attachment/trustee actions. Wage assignment jurisdiction rests with the Massachusetts Probate Court.

(2) Generally, a reasonable likelihood of success on the merits is required prior to attachment/trustee. Rule 4.1, 4.2, Rules of Civil Procedure. For wage assignment, there must be either a temporary order or final order for support or alimony. Wage assignments are routinely ordered.

(3) Service of process must comply with Rule 5 of the Massachusetts Rules of Civil Procedure, except ex parte proceedings when a party is in default for failure to appear.

(4) Service on attorney representing party is insufficient unless the attorney agrees to accept service on behalf of his client. Mass. Civ. Proc. R. 4(d)(1).

(5) All service must be made by the sheriff, deputy sheriff, or special sheriff, or any other disinterested person by any person duly authorized by the law. Mass. Civ. Proc. R.4(c).

(6) Service made outside the State of Massachusetts is valid if made by one authorized to do so by the laws of the foreign state in a manner lawful in the foreign state or lawful in the commonwealth. (The DOD accepts service by certified mail by Massachusetts sheriff.) See Mass. Civ. Proc. R. 4(e).

(7) Service on trustee process must be made within 30 days of a court order. Mass. Civ. Proc. R.4.2(c).

(8) Trustee is required to file, but not serve, his answer under oath within 20 days after service. Answer must be filed even if no money is held. Mass. Civ. Proc. R. 4.2(D).

(9) Failure to file results in automatic adjudication on trustee, regardless of whether money is held or not. Ch. 246, § 18.

(10) Trustee may be required to file answers to plaintiff's interrogatories within 7 days of notice. Ch. 246, § 12.

(11) The trustee may file responsive pleadings. Ch. 246, § 14.

(12) The amount of child support to be paid is determined by child support guidelines established by the probate court. The amount of alimony to be paid is left to the sound discretion of the probate court. Ch. 209, § 32 provides a spouse the ability to seek restraining orders and support orders, if he or she has suitable grounds.

(13) Plaintiff is responsible for notice to debtor. Ch. 246, § 5.

STATE EXEMPTIONS:

(1) As to regular garnishment or similar process:

(a) Wages -- $125 per week or $541.67 per month (125 X 52 - 12) is exempt. Ch. 246, § 28.

(b) Pension payments -- Pension payments and any amounts held in a pension are exempt from attachment, except for sums deposited in excess of 7% of total income for five years prior to entry of judgment or declaration of bankruptcy. Ch. 246, § 28.

(2) $500.00 in any account, trust company, or savings and loan shall be exempt from the garnishment process.

(3) The above provisions do not apply to a garnishment or wage assignment for support of a person. In those cases, the federal exemption rules apply. Ch. 246, § 28.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) The trustee is not required to raise defenses on behalf of the defendant.

(2) The trustee has no standing to challenge legal process, request accounting, waive technical defects or jurisdictional defects.

(3) The trustee is not required to provide notice to debtor under state law.

Massachusetts

The following summary was reviewed in August 1995 by Major Paula G. Humphries, 5064th USA Garrison, 28500 Avondale, Inkster, Michigan 48141, Telephone Number: (313) 965-8622, FAX: (313) 965-3951.

MICHIGAN

STATUTES:

I. Marriage - MICH. COMP. LAWS ANN. §§ 551.1 to 551.271 (1988 & Supp 1995).

II. Divorce - MICH. COMP. LAWS ANN. §§ 552.1 to 552-459 (1988 & Supp 1995).

III. Support and Visitation Enforcement Act - MICH. COMP. LAWS ANN. §§ 552.601 to 552.685 (1988 & Supp 1995).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent; between 16-18 requires parental consent. § 551.103.

(2) Medical Examination - None required. Prior statute repealed.

(3) License Fee - Twenty dollars ($20). Thirty dollars ($30) if both parties are nonresidents of the state. Charter counties with population of over 2 million may impose by ordinance greater fees. § 551.103.

(4) Waiting Period - License may be issued 3 days after application. § 551.103a.

(5) Solemnization - Any district judge or magistrate, federal judge, municipal judge, minister, mayor, probate judge, clerk of county or that clerk's authorized representative may perform marriage. § 551.7.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Invalid if effectuated after January 1, 1957. § 551.2. However, may be recognized if valid at the time and place outside Michigan where contracted.

(2) Marriage by Proxy - No statutory provision.

(3) Marriage by Contract - No statutory provision.

PROHIBITED MARRIAGES: A man may not marry his mother, grandmother, daughter, granddaughter, stepmother, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, sister, brother's daughter,

sister's daughter, father's sister, mother's sister, or cousin of the first degree. A woman may not marry any person with a corresponding relationship. Marriages where one party has a husband or wife living are prohibited. §§ 551.3, 551.4 and 551.5.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Marriages where one party has a husband or wife living, or is insane or an idiot, or is within a degree of prohibited consanguinity are void. However, the issue of such marriage shall been deemed legitimate. § 552.1. A marriage which is the result of force or fraud is void if there has been no cohabitation. Where there has been cohabitation, the marriage is not void. § 552.2.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - One party must be a resident of this state for 180 days next preceding commencement of action and must have resided in the county in which the complaint is filed for 10 days prior to commencement of the action, unless defendant was born in or is a citizen of another country or parties have a minor child or children, and there is a risk child or children may be taken out of the United States. § 552.9.

(2) Military Provision - No statutory provision.

(3) Service of Process - Nonresident defendant may be served outside state either personally or by publication. § 552.9a.

(4) Answer - Must be filed within 21 days if served in state; 28 days outside state. Mich. General Court Rule 2.108.

(5) Verification - Petition must be verified.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - No fault. Must allege in complaint that there has been a breakdown of the marriage relationship to extent that the objects of matrimony have been destroyed and there is no reasonable likelihood that the marriage can be preserved. § 552.6(1).

(2) Defenses - Defendant may either admit or deny without further explanation that there has been a breakdown. § 552.6(2). An admission by the defendant of the grounds for divorce may be considered by the court but is not binding on the court's determination.

(3) Period of Separation - No statutory provision.

SEPARATION:

(1) Acknowledged Legal Status - An action for separate maintenance may be filed based on the same grounds as an action for divorce. § 552.7.

(2) Effect of Separation Agreement on Divorce Decree - No statutory provision.

TIME REQUIRED BEFORE REMARRIAGE: No waiting period.

RECOGNITION OF FOREIGN DIVORCES: Court will recognize decree for alimony of foreign jurisdiction where party against whom decree was rendered was in court or personally served with process within that jurisdiction. § 552.121.

ALIMONY AND CHILD SUPPORT:

(1) Alimony may be terminated by the court as of the date the party receiving alimony remarries unless a contrary agreement is specifically stated in the judgment of divorce. Termination of alimony due to the remarriage of the party shall not affect alimony payments that accrued prior to the termination. § 552.13(2).

(2) The court may enter an order in a divorce action concerning the custody and care of the minor children of the parties and their suitable maintenance during the pendency of such suit as shall be deemed proper and necessary. § 552.15.

(3) After the divorce decree has been entered, the court may make further decrees as it shall deem just and proper concerning the care, custody and support of the minor children of the parties. § 552.16. Child support is determined by the child support formula developed by the Friend of the Court Office and cannot be deviated from unless the judge finds that the formula amount would be unjust or inappropriate.

(4) The court is authorized to order either parent to pay such allowance as it deems proper for the support of a minor child. Support may include medical, dental, and other child health care expenses and educational expenses. § 552.15.

(5) In unusual circumstances, the court may order support for a child after he or she reaches the age of 18, or until further order of the court. § 552.17a.

(6) In a divorce or separation action, the court may require either party to pay alimony for suitable maintenance of the adverse party, to pay what is necessary to conserve any real or personal

property owned by the parties, and to pay any sums necessary to enable the adverse party to carry on the action during its pendency, as well as costs. § 552.13. An alimony award may be terminated by the court as of the date the receiving party remarries unless contrary terms are stated in the divorce judgment/decree. § 552.13.

(7) If the estate in the divorce action is insufficient for the support and maintenance of either party and such children of the marriage, the court may further award such part of the real and personal property of either party and such alimony out of the real and personal property to be paid to either party in gross or otherwise. § 552.23.

(8) A married parent who has a minor child or children and who is separated from his or her spouse, may petition the circuit court, if the noncustodial parent fails to provide necessary shelter, food, care and clothing for them, for an order for support for the custodial parent and minor children. Parent may also complain to circuit court for support for a child or children who are beyond 18 years of age. § 552.451.

(9) Where alimony or support and education of the child shall be awarded, the amount thereof constitutes a lien on the defendant's real and personal property upon default of payment, and execution may be issued. § 552.27.

(10) In an action for divorce, separate maintenance, annulment, and separate petitions to modify the judgment, the plaintiff may have the court order the defendant party to pay plaintiff's attorney's fees. § 552.13. Jansen v. Jansen, 205 Mich. App. 169, 517 N.W.2d 275 (1994).

(11) Upon entering an order for support, the court may require either parent to file a bond in a sum to be fixed by the court, guaranteeing payment of the support ordered in the judgment. § 552.16.

(12) Alimony and Child Support - Care, custody and support of minor children ... each support order entered by court shall provide that each party keep the office of one friend of the court informed of:

(a) the name and address of his or her current source of income and

(b) any health care coverage available to him or her as a benefit of employment. § 552.15.

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution. § 552.19.

(2) Fees Awarded - Court may award attorney's fees and costs.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Best interests of child control. § 722.23 to 722.25.

(2) Judicial Approach - Best interests of child control.

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: MICH. COMP. LAWS ANN. §§ 780.151 to 780.174.

GRANDPARENTS VISITATION RIGHTS: Court may grant visitation rights when in best interests of child.

UNIFORM CHILD CUSTODY JURISDICTION ACT: MICH. COMP. LAWS ANN. §§ 600.651 to 600.673.

CRIMINALIZATION OF CHILD SNATCHING: Any person who interferes with the legal custody of another shall be guilty of a misdemeanor. § 750.138.

COMPLIANCE WITH CHILD SUPPORT ENFORCEMENT AMENDMENTS OF 1984: See Michigan Family Support Act (§§ 552.451 to 459) and Michigan Friend of the Court Act (§§ 552.501 to 650). The Friend of the Court Act contains the wage withholding and other required provisions of the CSEA. Michigan is also one of the first states to pass the uniform Interstate Income Withholding Act. §§ 552-671 to 685.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: MICH. COMP. LAWS ANN. §§ 600.4011 to 8306.
MICH. COMP. LAWS ANN. §§ 552.13 to 451.
MICH. COMP. LAWS ANN. §§ 552.501 to 535.
MICH. COMP. LAWS ANN. §§ 552.601 to 650.

(1) The court may order an assignment to the Friend of the Court of the salary, wages or other income of the defendant for support, maintenance, and education of the child. This assignment is continuing until further order of the court.

(2) A writ of garnishment may be issued before judgment provided a showing of real need. § 600.4011(3).

(3) Except as otherwise provided by court rule, the state of Michigan and every governmental unit therein, may be proceeded against as garnishees in the same manner and with like effect as individuals. § 600.4011(2).

(4) The court may order an assignment for the support, maintenance, education, and medical expenses of the child. This assignment is continuing until further order of the court.

PROCEDURES:

(1) The circuit court or Friend of the Court (through the circuit court's citation) has broad authority to collect any and all delinquent payments due dependent minor children. §§ 552.505-509.

(2) The circuit court shall have garnishment power to satisfy a Michigan or foreign judgment. § 600.4011(1).

(3) The district court and municipal courts may exercise the jurisdiction granted to the court, provided they follow the rules adopted by the Supreme Court to protect the parties. § 600.8306(3).

(4) Where an order to pay alimony or child support has been violated, the defendant must be personally served with process or appear personally in court or be represented by his attorney before action can be taken against him. § 552.151.

(5) A writ of garnishment may be issued before judgment only if the defendant is not subject to the judicial jurisdiction of the state, or after diligent effort, the defendant cannot be served with process. § 600.4011.

(6) A writ of garnishment issued without a judge's order is void. The order may be made following due notice to the defendant if installments are due. § 600.6231.

(7) If payments under a divorce action are in default, the plaintiff (also Friend of the Court) may make a motion before the court showing by records in the clerk's or Friend of the Court's office, etc., that such default has occurred, and the court may execute its order. § 552.152.

(8) The garnishee must file his answer within 15 days after service. NOTE: Federal law (30 days) prevails.

STATE EXEMPTIONS:

(1) Alimony and child support payments are not exempt from garnished wages. First Nat'l Bank v. Hasty, 415 F.Supp. 120 (1976).

(2) If the defendant enters into an agreement with creditors and such agreement is approved by the court, his combined debts can be paid off in installments by wage assignment. If a child support order is served on the defendant, it takes priority over the creditors' assignment. § 600.5315.

(3) Michigan follows the Federal rules for exemption in alimony and child support garnishment proceedings.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

There are no statutory references concerning the garnishee's duty to raise defenses on behalf of the defendant or standing to challenge legal process, request accounting, or waive technical and jurisdictional defects.

Michigan

MINNESOTA

STATUTES:

I. Marriage - MINN. STAT. ANN. §§ 517.01 to 517.21 (1990 & Supp. 1995).

II. Marriage Dissolution - MINN. STAT. ANN. §§ 518.002 to 518.68 (1990 & Supp. 1995).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent; age 16 with consent of parent or guardian or court. § 517.02.

(2) Medical Examination - No statutory provision.

(3) License Fee - $65.00. § 517.08(1b).

(4) Waiting Period - License may be issued upon expiration of 5 days after receipt of application. § 517.08(1b).

(5) Solemnization - Any licensed or ordained minister of any religious denomination, judge, clerk of court and certain school superintendents. Special provisions for American Indians and members of the Quaker, Baha'i, Hindu and Muslim faiths. §§ 517.04 and 517.18.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Only common law marriages contracted on or before April 26, 1941, are valid. All others are void. § 517.01.

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Not recognized.

PROHIBITED MARRIAGES: All marriages between ancestors and descendants, brothers and sisters, uncles and nieces, aunts and nephews, first cousins and those involving a mentally incompetent person (unless approved by the commissioner of human services if committed to his care). Also, bigamous marriages are void. §§ 517.03, 517.01.

UNIFORM MARRIAGE AND DIVORCE ACT: §§ 518.002 to 518.27.

GROUNDS FOR ANNULMENT: Lack of mental capacity, drug addiction (including alcoholism), and impotence at time of solemnization, consent obtained by force or fraud with no subsequent voluntary cohabitation, or non-age. §§ 518.02, 518.05.

Minnesota

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - One party must have resided in this state for not less than 180 days immediately preceding commencement of action. § 518.07.

(2) Military Provision - A member of armed force stationed in this state for 180 days immediately preceding commencement of action satisfies jurisdictional requirement. § 518.07.

(3) Service of Process - Personal service unless otherwise specified by court or petition is joint. Court may order that service be made by publication upon showing that defendant is nonresident and address unknown for purposes of service by mail. § 518.11.

(4) Answer - Within 30 days of date of service of process. § 518.12.

(5) Verification - Petition must be verified by party and its allegations established by competent evidence. § 518.10.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - No fault; irretrievable breakdown is only ground for divorce. § 518.06.

(2) Defenses - Abolished. § 518.06.

(3) Period of Separation - Not required. § 518.06.

SEPARATION:

(1) Acknowledged Legal Status - Court may grant petition of legal separation. § 518.06.

(2) Effect of Separation Agreement on Divorce Decree - No statutory provision.

TIME REQUIRED BEFORE REMARRIAGE: No waiting period.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT:

(1) Maintenance is an award in a dissolution or separation proceeding of payments from future income or earnings of one spouse for the support of the other. § 518.54(3).

(2) Maintenance will be awarded where one spouse lacks sufficient property to provide for his (or her) reasonable needs and is unable to adequately support himself through appropriate employment or is the custodian of a child whose circumstances make it appropriate that the custodian not seek employment outside the home. Maintenance order shall be based on the following factors: (a) financial resources of the parties; (b) time necessary to obtain an adequate education; (c) standard of living established during the marriage; (d) duration of the marriage; and (e) the condition of the spouse seeking maintenance. § 518.552.

(3) Support money is an award in a dissolution, legal separation, or annulment proceeding for the care, support, and education of a child of the marriage. § 518.54(4).

(4) Costs and Disbursements and Attorney Fees - Court shall award attorney fees, costs, and disbursements provided it finds that a) fees are necessary for the assertion of the party's rights; b) party from whom fees are sought has means; c) party to whom fees are awarded does not have means to pay. § 518.14.

(5) Every award of maintenance or support money shall clearly designate whether the same is maintenance or support money, or what part of the award is maintenance and what part is support money. § 518.55.

(6) Child support quidelines established a rebuttable presumption of the proper level of child support. § 518.551.

PROPERTY DISTRIBUTION:

(1) Method: Marital property - equitable division. § 518.58. Pre-marital property, up to half if necessary to prevent undue hardship. § 518.58.

(2) Fees Awarded - Court may award attorney's fees and costs. § 518.14.

UNIFORM INTERSTATE FAMILY SUPPORT ACT: MINN. STAT. ANN. §§ 518C.101 to 518C.902.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Best interests of child control. See § 518.17 for other factors a court may consider.

(2) Judicial Approach - Parents viewed as equally qualified. Best interests of child control. Joint custody is a rebuttable presumption to be in the best interest of the child if requested by either or both parties unless domestic abuse has occurred between the parents. § 518.17.

GRANDPARENTS VISITATION RIGHTS: Court may grant visitation rights to grandparents when in best interests of child. § 257.022.

UNIFORM CHILD CUSTODY JURISDICTION ACT: MINN. STAT. ANN. §§ 518A.01 to 518A.25 (West).

CRIMINALIZATION OF CHILD SNATCHING: Depriving another of custodial or parental rights is a felony in Minnesota punishable by imprisonment for not more than two years, a fine not more than $4,000.00, or both. Charges may be dismissed if the child is returned within 48 hours, or the person taking the child has not left the state with the child and the child is returned voluntarily or an action to retain the child initiated. § 609.26.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: MINN. STAT. ANN. §§ 518.14 to 518.62, and 571.41 to 571.932 (1988 & Supp. 1995).

(1) Wages can be garnished for child support and alimony until judgment is satisfied. § 571.71.

(2) Each order for withholding shall provide for notice to the obligor that automatic withholding shall result if he or she fails to make the maintenance or support orders and that he or she is in arrears of at least 30 days. Obligee or public authority must serve written notice of income withholding on obligor at least 15 days before service of notice on payor of funds. 518.611(2)(a).

(3) Property Attachable by Garnishment - Service of garnishment attaches:

(a) all unpaid nonexempt disposable earnings owed or to be owed by garnishee and earned or to be earned by debtor within pay period in which garnishment summons is served and within all subsequent pay periods whose paydays occur within the 70 days after date of service of garnishment.

(b) all other nonexempt indebtedness belonging to debtor and owing by garnishee. § 571.73.

(4) Garnishment Provisions - Summons may be issued by a creditor and served upon garnishee in same manner another summons, except it may not be made by publication. Certified mail is an

acceptable means. Summons served on garnishee must also be served on debtor not more than 5 days after service on garnishee. Affidavit of service of original summons and complaint must also be served. § 571.72.

(5) An answer, called a "disclosure", is required of the garnishee. Disclosure should set forth the money and property held. Exemptions, setoffs, and claims of adverse parties should be stated. Disclosure is required within 20 days of service of summons. §571.75. If no disclosure is made, a default judgment can be taken against the garnishee. § 571.53.

(6) Payment is to the officer of the court holding the order. § 571.74.

(7) Notice to the defendant is required, and affidavit of service on the defendant is required. § 571.72(2) (4).

STATE EXEMPTIONS:

(1) Seventy-five percent (75%) of disposable pay or 40 times the federal minimum wage, whichever is greater. § 571.922.

(2) The above applies to the support of a person where federal guidelines apply. § 571.922.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) Garnishee does not have to defend the debtor. Any setoff, exemptions, or adverse claims can be stated in the disclosure (answer). See § 571.78, Duties of a Garnishee.

(2) A garnishee may assert all setoffs and defenses existing in his or her favor when garnishment was served and which might have been enforced had an action been brought by the defendant-debtor. Henderson v. Northwest Airlines, 231 Minn. 503, 43 N.W.2d 786 (1950).

(3) If any garnishee who is duly summoned fails to serve his disclosure as required, upon proof by affidavit of such fact, the court may render judgment against the garnishee for an amount not exceeding the judgment against the debtor, or 110% of the amount claimed in the garnishee's summons. § 571.82.

Minnesota

The following summary was reviewed in April 1995 by COL William M. Bost, Jr., USAR JAGC, Senior Military Judge, Ellis & Bost, Ltd., P.O. Drawer 1099, 901 Belmont Street, Vicksburg, Mississippi 39181, Telephone Number: (601) 636-5433, FAX: (601) 638-2938.

MISSISSIPPI

STATUTES:

I. Marriage - MISS. CODE ANN. §§ 93-1-1 to 93-1-25 (1972 & Supp. 1992).

II. Divorce - MISS. CODE ANN. §§ 93-5-1 to 93-5-33 (1972 & Supp. 1992).

MARRIAGE REQUIREMENTS:

(1) Age - 21 without parental notification. Male must be at least 17 and female 15, unless court approval or parental consent is obtained. § 93-1-5.

(2) Medical Examination - Standard serological test for syphilis conducted by a State Board of Health approved laboratory no more than 30 days prior to marriage application. § 93-1-5(e).

(3) License Fee - Twenty dollars ($20).

(4) Waiting Period - License may be issued upon expiration of 3 days after receipt of application, unless waiting time is waived. § 93-1-5(b).

(5) Solemnization - Any clergyman, judge, justices of peace and members of boards of supervisors within their counties may perform marriage. § 93-1-17.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Not valid if contracted after April 5, 1956. § 93-1-15. But see § 93-1-13 which requires a marriage license but specifically leaves marriages at common law valid although no license is obtained.

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Not recognized.

PROHIBITED MARRIAGES: All marriages between parents and children, ancestors and descendants, brothers and sisters, uncles and nieces, aunts and nephews, and first cousins. Father shall not marry son's widow and like prohibition extends to females. Also bigamous marriages are void. § 93-1-1.

Mississippi

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Bigamy, marriage within prohibited degrees of kindred, incurable impotency, insanity, failure to comply with marriage requirements, non-cohabitation, consent obtained by force or fraud, physical incapacity at time of solemnization, pregnancy of wife by another if husband unaware of condition. §§ 93-7-1, 93-7-3.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - One of the parties must have been resident of state for 6 months next preceding commencement of suit. § 93-5-5.

(2) Military Provision - A member of armed forces stationed in state for 6 months and residing within the state with his spouse satisfies jurisdictional requirement, provided that member and spouse were residing in Mississippi at time of separation. § 93-5-5.

(3) Service of Process - Service by process server, sheriff or certified mail is preferred. Publication used when residence of defendant is unknown. Miss. Rule Civ. Proc.4.

(4) Answer - Due within 30 days of service of process. Miss. Rule Civ. Proc. 12.

(5) Verification - Complaint, except where based on irreconcilable differences, must be accompanied by an affidavit of non-collusion. § 93-5-7.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Impotency, adultery, conviction and sentencing to penitentiary, desertion (1 year), alcoholism, bigamy, mental incompetence, pregnancy of wife by another, parties within prohibited degrees of kindred, addiction to narcotics, habitual and inhuman treatment. § 93-5-1. Also, no fault divorce on basis of irreconcilable differences. But for a no fault divorce, a written agreement settling child custody and support and property issues is required, or a written stipulation may be filed by the parties to permit court to decide on issues which cannot be agreed upon. § 93-5-2.

(2) Defenses - Recrimination may be considered but is not necessarily a bar to divorce. Condonation, collusion, connivance, provocation, and reformation are also defenses.

(3) Period of Separation - No statutory provision for fault grounds, but a complaint for divorce on no fault grounds must have been on file for 60 days before the case may be heard. § 93-5-2.

SEPARATION:

(1) Acknowledged Legal Status - No statutory provision.

(2) Effect of Separation Agreement on Divorce Decree - Required for no fault divorce. § 93-5-2.

TIME REQUIRED BEFORE REMARRIAGE: When divorce granted on ground of adultery, court may prohibit remarriage (very rarely if ever done). After 1 year, court may remove that restriction for good cause shown. § 93-5-25.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT:

(1) The court may award alimony or separate maintenance to either party when equitable and just. § 93-5-23. The alimony may be lump sum or permanent periodic.

(2) A decree of permanent alimony is never a final judgment and may be modified on a showing of change of circumstances. Banks v. Banks, 511 So. 2d 933 (Miss. 1987).

(3) State law gives wide discretion to courts to determine need for and amounts of alimony; suit money (attorney fees) as well as temporary or permanent support may be granted to either party. § 95-5-23. (See Pratt v. Pratt, 623 So. 2d 258 (Miss. 1993) for discussion of twelve factors).

(4) The "necessaries" must be supplied to children according to Common Law definition: shelter, food, education, clothing, medical fees, etc. The court, in making the child support award, must require that each parent contribute according to his or her ability. Whenever child support payments remain unpaid for at least 30 days, the court may order the delinquent parent to post a bond to secure payments. § 93-5-2.

(5) Statutory guidelines provide for a percentage of adjusted gross: 1 child - 14%, 2 children - 20%, 3 children - 22%, 4 children - 24% and 5 children - 26%. MISS. CODE ANN. 43-19-101.

PROPERTY DISTRIBUTION:

(1) Method - No statutory provision.

(2) Fees Awarded - No statutory provision. See Holloman v. Holloman, 527 So. 2d 90 (Miss. 1988).

(3) Mississippi is now an "equitable distribution" jurisdiction. All property acquired or accumulated during the marriage is subject to equitable distribution and a wife who works in the home as a housewife and never brings home a paycheck is an equal partner and may be entitled to a one-half share. Ferguson v. Ferguson, 639 So. 2d 921 (Miss. 1994), and Hemsley v. Hemsley, 639 So. 2d 909 (Miss. 1994). Military pensions, to the extent accumulated during the marriage, may be part of the marital estate and subject to distribution. Pierce v. Pierce, 648 So. 2d 523 (Miss. 1995).

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT LAW: MISS. CODE. ANN. §§ 93-11-1 to 93-11-65 (1972 & Supp. 1990).

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Joint custody is presumed to be in the best interest of the child when both parents have agreed. § 93-5-24(4).

(2) Judicial Approach - Court has discretion to award or not to award joint custody. In a divorce for irreconcilable differences, if both parents agree on joint custody, there is a strong presumption in its favor. Where the divorce is based on fault grounds, a greater degree of discretion will be exercised by the court. § 93-5-24(2) and (3). Best interests of child control. Yates v. Yates, 284 So. 2d 46 (Miss. 1973).

GRANDPARENTS VISITATION RIGHTS: Court may grant visitation rights to grandparents. §§ 93-16-1 to 93-16-7.

UNIFORM CHILD CUSTODY JURISDICTION ACT: Adopted in 1982. §§ 93-23-1 to 93-23-47.

CRIMINALIZATION OF CHILD SNATCHING: Unlawful for noncustodial parent or relative to remove a child under the age of 14 from the state with the intent of violating a court custody order. Punishable by a fine not to exceed $2,000 and/or imprisonment not exceeding three years. § 97-32-51.

TREATMENT OF MILITARY RETIRED PAY: Courts have power to adjudicate an interest in military retired pay in a divorce action. Powers v. Powers, 465 So. 2d 1036 (Miss. 1985). However, Mississippi does not recognize that a spouse has a property interest in the service member's retired pay. Mississippi courts will enforce any such interest that vests while residing in states that do find such an interest exists. Flowers v. Flowers 624 So. 2d 992 (Miss. 1993).

The recent case of Pierce v. Pierce, 648 So. 2d 523 (Miss. 1995) approved the equal division of a military pension on the theory that since the pension was accumulated during the marriage it is subject to equitable division. A spouse is not automatically entitled to an equal division of jointly-accumulated properties.

ADOPTIONS: Termination of Rights of Unfit Parents, §§ 93-15-101 to 93-15-111 and Adoption, Change of Name and Legitimation of Children, §§ 93-17-1 to 93-17-31.

GARNISHMENT AND WAGE ASSIGNMENT:

STATUTE: MISS. CODE ANN. §§ 11-35-1 to 11-35-61 (1972 & Supp. 1988); §§ 93-5-23 to 93-5-25 (1972 & Supp. 1990); §§ 93-11-101 to 93-11-119 (Supp. 1990).

(1) Section 11-35-23(1) states "any indebtedness of the garnishee to the defendant, except for wages, salaries, or other compensation, shall be bound from the time of service of the writ of garnishment, and be appropriable to the satisfaction of the judgment or decree, or liable to be condemned in the attachment."

(2) Whenever the court has ordered a party to make periodic child support payments, and such payments are 30 days in arrears, an order may be entered requiring that bond, sureties, or other security be given by the person obligated to make such payments. Obligor shall be served with process and shall be entitled to a hearing in such case. § 93-5-23.

PROCEDURES:

(1) The clerk of the circuit court where a judgment or decree was obtained by the creditor, or any officer issuing a writ of attachment, or a justice of the peace where judgment was obtained in his court, may issue writs of garnishment directed to the sheriff or proper officer. §§ 11-35-1 and 11-35-3.

(2) A judgment (for arrearages) is required before the issuance of a summons of garnishment. It is suggested that it is the judgment that in fact creates the lien. See Grace v. Pierce, 90 So. 590 (Miss. 1922). However, this may also apply to the actual divorce decree itself which directs the payment of specific support.

(3) The writ of garnishment is served by the sheriff or constable of the county or marshal of the city.

(4) No mention was made regarding required attachments to a garnishment issued in aid of a judgment against a defendant.

(5) Garnishee has until the first day of the return term of the circuit or chancery court to make answer to the writ. § 11-35-27. Garnishee must answer on oath in writing whether or not he or she is indebted to the defendant or was so indebted at the time of service of the writ, or has since been indebted, and if so in what amount and whether due or not and when due. § 11-35-25. He also must state what effects of defendant he has or had at time of service or has since acquired. He must also state if he knows or knew of anyone else who might be indebted to the defendant, in what amount and where such person can be located. Failure to make answer will lead to liability of garnishee in full amount of judgment against defendant. § 11-35-31. NOTE: Federal law provides for 30 days to make answer.

(6) Wages, salary, and other compensation garnished will be paid to the court. All other property garnished will be surrendered to the court. § 11-35-23.

(7) The writ is served in the same manner as a summons and can be served in person or by mail. § 11-35-9.

STATE EXEMPTIONS:

There are no statutory exemptions for nonresidents. For residents, wages shall be entirely exempt for a period of 30 days from the date of service of any writ. After 30 days, a resident may be garnished up to the lesser of 25% of his disposable weekly earnings or 30 times the federal minimum hourly wage. If the garnishment involves a support order, the garnishable amount rises to 50% of weekly wages if the debtor is supporting another spouse or child and 60% if the debtor has no other spouse or child. These amounts rise an additional 5% if the debtor is more than 12 weeks in arrears. § 85-3-4. Both active duty and retired pay appear to be garnishable.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) The garnishee may indicate in his answer his belief on the part of the defendant that the defendant will claim exemptions from garnishment. If the defendant is shown by oath to be absent from the state, the clerk of court shall issue a summons or publication to the defendant instructing him to assert his claim before the court. Upon failure to appear, judgment can be taken against defendant. § 11-35-33.

(2) Failure to answer in timely manner by garnishee can result in liability to plaintiff for full amount of the judgment. § 11-35-31.

ALIMONY AND CHILD SUPPORT: In every case, garnishments issued pursuant to court ordered child support shall have first priority, even if previous garnishments are in effect or pending. § 11-35-24(1).

INCOME WITHHOLDING FOR CHILD SUPPORT OBLIGATIONS: Mississippi passed mandatory wage withholding legislation in 1985. MISS. CODE ANN. §§ 93-11-101 to 93-11-119.

(1) After 1 July 1985, whenever a court enters an order for child support, it will enter a separate order for wage withholding. The wage withholding order shall not take effect unless the obligor (i.e., noncustodial parent) becomes delinquent or unless the obligor requests that the order take effect. § 93-11-103(1). Effective with the passage of an amendment on March 17, 1994, all such orders issued or modified on or after January 1, 1994 shall be ordered to take effect immediately without any requirement that the obligor be delinquent in payment. An exemption is provided for good cause where the custodial parent is not a recipient of public assistance under title IV-D of the Social Security Act. § 93-11-103(1).

(2) All support orders issued before 1 July 1985 are presumed to contain a withholding provision like the one described above. § 93-11-103(2).

(3) The withholding must be from any periodic income, to include annuity and retirement benefits. § 93-11-101(g).

(4) The order directs the employer to withhold the amount equal to the support obligation plus an additional 10% until any arrearage is liquidated. However, the employer may not withhold an amount in excess of that allowed under Section 303(b) of the Consumer Credit Protection Act, 15 U.S.C. § 1673, as amended. § 93-11-103(3).

PROCEDURES:

(1) When the obligor is delinquent in an amount of at least one month's support obligation, either the obligee (i.e., custodial parent) or the Mississippi Department of Public Welfare may serve on the obligor notice of the terms of the support order, a computation of the amount of the delinquency, and a warning that the order for withholding will be served upon the payor (i.e., the noncustodial parent's employer) unless the obligor files a petition to stay the service of the withholding. § 93-11-105.

(2) The obligor must file for a stay within 10 days of receipt of notice of the delinquency. The grounds for granting a stay are limited to mistakes of fact that make the withholding improper or the amount of the withholding incorrect. § 93-11-107(1).

(3) After 10 days of service of notice of delinquency, the clerk of court may order the payor to withhold money. § 93-11-109.

(4) When a payor has been served with more than one order for withholding for the same obligor, he shall honor all on a first-come-first served basis, but the total amount withheld cannot exceed the limits of Section 303(b) of the Consumer Credit Protection Act, 15 U.S.C. § 1673, as amended. § 93-11-111(8).

(5) A total of $7 per withholding may be deducted from the obligor's income to defray the administrative expenses of the payor ($2) and the Department of Public Welfare ($5). § 93-11-111(2), (3).

(6) Payors who willfully fail to withhold income may be forced to pay the Department of Public Welfare the amount they failed to withhold. § 93-11-117.

(7) Obligees seeking to enforce foreign support orders through wage withholding in Mississippi must comply with all the procedural requirements of §§ 93-11-101 to 93-11-119.

MISSOURI

STATUTES:
I. Marriage - Mo. REV. STAT. §§ 451.010 to 451 (1986 & Supp. 1995).
II. Divorce - Mo. REV. STAT. §§ 452.075 to 452.420 (1986 & Supp. 1995).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Under 18 requires sworn written consent under oath of parent or guardian. No person under 15 may be married without court approval. § 451.090.

(2) Medical Examination - Not required.

(3) License Fee - Ten dollars ($10). § 451.150.

(4) Waiting Period - License may be issued upon expiration of 3 days after receipt of application. Certificate void 30 days after issuance. § 451.040.

(5) Solemnization - Any clergyman, judge or religious society in accordance with customs of such society may perform marriage. § 451.100.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - All common law marriages contracted after March 31, 1921 are null and void. § 451.040(5).

(2) Marriage by Proxy - Not recognized.

(3) Marriage Contracts - Not recognized unless in writing. § 451.220. Must be recorded to affect third parties. § 451.240.

PROHIBITED MARRIAGES: All marriages between parents and children, grandparents and grandchildren, brothers and sisters (of the half and whole blood), uncles and nieces, aunts and nephews, first cousins, and those involving persons lacking capacity to enter into a marriage contract are void. Also, bigamous marriages are void. §§ 451.020 and 451.030.

UNIFORM MARRIAGE AND DIVORCE ACT: Adopted in part (Dissolution of Marriage Act is similar to UMDA).

GROUNDS FOR ANNULMENT: No statutory provision. See Prohibited Marriages, supra.

Missouri

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - One party must be a resident of this state for 90 days next preceding commencement of action and 30 days must have elapsed since the commencement of the action. § 452.305(1).

(2) Military Provision - A member of the armed forces who has been stationed in this state for 90 days next preceding commencement of action (30 days must have elapsed since the filing of the petition) satisfies jurisdictional requirement. § 452.305(1).

(3) Service of Process - Personal service not required for decree changing status or ordering custody of children present and land within state. In re Marriage of Southard, 733 S.W.2d 867 (Mo. App. 1987.) Personal service required unless shown that such service cannot be perfected on defendant in this state. Service by registered mail or publication authorized by judge or clerk in such event. § 452.310.

(4) Answer - Within 30 days after date of service of process. C.R. 55.25 and § 452.310.

(5) Verification - Petition and answer must be verified by party. § 452.310.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Irretrievably broken. If a party contests the action, findings such as adultery, abandonment (6 months) or separation (24 months or 12 months mutual consent) must support contention that marriage "irretrievably broken." § 452.320.

(2) Defenses - Abolished. §425.310(5).

(3) Period of Separation - Not a prerequisite for divorce but may support finding that marriage is irretrievably broken.

SEPARATION:

(1) Acknowledged Legal Status - Party may request decree of legal separation rather than divorce. § 452.305.

(2) Effect of Separation Agreement on Divorce Decree - Binding on court unless unconscionable, but not binding as to custody, support, and visitation of children. § 452.325.

TIME REQUIRED BEFORE REMARRIAGE: No statutory provision.

RECOGNITION OF FOREIGN DIVORCES: Decrees of another state are presumed valid, but one party must be a domiciliary of that state. § 511.760. Uniform Enforcement of Foreign Judgments Act.

ALIMONY AND CHILD SUPPORT:

(1) Child support is defined under state law as any payment for the support of a child. § 452.340. It is thoroughly congruent with the federal definition, however, the state law does not provide for specific need payments. Support may be ordered of either or both parents. Guidelines published by the Missouri Supreme Court establish a rebuttable presumption of the proper level of child support. § 452.340.

(2) Alimony is defined under state law as maintenance. Court may grant a maintenance order to either spouse. § 452.335. Missouri also has alimony in gross which should be considered in the nature of a property settlement. § 452.080, Gunkel v. Gunkel, 633 S.W.2d 108 (Mo. App. 1982). Remarriage ends duty to pay alimony or maintenance to ex-spouse. § 452.075.

(3) Attorney's fees, costs and interest are not properly awarded as an element of child support and alimony. Dyche v. Dyche, 570 S.W.2d 293 (Mo. 1978).

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution. (Both "marital property" and "separate property" recognized.) § 452.330.

(2) Fees Awarded - Court may award attorney's fees and costs. § 452.355.

(1958) UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: Mo. Rev. Stat. §§ 454.010 to 454.360 (Vernon).

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Best interests of child control. Joint custody is provided as favored alternative. § 452.375.

(2) Judicial Approach - Parents viewed as equally qualified. Best interests of child control.

GRANDPARENTS VISITATION RIGHTS: Court may grant reasonable visitation rights to either maternal or paternal grandparents. § 452.402.

UNIFORM CHILD CUSTODY JURISDICTION ACT: Mo. Rev. Stat. §§ 452.440 to 452.550 (Vernon).

Missouri

CRIMINALIZATION OF CHILD SNATCHING: Knowingly interfering with custody is a misdemeanor unless child is removed from state, in which case it is a felony. § 565.150.

TREATMENT OF MILITARY RETIRED PAY: Treated as marital property. Coates v. Coates, 650 S.W.2d 307 (Mo. App. 1983); Starrett v. Starrett, 703 S.W.2d 544 (Mo. App. 1985).

UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT LAW. §§ 454.400-.528.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: Mo. ANN. STAT. §§ 452.310 to 452.350, § 143.781 (1986 & Supp. 1995), and Mo. Rules of Civ. Proc. 90.02 to 90.22 (1981 & Supp. 1994).

(1) Missouri has enacted a mandatory wage withholding law. Every order for child support shall include a provision informing the person obligated to pay such support, that his wages may be assigned to the person entitled to the support if he becomes delinquent for an amount equal to one month's support obligation. For traditional garnishment, the remedy is initiated via a summons. R. 90.02. Service of the process compels the garnishee to withhold monies as of the date of service and through the return. R. 90.06.

(2) Any individual who is indebted or employs the defendant may be subject to court order as a garnishee. § 452.315.

PROCEDURES:

(1) Unpaid installments of child support and alimony become judgments by operation of law. Thus, the obligee need not reduce amounts due and owing to judgments. A mere decree of dissolution is sufficient. The obligee then proceeds by affidavit to cause execution to issue. The execution is then delivered to the sheriff and a summons is served on the garnishee. § 452.350. Each order for child support or maintenance shall include a provision notifying obligor that upon application of obligee or division of child support enforcement of the Department of Social Services, obligor's wages or other income shall be subject to withholding without further notice if obligor becomes delinquent in an amount equal to one month's total support obligation.

(2) The remedy is ancillary. Therefore, the remedy is only as valid as the underlying execution and judgment.

(3) Service of process must be accomplished in the manner provided for in the rules of the Supreme Court. § 452.310(1). Rule 54.03 further provides that service of process must be

accomplished in accordance with federal law and regulation. The state further imposes a requirement that the summons be served by dthe sheriff or, for good cause, by an appointed person. R. 54.03.

(4) Prior to issuance of summons of garnishment, garnishor shall file within interrogatories to garnishee. They shall be served with the summons of garnishment. The garnishee shall file and serve his verified answers within 10 days after the return date. The garnishor then has 10 days to take exception to the answers. The garnishee may reply within 10 days after service of exceptions and the issues to be tried are thus framed. R. 90.13. Upon application of obligee or division of child support enforcement, circuit clerk shall send, by certified mail, return receipt requested, a written notice to the employer or other payor listed on application. § 452.350.

(5) The garnishee always has the option of surrendering the money in its hands to the sheriff. The procedure will discharge the garnishee for that amount so far as the obligee is concerned. R. 90.07. The garnishee also always has the option to withhold monies and await the further order of the court notwithstanding arguments "that it is not the way we do it." R. 90.19. Payment upon order discharges the liability of the garnishee to the plaintiff (for the amount confessed) and acquits the garnishee from liability on the same claim to the obligor.

(6) Interrogatories are authorized by the law of Missouri. Rule 90.13.

(7) There is no constitutional requirement that obligors be given post-judgment notice of an enforcement effort.

(8) The director of revenue has the power to intercept state income tax refunds for the benefit of child support or alimony. § 143.781.

STATE EXEMPTIONS FROM ATTACHMENT AND EXECUTION: See § 513.430.

There is an exemption for personal property, of real estate held in the name of husband and wife, to enforce judgments or orders for child support or maintenance. § 454.528.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

The garnishee must raise defenses and objections which are jurisdictional. As to defenses which are not jurisdictional, the garnishee may not raise or litigate them. There is no specific standing for garnishee to request an accounting.

Missouri

The following summary was reviewed in February 1995 by LTC Dennis Wood, 675 Sycamore Drive, Milpitas, CA 95035, Telephone Number: (408) 434-3765, FAX: (408) 434-5885.

MONTANA

Unless specifically stated otherwise, all citations are to the Montana Code Annotated (MCA).

STATUTES:

I. Marriage - MONT. CODE ANN. §§ 40-1-101 to 40-1-404 (1991).
II. Dissolution (Divorce) - §§ 40-4-101 to 40-4-225 (1991).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Minimum age 16. Anyone under 18 but over 16 may marry with parental consent and/or judicial approval. Judicial approval requires statutory pre-marital counseling. §§ 40-1-202 and 213.

(2) Medical Examination - Standard serological test for rubella immunity and syphilis. §§ 40-1-202 and 206. Forms from other states or the military (for military personnel) are acceptable. § 40-1-205.

(3) License Fee - Thirty dollars ($30). § 40-1-202.

(4) Waiting Period - License to marry becomes effective upon issuance and expires after 180 days. § 40-1-212.

(5) Solemnization - May be performed by any judge, mayor, city judge, justice of the peace, tribal judge, or religious society in accordance with customs of such society denomination. § 40-1-301.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriages are Recognized. § 40-1-403. Such marriage requires mutual and competent consent of the parties to enter into a ceremonial marriage and the beginning of the relationship, to include cohabitation and the reputation of being husband and wife. Miller v. Townsend Lumber Co., 152 Mont. 210, 448 P.2d 148, 152 (1968).

(2) Marriage by Proxy - A party unable to attend at solemnization may, in writing, authorize third party to act as his/her proxy. §§ 40-1-213 and 40-1-301.

(3) Marriage by Contract ("Declaration") - § 40-1-311. Must be subscribed by parties, attested by two (2) witnesses and formally acknowledged to the clerk. Medical certificate must be attached. License fee of $30. Montana has adopted the Uniform Premarital Agreement Act. See §§ 40-2-601 through 40-2-610.

PROHIBITED MARRIAGES: All marriages between parent and child, ancestors and descendant, brother and sister, half-brother and sister, uncle and niece, aunt and nephew, first cousins, or bigamous marriages. §§ 40-1-401 and 45-5-611.

UNIFORM MARRIAGE AND DIVORCE ACT: Adopted in large part (with alterations) by §§ 40-1-101 to 404, and §§ 40-4-101 to 221.

GROUNDS FOR ANNULMENT: If a party: lacked capacity to consent because of mental infirmity, influence of drugs and alcohol, or if consent was induced by fraud, duress, or force; lacked physical capacity to consummate marriage at time of solemnization, without other party's knowledge; did not meet the age requirements; or, if marriage was prohibited (see PROHIBITED MARRIAGES, above). § 40-1-402.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - A party must have been domiciled for 90 days immediately preceding making of findings. § 40-4-104(1).

Military Provision - Member of armed forces who has been stationed in state for 90 days preceding the making of findings meets requirement, without inquiry into domicile. § 40-4-104(1).

(2) Service of Process - Nonresident defendant may be served by publication upon showing that defendant is unavailable for personal service within state. If defendant's address is known, a copy of summons and complaint must also be mailed to defendant to perfect service. § 40-4-105 and Rule 4D(5)(5)(iii), Mont. Rules of Civil Procedure.

(3) Answer must be filed within 20 days of service of process. § 40-4-105 and Rule 12(a), Mont. Rules of Civil Procedure.

(4) Petition and answer must be verified. § 40-4-105.

(5) Dissolution section should be titled, "In re the Marriage of _____ and _____." § 40-4-103.

(6) Filing fee of $120. § 25-1-201.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Irretrievable breakdown is a basis for no fault dissolution. § 40-4-107.

(2) Defenses to divorce and legal separation have been abolished. § 40-4-105(4).

(3) Period of Separation - Not prerequisite for divorce, but separation for 180 days or more supports contention that marriage is irretrievably broken. § 40-4-104(1)(b)(i).

SEPARATION:

(1) Acknowledged Legal Status - Party may petition court for decree of legal separation, rather than for dissolution. § 40-4-104(2).

(2) Separation agreement is considered binding on court unless it determines agreement to be unconscionable, or if it pertains to custody, support or visitation. § 40-4-201.

TIME REQUIRED BEFORE REMARRIAGE: None. § 40-4-108.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT:

(1) Maintenance of either spouse and child support are authorized. Automatic income withholding is authorized. §§ 40-4-203 and 40-4-204. Child support must be ordered pursuant to state guidelines unless the court enters findings as to why the amount is unjust or inappropriate. § 40-4-204.

(2) Court may order a party to pay the other a reasonable amount for cost of proceeding for divorce, child custody or support, including attorneys fees and costs. § 40-4-110.

(3) Alimony and child support may be paid (if desired) in one lump payment.

PROPERTY DISTRIBUTION:

Equitable distribution between parties. Court to consider: contribution of parties to marriage; length of marriage; antenuptial agreement; age, health, needs, occupation, vocational skills, and income of parties; their potential future acquisitions; whether maintenance will also be awarded. § 40-4-202.

UNIFORM PREMARITAL AGREEMENT ACT: §§ 40-2-601 to 40-2-610.

Montana

UNIFORM INTERSTATE FAMILY SUPPORT ACT: §§ 40-5-101 through 197.

INCOME DEDUCTION: If child support delinquency equals or exceeds 3 months of ordered support, the district court may notify the delinquent parent that they are subject to a direct income deduction from their paychecks to recover the delinquency. If the delinquency is not discharged prior to the hearing, the court shall order the deduction directly from the paychecks until the delinquency is recovered and (if ordered) the duty of support payment ends. §§ 40-5-301 et seq.

DETERMINATION OF CHILD CUSTODY: Determined in accordance with the best interests of the child. § 40-4-212.

GRANDPARENTS VISITATION RIGHTS: Upon their petition grandparents may be granted reasonable visitation rights if court find it in the child's best interests. § 40-4-217.

UNIFORM CHILD CUSTODY JURISDICTION ACT: Adopted with some changes. §§ 40-7-101 through 125.

CRIMINALIZATION OF CHILD SNATCHING: "Custodial interference" is when a party who "has no legal right to do so" takes, entices, or withholds from lawful control a child, etc., entrusted by authority of law to the custody of another person or institution, including situations of joint custody, or prior to custody determination. It is a felony punishable by imprisonment for not longer than 10 years and/or a $50,000 fine. No crime is committed if the party taking the child returns him/her prior to arraignment, unless he has taken the child out of state. A person who has left the state does not commit an offense if he voluntarily returns the child to lawful custody prior to arrest. § 45-5-304.

ADOPTION: §§ 40-8-101 to 40-8-202.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: MONT. CODE ANN. §§ 25-13-101 to 25-13-617, §§ 40-5-301 to 40-5-443 (1991).

(1) A mandatory income withholding law has gone into effect for the benefit of child support arrearages and for routine child support payments. §§ 40-5-302 and 40-5-402.

(2) When obligor falls 3 months behind in court ordered child support payments, he shall be considered delinquent. § 40-5-304. Once delinquent, the obligor will become subject to an "income deduction." § 40-5-303. The amount of money deducted will be the amount necessary to pay current installments of child support as

they become due, and an amount, when deducted in equal amounts each payday, to pay off all outstanding child support payments within 2 years or not less than 25% of disposable earnings, but not more than federal garnishment limits. § 40-5-309.

(3) After January 1, 1990, the income of an obligor is subject to immediate withholding regardless whether child support payments are in arrears unless the court or administrative authority that issued or modified the support order finds good cause for not withholding or there is an alternative arrangement between the parties for the payment of support. § 40-5-411.

PROCEDURES:

(1) The district courts of Montana may issue both remedies of garnishment in aid of execution and income withholding. The execution writ is issued by the district court judge and the notice of garnishment is issued by the sheriff or levying officer of the county. § 40-5-402(4).

(2) A writ of execution may be issued at any time within 6 years after entry of judgment except if for payment of child support within ten years after the termination of the support obligation. § 25-13-101 (1993).

(3) The wage withholding is binding on the employer or other payor of the fund for the first pay period two weeks after service upon employer or other payor of the notice that an assignment has been made. § 40-5-421(1).

(4) The execution writ shall be directed to the sheriff or levying officer, detailing amount due in accordance with a judgment or support order. § 25-13-301.

(5) Montana law does not provide a form for wage assignment. In the event the debtor fails or refuses to execute and deliver a wage assignment, the order may provide that the clerk of the court or its deputy, pursuant to Rule 70, Montana Rules of Civil Procedure, execute the assignment in lieu of the debtor.

(6) Garnishee must answer the notice of garnishment as set forth in the notice itself as of date of service. There is no need to appear unless the answer is traversed.

(7) Wage assignments do not require an answer from employer.

(8) If another individual has monies due or owing to the debtor which are not exempt by federal law, he or she may deliver it to the sheriff in total or partial satisfaction of the debt. § 25-13-502.

(9) Garnishee is not required by state law to notify the debtor of the garnishment.

STATE EXEMPTIONS: See §§ 25-13-601 to 25-13-615.

The following summary was reviewed in January 1995 by Major Margaret A. McDevitt, Defense Team 4, 8th LSO, Omaha; Legal Services of Southeast Nebraska, Lincoln, Nebraska 68502, Telephone Number: (402) 435-2161, FAX: (402) 435-2171.

NEBRASKA

STATUTES:

I. Marriage - NEB. REV. STAT. §§ 42-101 to 42-121 (1993).
II. Divorce - NEB. REV. STAT. §§ 42-341 to 42-381 (1993).

MARRIAGE REQUIREMENTS:

(1) Age - Minimum age 17. If a minor, the written consent of the custodial parent or either parent if they live together or the minor's guardian, must be provided to the county clerk before issuing the marriage license. §§ 42-102, 42-105.

(2) Medical Examination - Woman must be tested for rubella immunity unless over 50 years of age, surgically sterile, or evidence of prior test. § 42-121. § 42-102 prohibits marriage by any person with a venereal disease but current law does not require test.

(3) License Fee - Ten dollars ($10).

(4) Waiting Period - No statutory requirement.

(5) Solemnization - Any clergyman, active or retired judge, clerk-magistrate, or preacher authorized to perform marriage ceremonies may perform marriage. §§ 42-108 and 42-115.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Recognized if entered into prior to 1923. See Bourelle v. Soo-Crete, Inc., 165 Neb. 731, 87 N.W.2d 554 (1958). Also recognized if valid where contracted outside this state. § 42-117.

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Not recognized.

PROHIBITED MARRIAGES: All marriages between parents and children, grandparents and grandchildren, brothers and sisters, of half as well as whole blood, uncles and nieces, aunts and nephews, and first cousins of the whole blood. This prohibition applies to children born outside of the marriage too. Also, bigamous marriages and marriage involving mental incompetent. § 42-103. Persons with venereal disease may not marry. § 42-102.

Nebraska

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Consent obtained by fraud or force, mental incompetence at time of marriage, retardation, or illness at the time of marriage, party not old enough, impotence at time of solemnization, bigamy, venereal disease and marriage within prohibited degrees of kindred. §§ 42-102 and 42-374. Petitioner must be actual resident of county where petition is filed. § 42-373.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - One party must have resided in state for 1 year next preceding commencement of action with a bona fide intention of making the state his permanent home, or marriage must have been solemnized in this state and either party must have resided in the state for time of marriage to time of petition. § 42-349.

(2) Military Provision - A member of the armed forces stationed within state for 1 year next preceding commencement of action satisfies jurisdictional requirement. Also, if the marriage was solemnized in this state and parties have resided in state from marriage until filing of the petition. § 42-349.

(3) Service of Process - Respondent must have been properly served with process or have entered an appearance in the case, for dissolution or separation to be decreed. Summons shall be served on the respondent by personal service or, upon motion and showing by affidavit that service cannot be made without reasonable diligence, by any other method provided by statute. The court may permit service to be made (1) by leaving process at the defendant's usual place of residence and mailing a copy by first class mail to the defendant's last known address, (2) by publication, or (3) by any manner reasonably calculated under the circumstances to provide the party with actual notice of the proceedings and an opportunity to be heard. Additionally, the respondent may simply enter an appearance in the case. §§ 42-352, 42-355, 25-517.02. Must have in personam jurisdiction over respondent to order child support, alimony, or other financial obligations. Stucky v. Stucky, 186 Neb. 636, 185 N.W.2d 656 (1971).

(4) Answer - Responsive pleading must be filed within 30 days after service of summons and petition. § 42-354.

(5) Verification - No statutory provision but the common practice is to have the petitioner verify the allegations in the petition for dissolution.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Marriage is irretrievably broken and no reasonable possibility of reconciliation exists. §§ 42-353, 42-347(2), and 42-360.

(2) Defenses - No statutory provision.

(3) Period of Separation - No statutory provision. NOTE: Suit cannot be heard until 60 days after perfection of service although temporary custody and support orders can be entered. § 42-363.

SEPARATION:

(1) Acknowledged Legal Status - Party may petition court for decree of legal separation. § 42-347(3). NOTE: No minimum residency period required.

(2) Effect of Separation Agreement on Divorce Decree - Property settlement agreement is binding on court, except provisions pertaining to custody or support of minor children, unless the provisions are unconscionable. § 42-366(2).

TIME REQUIRED BEFORE REMARRIAGE: Decree is not final or operative until six months after decree is rendered, except for purposes of appeal. If appealed, decree is not final until proceedings are finally determined. Parties may not remarry until proceedings are final. If not appealed, court may vacate or modify its decree within the six month period after it is entered. § 42-372.

RECOGNITION OF FOREIGN DIVORCES: Divorce except as provided in § 30-2353 (effect of divorce on will) obtained in another jurisdiction has no effect if both parties were domiciled in this state at time. §§ 42-341 to 42-344.

ALIMONY AND CHILD SUPPORT:

(1) The court may order either party to pay temporary alimony and child support during pendency of the action. § 42-357.

(2) The court may require the husband to pay any sum necessary to enable the wife to maintain the action during pendency. This temporary alimony may remain in effect until a final judgment is rendered. § 42-367. The court may also enter temporary and final orders regarding support of either party, settlement of property rights, and award of costs and attorney's fees. § 42-451.

(3) The court may, in the final decree, order either party to pay alimony to the other and provide for the payment of child support. §§ 42-364 and 42-365. Child support guidelines published by the State Supreme Court must be considered by courts ordering child support.

(4) The court shall order the employer of a parent ordered to pay child support to withhold and transmit from the parent-employee's earnings such amounts as shall reduce or satisfy child support payments unless the court specifically finds good cause not to require such withholding or the parties provide an alternative arrangement in a written agreement (1994 Neb. Laws LB 1224).

(5) The court may award a reasonable attorney's fee to enable one party to maintain the action and an additional award in the final decree, as well as costs. §§ 42-351, 42-367. Attorney's fees may be taxed against a party held in contempt. § 42-370.

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution. Consideration to include circumstances of the parties, duration of the marriage, ability of spouses to engage in gainful employment due to care of children, and interruptions in careers and education and contributions to the marriage of each party. § 42-365.

(2) Fees Awarded - Court may award attorney's fees and costs. §§ 42-351 and 42-367.

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT:
Has been repealed and replaced by the Uniform Interstate Family Support Act, §§ 42-701 to 42-7,105.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Best interests of child control. Court shall consider relationship of children to each parent, desires and wishes of child if based on sound reasoning, health, welfare, and social behavior of child, and any credible evidence of abuse inflicted on any family or household member. Shared or joint custody may only be ordered if parents agree. § 42-364.

(2) Judicial Approach - Best interests of child control.

GRANDPARENTS VISITATION RIGHTS: NEB. REV. STAT. §§ 43-1801 to 43-1803 (1993). Grandparents may file petition for visitation with biological or adoptive grandchild in district court where there has been prior dissolution proceeding or paternity case involving child. The court may grant reasonable visitation if court

determines by clear and convincing evidence there is or has been a significant beneficial relationship between child and grandparents, best interest of child requires that relationship continue, and visitation will not adversely interfere with parent child relationship.

UNIFORM CHILD CUSTODY JURISDICTION ACT: NEB. REV. STAT. §§ 43-1201 to 43-1225.

CRIMINALIZATION OF CHILD SNATCHING: Any person who takes a child without legal right to do so is guilty of a Class II misdemeanor in Nebraska. Violation of a custody order with the intent to deprive the lawful custodian of custody is a Class IV felony. § 28-316.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: NEB. REV. STAT. §§ 43-1701 to 1743 (1993) and 1994 Neb. Laws LB 1224.

(1) Applies to court orders for child support, alimony, and medical support.

(2) Support orders shall operate as wage assignments to the clerk of the district court designated to receive support payments. The assignment shall take effect as provided in § 43-1718.01 or § 67, LB 1224 which requires income withholding by employer unless the parties otherwise agree or the court finds good cause not to withhold.

PROCEDURES:

(1) In the case of immediate wage withholding, the obligor must prepare a notice to withhold income which is sent to the employer directing withholding. The employer must remit within 10 days of date the obligor is paid, the income withheld minus any administrative expense of the employer. § 67, LB 1224.

(2) If the obligor is not subject to immediate wage withholding, an employee's wages may be subject to income withholding on the date on which the child support payments are delinquent in an amount equal to the support due and payable for a one month period of time or upon the request of the child support obligee or state Department of Social Services. The obligor shall receive notice and a right to a hearing before implementation of withholding.

(3) There can be income withholding to collect arrears and current support.

Nebraska

OTHER PROCEDURES TO COLLECT DELINQUENT CHILD SUPPORT:

(1) All child support payments become delinquent the day after due and owing. Interest accrues thirty days after payments are delinquent. § 42-358.02(2).

(2) Court may find obligor guilty of contempt of court for failure to pay permanent child support and may imprison and commit to court-supervised work program. § 42-358.03. A child support judgment shall be a lien as in other actions upon real property and any personal property registered with a county office and may be collected by execution and the other means authorized for collection of money judgments. A release of judgment for child support must be approved by the court which rendered the judgment. The judgment debtor may petition the court for an order to release the child support lien as to specific personal or real property. The court may release the lien if the debtor shows that sufficient real or personal property remains subject to the lien to cover all support due or which may become due. § 42-371.

NEVADA

STATUTES:

I. Marriage - NEV. REV. STAT. §§ 122.010 to 122.270 (1993).

II. Divorce and Annulment - NEV. REV. STAT. §§ 125.010 to 125.550 (1993).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Under 18 with written parental consent acknowledged before notary. Minimum age 16. District court may authorize marriage of person under 16 if court finds marriage will serve best interests of such person and parental consent is given. §§ 122.020 and 122.025.

(2) Medical Examination - None required.

(3) License Fee - Thirteen dollars ($13), plus a three dollar ($3) recording fee, and additional nine dollars ($9) for State of Nevada and ten dollars ($10) for the state general fund for assistance to victims of domestic violence. § 122.060.

(4) Waiting Period - None.

(5) Solemnization - Any clergyman, chaplain assigned to duty in this state, justice, commissioner of civil marriage, Quaker ceremonies and Indian customs may solemnize marriage. §§ 122.150, 122.160, 122.062, 122.170, and 122.080.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Recognized if contracted prior to March 29, 1943. § 122.010.

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Not recognized.

PROHIBITED MARRIAGES: All marriages between parents and children, ancestors and descendants, brothers and sisters, uncles and nieces, aunts and nephews, first cousins, first cousins once removed; a man and his grandaunt, grandniece (same prohibitions for women in corresponding degrees of kindred), and bigamous marriages. § 122.020. Void marriages, §§ 125.290 to 125.380.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

Nevada

GROUNDS FOR ANNULMENT: Non-age, mental incapacity, consent obtained by fraud, lack of parental consent when such consent is required, want of understanding rendering party incapable of assenting to the marriage, or any other cause which is ground for voiding contract in court of equity. §§ 125.290 to 125.390.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - One of the parties must have been resident of state for not less than 6 weeks next preceding commencement of action. § 125.020-2.

(2) Military Provision - No statutory provision.

(3) Service of Process - Nonresident defendant may be served by publication upon showing that defendant resides outside state and a sufficient showing of due diligence that has failed to uncover his whereabouts. If address known, mailing of summons and complaint must accompany publication. N.R.C.P. 4. Publication must include brief statement of object of the action.

(4) Answer - Within 20 days of service of process. § 125.020. N.R.C.P. 4.

(5) Verification - Complaint must be verified. § 125.020.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Insanity existing for 2 years prior to action, living separate and apart for 1 year without cohabitation during that period. § 125.010.

(2) Defenses - No statutory provision.

(3) Period of Separation - No statutory provision.

SEPARATION:

(1) Acknowledged Legal Status - When spouse has been deserted for 90 days, or has any cause of action for divorce, that person may file action for separate maintenance instead of divorce. § 125.190.

(2) Effect of Separation Agreement on Divorce Decree - In event of divorce decree, the agreement shall become effective. Mutual consent of parties is sufficient consideration for agreement. § 123.080.

TIME REQUIRED BEFORE REMARRIAGE: No waiting period.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT:

(1) Usually, the divorce decree will provide for the particular items of support, education expenses, food, clothing, shelter, medical care and transportation as allowable elements of child support. Guidelines for child support are promulgated at § 125B.020.

(2) § 125.040 provides for allowances and suit money during pendency of action. § 125.150 states that the court may award attorney's fees if they are in issue under the pleadings.

(3) Under ch. 31A ("Recovery of Payments for Support of Child," enacted in 1985), costs and attorney fees may be awarded. § 31A.060. § 31.295 establishes limitations upon garnishment of wages.

(4) §§ 31A.025-31A.240 - Withholding of Income

31A.030 - Amount withheld calculation (in accordance with NRS 31.295) 1.(a) Amount of current support due plus (1) 10% of the amount to satisfy arrearage.

31A.040 - Notice to Parent Subject to Withholdings Required.

31A.050 - Request for hearing to contest withholding may be granted if parent responds within 15 days after notice of withholding.

31A.070 - Notice shall be given to employer 15 days after notice is mailed to parent being withheld from.

31A.090 - Notice to employer to withhold wages and commissions is binding upon employer.

31A.120 - Employer cannot use withholding of wages as a basis for discharging, disciplining, or refusing to hire an employee.

31A.240 - County clerks may collect and disburse withholdings pursuant to NRS 31A.025 to 31A.240.

31A.250 - 31A.340 - Assignment of Income.

31A.250 - Court may order assignment of wages or commissions to person entitled to payment.

31A.260 - 1) Upon application in writing, verified by person entitled to support, court may order responsible parent to make an assignment of his wages; 2) Within 10 days after order is entered, notice shall be sent by certified mail to responsible parent, advising him that the assignment will go into effect 15 days after day on which notice was sent; 3) Responsible parent may request a hearing before assignment goes into effect.

31A.290 - Employer may not use assignments of wages and commissions as a basis for discharge or disciplinary action.

31A.330 - Money may be withheld for support of a child pursuant to NRS 31A.250-31A.340 from any money due responsible parent as a pension, annuity, unemployment compensation, disability or retirement benefit. (Note: Military benefits not mentioned, but federal government may be exempt from assignment responsibility.)

PROPERTY DISTRIBUTION:

(1) Method - Community property plus equitable distribution. See § 125.150.

(2) Fees Awarded - Court may require either party to pay moneys necessary to assist the other party in maintaining the action. § 125.040.

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: §§ 130.010 to 130.370.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Best interests of child control. Joint custody will be granted if it is thought to be in the child's best interests. § 125.480.

(2) Judicial Approach - Parents viewed as equally qualified. Best interests of child control.

(3) Uniform Child Custody Jurisdiction Act: §§ 125A.010 to 125A.250.

GRANDPARENTS AND OTHER RELATIVES' VISITATION RIGHTS: District court may grant right to visit minor child of deceased or divorced parent to certain relatives of that parent if in the best interests of child. § 125A.330.

UNIFORM CHILD CUSTODY JURISDICTION ACT: §§ 125A.010 to 125A.250.

CRIMINALIZATION OF CHILD SNATCHING: Detention, concealment, removal of child from person having lawful custody in violation of court order may result in punishment by imprisonment in the State prison for not less than 1 year nor more than 6 years, or by a fine of not less than $1,000 nor more than $5,000, or by both fine and imprisonment. Upon conviction, the court shall order the defendant to provide restitution for any expenses incurred by the parent, guardian, or other person in locating or recovering the child. If recommended by the prosecuting attorney, the defendant may be sentenced by the judge as for a misdemeanor. § 200.359.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: NEV. REV. STAT. §§ 31.010 to 31.460 (1986 & Supp. 1991).

(1) Post-judgment execution pursuant to a court order has been the main remedy in Nevada to enforce the legal obligations for child support or alimony. Nevada also permits assignment of wages in the area of child support.

(2) Any person having a judgment remaining unsatisfied in any court of record in the state, upon which execution has been issued and delivered, and which remains uncollected and unsatisfied, may, without application to the court, have a writ of garnishment issued. § 31.450.

PROCEDURES:

(1) Nevada district courts have jurisdiction over writs of garnishment and wage withholding orders.

(2) Nevada law authorizes a judgment for arrearages in payment of alimony and support. When a party defaults in paying any sum of money as required by a judgment or order directing the payment thereof, the district court may make an order directing entry of judgment for the amount of such arrears, together with costs and reasonable attorney's fee. § 125.180. This judgment can be enforced by execution or any other manner provided by law.

(3) The mandatory wage withholding order may include the amount of current support due, and a payment of the arrears if previously ordered by a court of competent jurisdiction.

(4) The writ of garnishment shall be issued by the sheriff directed to the garnishee. The execution is prepared and issued by the clerk of the court. Service is made only to the garnishee. § 31.270.

(5) With respect to child support, upon receipt of the completed application, the enforcing authority (Welfare Division of Department of Human Resources) notifies the responsible parent by certified mail at his or her last known address. This notice shall include: 1) that the parent is delinquent; 2) the amount of the arrearage; and 3) that a motion to withhold wages and commissions will be mailed to his or her employer ten (10) days after the date of mailing of the notice, unless the arrearage is contested. § 31A.040.

(6) The required documents presented are the execution of judgment and the summons or writ from the sheriff. In most cases, a copy of the judgment in arrears is attached.

(7) The required document is simply the court order commanding the withholding.

(8) The enforcing authority, at the request of the responsible parent, shall notify the garnishee to discontinue withholding if the required payments have been withheld and paid for 18 consecutive months to the party for whom support is being collected. § 31A.170.

(9) Monies withheld may be delivered to the officer making service. There is no requirement to answer a garnishment since it is based on a post-judgment execution. The sheriff does not attach any interrogatories nor does he require any kind of information. The sheriff just directs the garnishee to deliver the monies to him.

(10) The withholding order is effective as of the date of service and should commence at the next payroll cycle. § 31A.080.

(11) Garnishee is discharged upon payment or delivery of the non-exempt property subject to the execution. No payover order is required. § 31.300.

(12) Payments are made each month to the county clerk's office. Payments should not exceed the federal exemption. In some cases payments will be made to the parent receiving the support payment or to the welfare division as directed by the court.

(13) The parent responsible for support shall receive notice of delinquency, and failing to respond or contest within 15 days, the employer shall be sent the withholding order. § 31A.040.

STATE EXEMPTIONS:

50% of disposable earnings for one week are exempt if the obligor is supporting a spouse or child, other than the spouse or child for whom support is ordered; or 40% of disposable earnings if he or she is not supporting another spouse or child. An additional 5% penalty will be assessed if obligor falls in excess of 12 weeks in arrears.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) Garnishee's duty to plaintiff is to deliver the proper amount to the sheriff. Garnishee has the duty to notify the debtor of the garnishment. Garnishee is discharged upon payment. § 31.300.

(2) Employer shall cooperate with the prosecuting attorney for the purpose of enforcing a child support obligation. A disclosure made in good faith does not give rise to any action for damages for the disclosure. § 31A.090.

(3) If the employer is making direct payments to a person and for a period of 3 months he or she is unable to deliver such payments due to failure by the person to notify the employer of a change of address, the employer does not have to make any further payments and will return all the undeliverable payments to the employee.

The following summary was reviewed in August 1995 by Major Timothy J. Wells, DET1 HHC 42 ID, P.O. Box 735, White River Jct., VT 05001, (802) 295-7518, FAX: (802) 295-2347.

NEW HAMPSHIRE

STATUTES:

I. Marriage - N.H. REV. STAT. ANN. §§ 457:1 to 457:44 (1992).

II. Annulment, Divorce, and Separation - N.H. REV. STAT. ANN. §§ 458:1 to 458:36 (1992).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. § 457:5. Minimum age to enter a valid marriage with proper judicial approval is for male (14), and female (13). Under 18 requires court approval. § 457:4.

(2) Medical Examination - None required; repealed in 1986. §§ 457:17, 457:23. However, both parties must be given brochures produced by the division of public health concerning fetal alcohol syndrome and AIDS.

(3) License Fee - Forty-five dollars ($45). § 457:29.

(4) Waiting Period - License may be issued after period of 3 days has expired from time notice of intention to marry filed. A justice for good cause shown may shorten the three day waiting period. However, the waiting period cannot be shorten if both parties are nonresidents. § 457:26. The license is good for 90 days.

(5) Solemnization - Any clergyman, rabbi, justice of the peace may perform marriage. Quakers may perform marriage according to religious custom. §§ 457:31, 457:37. The clergyman must reside in the state or be in pastoral charge of a parish which is wholly or in part in New Hampshire.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Persons who have cohabited 3 years and have acknowledged each other as husband and wife and are generally reputed to be husband and wife and until the decease of one them shall thereafter be deemed legally married. § 457:39.

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Not recognized.

New Hampshire

PROHIBITED MARRIAGES: All marriages between parents and children, ancestors and descendants, brothers and sisters, uncles and nieces, aunts and nephews, first cousins, step-relations between a male and his stepmother, stepdaughter, grandson's wife, mother-in-law or daughter-in-law (same prohibitions pertain to women in corresponding degree of kindred). Also, bigamous marriage. §§ 457:1, 457:2 and 458:1.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Non-age, within prohibited degree on kinship, bigamy, and any other ground deemed reasonable by court of equity. §§ 458:1 and 458:2.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - Jurisdiction over the parties to a divorce exists:

(a) where both parties are domiciled in the state when the action was commenced.

(b) where the plaintiff was so domiciled and defendant was personally served process within the state.

(c) where plaintiff was domiciled in the state for one year prior to the time the action was commenced. § 458:5.

(2) Military Provision - No statutory provision.

(3) Service of Process - Nonresident defendant must be personally served outside state if residence known. If residence unknown, court may order service by publication. § 458:9.

(4) Answer - Within 30 days of service of process.

(5) Verification - Verification required.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - No fault on basis of irreconcilable differences is by far the most common ground used. Also, adultery, impotence, extreme cruelty, conviction of crime punishable with imprisonment of more than 1 year and actual imprisonment under such statute, severe injury to health or endanger, abandonment or separation for 2 years, alcoholism for 2 years, or joining a religious sect which believes relations between the spouses are unlawful (coupled with 6 months refusal to cohabit). §§ 458:7 and 458:7-a.

(2) Defenses - No statutory provision.

(3) Period of Separation - none provided by statute. Return date on libel for divorce must run then will be scheduled very quickly for hearing on the merits if no answer or uncontested.

SEPARATION:

(1) Acknowledged Legal Status - Party may petition court for decree of legal separation which will have all the effects of a divorce except parties will not be free to marry any third person. § 458:26(I).

(2) Effect of Separation Agreement on Divorce Decree - Party can amend a decree of separation to one of divorce. The court may then consider whether justice requires that such a change be made, and, upon such consideration, the court may grant such a motion. § 458:26 (II).

(3) For a divorce or separation proceeding, participation of a marriage counselor is permitted and may be ordered.

TIME REQUIRED BEFORE REMARRIAGE: No waiting period.

RECOGNITION OF FOREIGN DIVORCES: A divorce obtained in another jurisdiction shall have no force or effect in this state if both parties were domiciled in the state at time of proceedings. §§ 459:1, 459:4 (Uniform Divorce Recognition Act).

ALIMONY AND CHILD SUPPORT:

(1) The court may order temporary alimony or child support during a pending divorce action. § 458:16.

(2) In all cases where there is a decision for divorce, the court shall make a further order in relation to the support, education, and custody of the children. All such support orders issued or modified after 1 January 1994 shall provide for the assignment of the wages of the responsible parent pursuant to RSA 458-B. In cases where the obligee is receiving public assistance for the benefit of the minor child such assignment shall take effect immediately. Assignment of wages can be suspended in cases where the obligee is not receiving public assistance provided a court finds:

(a) There is a consensual agreement;

(b) When the court finds there is good cause not to require immediate assignment of wages which must be based on:

1) A written explanation and determination as why immediate wage assignment would not be in the best interest of the child;

2) Proof of timely payment of any previously ordered support. RSA 458-B:2-I(b), § 458:17-1. The amount of arrearage withheld shall be no less than 20% of the current support withheld; however, a court could order a greater amount withheld. RSA 458-B-III, V. (1993 supp.)

(3) Upon a decree of nullity or divorce, the court may order alimony to be paid for such length of time as the parties may agree or the court orders. The court will consider the length of marriage, the age, health, station, occupation, amount of sources of income, vocational skills, employability, estate, liabilities, and need of the parties and the opportunity for future acquisition of capital assets and income. The court may also consider the contribution of each of the parties in the acquisition, preservation, and appreciation in value of their respective estates and the non-economic contribution of each of the parties to the family unit. The unanticipated consequences of changes in federal tax legislation or regulations may be grounds to modify any alimony agreement. The court shall specify in writing reasons for granting or denying any motion for alimony. (Note: alimony must be included in the original divorce decree in order to be later modified. If it is not included in the degree it cannot be obtained after the divorce. Sometimes one dollar of alimony per year is included so it can be modified at a later date.) §§ 458.19 and 458.31.

(4) § 458-C:1 - "Child Support Guidelines" uniform system to be used in the determination of child support. Guidelines based on the following principles:

(a) Custodial parent shall share economic responsibility for the children.

(b) Children in obligor's initial family are entitled to a standard of living equal to that of obligor's subsequent families.

(c) Percentage of net income paid for child support should vary according to number of children and not according to income level.

In all support cases, the parties shall certify to the court that: (1) no aid to families with dependent children (AFDC) is being provided for any of the children; or (2) the Division of Human Services Office of Child Support Enforcement Services has been given notice of the proceedings. RSA 458:17 XIII (Supp. 1993).

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution.

(2) Fees Awarded - Court may award attorney's fees and costs.

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT:
N.H. REV. STAT. ANN. §§ 546:1 to 546:41.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Best interests of child control. No preference given because of the parent's sex, but court may take into consideration any preference shown by said children. § 458:17.

(2) Judicial Approach - Parents viewed as equally qualified. Best interests of child control.

GRANDPARENTS VISITATION RIGHTS: Court may grant reasonable visitation rights when in best interests of child. § 458:17(VI).

UNIFORM CHILD CUSTODY JURISDICTION ACT:
N.H. REV. STAT. ANN. §§ 458-A:1 to 458-A:25.

CRIMINALIZATION OF CHILD SNATCHING: Interference with Custody, § 633:4: A person is guilty of a felony if he knowingly takes or entices a child away from state with intent to detain or conceal the child and has no right to custody. A person is guilty of a misdemeanor if the child is not taken out of state. Affirmative defense: person was acting in good faith to protect child from real and imminent physical danger. Not applicable if child is taken out of state.

TREATMENT OF MILITARY RETIRED PAY: A case decided before the Former Spouses' Act held that military retired pay was not marital property and was separate property of retiree. Baker v. Baker, 120 N.H. 645, 421 A.2d 998 (1980).

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: N.H. REV. STAT. ANN. §§ 458-B:1 to 458-C:5 (1994).

(1) There are no continuing garnishment orders for child support and alimony. § 512:21.

(2) Wage assignment continuing orders are proper for child support and alimony only. These orders terminate when satisfied and no exemptions are permitted.

New Hampshire

PROCEDURES:

(1) Jurisdiction is vested in the superior court. For service on resident principal-defendant, see ch. 510, §§ 2 and 2-A. For service on non-resident principal-defendant, see § 510:4.

(2) Nothing in the New Hampshire garnishment and wage withholding statutes precludes a judge from invoking the wage withholding provisions without accrual of arrearage, when it is deemed to be in the best interest of the child, payee, or payor to do so. A judicial order under these terms will satisfy all due process required of this chapter. § 458-B:9.

(3) Service must be made on trustee (employer) and principal-defendant (debtor). a) When arrearage on child support obligation accumulates to an amount equal to the support obligation for one month, wage assignment shall be applicable against obligor; b) If obligor does not contest wage assignment withholding, then judicial determination is not necessary otherwise, wage assignment may not be implemented until judicial determination is made; c) Amount withheld is amount of support due as well as additional amount applied to arrearage. Arrearage amount withheld shall be no less than 20% of the current support withheld, unless circumstances warrant. §§ 458-B:4 et seq.

(4) Notice to Obligor - Before notice of wage withholding is given to employer, obligor is given 15 days prior notice. § 458-B:5.

(5) Opportunity to Contest Withholding - Within 45 days from date of notice to obligor, division shall provide obligor with an opportunity to present his case. § 458-B:7.

(6) A writ of attachment, summons, and copy of return of service must be attached. § 512:3.

(7) Garnishee must answer and make all available defenses to the general issue(s) presented. No special pleading is required. Ch. 515, § 3. See Woodward v. Tupper, 58 N.H. 577 (1879); Wentworth Bus Lines, Inc. v. Windle, 98 N.H. 234, 97 A.2d 228 (1953).

(8) The defendant or trustee may discharge the liability of the trustee by paying into court the sum for which the trustee is charged. § 512:39.

(9) There is no statutory provision concerning pre-process interrogatories. Trustee and others can present defenses which, presumably, permits interrogatories.

(10) The amount withheld shall include both the amount of support stated in the order and an additional amount which shall be applied to the arrearage. The arrearage amount will be no less than 20%, but may be more. § 458-B:4.

STATE EXEMPTION:

(1) Pensions that have not come into the defendant's actual possession are completely exempt. § 512:21.

(2) Current wages are subject to garnishment. There are no exemptions for child support.

(3) There are no discretional or jurisdictional exemptions. The federal exemptions apply.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) Garnishee (trustee) can present defenses on behalf of defendant.

(2) The garnishee shall cooperate with the wage assignment order, or be subject to direct penalties.

New Hampshire

NEW JERSEY

STATUTES:

I. Marriage - N.J. STAT. ANN. §§ 37:1-1 to 37:1-27 (1968 & Supp. 1994).

II. Divorce - N.J. STAT. ANN. §§ 2A:34-1 to 2A:34-27 (1968 & Supp. 1994).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Under 18 requires parental consent in writing and witnessed by two persons. Under 16 requires both parental consent and judicial approval. However, in certain circumstances, if female pregnant, consent or judicial approval not needed. § 37:1-6.

(2) Medical Examination - Standard serological test for venereal disease. §§ 37:1-9 and 37:1-20. Must occur 30 days prior to issuance of license. No license for an applicant who is mentally incompetent or who is infected with a venereal disease. § 37:1-9.

(3) License Fee - Three dollars ($3) plus a twenty-five dollar ($25) fee for Department of Human Services Trust Fund. § 37:12.1.

(4) Waiting Period - License may be issued upon expiration of 72 hours after receipt of application "unless an emergency exists, or person arrested on certain criminal charges consents to marry the woman involved. § 37:1-4.

(5) Solemnization - Any clergyman, United States magistrate, judge (expressly includes federal district court and U.S. magistrate) and excludes judge of a county district court, mayor, chairman of township committee, village president or religious society in accordance with customs of such society may perform marriage. § 37:1-13.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Recognized if contract entered prior to December 1, 1939. § 37:1-10.

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Not recognized.

PROHIBITED MARRIAGES: All marriages between parents and children, ancestors and descendants, brothers and sisters, uncles and nieces, aunts and nephews. Bigamous marriages. §§ 2A:34-1 and 37:1-1.

New Jersey

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Bigamy, parties within prohibited degrees of kinship, impotence at time of solemnization, mental incompetence, alcoholism, drug addiction at time of solemnization in and party making application was ignorant of such act, consent obtained by force or fraud, non-age or any other ground allowable under equity jurisdiction of superior court. § 2A:34-1.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - No action for divorce shall be commenced for any cause other than adultery, unless one of parties is domiciled in state for 1 year next preceding commencement of action. § 2A:34-10.

(2) Military Provision - Court must appoint counsel to protect interests of servicemember-defendant. Soldiers' and Sailors' Civil Relief Act. §§ 38:23c-1 et seq.

(3) Service of Process - Nonresident defendant may be served by mail upon showing that defendant cannot be personally served within state. If address unknown, defendant may be served by publication.

(4) Answer - Within 35 days of service of process outside state.

(5) Verification - Complaint must be verified.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Adultery, desertion (for 1 year or more), cruelty, separation for 18 months or more without reasonable prospect of reconciliation (no fault), habitual drunkenness, drug addiction, institutionalization for mental illness for 24 months or more preceding filing of complaint, imprisonment of 18 months or more, deviant sexual conduct. § 2A:34-2.

(2) Defenses - Recrimination, condonation, and clean hands doctrine abolished as defenses to divorce. § 2A:34-7.

(3) Period of Separation - No statutory provision.

SEPARATION:

(1) Acknowledged Legal Status - Party may seek a divorce from bed and board instead of absolute divorce. § 2A:34-3.

(2) Effect of Separation Agreement on Divorce Decree - Does not prejudice either party from applying for a subsequent divorce. § 2A:34-3.

TIME REQUIRED BEFORE REMARRIAGE: No waiting period.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT:

(1) Pending suit for divorce or after judgment for divorce, the court has power to make orders touching alimony of parties and to revise from time to time as circumstances require. Court may award alimony to either party and in doing so shall consider need and ability to pay of parties and duration of marriage; on all grounds except separation, court may consider proofs made in establishing such grounds, and on ground of institutionalization for mental illness court may consider burden upon taxpayers as well as ability of plaintiff to pay. In determining the amount to be paid by parent for child support, various factors are to be considered: needs of the child, standard of living and economic circumstances of each parent, income and assets of parents, earning ability of parents, needs and capacity of child for education, age and health of child and parents, income, assets, and earning ability of child, responsibility of parent for court-ordered support of others, debts and liabilities of parent and child, and any other relevant factors. § 2A:34-23.

(2) Alimony is a personal right in nature of an annuity, the purpose of which is to require a spouse to pay periodically such sum as will, in view of the circumstances and necessities of the parties, reasonably fulfill the continuing duty of one spouse to the other. Mendell v. Mendell, 393 A.2d 600 (1978).

(3) Alimony is for the personal support of the wife and is not a property right or enrichment of the wife or a penalty against the husband. It is in futuro and not in ease and cannot be enjoyed by the wife in anticipation. Blaine v. Blaine, 96 N.J. Super. 460, 233 A.2d 212 (1967).

(4) Supporting spouse's obligation is mainly determined by quality of economic life during the marriage, not bare survival. Lepis v. Lepis, 416 A.2d 45 (1980).

(5) Superior court may make orders respecting care, custody, education, and maintenance of children of parties pending suit for divorce or after judgment for divorce, and may revise same from time to time as circumstances require. § 2A:34-23.

(6) Expenses of college education may properly be included in child support where child shows scholastic aptitude and parents are well able to afford it. Khalaf v. Khalaf, 58 N.J. 63, 275 A.2d 132 (1971).

(7) Support and maintenance executions have a priority over other types of executions. §§ 2A:17-12 and 2A:17-52.

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution, except acquired property by way of devise or interstate succession. § 2A:34-23.

(2) Fees Awarded - Court may award attorney's fees to allow spouse to prosecute or defend action.

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: §§ 2A:4-30.24 to 2A:4-30.64.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - No statutory provision. But see §§ 9:2-1 to 9:2-4. The court uses its own discretion to make judgments concerning care, custody, education, and maintenance. Encouragement of joint custody.

(2) Judicial Approach - Parents viewed as equally qualified.

GRANDPARENTS VISITATION RIGHTS: Court may grant reasonable visitation rights when in best interests of child. § 9:2-7.1.

UNIFORM CHILD CUSTODY JURISDICTION ACT: §§ 2A:34-28 to 2A:34-52, and 9:2-4.

CRIMINALIZATION OF CHILD SNATCHING: Interference with Custody, § 2C:13-4: It is unlawful to take or entice any child under 18 away from the parent's custody unless necessary to protect child from danger in which case notice must be given to police as soon as reasonably practical, or unless the child, being not less than 14 years of age, is taken away at his or her own volition. Interference is a crime of the third degree but there is a presumption of non-imprisonment for a first offense. However, if child is taken out of U.S., crime is second degree.

TREATMENT OF MILITARY RETIRED PAY: Divisible upon divorce as marital property. Kruger v. Kruger, 139 N.J. Super. 413, 354 A.2d 340 (1976), aff'd 73 N.J. 464, 375 A.2d 659 (1977) and Castiglioni v. Castiglioni, 471 A.2d 809 (1984).

ADOPTION: §§ 9:17-38 to 9:17-59 (Uniform Parentage Act).

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: N.J. STAT. ANN. §§ 2A:17-50 to 2A:17.56.9 (1987 & Supp. 1994).

(1) Executions against wages are all continuing until fully paid and satisfied or until further notice of the court. § 2A:17-51.

(2) All orders for support must include a provision for the mandatory withholding of income in the event of a support arrearage. § 2A:17-56.8.

PROCEDURES:

(1) A judgment is required, except acquired property by way of devise or intestate succession. § 2A:17-50.

(2) Notice to garnishee is required. § 2A:17-50.

(3) The required document is an order directing that execution issue against wages, debts, earnings, or salary. § 2A:17-50.

(4) No answer required, only compliance with and payment under the order issued by the court. § 2A:17-53.

(5) Payment made to an officer of the court and up to 5% may be deducted by the garnishee as compensation for expenses and services in payment of the execution, deductible from each payment made. § 2A:17-53.

(6) No pre-process interrogatories are required.

(7) Notice to judgment debtor is required unless court orders otherwise. § 2A:17-50. Execution issues from the court where judgment was recovered, and proper notice to debtor before the judgment is required. § 2A:17-50.

STATE EXEMPTIONS:

(1) Debtor must be making more than $48 per week before an execution can issue. § 2A:17-50. If the wages do not exceed $7,500 per year, the execution shall not exceed 10% thereof; where debtor receives more than $7,500, the court may order a larger percentage. This includes orders for the support of individuals. § 2A:17-56.

(2) No discretional or jurisdictional exemptions. No difference between retired or active duty pay. Passaic National Bank & Trust Co. v. Eelman, 183 A. 677 (N.J. 1936).

(3) See 2A:17-56.7 New Jersey Support Enforcement Act concerning income execution against judgment debtor.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) Garnishee does not have to defend the debtor.

(2) Improper notice or defective order can be raised by garnishee.

(3) An employer shall remit wages levied upon by a judgment or order of support within ten (10) days of the first wage cycle after receipt of notice. § 2A:17-56.6.

The following summary was reviewed in January 1995 by Major Stephen D. Aarons, USAR - IMA Fort Carson SJA; 204 North Guadalupe Street, P.O. Box 2729, Santa Fe, NM 87504-2729, Telephone Number: (505) 988-5444, FAX: (505) 988-4555.

NEW MEXICO

Unless otherwise indicated, citations are to chapters, articles and sections of New Mexico Statutes Annotated, 1978. *Cf.* Uniform Interstate Family Support Act, §§ 40-6A-101 to 40-6A-903 NMSA 1978 (1994 Repl.)(effective 1 July 95); *see also* New Mexico Supreme Court Rules Annotated 1986 (SCRA. 1986).

STATUTES:

1. Marriage - §§ 40-1-1 to 40-1-20.
2. Divorce - §§ 40-4-1 to 40-4-20.

MARRIAGE REQUIREMENTS:

1. Age - 18 without parental consent. Under 18 requires parental consent. Minimum age 16. With or without parental consent, the district court may approve marriage of person under 16 where female is pregnant or child has been born to the party. §§ 40-1-5 and 40-1-6.

2. Medical Examination - Standard tests as specified by health and environment department must be performed not more than 30 days prior to application for license. § 40-1-11.

3. License Fee - $25.00.

4. Waiting Period - None.

5. Solemnization - Any clergyman, civil magistrate, or religious society in accordance with customs of such society may perform marriage. §§ 40-1-2, -3.

ALTERNATIVE MARRIAGE FORMS:

1. Common Law Marriages - Not recognized unless contracted by domiciliaries in a state or country which recognizes its validity. § 40-1-4.

2. Marriages by Proxy - No statutory authorization. AG Opinion that such marriage valid upon execution of special power of attorney which specifies age, relationship or the engaged persons, consanguinity, present marital status, and a specific statement authorizing the named proxy to participate in the

application for a marriage license and in a marriage ceremony by proxy with the person named. Attorney General's Opinions 42-83 (new ceremony when possible recommended) and 57-13.

3. Marriages by Contract - No statutory authorization.

PROHIBITED (VOID) MARRIAGES: All marriages between relations and children, whether born legitimate or not, grandparents and grandchildren, brothers and sisters (full and half-blooded), uncles and nieces, aunts and nephews, whether born in bigamous marriages. First cousins may marry. § 40-1-7.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Prohibited marriages between relations. Action for annulment of marriage by infant under age of consent may be brought by the infant, his next friend, guardian, either parent, or the district attorney before the minor reaches legal age. § 40-1-9.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

1. Jurisdiction (Residency) - One party must have resided in state for 6 months immediately preceding filing of action and have a domicile in New Mexico. § 40-4-5.

2. Military Provision - Anyone who resided in New Mexico for six months before his or his spouse's entry into the armed forces is deemed a domicile of the state, so long as he has a present intention to return and reside in the state. A member of the armed forces continuously stationed in New Mexico for six months also satisfies the jurisdictional requirement of domicile. § 40-4-5(C and D).

3. Service of Process - Nonresident defendant may be personally served outside of state. Service by publication permitted upon showing that defendant is outside state. If address is known, mailing of notice must accompany publication. § 38-1-16(A)(5).

4. Answer - Within 30 days of service of process. Rule 1-004, SCRA 1986.

5. Verification - Petition for dissolution of marriage must be verified. § 40-4-6.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

1. Grounds - Incompatibility (no fault), cruel and inhuman treatment, adultery, or abandonment. §§ 40-4-1 and 40-4-2.

2. Defenses - No statutory provision.

3. Period of Separation - No statutory provision.

SEPARATION:

1. Acknowledged Legal Status - Whenever parties have permanently separated, either may institute proceedings for division of property, disposition of children, or alimony without obtaining absolute divorce. §§ 40-4-3 and 40-4-7.

2. Effect of Marital Separation Agreement on Divorce Decree - No statutory provision. While the court presumes such agreements to be valid, it has discretion to change any provision in the interest of justice. Scanlon v. Scanlon, 60 NM 43, 287 P.2d 238 (1955).

TIME REQUIRED BEFORE REMARRIAGE: Waiting period repealed.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT:

1. In proceedings for dissolution of marriage, separation or support, the property of either party may be vested in a conservator for the maintenance, education and support of the minor children. § 40-4-14.

2. The court may order the parent to provide the child support necessary for the proper care, maintenance, and education of the minor children. § 40-4-11. Child support guidelines established a rebuttable presumption of the proper level of child support owed. § 40-4-11-1. Those guidelines are based on each party's "gross income" including "benefits that reduce personal living expenses" § 40-4-11.1(C)(2) NMSA (1994 Supp.).

3. A person may enforce any decree for alimony or support by attachment, garnishment, execution, etc. § 40-4-19.

4. In proceedings for dissolution of marriage, separation or support between husband and wife, the separate property of one spouse can be used for alimony of the other spouse. §§ 40-4-7B(1) and 40-4-12.

5. The plaintiff in a garnishment proceeding may be awarded costs and reasonable attorney's fees (up to 10% of judgment against garnishee) against the defendant. § 35-12-16. Under the Support Enforcement Act, §§ 40-4A-1 to 40-4A-16, wage withholding is authorized.

6. Attorney's fees can be considered support if they are not payable to the attorney. Lloyd v. Lloyd, 60 N.M. 441, 292 P.2d 121 (1956).

7. Abandonment of a dependent, when the obligor has ability and means to provide support, is a 4th degree felony. Abandonment of a child consists of the parent or custodian of the child intentionally leaving or abandoning the child under circumstances whereby child may or does suffer neglect (child is w/o proper parental care and control of subsistence, education, medical, or other care required for his well-being). § 30-6.

PROPERTY DISTRIBUTION:

1. Method - The failure to divide the property on divorce shall not affect the property rights of either spouse, and either may subsequently institute and prosecute a suit for division and distribution, or any other matter pertaining thereto, which could have been litigated in the original divorce. Community property ceases upon divorce and becomes held as tenants in common if not otherwise divided. § 40-4-20; Jones v. Tate, 68 N.M. 258, 360 P.2d 920 (1961).

2. Fees Awarded - During pendency of proceeding, court may make award to enable either party to prepare for proceedings.

3. Uniformed Services Former Spouses' Protection Act - military retirement benefits are community property for purposes of distribution of property upon divorce. Walentowski v. Walentowski, 100 NM 484, 672 P.2d 657 (1983).

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: §§ 40-6-1 to 40-6-41.

DETERMINATION OF CHILD CUSTODY: The court has power to issue and modify orders relating to the custody of visitation of children, with custody governed by the best interests of the child. § 40-4-1. Factors for court's consideration are outlined in § 40-4-9.1

GRANDPARENTS VISITATION RIGHTS: Grandparents are entitled to visitation rights by order of the court at any time. Grandparent's Visitation Privileges Act, §§ 40-9-1 to 40-9-4.

UNIFORM CHILD CUSTODY JURISDICTION ACT: Adopted by New Mexico, except for §§ 23 and 24 and minor modifications. §§ 40-10-1 to 40-10-24.

CRIMINALIZATION OF CHILD SNATCHING: Felony in 4th degree if parent without legal right takes child with intent to hold child indefinitely. Felony charge may be dismissed if child is brought back within 14 days. § 30-4-4.

CHILD SUPPORT ENFORCEMENT: New Mexico's "Support Enforcement Act," authorizes immediate child support income withholding resulting from any judicial proceeding in which such support is ordered, modified or enforced pursuant to Title IV-D of the SOcial Security Act, 42 U.S.C. 651. §§ 40-4A-1 to 40-4A-16 (1994 Repl.).

1. Support Enforcement: Income Withholding - in any proceeding in which child support is ordered, income of obligor shall be subject to immediate income withholding regardless of the existence of arrearage or delinquency. Amount withheld shall not exceed 50% of the obligor's income. § 40-4A-4.1.

2. Procedure to avoid Income Withholding - obligor may prevent a notice to withhold income from being served by filing a petition to stay service with the clerk of the district court within 20 days after service of notice of delinquency. § 40-4A-7.

3. See § 40-4A-8 for duties of payor (employer). He shall withhold income no later that the next payment of income that is payable 14 days following service of the notice to withhold income.

4. Amount subject to withholdings - amount equal to monthly support obligation. In event of delinquency, additional twenty percent (20%) of the monthly support obligation shall be withheld until arrears paid. § 40-4A-6. The maximum amount subject to withholding under the Act shall not exceed fifty percent (50%).

UNIFORM INTERSTATE FAMILY SUPPORT: Effective 1 July 1995. §§ 40-6A-101 et seq. (1994 Repl).

GARNISHMENT AND WAGE ASSIGNMENTS: §§ 35-12-1 to 35-12-19.

1. The court shall render judgment against the garnishee for the unpaid balance of the plaintiff's judgment against defendant and shall order the garnishee to pay to the plaintiff each pay period the defendant's non-exempt wages or salary which come due subsequent to the time of answer until judgment is satisfied. § 35-12-4.

2. Garnishment may be issued in advance of judgment in a civil action in the magistrate court only upon the filing of a civil complaint accompanied by a bond to defendant in double the amount of the complaint, conditional that the plaintiff will pursue the action with all due haste and pay for all damages to defendant and garnishee should no judgment be rendered. § 35-12-1.

PROCEDURES:

1. Garnishments may be issued in the district court, magistrate court, or small claims court. § 35-12-19.

2. Service of a garnishment issued in advance of judgment does not attach any wages or salary due the defendant from the garnishee. § 35-12-3.

3. Writ of attachment may be served by anyone designated by the court who is not a party to the action and is over age 21.

4. No statutory reference concerning the attachments to a garnishment issued in aid of execution of a judgment against a defendant.

5. The writ of garnishment shall be served on the defendant as an ordinary summons. § 42-9-17.

6. If the defendant cannot be served personally with the writ of garnishment, he shall be served by publication. § 42-9-18.

7. Garnishee has 20 days from date of service to answer summons under oath as of the date the garnishment was served and as of the date of answer. § 35-12-2. NOTE: Federal law prevails (30 days).

8. The court shall order the garnishee to deliver defendant's personal property to the sheriff. § 35-12-4(c).

9. If plaintiff prevails he may be awarded attorneys' fees from defendant, and in some cases from the garnishee. § 35-12-16.

STATE EXEMPTIONS:

1. Wages subject to a garnishment for child support are entitled to a 50% exemption of disposable earnings. § 35-12-7(a).

2. Any assignment of wages or salary is void if it provides for an assignment of more than 25% of the assignor's disposable earnings for any pay period or if it provides for more than 40 times the Federal minimum hourly wage rate. § 35-12-7(a).

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

1. There is no statutory reference concerning the garnishee's right to raise defenses on behalf of the defendant.

2. Garnishee must answer the garnishment under oath within 20 days or the magistrate may render judgment by default against the garnishee for the full amount of the judgment, including interest and costs.

New Mexico

NEW YORK

STATUTES:

I. Marriage - N.Y. DOM. REL. LAW Art. 1-3 §§ 1 to 61 (McKinney 1988 & Supp. 1994).

II. Annulment of Marriage - N.Y. DOM. REL. LAW Art. 9 §§ 140-146 (McKinney 1988 & Supp. 1994).

III. Divorce - N.Y. DOM. REL. LAW Art. 9-12 §§ 170-221 and 252 (McKinney 1988 & Supp. 1994).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent (Art. 2 § 7). Minimum age is 14. Judicial approval and written parental consent required for under 16 (Art. 3 §§ 15(2), 15(3) and 15-a).

(2) Medical Examination - Serological test for venereal diseases not required as of 1 August 1985. Sickle cell anemia test for non-Caucasian, non-Indian, non-Oriental races, as of 1 September 1972. Positive finding or refusal to take test does not void marriage or disable parties from marrying. Test may be refused on religious grounds. Art. 3 § 13aa.

(3) License Fee - Fifteen dollars ($15) outside of New York City. Twenty-five dollars ($25) inside of New York City. (Art. 3 § 15(3), 15(4)).

(4) Waiting Period - Marriage shall not be solemnized within 24 hours after issuance of license, nor after 60 days after issuance of license. (Art. 3 § 13-b).

(5) Solemnization - Any mayor, federal or state judge, clergyman, magistrate, or religious society, in accordance with the customs of said society may solemnize a marriage (Art. 3 § 11).

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - No common law marriage in New York unless entered into before 28 April 1933 (See Kelly v. Metropolitan Life Ins. Co., 352 F. Supp. 270 (S.D.N.Y. 1972)). However, common law marriage recognized in another jurisdiction will also be recognized in New York. (See In re Watts' Estate, 31 N.Y.2d 491 (1973))

(2) Marriage by Proxy - No marriage by proxy in New York. However, may be recognized if valid in the place where contracted.

(3) Marriage by Contract - Expressly authorized (Art. 3 §§ 10 and 11. Requires 2 subscribers to marriage contract, both over 18, and 2 witnesses. Acknowledgement of signatures required.

PROHIBITED MARRIAGES: All marriages between parents and children, ancestors and descendants, brothers and sisters, of the whole or the half blood, uncles and nieces, aunts and nephews, and bigamous marriages are void. (Art. 2 § 5-6).

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Marriage may be annulled if it is void or voidable. Marriage is voidable:

a) spouse still living (§ 140(a))
b) party under the age of consent (§ 140(b))
c) party under mental incapacity at time of entry into marriage (§ 140(c))
d) party continues under physical incapacity which is incurable (§ 140(d))
e) consent to marriage obtained by force or duress (§ 140(e))
f) incurable mental illness of a party, lasting 5 years (§ 140(f))

PROCEDURAL REQUIREMENTS FOR DIVORCE, SEPARATION, ANNULMENT:

(1) Jurisdiction (Residency) - Satisfied if- a) Married in state, and one party is resident when action filed and has been so resident for one year, or b) Both parties resident in state, or c) Either party has been resident in state for 2 years continuously. (Art. 10 § 230). Residence is determined to be party's dwelling place. (Art. 10 § 231).

(2) Military Provision - No statutory provision.

(3) Action Commenced - Commenced by filing of summons with notice, as set out in Art. 13 § 232, with the court, and index fee paid (one hundred seventy dollars ($175)) pursuant to CPLR 306a (Art. 11-A § 211). Service must be made upon defendant within 120 days of filing and proof of service filed with court within 120 days of filing of summons with court. (Art. 13 § 232) (NOTE, effective as of 1 January 1993.) Plaintiff may seek court leave to make service by substituted or expedient means under CPLR 308 or 316.

(4) Answer - Must be filed within 30 days if not personally served; 20 days if personally served.

(5) Verification - Complaint must be verified but answer need not unless counterclaim pleaded. All other pleadings in a matrimonial action shall be verified. (D.R.L. § 211).

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - a) Cruelty, by defendant to plaintiff, b) abandonment for 1 or more years, c) confinement of defendant in prison for 3 or more consecutive years, d) adultery, e) separation for 1 year pursuant to separation agreement and upon satisfactory showing that terms of said agreement have been complied with. (D.R.L. § 170).

(2) Defenses - Divorce may be denied, even though adultery proved, upon showing of connivance by plaintiff, forgiveness, statute of limitations (5 years) or adultery on part of plaintiff. Defendant may also show justification for alleged abandonment as an affirmative defense. (D.R.L. § 171 and 210).

(3) Period of Separation - One (1) year separation required for divorce based on separation pursuant to decree of separation or separation agreement. This is known as a "conversion divorce". There is no " no fault " divorce in New York pursuant to D.R.L. § 200. (D.R.L. §§ 170(5) and 200). Note, parties may not co-habit at any time during separation period.

SEPARATION:

(1) Acknowledged Legal Status - Either party may procure judgment separating parties from bed and board forever, or for a limited time. (D.R.L. § 200).

(2) Effect of Separation Agreement on Divorce Decree - Required for divorce based on separation. (D.R.L. § 170(6)).

TIME REQUIRED BEFORE REMARRIAGE: No waiting period. In some circumstances, parties to divorce must certify that they have taken all necessary steps to remove barriers to remarriage by opposite party where religious barrier, conscientious restraint or inhibition to remarriage remains. (D.R.L § 253).

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT:

NOTE: § 236 of D.R.L. part A which concerns alimony is applicable only to those actions commenced prior to 19 July 1980. § 236 of D.R.L. part B applies to all other (i.e., "new") actions. Part B sets out maintenance and distributive award as follows:

(1) "Maintenance" is defined as periodic payments provided for by agreement of the parties or order of the court, for definite or indefinite duration subject to termination at death or remarriage or modification pursuant to D.R.L. § 236(9), or § 248.

Award is to meet the reasonable needs of the parties. (This is in contradiction to the term "distributive award" which means payments made to effectuate a distribution of property.) Factors to be considered in determining amount and duration of maintenance are listed at D.R.L. § 236(6)(a) thus:

(a) income and property of respective parties,
(b) duration of marriage and age and health of parties,
(c) present and future earning capacity of both parties,
(d) training necessary for party needing support to become self-supporting,
(e) presence of children of the marriage in the respective homes of the parties,
(f) tax consequences
(g) standard of living established by the parties during the marriage
(h) contributions of one party to the career of the other party, and
(i) wasteful dissipation of family assets by either spouse.

In a matrimonial action, court shall order either or both parents to pay temporary support or child support without a showing of immediate need. (D.R.L. § 236(7)(a). The court shall consider all relevant factors including:

-financial resources of all parties, including child.
-physical and emotional health of child.
-educational or vocational needs.
-accustomed standard of living of child.
-tax consequence to all parties.
-non-monetary contribution to care and well being of child.

In addition to treating maintenance and child support obligations D.R.L. § 236 also authorizes division of property by:

- distributive award - division of property by valid agreement.

i/ property is defined as marital property. That is that which was obtained during the marriage and before separation or commencement of any action and does not include separate property which is described as

ii/ property acquired before the marriage or by gift, bequest or devise from other than the spouse; compensation for personal injuries; property designated separate property by a writing or property received in exchange for separate property.

§ 236 also requires compulsory financial disclosure between parties and valuation of assets.

Disposition of property may be made by agreement or order of equitable distribution whereunder the court looks at the following:

-income and property of each party
-duration of marriage and age and health of parties
-need of custodial parent for residence and effects
-loss of inheritance and pension rights
-maintenance award
-equitable claims to title
-liquidity
-probable future financial condition of parties
-difficulty in valuation of assets
-tax consequences
-wasteful dissipation of assets
-unfair transfer of property
-any just and proper consideration

The court may make such modifications to any orders or judgments upon application of any party and substantial showing of a change in circumstances.

(2) Court may order one party to pay fees and expenses of party maintaining the action directly to the other party's attorneys, or as justice may require. (D.R.L. § 237).

Some examples of court findings regarding distributions and payments are as follows:

(a) Court properly denied wife's request for a replacement of her automobile. Apparently such would not constitute alimony. Simon v. Simon, 65 A.D.2d 620, 409 N.Y.S.2d 536 (1978).

(b) Husband's obligation to support the wife and child includes the costs for the wife's hospitalization due to pregnancy Finger v. Finger, 38 A.D.2d 956, 331 N.Y.S.2d 465 (1972).

CHILD SUPPORT:

Child support is treated in depth at D.R.L. § 240 along with custody and visitation rights. The court makes any determinations with respect thereto based upon the circumstances of the respective parties and the best interests of the child. There is no prima facie right to custody in either parent. Support provisions shall be made out of the property of either or both parents. Visitation orders may provide for the rights of grandparents to visitation. Support orders shall direct payment of support obligation to

custodial parent or third persons for goods and services education and maintenance of the child. Support can continue until age 21. D.R.L. § 236f, Part B. The court will consider express categories of factors and non-expressed considerations when fashioning child support including the "basic child support obligation", which is derived virtually by formula contained in the statute itself. Obliged parents will pay a "child support percentage" for care maintenance and education of non-emancipated children under 21 years of age based upon percentages of gross income as reported on federal tax returns and including worker's compensation, disability benefits, unemployment insurance, social security, veteran's benefits, pensions, fellowships, stipends, annuity payments. The court's order may also reach to other resources such as non-income producing assets; meals and perquisites; fringe benefits; money, goods, and services from friends and relatives; former income if it appears that party has purposefully diminished his or her capacity and resources to avoid child support; depreciation benefits; public assistance; life insurance policies; gifts and inheritance; lottery winnings; recovery of bad debts, etc. However, the court will not burden a party to the extent of enforced impoverishment (as defined by U.S. Department of Health and Human Services). In all cases the statute must be consulted for specific guidance. Nothing in § 240 disables parties from entering into valid agreements concerning child support obligations: however, the agreement may not deviate from the basic child support obligation so as to fall below its requirements. Court orders may incorporate such valid agreements. The court retains wide discretion to determine the child's best interest.

ORDER OF PROTECTION

D.R.L. § 240(3) provides for court orders of protection which may require any party to:

- stay away from home or child or any party
- permit visitation to child for stated periods
- abstain from offensive conduct against child or party
- pay reasonable attorney's fees for obtaining order
- give proper attention to care of home
- refrain from activity tending to make home an improper place for a child.

Presentation of such an order to any peace officer shall constitute authority for the officer to arrest violator of the order.

An assignment of wages or order for New York income deduction for support takes priority over any other assignment or garnishment of wages.

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: Not adopted. (Adopted the Uniform Support of Dependents Law, §§ 30 to 43, which is similar to URESA and permits reciprocity between jurisdictions.

UNIFORM CHILD CUSTODY JURISDICTION ACT: D.R.L. §§ 75-A to 75-Z.

CRIMINALIZATION OF CHILD SNATCHING: A person who knowingly takes child from person with lawful custody is guilty of a Class A misdemeanor in New York. Custodial interference is the second degree. Penal Code § 135.45. If the child is exposed to risk of injury while taken from lawful custodian, or child is removed from the state, the person is chargeable with a Class E felony, custodial interference in the first degree. Penal Code § 135.50. Affirmative defenses: child abandoned or existence of emergency need to prevent mistreatment of abuse.

ADOPTION: See §§ 109 to 117.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: N.Y. Civ. Proc. Law and Rules (CPLR) §§ 5201 to 5242 (McKinney 1978 & Supp. 1994).
N.Y. Dom. Rel. Law §§ 236 to 240 (McKinney 1986 & Supp. 1994).
N.Y. Pers. Prop. Law § 48.

(1) When an obligor is in default, an execution for support enforcement may be issued by the support collection unit or by the sheriff, the clerk of the court, or the attorney representing the obligee. CPLR § 5241(b).

(2) Wage assignment orders may cover arrears as well as current orders of support. Doe v. Doe, 37 Misc. 2d 788, 234 N.Y.S.2d 688 (1962); Villano v. Villano, 98 Misc. 2d 774, 414 N.Y.S.2d 625 (1979). It appears that these cases remain good law, but both are based on PPL § 49-b. In light of its repeal, this may no longer be good law, but New York appellate courts must address this point.

(3) Upon application of a creditor, the court may enter an income deduction order for support enforcement. Proof of default establishes a prima facie case against the debtor.

PROCEDURES:

(1) Jurisdiction is based on the fact that the government has wages of the debtor. CPLR § 5201(a). It does not matter whether debt was incurred within or without the state, to or from a resident or non-resident.

(2) A judgment is required for support enforcement. CPLR § 5242(b).

(3) Notice to employer is required. CPLR § 5241(c).

(4) Notice must be given to debtor by creditor, of execution for support enforcement. CPLR § 5241(d).

(5) Answer of garnishee is not required. CPLR § 5241(c)(4).

(6) Upon receipt of the order, the employer must deduct the amount as ordered and forward it monthly as directed in the order. CPLR § 5241(g).

(7) Pre-process interrogatories are not required.

(8) Debtor must be provided with notice at least 15 days prior to service of order on the employer and given an opportunity to pay arrears before the order is served on the employer. CPLR § 5241(c)(4).

(9) The court may issue an income deduction order at the time an order for support is made, or at any time thereafter, upon a showing of good cause. Proof of default establishes a prima facie case against the debtor, which can be overcome only by proof of the debtor's inability to make the payments. CPLR § 5242.

(10) There is no distinction between current earnings and retired pay. M.H. v. J.H., 93 Misc. 2d 1016, 403 N.Y.S.2d 411 (1978); Villano v. Villano, 98 Misc. 2d 774, 414 N.Y.S.2d 625 (1979).

STATE EXEMPTIONS:

(1) On orders unrelated to support obligations, 90 percent of income is exempt from execution, and if the obligor's weekly income does not exceed 30 times the current federal minimum wage, the entire amount is exempt. CPLR § 5231.(F).

(2) The exemptions of CPLR § 5231.4 do not apply to the support of persons. For child support or alimony arrearages, the amount of deduction to be withheld shall not exceed 50 percent of disposable earnings. However, if the obligor is not supporting an additional spouse and/or children, the amount of the deduction to be withheld is 40 percent. § 5241(g)(1-2). The 5 percent delinquency standard of 15 U.S.C. 1673 also applies.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) Garnishee does not have to defend the debtor.

(2) Garnishee must execute the income deduction within 14 days of the first pay period after receipt of the order. CPLR § 5241(g).

(3) Failure of garnishee to deduct the appropriate amount may result in the creditor commencing a proceeding against the garnishee for accrual deduction, together with interest and reasonable attorney's fees.

New York

The following summary was reviewed in January 1995 by LTC (P) Mark E. Sullivan, (IMA) OTJAG, HQDA, Washington, D.C.; 1306 Hillsborough Street, Raleigh, North Carolina 27605, Telephone Number: (919) 832-8501, FAX: (919) 833-2852.

NORTH CAROLINA

STATUTES:

I. Marriage - N.C. GEN. STAT. §§ 51-1 to 51-21.

II. Divorce, Custody, Alimony, and Child Support - N.C. GEN. STAT. §§ 50-2 to 50-21. See also §§ 50-30 to 50-39.

ANTENUPTIAL AGREEMENTS: Uniform Premarital Agreement Act §§ 52B-1 to 52B-11.

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Between ages 16 and 18, parental consent is required. Special license can be obtained if applicant is a female between ages 12 and 18 is pregnant, or has had a child, and has parental consent to marry. § 51-2.

(2) Medical Examination - None.

(3) License Fee - Forty dollars ($40). § 161-10(a)(2).

(4) Waiting Period - None.

(5) Solemnization - Clergymen, magistrates, or religious societies of Quakers or Baha'i may perform marriage. § 51-1.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Not recognized.

(2) Marriage by Proxy - Invalid. Consent must be given by male and female and in the presence of each other. § 51-1.

(3) Marriage by Contract - Invalid; same reason as above.

PROHIBITED MARRIAGES: All marriages between parents and children, ancestors and descendants, brothers and sisters, uncles and nieces, aunts and nephews, first cousins, and double first cousins. Also, bigamous marriages or marriages to persons physically impotent or mentally insufficient. §§ 51-3, 51-4.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

North Carolina

GROUNDS FOR ANNULMENT: Bigamy, marriage within prohibited degrees of kinship, insanity, mental incompetence, non-age, mistaken belief that female is pregnant, impotence, fraud, duress, and mock marriage (without subsequent cohabitation). § 50-4.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - One party must have been residing in state for 6 months preceding filing of § 50-6.

(2) Military Provision - A member of armed forces who has been stationed in state for 6 months next preceding filing of complaint satisfies jurisdictional requirement. § 50-18. Court may order plaintiff to pay travel expenses of defendant from home to court site to defend in action.

(3) Service of Process - Nonresident defendant may be served personally or by mail outside state. If address is unknown, service by publication is permitted. § 50-8. See also N.C. Rules of Civ. Proc. Rule 4.

(4) Answer - Within 30 days if personally served, additional 3 days if by mail, and within 40 days of publication. If no answer is filed by defendant, then plaintiff must still calendar divorce hearing (oral testimony of a party or summary judgment motion) since, unless admitted by defendant, all allegations are deemed denied. Schlagel, 117 S.E.2d 790 (N.C. 1961). Date of separation is immaterial so long as at least one year's separation exists with intent to be permanently separated. Myers, 302 S.E.2d 476 (N.C. App. 1983).

(5) Verification - Complaint must be verified. § 50-8.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Incurable insanity with 3 years' institutionalization (§ 50-5.1), and no-fault divorce based on more than one year's separation (§ 50-6) are only grounds. Living in same house is not "separate and apart" within meaning of § 50-6. Richardson v. Richardson, 127 S.E.2d 525 (N.C. 1962). Cessation of sexual relations doesn't constitute separation: Dudley v. Dudley, 33 S.E.2d 489 (N.C. 1945).

(2) Defenses - Recrimination is not a defense to divorce based on separation. § 50-6. Since divorce is basically no-fault, based on separation for more than one year with intent of at least one party to be separated permanently, defense must negate one of these elements -- separation or intent -- or must attack residency requirement.

(3) Period of Separation - Divorce based on ground of separation requires separation of at least one year. § 50-6.

(4) Waiting Period - If divorce is based on insanity, this ground must have existed for at least 3 years prior to filing. Otherwise, there is no waiting period before filing, other than requisite residency (6 months) and period of separation (more than a year).

SEPARATION: There is no "legal separation" in North Carolina. North Carolina law does not require any document to be executed upon separation or for purposes of divorce. Parties frequently solemnize their separation with a separation agreement, however.

TIME REQUIRED BEFORE REMARRIAGE: No waiting period.

RECOGNITION OF FOREIGN DIVORCES: Absent a valid residency requirement and jurisdictional basis, foreign divorces are deemed to be invalid. Mayer v. Mayer, 66 N.C. App. 522, 311 S.E.2d 659 (1984).

ALIMONY AND CHILD SUPPORT:

(1) Child support is defined as payment for the support of a child. §§ 50-11.2 and 50-13.4. It must meet reasonable needs of the child and it terminates when the child is 18 unless he is still attending primary or secondary school, in which case payments will continue until child reaches age 20 or stops attending school, whichever comes first, although the court has the discretion to stop child support before school attendance ceases. §§ 50-13.8. Uniform statewide presumptive guidelines for the computation of child support obligations ("Income Shares Approach") have been adopted, as well as criteria for determining when the application of guidelines would be unjust or inappropriate. § 50-13.4(c1).

All court orders for child support [which presumably includes separation agreements covering child support which are to be incorporated into divorce decrees] must contain finding as to conformity with child support guidelines or, if variance, the reasons therefor.

(2) Alimony is defined as payment for the support and maintenance of a spouse. § 50-16.1.

(3) Attorney's fees and costs may be awarded in court's discretion in actions for child support and alimony. §§ 50-13.6, 50-16.3, and 50-16.4.2

(4) Grounds for alimony include adultery, abandonment, cruel and barbarous treatment, personal indignities, as well as others. § 50-16.2. The claimant must be a dependent spouse and other party must be supporting spouse. Id. Waiver in separation agreement, or adultery by the claimant, is absolute bar to alimony, but other misconduct by the claimant is only a qualified defense, allowing court in its discretion to reduce or deny alimony. § 50-16.6(a) and (b).

(5) Court may award temporary alimony to dependent spouse pending divorce or final trial. § 50-16.3.

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution. §§ 50-20 and 50-21. At any time after husband and wife begin to live separate and apart from each other a claim for equitable distribution may be filed.

(2) Attorney's Fees - No statutory provision for attorney fees except for wrongful removal of separate or marital property [§ 50-20(i)] or for enforcement proceedings, contempt. Conrad v. Conrad, 82 N.C. App. 758 (1986). Contingent fee agreements are enforceable. In re Cooper, 81 N.C. App. 27, 344 S.W.2d 27 (1986). Court can grant "interim allocation" as an advance on a party's share of marital property, and this fund may be used to pay for attorney, CPA, appraiser, etc. § 50-20 (i1).

(3) Vested pension rights are divisible, but the expectation of nonvested pension rights is separate, non-divisible property. Pension payments do not terminate on death of pensioner unless plan so provides and no joint/survivor annuity chosen. Vesting occurs at 18 years of creditable service for officers and warrant officers. Milam v. Milam, 373 S.E.2d 459 (N.C. App. 1988). Vesting for enlisted personnel is 20 years of service. George v. George, 444 S.E.2d 449 (N.C. App. 1994).

(4) An equal division of marital property is presumed to be fair and equitable. § 50-20(c). Marital fault is not relevant to equal/unequal determination. Hinton v. Hinton, 321 S.E.2d 161 (N.C. App. 1984)

(5) Marital property is valued as of date of separation. § 50-21(b).

(6) Property acquired by gift/inheritance or before marriage, as well as business/professional licenses and nonvested retirement rights, are considered separate property. § 50-20(b)(2).

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: N.C. GEN. STAT. §§ 52A-1 to 52A-32.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Best interest of child control. No presumption for either parent. Joint custody (which is undefined in statutory and case law) may be awarded upon application of either parent. § 50-13.2.

(2) Attorney's fees are awardable. § 50-13.6.

GRANDPARENTS VISITATION RIGHTS: Grandparents are entitled to visitation rights in court's discretion. §§ 50-13.2(b1), and 50-13.5(j).

UNIFORM CHILD CUSTODY JURISDICTION ACT: §§ 50A-1 to 50A-25.

DOMESTIC VIOLENCE ACT: §§ 50B-1 to 50B-8.

CRIMINALIZATION OF CHILD SNATCHING: Transporting child outside state with intent of violating court order is a felony punishable by up to 3 years in prison or fine. § 14-320.1. Separating a child under 6 months old from custodial parent is a misdemeanor punishable by imprisonment for up to one year or a fine of $500 or less, or both. § 14-320.

GARNISHMENT AND WAGE ASSIGNMENT:

STATUTE: N.C. GEN. STAT. § 110-136 (1991).

(1) The traditional remedy in North Carolina is a garnishment summons. The moving party serves the employer with a motion to join the employer as a third-party defendant-garnishee. § 110-136(b). Service of the motion compels the garnishee to answer, but the employer is not required to withhold until the order is served.

(2) The statute also provides for wage assignment which may be used specifically to collect current support. The remedy is secured upon motion of the ex-spouse, parent, custodian, guardian or "any designated representative interested in the support of a dependent child." The remedy may be used only to order the obligor to assign and is enforced pursuant to § 1A-1, Rule 70. § 110-136(b)(1).

PROCEDURES:

(1) Unpaid installments of child support and alimony are vested and become judgments by operation of law. Thus, the obligee need not reduce amounts due and owing to judgment. § 110-136. The

obligee then proceeds by motion to join employer and moves for garnishment. The order is served on the garnishee.

(2) The district court has jurisdiction over the subject matter. In the enforcement action (not to be confused with the underlying judgment), the court is not required to exercise in personam jurisdiction over the obligor.

(3) The remedy is ancillary and it is thus only as valid as the underlying judgment, order or incorporated agreement. § 110-136.

(4) Service of process must be accomplished in accordance with federal law and regulations.

(5) The garnishee must file an answer within 30 days after service of the motion. State law is 10 days, but it is preempted by federal law. § 110-136(b).

(6) The garnishee must pay in accordance with the order.

(7) There is no constitutional requirement that obligor be given post-judgment notice of an enforcement effort. However, state law requires the obligor be served with the motion to join garnishee and the motion for garnishment. Failure of notice is not jurisdictional and renders the process served on the garnishee defective but not void.

STATE EXEMPTIONS:

(1) The state has a jurisdictional exemption which saves to the obligor 60% of disposable earnings. § 110-136. Therefore, the federal exemption is inapplicable.

(2) The garnishee need not raise discretionary exemptions and therefore none are stated.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

The garnishee must raise defenses and objections which are jurisdictional. As to defenses which are not jurisdictional, the garnishee may, but is not required to, raise and litigate them. There is no specific standing for the garnishee to request an accounting.

ADDITIONAL INFORMATION

A. Marriage

In North Carolina males and females under the age of sixteen may not marry except under special circumstances. Persons of either sex under the age of eighteen who are not emancipated minors may marry only after written consent has been obtained from one parent with whom the person under 18 resides (consent not being necessary from both parents) or from the guardian or institution having legal custody. Special licenses are allowed when an unmarried female between the ages of 12 and 18 is pregnant or has given birth, if she and the putative father agree to marry and if written consent is given by one parent with whom female resides (consent not being necessary from both parents) or the guardian or institution having legal custody, or by the director of social services of the county in which either party resides.

No minister or officer may perform a ceremony of marriage unless a marriage license has been issued by the register of deeds of the county in which the marriage is to take place. The register of deeds may require the party applying to present a certified copy of a birth certificate or a birth registration card. If the register of deeds finds that no legal impediments exist, he will issue a marriage license to the parties. This license then must be presented within 60 days to an ordained minister or a magistrate who will fill out the marriage certificate to show that he has performed the ceremony. There must be at least two witnesses to the marriage ceremony. The minister or other official who performs the ceremony will then return the marriage certificate to the register of deeds, who files it as a permanent record of the marriage.

North Carolina does not recognize common law marriages. If the parties enter into a common law marriage in a state that does recognize them, however, North Carolina will also recognize the marriage as valid.

North Carolina has adopted the Uniform Premarital Agreement Act (NCGS Chapter 52B). Such an agreement can be used to define, limit or waive property rights (including alimony) in the event of death or divorce.

B. Divorce and Annulment

Since October 1, 1983, the only two grounds for absolute divorce are (1) separation for more than 3 years without cohabitation by reason of incurable insanity of one spouse; and (2) continuous separation for at least one year with the intent that it be permanent. The second ground is almost always the one used. Isolated sexual relations will not toll the one-year separation period for absolute divorce.

North Carolina

Grounds for a judicial decree of divorce from bed and board, suspending the rights and duties of marriage, are: Abandonment, adultery, cruel and barbarous treatment endangering life, indignities to the person rendering life burdensome and intolerable, excessive use of alcohol or drugs, and maliciously turning the other out-of-doors. Since a judgment of DBB suspends the duty of spousal support, this procedure may be advisable to prevent "commander complaints" about spousal nonsupport.

In either type of divorce the plaintiff or defendant must have been a bona fide resident of North Carolina, or a resident pursuant to military duty, for six months before bringing the action. The suit must be started in the county where either the plaintiff or the defendant resides. Attorney fees are generally not awarded in divorce cases.

Separation agreements signed by both parties are valid and recognized in this state and may be enforced in the district courts of North Carolina. These agreements are often used to effect a property distribution between the parties and set forth other rights and responsibilities while separated. The signatures must be acknowledged by a notary. When a signing party is overseas, the acknowledgment required by statute is as follows:

_____

SIGNATURE

On this the _____ day of _____, 199___, before me _____, known to me (or satisfactorily proven) to be accompanying or serving in or with the armed forces of the United States (or to be the spouse of a person accompanying or serving in or with the armed forces of the United States) and to be the person whose name is subscribed to the within instruments and acknowledged that _____ he _____ executed the same for the purposes therein contained. And the undersigned does further certify that he is at the date of this certificate a commissioned officer of the rank stated below and is in the active service of the armed forces of the United States.

_____

Signature of Officer

_____

Rank of Officer and command to which attached.

In North Carolina, certain marriages are prohibited and therefore voidable. Those include marriages of persons nearer in kin than first cousins, marriage of a person under 16, and marriage of a person who is incapable of contracting a marriage because of lack of understanding or coercion. A marriage is void if to a person who has a living spouse. Annulment is a lawsuit in which a prohibited marriage is declared void. The lawsuit will not succeed (1) where there is cohabitation as man and wife after the period of nonage; (2) where the female is pregnant or a child has been born and is still living; or (3) where after cohabitation and birth of issue either party has since died.

At the time of divorce, the parties' separation agreement (if there is one) may be incorporated into the decree if either has requested this in the pleadings. The incorporation is option, not mandated by state law. Incorporation makes the terms of the agreement an order of the court, enforceable by contempt or other means. It also makes modifiable the executory (or uncompleted) provisions in the agreement, unless those terms are part of an integrated (and thus nonmodifiable) settlement. Since this is a complex area, be sure to get competent advice before deciding on terms for incorporation in a separation agreement.

C. Marital Debts

North Carolina follows the common law rule set out in case law which holds that a party is liable for debts contracted by his or her spouse for "necessaries." This would include "making good" checks that the wife wrote for necessities because her husband neglected or refused to provide her with support, and it would not matter whether the merchant knew or did not know of the marital circumstances of the couple.

Litigation involving reimbursement or liability for "necessaries" is rare. Most marital debt issues are handled at the time property division is resolved, whether through an equitable distribution trial or by means of a separation agreement or property settlement agreement. Marital debts, like property, are divisible by the courts.

D. Separate Maintenance

A dependent spouse may obtain court-ordered support (called alimony) in connection with a separation. In addition a separation agreement may be negotiated between the parties, providing for one party to pay a stated amount to the other for support; such an agreement will survive the final divorce decree as an enforceable contract.

North Carolina

E. Alimony, Child Support and Garnishment

1. Alimony Overview

Alimony is a four-step process. The steps are:

a. Fault. The applicant for alimony must prove that the other party has committed at least one of the fault grounds for alimony. Examples are abandonment, adultery, personal indignities (another name for "mental cruelty") and alcohol/drug abuse.

b. Dependency. The applicant must be the dependent spouse. This means that she (or he) must be actually substantially dependent on the other for support or that the applicant is actually in need of support from the other spouse in order to support herself at her accustomed standard of living.

c. Supporting Spouse. The party sued must be the supporting spouse; he must be actually capable of providing support for the applicant, giving due consideration to his net income, debts and reasonable needs and expenses.

d. How much? The amount of alimony is in the discretion of the trial judge. There are no alimony guidelines. It will usually be:

1) The net [negative] difference between the applicant's reasonable living expenses and her net income (i.e., her monthly "deficit"), which hopefully equals...

2) The net [positive] difference between the defendant's net income and his own reasonable living expenses (i.e., his monthly "surplus," if any).

2. Types of Alimony

Alimony can be granted at the outset of a lawsuit at an abbreviated hearing before a judge alone. This is called **temporary alimony** or **alimony pendente lite**. In such a hearing, the applicant need only show that there is a reasonable likelihood ("probable cause") that she will prevail on the merits at the time of a full hearing. The full hearing is usually held after an absolute divorce has been granted and after the parties' property has been divided (either by separation agreement or in an equitable distribution trial). The full de novo hearing may be before a jury of twelve (on

the issue of fault alone) if requested by either party. The issues of dependent/supporting spouse and amount of alimony are always non-jury issues.

3. Other Alimony Issues.

a. Alimony is usually awarded for an indefinite period, to terminate upon the death of either party or the remarriage of the applicant. Alimony for a limited term (or lump-sum alimony) is allowable but seldom awarded.

b. Adultery by the applicant is a full affirmative defense that bars the awarding of alimony; other spousal misconduct on her part is only a partial or qualified defense--it may be used by the judge to reduce or deny alimony.

c. Alimony is never "permanent." It may be changed, or even terminated, if there is a substantial change of circumstances.

d. Attorney fees may be awarded to an applicant if she is found to be entitled to temporary alimony. The amount is in the discretion of the judge and will not necessarily reflect the actual fees paid to her attorney.

e. An award of alimony may include exclusive possession of personal or real property (i.e., the marital residence) or title to personal property (i.e., the family car).

f. Alimony orders may be enforced by contempt, garnishment and seizure of property in North Carolina.

4. Custody

a. Overview. A district court judge has the authority to grant custody of a minor child (one under 18) to either parent, as well as the power to order visitation rights and child support. There are no presumptions favoring either parent for custody or favoring joint custody over sole legal custody. Indeed, joint custody isn't even defined in the statutes. Custody is ordinarily given to the parent who can best provide for the child, with the decision often weighted in favor of whichever parent was the primary caretaker before the separation.

b. Custody cases. A child may testify in a custody trial and, if the child is of "suitable age, discretion and maturity," the court will give serious consideration to the testimony; no trial judge, however, is bound by the preferences of a minor child in custody trial testimony. Visitation rights can be suspended or curtailed only with specific findings of fact to justify such restrictions. A custody order is never permanent, and it may be modified by a subsequent change of circumstances that is substantial in nature and that involves an adverse impact on the minor child. Attorney fees can be awarded in custody suits in the discretion of the court if the action is brought in good faith by an interested party who lacks the financial resources to pursue the suit and meet the other party as a litigant without a fee award. A provision for custody or visitation in a separation agreement is not binding on the court in ruling on custody. It is presumed to be fair, reasonable, adequate and necessary "in the absence of evidence to the contrary," but when such evidence is adduced, the presumption disappears and the court starts from a clean slate.

5. Child support

a. Overview. A parent's obligation for support of a child ends when the child turns 18 unless he or she is still in school, in which case it is extended until the child leaves school but not beyond age 20. It can be terminated by court order for good cause shown if the child is still in school beyond age 18. There is no obligation by a parent to support a child who is incapable of self-support and is beyond the above child support limits. Child support can terminate earlier than 18 if the child is emancipated (by marriage, by court order, by entry into military service or otherwise), and it can be extended beyond the above limitations by agreement of the parties (such as in a separation agreement or consent order).

b. Support orders. A court order for child support can be changed prospectively if there is a substantial change of circumstances to justify the modification, but retroactive reduction or the forgiveness of arrears is generally forbidden, absent an express or implied oral or written agreement to do so between the parents. Child support may be ordered retroactively (back to the date of separation), and the noncustodial parent does not have the right to demand information on how the child support is spent. Child support awards usually make provision

for monetary payments, medical insurance coverage and division of health care expenses that are not covered by insurance. Attorney fees can be awarded in child support cases in the discretion of the court if the action is brought in good faith by an interested party who lacks the financial resources to pursue the suit and meet the other party as a litigant without a fee award; as an additional requirement, the other party must have failed to pay adequate support at the time the action was instituted. The courts lack the power to order college expenses or (in the absence of testimony by an expert witness) escalator clauses, but such terms may be enforced if they are in a separation agreement or consent order.

c. Setting child support. Child support is determined by using the "Income Shares" approach, which takes into consideration both parents' gross incomes, medical insurance premiums (if any) and the cost of work-related day care in arriving at a child support figure that pro-rates the cost of support between the parents in proportion to their incomes. The "Basic Child Support Obligation" which is pro-rated between the parents is found in a published schedule. Different work sheets are used for sole custody, split custody (one or more children living with each parent) and shared custody (visitation of at least 123 overnights per year). Variations from the guideline formula are allowed for unusual circumstances.

d. Enforcement. Child support orders can be enforced by contempt, wage withholding, garnishment (up to 40% of a parent's maximum disposable earnings) and involuntary allotment. Garnishment must be based on a prior court order for child support. Federal expedited process rules (see Article 2 of Chapter 50) require that cases be brought quickly for a hearing to determine child support, usually within 60 days of service of process on the defendant. When child support has been ordered to be paid through the clerk of court, the clerk will institute contempt proceedings if the payor becomes the equivalent of one month behind in support and fails to catch up the arrears within three weeks of receipt of notice by the clerk's office.

F. Equitable Distribution

a. Overview. North Carolina's equitable distribution act is found at NCGS 50-20 and -21. It became effective in 1981 and the pension division portion took effect in

1983; pensions cannot be divided retroactively (i.e, when the divorce suit was filed before 1 Aug 83). A written, notarized agreement (separation agreement, property settlement or premarital agreement) may bar equitable distribution, even if it is silent on the subject, unless it clearly reserves property division for subsequent agreement or litigation between the parties. The claim for equitable distribution must be filed after the separation of the parties and before their divorce to be valid. The process of equitable distribution involves four elements: identification, classification, evaluation and distribution.

b. Identification. In the process of settling property division (or going through an equitable distribution trial), it is first essential to identify the property -- regardless of whether it is separate or marital property, what is it and who has it?

c. Classification. All property acquired during the marriage (i.e., before the "date of separation," or DOS) must be classified as marital property, separate property or mixed as of the DOS. Separate property is anything that a party acquired before the marriage, a gift or inheritance to a party (from a non-spouse), a business/professional license that cannot be transferred or a nonvested pension. Everything else is marital property. There is a presumption that everything acquired during the marriage is marital property. Separate property remains separate, regardless of who may have title to it, except that:

1) When a party uses separate consideration to acquire real property and then places title in the name of husband and wife ("tenancy by the entirety"), there is a strong presumption that the realty is marital property because a gift has been made to the marriage, and the presumption can only be overcome by clear, cogent and convincing evidence.

2) When there is an increase in the value of separate property during the marriage, and the increase is due to marital efforts, expenditure of marital funds or other marital causes, the increase is deemed "active appreciation" and is marital property.

Nonvested pensions are separate property. If the DOS precedes the date when the pension vests, then it is separate property. A nonvested pension for an officer or warrant officer is one based on less than 18 years of creditable service; for an enlisted person, less than 20 years of service means the pension is not vested.

d. Evaluation. Net fair market value must be assigned to marital property before it can be divided, and the effective date for valuation, generally, is the DOS. "Net" means that liens and mortgages must be subtracted; even when there is no security interest, the court has the power to allocate and divide the marital debts of the parties. FMV should really stand for "Flea Market Value," since the real value put on personal property by the courts is not its original cost and not its replacement value, but rather the price it would bring at a yard sale or an auction.

e. Distribution. It is presumed that an equal division will be an equitable one, although the court can do an unequal division based on enumerated factors set out in NCGS 50-20(c), such as the physical/mental health of a party, substantial separate assets, wasting or squandering of marital property, having custody of minor children, etc. Marital fault (i.e., adultery, abandonment, domestic violence) cannot be used as a ground for unequal division of marital property. Sometimes the court uses a distributive award, which is a lump sum paid at interest over no more than 6 years, to equalize the parties' shares of the marital property. If a pension cannot be divided by offsetting its present value against other marital property, then the court can use a deferred division approach, granting to the nonpensioned spouse a portion of the pension payments "if, as and when received." The amount awarded is based upon the proportion of the number of years of marital pension service to the total years of pension service.

f. Attorney fees. Attorney fees can be awarded if post-judgment action is necessary to enforce the court's award. Fees are also allowed if injunctive relief must be obtained to prevent a party from damaging or destroying marital or separate property. Otherwise, no attorney fees can be awarded in equitable distribution cases. The provision for interim allocation of marital assets, NCGS 50-20(i1), can be used to obtain an advance on marital funds when one of the parties needs access to such property in order to pursue the litigation, hire an attorney, or obtain appraisers, accountants and other experts.

NORTH DAKOTA

STATUTES:

I. Marriage - N.D. CENT. CODE §§ 14-03-01 to 14-03-28 (1991 & Supp. 1993).

II. Divorce - N.D. CENT. CODE §§ 14-05-01 to 14-05-26 (1981 & Supp. 1993).

III. Uniform Premarital Agreement Act - N.D. CENT. CODE §§ 14-03.1-01 to 14-03.1-09 (1981 & Supp. 1993).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Minimum age 16. Person between age 16 and 18 requires parental consent. § 14-03-02.

(2) Medical Examination - Repealed, ch. 175, § 3.

(3) License Fee - Six dollars ($6) plus twenty-nine dollars ($29) to aid victims of domestic violence. § 14-03-22.

(4) Waiting Period - None.

(5) Solemnization - Any clergyman, judge of a court of record (county judges within their jurisdictions), or religious society authorized by the North Dakota Nonprofit Corporation Act may perform marriage. § 14-03-09.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Not recognized.

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Not recognized.

PROHIBITED MARRIAGES: All marriages between parents and children, ancestors and descendants. The following includes half blood as well as whole blood: brothers and sisters; uncles and nieces; aunts and nephews; and first cousins. Bigamous marriages are also prohibited. §§ 14-03-03 and 14-03-06.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Non-age, bigamy, mental incapacity at time of marriage, consent obtained by fraud or force, physical incapacity, impotence at time of marriage, marriage within prohibited degrees of kindred. §§ 14-04-01 et seq.

North Dakota

ANTENUPTIAL AGREEMENTS: Uniform Premarital Agreement Act adopted. § 14-03.1 - 14-03.1-09.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - Plaintiff must have been resident of state for 6 months preceding commencement of action. § 14-05-17. If spouse is institutionalized outside of state, person applying for divorce must have been a resident for at least five years. § 14-05-03.

(2) Military Provision - A member of armed forces or his spouse who has been stationed in state for 6 months next preceding commencement of action satisfies jurisdictional requirement. §§ 14-03-01.1 and 14-05.17.

(3) Service of Process - Nonresident defendant may be personally served outside state. Service by publication is also permitted in certain situations when defendant has not been served personally. Rule 4, N.D. Rules of Civil Procedure.

(4) Answer - Within 20 days of service of process.

(5) Verification - No statutory provision.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Irreconcilable differences; adultery; cruelty; willful desertion; willful neglect or alcoholism for one year; conviction of felony; insanity for 5 years. §§ 14-05-03 to 14-05-09.1.

(2) Defenses - Connivance, collusion, condonation, lapse of time. § 14-05-10.

(3) Period of Separation - No statutory provision.

SEPARATION:

(1) Acknowledged Legal Status - Party may petition court for decree of separation from bed and board. § 14-06-01.

(2) Effect of Separation Agreement on Divorce Decree - A separation agreement does not hinder subsequent efforts for a divorce. If a separation decree has been in effect more than 1 year and reconciliation is improbable, divorce may be granted. The court can revoke this decree and render a decree of divorce. § 14-06-05.

TIME REQUIRED BEFORE REMARRIAGE: Court must specify in the order for judgment whether either or both parties shall be permitted to marry, and if so, when. § 14-05-02. The court can modify this decree at any time so as to permit one or both of the parties to marry.

RECOGNITION OF FOREIGN DIVORCES: A divorce obtained in another state's jurisdiction shall have no force or effect in this state if both parties were domiciled in this state at time of proceedings. § 14-05-08.1. Uniform Divorce Recognition Act adopted. § 14-05-08.1.

ALIMONY AND CHILD SUPPORT:

(1) Child support is defined under state law as amounts to provide for the children of the marriage. § 14-05-23. The law speaks of an "allowance" which may be pendente lite, § 14-05-23, or permanent, § 14-05-24. It is thoroughly congruent with the federal definition; however, the state law does provide for specific need payments. § 14-05-23. Wage assignments must be ordered. Provision is made for out of state wage withholding orders. §§ 14-09-09.19 to 14-09-09.22.

(2) Alimony is defined under state law as a suitable allowance to the party for support. § 14-05-23. It may be pendente lite or permanent. Federal law does not include specific need payments within the definition of alimony.

(3) Attorney's fees, costs, and interest are properly awarded as an element of child support and alimony. § 14-05-23 (same as support statute).

(4) Child support guidelines establish a rebuttable presumption of the proper level of child support. § 14-09-09.7.

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution. § 14-05-24.

(2) Fees Awarded - Court may award attorney's fees and costs. § 14-05-23.

UNIFORM INTERSTATE FAMILY SUPPORT ACT: §§ 14-12.2-01 to 14-12.2-49. (Replaced the Revised Uniform Reciprocal Enforcement of Support Act repealed in 1995.)

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Discretion of the court. §§ 14-05-22, 14-09-06.1 et seq.

(2) Judicial Approach - Parents viewed as equally qualified. Best interests of child control.

GRANDPARENTS VISITATION RIGHTS: § 14-09-05.1. Granted if best interests of the child are served.

UNIFORM CHILD CUSTODY JURISDICTION ACT: §§ 14-14-01 et seq.

CRIMINALIZATION OF CHILD SNATCHING: Any person who intentionally detains his or her own child outside state without legal rights to do so is guilty of a Class C felony (5 years, $5,000, or both). Detaining a child in excess of 72 hours is prima facie evidence of intent to violate decree at the time of removal. § 14-14-22.1.

ADOPTION: §§ 14-15-01 to 14-15-23, and §§ 14-17-01 to 14-17-26 (Revised Uniform Adoption Act).

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: N.D. CENT. CODE § 32-09.1-01 to § 32-09.1-23 (Supp. 1991); § 14-09-09.3 to § 14.-09-09.23 (1991 & Supp. 1992).

(1) Any creditor is entitled to proceed by garnishment in any court having jurisdiction. § 32-09.1-02.

(2) The traditional remedy of North Dakota is a summons to garnishee, but actually the demand is the operative instrument. The demand must be served and filed with the court before the summons to garnishee will issue. Service of the demand compels the garnishee to withhold monies as of the date of service and for 5 days thereafter. § 39-09-03. Service impresses the garnishee with a personal liability. §§ 32-09-07 and 32-09-28.

(3) § 14-09-09-16 Service Income Withholding Order on Income Payor. Income withholding order shall be served on income payor within 15 days of the date of notice to obligor. If a hearing was held under § 14-09-09.14 or § 14-09-09.21, income withholding order and copy of this chapter must be served within 15 days of the date of court's determination. Income withholding order must be sent no later than 45 days following the notice given pursuant to § 14-09-09.13 or § 14-09-09.20.

(4) § 14-09-09.11 Income Withholding Order. When a judgment or order requires the payment of child support, it may be enforced by an income withholding order.

(5) § 14-09-09.12 Provision of Notice of Impact of Income Withholding Laws to Obligors. Each judgment or order of support of children must include a statement that delinquency in payment will result in an income withholding order.

(6) § 14-09-09.3 Child Support-Duties and Liabilities of Income Payor Under Income Withholding Order.

(a) Any income payor failing to comply with requirements in 14-09-09.16 (Service of income withholding order on income payor) may be punished for civil contempt.

(b) Any income payor who shall fail to deliver income pursuant to an income withholding order shall be personally liable for amount of such income which income payor has failed to deliver.

(7) § 14-09-09.7 Child Support Guidelines. To help courts determine amount a parent should be expected to contribute toward support of the child.

(8) § 14-09-09.13 Procedure - Notice to Obligor. If obligor is delinquent, court shall serve notice on obligor stating: amount of child support owed; amount of arrearage; amount of money to be withheld; that obligor may contest issuance of withholding order by filing a written request for hearing within 10 days of notice given.

(9) § 14-09-09.14 Hearing Upon Obligor's Request. If obligor files request for hearing within 10 days of date of notice, court shall hold a hearing within 10 working days after date of request.

(10) § 14-09-09.13 Amount Withheld. Total amount to be withheld is the sum of:

(a) Obligor's current monthly support obligation.

(b) Amount obligor is ordered to pay toward outstanding arrearage. If no arrearage order, then an amount equal to 20% of the obligor's current support obligation.

(11) § 14-09-09.16. Amount of income withheld by an income payor may not exceed 50% of the obligor's disposable income.

(12) § 14-09-09.18 Interstate Income Withholding. On application of a resident of this state; an obligee or an obligor of a support order issued by this state, the public authority shall request the child support enforcement agency of another state in which the obligor of a support order derives income to enter the order to withhold income.

(13) § 14-09-09.20 Interstate Notice to Obligor. Notice shall be served on obligor stating that an income withholding order has been requested by another state.

(14) § 14-09-09.21 Interstate Income Withholding Hearing. If obligor files a request for hearing within 10 days of date of notice, court shall hold a hearing within 10 working days of date of request.

(15) § 14-09-09.24 Immediate Income Withholding. Each judgment which requires the payment of child support, issued on or after January 1, 1990, subjects the income of the obligor to income withholding, regardless of whether the support payments are delinquent.

PROCEDURES:

(1) At least 10 days before issuance of a garnishee summons against the earnings of any person, the creditor must serve notice upon the debtor that a garnishee summons may be issued. § 32-09.1-04.

(2) A garnishee summons may be issued in any action for the recovery of money any time after judgment. § 32-09.1-06.

(3) The summons requires the garnishee to serve a written disclosure of indebtedness to the defendant and answers to all interrogatories within 20 days of service. § 32-09.1-07. The summons must state that the garnishee must retain property or money in his possession until plaintiff causes a writ of execution to issue or defendant authorizes release to plaintiff. The summons also must state that the summons will lapse 180 days after service and thereafter the garnishee must release all property to the defendant and is released. § 32-09.1-07.

(4) Service of garnishee summons and notice to defendant is served upon the garnishee. Plaintiff may also must serve interrogatories and a disclosure form. Copies of all matters served on the garnishee must be served on defendant not later than 5 days after service is made upon garnishee. § 32-09.1-08.

(5) Garnishee must respond with disclosure of disposable earnings, property held, setoffs, and any exemptions or objections claimed by defendant. § 32-09.1-09.

(6) Disclosure is conclusive as to all property of defendant absent objection. § 32-09.1-11.

STATE EXEMPTIONS:

(1) The amount of disposable earnings subject to garnishment is limited. Garnishment shall not exceed 50% of disposable earnings when the individual is also supporting a spouse or child not subject to a support order. Absent such additional child or spouse, garnishment shall not exceed 60% of disposable earnings. North Dakota law also allows a 5% increase of maximum amounts to be garnished depending upon the length of the pay period subject to garnishment. § 32-09.1-03.

(2) The garnishee is not required to raise discretionary exemptions, but the garnishee may raise such exemptions. §§ 32-09-22 and 32-09-15.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

The garnishee must raise defenses and objections which are jurisdictional. As to defenses which are not jurisdictional, the garnishee may, but is not required to, raise and litigate them. § 32-09-21. There is no specific standing for the garnishee to request an accounting.

North Dakota

The following summary was reviewed in August 1995 by CPT Karen E. Elliott, 9th JAG Det (LSO), Blacklick, Ohio; Elliott Law Office, Findlay, Ohio 45840, Telephone Number: (419) 422-9770, FAX: (419) 422-1201.

OHIO

STATUTES:

I. Marriage - OHIO REV. CODE ANN. §§ 3101.01 to 3101.99 (1989 & Supp.).

II. Divorce, Alimony, Annulment - OHIO REV. CODE ANN. §§ 3105.01 to 3105.99 (1989 & Supp.).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Persons under 18 require parental consent. Minimum age for male is 18; female is 16. Persons under minimum age require judicial approval. Minors must receive counseling approved by court. §§ 3101.01 to 3101.05. If minor wants to marry and has no responsible adult, or if minor pregnant or gave birth, file application for judicial approval. Juvenile Rule 42.

(2) No blood tests required.

(3) License Fee - $10.00, §2101.16(A)(46), and $17.00 to assist shelters for domestic violence victims, § 3113.34.

(4) Waiting Period - License at least 5 and no more than 30 days after filing of application. § 3101.05. License expires 60 days after issuance. § 3101.07.

(5) Solemnization - Any ordained or licensed minister, judge of county court in his county, authorized judge of municipal court, a probate judge, mayor of municipal corporation, superintendent of state school for the deaf, or religious society in conformity with customs of such society may perform marriage. § 3101.08.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Prohibited unless established prior to Oct. 10, 1991. § 3105.12.

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Not recognized.

PROHIBITED MARRIAGES: All marriages between relations nearer of kin than second cousins; nonage and bigamous marriages are also void. § 3101.01.

Ohio

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Non-age, bigamy, adjudicated mental incompetence at time of marriage, consent obtained by fraud or force, failure to consummate marriage. § 3105.31.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - Plaintiff must have been a resident of state for 6 months immediately prior to filing complaint for divorce or annulment. § 3105.03. One petitioner resident 6 months before dissolution. § 3105.62.

(2) Military Provision - No statutory provision.

(3) Service of Process - If nonresident defendant, defendant's address unknown, or resident but absent from state, shall serve by publication. § 3105.06.

(4) Answer - Within 28 days of service of process. Civ.R. 12.

(5) Verification - Not required.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Bigamy, willful absence for 1 year, adultery,extreme cruelty, fraudulent contract, gross neglect, habitual drunkenness, imprisonment, unilateral procurement of divorce outside state, separation for 1 year and incompatibility (unless denied by other party). § 3105.01. Also, no fault termination where both parties agree to dissolution and prepare separation agreement providing for property division, spousal support (formerly alimony), and allocation of parental rights and responsibilities for the care of the minor children. §§ 3105.61, 3105.63.

(2) Defenses - Condonation and recrimination will not bar divorce. § 3105.10(C).

(3) Period of Separation - One (1) year separation where the separation is the ground for the divorce. § 3105.10(J). Otherwise, no requirement.

(4) Conversion - At any time before a final judgment is entered in a divorce action, the spouse may convert the action for divorce into an action for dissolution, or a dissolution into a divorce action. § 3105.08.

LEGAL SEPARATION:

(1) Grounds - Same as for divorce.

(2) Distinction - Court may provide for support of family without loss of all benefits of marriage. Court may bar dower in real estate granted to one party. § 3105.10.

SEPARATION:

(1) Acknowledged Legal Status - Parties may agree to separation and make provisions for the support of either of them and their children during separation, and that agreement may be enforced by the common pleas court. § 3105.10. Living separate and apart for one year without cohabitation constitutes a ground for divorce. § 3105.01(J).

(2) Effect of Separation Agreement on Divorce Decree - No statutory provision.

TIME REQUIRED BEFORE REMARRIAGE: No waiting period.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

SPOUSAL SUPPORT AND CHILD SUPPORT

(1) Spousal support (formerly alimony) is an allowance which the court may grant to either spouse, based upon consideration of fourteen factors including the relative earning abilities of the parties, their retirement benefits, the duration of the marriage, the contribution of a spouse as homemaker, tax consequences, contributions toward the education or training of either party, and time and expense in training the payee-spouse. § 3105.18(C). Each party is presumed "to have contributed equally to production of marital income." § 3105.18(C)(2). A court has no jurisdiction to modify spousal support payments unless the parties have agreed (dissolution of marriage cases, or settlement) or the court has specifically reserved jurisdiction (court ordered divorce cases). §§ 3105.18(E), 3105.65.

(2) Child support is an allowance in support of a minor child or children. §§ 3109.05, 3109.21. Support schedule establishes a rebuttable presumption of the proper level of child support owed. § 3113.21.5. Court must make specific findings to deviate from schedule. Support is payable during periods of "seasonal vacation periods." § 3109.05(E). Court must complete support work sheet in accordance with statutory schedule before considering deviation. Marker v. Grimm (1992), 65 Ohio St. 3d 139, 601 N.E.2d 496.

(3) Under the laws of Ohio, the duty of parents to support their children extends to the age of majority or so long as the child attends high school. § 3103.03. The court will enforce a separation agreement providing for support of children 18 years of older. § 3105.10.

(4) "Each married person must support himself or herself and his or her spouse .... If a married person is unable to do so, the spouse must assist in the support so far as the spouse is able." § 3103.03 (A). Court may award reasonable spousal support to either party. In determining whether spousal support is appropriate and reasonable, and in determining the amount and duration of and terms of payment, the following factors may be considered: income of the parties, earning abilities of the parties, ages and physical and mental health of the parties, duration of the marriage, standard of living during the marriage, education of the parties, assets and liabilities of each party, contribution of each party to the education or earning ability of other party, tax consequences, lost income production capacity of either party that resulted from party's marital responsibilities. If there is a continuing order for periodic payments entered in a divorce or dissolution of marriage action after Jan 1, 1991, the court that enters such decree does not have jurisdiction to modify the amount or terms of the alimony or spousal support unless the court determines that the circumstances of either party have changed and a provision in the decree contains a provision specifically authorizing the court to modify the amount or terms of alimony. § 3105.18.

(5) Attorney's fees may be awarded as additional spousal support or as expenses of either party. § 3105.18(H).

(6) Temporary spousal support may be awarded by a court during the pendency of an action for divorce or legal separation. § 3105.18. Party to action must retain spouse and dependents on health insurance until order relieves them of obligation. § 3105.71.

(7) Spousal support terminates on death of either party unless otherwise specified. § 3105.18(B).

PROPERTY DISTRIBUTION: Equitable distribution, presumed 50 - 50. § 3105.171. Court must determine "separate" and "marital" property but may divide "separate" property as a "distributive award." § 3105.171.

UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: §§ 3115.01 to 3115.34.

DETERMINATION OF ALLOCATION OF PARENTAL RIGHTS & RESPONSIBILITIES: Best interests of child. No age of choice. However, court must interview child of any age upon request of either parent. Must also appoint guardian ad litem for child upon request, or may on its own motion. Ten (10) factors specified in best interest test include failure to pay child support, denial of visitation, and any offenses of violence toward family members. § 3109.04. Shared parenting permitted on request of either party upon submission of a motion and shared parenting plan if found to be in child's best interest. § 3109.04(D).

GRANDPARENTS VISITATION RIGHTS: Court may grant reasonable visitation rights when in best interests of child. § 3109.051.

UNIFORM CHILD CUSTODY JURISDICTION ACT: §§ 3109.21 to 3109.37.

CRIMINALIZATION OF CHILD SNATCHING: Interference with custody is a misdemeanor. § 2919.23. Child snatching which creates "substantial risk to the health or safety of a child" is a felony. § 2919.22. Child snatching accompanied by physical harm also may constitute "Domestic Violence." The first offense is a misdemeanor; the second is a felony. § 2919.25.

DOMESTIC VIOLENCE ACT: Statutory remedies are available through municipal and common pleas courts to victims of domestic violence. These remedies include arrest, restraining orders, temporary possession of premises and temporary award of child custody. §§ 2919.25, 2935.03, and 3113.31.

ADOPTION: §§ 3107.01 to 3107.07 (Adoption procedures) and §§ 3107.39 to 3107.44 (Release of Adoption Information). Consent to adoption required from both parents unless no communication or support for 1 year (adjudicated fathers) or abandoned child, or mother during pregnancy (putative fathers).

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: Ohio Rev. Code Ann. §§ 2329.01 - 2329.86.

(1) Ohio has a wide range collection of remedies available to a judgment creditor, including provisions for placing a judgment lien on the debtor's land and foreclosing and selling same (§§ 2329.02 and 2323.07); garnishing a debtor's wages or attaching his property (§§ 2716.01 and 2716.11); levying on specific chattels (§ 2715.01); proceedings in aid of executions such as continuing orders over a debtor's debtor and examination hearings (§§ 2333.01 and 2333.04). Additional remedies are available for collection of spousal support and child support orders. These remedies include a continuing wage order. § 3113.21.

(2) An order of attachment shall bind the property attached from the time of service. A garnishee shall be liable to the plaintiff in attachment for all property of the defendant in his hands, and money and credits due from him to the defendant at the time he is served with the order of attachment. § 2715.19.

(3) The court shall order income withholding for the collection of child support or spousal support. § 3113.21.

(4) Judgment on support arrearage may be granted to expand collection methods. Laches of limited use in defending claims. See Sheets v. Sheets (Dec. 30, 1994), 1994 Ohio App. LEXIS 6102 (14 years after emancipation); Connin v. Bailey (1984), 15 Ohio St. 3d 34, 472 N.E.2d 328 (35 years).

PROCEDURES:

(1) Common Pleas Courts can enforce all of the above-described remedies. Municipal Courts also can enforce most of these remedies.

(2) Garnishment of wages presupposes a valid, unstayed judgment and may be filed every 30 days until the judgment is satisfied. § 2716.03(B). Up to 25% of a debtor's wages may be obtained each month unless for health care services (then 12%) §§ 2716.05, 2716.051. The garnishment action is filed with the Clerk of Court. It must be preceded by a 15-day Notice of Garnishment which generally spells out the nature of the proceeding and the right of the debtor to stay garnishment through state trusteeship or consumer credit counseling services. § 2716.02.

(3) Garnishment of property, commonly a bank account, also requires a valid unstayed judgment. There is no limitation upon the amount or frequency of such attachments. An action is filed with the Clerk of Courts, setting forth, by affidavit, the judgment, names of judgment debtor and garnishee(s), and description of the property. § 2716.11. The garnishee is bound to hold the property upon receipt of the court order. § 2716.13. At the same time, the Court delivers a Notice to the defendant, advising of the attachment and permitting him five business days after receipt of notice to request a hearing to protest same. § 2716.13.

(4) Upon issuance of a wage order by the court, the amount ordered for support is removed from the debtor's pay each pay period until further order of court. The wage order is subject to maximum amounts permitted under section 303(b) of the Consumer Credit Protection Act, 15 U.S.C. § 1673(b). § 3113.21.

(5) A continuing support order issued pursuant to § 3113.21 is sufficient for the withholding of a defendant's earnings. No additional documents are required.

(6) The answer of the garnishee required under § 2715.13 shall be made before the clerk of the court of common pleas in the county in which the garnishee resides, or, if he resides out of the state, before the clerk of the county where he was served or where the action is pending.

(7) A garnishee may pay the money owing him to the court, or so much thereof as the court orders to the court. He shall be discharged from liability to the defendant for money so paid, not exceeding the plaintiff's claim. § 2715.30.

(8) A garnishee need not wait for an order of disbursement before surrendering funds subject to the garnishment action.

(9) The person seeking an order of attachment against personal earnings or an order in aid of execution against personal earnings must make a demand in writing for the excess over the amount of personal earnings exempt from execution, attachment, or sale to satisfy a judgment or order, or so much thereof as will satisfy the claim. The demand shall be made after judgment is obtained, and at least 15 and not more than 45 days before such order of attachment or order in aid of execution is sought, by delivering such demand to the debtor personally, or by leaving it at, or by sending it by registered letter to, his usual place of residence. § 2716.02(B).

(10) The demand shall contain a statement in substance that application for an order of attachment or order in aid of execution will be made to the court of common pleas.

STATE EXEMPTIONS:

(1) Under § 2716.13(C), certain benefit payments cannot be taken to satisfy a judgment. Typical among these benefits are:

(a) Workers' compensation benefits;
(b) Unemployment compensation payments;
(c) Aid to dependent children (A.D.C.);
(d) General assistance (G.A.);
(e) Social security benefits;
(f) Supplement security income (S.S.I.);
(g) Veterans benefits;
(h) Black lung benefits;
(i) Certain pensions.

Other chattels and real estate may also be claimed exempt from execution, garnishment, or attachment. § 2329.66.

(2) Wages over a certain amount are also automatically exempt. This amount is the greater of:

(a) If paid weekly, thirty times the federal minimum hourly wage; if paid bi-weekly, sixty times the current federal minimum hourly wage, if paid semi-monthly, sixty-five times the current federal minimum hourly wage, or if paid monthly, one hundred thirty times the current federal minimum hourly wage, which is in effect at the time the earnings are payable, as prescribed by the "Fair Labor Standards Act of 1938," 52 Stat. 1060, 29 U.S.C. § 206(a)(1), as amended.

(b) Seventy-five percent of the disposable earnings owed to the person. Other chattels and real estate may also be claimed exempt from execution, garnishment, or attachment. § 2329.66(A)(13).

(3) No exemptions under Ohio law are afforded a defendant with reference to continuing support orders under § 3113.21.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) Although the garnishee may interpose any defense he may have against the action, failure of the garnishee to assert a defense in behalf of the debtor would not prevent the debtor himself from raising such defenses. Some defenses, such as certain claims of exemption, are personal to the debtor and must be raised only by the debtor. § 2716.21.

(2) If there are any jurisdictional defects or other defects in the garnishment, the garnishee should inform the court, preferably before the answer or at the time of the answer.

OKLAHOMA

STATUTES:

I. Marriage - OKLA. STAT. ANN. tit. 43, §§ 1 to 37 (1990 & Supp. 1996).

II. Divorce - OKLA. STAT. ANN. tit. 43, §§ 101 to 137 (1990 & Supp. 1996).

III. Civil Procedure - OKLA. STAT. ANN. tit. 12, §§ 1151 to 1284 (1988 & Supp. 1996).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Under 18 requires parental consent. Minimum age 16. Under 16 requires parent consent and court approval in addition to showing the female is pregnant or has given birth. Tit. 43, § 3.

(2) Medical Examination - Standard serological test for syphilis, made not more than 30 days prior to application for license. Tit. 43, §§ 31 and 35.

(3) License Fee - Ten dollars ($10) (includes fee for recording license).

(4) Waiting Period - None required unless either party under legal age. Application must be on file 72 hours before issuance of license to minor. Tit. 43, § 5.

(5) Solemnization - Any clergyman or judge of any court of record may perform marriage. Tit. 43, § 7. Marriages according to "Indian custom" are recognized, as well as designated persons in Quaker, Baha'i, or Church of Jesus Christ of Latter Day Saints organizations.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Recognized by case law.

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Not recognized.

PROHIBITED MARRIAGES: All marriages between parents and children, ancestors and descendants, brothers and sisters, uncles and nieces, aunts and nephews, stepfathers and stepdaughters, stepmothers and stepsons, first cousins, and bigamous marriages. Tit. 43, § 2.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

Oklahoma

GROUNDS FOR ANNULMENT: Non-age, mental incompetence, remarriage within 6 months of divorce decree. Tit. 43, §§ 3, 4, and 126.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - Either party must have been domiciled in state for 6 months next preceding filing of petition. Tit. 43, § 102.

(2) Military Provision - A member of armed forces stationed in state for 6 months next preceding filing of petition satisfies jurisdictional requirement. Tit. 43, § 102.

(3) Service of Process - Service may be made outside of state either by personal service or by mail at election of plaintiff. Service by publication also authorized when out-of-state defendant upon showing that above methods of service ineffectual.

(4) Answer - Within 30 days of service of process. Response time to service by publication not less than 41 days from date of first publication. If new action is alleged - answer must be verified. Tit. 43, § 106.

(5) Verification - Petition must be verified. Tit. 43, § 105.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Abandonment for 1 year, adultery, impotency, pregnancy at time of marriage (husband not father), cruelty, fraudulent contract, incompatibility (no fault), alcoholism, gross neglect, imprisonment for felony, or insanity marked by institutionalization for period of 5 years. Incompatibility operates as no-fault divorce sometimes; however, the Supreme Court of Oklahoma has held that Oklahoma does not recognize no-fault divorces. Minimum testimony is required regarding fault, and there is no defense except for a finding that incompatibility is due to the fault of both parties. Tit. 43, § 101.

(2) Defenses - No statutory provision.

(3) Period of Separation - No statutory provision.

SEPARATION:

(1) Acknowledged Legal Status - Party may bring action for alimony instead of absolute divorce. Tit. 43, § 129.

(2) Effect of Separation Agreement on Divorce Decree - No statutory provision.

TIME REQUIRED BEFORE REMARRIAGE: Six (6) months from date of divorce decree or 30 days from date of final judgment rendered pursuant to appeal, if the granting of the divorce was a question raised on appeal. Tit. 43, § 123.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT:

(1) Either spouse may be allowed alimony out of the real and personal property of the other. Alimony may be allowed from real or personal property, or both, in the form of a money judgment, payable either in gross or in installments. Tit. 43, § 121.

(2) In any divorce decree providing for periodic payments, the court shall designate what portion is spousal support (alimony) and what portion is a division of property. Payments pertaining to a division of property are irrevocable and not subject to subsequent modification by the court making the award. Tit. 43, § 134.

(3) Home mortgage payments required by a decree, which also had separate alimony payments, were means of effecting equitable division of property and were not considered alimony. Thomas v. Thomas, 518 P.2d 1294 (Okla. Ct. App. 1973).

(4) Court will make provision for custody, support, and education of minor children when divorce is granted and may modify any order before or after final judgment if circumstances make change proper. Any child shall be entitled to support by the parents until child reaches 18 years of age. Tit. 43, § 112. Child support guidelines establish a rebuttable presumption of the proper level of child support. Tit. 43, § 118.

(5) Upon death or remarriage of recipient, payments for support shall terminate. Voluntary cohabitation of a former spouse with a member of the opposite sex shall be a ground to modify provisions of a final judgment or order for alimony as support. Tit. 43, § 134.

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution. Tit. 43, § 121.

(2) Fees Awarded - Court may award attorney's fees and costs.

UNIFORM INTERSTATE FAMILY SUPPORT ACT: Tit. 43, §§ 601-100 to 601-901.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Best interests of child control. Tit. 43, § 112.

(2) Judicial Approach - Best interests of child control.

GRANDPARENTS VISITATION RIGHTS: Court may grant grandparents reasonable visitation privileges when in child's best interests.

UNIFORM CHILD CUSTODY JURISDICTION ACT: Tit. 43, §§ 503-527.

CRIMINALIZATION OF CHILD SNATCHING: Child "stealing" is both a misdemeanor and a felony. Anyone who forcibly or fraudulently takes or entices a child under the age of 12, with intent to detain and conceal from parent may be imprisoned up to ten years in the state penitentiary or imprisoned up to one year in the county jail and fined $500. Tit. 21, § 891.

ADOPTION: Tit. 10, § 60.1 to 60.56 (1995)(includes Uniform Adoption Act).

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: OKLA. STAT. ANN. tit. 12, §§ 1170 to 1244 (1988 & Supp. 1996) and tit. 43, § 115 (1990 & Supp. 1996).

(1) Garnishment is authorized for child support and alimony arrears. Garnishment or income assignment for current obligations is authorized. Tit. 12, § 1171.2.

(2) There is now statutory authority for continuing orders for alimony (see § 1173.4), in addition to the statutory authority for continuing garnishment for child support. § 1173.1. Child support garnishments or income assignments may be issued for any current or past due support. Tit. 12, § 1171.2.

PROCEDURES:

(1) Any creditor is entitled to proceed by garnishment against any person who shall be indebted to the creditor's debtor or has any property in his possession or under his control belonging to such creditor's debtor. Tit. 12, § 1171.

(2) Money earned as wages or salary is exempt from pre-judgment garnishment except where support is ordered by an interlocutory court order and where child support is awarded. Tit. 12, §§ 1171.1, 1171.2. Pre-judgment garnishment of other monies

is also possible where the plaintiff complies with the notice to defendant provision of tit. 12, § 1172.1.

(3) Service of Process - Upon the filing of an affidavit complying with tit. 12, § 1172, a garnishee summons will be issued by the clerk to the garnishee. The summons must state whether pre-judgment or post judgment garnishment, or garnishment for child support is sought. Tit. 12, § 1173.

(4) Pre-judgment Garnishment Procedures tit. 12, § 1172.1 - No prejudgment garnishment summons may issue unless:

(a) The dependent is given notice of a right to file a written objection. Defendant must also receive a copy of the plaintiff's affidavit. Defendant has 5 days to object. If a written objection is filed the court is to hold an expedited hearing.

(b) If defendant cannot be given notice but plaintiff establishes that a reasonable effort was made to notify the defendant, the court is to conduct a hearing. If plaintiff proves the probable merit of his case and has filed a bond with one or more sureties of double the amount of the claim, a pre-judgment garnishment summons may be issued.

(c) If the defendant is given notice but does not object within 5 days, the summons issues. Tit. 12, § 1172.1A2.

(5) Post-judgment Garnishment Procedures (Tit. 12, § 1172.2):

(a) The court is to attach to the summons a notice of garnishment and the exemptions authorized in tit. 12, § 1274 and an application for the defendant to request a hearing.

(b) If the garnishee holds money belonging to the defendant the garnishee is to send the defendant by first-class mail (or deliver it personally) a copy of the notice of garnishment and exemptions and the application for a hearing. The garnishee is liable only for willful failure to mail or deliver the notice.

(6) Answer of Garnishee. The garnishee has 10 days from receiving the notice of garnishment to answer. Tit. 12, § 1178. The garnishee may deny that he is indebted to or holds any money of the defendant, in which case the statute specifies an answer form. Tit. 12, § 1176. If the garnishee admits that he is indebted to or holds money of the defendant, the statute also specifies a form. Any judgment creditor may retain a continuing lien on wages; within 7 days after the end of each pay period, the garnishee shall pay the amount withheld into court. Tit. 12, § 1173.4.

(7) Notice of Garnishment to Defendant. Tit. 12, § 1174.

(a) In pre-judgment garnishment cases the defendant must be given notice by the plaintiff and an opportunity to file a written objection.

(b) In post-judgment cases, the defendant is notified by the garnishee.

(c) In child support garnishment cases, the defendant is given notice of the issuance of any garnishee summons, the date of issuance of the summons and the name of the garnishee. The notice sets a date not more than fifteen days after the issuance of the summons by which the defendant may appear and defend. (This notice would apparently be issued by the clerk of court in that the answer time, and other particulars are the same as those specified for income assignments.

(8) Notification may be accomplished by:

(a) Serving a copy of the garnishee summons on the defendant or his attorney of record in the manner provided for service of summons; or

(b) Sending it to the defendant or his attorney certified or registered mail, return receipt requested; or

(c) (In pre-judgment garnishment) endorsing the notice on the summons issued in the principal action prior to its service; or

(d) (In pre-judgment garnishment) including the notice in the publication notice when service in the principal action is by publication; or

(e) Publication once in a general circulation newspaper in the county where the action is filed at least five (5) days prior to the garnishee's answer date if the defendant is a nonresident or his whereabouts are unknown.

INCOME (WAGE) ASSIGNMENT VS. GARNISHMENT:

(1) Garnishee's affidavit where garnishment summons for collection of child support - where garnishment summons is for the collection of child support, garnishee shall, within 10 days from service of garnishee's summons or within 7 days after the end of defendant's current pay period, or 30 days from date of service of summons, file an affidavit stating existing liability to defendant, defenses, exemptions. Tit. 12, § 1178.1.

(2) A person seeking to garnish for alimony would use the regular garnishment provisions. A person seeking to collect past due child support could use either the regular garnishment provisions or the new income assignment provisions. The benefit of the income assignment provisions is that once the arrearage is exhausted, the order continues for future child support. Under the regular garnishment provisions once the arrearage is paid off, collection cease. If the defendant has not been paying current support, a new garnishment action must be commenced.

(3) Income assignment provisions (Tit. 12, § 1171.3):

(a) Any person entitled to receive child support payments for the current or prior month or months, may initiate income assignment proceedings.

(b) Notice of delinquency shall be served on obligor, postmarked no later than ten days after date on which application was filed.

(c) Court shall notify payor of income assignment.

(d) If obligor fails to request a hearing within 15 days, court shall send a notice of assignment to payor.

In all child support cases arising out of an action for divorce, the court may order the wages of any parent ordered to pay child support be subject to immediate income assignment regardless of whether support payments are in arrears at the time of the order, if said court determines that immediate income assignment would be in the best interest of the child. Tit. 12, § 1171.3 and tit. 43, § 115.

(4) Collection of Child Support - Summons. Where garnishment is for the collection of child support, garnishee summons shall be issued by district court if prejudgment or postjudgment garnishment is sought. Tit. 12, § 1173.2.

STATE EXEMPTIONS:

(1) A seventy-five percent (75%) exemption exists, tit. 12, § 1171.1, except where child support is involved. In child support cases the exemptions are the same as the federal exemptions of 15 U.S.C. § 1673 (50% of disposable earnings if the defendant has a second set of dependents or 60% if there is no second set of dependents, with an additional 5% added on if the defendant is 12 or more weeks in arrears. Tit. 12, § 1173.

(2) There is no statutory difference between retired pay and active duty pay.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) The garnishee can defend the defendant as to his exemption or other defenses. This is an option of the garnishee which he is under no obligation to undertake. Tit. 12, § 1181.

(2) The garnishee can deny the existence of any property. Tit. 12, § 1177. The garnishee can raise the following questions in his answer under tit. 12, § 1178: Any setoff or any defense or the existence of any other indebtedness or liability, or any lien or claim to such property; exemption of defendant; adverse claim of third parties.

LIEN FOR ARREARAGE IN CHILD SUPPORT AGAINST REAL OR PERSONAL PROPERTY: Tit. 12, § 1289.1 and tit. 43, § 135.

(1) Arrearages in child support reduced to an order of the court or administrative order of the Department of Human Services or any past due payment of child support that is a judgment by operation of law may be a lien against the real and personal property of the person ordered to pay such support.

(2) Past due child support will not become a lien until the person has been given notice and opportunity for a court or administrative hearing unless the person has already been given a hearing in some other proceeding to determine the amount due.

OREGON

STATUTES:

I. Marriage - OR. REV. STAT. ANN. §§ 106.010 to 106.990. (1990 & Supp. 1994).

II. Divorce - OR. REV. STAT. ANN. §§ 107.005 to 107.445. (1990 & Supp. 1994).

III. Separation - OR. REV. STAT. ANN. §§ 107.455 to 107.475. (1990 & Supp. 1994).

IV. Summary Dissolution Procedure - OR. REV. STAT. § 107.485 to 107.500. (1990 & Supp. 1994).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Under 18 requires parental consent. § 106.060. Minimum age 17. § 106.010.

(2) Medical Examination - Not required. §§ 106.041, 106.077.

(3) License Fee - Twenty-five dollars ($25) in addition to any other fees provided by law. § 106.45.

(4) Waiting Period - License becomes effective 3 days after filing for application. § 106.077.

(5) Solemnization - Any clergyman, judge within his jurisdiction, county clerk, or religious society in accordance with customs of such society may perform marriage. § 106.120.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Not recognized.

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Not recognized.

PROHIBITED MARRIAGES: When the parties are first cousins or any nearer kin to each other whether of whole or half blood, computing by rules of civil law. Also bigamous marriages. § 106.020.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Non-age, mental incompetence, consent obtained by force or fraud. § 107.015. An annulment can be decreed for these reasons, provided that the contract was not later ratified subsequent to the prohibited marriage.

Oregon

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - One party must be resident of state for 6 months prior to commencement of action, unless marriage was solemnized in the state and either party is a resident at the time the suit is commenced. § 107.075.

(2) Military Provision - No statutory provision.

(3) Service of Process - Nonresident defendant may be served personally or by mail. If service not possible by above means, court may order service by publication.

(4) Answer - Within 30 days of service of process. Service by publication requires response within 30 days of first publication. ORCP 7.

(5) Verification - No statutory provision.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Marriage within prohibited degrees of kindred, bigamy, non-age, mental incompetence, consent obtained by force or fraud, irreconcilable differences causing irremedial breakdown of marriage (no fault). §§ 106.020, 107.015, 107.025, and 107.036.

(2) Defenses - Abolished.

(3) Period of Separation - None required.

SEPARATION:

(1) Acknowledged Legal Status - Parties may petition court for decree of legal separation on basis of irreconcilable differences which have caused breakdown of marriage. § 107.025. The parties must live apart for one year without any cohabitation during that time period.

(2) Effect of Separation Agreement on Divorce Decree - Provisions pertaining to separation do not affect any right concerning a subsequent divorce. § 107.455.

TIME REQUIRED BEFORE REMARRIAGE: Decree is not effective to dissolve marriage until 30 days from date of decree, or if appeal is taken, until the suit is determined on appeal, whichever is later. § 107.115.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

SUMMARY DISSOLUTION PROCEDURES: If the parties have no minor children, the wife is not now pregnant, the marriage is less than 10 years in duration, neither owns any interest in real property, their mutual obligations are $15,000 or less, total assets are $30,000 or less, and the petitioner waives spousal support, a summary marriage dissolution may be obtained. § 107.485. Forms to be used are specified in § 107.500.

ALIMONY AND CHILD SUPPORT:

(1) "Alimony" is no longer awarded. "Support," pendente lite or permanent, is allowed. § 107.105.

(2) Child support is money awarded for the support and maintenance of children to whom the party owes an obligation of support. Support may be ordered pendente lite or in decree. § 107.105. Support generally includes health, education, and welfare support. Continues while child is attending school. Support guidelines establish a rebuttable presumption of the proper level of child support. §§ 25.275 and 25.280.

(3) Attorney's fees are collectible in garnishment as alimony and child support. § 23.185. Other debts such as health care and car payments are usually settled separately, and future payments or health care are usually considered when calculating the support amount.

(4) Medical insurance shall be included in all support orders. § 416.415.

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution. (1981 Or. Laws Ch. 775 (SB 835)).

(2) Fees Awarded - Court may award attorney's fees and costs. §§ 107.095, 107.445.

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT:
OR. REV. STAT. §§ 110.005 to 110.291.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Court may award custody as it deems just and proper. Best interest of the child to control. §§ 107.105 and 107.137.

(2) Judicial Approach - Parents viewed as equally qualified. Best interests of child control.

GRANDPARENTS VISITATION RIGHTS: Court has discretionary power to grant reasonable visitation rights when in best interests of child. §§ 109.121 and 109.123.

UNIFORM CHILD CUSTODY JURISDICTION ACT: §§ 109.700 to 109.930.

CRIMINALIZATION OF CHILD SNATCHING: The crime of custodial interference in the second degree is a Class C felony with a penalty of up to 5 years imprisonment, or a fine up to $100,000, or both. Custodial interference in the first degree is a Class B felony with up to 10 years imprisonment, or a fine up to $100,000, or both. The expenses of the custodial parent in regaining physical custody of the child are deemed "pecuniary damages" for purposes of restitution. (1981 or Laws Ch. 774 and Ch. 775 (SB 827 and SB 835)).

TREATMENT OF MILITARY RETIRED PAY: Military pension is considered marital property. In the Matter of the Marriage of Manners, 68 Or. App. 896, 683 P.2d 134 (1984).

COMPLIANCE WITH CHILD SUPPORT ENFORCEMENT AMENDMENTS OF 1984: c. 610, SB 250, synopsized in DIG. ORE LAWS 1985 at 48, expands parties on whom wage withholding order may be served, authorizes service of wage withholding orders by mail and, inter alia, repeals law providing that out-of-state obligees who request entry of URESA order in Oregon thereby submit out-of-state decree to modification in Oregon.

ADOPTION: §§ 109.305 to 109.500.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: OR. REV. STAT. ANN. §§ 23.030 to 23.730 (1988).

(1) Garnishment means any legal or equitable procedure through which the earnings of an individual are required to be withheld for the payment of a debt. § 23.175.

(2) The support creditor, the district attorney, or the Support Enforcement Division of Oregon Department of Justice may initiate an action in garnishment. § 23.050.

(3) Oregon does provide for continuing garnishment orders for spousal and/or child support to cover each and every pay period until all delinquent amounts due, together with interest, are paid in full, plus all further amounts coming due before the delinquent amounts are paid. § 23.050.

(4) Regarding the obligation to pay -- ". . . all further amounts coming due before all delinquent amounts are paid in full"

would strongly suggest that Oregon does provide garnishment (to a certain extent) for current support. § 23.050.

(5) Oregon has enacted a mandatory income withholding statute. All support orders must include this provision. § 23.050.

PROCEDURES:

(1) Jurisdiction for garnishment of personal property can be in justice's court, § 52.210, in district court, § 46.080, and generally in circuit court, §§ 46.080, 52.210.

(2) All garnishment orders must recite the amount of all delinquent support amounts due. § 23.050.

(3) Service of the writ of garnishment is obtained in the same manner as service of a summons. § 23.425.

(4) Personal service is required within the state by the sheriff or any disinterested adult resident of the state.

(5) Service by publication may be obtained when defendant out of state and residence unknown; but where residence of defendant is known, service by mail is required.

(6) Oregon law states that a garnishee must answer any proffered interrogatories within 10 days.

(7) Payment should be made to the court-designated payee, usually the sheriff, clerk of court, or the Oregon Department of Human Resources.

STATE EXEMPTIONS:

(1) State law exempts 75 percent of a person's wages each week from regular garnishment. § 23.185.

(2) The court, in its discretion, may enlarge the amount of disposable earnings subject to garnishment for support, including attorney's fees and costs. § 23.050.

(3) Pensions are exempt from execution. § 23.170. However, Oregon case law seems to indicate that this does not apply when the debt owed is in the nature of spousal and/or child support. Gerold v. Gerold, 6 Or. App. 353, 488 P.2d 294 (1971); Calvin v. Calvin, 6 Or. App. 572, 487 P.2d 1164 (1971). Accordingly, Oregon garnishment law is interpreted to affect retired/reserve pay as well as active duty pay.

Oregon

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) Garnishee must submit an answer to the writ or any attached interrogatories within 10 days (if out of the county of issuing court) or be liable to judgment for the total amount of the support debt.

(2) No other duties or powers of garnishee regarding notice or pleading on behalf of defendant are set out.

PENNSYLVANIA

STATUTES:

NOTE: in 1993, all of the Pennsylvania laws dealing with family law matters have been consolidated into one volume, 23 PA. CONS. STAT. ANN. § _____, normally abbreviated 23 Pa.C.S.A § ___. Certain matters are also specifically mentioned in the Rules of Civil Procedure; the proper full cite for such rules is Pa. R.Civ.P, Rule _____, 42 Pa.C.S.A., but again in working parlance may be referred to (as they are below), as Pa. R.Civ.P. _____. Although Pennsylvania has a unified bar, there are nevertheless certain Local Rules and forms, not mentioned in this review below, that still govern practice,particularly in the two great urban centers, Allegheny County (Pittsburgh and suburbs) and Philadelphia County. Please call the "Prothonotary," "Court Administrator," or "Clerk of Family Court," of the appropriate county for help; their functions vary by county.

I. Marriage - 23 Pa.C.S.A §§ 1101 - 1905 (1991 & Supp. 1995).

II. Divorce - 23 Pa.C.S.A. §§ 3101 - 3707 and Pa. R.Civ.P. 1920.1-1920.92 (1991 & Supp. 1995).

III. Support (Child/Spousal) - 23 Pa.C.S.A. §§ 4301-4540 and Pa. R.Civ.P. 1910.1-1910.50 (1991 & Supp. 1995).

IV. Child Custody - 23 Pa.C.S.A. §§ 5301-5366 and Pa. R.Civ.P. 1915.1-1915.25 (1991 & Supp. 1995).

(NOTE: unless a textual change noted, changes in citation mean that text remains the same.)

MARRIAGE REQUIREMENTS:

(1) Age - 18 without custodial parental consent. Under 18 requires parental consent. Under 16 requires judicial approval. 23 Pa.C.S.A § 1304(b).

(2) Medical Examination - Standard serological test for syphilis. 23 Pa.C.S.A. §§ 1304(a) and 1305.

(3) License Fee - 23 Pa.C.S.A. § 1105(a).

(4) Waiting Period - License may be issued upon expiration of 3 days after filing of application. 23 Pa.C.S.A. § 1303.

(5) Solemnization - Any clergyman, justice of supreme court, judge of superior court, court of common pleas, orphan's court, commonwealth court, federal circuit court if the judge is a

resident of Pa., federal magistrate, district justice, magistrate, mayor, burgess or religious society in accordance with customs of such society may perform marriage. 23 Pa.C.S.A. § 1101.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Recognized. 23 Pa.C.S.A. § 1103. Present intent of the parties to form marriage contract is a crucial element in proving valid common law marriage.

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Not recognized.

PROHIBITED MARRIAGES: (revised to conform to the list in the Divorce code) All marriages between parents and children, brothers and sisters, uncles and nieces, aunts and nephews, first cousins, and if either party is insane or of unsound mind. 23 Pa.C.S.A. § 1304(e). Bigamy is prohibited. 23 Pa.C.S.A. § 3304(a).

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Bigamy, mental incompetence, non-age, alcoholism or drug addiction (must file within 60 days of ceremony), marriage within prohibited degrees of kinship, consent obtained by fraud or force, impotence at time of marriage. 23 Pa.C.S.A. § 3304 and § 3305.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - At least 1 party must have been domiciled in state for 6 months next preceding commencement of action. 23 Pa.C.S.A. § 3104(b).

(2) Military Provision - No statutory provision.

(3) Service of Process - Normal service in civil cases is by sheriff in-state, and by certified mail out of state. Family law actions, however, may also be served by certified mail in-state, and personally by a non-party. Service by publication permitted upon court order if address unknown. Pa. R.Civ.P. 402, 412, and 1910.4.

(4) Answer - Although Pennsylvania remains a strict fact-pleading state (i.e., a bare denial without stating counter-fact is an admission), no *Answer* is required in family law actions. However, to raise other grounds for divorce, or other claims (equitable distribution, alimony/support, custody) not mentioned

in the *Complaint*, plaintiff must amend *Complaint* or defendant must file *Petition*. Such grounds and claims may be raised until final decree issues. Pa. R.Civ.P. 1920.13-1920.15.

(5) Verification - *Complaint*, and any document alleging new facts, must be verified by the party, as well as signed by attorney (unless *pro se*). Verification may be either by acknowledgement before notary public, or by the following statement, signed by the party:

I verify that the statements made in this (*Complaint*) are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S.A. § 4904, relating to unsworn falsification to authorities.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE: (*Note reduction of waiting period from three years to two, and reduction in insanity period to 18 months*)

(1) Grounds - Two types of No-Fault ("irretrievable breakdown") divorce: 90 days after filing of divorce action if both parties consent, or 2 years after final separation. Fault divorce remains, but is rarely used, except as a scare tactic. Grounds are: adultery; wilful desertion without reasonable cause for 1 year; bigamy; sentenced to imprisonment for a term of 2 years; institutionalization for insanity for 18 months without reasonable prospect of discharge in next 18 months; one or more instances of cruelty endangering life or health; or a period of indignities that make the spouse's life burdensome. 23 Pa.C.S.A. § 3301.

(2) Defenses - Recrimination, condonation, connivance, collusion, and provocation retained as defenses to traditional grounds, but abolished as pertaining to petition based on irretrievable breakdown. 23 Pa.C.S.A. § 3307.

(3) Period of Separation - Separation is not a prerequisite for divorce unless 2 year separation is coupled with irretrievable breakdown as grounds for divorce. In this case, defendant's consent is unnecessary.

SEPARATION:

(1) Acknowledged Legal Status - No legal procedure for establishing separation or divorce *a mensa et thoro*, but separation occurs if the parties no longer cohabit the same residence. Parties may continue to live in the same dwelling, provided they have separate living quarters and do not account to each other for their whereabouts; they may even have occasional sexual relations without breaking the period of separation.

(2) Legal consequences of separation:

a) Property acquired after date of separation is non-marital. 23 Pa.C.S.A. § 3501(a)(4).

b) Sexual relations with a third party will not constitute adultery or affect alimony. 23 Pa.C.S.A. § 3701(b)(14).

(3) If a spouse fears physical or sexual abuse (verbal or emotional is not enough), to self or children, from the other spouse or other family member or intimate partner, then victim spouse may apply at courthouse or at district justice (what other states call a justice of the peace or magistrate) for a Protection from Abuse Order (PFA). Temporary order issued immediately, with full hearing within 10 days; may evict abuser from dwelling, and may order temporary custody. Violation of order punishable by imprisonment.

(4) Effect of Separation Agreement on Divorce Decree - May be incorporated into divorce decree if free from fraud or coercion, and not directly conducive to procurement of divorce. Also, whether agreement merges with decree depends on parties' intent. Millstein v. Millstein, 311 Pa. Super. 495, 457 A.2d 1291 (1983).

TIME REQUIRED BEFORE REMARRIAGE: None.

RECOGNITION OF FOREIGN DIVORCES: Foreign decree provisions are recognized and can be enforced in this state. 23 Pa.C.S.A. § 3705.

ALIMONY AND CHILD SUPPORT:

(1) The court may require that an obligor pay a designated percentage of a child or spouse's reasonable and necessary health care expenses, and in some cases, require health care coverage. Failure to comply with this would serve as an arrearage. 23 § 4324. Child and spousal support guidelines establish a rebuttable presumption of the proper level of support. § 4322. Reasonable child care expenses can be added to the Guideline amount. Pennsylvania imposes a 50% cap (vs. the 65% Federal cap) on the total amount of support.

(2) Alimony is an order for support granted by Pennsylvania or any other state to a spouse or former spouse in conjunction with a decree granting a divorce or annulment. 23 Pa.C.S.A. § 3701.

(3) "Order for Support" includes assistance imposed or imposable by law of any court for failure to support a spouse or child. "Support" is defined as care, maintenance, and financial assistance. 23 § 4302.

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution. 23 Pa.C.S.A. § 3502.

(2) Fees Awarded - Court may award attorney's fees and costs. 23 Pa.C.S.A. § 3502(e)(7).

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: Adopted 1968. Presently codified at 23 Pa.C.S.A. §§ 4501-4540.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Guidelines - "Best interest of the child" controls; "Tender Years" Doctrine (i.e., award small child to mother) abolished. Parents will be given priority over non-parents, although a relationship in loco parentis (actual primary caretaker of child) can raise one's status to that of a parent. Court will consider which parent will assure a reasonable and continuing contact with other parent, and will also consider the past or present violent or abusive conduct of the parents and their adult household members. 23 Pa.C.S.A. § 5303(a). "Shared" (50-50) custody is possible if parents can work together for the good of the child, and do not live so far apart as to make it impracticable. 23 Pa.C.S.A. § 5304. With or without a custody order, permanently moving out of state with the child can be enjoined by the court, unless consent of the other parent or court's permission has been obtained. 23 Pa.C.S.A. § 5308 and 18 Pa.C.S.A. § 2904.

(2) Judicial lodestones - Courts normally award primary custody to primary caretaker of child; stability of home is important. Allegheny County automatically orders Home Study by social worker and parenting evaluation by a psychologist; if these experts agree, hard to fight. Counties vary greatly in their deference to child's wishes: maxim in Allegheny county is "16 - year-olds are like elephants-- they sleep where they want to," whereas in neighboring Beaver County the court feels that the decision of choosing the custodial parent is an unfair burden to place on a child, and can lead to bribery of the child.

GRANDPARENTS VISITATION RIGHTS: Grandparents and great-grandparents may petition for custodial or visitation rights, which will be granted if it is in the best interest of the child, will not interfere in the parent-child relationship, and one of three situations exist:

23 Pa.C.S.A. § 5311 - the parent of their grandchild is deceased;

23 Pa.C.S.A. § 5312 - parents have filed for divorce or have separated for 6 months; or

23 Pa.C.S.A. § 5313 - child has lived at least 12 months with that grandparent or great-grandparent.

UNIFORM CHILD CUSTODY JURISDICTION ACT: 23 Pa.C.S.A. §§ 5341-5366.

CRIMINALIZATION OF CHILD SNATCHING: A person who knowingly takes or keeps child from lawful custodian is subject to felony penalties. 18 Pa.C.S.A. § 2904.

COMPLIANCE WITH CHILD SUPPORT ENFORCEMENT AMENDMENTS OF 1984: Act 66 of the 1985 Pennsylvania Legislative Session, codified at §§ 23 4301 to 4540 contains extensive provisions implementing the federal statutory requirements.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: 23 Pa.C.S.A. §§ 4301-4354.

(1) Wages can be garnished for current child support and alimony. 23 Pa.C.S.A. § 4348.

(2) All orders for support shall provide for the mandatory attachment of obligor's income unless the obligor is not in arrears equal to or greater than one month' support obligation, AND there is good cause not to attach. 23 Pa.C.S.A. § 4348(b).

PROCEDURES:

(1) The Supreme Court shall by general rule provide for expedited procedures for the determination of support. The Supreme Court shall also provide an alternate expedited procedure which may be adopted by local rule of the courts of common pleas. 23 § 4342(a-b). Currently, an office called "Domestic Relations" schedules an informal hearing with a support officer. Appeal: 20 days to file "Exceptions." Currently, one addresses an office at the county courthouse called "Domestic Relations" to request spousal or child support, alimony *pendente lite* (APL, and enforcement of post-divorce alimony provisions. It costs nothing to file a Complaint in Support (APL or post-divorce alimony will require prior action by one's attorney, however), and the personnel will help the complainant fill out the paperwork, including a RURESA action if appropriate. Pennsylvania, unlike some states, will make a good faith effort to collect support for out-of-state complainants. Domestic Relations schedules an informal hearing for the parties with a Domestic Relations officer, who will issue

either an agreed order or a recommendation. One has 20 days after a recommendation is issued to file Exceptions (what one titles an appeal from a Domestic Relations or Custody Hearing officer).

(2) A judgment of arrears is not required. Further, the court may on its own motion, order the attachment of the obligor's income where the court has a reasonable basis to believe the obligor will not comply with the support order. 23 Pa.C.S.A. § 4348(b).

(3) Service of process can be accomplished by any adult person (personal service) or by certified or registered mail.

(4) The obligor shall be given advance notice prior to the attachment of his or her income. Such notice will include: 1) the amount to be withheld; 2) notice of how and when the order may be contested; 3) that the order will apply to current and future employers; 4) that the only grounds for contesting the order shall be mistake of fact; 5) that attachment will occur in 10 days of issuance. 23 Pa.C.S.A. § 4348(e).

(5) Answer of garnishee is not required. 23 Pa.C.S.A. § 4348(e)(1)(iv).

(6) Payment must be sent to the domestic relations section within ten (10) days of the date obligor is paid. The employer may combine attachment payments into a single payment to the domestic relations section. 23 Pa.C.S.A. § 4348(i)(1-6).

(7) Pre-process interrogatories are not required. However, the Domestic Relations office will send out an income and expense statement for each party to fill out.

(8) Prior to the court order being served on the garnishee, a complaint is required to be served on defendant, who has 10 days to answer. A Domestic Relations hearing is scheduled; the hearing may occur up to eight weeks after the filing of the complaint. Note that the period of support (an arrearage!) begins as of the date of the filing of the complaint. On the other hand, support will not be calculated for the period before the filing. After hearing, recommendation, and the passage of the 20-day Exceptions period, the recommendation becomes a final order, which cannot be modified for six months, except for major change in circumstances. Garnishee must notify debtor of the order. 23 Pa.C.S.A. § 4348(e)(1).

(9) An order of attachment for support shall have priority over all other attachments, garnishments, or wage assignments. 23 Pa.C.S.A. § 4348(o).

(10) The court may attach other assets including trusts, private, public and state pensions, to insure payment of support obligation. 23 Pa.C.S.A. § 4348(n).

STATE EXEMPTIONS:

(1) There is no exemption for child support or alimony, except that for alimony arrearages there is a fifty percent (50%) exemption. The maximum amount of any attachment under this section shall not exceed the limits set for in the Consumer Credit Protection Act, 15 U.S.C. § 1673. 23 § 4348(g).

(2) There are no discretional or jurisdictional exemptions. In determining support, no distinction will be made in reference to the current marital status of the parents. 23 § 4323(b).

(3) There is no statutory distinction between garnishment of current earnings and retired pay.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) A garnishee-employer who willfully fails to comply with an order of attachment may be adjudged in contempt, and committed to jail or fined by the court. 23 § 4348(k).

(2) The court may, as a general rule, attach funds or property of an employer. 23 § 4348(k)(2).

PUERTO RICO

STATUTES:

I. Marriage - P.R. LAWS ANN. tit. 31, §§ 221 to 265 (1993).

II. Divorce - P.R. LAWS ANN. tit. 31, §§ 321 to 381 (1967 & Supp.).

P.R. LAWS ANN. tit. 31, §§ 3551 to 3562 (1991).

MARRIAGE REQUIREMENTS:

(1) Age - 21. Minor needs parental consent. Minimum age for male 18; female 16. Minors of both sexes who have reached 18 do not need parental consent when proven that woman has been raped, seduced, or is pregnant. § 232.

(2) Medical Examination - Standard serological test for venereal disease. Medical certificate is good for 10 days. After the 10 days have elapsed, the couple may not contract until a new certificate is issued. §§ 235, 236, 254.

(3) License Fee - No fee.

(4) Waiting Period - None required. However, a divorced woman must provide a medical certificate stating whether she is pregnant, if she remarries within 301 days, § 232a. This certificate, if positive, shall constitute presumption of paternity of the spouse of the dissolved marriage.

(5) Solemnization - Any clergyman, judge (including federal), or justice of the peace may solemnize a marriage. § 243.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Not recognized.

(2) Marriage by Proxy - Marriage may be contracted by mandate through special power of attorney. § 253. A medical certificate is required from a practicing physician that the party marrying by proxy is not suffering from insanity, idiocy, syphilis, or any venereal disease. § 254.

(3) Marriage by Contract - Not recognized.

PROHIBITED MARRIAGES: Marriage of any person suffering from insanity, idiocy, venereal disease, insanity or impotence. All marriages between parents and children, ancestors and descendants,

first cousins, parents and adopted children, and descendants of adopting parents and adopted children while adoption exists. Also bigamous marriages and minors without the required parental consent. §§ 232-235.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Insanity, idiocy, impotence, or venereal disease existing at time of marriage and continuing at time action instituted. § 235.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - Plaintiff may obtain divorce if he or she has resided 1 year on the island before filing complaint, or if the ground for divorce is committed in Puerto Rico, or if one of spouses resides in jurisdiction. § 331.

(2) Military Provision - No statutory provision.

(3) Service of Process - Nonresident defendant may be served by publication upon showing that he is unavailable for personal service in territory. Mailing of notice must accompany publication if defendant's address known.

(4) Answer - Within 20 days from personal delivery of summons and complaint outside territory, or if service by publication, within 20 days of last publication.

(5) Verification - No statutory provision.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Adultery, conviction of felony, alcoholism, drug addiction, cruelty, abandonment for 1 year, incurable impotency, attempt to prostitute children or wife, separation for 2 years (no fault), incurable insanity for period of more than 7 years. § 321. Mutual consent - as of May 1978, the Supreme Court of Puerto Rico declared unconstitutional any disposition tending to prohibit divorce based on the mutual consent of the spouses.

(2) Defenses - Traditional defenses have been abolished as to divorce based on grounds of separation.

(3) Period of Separation - No statutory provision.

TEMPORARY MEASURES WHILE DIVORCE SUIT IS PENDING:

Alimony - Spouse is entitled to bring motion for separate maintenance while divorce is pending. §§ 342-343. If spouse suing for divorce has left or will leave, the conjugal domicile, court will designate a dwelling to be resided in until termination of the trial.

SEPARATION:

(1) Acknowledged Legal Status - Spouse entitled to bring action for separate maintenance while divorce pending. The amount will be based proportionately to his or her means. § 343.

(2) Effect of Separation Agreement on Divorce Decree - No statutory provision.

TIME REQUIRED BEFORE REMARRIAGE: No waiting period. If remarry within 301 days, see § 232a.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT:

(1) If one spouse has insufficient means to provide for his or her maintenance during the suit, the superior court shall order the husband or wife to pay the other party for his or her separate maintenance in proportion to his or her means. Tit. 31, §§ 343 and 385.

(2) Children are entitled to support from their parents. Tit. 31, §§ 383 and 384.

PROPERTY DISTRIBUTION:

(1) Effect of Divorce - Divorce requires a separation and division of conjugal society and a distribution of property. § 381.

(2) Method -

(a) Community property or conjugal society. §§ 3621 to 3701.

(b) An exception can be made by signing a deed before a Notary Public prior to marriage which specifically excludes the proposed marriage from the conjugal society (community property) relationship. §§ 3551 to 3562.

(2) Fees Awarded - Court may order payment of alimony during suit when a spouse has insufficient means of support. The amount will be proportionate to the spouse's means. § 343.

(3) Should the marriage be contracted in a foreign country, between a Puerto Rican and a foreign woman or between a foreigner and a Puerto Rican woman, and the contracting parties have not stated or stipulated anything with regard to their property, it shall be understood, when the husband is a Puerto Rican, that he marries under the system of the legal conjugal partnership, and when the wife is a Puerto Rican, that she marries under the system of laws in force in the husband's country. § 1277.

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: Tit. 32, §§ 3311 to 3312.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Best interest of the child. Tit. 31, § 383.

(2) Judicial Approach - Best interests of child control.

GRANDPARENTS VISITATION RIGHTS: No statutory provision.

UNIFORM CHILD CUSTODY JURISDICTION ACT: Not adopted.

CRIMINALIZATION OF CHILD SNATCHING: Any person who deprives child from lawful custodian is punishable by imprisonment not exceeding 6 months or a fine of up to $500 or both. If the child is taken outside the territory, it shall be deemed an aggravated offense punishable by a minimum of 3 years in prison and a maximum of 5 years. Tit. 33, § 4244.

ADOPTION: Tit. 31, §§ 531 to 539. See also, Appendix E.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: P.R. LAWS ANN. tit. 32, §§ 1130, 2971 (1990 & Supp. 1990).

(1) All claims for temporary maintenance shall be governed by the procedure provided for actions of unlawful detainer. An appeal lies against a judgment rendered in this class of actions. But such appeals shall not be an obstacle to the execution of the judgment. Tit. 32, § 2971.

(2) There is no right to attach unearned salaries of an employee, since ordinarily no right to the salary arises until the services are rendered. Therefore, an employer cannot be compelled against his will to comply with an order of attachment by deducting part of the salary of an employee, unearned at the time of the

attachment, even though the employee has so agreed. Rodriguez v. Fontes, 51 P.R.R. 648 (1937); F.N. Bank of Boston v. Antonio Santisteban & Co., 181 F. Supp. 366 (D.P.R. 1960), affirmed, 285 F.2d 855.

PROCEDURES:

(1) A bond shall be executed on condition that if the claimant fails to justify his claim, he shall return the property to the attaching officer, to his successor or the depositary of the property, and shall be liable for any damage or impairment sustained by the same, including total loss. The claimant shall likewise pay any other compensation the court deems fair and reasonable under the specific facts of the case. If the claimant prevails, the bond shall be released. Tit. 32, App III R 22.1.

(2) Whenever a marshal executes a writ of execution, a writ of attachment, or any other order against any item of personal or real property, and said property, or any part thereof or any interest in the same is claimed by one not a party to the action, said third party shall be entitled to bring a motion to intervene. The procedure to intervene in relation to real or personal property shall be governed by these rules. Tit. 32, App III R 21.5.

(3) In cases where the third-party intervenor wishes to obtain possession of the attached property, he shall file a motion to that effect and the court shall decide on it after holding a hearing to give the parties the opportunity to present their views on the intervenor's motion. If the motion is granted, the third-party intervenor shall, in order to have possession restored to him, give security for the amount of the attachment, plus any other sum determined by the court to protect the rights of the affected party. Tit. 32, App III R 21.6.

STATE EXEMPTIONS:

Three-fourths of the earnings of the judgment debtor for personal services rendered at any time within 30 days preceding the levy of execution or levy of attachment are exempt when it appears by the debtor's affidavit, or otherwise, that such earnings are necessary for the use of the family residing in this Commonwealth, supported wholly or in part by his labor. Tit. 32, § 1130(7).

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

There are no statutory references to the garnishee's obligation to raise defenses on behalf of the defendant, or concerning the garnishee's standing to challenge legal process or waive technical defects and jurisdictional matters.

Puerto Rico

RHODE ISLAND

STATUTES:
I. Marriage - R.I. GEN. LAWS §§ 15-1-1 to 15-4-1 (1988 through 1995 Cum. Supp.).
II. Divorce - R.I. GEN. LAWS §§ 15-5-1 to 15-5-29 (1988 through 1995 Cum. Supp.).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Minimum age 16 for females and 18 for males. Persons under minimum age may be married upon approval of state department of social welfare. § 15-2-11.

(2) Medical Examination - Standard serological test for venereal disease. Also, females under 55 must be tested for rubella immunity. § 15-2-3.

(3) License Fee - Fourteen dollars ($14). § 15-2-9.

(4) Waiting Period - None. § 15-2-1.

(5) Solemnization - Any clergyman; justice or former justice of family court, supreme court, superior court or district court; associate justice; clerk of court; or religious societies (Quaker or Bahai) may perform marriage. § 15-3-5.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Recognized by case law.

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Is recognized, subject to statute of frauds. § 9-1-4.

PROHIBITED MARRIAGES: Marriages between parents and children, ancestors and descendants, brothers and sisters, uncles and nieces, aunts and nephews. A male may not marry his stepmother, stepdaughter, grandfather's wife, grandson's wife, mother-in-law, wife's grandmother, daughter-in-law, or wife's granddaughter. (Same prohibition applies to female in corresponding degrees.) However, marriages between Jews within degrees of consanguinity permitted by their religion are valid. § 15-1-4. Bigamous marriages, and marriages involving mentally incompetent persons, are prohibited. Anyone who knowingly performs a bigamous marriage shall be imprisoned for a maximum of six (6) months, or fined up to one thousand dollars ($1,000). §§ 15-1-1 to 15-1-5 and 15-3-11.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: No statutory provision.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - One party must have been domiciled in state and have resided for period of 1 year next preceding filing of complaint. § 15-5-12.

(2) Military Provision - Residency and domicile of person immediately prior to commencement of service in armed forces or immediately prior to his absence from state in connection with performance of duty remains his residency and domicile for purposes of this section until 30 days after termination of service. § 15-5-12.

(3) Service of Process - Nonresident defendant whose address is known must be served personally outside state. Service by publication permitted when address unknown. Must show reasonable and due inquiry for six months if address unknown. §§ 15-5-20 and 15-5-21.

(4) Answer - Within 20 days of service of process unless court directs otherwise.

(5) Verification - Complaint must be verified. § 15-5-11.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Impotency, adultery, extreme cruelty, wilful desertion for 5 years (or less in discretion of the court), alcoholism, drug addiction, general gross misbehavior, denial of necessities for subsistence by husband for one year, separation for period of 3 years, no fault on basis of irreconcilable differences that have caused irremediable breakdown of the marriage. §§ 15-5-2 to 15-5-3.1.

(2) Defenses - Collusion. § 15-5-4.

(3) Period of Separation - Three (3) years if separation is grounds for divorce. § 15-5-3. Ordinary and usual relations that exist between married persons, including intercourse, must not continue.

SEPARATION:

(1) Acknowledged Legal Status - Divorce from bed and board may be granted. § 15-5-9.

(2) Effect of Separation Agreement on Divorce Decree - No statutory provision. Agreements must be fair, must not be designed to induce improper conduct of parties in divorce proceedings, and must not mislead the court.

TIME REQUIRED BEFORE REMARRIAGE: Final decree becomes operative 3 months after trial and decision. Party may remarry upon expiration of 3 months. Final decree from the bond of marriage may be entered ex parte and in chambers on the suggestion of the prevailing party at any time within 30 days next after the expiration of 3 months from the date of decision. After the expiration of the 30 days, final decrees may be entered only in open court and on motion. § 15-5-23.

RECOGNITION OF FOREIGN DIVORCES: Foreign divorce has no force or effect in this state if both parties domiciled in this state at time of proceeding. §§ 15-6-1 to 15-6-4 (Uniform Divorce Recognition Act).

ALIMONY AND CHILD SUPPORT:

(1) Family court has jurisdiction to award counsel fees in actions to provide for the education, maintenance, and support of children of all persons divorced. § 15-5-16; Gower v. Gower, 101 R.I. 719, 227 A.2d 191 (1967). § 15-5-16 enumerates factors to consider when awarding child support. Child support guidelines constitute a rebuttable presumption of the appropriate level of child support.

(2) If the court in a divorce decree has ordered the husband to pay a certain sum per week, then he has no further duty of support.

(3) Alimony is the allowance which a spouse may be compelled to pay to the other for maintenance when they are living apart from each other or have been divorced. See Gilbert v. Hayward, 37 R.I. 303, 92 A. 625, 627 (1914).

(4) The right to alimony is based on the husband's duty to provide for present and future support of his wife. The wife is entitled to only that which is equitable. Brown v. Brown, 48 R.I. 420, 138 A. 179 (1927).

(5) The right to alimony does not exist apart from the right to be supported. Prosser v. Prosser, 51 R.I. 58, 150 A. 754 (1930).

(6) Wage assignments for support are statutorily recognized. § 15-5-24.

Rhode Island

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution.

(2) Fees Awarded - Court may award attorney's fees and costs. § 15-5-16.

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: §§ 15-11-1 to 15-11-42.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Statute refers to "best interest of the child." Receipt of public assistance shall not be a factor, domestic violence will be a factor. § 15-5-16.

(2) Judicial Approach - Best interests of child control.

GRANDPARENTS VISITATION RIGHTS: Court may grant reasonable visitation rights when in child's best interests. §§ 15-5-24.1 to 15-5-24.3.

UNIFORM CHILD CUSTODY JURISDICTION ACT: §§ 15-14-1 to 15-14-26.

CRIMINALIZATION OF CHILD SNATCHING: Intentional removal of or detaining of child outside the state, with intent to deny custodial parent's right to custody, is a felony and can be punished for a term of two (2) years in prison or $10,000 or both. § 11-26-1.1.

COMPLIANCE WITH CHILD SUPPORT ENFORCEMENT AMENDMENTS OF 1984: Rhode Island substantially revised its domestic relations law concerning child support to incorporate changes mandated by the Support Enforcement Amendments.

ADOPTIONS: §§ 15-7-2 to 15-7-26.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: R.I. GEN LAWS §§ 9-26-4, 10-17-1 to 10-17-22, 15-5-24 to 15-5-29 (1988 and Cum. Supp. 1994).

(1) An action for child support or alimony must be reduced to judgment before wages can be garnished. § 10-17-2.

(2) Each judgment containing support provisions and each order for support shall include an order directing the obligor to assign such income as is currently due or to be due in the future, in such amount as will be sufficient to meet the support payments imposed by the court. § 15-5-24.

(3) The assignment shall take effect when the obligor has failed to make a support payment in full within 14 days of the due date, or if the court finds that the obligor has a history of non-support or is likely to default on the timely payment of child support, the court shall order the assignment to take effect immediately. § 15-5-24.

(4) In cases where an assignment has not been secured, the court may order a garnishing agent of the obligor to withhold from the obligor's income such amounts as shall satisfy the obligor's previous arrearage in support payments, current payments due, and attorney's fees. § 15-5-25.

PROCEDURES:

(1) The following courts have jurisdiction to hear garnishment actions: Rhode Island Family Courts, District Courts, and Superior Courts.

(2) In the event of a support default, the person entitled to receive such support may file an application to the court for both current support and arrearages. No assignment shall become effective unless the obligor has been given notice, by way of pleadings or otherwise, and the exemption to which he or she may be entitled. § 15-5-24.

(3) Garnishee can be served by the sheriff or his deputy within the county, or by any other person authorized by law or appointed by the court. § 9-26-2.

(4) Attachment of the writ of attachment is required.

(5) Garnishee must file an answer under oath as to all property, even though no property is held. §§ 10-17-2 and 10-17-3. Copy of affidavit must be sent to plaintiff's attorney.

(6) When primary defendant questions title of personal estate attached, garnishee may (and seemingly should) also set forth the adverse claim in his affidavit and request the court to determine his liability as garnishee.

(7) Pre-process interrogatories are not required.

(8) A court having jurisdiction over a defendant or his assets, including his personal estate or real estate, may authorize a plaintiff to attach same, or any part thereof, after hearing on a motion to attach, notice of which has been given to the defendant . . . At the time of the commencement of the action, or at any time thereafter, a plaintiff must file a motion in said court for authority to attach said defendant's assets, including his personal

or real estate, and the said motion must state the day, time, and place of hearing and a copy must be served by the process server on the defendant at least five days before the fixed date of hearing.

(9) Any assignment for child support or alimony shall have priority over any other attachment, garnishment, execution, or wage assignment unless otherwise ordered by the court. § 15-5-24(7).

STATE EXEMPTIONS:

(1) There is a $50 weekly exemption of debtor's earnings due or payable to any other debtor. § 9-26-4.

(2) Debtor is entitled to this exemption on each writ served. See Palmisciano v. Rapone, 38 R.I. 10, 94 A. 852 (1915).

(3) For collection of any support, federal law exemptions apply.

(4) The state has no statutory distinction between garnishment of current earnings and retired pay.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) Garnishee is not required to raise defenses on behalf of the defendant.

(2) The primary-defendant may question title of personal estate attached, § 10-17-19. In such a case, the garnishee may (and seemingly should) also set forth the adverse claim in his affidavit and request the court to determine his liability as garnishee. § 10-17-13.

(3) Any garnishee who fails to deliver income pursuant to a wage assignment or wage withholding order, shall be held personally liable for amount of such income which was not delivered, together with costs, interest, and reasonable attorney's fees. § 15-5-26.

SOUTH CAROLINA

STATUTES:

I. Marriage - S.C. CODE §§ 20-1-10 to 20-1-380 (1976 & Supp. 1995).

II. Divorce - S.C. CODE §§ 20-3-10 to 20-3-230 (1976 & Supp. 1995).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Minimum age for male 16, female 14. Persons under minimum age may be married when parental consent obtained. § 20-1-250. Documentary evidence is required to prove age of individuals under 25, § 20-1-270.

(2) Medical Examination - None required.

(3) License Fee - A "fee provided by law." §§ 20-1-230, 20-1-370.

(4) Waiting Period - License may be issued 24 hours after written application therefor. § 20-1-220.

(5) Solemnization - Any minister of gospel, Jewish rabbi, public officers authorized to administer oaths and Quaker religious ceremonies may solemnize marriage. § 20-1-20.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Recognized by case law.

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Recognized.

PROHIBITED MARRIAGES: All marriages between parents and children, ancestors and descendants, brothers and sisters, uncles and nieces, aunts and nephews. A man may not marry his stepmother, stepdaughter, grandfather's wife, grandson's wife, mother-in-law, wife's grandmother, wife's granddaughter, daughter-in-law. (Same prohibition for female in corresponding degrees of kinship.) Also, bigamous marriages and those involving mental incompetents. §§ 20-1-10 and 20-1-80.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Showing of lack of consent or other cause substantiating claim that no real contract entered providing there is no cohabitation. § 20-1-530. Action for annulment cannot be

brought against a military service man or woman "beyond the seas," until he or she has returned for three months, unless he or she consents to such a proceeding. § 20-1-560.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - Either party must have resided in state at least 1 year prior to commencement of action. Caveat: When both parties are residents of state, plaintiff need only have resided in state 3 months prior to commencement of action. § 20-3-30. Physical presence for the appropriate amount of time as a result of military service will satisfy the residency requirement.

(2) Military Provision - § 20-3-100 Attempt at Reconciliation when one party is in armed forces overseas. When either of the parties is a member of the armed forces and is serving outside the continental limits of the United States, an affidavit by such party, taken before any officer of the armed forces authorized to administer an oath, to the effect that . . . a reconciliation is impossible, shall be accepted by the court that an unsuccessful attempt to reconcile the parties has been made.

(3) Service of Process - Nonresident defendant may be personally served outside of state or served by publication upon showing of unavailability within state. § 20-3-70.

(4) Answer - Within 20 days of service of process.

(5) Verification - Petition must be verified.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Adultery, desertion for 1 year, physical cruelty, habitual drunkenness (alcohol or drugs), separation without cohabitation for a period of 1 year (no fault). § 20-3-10.

(2) Defenses - Collusion. § 20-3-20. Condonation also is recognized by case law. Buero v. Buero, 143 S.E.2d 719 (S.C. 1965).

(3) Period of Separation - One (1) year as a grounds for divorce. § 20-3-10.

SEPARATION:

Effect of Separation Agreement on Divorce Decree - No statutory provision.

TIME REQUIRED BEFORE REMARRIAGE: No waiting period.

RECOGNITION OF FOREIGN DIVORCES: Divorce obtained in another state has no force or effect in this state if both parties to marriage were domiciled in this state at time of proceeding. §§ 20-3-410 to 20-3-440 (Uniform Divorce Recognition Act).

UNIFORM DIVORCE RECOGNITION ACT: §§ 20-3-410 to 20-3-440.

ALIMONY AND CHILD SUPPORT:

(1) All orders for support (either alimony or child support), entered or modified on or after 1 October 1985, must contain a provision for income withholding procedures to take effect in the event a delinquency occurs. § 20-7-1315(B)(1). Child support guidelines establish a rebuttable presumption of the appropriate level of child support. § 20-7-852.

(2) In divorce proceedings and in actions for separate maintenance and support, the court may grant alimony or separate maintenance and support in such amounts and for such terms as the court considers appropriate as from the circumstances of the parties and the nature of the cause. No alimony may be awarded a spouse who commits adultery before the earliest of these two events: (1) the formal signing of a written property or marital settlement agreement or (2) entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties. Alimony and separate maintenance and support awards may be granted pendente life and permanently in such amounts and for periods of time subject to conditions as the court considers just. See statute for considerations. § 20-3-130.

(3) In all actions for separate support and maintenance, legal separation, or other marital litigation between the parties, allowances of alimony and suit money and allowances of alimony and suit money pendente lite shall be made according to the principles controlling such allowance and actions for divorce a vinculo matrimonii. § 20-3-140.

(4) In any action for divorce from the bonds of matrimony, the court may at any stage of the cause, or from time to time after final judgment, make such orders touching the care, custody and maintenance of the children of the marriage and what, if any, security shall be given for the same as from circumstances of the parties and the nature of the case and the best spiritual as well as other interests of the children may be fit, equitable, and just. § 20-3-160.

South Carolina

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution.

(2) Fees Awarded - Court may award attorney's fees and costs. §§ 20-3-120 and 20-3-140.

UNIFORM INTERSTATE FAMILY SUPPORT ACT:
§§ 20-7-960 to 20-7-980. See also "Income Withholding to Enforce Support Obligations," §§ 20-7-1315 to 1329.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Religious faith shall be considered. § 20-7-1520. "Tender Years Doctrine" abolished. § 20-7-1555.

(2) Judicial Approach - Best interests of child control.

GRANDPARENTS VISITATION RIGHTS: Family court has jurisdiction to order periods of visitation for grandparents. § 20-7-420.

UNIFORM CHILD CUSTODY JURISDICTION ACT: §§ 20-7-782 to 20-7-830.

CRIMINALIZATION OF CHILD SNATCHING: Transporting a child under 16 outside state with intent to violate court order is a felony punishable by fine (discretionary) or imprisonment of up to 5 years or both. Return within 7 days is a misdemeanor. § 16-17-495.

ADOPTION: South Carolina Adoption Act, §§ 20-7-1646 to 20-7-1897.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: S.C. CODE § 20-7-1315, § 15-39-310 to § 15-39-490 (1985 & Supp. 1992).

(1) All orders for support (either alimony or child support), entered or modified on or after 1 October 1985, must contain a provision for income withholding procedures to take effect in the event a delinquency occurs. § 20-7-1315.

(2) Garnishment of wages for all actions other than child support remain unavailable in South Carolina as all current earnings are exempt. § 15-39-410. But action to initiate a wage assignment for the collection of delinquent and current child support is available as a result of 1985 legislation enacted to comply with the Child Support Enforcement Amendments of 1984.

PROCEDURES:

(1) For all orders issued or modified after January 3, 1994, the income of an obligor is subject to immediate withholding, without the requirement that an arrearage accumulate.

(2) The obligor must be served notice of the delinquency by regular mail. The notice shall inform the obligor that a delinquency has occurred and that a notice to withhold will be sent to obligor's employer within ten (10) days, failing correction of the arrearage. § 20-7-1315(E).

(3) An obligor may petition the court at any time prior to the occurrence of a delinquency seeking an order for income withholding to begin immediately. § 20-7-1315(C)(2).

(4) Payor shall be served notice to withhold 15 days after notice to obligor has been sent, provided obligor has not requested to stay service. The notice will direct the garnishee to withhold an amount sufficient to cover current support obligations. § 20-7-1315(E)(1).

(5) An additional amount of earnings may be withheld to cover any arrearage, until the arrearage is paid in full. § 20-7-1315(F)(2).

STATE EXEMPTIONS:

(1) All current earnings are exempt from garnishment, except for child support. § 15-39-410.

(2) For wage withholding, South Carolina follows the federal exemption of 15 U.S.C. 1673. § 20-7-1315(F)(4).

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) The garnishee is under no duty to raise defenses on behalf of obligor.

(2) Failure to comply with a withholding order of the court, will result in personal liability and possible fines for the payor. § 20-7-1315.

ALIMONY AND CHILD SUPPORT:

An "order for child support" means any order of a court which provides for periodic payments of funds for the support of a child or maintenance of a spouse or former spouse, whether temporary or final. § 20-7-1315(A)(1).

South Carolina

SOUTH DAKOTA

STATUTES:
I. Marriage - S.D. CODIFIED LAWS ANN. §§ 25-1-1 to 25-1-40 (1992 & 1995 Supp.).
II. Divorce - S.D. CODIFIED LAWS ANN. §§ 25-4-1 to 25-4-55 (1992).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Persons between ages of 16 and 18 require written parental consent. Persons under 16 may marry upon showing that female is pregnant or has given birth. § 25-1-9; see also §§ 25-1-13.

(2) Medical Examination - Repealed.

(3) License Fee - Forty dollars ($40). § 25-1-10.

(4) Waiting Period - None.

(5) Solemnization - Any clergyman, justice of supreme court, judge of circuit court, or mayor may perform marriage. § 25-1-30.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Common law marriages entered into before July 1, 1959, recognized. § 25-1-29.

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Not recognized.

PROHIBITED MARRIAGES: All marriages between parents and children, ancestors and descendants, brothers and sisters, uncles and nieces, aunts and nephews, first cousins, second cousins, a male with stepmother or stepdaughter (same prohibition for female in corresponding degrees of kinship). Also, bigamous marriages. Note: This prohibition includes relationships that arise through adoption. §§ 25-1-6 to 25-1-8.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Bigamy, mental incompetence at time of marriage, non-age, consent obtained by force or fraud, physical incapacity at time of marriage (continuing and apparently incurable). §§ 25-3-1 to 25-3-8. An action alleging fraud or physical incapacity must be brought within 4 years of marriage.

South Dakota

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - Plaintiff must be domiciled in state at time action is commenced. § 25-4-30.

(2) Military Provision - Plaintiff who is stationed in state at time action is commenced and who is still within state at time of decree satisfies jurisdictional requirements. § 25-4-30.

(3) Service of Process - Nonresident defendant may be served by publication upon showing that he is unavailable for personal service within state. Mailing of notice must accompany publication when defendant's address is known.

(4) Answer - Within 30 days of service of process or last publication (exclusive of day of service or last publication).

(5) Verification - No statutory provision.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Adultery, extreme cruelty, wilful desertion, wilful neglect, alcoholism, conviction of felony, chronic mental illness for 5 years characterized by institutionalization, and irreconcilable differences. § 25-4-2.

(2) Defenses - Connivance, collusion, condonation, limitation or lapse of time. § 25-4-19. Note, however, that condonation can be revoked. § 25-4-26.

(3) Period of Separation - No statutory provision. (NOTE: There is a 60 day statutory waiting period between service and divorce hearing. § 25-4-34.

SEPARATION:

(1) Acknowledged Legal Status - An action for separate maintenance may be maintained without request for divorce, but must be made upon a ground for which a divorce action would lie. § 25-4-40.

(2) Effect of Separation Agreement on Divorce Decree - No statutory provision.

TIME REQUIRED BEFORE REMARRIAGE: No waiting period after decree.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT:

(1) Child support is defined under state law as a suitable allowance for the support of children. § 25-4-41. Guidelines at § 25-7-6.2 establish a rebuttable presumption of the appropriate level of child support. It may be pendente lite. § 25-4-38. It is thoroughly congruent with the federal definition; however, the state law does not provide for specific need payments. A parent's obligation to provide support for the child's education terminates when the child reaches the age of majority, where there is no contract or agreement requiring the parent to pay such support after the child reaches the age of majority. Warne v. Warne, 360 N.W.2d 510 (1984).

(2) Alimony is defined under state law as a suitable allowance for the support of the other party. § 25-4-41. It may be pendente lite. § 25-4-38. Federal law does not include specific need payments within the definition of alimony.

(3) Attorney's fees, costs and interest are properly awarded as elements of child support and alimony. §§ 25-4-38, 25-4-17.2.

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution.

(2) Fees Awarded - Court may award alimony during action to enable spouse to prosecute or defend action. § 25-4-38.

UNIFORM INTERSTATE FAMILY SUPPORT ACT: §§ 25-9B-101 to 25-9B-902. (Replaced the Revised Reciprocal Enforcement of Support Act repealed in 1994.)

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Best interests of child control. § 30-27-19. The court may modify judgment at any time or vacate judgment. § 25-4-45.

(2) Judicial Approach - Best interests of child control.

GRANDPARENTS VISITATION RIGHTS: Reasonable visitation rights may be granted. §§ 25-4-52 through 25-4-54. These rights terminate if the child is placed for adoption with one other than child's stepparent or grandparent.

UNIFORM CHILD CUSTODY JURISDICTION ACT: §§ 26-5A-1 to 26-5A-26.

CRIMINALIZATION OF CHILD SNATCHING: Any parent who takes child from the other parent without prior consent, or in violation of

visitation rights, is guilty of misdemeanor (1 year, $1,000, or both), except that removal of child from the state is felonious. §§ 22-19-9 and 22-19-10. A second violation in the state is a felony (5 years, $5,000, or both). More generally, any person who takes or entices child with intent to detain or conceal the child is guilty of a felony (ten years, $10,000, or both).

COMPLIANCE WITH CHILD SUPPORT ENFORCEMENT AMENDMENTS OF 1984: South Dakota enacted a schedule and guidelines for child support obligations (§ 25-7-7), repealed its prior law on wage assignments, and enacted new provisions for collection of child support in 1985-86. §§ 25-7A-1 to 25-7A-53.

ADOPTION: §§ 25-6-1 to 25-6-20 (Adoption of Children, generally) and §§ 25-6A-1 to 25-6A-14 (Interstate Compact on Adoption and Medical Assistance).

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: S.D. CODIFIED LAWS ANN. § 21-18-3 and §§ 25-7a-1 to 25-7a-53.

(1) The traditional remedy of South Dakota is a summons to garnishee. Service of the process compels the garnishee to withhold monies as of the date of service and through the date of answer. § 21-18-12. Service impresses the garnishee with personal liability.

(2) Upon entry of any order for support on or after July 1, 1986, an order for withholding of income shall be entered, which shall take effect immediately, unless the obligor or obligee demonstrates . . . that there is good cause not to require immediate income withholding, or if parties make an agreement providing for an alternate arrangement. If immediate income withholding is not required, withholding shall take effect if the obligor becomes delinquent in paying any part of the order for support, or upon the date the obligor requests withholding of income, whichever occurs first.

PROCEDURES:

(1) Unpaid installments of child support and alimony become judgments by operation of law. Holt v. Holt, 84 S.D. 671, 176 N.W.2d 51 (1970). Thus, the obligee need not reduce amounts due and owing to judgments. A mere decree of dissolution is sufficient. The obligee then proceeds by affidavit to cause execution to issue. The execution is then delivered to the sheriff and a summons is served on the garnishee. The affidavit must be annexed to the summons. §§ 21-18-3, 21-18-6, 21-18-7 and 21-18-11.

(2) The circuit court has presumptive jurisdiction over the subject matter. In the enforcement effort (not to be confused with the foundational judgment), the court is not required to exercise in personam jurisdiction over the obligor. Knittle v. Ellenbush, 159 N.W. 893 (1916).

(3) The remedy is ancillary. § 21-18-3.1. Therefore, the remedy is only as valid as the underlying execution and judgment. Garnishment of earnings may only be used following a final judgment on the principal action.

(4) Such garnishee summons, affidavit and garnishment disclosure may be served by certified mail, return receipt requested or personally by the sheriff of the county where any garnishee or defendant may be found, or by any other persons not a party to the action. The service shall be made and the same reheard, with proof of the service, to the person whose name is subscribed thereto, with reasonable diligence.

(5) The garnishee must file an answer within 30 days after service. The answer must be sworn, must touch upon the indebtedness of the garnishee as of date of service and date of answer, must include any set-off, and may include a claim of exemption. § 21-18-27. The answer of garnishee is conclusive unless properly traversed. A traverse is accomplished by serving notice in writing within 30 days that issue is taken. § 21-18-30. The answer of the garnishee and the traverse frame the issues; no other pleadings are required. The burden is on the obligee to prove all elements of the garnishee's liability by a preponderance of the evidence. Traverse as used herein includes all denials of the garnishee's answer by the obligee by whatever name.

(6) The garnishee has the option of surrendering the money in its hands to the clerk. This procedure will discharge the garnishee for that amount so far as the obligee is concerned. The garnishee also has the option to withhold monies and await the further order of the court, notwithstanding arguments "that is not the way we do it." Payment upon order discharges the liability of the garnishee to the plaintiff (for the amount confessed) and acquits the garnishee from liability on the same claim to the obligor.

(7) Interrogatories are authorized; however, these may be propounded only to a party in the action. Thus, the limitation will have to be ignored (on the assumption that a potential garnishee is a nominal party) or the agency will have to be made a party.

(8) There is no constitutional requirement that obligors be given post-judgment notice of an enforcement effort. However, state law requires the obligor be served within 10 days after service on the garnishee. Failure of notice is jurisdictional and renders the process served on the garnishee void. § 21-18-10. Notice of delinquency must be served on obligor prior to a wage withholding. Obligor may only contest this on mistake of fact grounds. § 25-7a-24.

STATE EXEMPTIONS:

(1) The amount actually withheld for support arrearages may not be in excess of 50% of wages, salaries, commissions, etc. However, the total amount of arrearage may be withheld from personal property, money, and credits, or other income not otherwise exempt. § 25-7a-32.

(2) The garnishee is not required to raise discretionary exemptions, but it may raise them. § 21-18-27.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) The garnishee must raise defenses and objections which are jurisdictional. As to defenses which are not jurisdictional, the garnishee may, but is not required to, raise and litigate them. There is no specific standing for the garnishee to request an accounting.

(2) The garnishee-payor shall transmit the amount withheld to the Department of Human Resources within five (5) days after the date the obligor is paid. § 25-7a-34.

TENNESSEE

STATUTES:
I. Marriage - TENN. CODE ANN. §§ 36-3-101 to 36-3-308 (1994 Supp.).
II. Divorce - TENN. CODE ANN. §§ 36-4-101 to 36-4-128 (1994 Supp.).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Persons under the age of 18 require written parental consent by both parents or consent of legal custodian. Under 16 requires judicial approval. §§ 36-3-105 to 36-3-108 and generally is only granted upon the pregnancy of the female.

(2) Medical Examination - Not Required

(3) License Fee - Varies from County to County. Generally $18.00 to $26.50. Checks are not accepted.

(4) Waiting Period - None. License may be issued by a County Clerk to a minor upon expiration of three (3) days after application and joinder of parents or legal guardian.

(5) Solemnization - Any clergyman, members of county legislative bodies, judges, chancellors, county clerks, governor, speaker of house and senate, retired judges, retired chancellors, and county executives except judges convicted of a felony or removed from office may perform marriage. Also recognized are the traditional marriage rites of the Religious Society of Friends. § 36-3-301.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Not recognized. However, a common law marriage validly entered in another state will be recognized.

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Not recognized.

PROHIBITED MARRIAGES: All marriages between parents and children, ancestors and descendants, brothers and sisters, uncles and nieces, aunts and nephews. A male may not marry his grandniece, stepmother, grandfather's wife, wife's grandmother, wife's granddaughter, or daughter-in-law. However, marriage between first cousins, second cousins and other degrees of consanguinity is not

specifically prohibited by Tennessee Law. (Same prohibitions for females in corresponding degrees of kinship). Also, bigamous marriages are void. §§ 36-3-101, 102.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Same as grounds for divorce or divorce from bed and board. Annulment may be granted for mental incapacity, non-age, fraud, duress, or fact that marriage was prohibited by law. §§ 36-4-101, 102; 36-4-119, 120.

LEGAL SEPARATION: Tennessee does not recognize any form of legal separation other than divorce.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - One party must have been domiciled in state for 6 months next preceding filing of complaint, and also must have been a resident in the County in which the divorce is filed for the preceding six months. An additional requirement is the parties must have last resided together as man and wife in the county in which the action is filed. § 36-4-104. NOTE: This section has been interpreted to apply only where divorce acts occurred out of state. A nonresident who moves to Tennessee and the subsequent divorce acts are committed in Tennessee need only establish domicile to go forward with a divorce petition; the six-month provision is not apposite. See Atchley v. Atchley, 585 S.W.2d 614 (Tenn Ct App. 1978).

(2) Military Provision - A member of armed forces or spouse who has been living in state for 1 year presumed to be domiciliary of this state for purposes of this Chapter. § 36-4-104. In addition, any person who is in the United States Military Full Time, or is called from the Reserves to active duty and maintains a domicile in Tennessee may also file for divorce in Tennessee in the county in which he was domiciled before entering the service.

(3) Service of Process - Nonresident defendant may be personally served outside state. Also service by publication allowed upon showing that defendant not available for personal service within state. § 36-4-108. See also § 36-4-103 for divorce sought because of irreconcilable differences.

(4) Answer - Within 30 days of service of process.

(5) Verification - Petition for divorce must be verified except those based on the ground of irreconcilable differences. § 36-4-107.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Impotence at time of marital contract and remains so, bigamy, adultery, willful desertion, conviction of infamous crime, attempted murder of spouse, pregnancy at time of marriage (husband unaware and not responsible), alcoholism, drug addiction, irreconcilable differences without contest (if contested irreconcilable differences insufficient ground for divorce. Additionally, on an irreconcilable differences divorce there can be no adjudication of property as all matters must be agreed to between the parties.), or separation for two (2) years, if there is no cohabitation and there are no minor children of the parties, improper marital conduct is also a ground for divorce and is not defined by statute. Any conduct which is outside the ordinary kin of the marital relationship will suffice. § 36-4-101.

(2) Defenses - Recrimination and condonation defenses to adultery. § 36-4-112. Justifiable cause is a defense to neglect as grounds for divorce. Any grounds for divorce must be generally denied and a bill of particulars or a more specific statement should be demanded.

(3) Period of Separation - Continual two (2) year period if suing on separation. No cohabitation in that period, no minor children. § 36-4-101(12). If it can be established that the spouse deserted, one year will suffice.

SEPARATION:

(1) Tennessee has no recognized legal separation. Tennessee does however, have a type of divorce known as divorce from bed and board. Customarily, a divorce from bed and board is used where pension benefits are in question or where there are religious grounds which would cause the parties not to have an absolute divorce.

TIME REQUIRED BEFORE REMARRIAGE: No waiting period. However, the divorce is not final until thirty days after the date of hearing. § 36-4-124.

RECOGNITION OF FOREIGN DIVORCES: No specific statutory provision. However, a certified and exemplified copy may be filed with the proper court of record in Tennessee along with the petition for enforcement.

ALIMONY AND CHILD SUPPORT:

(1) Court may order support and maintenance of either party and of the children according to the nature of the case and the circumstances of the parties. Court may fix some definite amount

to be paid in monthly, semimonthly, or weekly installments. Child support guidelines are mandatory in Tennessee. § 36-5-101. Enforcement fees also may be awarded. § 36-5-103. (Court may enforce orders and decree by sequestering rents and profits of real estate, etc., attorney fees, etc.

(2) Provisions in a divorce decree that husband would give wife life insurance policies and continue the premiums in effect were considered a property settlement rather than alimony. Prince v. Prince, 572 S.W.2d 908 (1978).

(3) Court is authorized to grant wife additional alimony for purpose of enabling her to pay attorney, and in practice such additional alimony is frequently designated simply as a fee to be paid to wife's counsel. Palmer v. Palmer, 562 S.W.2d 833 (1977).

(4) Under Tennessee law, a divorced father is obligated to pay a child's necessary medical expenses, and the guidelines for child support mandate that the father will either provide medical insurance or pay the costs of medical insurance. However, both parents are equally responsible for any necessary medical services to a child under the age of 18. Hickey v. Insurance Company of North America, 239 F. Supp. 109 (1965).

(5) In determining whether the granting of an order for alimony to a party is appropriate, and in determining the nature, amount, length of time, and manner of payment,t he court shall consider the following factors: (§ 36-5-101)

(a) relative earning capacity of both spouses;

(b) relative education and training and the necessity of a party to secure further education and training;

(c) duration of the marriage;

(d) age and condition of each party;

(e) separate assets of each party;

(f) standard of living of the parties established during the marriage;

(g) extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions to the education, training, or increased earning power of the other party;

(h) relative fault of the parties in cases where court deems it appropriate;

(i) other consequences the court deems relevant.

(6) A divorce may be granted without alimony and alimony may be granted without a decree of divorce, there being no necessary or absolute connection between divorce and alimony under the statute. Qualls v. Qualls, 589 S.W.2d 906 (1979).

Tennessee also makes provision for rehabilitative alimony to provide that the divorced spouse may complete their education or may re-enter the work force. Customarily, such an award is not to exceed three years and is a declining amount.

(7) It is improper to make a child support award by decreeing that a parent will assume a bank debt of the custodial parent. McDowell v. McDowell, 586 S.W.2d 110 (1979).

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution. § 36-4-121(a).

(2) Fees Awarded - Court may decree court costs against either party; § 36-4-122.

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: §§ 36-5-201 to 36-5-229.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Court award of custody is based on the welfare and interests of the child. § 36-6-101.

(2) Judicial Approach - Best interests of child control.

GRANDPARENTS VISITATION RIGHTS: Court may grant reasonable visitation rights when in best interests of child. § 36-6-301(a).

UNIFORM CHILD CUSTODY JURISDICTION ACT: §§ 36-6-201 to 36-6-225.

CRIMINALIZATION OF CHILD SNATCHING:

(a) It is the offense of custodial interference for a natural or adoptive parent, step-parent, grandparent, brother, sister, aunt, uncle, niece, or nephew of a child younger than 18 years of age or an individual adjudged to be incompetent to knowingly detain or move the child or individual adjudged to be incompetent from the vicinity where the child or person adjudged to be incompetent is found when the person knows that the detention or moving of the

child or person adjudged to be incompetent violates a temporary or permanent judgment or court order regarding the child's or incompetent's custody or care.

(b) It is a defense to custodial interference that the individual detained or moved in contravention of order of custody was returned by the defendant voluntarily and before arrest or the issuance of a warrant for arrest.

(c) custodial interference shall be a Class E felony unless the person taken from lawful custody is returned voluntarily by the defendant in which case custodial interference is a Class A misdemeanor.

COMPLIANCE WITH CHILD SUPPORT ENFORCEMENT AMENDMENTS OF 1984: The Tennessee Legislature passed the Child Support Enforcement Act of 1985, effective October 1, 1985, during its 1985 legislative session. See, Public Chapter No. 477, 1985 Advance Legis. Ser., TENN. CODE ANN., No. 6, at 87, codified at TENN. STAT. ANN. §§ 36-2-106, 36-2-108, 36-5-101, 36-5-103, 14-8-124, 8-21-403, 50-2-105, 36-5-401, 36-5-403 to 406, 36-5-501 to 36-5-504.

ADOPTION: §§ 36-1-101 to 36-1-141.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: TENN. CODE ANN. § 26-2-101 to § 26-2-223; § 29-7-101 to § 29-7-149; § 36-5-101 to § 36-5-613 (1980 & Supp. 1992).

(1) Garnishment is authorized for child support and alimony on a judgment or where a legal action is pending. § 26-2-214.

(2) Pursuant to Tennessee Code established in 1993 garnishment continues until a judgment is completely satisfied. § 26-2-214.

(3) When any order for the support of minor children is entered in a court, the court may order an immediate assignment of the party's wages, salaries, commissions, pensions, annuities, and other income in an amount sufficient to satisfy any accumulated arrearages or in such amount as the court may find necessary to comply with the order of support. § 36-5-501. Should it be found in a subsequent hearing that the paying parent has been late or erratic in payments, then a wage assignment must be ordered. It will be sent to the employer and it is the employer's duty to forward the same to any subsequent employers. Clerk's fee for this is 5% and the employer may charge up to 3% for bookkeeping.

PROCEDURES:

(1) Jurisdiction is based on the fact that the government has property, choices in action, or effects of the debtor in its possession.

(2) Judgment is necessarily required. Garnishment is not authorized where a legal action is commenced, but may only be instituted when a judgment has resulted. A wage assignment may be ordered at the discretion of the court or if child support is late, it must be issued. § 36-5-501.

(3) Notice to garnishee is required. § 29-7-103. Copy of execution upon property must be furnished to judgment debtor. § 26-2-405.

(4) Writ of garnishment is required.

(5) The garnishee is required to answer within 10 days as to money owed to the defendant at the time of garnishment. If answer is not made, a default judgment can be entered against the garnishee. § 26-2-209. Motion to quash garnishment or execution may be filed 20 days from withholding of wages or 20 days from mailing notice in a levy of execution.

(6) A judgment is given on the answer, and money or other property is delivered to the clerk of the court issuing the garnishment. The holding period as to salary or wages is until the judgment is satisfied in full, including court costs (Public Acts, 1993). § 26-2-214. The employer pays the money into the court every 30 days. § 26-2-215.

(7) Pre-process interrogatories are not required.

(8) The sheriff or other officer serving the garnishment summons on the garnishee must affix a notice to the judgment debtor on the summons. The garnishee in turn has an obligation to furnish the notice to the judgment debtor. § 26-2-216. Debtor may apply to the court for an order suspending further garnishments by the same creditor upon the debtor's paying a certain sum of money weekly, biweekly, or monthly, to pay the judgment. If this motion is filed, the garnishment of wages will stop for as long as payments ordered by the court are made.

(9) At the court's discretion, the obligor may be required to post a bond or security to insure future support payments. § 36-5-101(b).

(10) Immediate income assignment is not required if the court finds from the proof of one party that there is good cause for not requiring immediate income assignment, or if there is a written agreement by both parties which provides for an alternative arrangement.

STATE EXEMPTIONS:

(1) The exemption is forty-five percent (45%) of disposable pay or 30 times the federal minimum hourly wage, whichever is the greater. § 26-2-106. The personal earnings of the debtor shall not be exempt from an order, judgment, decree, or assignment for support when such order is rendered for the support of his or her minor child or children; nor when such order is for alimony and the party in whose favor such order was rendered has not remarried. § 26-2-108.

(2) Exemptions are the same for retired pay and active duty pay. The exception is that portion of retired pay which is disability retirement is not subject to garnishment or wage assignment.

(3) The amount to be assigned under the income assignment, may not be in excess of fifty percent (50%). § 36-5-501(f).

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

No duty exists for the garnishee to defend the debtor. Service of process and a defective writ of garnishment can be challenged. However, if the garnishee fails to answer or withholds the answer, a judgment over against the garnishing employer may be had upon application to the court.

TEXAS

STATUTES:

I. Marriage - TEX. FAM. CODE Ch. 1 and 2.2.2.

II. Divorce - TEX. FAM. CODE Ch. 3.

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. If under 18, must have: (i) consent of a parent or guardian; or (ii) a court order. An applicant between 14 and 18 years of age may apply with proper parental consent. No person under 14 may marry without a court order. TEX. FAM. CODE ANN. §§ 1.51-1.53.

(2) License - Required. It can be obtained from any county clerk. TEX. FAM. CODE ANN. § 1.07. Both parties must personally appear before the clerk unless the appearance requirement is waived by a county judge. TEX. FAM. CODE ANN. § 1.02. The marriage ceremony may not take place during a 72-hour period immediately following the issuance of the marriage license unless an applicant is a member of the U.S. Armed Forces on active duty or obtains a court order waiving the waiting period. TEX. FAM. CODE ANN. § 1.82. If the marriage is not conducted within 30 days after issuance of the license, the license becomes invalid. TEX. FAM. CODE ANN. § 1.81.

(3) Medical Examination - Not addressed by statute.

(4) Waiting Period - Neither party to a divorce may marry for 30 days after date of divorce decree without showing good cause. TEX. FAM. CODE ANN. § 3.66.

(5) Solemnization - A marriage may be performed by any of the following: a licensed or ordained Christian minister or priest; a Jewish rabbi; an officer of a religious organization authorized by that organization to perform marriages; a justice of the peace; or a judge of any court of record. Justices of the peace and judges are prohibited from discriminating on the basis of race, religion, or national origin. TEX. FAM. CODE ANN. § 1.83.

(6) Reporting Requirements - The county clerk maintains records of marriage licenses issued. A person who solemnizes a marriage must endorse the license to that effect, and return it to the county clerk within 30 days. The clerk then records the return with the license. TEX. FAM. CODE ANN. § 1.84.

Texas

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Texas recognizes two types of informal marriages. One is a declaration and registration of informal marriage on a form provided by a county clerk and the recording of same by the county clerk. The other informal marriage, commonly known as "common law" marriage, may be proved by evidence that a man and a woman agreed to be married, after the agreement they lived together in Texas as husband and wife, and represented in Texas to others that they were married. TEX. FAM. CODE ANN. § 1.91-.95.

(2) Marriage by Proxy - Where a couple is separated by military service, a ceremonial marriage may be performed by proxy acting under a power of attorney. Such a marriage is considered legal. If the husband in such a marriage abandons his spouse, he can be guilty of desertion. Op. Atty. Gen. 1946, No. 0-7529.

(3) Marriage by Contract - No statutory provision.

(4) Foreign Marriages - A foreign marriage will be recognized unless contrary to state policy.

PROHIBITED MARRIAGES: A person may not marry any of the following: his or her aunt or uncle; his or her nephew or niece (including half-blood or by adoption), or any nearer relative by consanguinity; his or her stepparent; or his or her stepchild. A marriage to any such person is void. TEX. FAM. CODE ANN. § 2.21.

GROUNDS FOR ANNULMENT: Grounds for annulment include: natural or incurable impotency at the time the parties enter into the marriage contract; or any other impediment which renders the marriage contract voidable. TEX. FAM. CODE ANN. § 2.41-.46. If the grounds for annulment is nonage, a statutory time limit of 90 days after the date the person seeking to annul the marriage knew or should have known of the marriage applies. Once the underage person reaches 18 years of age, suit for annulment is barred. TEX. FAM. CODE ANN. § 2.41.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Residency Requirements - Petitioner or respondent must be a Texas domiciliary for the preceding six (6) months, and a resident of the county in which the suit is filed for the preceding 90 days. TEX. FAM. CODE ANN. § 3.21-.24.

(2) Military Provision - Time spent by a Texas domiciliary in the Armed Forces of the United States outside the state and his or her county of residence is considered to be residence in the state and county for purposes of divorce jurisdiction. A person serving

in the Armed Forces of the United States, who has been stationed in Texas for at least the last six (6) months, and in the county for the last 90 days, is considered to be a domiciliary of the state and a resident of the county for divorce purposes (even though such person was not previously a Texas resident). TEX. FAM. CODE ANN. § 3.21-.24.

(3) Provision for Out-of-State Spouses - A spouse domiciled in another state or country may file for divorce in Texas if the other spouse has been a Texas domiciliary for at least the last six (6) months. The suit must be filed in the county where Texas domiciliary spouse resides at the time the suit is filed. TEX. FAM. CODE ANN. § 3.21-.24.

(4) Jurisdiction/Venue - The district courts have jurisdiction over all divorce actions. Venue lies in the district court in the county where the plaintiff or respondent resided for the 90 days immediately prior to filing the action, subject, however, to the requirement that the plaintiff or respondent must also have been a resident of Texas for the six-month period immediately prior to filing. TEX. FAM. CODE ANN. §§ 3.26; 3.21.

(5) Pleadings must allege grounds in substantially the same language used in the statute. (See "Substantive Requirements for Divorce," below.) Detailed statements, and summations of evidence, should not be included in the pleadings, but the pleadings must indicate whether or not children under 18 were born of the marriage or adopted by the parties. TEX. FAM. CODE ANN. § 3.55[a].

(6) Waiting Period - Divorce may not be granted until the suit has been on file for 60 days. While the suit is pending, the court may order temporary alimony (permanent alimony is not allowed in Texas) payments for the support of either of the parties until a final decree is entered. The court may also issue other temporary orders concerning the parties and their property if it deems it necessary and equitable to do so.

(7) Debts Incurred During Pendency of Suit - If a party to a divorce action transfers community property, or incurs debts against the community estate, while the suit is pending, any such transfer or debt is void as to the other spouse if the transfer/contract for debt was done for the purpose of injuring the rights of the other spouse.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - A "no-fault" type divorce may be granted when the marriage has become unsupportable due to discord or a personality conflict that destroys the legitimate ends of the marriage relationship, and prevents any reasonable expectation of

reconciliation. A divorce may also be granted in favor of either spouse upon the occurrence of any of the following: the other spouse is guilty of cruel treatment against the complaining spouse; the other spouse has voluntarily left the complaining spouse for one year with the intention of abandonment; the other spouse has engaged in adultery; the two spouses have lived apart without cohabiting for three years; the other spouse has been convicted, after the marriage, of a felony, been imprisoned for at least one year, and not been pardoned (but not if the convicted spouse has been pardoned or if the convicted spouse was convicted on the testimony of the complaining spouse); and when, at the time the action begins, the other spouse has been confined in a mental hospital for three years, and has a disorder such that he or she will probably not adjust, or into which he or she will relapse even if initial adjustment occurs. TEX. FAM. CODE ANN. § 3.01-.07. The grounds of adultery, abandonment, cruelty, and imprisonment for a felony, are what is known as "fault" grounds. If fault is proven, it is one of the factors a court may consider in dividing the community property of the marriage.

(2) Defenses - Condonation is a defense, but only when a reasonable expectation of reconciliation exists. Adultery and recrimination have been abolished as defenses. TEX. FAM. CODE ANN. § 3.08.

(3) Period of Separation - Not required.

SEPARATION:

(1) Grounds - There is no separate action for legal separation in Texas. In a lawsuit affecting the parent-child relationship, a court shall appoint a managing conservator (at least one) of the child/children if the parents have physically separated. TEX. FAM. CODE ANN. § 14.01[a].

(2) Separation Agreements - Spouses may partition or exchange between themselves any part of their community property as they may desire. Property exchanged or transferred becomes separate property. Partition or exchange agreements must be in writing and signed by both parties voluntarily and with full disclosure or waiver. TEX. FAM. CODE ANN. § 5.51-56.

TIME REQUIRED BEFORE REMARRIAGE: Neither party to a divorce may marry another person for 30 days immediately following the date of the decree, absent a showing of good cause. This restriction does not apply to remarrying the former spouse from whom the divorce was granted. TEX. FAM. CODE ANN. § 3.66.

ALIMONY AND CHILD SUPPORT:

(1) Permanent alimony does not exist in Texas. The parties to a divorce can agree among themselves that one will make periodic payments to the other as part of a separation agreement. Such an arrangement is contractual, and is enforceable as a contract.

(2) Temporary payments by one spouse for the support of the other may be ordered by a court during the pendency of a divorce action. TEX. FAM. CODE ANN. § 3.59.

(3) A court may order either or both parents to make periodic payments, a lump sum payment or both, purchase an annuity, or set aside property for the support of their children until the children reach age 18. In certain circumstances, payments can be required beyond age 18. TEX. FAM. CODE ANN. § 14.05.

(4) The court shall order income withheld for child support from the disposable earnings of the obligor except for good cause shown or on agreement of the parties. If the court does not order withholding, a support order entered or modified after January 1, 1987, must contain income withholding provisions to insure that withholding will be effective in the event of a delinquency. Support orders will be construed to contain withholding provisions even if such provisions do not appear in the order. TEX. FAM. CODE ANN. § 14.05.

(5) Application of support guidelines is rebuttably presumed to be in the best interest of the child, and support amounts shall be determined without regard as to whether or not the child was born out of wedlock. TEX. FAM. CODE ANN. § 14.05. The guidelines are statutory, and include guidelines for support, establishing orders of child support, evidentiary factors, amounts ordered, and modification of prior orders. TEX. FAM. CODE ANN. §§ 14.052-14.058. (Note: Under certain circumstances, a court may order support for a minor or adult disabled child.)

(6) In addition to requiring child support payments, Texas courts shall also order that health insurance be provided for the child. Health insurance is in addition to the amount required to be paid as support, but is otherwise treated/enforced as a child support obligation. TEX. FAM. CODE ANN. § 14.061.

CUSTODY OF CHILDREN:

(1) Whenever the parent-child relationship is affected, or whenever parents are separating, Texas law provides for the appointment of either a sole or joint managing conservator of the child(ren). TEX. FAM. CODE ANN. § 14.01. The person(s) appointed will be one or both of the parents, subject to the requirement that

the appointment be in the best interest of the child(ren). If appointment of one or both parents is not in the child(ren)'s best interest, some other person(s) may be appointed. The conservator must be a suitable, competent adult or agency. TEX. FAM. CODE ANN. § 14.01.

(2) A managing conservator's rights and duties are spelled out by statute. TEX. FAM. CODE ANN. § 14.02.

(3) A parent appointed as sole managing conservator retains all parental rights and responsibilities, to the exclusion of the other parent, subject to the rights, duties and powers of any possessory conservators. TEX. FAM. CODE ANN. § 14.02. A nonparent managing conservator has almost the same rights, but cannot inherit from or through the child. A nonparent also has no duty to provide medical care for the child, or to manage the child's estate. TEX. FAM. CODE ANN. § 14.02.

(4) Appointing both parents as managing conservators of a child will be done only if the court finds such to be in the best interest of the child.

(5) When a managing conservator is appointed, a court may appoint one or more possessory conservators, setting times and conditions for possession of/access to the child. Generally, the parent not appointed managing conservator will be appointed possessory conservator, unless this is not in the child's best interest or would endanger the child. During periods of possession, a possessory conservator has the following: the duty to provide care, control, protection, and reasonable discipline of the child; the duty to provide the child with clothing, food, and shelter; the power to consent to medical and surgical treatment in emergencies involving immediate threats to the child's health and safety; and the right of access to medical, dental, and educational records of the child. TEX. FAM. CODE ANN. § 14.03.

(6) Texas has adopted the Uniform Child Custody Jurisdiction Act, but with some variations. TEX. FAM. CODE ANN. §§ 11.51-.75.

GRANDPARENTS VISITATION RIGHTS:

(1) Texas law gives adoptive and biological grandparents an independent cause of action for visitation.

(2) This right does not apply if the grandparents seeking possession of/access to the child are parents of a person whose parental rights to the child have been terminated by death or court order, and the child has been adopted by someone other than the spouse of the former spouse of the parent whose rights have been terminated.

PROPERTY DISTRIBUTION:

(1) Method - Community Property. To understand how this method works requires an understanding of Texas matrimonial property law.

(2) Community Presumption - Under Texas law, all property owned by a husband and wife is presumed to be community property during the course of their marriage, or upon divorce, unless the contrary can be shown. Community property is all property acquired during marriage by a husband and wife, except that which is defined as separate property. If a couple moves to Texas with property acquired in another jurisdiction, Texas courts will examine the property to see if it would have been community at the time it was acquired had the spouse in question been domiciled in Texas at the time of acquisition.

(3) Separate Property - Separate property is all property, real or personal, owned by either spouse prior to the marriage, or acquired after the marriage by gift, devise, or descent. Increases in the value of such property are also the separate property of the owner, as is money received in exchange for the sale of such property. Income earned on separate property, however, (including rents, profits, dividends and interest) is community property.

(4) Upon divorce, the court may divide the community property as it deems just and right, giving due regard to the rights of the parties and any children. (Remember: all property owned by a husband and wife upon divorce is presumed to be community property absent a showing to the contrary.) A court may consider numerous factors in making a just and right division of community property upon divorce, including the following: fault; disparity of income; disparity of earning capacity; benefits the party not at fault would have realized had the marriage continued; disparity of education between the parties; disparity of physical condition between the parties; disparity of financial condition; disparity of age; size/amount of separate property; nature of the property involved; expected inheritance by one of the parties; needs of minor children; needs of adult children; a party's wasting of community assets; excessive community gifts to children; tax consequences of the property division; spousal gifts during the marriage; attorneys' fees owed by the parties; whether the value of one spouse's separate property has increased as a result of the community efforts during the marriage; and potential intentional tort claims against a party.

(5) Military Retirement Benefits, as well as other types of retirement benefits are divisible upon divorce in Texas if they were earned or accumulated during marriage.

NAME CHANGE:

(1) Texas law allows the court to change the name of either party to a divorce action upon a showing of good cause. TEX. FAM. CODE ANN. § 3.64.

ENFORCEMENT OF COURT ORDERS FOR CHILD SUPPORT AND POSSESSION OF AND ACCESS TO A CHILD:

(1) Commencement of Proceedings - Enforcement proceedings are commenced by filing a motion to enforce a final order. TEX. FAM. CODE ANN. § 14.31.

(2) In child support enforcement, the motion must state the amount owed, the amount paid, and the amount of the arrearage. A copy of a record of child support payments maintained by a state or local child support registry may be attached, and constitutes *prima facie* facts admissible in evidence. TEX. FAM. CODE ANN. § 14.311.

(3) On the filing of a motion, the court shall order the time, place, and date of the hearing at which Respondent shall appear and respond to the motion. TEX. FAM. CODE ANN. § 14.314. An employer who may be directed to withhold income from earnings need not be given notice of the proceedings before issuance of an order for income withholding. TEX. FAM. CODE ANN. § 14.316. If the respondent fails to appear, the court may grant default judgment, and issue a capias for his or her arrest. TEX. FAM. CODE ANN. § 14.317.

(4) An obligor that has failed or refused to make child support payments that were past due and owing at the time of the filing of the enforcement proceeding shall be ordered to pay Movant's reasonable attorney's fees and all court costs, in addition to any other amounts past due, unless the court makes a specific finding that the attorney's fees and costs not be paid and states the reason supporting that finding. TEX. FAM. CODE ANN. § 14.33.

(5) Interest accrues on unpaid child support obligations prior to judgment at the rate of 10% per year computed monthly. Interest does not accrue on child support that is paid and that is 30 days or fewer overdue. Prejudgment interest that accrues is part of the child support obligation. TEX. FAM. CODE ANN. § 14.34.

(6) Child support orders may be enforced by contempt after notice and hearing, however, the court may not reduce or modify the amount of child support arrearages in a contempt proceeding.

(7) If the court finds a child support obligor in contempt for failure to pay child support, it may suspend imposition of commitment and place the obligor on probation provided that the obligor continues the court-ordered child support payments, pays court costs and complies with any other reasonable conditions required by the court. TEX. FAM. CODE ANN. § 14.40.

(8) A child support payment not timely made shall constitute a final judgment of the amount due and owing, including prejudgment interest. A court shall confirm the amount of child support in arrears, and shall render judgment against an obligor for any amount of child support unpaid and owing upon motion of the obligee or obligor after notice and hearing. The judgment rendered by the court shall be subject to a counterclaim or offset, and may be enforced by any means available for the enforcement of judgment for debts, or by an order withholding from earnings. The court may not reduce or modify the amount of child support arrearages in rendering judgment.

(9) If the child support obligor is employed by an employer not subject to income withholding, is self-employed, or otherwise in circumstances where income withholding is unworkable or inappropriate, the court may require the posting of security or a bond in an amount set by the court to secure child support payments. On motion of the obligee, after notice and hearing, such bond or security deposit may be forfeited for any amount of child support payments that are due and owing upon proof that they are unpaid. The court may also apply any excess funds of the forfeited bond or security deposit toward attorneys' fees and costs. TEX. FAM. CODE ANN. § 14.42.

WITHHOLDING FROM EARNINGS FOR CHILD SUPPORT: Except for good cause shown, or on agreement of the parties, the court shall enter an order that provides that income be withheld from the disposable earnings of the obligor:

(1) in every original suit affecting the parent-child relationship in which child support payments are ordered;

(2) on motion to require income withholding regarding a prior child support order when the obligor is shown to be in arrears for a time period of at least 30 days for some portion of the amount due and in arrears for an amount equal to or greater than that due for a one-month period;

(3) on a motion to modify a prior child support order that did not originally order income withheld when the obligor is shown to be in arrears for a time period of at least 30 days for some portion of the amount due and in arrears for an amount equal to or greater than that due for one month; or

(4) after a hearing unsuccessfully contesting a notice of delinquency in a case involving the delinquency of either a child support order entered before January 1, 1987, or after that date, that did not originally order income withheld. Payment of overdue support after receipt of notice of hearing shall not be the sole basis for the court to refuse to order withholding from income.

(5) If the Texas Attorney General seeks to enforce a child support order by virtue of his authority as the enforcing agency under Part D of Title IV of the Federal Social Security Act, income withholding will be automatic in all cases without exception.

(6) Income withheld for child support will be paid through and promptly distributed by a court registry, a child support collection office, or the Texas Attorney General, unless the court finds that there is good cause to require payments be made to another person or office.

(7) Child support arrearages, including prejudgment interest, may also be subject to income withholding, subject to the limitations placed on the maximum amount withheld. The additional amount withheld to be applied towards arrears shall be sufficient to fully discharge those arrears in not more than two years or add 20% to the amount of the current monthly support order, whichever is quicker, consistent with the limitations on the maximum amount that may be withheld from earnings. The court may extend the repayment period for a reasonable length of time if the court finds that unreasonable hardship may result.

(8) An order withholding income shall direct any employer of the obligor to withhold from disposable earnings, the amount specified in the order, up to a maximum amount of 50% of the obligor's disposable earnings. The employer shall begin to withhold income no later than the first pay period 14 days after service of the order or writ and shall continue to withhold income as long as the obligor is employed by the employer. The amount to be withheld shall be remitted to the person or office named in the order on each regular due date or pay day. The employer may deduct an administrative fee of not more than $5 per month from the obligor's disposable earnings in addition to the amount to be withheld as child support. The court clerk may charge a fee for each order delivered to an employer by mail of no more than $5.

(9) An employer may make a motion for hearing on the applicability of the order within 20 days after delivery of an order or writ of income withholding. A hearing will be held within 15 days after the filing of any such motion. Pending the hearing, the order or writ is binding and payments continued unless otherwise ordered by the court. **The order or writ has priority over any garnishment, attachment, execution, or other assignment or order affecting disposable earnings.**

(10) An employer who complies with an order or writ is not liable to the obligor for the amount of income withheld and paid as provided in the order or writ. An employer who does not comply is liable for the amount not paid in compliance with the order or writ and for reasonable attorneys' fees and court costs. An employer must comply with all orders or writs served on the employer to the maximum extent possible. If the total amount in the orders or writs exceeds the maximum amount allowable, the amount paid on all shall be equal until they are individually complied with or until the maximum amount of allowable withholding is reached, whichever occurs first.

(11) An employer may not use an order or writ for termination of employment or for any other disciplinary action against an employee. An employer may not refuse to hire an employee because of an order or writ withholding income. Both the obligor and the employer must notify the court and the obligee of any employment termination within 7 days of the termination and provide the obligor employee's last known address and the name and address of the obligor's new employer, if known. An obligor has the continuing duty to inform any subsequent employer of the income withholding order after obtaining employment.

PRACTITIONER'S NOTE:

On April 20, 1995, Texas Governor George W. Bush signed House Bill 655 into law, which is EFFECTIVE IMMEDIATELY. This law, which runs 190 pages, recodifies significant portions of Texas' Family Code. It does not make substantive changes to the law, but replaces old numbers with new, replaces passive voice with the active voice, corrects grammatical errors, and eliminates redundant portions of the Family Code.

Texas

The following summary was reviewed in May 1995 by COL J. Bruce Reading, State Staff Judge Advocate, Utah National Guard, Draper, Utah; Mailing Address: Scalley & Reading, 261 East 300 South, Suite 200, Salt Lake City, UT 84111, Telephone Number: (801) 531-7870, FAX: (801) 531-7968

UTAH

STATUTES:

I. Marriage - UTAH CODE ANN. §§ 30-1-1 to 30-1-39 (1989 & Supp. 1993).

II. Divorce - UTAH CODE ANN. §§ 30-3-1 to 30-3-18 (1989 & Supp. 1993).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Under 18 requires written consent of parent or guardian to obtain a marriage license. § 30-1-9. All marriages are void if male or female is under 14 years of age. § 30-1-2(4).

(2) Medical Examination - No statutory requirement.

(3) License Fee - Five dollars ($5).

(4) Waiting Period - None, unless consent statement is required.

(5) Solemnization - Any clergyman, judge, justice court, court commissioner, governor, mayor or county clerk in accordance with customs of society may perform marriage. § 30-1-6.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - May be solemnized by a court if the court finds it arises out of a contract between two consenting parties who:

(a) are capable of giving consent;
(b) are legally capable of entering a solemnized marriage under the provisions of this chapter;
(c) have cohabited;
(d) mutually assume marital rights, duties, and obligations; and
(e) who hold themselves out as and have acquired a uniform and general reputation as husband and wife.

A petition to solemnize the marriage must be brought before the court within one year after the couple has separated.

(2) Marriage by Proxy - Prohibited.

(3) Marriage by Contract - Prohibited.

PROHIBITED MARRIAGES: All marriages between persons of the same sex, between parents and children, ancestors and descendants of every degree, brothers and sisters of the half and whole blood, uncles and nieces, aunts and nephews, first cousins, non-age, bigamous marriages, those involving a divorced person where the divorce decree is not yet final or an appeal is pending, and between persons of the same sex. §§ 30-1-1 and 30-1-2.3.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Marriages can be annulled when they are prohibited under the statute and upon grounds existing at common law. § 30-1-17.1. Such grounds include incestuous marriages, marriages with idiots or persons with communicable venereal diseases, bigamous marriages and marriages with persons under 14 years of age.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - One party must be a resident of the county where the action is brought for 3 months prior to the commencement of the action. § 30-3-1.

(2) Military Provision - A member of the armed forces may bring an action in divorce when he or she has been stationed in this state for 3 months prior to the commencement of the action. § 30-3-1.

(3) Service of Process - Service by delivery to individual directly, by mail, or by publication are acceptable forms of service. However, only personal service will provide the court jurisdiction to deal with issues other than the dissolution of marriage, i.e., child support, custody, alimony, etc.

(4) Answer - Within 20 days after the service of the summons is completed in state; within 30 days after the service of the summons is completed out of state.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Impotency at time of marriage, adultery, willful desertion for more than 1 year, willful neglect, habitual drunkenness, conviction for felony, cruel treatment, couple has lived apart for 3 consecutive years under separation agreement of any state, permanent insanity, or irreconcilable differences. § 30-3-1.

(2) Defenses - Abolished, except by case law.

(3) Period of Separation - Three (3) years if under separation agreement of any state. § 30-3-1(3)(j).

SEPARATION:

(1) Acknowledged Legal Status - Party may request decree of separate maintenance rather than divorce. § 30-4-1.

(2) Effect of Separation Agreement on Divorce Decree - A 3-year separation under a valid separation agreement of any state can be grounds for divorce action. § 30-3-1(3)(j). A decree of divorce granted under § 30-3-1(3)(j) does not affect the liability of either party under any provision for separate maintenance previously granted.

TIME REQUIRED BEFORE REMARRIAGE: Remarriage of either party is prohibited until the divorce becomes absolute or, if an appeal is taken, until after affirmance of the decree. This does not apply to the persons who are obtaining the divorce should they decide to remarry. § 30-3-8.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT:

(1) Support debt is the debt created by nonpayment of child support under the Utah laws or court decree. § 62A-11-303.

(2) Dependent child is a person under 18 who is not otherwise emancipated, self-supporting, married, or a member of the U.S. Armed Forces. § 62A-11-303.

(3) Earnings of the defendant can be garnished for the past, present and future support, maintenance, and education of such minor child. Income withholding may be effective until the obligor no longer owes child support to the obligee and will be included as part of any support order. §§ 62A-11-403 through 62A-11-504.

(4) In divorce proceedings, the court shall have the power to order the payment of alimony. But unless the decree of divorce specifically provides otherwise, alimony automatically terminates on remarriage of the former spouse or upon the establishment by the party paying alimony that the former spouse is residing with a person of the opposite sex (unless the former spouse can establish that there is no sexual contact). § 30-3-5(5)(7).

(5) The court may order the spouse to pay the clerk for child and spousal support and maintenance. § 30-3-3.

(6) The court may award either spouse possession of any real or personal property of the other spouse for the support of the other spouse and the minor children. The spouse can secure a lien upon the other's property to secure payment. § 30-4-3.

(7) Unless the support order provides otherwise, all monthly payments of support, maintenance, or alimony provided for in the order or decree are due one-half (1/2) by the 5th day of each month and the remaining one-half (1/2) by the 20th day of that month. § 30-3-10.5.

(8) The court may make an award to enable a party to prosecute or defend the action. § 30-3-3.

UNIVERSAL INCOME WITHHOLDING

(1) § 62A-11-403. Provision for Income Withholding in Child Support Order--Immediate Income Withholding. Effective 1 Jan 94, whenever a child support order is issued or modified, the obligor's income is subject to mandatory income withholding for the child support and the order shall include a provision providing for such. In any income withholding, an additional processing fee of Seven dollars ($7) a month is charged by the Office of Recovery Services to the obligor and is included in the amount withheld.

(2) § 62A-11-404. Procedure for obligee seeking income withholding: (1) obligee may apply for income withholding services by Office of Recovery Services. Alternately, obligee may seek income withholding in a district court of competent jurisdiction when a delinquency occurs under a child support order entered prior to 13 Oct 90, and not modified after that date if the order includes authorization of income withholding. With regard to child support order entered after 13 Oct 90 and not modified after 1 Jan 94, obligee may seek income withholding in a court of competent jurisdiction, when a delinquency occurs, regardless of whether the order includes authorization of income withholding.

(3) Obligor has 15 days after service of notice of withholding to contest the withholding. The only basis for contesting the withholding is mistake of fact and the obligor will be afforded an administrative hearing. § 62A-11-405.

(4) § 62A-11-406. Notice to Payor. Office of Recovery Services shall give payor written notice stating the amount of child support to be withheld, that it must be sent to office within ten days of payment to obligor, that payor is liable for amount failed to be withheld.

(5) § 62A-11-408. Termination of Income Withholding. At any time after withholding begins, a party to the child support order may request a judicial or administrative hearing to determine whether income withholding should be terminated.

(6) See also "Uniform Civil Liability for Support Act." § 78-45-1 to -9.

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution. § 30-3-5.

(2) Fees Awarded - Court may award attorney's fees and court costs. §§ 30-3-3 and 30-3-5.

UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT:
UTAH CODE ANN. §§ 77-31-1 to 77-31-39.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Court award of custody is based on welfare of the child. §§ 30-3-5, 30-3-10.

(2) Judicial Approach - Parents viewed as equally qualified. First and foremost consideration is welfare of the child. § 30-3-10. Court shall consider the past conduct and demonstrated moral standards of each of the parties. The court may also consider the children's desires.

GRANDPARENTS VISITATION RIGHTS: Court may grant reasonable visitation rights to the grandparents of the child if it is in best interests of grandchildren. §§ 30-5-2, 30-3-5(4).

UNIFORM CHILD CUSTODY JURISDICTION ACT: §§ 78-45c-1 to 78-45c-26.

CRIMINALIZATION OF CHILD SNATCHING: Class A misdemeanor punishable by imprisonment for up to one (1) year, $5,000, or both; third degree felony, punishable by imprisonment for up to five (5) years, $10,000, or both, if child is taken from one state to another. § 76-5-303.

ADOPTION: §§ 78-30-1 to 78-30-16.

(1) Ages and Consent of Spouse - In the adoption of a minor the adopting parent must be 10 years senior in age. If a married person desires to adopt, the spouse must consent to the adoption. § 78-3-2 and -3.

(2) Preplacement Study - Except in a home where a parent of the child being adopted resides, a preplacement adoptive study is required before a child may be placed in the home pending adoption. § 78-30-3.5.

(3) Consents or Relinquishment - consent is required before adoption from the following:

(a) the adoptee, if he is over the age of 12 years, unless the adoptee does not have the mental capacity to consent:
(b) the parents of an adoptee who was conceived or born within a marriage, unless the adoptee is 18 years of age or older;
(c) the mother of an adoptee born outside of marriage:
(d) the biological father of an adoptee born outside of marriage who, in a contested hearing proves that after the adoptee's birth he has:
(i) developed a substantial relationship with the adoptee; or
(ii) received the adoptee into his home, openly held out the adoptee as his own child, and otherwise treated the child as if it were his legitimate child; and
(e) the licensed child placing agency to whom an adoptee has been relinquished and that is placing the adoptee for adoption.

§ 78-30-4.1.

(4) When Consent Unnecessary - If the court finds that a parent has not provided support and made no effort to maintain the parental relationship , no consent from that parent. § 78-30-5.

(5) Alien Child - Proof of lawful admission to the United States must be submitted in adoption proceeding before an alien child under 16 years of age may be adopted. § 78-30-8.5.

GARNISHMENT AND WAGE ASSIGNMENTS:

PROCEDURES: Utah R.C.P. 64D

(1) The district courts have jurisdiction over matters of divorce, annulment, separate maintenance, child custody, alimony and support. § 30-3-12.

(2) A writ of garnishment is available to satisfy money judgments for back child support, alimony, attorney fees, and costs. Utah R.C.P. 64D(a)(ii).

(3) The writ of garnishment shall be based upon plaintiff's affidavit of application. Utah R.C.P. 64D(d) (i).

(4) The writ of garnishment and any order shall be served by sheriff, deputy, constable, or any other court-designated person. All other service may be by first class mail or hand delivery. Utah R.C.P. 64(D) (3).

(5) The garnishee has 5 business days from date of service to answer interrogatories and, if the garnishee has possession of any property subject to garnishment, the garnishee must forward a copy of the writ of garnishment, answers to interrogatories, notice of garnishment and exemptions, and two copies of a request for hearing to the defendant and to any other person shown in garnishee's records as a co-owner or having any interest in the property of money garnished. Utah R.C.P. 64D(d) (ii).

(6) The garnishee may deliver to the officer serving the writ the money due to the defendant, as shown in the garnishee's answer. The officer shall return the writ and the money to the court to be dealt with as thereafter ordered by the court and garnishee shall be relieved from further liability unless the garnishee's answer is successfully converted. Utah R.C.P. 64(D) (g)

(7) The judgment debtor has ten (10) days from date of service to request a hearing to claim any exemption to the garnishment or to contest the writ. Utah R.C.P. 64D (h).

(8) If no hearing is requested and the time for doing so has expired, the court, upon plaintiff's request, shall issue an order directing the garnishee to release the property subject to garnishment to plaintiff or plaintiff's attorney. Utah R.C.P. 64 (D) (h) (i). If a hearing is requested, the court, after hearing, will issue an order to garnishee to release the property subject to garnishment or to pay the property subject to garnishment, depending upon its findings. Utah R.C.P. 64(D) (h) (iii).

STATE EXEMPTIONS:

State retirement benefits are exempt. § 49-1-609.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) There is no statutory reference concerning the garnishee's duty to raise defenses on behalf of the defendant.

(2) There is no statutory reference concerning the standing of the garnishee to challenge legal process, etc.

(3) If the writ of garnishment attaches disposable earnings, the garnishee is liable to withhold the lesser of:

(a) 25 percent of defendant's disposable earnings (50 percent if to enforce payment of a judgment arising out of failure to support dependent children) computed for the pay period for which the earnings accrued: or

(b) the amount by which the defendant's aggregate disposable earnings computed for the pay period for which the earning accrued exceeds the number of weeks in the period multiplied by thirty times the federal minimum hourly wage prescribed by the Fair Labor Standards Act.

Utah R.C.P. 64D (d) (viii).

(4) If garnishee fails to answer interrogatories or fails to send defendant the copy of the writ, answers to interrogatories, notice and request for hearing as required under Utah R.C.P. 64D, the garnishee can be found in contempt of court and liable for expenses and costs, including attorney fees, incurred by all parties due to failure to answer interrogatories. Utah R.C.P. 64D(j).

The following summary was reviewed in August 1995 by Major Timothy J. Wells, DET1 HHC 42 ID, P.O. Box 735, White River Jct., VT 05001, (802) 295-7518, FAX: (802) 295-2347.

VERMONT

STATUTES:

I. Marriage - VT. STAT. ANN. tit. 15, §§ 1 to 7 (1989 & Supp. 1995), tit. 18, §§ 5131 to 5149

II. Divorce - VT. STAT. ANN. tit. 15, §§ 511 to 758 (1989 & Supp. 1995).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Under 18 requires parental consent. Persons under 16 must obtain judicial approval. Tit. 18, § 5142.

(2) Medical Examination - Standard serological test for syphilis. Tit. 18, §§ 5132 to 5134, repealed 1985, No. 114 (Adj. Sess.), § 2, effective April 9, 1986.

(3) License Fee - Six dollars ($6).

(4) Waiting Period - License may be issued upon expiration of 3 days after date of application. NOTE: This requirement does not apply to persons enlisted in the armed forces; they may have the 3 day requirement waived. Tit. 18, § 5145.

(5) Solemnization - Any clergyman, supreme court justice, superior judge, probate judge, district judge, justice of the peace, assistant judge. Also, Quaker and Bahai marriage ceremonies are recognized. Tit. 18, § 5144.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Not recognized.

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Not recognized. See § 15-1001, effective July 1, 1974.

PROHIBITED MARRIAGES: All marriages between parents and children, ancestors and descendants, brothers and sisters, uncles and nieces, aunts and nephews. Also, bigamous marriages. Tit. 15, §§ 1 and 2. A man shall not marry his mother, grandmother, daughter, granddaughter, sister, brother's daughter, sister's daughter, father's sister or mother's sister. Same in relation to a woman and her relatives. Tit. 15.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Bigamy, marriage within prohibited degrees of kinship, non-age (if action brought before person reaches age of consent), idiocy or lunacy, physical incapacity (action must be brought within two years of solemnization), consent obtained by force or fraud. Tit. 15, §§ 512 to 516.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - One of the parties must have resided in state for 6 months at the time the divorce or annulment complaint is brought. However, divorce shall not be decreed unless one of the parties has resided in state for 1 year next preceding the date of final hearing. Tit. 15, § 592. Employment, health, service as a member of the armed forces of the United States or other legitimate reason and bona fide reason for being out of the state shall not affect the 6 month or 1 year periods.

(2) Military Provision - Temporary absence from state due to military service does not affect the 6 months or 1 year period above, provided the persons has otherwise retained his residence in this state. Tit. 15, § 592.

(3) Service of Process - Nonresident defendant may be personally served outside state. Upon showing that personal service cannot be perfected outside state, service by mail is permitted. Service by publication permitted if above means of service cannot be perfected. VRCP 4 as adopted in the Vermont Family Court.

(4) Answer - Within 20 days of service of process.

(5) Verification - Complaint for divorce must be verified. VRFP 4(b)(1)(A).

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Adultery, sentenced to incarceration for 3 years, intolerable severity, willful desertion or absence for 7 years, failure to provide suitable maintenance for the other spouse and without cause, persistent refusal or neglect to do so; incurable insanity, separation for 6 consecutive months and resumption of marital relations is not reasonably probable (basically no fault and by far the most commonly used ground - at the outset it is usually alleged to be anticipatorily with the intent being that the parties will have satisfied the requirement of having lived separate and apart for six consecutive months at the time of the final hearing - sometimes the parties may actually

live under the same roof and be found to have lived separate and apart as many judges can be persuaded if the parties don't take their meals together, don't sleep together, don't engage in sex, don't wait on one another, e.g., laundry, etc., however, it is the better practice to have a clear separation because of the risk the judge may determine the six months has not been satisfied). Tit. 15, § 551.

(2) Defenses - Defenses of recrimination and condonation abolished. Tit. 15, §§ 562 and 563. Definition of collusion: tit. 15, § 553. See Allen v. Allen, 315 JA.2d 459 (1974).

(3) Period of Separation - Not a prerequisite for divorce unless separation (6 months) is used as the basis for divorce. Tit. 15, § 551(7).

SEPARATION:

(1) Acknowledged Legal Status - Either party may ask for temporary or permanent separation. Tit. 15, § 555.

(2) Effect of Separation Agreement on Divorce Decree - No statutory provision.

TIME REQUIRED BEFORE REMARRIAGE: Divorce decree becomes absolute after 3 months from date of entry (decree nisi). Court may fix earlier date. Tit. 15, § 554. It is common practice to have this period shorten to thirty days or less. During the nisi period neither party may remarry and should one party die during the nisi period the divorce will be a nullity.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT:

(1) Child support is defined under state law as maintenance of a minor child. Support guidelines establish a rebuttable presumption of the amount of support owed on child. Tit. 15, § 654. It may be awarded pendente lite. However, authority to grant such temporary alimony is contingent upon the existence of a divorce action. Grant v. Grant, 383 A.2d 627 (1978). See 1981 (Adj. Sess.), § 18, repealing § 15.675. It is thoroughly congruent with the federal definition, however, the state law does not provide for specific need payments. Wage support assignments are statutorily authorized: tit. 15, §§ 780 to 790.

(2) Alimony is defined under state law as allowance to either party in accord with circumstances. Federal law does not include specific need payments within the definition of alimony. It may be either rehabilitative or permanent in nature if the court finds the spouse seeking maintenance:

(a) Lacks sufficient income, property, or both including property apportioned in accordance with property settlement to provide for his or her reasonable needs; and

(b) is unable to support himself or herself through appropriate employment at the standard of living established during the marriage or is custodian of a child of the parties. See tit. 15, § 752.

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution. Tit. 15, § 751.

(2) Fees Awarded - Court may award attorney's fees and costs. See tit. 15, § 607.

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: Tit. 15, §§ 385 to 428.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - For public policy, the legislature finds and declares it is best for both parents to have maximum physical and emotional contact, absent risk of harm. 15 VSA 650.

(2) Judicial Approach - Best interests and welfare of child control. Lumbra v. Lumbra, 136 Vt. 529, 394 A.2d 1139 (1978).

GRANDPARENTS VISITATION RIGHTS: May be granted in best interests of child, but no right to appeal a decision and not a party to the action. Tit. 15, §§ 1011 to 1016.

UNIFORM CHILD CUSTODY JURISDICTION ACT: Tit. 15, §§ 1031 to 1051.

CRIMINALIZATION OF CHILD SNATCHING: A person commits custodial interference by knowingly taking or keeping child from lawful custodian. Punishable by 5 years in prison or up to $5,000, or both. Tit. 13, § 2451.

It shall be a defense to a change of keeping a child from the child's lawful custodian that the person charged with the offense was acting in good faith to protect the child from real and imminent physical danger. Evidence of good faith shall include, but is not limited to, the filing of a non-frivolous petition

documenting that danger and seeking to modify the custodial decree in a Vermont court of competent jurisdiction. Petition must be filed within 72 hours of the termination of visitation rights. This defense shall not be available if the person charged with the offense has left the state with the child.

COMPLIANCE WITH CHILD SUPPORT ENFORCEMENT AMENDMENTS OF 1984: Vermont, in 1985, passed extensive provisions concerning wage assignments in court orders. See tit. 15, §§ 780 to 790. NOTE: 1995 statute 15 VSA 798 permits a motion to suspend the driver's license for failure to comply with a child support order. Inability to comply may be used as a defense.

ADOPTION: Tit. 15, §§ 431 to 454.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: VT. STAT. ANN. tit. 15, § 780-790 (Supp. 1987).

(1) The traditional remedy of Vermont is a summons to trustee. Service of the process compels the garnishee to withhold monies as of the date of service. V.R.C.P. 4.2. Service impresses the garnishee with a lien.

(2) Withholding Wages Upon Issuance or Modification of Support after July 1, 1990. (a) All orders for child support made or modified on or after July 1, 1990 shall include an order for immediate wage withholding in an amount equal to the support obligation and any obligation to pay support arrearage, unless the court finds good cause not to order immediate wage withholding or the parties have entered into an alternate arrangement by written agreement. Tit. 15, § 781.

(3) Expedited Procedure for Wage Withholding. (a) In the case of an order for child support made or modified after July 1, 1990 which does not include an order for immediate wage withholding, an obligee may request a wage withholding order when any amount due under the order has not been paid within several days after the amount is due. Obligor may request wage withholding at any time. Tit. 15, § 782.

PROCEDURES:

(1) Previously, unpaid installments of child support and alimony did not become judgments by operation of law. V.R.C.P. 4.2(J). Thus, the obligee needed to reduce amounts due and owing to judgments. A mere decree of dissolution is insufficient. The obligee then proceeds by complaint to cause attachment to issue. Upon order the attachment is then delivered to the sheriff and a summons is served on the garnishee. However effective 1995, 15 VSA

606 (b) states: "Any support payment or installment shall become a judgment on the date it becomes due for the purpose of calculating interest." An action to enforce a judgment under 15 VSA 606(b) may be brought no later than six years after the youngest child covered by the support order attains the age of majority or no later than six years after a child covered by the child support order is no longer covered.

(2) The family court has presumptive jurisdiction over the subject matter. V.R.F.P. 4(a).

(3) Service of process must be accomplished in accordance with federal law and regulation. The sheriff or a person specially appointed must serve process. V.R.C.P. 4.1(d).

(4) The prospective trustee must file an answer within 30 days after service. The answer must be in the form of an answer to interrogatories, which must be propounded to the trustee. V.R.C.P. 4.2(f). The burden is on the obligee to prove all elements of the garnishee's liability by a preponderance of the evidence.

(5) The attachment requires the trustee to hold monies and await the further order of the court. Payment upon order discharges the liability of the garnishee to the plaintiff (for the amount confessed) and acquits the garnishee from liability on the same claim to the obligor.

(6) Interrogatories are authorized by law; however, these may be propounded only to a party in the action. Thus, the limitation will have to be ignored (on the assumption that a potential garnishee is a nominal party) or the agency will have to be made a party.

There is no constitutional requirement that obligors be given post-judgment notice of an enforcement effort. However, state law requires the obligor be served with a copy of the summons to trustee. V.R.C.P. 4.2. Failure of notice is not jurisdictional and renders the process served on the garnishee defective, but not void.

(7) Wage Withholding; notice and hearing.

(a) In the case of a child support order issued prior to July 1, 1990 or a spousal support order, an obligee may request a wage withholding order when any amount due under a support order has not been paid within seven days after the amount is due.

(b) Petition may be served by personal service or by mail, certified, return receipt requested.

(c) If obligor does not file an objection to withholding within 20 days of receiving petition, court shall enter a judgment for wage withholding without requiring a hearing.

(d) If obligor files objection, hearing must be held within 20 days of receipt of the objection.

(e) Court shall order wage withholding if obligor has requested wage withholding or if amount due under a support order has not been paid within 7 days after the amount is due. Court shall issue wage withholding order within 45 days of notice sent to responding party. Tit. 15, § 783.

(8) Wage Withholding Orders. Order shall set forth: amount of support, frequency of support, judgment for support arrearage, provisions after periodic repayments of arrearage, reduction and termination dates. Tit. 15, § 785.

(9) Obligee's Responsibility.

(a) Obligee is to notify registry and obligor of any event that would affect the amount of support to be withheld under the order. Any person who has assigned or authorized all rights of collection shall notify the assignee of any event that would affect the amount of support to be withheld. Notice shall be in writing, mailed or delivered with in seven days of any such event.

(b) Any amounts received by the obligee is excess of the amounts paid by the obligee to be registry within 7 days of receipt. Tit. 15, § 786.

STATE EXEMPTIONS:

(1) The state has a jurisdictional exemption which saves to the obligor 75%. Rule 4.2(j).

(2) Wage Withholding Exemptions

(a) Wage withholding order for a current support obligation shall be subject to section 303(b) of the Consumers Credit Protection Act (15 U.S.C. § 1673(b)).

(b) Wage withholding order shall have priority over other legal process against the same wages and shall be at least in the amount of the current support order. A wage withholding order for a current support obligation shall have priority over periodic payments to be applied to unpaid support arrearage, but shall not preclude withholding for both, provided that the claims for arrearage has been reduced to judgment. No withholding for an

arrearage may occur unless there is available income which is not exempt under section 303(b) of the Consumer Credit Protection Act (15 U.S.C. § 1673(b)).

(c) Wage withholding shall cease upon the termination to the obligation to pay current support or upon the repayment of arrearage, whichever is later.

(d) If wage withholding is sought for repayment of outstanding arrearage in addition to support previously ordered, the additional amounts withheld for repayment shall not exceed 25% of the obligor's support obligation existing at the time of issuance of the wage withholding order.

(e) If arrearage exist after termination of the obligation to pay support, the amount withheld shall remain unchanged until all arrearages are paid in full. Tit. 15, § 789.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) The garnishee must raise defenses and objections which are jurisdictional. As to defenses which are not jurisdictional, the garnishee may not raise and litigate them. V.R.C.P. 4.2(e). There is no specific standing for the garnishee to request an accounting.

(2) Employer's Responsibility.

(a) Upon receipt of notice of wage withholding under this chapter, an employer shall:

(1) withhold the specified amount

(2) forward the withheld wages to the registry within 7 working days.

(3) retain a record of all withheld wages

(4) cease withholding wages upon notice

(5) notify registry of obligor's termination from employment within 10 days. Tit. 15, § 787.

PARENT'S RESPONSIBILITY:

When a wage withholding order is in effect, either parent shall notify in writing, the registry of the name and address of a new employer within seven days of commencing new employment. If the registry has received information about new employment of a parent, it shall notify the other parent. Tit. 15, § 788.

VIRGIN ISLANDS

STATUTES:

I. Marriage - V.I. CODE ANN. tit. 16, §§ 1 to 86 (1964 through 1994 Cum. Supp.).

II. Divorce - V.I. CODE ANN. tit. 16, §§ 101 to 111 (1964 through 1994 Cum. Supp.).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Under 18 requires written parental consent. Minimum age 16 for males, 14 for females. 16 §§ 2 and 36.

(2) Medical Examination - None required.

(3) License Fee - $25.00 for license and $200.00 for marriage by a judge. 16 § 39.

(4) Waiting Period - Application must be posted in Clerk of Court's office for public inspection for 8 days prior to issuance of license. 16 § 37.

(5) Solemnization - Any clergyman, judge or Bahai ceremony may solemnize marriage. 16 § 32.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Not recognized as capable of being contracted in Virgin Islands (2 V.I. Op. Atty. Gen. 219), but recognized if validly contracted elsewhere and proved in Virgin Islands. 3 V.I. Atty. Gen. 24.

(2) Marriage by Proxy - No statutory provision, but common law principles apply and could validate a proxy marriage.

(3) Marriage by Contract - No statutory provision, but see "Vesper" Marriages.

(4) "Vesper" Marriage - A vesper marriage is a civil contract between two competent persons of the opposite sex who both must be 60 years or more of age, by which the parties agree to live together as man and wife without acquiring any interest in or claim to the other's marital estate, property, or income, and without any legal right of inheritance. See 16 §§ 81-86.

Virgin Islands

PROHIBITED MARRIAGES: All marriages between parents and children, ancestors and descendants, brothers and sisters, uncles and nieces, aunts and nephews. Also, marriage between man and his grandfather's wife, grandson's wife, wife's grandmother, wife's granddaughter, stepmother, stepdaughter, mother-in-law, daughter-in-law (same prohibition for woman in corresponding degrees of kinship). Also, bigamous marriages are prohibited. 16 § 1.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Idiocy or lunacy, consent obtained by force or fraud, physical incapacity, non-age, marriage within prohibited degrees of kinship. §§ 1, 2 and 102. Six-week residency requirement if marriage was solemnized outside of Virgin Islands before annulment action can be brought. 16 § 105.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - Plaintiff must have been domiciled in Island for 6 weeks next preceding commencement of action. 16 § 106.

(2) Military Provision - Any person in the armed forces and who is a resident of the Virgin Islands at time of entry into the service shall be deemed to have continuously resided in the Virgin Islands. 16 § 106(b).

(3) Service of Process - Nonresident defendant may be personally served or constructively served in manner reasonably calculated to give actual notice. Service by publication requires court order.

(4) Answer - Within 20 days of service of process.

(5) Verification - No statutory provision.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Irretrievable breakdown (incompatibility of temperament) is the sole ground for divorce. Plaintiff must show legitimate objects of matrimony have been destroyed, and there is no reasonable likelihood that the marriage can be preserved. § 104.

(2) Defenses - All defenses abolished. Only bar to divorce is showing that the legitimate objects of matrimony not destroyed. § 107.

(3) Period of Separation - Not a prerequisite for divorce.

SEPARATION:

(1) Acknowledged Legal Status - Party may petition court for decree of legal separation. § 101.

(2) Effect of Separation Agreement on Divorce Decree - No statutory provision.

TIME REQUIRED BEFORE REMARRIAGE: Neither party capable of marrying a third person until appeal heard or time for taking appeal has run. (30 days) NOTE: If action uncontested, parties may remarry immediately after judgment declared. § 111.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision. However, collateral attack on a foreign divorce rendered in another state or country has been denied where it was shown that the party contesting the divorce assisted in its procurement and was validly subject to the jurisdiction of the foreign court. Government of Virgin Islands v. Lorillard, 358 F.2d 172, 5 v.I. 483 (3rd Cir. 1966) and Perrin v. Perrin, 7 v.I. 21 (1969).

ALIMONY AND CHILD SUPPORT:

(1) Whenever a marriage is declared void or dissolved, the court may, without regard to any determination that the breakdown of the marriage was the fault of one party or the other, further decree:

(a) For the recovery by the party granted care and custody of the children, such an amount of money, in gross or in installments, as may be just and proper for the custodial parent to use toward the nurture and education of the minor children; and

(b) For the recovery for a party determined to be in need thereof, the amount of money in gross or in installments, as may be necessary for the support and maintenance of such party. § 109.

(2) The right to support or current maintenance is so fundamental in its nature that it is recognized even in the absence of statutory authority. Poe v. Poe, 409 F.2d 40 (3rd Cir. 1969). However, it is within the discretion of the court whether or not alimony will be awarded. Alleyne v. Alleyne, D.C. v.I. 18 v.I. 544 (1981).

(3) Child support guidelines establish a rebuttable presumption as to the appropriate level of child support.

Virgin Islands

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution. § 109; Dyndul v. Dyndul, 13 v.I. 351 (1976).

(2) Fees Awarded - Court may award a party attorney's fees and costs (pendent lite). § 108(1).

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: §§ 391 to 429.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - No statutory provision.

(2) Judicial Approach - Best interests of child control. Bergen v. Bergen, 439 F.2d 1008 (3d Cir. 1971).

GRANDPARENTS VISITATION RIGHTS: No statutory provision.

UNIFORM CHILD CUSTODY JURISDICTION ACT: Tit. 16, §§ 115 to 139.

CRIMINALIZATION OF CHILD SNATCHING: No statutory provision.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: V.I. CODE ANN. tit. 5, §§ 471 to 532 (1967 & Supp. 1988); tit. 5, App. I Rule 64 and tit. 5, App. V, Rule 18 (1982 & 1994 Cum. Supp.).

(1) An attachment or an execution on a judgment for alimony or support can be levied upon wages due a judgment debtor from an employer-garnishee under the provisions of this title. The attachment or execution (referred to as the "levy") may become a lien and a continuing levy upon the gross wages due or to become due to the judgment debtor for the amount specified in the levy, if so decreed by the court. § 522. A continuing levy is an involuntary wage assignment.

(2) A voluntary assignment by an employee of wages to become due shall not be valid against a levy upon such wages in (1) above unless executed in writing prior to the date of the levy, and made to secure a debt of a stated amount contracted prior to or simultaneous with the execution of the assignment. This is to prevent employees subject to garnishment from fraudulently assigning away wages to defeat the garnishment action. § 527.

PROCEDURES:

(1) The writ of execution shall be issued by the clerk and directed to the marshal. It shall contain the name of the court, the names of the parties to the action, and the title thereof. It shall substantially describe the judgment if it is for money, and shall state the actual amount due thereon. § 473.

(2) The marshal shall endorse upon the writ of execution the time when he received the same, and such writ shall be promptly executed by the marshal and shall be returnable, within 60 days after its receipt by the marshal, to the clerk's office of issuance. § 474.

(3) A judgment creditor, upon application and filing an affidavit which contains a description of his judgment, its amount, and which states that execution has been returned unsatisfied, and after giving mailed notice to the employer-garnishee and the judgment debtor, may obtain an order for the garnishment of the wages of his judgment debtor. Tit. 5, App. V, Rule 18.

NOTE - This sequence apparently requires the judgment creditor to first attempt to satisfy the judgment from the property of the judgment debtor, or against the person of the judgment debtor or against real or personal property of the judgment debtor (§ 472) before next proceeding against an employer - garnishee of the debtor for wages (tit. 5, App. V, Rule 18).

(4) No discovery under the Virgin Islands Rules of Civil Procedure shall be conducted in a proceeding pursuant to this rule without first obtaining an order of the court, except that the following questions may be propounded to the employer-garnishee upon written interrogatory:

"(a) Were you, at the time of receiving this interrogatory, the employer of the defendant?

(b) State the amount paid the defendant as wages in the most recent weekly pay period or a pay period of a different duration." (tit. 5, App. V, Rule 18(E)).

(5) An employer upon whom levy is served, and who--

(a) at the time is indebted for wages to an employee who is the judgment debtor named in the levy, or

(b) becomes so indebted to the judgment debtor in the future, shall, while the levy remains a lien upon such indebtedness, withhold and pay the judgment creditor or his legal representative, within fifteen days after the close of the last pay

period of the judgment debtor ending in each calendar month, that percentage of the gross wages payable to the judgment debtor for the pay periods in such calendar month to which the judgment creditor is entitled under any levy until such levy is wholly satisfied. § 523.

(6) The lien shall be a continuing levy until the judgment, interest, and costs thereof are fully satisfied and paid, and in no event may monies be withheld by the employer-garnishee from the judgment debtor in amounts greater than those prescribed by that section. Only one levy upon the wages of the judgment debtor may be satisfied at one time. Where more than one levy is issued upon the wages of the same judgment debtor and served upon the same employer-garnishee, the levy first delivered to the marshal shall have priority, and all subsequent levies shall be satisfied in the order of priority according to the dates when they were so delivered to the marshal. § 522(b).

(7) In cases of continuing levies, the judgment-creditor must file a report every 3 months with the clerk of the court showing the amount received and the amount remaining due. (tit. 5, App. V, Rule 18(D)).

TERRITORIAL EXEMPTIONS:

In the case of execution on a judgment, order, or decree for the payment of a sum for support or maintenance of a spouse, former spouse or children, the limitation shall be fifty percent (50%) of the gross wages due or to become due to any such person for the pay period or periods ending in any calendar month. § 522(c). In all other cases, it is 10% of so much of the gross wages as exceeds $30 due from the employer for any pay period. § 522(a).

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) An employer-garnishee may move to vacate a lien and continuing levy on the judgment upon which it is based and the employer is to make no further payments until a further order of the court is received which terminates the vacation proceedings (tit. 5, App. V, Rule 18(C) and § 523(b).

(2) Otherwise, once a continuing levy becomes effective, the employer is required to pay the percent specified in § 522 and is personally liable for failure to comply for any amounts not paid. § 525. But any payments made act as a discharge of any liability. § 523(c).

VIRGINIA

STATUTES:

I. Marriage - VA. CODE ANN. §§ 20-1 to 20-49 (1983 & 1994 Cum. Supp.).

II. Divorce - VA. CODE ANN. §§ 20-61 to 20-146 (1983 & 1994 Cum. Supp.).

III. Custody & Support of Children - VA. CODE ANN. §§ 20-103, 20-107.2, 20-108.1, and 20-108.2 (1994 Cum. Supp.).

IV. Alimony - VA. CODE ANN. §§ 20-103, 20-107.1 (1983 & 1994 Cum. Supp.).

V. Property Division - VA. CODE ANN. § 20-107.3 (1994 Cum. Supp.).

PREMARITAL AGREEMENTS: Premarital Agreement Act - §§ 20-147 to 20-155.

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental or guardian's consent. Minimum age at which persons may marry, with consent of parent or guardian, is 16. §§ 20-48 and 20-49. If either party is under 16, doctor may issue certificate that female is pregnant or has been pregnant within 9 months of examination. In that event, with consent of parent or judicial officer, license may be issued.

(2) Medical Examination - Repealed 1984.

(3) License Fee - Twenty dollars ($20). § 20-15.

(4) Waiting Period - None.

(5) Solemnization - Any clergyman (minister) with proper statutory bonding, appointee of court clerks, and other individual authorized by competent judicial authority may perform marriages in religious setting. §§ 20-23, 20-25 and 20-26.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Prohibited, but recognized as valid if valid where celebrated before moved to Virginia, except those void as per public policy, i.e., incestuous.

(2) Marriage by Proxy - Prohibited.

(3) Marriage by Contract - Prohibited.

Virginia

PROHIBITED MARRIAGES: Any marriage entered into prior to the dissolution of an earlier marriage by one of the parties; or marriage between an ancestor and descendant, brother and sister, whether half or whole blood; or a marriage between uncle and niece, aunt and nephew, whether half or whole blood. §§ 20-38.1 and 20-45.1. Void marriages include those with persons who are under age (§ 20-45.1(a)), who lack mental capacity (§ 20-45.1(b)), or who are of the same sex (§ 20-45.2).

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Void marriages due to their violation of the prohibited marriage statutes and all marriages solemnized when either party lacked capacity to consent because of mental incapacity or infirmity, or where wife, without the knowledge of the husband was with child by someone other than her husband, or where husband, without knowledge of the wife, fathered a child born to a woman other than wife, within 10 months after the date of the solemnization of the marriage, also impotency existing at the time of marriage, felony conviction, or either party had been a prostitute prior to marriage. § 20-89.1. Must bring suit within 2 years of marriage, or immediately upon knowledge of such facts with no cohabitation after such knowledge. § 20-89.1(c).

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - Domicile and actual bona fide residency of one of the parties for at least 6 months preceding the commencement of the suit. § 20-97.

(2) Military Provision - Servicemember will be deemed to be a domiciliary if resided in Virginia with spouse for 6 months next preceding separation and either spouse lives in Virginia at time of filing. Will be deemed to be an actual bona fide resident if stationed or residing at a ship with a home port in Virginia, or at a military base in Virginia. Any member of the armed forces of the U.S. who (i) at the time the suit is commenced is stationed in any territory or foreign country and (ii) was domiciled in the commonwealth for the six-month period immediately preceding his being stationed in such territory or country, shall be deemed to have been domiciled in and to have been a bona fide resident of the commonwealth during the six months preceding commencement of a suit for annulment or divorce. § 20-97.

(3) Service of Process - Within Virginia, process may be served in the same manner as in any other civil suit. §§ 20-99.2 and 8.01-296. Service may be made on a nonresident by any person authorized to serve process in the jurisdiction where the nonresident resides. § 20-99. Service by publication is acceptable against a nonresident. § 20-104.

(4) Answer - Within 21 days of service. Rule 2:7, Rules of the Virginia Supreme Court. However, no bill of complaint may be taken as confessed, and whether the defendant answers or not, the cause shall be heard independently of the admissions of either party in the pleadings or otherwise. § 20-99.

(5) Verification - A divorce will not be granted unless the petition is verified. No distribution of property may occur unless the Virginia court has in personam jurisdiction, but the court can grant the party seeking a divorce a Virginia divorce.

(6) Premarital Agreement Act adopted. §§ 20-147 to 20-154 (See § 20-155 for marital agreements).

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds -
(a) Adultery, or sodomy or buggery outside the marriage;
(b) Conviction of a felony, and confinement for more than one year, after marriage;
(c) Cruelty, reasonable apprehension of bodily hurt, or wilful desertion, after a period of one year from the date of such act;
(d) Continuous separation for one year without cohabitation;
(e) Continuous separation for 6 months without cohabitation if the parties have entered into a signed separation agreement and there are no minor children of the marriage.

(2) Defenses - Insanity of guilty party after commencement of desertion is no defense. However, in a suit for adultery, sodomy or buggery, the divorce shall not be granted if it appears that the parties voluntarily cohabited after knowledge of the fact of adultery, sodomy or buggery or it occurred more than 5 years before the institution of the suit or it was committed by the procurement or connivance of the party alleging such act. §§ 20-93 and 20-94. See also § 18.2-367.

(3) Period of Separation - 1 year before decree to innocent party if basis is cruelty, reasonable apprehension or bodily hurt, or desertion, except no waiting period if asking only for a "divorce from bed and board," which is formal separation.

- 1 year before decree to either party if basis is separation without cohabitation;

- 6 months before decree to either party if basis is separation, there is separation agreement, and no children;

Virginia

- no waiting period for adultery, extramarital sodomy, buggery, or felony conviction with 1 year sentence during marriage.

SEPARATION:

(1) Acknowledged Legal Status - Party may request a decree for divorce from bed and board which is distinguished from a divorce from bonds of matrimony in that parties may not remarry during life of the other. §§ 20-95 and 20-116.

(2) Effect of Separation Agreement on Divorce Decree - Divorce decree from bed and board (a mensa decree) may be merged into a subsequent final divorce decree upon court order. § 20-121. If guilty party initiates proceedings for merger, he shall give other party ten days to notice thereof.

TIME REQUIRED BEFORE REMARRIAGE: No statutory provisions unless an appeal is filed, then must await remarriage pending outcome of appeal. § 20-118.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT:

(1) The legislature has provided a statutory scheme for the support of a spouse during the pendency of a suit and thereafter. The law provides for only two types of spousal support, either pendente lite pursuant to § 20-103, or support due a former spouse pursuant to § 20-107.1 Weizenbaum v. Weizenbaum, 407 S.E.2d 37 (Va. App. 1991).

(2) State Department of Social Services has authority to issue orders for payment of child support in the absence of a court order. § 63.1-250.

(3) The court may order support for minor children, including an order that either party provide health care coverage. Court may also order that support be paid for any child of the parties who is (i) a full-time high school student, (ii) not self-supporting, and (ii) living in the home of one parent seeking or receiving child support until such child reaches the age of nineteen or graduates from high school, whichever occurs first. § 20-107.2. The amount of support, which is presumptively correct, is specified in §§ 20-108.1 to 108.2

(4) Attorney's fees, costs and interest are properly awarded as an element of child support and alimony. Eddens v. Eddens, 188 Va. 511, 50 S.E.2d 397 (1948).

PROPERTY DISTRIBUTION:

(1) Method - Equitable Distribution. § 20-107.3. Court decides first what is separate party which is retained by the respective party, and what is marital property. The court may partition only marital property titled in both names. Court cannot order transfer of legal title of property except by consent of titled owner, which may be done to satisfy a monetary award. Based upon the equities and the rights and interests of each in the marital property, the court may grant a monetary award, payable either in a lump sum or in installments.

(2) A decree of absolute divorce automatically converts a joint tenancy or tenancy by entireties into a tenancy in common. § 20-111. But a divorce from bed and board acts automatically only upon after-acquired property, rendering it separate property in any subsequent suit for absolute divorce. § 20-116.

(3) Fees Awarded - Court may award attorney's fees and court costs as equity and justice may require.

UNIFORM INTERSTATE FAMILY SUPPORT ACT: §§ 20-88-32 to 20-88-82. Replaced the Revised Uniform Reciprocal Enforcement of Support Act which was repealed in 1994.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Best interests of the child applies with specific factors delineated. §§ 20-124.1 to 20-124.3.

(2) Judicial Approach - Consideration is given to same factors as those for child maintenance but the controlling consideration is always the child's welfare.

GRANDPARENTS VISITATION RIGHTS: Court may grant reasonable visitation rights to grandparents or any other party "with a legitimate interest" in visitation, construing "legitimate interest" broadly in the best interests of the child, provided that such parties have intervened in the suit, or are "otherwise properly before the court." § 20-107.2.

UNIFORM CHILD CUSTODY JURISDICTION ACT: §§ 20-124.1 to 20-146.

CRIMINALIZATION OF CHILD SNATCHING: Child snatching by a parent, if child is removed from state, is a Class 6 felony in addition to finding the perpetrator in contempt of court. § 18.2-47. Class 6 felonies are punishable by imprisonment for up to five (5) years. § 18.2-10. Child snatching by parent, when there is no removal

from state, is a Class 1 Misdemeanor plus any penalty for contempt of court. (Misdemeanor punishable by imprisonment up to 12 months, or up to $1,000 fine, or both.)

TREATMENT OF MILITARY RETIRED PAY: Military retirement pensions are considered marital property to the extent that a portion of it was "acquired by either party during the marriage, and before the last separation of the parties." Section 20-107.3. Additionally, in deciding whether to grant a monetary award, the court shall consider the present value, whether vested or not, of pension or retirement benefits. The court may direct payment of a percentage of . . . retirement benefits, whether vested or nonvested, payable in a lump sum or over a period of time and only as such benefits are payable. No such payment shall exceed fifty percent of the cash benefits actually received by the party against whom such award is made. § 20-107.3G.

ADOPTION: §§ 63.1-220 to 63.1-238.

GARNISHMENT AND WAGE ASSIGNMENTS: VA. CODE ANN. § 8.01-511 to § 8.01-576; § 63.1-250 to § 63.1-287.

(1) The traditional remedy of Virginia is a summons of garnishment. § 8.01-511. Service of the process compels the garnishee to withhold monies as of date of service and date of return. § 8.01-511. Service impresses the garnishee with a personal liability. Lynch v. Johnson, 196 Va. 516, 84 S.E.2d 419 (1954).

(2) As part of every administrative order directing a responsible person to pay child or spousal support, a provision shall be made for (i) withholding from the earnings of the responsible person the amount of the withholding order plus (ii) an amount to be applied toward liquidation of arrearages if the responsible person fails to make payments in an amount equal to the support payable for one month. § 63.1-250.3.

Upon default of an administrative or judicial support order, the Department of Social Services shall serve notice on the responsible person of delinquency by certified mail, or service may be waived. Obligee shall also be sent a copy of such notice. Notice will inform the responsible person (i) of the amount to be withheld, (ii) that withholding applies to any current or subsequent period of employment, (iii) of the right to contest the withholding, but that the only basis for contesting it is mistake of fact, (iv) that a written request to contest must be made to Department of Social Services within 10 days of notice, (vi) that a determination on the contest will be made no later than 45 days

from the receipt of notice, (vii) that payment of overdue support upon receipt of req'd notice shall be to the implementation of withholding, and (viii) moneys will be withheld during pendency of any contest. § 63.1-250.3.

Maximum amount of disposable income subject to wage assignment: 50%; debtor support other dependent; 55 %; debtor supporting other dependent plus 12 week arrearage; 60%; no other dependent; 65%; no other dependent plus 12 week arrearage.

(3) As part of every court order for support, the court may, for good cause shown, order a withholding from earnings. The provisions stated in paragraph #2 above apply. §§ 20-79.1, 20-79.2.

PROCEDURES:

(1) Ordinarily, unpaid installments of child support and alimony need not be reduced to judgments--a mere decree of dissolution is sufficient. However, a support decree may be enforced in a garnishment proceeding against the United States only after arrearage has been reduced to judgment. § 20-78.1. The obligee then proceeds by suggestion to cause execution to issue. The execution is then delivered to an officer and a summons is served on the garnishee. § 8.01-511.

(2) The circuit district court has presumptive jurisdiction over the subject matter. In the enforcement effort (not to be confused with the foundational judgment), the court is not required to exercise in personam jurisdiction over the obligor.

(3) The remedy is ancillary. Therefore, the remedy is only as valid as the underlying execution and judgment.

(4) Service of process must be accomplished in accordance with federal law and regulation. The state further imposes a requirement that an officer or a disinterested person serve process.

(5) The garnishee must file an answer within 21 days after service. Va. Rule of Court 3.5. The answer must be sworn or supported by an affidavit and must touch upon the indebtedness of the garnishee as of the date of service and date of return. § 8.01-515. The answer of garnishee is conclusive unless properly traversed. The answer of the garnishee and the traverse frame the issues; no other pleadings are required. The burden is on the obligee to prove all elements of the garnishee's liability by a preponderance of the evidence. Traverse as used herein includes all denials of the garnishee's answer by the obligee by whatever name.

(6) The garnishee has the option of surrendering the money he is liable for to the clerk of the court issuing the summons. § 8.01-520. This procedure will discharge the garnishee for that amount so far as the obligee is concerned. Payment upon order discharges the liability of the garnishee to the plaintiff (for the amount confessed) and acquits the garnishee from liability on the same claim to the obligor. § 8.01-517.

(7) Interrogatories are authorized by law. § 8.01-506.

(8) Debtor must be served with a summons personally or by first class mail through the clerk of the court to the debtor's last known address. § 8.01-511.

(9) An obligor's state income tax refund may be intercepted, and the monies paid to settle any support delinquency. § 58.1-525.

(10) For procedures involving the Department of Social Services, see § 20-79.2

STATE EXEMPTIONS:

(1) The greater of 25% of disposable weekly earnings or 30 times the federal minimum hourly wage is exempted. § 34-29.

(2) For support actions, the exempt amount is 40% of disposable weekly earnings which increases to 50% if the debtor is supporting another spouse or dependent child. These exemptions decrease 5% if the debtor is more than 12 weeks in arrears. § 34-29.

DUTIES AND POWERS OF GARNISHEE:

The garnishee must raise defenses and objections which are jurisdictional. As to defenses which are not jurisdictional, the garnishee may, but is not required to, raise and litigate them. There is no specific standing for the garnishee to request an accounting.

PATERNITY PROCEEDINGS: See §§ 20-49.1 to 20-49.8.

WASHINGTON

STATUTES:
I. Marriage - WASH. REV. CODE §§ 26.04.010 to 26.04.250 (1986 through 1995 Cum. Pocket Part).
II. Divorce - WASH. REV. CODE §§ 26.09.002 to 26.09.913 (1986 through 1995 Cum. Pocket Part).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Under 18 requires parental consent. Under 17 requires approval of superior court judge. § 26.04.010.

(2) Medical Examination - None required.

(3) License Fee - Eight dollars ($8), plus an additional five dollar fee ($5) (to expire in 1995), and an additional ten dollar ($10) fee. § 36.18.010.

(4) Waiting Period - No waiting period. § 26.04.170.

(5) Solemnization - Justice of the supreme court, judges of the court of appeals, judges of superior court, justice of peace within their respective counties and clergymen may perform marriage. § 26.04.050.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Not recognized.

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Not recognized.

PROHIBITED MARRIAGES: All marriages between parents and children, ancestors and descendants, brothers and sisters, uncles and nieces, aunts and nephews, first cousins, first cousins once removed. Also, marriages between a man and his grandaunt or grandniece (same prohibition for female in corresponding degrees of kinship), and bigamous marriages. § 26.04.020.

UNIFORM MARRIAGE AND DIVORCE ACT: WASH. REV. CODE ANN. §§ 26.09.010 to 26.09.902.

GROUNDS FOR ANNULMENT: Voidable marriages, including those invalid due to: bigamy; non-age; marriage within prohibited degrees of kinship; lack of capacity to consent due to alcoholism, mental incompetence or drug addiction; consent obtained by fraud or force. § 26.04.130.

Washington

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - Plaintiff must be resident of state in order to petition court for decree of dissolution. § 26.09.030.

(2) Military Provision - A member of the armed forces stationed in the state may petition court for decree of dissolution. § 26.09.030.

(3) Service of Process - Nonresident defendant may be served personally or by mail. Service by publication requires court order.

(4) Answer - Within 20 days of personal service or 60 days if served personally outside state or by publication.

(5) Verification - No statutory provision.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - No fault on basis of irretrievable breakdown sole ground for divorce. § 26.09.030.

(2) Defenses - Marriage not irretrievably broken. § 26.09.030(3).

(3) Period of Separation - None required. Must wait 90 days from date petition is filed before petition is heard. § 26.09.030.

SEPARATION:

(1) Acknowledged Legal Status - Party may request decree of legal separation in lieu of dissolution. § 26.09.030(4).

(2) Effect of Separation Agreement on Divorce Decree - Binding on court except where unfair, or contains provisions pertaining to custody, support or visitation. §§ 26.09.070(3) and 26.09.150. 6 month period before agreement will ripen into decree.

(3) A decree of dissolution of marriage, legal separation, on declaration of invalidity is final when entered, subject to the right of appeal no earlier than 6 months after entry of a decree of legal separation on motion of either party, the court shall convert the decree of legal separation to a decree of dissolution of marriage.

TIME REQUIRED BEFORE REMARRIAGE: A decree of dissolution is final when entered, subject to the right of appeal. An appeal which does not challenge the finding of irretrievable breakdown does not delay the finality of the decree and either party may remarry pending such an appeal. § 26.09.150. On request of wife whose marriage dissolved, court shall order a former name restored or assumption of a name other than husband's.

RECOGNITION OF FOREIGN DIVORCES: See Uniform Enforcement of Judgments Act, § 6.36.025. A foreign judgment filed in office of any superior court clerk in any county of the state will be treated as a judgment of the Superior Court of Washington.

ALIMONY AND CHILD SUPPORT:

(1) Alimony may be awarded without regard to marital misconduct. See § 26.09.090 for relevant factors.

(2) Alimony is the provision decreed by the court for the support of a wife, the amount of which depends upon the needs of the wife and the ability of the husband to pay as those facts are adjudged by the court. Thompson v. Thompson, 82 Wash. 2d 352,510 P.2d 827 (1973); Stacy v. Stacy, 68 Wash. 2d 573, 414 P.2d 791 (1966). This case may be unconstitutional based on its gender-based distinctions in light of Orr v. Orr, 440 U.S. 268 (1979).

(3) "Duty of Support" means the duty to provide for the needs of a dependent child, which may include necessary food, clothing, shelter, education, and health care. § 26.18.020.

(4) State law expressly authorizes child support and maintenance orders, including payment of health insurance premiums (§ 26.09.105), for either spouse, pending and following dissolution of the marriage or separation. §§ 26.09.060, 26.09.090 and 26.09.100.

(5) Child support guidelines establish a rebuttable presumption of the appropriate level of child support. § 26.19.075.

PROPERTY DISTRIBUTION:

(1) Method - Equitable and just distribution, including community property. § 26.09.080.

(2) Fees Awarded - Court may award attorney's fees and costs. § 26.09.140.

Washington

UNIFORM INTERSTATE FAMILY SUPPORT ACT: §§ 26.21.005 to 26.21.500. (Replaced the Uniform Reciprocal Enforcement of Support Act.)

DETERMINATION OF CHILD CUSTODY:

(1) Judicial Approach - Best interests of child control.

(2) Civil action may be brought against one who has interfered with custody. Damages and reasonable expenses can be awarded, including investigative services and reasonable attorney fees. § 26.09.255.

GRANDPARENTS VISITATION RIGHTS: Court may order visitation rights for any person when in best interests of child. § 26.09.240. Any person may petition courts for visitation rights at any time, but will not be allowed such privilege if disruptive to an adoption.

UNIFORM CHILD CUSTODY JURISDICTION ACT: §§ 26.27.010 to 26.27.930.

CRIMINALIZATION OF CHILD SNATCHING: Custodial interference:

§ 9A.40.060 1st degree: Offender takes child, intending to hold child permanently or to expose child to substantial risk of physical injury, or removes child from state or conceals child from authorized custodian with intent to intimidate or harass a parent or guardian. Class C felony (10 years, $20,000, or both).

§ 9A.40.070 2nd degree: Relative who intends to deny access to lawful custodian is guilty of gross misdemeanor (1 year, $5,000, or both). A subsequent conviction is a Class C felony.

TREATMENT OF MILITARY RETIRED PAY: Military pensions are considered marital property. Konzen v. Konzen, 103 Wash. 2d 470, 693 P.2d 97 (1985), cert. den., 473 U.S. 906 (1985).

SUPPORT ORDERS: NOTICE, PAYMENT, ENFORCEMENT:

(1) Superior Court shall include in all superior court orders which establish or modify a support obligation with assistance of the Office of Support Enforcement: a provision which orders and directs that the responsible parent make all support payments to the Washington State Support Registry; a statement that a notice of payroll deduction may be issued or other income withholding action may be taken, without further notice to the responsible parent if a support payment is not paid when due; and an amount equal to or greater than the support payable for one month is owed under an order entered prior to July 1, 1990, or at any time after entry of the court order.

(2) The court may order the responsible parent to make payments directly to the person entitled to receive the payments, or direct that the issuance of a notice of payroll deduction or other income withholding be made in a regular and timely manner. § 26.23.050.

ADOPTION: Washington recodified its adoption statutes in 1984, effective January 1, 1985. See, §§ 26.33.010 to 26.33.901. See also, Appendix E.

GARNISHMENT AND WAGE ASSIGNMENTS:

GARNISHMENT:

STATUTE: WASH. REV. CODE ANN. §§ 6.27.010 to 6.27.360 (1995); §§ 74.20A.010 to 74.20A.055 (1982 & Supp. 1995).

(1) There are two methods for garnishing wages in Washington. The first is through an administrative process whereby the Office of Support Enforcement issues an "Order to Withhold and Deliver." This order is not issued by a court, but by the Secretary of the Department of Social and Health Services under his statutory authority. § 74.20A. The order issues on one of two bases:

(a) On the court order requiring the debtor to pay child support. § 74.20A.040; or

(b) Based on an original determination by the state that support is due and owing, even though the debtor has not been ordered by a court to pay support. § 74.20A.055.

(2) Notice of Support Debt - notice of a support debt may be served in manner prescribed for the service of a summons, or mailed to debtor by certified mail, return receipt requested, demanding payment within 20 days of day of receipt. § 74.20A.040.

(3) Notice and Finding of Financial Responsibility of Responsible Parent - secretary may in the absence of a superior court order, serve on the responsible parent a notice and finding of financial responsibility requiring a responsible parent to appear and show cause why the finding of responsibility and amount thereof is incorrect, should not be finally ordered, but should be rescinded or modified. Notice shall be served upon the debtor within 60 days from the date the state assumes responsibility for the support of the dependent children on whose behalf support is sought. Any responsible parent who objects to the notice and finding shall have the right for not more than 20 days from the date of service to file an answer for an adjudicative proceeding.

In the event the responsible parent does not make payment of the temporary current and future support, the Department of Social and Health Services may take collection action pursuant to 74.20A during pendency of adjudicative proceeding.

(4) Although an order to withhold and deliver is normally issued in a welfare case where the state is seeking reimbursement for the money it has spent, the state also has the power to enforce support in cases where welfare is not involved.

(5) The Comptroller General of the United States has determined that these administrative orders constitute valid legal process under 42 U.S.C. § 659 in opinion number B-183433 (November 28, 1975). For a current definition of "legal process," see 42 U.S.C. § 662(e).

(6) The second method for garnisheeing wages is through the issuance of a writ of garnishment. § 6.27.020.

PROCEDURES:

(1) The procedure to implement an order to withhold and deliver under section 74.20A.040 will not be enlarged since the Comptroller General has not determined that it is necessary to obtain any underlying documents from the State of Washington to establish that the essential elements of the statute it was issued under have been complied with, before such administrative order can be honored.

(2) With respect to the issuance of a writ of garnishment, the application for issuance is made to the clerk of court upon or after filing the action for the collection of the debt. The application is made by affidavit of the person to whom the support is owed or another person in his behalf. The affidavit must state facts authorizing issuance of a writ such as the amount alleged due and that the creditor has reason to believe that the garnishee is indebted to the debtor or that garnishor has in his possession, or under his control, personal property or effects belonging to the creditor. § 6.27.060.

(3) Service of process is effected by serving upon the garnishee the following:

(a) Four copies of the answer form.

(b) Three stamped envelopes addressed one each to:
(1) Clerk of Courts.
(2) Defendant (Debtor).
(3) Plaintiff (Creditor) or his attorney.

(c) Cash or check of $10 payable to garnishee.

(4) Notice is given by registered or certified mail with a copy of the writ to the debtor or serving a copy on the debtor on or before the day or within 2 days after the date of service on the garnishee. § 6.27.060.

(5) In any action to enforce a support order, the court may, at its discretion, order a parent obligated to pay support for a minor child to post a bond or other security with the court. § 7.33.040.

STATE EXEMPTIONS:

(1) Exemptions under an order to withhold and deliver when based upon court ordered child support are 50% of the debtor's disposable earnings. § 74.20A.090.

(2) Where the order to withhold and deliver is based upon the determination by the state that support is due, the amount subject to garnishment is stated in the order and varies according to the income and time of disbursement of funds. Where the amount disbursed is over the particular maximum, 25% is subject to garnishment.

(3) In the case of a writ of garnishment, the greater of 30 times the state hourly minimum wage, the federal exemption, or 75% of the debtor's disposable earnings is exempt from execution. § 6.27.150. This exemption does not apply in the case of child support where the garnishment is based on a judgment or court order and the amount stated on the writ does not exceed the amount of 2 months' support payments. In this latter instance the following language must appear on the writ:

This garnishment is based on a judgment or court order for child support. Hold all funds you owe the defendant up to the amount stated above without regard to any statutory exemptions.

Therefore, if a garnishment is for up to 2 months' child support, 100% of the debtor's pay may be garnished under state law. The federal restriction governs.

(4) In the case of a garnishment based on a judgment or other court order for child support, other than a mandatory wage assignment order, the exemption shall be 50% of the disposable earnings of the defendant if the individual is supporting a spouse or dependent child (other than a spouse or child on whose behalf the garnishment is brought), or 40% of the disposable earnings of the defendant if the individual is not supporting such a spouse or dependent child.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) An answer to writ of garnishment is usually made on a statutory form which is provided by the creditor. § 6.27.190.

(2) A form for an answer to the order to withhold and deliver is also provided with this type of order. § 6.27.190.

(3) Statutory limits for filing the answer are not applicable here and 42 U.S.C. § 659(d) applies.

(4) There is no statutory indication that the garnishee has standing to challenge legal process or request an accounting.

WAGE ASSIGNMENTS:

STATUTE: WASH. REV. CODE ANN. §§ 26.18.070 to 26.18.160 (1986 & Supp. 1995).

(1) A petition or motion seeking mandatory wage assignment can be filed if there is a present support order and an arrearage of more than 15 days. § 26.18.070.

(2) The total amount withheld to satisfy a wage assignment is limited to 50% of the obligor's disposable earnings. § 6.18.090.

(3) A family support wage assignment will have priority over all preexisting garnishments or wage assignments that are not for family support. § 26.18.100.

(4) Employers who fail to honor orders can be responsible for 100% of the support or spousal maintenance debt. § 26.18.110.

(5) There are very specific requirements and formats regarding service and answers. See §§ 26.18.120 and 26.18.130.

The following summary was reviewed in June 1995 by LTC Michael L. Stevens, USAR, IRR, St. Louis; P.O. Box 4030, 2907 Ring Road, Elizabethtown, KY 42702-4030, Telephone Number: (502) 737-0499, FAX: (502) 737-0488.

WEST VIRGINIA

STATUTES:

I. Marriage - W. VA. CODE §§ 48-1-1 to 48-1-24 (1986 & Supp. 1991).

II. Divorce, Annulment and Separate Maintenance - W. VA. CODE §§ 48-2-1 to 48-2-36 (1986 & Supp. 1991).

MARRIAGE REQUIREMENTS:

(1) Age - 18 without parental consent. Parental consent required age 16 and 17. Court order and parental consent required age 15 and younger. § 48-1-1.

(2) Medical Examination - Requirement to present a certificate from state licensed physician stating both parties have been given statutory serological tests and examination. § 48-1-6a. Required within 30 days of date on which license issued.

(3) License Fee - Fifteen dollars ($15) plus additional fifteen dollar ($15) fee to be disbursed for local family protection. § 48-1-24.

(4) Solemnization - Any minister, priest or rabbi, over age 18, properly certified and bonded in accordance with the statutes and a judge of any court within the state. §§ 48-1-12a, 48-1-12b and 48-1-12c.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Prohibited.

(2) Marriage by Proxy - Prohibited.

(3) Marriage by Contract - Prohibited.

PROHIBITED MARRIAGES: Marriages between a man and his mother, grandmother, sister, daughter, granddaughter, half sister, aunt, brother's daughter, sister's daughter, first cousin or double cousin (unless adopted) are prohibited. Also, a woman may not marry her father, grandfather, son, grandson, half brother, uncle, brother's son, sister's son, first cousin or double cousin. §§ 48-1-2 to 48-1-4. Bigamy is a crime. §§ 61-8-1 and 61-8-2.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Bigamy, consanguinity conflicts, parties or party to marriage mentally incompetent at time of marriage, either party afflicted with venereal disease at time of marriage, impotency at the time of marriage, party was under age of consent without knowledge of other party, wife was pregnant by some other person than husband at time of marriage, or either party had been convicted of infamous crime prior to marriage, or either wife had been prostitute or husband had been notoriously a licentious person. § 48-2-2.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - If grounds for divorce is adultery, plaintiff must have been resident for 1 year next preceding the commencement of the action. If the grounds for divorce is other than adultery, either party may fulfill the 1-year residency requirement. § 48-2-7.

(2) Military Provision - No statutory provision.

(3) Service of Process - Personal service, delivery to usual place of abode to member of family over 16 years, pasting copy upon front door of same, delivery to agent or attorney in fact, also service by mail and publication if personal service not possible.

(4) Answer - Within 30 days after service. Must be verified. § 48-2-4(a).

(5) Verification - All pleadings must be verified. §§ 48-2-10 and 48-2-4(10).

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Include adultery, when either party subsequent to the marriage has been convicted for the commission of a crime which is a felony, abandonment or desertion for 6 months, cruel or inhumane treatment, habitual drunkenness, habitual drug use subsequent to marriage, separation for at least one year without interruption, permanent insanity if the person has been confined in a mental hospital for not less than 3 consecutive years preceding the filing of the case, child abuse of child of marriage, and irreconcilable differences. § 48-2-4.

(2) Defenses - Condonation after knowledge of a ground for divorce, uncorroborated testimony of a prostitute, or that the offense charged was committed by the procurement or connivance of plaintiff. § 48-2-14. Collusion shall not be pleaded as a bar to a divorce.

(3) Period of Separation - No requirement unless separation (one year) is the basis for the divorce. § 48-2-4.

SEPARATION:

(1) Separate maintenance allowed; but divorce from bed and board, or a legal separation, is not recognized. §§ 48-2-13 and 48-2-28.

(2) Acknowledged Legal Status - Party may file an action for separate maintenance through any court that would have jurisdiction in an action for divorce. § 48-2-28.

(3) Effect of Separation Agreement on Divorce Decree - If agreement was entered into fairly and reasonably, and not obtained by fraud or duress, divorce decree can be conformed to it. § 48-2-16.

TIME REQUIRED BEFORE REMARRIAGE: No statutory provision.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT: The court may, at any time after commencement of action and notice to other party, make any order compelling either party to pay any sum necessary for maintenance of other party and to enable him or her to carry on or defend action, or to provide for custody and maintenance of minor children of parties, or to preserve estate of either party, or to compel either party to give security to abide such order, or to compel either party to deliver to other any of his or her separate estate, or to prevent either from interfering with separate estate of other. § 48-2-13. Upon granting a divorce, a court may make such further orders from time to time as it deems expedient concerning maintenance of parties and care, custody, education, and maintenance of minor children. § 48-2-15. In making determinations as to the appropriate amount of alimony or child support, courts shall take into consideration the financial needs of the parties, length of marriage, income abilities, ages, physical, and mental condition of each, educational qualifications, cost of providing health care and education to children the earnings of the husband and wife, and the property of the spouses, and other factors the court deems appropriate to consider in order to arrive at a fair and equitable grant of alimony, child support or separate maintenance. § 48-2-16(b). Court can order medical support to be provided by one or both of the parents, and the costs of any such coverage will be considered in computing the child support guidelines. § 48-2-15a (1994).

West Virginia

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution including, but not limited to, several factors enumerated in the statute, including fault. See § 48-2-32.

(2) Fees Awarded - Court may award attorney's fees and court costs as justice requires. § 48-2-13.

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: §§ 48-9-1 to 48-9-42, repealed by Acts of 1986.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Court shall award custody as it deems expedient. § 48-2-15.

(2) Judicial Approach - Consideration is given to same factors as those for child support, also the misconduct that led to the action, and finally the controlling consideration is always the child's welfare.

GRANDPARENTS VISITATION RIGHTS: Court may grant reasonable visitation rights to any grandparent upon proper application. § 48-2-15.

UNIFORM CHILD CUSTODY JURISDICTION ACT: §§ 48-10-1 to 48-10-26.

CRIMINALIZATION OF CHILD SNATCHING: Any person, other than the father or mother, who illegally, or for any unlawful, improper, or immoral purpose other than prostitution or concubinage seizes, takes, or secretes a child under 16 years of age, from the person having lawful charge of such child, shall be guilty of a felony, and upon conviction thereof, shall be confined in the penitentiary not less than one nor more than 10 years.

TREATMENT OF MILITARY RETIRED PAY: Divisible as marital property by statute. § 48-2-32(j) provides that whenever the court enters an order requiring a division of property and it appears that military retired or retainer pay, pursuant to the Uniformed Services' Former Spouses Protection Act (14 U.S.C. § 1408) will be effected, the court is to specifically provide for the payment of an amount, expressed in dollars or as a percentage of the retired or retainer pay, from the disposable retired or retainer pay of the payor party to the payee party.

ADOPTION: §§ 48-4-1 to 48-4-15.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: W. Va. Code §§ 38-5A-1 to 38-5A-13 (1985).

(1) The most commonly used remedy is the suggested execution against salary or wages commencing upon service and requiring the garnishee to pay 20% of the wages of the judgment debtor for a period of 1 year provided the payments do not reduce the wages paid to the judgment debtor below a weekly amount computed at 30 times the federal minimum hourly wage. §§ 38-5A-1 to 38-5A-5.

(2) The court may order a person obligated to pay support to execute an assignment of his wages to the person having custody of the child. Failure to do so may result in punishment as for contempt of court. § 49-7-6.

PROCEDURES:

(1) Jurisdiction is based on the fact that the government is holding wages or other property of the defendant debtor. §§ 38-7-1, 38-7-15, and 38-5A-3.

(2) Judgment is not required, but a pending legal action is required. §§ 38-7-1 and 38-7-5. An affidavit stating the nature of the plaintiff's claim and the amount of the debt is required. § 38-7-1.

(3) Order of attachment and/or garnishment or a suggested execution is served on the garnishee by the sheriff and signed by the clerk. §§ 38-5A-5, 38-7-4, and 38-7-13.

(4) The attachment or garnishment order should be furnished. Affidavit must be submitted before issuance of writ, but does not have to be served on garnishee. §§ 38-7-1 and 38-7-4.

(5) An answer of the garnishee is required on or before the return date set forth on the writ. § 38-7-24. If the garnishee fails to answer, he can be defaulted. § 38-7-27. No answer is required for a suggested execution.

(6) Payment is made to the county clerk. Upon payment the garnishee is discharged. § 38-7-25.

(7) Pre-process interrogatories are not required.

(8) Service of process on the defendant is required. §§ 38-7-30 and 38-7-4. The judgment debtor must also be served with a certified copy of the suggested execution by the court clerk. § 38-5A-4.

West Virginia

STATE EXEMPTIONS:

The exemption applicable is 80% of wages or 30 times the federal minimum hourly wage, whichever is the greater. § 38-5A-3.

DUTIES AND POWERS OF GARNISHEE:

(1) The defendant may defend against the attachment. There is no obligation for the garnishee to present any defense on behalf of defendant. §§ 38-7-31 and 38-7-32.

(2) Garnishee can contest the writ on the basis of improper service or a defective writ.

WISCONSIN

STATUTES:

I. Marriage - WIS. STAT. ANN. §§ 765.001 to 765.31 (1993 & Supp. 1995).

II. Divorce - WIS. STAT. ANN. §§ 767.01 to 767.60 (1993 & Supp. 1995).

MARRIAGE REQUIREMENTS:

(1) Age - Every person who has attained the age of 18 years may marry if otherwise competent. § 765.02 (1) persons between ages of 16 and 18 with written consent of parents, guardian, custodian, or parent having the actual care, custody and control of the person. If there exists none of the above a court having probate jurisdiction may grant approval. § 765.02(2).

(2) Medical Examination - Not required. Informational items required by Department of Health and Social Services.

(3) License Fee - Forty-nine dollars and fifty cents ($49.50). § 765.15.

(4) Waiting Period - Application for marriage license must be made at least 5 days before issuance. County clerk can waive requirement if additional ten dollar ($10.00) fee is paid. § 765.08.

(5) Solemnization - by mutual declaration of the 2 parties before 2 competent adult witnesses and any ordained clergyman, licentiate of a denominational body or an appointee of any bishop serving as the regular clergyman of any church, any judge of a court of record or a reserve judge, any family court commissioner, court commissioner, court commissioner or municipal judge; or the 2 parties themselves, by such mutual declarations, and in accordance with the custom, rules and regulations of any religious society, denomination or sect. § 765.16.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Not recognized.

(2) Marriage by Proxy - Not recognized.

(3) Marriage by Contract - Not recognized.

Wisconsin

PROHIBITED MARRIAGES: All marriages between persons who are nearer of kin than second cousins except that marriage may be contracted between first cousins where female has reached age of 55 or where either party is permanently sterile. Also, bigamous marriages and marriages involving a person lacking understanding rendering him incapable of assenting to marriage. Must wait six (6) months after divorce (in any state). § 765.03.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT:

(1) A party lacked the capacity to consent at the time the marriage was solemnized because of age; mental incapacity or infirmity; influence of alcohol, drugs or other incapacitating substance; was induced by force, duress, or fraud. § 767.03(1).

A party under 16 or 17, and who did not have consent of parent, guardian, or judicial approval, may bring action anytime prior to attaining age of 18. Parent of guardian must bring suit within 1 year of obtaining knowledge of marriage. § 767.03(3).

(2) A party lacks the physical capacity to consummate the marriage by sexual intercourse and at the time of solemnization the other party did not know of the incapacity. Petitioner must bring suit no later than 1 year after learning of the incapacity. § 767.03(2).

(3) The marriage is prohibited by the laws of this state. This section has a 10 year statute of limitations from the date of marriage except for bigamy. § 767.03(4).

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - At least 1 party must have been domiciled in county where action brought for 30 days and one of the parties must have been a domicile within the state for at least 6 months next preceding commencement. § 767.05.

(2) Military Provision - No statutory provision.

(3) Service of Process - Nonresident defendant may be served personally or by mail outside state. Service by publication permitted if service cannot be perfected by above means. Mailing must accompany publication if address known.

(4) Answer - Within 20 days of service of process.

(5) Verification - Not required.

(6) No action for divorce or separation may be brought to trial until after 120 days from date of service unless court finds necessary for protection of health or safety of the parties or children or other emergency reason. § 767.083 (Pregnancy of wife by another man who she intends to marry is normally not sufficient for waiver).

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - No fault. If both parties state that the marriage is irretrievably broken, or if parties have voluntarily lived apart continuously for 12 months or more and one party so states. If parties have not lived apart for at least 12 months prior to commencement, and do not agree that marriage is irretrievably broken, the court must consider the prospect of reconciliation, and may continue the matter for up to 60 days and order counseling.

(2) Defenses - Abolished.

(3) Period of Separation - See Grounds, supra.

SEPARATION:

(1) Acknowledged Legal Status - Party may request a decree of legal separation. § 767.07. If both parties state under oath that the marital relationship is broken or the court finds that the marriage is irretrievably broken, the court may approve and provide for legal custody, child support, maintenance, and distribution of property.

(2) Effect of Separation Agreement on Divorce Decree - No statutory provision, but case law states that a trial court is not required to give effect to an agreement entered into prior to commencement of divorce proceedings. Parties to an action may stipulate, subject to court approval, to property division, maintenance, child support, family support, legal custody and placement. A court may not approve a stipulation for child support or family support unless the stipulation provides for payment of child support consistent with §§ 767.25 or 767.51. § 767.10.

TIME REQUIRED BEFORE REMARRIAGE: Unlawful for person to marry within 6 months after divorce decree granted. § 765.03(2).

RECOGNITION OF FOREIGN DIVORCES: Divorce obtained in another jurisdiction is of no effect where both parties domiciled in Wisconsin at time of divorce. § 767.22 (Uniform Divorce Recognition Act). Proof that a person obtaining a divorce in another jurisdiction was (a) domiciled in this state within 12 months prior to the commencement of the proceedings therefore, and

resumed residence in the state within 18 months after the date of his/her departure from the state, and until his return maintained a place of residence within this state, shall be prima facie evidence that the person was domiciled in this state when the divorce proceeding was commenced. See § 767.22. All courts shall give full faith and credit to any judgment in an action affecting the family rendered by a court of competent jurisdiction in another state, territory or possession of the U.S., except judgments regarding child custody. Full faith and credit will also be given to the determination by another jurisdiction of arrearages for child support, family support, or maintenance. § 767.21(1). All matters relating to the effect of a judgment of another court regarding child custody shall be governed by Ch. 822 (Uniform Child Custody Jurisdiction Act).

MAINTENANCE (ALIMONY), FAMILY SUPPORT, AND CHILD SUPPORT:

(1) The court may award maintenance to either party for a limited or indefinite length of time, after considering: (a) length of marriage; (b) age and physical and emotional health of the parties; (c) division of property; (d) educational levels of the parties; (e) earning capacity; (f) feasibility of self-support; (g) tax consequences; (h) prior agreements; (i) contribution to education, training, or increased earning power of the other; (j) other relevant factors. § 767.26. NOTE: Unless held open at trial, denial of maintenance or voluntary waiver prohibits subsequent requests for maintenance.

(2) The court shall order either or both parents to pay child support. Child support is determined by using the percentage standards in WIS. ADMIN. CODE Ch. HSS 80. § 767.25(1j). A party may request deviation from percentage standards if the court finds the standards are unfair to the child or any of the parties, after considering: (a) financial resources of the child; (b) financial resources of both parents; (c) maintenance received by either party; (d) the needs of each party to support themselves at a level above federal poverty guidelines; (e) the needs of other persons whom the party is legally obligated to support; (f) the standard of living the child would have enjoyed had the marriage not ended; (g) desirability that the custodian remain in the home as a full-time parent; (h) cost of day care (i) award of substantial periods of physical placement to both parties; (j) extraordinary travel expenses for physical placement; (k) physical, mental and emotional health needs of child and costs of health insurance; (l) child's educational needs; (m) tax consequences; (n) best interests of child; (o) earning capacity of each party; and (p) any other relevant factors. § 767.25 (1m).

(3) Violation of physical placement rights by the custodial parent does not justify failure to pay child support. § 767.25(3).

(4) Court shall order either party or both to pay for the support of any child of the parties who is less than 19 years old and is pursuing a course of instruction leading to the acquisition of high school diploma or its equivalent.

(5) Court shall assign responsibility for and direct the manner of payment of child's health care expense.

(6) Court may order either or both parents to seek work. § 767.253.

(7) Judgment providing for maintenance, child support, or family support may be revised or altered due to a substantial change in circumstances. Revision may only be prospective. § 767.32.

(8) The assignment shall be for an amount sufficient to ensure payment under order or stipulation . . . Any arrearages due at a periodic rate are not to exceed 50% of the amount of support due under the order, so long as the addition of the amount toward arrearages does not leave the party at an income below the poverty line. § 767.265.

(9) If a court-ordered assignment does not require immediately effective withholding and pay or fails to make required maintenance, child support, spousal support, or family support payment within 10 days after its due date, or if court receives notice of assignment for withholding required under similar laws of another state, within 10 days after receipt of notice for withholding, the court shall cause the assignment to go into effect and shall send notice by regular mail to the last known address of the payer. The notice shall inform the payer that an assignment is in effect and that payer may, within a 10 day period, by motion request a hearing on the issue of whether the assignment should remain in effect.

(10) Family support (basically a combination of maintenance and child support) generally is tax deductible.

PROPERTY DISTRIBUTION:

(1) Method - Usually a 50/50 division except where to do so would cause "undue hardship" to one party. Gifts and inheritance are usually excluded from division except where failure to do so will cause hardship to party or children. The court must presume that property is divided equally, but may alter distribution after considering: (a) length of marriage; (b) property brought into the marriage by each party; (c) if one party has substantial assets not subject to division; (d) contribution of each party to the

marriage; (e) age, physical and emotional health of the parties; (f) contribution by one party to the education, training or increased earning power of the other; (g) the earning capacity of each party; (h) desirability of awarding the family home to party having physical placement; (i) maintenance payments; (j) other economic circumstances including pensions; (k) tax consequences; (l) written agreements; (m) other relevant factors. § 767.255.

(2) Fees Awarded - Court may award attorney's fees and costs. § 767.262.

UNIFORM INTERSTATE FAMILY SUPPORT ACT: §§ 769.101 to 769.903 (Replaced the Revised Uniform Reciprocal Enforcement of Support Act repealed effective April 30, 1994).

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - Best interests of child control. § 767.24.

(2) Judicial Approach - Best interests of child control.

GRANDPARENTS VISITATION RIGHTS: Court may grant reasonable visitation rights when in best interests of child. § 767.24. Upon petition by a grandparent . . or person who has maintained a relationship similar to a parent child relationship with the child, the court may grant reasonable visitation rights to that person if the parents have notice of the hearing and if the court determines that visitation is in the best interests of the child. § 767.24.

(3) Court may grant joint legal custody if it finds that it is in the child's best interests and:

(a) Both parties agree to joint legal custody, or

(b) One party requests joint legal custody, and:

(1) Both parties are capable of performing parental duties and responsibilities

(2) No conditions exist which would interfere with exercise of joint legal custody

(3) Parties will be able to cooperate in future decision making.

UNIFORM CHILD CUSTODY JURISDICTION ACT: §§ 822.01 to 822.25.

CRIMINALIZATION OF CHILD SNATCHING: Any person who intentionally interferes with custody of child under 18 for more than 12 hours beyond court-approved placement or visitation is guilty of a Class E felony punishable by imprisonment up to two (2) years. § 948.31. It is an affirmative defense to prosecution for violation of this section if the action is: taken by parent fleeing from imminent physical harm to himself or herself; or is consented to by the other parent or agency having legal custody of the child.

TREATMENT OF MILITARY RETIRED PAY: Divisible as community property. Leighton v. Leighton, 81 Wisc. 2d 620, 261 N.W.2d 457. Mack v. Mack, 108 Wis. 2d 604, 323 N.W.2d 153 (ct. app. 1982); (Chen v. Chen, 142 Wis. 2d 7, 416 N.W.2d 661 (ct. app. 1987).

ADOPTION: §§ 48.81 to 48.975.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: WIS. STAT. ANN. § 767.265 (Supp. 1989); § 812.01 to § 812.24 (1977 & Supp. 1989).

(1) Wages can be garnished for child support or alimony. Any creditor may proceed against any person who is indebted to or has any property in his possession or under his control belonging to a defendant. § 812.01.

(2) Every order for child support, maintenance, or for family support constitutes an assignment of all commissions, earnings, salaries, wages, pension benefits, worker's compensation or unemployment benefits, or lottery prizes to the clerk of court. § 767.265. (1) An income assignment is processed and sent to payor's employer in every case, unless the court finds that income withholding will cause payor irreparable harm. § 767.265 (2r). If immediate income withholding not required, and payor more than 10 days late with any payment, then the court shall cause the assignment to go into effect. § 767.265 (2h). A wage assignment for child support or maintenance has priority over any other assignment or garnishment. § 767.265(4).

PROCEDURES:

(1) Jurisdiction is based on the fact that the government has wages and other property belonging to the defendant. § 812.01.

(2) Plaintiff may not commence any garnishment action affecting the earnings of the defendant prior to judgment in the principal action. § 812.02. Plaintiff may not commence garnishment action affecting property of a spouse who is not a defendant in the principal action unless spouse defendant in the garnishment action.

(3) Service on the garnishee and defendant is required. § 812.07. Service may be made upon plaintiff's attorney by mailing a copy of the garnishee answer to the attorney's post office address shown on the summons. § 812.11.

(4) A garnishee complaint and summons is required. §§ 812.04 and 812.07.

(5) An answer is required within 20 days from service of summons setting forth the wages or property available belonging to defendant. If applicable, the answer may include a setoff or any defense that garnishee may claim, any exemption, prior government debt, or claim of adverse third parties. § 812.11. Answer pertains to money due at date of service of summons. § 812.11.

(6) Payment made to the county clerk releases the garnishee. Payment should be within 5 days of plaintiff's request. § 812.13. If no request is made, the garnishee may pay the court or hold the sums until order of the court. § 812.13. Payments paid to clerk of the court by garnishee are not to exceed $40.

(7) Pre-process interrogatories are not required.

(8) Notice and a copy of the summons should be served on the defendant. If personal service is unobtainable, the court may permit substitute service upon the defendant's employer. § 812.02.

(9) Wisconsin law allows for the interception of an obligor's state income tax refund to collect an arrearage in excess of $500.00. § 46.255.

STATE EXEMPTIONS:

(1) The state exemptions do not apply in the case of an order for the support of any person. § 812.18. Thus, the federal exemption applies.

(2) Garnishment of "earnings" includes both wages and pension or retirement programs. § 812.01. There is no distinction made between active duty pay and retired pay.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

Garnishee can raise defenses. § 812.11. There is no duty for garnishee to present defendant's defenses, but the defendant can present both garnishee's defenses and his own within 20 days from date of service upon him. § 812.15.

The following summary was reviewed in September 1994 by LTC James L. Edwards, Stevens, Edwards & Hallock, P.C., P.O. Box 1148, Gillette, Wyoming 82717-1148, Telephone Number: (307) 682-1444, FAX: (307) 687-2896.

WYOMING

STATUTES:

I. Marriage - WYO. STAT. ANN. §§ 20-1-101 to 20-1-202 (1987 & Supp. 1994).

II. Divorce - WYO. STAT. ANN. §§ 20-2-101 to 20-2-118 (1987 & Supp. 1994).

MARRIAGE REQUIREMENTS:

(1) Age - Parental or guardian's consent is required if person is a minor. Court may approve marriages of party or parties under age of 16. § 20-1-102.

(2) Medical Examination - If female is under 45 and capable of having children, a standard serological test for rubella, immunity and Rh type is required. § 20-1-112.

(3) License Fee - Five dollars ($5) .

(4) Waiting Period - None.

(5) Solemnization - District and county judges, justice of peace, and licensed and ordained ministers may perform ceremony. §§ 20-1-106 and 20-1-110. At least two witnesses must be present at the ceremony.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - Will be recognized as valid if contracted for in jurisdiction which recognizes common law marriages. Common law marriage not valid if contracted for in Wyoming.

(2) Marriage by Proxy - Prohibited.

(3) Marriage by Contract - Prohibited.

(4) Foreign Marriages - Recognized as valid so long as valid where the marriage ceremony is performed. This includes common law marriages. § 20-1-111. Jim's Water Service v. Eayrs, 590 P.2d 1346 (Wyo. 1979).

Wyoming

PROHIBITED MARRIAGES: When parties stand in the relation to each other of parent and child, grandparent and grandchild, brother and sister of half or whole blood, uncle and niece, aunt and nephew, or first cousins. Also, bigamous marriages, marriages where either party is mentally incompetent at time of marriage, and marriages due to nonage are voidable. § 20-2-101.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Those marriages which are prohibited are subject to annulment. Marriages where a party was under the age of legal consent, and no consent is obtained, or consent was obtained by fraud or force and there was no subsequent voluntary cohabitation, and marriages with persons who are mentally incompetent or physically incapable, are subject to annulment. § 20-2-101.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - Plaintiff must have resided in state for 60 days immediately preceding the time of filing of complaint or was married in the state and resided in the state continuously prior to the filing of the complaint. § 20-2-107.

(2) Military Provision - No statutory provision.

(3) Service of Process - Personal service, mails, and publication if address unknown. W.R.C.P. 4.

(4) Answer - Twenty (20) days if personally served and 30 days if served outside the state or served by mail.

(5) Verification - Every pleading of a party represented by attorney shall be signed in his name by at least one attorney of record or by the party himself if not represented.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds - Irreconcilable differences and insanity where individual has been confined in a mental hospital for at least 2 years. §§ 20-2-104 and 20-2-105.

(2) Defenses - All defenses available in an action for divorce are available. § 20-2-106(d).

(3) Period of Separation - Two (2) years separation may be grounds for converting a separation decree to a divorce decree if grounds existed prior to petitioning for judicial separation. A divorce may be granted after a separation decree is entered provided grounds exist for the divorce which occur after the entry of the separation decree. § 20-2-106(b).

SEPARATION:

(1) Acknowledged Legal Status - Party may seek an action for separation by judicial decree using the same procedure as though the petitioner were seeking a decree of divorce. § 20-2-106(a).

(2) Effect of Separation Agreement on Divorce Decree - Separation by decree shall not be grounds for a divorce action. Separation decree is usually discharged upon award of final decree for divorce if such is sought by one of the parties. § 20-2-106(b). Agreement will be enforced if incorporated into divorce decree.

TIME REQUIRED BEFORE REMARRIAGE: No statutory provision.
NOTE: Divorce decree cannot be entered less than 20 days from the date the complaint is filed. § 20-2-108.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT:

(1) In every action brought for divorce, the court may require one spouse to pay any sum necessary to enable the other spouse to carry on or defend the action and for support, maintenance and the support of the children of the parties during its pendency. The court also may include costs. § 20-2-111.

(2) There are specific statutes in Wyoming for support in the nature of medical, dental or other services for children. W.S. 20-60-401.

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution. § 20-2-114.

(2) Fees Awarded - The court may decree costs to include attorney fees against either party. § 20-2-111.

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT:
§§ 20-4-101 to 20-4-138.

Wyoming

DETERMINATION OF CHILD CUSTODY:

(1) Statutory Method - The court shall make disposition of the children as appears most expedient and beneficial for the well-being of the children. § 20-2-113.

(2) Judicial Approach - The welfare of the child is of paramount consideration although the rights of both parents are also considered.

GRANDPARENTS VISITATION RIGHTS: Subsequent to death or remarriage of one or both parents, or after a divorce or judicial separation, grandparents will be allowed visitation if, after a hearing it is determined to be in the best interest of the child. § 20-2-113(c).

UNIFORM CHILD CUSTODY JURISDICTION ACT: §§ 20-5-101 to 20-5-125.

CRIMINALIZATION OF CHILD SNATCHING: A person is guilty of interference with custody if he knowingly takes or entices a minor from the custody of the parent, guardian, or other lawful custodian. Interference is punishable by 5 years imprisonment if defendant is not a parent or defendant knowingly conceals and harbors the child and refuses to reveal the location to the parent, guardian, or lawful custodian. Any other interference with custody is punishable by imprisonment for not more than one year and one day. It is an affirmative defense that the action was necessary to preserve the child from an immediate danger to his welfare, or the child was not less than 15 years old and the child was taken away or was not returned at his/her own instigation and without intent to commit a criminal offense with or against the child. § 6-2-204.

COMPLIANCE WITH CHILD SUPPORT ENFORCEMENT AMENDMENTS OF 1984: Wyoming has enacted a Child Support Enforcement Act (§§ 20-6-101 to 20-6-109) which provides that state child support enforcement services are provided in conjunction with the federal government programs for enforcement of support.

ADOPTION: §§ 1-22-101 to 1-22-116.

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: W.S. §§ 1-15-101 to 1-15-511; §§ 1-17-101 to 1-17-707; §§ 20-3-101 to 20-3-104; and §§ 20-6-101 to 20-6-222.

(1) Pre-judgment attachments and garnishments: There is a procedure available which permits pre-judgment attachment or garnishment. A person whose property is being attached subject to this provision has the right to request a hearing. §§ 1-15-107(a) and 20-6-216.

(2) Post-judgment executions, attachments and garnishments: Post-judgment executions, attachments and garnishments are permitted pursuant to §§ 1-17-101 through 1-17-707.

PROCEDURES:

(1) The court that issues the writ has jurisdiction over the matter (the clerk of the court involved issues a writ pursuant to court order). Where a pre-judgment claim is involved, the statutory section is 1-15-202. Where a writ of execution is issued pursuant to a judgment, the statutory section is 1-17-101. In either instance, the sheriff of the county will serve the documents (see 1-15-104 and 1-15-107).

(2) A judgment is required before a writ of execution can be issued. Unpaid child support or alimony obligations which occur subsequent to the judgment, may not be added on to the judgment. However, through the use of W.S. Sections 20-6-201 through 20-6-222, the same result can be obtained which will allow for the assignment of wages to enforce child support obligations.

(3) A writ of garnishment together with a notice of right to hearing and request for hearing is served upon the garnishee pursuant to W.S. Sec. 1-15-107. The person whose assets are being garnished must file a written request for a hearing with the clerk of the court within 10 days after seizure of the property, funds or wages. In the event this is not done, the person may waive or lose the rights to claim exemptions under the statutes. (See W.S. Sec. 1-17-102[b]). Federal law allows 30 days in which to answer. The request for hearing applies both in pre- and postjudgment proceedings. (See W.S. Sec. 1-15-107 for prejudgment hearings). The exemptions which exist are the following:

a) Social Security benefits pursuant to 42 U.S.C. 407 and supplemental security income;
b) Veterans benefits;
c) Black lung benefits;
d) Aid to families with dependent children and general assistance payments;
e) Federal civil service and state retirement system benefits as provided in 5 U.S.C. 8346 and §§ 9-3-426 and 9-3-620;
f) Worker's Compensation benefits;
g) Unemployment compensation benefits;
h) A portion of wages as provided in § 1-15-102(a)(vi), or in the case of consumer credit sales, leases, or loans as provided by § 40-14-505;

i) Homestead, personal articles used for carrying on a trade or business to the extent provided by §§ 1-20-101 through 1-20-109; and
j) Other exemptions as provided by law. (See §§ 1-15-107 and 1-17-102.

ATTACHMENT PROCEEDINGS:

Wyoming Statute §§ 1-15-201 to 1-15-212. These statutory sections describe the procedure for attachment of specific items of property.

(1) § 1-15-201 describes the procedure for prejudgment attachment for all property not exempt from execution. The person requesting the writ of attachment shall file an affidavit stating 1) that the defendant is indebted to the plaintiff; the amount of the indebtedness must be stated over and above any set-offs; 2) the affidavit must say that the attachment is not sought to hinder, delay or defraud any creditor of the defendant; 3) that the payment of the indebtedness has not been secured by any mortgage or lien upon real or personal property in the state, or if so secured, the security has without any act of the plaintiff or the person to whom the security was given become impaired; and 4) any of the following: a) that the defendant is not a resident of the state; b) that the defendant is a foreign corporation not qualified to do business in the state; c) that the defendant stands in defiance of an officer or conceals himself so the process cannot be served upon him; d) that the defendant has assigned, removed, disposed of or concealed or is about the assign, remove, dispose of or conceal any of his property with the intention to defraud his creditors; e) that the defendant has departed or is about to depart from the state to the injury of his creditors; and f) that the defendant fraudulently or criminally contracted the debt or incurred the obligation respecting which the action is brought.

(2) § 1-15-103 describes the manner of executing a writ. The manner of executing a writ depends on the type of property involved (i.e., whether it is real, personal, or otherwise).

(3) Assuming that a judgment is recovered by the plaintiff, the sheriff is required to satisfy the judgment out of the attached property. Any property held in excess of that needed to pay the judgment plus costs is to be returned to the defendant.

(4) § 1-15-403 provides a procedure for obtaining writs for pre-judgment garnishments. An affidavit must be filed stating 1) the facts showing that plaintiff's claim is one upon which attachment is authorized (see discussion of § 1-15-201 in paragraph (1) above); 2) the grounds and cause for the garnishment; 3) that the plaintiff has good reason to believe the defendant has no

exempt credit, chattels, goods, effects, debts, choice in action or other personal property or rights to obligations or performance in the possession or control or otherwise owing from one or more specified third persons that plaintiff seeks to charge as garnishee; 4) that the property, rights, or debts are not earnings for personal services or otherwise exempt from garnishment. (Note that garnishment of earnings for personal services are limited to the provisions of § 1-15-408. The maximum amount is 25% of the weekly disposable earnings.)

(5) §§ 1-15-501 through 1-15-511 provide for continuing garnishments. The garnishment can be issued against any garnishee who is an employer of the debtor. The garnishment pursuant to these statutory sections constitute a continuing levy against the earnings due until the employment relationship is terminated, the judgment is vacated, modified or satisfied in full, the writ is dismissed or 90 days have expired since service of the writ, whichever is sooner. Continuing garnishments may only apply to the earnings of a judgment debtor who is a natural person. The same limitations on the amount of earnings that may be garnished apply as described in paragraph (4) above.

CHILD SUPPORT ENFORCEMENT ACT:

(1) §§ 20-6-101 through 20-6-401. This statute was enacted in cooperation with the federal government's program pursuant to Title IV-D to aid in enforcing child support obligations. § 20-6-103. This statute generally provides assistance to individuals who qualify who are not receiving child support. The aid is provided upon the condition that the rights to support are assigned to the division charged with locating and obtaining funds from the obligor.

(2) §§ 20-6-201 through 20-6-222 is the Income Withholding Act. This statutory section provides for the entry of orders from a court of competent jurisdiction which requires an employer, to withhold certain amounts of income from the obligor s earnings. The income is then paid to the clerk of district court that has jurisdiction over the matter for distribution to the payee.

(3) The Income Withholding Order under this Act has priority over any other legal process under state law against the same income (i.e., attachment, garnishment, etc.)

(4) Note that the information on the Income Withholding Act has been discussed in the Marriage Guide materials previously submitted. The information on this sheet is submitted for the purpose of replacing all of the information on pages 2-152 through 2-154.

Wyoming

AMERICAN SAMOA

STATUTES:

I. Marriage - 42 AM. SAMOA CODE ANN. §§ 42.0101 to 42.0108 (1981 & Supp. 1988).

II. Divorce and Annulment - 42 AM. SAMOA CODE ANN. §§ 42.0201 to 42.0211 (1981 & Supp. 1988).

NOTE - Information on American Samoan laws, statutes, etc., may be obtained from Book Publishing Company, 2518 Western Avenue, Seattle, WA 98121, the current American Samoa Code Annotated codifier, indexer, and publisher. Before 1981, the American Samoan Code was published by Equity Publishing Corporation, Orford, New Hampshire. Equity Publishing used a different code system. The citations used by Equity which correspond to those now used by Bock Publishing are: tit. 17, § 1-8 (Marriage) and tit. 17, §§ 401-408 (Divorce and Annulment).

MARRIAGE REQUIREMENTS:

(1) Age - Male must be at least 18 and the female at least 14. If female is less than 18, parental consent is required. § 42.0101.

(2) Neither of the parties may have a lawful spouse living. § 42.0101.

(3) Medical Examination - None required.

(4) License Fee - $10.00 for application and issuance of license. § 42.0103 and § 42.0107(a). Clergymen may not charge more than $10 to perform ceremony. § 42-0107(b).

(5) Waiting Period - 30 days after license issued, but marriage must take place within 90 days after license issued.

(6) Solemnization - Minister of Christian religion who has registered a letter of identity with the Registrar of Vital Statistics. (Marriage performed by an unregistered minister is valid, but minister is subject to a fine.) § 42-0102(a); marriages performed by an Associate Judge or the Associate Justice or Chief Justice, American Samoa.

ALTERNATIVE MARRIAGE FORMS:

(1) Common Law Marriage - No statutory provision.

(2) Marriage by Proxy - No statutory provision.

(3) Marriage by Contract - No statutory provision.

PROHIBITED MARRIAGES: Marriages between those related nearer than the fourth degree of consanguinity; marriages between parties having a lawful spouse living. § 42.0101. Also, under Samoan custom, women do not marry men from their families. Families may include persons who are not related by blood. Lolo v. Heirs of Sekio, (H.C.T.D. 1964) 4 A.S.R. 477.

UNIFORM MARRIAGE AND DIVORCE ACT: Not adopted.

GROUNDS FOR ANNULMENT: Any marriage illegally contracted may be annulled (non-age, prohibited degrees of relationship). § 42.0203.

PROCEDURAL REQUIREMENTS FOR DIVORCE:

(1) Jurisdiction (Residency) - Either petitioner or respondent must have been a bona fide and continuous resident of American Samoa for 1 year next proceeding commencement of the action. § 42.0206(1).

(2) Application by petition to court stating ground in either § 42.0202 or § 42.0203.

(3) Military Provision - None.

(4) Service of Process - Divorce statute specifies only "as required by law." § 42.0204(b). § 43.0501(4), Civil Remedies and Procedures, permits service by publication in a divorce or annulment action, or in a modification to such an action, where the defendant is a nonresident of Samoa or his residence is unknown. Such notice must be published once each month for 2 consecutive months, posted in front of the courthouse in the village of Fagatoga for the same period and mailed to the defendant by registered U.S. mail at his last known address. Publication is not necessary when service is personal. § 43.0504. Otherwise, § 43.0201 requires compliance as nearly as possible with the Federal Rules of Civil Procedures, which would include F.R.C.P. 4.

(5) Answer - Within 2 months and 10 days from date of first publication. § 43.0502(3).

(6) Verification - No statutory provision.

SUBSTANTIVE REQUIREMENTS FOR DIVORCE:

(1) Grounds:
  (a) Adultery;
  (b) habitual cruelty or ill usage;
  (c) desertion for 6 months or more;

(d) sentence to imprisonment for a term of 10 or more years or for life;

(e) voluntary continuous separation for a period of 5 years or more. § 42.0202.

(2) Defenses:

(a) Connivance or collusion in procurement of divorce. § 42.0205; § 42.0206(3) and (4).

(b) That the petitioner is guilty of any of the grounds for divorce. § 42.0206(5).

(c) Condonation. § 42.0206(6).

However, if the ground sued for is voluntary separation for 5 years or more, the defenses above are not available. § 42.0206(b).

(3) Period of Separation: No statutory provision.

SEPARATION:

(1) Acknowledged Legal Status - Status of legal separation without absolute divorce is recognized. §§ 42.0204(a) and 42.0208.

(2) Effect of Separation Agreement on Divorce Decree - No statutory provision; no case law found.

TIME REQUIRED BEFORE REMARRIAGE: No statutory provision.

RECOGNITION OF FOREIGN DIVORCES: No statutory provision.

ALIMONY AND CHILD SUPPORT:

(1) Alimony. "When the divorce, separation, or annulment is granted, the court may make an order for the maintenance of either party it deems proper and just under the circumstances." § 42.0209.

(2) Child Support. The court may make any order it deems just and property for the maintenance and support of the minor children. § 42.0210.

PROPERTY DISTRIBUTION:

(1) Method - Equitable distribution ("[T]he court may make a division of, or order with respect to, the property of either or both of the parties as it deems fair and proper . . ."). § 42.0210.

(2) Fees awarded - No statutory provision.

American Samoa

REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT: §§ 42.0401 to 42.0454.

DETERMINATION OF CHILD CUSTODY:

(1) Statutory method: "[T]he court may make . . . an order for the custody (and) care . . . of the minor parties . . ." as it deems fair and proper. § 42.0210.

(2) Judicial approach: See above.

GRANDPARENTS VISITATION RIGHTS: No statutory provision.

UNIFORM CHILD CUSTODY JURISDICTION ACT: No statutory provision.

CRIMINALIZATION OF CHILD SNATCHING: A person commits the crime of interference with custody, if, knowing that he has no legal right to do so, takes or entices from lawful custody any person entrusted by order of a court to the custody of another person or institution. Interference with custody is a Class A misdemeanor (§ 46.3535(a)), unless the person taken or enticed away from legal custody is removed from the territory, then it is a Class D felony (§ 46.3535(b)).

COMPLIANCE WITH CHILD SUPPORT ENFORCEMENT AMENDMENTS OF 1984: No statutory provisions found.

ADOPTION: American Samoan adoption laws were substantially revised in 1980 and are based largely on provisions of the Colorado Revised Statutes. See Research Guide note, AM. SAMOA CODE ANN., § 45, Chapter 04, Juvenile Justice, at 45-26. Adoption law is codified at §§ 45.0401 to 45.0431. See also, C.R.S. 19-4-101 to 19-4-116 (1973).

GARNISHMENT AND WAGE ASSIGNMENTS:

STATUTE: Attachment - AM. SAMOA CODE ANN. §§ 43.0901 to 43.0920 (Book Pub. Co.). Garnishment - AM. SAMOA CODE ANN. §§ 13.1801 to 43.1815 (Book Pub. Co.).

NOTE -

(1) Property of a defendant in the possession of another, or debts due him, may be garnished. § 43.1801.

(2) No provision found for wage assignments.

PROCEDURES:

(1) Effected by serving a written notice on the garnishee forbidding him to pay any debt owing to the principle defendant. § 43.1802(b).

(2) Garnishee is to appear and answer on the second Tuesday following the date of service of notice. § 43.1802(b).

(3) The U.S. may be garnished for enforcement of alimony and child support obligations of federal employees, including members of the armed forces, but the American Samoan government or any other public bodies and agencies may not be garnished without prior approval of the Governor. § 43.1803.

(4) Three statutory interrogatories are specified and the court may permit any others that the court thinks proper. § 43.1805.

(5) Garnishee may exonerate himself at any time after answer, by paying over to the clerk of the court any amount owing by him to the defendant. § 43.1809.

(6) Judgment against garnishee may not be taken until the principal defendant has had 7 days written notice of the garnishment proceedings. A return by the marshal of notice is required. § 43.1812.

TERRITORIAL EXEMPTIONS:

(1) No territorial wage, personal or real property exemptions are found within either the Garnishment or Attachments chapters.

(2) The Executions chapter contains only one: Real property of Samoans is not subject to execution, unless it is a judgment foreclosing on a valid mortgage. § 43.1528.

(3) The federal wage exemptions of 16 U.S.C. § 1673 apparently apply.

RESPONSIBILITIES AND LIABILITIES OF GARNISHEE:

(1) See PROCEDURES, generally.

(2) The garnishee is liable to the plaintiff on any judgment to the full amount of the indebtedness of defendant held by the garnishee, unless before judgment the garnishee has delivered it to the clerk of court. § 43.1811.

(3) If the debt of the garnishee to the defendant is not due, execution is suspended until it's maturity. § 43.1814.

ALIMONY AND CHILD SUPPORT:

(1) Alimony and child support obligations are expressly considered garnishable debts. See PROCEDURES, para. (3).

(2) American Samoa also recognizes the offense of criminal nonsupport for knowingly failing to provide support, without good cause, for a child under age 18 (legitimate or illegitimate). It is misdemeanor if the accused has not left the territory, otherwise, a Class D felony.

CHAPTER 5

FAMILY LAW PRACTICE NOTES
THE ARMY LAWYER

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MEDICAL AND DENTAL CARE FOR WARDS
AND PREADOPTIVE CHILDREN
The Army Lawyer, December 1995

Several statutory changes have extended medical and dental benefits to certain wards and preadoptive children. Army Regulation 600-8-14, Identification Cards, Tags, and Badges (15 July 1992) (AR 600-8-14), does not reflect these changes, and many LEGAL ASSISTANCE attorneys may be unaware of them.

Section 702 of the National Defense Authorization Act for Fiscal Year 1994 [FN73] and § 701 of the National Defense Authorization Act for Fiscal Year 1995 [FN74] broadened the definitions of dependents who are eligible for medical care. The new definitions are found in Title 10 of the U.S.C. [FN75] Before these amendments, wards and preadoptive children were not eligible for either medical or dental care. [FN76] To remedy this, the 1994 amendments included in the definition of dependent an "unmarried person who is placed in the legal custody of the member ... as a result of an order of a court ... in the United States (or a territory or possession) for a period of at least twelve consecutive months." [FN77] The child must also be under age twenty-one (twenty-three if a full time student) or incapable of self-support. This change was sufficient to entitle these dependents to care in military medical facilities on a space available basis.

The 1995 amendment included in the definition of dependent "an unmarried person who is placed in the home of a member... by a placement agency (recognized by the Secretary of Defense) in anticipation of legal adoption by the member." [FN78] This change was sufficient to entitle these dependents to care in military medical facilities on a space available basis. The 1995 amendment also modified 10 U.S.C. §§ 1076a and 1079 to make both categories of dependents eligible for the Dependent's Dental Program and CHAMPUS. [FN79]

The United States Army Personnel Command (PERSCOM), by electronic message, directed the extension of these benefits to wards and preadoptive children,[FN80] and PERSCOM will include these changes in the next update to AR 600-8-19. [FN81] Major Emswiler, Department of the Army, Office of The Judge Advocate General (ATTN: DAJA-LA), Washington, D.C.

Footnotes

FN73. Pub. L. 102-484, Oct. 23, 1992, 106 Stat. 2315 (1992).

FN74. Pub. L. 103-337, Oct. 5, 1994, 108 Stat. 2663 (1994).

FN75. 10 U.S.C. § 1072 (1994).

FN76. Dep't of Army, Reg. 600-8-14, Identification Cards, Tags, and Badges, fig. B-1A (15 July 1992).

FN77. 107 Stat. 1547, 1686 (1993).

FN78. 108 Stat. 2663, 2797 (1994).

FN79. Id.

FN80. Message, Commander, United States Army Personnel Command, TAPC-PDO-IP, subject: Changes in Benefits and Entitlements for Members of the Armed Services and Eligible Family Members (131346Z Mar 95).

FN81. Id.

RESOLVING PATERNITY AND NONSUPPORT
ALLEGATIONS--NO EASY WAY OUT
The Army Lawyer, December 1995

Opinions and conclusions in articles published in the Army Lawyer are solely those of the authors. They do not necessarily reflect the views of the Judge Advocate General, the Department of the Army, or any other government agency.

Two recent court cases from Wisconsin and Arkansas focused on attempts to contract away child support and paternity allegations. [FN82] In both situations, the results were the same. The attempts were ineffective to the great detriment of the alleged father. Recent cases from Florida and New Hampshire further clarify that this is true no matter what representations are made about fault for pregnancy, and that adoption does not cut off support obligations, at least to the extent of arrearages. [FN83]

In Jasmine J.E. v. John E.P., [FN84] the Wisconsin case, a child's unwed mother settled a paternity case against the alleged father for $5000. Some ten years later, a paternity suit was again initiated against the alleged father. As a result, he was determined to be the child's father and ordered to pay support. Finding that Wisconsin law prevents abrogation of support obligations by agreement, the court further determined that he was not due credit for the $5000 paid to the mother in 1981. [FN85]

Along similar lines, in Davis v. Office of Child Support Enforcement, [FN86] the Arkansas case, a paternity case against an alleged father was dismissed with prejudice after the parties settled. Under the terms of the settlement, the alleged father paid $10,000 towards medical expenses and child support. Although the first suit was dismissed with prejudice, the State of Arkansas Office of Child Support Enforcement subsequently initiated a paternity action seeking payment of child support. Finding that the suit was not barred, the Arkansas Supreme Court noted that "a parent can not permanently bargain away a child's right to support." [FN87]

Some alleged fathers may feel they are being unfairly burdened with obligations resulting from parenthood and seek to relieve themselves of these obligations. In Welzenbach v. Powers, [FN88] a New Hampshire case, the father of an illegitimate child sought damages from the child's mother based on her misrepresentations regarding the adequacy of contraceptive measures she had taken. As damages, the father sought to be reimbursed in part for the child support payments that he had been ordered to pay. In denying the father's claims, the New Hampshire Supreme Court determined that the action violated public policy requiring parents to support their children.

In Kranz v. Kranz, [FN89] a Florida decision, a child was born during the marriage but placed in the custody of the mother following the divorce of the parties. Thereafter, the mother remarried, and the mother's new husband adopted the child. Relying on Florida statutory law that terminates support obligations on adoption, the trial court held that all support obligations including arrearages had been discharged. Reversing on appeal, the appellant court held that the law is prospective and does not discharge existing support arrearages. [FN90]

All of the cited opinions reflect the strength of public policy in favor of enforcing a child's right to support. The action of the courts in these cases reemphasizes the point that avoiding paternity allegations and nonsupport complaints, through settlement or otherwise, may work to the significant disadvantage of an alleged parent. [FN91]

LEGAL ASSISTANCE attorneys must ensure that clients understand that it is unlikely that paternity and nonsupport allegations will just go away. A strong public policy favoring paternal support drives the courts. Any action short of disqualification as a prospective parent through blood testing where paternity is at issue, or in obtaining judicial approval of limitations on support obligations, may operate to preserve issues for another day. Major Block.

Footnotes

FN82. Jasmine J.E. v. John E.P., 22 Fam. L. Rep. (BNA) 1046 (Wis. Ct. App. 4th Dist. Nov. 9, 1995); Davis v. Office of Child Support Enforcement, 22 Fam. Law Rept. (BNA) 1047 (Ark. Sup. Ct. Nov. 6, 1995).

FN83. Kranz v. Kranz, 22 Fam. Law Rept. (BNA) 1021 (Fla. 3rd Dist. Ct. App. Oct. 5, 1995); Welzenbach v. Powers, 21 Fam. Law Rept. (BNA) 1496 (N.H. Sup. Ct. June 30, 1995).

FN84. 22 Fam. Law Rept. (BNA) 1046 (Wis. Ct. App. 4th Dist. Nov. 9, 1995).

FN85. Id. at 1496.

FN86. 22 Fam. L. Rep. (BNA) 1047 (Ark. Sup. Ct. Nov. 6, 1995).

FN87. Id. at 1497.

FN88. 21 Fam. L. Rep. (BNA) 1496 (NH Sup. Ct. June 30, 1995).

FN89. Kranz v. Kranz, 22 Fam. Law Rept. (BNA) 1021 (Fla. 3d Dist. Ct. App. Oct. 5, 1995).

FN90. Id. at 1021.

FN91. The same proposition holds true for delay or refusing to cooperate given the potential for award of child support retroactive to birth. See Nebraska ex re. Matchett v. Dunkle, 508 N.W.2d 580 (1993).

DRAFTING A SEPARATION AGREEMENT? DON'T FORGET THE SURVIVOR BENEFIT PLAN!

The Army Lawyer, December 1995

LEGAL ASSISTANCE attorneys have more to consider than just division of military retired pay when advising spouses seeking to divorce a service member. LEGAL ASSISTANCE attorneys must not forget about the Survivor Benefit Plan when drafting a separation agreement. Failure to do so will waive the former spouse's claim to benefits under the Survivor Benefit Plan.

Former spouses of service members must do two things to ensure that they are covered by the Survivor Benefit Plan. First, they must obtain a court order. [FN92] They can either enter into a written agreement with their service member former spouse agreeing that he or she must maintain coverage under the Survivor Benefit Plan and have that agreement incorporated or ratified by a court, or they can obtain a court order stating that the service member former spouse will provide coverage for them under the Survivor Benefit Plan. [FN93] Second, former spouses must send a copy of the court order to the Defense Finance and Accounting Service (DFAS) within one year of the date of the court order. [FN94] If a former spouse fails to ensure that both of these steps are taken, he or she runs the risk of not being covered by the Survivor Benefit Plan on the death of the service member former spouse.

The recent case of Sumakeris v. United States [FN95] illustrates this point. Mrs. Sumakeris was married to her service member husband when he retired, and he elected to cover her under the Survivor Benefit Plan. Mrs. Sumakeris and her service member husband divorced shortly thereafter. Despite being represented by legal counsel, the parties did not agree to provide Survivor Benefit Plan coverage for Mrs. Sumakeris, and her husband was not ordered to elect Survivor Benefit Plan coverage in her favor. Not surprisingly, neither she nor her attorney sent a copy of the divorce decree to the DFAS. Mr. Sumakeris canceled his participation in the Survivor Benefit Plan.

Because Mrs. Sumakeris did not obtain a court order and did not send a copy of it to DFAS within one year of the date of the court order, she was not entitled to coverage under the Survivor Benefit Plan. Even though Mrs. Sumakeris was never notified that her ex-husband had cancelled her coverage, the court held that she had waived her right to coverage under the Survivor Benefit Plan.

LEGAL ASSISTANCE attorneys should ensure their clients understand the Survivor Benefit Plan and the need for former spouses to take affirmative steps to protect their Survivor Benefit Plan rights. To prevent waiver, Survivor Benefit Plan coverage must be provided for in a court ratified separation agreement or court order which must be filed with DFAS within one year of the date of the court order. Major Henderson.

Footnotes

FN92. 10 U.S.C. § 1450(f)(3)(A) (1988).

FN93. Id.

FN94. Id. § 1450(f)(3)(B).

FN95. 34 Fed. Cl. 246, 1995 WL 576775 (Fed. Cl. Sept. 28, 1995).

TEXAS AMENDS LAW TO PERMIT ALIMONY [FN12] - SOMETIMES!
The Army Lawyer, October 1995

Military LEGAL ASSISTANCE practitioners frequently come into contact with Texas domiciliaries as part of their assistance practice. [FN13] Almost all military practitioners are familiar with the longstanding bar on post-divorce alimony in Texas. However, as a result of legislation passed by the Texas legislature in 1995, this bar will end effective 1 September 1995. [FN14] While the absolute bar to alimony will end, practitioners must understand that the law provides prerequisites on eligibility for alimony as well as limits on the duration and amount of alimony a court can award.

Under the new law, two major prerequisites to the award of alimony exist. One prerequisite is the documented commission of an act of family violence by the payor spouse. [FN15] The alternative prerequisite is that the marriage lasted ten years or longer. [FN16] Eligibility under the ten-year durational prerequisite is further limited by several additional prerequisites. These include either incapacity of the spouse or a child requiring care of the spouse in the home or inability of the spouse to be self-supporting. [FN17] In the latter case, the spouse must overcome a presumption that alimony is not warranted. [FN18] One of these two prerequisites must be met before a court is authorized to order alimony.

Should a spouse actually meet all the prerequisites, two additional limitations apply. First, the court cannot order alimony for more than three years unless the spouse requesting support is incapacitated. [FN19] Second, alimony awards in excess of the lesser of $2500 or twenty percent of gross income are not permitted. [FN20] Military payers will appreciate that Veterans Administration service-connected disability payments are excluded from alimony. [FN21]

A superficial review of the changing law on alimony in Texas is misleading. The ban on award of alimony has been removed, but significant barriers stand in its place. [FN22] Military practitioners should be prepared to incorporate a clear understanding of the new law and its impact into their LEGAL ASSISTANCE practice. Major Block.

Footnotes

FN12. The term "alimony" is used for ease of recognition by practitioners throughout this note. Texas law addresses this topic through use of the term "maintenance." See TEX. FAMILY CODE ANN § 3.9601 (West 1995) (effective September 1, 1995) for definition.

FN13. Many soldiers are recruited directly into the Army from Texas. Many become domiciliaries of Texas during training or assignments to Texas at least in part to take advantage of the favorable tax treatment of military pay by the State of Texas.

FN14. TEX. FAMILY CODE ANN §§ 3.9601--3.9611 (West 1995) (effective 1 September 1995).

FN15. Id. § 3.9602(1). The offense must result in a conviction or a deferred adjudication.

FN16. Id. § 3.602(2).

FN17. Id. § 3.9602(2)(A)-(C).

FN18. Id. § 3.9604.

FN19. Id. § 3.9605.

FN20. Id. § 3.9606.

FN21. Id.

FN22. Some of these barriers (e.g., a ten-year test or family violence victim status) may seem familiar from experience with the Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 730 (1982), as amended, and codified at 10 U.S.C. §§ 1072, 1076, 1086, 1408, 1447, 1448, 1450, & 1451. Despite their seeming similarity, they are entirely independent and should not be confused.

CHILD SUPPORT ENFORCEMENT AGAINST MILITARY PERSONNEL
The Army Lawyer, September 1995

In February 1995, President Clinton signed an executive order focused on improving the federal government's responsiveness to child support enforcement efforts. [FN9] While the President's order will likely stimulate new initiatives at the national level, some military legal offices already have established progressive relationships with their local state office of child support enforcement (OCSE).

Relationships with the local OCSE have the potential to be mutually reinforcing. For custodial parents, the local OCSE can offer services that can lead to creation and enforcement of court-ordered support obligations at little or no cost. This service is available to welfare and nonwelfare recipients and may be of particular interest to our significant military sole-parent population.

Military personnel who are the subject of child support enforcement efforts also may benefit from a relationship between the local OCSE and their legal office. Inquiries handled informally may result in reduced court costs and possibly greater willingness to cost share on blood testing. A fuller understanding of military support regulations and pay systems also can ensure that income and obligations are fairly stated.

One vehicle for opening a relationship with a local OCSE is to offer, or respond to an offer, to provide military support enforcement training. The TJAGSA LEGAL ASSISTANCE Branch has developed training materials for this purpose. The materials are updated regularly and have been used to train child support enforcement caseworkers, prosecutors, and even judges at state and national conferences.

The TJAGSA training materials are incorporated into a guide titled Support Enforcement Against Military Personnel, which has been uploaded onto the Legal Automation Army-Wide Systems (LAAWS) Bulletin Board System. Two versions have been uploaded: "CHILDSPT.ASC" in ASCII format and "CHILDSPT.WP5" in WordPerfect 5.0 format. Attorneys interested in incorporating the guide into training, or who have questions or suggestions regarding the guide, are encouraged to contact TJAGSA. Major Block.

Footnotes

FN9. Exec. Order No. 12,953,60 Fed. Reg. 11,013 (1995).

FAMILY LAW AGREEMENTS--EXPLORING THEIR LIMITS
The Army Lawyer, May 1995

Attorneys generally are sensitive to the legitimate reasons of avoiding litigation in FAMILY LAW cases. In addition to generating significant expense, litigation may cause heightened emotional trauma for adults and children, and produce unpredictable or undesired results. Agreements, on the other hand, usually save money and give the parties some control over their own destiny. Assuming a reasonable agreement can be reached, expectations regarding compliance are likely enhanced.

Despite their general appeal, several recent cases emphasize that agreements can be subject to significant limitations. For example, in Blum v. Ader (Blum), a New Jersey Superior Court defeated a separation agreement's election in favor of Delaware law and ordered payment of college expenses. [FN76] While Delaware law does not require payment of these expenses, if the parents have the ability to pay and the child is eligible for college, New Jersey law does. Finding that the child involved was a New Jersey resident, the court recognized a right to college support that could not be bargained away. [FN77]

A recent California case, Shasta County ex rel. Caruthers v. Caruthers, focused on parental authority to bargain away continuing support obligations. [FN78] In Shasta, a mother agreed dismiss her paternity suit with prejudice in exchange for $15,000 settlement. Finding that this agreement ignored legitimate interests of the child which were unrepresented, the court determined that the child retained the right to attempt establish paternity and obtain support. The court specifically found that neither dismissal with prejudice of the mother action, nor the mother's agreement, could foreclose this fundamental right. [FN79]

McAlpine v. McAlpine, a Louisiana case, presents another example of ineffective waiver. [FN80] In McAlpine, the parties executed an antenuptial agreement which waived claims to permanent alimony in the event of divorce. In exchange, the husband agreed to pay a lump sum settlement that varied size dependent on the length of the marriage. [FN81]

While acknowledging a trend to allow waiver in postmarriage separation agreements, the court round a premarriage waiver violative of public policy. Specifically, the court determined that waiver of alimony at this early stage would fail to insulate the public from the potential need for public assistance of a spouse without a right to alimony. [FN82]

FAMILY LAW agreements, and particularly separation agreements, will continue to be of major interest to Army LEGAL ASSISTANCE Program clients. LEGAL ASSISTANCE Attorneys (LAAs) should be sensitive to the possibility that the ability the parties to agree may not be the only limit on the terms an agreement. As the above cases demonstrate, the impact childrens' rights and public policy concerns can be a factor. Because the significance of this impact is largely dependent on state law, LAAs must have access to state law resources, or be prepared to seek assistance from, or referral to, someone who does. Major Block.

Footnotes

FN76. 21 Fam. L. Rep. 1226 (BNA) (N.J. Sup. Ct. 1995).

FN77. Id.

FN78. 21 Fam. L. Rep. 1185 (BNA) (Cal. Ct. App. 1995).

FN79. Id. at 1186.

FN80. 21 Fam. L. Rep. 1195 (BNA) (La. Sup. Ct. 1995).

FN81. Id.

FN82. Id. at 1196. A dissenting opinion would have required evaluation of spousal need at the time of divorce on a case-by-case basis. If the public was adequately protected, waiver could be enforced.

Responding to Unwarranted Child Support Enforcement Efforts
The Army Lawyer, April 1995

Aggressive family support collection efforts by our states have greatly reduced the level of unpaid support by noncustodial parents. Occasionally, however, it can be difficult to stop unwarranted collection efforts once initiated. One case discussed at the Course involved a service member who fell into arrears on child support payments in the early 1980s. In response to an order from a Hawaiian court, his wages were garnished until the arrearage was satisfied in 1987. The service member continued to pay all outstanding support obligations. In 1993, without notice, the Internal Revenue Service (IRS) withheld the service member's 1993 tax refund at Hawaii's request. Hawaii had requested the tax intercept to recover the same arrearage satisfied by the pay garnishment completed in 1987. Efforts to discuss the case with support enforcement personnel failed and written correspondence generated only form letters in return. How can this matter be resolved before the member's 1994 tax refund is seized?

Tax intercept is an effective remedy for enforcing indebtedness on behalf of child support collection efforts. Problems with intercepts can be addressed with the originating agency, but may be more quickly resolved by contacting the IRS directly. In the present case, the client should contact an IRS employee at the IRS Collection Office. If that fails, the client should use the IRS "Problem Resolution Program." [FN38] The "Problem Resolution Office," found in all IRS district offices, can provide forms and assistance necessary to claim a refund, and to address future intercepts.

At the state level, many LEGAL ASSISTANCE attorneys have discovered that they can frequently open a dialog by communicating with a support enforcement attorney or prosecutor, as opposed to a caseworker or collections specialist. In the present case, documentation from the IRS refund application can be provided to substantiate the collection error that has occurred. Major Block.

Footnotes

FN38. See IRS Publication 1, Your Right as a Taxpayer and Publication 594, Understanding the Collection Program.

Responding to Paternity Allegations
The Army Lawyer, April 1995

Army LEGAL ASSISTANCE attorneys generally understand that AR 608-99 creates no legal obligation for a soldier to support a child born outside of marriage unless there is a court order identifying the soldier as the father of a child, and directing financial support of that child. [FN39] Several questions raised at the Course, however, reflect an appreciation that this should not be used as a basis for advice to ignore paternity allegations.

State child support enforcement officials frequently advance paternity allegations. Allegations often are raised informally at first, and later in formal pleadings if necessary. At an informal stage, soldiers can frequently negotiate a cost-sharing or no cost approach to blood testing, and, if paternity is not in dispute, may be able to reach agreement on favorable child support terms that take into consideration personal circumstances. Once pleadings are filed, soldiers may find a less receptive response to cost sharing and consideration of "personal problems." Coupled with the potential for award of support retroactive to birth, [FN40] the merit of not responding or refusing to cooperate is questionable. This may even be true when legitimate challenges to jurisdiction exist, given an opportunity to resolve a paternity allegation with finality.

Some soldiers will likely continue to ignore the chance to address paternity allegations at the earliest possible date, while others will affirmatively deny an obligation to support based on AR 608-99. The belief that AR 608-99 will insulate a soldier from support obligations to illegitimate children in the long term is misplaced. LEGAL ASSISTANCE attorneys should actively dispel this notion in their preventive law efforts. At the same time, LEGAL ASSISTANCE attorneys can foster a relationship with state child support enforcement officials through mutual training arrangements and discussion. [FN41] We can learn a lot from these officials, and frequently will discover that they have many questions about the military.

Assistance in responding to questions raised by the state child support enforcement community and training materials focused on support enforcement against the military are available from the LEGAL ASSISTANCE Branch, Administrative and Civil Law Division, TJAGSA. Major Block.

Footnotes

FN39. DEP'T OF ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY, para. 2-2a (1 Nov. 1994).

FN40. For example, see the Nebraska Supreme Court's discussion of the Nebraska Revised Statutes, § 43-1402, in Nebraska ex rel. Matchett v. Dunkle, 508 N.W.2d 580 (1993).

FN41. For example, students from the state of Washington reported that they have invited child support enforcement officials onto the installation for lunch time training sessions.

PROPERTY DISTRIBUTION--THE IMPACT OF
PREMARITAL COHABITATION
The Army Lawyer, March 1995

Separation agreement questionnaires and interviews routinely address a multitude of issues relating to a marriage. With regard to property, questions routinely focus on differentiating separate from marital or community property, and determining an appropriate date of valuation. [FN6] A recent New Jersey case, McGee v. McGee, suggests that our inquiry also should extend to periods of premarital cohabitation. [FN7]

At trial, McGee was an apparently straightforward divorce case involving a four-year marriage between two previously divorced parties. The parties' joint assets, including a marital residence, were simply valued as of time of distribution and divided. The court denied the wife's petition for permanent alimony in favor of six months of rehabilitative alimony.

At issue on appeal was whether a lengthy premarital relationship and property transactions that occurred during that period should have affected property distribution and alimony. Finding for the wife, the appellate court remanded the case to the trial court to consider the "complete factual scenario surrounding the parties' lengthy relationship." [FN8] The trial court was to reassess the wife's share in the equity of the marital residence, and consider permanent alimony as an appropriate alternative to rehabilitative alimony.

McGee expressly clarified that, under New Jersey law, the point in time when a ceremonial marriage is performed should not be seen as a barrier for considering the full impact of a relationship. Premarital periods are not ignored, but instead considered as encompassing a "shared enterprise of marriage beginning before the ceremonial act or as one in which equitable remedies such as constructive trust, quasi contract or quantum meruit are invocable for equitable reasons." [FN9]

Coming from a noncommon law marriage state, [FN10] McGee reflects a predisposition towards equity in the FAMILY LAW arena. Although this decision may largely be the result of exceptional facts, it should sensitize practitioners to consider a client's entire relationship, and not just the periods of formal marriage.

LEGAL ASSISTANCE practitioners may wish to focus at least part of their questionnaires or checklists to a discussion of relationships, and not just the period of marriage. Questionnaires that focus on marriage alone may infer a complete lack of relevance to important facts that unwitting clients fail to mention and unsuspecting attorneys fail to consider. Major Block.

Footnotes

FN6. Dependent on state law, this may lead to valuation of assets on the date of separation, the date of filing for divorce or legal separation, or the actual divorce date.

FN7. 21 Fam. L. Rep. (BNA) 1053 (N.J. Super. Ct. 1994).

FN8. Id. at 1054.

FN9. Id.

FN10. N.J. Stat. § 37:1-10.

SMOKING AND CHILD CUSTODY DETERMINATIONS--PART II
The Army Lawyer, March 1995

A prior practice note emphasized that many factors may be considered in reaching a custody decision that is in the best interests of a child. [FN11] By way of example, the note mentioned a New Jersey court case that held smoking as a factor that a court may consider in awarding custody. [FN12] A more recent New York decision indicates that smoking may be an overwhelming factor in exceptional circumstances. [FN13]

In re Lizzio addressed a petition to transfer custody from a smoking mother to a nonsmoking father. Based solely on the health risk to one of the children associated with smoking, the court transferred custody of two children to their nonsmoking father. [FN14]

Although Lizzio involved a child that was allergic to smoke, the significance of the court's willingness to transfer custody based on smoking alone should not be overlooked. As lawmakers continue to acknowledge the dangers of secondhand smoke by expanding the ban on public smoking, the extension of similar protection to children through custody determinations may become more prevalent. Major Block.

Footnotes

FN11. See FAMILY LAW Note, Smoking and Child Custody Determinations, ARMY LAW., Jan. 1995, at 68.

FN12. Id. (discussing Unger v. Unger, 20 Fam. L. Rep. (BNA) (N.J. Super. Ct. 1994)).

FN13. In re Lizzio, 21 Fam. L. Rep. 1058 (BNA) (N.Y. Fam. Ct. 1994).

FN14. Id.

PROPERTY ACCUMULATIONS DURING SEPARATION
The Army Lawyer, January 1995

Parties to separation agreements drafted in military LEGAL ASSISTANCE offices frequently are preoccupied with the legal impact of an agreement on their social activities. Specifically, many clients want to know if postseparation agreement sexual activity is considered adultery. [FN328] A recent Illinois case, In re Morris, illustrates that parties also should consider the impact of separation on the accumulation of property. [FN329]

Morris involved a divorce case filed by a man who had been separated from his wife for twenty-four years. Prior to their separation, the couple had been married for two years. At issue was what share, if any, the wife should receive in the husband's sixty-five percent share of a recent 2.9 million dollar lottery jackpot. Finding for the husband, the trial court concluded that although the lottery winnings were marital property, they were not divisible because they were not the result of a "shared enterprise." [FN330] The appellate court reversed, holding that the failure of the trial court to award the wife any share of the lottery proceeds effectively acknowledged the existence of a common law divorce.

While the trial court might have concluded a less than equal share was appropriate, the appellate court held that the parties' extended marriage must be taken into consideration as a matter of law and public policy. [FN331]

Most LEGAL ASSISTANCE practitioners are aware that soldiers and their spouses frequently separate for reasons other than deployments and unaccompanied tours. Some separate after executing a written separation agreement, some do not. Many of those who separate wait for years without initiating a divorce action.

Particularly for those who do not contemplate remarriage, separation appears to be a reasonable way to ensure that military benefits remain available to the spouse. What seems reasonable at first, can become inherently unattractive, however, if the prospect of sharing postseparation property accumulations is considered.

Although not every soldier who separates from their spouse will win the lottery, many eventually will qualify for retirement pay, which states can divide as marital property. Accordingly, LEGAL ASSISTANCE practitioners should consider, as an important factor, the potential for sharing retired pay equally with a spouse who has been separated from a soldier. Major Block.

Smoking and Child Custody Determinations
The Army Lawyer, January 1995

Without ruling that smoking alone can form a basis for not awarding custody to a parent, a recent New Jersey court ruled that smoking is a factor that may be considered in making a custody award. [FN332] In Unger v. Unger, the court was asked to reconsider a custody order based on the impact of "environmental tobacco smoke" (ETS) on children in the custody of their mother, a long-term smoker. Finding that ETS affects the safety and health of the children, the court determined that it was an appropriate factor to consider in making a custody determination. [FN333]

While the court did not remove the children from custody of the mother, it did order her to refrain from smoking in her car or house while the children are present, and for ten hours before the children are present. [FN334] LEGAL ASSISTANCE attorneys need to sensitize their clients that custody determinations are based on more than simply identifying the primary care provider. Instead, consideration of a full range of factors, including smoking, that focus on determining what is in the best interests of the child(ren), should be anticipated. Major Block.

Footnotes

FN328. For those who have not encountered this issue, no legal action short of divorce is a defense to an adultery charge. Sexual relations between husband and wife subsequent to execution of a separation agreement may affect the agreement under a reconciliation clause.

FN329. 21 Fam. Law. Rep. (BNA) 1011 (Ill. Ct. App. 1994).

FN330. Id.

FN331. Id.

FN332. Unger v. Unger, 20 Fam. Law. Rep. (BNA) (N.J. Sup. Ct. 1994).

FN333. Id.

FN334. Id.

EMANCIPATION FOR PURPOSES OF TERMINATING CHILD SUPPORT OBLIGATIONS

The Army Lawyer, December 1994

A recent Missouri Court of Appeals decision, Porath (McVey) v. McVey, illustrates how difficult resolving all issues that may arise regarding child support can be. [FN21] In McVey, the court wrestled with the question of whether a child's attendance at the United States Military Academy at West Point terminates a parent's child support obligation. This issue of what constitutes emancipation was framed by language in Missouri law providing for emancipation when a child enters the military, or when a child reaches eighteen, unless the child leaves high school and attends an institution of higher learning. [FN22] If attending an institution of higher learning, the child support obligation is terminated when the child graduates or turns twenty-two, whichever occurs first. [FN23]

While the issue before the court in McVey was framed by statute, the same issue is created in separation agreements that define emancipation for purposes of terminating child support obligations in much the same way as Missouri law. Standard language provisions in many separation agreements prepared in military LEGAL ASSISTANCE offices around the world likely provide us with many such examples. Given the predisposition towards considering military academies of all services as a college option in many military families, this might be an issue the parties can resolve and address, if brought to their attention.

How did the Missouri court resolve the question? After reviewing the conditions under which a student attends West Point, [FN24] the court found that the child had entered active duty as the term is used in Missouri law. [FN25] Consequently, the child was emancipated and the parental obligation to support had terminated. In reaching this conclusion, the court noted that New York and New Hampshire courts had reached a similar result, while an Ohio court had held to the contrary. [FN26]

Drafting separation agreements that address every possible point of interest or contention is not a realistic possibility. To the extent they can be anticipated, however, gaps that affect money, and particularly family support, should be closed whenever possible. Major Block.

Footnotes

FN21. 20 Fam. L. Rep. 1571 (BNA) (Mo. Ct. App. 1994), [hereinafter McVey].

FN22. MO. REV. STAT. § 452.340.3 (1993).

FN23. Id. § 452.340.5.

FN24. Some of the factors noted were a cadet's Regular Army status, compensation, and military obligation.

FN25. McVey, supra note 21, at 1572.

FN26. Id. (citing Zuckerman v. Zuckerman, 546 N.Y.S.2d 666 (Sup. Ct. App. Div. 1989)); Dingley v. Dingley, 433 A.2d 1281 (1981); and Howard v. Howard, 610 N.E.2d 1152 (Ohio Ct. App. 1992)).

JURISDICTION OVER PATERNITY ACTIONS
The Army Lawyer, August 1994

The Nebraska Court of Appeals recently held, [FN73] consistent with decisions in several other states, [FN74] that an act of sexual intercourse within the state provided "minimum contacts" sufficient to vest a state paternity court with jurisdiction over a nonresident defendant. The same court upheld a default judgment of paternity and award of child support based on Nebraska child support guidelines.

The decision of the court in Nebraska, and in other states that take an expansive view of long-arm jurisdiction, emphasizes what soldiers should already understand-complaints of paternity should not be ignored. The result may be a lost opportunity to challenge a judgment of paternity or provide input into a determination regarding child support. In either case, the soldier may have little or no basis to challenge the decision. At the same time, the decision would form a basis for a punitive family support obligation under Army Regulation 608-99. [FN75] Responding to paternity allegations and family support generally continues to be an excellent subject for troop training by LAAs. Major Block.

Footnotes

FN73 Nebraska Dep't of Social Services. ex. rel. Yankton v. Cummings, 20 Fam. Law Rept. 1333 (BNA May 1994).

FN74 Id. States cited include Wisconsin, Iowa, California, Louisiana, and Mississippi.

FN75 DEP'T OF ARMY, REG. 608-99, PERSONNEL AFFAIRS: FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY (22 May 1987).

DIVORCE JURISDICTION
Durational Residency Requirements
The Army Lawyer, April 1995

A recent Maryland case, Wamsley v. Wamsley, [FN41] demonstrates that durational residency requirements may not stand in the way of divorce jurisdiction, at least in a service member's state of domicile.

Wamsley involved a Navy member who left Maryland at age seventeen to join the Navy. Over the next eleven years, the Navy member married, had two children, and although he moved several times, never returned to live in Maryland. In 1992, while stationed in Virginia, he separated from his wife and filed a complaint for divorce in Maryland alleging fault grounds. Under Maryland law, if fault grounds occurring outside the state are alleged as a basis for the divorce, one party to the action must have "resided" in the state for one year preceding the filing. Finding that neither of the parties had resided in the state for the requisite period, the trial court dismissed the complaint.

In a case of first impression in Maryland, the Maryland Court of Appeals first determined that the terms residence and domicile have the same meaning unless a contrary intent is shown. The court then reversed the lower court's reliance on a presumption that domicile is where you live. The court specifically noted that where someone lives may be a strong indication of intent, but held that "[i]n the case of a service member who is frequently moved from state to state, the location of his or her residence is not nearly so important a factor in determining intent as is his or her choice of voting registration, state income taxes, vehicle registration, etc." [FN42] Sufficient facts in the trial court's record to demonstrate that the Navy member's claim of domicile in Maryland were found to exist. [FN43]

In dispensing with a distinction between domicile and residence, the court in Wamsley effectively eliminates what may have been seen as a physical presence requirement existing in addition to domicile. Fortunately, many states, by legislation or case law, have deemed a military person's residence to continue if that member's absence is because of military duty. Do not assume, however, the existence or nonexistence of such legislation or case law.

Jurisdiction for divorce actions and other FAMILY LAW issues is a continuing issue of interest for LEGAL ASSISTANCE practitioners. The varying perspectives on jurisdiction taken by the states suggest that reference to a suitable source on a case-by-case basis is necessary. Readily available references include TJAGSA's JA 263, FAMILY LAW Guide [FN44] and the Martindale-Hubbell Law Digests for the United States. Major Block.

Footnotes

FN41 Md.Ct.App. No. 78, 20 FLR 1162 (1993).

FN42 Id. at 1163.

FN43 From 1981, when he left the state to join the Navy, until he filed for divorce, Richard Wamsley's ties to Maryland were as follows:

(1) he listed his mother's address in Maryland as his home of record;
(2) the Navy withheld Maryland state income tax and he filed returns in Maryland each year;
(3) he maintained voting registration in Maryland;
(4) he registered three vehicles owned in Maryland; and
(5) he always intended to retain Maryland as his permanent residence.

FN44 ADMIN. & CIV.L.DIV., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 263, FAMILY LAW GUIDE (June 1993). This publication can be downloaded from the Legal Automated Army-Wide System (LAAWS) Bulletin Board System.

APPENDIX A

SEPARATION AGREEMENT CHECKLIST

Edward I. Stein, a Chicago, Ill., family law practitioner, argues that separation agreements are a critical and indispensable part of most marriage dissolutions. Given increased court workloads, he notes that separation agreements provide courts with a roadmap to delineate the respective rights and obligations of the parties. Following is an edited version of a checklist he developed for his private practice, which has been expanded to incorporate questions which should also be considered by military attorneys.

A. Custody of Children.

1. Which parent is to have custody of the children?

2. Will it be joint custody?

3. If joint custody, will it be joint legal custody or joint physical custody?

4. Will there be limitations on the noncustodial parent in making decisions governing:

   (a) Education (choice of schools, etc.).

   (b) Health (choice of doctors, dentists, surgeons).

   (c) Summer Plans (camps, trips).

   (d) General welfare?

5. In the event of a dispute, is there to be arbitration or court decision.

6. If not, which parent has the final say?

B. Removal of Children.

1. May the children be permanently moved to another jurisdiction?

2. Must the custodial parent first obtain leave of court before moving the child?

3. Is there to be any notice to the non-custodial parent?

4. What will be the form and time of the notice?

5. How are visitation provisions to be adjusted?

6. Are the parties to share in the transportation expense of children incident to long distance visitation?

7. What will be the frequency of the telephone contact with the children?

C. General Concerns.

1. Is there to be any notice to the noncustodial parent in the event a child becomes seriously ill or injured?

2. Will the noncustodial parent be entitled to receive all information from the treating physician which is available to the custodial parent?

3. Will the noncustodial parent be authorized to pick the children up from school on non-visitation days?

D. Visitation With Children.

1. When and under what circumstances is visitation to be conducted.

2. With whom are the children to spend their winter, spring and summer vacations?

3. With whom are the children to spend other school vacations, holidays and birthdays?

4. Who pays for the transportation expenses associated with these vacations?

5. Are the visitation and vacation provisions to be changed when the children reach a certain age? In what respect?

6. Are trips and vacations to be limited in length of time or geographic location?

7. Are the children to be given any of their personal clothing and effects to take along during visitation?

8. Is there to be any notice of intent to exercise visitation rights by the noncustodial parent? What will be the form and time of the notice?

9. Is the custodial parent to have a veto power over visitation if timely notice is not given.

E. Support of Children and Related Matters.

1. What provision is to be made for the support of each child?

2. How often and on what dates are the support payments to be made?

3. Are support payments to abate in whole or in part when the children are visiting with the noncustodial parent? When living away at school? At summer camp?

4. Are child support provisions to be designated as such in the separation agreement or are they to be unallocated and lumped together with the support allowance for the wife? Tax consequences?

5. Is there a specific amount from the total to be allocated to each child?

6. Who claims which of the children as dependents for income tax purposes? Under what terms and conditions?

7. Are the payments to continue in whole or in part when the children become emancipated? Under what terms and conditions? What is defined as the emancipation event?

8. Can the custodial spouse obtain income from employment or some other source without it affecting the amount of child support she is to receive? If so, is there to be any limitation?

9. Is the custodial spouse to receive any supplemental support for such expenses as summer camp? Religious training? Music lessons? Other special expenses?

10. Does the local jurisdiction have child support guidelines? Do the parties have the authority to deviate from the guidelines or are they mandatory?

11. Will the military parent be required to initiate an allotment for the support of the children?

F. Medical, Dental, Optical and Related Expenses of Children.

1. Who pays for the ordinary medical, dental, optical

and related expenses for the children?

2. Who pays for the extraordinary medical, dental, optical and related expenses of the children? Which hospital, optical, orthodontial, dental, medical, surgical, counselling or psychiatric expenses should be classified as extraordinary? Family counselling expenses?

3. Is there any notice to be given to the noncustodial parent before extraordinary medical, dental or optical expenses are incurred?

4. Who chooses the doctor, dentist or other specialist?

5. Will the noncustodial parent be authorized access to medical, dental or other records?

6. Is a major medical or other type of insurance such as Blue Cross/Blue Shield to be maintained? At whose expense? What is the minimum extent of coverage to be given?

7. Are any medical, dental, optical of related payments to be continued by the noncustodial parent beyond the time a child reaches majority? During the time a child attends trade school, college or professional school?

Military Considerations

8. If any children are more than 10 years old, do they have identification cards?

9. If the custodial non-military spouse fails to use available military medical facilities in a non-emergency, will the noncustodial military spouse be relieved of the responsibility for such expenses?

10. Who will be responsible for paying the CHAMPUS annual deductible?

11. Who will be responsible for paying any amount that CHAMPUS fails to pay for either out-patient or in-patient care?

12. Who will file the CHAMPUS forms? To whom will the CHAMPUS reimbursement checks be sent?

G. Education of Children and Related Expenses.

1. Who pays the trade school or college tuition fees for the children? Graduate school? Professional school? Other special school?

2. Who decides what school the children are to attend? Location of the school? Accreditation of the school?

3. What scholastic requirements must the children maintain?

4. Is there a time limit in which the trade school or college education must be attained? Graduate school? Professional school?

5. Who pays for room, board, fraternity or sorority, money allowance, and other expenses incident to the children's education?

6. Who pays for travel expenses to and from school? Is there any limit to the number of trips per school year?

7. Must children apply for loans, scholarships or school employment?

8. Must children carry a full academic program? Are grade records to be made available to the noncustodial parent?

9. Is there an effect on allowances if children have income from employment?

10. May college expenses be paid directly to the children or must they be paid through the custodial spouse?

H. Allowance and Support For Wife.

1. What provision is to be made for the wife's allowance and support?

2. Is there to be a lump sum settlement or periodic payments?

3. If a lump sum settlement, is it to be paid in installments?

4. If periodic payments, are they fixed in amount or subject to fluctuation? Depending upon what factors?

5. How often are the support payments to be made? What dates?

6. Can the wife obtain income from employment or some other source without affecting the amount of her support allowance? If so, is there to be any limitation on the amount she can earn?

7. When does the allowance terminate?

8. How are the wife's social security rights to be handled? Does she get any benefits?

9. Tax consequences of payments and receipts.

10. Security provision for allowances in the event husband fails to pay?

I. Details of Insurance.

1. What life insurance is there on the husband's life? On the wife's? Who owns each policy?

2. Is there any loan on the insurance? If so, how and when will the loan be repaid? Will the husband have the right to borrow on the policies in the future?

3. What is the approximate total amount of obligations the husband will be required to pay to the wife and children pursuant to the terms and provisions of the separation agreement? Over what length of time? What is the present value of those payments? Is there enough life insurance to equal the present value of those payments?

4. Is the husband to bind himself to keep the insurance in force for the benefit of the wife and children? In what amounts and for how long?

5. Is the husband to assign all his rights in the insurance to the wife? Can any of the insurance be released to the husband? How much? When?

6. Are the policies to be deposited with the wife? Is the wife to be sent duplicate premium notices and receipts?

7. If there is no existing insurance, is the husband to obtain some?

8. Must the husband submit to a medical examination or otherwise cooperate with the wife to allow her to purchase more insurance on his life?

9. Are there any annuities or proceeds of insurance on deposit with any companies? What disposition is to be made of them?

10. Tax consequences related to premium payments and ownership of policies?

11. Must the husband maintain any other insurance with regard to himself such as major medical or income protection?

12. Is an insurance trust to be created? What provisions should the trust contained?

Military Considerations

13. Will the husband be required to name the wife as beneficiary of the Serviceman's Group Life Insurance? Will he be required to provide her with a copy of the beneficiary designation form?

14. Does the SGLI beneficiary designation form contain the words "by law" or is the wife specifically designated as beneficiary? Effect of divorce?

15. If the husband is eligible to participate in the Survivor Benefit Plan, will the wife be designated as the beneficiary? Effect of divorce?

J. Property Settlement Matters.

1. Which property is marital property? (Community property or property subject to equitable distribution). Nonmarital property (separate property).

2. Do the parties own a home? How is title held? Are there any other parcels of real property? Title status? Are there any mortgages, liens or encumbrances thereon? Who will assume which obligations? Have taxes been paid? Who is to get these properties? What tax consequences will result from any transfer of interest in real estate to be sold? For what price? When? Will an appraiser be required? Who will be the appraiser? Who will pay for the cost of the appraisal?

3. Are the parties living in an apartment? Is there a lease? In whose name? When does it expire? Who is to continue to occupy the apartment? Who is to pay the rent? Is the lease assignable? Is it to be assigned?

4. Has either party an interest in an on-going business. Is the business to be appraised? Is the business a partnership? Is either party a partner? Is the business incorporated? Is either party an officer in the corporation? Is either party to resign? Is either party a stockholder, and if so, what disposition is to be made of respective holdings? What tax consequences will result from any transfer of business or partnership assets?

5. Is the wife holding in her name any property belonging to the husband, or vice versa. If so, is she or he to retain it?

6. Has the wife any real estate of her own? Is the husband to quitclaim to her any interest he has in it? What tax consequences result?

7. Have the parties already made a division of their personal property? If not, what is to be the disposition? Consideration should be given to:

a. Household goods, furniture and furnishings such as rugs, draperies, etc.

b. Household appliances and equipment such as refrigerators, washing machines, deep-freeze units, air conditioning units, etc.

c. Television sets, radios, musical instruments, stereo sets, phonograph records, VCRs, and furniture units to hold these items.

d. Silverware, glassware, china and linens.

e. Books, works of art (paintings, prints, statuary), bric-a-brac and ornaments, special collections such as a stamp and coins and objects related to any other kind of hobby.

f. Stocks and bonds.

g. Promissory notes.

h. Bank accounts.

i. Club memberships.

j. Merchandise credits, charge accounts.

k. Automobiles and boats.

l. Goods in storage.

m. Jewelry and furs.

n. Cameras, camera equipment, projectors, screens, etc.

o. Sporting equipment.

p. Power tools and lawn and gardening equipment.

q. Pets.

8. Is there any insurance on these items of personalty? In whose name? Any premiums due? Are there any policies to be transferred?

9. Are schedules listing and describing any property to be prepared? By whom?

10. Do either of the parties have any interest in any profit sharing plans or other pension plans? Are these benefits fully vested? Partially vested? What disposition is to be made of these interests? When?

11. Do either of the parties have an Individual Retirement Account? What will be the disposition of any IRA's? Will the parties split any penalties occasioned by early termination of the IRA's or will one party bear these expenses?

Military Considerations

12. Is the military member qualified to retire? Will the nonmilitary spouse seek an interest in the military member's retired pay?

13. Are the parties living on a military installation? If so, who will pay the expenses of moving the non-military spouses' household goods and other effects off the installation?

14. If the non-military spouse is moving to another geographic location, who will pay the moving expenses? If the move is at government expense, which party will be liable for any sums due the government for shipments which exceed the household goods weight allowance?

15. Will the non-military spouse be eligible to file a government claim for damages done during the move, if at government expense? Will the military spouse be responsible for filing the claim? Who will receive the claim check?

16. If the non-military spouse is ineligible to file a government claim for damages done during the move, will the military spouse be required to obtain commercial insurance to cover the move?

K. Debts and Obligations.

1. Do either of the parties owe each other any money? Is there an outstanding note or other evidence of the obligation? How is the indebtedness to be treated?

2. Are the husband and wife jointly liable on any obligation? If so, what disposition is to be made when the obligation matures? Is the husband to assume it? Is he to indemnify the wife thereon?

3. Is there any litigation pending between the parties in addition to the marital litigation?

4. Is there any litigation pending in which both parties are involved, either as co-plaintiffs or co-defendants?

5. Are there any outstanding bills or obligations incurred by the wife for which the husband is or may be liable? Who is to discharge them? When? Indemnification?

6. Cancellation and surrender of charge cards and credit accounts?

7. Are schedules to be prepared listing exact debts each party is to assume and pay? By whom?

L. Tax Matters.

1. Have the parties filed any joint income tax returns in the past? If there is a refund, who gets it? If there is a deficiency assessment, who is to pay it? Is the husband to indemnify the wife as to any liability regarding prior returns?

2. Is the wife to be obligated to file joint tax returns with the husband for any year prior to the year in which the marriage may be dissolved? Amended returns? Refunds? Assessments?

3. What about other tax returns and tax matters, such as estate taxes, corporation and partnership returns?

4. Are authenticated copies of future tax returns of the parties to be provided to each other?

M. Wills, Trusts, Estates and Security Provisions.

1. Is each party to waive his or her rights in the estate of the other?

2. Has either party an existing will in which the other is named as executor or executrix? Devisee or legatee? Is this to be changed?

3. Is the husband to bind himself to leave the wife or the children a specific sum or sums by his will, or a specified portion of his net estate? Are there to be any provisions to prevent the husband from wilfully depleting his estate?

4. Are there revocable inter vivos trusts that should be changed because of the altered marital relationship?

5. Are the children beneficiaries under any existing inter vivos or testamentary trusts? Which parent is to receive the income on the children's behalf?

6. Is the husband's obligation (assuming there are continuing payments) to survive his death and be binding on the estate? If so, may the obligation be capitalized so that the estate may be promptly closed?

7. Is the husband to furnish any security for the performance of his obligations under the agreement? If so, what form will the security be?

N. Counsel Fees, Costs and Expenses.

1. Who is to pay the parties' respective counsel fees and costs of suit? How much? When?

2. Can the tax laws property be applied to make counsel fees legally deductible? Can the form of billing assist in tax savings?

3. Who pays for audits, costs of transferring real estate and other expenses incident to dissolution of the marriage?

4. Is one party to pay the other party's counsel fees and costs arising out of any post-judgment litigation? Under what terms and conditions?

APPENDIX B

SEPARATION AGREEMENT WORKSHEET

INFORMATION ABOUT YOU:

1. Name: _____ SSN: _____

   Grade: (if military) _____

2. Current Address: _____

   Phone No:_____

3. Occupation and Place of Employment: _____

   _____

   Phone Number: _____

4. City And State Of Legal Residence: _____

   _____

5. Date and Place of Entry Onto Active Duty:_____

   _____

INFORMATION ABOUT YOUR SPOUSE:

6. Name: _____ SSN: _____

   Grade: (if military) _____

7. Current Address: _____

   Phone No:_____

8. Occupation and Place of Employment: _____

   _____

   Phone Number: _____

9. City And State Of Legal Residence: _____

   _____

10. Date and Place of Entry Onto Active Duty:_____

    _____

INFORMATION ABOUT YOUR CHILDREN

11. Children Full name(s)	Date Of Birth	Custody At Present	Natural, Adopted, or Stepchild?

INFORMATION ABOUT YOUR MARRIAGE(S)

12. Date And Place of Marriage: _____

_____

13. Date of Separation: _____

14. Have You Previously Been Married?: Yes No

If Yes List The Name(s) of Prior Spouse(s), Date(s) Of Prior Marriage(s), Dates of Divorce(s), and Place(s) Where The Divorce(s) Was/Were Granted:

_____

_____

_____

15. Has Your Spouse Previously Been Married? Yes No

If Yes List The Name(s) of Prior Spouse(s), Date(s) Of Prior Marriage(s), Dates of Divorce(s), and Place(s) Where The Divorce(s) Was/Were Granted:

_____

_____

_____

16. List Names And Ages Of Any Children Of Prior Marriage And Indicate The Parents Of Child And With Whom They Live:

_____

_____

17. Amount Of Support Furnished To Former Spouse(s) And Children Of Prior Marriage(s):

18. Other Dependents (Name, Relationship, Amount Of Support Furnished):

19. Profession Or Occupation Specialty (Including Non-Service Employment And Years So Engaged):

20. Average Earnings (Annually, Past 3 To 5 Years)
_____ Gross

a. Present Monthly Income From Employment
_____ Gross

b. Present Monthly Income From Investments (Stocks, Bonds, Interest, Business Ventures)
_____

c. Present Monthly Income From Part Time Employment
_____

d. Total Average Monthly Income
_____

e. Mandatory Employment Deductions (Itemized)

21. Your Monthly Expenses	Before Separation	After Separation
a. Shelter (Rent or Mortgage Payment):	$_____	$_____
b. Household Expenses: Utilities, Taxes, Food, Repairs, Household Assistance, Automobile, Cleaning, etc....:	_____	_____
c. Clothes:	_____	_____
d. Medical:	_____	_____
e. Insurance Premiums:	_____	_____
f. Installment Payments:	_____	_____
TOTAL DUE:	_____	_____
g. Children's Educational Expense:	_____	_____
h. Gifts (Charity, etc.)	_____	_____
TOTAL:	$_____	$_____

22. Value Of Assets:

a. Real Estate (Home, Summer Place, Investment):

b. Investments (Stocks, Bonds, Partnerships):

c. Savings Bank Accounts Balance:

d. Average Monthly Checking Account Balance (After Payment Of Expenses):

e. Autos, Boats, House Trailers, Aircraft, Large Appliances (Freezers, TV's, etc.):

f. Furniture Value:

g. Monies Owed You (Amount, Name, Address Of Debtor):

h. (1) Life Insurance Policies: Company, Amount, Type Of Policy, And To Whom Payable:

(2) Property Insurance, Type Of Policy, Item Insured, Company And Amounts:

i. Educational Endowment Policies:

j. Other Assets (Jewelry, Collections, etc.):

23. Liabilities:

a. Installment Contract and Revolving Credit Account Liabilities:

Creditor Or Item Purchased	Monthly Payment/ Amount Past Due	Whose Debt? Husband, Wife, Or Joint?

1. _____

2. _____

Creditor Or Item Purchased	Monthly Payment/ Amount Past Due	Whose Debt? Husband, Wife, Or Joint?
3.		
4.		
5.		
6.		
7.		

Total Amount of Installment Liabilities: $_____

b. Debts Owed Others (Amount, Name And Address Of Creditor, And Due Date):

c. Litigation Pending Against You, Your Spouse, Or Both Of You Jointly:

d. Other Liabilities:

24. Income Tax

a. Have The Parties Filed Joint Returns Before? Yes No

b. If There Is A Refund, Who Is Entitled To It?

Husband Wife Split

c. If There Is A Deficiency, Who Will Pay It?

Husband Wife Split

d. Prior To divorce, Will The Parties Be Required To File Separate Returns? Yes No

25. Do The Parties Release All Claims Against The Estate Of The Other? Yes No

26. Who Will Pay The Attorneys' Fees And Court Costs?

Husband Wife Each Pays Own Other Arrangements

27. Miscellaneous:

APPENDIX C

ETHICAL CONSIDERATIONS IN FAMILY LAW PRACTICE

1. Representing both parties. Rule 1.7 of the Rules of Professional Conduct for Lawyers, AR 27-26, generally prohibits a lawyer from representing a client in a matter adversely affecting the interests of another client. Moreover, legal assistance providers should not represent both spouses in a separation or divorce action, even when there is full disclosure and agreement between the parties.

Legal assistance providers should also exercise caution when counseling or drafting wills for both spouses, particularly if the spouses propose conflicting property dispositions or desire to name different guardians. Of course, legal assistance providers should discuss such estate planning considerations only with the client seeking domestic relations advice or assistance and not the opposing client. The represented client may desire to change his will, power of attorney, or other estate planning document when contemplating a separation or divorce. The legal assistance should provide the client appropriate advice and assistance on such matters. If the parties reconcile and subsequently desire assistance in preparing new estate planning documents, the legal assistance provider should review Rules 1.6 and 1.7 before proceeding to assist both spouses. Instead of representing both spouses, another legal assistance provider should assist the other spouse.

Occasionally, lawyers serve as intermediaries, such as mediators or arbitrators. Rule 2.2 recognizes that lawyers may act as mediators. When conducting mediation, lawyers do not have an attorney-client relationship with either side. Thus, there is no attorney-client privilege and the legal assistance provider must be impartial. Furthermore, legal assistance providers should not attempt to mediate where they previously have formed an attorney-client relationship with one side or the other.

2. Representation of opposing parties by two members of the same legal office. Imputed disqualification does not automatically apply to Army lawyers (see e.g., United States v. Stubbs, 23 M.J. 188 (C.M.A. 1987) (accused formed attorney-client relationship and discussed facts with a legal assistance attorney who subsequently became a trial counsel; this trial counsel did not discuss accused's case with other trial counsel in office--no disqualification) and United States v. Reynolds, 24 M.J. 261) (legal assistance officer served as investigating officer of charges originating from claims office--social relationship with other attorneys in office, including trial counsel did not prejudice accused--no disqualification of trial counsel). Two legal assistance providers working in the same legal assistance office are not automatically disqualified from representing

conflicting parties to a dispute. Rule 1.10 recognizes that military service may require representation of opposing sides by Army lawyers working in the same legal office. This rule further provides that "[s]uch representation is permissible so long as conflicts of interest are avoided and independent judgment, zealous representation, and protection of confidences are not compromised." Nevertheless, AR 27-3, para 4-9c, provides that "Army policy discourages attorneys from the same legal office from providing legal assistance to both spouses involved in a domestic dispute . . ." AR 27-3, para 4-9 provides guidance for supervisory attorneys for authorizing exceptions to this policy as a last resort.

3. Conferring with adverse party. Although Army attorneys may communicate with unrepresented adverse parties, they should exercise caution when doing so. Rule 4.3 prohibits an attorney from giving advice to unrepresented third parties, and it also prohibits creating an implication that the attorney is disinterested.

An attorney should not communicate with an adverse party whom the lawyer knows to be represented by counsel in the matter unless the opposing party's counsel has consented to the communication or the communication is otherwise authorized by law (Rule 4.2).

4. Relationships with clients and former clients. Legal assistance providers are well-advised to refrain from social and sexual relations with clients and former clients (at least during the pendency of divorce actions). ABA Formal Opinion 92-364, Sexual Relations with Clients) finds that "a sexual relationship between lawyer and client may involve unfair exploitation of the lawyer's fiduciary position, and/or significantly impair a lawyer's ability to represent the client competently, and therefore may violate both the Model Rules of Professional Conduct and the Model Code of Professional Responsibility." Professional Responsibility Opinion 92-6 further highlights professional responsibility concerns when a social and/or sexual relationship occurs after termination of the representation. In that case, a Professional Responsibility Committee determined that a legal assistance provider violated AR 600-50, by obtaining his former client's telephone number from the client card. The committee determined that the legal assistance attorney, having engaged in a sexual relationship with a former client in that case, exhibited "extremely poor judgment. . . . As a lawyer, he should have known that his conduct could complicate the clients' domestic relations matters or reduce the likelihood of reconciliation." As a precaution, counsel should consult their supervisors for guidance before entering into social relationships with clients and former clients.