

DIVORCE GROUNDS AND PROCEDURE

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A. Chapter Competencies

After studying chapter 7 the student should know or be able to:

1. identify the major no-fault grounds of divorce.
2. identify the major fault grounds of divorce.
3. state the historical reasons for the development of the no-fault grounds for divorce.
4. state the rule of consecutiveness in the living-apart ground of divorce.
5. state the causation issue in the living-apart ground of divorce.
6. state the conversion rule of a legal separation and divorce.
7. determine when fault may be an issue in a divorce on the ground of living apart.
8. determine whether both sides must agree that the spouses are incompatible in order to obtain a divorce on the ground of incompatibility.
9. state the relationship between the grounds of cruelty and incompatibility.
10. state the reasons why the legislature created the irremediable-breakdown ground for obtaining a divorce.
11. determine whether both sides must agree that the marriage is irremediable.
12. determine when adultery can be a ground for divorce.
13. determine when cruelty can be a ground for divorce.
14. determine when desertion or abandonment can be a ground for divorce.
15. define constructive desertion.
16. identify the five major defenses that exist to the fault grounds of divorce: collusion, connivance, condonation, recrimination, and provocation.
17. interview a client in order to determine whether the following grounds of divorce exist: living apart, adultery, incompatibility, desertion, and irretrievable breakdown.
18. state how a Jewish couple and a Moslem couple can obtain a religious divorce.
19. define a judicial separation and to identify its consequences.
20. distinguish a judicial separation and a separation agreement.
21. state the grounds for a judicial separation.
22. determine the effect of a reconciliation on a judicial separation.
23. state how a judicial separation can become a divorce.
24. define separate maintenance and identify its consequences.
25. state the effect of reconciliation on a separate maintenance decree.

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26. distinguish between a contested and an uncontested divorce.
27. define migratory divorce, transitory divorce, foreign divorce, “quickie” divorce, collusive divorce, default divorce, divisible divorce, bifurcated divorce, bilateral divorce, ex parte divorce, dual divorce, divorce a mensa et Thor, limited divorce, and divorce a vinculo matrimonii.
28. distinguish domicile and residence.
29. state why it can be important to identify one’s domicile.
30. distinguish domicile by operation of law and domicile by choice.
31. interview a person in order to determine his or her domicile.
32. state what a declaration of domicile is.
33. distinguish a full adversarial proceeding from an ex parte proceeding.
34. distinguish a direct attack from a collateral attack on a judgment.
35. state the doctrine of res judicata.
36. state the doctrine of equitable estoppel.
37. distinguish between a foreign state and the forum state.
38. state the effect of the full faith and credit clause of the United States Constitution.
39. state what is meant by substituted service.
40. state the geographic and the power meanings of jurisdiction.
41. distinguish subject-matter jurisdiction, in rem jurisdiction, and personal jurisdiction.
42. state the domestic relations exception to federal court jurisdiction.
43. identify the kind of jurisdiction needed (a) to dissolve a marriage, and (b) to make an alimony or property division award.
44. state whether the person who obtained the divorce can attack it on jurisdictional grounds.
45. state whether the person against whom the divorce was obtained can attack it on jurisdictional grounds.
46. state whether a person who was not a party in the divorce action can attack the divorce on jurisdictional grounds.
47. state when one state must give full faith and credit to that part of the judgment of another state (a) that dissolves the marriage, and (b) that orders alimony or a property division.
48. state how a court acquires subject-matter jurisdiction over a divorce.
49. identify the ways in which a court can acquire personal jurisdiction over a defendant.
50. state how a court acquires long-arm jurisdiction.
51. distinguish jurisdiction and venue.
52. state the function of a complaint or petition, a summons, an answer, and a counterclaim.
53. state the major components of a divorce complaint.
54. state what it means to file in forma pauperis.
55. state what is meant by a summary dissolution.
56. state the role of a guardian ad litem.
57. state the purpose of a waiting or cooling-off period.
58. identify the function of the standard discovery devices: interrogatories, deposition, request for admissions, mental or physical examinations, and requests for production.
59. identify the major kinds of rulings that a court can make pendente lite, e.g., orders on child custody, child support, alimony, attorney fees, court costs, molestation, property transfers, leaving the state.
60. identify the major steps in a trial.
61. state the standard of proof in a divorce case.
62. state the extent to which the privilege for marital communications applies in a divorce case.
63. define the major kinds of alternative dispute resolution: arbitration, rent-a-judge, mediation, and med-arb.
64. state the meaning of an interlocutory decree or a decree nisi.
65. identify the major enforcement options that exist: civil contempt, execution, garnishment, attachment, posting security, receivership, and constructive trust.
66. state how a civil union is dissolved in Vermont.

B. Introduction

Here are some quotes you may want to use while covering chapter 7:

“We were waiting for the children to die.”

This is the answer given by a 95-year-old woman in a divorce case against her 95-year-old husband when asked why she wanted to end their 70 years of marriage. *The Divorce Revolution Has Failed*, San Diego Union-Tribune, B6 (4/11/95).

“Because he’s not the man I knew 70 years ago.”

This is the answer given by a woman in her eighties to the question of why she wanted a divorce. *American Bar Association Journal*, (4/90):122.

“Him wanting a divorce from me.”

This is the answer given by a woman during a deposition when asked for an example of her charge that her husband was emotionally unstable. 56 *Texas Bar Journal* 56 (6/93):628.

Court Transcript:

Q: What is your name?

A: Ernestine McDowell.

Q: What is your marital status?

A: Fair.

“Disorder in the Court,” *At Issue*. San Francisco Association of Legal Assistants (10/92):14.

Court Transcript:

Q: Are you married?

A: No, I’m divorced.

Q: What did your husband do before you divorced him?

A: A lot of things that I didn’t know about.

“Disorder in the Court,” *At Issue*. San Francisco Association of Legal Assistants (10/92):14.

C. Celebrating Divorce?

Is there any way to take the acrimony out of the divorce process?

Two ministers in New Rochelle, New York have designed a divorce ritual to mark the end of a marriage. In front of the ex-husband and the ex-wife, the minister:

- says an invocation,
- says a special prayer,
- supervises a ritualistic burning of a small meaningful item (e.g., the marriage certificate), and
- has a moment when the vows are broken and the rings returned.

At the end of the ceremony, the minister says, “now release yourselves.” Couples often do so by shaking hands.

The service costs about \$400. As of May 1995, about fifty divorce ceremonies had been performed.

Ceremonies Celebrating Divorce, *New York Times Magazine* 9 (May 5, 1995).

D. Biography of a Divorce Litigation

Early in the course, consider giving the students an overview chart of divorce litigation in a court of your state. Present the story or biography of this kind of litigation. The goal of the chart is to introduce the students to the *institutions* and *documents* that are often involved in divorce litigation in the state. Your presentation and explanation of the chart can become a point of departure for the parts of the course that discuss the procedural components of divorce.

Assignment 7.29 at the end of Chapter 7 asks the students to prepare components of a divorce flowchart. Whether or not you require them to do Assignment 7.29, you should consider doing this biography lecture.

Every student may not have had a course in civil procedure, litigation, or evidence. Hence, your lecture should assume that you will need to cover at least some of the basics in these areas. For those students who have had civil procedure, litigation, or evidence courses, your coverage will be a good reinforcement.

Selecting a Case to Describe

The first step in preparing the chart is to select a case that you will describe for the class. Pick a garden-variety divorce case. Make up names, addresses, and events. Invent children, property acquisitions, etc. If, for example, the case involves Ralph and Pauline Davis, you would start by placing the following on the board:

Davis v. Davis

It would be their litigation that you would describe in biography or story fashion. For purposes of this example, assume that settlement efforts (which you need to describe) fail and that both sides aggressively contest and litigate everything, or almost everything.

Preparing an Institutions/Offices List and Preparing a Documents List

Before the lecture begins, prepare two lists. First, make a list of all the institutions that could be involved in your biography of the Davis/Davis case. Give the *exact* names of every institution (public or private) that you will incorporate in the story. Make a separate entry for every major office within each such institution. For example:

- The XYZ County Court, Civil Branch—Clerk’s Office
- The XYZ Sheriff’s Office (service of process)
- The XYZ County Court, Civil Branch—Motions Calendar
- The XYZ County Court, Civil Branch—Trial Session
- The XYZ Middle Appeals Court—Clerk’s Office
- The XYZ Middle Appeals Court—Oral Argument Session
- The XYZ State Supreme Court—Clerk’s Office
- The XYZ State Supreme Court—Oral Argument Session
- The XYZ Sheriff’s Office (execution)
- Etc.

The above examples, of course, may have no relationship to the actual names used by the major institutions and offices that would be involved in your state. Substitute the real names that Davis/Davis and their attorneys and paralegals would probably have to confront in your state. Also, your list will hopefully be much more extensive.

Next, prepare a list of the major documents that would probably be involved in the Davis/Davis litigation, both in the preparation of the case and in its litigation through all available courts in your state. For example:

- Retainer
- Complaint or Petition
- Answer
- Summons
- Affidavit of Service of Process
- Protective Orders
- Declaration of Assets and Liabilities
- Interrogatories
- Answers to Interrogatories
- Motion to Produce
- Motion for Medical Examination
- Deposition Demand
- Deposition Transcript
- Settlement Agreement
- Summary Judgment Motion
- Trial Notebook
- Exhibits
- Request for Instructions
- Motion for Dismissal
- Verdict
- Judgment
- Motion for a New Trial
- Appellant Brief—Middle Appeals Court
- Appellee Brief—Middle Appeals Court
- Reply Brief—Middle Appeals Court
- Appellant Brief—State Supreme Court
- Appellee Brief—State Supreme Court
- Reply Brief—State Supreme Court
- Execution Documents
- Garnishment Documents

- Contempt Documents
- Etc.

Of course, your list will use the *actual* names of the documents that would probably be involved in the litigation that you will be describing when you walk the students through the Davis/Davis divorce litigation.

Your two lists (one on institutions/offices, and one on documents) should act as a checklist for you as you tell the story of the litigation. You want to make sure that you mention and briefly describe *every* item on both lists as you tell the story.

The students may have many questions as you go through the litigation story. Resist the temptation to answer all these questions if they would steer you away from the main objective of the lecture which is to provide a procedural overview of a typical contested divorce case. Briefly respond to the question, but tell the students that their question will be dealt with in greater depth later or that a more in-depth answer is beyond the scope of the course.

The students may need a relatively small amount of black letter divorce law in order to follow your story. If so, provide this law in the overview, but point out that a fuller treatment of divorce will come later.

E. Court Visit

Later in the chapter, Assignment 7.25 asks the students to go to a divorce court hearing. Early in the course, you would need to make the necessary arrangements for such a visit whether the students go as a group or individually. At the very least, they will need directions and information about court calendars. Such a visit will be enormously beneficial, particularly if you can prepare them in advance.

They need to know what to expect. What kinds of proceedings are they likely to observe? What terminology will probably be heard as the attorneys handle the various phases of a case?

F. Assignment 7.1(b) (grounds for divorce)

- You should consider doing the checklist formulation assignment in part (b) as an in-class exercise. It would help the students develop the skill of carefully reading statutes. It would also demonstrate the practical implications of such careful reading, such as the design of interview questions in a checklist format.

G. Assignment 7.2 (living apart)

- More than two years elapsed between June 10, 1995 and July 25, 1997. The parties were separated (living apart) for two consecutive years. But was the separation voluntary? Fred asked to be able to come back on May 15, 1997 when he found out that Susan was thinking of filing for divorce. When she refused, did the separation become involuntary? Clearly the initial decision to separate was voluntary. But didn't the separation itself become involuntary twenty-three months later when Fred changed his mind about wanting to be separated?

It appears unlikely, however, that a court would deny the divorce on these facts. Would this case be any different if Fred asked her to let him come back ten minutes before the two years elapsed? Denying the divorce would be a rather harsh result especially in a state where there is no other ground for a divorce.

- In most states the divorce would be granted since they were living apart for two years consecutively from November 1, 1995 to December 28, 1997. But was the separation voluntary? In some states this question is relevant when the parties separated because of fault. Diane deserted Tom on November 1, 1995. Tom apparently never consented to this separation until June 14, 1996. Two years did not elapse between this date and December 28, 1997. This would be enough to deny the divorce in some states. In other states, only the "guilty" party, i.e., the party at fault, will not be able to obtain the divorce. Tom is seeking the divorce. He was not the guilty party on November 1, 1995 when the separation began. Diane deserted him and hence she was the "guilty" party.

But did he also become a "guilty" party when he said that he never wanted to see Diane on June 14, 1996. Presumably if Diane had called him on this date and asked to be allowed to come back, he would have said no. Hence, he also is a "guilty" party?

- For all practical purposes, Bill and Susan have probably met the criteria of the statute. The issue is whether the legislature meant living apart to mean living under separate roofs or whether it means the termination of any meaningful marital life together. They rarely have anything to do with each other. We need to know what contact they do have. Do they ever share meals? Discuss expenses? Discuss the children, if any? If none of these kinds of contacts occur, the likelihood is that the legislature intended to include them within the category of living apart.

H. Assignment 7.4(b) (incompatibility)

- b. Not necessarily. What did the partner mean by “love”? I no longer love you the way I loved you when we were first married? I hate you? I love someone else?

Is the lack of love due to something petty? We need to know more about the condition of the relationship. Not loving someone does not necessarily mean that the parties can no longer live together. We also need to know whether the other partner has also fallen out of love.

I. Domicile

For more on domicile, see also Assignment A.6 in Appendix A. This assignment is part of the introduction-to-legal-analysis section of Appendix A. The hypothetical in this assignment involves the law of domicile. Domicile was selected for this legal analysis assignment because of the fact-intensive nature of domicile, which made it appropriate for an introductory-level legal analysis exercise. The suggested response to Assignment A.6 is found later in this Instructor’s Manual.

You might want to consider asking the students to do Assignment A.6 now while you are covering domicile here in Chapter 7.

There was a time in the law when the wife’s domicile was that of her husband no matter what state she lived in—even she lived in a state different from her husband’s! If such a law existed today, it would certainly be struck down as a violation of Equal Protection.

J. Bifurcated Divorce

Ask the class if it can think of a situation when a bifurcated divorce would be strategically disadvantageous to a wife. Example: Wife and Husband were married for twenty years. The wealth accumulated during the marriage was generated and controlled by the Husband. There are no children. He now wants to marry someone else. He resists her demands for her share of the property division. This issue must be litigated. To be allowed to remarry, he asks for a dissolution of the marriage now and a resolution (litigation) of the property issues later (a bifurcated divorce). This would be to the Wife’s disadvantage. If he is allowed to remarry immediately, he does not have any incentive to reach an accommodation on the property issue. He can let this drag on in litigation. Hence, in this example, it would be to her strategic advantage to oppose the bifurcation of the divorce. Her opposition might be an inducement to get him to be more receptive to her property demands: No remarriage until the property issues are settled.

K. Assignment 7.10 (domicile)

- a. Fred was physically present in Alaska. Within the three-month period, his intent was to make Alaska his permanent home. If he had left the state within the three months, e.g., on a trip, his intent would have been to return to Alaska. We know this because of his three-month commitment.

New Mexico could not be his domicile. He was not physically in New Mexico. His intent to make New Mexico his permanent home was conditional on the three-month period in Alaska. Clearly, Illinois could not be his domicile. He never intended to return to Illinois. Hence at the time of death he was domiciled in Alaska.

- b. Oregon is not the domicile. The facts do not indicate that she was ever in Oregon. The facts suggest that Gloria was once in Montana. Assuming that she once had a physical presence in Montana, could this be her domicile? She definitely wanted to go to Montana. But was it a present intent to go there? Was it her intent to go to Montana even if her husband stayed in Oregon? The facts are not clear on this point. Similarly the facts are not clear as to whether she intended to stay in New York if she could not work out her problem with her husband over Oregon. Montana is the most likely candidate. There is no indication that she wanted to stay in New York.

L. Assignment 7.13 (jurisdiction)

Sandra was domiciled in Florida. Hence Georgia would have to give full faith and credit to the part of the Florida decree that dissolved the marriage of the parties.

The property division order on the car, however, requires personal jurisdiction over John. John is not a resident in Florida. How could Florida obtain personal jurisdiction over him, assuming he never consented to the exercise of personal jurisdiction over him by Florida? Florida may be able to use its long arm statute to obtain this kind of personal jurisdiction over him. Does John have sufficient purposeful contact with the state of Florida so that it would be fair and reasonable for Florida to resolve the child support issue?

- He allows the kids to go back and forth between Florida and Georgia for visits.
- He calls them on the phone.
- He once sent his mother to Florida to care for the kids when Sandra was ill.

Are these sufficient minimum contacts with Florida to justify Florida's exertion of personal jurisdiction over him for purposes of imposing a property division order? Would it be fair and just to him to make him responsive to the Florida order? As indicated in the text, there are no clear answers in this area of the law.

On balance, the contacts with Florida do *not* appear to be sufficient. He has not taken advantage of the benefits of the state of Florida. His connection with the state is arguably somewhat tenuous.

M. Assignment 7.25 (procedure)

See the comments at the beginning of this chapter on arranging a court visit.

N. Ethics in Practice

It is unethical for an attorney to raise a claim or assert a defense if the attorney does not have reasonable basis to do so. Litigation steps, taken solely to delay or harass, are unethical. The attorney at Smith & Smith knows that David Gerry does not want custody. All procedural steps taken to obtain custody are designed to waste the court's time and to harass Lena Gerry. The attorney's agreement to do what David asks is unethical.