

# SPOUSAL SUPPORT, PROPERTY DIVISION, AND THE SEPARATION AGREEMENT

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### A. Chapter Competencies

*After studying chapter 8 the student should be able to:*

1. identify the reasons why a separation agreement is needed.
2. identify the five characteristics of an effective separation agreement.
3. identify the major lists that need to be prepared prior to drafting a separation agreement.
4. use interrogatories to uncover information on the financial assets of the other spouse, e.g., information on real estate assets, employment income, self-employment income, personal assets, stock assets, trusts, insurance policies, pension and disability benefits, expenses, and liabilities.
5. identify the kinds of collusion that will invalidate a separation agreement.
6. state the test for determining legal capacity to enter a separation agreement.
7. state when a separation agreement will be set aside for (a) duress, and for (b) fraud.
8. state the consideration for a separation agreement.
9. distinguish alimony from property division.
10. state the significance of the distinction between alimony and property division in the following areas: bankruptcy, modification, remarriage and death, federal income tax treatment, and the sanction of contempt.
11. identify the factors that a court will consider in determining whether a clause in a separation agreement is alimony or property division.
12. identify the major options that are available in drafting the alimony terms of the separation agreement.
13. identify the major options that are available in drafting the alimony-termination terms of the separation agreement.
14. identify the major options that are available to secure the alimony obligations of the separation agreement, e.g., escrow, surety bond, annuity, trust.
15. identify the major factors that a court will consider in rendering an alimony decree when the parties are not able to agree.
16. define rehabilitative alimony.
17. distinguish real property from personal property.
18. distinguish between tangible and intangible property.
19. distinguish between separate and marital property.

20. state the consequence of commingling.
21. identify the major ways in which parties may have held their property, e.g., individually, joint tenancy, tenancy by the entireties, tenancy in common, community property.
22. distinguish community property states from common law property states.
23. distinguish separate property, community property, and quasi-community property.
24. identify the standards that a court will use in making an equitable distribution of property.
25. state what a court will do when one of the spouses unlawfully dissipates property before it is divided.
26. distinguish a defined benefit plan from a defined contribution plan.
27. state how pensions are handled in a property division.
28. state the function of a Qualified Domestic Relations Order (QDRO).
29. state how the present value of a benefit is determined.
30. state how professional degrees and occupational licenses are handled in a property division.
31. identify the kinds of documents that should be collected in order to value a business that must be divided.
32. determine how goodwill is handled in a property division.
33. identify the major considerations that go into drafting the insurance terms of the separation agreement.
34. identify the kinds of debts that need to be discussed, and the options that the parties have in handling these debts.
35. identify the tax-paying and tax-filing issues that need to be discussed and resolved.
36. distinguish between dying testate and dying intestate.
37. state what is meant by electing against the will.
38. identify the topics that must be addressed on the subject of wills.
39. determine the extent to which a court can or cannot modify property division terms, child custody terms, child support terms, and alimony terms of a separation agreement.
40. identify the basis of a court's power to modify the alimony terms of a separation agreement.
41. identify those circumstances when a court will exercise its power to modify the alimony terms of a separation agreement.
42. identify the major options that exist for mediation and arbitration.
43. state the effect of a reconciliation on the obligations of a separation agreement.
44. identify examples of computer software used in the negotiation and drafting of a separation agreement.
45. state some of the ways computers are used in the negotiation and litigation of separation agreements.
46. draft a separation agreement.

## B. Introduction

Here are some quotes you may want to use while covering chapter 8:

*A Family law judge asked a pro se divorce litigant, "Have you and your wife fairly and equitably divided everything?" "Yes sir. I came by and picked up what she threw out."*

79 *American Bar Association Journal* 53 (10/93).

*Court order in a divorce case: "It is ordered and decreed that as to the parrot, HERME, each party shall have the exclusive possession of HERME for alternating two week periods, with respondent having the first two week period."*

*Fla Bar News* (5/15/93):36.

*"A woman is not a breeding cow to be nurtured during her years of fecundity, then conveniently and economically converted to cheap steaks when past her prime."*

*In re Brantner*, 136 Cal. Rptr. 635, 637 (California Court of Appeal, 1977).

*Good Morning America's Joan Lunden was ordered to pay temporary alimony of \$18,000 a month to her 52-year-old husband of fourteen years. She said, "This is a deplorable and shameful statement on how working women are treated today."*

*People* (7/6/92).

*Lorena Bobbitt severed the penis of her husband, John Bobbitt, with a kitchen knife while he slept. His organ was surgically reattached. The story made national news for months. John has asked that the knife be returned to him. A judge has not yet ruled whether the knife constitutes marital property.*

*The New York Times* (7/13/93); Harry Krause, *Family Law in a Nutshell*, p. 155, 3rd ed. (1995).

### C. Drafting a Separation Agreement

The last assignment in Chapter 8 (Assignment 8.16) covers the negotiation and drafting of a separation agreement. Of course, since chapter 9 (custody), chapter 10 (child support), and chapter 11 (taxation) are also directly relevant to the separation agreement, you may want to postpone the chapter 8 negotiation/drafting assignment until after these other chapters are covered during the course.

On the following pages you will find a negotiation/drafting assignment you can consider as *additional* to, or as an *alternative* to the last assignment in chapter 8. As with the latter assignment, however, you still need to decide when to give the assignment in view of the interrelationship among chapters 9, 10, and 11.

You may want to announce the chapter 8 negotiation/drafting assignment (8.16), or the one below, early in the course, but make it due toward the end of the course when you have covered most of the topics relevant to the separation agreement.

Each student will be asked to meet with another student, negotiate a separation agreement, and draft the separation agreement according to the guidelines and options discussed in chapter 8. In addition, they will turn in a memo discussing the tax consequences of the separation agreement.

Photocopy the following instructions for distribution to the students.

You need to select pairs of students to work on the negotiation together. It is recommended that you try to select students who do not know each other.

Stress the following point to the students: In the bargaining during the negotiation there should be a lot of give and take, offer and counteroffer, *but you must come to an agreement on everything that is to be negotiated*. It must be made clear to the students that it will *not* be acceptable for them to come back to you and say “we couldn’t come to an agreement” on one or more of the major topics.

You also need to decide whether you want the students to use any of the standard forms for separation agreements that may be available in your state (or any of the standard clauses at the end of chapter 8.) It is recommended that you ask them not to use any of the standard forms or standard clauses. Have them write the agreement “from scratch” “in English” so that it is intelligible by any layperson. They should avoid language such as “whereas,” “hereinbefore,” “party of the first part,” “in consideration of the premises,” etc.

#### **Student Instructions for the Negotiation and Drafting of a Separation Agreement**

1. In this assignment, you will be working with another student in the class. Your instructor will let you know who this student will be. You will meet with this student, negotiate the terms of a separation agreement, and draft a separation agreement. Each student will draft a separation agreement—one per student. You and the student with whom you will be working in the negotiation will *not* be submitting one separation agreement together.
2. When you know who the other student will be, arrange to meet with him or her in order to negotiate the agreement. Try to set aside two to three hours for your meeting.
3. Before you meet, read the following chapters in the book that are directly relevant to separation agreements: chapter 8, chapter 9, chapter 10, and chapter 11. These chapters deal with the basics of the agreement in general (chapter 8), child custody (chapter 9), child support (chapter 10), and taxation (chapter 11). You must have this background before negotiating and drafting the separation agreement.
4. Read the facts of the case that will be given to you. These facts will be the starting point of your negotiation. If there are missing facts that you identify during the negotiation, the two of you can agree on what these facts should be. When you are drafting the separation agreement, if there are missing minor facts, e.g., addresses, you can make these facts up on your own.
5. There are two main parties in the facts of the case: Mary Smith and Sam Smith. You will be representing one of these parties. See if you and your fellow student can agree at the outset which side each will represent. If you cannot agree, flip a coin. The person you represent will be your client.
6. Assume that your client has given you the following instruction: try to obtain the most satisfactory agreement that is consistent with my objectives. These objectives are presented in the facts of the case. If you are not sure what your client’s objective would be on a particular matter, do your best to try to guess what the objective would be in view of what you are told about the client in the facts of the case.
7. When you meet to negotiate, only you and the other student will be present. There is no specified order in which to begin. Negotiation takes place by a bargaining process. If, for example, each side wants full possession and ownership of the car, you must bargain your way to an agreement, e.g., your client will give up the car if the other side agrees to give you something else that you want which he/she may have been initially reluctant to give. Your job is to obtain the most satisfactory settlement for your client that is possible.
8. There is nothing wrong with bargaining with vigor and determination, *but you must reach agreement on everything*. Keep at it until agreement is reached. There are many topics in chapters 8, 9, 10, and 11. Assume that all

of these topics must be covered. It would be a good idea for you to make a checklist of things that you will want to cover during the negotiation. See the second checklist in the section at the beginning of chapter 8 called “Checklists for Preparation of a Separation Agreement.” You can use this as a guide for your own checklist.

9. Take extensive notes on the agreements that you reach during the negotiation. You will need these notes when you draft the separation agreement. (You and the student with whom you will be working should keep a *separate* set of detailed notes since each of you will be drafting your own individual separation agreement.)
10. After the negotiation, you draft the separation agreement. Again, each of you will be drafting your OWN agreement separately. It will *not* be a joint project. Attach a cover sheet to the agreement in which you state your name, the side (party) you represent, the name of the person with whom you did the negotiation, and the date that you conducted the negotiation.
11. Normally you would not draft the separation agreement immediately after the negotiation. The client would have to be consulted to see if he or she agrees with everything you have negotiated. You can assume, however, that this meeting has already taken place and that the client has agreed to accept the terms you negotiated.
12. In addition to handing in the separation agreement with the cover sheet, you are to attach a memorandum in which you discuss the tax consequences of the separation agreement that you have drafted. What will be included in the husband’s income? What deduction will he be able to take? What will be included in the wife’s income. What deductions will she be able to take? Etc. Explain your answers.

### **Facts of the Case for the Negotiation and Drafting of the Separation Agreement**

Mary and Sam Smith were married in your state nine years ago. They have two children: George (6 months old), and Janet (10 years old). They now live at 123 Main Street. Six months ago, they began having serious marital problems and have decided to separate. Sam will move out in a week.

Sam works at the Fredericks Chemical Company as an engineer. He has been there eight years. His annual salary is \$37,000. His increase has averaged about seven percent each year. There is a pension plan there for him. He pays \$3,000 a year into it and his employer contributes \$2,000 a year. He cannot begin receiving any benefits from the plan until he is 55 years old. He is now 42. If he leaves before he becomes 55 for any reason, he is entitled to receive only what he has contributed (\$3,000 a year for the last eight years) plus five percent interest that has accrued on the share he has contributed. He likes his job and expects to remain there until he retires. He can begin retirement once he is 65 years old.

He has a health insurance policy through his work covering himself and his family. The monthly premium is \$400 a month. He pays half (\$200); his employer pays the other half.

Mary has a part-time job at a bridal shop where she has earned an average of \$6,000 a year. She began this job two years ago when George was able to go into a day care center. Mary is 38 years old.

Both Sam and Mary have college degrees. Sam’s degree was in Engineering. He has a bachelor’s degree and a master’s degree. Mary’s degree was in English. She has not been able to use the degree in any employment. She would like to go back to school and get a law degree.

Mary obtained her degree before she met Sam. The same is true of Sam’s first degree, but his second degree was obtained while they were married. Mary sold a diamond ring her aunt had given her in order to help finance Sam’s graduate education. The ring was sold for \$4,600.

Both Mary and Sam want sole custody of the children. Sam expects to remarry in about six months. His wife-to-be has agreed to care for the two children, plus those that they expect to have together.

Sam is in excellent health. Mary, however, has been having back problems. She has been seeing specialists. The medical bills have amounted to \$3,900, only 60 percent of which have been covered by Sam’s job health policy. In the next few years, the bills will probably come to about \$6,000 a year, and will last about five years. (Again, only 60 percent will be covered by insurance.)

George is healthy, but Janet has recently developed an eye condition. It is unclear how serious this is. She has an appointment next week at the medical center. Sam and Mary have already been told by their family doctor that Janet may need special care.

The two children are in a private school. Tuition and expenses come to \$2,480 a year each. Mary wants them to continue at this school while Sam has expressed his view that they should be in public school.

Janet has a very close relationship with Sam. They both take violin lessons together. The cost of Janet’s lessons is \$670 a year. She needs a new violin. It will cost about \$500. Mary does not think that Janet is making enough progress in music to justify the expense. Sam, however, insists on continuing the lessons.

There is a life insurance policy on Sam’s life with Mary and the children as beneficiaries. Sam owns this policy, i.e., he can terminate the policy or change the beneficiaries at any time. The premium is \$400 a year. The dividends have been used to purchase additional insurance. The current amount of insurance (the death benefit) is \$78,000.

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Sam and Mary jointly own their home. They purchased it for \$50,000 when they were married. The down payment was \$4,000, which Mary paid from the savings that she brought into the marriage. The mortgage payment is \$425 a month. There is a \$40,425 balance on the mortgage. Substantial repairs are needed on the house. Over the next two years, \$6,000 is needed for a new roof and fence. The heat bill is \$1,000 a year. Electricity, \$112 a month. House insurance, \$500 a year. Phone bill, \$30 a month. Real estate taxes, \$790 a year.

Mary's brother built a new porch last year. He is still owed \$1,700.

Last year Sam and Mary bought some country land in a neighboring state. The purchase price was \$5,000. They paid \$500 as a down payment. The yearly expenses are \$620, which includes mortgage, insurance, taxes, etc. The land is in Sam's name only. They had hoped to build on the land someday and use it as a vacation home for the family.

Both Sam and Mary would like to obtain sole possession and ownership of the home where they now live, and sole possession and ownership of the country land.

They have two cars, both in Mary's name. The value of the cars is \$7,059 (for the Pontiac) and \$13,700 (for the Volvo). Both Mary and Sam want the Volvo and want the other one to take the Pontiac.

Last year Sam bought an Apple home computer and printer. Its current value is \$3,600. He uses it for the work he takes home from the office. He wants to keep it, but Mary thinks it should be sold and the proceeds divided evenly.

Other possessions and values: furniture (\$2,900), boat (\$600), motorcycle used by Mary (\$1,200), Mary's jewelry acquired during the marriage (\$2,580), joint checking account (\$3,000), his separate savings account (\$28,000), her separate savings account (\$6,500), joint savings account (\$2,500), miscellaneous cash (\$200). Sam wants to keep the money he has in his own savings account and divide the value of the rest. Mary wants everything divided equally.

### D. Assignment 8.1 (facilitating divorce)

- a. The clause appears to be innocuous. Presumably it says what the parties would do anyway: raise only those defenses that they think are valid and proper. But the clause says that no defense will be asserted if it is clear "to both parties" that there is no defense. Does this mean that a defense cannot be asserted if one side thinks the defense is valid but the other side doesn't? If the husband thinks he has a defense but the wife does not think so, is he prevented from raising it? If this is the effect of the clause, it would be collusive. A party cannot bind him or herself not to assert a defense if that party thinks the defense is proper, no matter what the other side thinks.

On the other hand, the clause might mean that he will refrain from raising only those defenses that they both agree are not valid. If he thinks it is valid, he can still raise it no matter what she thinks. If this is the meaning, it is OK, but it doesn't appear to say much.

- b. Normally the husband (or whoever has all or most of the assets) would be obligated to pay the legal expenses of the wife anyway. The wife may even be able to obtain a preliminary order from the court covering such expenses from him. The clause is not invalid even though it makes it easier for the wife to go ahead with the divorce.
- c. This clause poses no problem so long as "cooperate" does not mean committing any falsehood or dishonesty on the court.

### E. Assignment 8.3 (*Bell v. Bell*)

- a. Coercion? The following relevant facts suggest the absence of coercion because of the extent to which they show she exerted control over the situation:
  - She apparently initiated the discussion of the separation agreement.
  - She consulted her own attorney who wrote the initial separation agreement.
  - She received \$45,000.
  - She made several protests to his version of the separation agreement.
  - She read through his version of the agreement.
  - She "actively" negotiated several changes in his version of the separation agreement.
  - During the negotiations she told him she was trying to get "as much as I can"—as he would. (This does not sound as if someone is being overpowered.)
  - Several times during the course of the conversation she threatened to leave.
  - Several times during the course of the conversation she requested an opportunity to consult with her attorney.
  - There was evidence she was not extremely upset after the separation agreement was signed.

Here are some relevant facts suggesting the presence of coercion in the case:

- He threatened to disclose the affair to the police and to the media.
  - He hired private detectives who did an investigation about the adultery, suggesting that he was a bit overpowering in his presentation.
  - His tape recording of the conversation may have been somewhat intimidating.
  - She had relatively little education; he had much more.
  - She had relatively little business experience; he had a lot.
  - There was evidence she was extremely upset after the separation agreement was signed.
- b. Here is an alternative to the debate format called for in Assignment 8.3(b):
1. Have two students role-play a conversation between Diane Bell and Stanley Bell. Ask a man and a woman in the class to assume that the conversations mentioned in the opinion *have not taken place yet*, but are about to take place.
  2. Tell the student role-players to try to have a conversation that avoids any of the actual and potential legal problems mentioned in *Bell v. Bell*.
  3. The role-players should assume that all of the facts of *Bell v. Bell* apply except that the conversation about the proposed separation agreement has not yet taken place. It will now take place in front of the class.
  4. When the students start the role-playing, you should interrupt them every time there may be a problem concerning issues such as duress and fraud based upon what the role-players say to each other.

When you interrupt, ask the class if it sees any problem. If the class does not, you point out what the problem might be. For example: “What if that statement (just made by one of the student role-players) later gets introduced into the divorce trial as evidence. Could it be used to help show coercion—or the lack of it? Then ask the student role-players to resume the conversation/negotiation, but this time try to avoid the problem the class and/or you identified.

This exercise could be a good vehicle to make some of the *Bell v. Bell* issues concrete. Of course, you may want to expand the exercise to include commentary on issues in addition to duress and fraud.

## F. How Much Does a Homemaker Contribute?

Here is an excerpt from a case that you may want to share with the class on the economic evaluation of a homemaker’s contribution.

### ***Wendt v. Wendt***

1998 WL 161165, 33-5 (Conn. Super.)

*The “human capital” theory is an economic concept “as old as Adam Smith.” Professor Gary S. Becker of the University of Chicago was awarded the Nobel Prize in Economics, in part related to the “human capital” theory. He applied microeconomic theories to social problems including various aspects of family life. Gary S. Becker, A Treatise on the Family (1991). Professor Becker defines the human capital theory as, “People make investments in careers by education and on the job training. Rewards from those investments accrue over the entire time that they are in the labor market.” The theory considers that nonmonetary contributions can be made by a nonworking spouse by putting food on the table, paying tuition for the husband’s schooling and general support of the husband. Human capital may be augmented by education, training, experience, and medical care, or it can deteriorate from such causes as lack of current work experience or substance addiction. Gary S. Becker, Nobel Lecture, The Economic Way of Looking at Behavior, 101 J. Pol. Econ. 385, 392 (1993). Therefore, according to Professor Strober, the “human capital” theory is one of the three different approaches she used in evaluating the plaintiff’s nonmonetary contributions.*

*The first approach discussed by Professor Strober was “market value replacement.” That would be the amount of money that would have to have been paid by the defendant over the 31-year marriage to replace the actual physical labors performed by the plaintiff. This approach lists all the jobs performed by the homemaker, the number of hours each week devoted to each activity and the hourly wage paid to an individual employed in that particular function. One writer suggests the following tasks: “buyer (food and household), nurse, tutor, waitress, seamstress, laundress, chauffeur, gardener, family counselor, maintenance worker, nanny/child care, cleaning woman, housekeeper, cook, errand runner, bookkeeper/budget manager, interior decorator, caterer, dishwasher, dietician, secretary and maid/hostess.” M. Minton, Valuing the Contribution of the Homemaker at Trial, 1 Fairshare 7, 11 (Oct. 1981). Another author breaks down the tasks into six services: (1) meal preparation, (2) laundry work, (3) housecleaning, (4) shopping, (5) child care, and (6) miscellaneous activities such as general repairs. B. F. Kiker, Divorce Litigation: Valuing the Spouses’ Contribution to the Marriage, Trial 48 (Dec. 1980).*

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Professor Strober stated that there are three general categories of workers that would have to be hired to duplicate the work of the plaintiff: (1) child care, (2) cooking, and (3) house cleaning. Each would work a separate mythical eight-hour day each day of the year. At \$10.00 per hour times 24 hours times 365 days, a full-time child care/cooking/house cleaning worker at that rate would be paid \$87,600 annually. Dr. Strober noted, that not included in the above, would be the following additional services: (1) parental supervision, (2) bill paying, (3) trip planner, (4) shopper, and (5) child homework tutor. The support furnished to the defendant by his wife and the support furnished to the family by a mother would not be capable of being qualified in economic terms. Professor Strober purposefully did not include possible income tax deductibility of these costs to the defendant, inflation over 31 years nor administrative and costs of benefits. The total of \$87,600 times the 31 year marriage is \$2,715,600.

Another report entitled the “Sylvia Porter Study” assumes 99.6 hours per week spent in domestic work. Using 1979 dollars, that study computes the annual value of that work at \$18,862.48. William G. Baker and Michael K. Seck, *Determining Economic Loss in Injury and Death Cases*, 191–92 (1987). Using a 6 percent annualized rate of inflation, the \$18,862.48 is \$53,513 in 1997 dollars. At 99.6 hours per week this is \$10.33 per hour, a similar hourly rate used by Professor Strober whose results are larger since each of the 168 hours of a calendar week were used. Clearly the defendant can offer to pay the plaintiff a lump sum in cash of \$2,715,600, but that sum is only one quarter of the sum the defendant has offered. Only one/one-hundredth of one percent of the families in the United States have assets that approach those numbers. The “market value replacement” approach does not work in this case. The “opportunity cost” approach values a nonmarket laborer, i.e., what would plaintiff’s earnings have been if she had been involved in her musical career throughout those 31 years? “[T]he unit value of a person’s time is considered the same for marketplace and nonmarketplace production; thus, ‘the economic value of unpaid work is equal to or greater than the wage rate that the same person would command in the marketplace, regardless of the comparability of the two jobs performed.’” J. Avner, *supra*, 4 U. of Bridgeport, L. Rev. 268–69 n. 13. There was little testimony supporting the “opportunity cost” approach. There was testimony that the wife had earnings in the \$6,000 to \$7,000 range as a music teacher in the mid 1960s. There was no testimony as to what the current earnings would be for a public school music teacher.

### G. Assignment 8.6 (*Crabill v. Crabill*)

Here are excerpts from *Crabill v. Crabill*, 119 Md. App. 249, 704 A.2d 532 (Court of Special Appeals of Md., 1998):

#### Quote from Headnote of Opinion:

*Trial court, in awarding alimony, properly declined to impute to wife income she could have earned as paralegal rather than lesser income she earned as secretary; job as secretary allowed for flexible schedule that was necessary for wife to care for child with severe emotional problems. Paralegal job does not permit flextime.*

#### Quote from Opinion:

*Mr. Crabill next argues that the trial court should have imputed income to Mrs. Crabill because the master and the trial court found that she was not working at her highest level of earning capacity. Mr. Crabill is correct that both the master and the trial court found that Mrs. Crabill, who is a qualified paralegal, has held higher paying jobs in the past and may be able to obtain higher paying employment in the future, thereby becoming self-sufficient. Nevertheless, both the master and the trial court found Mrs. Crabill’s current employment acceptable based on other considerations.*

*Specifically, the master found that [their child] Nadine suffers from severe emotional problems and needs a high level of adult supervision. Nadine has a marked tendency to wander off, resulting in over a dozen missing person requests. Mrs. Crabill’s position at Our Lady of Mercy allows her the flexibility to care for Nadine. Because of Mrs. Crabill’s flex-time schedule, she may leave the premises at any time and reschedule her work day with no advance notice. On more than several occasions Mrs. Crabill has taken advantage of this flexible schedule to care for Nadine. The trial court also found that Mrs. Crabill’s position at Our Lady of Mercy provides her with the flexibility she needs to care for Nadine. The court stated that “she has the potential to earn more as a paralegal but [felt that] a monetary gain, in the end, would be detrimental to the children.”*

When determining whether to grant an alimony award, the court cannot require a spouse to take unreasonable steps in order to become self-supporting. *Reuter*, 102 Md. App. at 231, 649 A.2d 24. In addition, “the law and policy of this State is that the child’s best interest is paramount.” *Id.* In the case at hand, the master heard testimony that Nadine’s emotional and physical health would be adversely affected if Mrs. Crabill were not available at a moment’s notice to care for her. The trial court found that requiring Mrs. Crabill to obtain a job where she would not

be able to care for Nadine would not be in Nadine's best interest. We conclude that the trial court did not abuse its discretion by failing to require Mrs. Crabill to obtain higher paying employment. Imputing income to Mrs. Crabill, in this case, would have been contrary to the best interests of the Crabills' children, and thus the trial court did not err in failing to impute income to Mrs. Crabill.

*Crabill v. Crabill*, 119 Md. App. 249, 265, 704 A.2d 532, 540 to 119 Md. App. 249, 266, 704 A.2d 532, 540.

## H. Assignment 8.8 (*Gastineau v. Gastineau*)

a. Facts supporting her:

- She met him in college and never finished her college education after she met him.
- She didn't work during the marriage. (So she could take care of the child?)
- She supervised the renovations made on the Huntington house.
- She traveled with the him wherever he trained.
- She raised and cared for their child (with the assistance of a full-time nanny).
- He voluntarily terminated his contract with the New York Jets, depriving her and their child of the standard of living to which they had become accustomed.
- He failed to obtain meaningful employment after he quit the Jets.

Facts supporting him:

- She didn't have to work for the duration of the marriage. (True?)
- It was a short marriage.
- There was minimal testimony on her direct or indirect contributions to his acquisition of marital assets.
- It was his athletic abilities and disciplined training that made it possible for him to obtain and retain his position as a professional football player.
- During the years of his greatest productivity, she enjoyed the fruits of his labors to the fullest.

b. New York is an equitable distribution state. The court felt  $\frac{1}{3}$  of the marital assets would be equitable for her.

- $\frac{1}{3}$  of the Huntington equity (\$264,000) = \$87,120
- $\frac{1}{3}$  of the dissipated assets (\$324,573) = \$107,109
- arrears owed (pendente lite) = \$71,707

\$ 87,120  
\$107,109  
\$ 71,707  
\$265,936

If, however, New York was a community property state? Lisa gets:

- $\frac{1}{2}$  of the Huntington equity (\$264,000) = \$132,000
- $\frac{1}{2}$  of the dissipated assets (\$324,573) = \$162,286
- arrears owed (pendente lite) = \$71,707

\$132,000  
\$162,286  
\$ 71,707  
\$365,993

Note that the sequestered severance pay of \$83,000 would not be involved in these determinations since the court suggests that the wife properly used up this amount for living expenses.

## I. Assignment 8.9 (QDRO)

Every student in the class may not know a friend or relative covered by a pension, and hence will not be able to do this assignment. If so, you may want to consider making the assignment an optional extra credit assignment.

Once the students have collected the information called for in the assignment, consider having a class discussion. Ask the students to share the results of their efforts with the class. There should be a good deal of very useful information pertaining to difficulties encountered in obtaining this information and the kinds of plans that exist.

**J. Assignment 8.10 (*Woodworth v. Woodworth*)**

- a. There should be a good deal of controversy generated in the class on the wisdom of the kind of property division involved in *Woodworth v. Woodworth*. You might want to take an informal poll—by a show of hands—on whether the attorney in *Woodworth* should be forced, in effect, to give up a part of his degree. Does the *Woodworth* case raise feminist issues? Does the gender of the degree holder make any difference? The response of the class to part (b) of Assignment 8.10 might be relevant to this question, since in part (b) the spouse who arguably is “about to be shafted” in the property division is the male.
- b. (i) Is Elaine’s paralegal certificate a marital asset that can be divided? Would it be “unconscionable” for Frank to walk away with nothing while only Elaine enjoys the fruits of their joint efforts—the paralegal certificate? The answer depends on whether the *Woodworth* court will consider the paralegal certificate in Assignment 8.10 to be a “family investment, rather than a gift or a benefit to the” paralegal certificate “holder alone.”

***There are a number of striking similarities between the Woodworths, and Elaine and Frank:***

- Like the law degree in *Woodworth v. Woodworth*, Elaine’s paralegal certificate “was the end product of a concerted family effort,” and “[b]oth parties planned their family life around the effort to attain” the paralegal certificate and then the electrician’s training. Like the Woodworths, Elaine and Frank “divided the daily tasks encountered in living” toward the end of obtaining the paralegal certificate. It became “the main focus and goal of their activities.” Obtaining the paralegal certificate “was the result of mutual sacrifice and effort by both” Elaine and Frank, as with the couple in *Woodworth*. To paraphrase the Court, perhaps it can be said that: “While” Elaine “studied and attended classes,” Frank “carried” his “share of the burden as well as sharing vicariously in the stress of the” paralegal school “experience known as the paper chase.”
- Like the plaintiff in *Woodworth*, Frank underwent substantial hardship to enable Elaine to attend paralegal school. He went to work rather than go to electrician’s school so that Elaine could go to paralegal school. Consequently, it can be said that the paralegal certificate “holder [Elaine] has expended great effort to obtain the” certificate “not only for him or herself, but also to benefit the family as a whole. The other spouse [Frank] has shared in this effort and contributed in other ways as well, not merely as a gift to the student spouse [Elaine] nor merely to share individually in the benefits but to help the marital unit as a whole.”
- Like the parties in *Woodworth*, Elaine and Frank did not simultaneously earn substantially similar advanced educational credentials during the marriage, which the court in dictum suggests might lead to a different holding.

Given these similarities, the *Woodworth* court would probably conclude that “fairness dictates that the spouse who did not earn an advanced” training certificate “should be compensated whenever the advanced” training certificate “is the product of such concerted family effort.”

There is, of course, a difference: *Woodworth v. Woodworth* involved a law degree; the case in the assignment involves a paralegal certificate. But this difference should not be considered significant. The same fairness concerns that prompted the *Woodworth* court to give the spouse who stayed at home a remedy apply to Frank as well. The certificate was very much the product of a joint effort. Frank stands in the same shoes as the plaintiff in *Woodworth*. He may even have greater equities on his side since it is so dramatically clear in his case that he postponed his own higher training explicitly because of Elaine. He also may be in a more desperate predicament than the plaintiff in *Woodworth* because of his physical injury.

Both the law degree and the paralegal certificate are educational credentials that are tickets to potentially higher economic rewards.

The fact that the attorney may earn more than the paralegal should not be significant. There is simply less to divide in the case of the paralegal certificate. Surely this economic difference should not be a reason to refuse to divide the certificate at all—so long as the *same equities are at play* as they arguably are in the Elaine–Frank case.

It is not too speculative to calculate the future earnings of a paralegal. There are national paralegal salary surveys as well as state paralegal salary surveys in almost every state and are conducted nearly every year.

It would be “unconscionable” for Frank to walk away with nothing. Like the plaintiff in *Woodworth*, Frank is merely “seeking” his “share of the fruits of a” certificate which he “helped” Elaine “earn.”

What should the amount of Frank’s compensation be? The court laid out some criteria:

- the length of the marriage after the degree was obtained,
- the sources and extent of financial support given the student while in school, and
- the overall division of the marital property.

In determining the present value of the certificate, the *Woodworth* court would want to know what Elaine “is likely to make” in the job market, and will “subtract that from what” she “probably would have earned without the” certificate.

### **K. Assignment 8.13 (modification of alimony)**

It might be useful to determine whether the annulled marriage was void or voidable (depending upon the ground used). If the marriage was void, then no marriage ever existed. Karen in effect never “remarried.” If the marriage was voidable, then the revival of the alimony obligation, if any, may start on the date of the annulment.

A court will be reluctant to force the resumption of Jim’s alimony obligation even though technically there may never have been a marriage to Paul. If Karen is about to become destitute, however, the court might be receptive.

A factor is the availability of *Paul* to pay alimony. Some states allow this in annulment actions.

### **L. Assignment 8.14 (reconciliation)**

Has there been a reconciliation or only an agreement to think about it? Before Tom died, it looked like they might get back together again, but it was arguably very tentative. A court would probably not find a reconciliation on these facts. Hence, no right of election.

### **M. Assignment 8.16 (drafting a separation agreement)**

See the discussion earlier at the beginning of this chapter on drafting a separation agreement.

### **N. Ethics in Practice**

If an attorney is aware that an opposing attorney has failed to disclose controlling “laws or other authority” to the court, the attorney must inform the court of this omission even if the law or authority goes against the attorney’s client. The wife’s attorney has misinterpreted the law on the division of pensions.

But can James & James simply assume that the wife does not want part of the husband’s pension? Unlikely. If *the court* is also unaware of this pension law, then James & James clearly have an obligation to inform the court what law or authority says that pensions are divisible.