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Fineman
Family Law Final Exam
Fall 2003

EMORY UNIVERSITY
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Family Law
Final Examination
Fall 2003
December 15, 2003
8:30am – 11:30am

Cornell Law School
Professor Martha Fineman

Exam Number 18

QUESTION I

Thomas Oldham explains some of the "unique" aspects of American family law by stating that "…American [family] bonds generally are weaker than that in other countries. " He also concludes that our laws governing the family reflect the "extreme individualism of American culture."

In your opinion, what areas or aspects of family law that we studied this semester support these views? Are there some aspects of family law that undermine Oldham's assertions? Please elaborate.

QUESTION II

Upon filing for the dissolution of his17-year marriage to the famous opera singer, Alice Adams, her husband Brad has argued that her career and celebrity status are attributable in large measure to his efforts. At the time of their marriage in 1986, Alice had just begun her career and was performing minor roles with the Metropolis Opera Company. During the marriage, she became a highly successful concert and television performer and international recording artist. Although in the first year of the marriage she earned only $5,250, her earnings have increased each year and for 2003 will be $821,878.

During the marriage Alice's husband served as her voice coach and photographer, traveling with her, critiquing her performance, and photographing her for albums and magazine articles. He claims he sacrificed his own career as an opera teacher and singer to devote himself to her career. He was also the primary caretaker of their two children, now ages 16 and 14.

Brad contends that as a result of his efforts in building her career he should be entitled to an equitable distribution of the appreciation of the value of Alice's career and her celebrity status, which he claims "Our State" should classify as marital property using the arguments of the New York court in *O'Brien v. O'Brien* (casebook, page 782). Alice, by contrast, argues that "Our State" should reject this approach as deeply flawed and unfair, noting the unanimous refusal of other states to follow it, as well as the philosophy and approach to property division adopted in the recently promulgated American Law Institute's Principles of the Law of Family Dissolution (2000) (attached to this exam).

You are the law clerk for the Chief Justice of the "Our State" Supreme Court, which is hearing an appeal from a trial court determination that *O'Brien* is not applicable and that the marital property should be divided equally, with no spousal maintenance awarded. The Chief Justice asks you to write a memo considering the wisdom of adopting or rejecting the approach taken in *O'Brien* case, as well as generally whether there is a more equitable approach to resolving the economic issues between the spouses than that taken by the trial court.

The record below reveals that Brad could become employed almost immediately as an opera coach with the New Metropolis Second City Opera Company, earning about $55,000 a year. In addition, the record indicates that the couple tended to live "high on the hog" during their marriage, although they have accumulated a little in the way of more "traditional" property over the past 17 years. Their Metropolis apartment has about $150,000 worth of equity in it and they have bank accounts and a money market fund that have a total worth of $250,000.

What would your memo conclude?

QUESTION III

Cynthia Bowman has argued for the superiority of a system of regulation of family and intimacy that recognizes common-law marriages and extends either marriage or its benefits of marriage to same-sex couples living in committed relationships. Her reasoning in regard to women is that:

> common law marriage...protects the interests of women, especially poor women...more effectively than any of the theories suggested to address the problems created by its absence...The impact of non-recognition is clearly disparate: it hurts most those women who are most vulnerable, and its effect is greatest on issues with a significant impact on their welfare, such as the ability to leave [a] violent relationship or to obtain a variety of benefits upon the death of a family's breadwinner.

What are the arguments for and against reinstitution of common law marriage? Do such arguments apply equally to heterosexual and same sex couples? Would the position taken by the American Law Institute in Chapter 6 – Domestic Partners, be a better approach? Why or why not?

THE END!!!!!!!!!!!!!

2002 EXAM – Family Law
M.L.A. Fineman

QUESTION I

Legislatures and state courts have taken various positions with respect to the enforcement of prenuptial (antenuptial, premarital) agreements. New Jersey's Supreme Court held in *DeLorean v. DeLorean* that so long as there was no fraud or duress in an agreement's execution, the parties made full and complete financial disclosure before signing it, and it is not "unconscionable" in the sense that under it "a spouse is ... left destitute or a public charge," an agreement should be upheld.

Other jurisdictions looking at prenuptials interpret unconscionability more generously. Significantly changed circumstances in those jurisdictions may render alimony provisions unconscionable and, hence, voidable even when the recipient would not be rendered destitute, but would simply suffer a significant diminution in lifestyle.

The ALI proposes that courts be empowered to set aside prenuptial agreements where they will work a "substantial injustice" when (a) a specified period of time (such as 10 years) has elapsed since the signing, or (b) a child has since been born or adopted by the parties (who previously had no children together), or (c) the circumstances of one or both parties has changed in ways creating a significant impact that they would probably have been unable to anticipate. In determining whether upholding the agreement would work a substantial injustice, the court is to consider (a) magnitude of disparity between the outcome under the terms of the agreement and the likely outcome absent the agreement; (b) if practical/relevant, how well-off the person claiming substantial injustice would have been absent the marriage; (c) whether the initial purpose of the agreement was to protect third parties such as prior children and was reasonably designed to do that, and (d) the impact on any children born after the agreement.

Another possible approach is to disallow prenuptial agreements altogether except in specified circumstances, such as when the marriage is a second marriage for one or both of the parties, and either party has children from a former marriage.

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Please evaluate the pros and cons of each approach, and indicate which, if any, you think makes the most sense. Among the questions you might consider are:

Which approach best comports with our modern view of marriage?

Which approach best reflects our contemporary economic and/or social realities?

QUESTION II

Amber and Bradley married on July 25, 1995. Amber was employed part-time as well as being a student at the City University of New York at the time of the marriage. On February 20, 1996 their son was born. After taking 6 weeks off, Amber continued her studies, leaving care of the child to the paternal grandmother who lived a few blocks from the apartment that Amber and Bradley shared. She also resumed her part-time work as a pilot with the U.S. Army, a position that provided for her tuition as well as giving her a salary.

In December of 2000, Amber told Bradley that she was sick of the marriage and wanted a divorce. On advice of counsel, Bradley refused to leave their apartment, so Amber, with his consent, left with the child. She lived for a while with her parents in Westchester NY, but eventually found a small apartment close to Bradley, continuing the childcare arrangements with his mother. Bradley spent a great deal of time with the child, particularly since his employment was sporadic in nature, although Amber was considered by both to be the "primary" custodian.

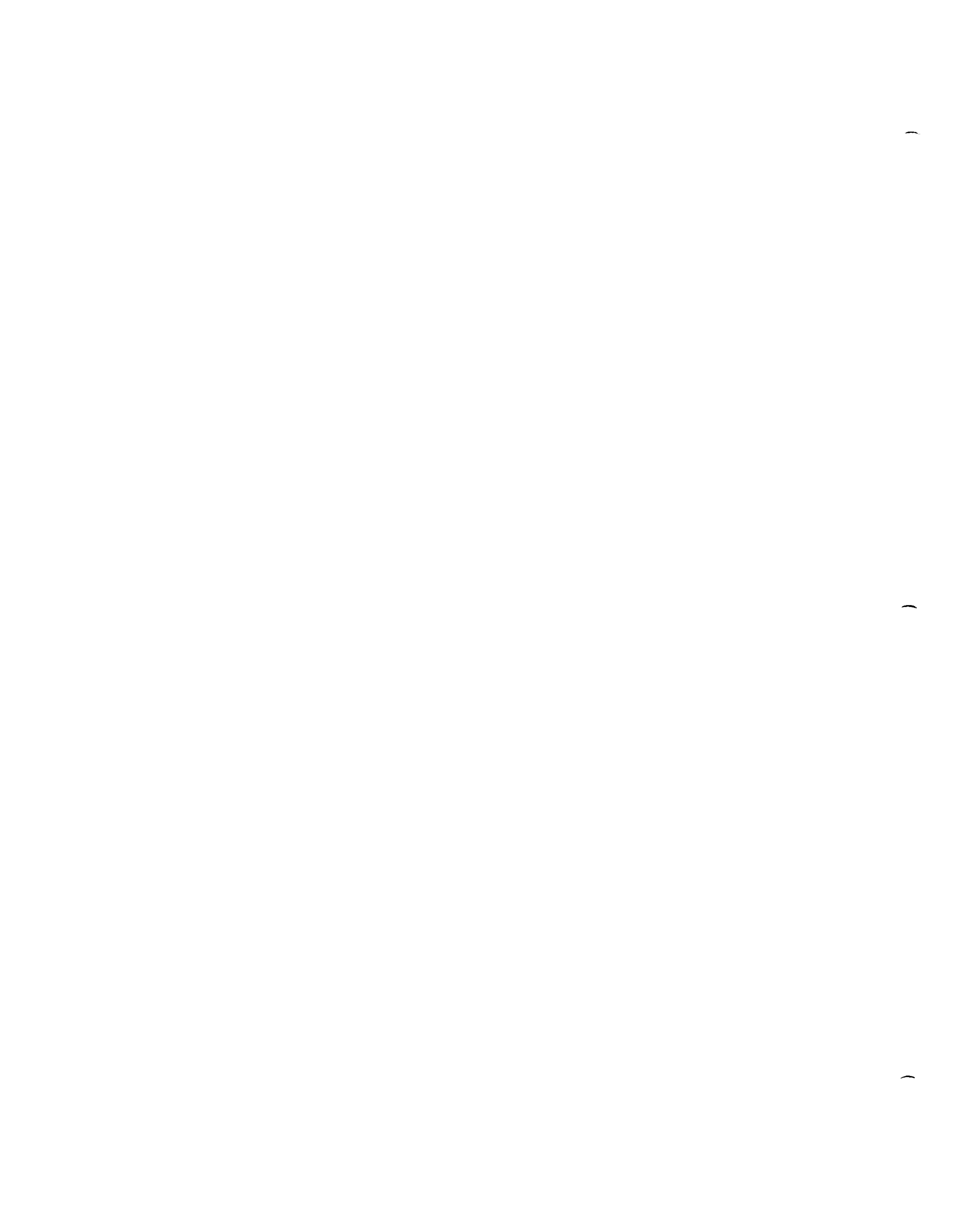
In May of 2001 after she received her degree, Amber temporarily placed the child with Bradley (who was still living in the marital apartment) while she moved to Versailles, Kentucky, for what was expected to be a short time. The move was in order to allow her to be closer to her job as a part-time pilot, increasing her flying time and earning more money so as to be better able to support herself and the child when she returned to New York.

Bradley, an ironworker, was unemployed at the time of and during the summer after Amber's move and was able to accommodate his schedule so as to care for the child. He resented it, however, particularly since Amber's leaving the child constituted "abandonment" in his mind. In fact, one of the problems during the marriage had been the disparity in levels of ambition between the two. Bradley had been openly critical of Amber's decisions to leave the child so soon after its birth. He complained that she had always put herself first, disguising her driven self-centered nature behind a veil of concern for her child's future economic well being.

In September of that year Amber returned to New York, informing Bradley that she had decided that she really wanted to attend law school. She had already applied to the University of Kentucky Law School, as well as to Fordham University Law School and been accepted by both. Amber also told Bradley that she preferred to go to school in Kentucky since she had begun a relationship with Charles, a well connected, but still married local man she met during the summer she spent there. In fact, Amber has told Bradley that she is pregnant by Charles and intends to have the baby. She is not apologetic about the relationship – she considers her marriage to Bradley to have ended years ago, even if there has been no divorce.

Charles has been separated from his wife for the past several years, but intends now to proceed with a divorce in order to be free to marry Amber should she have him. Amber is unwilling to make a commitment at this time, however. Feeling she is just about to get out of one bad relationship, she is little interested in pursuing any marriage proposal at this time.

Bradley consults you about his chances of gaining custody of his son. At the time of his separation from Amber, Bradley didn't believe he would be able to successfully mount a custody



fight – his lawyer told him that the "tender-years" doctrine was "alive and well," regardless of the gender neutral nature of the best interest of the child test. Given Amber's recent behavior, which he casts as "abandonment," Bradley thinks he just might now have a chance to gain custody.

Please assess his prospects, comparing the likely results under the best interest of the child test, the primary caretaker test, and the ALI proposals (attached).

QUESTION III

Alice Abrams (49) has approached your law firm for advice concerning her desire to divorce her husband Barry (53), after 23 years of marriage. Both live in New York, where they have resided for the entire marriage. Alice is a high-fashion designer; Barry is a partner in a Wall Street law firm. They have three children, Charlie (21), Dan (16) and Ellen (13). Alice believes Barry took up with his secretary (Gina) some three years ago, but has no "proof" of this other than rumor, her husband's lack of attention and frequent late nights in the office, and Gina and Barry's frequent travel together on business.

Alice has earned on average $400,000 annually from her design business for two of the past three years. Barry's earnings have exceeded $1 million annually for the last 3 years. The couple own outright a condo in New York valued at $1.3 million, purchased with a $300,000 gift from Alice's parents at the time of their marriage; most mortgage payments were made out of Alice's business profits. They also own a summer house in East Hampton valued at $2 million, purchased outright for $1 million with Barry's inheritance when his father died. They have upgraded the property twice; Alice acted as "general contractor" – designing and supervising both renovations.

After their marriage, Alice supported them for two years by working in design while Barry went to law school. When their first child was born, Alice ceased work and Barry's family paid for the remaining year of Barry's education and also assisted in supporting the family for that year. Alice remained out of the workforce until ten years ago when she began her design business. Alice's design business was recently assessed at $2 million. However, Alice recently learned that she suffers from serious macular degeneration (which causes eventual blindness) and has been advised to get out of the design business. Unbeknownst to her husband, she has found a potential buyer who wants to expand his design business and is willing to pay her almost double the assessed value for her business.

When Alice formed her business, the couple decided to fund tax-free education accounts for their children (total value $50,000 per child), the East Hampton upgrades ($350,000), and any ongoing living expenses which could be characterized as business expenses (large at-home office; car, travel and so on) out of Alice's design proceeds, so as to reduce her business earnings for tax purposes.

Alice wants to end the marriage as soon as possible. She wants to know what her economic rights will be at divorce (*ie*: what property will she likely get and how much alimony and child support is she likely to receive and for how long).

What issues and problems would Alice face under the proposed ALI rules (attached)? Are there any ethical considerations that might need to be addressed? What additional information might be needed from Alice in order to advise her?

THE END!!!!!!!

AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2000)

[SELECTED PRINCIPLES AND COMMENTARY]

Below are selected ALI Principles (and selected commentary) on the topics of child custody (Chapter 2), division of property upon dissolution and compensatory spousal payments (Chapters 4 and 5) and domestic partners (Chapter 6). The remaining sections of the ALI Principles (including Commentary, Illustrations and Reporter's Notes) may be found in the American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations (Matthew Bender & Co., 2002).*

CHAPTER 2. THE ALLOCATION OF CUSTODIAL AND DECISIONMAKING RESPONSIBILITY FOR CHILDREN

TOPIC 1. SCOPE, OBJECTIVES, DEFINITIONS, AND PARTIES

§2.01 Scope of Chapter 2

This Chapter sets forth Principles governing the allocation of custodial and decisionmaking responsibility for a minor child when the parents do not live together.

§2.02 Objectives; best interests of the child defined

(1) The primary objective of Chapter 2 is to serve the child's best interests, by facilitating all of the following:

(a) parental planning and agreement about the child's custodial arrangements and upbringing;

(b) continuity of existing parent-child attachments;

(c) meaningful contact between the child and each parent;

(d) caretaking relationships by adults who love the child, know how to provide for the child's needs, and place a high priority on doing so;

(e) security from exposure to conflict and violence;

(f) expeditious, predictable decisionmaking and the avoidance of prolonged uncertainty respecting arrangements for the child's care and control.

(2) A secondary objective of Chapter 2 is to achieve fairness between the parents.

COMMENT

a. In general. This section sets forth general criteria defining the child's best interests. More specific criteria are set forth in other sections of Chapter 2. See §2.08 (allocation of custodial responsibility), §2.09 (allocation of decisionmaking authority), §2.10 (dispute resolution), §2.11 (limiting factors), §2.12 (prohibited factors), §2.17 (the relocation of a parent), and §2.18 (allocation of responsibility to individuals other than legal parents).

b. The child's best interests and fairness to parents. Paragraph (1) states the Chapter's primary objective as serving the child's best interests. The priority of the child's interests over those of the competing adults is premised on the assumption that when a family breaks up, children are usually the most vulnerable parties and thus most in need of the law's protection.

Fairness to the parents when it can also be achieved, however, is another objective of Chapter 2. Fairness to parents is not only a valid objective in itself, but it is intertwined with the child's interests. The Chapter assumes that without confidence in the basic fairness of the rules, parents are more likely to engage in strategic, resentful or uncooperative behavior, from which children may suffer; conversely, when parents believe that the rules are fair, they are more likely to invest themselves in their children and to act fairly toward others. Accordingly, when more than one rule could be expected to serve the interests of children equally well, or when the impact of the alternative rules upon children is uncertain, Chapter 2 adopts the rule most likely to produce results that achieve the greatest fairness between parents.

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Acceptance of the rules governing the allocation of responsibility for children also depends on the consistency between these rules and society's basic values, such as freedom of religion, the ability to relocate geographically, and equal treatment based on race and sex. Respect for these values necessarily informs what is considered beneficial to children, as well as what is fair to adults. Chapter 2 incorporates these values implicitly in the design of these Principles and through express limitations on the factors that can be considered in applying the Principles.

c. Securing Chapter 2's objectives through determinate standards. While the best-interests-of-the-child test expresses the appropriate priority in favor of the interests of the child, and while it provides the flexibility that permits a court to reach what it believes is the best result in an individual case, it has long been criticized for its indeterminacy. To apply the test, courts must often choose between specific values and views about childrearing. For example, a court may need to choose between a parent who provides greater emotional security for the child and one who emphasizes intellectual stimulation, or between a home life emphasizing the values of conformance and obedience and an upbringing that encourages creativity and challenge to authority. One parent may be deeply religious while the other parent has no religious faith. The parents may use different disciplinary styles, have different attitudes about sex education, or disagree about the need for bedtime routines. When the only guidance for the court is what best serves the child's interests, the court must rely on its own value judgments, or upon experts who have their own theories of what is good for children and what is effective parenting.

The indeterminacy of the best-interests test makes it often difficult for parents to predict the outcome of a case. This difficulty encourages strategic or manipulative behavior that is usually adverse to the child's interests. For example, a parent may make custodial demands for strategic purposes to pressure the other parent into financial or other compromises that are unfair and do not serve the child's interests, or to force into litigation a case that could have been settled if the result were more predictable. A parent may attempt to leave the other out of decisions respecting the child, or to influence the child, the child's teachers, and others to see the other parent in a negative light. A parent uncertain of a case's outcome is more likely to hire experts whose job it will be, in part, to highlight the flaws of the other parent in custody reports or in courtroom testimony.

More determinate custody standards can help reduce these difficulties. More determinate standards, however, are not necessarily better standards. Favoring a parent because of his or her sex, or religion, for example, may produce relatively certain, predictable results, but not acceptable ones. Moreover, even when a determinate standard conforms to broadly held views about what is good for children, it can intrude — just as indeterminate standards do — on matters concerning a child's upbringing that this society generally leaves up to parents themselves, and standardize child-rearing arrangements in a way that unnecessarily curtails diversity and cultural pluralism.

The question for rule-makers is not whether the law in this area should require determinacy or permit unbridled judicial discretion. It is, rather, what blend of determinacy and discretion produces the best combination of predictable and acceptable results, and what substantive values are most appropriately reflected in the mix. This Chapter attempts to achieve this equilibrium through structured decisionmaking criteria that limit judicial discretion and at the same time express widely held societal commitments to children and to family diversity.

Some authorities argue for a focus on avoiding harm to the child — the-least-detriment-to-the-child standard — rather than on affirmatively serving the child's best interests. There are certain advantages to such a focus, which implicitly concedes that the law is limited in its ability to ensure good outcomes for children. However, a least-detriment standard is no more determinate than a best-interests standard, and thus could not be expected to avoid its difficulties. Moreover, in setting a modest goal, a least-detriment standard may set the sights of parents too low, when the law should be trying to stimulate their best efforts on behalf of their children. For this reason, Chapter 2 attempts to clarify and refine the best-interests standard rather than to eliminate it.

d. Parental planning and agreement. The law is limited in its ability to secure the welfare of children. Even if there were consensus on what parenting practices were best for children, parents cannot be made to love their children, nor can they be supervised in all of their encounters with them. However, the law can attempt to stimulate, or at least not inhibit, the motivations of parents to do well by their children. One of the ways it can do this is by respecting the decisions parents have made about their children in the past and by encouraging their planning for their children's future.

Chapter 2's reliance on past caretaking in allocating custodial responsibility respects decisions parents have made about their children in the past. See §2.08(1). In requiring parenting plans, the Chapter encourages parents to plan for their children's future. See §2.05. The limits the Chapter places on the court's discretion to reject voluntary and informed agreements by the parents further affirms parental autonomy and situates responsibility in those assumed by Chapter 2, as a general matter, to be in the best position to decide what is in the child's best interests. See §§2.06 and 2.16(1).

e. Continuity of existing parent-child attachments. While Chapter 2 attempts to avoid unnecessary value judgments about what is best for children, it accepts and builds on certain principles of child welfare about which there is clear consensus. One of these principles, recognized in Paragraph 1(b), is that the continuity of existing parent-child attachments after the breakup of a family unit is a factor critical to the child's well-being. Such attachments are thought to affect the

child's sense of identity and later ability to trust and to form healthy relationships.

It is sometimes difficult to evaluate the strength of a child's various attachments or to weigh the importance of the child's attachments against other factors that are relevant to the child's welfare. Chapter 2's priority on the past division of caretaking responsibilities recognizes these difficulties by assuming that the strength of the child's various attachments correspond roughly to the share of responsibility a party has assumed for the child's past caretaking. See §2.08(1). . . .

§2.03 Definitions

For purposes of this Chapter, the following definitions apply.

(1) Unless otherwise specified, a *parent* is either a legal parent, a parent by estoppel, or a de facto parent.

(a) A *legal parent* is an individual who is defined as a parent under other state law.

(b) A *parent by estoppel* is an individual who, though not a legal parent,

(i) is obligated to pay child support under Chapter 3; or

(ii) lived with the child for at least two years and

(A) over that period had a reasonable, good-faith belief that he was the child's biological father, based on marriage to the mother or on the actions or representations of the mother, and fully accepted parental responsibilities consistent with that belief, and

(B) if some time thereafter that belief no longer existed, continued to make reasonable, good-faith efforts to accept responsibilities as the child's father; or

(iii) lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child's best interests; or

(iv) lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's parent (or, if there are two legal parents, both parents), when the court finds that recognition of the individual as a parent is in the child's best interests.

(C) A *de facto parent* is an individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years,

(i) lived with the child and,

(ii) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions,

(A) regularly performed a majority of the caretaking functions for the child, or

(B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.

(2) A *parenting plan* is a set of provisions for allocation of custodial responsibility and decisionmaking responsibility on behalf of a child and for resolution of future disputes between the parents.

(3) *Custodial responsibility* refers to physical custodianship and supervision of a child. It usually includes, but does not necessarily require, residential or overnight responsibility.

(4) *Decisionmaking responsibility* refers to authority for making significant life decisions on behalf of the child, including decisions about the child's education, spiritual guidance, and health care.

(5) *Caretaking functions* are tasks that involve interaction with the child or that direct, arrange, and supervise the interaction and care provided by others. Caretaking functions include but are not limited to all of the following:

(a) satisfying the nutritional needs of the child, managing the child's bedtime and wake-up routines, caring for the child when sick or injured, being attentive to the child's personal hygiene needs including washing, grooming, and dressing, playing with the child and arranging for recreation, protecting the child's physical safety, and providing transportation;

(b) directing the child's various developmental needs, including the acquisition of motor and language skills, toilet training, self-confidence, and maturation;

(c) providing discipline, giving instruction in manners, assigning and supervising chores, and performing other tasks that attend to the child's needs for behavioral control and self-restraint;

(d) arranging for the child's education, including remedial or special services appropriate to the child's needs and interests, communicating with teachers and counselors, and supervising homework;

(e) helping the child to develop and maintain appropriate interpersonal relationships with peers, siblings, and other family members;

(f) arranging for health-care providers, medical follow-up, and home health care;

(g) providing moral and ethical guidance;

(h) arranging alternative care by a family member, babysitter, or other child-care provider or facility, including investigation of alternatives, communication with providers, and supervision of care.

(6) *Parenting functions* are tasks that serve the needs of the child or the child's residential family. Parenting

functions include caretaking functions, as defined in Paragraph (5), and all of the following additional functions:

(a) providing economic support;

(b) participating in decisionmaking regarding the child's welfare;

(c) maintaining or improving the family residence, including yard work, and house cleaning;

(d) doing and arranging for financial planning and organization, car repair and maintenance, food and clothing purchases, laundry and dry cleaning, and other tasks supporting the consumption and savings needs of the household;

(e) performing any other functions that are customarily performed by a parent or guardian and that are important to a child's welfare and development.

(7) *Domestic violence* is the infliction of physical injury, or the creation of a reasonable fear thereof, by a parent or a present or former member of the child's household, against the child or another member of the household. Reasonable action taken by an individual for self-protection, or the protection of another individual,,is not domestic violence.

COMMENT

a. Legal parent. This Chapter uses the term "legal parent" to refer to any individual recognized as a parent under other state law. Individuals defined as parents under state law ordinarily include biological parents, whether or not they are or ever have been married to each other, and adoptive parents. In some states, an individual may be a parent also by virtue of an unrebutted legal presumption, such as the presumption that a husband is the father of his wife's child. An individual is not a parent under Paragraph (1)(a) if, under applicable state law, the individual's status as parent has been terminated. . . .

b. Parent by estoppel. An individual who is not a legal parent may be a parent by estoppel under Paragraph (1)(b). A parent by estoppel is an individual who, even though not a legal parent, has acted as a parent under certain specified circumstances which serve to estop the legal parent from denying the individual's status as a parent. While these circumstances typically contain a component of reliance by the individual claiming parent status, the goal of the Chapter is to protect the parent-child relationship presumed to have developed under these various circumstances rather than reliance itself. Accordingly, the requirements in §2.03(1)(b) focus on function, rather than on detrimental reliance.

A parent by estoppel is afforded all of the privileges of a legal parent under this Chapter, including standing to bring an action and the right to have notice of and participate in an action brought by another under §2.04, the benefit of the presumptive allocation of custodial time provided for in §2.08(1)(a), the advantage of the presumption in favor of a joint allocation of decisionmaking responsibility afforded by §2.09(2), the right of access to school and health records specified in §2.09(4), and priority over a de facto parent and a nonparent in the allocation of primary custodial responsibility under §2.18.

(i) Individual who is obligated to pay child support. Four circumstances may create parent-by-estoppel status under §2.03(1)(b). First, when a parent obtains a child-support order against another under Chapter 3, the parent is estopped under §2.03(1)(b)(1) from denying that the other individual is a parent when that individual seeks an allocation of custodial responsibility under Chapter 3. Most individuals upon whom a child-support obligation is imposed under Chapter 3 are legal parents. However, §3.03 permits the imposition of a child-support obligation upon other individuals when a court determines that their prior conduct estops them from denying the obligation. For example, a stepfather who undertook to replace a child's biological father by supporting the child and otherwise assuming responsibility for the child may be estopped, under some circumstances, from denying an obligation for child support when the marriage underlying the stepparent relationship ends. . . . When this happens and a child-support order is issued against the stepfather under §3.03. §2.03(1)(b)(l) provides that legal parent is, in turn, estopped from denying the supporting parent status as parent under Chapter 2. . . .

(ii) Individual who had reasonable, good-faith belief he was the child's father. A man is a parent by estoppel if he lived with the child and fully accepted parental responsibilities for the child for at least two years, in the reasonable, good-faith belief that he was the child's biological father. See Paragraph (1)(b)(ii). Paragraph (1)(b)(ii) applies only to men, based on the assumption that a woman virtually always knows if she is a child's mother, whereas a man may be unsure, or misled, about his parentage. Estoppel principles are not likely to be helpful when there are mistakes over maternity, such as might occur when conception occurs outside the womb or when babies are switched at birth. These situations are not covered by this Chapter.

Because Chapter 2 treats a parent by estoppel the same as a legal parent, it is important to limit the category to the most appropriate cases. The objective requirements in Paragraph (1)(b)(ii) that a man have lived with the child for at least two years and fully accepted responsibilities as a parent during that period are designed to identify those parent-child relationships most important to preserve through allocations of responsibility under Chapter 2.

To determine whether the requirements of Paragraph (1)(b)(ii) are met, the full range of parenting functions performed by the adult in question are relevant, not just the caretaking functions. In this sense, the definition is more generous than the definition of de facto parent in Paragraph (1)(c) and Comment *c*, below. The parent-by-estoppel definition is more strict, however, in requiring that the man have had a reasonable, good-faith belief that he was the parent. When this reasonable good faith exists, the individual is seeking status based not solely on his functioning as a parent, but on the combination

of the parental functions performed and the expectations of the parties. As is the case with a de facto parent, the necessary indications of a commitment to the child must have existed for a period of at least two years, assuring that the commitment is serious, longterm, and significant.

A man's good-faith belief that he was the child's legal father may be based on a number of different factors. Marriage to the child's mother is perhaps the most common circumstance. In some states, marriage to the child's mother at the time the child is born is sufficient to establish that a man is the child's legal father; in most states it will create a presumption to that effect. If an individual is a legal parent under state law by virtue of such rules, he or she is a legal parent under Paragraph (1)(a). Under Paragraph (1)(b)(ii), it may reasonably be inferred, absent evidence to the contrary and even without an applicable presumption, that a man who was married to the child's mother when the child was born had a reasonable, good-faith belief that he was the child's biological father.

Another way a man can establish the reasonable, good-faith belief required by Paragraph (1)(b)(ii) is by establishing that he had sexual intercourse with the mother at the approximate time of conception, and that the mother made subsequent statements or otherwise engaged in conduct that affirmed his paternity of the child.

In some circumstances a man who had a good-faith belief that he was the child's father and who lived with the child for two years or more may learn that he is not the child's father before an action for custodial responsibility or decisionmaking authority under Chapter 2 is initiated. In such a circumstance, a man remains a parent by estoppel as long as he continues to accept responsibilities as the child's father after learning the truth, or makes reasonable efforts to do so. See Paragraph (1)(b)(ii)(B). . . .

(iii) Individual who is a co-parent since the child's birth, pursuant to a co-parenting agreement with the legal parent(s). An individual may also be a parent by estoppel on the basis of a co-parenting agreement with the child's legal parent or parents, when that individual has lived with the child since the child was born, holding himself or herself out as the child's parent and accepting the responsibilities thereof. See Paragraph (1)(b)(iii). This Paragraph combines functional criteria with an agreement that the individual in question will act fully and permanently as parent.

This Paragraph contemplates the situation of two cohabiting adults who undertake to raise a child together, with equal rights and responsibilities as parents. Adoption is the clearer, and thus preferred, legal avenue for recognition of such parent-child relationships, but adoption is sometimes not legally available or possible, especially if the one of the adults is still married to another, or if the adults are both women, or both men. Neither the unavailability of adoption nor the failure to adopt when adoption would have been available forecloses parent-by-estoppel status. However, the failure to adopt when adoption was available may be relevant to whether an agreement was intended.

A formal, written agreement is not required to create a parent-by-estoppel status under Paragraph (1)(b)(iii), but the absence of formalities may also affect the factfinder's determination of whether an agreement was made. The factfinder must determine whether, given the circumstances, the actions of the individual seeking status as parent and those of the legal parent or parents are sufficiently clear and unambiguous to indicate that a parent status was understood by all of them. The factfinder's determination should not turn upon whether the parties are of the same sex or different sexes, or even whether the parties are married, since these factors do not bear on whether a family relationship is intended. As a practical matter, however, the less traditional the arrangement, the greater assistance a formal agreement may be in clarifying the parties' intentions.

Paragraph (1)(b)(iii) requires the agreement of the child's legal parent or parents. Sometimes the child has only one legal parent. When there are two legal parents, each parent must agree. Agreement may be implied from the circumstances. See Comment *iv*, below.

An individual may not be a parent by estoppel under this Paragraph if the agreement provides for less than a full assumption of the responsibilities as a parent. An agreement for visitation only, or one that specifically excludes obligations for financial support or for caretaking responsibility, does not serve as the basis for recognition as a parent by estoppel. However, in appropriate circumstances, an agreement under which a legal parent gives up some parental rights and obligations but reserves others may have some effect. . . .

Parent-by-estoppel status is created under this Paragraph only when the court determines that the status is in the child's best interests. This inquiry should focus primarily on the benefits and costs of participation by another individual, as a parent, in the proceedings and in the child's life. Ordinarily, if an individual meets the criteria of Paragraph (1)(b)(iii) (or Paragraph (1)(b)(iv)), the court would be expected to find that parent-by-estoppel status is in the child's best interests. The case for recognition of an additional parent is weaker if a child already has two (or more) parents, although this factor is not dispositive, particularly if one of the child's legal parents has formed no significant parental relationship with the child. Other relevant factors include the extent of the involvement of the various parties in the child's life and the strength of their respective emotional bonds to the child. . . .

(iv) Individual who is a co-parent for at least two years, by agreement with the legal parent(s). Some co-parenting arrangements arise not from an undertaking by the couple before the child's birth, but afterwards, when the legal parent or parents agree to the assumption of the responsibilities of parenthood by another. These arrangements may give rise to parent-by-estoppel status only when the individual in question lived with

the child for two years and more, holding out and accepting full and permanent responsibilities as a parent, with the agreement of the child's legal parent or parents. See Paragraph (1)(b)(iv). As with Paragraph (1)(b)(iii), this Paragraph applies only when the court determines that the creation of parent-by-estoppel status is in the child's best interests. See Comment *iii*, above.

One circumstance contemplated by this Paragraph is the marriage of a man to a woman who is pregnant with another man's child, with the understanding that he will serve as the child's father. If the understanding continues for two years or more, with the man living with the child and accepting full responsibilities as the child's parent, he could be a parent by estoppel under Paragraph (1)(b)(iv).

Marriage is not essential to the creation of parental status under Paragraph (1)(b)(iv), although it may make it easier to persuade a factfinder of the individual's full and permanent commitment to the child. Likewise, it is not essential that the two adults are of different sexes; a same-sex couple might also undertake to have permanent joint parenting rights and responsibilities and thereby create parent-by-estoppel status under this Paragraph.

Paragraph (1)(b)(iv) requires the agreement of each of the child's legal parents. As is the case under Paragraph (1)(b)(iii), sometimes the child has only one legal parent. If the child has two legal parents, both parents must agree. A parent cannot be estopped from denying parent status to an individual who has functioned as such, if that parent did not earlier agree to the arrangement giving rise to the estoppel. Agreement, however, may be implied from the circumstances. For example, the legal father who knows that his child is being raised by the mother and her husband and who fails to visit or support the child has, by this conduct, communicated his acceptance of this arrangement and is estopped from later denying parental status to the stepfather. In contrast, the legal father who acknowledges the stepfather's role but who continues to exercise his own parental rights and responsibilities has not agreed to stepfather's status as the child's parent. . . .

c. De facto parent. Occasionally an individual who is not a legal parent under state law, does not have a child-support obligation, did not have the good-faith belief that he was the child's parent, did not hold himself or herself out as the child's parent, did not have an agreement with the legal parent to serve as a co-parent, and otherwise does not meet the requirements of a parent by estoppel, may nonetheless have functioned as the child's primary parent. Such individual may be a de facto parent under Paragraph (1)(c).

The requirements for becoming a de facto parent are strict, to avoid unnecessary and inappropriate intrusion into the relationships between legal parents and their children. The individual must have lived with the child for a significant period of time (not less than two years), and acted in the role of a parent for reasons primarily other than financial compensation. The legal parent or parents must have agreed to the arrangement, or it m[ay] have arisen because of a complete failure or inability of any legal parent to perform caretaking functions. In addition, the individual must have functioned as a parent either by (a) having performed the majority share of caretaking functions for the child, or (b) having performed a share of caretaking functions that is equal to or greater than the share assumed by the legal parent with whom the child primarily lives.

As is the case with an individual seeking to be a parent by estoppel under Paragraph (1)(b)(iii) or Paragraph (1)(b)(iv), the best course of action for an individual who expects legal recognition as a de facto parent would be formal adoption, if available under applicable state law. Failure to adopt the child when it would have been possible is some evidence, although not dispositive, that the legal parent did not agree to the formation of the de facto parent relationship.

(i) Residence requirement. Like an individual seeking recognition of a parent by estoppel under Paragraph (1)(b)(ii), (iii), or (iv), an individual seeking recognition as a de facto parent must have lived with the child. See Paragraph (1)(c)(i). This requirement is especially important, since the de facto parent category might otherwise include neighbors, nonresidential relatives, or hired babysitters on whom parents have relied for regular caretaking functions, and whose recognition as parents, as a general matter, would be highly undesirable. In requiring that an individual seeking recognition a[s a] de facto parent have previously lived with the child, Pa[ra]graph (1)(c) is intended to cover those individuals most likely to have engaged with the child in the role of a family member and to exclude those outsiders the parents may have called upon to assist them in caring for their child in an auxiliary role. . . .

(ii) Exclusion of relationships motivated by financial compensation. To qualify as a de facto parent, an adult must have performed caretaking functions "for reasons primarily other than financial compensation." See Paragraph (1)(c)(ii). The law grants parents responsibility for their children based, in part, on the assumption that they are motivated by love and loyalty, and thus are likely to act in the child's best interests. The same motivations cannot be assumed on the part of adults who have provided caretaking functions primarily for financial reasons. Thus, relationships to children formed by babysitters and other paid caretakers are not recognized under Paragraph (1)(c). Relationships with foster parents are also generally excluded, both because of the financial compensation involved and because inclusion of foster parents would undermine the integrity of a state-run system designed to provide temporary, rather than indefinite, care for children.

The requirement that an individual have performed caretaking functions primarily for nonfinancial reasons does not rule out caretakers who may qualify for financial assistance to care for the child but whose caretaking role was not motivated primarily by that assistance. Th[us], for example, family members who take children into th[e]

homes primarily out of family affinity may be de facto parents even if, as a result of taking a child into their home, they are able to qualify for welfare benefits, foster-care payments, or other forms of financial assistance. . . .

(iii) Agreement of a parent to the de facto parent relationship. Like a parent-by-estoppel status, a de facto parent relationship cannot arise by accident, in secrecy, or as a result of improper behavior. The agreement requirement of Paragraph (1)(c)(ii) limits de facto parent status, in most circumstances, to those individuals whose relationship to the child has arisen with knowledge and agreement of the legal parent. Although agreement may be implied by the circumstances, it requires an affirmative act or acts by the legal parent demonstrating a willingness and an expectation of shared parental responsibilities. Agreement is not established by the mere delegation of babysitting duties to a roommate or an adult partner. Retention of authority over matters of the child's care, such as discipline, manifests an absence of agreement to the formation of a de facto parent relationship.

The only circumstance in which a de facto parent may e recognized without the agreement of a legal parent is when there has been a total failure or inability by the legal parent to care for the child. This circumstance exists only when a parent is absent, or virtually absent, from the child's life, such as when a parent has abandoned the child or has been imprisoned or institutionalized. While some of these circumstances may be considered beyond the control of the legal parent, they function in the same way to permit to develop the kind of long-term, substitute parent-child relationship that this Chapter seeks to recognize. . . .

(iv) Length of caretaking relationship. To qualify as a de facto parent, an adult must have assumed caretaking functions for a significant period of time, not less than two years. The two-year minimum is intended to establish a threshold that readily will screen out potential claimants who have only temporary relationships with a child. In some cases, a period longer than two years may be required in order to establish that an individual has the kind of relationship that warrants recognition. The length of time that constitutes a significant period will depend on many circumstances, including the age of the child, the frequency of contact, and the intensity of the relationship. For a child under the age of six whose caretaking needs are quite significant, a two-year period in which the adult in question has performed the clear majority of caretaking functions is likely to qualify as significant. A longer period may be required for school-aged children, and an even longer period if the child is an adolescent.

In addition to the time-period requirement set forth in Paragraph (1)(c), a de facto parent, in order to have standing to initiate an action, must have resided with the child within the six-month period prior to the commencement of the action or maintained or attempted to maintain the relationship since no longer living with the child. See §2.04(l)(c). This additional standing requirement is justified by the fact that the status of a de facto parent is based on an individual's functioning as a parent, and it is assumed that the importance of this role diminishes as the period of functioning as a parent becomes more remote in time. . . .

(v) Share of caretaking functions. To be a de facto parent, the individual must have functioned as a parent in one of two alternative ways. The first alternative is to have performed the majority share of caretaking functions for the child. What constitutes a caretaking function is defined in Paragraph (5). See Comment *g*, below, and §2.08, Comment *c*.

The second way to satisfy the caretaking-functions requirement is to have performed a share of caretaking functions that was equal to or greater than that performed by the parent with whom the child primarily lived. An individual who is sharing caretaking responsibility equally with a child's only other parent will meet this criterion. So will an individual who is sharing caretaking responsibility for a child whose parents live in different households, if the child lives primarily in the household in which that individual also lives and the individual performs at least as much caretaking responsibility as the parent in that household. An equal sharing of caretaking duties with a parent who is not providing the primary home for the child is insufficient to satisfy this criterion. . . .

d. Parenting plan. A parenting plan sets forth provisions for the allocation of responsibility for a child, including custodial arrangements and decisionmaking responsibility. It also includes mechanisms for resolving subsequent disputes that may arise between the parents. The required components of a parenting plan are set forth in §2.05. Criteria for each of these components are set forth in §§2.06 to 2.12.

e. Custodial responsibility. This Chapter replaces the traditional terminology of "custody" and "visitation," as well as the more specific labels "sole," "joint," and "shared" custody, with the single term "custodial responsibility." This substitution is intended to avoid the win-lose conceptualization suggested by the more conventional terminology of "custody" and "visitation," and to reinforce the reality that not only primary responsibility for the child but all other forms of physical responsibility are also important, and custodial in nature. While any beneficial effects of this shift in terminology on people's perceptions of parenthood cannot be measured, it is assumed that the unified concept of custodial responsibility has some potential to strengthen the usual expectation that both parents have responsibility regardless of the proportion of time each spends with the child, and that neither parent is a mere "visitor". . . .

f. Decisionmaking responsibility. Decisionmaking responsibility is the Chapter's term for what most states call "legal custody." It encompasses the authority to make significant decisions delegated to parents over their minor children as a matter of law, such as those relating to health care, education, permission to marry, and to enlist in the military. The definition leaves open the possibility of adding other areas that, in individual cases,

are significant life decisions for the child. Whether the child will attend a religious school or boarding school, pursue school sports, travel alone abroad, work in a resort away from home for the summer, or buy an expensive car are examples of other significant life decisions for which it might be appropriate to allocate decision-making responsibility. . . .

g. Parenting and caretaking functions. This Chapter recognizes two overlapping sets of functions that parents serve. Parenting functions encompass a broad category of responsibilities and chores related to the child's upbringing and to support of the family and household. These include not only caretaking functions, discussed in more detail below, but also other functions relating to the maintenance of the child and the child's family, such as financial support, purchase and care of clothing, food shopping, and care and upkeep of the family residence, automobile, and yard. See §2.03(6).

Caretaking functions are the subset of parenting functions that involve the direct delivery of day-to-day care and supervision to the child. These functions include physical supervision, feeding, grooming, discipline, transportation, direction of the child's intellectual and emotional development, and arrangement of the child's peer activities, medical care, and education. See Paragraph (5). Because caretaking functions involve tasks relating directly to a child's care and upbringing, it is assumed that they are likely to have a special bearing on the strength and quality of the adult's relationship with the child. For this reason, the Chapter makes each parent's share of past caretaking functions central to the allocation of custodial responsibility at divorce. See §2.08(1). While caretaking functions have greater significance for the allocation of custodial responsibility, parenting functions are relevant to other matters, including the guaranteed minimum allocation of custodial responsibility allowed in §2.08(1)(a), the presumed allocation of joint decisionmaking responsibility in §2.09(2), and other issues.

The distinction between parenting and caretaking functions is not intended to suggest different degrees of commitment by parents to a child. Rather, it recognizes that different types of involvement in the child's life are relevant in different ways to the various allocation issues addressed by the Chapter. . . .

h. Domestic violence. The Principles of this Chapter require that when a parent commits domestic violence affecting the safety of another parent or the child, special measures must be taken to protect family members. See §2.11; see also §2.05(2)(f) (parenting plan requires description of circumstances involving domestic violence); §2.05(3) (court must have screening process for identifying domestic violence); §2.06(2) (requiring hearing on parental agreement when there is credible information that child abuse or domestic violence has occurred); §2.07(2) (requiring mediators involved in dispute resolution to screen for domestic violence); and §2.07(3) (precluding involuntary, face-to-face mediation).

Paragraph (7) defines domestic violence as the infliction of physical injury, or of reasonable fear thereof, between family members or members of a household, past or present. The definition does not include emotional abuse, even though this form of abuse can be very harmful to an individual and coercive, because of the difficulty of distinguishing it from the emotional turmoil produced in many intimate relationships, particularly in the circumstances surrounding family dissolution. Taking advantage of the emotional vulnerability of a parent, however, may be a reason for the court to decide that a parental agreement is not voluntary, and thus not entitled to deference. See §§2.06(1)(a) and 2.16(1). See also §2.07(2) (requiring individuals providing mediation services to screen not only for domestic violence, but also for other conditions or circumstances that may impede a party's capacity to participate in the mediation process).

Physical injury, or reasonable fear thereof, may be established by various means. To facilitate proof in cases in which a criminal action has already been successfully prosecuted, states may designate crimes involving physical injury or the threat thereof against the domestic victim, that are presumed to meet the definition of domestic violence. These crimes may include assault, battery, kidnapping, malicious mischief, reckless endangerment, sexual assault, rape, and stalking, among others. The existence of domestic violence may also be established by credible testimony thereof, or by proof of violation of a domestic-violence protection order when adequate notice and opportunity to be heard were properly afforded respondent.

Domestic violence sometimes involves responsive actions between the parents. Responsive acts of violence do not necessarily cancel each other out. The definition of domestic violence in Paragraph (7) excludes a reasonable, defensive act to another individual's aggression, such as action reasonably taken for self-protection or for the protection of another individual.

Similarly, in some situations of mutual domestic violence, one parent's physical aggression is substantially more extreme, or dangerous, than the other's. While both aggressions may satisfy the definition of domestic violence, the measures necessary to protect a victim of domestic violence required by §2.11 must be commensurate with the severity of the violence. . . .

§2.04 Parties to an action under this chapter

(1) All of the following individuals should be given a right to bring an action under this Chapter, and to be notified of and participate as a party in an action filed by another:

(a) a legal parent of the child, as defined in §2.03(l)(a);

(b) a parent by estoppel, as defined in §2.03(l)(b);

(c) a de facto parent of the child, as defined in §2.03(l)(c), who has resided with the child within the six-month period prior to the filing of the action or who has consistently maintained or attempted to maintain the parental relationship since residing with the child;

(d) a biological parent who is not a legal parent but who has an agreement with a legal parent un-

der which he or she reserved some parental rights or responsibilities;

(e) an individual allocated custodial responsibility or decisionmaking responsibility regarding the child under an existing parenting plan.

(2) In exceptional cases, a court should have discreon to grant permission to intervene, under such terms s it establishes, to other individuals or public agenies whose participation in the proceedings under this hapter it determines is likely to serve the child's best nterests, but such individuals should not have standng to initiate an action under this Chapter.

TOPIC 2. PARENTING PLAN

§2.05 Parenting plan: proposed, temporary, and final

(1) An individual seeking a judicial allocation of custodial responsibility or decisionmaking responsibility under this Chapter should be required to file with the court a proposed parenting plan containing proposals for each of the provisions specified in Paragraph (5) [illegible]ividuals should be allowed to file a joint plan.

(2) Each parenting plan filed under Paragraph (1) should be required to be supported by an affidavit containing, to the extent known or reasonably discoverable by the filing individual or individuals, all of the following:

(a) the name and address of any individual who has a right to participate in the action under §2.04;

(b) the name, address, and length of co-residence of any individuals with whom the child has lived for one year or more, or in the case of a child less than one year old, any individuals with whom the child has lived for any significant period of time since birth;

(c) a description of the past allocation of caretaking and other parenting functions performed by each individual identified under Paragraph (2)(a) or (2)(b), including at a minimum during the 24 months preceding the filing of an action under this Chapter;

(d) a description of the employment and childcare schedules of any individual seeking an allocation of custodial responsibility, and any expected changes to these schedules in the future;

(e) a schedule of the child's school and extracurricular activities;

(f) a description of any of the limiting factors specified in §2.11 that are present in the case, including any restraining orders to prevent child [illegible]se or domestic violence, with case number and [illegible]uing court;

(g) financial information required to be disclosed under Chapter 3;

(h) a description of the known areas of agreement and disagreement with any other parenting plan submitted in the case.

The court should maintain the confidentiality of information required to be filed under this section if the individual providing the information demonstrates a reasonable fear of child abuse or domestic violence and disclosure of the information would increase safety risks.

(3) The court should have a process to identify cases in which there is credible information that child abuse, as defined by state law, or domestic violence as defined in §2.03(7), has occurred. The process should include assistance for possible victims of domestic violence in complying with Paragraph (2), referral to appropriate resources for safe shelter, counseling, safety planning, information regarding the potential impact of domestic violence on children, and information regarding civil and criminal remedies for domestic violence. The process should include a system for ensuring the court review mandated in §2.06(2) when there is credible information that child abuse or domestic violence has occurred.

(4) Prior to a decision on a final parenting plan and upon motion of a party, the court may order a temporary allocation of custodial responsibility or decisionmaking responsibility as the court determines is in the child's best interests, considering the factors in §§2.08 and 2.09. A temporary allocation order ordinarily should not preclude access to the child by a parent who has been exercising a reasonable share of parenting functions. Upon credible information of one or more of the circumstances set forth in §2.11(1) and pending adjudication of the underlying facts, the court should issue a temporary order limiting or denying access to the child as required by that section, in order to protect the child or other family member.

(5) After consideration of any proposed parenting plans submitted in the case and any evidence presented in support thereof, the court should order a parenting plan that is consistent with the provisions of §§2.08-2.12 and contains the following provisions:

(a) a provision for the child's living arrangements and for each parent's custodial responsibility, which should include either

(i) a custodial schedule that designates in which parent's home each minor child will reside on given days of the year; or

(ii) a formula or method for determining such a schedule in sufficient detail that, if necessary, the schedule can be enforced in a subsequent proceeding.

(b) an allocation of decisionmaking responsibility as to significant matters reasonably likely to arise with respect to the child; and

(c) a provision consistent with §2.07 for resolution of disputes that arise under the plan, and a provision establishing remedies for violations of the plan.

(6) The court may provide in the parenting plan for how issues relating to a party's future relocation will be resolved, and it may provide for future modifications of the parenting plan if specified contingencies occur.

(7) Expedited procedures should facilitate the prompt issuance of a parenting plan.

COMMENT

a. In general. The parenting plan is a core concept of this Chapter. This section requires parents to file a parenting plan in order to encourage them to anticipate their children's needs and make arrangements for them. Although courts will still be called upon to resolve conflicts between some parents, the parenting-plan requirement locates responsibility for the welfare of the child in the first instance in parents rather than in courts. If the parents reach agreement on how their children's needs will be met, §2.06 requires the court ordinarily to accept and order that plan. Even when the parents cannot agree, the requirement that courts consider each of their proposed plans gives each of the parents an incentive to produce a thoughtful and rational plan.

The parenting-plan concept presupposes a diverse range of childrearing arrangements, and rejects any preestablished set of statutory choices about what arrangements are best for children. Rules that favor sole custody with visitation, joint custody, or some other specified arrangement express particular preferences about what is best for children, but they do not reflect the preferences, experiences, or welfare of all families. The parenting-plan requirement allows parents to customize their arrangements to take account of the family's own actual circumstances; if they cannot agree, other rules in the Chapter retain the focus on the family's actual experience, through its patterns of past caretaking. See §2.08(1). . . .

e. Order allocating custodial responsibility. Paragraph 5(a) requires that a court-ordered parenting plan allocate custodial responsibility for the child. Custodial responsibility is defined in §2.03(3). The custodial arrangements should include either a schedule for each parent's access to the child or a method for determining such a schedule, with sufficient specificity that the court or third-party decisionmaker can enforce the order if necessary. A method may involve decisionmaking by a third party or another nonjudicial mechanism for dispute resolution. See also Comment *g* and §2.10. An order for "reasonable" access is not specific enough unless a method is specified for interpreting the provision in the event of future disputes.

f. Order allocating decisionmaking responsibility. Paragraph (5)(b) requires an allocation of decisionmaking responsibility relating to significant matters the parents or the court reasonably anticipate arising with respect to the child, such as the child's health and education. Limits on the court's authority to settle disputes concerning a child's religious upbringing are addressed in §2.09 and §2.12. Matters not covered by §2.09 constitute day-to-day decisionmaking and follow custodial responsibility. See §2.09(3). . . .

Not all potential issues of decisionmaking responsibility must be resolved in the parenting plan. Some assessment must be made of those likely to arise, which should be resolved, and those that are not likely to arise. Efforts to resolve detailed hypothetical questions in advance may provoke unnecessary parental conflict. . . . The parents, of course, are free to settle any issues they wish on their own, in a jointly submitted parenting plan. A court, however, should not address potentially inflammatory issues that appear unlikely to arise. It may also defer unresolved issues that may arise to a mechanism for dispute resolution specified in the parenting plan. See Paragraph (5)(c) and §2.10.

g. Provisions for resolving future disputes. Paragraph (5)(c) requires that a parenting plan address how disputes that may arise under the plan will be resolved. Such provisions should minimize the need for future judicial involvement. They may entail mediation or a designated arbitrator or decisionmaker who has the authority, when the parents disagree, to assess a child's circumstances and resolve the disagreement. Such provisions may also provide a mechanism for periodic review of the child's circumstances to anticipate and prevent future disputes. Any procedure for dispute resolution is subject to the limits set forth in §2.07 and §2.10, including those relating to judicial review.

h. Discretionary provisions relating to relocation of one of the parents. Paragraph (6) gives the court discretion to anticipate and resolve future disputes relating to the relocation of one of the parents. These provisions can either set forth in advance the consequences of a relocation or require a procedure to be followed in the event of a relocation.

If a plan does not resolve matters relating to a parent's relocation, these matters must be resolved under 2.17, which provides a default rule. Provisions relating to relocation, like any other provisions of the parenting plan, are subject to modification under the rules set forth in §§2.15 and 2.16. . . .

§2.06 Parental Agreements

(1) The court should order provisions of a parenting plan agreed to by the parents, unless the agreement

(a) is not knowing or voluntary, or

(b) would be harmful to the child.

(2) The court, on any basis it deems sufficient, may conduct an evidentiary hearing to determine whether there is a factual basis under Paragraph (1) to find that the court should not be bound by an agreement. If credible information is presented to the court that child abuse as defined by state law or domestic violence as defined by §2.03(7) has occurred, the court should hold a hearing and, if the court determines that child abuse or domestic violence has occurred, it should order appropriate protective measures under §2.11.

(3) If the court rejects an agreement, in whole or in part, under the standards set forth in Paragraph (1), it should allow the parents the opportunity to negotiate another agreement.

COMMENT

a. Deference to private agreements. The law in most jurisdictions grants courts, as part of their *parens*

patriae authority, the authority to review a private agreement at divorce to determine whether it serves the child's interests. This section takes a more deferential view toward an agreement parents make about their children, requiring the court to adopt an agreement to which the parents have agreed at the time of the hearing, except when the agreement is not knowing or voluntary or when it would harm the child.

This section, like §7.09, is subject to standard contract-law principles not inconsistent with the section. Most of the principles addressing basic issues of contract formation, such as the capacity of the parties to contract, are not specifically addressed in these sections and thus must be derived from other applicable law.

This section does not govern agreements made during or before marriage, although such agreements may sometimes be relevant to an allocation of custodial and decisionmaking responsibility. See §§2.08(1)(e) and 2.09(1)(e).

The approach to parental agreements taken in these Principles assumes that courts have neither the time nor the resources to give meaningful review to all parental agreements. Even if greater time and resources were available, court review is unlikely to uncover concrete evidence that the agreement is not in the interests of the child, particularly in the face of a united front by the parents, or to lead to a better agreement than the agreement the parents have reached on their own. This section also assumes that a plan to which parents agree is more likely to succeed than one that has been ordered by the court over the objection of one or both parents.

The obligation to defer to parental agreements applies whether the agreement covers all matters to be resolved between the parents or only some of them. If the court finds part, or the whole, of the agreement to be unacceptable under the Paragraph (1) standards, Paragraph (3) requires the court to allow parents an opportunity to renegotiate the agreement. . . .

b. When the agreement is not knowing or voluntary. Contract law requires mutual assent to an agreement for it to be enforceable. Requirements of knowing and voluntary consent are viewed more strictly in the family-law setting than in the commercial context because of the greater opportunities that tend to exist in the family-dissolution setting for manipulation, advantage taking, and coercion. Although this section takes a more deferential stance toward parental agreements than is generally taken under prevailing law, a court still may determine that the agreement should not be enforced because the parties failed to consent to it. . . .

c. Harm to the child. The court also should not defer to a parental agreement if it finds that the agreement is harmful to the child. See Paragraph (1)(b). This standard is different from traditional law which, as a formal matter at least, expects courts in every case to determine affirmatively if an agreement is in the child's best interests.

This section does not rule out any particular type of agreement as per se harmful. Most problematic in principle is one parent's waiver of the other parent's child-support obligation, in exchange for the latter agreeing not to seek custodial access to the child. Agreements involving child support are subject to the Principles set forth in Chapter 3, which do not allow the approval of an agreement if it provides for substantially less child support than would otherwise be awarded, unless the court determines that the child-support terms are consistent with the interests of the child. . . .

Previous abuse by a parent to whom a significant amount of custodial responsibility has been allocated in the agreement is another circumstance that may lead a court to conclude that the agreement would be harmful to the child. . . .

§2.07 Court-ordered services

(1) The court may inform the parents, or require them to be informed, about any of the following:

(a) how to prepare a parenting plan;

(b) the impact of family dissolution on children and how the needs of children facing family dissolution can best be met;

(c) the impact of conflict and domestic violence on children, and the availability of resources for addressing these issues;

(d) mediation or other nonjudicial procedures designed to help them reach agreement.

(2) A mediator should screen for domestic violence and for other conditions or circumstances that may impede a party's capacity to participate in the mediation process. If there is credible evidence of such circumstances, the mediation should not occur, unless reasonable steps are taken both

(a) to ensure meaningful consent of each party to participate in the mediation and to any results reached through the mediation process; and

(b) to protect the safety of the victim.

(3) The court should not compel any services under Paragraph (1) that would require a parent to have a face-to-face meeting with the other parent.

(4) A mediator should not be allowed to make a recommendation to the court in a case in which the mediator has provided mediation services.

(5) A mediator should not be allowed to reveal information that a parent has disclosed during mediation under a reasonable expectation of confidentiality, except such information as is necessary to factfinding under §2.06 or §2.11.

(6) A court should be prohibited from ordering services authorized under Paragraph (1) unless available at no cost or at a cost that is reasonable in light of the financial circumstances of each parent. When one parent' ability to pay for such services is significantly greater than the other', the court should have discretion to order that parent to pay some or all of the expenses of the other.

§2.08 Allocation of custodial responsibility

(1) Unless otherwise resolved by agreement of the parents under §2.06, the court should allocate custodial

responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents'separation or, if the parents never lived together, before the filing of the action, except to the extent required under §2.11 or necessary to achieve one or more of the following objectives:

(a) to permit the child to have a relationship with each parent which, in the case of a legal parent or a parent by estoppel who has performed a reasonable share of parenting functions, should be not less than a presumptive amount of custodial time set by a uniform rule of statewide application;

(b) to accommodate the firm and reasonable preferences of a child who has reached a specific age, set by a uniform rule of statewide application;

(c) to keep siblings together when the court finds that doing so is necessary to their welfare;

(d) to protect the child' welfare when the presumptive allocation under this section would harm the child because of a gross disparity in the quality of the emotional attachment between each parent and the child or in each parent's demonstrated ability or availability to meet the child's needs;

(e) to take into account any prior agreement, other than one under §2.06, that would be appropriate to consider in light of the circumstances as a whole, including the reasonable expectations of the parties, the extent to which they could have reasonably anticipated the events that occurred and their significance, and the interests of the child;

(f) to avoid an allocation of custodial responsibility that would be extremely impractical or that would interfere substantially with the child' need for stability in light of economic, physical, or other circumstances, including the distance between the parents' residences, the cost and difficulty of transporting the child, each parent's and the child's daily schedules, and the ability of the parents to cooperate in the arrangement;

(g) to apply the Principles set forth in §2.17(4) if one parent relocates or proposes to relocate at a distance that will impair the ability of a parent to exercise the presumptive amount of custodial responsibility under this section;

(h) to avoid substantial and almost certain harm to the child.

(2) In determining the proportion of caretaking functions each parent previously performed for the child under Paragraph (1), the court should not consider the division of functions arising from temporary arrangements after the parents'separation, whether those arrangements are consensual or by court order. The court may take into account information relating to the temporary arrangements in determining other issues under this section.

(3) If the court is unable to allocate custodial responsibility under Paragraph (1) because there is no history of past performance of caretaking functions, as in the case of a newborn, or because the history does not establish a sufficiently clear pattern of caretaking, the court should allocate custodial responsibility based on the child's best interests, taking into account the factors and considerations that are set forth in this Chapter, preserving to the extent possible this section's priority on the share of past caretaking functions each parent performed.

(4) In determining how to schedule the custodial time allocated to each parent, the court should take account of economic, physical, and other practical circumstances, such as those listed in Paragraph (1)(f).

COMMENT

a. In general. This section states the criteria for allocating custodial responsibility between parents when they have not reached their own agreement about this allocation. These criteria also establish the bargaining context for parents seeking agreement.

Custodial responsibility refers to physical control of and access to the child, or what traditionally has been called child custody. See §2.03(3). This term refers to the child's living arrangements, including with whom the child lives and when, and any periods of time during which another person is scheduled by the court to have caretaking responsibility for the child.

Paragraph (1) establishes the general rule that the proportion of custodial responsibility allocated each parent should approximate the proportion of caretaking functions each parent exercised prior to their separation or, if they never lived together, prior to the filing of the action. The exceptions set forth in this section are, for the most part, quite specific. First, when a parent had a caretaking role so minimal that the allocation based on past caretaking would not allow for sufficient contact for that parent to have a meaningful relationsehip with the child, Paragraph (1)(a) requires the court to order an allocation sufficient to allow such a relationship. In the case of a parent who has exercised a reasonable share of parenting functions, which includes such things as providing financial support for the child, see §2.03(6), the amount of this allocation is determined according to presumptive guidelines, established in a uniform rule of statewide application.

Second, under Paragraph (1)(b), the court should accommodate the firm preferences of a child who has reached a specific age. This age should be set forth in a uniform rule of statewide application.

Third, under Paragraph (1)(c), the court should depart from the allocation of custodial responsibility based on past caretaking when keeping the child's siblings together is necessary for their welfare.

Fourth, Paragraph (1)(d) requires a departure from the allocation based on past caretaking to protect the child's welfare when there is a gross disparity in the quality of the emotional attachments between each parent and the child or in each parent's demonstrated ability or availability to meet a child's needs.

Fifth, Paragraph (1)(e) requires a court to give effect to a prior agreement of the parents when the circum-

stances as a whole, including the reasonable expectations of the parents and the interests of the child, make it appropriate to do so.

Sixth, Paragraph (1)(f) requires the court to take into account the impracticality, or the impact on the child's stability, of various practical circumstances, including the parents' financial resources, the location of their residences, their, schedules and the schedule of the child, and their ability to cooperate.

Seventh, Paragraph (1)(g) provides for a departure from the past caretaking, standard that is made necessary by a parent's actual or pending relocation, in accordance with the considerations relevant to modifications of a parenting plan when a parent relocates, which are set forth in §2.17.

All provisions in this section are subject to the requirements of §2.11, requiring limitations to protect the child and the child's parent from domestic violence and other serious parental failures.

Paragraph (2) limits the weight to be given to temporary custodial arrangement. Evidence of the adjustment of the child or the parent to a temporary arrangement may be considered in resolving some issues relevant to the child's welfare, but the proportion of caretaking functions assumed by each parent during this period is not taken into account in determining what share of past caretaking functions each parent performed under Paragraph (1).

In some cases, custodial responsibility cannot be allocated under Paragraph (1). The prior division of caretaking functions does not provide a basis for an allocation under Paragraph (1) if, for example, parents who equally shared past caretaking functions agree that the child should live primarily with one parent but are unable to agree who should be that parent. The factor will also be inapplicable in cases involving newborns, or when caretaking patterns have changed too significantly or too often over time. See also Paragraph (1)(f) and §2.17(4)(c). In such cases, Paragraph (3) provides that the court make the allocation decision in accordance with the traditional, more open-ended best interests-of-the-child test. All of the factors referred to in this section may be relevant to this test and, in applying the test, the priority on the past division caretaking functions should be preserved to the extent possible.

Once the parents' respective shares of custodial responsibility have been established, Paragraph (4) provides for consideration of practical factors in determining the scheduling of custodial time.

b. Rationale for reliance on past caretaking. The ideal standard for determining a child's custodial arrangements is one that both yields predictable and easily adjudicated results and also consistently serves the child's best interests. While the best-interests-of-the-child test may appear well suited to this objective, the test is too subjective to produce predictable results. Its unpredictability encourages strategic bargaining and prolonged litigation. The indeterminacy of the test also draws the [illegible] values that are matters of parental autonomy not appropriate for judicial resolution. See §2.02, Comment c.

The allocation of custodial responsibility presumed in Paragraph (1) yields more predictable and more easily adjudicated results, thereby advancing the best interests of children in most cases without infringing on parental autonomy. It assumes that the division of past caretaking functions correlates well with other factors associated with the child's best interests, such as the quality of each parent's emotional attachment to the child and the parents' respective parenting abilities. It requires factfinding that is less likely than the traditional best-interests test to require expert testimony about such matters as the child's emotional state or developmental needs, the parents' relative abilities, and the strength of their emotional relationships to the child. Avoiding expert testimony is desirable because such testimony, within an adversarial context, tends to focus on the weaknesses of each parent and thus undermines the spirit of cooperation and compromise necessary to successful post-divorce custodial arrangements; therapists are better used in the divorce context to assist parents in making plans to deal constructively with each other and their children at separation.

Some parents will disagree over how caretaking roles were previously divided, making the past division of caretaking functions itself a potential litigation issue. The difficulties in applying the standard, however, must be evaluated in light of the available alternatives. While each parent's share of past caretaking will in some cases be disputed, these functions encompass specific tasks and responsibilities about which concrete evidence is available and thus offer greater determinacy than more qualitative standards, such as parental competence, the strength of the parent-child emotional bond or — as the general standard simply puts it — the child's best interests. These qualitative criteria are future-oriented and highly subjective, whereas how the parents divided caretaking responsibilities in the past is a concrete question of historical fact, like other questions courts are accustomed to resolving.

Fashioning arrangements based on patterns of past caretaking is calculated to preserve the greatest degree of stability in the child's life. This is not to say that the child's life will stay the same after separation. Before separation, caretaking functions are often exercised by the parents together, or at frequently interspersed intervals. These functions must be handled differently once the parents live separately. In addition, the parents' separation may make it necessary for them to change their work schedules and rearrange other obligations. The inevitability of such changes, however, makes it all the more desirable that there be stability as to those matters the court can affect, especially the child's relationships with the primary caretaker.

The reliance on past caretaking is also designed to correspond reasonably parties' actual expectations, sometimes better than their own stated at divorce. This is because expectations and preferences are often at [illegible] guilt and anger —

feelings that tend not only to cloud a parent's judgment and ability to make decisions on behalf of the child, but also to exaggerate the amount of responsibility a parent wants to assume for a child, or the objections he or she has to the other parent's level of involvement in the child's life. The way the parents chose to divide responsibility when the family lived together anchors the negotiations in their own lived experience rather than in unrealistic or emotion-based aspirations about the future. . . .

c. Measuring past caretaking functions. The relevant shares of past caretaking functions to be measured under this section are those exercised while the parents lived together or, if they never lived together, before the filing of the action. The standard does not incorporate other parenting functions that are not caretaking functions. See §2.03(5) and (6). It also does not encompass functions performed after their separation, unless the parents have otherwise agreed. See §2.08(2) and Comment *m*.

A parent's proportion of past caretaking functions is measured primarily by the time spent performing the functions. Any different measure, even if it is otherwise reasonable, would only reintroduce the kinds of qualitative disputes that the caretaking-functions factor is intended to reduce. Significant disparities in the level of initiative and investment between the parents would be appropriate only when there is a demonstrated disparity in parenting abilities that is so substantial that consideration of it is required to prevent harm to the child's welfare. See Paragraph (1)(d) and Comment *h*.

In the majority of cases, only a rough approximation of each parent's share of past caretaking is necessary. For example, when a "traditional" homemaker parent has spent a much larger proportion of time caring for the child than the other, that parent ordinarily will be allocated primary custodial responsibility for the child subject only to the presumptive allocation of custodial time to the other parent necessary to satisfy Paragraph (1)(a). See Comment *e*. If this allocation exceeds the parent's share of past caretaking responsibilities, there is no reason for him or her to litigate those shares more precisely.

Parents who shared responsibility for their child more or less equally also are unlikely to have reason to dispute the exact proportions of time each parent spent performing caretaking functions, since the more nearly equal past caretaking has been, the more the practical factors relating to work schedules and the location of the parents' respective homes and school determine the details of the arrangements. See Paragraphs (1)(f) and (4); §2.20.

While a precise accounting of the responsibilities assumed for caretaking functions is often not required, when measurements are necessary they should be based on the parents' actual performance of caretaking functions. They should not be based on unsupported assumptions, especially those arising from a parent's sex or work status. . . .

The most difficult circumstance for ascertaining the parents' respective shares of past caretaking functions is when the division of caretaking functions has changed substantially over time. When an arrangement that lasted a long time is followed by a more recent arrangement of much shorter duration, the longer arrangement usually warrants priority; a different result would give too little consideration to the caretaking functions likely to have been most significant to the child, and would provide an incentive for parents to engage in strategic behavior close in time to, and in anticipation of, a separation. By the same token, a substantial change in caretaking patterns that has endured for a significant period ordinarily should take precedence over a long-past caretaking pattern. It would be difficult to reduce these guidelines to a mathematical formula, given the variety of circumstances such guidelines would have to address, including the child's age, the relative lengths of each prior caretaking arrangement, and the relative involvement of each parent in caretaking. When changes over time have been sufficiently complex or difficult to measure, the court must allocate custodial responsibility without the aid of the caretaking functions factor. See Paragraph (3) and Comment *n*.

Sometimes there is no history of past performance of caretaking functions, as is the case with a newborn child. In such a case, it is not possible to allocate custodial responsibility according to past practices, and the dispute must be resolved under the best-interests test. See Paragraph (3). . . .

f. Child's preferences. Giving great weight to the preferences of a child at his or her parents' divorce can raise significant difficulties. Children may feel responsible for the outcome of a custody dispute if they believe they have participated in its resolution, whatever that might be. Children whose preferences are followed may feel responsible for the consequences, whether that be their own unhappiness or that of a parent. Children whose preferences are not followed may come to believe that the court considered them unimportant, or ineffective.

In addition, the child's preference can be unreliable, short-sighted or irrational. It can also be difficult to ascertain, as the child may have conflicted feelings, or be subject to pressure by one or both parents, or wish to mislead the interviewer. . . .

For these reasons, Paragraph (1)(b) provides for a departure from the division of custodial time otherwise warranted by the past division of caretaking functions only to accommodate the preferences of a child who has attained a specified, mature age, and only when the child's preferences are firm and within the bounds of reason. This accommodation assumes that the preferences of older children are more likely to conform to their best interests than those of younger children, and thus that these preferences may be appropriate to consider along with the past caretaking roles of the parents. This qualification to the past caretaking standard also acknowledges that it is often unrealistic to expect a court-ordered arrangement to work well when an older child is firmly opposed to it.

So that the rule can be easily administered, the age at which a child's preferences should matter under Para-

graph (1)(b) should be set forth in a uniform rule in each jurisdiction. Since maturity develops gradually rather than all at once upon attaining a certain age, no single age will either identify all mature minors or exclude all immature ones. The rule-maker could reasonably choose the age of 11, 12, 13, or even 14 as the appropriate age, in accord with its views about maturity and childhood.

When a child attains the age specified by the uniform state rule at a time after a parenting plan has been ordered, the original plan may be later modified to accommodate the child's firm and reasonable preferences. This modification can be ordered under §2.16(2)(c), without meeting the more rigorous standards of §2.15.

The preferences of children who do not meet the age specified in the rule of statewide application are not relevant in applying Paragraph (1). When custodial responsibility is not allocated under Paragraph (1), however, the court must resort to the more open-ended best-interests-of-the-child test, under Paragraph (3). . . . Under this test, even the preferences of young children may provide evidence of the child's best interests, as good as other evidence relevant under this standard. The weight to be given these preferences should depend on indicators of its reliability, including the child's age and maturity level, and the quality of the reasons given for it.

Generally speaking, the preferences of a child, even when relevant, should not be directly solicited. The risks of involving children in disputes for which they may feel personally responsible may be diminished by ascertaining their preferences indirectly. . . . Paragraph (1)(b) assumes that in most cases, children with firm preferences will find a way to make those preferences known without significant effort by those involved in the case.

j. When otherwise appropriate allocation of custodial responsibility would be extremely impractical or would substantially interfere with child's need for stability. Some custodial arrangements that would otherwise be appropriate under Paragraph (1) may be extremely impractical, or substantially interfere with a child's needed stability. Custodial arrangements involving substantially equal amounts of custodial responsibility and no primary custodial home pose particular challenges. When the difficulties of making an arrangement consistent with past caretaking patterns are so substantial as to compromise the child's welfare, Paragraph (1)(f) provides for departure from the otherwise appropriate arrangement.

The practical circumstances to be accounted for under Paragraph (1)(f) include the location of the parents' residences, as well as their daily schedules, flexibility, and ability to manage a particular arrangement without excessive conflict. In addition, the parents' economic circumstances, while not otherwise relevant to how custodial responsibility is allocated (see §§2.12(1)(f) and 2.15(3)(a)), are relevant in determining whether a particular custodial arrangement is feasible. Factors relating to the child, including his or her daily schedule, activities, and individual needs, also affect the practicality of a custodial arrangement. . . .

§2.09 Allocation of significant decisionmaking responsibility

(1) Unless otherwise resolved by agreement of the parents under §2.06, the court should allocate responsibility for making significant life decisions on behalf of the child, including decisions regarding the child's education and health care, to one parent or to two parents jointly, in accordance with the child's best interests, in light of the following:

(a) the allocation of custodial responsibility under §2.08;

(b) the level of each parent's participation in past decisionmaking on behalf of the child;

(c) the wishes of the parents;

(d) the level of ability and cooperation the parents have demonstrated in past decisionmaking on behalf of the child;

(e) a prior agreement, other than one agreed to under §2.06, that would be appropriate to consider under the circumstances as a whole including the reasonable expectations of the parents and the interests of the child;

(f) the existence of any limiting factors, as set forth in §2.11.

(2) The court should presume that an allocation of decisionmaking responsibility jointly to each legal parent or parent by estoppel who has been exercising a reasonable share of parenting functions is in the child's best interests. The presumption is overcome if there is a history of domestic violence or child abuse, or if it is shown that joint allocation of decisionmaking responsibility is not in the child's best interests.

(3) Unless otherwise provided or agreed by the parents, a parent should have sole responsibility for day-to-day decisions for the child while the child is in that parent's custodial care and control, including emergency decisions affecting the health and safety of the child.

(4) Even if not allocated decisionmaking responsibility under this section, any legal parent and any parent by estoppel should have access to the child's school and health-care records to which legal parents have access by other law, except insofar as access is not in the best interests of the child or when the provision of such information might endanger an individual who has been the victim of child abuse or domestic violence.

§2.10 Criteria for parenting plan — dispute resolution

(1) Unless otherwise resolved by agreement of the parents under §2.06, and subject to the limitations set forth in §2.07, the court should include in the parenting plan a process for resolving future disputes that will serve the child's best interests in light of the following:

(a) the parents' present wishes regarding future dispute resolution;

(b) circumstances, including but not limited to financial circumstances, that may affect the parents' ability to participate in a prescribed process for dispute resolution;

(c) the existence of any limiting factor set forth in §2.11.

(2) The court may order a nonjudicial process of dispute resolution, by designating with particularity the person or organization to conduct the process or the method for selecting such a person or organization.

(3) The disposition of a dispute through a nonjudicial process of dispute resolution that was ordered by the court without prior parental agreement is subject to de novo judicial review. However, if the parents have agreed in a parenting plan or by agreement thereafter to a binding resolution of future disputes by nonjudicial process, a decision resulting from such process is binding upon the parents, unless the court finds it will result in harm to the child or is the result of fraud, misconduct, corruption, or other serious irregularity in the dispute-resolution process.

§2.11 Criteria for parenting plan — limiting factors

(1) If either of the parents so requests, or upon receipt of credible information that such conduct has occurred, the court should determine promptly whether a parent who would otherwise be allocated responsibility under a parenting plan has done any of the following:

(a) abused, neglected, or abandoned a child, as defined by state law;

(b) inflicted domestic violence, or allowed another to inflict domestic violence, as defined in §2.03(7);

(c) abused drugs, alcohol, or another substance in a way that interferes with the parent's ability to perform caretaking functions;

(d) interfered persistently with the other parent's access to the child, except in the case of actions taken with a reasonable, good-faith belief that they are necessary to protect the safety of the child or the interfering parent or another family member, pending adjudication of the facts underlying that belief which the interfering parent should be required to initiate as soon as reasonably possible.

(2) If a parent is found to have engaged in any activity specified by Paragraph (1), the court should impose limits that are reasonably calculated to protect the child, child's parent, or other member of the household from harm. The limitations available to the court to consider include, but are not restricted to, the following:

(a) an adjustment, including a reduction or the elimination, of the custodial responsibility of a parent;

(b) supervision of the custodial time between a parent and the child;

(c) exchange of the child between parents through an intermediary, or in a protected setting;

(d) restraints on a parent's communication with or proximity to the other parent or the child;

(e) a requirement that a parent abstain from possession or consumption of alcohol or nonprescribed drugs while exercising custodial responsibility and within a specified period immediately preceding such exercise;

(f) denial of overnight custodial responsibility;

(g) restrictions on the presence of specific persons while a parent is with the child;

(h) a requirement that a parent post a bond to secure return of the child following a period in which the parent is exercising custodial responsibility or to secure other performance required by the court;

(i) a requirement that a parent complete a treatment program for perpetrators of domestic violence, for drug or alcohol abuse, or for other behavior addressed in this section;

(j) any other constraints or conditions that the court deems necessary to provide for the safety of the child, a child's parent, or any other person whose safety immediately affects the child's welfare.

(3) If a parent is found to have engaged in any activity specified in Paragraph (1), the court should not allocate custodial responsibility or decisionmaking responsibility to that parent without making special written findings under §1.02 that the child, other parent, or other household member can be adequately protected from harm by the limits imposed under Paragraph (2). A parent found to have engaged in the behavior specified in Paragraph (1) should have the burden of proving that an allocation of custodial responsibility or decisionmaking responsibility to that parent will not endanger the child, other parent, or other household member.

§2.12 Criteria for parenting plan — prohibited factors

(1) In issuing orders under this Chapter, the court should not consider any of the following factors:

(a) the race or ethnicity of the child, a parent, or other member of the household;

(b) the sex of a parent or the child;

(c) the religious practices of a parent or the child, except to the minimum degree necessary to protect the child from severe and almost certain harm or to protect the child's ability to practice a religion that has been a significant part of the child's life;

(d) the sexual orientation of a parent;

(e) the extramarital sexual conduct of a parent, except upon a showing that it causes harm to the child;

(f) the parents' relative earning capacities or financial circumstances, except the court may take account of the degree to which the combined financial resources of the parents set practical limits on the custodial arrangements.

(2) Nothing in this section should preclude the court's consideration of a parent's ability to care for the child, including meeting the child's needs for a positive self-image.

COMMENT

a. In general. This section prohibits decisionmaking based on race, ethnicity, sex, religion, sexual orientation, extramarital sexual conduct, or the parents' financial circumstances, except in very limited circumstances. Historically, courts have sometimes taken these factors into account in custody determinations. Insofar as the decision rules of the Chapter rely on concrete standards to which these prohibited factors are irrelevant, the section is redundant. See, e.g., §2.08(1) and §2.17(4)(a). The best-interests test has been retained, however, in circumstances in which these concrete standards are inappropriate, or cannot be applied. See, e.g., §2.08(3) and §2.17(4)(b) and (c). Section 2.12 ensures that in applying these more open-ended standards, decisionmaking is not based on any of the prohibited factors.

All stereotypes should be avoided in decisionmaking under this Chapter, including those based on many factors not covered by this section such as disability, age, intelligence level, personality, and appearance. The section singles out race, ethnicity, sex, religion, sexual orientation, extramarital conduct, and financial circumstances because these factors historically have created the most troublesome distortions in judgments about what is best for a child, and thus require the greatest vigilance to avoid.

The section does not preclude consideration of a parent's ability to meet a child's needs, which is relevant to many determinations under this Chapter. See, e.g., §2.08(1)(d) and §2.08(3). A child's needs may include such factors as positive self-esteem and a healthy sense of identity, which may sometimes relate to the child's race, ethnicity, sex, religion, or sexual orientation. In cases in which matters of this sort would otherwise be relevant under the Chapter, Paragraph (2) clarifies that the section does not preclude their consideration.

b. Race and ethnicity. The Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution prohibits use of a parent's race as a determinative factor in custody decisions. Palmore v. Sidoti, 466 U.S. 429 (1984). *Palmore* concerned a motion for a change in custody brought by a father who claimed that his daughter would be psychologically damaged and stigmatized by the remarriage of her white custodial mother to a black man. The Supreme Court acknowledged the "risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin," 466 U.S. at 433. Nonetheless, the Court held that "private biases and the possible injury they might inflict" are not permissible considerations. *Id.* "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.*

While racial prejudice has no place in custody decisions, many believe that a child's positive sense of his or her racial identity depends on being raised by a parent of the same race. It is especially tempting to assume that a child who is a member of a stigmatized race is best off when raised by a parent with the same racial identity.

In accordance with this assumption, some states have allowed or even preferred race matching in foster-care and adoption placements. Whether or not a race-based preference is appropriate in these contexts, this section states the principle that race has no appropriate part to play in resolving disputes between the parents of a biracial child. A child shares the race of each biological parent. The very act of identifying a child with the race of one parent—usually the one belonging to the more stigmatized race—contributes to the racial subordination of which it is a response. Moreover, each parent can contribute to a child's sense of a positive racial identity, regardless of his or her own racial identity, and regardless of whether he or she has primary custodial responsibility. In any event, it cannot be assumed that the parent whose racial identity is most closely identified with that of the child is better suited to nurturing a healthy racial identity than the other parent.

The prohibition of consideration of race does not preclude consideration of a parent's greater capacity to nurture a child's self-esteem, including a positive, racial identity. See Paragraph (2). Capacity to meet a child's needs that are related to his or her race does not concern race, in the prohibited sense, but a parent's abilities, which are relevant under §2.08(1)(d) and §2.08(3). A higher capacity for nurturing a child's self-esteem, however, is not established merely by showing the closest racial identity with the child. . . .

c. Sex. Attitudes about appropriate gender roles and differences between men and women have been pervasive in family law. In 19th-century England, fathers had an absolute right to the custody and earnings of their children. While fathers' rights were paramount in colonial America, by the 19th century custody awards were justified in accordance with the child's best interests. This focus for a time favored the innocent party to a divorce but gradually led to presumptions and preferences favoring mothers, especially mothers of young children.

The tender-years presumption and maternal-preference rules have been eliminated almost entirely from state statutes, but implicit bias is still sometimes evident. The assumption that mothers do, and should, provide most of the care of children leads to a custody bias against fathers in favor of mothers. At the same time, an implicit maternal bias also gives rise to expectations about mothers that, when disappointed, may cause women to be judged more negatively than fathers for the same conduct, and fathers to be overly rewarded for parenting conduct that exceeds the rather modest expectations set for them.

Paragraph (1)(b) prohibits consideration of the sex of the parent or the child as a general rule. It disallows both explicit discrimination based on sex, and the implicit evaluation of the behaviors and abilities of mothers and fathers according to different sets of expectations based on their sex. It provides that neither parent should be

penalized for acting according to, or outside of, traditional gender-role expectations. For example, a mother who works and puts her child in day care should not be evaluated as putting her career above the welfare of her children when a father who works while his children are in day care is considered a responsible provider. Likewise, a mother who has an extramarital affair should not be deemed less fit than a father who has such an affair; and a mother should not be judged more negatively because she is easily "overwrought," while a father's temper is overlooked as ordinary or understandable. The prohibition against sex-based determination in Paragraph (1)(b) requires courts to be on guard against these types of stereotype-based judgments.

Some people believe that the healthy development of a child's gender identity is aided by a strong relationship with the same-sex parent, who can provide a model for the child's own behavior and self-definition. Even if it were shown that the parent of the same sex as the child had something unique to offer the child, however, sex is not an appropriate basis for the allocation of custodial responsibility for the child. First, sensitivity to the child's emotional needs has no inevitable relationship to the sex of the parent; some daughters have closer and healthier relationships to their fathers and some sons relate better to their mothers. Second, having a positive influence on a child is not the exclusive province of the parent with whom the child primarily lives. A father can influence and direct his son even if the child lives most of the time with his mother; a mother, likewise, can guide her daughter's maturation process even if she lives primarily with her father. Finally, the sex-modeling rationale presupposes a set of attitudes that are themselves, to some significant extent, the product of gender role stereotyping. While parents themselves are free to engrain gender-role stereotypes, the state is not.

Paragraph (1)(b) does not preclude consideration of a parent's ability to meet a child's needs, which might relate to her sense of gender identity and self-image. See Paragraph (2). The parent's sex, however, is not relevant in determining this ability. . . .

d. Religion. Paragraph (1)(c) prohibits decisionmaking based on the religious practices of the child or parent, except to the minimum degree necessary to protect a child from severe and almost certain harm, or to protect the child's ability to practice a religion to which the child has made a substantial commitment. This prohibition recognizes the constitutional importance of an individual's ability to freely exercise his or her religion, which combines with a parent's constitutionally protected interest in child-rearing to form a strong barrier to judicial consideration of religion in custody decisions. Under this section, custodial and decisionmaking responsibility for the child ordinarily will be allocated without regard to a parent's religion or religious practices.

The nature of religious faith makes it difficult to apply the exception for severe and almost certain harm to the child. A religious practice considered harmful by one parent may be considered necessary to eternal salvation by the other parent. A determination that one parent's religious practices will harm a child unavoidably intrudes on that parent's religious exercise. Nonetheless, harm that is sufficiently clear, significant, and certain should not be ignored altogether because of the presence of religious considerations. In deciding whether the potential harm is significant and certain enough, physical harm that would be recognized by a state's abuse and neglect statutes would ordinarily suffice, as would substantial interference with the relationship between the child and the other parent.

The issue of harm can arise when each parent wishes to expose the child to a different, conflicting religion. One parent may wish to limit the religious practices of the other parent when that parent is with the child, out of concern that those practices are distressing to the child, perhaps even inhibiting the child's ability to develop a coherent religious perspective. Paragraph (1)(c) precludes such limits. The confusion that exposure to different, even conflicting, religions can be expected to cause in some children is a harm, like many others (including any harm to children when married parents attempt to raise their children in two different religions), as to which the law is ill-equipped to save children. Taking this confusion into account would require courts to make comparative judgments between religions, which the U.S. Constitution prohibits. It would also require setting enforceable limits on a parent's religious practices when with the child. The approach taken by Paragraph (1)(c) reflects a realism about what courts can be expected to accomplish with respect to the spiritual health of children when the parents disagree about a child's religious upbringing.

Some parents anticipate disputes over the religious upbringing of their children by agreement at the time of divorce. Generally, parental agreements made in the context of a separation are favored by these Principles. See §2.06. Separation agreements concerning religion raise special enforcement problems that warrant special caution. In particular, First Amendment considerations prohibit courts from becoming entangled in adjudications concerning compliance with religious rules, or unduly interfering with the parent's free-exercise rights. Courts should not enforce contract provisions requiring a parent to follow through on a contractual obligation to engage, or forbear from engaging, in a religious practice, those necessitating interpretation of the requirements of a particular religion, or those whose obligations cannot be readily and objectively determined by the court without unnecessary entanglement in religious matters or intrusion into a parent's free-exercise rights.

When the agreement was made outside the setting of a divorce, it is not enforceable as such, although it may be taken into account when appropriate in light of the circumstances as a whole, including the reasonable expectations of the parents and the interests of the child-subject to the cautions listed above. See §2.08(1)(e) . . . ; §2.09(1)(e). . . .

The exception in Paragraph (1)(c) for children who have made a substantial commitment to the practice of a

particular religion is intended to apply to those children who have experienced an upbringing for a substantial period in a particular religious tradition and have developed their own identity in, or allegiance to, that religion. The section recognizes that at some point in the development of a religious identity, a child may acquire his or her own interest in religious freedom that warrants consideration along with the parents' interests. . . .

e. Sexual orientation. Consideration of a parent's sexual orientation is prohibited by Paragraph (1)(d). Sexual orientation is a factor to which prejudicial attitudes and stereotypes historically have attached. While some raise moral objections to homosexuality, the scientific evidence has not established that homosexual parent is inferior as a parent. It has not been shown that a homosexual parent is more likely to molest his or her child, or that a child raised by a homosexual parent is less well adjusted. Given this, consideration of a parent's sexual orientation would amount to decisionmaking based on conjecture and stereotype.

It may be assumed that the societal prejudice that attends homosexuality can be a source of distress for the child of a homosexual parent. The degree of any stress, however, does not appear to depend upon the amount of custodial responsibility the parent is assigned. Moreover, it has not been shown that less contact with a homosexual parent makes coming to terms with that parent's sexual identity any easier. Consideration of homosexuality as a negative factor in how parental responsibility is allocated may even reinforce the shame and stigma of that status, making the child's acceptance of the parent more difficult. In any event, societal prejudice is generally not a legitimate basis for making custody decisions.

In some cases, a child's own homosexuality may be an important dimension of the child's experience, and the parent's ability to address that dimension may be significant to the child's welfare. Paragraph (2) clarifies that consideration of this ability is not ruled out by this section. . . .

f. Extramarital sexual conduct. Sexual misconduct has also been a factor on which courts in custody cases sometimes relied unduly. Paragraph (1)(e) prohibits consideration of extramarital sexual conduct by a parent, unless it is shown that the conduct causes harm to the child.

In accordance with the general approach of this section against overreliance on factors that are grounded in prejudice and bias, Paragraph (1)(e) prohibits the court from presuming harm based on the extramarital relationship of a parent. Even a child's awareness of such a relationship, or dislike of the individual with whom a parent has developed an intimate relationship, should not justify inferences relating to the child's welfare or parental fitness; children cannot be protected from every source of unhappiness and unease. To prevent courts from exaggerating the significance of parental practices of which they disapprove, the section allows consideration of sexual misconduct only when there is a showing of harm. Specific harm must be shown, although the standard is not as rigorous as the severe and almost certain harm standard applied to restrictions on consideration of religious practices. See Paragraph (1)(c).

Paragraph (1)(e) applies equally to homosexual and heterosexual conduct. While a small number of states criminalize certain homosexual behaviors, these laws (like those criminalizing certain homosexual and heterosexual behaviors) are rarely enforced and do not authorize consequences relating to a parent's access to a child.

Even when sexual conduct may be considered because it is shown to be harmful to a child, this does not mean that the factor should be dispositive. In allocating custodial responsibility, for example, the parents' respective shares of past caretaking determine their shares of custodial time, unless one of the exceptions set forth in §2.08 applies. Even in cases in which the court is allocating custodial responsibility under the best-interests test, the priority on the past performance of caretaking functions is retained. See §2.08(3). Thus, in cases in which the caretaking functions exercised by one parent were more substantial than the other, that factor should still be the dominant consideration. . . .

g. Financial circumstances. Few doubt that a child's welfare is affected by the amount of financial resources available to help raise the child. Given fair child-support rules, however, this factor should not be used as a basis for allocating custodial and decisionmaking responsibility for the child. Allocation of these responsibilities depends on qualitative factors, measured in the first instance in this Chapter through past performance of caretaking functions. Taking account of the parents' financial circumstances undermines the priority on actual caretaking patterns, tending to favor the parent with the greater investment in human capital and, correspondingly, to disfavor the parent who has made the heavier investment in caretaking.

Paragraph (1)(f) prohibits consideration of disparities in the financial circumstances of the parents with one limited exception. The exception recognizes that in some circumstances the total financial resources of the parents place limits on the feasibility of alternative custodial arrangements, such as arrangements involving equal allocations of custodial time, or arrangements involving frequent long-distance travel. . . .

TOPIC 3. FACT FINDING

§2.13 Court-ordered investigation; appointment of guardian ad litem or lawyer for the child

(1) The court may order a written investigation or evaluation to assist it in determining any issue relevant to proceedings under this Chapter. The court should specify the scope of the investigation or evaluation and the authority of the investigator or evaluator.

(2) The court may appoint a guardian ad litem to represent the child's interests. The court should specify

the terms of the appointment, including the guardian's role, duties, and scope of authority.

(3) The court may appoint a lawyer to represent the child if the child is competent to direct the terms of the representation and the court has a reasonable basis for finding that the appointment would be helpful in resolving the issues of the case. The court may also appoint a lawyer to represent the guardian ad litem appointed under Paragraph (2). The court should specify the terms of the appointment, including the lawyer's role, duties, and scope of authority.

(4) When substantial allegations of domestic violence as defined by §2.03(7) or child abuse or child neglect as defined by existing state law have been made or when there is credible information that domestic violence or child abuse or neglect has occurred, the court should order an investigation under Paragraph (1) or appoint a guardian ad litem or an attorney under Paragraph (2) or (3), unless the court is satisfied that the information adequate to evaluate the allegations will be secured without such an order or appointment.

(5) Subject to whatever restrictions on disclosure may exist under other state law or §2.09(4), the court may require the child, parent, or other person having information about the child or parent to provide information to a person or agency appointed under this section.

(6) A party should be allowed to cross-examine an investigator, evaluator, or guardian ad litem who submits a report, evidence, or recommendations to the court. A lawyer appointed under Paragraph (3) should not be a witness in the proceedings, except as allowed under standards applicable in other civil proceedings.

(7) Appointments, investigations, evaluations services, or tests should not be ordered under this section unless at no cost to the persons involved, or at a cost that is reasonable in light of the financial resources of the parents. When one parent's ability to pay is significantly greater than the other's, the court should allocate the costs between them equitably.

COMMENT

a. In general. There are three basic models of child representation. The factfinder model uses a neutral person or agency who investigates the child's circumstances and presents to the court facts and evaluations deemed relevant to the proceedings. The child-protection model uses an intermediary who furthers the child's interests through either factfinding, advocacy, or some combination of the two. The attorney-client model is based on an attorney-client relationship, with the child as client directing the terms of the representation by the lawyer.

This section allows the court to act in accordance with any one of these three models. Paragraph (1) authorizes the court to order an investigation or an evaluation of the child or the parents or their circumstances. Paragraph (2) permits the appointment of a guardian ad litem who, at the court's discretion, may serve in an investigatory capacity, an advocacy role, or both. Paragraph (3) permits appointment of a lawyer to serve as independent counsel to the child or the guardian ad litem.

b. No general duty of appointment. There is an appealing case to be made for ordering an independent investigation or evaluation, or for appointing a guardian or an attorney for the child, in every dispute involving a child. Children are the innocent victims of family disruption, usually unable to protect or advocate effectively for themselves. Parents can be distracted at the time of separation or divorce, their judgments clouded by their own problems. The purpose of a court-ordered investigation or evaluation is to ensure that the court be able to make its decisions under this Chapter based on complete information. A guardian or lawyer for the child can act as a buffer against bad decisionmaking by parents and ensure that the child's best interests receive focused attention.

Despite these potential benefits, the measures permitted by this section present some significant difficulties. First, court-ordered investigations or evaluations and the appointment of an advocate for the child can constitute undesirable and inappropriate intrusions on the authority of parents. Ideally, parents make good arrangements for their children on their own, by agreement. Courts should not presume that they cannot do so, or distrust them when they try. See §2.06. Indeed, the presence of outside investigators, evaluators, and child representatives may relieve pressure on parents to keep the interests of the child paramount. When someone else has been assigned to protect the child's interests, a parent may feel released from that responsibility and more at liberty to protect his or her own interests. This effect is the opposite of what these Principles are attempting to achieve.

Second, the effort to obtain better information about, or representation for, the child can have a negative effect on the proceedings themselves. While the appointment of a separate representative for the child may sometimes ameliorate the level of conflict generated in the proceedings, it often only heightens conflict. Even the presence of an independent investigator or evaluator can intensify the strategic behavior of parents, who may seek advantage through alliance with he investigator or evaluator rather than a collaborative solution with each other. Investigators and representatives can also be expensive for the parents, whose financial resources often are already stretched as a result of the divorce.

In addition, it should not be assumed that an independent, court-ordered investigation or evaluation will assure an outcome for a child that is "best," in some objective or neutral sense. Disagreements about the best interests of children among child advocates and among academic and clinical professionals are hard to explain apart from the value judgments and policy commitments that underlie them. See §2.02, Comment c.

Because of these difficulties, this section does not require a court-ordered investigation or evaluation or the appointment of a guardian ad litem or attorney in every case. It gives the court discretion to make such an order or appointment when the court has concerns about

whether the child's welfare can be protected by the parties before the court. The court's discretion should be guided by the overall goals of the Chapter. . . .

§2.14 Interview of the child by the court

The court should have discretion to interview the child, or direct another person to interview the child, in order to obtain information relevant to the issues of the case. Counsel for a parent or for the child should be permitted to propose questions to the court that may be asked of the child.

TOPIC 4. MODIFICATION OF PARENTING PLAN

§2.15 Modification upon showing of changed circumstances or harm

(1) Except as provided in Paragraph (2), in §2.16 or in §2.17, a court may modify a court-ordered parenting plan if it finds, on the basis of facts that were not known or have arisen since the entry of the prior order and were not anticipated therein, that a substantial change has occurred in the circumstances of the child or of one or both parents and that a modification is necessary to the child's welfare.

(2) Even if a substantial change of circumstances has not occurred, a court may modify a parenting plan if it finds that the plan arrangements are not working as contemplated and in some specific way cause harm to the child.

(3) Unless the parents have agreed otherwise, none of the following circumstances is sufficient to justify a significant modification of a parenting plan except where harm to the child is shown:

(a) circumstances resulting in an involuntary loss of income, by loss of employment or otherwise, affecting the parent's economic status;

(b) a parent's remarriage or cohabitation;

(c) a parent's choice of reasonable caretaking arrangements for the child, including the child's placement in day care.

(4) For purposes of Paragraph (1), the onset or significant worsening of any limiting factor defined in §2.11(1) constitutes a substantial change of circumstances under this section.

COMMENT

a. In general. Rules for modifying a parenting plan must balance the benefits of stability against the costs of rigidity. On the one hand, changes in caretaking arrangements, or even the possibility that such changes will be made, promotes insecurity and instability in parenting arrangements. On the other hand, an inflexible approach to modification can perpetuate arrangements that have proven unsatisfactory or reduce a parent's incentive to agree to modified arrangements that would benefit the child. Given the risks, no approach to this issue is without difficulty.

This Chapter resolves the tension with a layered set of rules that recognize the need for stability in most circumstances, along with the desirability of flexibility in certain specified situations and the inappropriateness of modification others. As a general rule, significant judicial modification of a permanent parenting plan is allowed under this section only upon a showing of (1) a substantial change in the circumstances on which the parenting plan was based at makes modification necessary to the child's welfare, excluding changes in economic or marital status, or in caretaking arrangements; or (2) harm to the child. Modification is more readily available, under a less strict standard, in four specific circumstances: (1) changes agreed to by the parents, (2) changes in the actual arrangements under which the child has been receiving care without objection by the parent opposing the modification; (3) minor modifications in the plan; (4) the attainment of the age specified in a uniform rule of statewide application under §2.08(1)(b) of a child who has a firm and reasonable preference for a different residential arrangement. See §2.16. Other special rules are designed to strike a balance between stability and flexibility in a child's residential arrangements in the particular context of a parent's relocation. See §2.17. . . .

§2.16 Modification without showing of changed circumstances

(1) The court should modify a parenting plan in accordance with a parental agreement, unless it finds that the agreement is not knowing or voluntary, or would be harmful to the child.

(2) The court may modify a parenting plan without a showing of changed circumstances otherwise required by §2.15(1) if the modification is in the child's best interests and

(a) reflects the de facto arrangement under which the child has been receiving care, without parental objection, for the six months preceding filing of the petition for modification, provided the arrangement is not the result of a parent's acquiescence resulting from domestic violence or from other conditions or circumstances that impeded the parent's capacity to give meaningful consent;

(b) constitutes a minor modification in the plan;

(c) is necessary to accommodate the firm preferences of a child who has attained the age specified pursuant to §2.08(1)(b); or

(d) is necessary to change a parenting plan that was based on an agreement that the court would not have ordered under §2.06 had the court been aware of the circumstances at the time the plan was ordered, if modification is sought under this section within six months of the issuance of the parenting plan.

§2.17 Relocation of a parent

(1) The relocation of a parent constitutes a substantial change in circumstances under §2.15(1) only when the relocation significantly impairs either

parent's ability to exercise responsibilities the parent has been exercising or attempting to exercise under the parenting plan.

(2) Unless otherwise ordered by the court, a parent who has responsibility under a parenting plan who changes, or intends to change, residences for more than 90 days should give a minimum of 60 days' advance notice, or the earliest notice practicable under the circumstances, to any other parent with responsibility under the same parenting plan. Notice should include all of the following:

(a) the intended date of the relocation,

(b) the address of the intended new residence,

(c) the specific reasons for the intended relocation,

(d) a proposal for how custodial responsibility should be modified, if necessary, in light of the intended move.

A court may consider a failure to comply with the notice requirements of this section without good cause as a factor in determining whether the relocation is in good faith under Paragraph (4), and as a basis for awarding reasonable expenses and reasonable attorney's fees attributable to such failure.

(3) When changed circumstances are shown under Paragraph (1), if practical the court should revise the parenting plan to accommodate the relocation without changing the proportion of custodial responsibilities each parent is exercising.

(4) When a relocation constituting changed circumstances under Paragraph (1) renders it impractical to maintain the same proportion of custodial responsibility to each parent, the court should modify the parenting plan in accordance with the child's best interests, as defined in §2.08 and §2.09, and in accordance with the following principles:

(a) The court should allow a parent who has been exercising the clear majority of custodial responsibility to relocate with the child if that parent shows that the relocation is for a valid purpose, in good faith, and to a location that is reasonable in light of the purpose.

(i) For purposes of this Paragraph, what is a "clear majority" of custodial responsibility should be established through a rule of statewide application.

(ii) For purposes of this Paragraph, the court should recognize any of the following purposes for a relocation as valid: (1) to be close to significant family or other sources of support, (2) to address significant health problems, (3) to protect the safety of the child or another member of the child's household from a significant risk of harm, (4) to pursue a significant employment or educational opportunity, (5) to be with one's spouse or domestic partner who lives in, or is pursuing a significant employment or educational opportunity in, the new location, (6) to significantly improve the family's quality of life. The relocating parent should have the burden of proving the validity of any other purpose.

(iii) The court should find that a move for a valid purpose is reasonable unless its purpose is shown to be substantially achievable without moving, or by moving to a location that is substantially less disruptive of the other parent's relationship to the child.

(b) If a parent who has been exercising the clear majority of custodial responsibility does not establish that the purpose for that parent's relocation is valid, in good faith, and to a location that is reasonable in light of the purpose, the court should order the plan modifications most consistent with the child's best interests. Among the modifications the court should consider is a reallocation of primary custodial responsibility, effective if and when the relocation occurs, but such a reallocation should not be ordered if the relocating parent demonstrates that the child's best interests would be served by the child's relocation with the parent.

(c) If neither parent has been exercising a clear majority of custodial responsibility for the child, the court should modify the plan in accordance with the child's best interests, taking into account all relevant factors including the effects of the relocation on the child.

(d) The court should deny the request of a parent for a reallocation of custodial responsibility to enable the parent to relocate with the child if the parent has been exercising substantially less custodial responsibility for the child than the other parent, unless the relocating parent demonstrates that the reallocation is necessary to prevent harm to the child.

(e) The court should minimize the impairment to parent-child relationship caused by a parent's relocation through alternative arrangements for the exercise of custodial responsibility appropriate to the parents' resources and circumstances and the developmental level of the child.

COMMENT

a. In general. The relocation of a parent, or both parents, is a circumstance that frequently follows divorce. The ability to change one's area of residence is an important individual right. So is having access to one's child. When two parents have been exercising continuing care and responsibility for a child, the relocation of one of them puts these two interests in sometimes irreconcilable conflict.

In resolving the conflict between parents when one or both of them wish to relocate, courts have used a variety of tests, none of which is fully satisfactory. Some tests attach little value to the relocating parent's needs; others ignore what may amount to substantial consequences to the nonmoving parent. Balancing tests leave courts to pin their own value on the competing interests in an individual case, making objectivity and consistency extremely difficult.

This section treats any relocation that significantly impairs the exercise of a parent's custodial responsibility as a substantial change in circumstances, thereby justifying review of the custodial arrangements. See Paragraph (1). Upon review, if the relocating parent has been exercising the clear majority of custodial responsibility for the child, that parent is allowed to relocate with the child without a specific showing of the benefits to the child, as long as the relocation is for a valid purpose, in good faith, and to a location that is reasonable in light of the purpose. See Paragraph (4)(a). If the purpose for the modification is not valid or the location not reasonable and the nonmoving parent is willing and fit to assume primary custodial responsibility, the court may reallocate primary custodial responsibility to the nonrelocating parent, unless it finds that the child's interests would be best served by remaining with the relocating parent. See Paragraph (4)(b). Likewise, if the parents have been sharing custodial responsibility more or less equally, past caretaking patterns are not dispositive, and the court may modify the custodial arrangements under the best-interests test. See Paragraph (4)(c). Finally, a parent who has been exercising substantially less custodial responsibility for the child than the other parent may not relocate with the child, unless that parent demonstrates that the relocation is necessary to prevent harm to the child. See Paragraph (4)(d). Whatever effects a relocation may have on the allocation of primary custodial responsibility, the court should attempt to minimize the effects of a relocation through alternative arrangements that are consistent with the parents' resources and the child's needs. See Paragraph (4)(e). . . .

TOPIC 5. ALLOCATIONS OF RESPONSIBILITY TO INDIVIDUALS OTHER THAN LEGAL PARENTS

§2.18 Allocations of responsibility to individuals other than legal parents

(1) The court should allocate responsibility to a legal parent, a parent by estoppel, or a de facto parent as defined in §2.03, in accordance with the same standards set forth in §§2.08 through 2.12, except that

(a) it should not allocate the majority of custodial responsibility to a de facto parent over the objection of a legal parent or a parent by estoppel who is fit and willing to assume the majority of custodial responsibility unless

(i) the legal parent or parent by estoppel has not been performing a reasonable share of parenting functions, as defined in §2.03(6), or

(ii) the available alternatives would cause harm to the child; and

(b) it should limit or deny an allocation otherwise to be made if, in light of the number of other individuals to be allocated responsibility, the allocation would be impractical in light of the objectives of this Chapter.

(2) A court should not allocate responsibility to an individual who is not a legal parent, a parent by estoppel, or a de facto parent, over a parent's objection, if that parent is fit and willing to care for the child, unless any of the following circumstances exist:

(a) the individual is a grandparent or other relative who has developed a significant relationship with the child and

(i) the parent objecting to the allocation has not been performing a reasonable share of parenting functions for the child; and

(ii) if there is another legal parent or parent by estoppel, that parent is unable or unwilling to care for the child, or consents to the allocation;

(b) the individual is a biological parent of the child who is not the child's legal parent but who has an agreement with a legal parent under which the individual retained some parental rights or responsibilities;

(c) the available alternatives would cause harm to the child.

TOPIC 6. ENFORCEMENT OF PARENTING PLANS

§2.19 Enforcement of parenting plans

(1) If, upon a complaint from an individual with responsibility under a parenting plan, the court finds that another individual intentionally and without good cause violated a provision of a court-ordered parenting plan, it should enforce the remedies specified in the plan or, if no remedies are specified or they are inadequate, it should find that the plan has been violated and order an appropriate remedy, which may include one or more of the following:

(a) in the case of interference with the exercise of custodial responsibility for a child by the other parent, an award of substitute time for that parent to make up for time missed with the child;

(b) in the case of missed time by a parent, an award of costs in recognition of lost opportunities by the other parent, child-care costs, and other reasonable expenses in connection with the missed time;

(c) a modification of the plan, if the requirements for a modification are met under §2.15, §2.16, or §2.17;

(d) an order that the parent who violated the plan obtain appropriate counseling;

(e) an award of court costs, reasonable attorney's fees, and any other reasonable expenses in enforcing the plan;

(f) any other appropriate remedy.

(2) Except as provided in a jointly submitted plan that has been ordered by the court, the court should treat obligations established in a parenting plan as independent obligations, and it should not recognize as a defense to an action under this section by one parent that the other parent failed to meet obligations under a parenting plan or child-support order.

(3) A court may treat an agreement between parents to depart from a parenting plan as a defense to a claim that the plan has been violated, even though the agreement was not made part of a court order, but only as to acts or omissions consistent with the agreement that occur before the agreement is disaffirmed by either parent.

CHAPTER 4. DIVISION OF PROPERTY UPON DISSOLUTION

TOPIC 1. INTRODUCTORY PROVISIONS

§4.01 Scope of Chapter 4

(1) This Chapter sets forth principles for dividing property between spouses at the dissolution of their marriage.

(2) The enforceability of agreements between spouses or prospective spouses concerning the division of their property is governed by Chapter 7 and not by this Chapter.

§4.02 Objective of Principles Governing the Division of Property

The objective of this Chapter is to allocate property by principles

(1) that respect both spousal ownership rights in their property and the equitable claims that each spouse has on the property in consequence of their marital relationship;

(2) that facilitate the satisfaction of obligations the spouses have under Chapter 3 to support their children and under Chapter 5 to share equitably in the financial losses arising from the dissolution of their marriage; and

(3) that are consistent and predictable in application.

TOPIC 2. DEFINITION AND CHARACTERIZATION OF PROPERTY

§4.03 Definition of marital and separate property

(1) Property acquired during marriage is marital property, except as otherwise expressly provided in this Chapter.

(2) Inheritances, including bequests and devises, and gifts from third parties, are the separate property of the acquiring spouse even if acquired during marriage.

(3) Property received in exchange for separate property is separate property even if acquired during marriage.

(4) Property acquired during marriage but after the parties have commenced living apart pursuant to either a written separation agreement or a judicial decree, is the separate property of the acquiring spouse unless the agreement or decree specifies otherwise.

(5) For the purpose of this section "during marriage" means after the commencement of marriage and before the filing and service of a petition for dissolution (if that petition ultimately results in a decree dissolving the marriage), unless there are facts, set forth in written findings of the trial court (§1.02), establishing that use of another date is necessary to avoid a substantial injustice.

(6) Property acquired during a relationship between the spouses that immediately preceded their marriage, and which was a domestic-partner relationship as defined by §6.03, is treated as if it were acquired during the marriage.

§4.04 Income from and appreciation of separate property

(1) Both income during marriage from separate property, and the appreciation in value during marriage of separate property, are marital property to the extent the underlying asset is subsequently recharacterized as marital property, pursuant to §4.12.

(2) Both income during marriage from separate property, and the appreciation in value during marriage of separate property, are marital property to the extent the income or appreciation is attributable to either spouse's labor during marriage, pursuant to §4.05.

(3) Income from and appreciation of separate property are separate property if they are not marital property under Paragraph (1) or (2).

§4.05 Enhancement of separate property by marital labor

(1) A portion of any increase in the value of separate property is marital property whenever either spouse has devoted substantial time during marriag to the property's management or preservation.

(2) The increase in value of separate property over the course of the marriage is measured by the difference between the market value of the property when acquired, or at the beginning of the marriage, if later, and the market value of the property when sold, or at the end of the marriage, if sooner.

(3) The portion of the increase in value that is marital property under Paragraph (1) is the difference between the actual amount by which the property has increased in value, and the amount by which capital of the same value would have increased over the same time period if invested in assets of relative safety requiring little management.

§4.06 Property acquired in exchange for marital and separate property

(1) Property acquired during marriage in exchange for other property is presumed to be marital property.

(a) The presumption of Paragraph (1) is rebutted by evidence that the consideration for the acquired property included a spouse's separate property.

(b) If the presumption is rebutted, the acquired property consists of marital- and separate-property shares in proportion to the value of the marital and separate property for which it was exchanged.

(2) Property acquired on credit during marriage is presumed to be marital property.

(a) The presumption of Paragraph (2) is rebutted by evidence that the down payment, or any payments that reduce the loan's principal balance, were made from a spouse's separate property.

(b) If the presumption is rebutted as described in Paragraph (2)(a), the acquired property consists of marital and separate shares in proportion to the value of the marital and separate property that was applied to the down payment or to reduce the debt. Payments not shown to have been made from separate property are treated as having been made from marital property.

(c) The presumption of Paragraph (2) is rebutted by evidence that neither spouse has personal liability for the loan and that, under the terms of the loan instrument and governing law, the creditor's sole recourse for nonpayment is against one spouse's separate property.

(d) If the presumption is rebutted as described in Paragraph (2)(c),

(i) the acquired property is the separate property of the spouse who owns the separate property that the creditor may reach, except that

(ii) if either the down payment, or reductions in the principal balance of the loan, were made from marital property, the acquired property consists of marital and separate shares in proportion to the value of the marital and separate property that was applied to the debt or down payment. Any payments not shown to have been made from separate property are treated as having been made from marital property.

(3) Property acquired on credit before marriage is presumed to be the separate property of the acquiring spouse, except that the acquired property is marital property to the extent the principal balance of the loan is reduced with payments made from marital property.

(4) Any presumption under this section is also rebutted by evidence that the spouses shared an intention concerning the characterization of the property that is inconsistent with the presumption.

§4.07 Earning capacity and goodwill

(1) Spousal earning capacity, spousal skills, and earnings from post-dissolution spousal labor, are not marital property.

(2) Occupational licenses and educational degrees are not marital property.

(3) Business goodwill and professional goodwill earned during marriage are marital property to the extent they have value apart from the value of spousal earning capacity, spousal skills, or post-dissolution spousal labor.

(a) Evidence of an increment during marriage in the market value of business or professional goodwill establishes the existence of divisible marital property in that amount except to the extent that market value includes the value of post-dissolution spousal labor.

(b) Business or professional goodwill that is not marketable is nevertheless marital property to the extent a value can be established for it that does not include the value of spousal earning capacity, spousal skills, or post-dissolution spousal labor.

§4.08 Deferred or contingent earnings and wage substitutes

(1) Property earned by labor performed during marriage is marital property whether received before, during, or after the marriage. Property earned by labor not performed during marriage is the separate property of the laboring spouse even if received during marriage.

(a) Vested pension rights are marital property to the extent they are earned during the marriage.

(b) Contingent returns on labor performed during marriage, including unvested pension rights, choices in action, and compensation contingent on post-dissolution events, are marital property to the extent they are earned during the marriage.

(2) Benefits received as compensation for a loss take their character from the asset they replace.

(a) Insurance proceeds and personal-injury recoveries are marital property to the extent that entitlement to them arises from the loss of a marital asset, including income that the beneficiary-spouse would have earned during the marriage. The dissolution court may make a reasonable allocation of an undifferentiated award between its marital- and separate-property components.

(b) Disability pay and workers' compensation payments are marital property to the extent they replace income or benefits the recipient would have earned during the marriage but for the qualifying disability or injury.

(3) Where the value of the marital-property portion of a spouse's entitlement to future payments can be determined at dissolution, the court may include it in reckoning the worth of the marital property assigned to each spouse. Where the value of the future payments is not known at the time of dissolution, where their receipt is contingent on future events or not reasonably assured, or where for other reasons it is not equitable under the circumstances to include their value in the property assigned at the time of dissolution, the court may decline to do so, and instead either

(a) fix the spouses' respective shares in such future payments if and when received, or,

(b) if it is not possible to fix their share at the time of dissolution, reserve jurisdiction to make an appropriate order at the earliest practical date.

TOPIC 3. ALLOCATION OF PROPERTY ON DISSOLUTION OF MARRIAGE

§4.09 Division of marital property generally

(1) Except as provided in Paragraph (2) of this section, marital property and marital debts are divided at dissolution so that the spouses receive net shares equal in value, although not necessarily identical in kind.

(2) The spouses are allocated net shares of the marital property or debts that are unequal in value if, and only if, one or more of the following is true:

(a) Pursuant to §5.10, §5.11, or §5.14, the court compensates a spouse for a loss recognized in Chapter 5, in whole or in part, with an enhanced share of the marital property.

(b) Pursuant to §4.10, the court allows one spouse an enhanced share of the marital property because the other spouse previously made an improper disposition of some portion of it.

(c) Marital debts exceed marital assets, and it is just and equitable to assign the excess debt unequally, because of a significant disparity in the spouses' financial capacity, their participation in the decision to incur the debt, or their consumption of the goods or services that the debt was incurred to acquire.

(d) Debt has been incurred to finance a spouse's education, in which case it is treated as the separate obligation of the spouse whose education it financed.

(3) When a "deferred-sale-of-family-residence order" is made under §3.11, any resulting enhancement in the residential parent's property share is additional child support, whether or not it is recognized as such in the formal child-support award, and therefore no adjustment is required under this section to offset it.

§4.10 Financial misconduct as grounds for unequal division of marital property

(1) If one spouse, without the other spouse's consent, has made gifts of marital property to third parties that are substantial relative to the total value of the marital property at the time of the gift, the court should augment the other spouse's share of the remaining marital property by one-half of the value of such gifts. This Paragraph applies only to gifts made after a date that is set by counting back, from the date on which the dissolution petition is served, a fixed period of time specified in a rule of statewide application.

(2) If marital property is lost, expended, or destroyed through the intentional misconduct of one spouse, the court should augment the other spouse's share of the remaining marital property by one-half the value of the lost or destroyed property. This Paragraph applies only to misconduct after a date that is set by counting back, from the date on which the dissolution petition is served, a fixed period of time specified in a rule of statewide application.

(3) If marital property is lost or destroyed through the negligence of one spouse, the court should augment the other spouse's share of the remaining marital property by one-half the value of the lost or destroyed property. This Paragraph applies only to negligence that took place after service of the dissolution petition.

(4) If a spouse is entitled to a remedy under Paragraph (1) or (2), or would have been entitled to a remedy had concealed or conveyed property not been recovered, the court should enlarge that spouse's share of the marital property by an amount sufficient to offset all reasonable costs, including professional fees, which that spouse incurred to establish or remedy the improper concealment or conveyance, whenever the court also finds that the other spouse's concealment or conveyance either

(a) had the purpose of denying the first spouse his or her share of the marital property at dissolution, or

(b) was undertaken with knowledge that such denial was its likely effect.

(5) Paragraphs (1), (2), and (3) may be applied to gifts, misconduct, or neglect that occurred prior to the date specified in the statewide rule required under those sections, if facts set forth in written findings of the trial court (§1.02) establish that their application to the earlier incidents is necessary to avoid a substantial injustice.

(6) If there is insufficient marital property for an adjustment in its allocation to provide the appropriate remedy under this section, the court may achieve an equivalent result by

(a) making an award to one spouse of some portion of the other's separate property, as allowed under §4.11, or, if the available separate property is also inadequate for this purpose,

(b) requiring one spouse to make equitable reimbursement to the other in such installment payments as the court judges equitable in light of the financial capacity and other obligations of the spouse making reimbursement.

§4.11 Separate property

(1) In every dissolution of marriage, all separate property should be assigned to its owner, except that when there is insufficient marital property to permit the reimbursement that would otherwise be required under §4.10, the court may reassign the spouses' separate property in order to achieve the equivalent result.

(2) Separate property that is recharacterized as marital property under §4.12 is allocated between the spouses under §4.09 and not under this section.

§4.12 Recharacterization of separate property as marital property at the dissolution of long-term marriage

(1) In marriages that exceed a minimum duration specified in a rule of statewide application, a portion of the separate property that each spouse held at the time of their marriage should be recharacterized at dissolution as marital property.

(a) The percentage of separate property that is recharacterized as marital property under Paragraph (1) should be determined by the duration of the marriage, according to a formula specified in a rule of statewide application.

(b) The formula should specify a marital duration at which the full value of the separate property held by the spouses at the time of their marriage is recharacterized at dissolution as marital property.

(2) A portion of separate property acquired by each spouse during marriage should be recharacterized at dissolution as marital property if, at the time of dissolution, both the marital duration, and the time since the property's acquisition (the "holding period"), exceed the minimum length specified for each in a rule of statewide application.

(a) The percentage of separate property that is recharacterized as marital property under Paragraph (2) should be determined by a formula, specified in a rule of statewide application, that takes into account both the marital duration and the holding period of the property in question.

(b) The formula should specify a marital duration and holding period at which the full value of the property is recharacterized at dissolution as marital property.

(3) For the purpose of this section, any appreciation in the value of separate property, or income from it, that would otherwise itself be separate property, is treated as having been acquired at the same time as the underlying asset, and any asset acquired in exchange for separate property is treated as having been acquired as of the time its predecessor asset was acquired.

(4) A spouse should be able to avoid the application of this section to gifts or inheritances received during marriage by giving written notice of that intention to the other spouse within a time period following the property's receipt that is specified in a rule of statewide application.

(5) The provision of a will or deed of gift specifying that a bequest or gift is not subject to claims under this section should be given effect.

(6) This section should not apply to separate property if, as set forth in written findings of the trial court (§1.02), preservation of the property's separate character is necessary to avoid substantial injustice.

COMMENT

a. General Rationale. This section gives spouses in long-term marriages a share, at dissolution, in one another's separate property. According to the principle set forth in Paragraph (1)(a), that share increases with the length of their marriage. The share begins at zero in the marriage's earliest years. Serious inequities could result in the short-term marriage if the rule were otherwise. As the marriage lengthens, however, the equities change. After many years of marriage, spouses typically do not think of their separate-property assets as separate, even if they would be so classified under the technical property rules. Both spouses are likely to believe, for example, that such assets will be available to provide for their joint retirement, for a medical crisis of either spouse, or for other personal emergencies. The longer the marriage, the more likely it is that the spouses will have made decisions about their employment or the use of their marital assets that are premised in part on such expectations about the separate property of both spouses. If the marriage ends with the death of the wealthier spouse, the common law has traditionally provided the remedy of a forced share for survivors not otherwise provided for. The 1990 revision of the Uniform Probate Code gradually enlarges the spouse's forced share with the duration of the marriage according to a mechanical formula. Section 4.12 of these Principles provides an analogous remedy when the marriage ends with dissolution rather than death.

States that distinguish between marital and separate property generally do not have provisions under which the character of separate property changes with the passage of time. However, some states make no distinction between separate and marital property, and permit their courts to award any property owned by either spouse to the other. In practice, it appears that the longer the marital duration, the more likely are courts in these states to allocate a portion of one spouse's premarital or inherited property to the other spouse. This section reaches a similar result. . . .

CHAPTER 5. COMPENSATORY SPOUSAL PAYMENTS

TOPIC 1. INTRODUCTORY PROVISIONS

§5.01 Scope

(1) This Chapter sets forth the principles that govern financial claims between spouses arising in the dissolution of their marriage, other than claims for a share in their property or for support of their children.

(2) The enforceability of agreements between spouses or prospective spouses concerning financial claims otherwise arising under this Chapter is governed by Chapter 7 and not by this Chapter.

(3) The enforcement of judgments is not within the scope of this Chapter, but an order for periodic payments rendered pursuant to the principles set forth in this Chapter should be enforceable by all of the remedies available for enforcement of child-support awards.

§5.02 Objective

(1) The objective of this Chapter is to allocate financial losses that arise at the dissolution of a marriage according to equitable principles that are consistent and predictable in application.

(2) Losses are allocated under this Chapter without regard to marital misconduct, but nothing in this Chapter is intended to foreclose a spouse from bringing a claim recognized under other law for injuries arising from conduct that occurred during the marriage.

(3) Equitable principles of loss recognition and allocation should take into account all of the following:

(a) The loss of earning capacity arising from a spouse's disproportionate share of caretaking responsibilities for children or other persons to whom the spouses have a moral obligation;

(b) Losses that arise from the changes in life opportunities and expectations caused by the adjust-

ments individuals ordinarily make over the course of a long marital relationship;

(c) Disparities in the financial impact of a short marital relationship on the spouses' post-divorce lives, as compared to their situation prior to marriage;

(d) The primacy of the income earner's claim to benefit from the fruits of his or her own labor, as compared to claims of a former spouse.

COMMENT

a. Compensation for losses rather than meeting needs. The division of one household into two typically creates financial losses for the spouses. Without reallocation, these losses are not likely to fall equitably as between them. Such equitable reallocation is therefore the principal objective of this Chapter. The division of property and the provision of child support already reallocate some of the financial losses arising from divorce, but in many divorces there are additional financial losses that these remedies do not address. Not all of these additional losses give rise to claims between the spouses for compensation, but equity requires that many do. This Chapter identifies these compensable financial losses.

The measurement of compensable losses arising at dissolution requires defining the baseline against which to judge the claimant's financial status at dissolution. The sections that follow in Topics 2 and 3 generally adopt the marital living standard as the appropriate baseline in longer marriages, and each spouse's, premarital living standard as the appropriate baseline in shorter marriages. The divorced person may find himself or herself worse off than during the marriage, but better off than before it. In that case, the choice of baseline determines whether the same objective situation is seen as a loss or a gain. For the same reason, a principle that compensates a spouse for loss of the marital living standard could instead be said to protect the gain in living standard that spouse obtained from the marriage. The choice of language is of course less important than the underlying rule it describes. That rule, as implemented in this Chapter, ties the degree of protection against loss of marital living standard to two factors primarily: the marriage's duration (§5.04) and the duration of the period during which the claimant was the primary caretaker of the marital children (§5.05). Because losses are shared, the compensable loss is not equal to the entire loss of living standard in many cases. Losses other than the marital living standard may be compensable without regard to the marital duration or the duration of the caretaking period. Section 5.03 lists the compensable losses and identifies the section that addresses each in detail. The rationale for the selection and measurement of each compensable loss is provided in the identified section.

Counterparts can be found in the existing law of alimony (or as many states now call it, "maintenance") for each of the losses recognized in this Chapter. But, because the modern law of alimony has no coherent rationale, its application varies considerably both among and within jurisdictions. Early in the no-fault reform era, one influential formulation described alimony as an award meant to provide support for the spouse in "need" who is "unable to support himself through appropriate employment." Uniform Marriage and Divorce Act, §308(a)(1) and (2). With time, it has become apparent that this conception of alimony's purpose has two principal difficulties. There is first the failure to provide any satisfactory explanation for placing the obligation to support needy individuals on their former spouses rather than on their parents, their children, their friends, or society in general. The absence of any explanation for requiring an individual to meet the needs of a former spouse leads inevitably to the second problem, the law's historic inability to provide any consistent principle for determining when, and to what extent, a former spouse is "in need." We cannot choose among the many possible definitions of need if we do not know the reason for imposing the obligation to meet it. Some judicial opinions find the alimony claimant in "need" only if unable to provide for her basic necessities, others if the claimant is unable to support himself at a moderate middle-class level, and still others whenever the claimant is unable to sustain the living standard enjoyed during the marriage even if it was lavish. Some opinions suggest that the measure the claimant's need will vary with the identity of his former spouse or the length of his marriage.

These results cannot be harmonized if need is retained as the central concept, for there is nothing to explain why its definition should vary among these cases. The inference is that the explanation for alimony is something other than the relief of need. The gradual realization of this point can be seen in the great number of modern decisions allowing alimony awards without requiring need as the court itself would define it, and in other decisions terminating alimony awards despite the claimant's continued need.

The principal conceptual innovation of this Chapter is therefore to recharacterize the remedy it provides as *compensation for loss* rather than *relief of need.* A spouse frequently seems in need at the conclusion of a marriage because its dissolution imposes a particularly severe loss on him or her. The intuition that the former spouse has an obligation to meet that need arises from the perception that the need results from the unfair allocation of the financial losses arising from the marital failure. This perception explains why we have alimony, and why all alimony claims cannot be adjudicated by reference to a single standard of need. If the payment's justification is not relief of need but the equitable reallocation of the losses arising from the marital failure, then need is not an appropriate eligibility requirement for the award. While many persons who have suffered an inequitable financial loss will be in need, others will not, and the remainder will vary in their degree of need. At the same time, some formerly married individuals may find themselves in need for reasons unrelated to the marriage and its subsequent dissolution. In that case, there may be no basis for imposing a special obligation to meet that need on their former spouses.

This recharacterization of the remedy requires replacing the terms "alimony" and "maintenance," which are both associated historically with relief of need. The term "compensatory payment" or "compensatory award" is therefore employed instead. This change in terms should not obscure the fact that the advantage derived from grounding compensatory payments on a principle of *loss* rather than *need* is less the alteration of existing practices than the explanation of them. The categories of compensable loss bear a close factual relationship to fact patterns that often yield alimony awards in existing law. But focusing on loss permits more coherent definition of the cases qualifying for compensatory payments than is possible in a system judging all claims on the single but ill-defined goal of relieving need. The shift in analysis from *need* to *loss* thus facilitates more precise rules of adjudication, with a correspondingly reduced disparity of result. See Comment *d.*

Equally important, recharacterizing the award's purpose from the relief of need to the equitable allocation of loss transforms the claimant's petition from a plea for help to, a claim of entitlement. Although conceptual confusion over the grounds for alimony has undoubtedly contributed to mistaken judgments in both directions, inadequate or missing awards have been the more frequent problem. This failure of alimony has created pressure to expand the relief available through the division of property so as to reach claims for which that remedy is ill-suited. Reconceptualizing alimony as compensatory payments for losses arising from the marriage and its failure establishes it as an entitlement providing a more reliable remedy for the divorce-related financial claims.

b. Limitation to financial losses. This Chapter provides for the equitable allocation of the financial losses arising from divorce. Divorce also imposes emotional losses and emotional gains, but these Principles do not recognize these as an element of awards. The reasons for this exclusion are pragmatic as well, as principled. The pains and joys that individuals find from divorce are no commensurable with its financial costs, so that there is no method for determining the extent to which compensation for a financial loss should be reduced or enlarged to reflect nonfinancial gains or losses. Any effort to consider the emotional consequences of divorce would also require evaluation of the parties' marital conduct. A spouse may experience relief or even joy from having terminated an oppressive marriage, but we presumably would not wish to reduce that spouse's financial claims by assigning monetary value to these emotional gains. So also if joy came from the freedom to pursue an intimate relationship with a third person that had begun during the marriage, unless we distinguish the cases on grounds of fault. These same examples could of course be offered with the genders reversed. The point is nonetheless the same: To include consideration of emotional losses and gains would require a more general examination of marital misconduct, which this

Similar reasoning requires exclusion of the emotional loss sometimes borne by the noncustodial spouse who suffers estrangement from the marital children. Here, too, there is no common scale on which to weigh this estrangement and the spouses' financial losses. Moreover, the equitable weight of the noncustodial spouse's claim may depend upon whether the estrangement results from the custodial arrangement or the claimant's own conduct, yet that distinction would result in many of the same difficulties that counsel against marital fault adjudications. Finally, the parent's emotional disengagement from the marital children may have benefits as well as burdens, and the noncustodial spouse's emotional loss could not be considered in isolation from these other emotional consequences of the custodial arrangements. Taking full account of the emotional effects would require the court to gauge the net emotional outcome for each parent, and then compare them to one another. These Principles therefore exclude claims of emotional loss by the noncustodial parent, just as other nonfinancial losses are excluded.

c. Limitation to losses arising from dissolution. The remedies provided by section aim at an equitable allocation of the losses that are realized when one household is divided into two. They are not meant to provide compensation for inequities in the spousal give and take during the marriage. Divorcing individuals are likely to believe that the allocation of resources and responsibilities during their marriage was unfair. It would seem certain that some are correct. But the divorce law cannot provide general relief for unfair conduct in marriage. Married couples spend their funds on many joint consumption items — homes, vacations, automobiles, entertainment, meals — the value of which are impossible to locate between the spouses even though some will have been purchased primarily for their utility to one spouse, others for their utility to the other. The same is true of all activities during marriage that affect both spouses.

The no-fault divorce law of most states gives spouses the legal power to terminate the marriage unilaterally. In principle, this power makes it impossible for either spouse to impose an inequitable arrangement on the other, at least in the long term. In practice, this may not be true. Parties may be bound together by nonlegal ties that keep persons in unhappy relationships. There is little the law can do to alter that. The law can, however, ensure that parties are not bound to exploitative relationships by legal rules that place on them an unfair share of the losses that would arise if they divorce. A no-fault divorce law therefore requires concurrent remedies providing an equitable reallocation of those losses.

d. Consistency and predictability in application. The vague standards governing alimony in most existing law yields inconsistent and unpredictable adjudication. The analogous problem for child-support awards was resolved by the widespread adoption of child-support guidelines. Although alimony guidelines

have been employed in some states, they have not been widely adopted. Alimony is more resistant to guidelines because marriage does not alone establish an alimony obligation, in the way that parenthood alone establishes a child-support obligation. The benefits of predictability and consistency that can achieved with guidelines therefore require the prior establishment of a coherent rationale for requiring the award and accompanying rules for identifying eligible claimants. Satisfaction of these requirements, and thus achievement of the objective of consistency and predictability, is facilitated by reconceptualizing the award as compensation for loss rather than as relief of need. See Comment *a*.

e. Exclusion of marital misconduct. Paragraph (2) excludes consideration of marital misconduct in the equitable allocation of the financial losses arising at dissolution. This is consistent with the position of the Uniform Marriage and Divorce Act and of approximately half of the states. Nonfinancial losses are not compensable at dissolution in any event, see Comment *b,* and financial losses are compensable without regard to whether they arise from the other spouse's misconduct. In most states, individuals may bring tort actions to recover for physical and emotional losses arising from the intentional or negligent conduct of their spouse, and the exclusion of marital misconduct from consideration in dissolution proceedings does not bar such tort claims. For a more complete statement of the rationale underlying the exclusion of marital misconduct from dissolution proceedings, see Chapter 1, Topic 2.

f. Factors to consider in an equitable allocation of losses. Paragraph (3) sets out four essential components of an equitable allocation of the financial losses at dissolution. The first three identify categories of financial losses that an equitable system must consider. When one of the spouses leaves the labor market, in whole or in part, to care for children or other persons for whom both spouses are morally responsible, a loss in earning capacity may result with effects that linger after dissolution. These losses are addressed more fully in §§5.05 and 5.12. The second component, identified in Paragraph (3)(b), focuses on the consequence of a long-term relationship itself, whether or not it includes children. Over the course of a long marriage, people make adjustments to accommodate their life together, and these adjustments often have a financial impact on them that continues even after their relationship ends. This component of an equitable loss allocation is addressed more fully in §5.04. Finally, Paragraph (3)(c) recognizes that a short marital relationship may, in some cases, have a very different financial impact on one spouse than on the other. Sections 5.15 and 5.13 identify two such cases in which equitable considerations require a financial adjustment between the spouses.

Paragraphs (3)(a), (3)(b), and (3)(c) only identify three general circumstances in which equitable considerations may require a remedy. The commentary to the sections referenced above elaborates upon the rationale for a remedy in each case, identifies more precisely the circumstances under which a remedy is required, and provides an appropriate method for setting the remedy's amount.

Common to these sections is the conviction that, as marriages lengthen, continuing obligations between former spouses depend less on explicit agreement and promise than on their relationship itself, molded by them jointly, with consequences for them and their children. Marriages can give rise to duties that continue even though the marriage itself has been terminated on the petition of one or both spouses. A principal objective of this Chapter is therefore to identify the nature of those duties and the precise contours of the financial obligations arising from them that survive the marriage's dissolution. Paragraph (3)(d) is relevant in determining the limits of the financial obligations arising from these duties. The legal duties that spouses acquire toward one another over time cannot give rise to obligations so demanding as to place the obligor in less favorable circumstances than the obligee. The primacy of an individual's claim to the fruits of his or her own labors survives even the longest relationships, and necessarily limits that individual's responsibility to a former spouse. This principle operates even in fashioning the contours of the legal obligation to one's children, and helps explain why the law allows the income-earner to retain some disproportionate benefit from his earnings, as compared to the children. Legally enforced obligations to a former spouse can be no greater than to one's children. . . .

§5.03 Kinds of compensatory awards

(1) Compensatory awards should allocate equitably between the spouses certain financial losses that either or both may incur at dissolution when the family is divided into separate economic units.

(2) The following compensable losses are recognized in Topic 2 of this Chapter:

(a) In a marriage of significant duration, the loss in living standard experienced at dissolution by the spouse who has less wealth or earning capacity (§5.04).

(b) An earning-capacity loss incurred during marriage but continuing after dissolution and arising from one spouse's disproportionate share, during marriage, of the care of the marital children or of the children of either spouse (§5.05).

(c) An earning-capacity loss incurred during marriage and continuing after dissolution, and arising from the care provided by one spouse to a sick, elderly, or disabled third party, in fulfillment of a moral obligation of the other spouse or of both spouses jointly (§5.12).

(3) The following compensable losses are recognized in Topic 3 of this Chapter:

(a) The loss either spouse incurs when the marriage is dissolved before that spouse realizes a fair return from his or her investment in the other spouse's earning capacity (§5.15).

(b) An unfairly disproportionate disparity between the spouses in their respective abilities to recover their premarital living standard after the dissolution of a short marriage (§5.13).

(4) A spouse may qualify for more than one kind of compensatory award, but duplicate compensation should not be provided for any loss, and

(a) as provided in §§5.04, 5.05, and 5.12, the combined value of all Topic 2 awards cannot exceed the maximum award that could be made under §5.04 alone in any dissolution involving spouses with similar incomes; and

(b) as provided in §§5.15 and 5.13, awards are not available under Topic 3 to an individual whose aggregate entitlement under Topic 2 is substantial.

TOPIC 2. ENTITLEMENTS BASED ON THE PARTIES' DISPARATE FINANCIAL CAPACITY

§5.04 Compensation for loss of marital living standard

(1) A person married to someone with significantly greater wealth or earning capacity is entitled at dissolution to compensation for a portion of the loss in the standard of living he or she would otherwise experience, when the marriage was of sufficient duration that equity requires that some portion of the loss be treated as the spouses' joint responsibility.

(2) Entitlement to an award under this section should be determined by a rule of statewide application under which a presumption of entitlement arises in marriages of specified duration and spousal-income disparity.

(3) The value of the award made under this section should be determined by a rule of statewide application that sets a presumptive award of periodic payments calculated by applying a specified percentage to the difference between the incomes the spouses are expected to have after dissolution. This percentage is referred to in this Chapter as the *durational factor*, and should increase with the duration of the marriage until it reaches a maximum value set by the rule.

(4) The presumptions established under this section should govern unless there are facts, set forth in written findings of the trial court (§1.02), establishing that the presumption's application to the case before the court would yield a substantial injustice. An award may be made under this section in cases where no presumption of entitlement arises, if facts not present at the dissolution of most marriages of similar duration and income levels establish that a substantial injustice will result if there is no compensation, and those facts are set forth in written findings of the trial court (§1.02).

(5) The duration of an award of periodic payments made under this section should be determined as provided in §5.06. Subsequent modification of the award's amount or duration is allowed as provided under §§5.07, 5.08, and 5.09. An award of periodic payments that would otherwise arise under this section may be replaced, in whole or in part, by a single lump-sum payment, as provided in §5.10.

(6) In determining the duration of a marriage for the purpose of this section, the court should include any period immediately preceding the formal marriage during which the parties lived together as domestic partners, as defined in §6.03.

§5.05 Compensation for primary caretaker's residual loss in earning capacity

(1) A spouse should be entitled at dissolution to compensation for the earning-capacity loss arising from his or her disproportionate share during marriage of the care of the marital children, or of the children of either spouse.

(2) Entitlement to an award under this section should be determined by a rule of statewide application under which a presumption of entitlement arises at the dissolution of a marriage in which

(a) there are or have been marital children, or children of either spouse;

(b) while under the age of majority the children have lived with the claimant (or with both spouses, when the claim is against the stepparent of the children), for a minimum period specified in the rule; and

(c) the claimant's earning capacity at dissolution is substantially less than that of the other spouse.

(3) A presumption of entitlement governs in the absence of a determination by the trial court that the claimant did not provide substantially more than half of the total care that both spouses together provided for the children.

(4) The value of an award under this section should be determined by a rule of statewide application under which a presumption arises that the award shall require a set of periodic payments in an amount calculated by applying a percentage, called the *child-care durational factor*, to the difference between the incomes the spouses are expected to have at dissolution.

(a) The rule of statewide application should specify a value for the child-care durational factor that increases with the duration of the *child-care period*, which is the period during which the claimant provided significantly more than half of the total care that both spouses together provided for the children.

(b) The child-care period equals the entire period during which minor children of the marriage, or of the spouse against whom the claim is made, lived in the same household as the claimant, unless a shorter period is established by the evidence. In the case of stepchildren of the spouse against whom the claim is made, the child-care period equals the entire period during which the minor children lived in the same household as both spouses, unless a shorter period is established by the evidence.

(5) A claimant may be entitled to both an award under this section and an award under §5.04, but in no case shall the combined value of the child-care durational factor, and the durational factor employed to determine the presumed award under §5.04, exceed the maximum value allowed for the §5.04 durational factor alone.

(6) The presumed value of the award, as set under Paragraph (4), should govern unless there are facts, set forth in the written findings of the trial court (§1.02), establishing that the presumption's application to the case before the court would yield a substantial injustice.

(7) The duration of an award of periodic payments made under this section should be determined as provided in §5.06. Subsequent modification of the award's amount or duration is allowed as provided under §§5.07, 5.08, and 5.09. An award of periodic payments that would otherwise arise under this section may be replaced, in whole or in part, by a single lump-sum payment, as provided in §5.10.

§5.06 Duration of award of periodic payments under §§5.04 and 5.05

(1) An award of periodic payments made pursuant to §5.04 or §5.05 may have a term that is fixed or indefinite, according to a rule of statewide application under which a presumption arises

(a) that the term is indefinite when the age of the obligee, and the length of the marriage, are both greater than a minimum value specified in the rule; and, when this presumption does not apply,

(b) that the term is fixed at a duration equal, for awards under §5.04, to the length of the marriage multiplied by a factor specified in the rule and, for awards under §5.05, to the length of the child-care period multiplied by a factor specified in the rule.

(2) The term set by the presumption should govern in the absence of written findings of the trial court (§1.02) that show either

(a) that the term specified in the court's order is less likely than the presumed term to require subsequent modification or extension; or

(b) that the presumption's application to the particular case will yield a substantial injustice.

(3) An award of periodic payments, whether fixed or indefinite in term, may be modified, terminated, or extended as provided in §§5.07, 5.08, and 5.09.

(4) In determining the duration of a marriage for the purpose of this section, the court should include any period immediately preceding the formal marriage during which the parties lived together as domestic partners, as defined in §6.03.

§5.07 Automatic termination of awards made under §§5.04 and 5.05

An obligation to make periodic payments imposed under §5.04 or §5.05 ends automatically at the remarriage of the obligee or at the death of either party, without regard to the award's term as fixed in the decree, unless either

(1) the original decree provides otherwise, or

(2) the court makes written findings (§1.02) establishing that termination of the award would work a substantial injustice because of facts not present in most cases to which this section applies.

§5.08 Judicial modification of awards made under §§5.04 and 5.05

(1) The size of the periodic payments previously ordered under §5.04 or §5.05 should be modified if any of the following circumstances exists:

(a) the income of either the obligee or obligor is far below the level upon which the existing award was based, and the living standards of the spouses are therefore substantially more or substantially less disparate than contemplated by the prior order;

(b) the loss for which the award provides compensation is substantially smaller than was expected when the prior award was made because of an increase in the obligee's income;

(c) at the time of the prior order, the obligor's income, upon which the prior award was based, was less than it had been earlier in the marriage, but has since increased substantially.

(2) The amount of the periodic payments awarded under §5.04 or §5.05 may be adjusted to reflect significant changes in the cost of living that adversely affect the obligee, but only to the extent the income of the obligor has increased proportionately.

(3) The modified award is determined by applying the principles set forth in §5.04 or §5.05 to the changed circumstances. Circumstances that would justify departure from the presumptions that ordinarily govern at the time of an initial decree are also cause, if they later arise, for allowing or denying a petition for modification.

(4) The duration of a fixed-term award may be extended if both

(a) the existing decree is based upon a duration shorter than that called for by the governing presumption, and

(b) the circumstances as they actually occur are substantially inconsistent with those expected when the shorter duration was chosen.

§5.09 Effect of obligee's cohabitation

(1) An obligation to make periodic payments under §5.04 or §5.05 is terminated, without regard to its duration as fixed in the decree, when the obligor shows that the obligee established a domestic-partner relationship with a third person, unless either

(a) the original decree provides otherwise, or

(b) the court makes written findings (§1.02) establishing that termination of the award would work a substantial injustice.

(2) An obligor seeking termination of periodic payments under Paragraph (1) must show the obligee's establishment of a domestic-partner relationship with a third person by proof of any of the following:

(a) a court in another proceeding determined in a final order that the obligee established a domestic-partner relationship, as defined in §6.03;

(b) the obligee maintained a common household with the third person and their common child, as defined in §6.03, for the cohabitation parenting period set under §6.03(2);

(a) adding the obligor's share of the family living expenses during the period of education or training to the obligor's direct educational costs, to determine the obligor's total education or training costs;

(b) subtracting from the total costs the income of the obligor during that period, the amount of any debts then incurred that remain outstanding at the time of divorce and that are assigned to the obligor, and expenditures made during that period from the obligor's separate property; and

(c) adjusting the difference for changes in the real value of the dollar between the time when the education was obtained and the time of divorce.

(5) An award under this section is nonmodifiable and takes the form fixed under §5.14.

§5.13 Restoration of premarital living standard after a short marriage

(1) At the dissolution of a marriage in which neither spouse qualifies for an award under §5.04 or §5.05 because the marriage is childless and of short duration, the court may make an award to correct an inequitable disparity that would otherwise exist in the extent to which the spouses are able at dissolution to recover their respective premarital living standards.

(2) A disparity between the spouses in the extent to which each is able at dissolution to recover his or her premarital living standard is inequitable if the disparity arises because

(a) during marriage, or in anticipation of it, one spouse made significant expenditures from separate assets, or gave up specific educational or occupational opportunities; and

(b) the assets were expended, or the opportunities forgone, to allow the other spouse's pursuit of similar opportunities without undue disruption of the marital life, to facilitate the couple's bearing or adoption of children, or to serve some other purpose that the spouses then agreed was important to their marital life; and

(c) at the time of dissolution, the expended assets are largely unrecoverable, or the lost opportunities leave the claimant with an earning capacity that is significantly less than it was before the marriage.

(3) The value of an award under this section should be for half the amount necessary to allow the obligee to recover his or her premarital living standard, unless facts set forth in written findings of the trial court (§1.02) establish that equity requires a different award, in light of the duration of the marriage and of the parties' relative financial circumstances at dissolution.

(4) Where the loss arises from the obligee's forgone educational or occupational opportunities, an award of transitional assistance that allows the obligee a reasonable chance to recover the lost opportunity, or its equivalent, satisfies this section.

(5) An award made under this section may be for either a lump sum, or for periodic payments for a fixed term and amount, as is equitable and practical under the circumstances, and is in either event not modifiable.

§5.14 Form of award under §§5.12 and 5.13

An award made under §§5.12 and 5.13 may take any of the following forms:

(1) an enhanced share of the marital property, pursuant to §4.09;

(2) a lump-sum payment made by the obligor from his separate property;

(3) where neither (a) nor (b) is possible without imposing unreasonable hardship on the obligor, a set term of monthly payments of equivalent value. An award in the form of monthly payments is not modifiable and is unaffected by the death or remarriage of either party.

CHAPTER 6. DOMESTIC PARTNERS

TOPIC 1. SCOPE AND OBJECTIVES

§6.01 Scope

(1) This Chapter governs the financial claims of domestic partners against one another at the termination of their relationship. For the purpose of defining relationships to which this Chapter applies, domestic partners are two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple, as determined by §6.03.

(2) A contract between domestic partners that (i) waives or limits claims that would otherwise arise under this Chapter or (ii) provides remedies not provided by this Chapter, is enforceable according to its terms and displaces any inconsistent claims under this Chapter, so long as it satisfies the requirements of Chapter 7 for the enforcement of agreements.

(3) Nothing in this Chapter forecloses contract claims between persons who have no claims under this Chapter, but who have formed a contract that is enforceable under applicable law.

(4) Claims for custodial and decisionmaking responsibilities, and for child support, are governed by Chapters 2 and 3, and not by this Chapter.

(5) Claims arise under this Chapter from any period during which one or both of the domestic partners were married to someone else only to the extent that they do not compromise the marital claims of a domestic partner's spouse.

§6.02 Objectives of the rules governing termination of the relationship of domestic partners

(1) The primary objective of Chapter 6 is fair distribution of the economic gains and losses incident to termination of the relationship of domestic partners by

(a) allocating property according to principles that respect both individual ownership rights and

equitable claims that each partner has on the property in consequence of the relationship, and that are consistent and predictable in application; and

(b) allocating financial losses that arise at the termination of the relationship according to equitable principles that are consistent and predictable in application. Equitable principles of loss recognition and allocation should take into account

(i) loss of earning capacity arising from a partner's disproportionate share of caretaking responsibilities for children or other persons to whom the partners have a moral obligation;

(ii) losses that arise from the changes in life opportunities and expectations caused by the adjustments individuals ordinarily make over the course of a long relationship;

(iii) disparities in the financial impact of a short relationship on the partners' postseparation lives, as compared to their lives before the relationship; and

(iv) the primacy of the income earner's claim to benefit from the fruits of his or her own labor, as compared to the claims of a domestic partner.

(2) The secondary objective of Chapter 6 is protection of society from social-welfare burdens that should be borne, in whole or in part, by individuals.

COMMENT

a. The basis of this Chapter. A complete treatment of family dissolution cannot limit itself to relationships entered according to the procedures and ceremonies required to create a lawful marriage. Although society's interests in the orderly administration of justice and the stability of families are best served when the formalities of marriage are observed, a rapidly increasing percentage of Americans form domestic relationships without such formalities. Few of these couples make explicit contracts to govern their relationship or its termination. Most states have responded to this reality with principles drawn from the law of contract. Some have applied expansive notions of implied agreement and have also resorted to a variety of equitable doctrines. By these devices, they allow their courts to provide remedies when a domestic relationship dissolves, whether or not it has been created pursuant to an explicit agreement. . . .

Domestic partners fail to marry for diverse reasons. Among others, some have been unhappy in prior marriages and therefore wish to avoid the form of marriage even as they enjoy its substance with a domestic partner. Some begin a casual relationship that develops slowly into a durable union, by which time a formal marriage ceremony may seem awkward or even unnecessary, for many Americans entertain the widespread, albeit erroneous, belief that the mere passage of time transforms cohabitation into common-law marriage. Failure to marry may reflect group mores; some ethnic and social groups have a substantially lower incidence of marriage and a substantially higher incidence of informal domestic relationships than do others. Failure to marry may also reflect strong social or economic inequality between the partners, which allows the stronger partner to resist the weaker partner's preference for marriage. Finally, there are domestic partners who are not allowed to marry each other under state law because they, are of the same sex, although they are otherwise eligible to marry and would marry one another if the law allowed them to do so. In all these cases, the absence of formal marriage may have little or no bearing on the character of the parties' domestic relationship and on the equitable considerations that underlie claims between lawful spouses at the dissolution of a marriage.

This Chapter is premised on the familiar principle that legal rights and obligations may arise from the conduct of parties with respect to one another, even though they have created no formal document or agreement setting forth such an undertaking. The implementation of this principle requires careful definition of the domestic relationships that give rise to such obligations. Domestic relationships that satisfy the criteria of §6.03 closely resemble marriages in function, and their termination therefore poses the same social and legal issues as does the dissolution of a marriage. For that reason, this Chapter applies most of the Principles set out in Chapters 4 and 5 to the dissolution of domestic relationships. The application of these Principles to domestic relationships, and the exceptions to such application, are addressed in §§6.04, 6.05, and 6.06.

The Chapter does not impose all the consequences of recognition as domestic partners on every couple that falls within its definition because domestic partners may, by agreement, avoid the rules that this Chapter would otherwise apply. However, the freedom to contract with respect to a domestic relationship is not unlimited. It is subject, under traditional law as well as under Chapter 7, to some limitations not generally applicable to other contracts. Nevertheless, under §6.01, domestic partners have the same opportunity to contract out of the usual rules as do marital partners. This Chapter may thus be understood as a set of default rules that apply to domestic partners who do not provide explicitly for a different set of rules. The default rules are, in effect, a contract imposed by law on parties who do not set forth their agreement to some different set of rules. The law of marriage and divorce can, of course, be similarly understood. For marital partners who do not make another agreement, entry into formal marriage subjects them to the law of marriage and divorce. For domestic partners who do not make another agreement, their course of conduct over a period of years subjects them to parallel rules set forth in this Chapter.

b. The objectives of this Chapter. The most important objective of this Chapter is just resolution of the economic claims of parties who qualify as Chapter 6 domestic partners. The Chapter also advances, as a secondary objective, the fair allocation of responsibilities between individuals and society. Fairness vis-a-vis society requires that individuals closely implicated in the economic circumstances of persons with whom

they lived as domestic partners assume some economic responsibility for those circumstances. . . .

It is not an objective (or a likely effect) of this Chapter to encourage parties to enter a nonmarital relationship as an alternative to marriage. On the contrary, to the extent that some individuals avoid marriage in order to avoid responsibilities to a partner, this Chapter reduces the incentive to avoid marriage because it diminishes the effectiveness of that strategy. Under this Chapter, one may avoid such obligations in long-term nonmarital relationships only as one may avoid them in marriage, by entering enforceable agreements so providing. Nor are domestic relationships likely to provide a satisfactory alternative to marriage for those otherwise inclined to marry, because informal domestic relationships are not generally recognized by third parties, including governments, which often make marriage advantageous under various regulatory and benefit schemes. . . .

TOPIC 2. WHETHER PERSONS ARE DOMESTIC PARTNERS

§6.03 Determination that persons are domestic partners

(1) For the purpose of defining relationships to which this Chapter applies, domestic partners are two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple.

(2) Persons are domestic partners when they have maintained a common household, as defined in Paragraph (4), with their common child, as defined in Paragraph (5), for a continuous period that equals or exceeds a duration, called the *cohabitation parenting period*, set in a rule of statewide application.

(3) Persons not related by blood or adoption are presumed to be domestic partners when they have maintained a common household, as defined in Paragraph (4), for a continuous period that equals or exceeds a duration, called the *cohabitation period*, set in a rule of statewide application. The presumption is rebuttable by evidence that the parties did not share life together as a couple, as defined by Paragraph (7).

(4) Persons *maintain a common household* when they share a primary residence only with each other and family members; or when, if they share a household with other unrelated persons, they jointly, rather than as individuals, with respect to management of the household.

(5) Persons have a *common child* when each is either the child's legal parent or parent by estoppel, as defined by §2.03.

(6) When the requirements of Paragraph (2) or (3) are not satisfied, a person asserting a claim under this Chapter bears the burden of proving that for a significant period of time the parties shared a primary residence and a life together as a couple, as defined in Paragraph (7). Whether a period of time is significant is determined in light of all the Paragraph (7) circumstances of the parties' relationship and, particularly, the extent to which those circumstances wrought change in the life of one or both parties.

(7) Whether persons share a life together as a couple is determined by reference to all the circumstances, including:

(a) the oral or written statements or promises made to one another, or representations jointly made to third parties, regarding their relationship;

(b) the extent to which the parties intermingled their finances;

(c) the extent to which their relationship fostered the parties' economic interdependence, or the economic dependence of one party upon the other;

(d) the extent to which the parties engaged in conduct and assumed specialized or collaborative roles in furtherance of their life together;

(e) the extent to which the relationship wrought change in the life of either or both parties;

(f) the extent to which the parties acknowledged responsibilities to each other, as by naming the other the beneficiary of life insurance or of a testamentary instrument, or as eligible to receive benefits under an employee-benefit plan;

(g) the extent to which the parties' relationship was treated by the parties as qualitatively distinct from the relationship either party had with any other person;

(h) the emotional or physical intimacy of the parties' relationship;

(i) the parties' community reputation as a couple;

(j) the parties' participation in a commitment ceremony or registration as a domestic partnership;

(k) the parties' participation in a void or voidable marriage that, under applicable law, does not give rise to the economic incidents of marriage;

(l) the parties' procreation of, adoption of, or joint assumption of parental functions toward a child;

(m) the parties' maintenance of a common household, as defined by Paragraph (4).

TOPIC 3. CONSEQUENCES OF A DETERMINATION THAT PERSONS ARE DOMESTIC PARTNERS

§6.04 Domestic-partnership property defined

(1) Except as provided in Paragraph (3) of this section, property is domestic-partnership property if it would be marital property under Chapter 4, had the domestic partners been married to one another during the domestic-partnership period.

(2) The domestic-partnership period

(a) starts when the domestic partners began sharing a primary residence, unless either partner shows that the parties did not begin sharing life together as a couple until a later date, in which case the domestic-partnership period starts on that later date, and

(b) ends when the parties ceased sharing a primary residence.

For the purpose of this Paragraph, parties who are the biological parents of a common child began sharing life together as a couple no later than the date on which their common child was conceived.

(3) Property that would be recharacterized as marital property under §4.12 if the parties had been married, is not domestic-partnership property.

§6.05 Allocation of domestic-partnership property

Domestic-partnership property should be divided according to the principles set forth for the division of marital property in §4.09 and §4.10.

§6.06 Compensatory payments

(1) Except as otherwise provided in this section,

(a) a domestic partner is entitled to compensatory payments on the same basis as a spouse under Chapter 5, and

(b) wherever a rule implementing a Chapter 5 principle makes the duration of the marriage a relevant factor, the application of that principle in this Chapter should instead employ the duration of the domestic-partnership period, as defined in §6.04(2).

(2) No claim arises under this section against a domestic partner who is neither a legal parent nor a parent by estoppel (as defined in §2.03) of a child whose care provides the basis of the claim.