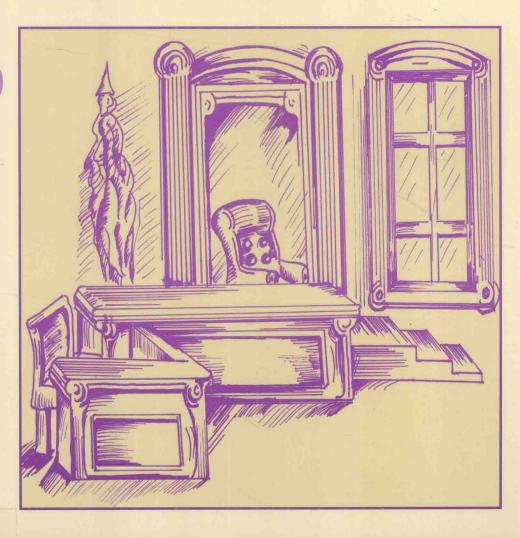
Fifth Edition
Robert E. Oliphant
Nancy Ver Steegh



Fifth Edition

Robert E. Oliphant

Professor of Law Emeritus Mitchell Hamline School of Law

Nancy Ver Steegh

Professor of Law Mitchell Hamline School of Law Copyright © 2016 CCH Incorporated.

Published by Wolters Kluwer in New York.

Wolters Kluwer Legal & Regulatory Solutions U.S. serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.WKLegaledu.com)

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or utilized by any information storage or retrieval system, without written permission from the publisher. For information about permissions or to request permissions online, visit us at www.WKLegaledu.com, or a written request may be faxed to our permissions department at 212-771-0803.

To contact Customer Service, e-mail customer.service@wolterskluwer.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer Attn: Order Department PO Box 990 Frederick, MD 21705

Printed in the United States of America.

1234567890

ISBN 978-1-4548-6844-6

Library of Congress Cataloging-in-Publication Data

Names: Oliphant, Robert E., 1938- author. | Ver Steegh, Nancy, 1953- author.

Title: Family law / Robert E. Oliphant, Professor of Law Emeritus, Mitchell Hamline School of

Law, Nancy Ver Steegh, Professor of Law, Mitchell Hamline School of Law.

Description: Fifth edition. | New York: Wolters Kluwer, [2016]

Identifiers: LCCN 2015049260 | ISBN 9781454868446

Subjects: LCSH: Domestic relations - United States - Outlines, syllabi, etc.

Classification: LCC KF505.Z9 O43 2016 | DDC 346.7301/5 — dc23

LC record available at http://lccn.loc.gov/2015049260



EDITORIAL ADVISORS

Erwin Chemerinsky

Dean and Distinguished Professor of Law Raymond Pryke Professor of First Amendment Law University of California, Irvine School of Law

Richard A. Epstein

Laurence A. Tisch Professor of Law New York University School of Law Peter and Kirsten Bedford Senior Fellow The Hoover Institution Senior Lecturer in Law The University of Chicago

Ronald J. Gilson

Charles J. Meyers Professor of Law and Business Stanford University Marc and Eva Stern Professor of Law and Business Columbia Law School

James E. Krier

Earl Warren DeLano Professor of Law The University of Michigan Law School

Richard K. Neumann, Jr.

Professor of Law Maurice A. Deane School of Law at Hofstra University

Robert H. Sitkoff

John L. Gray Professor of Law Harvard Law School

David Alan Sklansky

Stanley Morrison Professor of Law, Stanford Law School Faculty Co-Director, Stanford Criminal Justice Center

About Wolters Kluwer Legal & Regulatory Solutions U.S.

Wolters Kluwer Legal & Regulatory Solutions U.S. delivers expert content and solutions in the areas of law, corporate compliance, health compliance, reimbursement, and legal education. Its practical solutions help customers successfully navigate the demands of a changing environment to drive their daily activities, enhance decision quality and inspire confident outcomes.

Serving customers worldwide, its legal and regulatory solutions portfolio includes products under the Aspen Publishers, CCH Incorporated, Kluwer Law International, ftwilliam.com and MediRegs names. They are regarded as exceptional and trusted resources for general legal and practice-specific knowledge, compliance and risk management, dynamic workflow solutions, and expert commentary.

Preface

We are pleased to provide an updated and revised fifth edition of Family Law: Examples & Explanations. Each of the 24 chapters features recent developments in family law, and includes hundreds of hypothetical examples and explanations, most of which are based on fact patterns taken from actual cases. Because new developments in family law often reflect underlying societal changes in family structure and demographics, this volume incorporates empirical research and census data that are likely to be of interest to the reader. We also highlight ways that the practice of family law and the role of attorneys have been transformed through the use of processes such as mediation and collaborative law.

This book contains a balanced and in-depth analysis of family law. Because the tapestry of family law is complex, and because we believe that focus is an essential ingredient to learning, we have separated the subject of family law into specific topics that are organized as chapters. Each chapter is subdivided into discrete sections that often include hypothetical examples and illustrative explanations. We have based our analysis and the examples and explanations on nationally accepted legal principles. However, because family law is so often state specific, the text contains contrasting perspectives from various jurisdictions. To eliminate confusion and to assist with family law research, we have included hundreds of citations to relevant state decisions and legislation associated with the principles under consideration.

We believe that this book provides a clear, well-organized, and efficient learning platform that will assist readers in understanding and appreciating the subject of family law.

Robert E. Oliphant Nancy Ver Steegh

February 2016

Acknowledgments

We are thankful for the hard work, assistance, and encouragement of the generous people who have helped us complete five editions of this book.

In addition to the Wolters Kluwer editors, William Mitchell College of Law and its administration have remained solid supporters of the project since its beginning. A special thanks to Levit & James, Inc. for its support and generous use of its software to create the Table of Cases.

Our respective book widow and widower spouses, Susan Oliphant and Jack Ver Steegh, have been patient, tolerant, and supportive as we worked on the manuscripts for this edition. Thank you!

Summary of Contents

Contents			ix
Preface			xxix
Acknowle	edgm	ents	xxxi
Chapter	1	A History of Marriage and Divorce	1
Chapter	2	${\it Marriage Contracts-Requirements and Restrictions}$	19
Chapter	3	Annulment of Marriage	81
Chapter	4	Who May Divorce? Restrictions and Requirements	111
Chapter	5	Child Custody and Parenting Plans	141
Chapter	6	Modifying Child Custody	169
Chapter	7	Interstate Custody Struggles: The Uniform Child Custody Jurisdiction Enforcement Act and the	
		Parental Kidnapping Prevention Act—History,	
		Restrictions, and Requirements	213
Chapter	8	Parenting Time and Visitation	247
Chapter	9	Establishing Child Support	269
Chapter	10	Child Support Modification and Enforcement	297
Chapter	11	Establishing Alimony	319
Chapter	12	Modification of Alimony	339
Chapter	13	Dividing the Marital Estate upon Divorce	355
Chapter	14	Premarital (Antenuptial or Prenuptial) Contracts—	
		History, Requirements, and Restrictions	391
Chapter	15	Cohabitation	427
Chapter	16	Determining Parentage	457
Chapter	17	Adoption	483
Chapter	18	Assisted Reproduction — History, Restrictions, and Requirements	509
Chapter	19	Domestic Violence	541
Chapter	20	Neglect, Dependency, Child Abuse, and Termination of Parental Rights	561

Summary of Contents

Chapter 21	Abortion	589
Chapter 22	Mediation, Collaborative Law, Parenting Coordination, and Arbitration	621
Chapter 23	Professional Responsibility	639
Chapter 24	Jurisdiction	651
Table of Case	25	703
Index		731

viii

Preface Acknowledgments			xxix xxxi
Chapter I	A Hist	cory of Marriage and Divorce	1
	1.1.	Introduction	1
	1.2.	Roman and Early English Views of Marriage	2
	1.3.	Reformation	4
	1.4.	Parliamentary Divorce	4
	1.5.	Colonial American Model of Marriage and	
		Divorce	5
	1.6.	Nineteenth-Century Patriarchic Model of	
		Marriage	6
	1.7.	The Family Law Revolution	11
	1.8.	The Changing Role of the Federal Government	12
	1.9.	Same-Sex Marriage	13
	1.10.	The Value of Marriage	14
Chapter 2	Marria	ge Contracts — Requirements and	
•	Restric	_	19
	2.1.	Introduction	19
	2.2.	How Marriage Contracts Differ from Ordinary	
		Contracts	20
	Marriage	Requirements	20
	2.3.	State of Mind to Marry: Capacity — Generally	20
	2.4.	Capacity — Guardian's Consent	21
	2.5.	Capacity — Age Restrictions	21
	2.6.	Marriage License	22
	2.7.	Solemnizing a Marriage	23
	2.8.	Void/Voidable Distinction	24
	2.9.	Premarital Medical Testing	29
	2.10.	Premarital Counseling and Education	31
	Types of	Marriage	31
	2.11.	Common Law Marriage	31
	2.12	Putative Marriage Doctrine	34

	Forms of	f Marriage	47
	2.13.	Proxy Marriage	47
		Confidential Marriage	49
	2.15.	Tribal Marriages	50
	2.16.	Covenant Marriage	50
	Historic	Marriage Restrictions	51
	2.17.	Epilepsy	51
	2.18.	Anti-Miscegenation Statutes	51
	2.19.	Poverty	54
	2.20.	Prisoners	54
	Present N	Marriage Restrictions	55
	2.21.	Polygamy	55
	2.22.	Bigamy	57
	2.23.	Sham Marriages — Immigration Fraud	57
	2.24.	Consanguinity as a Barrier to Marriage	58
	2.25.	Affinity	59
	2.26.	Adopted Children Marrying Each Other	59
	2.27.	Recognizing Out-of-State Marriage; Lex Loci and	
		Full Faith and Credit	60
	Same-Sex	Marriage	67
	2.28.	History and Religious Perspectives	67
	2.29.	Trend Leading Toward Recognition of Same-Sex	
		Marriage	68
	2.30.	Courts Lead the Way to Eliminate Discrimination	
		Against Same-Sex Couples	69
	2.31.	Out-of-State Recognition of Same-Sex Marriages	72
	Transsex	ual Relationships	72
	2.32.	Recognizing Transsexual Relationships	72
Chapter 3	Annul	ment of Marriage	81
	3.1.	Introduction	81
	3.2.	Void/Voidable Distinction	82
	3.3.	Time Limitations	83
	3.4.	Standing	84
	Retroacti		88
	3.5.	Relation Back — Generally	88
	3.6.	Relation Back — Alimony	89
	3.7.	Relation Back — Uniform Marriage and Divorce Act	91
	3.8.	Relation Back — Enoch Arden Statute	92
	Capacity		92
	3.9.	Mental Capacity	92
	3.10.	Age	93
	3.11.	Under the Influence of Drugs or Alcohol	96
	3.12.	Marriage Made in Jest	96
		, , , , , , , , , , , , , , , , , , , ,	- 0

	Fraud	96
	3.13. Fraud — General Rule	96
	3.14. Immigration Fraud — Sham Marriage	100
	3.15. Fraud — False Pregnancy Claims	101
	3.16. Fraud — Broken Religious Promises	102
	Other	103
	3.17. Duress	103
	3.18. Impotence	103
	3.19. Sexual Preference Issues	104
	Defenses	105
	3.20. Continued Cohabitation	105
	Support and Property Distribution	105
	3.21. Children of a Void Marriage	105
	Procedure	105
	3.22. In Rem Proceeding	105
Chapter 4	Who May Divorce? Restrictions and	
	Requirements	111
	4.1. Introduction	111
	4.2. History	111
	Grounds for Divorce	114
	4.3. Fault	114
	4.4. Common Law Grounds for Divorce	115
	4.5. Common Law Defenses to Divorce Actions	120
	4.6. Divorce Reform in the United States—No-Fault	
	Emerges	128
	4.7. Limited Divorce	132
	4.8. Right to Jury Trial in Divorce Actions	132
	4.9. Covenant Marriage and Divorce	133
	4.10. Recognizing Same-Sex Couple Marriages When	
	They End in Divorce	134
	4.11. Divisible Divorce	134
Chapter 5	Child Custody and Parenting Plans	141
	5.1. Introduction	141
	The Impact of Divorce and Parental Separation	141
	5.2. Effects of Divorce and Separation on Children	141
	5.3. Divorce, Separation, and Parenting	142
	5.4. Parenting Education	143
	Defining Custodial Relationships	143
	5.5. Overview	143
	5.6. Legal Custody	144
	5.7. Physical Custody	144

	5.8.	Joint Legal and Physical Custody	144
	5.9.	Parenting Plans	146
	Presump	otions	149
	5.10.	Overview	149
	5.11.	Historical Paternal Presumption	149
	5.12.	Historical Maternal Presumption	150
	5.13.	Historical Primary Caretaker Presumption	151
	5.14.	Historical and Contemporary Natural Parent	
		Presumption	152
	5.15.	Contemporary Joint Legal and Physical Custody	
		Presumptions	153
	Model A	cts	156
	5.16.	Uniform Marriage and Divorce Act	156
	5.17.	American Law Institute	157
	Standard	s for Determining the Best Interests of the Child	157
	5.18.	Race	157
	5.19.	Religion	158
	5.20.	Disability	158
	5.21.	Child's Preference	159
	5.22.	Separating Siblings	160
	5.23.	Parental Conduct Not Affecting the Child: The	
		Nexus Test	161
	5.24.	Careers	162
	5.25.	Cooperative Parent Provisions	162
	5.26.	Intimate Partner Violence	163
	Processes	s and Professionals	168
	5.27.	Child Custody Evaluators	168
	5.28.	Guardians ad Litem	168
	5.29.	Dispute Resolution Processes	168
Chapter 6	Modif	ying Child Custody	169
	6.1.	Introduction	169
	6.2.	The State as a Third Party	170
	6.3.	Stability Is the Goal	170
	Barriers	to Modification Actions	171
	6.4.	Res Judicata; Presumption; Change in Circumstances	171
	6.5.	Moratorium	172
	Procedur	re	175
	6.6.	Initial Pleadings Must Demonstrate Necessity of Evidentiary Hearing	175
	6.7.	Two-Step Process to Decide Whether Change Is	1/3
	0.7.	Warranted	175
	6.8.	Varying State Modification Standards	176
	0.0.	arying state modification standards	1/0

	Typical C	laims Triggering Modification Demands	182
	6.9.	Unwarranted Denial of Visitation (Parenting	
		Time)	182
	6.10.	Failure to Pay Child Support	183
		Integration into Noncustodial Parent's Home	184
		Custodial Parent's Alleged Immoral Conduct	185
		Poor Parenting/Discipline	186
		Smoking	187
		Death of a Parent	187
		Disability of a Parent	188
		Drug Use	188
		Endangerment	189
		Modifying Joint Parenting Plans	190
	The Role	of a Child's Preference to Modify Custody	191
		Maturity	191
	Sole Custo	odian Relocating to Another Jurisdiction	196
		Introduction	196
		Relocation and Constitutional Right to Travel	197
	6.23.	The Social Science Relocation Debate	199
		Relocation Presumptions and Standards	200
		Active Military Service	202
		Natural Parent Presumption	203
		Where Parents Share Joint Physical Custody	204
	6.27.	Overview	204
	Model Re	location Drafting Efforts	205
	6.28.	American Law Institute (ALI)	205
	6.29.	American Academy of Matrimonial Lawyers	
		(AAML)	205
Chapter 7	Child C	te Custody Struggles: The Uniform sustody Jurisdiction Enforcement Act Parental Kidnapping Prevention listory, Restrictions, and ements	213
	7.1.	Introduction	213
	7.2.	Domicile View of Jurisdiction	214
	7.3.	Supreme Court Generates Uncertainty	215
	7.4.	First Interstate Jurisdiction Model Act — UCCJA	216
	7.5.	Parental Kidnapping Prevention Act (PKPA)	217
	7.6.	Native Americans — PKPA	220
	7.7.	Second Model Act: The Child Custody Jurisdiction	
		Enforcement Act — UCCJEA	222
	7.8.	The Status Theory of Jurisdiction	227

	7.9.	International Application of UCCJEA and Related	
		Laws	229
	7.10.	Is Canada a State for UCCJEA Purposes?	230
Chapter 8	Parenti	ing Time and Visitation	247
	8.1.	Introduction	247
	Model Ad	cts	248
	8.2.	Uniform Marriage and Divorce Act (UMDA):	
		Reasonable Visitation	248
	8.3.	American Law Institute (ALI)	249
	Standards	for Denying or Limiting Parenting Time	250
	8.4.	Denial or Suspension of Parenting Time	250
	8.5.	Restrictions on Parenting Time	250
	8.6.	Child Abuse and Intimate Partner Violence	251
	8.7.		251
		Child Abduction	251
		Cohabitation	252
		Religious Differences	252
		ent of Parenting Time	255
	8.11.	Contempt and Modification of Custody	255
	8.12.	Compensatory Parenting Time	255
	8.13.	Withholding Child Support	256
		Wishes of the Child	256
		ion of Parenting Time	257
		UMDA Provisions	257
		by a Third-Party	258
		Grandparents	258
		Troxel v. Granville	259
		Visitation with Stepparents	263
	8.19.	Visitation with a Nonbiological Gay or Lesbian	
	0.00	Co-Parent	264
	8.20.	Parents by Estoppel and De Facto Parents	265
Chapter 9	Establi	shing Child Support	269
	9.1.	Introduction	269
	History		269
	9.2.	Elizabethan Poor Laws	269
	9.3.	Common Law	270
	9.4.	The Changing Legal Landscape	271
	Role of the	he Federal Government	271
	9.5.	Child Support Traditionally a State Issue	271
	9.6.	Child Support and Establishment of Paternity Act	
		of 1974	271

xiv