



UNDERSTANDING FAMILY LAW

THIRD EDITION



John De Witt Gregory
Peter N. Swisher
Sheryl L. Wolf



LexisNexis

UNDERSTANDING FAMILY LAW

THIRD EDITION

John De Witt Gregory

*Sidney & Walter Siben Distinguished Professor of Family
Law*

Hofstra University

Peter N. Swisher

*Professor of Law
University of Richmond*

Sheryl L. Wolf

*Professor of Law
University of New Mexico*



LexisNexis™

Library of Congress Cataloging-in-Publication Data

Gregory, John DeWitt

Understanding family law / John De Witt Gregory, Peter N. Swisher, Sheryl L. Wolf.--
3rd ed.

p. cm. --(Understanding series)

Includes index.

ISBN 0-8205-6337-4 (softbound)

1. Domestic relations--United States. I. Swisher, Peter N., 1944-II. Wolf, Sheryl
L. (Sheryl Lynn), 1948-III. Title. IV. Series.

KF505.G734 2005

346.7301'5--dc22

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are trademarks of Reed Elsevier Properties Inc, used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.

Copyright © 2005 Matthew Bender & Company, Inc., a member of the LexisNexis Group.
All Rights Reserved. Originally published in

No copyright is claimed in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material exceeding fair use, 17 U.S.C. § 107, may be licensed for a fee of 10¢ per page per copy from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

ISBN#: 0-8205-6337-4

Editorial Offices

744 Broad Street, Newark, NJ 07102 (973) 820-2000

201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200

701 East Water Street, Charlottesville, VA 22902-7587 (804) 972-7600

www.lexis.com

TABLE OF CONTENTS

	Page
Chapter 1 AN INTRODUCTION TO FAMILY LAW	
§ 1.01	General Introduction 1
	[A] Legislative Regulation of Family Law 2
	[B] Judicial Regulation of Family Law 2
	[C] The Role of the Family Law Practitioner 5
§ 1.02	What is a Family? 7
	[A] The Traditional Family 8
	[B] The Nontraditional Family 12
§ 1.03	State Regulation of Family Law 16
§ 1.04	Federal Regulation of Family Law 17
§ 1.05	Constitutional Parameters to Family Law Regulation 19
Chapter 2 MARRIAGE AND MARRIAGE ALTERNATIVES	
§ 2.01	Introduction 23
§ 2.02	Consensual Alternatives to Marriage 25
	[A] Nonmarital Cohabitation: Contract Implications 26
	[B] Nonmarital Cohabitation: Property Issues 29
	[C] Nonmarital Cohabitation: Status Implications of Do- mestic Partnerships and Civil Unions 30
§ 2.03	Marriage: A Status or Contract? 33
§ 2.04	Formal Statutory Marriage 37
§ 2.05	Informal Marriages 39
	[A] Common Law Marriage 39
	[B] Putative Marriage 41
	[C] Marriage by Proxy 42
	[D] De Facto “Marriage” 43
	[E] “Marriage” by Estoppel 45
§ 2.06	The Last-in-Time Marriage Presumption 47

	Page
§ 2.07 Proof of Marriage	48
§ 2.08 Capacity and Intent to Marry	49
[A] Void and Voidable Marriages	49
[B] Same Sex Marriage	50
[C] Bigamous and Polygamous Marriage	54
[D] Incestuous Marriage: Prohibited Degrees of Kinship	56
[E] Underage Marriage	58
[F] Mental and Physical Incapacity	59
[1] Mental Incapacity	59
[2] Physical Incapacity	60
[G] Fraudulent Marriage	60
[H] Marriage under Duress	62
[I] Sham Marriage	62
[J] Marriage in Jest	63
§ 2.09 Conflict of Laws: Which Marriage Laws Govern?	64
§ 2.10 Annulment of Marriage	65
[A] Annulment Jurisdiction	65
[B] Annulment Grounds and Defenses	66
[C] Property and Support Rights on Annulment	67
 Chapter 3 PROPERTY AND SUPPORT RIGHTS DURING MARRIAGE	
§ 3.01 Introduction	69
§ 3.02 The Common Law Theory of Property Rights	70
§ 3.03 The “ <i>Feme Sole</i> Estate” and the Married Women’s Property Acts	71
[A] The “ <i>Feme Sole</i> Estate”	71
[B] The Married Women’s Property Acts	72
§ 3.04 Tenancy by the Entirety	72
§ 3.05 Common Law Property Rights on Death of a Spouse	74
[A] Common Law Dower and Curtesy	74
[B] Elective Share Statutes	75

	Page
§ 3.06 The Community Property System	76
§ 3.07 The Uniform Marital Property Act	79
§ 3.08 Marriage as an “Economic Partnership”	81
§ 3.09 Support Rights and Obligations	83
§ 3.10 The Doctrine of Necessaries	84
§ 3.11 Separate Maintenance	87
§ 3.12 Statutory Support Obligations	89
[A] Spousal and Child Support Statutes	89
[B] Criminal Non-Support Statutes	90
[C] Pendente Lite Statutes	90
§ 3.13 Rights of Consortium	91
§ 3.14 Relative Responsibility Statutes	92
§ 3.15 Support Enforcement Remedies	94

Chapter 4 MARITAL CONTRACTS AND AGREEMENTS

§ 4.01 Introduction	97
§ 4.02 Marriage Promises and Premarital Gifts	100
[A] Breach of Promise to Marry	100
[B] Fraudulent Inducement to Marry Actions	101
[C] Contracts Restraining or Promoting Marriage	101
[D] Premarital Gifts	102
§ 4.03 Premarital Agreements	103
[A] Traditional versus Modern Approaches	103
[B] The Uniform Premarital Agreement Act	107
§ 4.04 Contractual Agreements Between Husband and Wife	108
§ 4.05 Postnuptial and Separation Agreements	110
[A] Separation Agreements: Necessary Elements	111
[B] Separation Agreements: Application of Principles	115

Chapter 5 PROCREATION

§ 5.01 Introduction	117
-------------------------------	-----

	Page
§ 5.02 Paternity and Legitimacy	118
[A] Historical Background and Current Perspectives	118
[B] The Presumption of Legitimacy	120
[C] Children of Void and Voidable Marriages	123
[D] Constitutional Protection of the Nonmarital Child	123
[E] Paternity Grounds and Actions	125
[1] The Uniform Parentage Act	127
[2] Jurisdictional Issues	128
[3] Private Promises and Contracts	128
[F] Scientific Testing in Paternity Proceedings	129
[G] Inheritance Rights	132
[H] Artificial Insemination	135
[I] Custody Issues	136
[J] Claims and Defenses in Paternity Actions	137
§ 5.03 The Fundamental Right to Procreate	140
§ 5.04 Contraception	142
§ 5.05 Abortion	144
[A] General Introduction	144
[B] Constitutional Parameters: <i>Roe v. Wade</i>	145
[C] Constitutional Parameters: The State Response	147
[1] Rights of the Potential Father	147
[2] Rights of Minors	148
[3] Health and Safety Regulations	149
[4] Funding and Facilities	150
[5] Re-evaluation of <i>Roe v. Wade</i>	152
[6] Abortion Demonstrations	154
§ 5.06 Voluntary and Involuntary Sterilization	155
[A] Voluntary Sterilization	156
[B] Involuntary Sterilization	157
§ 5.07 Artificially Aided Conception	163
[A] Artificial Insemination	164
[B] Surrogate Motherhood	169

	Page
[C] In Vitro Fertilization	176
 Chapter 6 ADOPTION	
§ 6.01 Adoption and Termination of Parental Rights	183
[A] Introduction and Overview	183
[B] Involuntary Termination of Parental Rights	184
[1] Introduction	184
[2] Statutory Requirements	184
[3] Constitutional Considerations	185
[4] Grounds for Termination of Parental Rights	186
[a] Abandonment	186
[b] Child Abuse, Neglect and Dependency	187
[c] Failure to Provide Child Support	188
[d] Unfitness	189
[e] Mental or Physical Disability of the Parent	190
[f] Best Interests of the Child	190
[C] Independent or Private Adoption	191
[D] Agency Adoption	193
[E] Consent	195
[1] Who Must Give Consent?	195
[2] Consent of the Unwed Father	195
[3] Consent of Minor Parent	198
[4] Revocation of Consent	199
[F] Subsidized Adoptions and Children With Special Needs	200
[G] Adult Adoption	201
[H] Equitable Adoption	202
[I] Effects of Adoption	202

Chapter 7 UNIQUE FAMILY ISSUES

§ 7.01 Introduction	205
-------------------------------	-----

	Page
§ 7.02 Intrafamily Tort Immunity and Liability	206
[A] Interspousal Tort Actions	206
[B] Child and Parent Tort Actions	208
§ 7.03 Parental Discipline of a Child	211
§ 7.04 Parental Liability for a Child's Act	211
§ 7.05 Medical Care for the Child and the Spouse	212
§ 7.06 Wrongful Death, Wrongful Birth, and Wrongful Life	215
§ 7.07 Regulation of a Child's Education	217
§ 7.08 Domestic Violence	219
[A] Spousal Abuse	221
[B] Child Abuse	226
[C] Spousal Rape	229
§ 7.09 Children in Need of Supervision	230
§ 7.10 Family Rights versus Individual Rights	232

Chapter 8 DIVORCE GROUNDS AND DEFENSES

§ 8.01 Introduction	235
[A] Historical Background	235
[B] Fault Grounds for Divorce and the No-Fault Revolution	236
[C] Current Divorce Concerns and Statistics	238
[D] The Continuing Debate Over Fault Factors in Con- temporary Divorce Actions	240
§ 8.02 Jurisdiction and Venue	241
[A] Divorce Jurisdiction in General	241
[B] The Domiciliary Requirement	242
[C] Venue	246
[D] Service on the Defendant	247
[E] Bilateral Divorces	248
[F] Ex Parte Divorces	248
[G] Migratory Divorces	248
[1] Sister State Divorces	249
[2] Foreign Country Divorces	252
[H] The Divisible Divorce Doctrine	255

	Page
[I] Long-Arm Statutes	257
[J] Collateral Attack and Estoppel	258
§ 8.03 Divorce Grounds and Defenses	261
[A] Introduction	261
[B] Fault Grounds for Divorce	262
[1] Bed and Board Divorces and Absolute Divorces	262
[2] Adultery Grounds	263
[3] Cruelty Grounds	264
[4] Desertion Grounds	266
[5] Other Miscellaneous Fault Grounds	267
[C] Defenses to Fault-Based Divorce	268
[1] Connivance	269
[2] Collusion	269
[3] Condonation and Cohabitation	270
[4] Recrimination	271
[5] Justification	272
[6] Other Defenses	273
[D] Divorce Based upon Living Separate and Apart	274
[E] No-Fault Divorce Grounds	276
[F] Effect of Fault on Property Division and Spousal Support	278
[G] "Economic Fault"	281
[H] Divorce Practice and Procedure	281
[I] Appellate Review	284
§ 8.04 Ethical Issues for the Family Lawyer	284
[A] Dual Representation in Divorce Proceedings	285
[B] Confidential Information	288
[C] Attorney Fees on Divorce	290
[D] Sexual Relations with Divorce Clients	292
[E] Candor Toward the Court and Withdrawal from the Case	294
[F] Pro Se Divorces	294
[G] Representing Children	297
§ 8.05 Alternative Dispute Resolution	297

	Page
[A] Divorce Mediation	298
[B] Arbitration	302
 Chapter 9 SPOUSAL AND CHILD SUPPORT ON DIVORCE	
§ 9.01 Introduction	307
§ 9.02 Jurisdiction for Spousal and Child Support	309
[A] The Doctrine of Continuing Jurisdiction	309
[B] The Doctrine of Divisible Divorce	309
[C] Interstate Enforcement Legislation	310
[D] State Long-Arm Statutes	310
[E] Child Support Jurisdiction: The <i>Kulko</i> Case	310
§ 9.03 Spousal Support Factors and Judicial Discretion	312
[A] General Factors	313
[B] Fault as a Factor In Spousal Support	314
§ 9.04 Forms of Spousal Support	315
[A] Temporary Spousal Support <i>Pendente Lite</i>	315
[B] “Permanent” Spousal Support	316
[C] “Rehabilitative” Spousal Support	317
[D] New or Hybrid Forms of Alimony	320
§ 9.05 Modification of Spousal Support	322
§ 9.06 Child Support	331
[A] Basic Concepts	331
[B] Temporary Child Support <i>Pendente Lite</i>	334
[C] Statutory Child Support Guidelines	335
[D] Duration of the Child Support Obligation	343
[E] Modification of Child Support	347
[F] Enforcement of Spousal and Child Support Orders	351
[1] Support Arrearage Issues and Defenses	352
[2] State Enforcement Remedies	353
[a] Contempt Proceedings	353
[b] Other State Law Remedies	355
[3] Interstate Enforcement	356

	Page
[a] Traditional Interstate Enforcement	356
[b] The Uniform Reciprocal Enforcement of Support Acts	358
[c] The Uniform Interstate Family Support Act	358
[4] Federally Mandated Support Enforcement Remedies	361
[a] Income Withholding	362
[b] Security for Payments	363
[c] Income Tax Refund Intercepts	363
[d] Child Support Guidelines	364
[e] Parent Locator Service	365
[f] The Child Support Recovery Act of 1992	365
[g] The Personal Responsibility and Work Opportunity Reconciliation Act of 1996	366
§ 9.07 Federal Tax Consequences of Child and Spousal Support	367
[A] Alimony or Spousal Support Payments	368
[B] Child Support Payments	370
[C] Dependency Exemption for Children	371
[D] Deductibility of Legal Fees	372
[E] Other Divorce Related Taxation Issues	372
[1] Transfer of Property	372
[2] Head of Household Status	373
[3] Joint Returns	374
[4] The Family Home	374
[5] Retirement Plans	375
[6] Stock Transfers and Redemptions	375
[7] Federal Estate and Gift Taxes	376
§ 9.08 Bankruptcy	376
[A] Support Obligations	377
[B] Property Division Debts	383
[C] Marital Liens	384
[D] Automatic Stay	385

	Page
[E] Exempt Property	385
 Chapter 10 EQUITABLE DISTRIBUTION OF PROPERTY	
§ 10.01 Introduction	387
§ 10.02 Community Property Origins	388
§ 10.03 Characterizing Property for the Purpose of Equitable Distribution	389
[A] Dual Property Equitable Distribution Jurisdictions	389
[B] All Property Equitable Distribution Jurisdictions	391
§ 10.04 Characterizing Property as Marital or Separate: Change in Classification	392
[A] The Marital Property Presumption	392
[B] Judicial Development of Classification Rules . . .	393
[1] Inception of Title	393
[2] Source of Funds	393
[3] Transmutation	394
[C] Tracing	396
§ 10.05 Appreciation of Separate Property During Marriage	396
§ 10.06 Gifts and Inheritances	400
[A] Statutory Approaches	400
[B] Judicial Treatment	400
[1] Gifts or Inheritances From a Third Party to Ei- ther Spouse	400
[2] To the Spouses Jointly	401
[3] Interspousal Transfers	402
[4] Was There a Gift?	404
§ 10.07 Personal Injuries and Workers' Compensation	404
[A] Introduction	404
[B] Approaches to Classification	405
§ 10.08 Licenses, Degrees and Enhanced Earnings	406
[A] Overview	406
[B] Statutory Treatment	407
[C] Degree or License Not Property	407

	Page
[D] Degree or License as Marital Property	409
[E] Alternative Remedies for the Supporting Spouse	411
[1] Overview	411
[2] Reimbursement or Rehabilitation	412
§ 10.09 Professional Goodwill	413
[A] Goodwill: Definitions and Basic Concepts	413
[B] Classification of Professional Goodwill	414
[1] Community Property Influences	414
[2] Classification of Goodwill for Equitable Distribution	415
[a] Professional Goodwill as Divisible Property	415
[b] Professional Goodwill Not Divisible	417
[c] Professional Goodwill Divisible if Independent of Individual	418
[C] Valuation	419
[1] Book Value	420
[2] Capitalization of Excess Earnings	420
[3] Buy-Sell Agreements	421
[4] Discount for Minority Interest	422
§ 10.10 Pensions and Retirement Benefits	422
[A] Overview	422
[B] Basic Terms and Concepts	423
[C] Characterization of Pension Benefits	423
[1] Majority View—All Pensions Marital Property	424
[2] Classification of Pensions—Minority View	425
[D] Valuation and Distribution of Pensions	425
[E] Disability Benefits	427
[F] Federal Pensions	429
[G] Qualified Domestic Relations Orders (QDROs)	429
[H] Military Retirement Benefits	430
§ 10.11 Valuation of Assets: General Principles	431

	Page
§ 10.12 Fair and Equitable Distribution	432
[A] Introduction	432
[B] Factors in Equitable Distribution	432
[C] Equal Division and Starting Points	433
[D] Dissipation of Assets and Marital Misconduct	434
[1] Overview	434
[2] What Conduct Constitutes Dissipation?	434
[3] Burden of Proof	435
[4] Remedies for Dissipation	435
[5] Marital Misconduct or Fault	436
[E] Marital Debts and Liabilities	437
[F] The Marital Home	438
 Chapter 11 CHILD CUSTODY AND VISITATION	
§ 11.01 Introduction	441
§ 11.02 Child Custody Jurisdiction	441
[A] Traditional Rules	442
[B] The Uniform Child Custody Jurisdiction Act and the Uniform Child Custody Jurisdiction and Enforce- ment Act	443
[1] Jurisdictional Prerequisites	445
[2] Restraints on Jurisdiction	448
[3] Recognition and Enforcement of Custody Decrees	448
[4] Effect of a Party's Conduct on Jurisdiction	449
[C] The Parental Kidnapping Prevention Act of 1980	451
[1] Scope of Application	451
[2] Similarities and Differences between the Federal and State Statutes	452
[3] Personal Jurisdiction	454
[D] The Hague Convention on International Child Abduc- tion	455
§ 11.03 Factors in Disputed Child Custody Cases	460

	Page
[A] The Best Interests of the Child	460
[B] Doctrinal Presumptions	461
[1] The Tender Years Presumption	461
[2] The Natural Parent Presumption	463
[3] The Primary Caretaker Presumption	465
[C] The Effect of Parental Conduct on Custody Determinations	466
[1] Statutory Provisions Relating to Parental Conduct	467
[2] Judicial Approaches	467
[D] Relative Considerations Between Fit Parents	470
[1] The Gender of the Parents	470
[2] The Child's Preference in Custody Determinations	471
[a] Statutory Treatment	471
[b] Judicial Approaches	471
[3] Race	473
[4] Religion	474
[5] Physical Condition of the Custodial Parent	477
§ 11.04 Joint Custody	480
[A] Introduction and Overview	480
[B] Statutory Joint Custody Provisions	481
[C] Judicial Treatment of Joint Custody	481
§ 11.05 Visitation	484
[A] Right of Noncustodial Parent to Visitation	484
[1] Illustrative Statutes	484
[2] Enforcement of Visitation	485
[a] Statutory Remedies	485
[b] Judicial Remedies	485
[B] Restrictions on Visitation	487
[C] Visitation and Child Support	489
[1] Illustrative Statutes	489
[2] Case Law	489
[D] Visitation by Third Parties	490

	Page
[1] The Common Law Rule	490
[2] Third Party Visitation Statutes	491
[3] Grandparent Visitation	491
[4] Stepparent Visitation	493
[5] “De facto parent” Visitation	494
§ 11.06 Modification of Child Custody	496
[A] Introduction and Overview	496
[B] Judicial Standards for Modification of Custody De- crees	497
§ 11.07 Relocation of Custodial Parent	498
[A] Statutory Restrictions	498
[B] Court Ordered Limitations on Relocation by a Custo- dial Parent	499
§ 11.08 Interference With Child Custody	501
[A] State Criminal Sanctions	501
[B] Tortious Interference With Custody	502
§ 11.09 Mediation of Child Custody Disputes	503
 Table of Cases	 TC-1
 Index	 I-1