In re Gilmore
803 A.2d 601
Supreme Court of New Hampshire
July 24, 2002

Dalianis, J.

The respondent, William E. Gilmore, Jr., appeals an order of the Superior Court … requiring him to pay certain monthly expenses towards his adult child's college education. We reverse and remand.

The record supports the following facts. The parties were divorced in 1991. At the time of their divorce, the parties had two minor children. In the divorce decree the respondent was ordered to pay, among other obligations, "the entire expense of any private schooling or college for the two girls."

By July 2000, the parties' daughter Lindsey was an adult who was commuting to college while living with the petitioner, Nancy J. Gilmore. In September 2000, the petitioner filed a motion requesting that the respondent be ordered to continue paying child support for Lindsey while she attended college.

On November 22, 2000, the trial court dismissed the petitioner's request for child support but ordered the respondent to pay what it characterized as "reasonable college expenses" for Lindsey, including expenses for room and board while she lived at home with the petitioner, as follows:

Tuition, fees and books:	As required
Allowance, as previously established:	$200 per month
Room:	$532 per month
Gas:	$140 per month
Car insurance, repairs, and registration:	$146 per month
Medical and dental expenses:	$ 75 per month
Clothing and shoes:	$200 per month
Food:	$350 per month

The respondent filed a motion for reconsideration and clarification arguing, among other things, that the court did not have jurisdiction to order him to pay for items such as clothing, shoes and an allowance because they are not educational expenses, and that he should not be responsible for Lindsey's educational expenses when she was not in school. The court agreed that the respondent was not responsible for paying Lindsey an allowance, and that he was responsible for her educational expenses only during the months she was attending college, but otherwise denied the respondent's motion.

On appeal, the respondent argues that the court erred in ordering him to pay for such items as transportation, insurance, medical coverage, clothing and shoes because they are not educational expenses. He also argues that the court erred in requiring payments for Lindsey's room and board to be made to the petitioner.

We afford broad discretion to the trial court in divorce matters, and will not disturb the trial court's rulings regarding child support absent an unsustainable exercise of discretion or an error of law. *Rattee v. Rattee,* 146 N.H. 44, 46, 767 A.2d 415 (2001); *cf. State v. Lambert,* 147 N.H. 295, 296, 787 A.2d 175 (2001) (explaining unsustainable exercise of discretion standard). The party challenging the court's order has the burden of showing that the order was "improper and unfair." *Hunneyman v. Hunneyman,* 118 N.H. 652, 653, 392 A.2d 147 (1978) (quotation omitted).

RSA 458:17, I (1992) (amended 1993) provides that:

> In all cases where there shall be a decree of divorce or nullity, the court shall make such further decree in relation to the support, education, and custody of the children as shall be most conducive to their benefit and may order a reasonable provision for their support and education.

Generally, a parent's obligation to pay child support ceases when the child turns eighteen years old or graduates from high school, whichever is later. … Both this court and the legislature, however, have recognized the superior court's jurisdiction to order divorced parents, consistent with their means, to contribute toward the educational expenses of their adult children…. The respondent does not dispute the court's authority to order him to provide for Lindsey's educational expenses. He contends, however, that the court erred when it ordered him to pay for, among other things, transportation costs, medical expenses and clothing. He argues that these expenses are tantamount to child support, which he is no longer obligated to pay. The petitioner counters that the trial court's order was proper because RSA 458:20 allows

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the court to order the respondent to provide for Lindsey's support, maintenance and general welfare while she attends college. We disagree. RSA 458:20, in pertinent part, provides:

> In a proceeding under this chapter, the court may set aside a portion of the property of the parties in a separate fund or trust … for a child of the parties, who is 18 years of age or older, if the child is in college….

This provision gives the trial court authority, when dividing the property of divorcing parties, to order a portion of that property to be placed into a separate educational trust fund for a child who is both in college and at least eighteen years old.

A divorced parent's support obligation does not automatically terminate when a child reaches eighteen years of age…. However, the nature of that support varies depending upon the circumstances and needs of the child. … RSA 458:35-c does not place a time limit on a parent's obligation to pay for reasonable college expenses…. This is so because "jurisdiction to award education expenses is not limited as a matter of law to jurisdiction over minors." …

The issue before us, which is one of first impression, is what constitutes "educational expenses." A number of jurisdictions that have addressed the issue have construed educational expenses to be only those costs directly related to attending college, such as tuition, room and board, and related fees…. . We agree and hold that "educational expenses" are those expenses that are directly related to the child's college education. Such expenses, therefore, include tuition, books, room, board and other directly related fees.

To define "educational expenses" more broadly would essentially require the respondent to pay for Lindsey's general support and maintenance, which would, in this case, conflict with RSA 458:35-c because the petitioner's request for a continuation of child support was dismissed. Consequently, the superior court erred in including amounts for transportation (gas, maintenance and registration), medical and dental coverage, clothing and shoes in its order…..

Moreover, with respect to room and board, we hold that the respondent is not required to pay an amount greater than he would be required to pay if the child resided on campus in college housing. If he is currently paying more than the cost of college housing, then the court must modify its order accordingly. In addition, payments for room and board must ordinarily be made, if Lindsey resides in campus housing, directly to the college, or, if she lives off campus, directly to Lindsey to defray reasonable expenses for "room and board."

We, therefore, reverse the trial court's decision and remand for further proceedings consistent with this opinion.

Case Questions

1. Should a child's aptitude for college level work be considered in cases such as this?
2. Should the obligation to pay for educational expenses include some of the cost of studying abroad?

Noneconomic Obligations

Parents' noneconomic obligations include nurturing and controlling their children, seeing that they attend school, and protecting them from abuse and neglect. Authorities can intervene if parents fail to perform these duties. Although parents generally have the right to make decisions on their child's behalf about religious training and educational and medical needs, this right is limited. When a child's life is threatened, for example, and the parents' religious beliefs prevent them from seeking necessary medical care, the state will often intervene and ensure that the child receives treatment.

Children also have obligations, the single most important of which is to obey their parents. When children perpetually defy their parents, a judicial *CHINS* (child in need of supervision) proceeding may be instituted. Many states also statutorily require adult children to provide their parents with necessaries in the event that the parents become unable to provide for themselves.[56]

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Parental Immunity from Suit by Child

As we saw in Chapter VI, parents have traditionally been protected from suit by their children for negligence and intentional torts by an immunity. Over the last thirty years, however, many states have created exceptions to this immunity and have permitted suits in cases of child abuse, neglect, serious batteries, and the negligent operation of automobiles. Today, most states have either abolished the immunity or severely limited its use.

ENDING SPOUSAL RELATIONSHIPS

Spousal relationships can be ended through the legal actions of annulment and divorce, and they can be judicially altered by legal separation.

Annulment

An action to **annul** is appropriate when a marriage partner seeks to prove that no valid marriage ever existed. Thus the plaintiff is not seeking to terminate a valid marriage but, rather, to have a court declare that no valid marriage ever occurred. Annulments were historically important, especially during periods when divorces were difficult to obtain. Obtaining an annulment of a marriage was very useful because it could end the spousal relationship without branding either party as being "divorced," and thus enable each party to remarry. Today, with the advent of no-fault divorce, actions for annulment are much less popular, except among those who for religious reasons prefer to end a marriage legally without going through a divorce.

Although each state has its own grounds for annulments, common reasons include bigamy (where a person who is already married marries yet again); incest (where a person marries someone who is a close blood relative, contrary to law); mental incompetence (such as where the parties were intoxicated at the time of the ceremony);[57] fraud (such as where one party misrepresents a willingness to engage in sexual relations and have children);[58] coercion; and one or both parties' being underage at the time of the marriage.

Because of the serious potential consequences of an annulment, particularly to property rights, many states have declared the children born to parents whose marriage has been annulled to be legitimate.[59] These states provide by statute that child support and custody matters will be determined in the same way as in divorce cases.[60] Many state courts award temporary alimony, and some award permanent alimony to dependent spouses.[61] Each party to an annulment recovers the property held prior to the marriage and is considered a co-owner of property acquired during the marriage.

Legal Separation

Many states have statutorily recognized an action for **legal separation**, also called a *mensa et thoro* divorce (from table and pillow).[62] The so-called *mensa* divorce can be granted when lawfully married parties have actually separated and when adequate grounds for a legal separation have been shown. Although states differ on what constitute sufficient grounds, common reasons include irreconcilable differences, adultery, desertion, cruelty, and nonsupport. If a court grants a legal separation, the parties remain married to each other but live apart. A criminal action can be brought if one spouse interferes with the other spouse's privacy. Unlike a final divorce, neither party to a legal separation is free to remarry. The court, after considering the financial conditions of each party, can require one spouse to support the other and can determine child custody. States differ about whether a property division should occur. During the legal separation, the possibility of reconciliation still exists, as does the option to proceed with a final divorce. The separation period allows the estranged parties to try to work out their difficulties while living apart.

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Divorce/Dissolution

From the perspective of the early twenty-first century, it is difficult to understand the degree to which contemporary expectations of marriage differ from those of our ancestors. Historically, absolute divorce under Anglo-American law was very difficult to obtain. In New York, for example, the legislature had to approve each divorce until 1787, when courts became statutorily authorized to grant divorces in cases of adultery. This was New York's only ground for a lawful divorce until 1966![63] In nineteenth-century America it was assumed that persons were married for life.[64] In 1900 women lived an average of only forty-eight years,[65] so people were married for shorter periods of time. The social, legal, and economic circumstances of that era encouraged husbands and wives to remain formally married despite the existence of dysfunctional relationships and irreparable differences between the parties. Today, people live longer lives and have more choices.[66] There are fewer pressures on people to marry in the first place, and the miserably married are less likely to remain in intolerable relationships.[67] The availability of birth control permits people to be sexually active without conceiving children. Single parenting is common and is no longer considered unusual. Women have more economic opportunities than they did in 1950. The social stigma of being thirty and divorced or unmarried has greatly diminished. People who marry today do so primarily for companionship,[68] a need that can bring people together but can also cause them to follow different paths as their lives evolve with time.

This social transformation has gradually produced legal changes as well. Although many states had liberalized their divorce laws more than New York had by the early 1960s, divorces were generally limited—at least theoretically—to plaintiffs who proved that their spouses had engaged in adultery, cruelty (sometimes interpreted very liberally), and/or desertion.[69] The fact that a married couple had irreconcilable differences and was married in name only was not a sufficient basis under the law for a divorce. The fault-based approach was anti-divorce and existed because of widely held fears about the social consequences to families and society that would result from what was feared might become divorce on demand. When states began to liberalize their laws to meet the increasing demand for divorce, they often required long waiting periods before a divorce became final. During the waiting period it was unlawful for people to remarry, start new families, and get on with their lives.[70] To get around such restrictions, people often went to Nevada to obtain what were called "quickie divorces," because that state required only a six-week waiting period.[71] Reformers pressed for change, urging lawmakers to focus on the marriage relationship itself and to recognize that the adversarial process of proving fault was making a bad situation worse. It was damaging the parties and making the process of ending a marriage more difficult and painful than it ought to be. It encouraged collusion and caused some parties to perjure themselves, "admitting" things they had not done, just in order to qualify for a divorce.[72] In California, proponents of reform carefully drafted and quietly pursued the legislative process[73] and were rewarded with enactment of the nation's first "no-fault" divorce law, which took effect on January 1, 1970.[74] Once that dam was broken, all states adopted some form of no-fault divorce; the last state acted in 1985.[75] Today, in many states, the plaintiff can choose to proceed either on a no-fault basis or on the traditional fault basis. Proving fault can sometimes be advantageous if it makes it possible to avoid the waiting period that some states require before a divorce becomes final. Furthermore, in some jurisdictions proving fault can affect alimony and child custody decisions. Although state no-fault laws differ, a plaintiff usually has to prove marital breakdown and to prove that the parties have been living separately for a statutorily determined minimum period of time. In most states, a divorce can be granted despite the defendant's objection.[76] As a result of the philosophical changes that have occurred in recent years, the term *divorce* is increasingly being replaced with the more neutral term *dissolution*, which denotes the legal ending of the marital relationship.

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Jurisdictional and Procedural Considerations

You will recall the discussions of *in personam* and *in rem* jurisdiction in Chapter IV and of civil procedure in Chapter V. Because terminating a marriage often involves some interesting jurisdictional problems and specialized procedures, it is important briefly to revisit these topics as they relate to divorce.

Jurisdiction

If it is determined that a court has granted a divorce, awarded alimony, or determined custody of a child without having jurisdiction, the court's action is void and without effect. Furthermore, this jurisdictional deficiency would make the court's judgment ineligible for full faith and credit in other states. Although constitutional due process often permits the termination of a marriage on the basis of *in rem* jurisdiction, a court must have *in personam* jurisdiction over a person who is to be required to make alimony and child support payments. Thus, a court has jurisdiction to grant a divorce decree where at least one marital party has lived within the forum state long enough to satisfy that state's residency requirement. The residency requirement demonstrates a substantial connection with the forum state and helps to establish the *in rem* notion that the marriage itself (the *res*) is physically located within the forum state.

If the plaintiff seeks to have a court decree alimony or to order child support in addition to terminating the marriage, however, *in rem* jurisdiction is insufficient, and the minimum contacts requirement of *in personam* jurisdiction must be satisfied.

Procedure

Many states statutorily permit a court to issue temporary support orders once a divorce action is initiated. This order may temporarily require one party to pay for an economically dependent spouse's necessaries, determine child custody and support, and determine who is responsible for paying which debts. This order is limited and is intended only to enable both parties to meet their living expenses while the action is pending. These issues are not permanently decided until the divorce and related claims have been acted on and a final judgment and order are entered in the case. Although laypeople generally use the term **divorce** to refer to the entire process of concluding and reordering a couple's marital, parental, and economic relationships, this is actually a misnomer. It is common in many states for each of the divorce-related claims to be decided in segments rather than in one long trial. This approach is called **bifurcation**, and it means that child custody, alimony, property division, and marriage dissolution are taken up separately by the court.

Procedural requirements in a divorce action generally vary with the type and complexity of the claims that must be resolved. Thus a contested divorce will generally be more procedurally cumbersome than an uncontested action, and a no-fault action will often be less procedurally complex than a fault-based action. In some states, cooperating parties can privately negotiate a separation agreement that reflects their mutual decision about how property should be divided, the amounts and types of support to be paid, and even proposals about child custody. If the terms of this contract are not unconscionable, the laws of the state can make this agreement binding on the court except as it relates to child custody provisions. In some states, parties to no-fault divorces who have no children and no substantial assets can end their marriages in a matter of minutes.

Allocation of Financial Obligations

When people divorce, in addition to terminating their marital relationship, there is a need to untangle their financial affairs so that each spouse can function independently. This involves determining whether alimony and child support will be paid and allocating the marital assets and liabilities. In some cases the parties are able to resolve these matters amicably by themselves. They may also benefit from the assistance of a mediator or arbitrator (see

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Chapter XIV for more about these options). Where the parties are unable to reach agreement, a judge must ultimately make the decision.

Court-Ordered Alimony

Virtually all states permit a court to require an economically strong spouse to pay financial support to an economically dependent spouse where it is necessary and appropriate. This payment, which is discretionary with the court, is often referred to as **alimony**, although it is also called *spousal support*.[77] Some jurisdictions deny it to any spouse whose marriage ended as a result of that person's marital fault.

One form of spousal support is called *permanent alimony* because it continues until the recipient dies or is remarried. This form of alimony is intended to compensate an economically dependent wife who was married in another era, when homemaking was commonly viewed as a career and when it was reasonable to expect that one's husband would provide support for life. Someone who invested many years taking care of her home and her family, rather than working outside the home, is granted alimony when her marriage is terminated so that she receives economic justice. This form of alimony is on the decline, because public policy today favors sexual equality and because women today generally have the skills and education necessary to get a job and to be self-supporting.

Another type of spousal support, called *rehabilitative alimony,* is awarded for a specified period of years and is intended to provide funds so that the recipient can obtain education or training that will strengthen the person's job prospects. In deciding whether to grant rehabilitative alimony, a court takes into consideration many factors, including the payor's earning capacity; the dependent spouse's health status, work history, and present and future prospects for employment; and the likelihood that the person will take advantage of training and educational opportunities.

A court can order that alimony be paid either in a lump sum or periodically, usually on a monthly basis. If conditions materially change over time, either party can petition for modification. The payor, for example, might seek a reduction because of ill health and unemployment and the fact that the recipient, though not remarried, is cohabiting and has less financial need. The recipient, for example, might argue for an increase to offset inflation's impact on purchasing power and the recipient's need to pay for necessary medical treatment.

Enforcing payment of alimony is very problematic, because courts are reluctant to incarcerate defaulters (how can they earn money while in jail?), and because it is often too expensive for recipients to use the normal remedies available for enforcing civil judgments. (These remedies were discussed in Chapter V.)

Child Custody and Child Support

The general responsibility of parents to support their children was previously addressed in this chapter. The current discussion focuses on child custody and support in the context of a divorce, annulment, or temporary separation.

Although parents can negotiate an agreement and resolve many issues, they can only recommend whether the court should grant custody to both parents (**joint custody**) or grant custody to only one parent. Although the court has the responsibility to protect children, it usually will incorporate into the final judgment the custodial arrangements that have been agreed to by the parents if the arrangements are reasonable and appropriate. The court's decision is of great importance because of the custodial parent's right to make important decisions regarding a child's upbringing. Although judges historically have granted custody of young children to their mothers,[78] most states have discarded the "tender years doctrine," at least as a rigid rule, in response to increasing challenges from fathers during the 1970s.[79] The "best interest of the child" rule, preferred custody statutes (that favor the primary caretaker), and joint custody have become the most widely accepted standards for determining custody.[80] The "best interest of the child" rule requires judges to show no gender preference and to act in the best interest of each child.

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When making this decision, the courts consider such matters as each parent's ability to provide, and interest in providing, the child with love, a good home, food, clothing, medical care, and education. Inquiry will be made into the stability of each parent's employment and whether the employment is compatible with the child's needs. Courts also look for instances of parental misconduct (such as substance abuse and sexually and morally questionable behavior), continuity of care,[81] and a sound moral foundation for the child. The following case demonstrates the difficulty of applying the "best interest of the child" rule. Notice how issues of employment, educational and professional accomplishment, and parental bonding bear on the determination of custody.

Shannon Blakely v. Brandon Blakely
218 P.3d 253
Supreme Court of Wyoming
October 20, 2009

Hill, Justice

Shannon Blakely (Mother) appeals from her divorce decree, contending that the district court abused its discretion when it awarded Brandon Blakely (Father) primary residential custody of the parties' two sons, while the half-brother remained in Mother's custody….

Issue

Mother states the single issue as follows:

Whether the District Court erred when it awarded primary residential custody of the parties' two minor children to [Father]?

Facts

The parties to this action married on January 7, 2003. Mother brought a son, CS, into the marriage, and at the time of the marriage, Mother was pregnant with the couple's first son, CB, who was born in May of 2003. The couple's second son, EB, was born in August of 2005. During the relationship, the family lived in Buffalo, but Father often worked out of town.

The couple separated in October of 2005, with Mother leaving the home and taking all three boys with her. In June of 2007, Mother officially moved to Gillette with the three boys—by this time Mother was engaged to another man and expecting her fourth son, who was born in September of 2007. Father, meanwhile, continued to exercise visitation with his two sons.

Mother filed for divorce in August of 2007, and both parties requested temporary custody, which the district court awarded to Father on January 25, 2008. The case was tried on July 11, 2008, and at the close of evidence, the court made findings on the record. Ultimately, the court awarded primary residential custody to Father, with visitation to Mother. Mother appeals that decision.

Standard of Review

We have stated before that "[c]ustody, visitation, child support, and alimony are all committed to the sound discretion of the district court." ….

This Court has consistently recognized the broad discretion enjoyed by a district court in child custody matters. We will not interfere with the district court's custody determination absent procedural error or a clear abuse of discretion. In determining whether an abuse of discretion has occurred, our primary consideration is the reasonableness of the district court's decision in light of the evidence presented. We view the evidence in the light most favorable to the district court's determination, affording every favorable inference to the prevailing party and omitting from our consideration the conflicting evidence….

Discussion

Mother claims on appeal that in its decision giving primary residential custody to Father, the district court did not "give the welfare and needs of the children paramount consideration." Mother insists that the evidence presented at trial indicated that she was the more appropriate party to have primary residential custody. Essentially, Mother asks us to reweigh the evidence considered by the district court when she points to, and analyzes in detail, each of the statutory factors that guide a custody determination ….

Father contends that the court's decision is supported by the evidence and was a proper exercise of discretion—and, as evidenced by the court's oral ruling, the court thoroughly evaluated the evidence along with the statutory factors.

As we have consistently articulated, "This Court … does not reweigh evidence. Instead, we view the facts in the light most favorable to the prevailing party." …. In child custody determinations, the district court must

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base its decision on the factors articulated in § 20-2-201(a), which provides:

> (a) In granting a divorce, separation or annulment of a marriage or upon the establishment of paternity pursuant to W.S. 14-2-401 through 14-2-907, the court may make by decree or order any disposition of the children that appears most expedient and in the best interests of the children. In determining the best interests of the child, the court shall consider, but is not limited to, the following factors:
>
> (i) The quality of the relationship each child has with each parent;
>
> (ii) The ability of each parent to provide adequate care for each child throughout each period of responsibility, including arranging for each child's care by others as needed;
>
> (iii) The relative competency and fitness of each parent;
>
> (iv) Each parent's willingness to accept all responsibilities of parenting, including a willingness to accept care for each child at specified times and to relinquish care to the other parent at specified times;
>
> (v) How the parents and each child can best maintain and strengthen a relationship with each other;
>
> (vi) How the parents and each child interact and communicate with each other and how such interaction and communication may be improved;
>
> (vii) The ability and willingness of each parent to allow the other to provide care without intrusion, respect the other parent's rights and responsibilities, including the right to privacy;
>
> (viii) Geographic distance between the parents' residences;
>
> (ix) The current physical and mental ability of each parent to care for each child;
>
> (x) Any other factors the court deems necessary and relevant.

No single factor is determinative…. In fact, depending on the case, different factors will present a greater need for emphasis. The one constant is that the resolution must be in the best interests of the children in that particular family….

With these principles in mind, we turn to the facts of the instant case. The record is clear that each parent had a good relationship with the children. The court stated in its oral findings, "… these are two good parents. They both love their children and want the best for their children." Indeed, each party appears to be more than able to handle the care of the children, and the record contains evidence favorable to each party. For instance, Mother lives in a four-bedroom, two-bath home on two and a half acres, and is a stay-at-home mom. And even though Father works full-time, he is very responsible regarding daycare and has that "all lined out," according to the district court. The court found both parents to be on equal footing regarding maintaining and strengthening relationships with each other. The court also found to be a positive feature of both parents "the support of their extended families." The phrase "equal footing" was also applied regarding how the parents and each child interact and communicate with each other, as well as the ability and willingness of each parent to allow the other to provide care without intrusion, respecting the other parent's rights and responsibilities, including the right to privacy. By and large, the court found the parents to be on "equal footing" on most of the factors it considered.

Nevertheless, Mother points to a factor in particular that she believes weighs in her favor—that giving custody of EB and CB to Father splits up the four brothers. This Court has addressed the issue of separating siblings:

> [G]enerally speaking the separating of siblings through custody awards to different parents is not preferred. Keeping siblings together in the same household is considered the better practice. However, this court clarified that the effect of separating siblings from each other is just one of several factors courts consider in determining the primary issue-the best interests of the children….

The district court addressed this very issue at length on the record:

> All right. Another factor I want to take up, under factor 10, which is the general factor that may influence the Court decision is the subject of the half siblings, because it is very important.
>
> … I want the record to reflect I have taken into account the value of half-siblings being raised under the same roof, and I recognize that value….
>
> I am also going to note that right at this moment, that dad has indicated that he has no problem in affording access of these two boys, [CB] and [EB] to their half siblings, and I take that representation at face value.
>
> I want you to know, sir, that if that does not happen, that this Court is going to consider that to be a material and substantial change in circumstances, that could conceivably justify a change in custody later on so that should influence you in the right direction here. These boys

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need to have a full, deep, and long relationship with their half-siblings. And there is no reason why you and their mother cannot arrange that, particularly when you have the support of your extended families behind you.

The court concluded that it was in the children's overall best interests that Father be awarded custody. Furthermore, the court's oral findings were sufficiently detailed so as to provide an adequate basis for its ultimate determination awarding Father custody of the two boys, effectively separating them from their brothers for much of the time.

Because this was such a close case, we would like to again emphasize:

> "The law affords wide discretion to the district court when fashioning custody and visitation provisions for the best interests of the children." … We recognize such discretion encompasses one of the most difficult and demanding tasks assigned to a trial judge…. Ultimately, the "goal to be achieved is a reasonable balance of the rights and affections of each of the parents, with paramount consideration being given to the welfare and needs of the children.…"

Certainly, reasonable minds could reach different conclusions about which parent's custody would be in the best interests of the children….

> Seldom if ever does a divorce court have a choice between a parent who is all good on one side and a parent who is all bad on the other side. The matter of awarding custody is a comparative proposition wherein the court exercises its best judgment and discretion and awards custody to one parent or to the other, according to what the court thinks is for the best interest and welfare of the children.

… Here, even the district court admitted this was a close, tough case. This Court will accede to the district court's determination of the admissibility of evidence unless the court clearly abused its discretion…. The burden is on the party asserting an abuse of discretion to establish such an abuse. … In this instance, Mother has failed to meet the applicable burden and because the record includes sufficient evidence to support the district court's decision, we can find no abuse of discretion in the district court's award of custody to Father.

Conclusion

The district court did not err when it awarded Father primary residential custody of his two sons. This Court can find no abuse of discretion by the district court, and, accordingly, we affirm its decision.

Case Questions

1. Are you satisfied with the Wyoming Supreme Court's reasoning for affirming the trial court's decision?
2. Do you think there is a better way, in cases as close on the merits as this one, to arrive at a just decision as to which parent should have primary physical custody? Which justified rejecting the Iowa preference for not separating siblings in child custody disputes?

From your perspective, how should a court ethically weigh the economic contributions of a parent who works outside the home against the contributions of the parent who provides a child with primary care and psychological support?

Grandparental Visitation

The question as to what rights, if any, grandparents should have to visit their grandchildren has provoked considerable legislation and litigation throughout the country. In a case decided by the U.S. Supreme Court in 2002, *Troxel v. Granville*, 530 U.S. 57, a trial court in Washington, pursuant to a state statute, granted grandparents named the

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Troxels visitation rights with their deceased son's minor children. The children's mother disagreed with the amount of visitation granted by the trial court and appealed to the Washington Supreme Court. That court, believing that the statute was overly broad, concluded that it violated the federal constitution. Although the Troxels successfully petitioned the U.S. Supreme Court for a writ of certiorari, the justices agreed with the Washington Supreme Court and affirmed its decision.

In the aftermath of the *Troxel* decision, many state legislatures redrafted their statutes to accommodate the Supreme Court's concerns. They sought to create a framework for balancing the rights of parents to determine how children should be raised, and with whom they should associate, against denying children and their grandparents, where appropriate and in the best interest of the children, the right to maintain an existing relationship—even if the parent(s) and grandparents are antagonistic toward one another.

Pennsylvania's post-*Troxel* statute can be seen in Figure 9.7. The constitutionality of this statute was upheld by the Pennsylvania Supreme Court in August of 2006 in the case of *Hiller v. Fausey*.

INTERNET TIP

Readers interested in reading the Pennsylvania Supreme Court's decision in reading *Hiller v. Fausey* can find this case on the textbook's website.

In the next case readers will see how a divorced parent's failure to support his/her minor children financially can also be the determining factor in a contested adoption.

§ 5311. When parent deceased.

If a parent of an unmarried child is deceased, the parents or grandparents of the deceased parent may be granted reasonable partial custody or visitation rights, or both, to the unmarried child by the court upon a finding that partial custody or visitation rights, or both, would be in the best interest of the child and would not interfere with the parent-child relationship. The court shall consider the amount of personal contact between the parents or grandparents of the deceased parent and the child prior to the application.

§ 5312. When parents' marriage is dissolved or parents are separated.

In all proceedings for dissolution, subsequent to the commencement of the proceeding and continuing thereafter or when parents have been separated for six months or more, the court may, upon application of the parent or grandparent of a party, grant reasonable partial custody or visitation rights, or both, to the unmarried child if it finds that visitation rights or partial custody, or both, would be in the best interest of the child and would not interfere with the parent-child relationship. The court shall consider the amount of personal contact between the parents or grandparents of the party and the child prior to the application.

FIGURE 9.7 Title 23 Pennsylvania Consolidated Statutes

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ADA v. SA
132 P.3d 196
Supreme Court of Wyoming
April 20, 2006

Kite, Justice

CJ is the stepfather of ADA and SSA (the children), and SA is their biological father. Stepfather petitioned the district court to adopt the children without father's consent because father had failed to provide adequate child support for the children. The district court denied the petition, finding stepfather failed to prove by clear and convincing evidence that father willfully failed to pay child support….

Facts

The children's mother and father were divorced in 2001, and the divorce decree awarded custody of the children to mother and ordered father to pay $527.46 per month in child support. Mother married stepfather in January 2003, and stepfather assumed responsibility for supporting the children. Father did not comply with his child support obligation; consequently, on February 2, 2004, stepfather filed a petition to adopt the children without father's consent pursuant to Wyo. Stat. Ann. § 1-22-110.

The district court held a hearing on stepfather's petition. Father admitted he had not paid child support in accordance with the order but argued his failure was not willful…. [T]he district court concluded father's failure to pay child support was not willful and, consequently, denied stepfather's petition. Stepfather appealed….

Discussion

Stepfather claims the district court abused its discretion by denying his petition to adopt the children without father's consent. A petition for adoption without parental consent may be granted by the district court if the elements outlined in Wyo. Stat. Ann. § 1-22-110 are satisfied…. Wyo. Stat. Ann. § 1-22-110 states, in pertinent part:

> (a) In addition to the exceptions contained in W.S. 1-22-108, the adoption of a child may be ordered without the written consent of a parent or the putative father if the court finds … that the putative father or the nonconsenting parent or parents have:…
>
> (iv) Willfully failed to contribute to the support of the child for a period of one (1) year immediately prior to the filing of the petition to adopt and has failed to bring the support obligation current within sixty (60) days after service of the petition to adopt; or …
>
> (ix) Willfully failed to pay a total dollar amount of at least seventy percent (70 percent) of the court-ordered support for a period of two (2) years or more and has failed to bring the support obligation one hundred percent (100 percent) current within sixty (60) days after service of the petition to adopt.

The petition stated the adoption should be allowed without father's permission …because father had willfully failed to pay a total dollar amount of at least seventy percent of the court-ordered support for a period of two years or more. However, the district court's order denying the petition focused on Wyo. Stat. Ann. § 1-22-110(a)(iv), which allows adoption without the parent's consent if the parent has "willfully failed to contribute to the support of the child for a period of one (1) year immediately prior to the filing of the petition to adopt and has failed to bring the support obligation current within sixty (60) days after service of the petition to adopt." …Our inquiry, therefore, focuses on the willfulness element and not on the amount of support father did or did not pay.

We have explained the importance of the willfulness requirement as follows:

> Clearly, by inclusion of the modifying term "willfully" the statute draws a distinction, as it must, between the parent who though financially able to pay his court-ordered child support is unwilling to do so, and the parent who though willing to pay his court-ordered child support is financially unable to do so. "A natural parent's failure to support his or her child does not obviate the necessity of the parent's consent to the child's adoption, where the parent's financial condition is such that he or she is unable to support the child." 2 Am.Jur.2d Adoption § 88 (1974).

Moreover, this court has defined willfully in the context of Wyo. Stat. Ann. § 1-22-110 as "intentionally, knowingly, purposely, voluntarily, consciously, deliberately, and without justifiable excuse, as distinguished

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from carelessly, inadvertently, accidentally, negligently, heedlessly or thoughtlessly." …

…Father acknowledged he was aware of his child support obligation and did not pay it on a regular basis. He claimed he was unable to consistently pay child support because he had difficulty finding employment …and he had been incarcerated intermittently on a number of different charges….

Stepfather argues father's actions were willful because his behavior led to his incarceration which prevented him from earning the money to pay child support. We have directly addressed the issue of whether a non-consenting parent's failure to pay child support because he is incarcerated is sufficient to establish willfulness…. We [have] said … "Incarceration, standing alone, does not provide the direct intent necessary to constitute willful failure to pay under the pertinent statute." …Instead, "the focus must remain on the parent's intent and ability to pay. The courts should look at whether the parent has demonstrated, through whatever financial means available to him, that the parent has not forgotten his statutory obligation to his child." …When a parent is incarcerated, "'the proper inquiry to address …is whether the natural parent intentionally incapacitated himself for the purpose of avoiding the duty imposed by law; if so then imprisonment may constitute justification for dispensing with his consent in the adoption proceeding.…" There is no evidence in this record which indicates father willfully committed any crimes in order to have himself incarcerated so he could avoid his child support obligation. Thus, his incarceration, by itself, does not justify a finding of willfulness.

Of course, even when a parent is incarcerated, he must pay child support if he has the means to do so. "A parent must always pay child support according to his or her financial ability." …The record indicates father was incarcerated off and on over a period of several years; however, neither the actual dates of his imprisonment nor the total amount of time he spent in jail is shown in the record. Furthermore, stepfather did not present any evidence as to whether father earned wages while incarcerated…. Thus, we do not know if he had the ability to pay any child support while he was incarcerated….

Father testified, when he was not in jail, he attempted to find work in order to earn the funds to pay child support, but was not able to find consistent work in Uinta County. He identified two construction companies for which he had worked as a truck driver and stated, without contradiction, his child support was paid while he was working. Father also testified he had attempted to find work through "the union" and with "the rigs," but was unsuccessful. After he was unable to secure other employment, he said he started his own business with the hopes of earning a living. At the time of the hearing, the business apparently had not yet yielded any earnings. Father testified he was living with friends because he could not afford his own residence….

The determination of whether father's failure to pay child support was willful involves disputed factual issues; consequently, it was within the district court's province to weigh the evidence and judge the credibility of the witnesses…. Evidence exists in the record supporting father's contention he did not have the means to pay his child support because he had difficulty earning a living and had been incarcerated….

Stepfather also argues the record shows father chose to spend his money on drugs and/or alcohol instead of paying his child support obligation. The record does contain evidence suggesting father's use of intoxicating substances contributed to his difficulties….

Obviously, if a parent has money with which to buy drugs or alcohol and chooses to do so rather than pay child support, an argument could be made that the failure to pay child support was willful…. However, it is important to focus on the proper query when evaluating such an argument. As explained by the Montana Supreme Court when reviewing a lower court's termination of a mother's parental rights:

> [A parent's] admitted drug addiction alone cannot serve as clear and convincing evidence that she had the means to contribute to her children's support. The relevant inquiry is whether she obtained funds which could have been used for the support of the children which, instead, she chose to spend on drugs….

In the case at bar, there was no evidence concerning the extent of father's drug or alcohol use or the actual amount of money he spent on such substances. More importantly, the record does not show father had funds available to him to buy drugs and/or alcohol instead of paying child support.

As we have said before, the right of parents to associate with their children is fundamental, and due process requires we stringently guard this important right. Stepfather was charged with proving, by clear and convincing evidence, father willfully disregarded his child support obligation. The district court concluded he did not meet that onerous burden. Although father's efforts to pay his child support certainly cannot be characterized as model and may have, at times, been willful, stepfather must prove that fact with clear

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and convincing evidence, and this record does not contain such evidence. When there is a failure of proof, we cannot conclude the district court's denial of the petition for adoption was an abuse of discretion.

Affirmed.

Case Questions

1. What was the stepfather's claim in the intermediate appellate court?
2. What did the appellate court decide?
3. What rationale did the Wyoming Supreme Court give for its decision?

Preferred Custody Statutes

Preferred custody statutes were enacted because it was uncertain whether judges had sufficient reliable information to predict accurately what would be in a child's best interest.[82] Some states require that preference be given to a child's primary caretaker, when the primary caretaker can be established. Such an approach has the advantage of not favoring either gender, and it provides the child with continuity and stability in the parenting role.

When the statutory preference is for joint custody, the public policy provides that even though the marital relationship between the parents has ended, their parenting roles and responsibilities will continue as before. Both parents will share decision making in regard to their child's upbringing. Joint custody produces no winners and losers of a custody battle. The parents continue to share a family, but not a marriage.[83] When joint custody works, the child benefits from the active involvement of both a mother and a father. But it works only where divorcing parents are willing and able to separate their marital and parental relationships and act cooperatively to benefit their child.[84]

Once a court has determined that one parent should have custody, the noncustodial parent will normally be awarded visitation rights. It is important to encourage the noncustodial parent to continue to play an active role in the child's life. Sometimes the custodial parent wants to relocate, which would have the effect of curtailing the visitation opportunities of the noncustodial spouse. Courts are divided on what standard to apply when the parents disagree about making such a move.[85] Although the initial custody determination can be modified at a future date if material changes in the child's circumstances prove harmful, courts are reluctant to unsettle a child unless compelling reasons are shown.

Child Support

Although parents have the right to formally and informally break up with one another, they cannot divorce their minor children. Thus parents will generally be required to support their children until they reach the age of majority. In some special circumstances, however, the support obligation continues even beyond that date. We focus now on the special circumstances that can arise in conjunction with a divorce.

When a marriage that involves children is terminated, the court will examine the earning capacity of each parent and the needs of each child, determine who has custody, and determine each parent's support obligation. Every state has some guidelines to help judges make this determination. Generally, when custody has been awarded to one parent, the noncustodial parent will be ordered to make support payments. This parent is legally required to make the payments irrespective of side issues such as whether the custodial parent has violated the noncustodial parent's visitation rights or whether the custodial parent is spending the support payment money for other purposes than the children. Although child support is awarded to provide for the needs of the child, courts disagree about the exact meaning of that term. It certainly

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includes a child's necessaries, and there are cases in which noncustodial parents have been required to pay for their children's college educations.[86] Nevertheless, child support has a theoretically different purpose from that of alimony and property awards, which are intended to benefit a spouse.

When parents divorce, remarry, and establish second families, their support obligation to their first family continues, and many states require that the children from the first family receive priority over the children in the second family. Some states are moving away from this traditional approach and are structuring child support so that it benefits both families.[87] As was previously indicated, states differ about whether stepparents have a support liability for stepchildren.

As is the case with alimony, either party can petition for modification of the support order when there is a substantial change of circumstances.

Property Division

As we saw earlier in this chapter, when people divorce, the property that they have accumulated during their marriage is apportioned between them. It is common for married people to own a house, cars, and other tangible personal property concurrently and to have joint accounts at the bank. If they have been married for a long time, they will probably have accumulated much property. States address the distribution problem differently, depending on whether they follow the common law/equitable distribution approach or the community property approach.

Common Law/Equitable Distribution Approach

In most states, what is known as **equitable distribution** has replaced the traditional common law approach to determining property rights. Under the common law, the person who had title to property owned it, and generally this meant the husband. When lawmakers and judges began to look upon marriage as an economic partnership, property acquired during marriage was perceived in different terms. This new perspective produced reforms intended to result in the more equitable distribution of property to each of the divorcing parties. Though not all states that adopt equitable distribution classify property, many do. In those states, property is classified as separate property or as marital property. **Marital property** is nonseparate property acquired during the marriage and is subject to an equitable distribution by a judge. **Separate property**, that which was owned prior to the marriage or was received as a gift or inheritance, is not subject to distribution.

Obviously, the legal definition of property is crucial to any distribution scheme. Many states now treat pensions in which the ownership rights have matured (vested) and medical insurance benefits as also subject to distribution.

Though not all states agree with the holding in the following case, it is looked upon as a landmark decision. In the *O'Brien* case, the court declared that a spouse who has made significant contributions to her husband's medical education and licensing as a doctor was entitled to a property interest in his license at the time of their divorce.

O'Brien v. O'Brien
489 N.E.2d 712
Court of Appeals of New York
December 26, 1985

Simons, Judge

In this divorce action, the parties' only asset of any consequence is the husband's newly acquired license to practice medicine. The principal issue presented is whether that license, acquired during their marriage, is marital property subject to equitable distribution under Domestic Relations Law § 236(B)(5). Supreme Court held that it was and accordingly made a distributive award in defendant's favor. It also granted defendant maintenance arrears, expert witness fees and attorneys' fees.… On appeal to the Appellate Division, a majority of that court held that plaintiff's

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medical license is not marital property and that defendant was not entitled to an award for the expert witness fees. It modified the judgment and remitted the case to Supreme Court for further proceedings, specifically for a determination of maintenance and a rehabilitative award.… The matter is before us by leave of the Appellate Division.

We now hold that plaintiff's medical license constitutes "marital property" within the meaning of Domestic Relations Law § 236(B)(1)(c) and that it is therefore subject to equitable distribution pursuant to subdivision 5 of that part.…

I

Plaintiff and defendant married on April 3, 1971. At the time both were employed as teachers at the same private school. Defendant had a bachelor's degree and a temporary teaching certificate but required 18 months of postgraduate classes at an approximate cost of $3,000, excluding living expenses, to obtain permanent certification in New York. She claimed, and the trial court found, that she had relinquished the opportunity to obtain permanent certification while plaintiff pursued his education. At the time of the marriage, plaintiff had completed only three and one-half years of college but shortly afterward he returned to school at night to earn his bachelor's degree and to complete sufficient premedical courses and enter medical school. In September 1973 the parties moved to Guadalajara, Mexico, where plaintiff became a full-time medical student. While he pursued his studies defendant held several teaching and tutorial positions and contributed her earnings to their joint expenses. The parties returned to New York in December 1976 so that plaintiff could complete the last two semesters of medical school and internship training here. After they returned, defendant resumed her former teaching position and she remained in it at the time this action was commenced. Plaintiff was licensed to practice medicine in October 1980. He commenced this action for divorce two months later. At the time of trial, he was a resident in general surgery.

During the marriage both parties contributed to paying the living and educational expenses and they received additional help from both of their families. They disagreed on the amounts of their respective contributions but it is undisputed that in addition to performing household work and managing the family finances defendant was gainfully employed throughout the marriage, that she contributed all of her earnings to their living and educational expenses and that her financial contributions exceeded those of plaintiff. The trial court found that she had contributed 76 percent of the parties' income exclusive of a $10,000 student loan obtained by defendant. Finding that plaintiff's medical degree and license are marital property, the court received evidence of its value and ordered a distributive award to defendant. Defendant presented expert testimony that the present value of plaintiff's medical license was $472,000. Her expert testified that he arrived at this figure by comparing the average income of a college graduate and that of a general surgeon between 1985, when plaintiff's residency would end, and 2012, when he would reach age 65. After considering Federal income taxes, an inflation rate of 10 percent and a real interest rate of 3 percent he capitalized the difference in average earnings and reduced the amount to present value. He also gave his opinion that the present value of defendant's contribution to plaintiff's medical education was $103,390. Plaintiff offered no expert testimony on the subject.

The court, after considering the lifestyle that plaintiff would enjoy from the enhanced earning potential his medical license would bring and defendant's contributions and efforts toward attainment of it, made a distributive award to her of $188,800, representing 40 percent of the value of the license, and ordered it paid in 11 annual installments of various amounts beginning November 1, 1982 and ending November 1, 1992. The court also directed plaintiff to maintain a life insurance policy on his life for defendant's benefit for the unpaid balance of the award and it ordered plaintiff to pay defendant's counsel fees of $7,000 and her expert witness fee of $1,000. It did not award defendant maintenance.

A divided Appellate Division … concluded that a professional license acquired during marriage is not marital property subject to distribution. It therefore modified the judgment by striking the trial court's determination that it is and by striking the provision ordering payment of the expert witness for evaluating the license and remitted the case for further proceedings.…

II

The Equitable Distribution Law contemplates only two classes of property: marital property and separate property (Domestic Relations Law § 236[B][1][c], [d]). The former, which is subject to equitable distribution, is defined broadly as "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held" (Domestic Relations Law § 236[B][1][c] [emphasis added]; see § 236 [B][5][b], [c]). Plaintiff does not contend that his license is excluded from distribution because it is separate property; rather, he claims that it is not property at all but

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represents a personal attainment in acquiring knowledge. He rests his argument on decisions in similar cases from other jurisdictions and on his view that a license does not satisfy common-law concepts of property. Neither contention is controlling because decisions in other States rely principally on their own statutes, and the legislative history under-lying them, and because the New York Legislature deliberately went beyond traditional property concepts when it formulated the Equitable Distribution Law…. Instead, our statute recognizes that spouses have an equitable claim to things of value arising out of the marital relationship and classifies them as subject to distribution by focusing on the marital status of the parties at the time of acquisition. Those things acquired during marriage and subject to distribution have been classified as "marital property" although, as one commentator has observed, they hardly fall within the traditional property concepts because there is no common-law property interest remotely resembling marital property. "It is a statutory creature, is of no meaning whatsoever during the normal course of a marriage and arises full-grown, like Athena, upon the signing of a separation agreement or the commencement of a matrimonial action. [Thus] [i]t is hardly surprising, and not at all relevant, that traditional common law property concepts do not fit in parsing the meaning of 'marital property.'" …Having classified the "property" subject to distribution, the Legislature did not attempt to go further and define it but left it to the courts to determine what interests come within the terms of section 236(B)(1)(c). We made such a determination in Majauskas v. Majauskas …463 N.E.2d 15, holding there that vested but unmatured pension rights are marital property subject to equitable distribution. Because pension benefits are not specifically identified as marital property in the statute, we looked to the express reference to pension rights contained in section 236(B)(5)(d)(4), which deals with equitable distribution of marital property, to other provisions of the equitable distribution statute and to the legislative intent behind its enactment to determine whether pension rights are marital property or separate property. A similar analysis is appropriate here and leads to the conclusion that marital property encompasses a license to practice medicine to the extent that the license is acquired during marriage.

Section 236 provides that in making an equitable distribution of marital property, "the court shall consider: …(6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party [and] …(9) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession" (Domestic Relations Law § 236 [B][5][d][6], [9] [emphasis added]). Where equitable distribution of marital property is appropriate but "the distribution of an interest in a business, corporation or profession would be contrary to law" the court shall make a distributive award in lieu of an actual distribution of the property (Domestic Relations Law § 236[B][5][e] [emphasis added]). The words mean exactly what they say: that an interest in a profession or professional career potential is marital property which may be represented by direct or indirect contributions of the non-title-holding spouse, including financial contributions and nonfinancial contributions made by caring for the home and family.

The history which preceded enactment of the statute confirms this interpretation. Reform of section 236 was advocated because experience had proven that application of the traditional common-law title theory of property had caused inequities upon dissolution of a marriage. The Legislature replaced the existing system with equitable distribution of marital property, an entirely new theory which considered all the circumstances of the case and of the respective parties to the marriage…. Equitable distribution was based on the premise that a marriage is, among other things, an economic partnership to which both parties contribute as spouse, parent, wage earner or homemaker…. Consistent with this purpose, and implicit in the statutory scheme as a whole, is the view that upon dissolution of the marriage there should be a winding up of the parties' economic affairs and a severance of their economic ties by an equitable distribution of the marital assets. Thus, the concept of alimony, which often served as a means of lifetime support and dependence for one spouse upon the other long after the marriage was over, was replaced with the concept of maintenance which seeks to allow "the recipient spouse an opportunity to achieve [economic] independence." …

The determination that a professional license is marital property is also consistent with the conceptual base upon which the statute rests. As this case demonstrates, few undertakings during a marriage better qualify as the type of joint effort that the statute's economic partnership theory is intended to address than contributions toward one spouse's acquisition of a professional license. Working spouses are often required to contribute substantial income as wage earners, sacrifice their own educational or career goals and opportunities for child rearing, perform the bulk of household duties and responsibilities and

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forego the acquisition of marital assets that could have been accumulated if the professional spouse had been employed rather than occupied with the study and training necessary to acquire a professional license. In this case, nearly all of the parties' nine-year marriage was devoted to the acquisition of plaintiff's medical license and defendant played a major role in that project. She worked continuously during the marriage and contributed all of her earnings to their joint effort, she sacrificed her own educational and career opportunities, and she traveled with plaintiff to Mexico for three and one-half years while he attended medical school there. The Legislature has decided, by its explicit reference in the statute to the contributions of one spouse to the other's profession or career …that these contributions represent investments in the economic partnership of the marriage and that the product of the parties' joint efforts, the professional license, should be considered marital property.

The majority at the Appellate Division held that the cited statutory provisions do not refer to the license held by a professional who has yet to establish a practice but only to a going professional practice…. There is no reason in law or logic to restrict the plain language of the statute to existing practices, however, for it is of little consequence in making an award of marital property, except for the purpose of evaluation, whether the professional spouse has already established a practice or whether he or she has yet to do so. An established practice merely represents the exercise of the privileges conferred upon the professional spouse by the license and the income flowing from that practice represents the receipt of the enhanced earning capacity that licensure allows. That being so, it would be unfair not to consider the license a marital asset.

Plaintiff's principal argument, adopted by the majority below, is that a professional license is not marital property because it does not fit within the traditional view of property as something which has an exchange value on the open market and is capable of sale, assignment or transfer. The position does not withstand analysis for at least two reasons. First, as we have observed, it ignores the fact that whether a professional license constitutes marital property is to be judged by the language of the statute which created this new species of property previously unknown at common law or under prior statutes. Thus, whether the license fits within traditional property concepts is of no consequence. Second, it is an overstatement to assert that a professional license could not be considered property even outside the context of section 236 (B). A professional license is a valuable property right, reflected in the money, effort and lost opportunity for employment expended in its acquisition, and also in the enhanced earning capacity it affords its holder, which may not be revoked without due process of law…. That a professional license has no market value is irrelevant. Obviously, a license may not be alienated as may other property and for that reason the working spouse's interest in it is limited. The Legislature has recognized that limitation, however, and has provided for an award in lieu of its actual distribution….

Plaintiff also contends that alternative remedies should be employed, such as an award of rehabilitative maintenance or reimbursement for direct financial contributions…. The statute does not expressly authorize retrospective maintenance or rehabilitative awards and we have no occasion to decide in this case whether the authority to do so may ever be implied from its provisions…. It is sufficient to observe that normally a working spouse should not be restricted to that relief because to do so frustrates the purposes underlying the Equitable Distribution Law. Limiting a working spouse to a maintenance award, either general or rehabilitative, not only is contrary to the economic partnership concept underlying the statute but also retains the uncertain and inequitable economic ties of dependence that the Legislature sought to extinguish by equitable distribution. Maintenance is subject to termination upon the recipient's remarriage and a working spouse may never receive adequate consideration for his or her contribution and may even be penalized for the decision to remarry if that is the only method of compensating the contribution. As one court said so well, "[t]he function of equitable distribution is to recognize that when a marriage ends, each of the spouses, based on the totality of the contributions made to it, has a stake in and right to a share of the marital assets accumulated while it endured, not because that share is needed, but because those assets represent the capital product of what was essentially a partnership entity" (*Wood v. Wood,* …465 N.Y. S.3d 475). The Legislature stated its intention to eliminate such inequities by providing that a supporting spouse's "direct or indirect contribution" be recognized, considered and rewarded (Domestic Relations Law § 236 [B][5][d][6]).

Turning to the question of valuation, it has been suggested that even if a professional license is considered marital property, the working spouse is entitled only to reimbursement of his or her direct financial contributions…. If the license is marital property, then the working spouse is entitled to an equitable portion of it, not a return of funds advanced. Its value is the enhanced earning capacity it affords the holder and although fixing the present value of that enhanced earning capacity may present problems, the problems

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are not insurmountable. Certainly they are no more difficult than computing tort damages for wrongful death or diminished earning capacity resulting from injury and they differ only in degree from the problems presented when valuing a professional practice for purposes of a distributive award, something the courts have not hesitated to do.… The trial court retains the flexibility and discretion to structure the distributive award equitably, taking into consideration factors such as the working spouse's need for immediate payment, the licensed spouse's current ability to pay and the income tax consequences of prolonging the period of payment …and, once it has received evidence of the present value of the license and the working spouse's contributions toward its acquisition and considered the remaining factors mandated by the statute …, it may then make an appropriate distribution of the marital property including a distributive award for the professional license if such an award is warranted. When other marital assets are of sufficient value to provide for the supporting spouse's equitable portion of the marital property, including his or her contributions to the acquisition of the professional license, however, the court retains the discretion to distribute these other marital assets or to make a distributive award in lieu of an actual distribution of the value of the professional spouse's license.…

III

…Accordingly, in view of our holding that plaintiff's license to practice medicine is marital property, the order of the Appellate Division should be modified, with costs to defendant, by reinstating the judgment and the case remitted to the Appellate Division for determination of the facts, including the exercise of that court's discretion (CPLR 5613), and, as so modified, affirmed.

Case Questions

1. When Loretta O'Brien sued her husband Michael for divorce, what claim did she make with respect to the marital property of the couple?
2. What was the basis of her claim?
3. How does the court define marital property in this case?

What moral principles are reflected in the New York equitable distribution statute?

Determining Fairness

For a distribution to be fair, the court must identify, classify, and determine the value of each spouse's assets—or their detriment, in the case of debts. The court must also consider the circumstances and needs of the parties, the length of their marriage, their marital standard of living, their contributions to the marriage, and other similar factors. Although it is possible to take such matters to trial and have them decided by a judge, it is often faster—and the parties have more control over the outcome—if they negotiate a property settlement in lieu of fighting it out in court. Property dispute battles can be very expensive. Appraisals and expensive expert witnesses are required to establish the value of assets. Litigation costs can also increase dramatically and diminish the assets ultimately available for distribution. Judges frequently incorporate a negotiated agreement that equitably allocates marital assets and debts into the final judgment.

Community Property Approach

The states of Louisiana, Texas, California, New Mexico, Arizona, Nevada, Washington, Idaho, and Wisconsin have statutorily decided to treat all property that is not separate property and that was acquired during the marriage as presumptively

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community property that belongs equally to both spouses. Under this approach, it doesn't matter who worked and earned the money for a purchase or who purchased the property. Both spouses have the right to make management decisions regarding community property (such as whether it is leased, loaned, invested, etc.). If the parties wish to alter the community property presumption, they may do so by agreement, by gift, and by commingling separate and community assets so that separate property loses its character (such as the merger of a separate stamp collection with a community collection or the deposit of birthday money into the community checking account). In the event of a divorce, the court in a community property state makes an equitable division of all community property to each spouse.

The Decree

Irrespective of whether the issues are negotiated or litigated, at the end of the process the court issues a judgment that dissolves the marriage, distributes the property, and determines claims for alimony, child custody, and child support. The attorneys for the parties then assist the former spouses to implement the orders. Property must be exchanged, ownership rights transferred, money transferred, debts paid, insurance policies obtained, pension rights transferred, and other details wrapped up.

CHAPTER SUMMARY

Chapter IX began with a discussion of the family and its historical roles, as well as its place in contemporary America. Emphasis was given to the many tangible and intangible benefits that accrue to family members but are otherwise unavailable to nonfamily members. The discussion then shifted to the ways in which family relationships are created—through marriage or the formation of civil unions/domestic partnerships, by becoming a parent as a result of the birth of one's child, by adoption, and, to a limited extent, as a consequence of becoming a foster parent. The essential nature of each of these statutes was discussed and each process was explained.

The chapter concluded with an overview of how spousal relationships are legally ended—by way of annulment, legal separation, and divorce/dissolution. The discussion focused on how the divorcing couple's financial affairs are separated so that each spouse is able to function independently—decisions as to alimony, child custody and child support, and the distribution of property.

CHAPTER QUESTIONS

1. Andrea Moorehead was abandoned by her birth mother, a crack cocaine user who had tested positive for venereal disease shortly after birth. Andrea was placed with foster parents when she was nine days old. The foster parents, Melva and Robert Dearth, sought to adopt Andrea when she was ten months old. The county's Children Service Bureau (CSB) opposed this proposed adoption. The Dearths alleged that CSB's decision was predicated on the fact that they were white and Andrea was black. They proved that they lived in an interracial neighborhood, that they attended an interracial church, and that their two children attended an interracial school. They had a stable marriage and financial standing. The Dearths filed a motion for review of this administrative decision in the Common Pleas Court. They requested that CSB's custody be terminated and that permanent custody of Andrea be granted to them. The Court denied the Dearths' motion. The Dearths appealed.

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The appeals court found that there was clear evidence that CSB had a documented policy of placing black children with white adoptive parents only when no black parent could be found. Under Ohio law, adoption placements are to be made in the "best interests of the child." To what extent can adoption agencies such as CSB consider factors such as race and culture in determining adoption procedures? Under the law, can the racial factor outweigh all other considerations?
In re Moorhead, 600 N.E.2d 778 (1991)

2. Charles Collins and Bethany Guggenheim began living together in 1977. They were not married to each other. Bethany was recently divorced and had two children from the prior marriage. As part of the property settlement, she had received title to a 68-acre farm, and Charles, Bethany, and the children moved there in 1979. They intended to restore the farmhouse (circa 1740). Charles and Bethany jointly became liable for and made payments on a bank mortgage loan, insurance, and property taxes. They maintained a joint checking account to pay for joint expenses as well as individual checking accounts. They jointly purchased a tractor and other equipment, Charles paying two-thirds of the cost and Bethany one-third. Charles also invested $8,000 of his money in additional equipment and improvements for the farm. For several years they jointly operated a small business that made no profit. Despite Charles's contributions, the title to the farm remained at all times with Bethany. The parties experienced personal difficulties, and when they could not reconcile their differences, they permanently separated in 1986. During their cohabitation period, Charles contributed approximately $55,000 and Bethany $44,500 to the farm. Charles filed suit against Bethany. He claimed that fairness required either that Bethany and he should share title to the farm as tenants in common or that he should receive an equitable distribution of the property acquired during the period of cohabitation. Charles did not allege that Bethany had breached any contract or engaged in any type of misconduct. The trial court dismissed the complaint. What action should a court take in a situation such as this, where unmarried, cohabiting people go their separate ways?
Collins v. Guggenheim, N.E.2d (1994)

3. James Ellam filed suit for divorce against his wife, Ann, on the ground that they had been living separately and apart. Ann counterclaimed against James for desertion. The facts reveal that James moved out of the marital home on July 5, 1972, because of severe marital discord. He moved back to his mother's home in a nearby city, where he slept, kept his clothes, and ate some of his meals. For the next eighteen months, James had an unusual weekday routine. His mother would drive James early in the morning from her home to the marital home so that James could see his dog, check on the house, take his car out of the garage, and go to work, much as he had done before he and Ann "separated." At the end of the day, James would drive to the marital residence, put the car back in the garage, play with the dog, talk with his wife until she went to bed, and watch television until 12:30 A.M., when his mother would pick him up and take him "home." On weekends, James would do chores at the marital home and even socialize with his wife (although the parties had terminated their sexual relationship). James lived this way because he claimed to love his wife and especially the dog, he wanted to maintain the marital home properly, and he did not want the neighbors to know about his marital problems. New Jersey law provides that persons who have lived separate and apart for a statutory period of time may be granted a divorce. Should the trial court have granted a divorce on the grounds that James and Ann had satisfied the statutory requirements by living "separate and apart in different habitations" as permitted under New Jersey law?
Ellam v. Ellam, 333 A.2d 577 (1975)

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4. The Washington Revised Code (Section 26.16.205) provides as follows: "The expenses of the family…are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately."…

   Should a husband be financially obligated to pay the legal costs resulting from his wife's appeal of criminal convictions?

   State v. Clark, 563 P.2d 1253 (1977)

5. Oregon law provides for "no-fault" divorces. Marie and Max Dunn had been married for twenty years when Marie filed for divorce. After Marie presented evidence of irremediable and irreconcilable differences between herself and her husband, the trial court entered a decree dissolving the marriage. The court also awarded Marie custody of their two minor children and set alimony at $200 per month. Max appealed to the Oregon Court of Appeals on the ground that the trial court's decree was premature and was not supported by adequate proof. Max argued that the court acted without considering the views of both parties to the marriage. The appellate court interpreted the Oregon statute to require only that the trial court determine whether the existing difference "reasonably] appears to the court to be in the mind of the petitioner an irreconcilable one, and based on that difference…whether or not…the breakdown of that particular marriage is irremediable." What public policy arguments can you identify related to the facts in the above case that would favor "no-fault" divorces? What arguments could be brought to bear against them?

   Dunn v. Dunn, 511 P.2d 427 (1973)

6. Two women brought suit against the Jefferson County (Kentucky) Clerk of Courts because the clerk refused to issue them a license to become married to each other. The women alleged that the clerk's refusal denied them various constitutionally protected rights, among these the right to become married, the right to freedom of association, and the right to freedom from cruel and unusual punishment. The trial court ruled that persons seeking to enter into a same-sex marriage were not entitled under the law to a marriage license. The women appealed to the Court of Appeals of Kentucky. The Kentucky statutes do not define the term *marriage*. The appeals court disposed of the case without even reaching the appellants' constitutional claims. Can you surmise on what grounds the appeals court decided the case?

   Jones v. Callahan, 501 S.W.2d 588 (1973)

7. Sixteen-year-old Colleen provided day care for twelve-year-old Shane. The two began a sexual relationship that resulted in Colleen giving birth to a child when the mother and father were seventeen and thirteen years old, respectively. Although Shane was a victim of child abuse himself, a Kansas district court judge ordered him to pay $50 child support per month and found him financially responsible for over $7,000 in other assistance provided to the mother and baby in conjunction with the childbirth. Shane filed an appeal arguing that since he could not legally consent to sexual relations with Colleen, he should not be legally obligated to pay child support.

   What public policies are in conflict in this case? How do you think the Kansas Supreme Court ruled and why?

   State ex rel. Hermesmann v. Seyer, 847 P.2d 1273 (1993)

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NOTES

1. J. Demos, "A Little Commonwealth: Family Life in Plymouth," in *Family and State,* ed. L. Houlgate (Totowa, NJ: Rowman & Littlefield, 1988), pp. 30–31.
2. Table 60. Children Under 18 Years by Presence of Parents: 1980–2004. Statistical Abstract of the United States 2006.
3. B. Yorburg, *The Changing Family* (New York: Columbia University Press, 1973), p. 94.
4. D. Castle, "Early Emancipation Statutes: Should They Protect Parents as Well as Children?" 20 *Family Law Quarterly* 3, 363 (Fall 1986).
5. H. Jacob, *Silent Revolution* (Chicago: University of Chicago Press, 1988) p. 1.
6. M. Grossberg, *Governing the Hearth* (Chapel Hill: University of North Carolina Press, 1985) p. 3.
7. L. Houlgate, *Family and State* (Totowa, NJ: Rowman & Littlefield, 1988).
8. E. Pound, "Individual Interests in Domestic Relations," 14 *Michigan Law Review* 177, 179–181 (1916).
9. L. Wardle, C. Blakeseley, and J. Parker, *Contemporary Family Law*, Sec. 1:02 (Deerfield, IL: Clark Boardman Callaghan, 1988).
10. E. Jenks, *A Short History of English Law* (2d rev. ed.) (Boston: Little, Brown & Co., 1922), n. 24 at 20–22.
11. Wardle, Blakeseley, and Parker, Sec. 1:02.
12. Ibid., Sec. 1:03.
13. *Wisconsin v. Yoder,* 406 U.S. 205 (1972), 229–230.
14. P. C. Hoffer, *Law & People in Colonial America* (Baltimore: Johns Hopkins University Press, 1982).
15. Grossberg, pp. 3–4.
16. Ibid., p. 5.
17. Ibid., p. 6.
18. R. Melton, "Evolving Definition of 'Family,'" *Journal of Family Law* 504 (1990–1991).
19. *Braschi v. Stahl Association*, 543 N.E.2d 49 (1989) 58.
20. *Braschi*, 543 N.E.2d at 53–54.
21. J. Collier, M. Rosaldo, and S. Yanagisako, "Is There a Family? New Anthropological Views," in *Rethinking the Family: Some Feminist Questions*, eds. B. Thorne and M. Yalon (New York: Longman, 1982), pp. 25–39.
22. M. Farmer, *The Family* (London: Longmans, Green and Co., 1970), p. 17.
23. H. D. Krause, *Family Law* (2d ed.) (St. Paul: West Publishing, 1986), pp. 31–32.
24. *Maynard v. Hill*, 125 U.S. 190 (1888).
25. Wardle, Blakeseley, and Parker, Sec. 3:02.
26. Alabama, Colorado, the District of Columbia, Iowa, Montana, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah recognize common law marriages without qualification.
27. Montana Code Annotated 40-1-403 and Iowa Code Ann. 595.11
28. National Commission for Adoption, *Adoption Factbook* 18 (1989).
29. J. Evall, "Sexual Orientation and Adoptive Matching," 24 *Family Law Quarterly* 349 (1991).
30. Some states require that a petitioner be at least ten years or older than the person to be adopted, whereas others require that the adoptee not be related to the petitioner. Some states also refuse to allow an adult petitioner to adopt another adult who happens to be the petitioner's homosexual partner, where the parties may be trying to use the adoption law to circumvent the marriage, contract, and probate laws.
31. Krause, p. 163.
32. E. Bartholet, *Family Bonds* (Boston: Houghton Mifflin, 1993), p. 66.
33. Ibid., p. 71.

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34. Ibid., pp. 70–72.
35. L. Schwartz, "Religious Matching for Adoption: Unraveling the Interests Behind the 'Best Interests' Standard," 25 *Family Law Quarterly* 2 (Summer 1991).
36. *Wisconsin v. Yoder,* 406 U.S. 205 (1972), 229–230.
37. Ibid., p. 189.
38. Ibid.
39. J. Evall, "Sexual Orientation and Adoptive Matching," 24 *Family Law Quarterly* 3, 354–355 (1991).
40. Evall, pp. 356–357.
41. Bartholet, p. 48.
42. Ibid., p. 55.
43. Ibid., p. 56.
44. Adoption and Foster Care Analysis & Reporting System (AFCARS), *Interim FY 2008 Estimates as of October 2009*, U.S. Dept. of Health and Human Services.
45. A. Hardin, ed., *Foster Children in the Courts,* Foster Care Project, National Legal Resource Center for Child Advocacy and Protection (Chicago: American Bar Association, 1983), p. 70.
46. *Foster Care Fact Sheet*. Evan B. Donaldson Adoption Institute. (2002).
47. American Public Welfare Association, as quoted in *Newsweek*, April 25, 1994, p. 55.
48. HHS Press Release of September 14, 2009. HHS Awards &35 Million to States for Increasing Adoptions. http://www.hhs.gov/news/press/2009pres/09/20090914a.html.
49. Jacob, p. 1.
50. States differ as to exactly what level of support must be provided. Some states define necessaries to be essentially the most basic needs, whereas other states are more generous in their construction of that term.
51. C. Hused, "Married Woman's Property Law 1800–1850," 71 *Georgetown Law Journal* 1359, n. 4 at 1400 (1983). Also see *Thompson v. Thompson*, 218 U.S. 611 (1910).
52. *Griswold v. Connecticut*, 381 U.S. 479 (1965).
53. *Wisconsin v. Yoder*, 406 U.S. 205 (1972), 229–230.
54. See Kentucky Revised Statutes sec. 205.310, South Dakota Codified Laws Annotated Sec. 25-7-8, and Washington Revised Code Sec. 26.16.205. See also *M. H. B. v. H. T. B.*, 498 A. 2d 775 (1985).
55. See Alaska Statute Sec. 47.25.250, Iowa Code Sec. 252.5, *Estate of Hines*, 573 P.2d 1260 (1978), and Wisconsin Statutes Annotated Sec. 940.27.
56. See Alaska Statute Sec. 25.20.030 and Oregon Revised Statutes Sec. 109.010.
57. See *Mahan v. Mahan,* 88 SO2d 545 (1956).
58. See *Heup v. Heup*, 172 N.W.2d 334 (1969).
59. Maryland Annotated Code Article 16, Sec 27.
60. New Hampshire Revised Statutes annotated Sec. 458:17; Minnesota Sec. 518.57.
61. 4 *American Jurisprudence* 2d, 513.
62. *Posner v. Posner,* 233 So.2d 381 (1970).
63. Jacob, p. 30.
64. Ibid., p. 4.
65. U.S. Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1957* (Washington, D.C., 1960), p. 25.
66. This is not to suggest that the amount of choice is equally distributed throughout society and is not affected by considerations of race, gender, and socioeconomic status.
67. It is important to emphasize that, in all eras, spouses and parents have deserted their partners and families without bothering with legal formalities. Note also that the primary victims have been women who devoted their lives to their families and homes and who were often left destitute and with children. This has contributed to what is often referred to as the feminization of poverty.

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68. Jacob, p. 251.
69. Ibid., p. 47.
70. Ibid., pp. 46–47.
71. Ibid., p. 34.
72. Wadlington, "Divorce Without Fault Without Perjury," 52 *Virginia Law Revue*, 32, 40 (1966).
73. Jacob, pp. 60–61.
74. Ibid., p. 59.
75. Ibid., p. 80.
76. *Hagerty v. Hagerty*, 281 N.W.2d 386 (1979).
77. Freed and Walker, "Family Law in the Fifty States: An Overview." 24 *Family Law Review* 309, 355 (1991).
78. A. Shepard. "Taking Children Seriously: Promoting Cooperative Custody After Divorce," 64 *Texas Law Review* 687 (1985).
79. S. Quinn, "Fathers Cry for Custody," *Juris Docto*r 42 (May 1976).
80. R. Cochran Jr., "Reconciling the Primary Caretaker Preference, and Joint Custody Preference and the Case-by-Case Rule," in *Joint Custody and Shared Parentin*g, ed. Jay Folberg (New York: Guilford Press, 1991), pp. 218–219.
81. J. Goldstein, A. Freud, and A. Solnit, *Beyond the Best Interests of the Child* (New York: Free Press, 1970), pp. 107–109.
82. Cochran, p. 222.
83. M. Elkin, in *Joint Custody and Shared Parenting,* ed. Jay Folberg (New York: The Guilford Press, 1991) pp. 12–13.
84. Ibid., p. 13.
85. See *Gruber v. Gruber*, 583 A.2d 434 (1990), and *In re Miroballi*, 589 N.E.2d 565 (1992), for cases supporting parent's right to relocate. See *Plowman v. Plowman*, 597 A.2d 701 (1991), for a contrary opinion.
86. See *Fortenberry v. Fortenberry*, 338 S.E.2d 342 (1985), *Toomey v. Toomey*, 636 S.W.2d 313 (1982), and *Neudecker v. Neudecker*, 577 N.E.2d 960 (1991).
87. H. Krause, *Family Law in a Nutshell* (2d ed.) (St. Paul: West Publishing, 1986), p. 211.

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X

Contracts

CHAPTER OBJECTIVES

1. *Understand the origins of the modern contract action.*
2. *Identify and explain the essential requirements of an enforceable contract.*
3. *Explain how contracts are classified in terms of validity and enforceability.*
4. *Identify and explain the legal and equitable remedies available to an injured party when a contract is breached.*
5. *Understand how contractual rights and duties are transferred.*

A BRIEF HISTORY OF AMERICAN CONTRACT LAW

The modern contract action can be traced to the English common law writs of debt, detinue, and covenant, which were created in the twelfth and thirteenth centuries.[1] The **debt** action was used to collect a specific sum of money owed. **Detinue** was used against one who had possessory rights to another's personal property but who refused to return it when requested by the true owner. **Covenant** was initially used to enforce agreements relating to land (especially leases).[2] Later it was employed to enforce written agreements under seal.[3] Gradually, these writs were supplemented by the common law **writ of trespass**, which included trespass to land, assaults, batteries, the taking of goods, and false imprisonment. Each of these acts involved a tortfeasor who directly caused injury to the victim by force and arms and thereby violated the King's peace.

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In 1285, Parliament enacted the Statute of Westminster, which authorized the chancery to create a new writ, called **trespass on the case**, to address private wrongs that fell outside the traditional boundaries of trespass.[4] *Case*, as it came to be called, could remedy injuries that resulted from the defendant's failure to perform a professional duty that in turn resulted in harm to the plaintiff. Thus case would be appropriate where A's property was damaged while entrusted to B, as a result of B's failure to exercise proper skill or care.[5] These early writs were based on property rights and were not based on modern contractual notions such as offer, acceptance, and consideration.

In the fifteenth and sixteenth centuries, some breaches of duty (called undertakings) that had been included within the writ of trespass on the case evolved into a new writ called **assumpsit**.[6] For example, in one early case a ferry operator was sued in assumpsit for improperly loading his boat such that the plaintiff's mare drowned while crossing the Humber River.[7] By the early 1500s, a plaintiff could also sue in assumpsit for nonfeasance (failure to perform a promise).[8] During the 1560s, plaintiffs bringing assumpsit actions were generally required to allege that undertakings were supported by consideration.[9] Consideration grew in importance, and in the 1700s chancellors began refusing to order specific performance if they thought the consideration inadequate.[10] This development made the enforceability of contracts uncertain because judges could invalidate agreements reached by the parties and could prevent the parties from making their own bargains.

Assumpsit was the principal "contract" action until the early 1800s, when economic changes and widespread dissatisfaction with the technical requirements and expense of common law pleading resulted in an erosion of the common law approach.[11] The 1800s brought a significant shift in thinking: away from the old writs and toward the emerging new substantive action, called *contract*, which included all types of obligations. Contributing to the demise of assumpsit was the old-fashioned notion that courts had a responsibility to ensure that contracting parties received equivalent value from their bargains.[12] It became apparent that commercial prosperity required that courts protect their expectation damages (the return they had been promised in an agreement).[13] When the courts responded to these changes and demands, contract law rapidly developed. New York's replacement of the writ system in 1848 with its newly enacted Code of Civil Procedure established a trend toward modern code pleading that swept the nation.[14]

By 1850, American courts had accepted the notion that contracts are based on the reciprocal promises of the parties.[15] As courts became increasingly willing to enforce private agreements, they began to recognize the customs of each trade, profession, and business rather than general customs. The courts would often disregard existing legal requirements in favor of the rules created by the contracting parties. This fragmentation of law was bad for business. The absence of a widely accepted code of contract rules resulted in unpredictability and uncertainty in American society, the economy, and the courts. This caused business firms to press for uniform laws dealing with commercial transactions among states.

In the 1890s, the American Bar Association established the National Conference of Commissioners on Uniform State Laws to encourage states to enact uniform legislation. The Uniform Sales Act and the Negotiable Instruments Law were two products of this movement. During this era, Samuel Williston and Arthur Corbin wrote widely accepted treatises on the law of contracts. Then, in 1928, a legal think-tank of lawyers and judges, called the American Law Institute, developed and published the Restatement of Contracts, a proposed code of contract rules that was grounded in the common law.

In 1942, the American Law Institute and the American Bar Association sponsored a project to develop a **Uniform Commercial Code** (UCC), which was completed in 1952. In 1953, Pennsylvania was the first state to adopt the UCC. The code covers sales, commercial paper, bank collection processes, letters of credit, bulk transfers, warehouse

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receipts, bills of lading, other documents of title, investment securities, and secured transactions. The UCC governs only sales of (and contracts to sell) goods, defined as movables (personal property having tangible form). It does not cover transactions involving realty, services, or the sale of intangibles. If a contract involves a mixed goods/services sale (for example, application of a hair product as part of a beauty treatment), the courts tend to apply the UCC only if the sale-of-goods aspect dominates the transaction. The UCC has been adopted at least partially in all fifty states and is the legislation that has had the largest impact on the law of contracts.

NATURE AND CLASSIFICATION OF CONTRACTS

A **contract** is a legally enforceable agreement containing one or more promises. Not every promise is a contract—only those promises enforceable by law. Although the word *contract* is often used when referring to a written document that contains the terms of the contract, in the legal sense the word *contract* does not mean the tangible document, but rather the legally enforceable agreement itself.

In order to establish an enforceable contract, there must be (1) an agreement, (2) between competent parties, (3) based on genuine assent of the parties, (4) supported by consideration, (5) that does not contravene principles of law, and (6) in writing (in certain circumstances). Each of these requirements is discussed in detail in this chapter.

An **agreement** is an expression of the parties' willingness to be bound to the terms of the contract. Usually, one party offers a proposal, and the other agrees to the terms by accepting it. Both parties to the contract must be **competent**. Some people—because of age or mental disability—are not competent and thus do not have, from the legal standpoint, the capacity to bind themselves contractually. **Genuine assent** of both parties is also necessary. It is presumed to exist unless one of the parties is induced to agree because of misrepresentation, fraud, duress, undue influence, or mistake.

Consideration on the part of both parties is an essential element of a contract. One party's promise (or consideration) must be bargained for and given in exchange for the other's act or promise (his consideration). The bargain cannot involve something that is prohibited by law or that is against the best interests of society. And, finally, certain contracts, to be enforceable, must be evidenced in writing.

Common law is the primary source of the law of contracts. Many statutes affect contracts, especially specific types of contracts such as employment and insurance. But the overwhelming body of contractual principles is embodied in court decisions.

Valid, Void, Voidable, and Unenforceable Contracts

Contracts can be classified in terms of validity and enforceability. A **valid contract** is a binding and enforceable agreement that meets all the necessary contractual requirements. A contract is said to be valid and enforceable when a person is entitled to judicial relief in case of breach by the other party.

A **void contract** means no contract, because no legal obligation has been created. When an agreement lacks a necessary contractual element—such as consideration—the agreement is without legal effect, and therefore void.

A **voidable contract** exists when one or more persons can elect to avoid an obligation created by a contract because of the manner in which the contract was brought about. For example, someone who has been induced to make a contract by fraud or duress may be able to avoid the obligation created by the contract. Contracts made by those who are not of legal age are also voidable, at the option of the party lacking legal capacity. A voidable contract is not wholly lacking in legal effect, however, because not all the parties can legally avoid their duties under it.

A contract is **unenforceable** (not void or voidable) when a defense to the enforceability of the contract is present. For example, the right of

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action is lost in a situation in which a sufficient writing is required and cannot be produced. Also, when a party wanting to enforce a contract waits beyond the time period prescribed by law to bring the court action (statute of limitations), the contract is unenforceable.

Bilateral and Unilateral Contracts

All contracts involve at least two parties. **Bilateral contracts** consist simply of mutual promises to do some future act. The promises need not be express on both sides; one of the promises could be implied from the surrounding circumstances.

A **unilateral contract** results when one party makes a promise in exchange for another person performing an act or refraining from doing something. For example, assume that someone wants to buy an item owned by another for $100. If the buyer promises to pay the owner $100 for the item if and when the owner conveys legal title and possession to the buyer, a *uni*lateral contract is created. It is a promise of an act. The contract comes into existence when the act of conveying title and possession is performed. If, however, the buyer promises to pay $100 in exchange for the owner's promise to convey title and possession of the item, a bilateral contract results. A *bi*lateral contract comes into existence when mutual promises are made.

AGREEMENT

In order for a contract to be formed, there must be mutual **agreement** between two or more competent parties who must manifest their intent to be bound to definite terms. The agreement is usually reached by one party making an offer and the other—expressly or impliedly—accepting the terms of the offer.

The intention of the parties is the primary factor determining the nature of the contract. This is ascertained not just from the words used by the parties, but also from the entire situation, including the acts and conduct of the parties. In determining the intent of the parties, the courts generally use an objective rather than a subjective test. In an objective test, the question would be "What would a reasonable person in the position of party A think was meant by the words, conduct, or both of party B?" If a subjective test were used, the question would be "What did party A actually mean by certain expressions?" For example, suppose that one of the parties is not serious about creating a legal obligation, but the other party has no way of knowing this. Under the objective test, a contract would still be created.

In law, invitations to social events lack contractual intention and, when accepted, do not give rise to a binding contract. For example, when two people agree to have dinner together or to go to a baseball game together, each usually feels a moral obligation to fulfill his or her promise. Neither, however, expects to be legally bound by the agreement. An agreement also lacks contractual intent when a party's assent to it is made in obvious anger, excitement, or jest. This is true even when the parties' expressions, if taken literally as stated, would amount to mutual assent. Sometimes it is not obvious that a proposal is made in anger, excitement, or jest. Under the objective test, the surrounding circumstances and context of the expressions would be examined to determine what a reasonably prudent person would believe.

Offer

An **offer** is a proposal to make a contract. It is a promise conditional on a return promise, act, or forbearance being given by the offeree. The return promise, act, or forbearance is acceptance of the offer.

A legally effective offer must be (1) a definite proposal, (2) made with the intent to contract, and (3) communicated to the offeree. The terms of the offer, on acceptance, become the terms of the contract. An offer must be definite and certain, so that when the offeree accepts, both parties understand the obligations they have created.

It is important to distinguish between a definite proposal, which is an offer, and a solicitation of an

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offer. A willingness to make or receive an offer is not itself an offer, but an invitation to negotiate. For example, the question "Would you be interested in buying my television set for $100?" is considered an invitation to negotiate. A "yes" response would not create a contract, since there was no definite proposal made (form of payment, when due, etc.).

For an offer to be effective, it need not be made to one specific named person. It can be made to the general public, in the form of an advertisement. These may be circulars, quotation sheets, displays, and announcements in publications. However, the publication of the fact that an item is for sale, along with its price, is usually an invitation to negotiate, not an offer.

Termination of an Offer

The **offeree** can bind the **offeror** to his or her proposal for the duration of the offer—the time from the moment an offer is effectively communicated to the offeree until it is terminated. An offer can be terminated by (1) revocation by the offeror, (2) lapse of time, (3) subsequent illegality, (4) destruction of the subject matter, (5) death or lack of capacity, (6) rejection, (7) a counteroffer, and (8) acceptance.

An offeror has the power to terminate the offer by revocation at any time before it is accepted. Even when an offeror promises to hold an offer open for a certain period of time, the offeror can revoke the offer before that time, unless consideration is given to hold the offer open. For example, if a seller promises in an offer to give the offeree one week to accept the offer, the seller still retains the power to withdraw the offer at any time.

A contract whereby an offeror is bound to hold an offer open is called an **option**. In an option contract, consideration is necessary in return for the promise to hold the offer open. For example, if the offeree pays the offeror $10 to hold an offer open for ten days, the offeror does not have the power to withdraw the offer before the ten-day period is up.

If an offer stipulates how long it will remain open, it automatically terminates with the expiration of that period of time. When an offer does not stipulate a time period within which it may be accepted, it is then effective for a "reasonable" length of time.

An offer to enter into an agreement forbidden by law is ineffective and void, even if the offer was legal when made. If the subject matter of an offer is destroyed, the offer is automatically terminated because of impossibility.

An offer is terminated at the death of either the offeror or the offeree. Adjudication of insanity usually has the same effect as death in terminating an offer. The termination is effective automatically without any need for the terminating party to give notice. For example, if a person offers to sell an item at a stated price, but dies before the offer is accepted, there can be no contract, because one of the parties died before a meeting of the minds took place. If the offeree had accepted the offer before the death, however, there would have been a meeting of minds, and the offeror's estate would be responsible under the contract.

An offer is also terminated by a rejection or a counteroffer. When an offeree does not intend to accept an offer and so informs the offeror, the offer is said to have been terminated by rejection. If the offeree responds to an offer by making another proposal, the proposal constitutes a counteroffer and terminates the original offer. For example, if an offer is made to sell merchandise for $300 and the offeree offers to buy this merchandise for $250, the offeree has rejected the original offer by making a counteroffer. However, an *inquiry*, or a request for additional terms by the offeree, is not a counteroffer and does not terminate the offer. Thus, if the offeree had asked whether the offeror would consider reducing the price to $250, this inquiry would not terminate the original offer.

Acceptance

An **acceptance** is the agreement of the offeree to be bound by the terms of the offer. There is no

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meeting of the minds until the offeree has consented to the proposition contained in the offer. In order for an acceptance to be effective in creating a contract, there must be (1) an unconditional consent, (2) to an open offer, (3) by the offeree only, and (4) communicated to the offeror. In addition, there must be some act of manifestation of the intention to contract. This can be in the form of (1) silence or inaction, (2) a promise, (3) an act or forbearance from an act, or (4) any other manner specifically stipulated in the offer.

In most situations, silence or inaction on the part of the offeree does not constitute acceptance. When a person receives goods or services expecting that they will have to be paid for, the act of receiving the goods or services constitutes acceptance of the offer. An offeror is usually not permitted to word the offer in such a way that silence or inaction of the offeree constitutes acceptance. However, silence or inaction *can* do so in situations in which this method of dealing has been established by agreement between the parties or by prior dealings of the parties.

In an offer to enter into a bilateral contract, the offeree must communicate acceptance in the form of a promise to the offeror. The offeror must be made aware, by the express or implied promise, that a contract has been formed. An offer to enter into a unilateral contract requires an acceptance in the form of an act. A mere promise to perform the act is not an effective acceptance.

The offeror has the power to specify the means and methods of acceptance, and the acceptance must comply with those requirements. For example, an oral acceptance of an offer that called for a written acceptance would be ineffective. If nothing is stated, a reasonable means or method of acceptance is effective. An offer can provide that the acceptance is effective only on the completion of specified formalities. In such a situation, all these formalities must be complied with in order to have an effective acceptance.

At common law, an acceptance must be a "mirror image" of the offer. If it changes the terms of an offer in any way, it acts only as a counteroffer and has no effect as an acceptance. Under the UCC (2-207), an acceptance that adds some new or different terms to contracts involving the sale of goods does create a contract. The new terms are treated as proposals that must be accepted separately.

The next case involves a pest control company that sought to require customers wishing to renew their contracts to thereafter arbitrate rather than litigate contractual disputes between the parties. The company subsequently learned to its chagrin that its customer, the Rebars, had, unknown to company officials, transformed the company's proposed renewal contract into a counteroffer in which the company's arbitration clause was deleted.

Because the Rebars carefully read the company's proposed contract, they detected the presence of the arbitration clause. The Rebars, not wishing to give up their right to litigate any contract-related claims, made some changes to the noneconomic portions of the company's proposal and sent the revised document back to the company along with a check (which the company subsequently cashed). The company, not realizing that their proposal had been rejected, proceeded to provide services to the Rebars, believing that they had accepted the proposal containing the arbitration clause. The Rebars' actions went undiscovered until a contractual dispute arose and the Rebars elected to bring the matter to court.

The moral of this story is that a contracting party cannot assume that another contracting party will shine a spotlight on substantive changes it has decided to include in its contract proposals. Every party to a contract needs to take the time to carefully read an offer, and, if possible, compare it with previous agreements in order to identify changes.

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Cook's Pest Control, Inc. v. Robert and Margo Rebar

852 So.2d 730
Supreme Court of Alabama
December 13, 2002

Stuart, Justice

… August 28, 2000, Cook's Pest Control and the Rebars entered into a one-year renewable "Termite Control Agreement." Under the agreement, Cook's Pest Control was obligated to continue treating and inspecting the Rebars' home for termites during the term of the agreement, which, with certain limited exceptions, continued so long as the Rebars continued to pay the annual renewal fee. The agreement contained a mandatory, binding arbitration provision.

When the initial term of the agreement was about to expire, Cook's Pest Control notified the Rebars and requested that they renew the agreement for another year by paying the renewal fee. On August 16, 2001, Mrs. Rebar submitted a payment to Cook's Pest Control; with the payment she included an insert entitled "Addendum to Customer Agreement."… That addendum provided, in part:

> "Addendum to Customer Agreement:
> To: Cook's Pest Control, Inc.…
> Please read this addendum to your Customer Agreement carefully as it explains changes to some of the terms shown in the Agreement. Keep this document with the original Customer Agreement."…
>
> "Arbitration.
> Cook's [Pest Control] agrees that any prior amendment to the Customer Agreement shall be subject to written consent before arbitration is required. In the event that a dispute arises between Cook's [Pest Control] and Customer, Cook's [Pest Control] agrees to propose arbitration if so desired, estimate the cost thereof, and describe the process (venue, selection of arbitrator, etc.). Notwithstanding prior amendments, nothing herein shall limit Customer's right to seek court enforcement (including injunctive or class relief in appropriate cases) nor shall anything herein abrogate Customer's right to trial by jury. Arbitration shall not be required for any prior or future dealings between Cook's [Pest Control] and Customer.
>
> "Future Amendments.
> Cook's [Pest Control] agrees that any future amendments to the Customer Agreement shall be in writing and signed by Customer and [an] authorized representative of Cook's [Pest Control].
>
> "Effective Date.
> These changes shall be effective upon negotiation of this payment or the next service provided pursuant to the Customer Agreement, whichever occurs first."…
>
> "Acceptance be [*sic*] Continued Use.
> Continued honoring of this account by you acknowledges agreement to these terms. If you do not agree with all of the terms of this contract, as amended, you must immediately notify me of that fact."

The addendum proposed new terms for the agreement and notified Cook's Pest Control that continued service or negotiation of the renewal-payment check by Cook's Pest Control would constitute acceptance of those new terms. After it received the addendum, Cook's Pest Control negotiated the Rebars' check and continued to perform termite inspections and services at the Rebars' home.

On August 30, 2001, the Rebars filed this action against Cook's Pest Control. The Rebars alleged fraud, negligence, breach of contract, breach of warranty, breach of duty, unjust enrichment, breach of the duty to warn, negligent training, supervision and retention of employees, and bad-faith failure to pay and bad-faith failure to investigate a claim. Those claims were based upon Cook's Pest Control's alleged failure to treat and control a termite infestation in the Rebars' home and to repair the damage to the home caused by the termites.

Cook's Pest Control moved to compel arbitration of the Rebars' claims. In support of its motion, Cook's Pest Control relied upon the arbitration provision contained in the agreement; Cook's Pest Control also submitted the affidavit testimony of the president of the company, who testified regarding the effect of Cook's Pest Control's business on interstate commerce.

The Rebars opposed the motion to compel arbitration, asserting, among other things, that a binding, mandatory arbitration agreement no longer existed. The Rebars asserted that a binding, mandatory arbitration agreement no longer existed because the agreement between the parties had been modified when it was renewed in August 2001. The Rebars

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presented to the trial court a copy of the addendum and a copy of the canceled check they had written to Cook's Pest Control in payment of their renewal fee, which Cook's Pest Control had accepted and negotiated. The Rebars also submitted the affidavit of Mrs. Rebar, who testified that after Cook's Pest Control had received the addendum and had negotiated the check for the renewal fee, Cook's Pest Control inspected the Rebars' home.

On December 18, 2001, the trial court denied Cook's Pest Control's motion to compel arbitration.... Cook's Pest Control appeals....

Analysis

Cook's Pest Control argues that the trial court incorrectly found that it accepted the terms included in the addendum by continuing to inspect and treat the Rebars' home after it received the addendum and negotiated the Rebars' check for the renewal fee. Cook's Pest Control argues that, under the terms of the agreement, it was already obligated to continue inspecting and treating the Rebars' home. Cook's Pest Control also argues that the addendum was an improper attempt to unilaterally modify an existing contract. We reject those arguments.

First, we reject Cook's Pest Control's argument that the Rebars were attempting unilaterally to modify an existing contract. We note that the parties' original agreement was due to expire on August 28, 2001; Cook's Pest Control had already sent the Rebars a notice of this expiration and had requested that the Rebars renew the agreement by submitting the annual renewal fee.

Upon receiving notice that the agreement was up for renewal, the Rebars responded to Cook's Pest Control's offer to renew that contract with an offer of their own to renew the contract but on substantially different terms. This response gave rise to a counter-offer or a conditional acceptance by the Rebars:

> "If the purported acceptance attempts to restate the terms of the offer, such restatement must be accurate in every material respect. It is not a variation if the offeree merely puts into words that which was already reasonably implied in the terms of the offer. But the very form of words used by the offeror is material if the offeror so intended and so indicated in the offer. An acceptance using a different form makes no contract. A variation in the substance of the offered terms is material, even though the variation is slight....
>
> "In the process of negotiation concerning a specific subject matter, there may be offers and counter-offers. One party proposes an agreement on stated terms; the other replies proposing an agreement on terms that are different. Such a counter-proposal is not identical with a rejection of the first offer, although it may have a similar legal operation in part. In order to deserve the name 'counter-offer,' it must be so expressed as to be legally operative as an offer to the party making the prior proposal. It is not a counter-offer unless it is itself an offer, fully complying with all the requirements that have been previously discussed. This does not mean that all of its terms must be fully expressed in a single communication. Often they can be determined only by reference to many previous communications between the two parties. In this, a counter-offer differs in no respect from original offers. But there is no counter-offer, and no power of acceptance in the other party, unless there is a definite expression of willingness to contract on definitely ascertainable terms.
>
> "If the party who made the prior offer properly expresses assent to the terms of the counter-offer, a contract is thereby made on those terms. The fact that the prior offer became inoperative is now immaterial and the terms of that offer are also immaterial except in so far as they are incorporated by reference in the counter-offer itself. Very frequently, they must be adverted to in order to determine what the counter-offer is. Often, the acceptance of a counter-offer is evidenced by the action of the offeree in proceeding with performance rather than by words.
>
> "... If the original offeror proceeds with performance in consequence of the counter-offer, there can be no successful action for breach of the terms originally proposed.
>
> "The terms 'counter-offer' and 'conditional acceptance' are really no more than different forms of describing the same thing. They are the same in legal operation. Whether the word 'offer' is used or not, a communication that expresses an acceptance of a previous offer on certain conditions or with specified variations empowers the original offeror to consummate the contract by an expression of assent to the new conditions and variations. That is exactly what a counter-offer does. Both alike, called by either name, terminate the power of acceptance of the previous offer." Joseph M. Perillo, *Corbin on Contracts* §§ 3.32 at 478-80; §§ 3.35 (rev. ed. 1993) (footnotes omitted).

In this case, the Rebars did not accept the terms proposed by Cook's Pest Control for renewal of the

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agreement but instead proposed terms for the renewal of that contract that were materially different from the terms of the agreement…. The Rebars did not accept the arbitration provision proposed by Cook's Pest Control; they countered with an arbitration provision of their own.

In addition, the Rebars specified in the addendum the method by which Cook's Pest Control could signify its acceptance of those different terms. Had Cook's Pest Control wished to reject those terms, it could have refused to renew the agreement and forgone receipt of the Rebars' renewal check.

In response, Cook's Pest Control argues that it was obligated under the terms of the original agreement to continue servicing and treating the Rebars' home and that its continued service and treatment should not be regarded as acceptance of modifications to that agreement proposed by the addendum. We disagree.

Because the Rebars did not unconditionally accept the renewal contract as proposed by Cook's Pest Control but rather countered with terms that differed materially from those proposed by Cook's Pest Control, Cook's Pest Control had three options upon receipt of the addendum: (1) reject the Rebars' counteroffer and treat the agreement as terminated on August 28, 2001; (2) respond to the Rebars' counteroffer with a counteroffer of its own; or (3) accept the Rebars' counteroffer. Cook's Pest Control did not reject the counteroffer and treat the agreement as terminated; nor did it respond with its own counteroffer; rather, it deposited the Rebars' check and continued to inspect and treat the Rebars' home—the exact method specified by the Rebars for acceptance of the proposed modifications to the agreement. Those actions constituted acceptance of the Rebars' counteroffer.

Cook's Pest Control also argues that the addendum had no effect upon the renewal of the agreement because none of the employees in the office where the Rebars' payment was processed had the authority to enter into a contract on behalf of Cook's Pest Control. Thus, Cook's Pest Control argues, a properly authorized agent never assented to the modifications proposed by the Rebars. Again, we disagree.

"It is well settled that whether parties have entered a contract is determined by reference to the reasonable meaning of the parties' external and objective actions."… It is also well settled that an agent with actual or apparent authority may enter into a contract and bind his or her principal….

We note that if Cook's Pest Control wished to limit the authority of its employees to enter into contracts on its behalf, Cook's Pest Control, as the drafter of the original agreement, could have included such limiting language in the agreement. We find nothing in the agreement so limiting the authority of employees of Cook's Pest Control; we find nothing in the agreement requiring that a purported modification to the agreement be directed to any particular office of Cook's Pest Control, and we find nothing in the agreement stating that, to be effective, such a modification must be signed by a corporate officer or by a duly authorized representative of Cook's Pest Control.

Based upon the fact that Cook's Pest Control received the Rebars' proposed modifications to the agreement and that Cook's Pest Control, for some two months thereafter, acted in complete accordance with the Rebars' stated method of accepting those proposed modifications, we conclude that Cook's Pest Control's external and objective actions evidenced assent to the Rebars' proposed modifications. It was reasonable for the Rebars to rely upon those actions as evidence indicating that Cook's Pest Control accepted their proposed changes to the agreement.

We agree with the trial court's conclusion, i.e., that, after receipt of the Rebars' addendum, Cook's Pest Control's continuing inspection and treatment of the Rebars' home and Cook's Pest Control's negotiation of the Rebars' check constituted acceptance of the terms contained in that addendum. Upon acceptance of those new terms, the binding arbitration provision contained in the agreement was no longer in effect. The parties' agreement regarding arbitration had been amended to state:

> "Cook's [Pest Control] agrees that any prior amendment to the Customer Agreement shall be subject to written consent before arbitration is required. In the event that a dispute arises between Cook's [Pest Control] and Customer, Cook's [Pest Control] agrees to propose arbitration if so desired, estimate the cost thereof, and describe the process (venue, selection of arbitrator, etc.). Notwithstanding prior amendments, nothing herein shall limit Customer's right to seek court enforcement (including injunctive or class relief in appropriate cases) nor shall anything herein abrogate Customer's right to trial by jury. Arbitration shall not be required for any prior or future dealings between Cook's [Pest Control] and Customer."

Because the Rebars oppose arbitration of their claims against Cook's Pest Control, the trial court properly denied Cook's Pest Control's motion to compel arbitration….

Affirmed.

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Case Questions

1. Why did the appellate court conclude that the Rebars' addendum constituted a counteroffer?
2. What steps might Cook's Pest Control take to prevent this from happening in the future?

INTERNET TIP

Students can read a contract formation case entitled *Beaman Pontiac v. Gill* on the textbook's website. This case involves an oral, bilateral contract, and the opinion discusses issues involving the Uniform Commercial Code, the Mailbox Rule, and the existence of consideration.

REALITY OF CONSENT

Genuine assent to be bound by a contract is not present when one of the parties' consent is obtained through duress, undue influence, fraud, or innocent misrepresentation, or when either of the parties, or both, made a mistake concerning the contract. Such contracts are usually voidable, and the injured party has the right to elect to avoid or affirm the agreement. (These defenses against the enforceability of a contract can also be used against other legal documents, such as wills, trust agreements, and executed gifts.)

An injured party who wishes to avoid or rescind a contract should act promptly. Silence beyond a reasonable length of time may be deemed an implied ratification. An injured party who elects to rescind a contract is entitled to *restitution*—the return of any property or money given in performance of the contract. The injured party must also return any property or money received through the contract.

Duress

Freedom of will of both parties to a contract is absolutely necessary. When one of the parties' wills is overcome because of duress, the agreement is voidable. **Duress** is any unlawful constraint exercised on people that forces their consent to an agreement that they would not otherwise have made. Unlike those situations in which people act as a result of fraud, innocent misrepresentation, or mistake, a person acting under duress does so knowingly. Three elements are necessary for duress to exist: (1) coercion, (2) causing a loss of free will, and (3) resulting in a consent to be bound by a contract.

Any form of constraint improperly exercised in order to get another's consent to contract is sufficient for coercion. Exercise of pressure to contract is not enough; it must be exercised wrongfully. Thus, advice, suggestion, or persuasion are not recognized as coercive. Likewise, causing a person to fear embarrassment or annoyance usually does not constitute duress. In order to amount to coercion, the constraint must entail threatened injury or force. For duress to exist, the person must enter into the agreement while under the influence of this threat.

The threat need not necessarily be to the person or the property of the contracting party. For example, a threat to injure the child of a contracting party could amount to duress. A threat of criminal prosecution gives rise to duress when fear overcomes judgment and deprives the person of the exercise of free will. Making a threat of civil action, however—with the honest belief that it may be successful—is not using duress. For example, assume that an employee embezzles an undetermined amount of money from an employer. The employer estimates that the theft amounts to about $5,000, and threatens to bring a civil suit for damages unless the employee pays $5,000. Even though the employee takes the threat seriously and pays the $5,000, no duress exists. If the employer were to threaten to bring criminal charges under the same circumstances, duress would be present.

Economic distress or business compulsion may be grounds for duress. The surrounding circumstances of the business setting and the relative bargaining

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positions of the contracting parties are examined in order to determine whether duress is present.

Undue Influence

Undue influence results when the will of a dominant person is substituted for that of the other party, and the substitution is done in an unlawful fashion, resulting in an unfair agreement. Usually, undue influence is found when there is (1) a confidential relationship that is used to create (2) an unfair bargain.

In determining whether a confidential relationship exists, all the surrounding circumstances are examined to find out whether one of the parties dominates the other to the extent that the other is dependent on him or her. Family relationships, such as husband–wife or parent–child, often give rise to confidential relationships. Some relationships involving a special trust—such as trustee–beneficiary or attorney–client—entail a confidential relationship. Sometimes confidential relationships are created between business associates, neighbors, or friends. A person who is mentally weak—because of sickness, old age, or distress—may not be capable of resisting the dominant party's influence.

Whenever there is dominance in a confidential relationship, the court must determine whether the contract was equitable and voluntary. A contract is not invalid simply because there is a confidential relationship. A contract is voidable if one abuses the confidence in a relationship in order to obtain personal gain by substituting one's own will or interest for that of another. Whether the weaker party has had the benefit of independent advice is an important factor in determining fairness in contractual dealings. A legitimate suggestion or persuasion may influence someone, but it is not undue influence; nor, usually, is an appeal to the affections. When methods go beyond mere persuasion and prevent a person from acting freely, undue influence is present.

Fraud

The term **fraud** covers all intentional acts of deception used by one individual to gain an advantage over another. The essential elements of actionable fraud are (1) the misstatement of a material fact, (2) made with knowledge of its falsity, or in reckless disregard of its truth or falsity, (3) with the intention to deceive, (4) that induces reliance by the other party, and (5) that results or will result in injury to the other party.

For fraud, misstatements must be of a fact, a *fact* being something that existed in the past or exists at present. The misstated fact must be material. The often-used definition of a *material fact* is a fact without which the contract would not have been entered into. The speaker, when making the statement of fact, must know that it is false. The stating party must have the intention to deceive, and thereby to induce the other party to enter into the contract.

The deceived party's reliance on the misstatement must be justified and reasonable. A party wishing to rescind a contract need not show actual damages resulting from the fraud. However, a party wishing to sue for damages in addition to rescission must prove that actual damage has been sustained. Assume, for example, that Carlotta purchases a dog from Enrique based on his statements that the dog is a purebred with a pedigree from the American Kennel Club. Carlotta can rescind the contract, return the dog, and recover the purchase price from Enrique if she later discovers that the dog actually is a crossbred. Carlotta may also be able to recover for the dog's medical care, food, and supplies, based on their value to Enrique.

Misrepresentation

When a party to a contract misrepresents a material fact, even if unknowingly, and the other party relies on and is misled by the falsehood, **misrepresentation** is present. If a contract is induced by misrepresentation, the deceived party has the right of rescission. Fraud and misrepresentation are quite similar. However, the intent to deceive is the primary distinction between fraudulent and nonfraudulent misrepresentation. Rescission and restitution are available for both, although damages are not obtainable in cases of misrepresentation.

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Mistake

Sometimes one or both of the parties to a contract unintentionally misunderstands material facts. If ignorance is of a fact that is material to the contract, a **mistake** exists, and the contract may be voidable. Although a mistake of material fact related to the contract is sufficient for relief, a mistake of law is not. In addition, the mistake must refer to a past or present material fact, not to a future possibility.

When one enters into a plain and unambiguous contract, one cannot avoid the obligation created by proving that its terms were misunderstood. Carelessness, poor judgment, lack of wisdom, or a mistake as to the true value of an item contracted for are not grounds for relief. Relief based on mistake may not be had simply because one party to a speculative contract expected it to turn out differently.

The court in the following case ordered rescission of an executed agreement and restitution because the parties to the contract made a mutual mistake.

Carter v. Matthews

701 S.W.2d 374
Supreme Court of Arkansas
January 13, 1986

Newbern, Justice

This is a real estate sale case in which the chancellor granted rescission in favor of the appellant on the ground of mutual mistake but did not award the money damages she claimed. The damages she sought were for her expenses in constructing improvements that subsequently had to be removed from the land. The appellant claims it was error for the chancellor to have found she did not rely on misrepresentations made by the appellees through their real estate agent, and thus it was error to refuse her damages for fraud plus costs and an attorney fee. On cross-appeal, the appellees contend the only possible basis for the rescission was fraud, not mistake, and the chancellor erred in granting rescission once he had found there was no reliance by the appellant on any active or constructive misrepresentations of the appellees. We find the chancellor was correct on all counts, and thus we affirm on both appeal and cross-appeal.

1. Rescission

The chancellor found that conversations between the appellant and the appellees' agent showed that both parties were under the mistaken impression that the low, flat portion of land in question was suitable for building permanent structures such as a barn, horse corral and fencing. In fact, however, the area where the appellant attempted to build a barn and corral and which she wanted to use as pasture for horses was subject to severe and frequent flooding. The chancellor held there was thus a mutual mistake of fact making rescission proper. While there was evidence the appellees had known of one instance of severe flooding on the land, the evidence did not show they knew it was prone to the frequent and extensive flooding which turned out to be the case.

Other matters not known to the parties were that the low portion of the land, about two-thirds of the total acreage, is in the 100-year floodplain and that a Pulaski County ordinance…requires a seller of land lying in the floodplain to inform the buyer of that fact no later than ten days before closing the transaction. The county planning ordinance also requires that no structures be built in the floodplain. If the chancellor's decision had been to permit rescission because of the parties' lack of knowledge of these items, we would have had before us the question whether the mistake was one of law rather than fact and thus perhaps irremediable….

While the chancellor mentions these items, his basis for rescission was the mutual lack of knowledge about the extent of the flooding, and misunderstanding of the suitability of the property, as a matter of fact, for the buyer's purposes which were known to both parties. We sustain his finding that there was a mutual mistake of fact. A mutual mistake of fact as to a material element of a contract is an appropriate basis for rescission….

2. Damages for Fraud

The chancellor refused to allow the appellant any damages for the loss she sustained with respect to the improvements she had placed in the floodplain. He found the appellant had made an independent investigation of the propensity of the property to become flooded and had ascertained, erroneously, that the property was not in the floodplain. Thus, in spite of the legal duty on the part of the appellees to tell the

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appellant that the land was in the floodplain, and what might have been the resultant constructive fraud upon failure to inform her, he held that fraud may not be the basis of a damages award absent reliance on the misrepresentation. For the same reason the chancellor refused to base his decision on any alleged fraud resulting from the appellees' failure to tell the appellant what they may have known about the land's propensity to flood. He was correct. An essential element of an action for deceit is reliance by the plaintiff on the defendant's misrepresentation…. In view of the strong evidence, including her own testimony, that the appellant made her own investigation as to whether the land flooded, the extent to which a creek running through the land was in the floodplain, and the feasibility of bridging the creek above the floodplain, we can hardly say the chancellor's factual determination that the appellant did not rely on the failure of the appellees to give her information known to them or which they had a duty to disclose to her under the ordinance was clearly erroneous….

When rescission is based on mutual mistake rather than fraud, the recoveries of the parties are limited to their restitutionary interests…. As the appellant could show no benefit conferred on the appellees from her attempted improvements on the land, she was entitled to no recovery in excess of the return of the purchase price, which was awarded to her by the chancellor, as well as cancellation of her note and mortgage….

Affirmed.

Case Questions

1. The plaintiff-appellant in this case went to court seeking rescission as well as damages. What, exactly, is the remedy called rescission?
2. Why did the chancellor agree to grant rescission? What was the rationale behind this ruling?
3. Why did the chancellor refuse to allow the appellant any damages for fraud?
4. What recovery was made by the appellant?

CONSIDERATION

Consideration is simply that which is bargained for and given in exchange for another's promise. Each party to a contract has a motive or price that induces the party to enter into the obligation. This cause or inducement is called consideration. Consideration usually consists of an act or a promise to do an act. **Forbearance** or a promise to forbear may also constitute consideration. Forbearance is refraining from doing an act, or giving up a right.

A person must bargain specifically for the promise, act, or forbearance in order for it to constitute consideration. A promise is usually binding only when consideration is given in exchange. If a person promises to give another $100, this is a promise to make a gift, and it is unenforceable since the promise lacked consideration. If, however, the **promisee** had promised to convey a television set in return for the promise to convey $100, the promise to give $100 would have been supported by consideration and therefore would be enforceable. Although a promise to make a gift is not enforceable, a person who has received a gift is not required to return it for lack of consideration.

Consideration must be legally sufficient, which means that the consideration for the promise must be either a detriment to the promisee or a legal benefit to the **promisor**. In most situations, both exist. **Benefit** in the legal sense means the receipt by the promisor of some legal right to which the person had not previously been entitled. **Legal detriment** is the taking on of a legal obligation or the doing of something or giving up of a legal right by the promisee.

Assume that an uncle promises to pay a niece $1,000 if she enrolls in and graduates from an accredited college or university. If the niece graduates from an accredited college, she is entitled to the $1,000. The promisee–niece did something she was not legally obligated to do, so the promise was supported by legally sufficient consideration. The legal detriment of the niece certainly did not amount to actual detriment. It can hardly be said that the uncle received any actual benefit either.

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Consideration should not be confused with a condition. A condition is an event the happening of which qualifies the duty to perform a promise. A promise to give a person $100 if the person comes to your home to pick it up is a promise to make a gift on the condition that the person picks up the money. A promisee who shows up is not legally entitled to the $100.

When one party to an agreement makes what appears at first glance to be a promise but when on examination no real promise is made, this situation is called an **illusory promise**. A contract is not entered into when one of the parties makes an illusory promise, because there is no consideration. For example, a promise to work for an employer at an agreed rate for as long as the promisor wishes to work is an illusory promise. The promisor is really promising nothing and cannot be bound to do anything.

A court will not concern itself with the terms of a contract as long as the parties have capacity and there has been genuine assent to the terms. Whether the bargain was a fair exchange is for the parties to decide when they enter into the agreement. Consideration need not have a pecuniary or money value. If a mother promises her son $100 if he does not drink or smoke until he reaches the age of twenty-one, there is no pecuniary value to the abstinence; yet it is valid consideration.

It is not necessary to state the consideration on the face of the document when an agreement is put in writing. It may be orally agreed on or implied. Although the recital of consideration is not final proof that consideration exists, it is evidence of consideration that is *prima facie*, or sufficient on its face. Evidence that no consideration existed will, however, overcome the presumption that the recital creates. And a statement of consideration in an instrument does not create consideration where it was never really intended or given.

If a promise is too vague or uncertain concerning time or subject matter, it will not amount to consideration. If a promise is obviously impossible to perform, it is not sufficient consideration for a return promise. When a promise is capable of being performed, even though improbable or absurd, it is consideration.

Consideration must be bargained for and given in exchange for a promise. Past consideration is not consideration. If a person performs a service for another without the other's knowledge, and later the recipient of the service promises to pay for it, the promise is not binding, since the promise to pay was not supported by consideration. A promise to do what one is already legally obligated to do cannot ordinarily constitute consideration. For example, a promise by a father to pay child support payments that are already an existing legal obligation determined by a court will not constitute consideration. Similarly, consideration is also lacking when a promise is made to refrain from doing what one has no legal right to do.

The facts in the following case have been summarized so that you can concentrate on learning about the importance of "consideration" in contract formation.

After Josephine Hopkins died, her estate decided to sell two adjacent parcels of land located in a wealthy neighborhood. One parcel was on Richwood Avenue and had a house on it, and the other was on vacant land on LeBlond Avenue.

Joel and Sandra King, the defendants in the case, decided to buy the Richwood property. Joel King also decided to join with architect Gene Barber to buy the LeBlond Avenue land. Joel King and Barber negotiated an agreement which provided that at the closing on the LeBlond parcel, Joel would promise to relinquish his rights in the LeBlond site to Barber in exchange for Barber's promise to deed a specified 10' by 80' portion of the LeBlond site to Joel for $1. Joel wanted to make sure that his parcel would be large enough to comply with zoning setback requirements.

Barber submitted two offers to the estate. Barber and Joel King made the first offer and Barber and M. Ray Brown made the second offer. King was not an offeror on the second offer. Because no attorneys were involved in the LeBlond Avenue transaction, there were procedural irregularities. The estate, for example, accepted both offers and accepted earnest money from both purchasers. The second offer involving Barber and Brown closed.

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The Kings made renovations to the existing house and put on a new addition. Barber and Brown built themselves a new house on the LeBlond parcel and put up a fence along the boundary line between their tract and the Kings' tract. The Kings took offense because the fence was erected on land that the Kings believed to be within "their" 10' by 80' strip. The Kings argued in the ensuing lawsuit that Barber and Brown had breached the contract. The trial court, however, granted summary judgment in favor of Barber and Brown after ruling that the agreement with Joel King was unenforceable due to a lack of sufficient consideration. The Kings appealed.

Brown v. King
869 N.E.2d 35
Court of Appeals of Ohio
December 29, 2006

Mark P. Painter, Judge

This case involves neighbors and the ownership of a 10-foot-by-80-foot strip of land between their properties. The trial court granted summary judgment, holding that there was no consideration to support a contract requiring transfer of the strip…

II. Consideration

In their first assignment of error, the Kings argue that the trial court erred in granting summary judgment for Barber and Brown…

The elements of a contract include an offer, an acceptance, contractual capacity, consideration (the bargained-for legal benefit or detriment), a manifestation of mutual assent, and legality of object and of consideration.… The issue in the present case is whether there was consideration for the contract.

The Ohio Supreme Court has long recognized the rule that a contract is not binding unless it is supported by consideration. Consideration may consist of either a detriment to the promisee or a benefit to the promisor. A benefit may consist of some right, interest, or profit accruing to the promisor, while a detriment may consist of some forbearance, loss, or responsibility given, suffered, or undertaken by the promisee….

In the present case, the contract between Joel King and Barber was supported by consideration. Joel King had a valid contract with Barber to purchase the LeBlond parcel. The estate signed both offers and accepted $1,000 in earnest money. Thus, the contract where Joel King agreed to release all his rights to the LeBlond property in exchange for Barber's transferring a strip of land at the rear of the parcel was valid. The detriment to the promisee (Joel King) was his surrender of his property rights secured by the purchase contract. The surrendering of these rights in exchange for the rear strip of land was a contract supported by consideration.

And when "a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined."…

There were no material facts in dispute. The Kings contracted for the rear strip of land and provided consideration by surrendering their remaining property rights in the LeBlond parcel. Thus, the trial court erred by granting summary judgment for Barber and Brown. Summary judgment should have been granted to the Kings because the contract provided them with the property rights to that rear strip. The Kings' first assignment of error is sustained.

Accordingly, we reverse the trial court's grant of summary judgment in favor of Barber and Brown and remand this case so the trial court can enter summary judgment in favor of Joel and Sandra King.

Judgment reversed and cause remanded….

Case Questions

1. Was the contract between Joel King and Barber bilateral or unilateral?
2. What was bargained for and given in exchange by each party?

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INTERNET TIP

Interested readers will find another consideration case, *Labriola v. Pollard Group, Inc.*, included with the online materials for Chapter X. In that case, the Washington Supreme Court decided whether a restrictive covenant clause in an employment contract was supported sufficient consideration.

CAPACITY

In order to create a contract that is legally binding and enforceable, the parties must have the legal **capacity to contract**. Not all parties have the same legal capacity to enter into a contract, however. Full contractual capacity is present when a person is of legal age and is not otherwise so impaired as to be substantially incapable of making decisions for him-or herself.

It is presumed that all parties to an agreement have full legal capacity to contract. Therefore, any party seeking to base a claim or a defense on incapacity has the burden of proof with respect to that issue. The principal classes given some degree of special protection on their contracts because of their incapacity are (1) minors, (2) insane people, and (3) intoxicated people.

Minors

At common law, people remained minors until they reached the age of twenty-one. Generally, present legislation has reduced this age to eighteen. The law pertaining to minors entering into contracts formerly held that those contracts were void. Now that law has been almost universally changed, and such contracts are held to be voidable. This law applies not only to contracts, but also to executed transactions such as sales.

The law grants minors this right in order to protect them from their lack of judgment and experience, limited willpower, and presumed immaturity. A contract between an adult and a minor is voidable only by the minor; the adult must fulfill the obligation, unless the minor decides to avoid the contract. Ordinarily, parents are not liable for contracts entered into by their minor children.

Adults contract with minors at their own peril. Thus, an adult party frequently will refuse to contract with or sell to minors because minors are incapable of giving legal assurance that they will not avoid the contract.

Transactions a Minor Cannot Avoid

Through legislation, many states have limited minors' ability to avoid contracts. For instance, many states provide that a contract with a college or university is binding. A purchase of life insurance has also been held to bind a minor. Some statutes take away the right of minors to avoid contracts after they are married. Most states hold that a minor engaging in a business and operating in the same manner as a person having legal capacity will not be permitted to set aside contracts arising from that business or employment. Court decisions or statutes have established this law in order to prevent minors from using the shield of minority to avoid business contracts.

Minors are liable for the reasonable value (not the contract price) of any necessary they purchase, whether goods or services, if they accept and make use of it. The reasonable value of the necessaries, rather than their contract price, is specified to protect them against the possibility that the other party to the agreement has taken advantage of them by overcharging them. If the necessaries have not yet been accepted or received, the minor may disaffirm the contract without liability.

In general, the term **necessaries** includes whatever is needed for a minor's subsistence as measured by age, status, condition in life, and so on. These include food, lodging, education, clothing, and medical services. Objects used for recreation or entertainment and ordinary contracts relating to the property or business of the minor are not classified as necessaries.

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Disaffirmance of Contract

Minors may avoid both **executed** (completed) and **executory** (incompleted) contracts at any time during their minority. They may also disaffirm a contract for a reasonable period of time after they attain their majority. In this way, former minors have a reasonable time in which to evaluate transactions made during their infancy. What constitutes a reasonable time depends on the nature of the property involved and the surrounding circumstances. As long as minors do not disaffirm their contracts, they are bound by the terms. They cannot refuse to carry out their part of an agreement, while at the same time requiring the adult party to perform.

Disaffirmance of a contract by a minor may be made by any expression of an intention to repudiate the contract. Disaffirmance need not be verbal or written. If a minor performs an act inconsistent with the continuing validity of a contract, that is considered a disaffirmance. For example, if a minor sells property to Gaskins and later, on reaching majority, sells the same property to Ginger, the second sale to Ginger would be considered a disaffirmance of the contract with Gaskins.

Minors may disaffirm wholly executory contracts, that is, contracts that neither party has performed. In addition, if only the minor has performed, he or she may disaffirm and recover the money or property paid or transferred to an adult. A conflict arises, however, if the contract is wholly executed or if only the adult has performed and the minor has spent what he or she has received and therefore cannot make restitution. As a general rule, minors must return whatever they have in their possession of the consideration under the contract; if the consideration has been destroyed, they may nevertheless disaffirm the contract and recover the consideration they have given. For example, suppose Weldon, a minor, purchases an automobile and has an accident that demolishes the car. She may obtain a full refund by disaffirming the contract; moreover, she will not be liable for the damage to the car.

A few states, however, hold that if the contract is advantageous to the minor and if the adult has been fair in every respect, the contract cannot be disaffirmed unless the minor returns the consideration. In the preceding example, the minor would have to replace the reasonable value of the damaged automobile before she could disaffirm the contract and receive the consideration she gave for the automobile. These states also take into account the depreciation of the property while in the possession of the minor.

Some states have enacted statutes that prevent minors from disaffirming contracts if they have fraudulently misrepresented their age. Generally, however, the fact that minors have misrepresented their age in order to secure a contract that they could not have otherwise obtained will not later prevent them from disaffirming that contract on the basis of their minority. Most courts will hold minors liable for any resulting damage to, or deterioration of, property they received under the contract. Minors are also generally liable for their torts; consequently, in most states, the other party to the contract could recover in a tort action for deceit. In any case, the other party to the contract may avoid it because of the minor's fraud.

Ratification

Although minors may disaffirm or avoid their contracts before reaching their majority, they cannot effectively ratify or approve their contracts until they have attained their majority. **Ratification** may consist of any expression or action that indicates an intention to be bound by the contract, and may come from the actions of a minor who has now reached majority. For example, if a minor acquired property under a contract and, after reaching majority, makes use of or sells the property, he or she will be deemed to have ratified the contract.

Insane People

A person is said to be insane when that individual does not understand the nature and consequences of his or her act at the time of entering into an agreement. In such cases, the person lacks capacity and his or her contracts are either void or voidable.

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The contracts of a person who has been judicially declared insane by a court are void. Such a person will have a judicially appointed guardian who is under a duty to transact all business for him or her.

The contracts of insane people who have not been judicially declared insane are generally voidable. Although such people may not ratify or disaffirm a contract during their temporary insanity, they may do so once they regain their sanity. However, if the contract is executed and the sane party to the contract acts in good faith, not knowing that the other party is temporarily insane, most courts refuse to allow the temporarily insane person the right to avoid the contract, unless the consideration that has been received can be returned. On the other hand, if the sane party knows that the other party is mentally incompetent, the contract is voidable at the option of the insane person.

As in the case of minors, the party possessing capacity to contract has no right to disaffirm a contract merely because the insane party has the right to do so. The rule in regard to necessaries purchased by temporarily insane persons is the same as in the case of minors.

Intoxication

If persons enter into a contract when they are so intoxicated that they do not know at the time that they are executing a contract, the contract is voidable at their option. The position of the intoxicated person is therefore much the same as that of the temporarily insane person.

ILLEGALITY

An agreement is **illegal** when either its formation or performance is criminal, tortious, or contrary to public policy. When an agreement is illegal, courts will not allow either party to sue for performance of the contract. The court will literally "leave the parties where it finds them." Generally, if one of the parties has performed, that person can recover neither the value of the performance nor any property or goods transferred to the other party. There are three exceptions to this rule, however.

First, if the law that the agreement violates is intended for the protection of one of the parties, that party may seek relief. For example, both federal and state statutes require that a corporation follow certain procedures before offering stocks and bonds for sale to the public. It is illegal to sell such securities without having complied with the legal requirements. People who have purchased securities from a corporation that has not complied with the law may obtain a refund of the purchase price if they desire to do so.

Second, when the parties are not equally at fault, the one less at fault is granted relief when the public interest is advanced by doing so. This rule is applied to illegal agreements that are induced by undue influence, duress, or fraud. In such cases, the courts do not regard the defrauded or coerced party as being an actual participant in the wrong and will therefore allow restitution.

A third exception occurs within very strict limits. A person who repents before actually having performed any illegal part of an illegal contract may rescind it and obtain restitution. For example, suppose James and Richardo wager on the outcome of a baseball game. Each gives $500 to Smith, the stakeholder, who agrees to give $1,000 to the winner. Prior to the game, either James or Richardo could recover $500 from Smith through legal action, since the execution of the illegal agreement would not yet have occurred.

If the objectives of an agreement are illegal, the agreement is illegal and unenforceable, even though the parties were not aware, when they arrived at their agreement, that it was illegal.

On the other hand, as a general rule, even if one party to an agreement knows that the other party intends to use the subject matter of the contract for illegal purposes, this fact will not make the agreement illegal unless the illegal purpose involves a serious crime. For example, suppose Aiello lends money to Roja, at a legal interest rate, knowing Roja is going to use the money to gamble illegally. After Roja loses her money, she refuses to repay Aiello on the grounds that the agreement was

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illegal. Aiello can recover her money through court action, even though she knew Roja was going to gamble illegally with the money she lent her.

Contracts against Public Policy

A contract provision is contrary to public policy if it is injurious to the interest of the public, contradicts some established interests of society, violates a statute, or tends to interfere with the public health, safety, or general welfare. The term **public policy** is vague and variable; it changes as our social, economic, and political climates change. One example is the illegal lobbying agreement, an agreement by which one party uses bribery, threats of a loss of votes, or any other improper means to procure or prevent the adoption of particular legislation by a lawmaking body, such as Congress or a state legislature. Such agreements are clearly contrary to the public interest since they interfere with the workings of the democratic process. They are both illegal and void.

The court in the following case ruled that Connecticut's public policy was violated by a "Waiver, Defense, Indemnity and Hold Harmless Agreement, and Release of Liability Agreement" which was intended to shield a ski resort operator from liability for its own negligent conduct.

Gregory D. Hanks v. Powder Ridge Restaurant Corp.
885 A.2d 734
Supreme Court of Connecticut
November 29, 2005

Sullivan, C. J.

This appeal…arises out of a complaint filed by the plaintiff, Gregory D. Hanks, against the defendants, Powder Ridge Restaurant Corporation and White Water Mountain Resorts of Connecticut, Inc., doing business as Powder Ridge Ski Resort, seeking compensatory damages for injuries the plaintiff sustained while snowtubing at the defendants' facility. The trial court rendered summary judgment in favor of the defendants….

The record reveals the following factual and procedural history. The defendants operate a facility in Middlefield, known as Powder Ridge, at which the public, in exchange for a fee, is invited to ski, snowboard and snowtube. On February 16, 2003, the plaintiff brought his three children and another child to Powder Ridge to snowtube. Neither the plaintiff nor the four children had ever snowtubed at Powder Ridge, but the snowtubing run was open to the public generally, regardless of prior snowtubing experience, with the restriction that only persons at least six years old or forty-four inches tall were eligible to participate. Further, in order to snowtube at Powder Ridge, patrons were required to sign a "Waiver, Defense, Indemnity and Hold Harmless Agreement, and Release of Liability" (agreement). The plaintiff read and signed the agreement on behalf of himself and the four children. While snowtubing, the plaintiff's right foot became caught between his snow tube and the man-made bank of the snowtubing run, resulting in serious injuries that required multiple surgeries to repair.

Thereafter, the plaintiff filed the present negligence action against the defendants….

The defendants, in their answer to the complaint, denied the plaintiff's allegations of negligence and asserted two special defenses. Specifically, the defendants alleged that the plaintiff's injuries were caused by his own negligence and that the agreement relieved the defendants of liability, "even if the accident was due to the negligence of the defendants." Thereafter, the defendants moved for summary judgment, claiming that the agreement barred the plaintiff's negligence claim as a matter of law. The trial court agreed and rendered summary judgment in favor of the defendants…. Specifically, the trial court determined…that the plaintiff, by signing the agreement, unambiguously had released the defendants from liability for their allegedly negligent conduct. Thereafter, the plaintiff moved to reargue the motion for summary judgment. The trial court denied the plaintiff's motion and this appeal followed.

The plaintiff raises two claims on appeal. First, the plaintiff claims that the trial court improperly concluded that the agreement clearly and expressly releases the defendants from liability for negligence. Specifically, the plaintiff contends that a person of ordinary intelligence reasonably would not have believed that, by signing the agreement, he or she was releasing the defendants from liability for personal injuries caused by negligence and, therefore…the agreement does not bar the plaintiff's negligence claim. Second, the plaintiff claims that the agreement

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is unenforceable because it violates public policy. Specifically, the plaintiff contends that a recreational operator cannot, consistent with public policy, release itself from liability for its own negligent conduct where, as in the present case, the operator offers its services to the public generally, for a fee, and requires patrons to sign a standardized exculpatory agreement as a condition of participation….

I

We first address the plaintiff's claim that the agreement does not expressly release the defendants from liability for personal injuries incurred as a result of their own negligence…. Specifically, the plaintiff maintains that an ordinary person of reasonable intelligence would not understand that, by signing the agreement, he or she was releasing the defendants from liability for future negligence. We disagree…. We conclude that the trial court properly determined that the agreement in the present matter expressly purports to release the defendants from liability for their future negligence and, accordingly, satisfies the standard set forth by this court….

II

We next address … whether the enforcement of a well drafted exculpatory agreement purporting to release a snowtube operator from prospective liability for personal injuries sustained as a result of the operator's negligent conduct violates public policy….

Although it is well established "that parties are free to contract for whatever terms on which they may agree"; … it is equally well established "that contracts that violate public policy are unenforceable."

As previously noted, "the law does not favor contract provisions which relieve a person from his own negligence…."… This is because exculpatory provisions undermine the policy considerations governing our tort system. "The fundamental policy purposes of the tort compensation system [are] compensation of innocent parties, shifting the loss to responsible parties or distributing it among appropriate entities, and deterrence of wrongful conduct…. It is sometimes said that compensation for losses is the primary function of tort law … [but it] is perhaps more accurate to describe the primary function as one of determining when compensation [is] required…. An equally compelling function of the tort system is the prophylactic factor of preventing future harm…. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer."… Thus, it is consistent with public policy "to posit the risk of negligence upon the actor" and, if this policy is to be abandoned, "it has generally been to allow or require that the risk shift to another party better or equally able to bear it, not to shift the risk to the weak bargainer."…

Having reviewed the various methods for determining whether exculpatory agreements violate public policy, we conclude … that "no definition of the concept of public interest can be contained within the four corners of a formula."… Accordingly, we agree with the Supreme Courts of Maryland and Vermont that "the ultimate determination of what constitutes the public interest must be made considering the totality of the circumstances of any given case against the backdrop of current societal expectations."…

We now turn to the merits of the plaintiff's claim. The defendants are in the business of providing snowtubing services to the public generally, regardless of prior snowtubing experience, with the minimal restriction that only persons at least six years old or forty-four inches tall are eligible to participate. Given the virtually unrestricted access of the public to Powder Ridge, a reasonable person would presume that the defendants were offering a recreational activity that the whole family could enjoy safely….

The societal expectation that family oriented recreational activities will be reasonably safe is even more important where, as in the present matter, patrons are under the care and control of the recreational operator as a result of an economic transaction. The plaintiff, in exchange for a fee, was permitted access to the defendants' snowtubing runs and was provided with snowtubing gear. As a result of this transaction, the plaintiff was under the care and control of the defendants and, thus, was subject to the risk of the defendants' carelessness. Specifically, the defendants designed and maintained the snowtubing run and, therefore, controlled the steepness of the incline, the condition of the snow and the method of slowing down or stopping patrons. Further, the defendants provided the plaintiff with the requisite snowtubing supplies and, therefore, controlled the size and quality of the snow tube as well as the provision of any necessary protective gear. Accordingly, the plaintiff voluntarily relinquished control to the defendants with the reasonable expectation of an exciting, but reasonably safe, snowtubing experience.

Moreover, the plaintiff lacked the knowledge, experience and authority to discern whether, much less ensure that, the defendants' snowtubing runs were maintained in a reasonably safe condition…. [The] defendants…have the expertise and opportunity to foresee and control hazards, and to guard against the negligence of their agents and employees. They alone can properly maintain and inspect their premises, and train their employees in risk management. They alone can insure against risks and effectively spread the costs

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of insurance among their thousands of customers. Skiers, on the other hand, are not in a position to discover and correct risks of harm, and they cannot insure against the ski area's negligence.

"If the defendants were permitted to obtain broad waivers of their liability, an important incentive for ski areas to manage risk would be removed, with the public bearing the cost of the resulting injuries.… It is illogical, in these circumstances, to undermine the public policy underlying business invitee law and allow skiers to bear risks they have no ability or right to control." The concerns expressed by the court in *Dalury* [*v. S-K-I, Ltd.*] are equally applicable to the context of snowtubing, and we agree that it is illogical to permit snowtubers, and the public generally, to bear the costs of risks that they have no ability or right to control. Further, the agreement at issue was a standardized adhesion contract offered to the plaintiff on a "take it or leave it" basis. The "most salient feature [of adhesion contracts] is that they are not subject to the normal bargaining processes of ordinary contracts"… see also Black's Law Dictionary (7th Ed. 1999) (defining adhesion contract as "[a] standard form contract prepared by one party, to be signed by the party in a weaker position, [usually] a consumer, who has little choice about the terms"). Not only was the plaintiff unable to negotiate the terms of the agreement, but the defendants also did not offer him the option of pro-curing protection against negligence at an additional reasonable cost. See Restatement (Third), Torts, Apportionment of Liability 2, comment (e), p. 21 (2000) (factor relevant to enforcement of contractual limit on liability is "whether the party seeking exculpation was willing to provide greater protection against tortious conduct for a reasonable, additional fee"). Moreover, the defendants did not inform prospective snowtubers prior to their arrival at Powder Ridge that they would have to waive important common-law rights as a condition of participation. Thus, the plaintiff, who traveled to Powder Ridge in anticipation of snowtubing that day, was faced with the dilemma of either signing the defendants' proffered waiver of prospective liability or forgoing completely the opportunity to snowtube at Powder Ridge. Under the present factual circumstances, it would ignore reality to conclude that the plaintiff wielded the same bargaining power as the defendants.…

In the present case, the defendants held themselves out as a provider of a healthy, fun, family activity. After the plaintiff and his family arrived at Powder Ridge eager to participate in the activity, however, the defendants informed the plaintiff that, not only would they be immune from claims arising from the inherent risks of the activity, but they would not be responsible for injuries resulting from their own carelessness and negligence in the operation of the snowtubing facility. We recognize that the plaintiff had the option of walking away. We cannot say, however, that the defendants had no bargaining advantage under these circumstances.

For the foregoing reasons, we conclude that the agreement in the present matter affects the public interest adversely and, therefore, is unenforceable because it violates public policy.… Accordingly, the trial court improperly rendered summary judgment in favor of the defendants.

The defendants and the dissent point out that our conclusion represents the "distinct minority view."… We acknowledge that most states uphold adhesion contracts releasing recreational operators from prospective liability for personal injuries caused by their own negligent conduct. Put simply, we disagree with these decisions for the reasons already explained in this opinion.…

The judgment is reversed and the case is remanded for further proceedings according to law.

Case Questions

1. Why did the Connecticut Supreme Court refuse to enforce the contractual immunity agreement?
2. Do you agree with the Connecticut Supreme Court's argument that the ski resort could purchase liability insurance against negligence and pass the cost on to its patrons, thus making sure that injured patrons are able to obtain compensation for injuries sustained at the ski resort?

Agreements to Commit Serious Crimes

An agreement is illegal and therefore void when it calls for the commission of any act that constitutes a serious crime. Agreements to commit murder, robbery, arson, burglary, and assault are obvious examples, but less obvious violations are also subject to the rule, depending on the jurisdiction.

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Agreements to Commit Civil Wrongs

An agreement that calls for the commission of a civil wrong is also illegal and void. Examples are agreements to slander a third person, to defraud another, to damage another's goods, or to infringe upon another's trademark or patent.

A contract that calls for the performance of an act or the rendering of a service may be illegal for one of two reasons. (1) The act or service itself may be illegal (**illegal per se**), and thus any contract involving this act or service is illegal. Prostitution is a good example. (2) Certain other service contracts are not illegal per se, but may be illegal if the party performing or contracting to perform the service is not legally entitled to do so. This latter condition refers to the fact that a license is required before a person is entitled to perform certain functions for others. For example, doctors, dentists, lawyers, architects, surveyors, real estate brokers, and others rendering specialized professional services must be licensed by the appropriate body before entering into contracts with the general public.

All the states have enacted regulatory statutes concerning the practice of various professions and the performance of business and other activities. However, these statutes are not uniform in their working or in their scope. Many of the statutes specifically provide that all agreements that violate them shall be void and unenforceable. When such a provision is lacking, the court will look to the intent of the statute. If the court is of the opinion that a statute was enacted for the protection of the public, it will hold that agreements in violation of the statute are void. If, however, the court concludes that the particular statute was intended solely to raise revenue, then it will hold that contracts entered in violation of the statute are legal and enforceable.

A contract that has for its purpose the restraint of trade and nothing more is illegal and void. A contract to monopolize trade, to suppress competition, or not to compete in business, therefore, cannot be enforced, because the sole purpose of the agreement would be to eliminate competition. A contract that aims at establishing a monopoly is not only unenforceable, but also renders the parties to the agreement subject to indictment for the commission of a crime.

When a business is sold, it is commonly stated in a contract that the seller shall not go into the same or similar business again within a certain geographic area, or for a certain period of time, or both. In early times, such agreements were held void since they deprived the public of the service of the person who agreed not to compete, reduced competition, and exposed the public to monopoly. Gradually, the law began to recognize the validity of such restrictive provisions. To the modern courts, the question is whether, under the circumstances, the restriction imposed upon one party is reasonable, or whether the restriction is more extensive than is required to protect the other party. A similar situation arises when employees agree not to compete with their employers should they leave their jobs.

In the following case, the North Carolina Court of Appeals was asked to determine the validity of a postemployment noncompetition clause, which had been signed by a former employee at the time of his employment by Carolina Pride Carwash, Inc.

Carolina Pride Carwash, Inc. v. Tim Kendrick
COA04-451
Court of Appeals of North Carolina
September 20, 2005

Calabria, Judge

Tim Kendrick ("defendant") appeals from summary judgment entered in favor of Carolina Pride Carwash, Inc. ("Carolina Pride") for breach of an employment contract. We reverse and remand for entry of summary judgment in favor of defendant.

Carolina Pride is a car wash maintenance provider and distributor of car wash equipment and supplies.

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Carolina Pride employs approximately forty-five people and operates in North Carolina, South Carolina, and the southern half of Virginia, east of the Blue Ridge Parkway. In late 1999, Carolina Pride was negotiating for the purchase of PDQ Carolina ("PDQ"), a car wash equipment distributor, where defendant was employed as a service technician earning approximately $15.00 per hour. On 20 December 1999, defendant met with the president of Carolina Pride and entered into an employment contract. The contract provided that Carolina Pride would pay defendant $500.00 after signing, employ him beginning in January 2000 as a service technician at $15.00 per hour, and pay him a $1,000.00 bonus after one year of employment. The sixth and seventh provisions of the contract contained a covenant not to compete and a provision for liquidated damages:

> SIXTH: [Defendant] hereby agrees and guarantees to [Carolina Pride], that during the term of this contract and for three years after termination of this contract, [defendant] will not on his own account or as agent, employee or servant of any other person, firm or corporation engage in or become financially interested in the same line of business or any other line of business which could reasonably be considered as being in competition with [Carolina Pride] within North Carolina, South Carolina, or Virginia to-wit: Carwash sales and service of equipment, supplies, parts and any and all related merchandise; and further, that during this period, [defendant] will not directly or indirectly or by aid to others, do anything which would tend to divert from [Carolina Pride] any trade or business with any customer with whom [defendant] has made contracts or associations during the period of time in which he is employed by [Carolina Pride].
>
> SEVENTH: That in the event [defendant] violates the provision of the preceding paragraphs, then [Carolina Pride] shall be entitled to liquidated damages in the amount of $50,000.00 to be paid by [defendant] to [Carolina Pride].

In March 2000, defendant started employment as a technician with Carolina Pride and served customers predominantly in North Carolina and occasionally in South Carolina. The following year, in 2001, defendant left Carolina Pride's employ and took a position with Water Works Management Company, L.L.C. ("Water Works") as manager of repair, maintenance, and supply for several of their car wash facilities in Greensboro, Mt. Airy, Elkin, and Boone.

In January 2002, Carolina Pride filed suit alleging defendant interfered with its customer relationships in violation of the covenant not to compete. In the spring of 2002, Water Works discharged defendant due to Carolina Pride's lawsuit. Defendant answered Carolina Pride's complaint and included counterclaims for the following: (1) fraud; (2) negligent misrepresentation; (3) unfair and deceptive trade practices; and (4) wrongful or tortious interference with business relations.

Both defendant and Carolina Pride subsequently moved for summary judgment, and on 17 October 2003, the trial court granted Carolina Pride's motion based on defendant's alleged breach of the covenant not to compete. In addition, the trial court ordered that defendant pay $50,000.00 in liquidated damages.

Defendant assigns error to the trial court's denial of his motion for summary judgment and grant of Carolina Pride's motion for summary judgment. Defendant argues the covenant not to compete was unenforceable as a matter of law because the time and territorial restrictions of the covenant were unreasonable. We agree, under these facts, that the time and territorial restrictions were greater than reasonably necessary to protect Carolina Pride's legitimate interests….

"[A] covenant not to compete is valid and enforceable if it is '(1) in writing; (2) reasonable as to terms, time, and territory; (3) made a part of the employment contract; (4) based on valuable consideration; and (5) not against public policy.'"… "Although either the time or the territory restriction, standing alone, may be reasonable, the combined effect of the two may be unreasonable. A longer period of time is acceptable where the geographic restriction is relatively small, and vice versa."…

A central purpose of a covenant not to compete is the protection of an employer's customer relationships….Therefore, to prove that a covenant's territorial restriction is reasonable, "an employer must … show where its customers are located and that the geographic scope of the covenant is necessary to maintain those customer relationships."… "Furthermore, in determining the reasonableness of [a] territorial restriction, when the primary concern is the employee's knowledge of customers, the territory should only be limited to areas in which the employee made contacts during the period of his employment."… "If the territory is too broad, 'the entire covenant fails since equity will neither enforce nor reform an overreaching and unreasonable covenant.'" …

In the instant case, the covenant not to compete applied to all areas of North Carolina, South Carolina, and Virginia for a term of three years. However, the president of Carolina Pride testified that Carolina Pride's territory included North Carolina, South

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Carolina, and "the lower half of Virginia east of the Blue Ridge Parkway." Therefore, by including all of Virginia, the territorial restriction of the covenant encompassed a greater region than necessary to protect Carolina Pride's legitimate interest in maintaining its customer relationships. Moreover, while employed by Carolina Pride, defendant only contacted customers in North and South Carolina but never in Virginia. Therefore, the covenant was unreasonable not only for encompassing a greater region than necessary but also for encompassing any portion of Virginia because defendant never contacted customers in that state while employed by Carolina Pride. Additionally, although the covenant's three-year time period may be valid standing alone, it was unreasonable in this case when coupled with the unnecessarily broad territorial restriction.

Accordingly, we hold the covenant not to compete was unenforceable as a matter of law, and the trial court erred by entering summary judgment for Carolina Pride and failing to enter summary judgment for defendant with respect to Carolina Pride's breach of contract claim. We likewise reverse that portion of the trial court's order requiring defendant to pay liquidated damages and remand the case to the trial court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Case Questions

1. List some specific employment examples where a postemployment noncompetition agreement would be enforceable.
2. Why did the North Carolina Court of Appeals refuse to enforce the noncompete covenant?

WRITING

Every state has statutes requiring that certain contracts be in writing to be enforceable. Called the **statute of frauds**, these statutes are based on "An Act for the Prevention of Frauds and Perjuries," passed by the English Parliament in 1677. Statutes of frauds traditionally govern six kinds of contracts: (1) an agreement by an executor or administrator to answer for the debt of a decedent, (2) an agreement made in consideration of marriage, (3) an agreement to answer for the debt of another, (4) an agreement that cannot be performed in one year, (5) an agreement for the sale of an interest in real property, and (6) an agreement for the sale of goods above a certain dollar amount.

The writing required by the statute need not be in any special form or use any special language. Usually, the terms that must be shown on the face of the writing include the names of the parties, the terms and conditions of the contract, the consideration, a reasonably certain description of the subject matter of the contract, and the signature of the party, or the party's agent, against whom enforcement is sought. These terms need not be on one piece of paper but may be on several pieces of paper, provided that their relation or connection with each other appears on their face by the physical attachment of the papers to each other or by reference from one writing to the other. At least one, if not all, of the papers must be signed by the party against whom enforcement is sought. (The requirements of memorandums involving the sale of goods differ.)

Agreement by Executor or Administrator

A promise by an executor or administrator to answer for the debt of the decedent is within the statute and must be in writing to be enforced. In order for the statute to operate, the executor's promise must be to pay out of the executor's own personal assets (pocket); a promise to pay a debt out of the assets of a decedent's estate is not required to be in writing.

Agreement in Consideration of Marriage

Agreements made in consideration of marriage are to be in writing. Mutual promises to marry are not within the statute, since the consideration is the

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exchanged promise, not the marriage itself. However, promises made to a prospective spouse or third party with marriage as the consideration are within the statute. For example, a promise by one prospective spouse to convey property to the other, provided the marriage is entered into, is required to be in writing. Similarly, if a third party, say a rich relative, promises to pay a certain sum of money to a prospective spouse if a marriage is entered into, the promise will be unenforceable unless reduced to writing.

INTERNET TIP

The case of *In re Marriage of DewBerry* involves the statute of frauds. In the case the appellate court has to rule on whether an oral prenuptial agreement that all income acquired by either spouse be strictly considered to be separate property was unenforceable under the statute of frauds as an agreement in consideration of marriage. Interested readers will find this case included with the online Chapter X materials.

Agreement to Answer for the Debt of Another

Agreements to answer for the debt or default of another shall be unenforceable unless in writing. The rationale for this provision is that the guarantor or surety has received none of the benefits for which the debt was incurred and therefore should be bound only by the exact terms of the promise. For example, Bob desires to purchase a new law text on credit. The bookstore is unsure as to Bob's ability to pay, so Bob brings in his friend, Ellen, who says, "If Bob does not pay for the text, I will." In effect, the promise is that the bookstore must first try to collect from Bob, who is primarily liable. After it has exhausted all possibilities of collecting from him, then it may come to Ellen to receive payment. Ellen is therefore secondarily liable. Ellen has promised to answer for Bob's debt even though she will not receive the benefit of the new law text; therefore, her agreement must be in writing to be enforceable.

This situation must be distinguished from those in which the promise to answer for the debt of another is an original promise; that is, the promisor's objective is to be primarily liable. For example, Bob wants to purchase a new law text. When he takes the book to the cashier, his friend Ellen steps in and says, "Give him the book. I will pay for it." Ellen has made an original promise to the bookstore with the objective of becoming primarily liable. Such a promise need not be in writing to be enforceable.

Sometimes it is difficult to ascertain whether the purpose of the promisor is to become primarily liable or secondarily liable. In resolving the issue, courts will sometimes use the leading object rule. This rule looks not only to the promise itself, but also to the individual for whose benefit the promise was made. The logic of the rule is that if the leading object of the promise is the personal benefit of the promisor, then the promisor must have intended to become primarily liable. In such a case, the promise will be deemed to be original and need not be in writing to be enforced.

INTERNET TIP

Readers who wish to read a 2002 Missouri appellate court opinion about whether a promisor's alleged oral agreement to pay another's debt was within or outside the scope of the statute of frauds can find the case of *Douglas D. Owens v. Leonard Goldammer* on the textbook's website.

Agreements Not to Be Performed in One Year

Most statutes require contracts that cannot be performed within one year from the time the contract is formed to be in writing. This determination is made by referring to the intentions of the parties, to the nature of the performance, and to the terms of the contract itself. For example, if Jack agrees to build a house for Betty, the question is whether the contract is capable of being performed within one year. Houses can be built in one year. Therefore, this agreement need not be in writing even if Jack actually takes more than one year to build the house.

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It is important to remember that the *possibility* that the contract can be performed within one year is enough to take it out of the operation of the statute regardless of how long performance actually took.

Paul Kocourek, the plaintiff in the next case, filed suit against his employer. Kocourek alleged that although he had intended to hang on to "shadow stock," his employer had forced him to sell it—to his financial detriment—immediately after Kocourek had retired. So-called "shadow stock" is virtual stock and not real shares of stock. It is a device used by some corporations to determine how much additional compensation should be paid to corporate officers. Generally, each share of shadow stock is deemed to be worth whatever a real share of stock trades for on the stock market on the day it is redeemed. Upon redemption, the corporation multiplies the rate at which an actual share of stock was traded by the number of shadow shares "owned."

Paul Kocourek v. Booz Allen Hamilton Inc.
2010 NY Slip Op 02019
Appellate Division of the Supreme Court of New York, First Department.
March 16, 2010

Friedman, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

Plaintiff, an officer employed by the corporate defendants, alleged that the latter promised that the "shadow stock" he received would provide him with benefits equivalent to those provided by the common stock he also received as a corporate officer. According to plaintiff, defendants allegedly "forced" him to redeem the shadow stock shortly after his retirement, and he thereby was injured because he otherwise would have held the shadow stock and profited greatly when, 16 months after his retirement, the company sold a portion of its business to the Carlyle Group for $2.54 billion. It is undisputed, however, that the common stock could not be redeemed for two years after retirement, and thus plaintiff necessarily is contending that defendants breached an agreement not to redeem his shadow stock until he had been retired for two years. That agreement, however, is one which by its very terms has no possibility of being performed within one year…. Accordingly, the absence of a writing violates the statute of frauds, rendering the alleged oral promise as to stock redemption unenforceable….

We have considered plaintiff's remaining arguments on appeal and find them unavailing.

This constitutes the decision and order of the Supreme Court, Appellate Division, First Department.

Case Question

What practical lesson should you remember after reading this case?

Agreement Conveying an Interest in Real Property

The statute of frauds generally renders unenforceable oral agreements conveying interests in real estate. Most problems center on what an interest in real estate is and whether the agreement contemplates the transfer of any title, ownership, or possession of real property. Both must be involved to bring the statute into effect. Real property has commonly been held to include land, leaseholds, easements, standing timber, and under certain conditions, improvements and fixtures attached to the land.

The landlord in the following case brought suit to enforce a written but unsigned two-year lease. The court ruled that there was no leasehold and that only a month-to-month tenancy existed because the requirements of the statute of frauds were not satisfied.

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