When problems arise in a marriage, they can often be resolved with help from friends, family members, or counselors. Sometimes, however, a husband and wife may consider ending their marriage. When this occurs, it involves difficult changes for the entire family. This chapter covers procedures for ending a valid marriage through separation or divorce, as well as the many legal issues raised by divorce, including child custody, alimony, child support, and property division. If parents remarry or find a new life partner, new relationships are created for stepparents and children. All these changes involve the law.

Marriage Problems

A national survey identified the most common problems in a marriage. Some of the difficulties a couple may experience are conflicts with in-laws or relatives, job and career pressures, adultery, conflicts about children, sexual problems, and a breakdown in communication. Alcohol or drug abuse, money problems, and loss of shared goals or interests may also affect a couple’s relationship.
Minor disagreements are usually settled by the couple themselves or with the help of family members and friends. Major differences may require the couple to seek the help of a marriage counselor, psychologist, or social worker. A marriage counselor, for example, can help them explore the reasons for their problems and, ideally, work out a solution. The American Association for Marriage and Family Therapy can help couples find a local qualified marriage counselor. Couples can also ask for help from their friends or members of the clergy.

Separation and Divorce

If a married couple decides that their marriage has broken down and cannot be repaired, the partners have two legal options:

- **Separation.** The couple may decide to live apart. This may be for a short cooling-off period, or it may be permanent. In either case, the couple is still legally married and may reunite at any time.

- **Divorce.** A divorce is a court order that legally ends a valid marriage. After a divorce is final, each partner may legally remarry.

Separation

Just as the process for beginning a marriage is governed by state law, so is the process of ending a marriage. Most states require a couple to have a separation period prior to obtaining a final divorce. This period can range from a few months to more than a year. During this time, both spouses can consider the consequences of ending the marriage and can get their affairs in order so that they can go on with their separate lives. A separation period can be especially helpful to couples who have children. In addition, some couples will not consider divorce for religious or other reasons. In these situations, a separation rather than a divorce may be the best solution.

If a married couple chooses to separate, they still have legal and financial responsibilities to each other and to their children. They remain husband and wife, and neither can remarry. For these reasons, having a separation agreement is a good idea. This is typically a written document that sets out the couple’s agreed-upon terms for child custody and visitation, child and spousal support, division of property, and other issues. It is often the result of a negotiation between the husband and wife.
When a separation agreement has been signed by both the husband and the wife, it becomes a legally enforceable contract. For example, if one spouse refuses to pay promised support money or will not leave the home as agreed, he or she can be taken to court by the other.

A separation agreement can say anything the husband and wife want it to say. Separation agreements do not have to be approved by a court. After the parties have agreed to the terms of the contract, each side must abide by it. However, in certain cases, the partners may choose to go to court to have a judge approve the agreement. In this case, after it is signed, the agreement cannot be changed unless the court changes it or both spouses agree to the change. If a couple later decides to seek a divorce, the terms of the separation agreement usually form the basis for the final divorce decree, which is issued by the court.

Divorce

Each year, more than one million couples divorce in the United States. During the second half of the twentieth century, the divorce rate doubled. Today, about half of all marriages end in divorce. Divorce is the process by which a couple legally ends their marriage and divides their property. This does not mean, though, that the couple’s legal relationship is ended. There may be continuing financial obligations and, if there are children, continuing rights and responsibilities that the parents must share.

Ending a marriage can be expensive. Legal fees, alimony, child support payments, and the cost of maintaining two households are likely to pose a financial challenge. Divorce can also be emotionally difficult for all those involved—the spouses, children, friends, and extended family. This is why it is important that couples not rush into a divorce, which will have long-term effects on their lives and the lives of their children.

Because of the difficulties that arise when marriages end, lawyers and judges often recommend that couples who are considering a divorce first go through the process of mediation. (Mediation is described in detail in Chapter 4.) The presence of a neutral third party to assist couples in identifying, confronting, and solving the problems that divorce presents can make the process easier and may produce a more harmonious resolution.

Second or third marriages often bring additional challenges. There may be existing alimony, child support payments, or debts to resolve. Children and parents from previous marriages often form a “blended family.” Children gain stepparents, and spouses acquire stepchildren.

Blended families are formed when parents with children from previous relationships get married. Describe the challenges a divorcing couple might face.
For all these reasons, a couple should be aware that divorce is a serious step that will affect them and their children for the rest of their lives. A couple should not decide to seek a divorce in the heat of anger or without at least trying to work out their problems. This is why states recommend—and some require—a period of separation before they will grant a divorce.

When they have decided to seek a divorce, couples can proceed in several ways. Until recently, most divorcing couples hired lawyers to prepare their cases. However, it is not always necessary to have attorneys involved in every aspect of a divorce. Pro se (or do-it-yourself) divorce kits and classes are available in many places. To learn more about this alternative, check with your local court, library, bookstore, or legal aid office. If the divorce involves disagreements over children, large sums of money, property, or anything else substantial, then each spouse should have an attorney or consult a family mediation service.

A family mediator works with a couple to guide them through a series of negotiations designed to reach an agreement with which both can live. The agreement is usually reviewed by the couple’s lawyers before being filed in court. Mediators can help divorcing couples reach a settlement without the time, expense, or hard feelings of the traditional adversary process. Working with a mediator is also beneficial because the partners involved know the most about their own situation and are in the best position to devise solutions that will work.

**Problem 34.1**

Bill and Rachel married when both were 19 years old. One year later, they had a baby. After two years of marriage, they fight constantly and are miserable. They are unsure about a divorce, but both think it might be better to live apart for a while. Bill works as an auto mechanic, making $2,200 a month. Rachel works as a teller in a local bank, making $1,750 a month. They rent an apartment for $850 a month and spend $600 a month on child care. They also have $2,000 of joint credit-card debt and own the following assets: $750 in a savings account; a used, but paid for, car worth $6,000; furniture and appliances.

a. Do Bill and Rachel have any choices besides divorce? Explain.

b. Do Bill and Rachel need a lawyer? Who else could help them?

c. List the things that Bill and Rachel must decide before agreeing to a separation.
A new approach to divorce, called **collaborative divorce**, is similar to family mediation. Collaborative divorce uses informal discussions and conferences attended by both parties and their lawyers to settle all issues. Lawyers agree to withdraw from the case if their clients decide to contest the divorce in court. This provides an incentive for the parties to collaborate and not litigate. Other specialists, such as child development and financial experts, sometimes have a role in the process. Lawyers who do this work have special training.

At one time, most states allowed divorce only if one spouse could show that the other spouse had done something wrong or was at fault. Typical faults, or grounds for divorce, under this system included:

- **adultery**, or sexual intercourse between a married person and someone other than his or her spouse;
- abandoning one’s spouse or **desertion**, with no intention of returning or of reassuming the duties of marriage;
- acts of emotional or psychological abuse that amount to **mental cruelty** against one’s spouse;
- acts of violence or physical abuse that constitute **physical cruelty** against one’s spouse; and
- some form of mental illness or **insanity**.

Proving that one spouse was at fault was often difficult, and divorce tended to cause great embarrassment. In many cases, a finding that one spouse was at fault would preclude him or her from receiving any support after the marriage ended.

The laws have changed and most states now also maintain a **no-fault divorce** system. To obtain a no-fault divorce, one spouse does not have to prove that the other spouse did something wrong. Instead, a spouse has to show only that there are disagreements that cannot be resolved, or **irreconcilable differences**. This means that the marriage has completely broken down and is beyond repair. Many states also allow divorce when a couple can show that they voluntarily lived apart for a certain period of time—several months to more than a year, depending on state law—whether or not it was a formal period of separation.

Many states still have laws allowing divorce based on the fault grounds listed above. Most couples who choose to get a divorce do not use these fault grounds; instead they obtain no-fault divorces.
However, some argue that divorce has been made too easy and that divorce rates would go down if states required proof of fault before granting a divorce. Partially in response to this argument, some states have lengthened the time it takes to get a no-fault divorce.

In 1997, Louisiana passed a law enabling couples who are planning to marry to choose a **covenant marriage** instead of obtaining a regular license to marry. Couples choosing a covenant marriage agree in advance—in writing—to make no-fault divorce more difficult to obtain. Under traditional marriage laws in Louisiana, a couple must separate for six months before getting a no-fault divorce. To end a covenant marriage by no-fault divorce, the couple must separate and live apart for a period of two years.

Covenant marriages aim to reduce the divorce rate by limiting access to relatively easy divorces and encourage lifelong commitments by both partners. Couples who are already married also have the option to convert their existing marriage to a covenant marriage. Arkansas and Arizona also have covenant marriages.

**Problem 34.2**

**a.** The divorce rate is much higher now than it was 30 years ago. Develop a hypothesis to explain why.

**b.** Explain the difference between a fault divorce and a no-fault divorce.

**c.** Do you think that couples should be allowed to obtain no-fault divorces? What are the arguments in favor of allowing no-fault divorce? Should couples wanting to divorce be required to demonstrate fault by one party? What are the reasons to require demonstration of fault?

**d.** Do you think states should make it harder or easier to get a divorce? Why?

**Child Custody**

If a couple with children separate or divorce, important questions arise: Who will take care of the children? With whom will the children live? In legal terms, the question is: who will have **custody** of the children? The importance of the custody issue is illustrated by the fact that in 2006, more than 25 percent of minor children in the United States were living with single parents. Many of these situations were the result of divorce.

Custody decisions are important because the parent with custody decides most aspects of the child’s life, such as where the child will live and go to school. Custody may be temporary, or it may be permanently awarded to one parent. After it is awarded, unless circumstances change significantly, it is rarely changed. For example, if the custodial parent became a drug addict, the court could order a change of custody.

The noncustodial parent is usually given visitation rights. This means that he or she can visit with the child on certain days and at certain times of the year. Both parents are required to contribute to
the support of a child. The parent who has custody makes these contributions in the day-to-day life of the child. The noncustodial parent makes these contributions in the form of a regular monetary payment to the parent who has custody of the child.

Sometimes courts award custody to both parents. With **joint custody**, both parents have full responsibility for the child’s supervision, and both have an equal say in important issues such as schooling and religion. The child may live part-time with each parent but need not spend the same amount of time with each parent. For example, a child who attends school near her father might spend school nights with him and weekends with her mother.

Joint custody has become more common, but courts are careful about awarding it. There is concern that parents who cannot cooperate during marriage may not be able to cooperate after a divorce. Therefore, most judges are reluctant to approve a joint custody arrangement unless the parents can demonstrate an ability to work well together. Furthermore, joint custody is successful only when both parents want responsibility for the child or children. The court must have both parents’ agreement and cannot impose joint custody upon a parent who does not want it.

**Problem 34.3**

Wilma and Robert are getting divorced. They have a four-year-old child. Both are employed full-time, and they plan to live about 10 miles apart after the divorce.

a. What are the advantages and disadvantages of a joint custody arrangement for Wilma and Robert?

b. What are the advantages and disadvantages of sole custody with visitation awarded to the noncustodial parent?

c. What other information would you want to know before deciding the best custody arrangement?

d. If they choose joint custody, will both Wilma and Robert have to agree to the arrangement? What will happen if they cannot agree?
If parents cannot agree on custody or the court does not approve their agreement, the decision is made by the court. Traditionally, the law presumed that young children were better off with their mothers. This presumption was called the tender years doctrine. Today, most states have laws that require courts to treat men and women equally in custody disputes. In reality, though, some judges still favor the mother, especially when the decision involves young children, regardless of the desire or ability of the father to care for his child. It is becoming more common, however, for some judges to award custody to fathers. Their reasons may range from promoting nondiscrimination to wanting to encourage paternal interest or even punishing women who do not fit stereotypes of the “good mother” (for example, mothers who work rather than stay at home).

In determining custody, courts apply a standard of what is in the best interests of the child. This is often difficult to determine. Courts consider factors such as the youth’s actions in the home, school, and community; the emotional and economic stability of the parents; which parent has stronger bonds with the child; and which parent has been the primary care provider. Courts often consider the children’s desires, especially if they are old enough to understand the ramifications of their wishes or are over a certain age (in many states, age 12). To help with this decision, judges often assign a social services agency to study the parents and children. The results of this study are used as the basis for a custody recommendation.

Increases in substance abuse, incarceration, divorce, and other family and community problems have resulted in many grandparents and other relatives raising children whose parents cannot do so. This caregiving relationship is called kinship care. Approximately five million children are being raised by their grandparents. More than a million children are being raised by other relatives.

Many states have passed laws that allow grandparents to petition for visitation rights if the child’s parents will not voluntarily grant visitation to them. However, challenges to these laws brought by parents have been upheld in many states. In a 2000 case, the U.S. Supreme Court struck down a state law that allowed visitation by any person who could show that such visitation would be in the best interests of the child. The Supreme Court was concerned that such a broad granting of visitation rights
—even to family members, including grandparents—would undermine a parent’s fundamental interest in the care, custody, and control of his or her children.

Some custody disputes become so bitter that one parent takes the children from the other parent and hides them. This may involve moving permanently to another state, or the parent and children may move repeatedly to avoid being found. Thousands of parents have resorted to this illegal means of opposing a court’s custody decision. Such abductions may account for the majority of children reported missing each year. The Federal Parental Kidnapping Prevention Act prevents parents who abduct their children from getting new custody orders in a different state. It also provides resources to help custodial parents locate their missing children.

Each state also has a law stating that a custody decree entered in one state is valid in all states. Therefore, a parent without custody cannot remove his or her children from their home state and attempt to obtain a different custody order in another state. In addition, most states have statutes that make parental kidnapping—taking or hiding a child from a parent who has custody—a crime.

**Alimony, Property Division, and Child Support**

Since the development of no-fault divorce, most divorce disputes center on two issues: children and money. The major financial issues are alimony, child support, and property division. These issues are frequently negotiated between the parties on their own, through their attorneys, or in mediation. The parties then make a brief courtroom appearance to finalize the divorce.

U.S. Census Bureau statistics show that most women suffer financial hardship as a result of divorce, but most men experience financial improvement. This is not surprising, given the number of women who stay in the home to care for children, especially when the children are young. Upon divorcing, many women face financial hardship because they have been out of the workforce for a period of time and because a majority of children of divorced parents live primarily with their mothers. In 2006, only about 40 percent of mothers received full child support payments from their ex-husbands.
Alimony

Alimony, also called spousal support or maintenance, is money paid by a spouse to help support an ex-wife or ex-husband after a divorce. It can cover household and personal expenses, work-related costs, educational expenses, and recreation costs. Alimony has traditionally been paid by men to support their ex-wives, but the U.S. Supreme Court ruled in 1979 that state laws restricting alimony to women only were unconstitutional.

Alimony is based primarily on need, although the duration of the marriage is often a factor. As a result, alimony awards vary greatly from case to case. When awarding alimony, courts consider the couple’s standard of living as well as the financial status and wage-earning capacity of each spouse. Sometimes rehabilitative alimony is awarded temporarily to help one spouse regain or develop job skills needed for future employment. Alimony is not awarded in all cases. The decision whether or not to award alimony is left to the discretion of the court, based on the circumstances of the case.

An important consideration in awarding alimony is how long the payments should continue. Many people advocate that alimony should continue until the spouse no longer has the financial need for it, which could mean that payments continue indefinitely. Other people, however, feel that such an arrangement undermines the goal of ending the relationship for good. They say that the purpose of alimony is not to equalize incomes forever but rather to give the disadvantaged spouse an opportunity to reestablish his or her life as an independent person after the divorce. Under this theory, support payments should be made for a limited period of time, thereby encouraging both parties to move on with their lives.

Dividing property owned by the couple is another important issue during a divorce. It involves deciding who gets the house, the car, the furniture, the bank account, the life insurance, and so on. In general, property division is determined according to what the court considers to be fair and equitable for both spouses. The judge may consider the length of the marriage and the economic circumstances of each spouse, including employment history and future income-earning prospects.

Note that alimony and property division are separate concepts that are related to the process of divorce. Property includes all physical possessions and income that have been acquired by the family during the marriage. Alimony consists of future payments of support money after the end of the marriage.
The Medical School Degree

Roberto and Marta Flores sought a divorce to end their 11-year marriage. At first, the case seemed simple. The couple had no children, little property to divide, and, with California’s no-fault divorce law, seemingly little to argue about. However, at the time of the divorce, Roberto argued that he deserved part of his ex-wife’s income as a physician because he had worked to support the family—and pay some of her tuition—while she went to school to earn her medical degree.

Roberto claimed that he was entitled to a share of Marta’s total projected lifetime income as a doctor. He estimated that Marta was likely to earn over $3 million in twenty years of medical practice. She countered that while he might be entitled to reimbursement for part of the cost of her education, he is not entitled to share in the potential future value of her degree. She argues that there is no way to reasonably predict what she will earn in her career. She might decide to provide medical services in a developing country or to work in a community medical clinic. In either case, her income could be far less than what Roberto predicts.

Problem 34.4

a. What happened in this case? What is Roberto asking for?

b. What is fair reimbursement: the cost of Marta’s education or the value in terms of her potential increased earnings? Explain your answer.

Child Support

Both parents still have a legal duty to support their children after divorce. Therefore, divorcing couples with children need an agreement and court order regarding child support. Usually, only one parent actually makes child support payments. The other parent—the parent with physical custody—supports the child by taking care of daily needs such as food, clothing, and shelter. The level of support is based on the noncustodial parent’s ability to pay and the amount necessary to cover the child’s needs. Child support is usually paid until the child becomes an adult or is emancipated, unless the parties agree to a longer period of support, such as through college.

When one parent fails to provide the agreed-upon financial support, the other may seek a court order requiring payment. The Family Support Act of 1988 (FSA) was passed by Congress to help in enforcing support orders. This law requires states to have clear formulas for calculating child support and to expand their child support enforcement procedures and parent-locating services. The guidelines consider many factors, including both spouses’ incomes and the number and ages of their children. Some deviation from these guidelines is allowed, but a court must provide clear reasons for such a variation. The FSA allows child support payments to be deducted from a parent’s salary and permits states to track parents by means of their Social Security numbers.
Problem 34.5

Each of the following situations involves a divorce. Should either spouse pay alimony, child support, or both? If so, which spouse should pay what? How much should be paid, and for how long?

a. Miguel, a successful plumbing contractor, earns $75,000 per year. His wife, Carmen, stays at home and takes care of their four children. When Miguel and Carmen divorce, the two older children—a junior in high school and a freshman in college—wish to stay with Miguel. The two younger children prefer to stay with Carmen.

b. Angela, a government social worker, divorces her husband, Leroy, an occasionally employed freelance writer. He has been staying home, taking care of their two-year-old son. Angela's yearly salary is $33,000; Leroy has earned $6,000 in the past 12 months. The child will live with his mother.

Stepparents

After divorce, many people remarry and create new blended families. More and more families in the United States include stepparents who play important parts in the lives of children, especially when married to custodial parents. The relationship that develops is different in every family. In many cases, a stepparent takes on a role that is different from a birth parent but something like an additional parent.

State laws vary about the rights and responsibilities of stepparents. In many places, stepparents are required to support their stepchildren as long as they are living with them. In some places, if the stepparent has acted in loco parentis, or in place of the parent, this responsibility may continue after the stepchild has moved out. If the marriage ends in divorce, stepparents usually cannot claim custody of the stepchild, though they may be able to seek visitation rights.

Stepparents are not considered full parents unless they adopt their stepchildren. This is usually only possible if the child's noncustodial parent consents to the adoption. For example, assume that Jay and Marla marry and have a son, Brian. When Jay and Marla divorce, Brian lives primarily with Marla, and she marries Larry. Only if Jay consents to the adoption will Larry be able to adopt Brian because the adoption would end Jay's legal rights as Brian's parent.