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# Nondivorce Support and Property Rights

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CHAPTER 62

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**NONDIVORCE SUPPORT AND  
PROPERTY RIGHTS**

*by*

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*1994 Revision by*

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## CHAPTER 62

# **NONDIVORCE SUPPORT AND PROPERTY RIGHTS**

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### **SCOPE**

Although changes in societal norms and amendments to state domestic relations statutes have made it easier for couples to obtain divorces, the situation may arise in which a spouse needs and desires support or marital property rights, but does not wish to be divorced or legally separated. This chapter deals with such actions by one spouse against the other for nondivorce support and property rights, covers support and property rights for the dependent spouse, and support for children who are issue of the marriage.

Many of the considerations in this chapter are the same as those governing other matrimonial actions, for example, the factors governing awards of temporary alimony and child support. The practice pointers on evidentiary problems and expert witnesses (Chapters 20 and 23), and the strategies for obtaining and opposing permanent spousal support (Chapter 27) in a divorce case are all applicable to actions for support between nondivorcing spouses.

What is unique about nondivorce support actions and nondivorce marital property rights is the joining of often archaic judicial and statutory authority with modern situations, personalities, and needs. While many of these legal rules have

remained the same—for centuries in some cases—the participants, which sex must provide support, the professions of either or both spouses, and their needs—have changed dramatically. The attorney, in dealing with nondivorce support and nondivorce property rights, thus has the creative task of arguing the legal applicability of this “old wine in new bottles.”

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## § 62.01 Nondivorce Support and Property Rights

### [1] Introduction

Until the late 1940s, nondivorce support and property actions, as opposed to other kinds of matrimonial lawsuits, were relatively common. Public policy and private morality frowned on divorce. Laws in most states made it difficult to divorce, and no-fault divorce was virtually unknown. Spouses who considered divorce distasteful for moral, religious, or philosophical reasons, or spouses who could not legally prove the strict fault-based grounds for divorce turned to nondivorce support and property actions for relief.

The liberalization of American divorce laws—where all states now have enacted some form of “no-fault” divorce—and the increased public tolerance toward divorced persons resulted in the social and legal reality that nondivorce support actions and nondivorce property actions are not as widely utilized as they once were.

Nevertheless, there are a number of very important reasons why a family law practitioner must fully understand and should consider the legal alternatives of nondivorce support and property rights instead of divorce:

- (1) It remains a strong public policy in the overwhelming majority of states to promote marriage and to discourage divorce unless the parties meet the strict statutory

guidelines to dissolve their marriage.<sup>1</sup> Moreover, even with a relatively high divorce rate in America, the vast majority of Americans still marry,<sup>2</sup> with approximately one-half of current marriages being remarriages.<sup>3</sup> Accordingly, a family law practitioner must be aware of the applicable property and support rights of the parties *during* their marriage, as well as those property and support rights upon dissolution of marriage.

- (2) One or both of the spouses may wish to work toward saving their marriage. The spouse who needs support may not wish to concede that the marriage is unsalvageable, or may not wish to provide an "easy out" for the other spouse.
- (3) One or both of the spouses may not believe in absolute divorce based upon their moral or religious beliefs. In particular, Roman Catholics may not wish to be divorced.
- (4) A divorce based upon fault grounds, or a no-fault divorce where fault still plays a role in support obligations or distribution of marital property, may bring unwanted publicity or notoriety. A nondivorce support case may attract less attention.
- (5) State nondivorce support and nondivorce property statutes, applicable rules of court, and state judicial precedent may confer certain rights and remedies not available under alimony or equitable distribution statutes on divorce. For example, state nondivorce support laws may allow retroactive modification, simplified procedures, speedier adjudication, or less expensive fees and costs.
- (6) Some states provide the assistance of court personnel in initiating or mediating nondivorce support proceedings. For welfare agencies which desire periodic

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<sup>1</sup> See, e.g., *Maynard v. Hill*, 125 U.S. 190, 205 (1888); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971).

<sup>2</sup> See, e.g., 1 H. Clark, *Law of Domestic Relations in the United States*, 75 (West 2d ed. 1987) ("Notwithstanding these developments, a majority of Americans still marry in the traditional way and continue to regard marriage as the most important relationship in their lives.").

<sup>3</sup> 1990 U.S. Census Reports.

reimbursement of sums spent for supporting a poor or destitute family, a nondivorce support action may be the only redress available, since the family members may have neither the standing nor the purpose to initiate a divorce proceeding.

- (7) Because of differing state laws and jurisdictional problems, an alimony order in a divorce might not be available or might be difficult to enforce. A nondivorce support action in a different forum, or an action for nondivorce support rather than for alimony, may be procedurally or substantively easier to obtain.

## [2] Property Rights During Marriage

### [a] Common Law Property Rights During Marriage

Under the early common law, a married woman was under severe economic disabilities not shared by her husband. Upon marriage, her personal property acquired prior to or during the marriage became the property of her husband, and a married woman's real property also belonged to her husband during the marriage. The legal rationale for this economic disability on the part of the wife was that upon marriage, a husband and wife became "one" under a "unity of person" doctrine, and the husband was the "one" acting as the "guardian" for his wife.<sup>4</sup> Subsequent legislation in all states, however, has now ameliorated this harsh common law rule.<sup>5</sup>

The common law also generally regarded any services rendered by one spouse to the other as either obligatory or gratuitous. Spousal services therefore generally did *not* entitle that spouse to any rights in the property of the spouse benefiting from those services.<sup>6</sup> However, this general rule was a rebuttable presumption that could be overcome by factual evidence showing that such spousal services rendered were *not* intended to be gratuitous.<sup>7</sup> Thus, a spouse was permitted to prove that

<sup>4</sup> See, e.g., 1 Blackstone, Commentaries of the Law of England, 445 (J.B. Lippincott 3d ed. 1884); 2 Minor, The Law of Real Property, § 1004 (Michie 2d ed. 1928).

<sup>5</sup> See § 62.01[2][b] *infra*.

<sup>6</sup> See, e.g., Eggleston v. Eggleston, 228 N.C. 668, 47 S.E.2d 243 (1948); Cooper v. Spencer, 218 Va. 541, 238 S.E.2d 805 (1977).

<sup>7</sup> *Id.*