Legal Matters®

Family Law
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Grandparent visitation can be complicated issue for families

If you're a grandparent who dotes on your grandchildren, it would no doubt be devastating if you were denied access to them. Nonetheless, this gut-wrenching scenario plays out all the time.

For example, let's say your adult child passes away, leaving kids behind, and his or her surviving spouse decides it's time to move on and stops responding to your attempts to see the kids.

Similarly, maybe your child got divorced, his or her ex has the kids, and that person won't let you see them. Perhaps your adult son or daughter decides to use your grandchildren as pawns, either withholding access to them unless you give them money or as retaliation after a falling out. In such scenarios, do you have a legal right to see your grandchildren?

The answer is that you might, but it could be an uphill battle securing it. That's because of a U.S. Supreme Court case called *Troxel v. Granville*, which gives parents a very strong right to control the upbringing of their children. Before this case, decided nearly 20 years ago, family courts could grant visitation rights to grandparents, even over a perfectly fit parent's objection, if the court found it was in the "best interest of the child."

However, in *Troxel*, the Supreme Court said that judges must presume a fit parent is acting in the kids' best interests when making

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childrearing decisions, even if that means denying their kids a relationship with their grandparents. You can still seek visitation rights as a grandparent, but it can be tough to overcome that presumption in favor of the parents.

Still, many states have passed laws meant to provide guidance for grandparents in this situation, laying out specific factors that courts will consider. These factors usually include a parent's reasons for opposing the visitation, the child's emotional and physical needs, the

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nature and quality of the relationship between the grandparent and grandchild, and the child's wishes if he or she is mature enough to express them.

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Additionally, many states don't allow a grandparent to seek visitation over a parent's objection unless one or both parents have died, the parents are divorced or divorcing, or a custody proceeding is going on. Many states will require that the grandparent has repeatedly attempted to visit the grandchild and been denied contact.

These laws don't always help the grandparents. In a recent case from Rhode Island, the children's mother was killed by police in Florida while fleeing a robbery scene with her boyfriend. The father, who was separated from her at the time and had custody of the kids, continued to rely on their maternal grandmother to help with childcare.

However, he didn't need her around as much after he remarried. Plus, when the kids returned from visits with her, they exhibited behavior problems, had trouble sleeping, were acting up in school, and even exhibiting stress-related physical problems. They also complained that they didn't want to visit her anymore.

Though there were no allegations of abuse, the father stopped responding to the grandmother's visitation requests. She went to court seeking a visitation order, but the family court judge denied her request and the Rhode Island Supreme Court upheld the decision on the grounds that there was no evidence the father was unfit and that the grandmother couldn't show by clear and convincing evidence that his decision was unreasonable.

At the same time, if a court does order grandparent visitation, parents who defy the court will pay a price. For example, an Indiana court awarded visitation to a couple who had raised their four grandchildren for several years before they moved back in with their mother. She didn't allow the visits to happen, and a family court judge ordered the mother to serve 180 days in jail for contempt and to pay a $14,000 sanction. The order was upheld on appeal.

When grandparents secure visitation rights, parents can often still set the ground rules, as a recent case in South Carolina shows. There, a newborn child's father died in a car crash. The paternal grandmother demanded unsupervised visitation, but she had a strained relationship with the boy's mother, who felt uncomfortable with unsupervised visits. The mother offered to allow monthly supervised visits.

The grandmother took the mother to family court, where a judge granted unsupervised visitation. However, the state appeals court reversed the ruling, rejecting the grandmother's argument that supervised visits were unreasonable and stating that when a fit parent agrees to any visitation, further court intervention would violate the parent's rights.

The law can differ from state to state, so talk to a family lawyer where you live.

Pre-marriage business becomes marital property

Generally, marital property is property acquired by either spouse during the marriage. On the other hand, premarital property, owned by a spouse before the marriage, is considered separate property and isn't split up during a divorce.

Sometimes the lines get blurred, especially if you don't keep your separate property truly separate, as a South Carolina case demonstrates.

In that case, a husband formed a business before marrying his wife. Several years before they got married, the wife, who was a family friend at the time, loaned him money for the company and left college to work for the company.

After filing for the divorce, the wife sought to share in assets related to the business. According to the wife, she assisted her husband with the company while they were married, working without pay, and her husband held her out as an equal partner. She said she also obtained loans for the business and invested in it.

A divorce judge said this was enough to "transmute" the business to marital property. An appeals court agreed, upholding the judgment. Now, the business will be included in the marital estate and the wife will be entitled to her share.

Case shows 'do-it-yourself' prenups are dangerous option

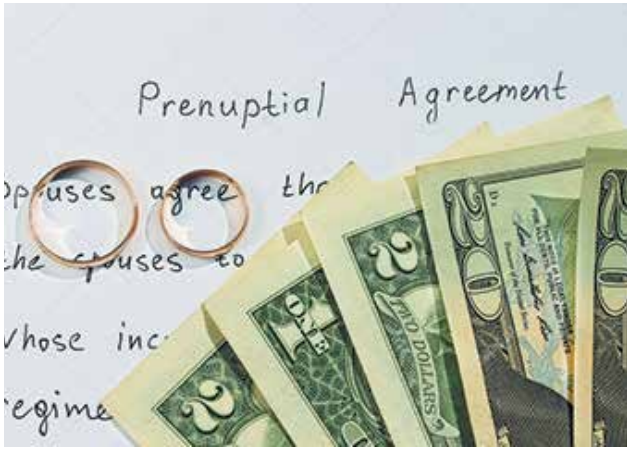
A lot of us like to save money, and a good way to do that is by learning how to do something yourself instead of paying a professional a premium. That's why you might go on YouTube to find a good how-to video for changing out a light switch, replacing your brake pads and rotors, making a hockey rink in your backyard, or installing a ceiling fan.

That same instinct might lead you to draft an important contract, such as a prenuptial agreement, from a do-it-yourself template you find on the internet, rather than forking over hard-earned cash to a lawyer. A recent Tennessee case shows just how bad an idea that can be.

In that case, a woman in Nashville who made a great living as a surgeon met a man with a spotty career history. They moved in together and the woman got pregnant. They ended up relocating to New Mexico because she had a great career opportunity there.

After they moved, they decided to get married. She wanted a prenup to protect her assets in case they ever got divorced. Rather than seeking out an attorney who drafts prenups for a living, they downloaded a form from the web and executed it. The form had a waiver of both alimony and spousal support, meaning she wouldn't have to support him after a divorce. It also had a space where they could choose which state's laws would apply in any dispute, but they left it blank. The couple got married in Colorado, moved a few more times as the wife's career progressed, had two more kids, and were back in Tennessee when the wife filed for divorce.

The husband demanded alimony, but the divorce judge denied it based on the waiver in their prenup. However, an appeals court reversed the decision. Because the couple left the "choice-of-law" provision blank, the court said New Mexico's laws should apply since that was where the document had been signed. New Mexico doesn't allow couples to waive spousal support in a prenup.



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The wife may have saved a small amount by downloading a form agreement instead of paying a lawyer to draft one for her, but she ended up paying a lot more in the long run both through the alimony she'll pay and the cost of fighting it out in court. Don't end up in that situation; call an attorney instead.

Judge can enforce marriage pact despite religious element

It's generally understood that U.S. courts can't decide questions of religious law. After all, the 1st Amendment forbids the government from getting involved in religious affairs. A recent Michigan case shows, though, that courts can enforce valid marriage agreements even if those contracts have a religious aspect to them.

In that case, a man named Khaja Syed asked another man, Mohammed Ali, for permission to marry his daughter Nausheen. Ali gave his blessing, so long as Syed paid his daughter $51,000 as a "mahr" (a groom's gift of property to a bride), which is a traditional component of Islamic marriages. After thinking about it awhile, Syed accepted the terms and married Nausheen in 2013. Syed put his promise in writing when he signed the marriage contract during their wedding ceremony.

The couple divorced three years later. At that point, Syed had only made about $4,000 in mahr payments. Nausheen asked the divorce judge to enforce their contract and order Syed to pay the other $47,000. The judge did as she asked.

Syed appealed, but the Michigan Court of Appeals upheld the decision. In doing so, it rejected Syed's argument that their contract imposed merely a religious obligation and not a legal obligation. It also rejected his argument that Michigan courts had no authority to enforce Islamic marriage contracts. The court pointed out that it didn't need to answer any religious questions in enforcing the contract. The parties had an enforceable agreement in which Nausheen had performed her part and Syed had to perform his.

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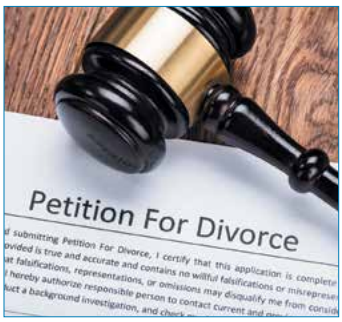

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New tax implications to consider in divorce

When Congress passed the Tax Cuts and Jobs Act of 2017, there was a lot of hubbub about parts of the law that would affect divorces. Most significantly, the new tax law made it so that alimony and maintenance would no longer be tax-deductible for the paying spouse or taxable to the person receiving the payment. This made settling pending divorce cases more complicated.

Another part of the law didn't generate as much attention but may be just as important for divorcing couples to know about. The law got rid of a part of the federal tax code that relates to "grantor trusts." These are trusts in which the person creating the trust (the "grantor") is taxed on the income that the trust produces, even if that income is going to someone else (the "beneficiary").

Before the new tax law, the tax code said that after a divorce, income paid to an ex-spouse from a grantor trust would be taxed directly to the ex-spouse instead of the grantor. Now, even following the divorce, the grantor will have to pay the tax on trust income (even if their ex is the one receiving the income). This is a game-changer that any divorcing spouse needs to consider, especially the spouse who would be the grantor.

Another thing to be aware of is that prenuptial and postnuptial agreements (a contract between a married couple determining each other's rights in case of divorce) are not grandfathered under the act. That means any alimony or maintenance dictated by the prenup or postnup will be taxed according to the new laws, regardless of the specifics of the contract.

There may be even more consequences created by the new tax law in your specific situation. A local divorce attorney can go over them in detail with you.