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1. The Divorce Process

I. THE DIVORCE PROCESS

A. Introduction

The goal of the legal process of divorce is to end the marriage and decide such issues as child custody, visitation, child support, alimony (sometimes called spousal support or maintenance), property and debt division and attorney's fees and costs.

A divorce judgment can be based on an agreement between the parties or result from a trial. An agreement is usually less traumatic for you and your children, and less expensive than a trial. Ultimately, most cases are resolved without a trial.

Divorce is called dissolution of marriage in some states.

B. Divorce Proceedings

The divorce process varies from state to state. What procedures are available and how long the process lasts is unique to each state's court system. Your lawyer can explain how the process works in your state. The following general description applies in most states.

1. The Petition

A divorce begins with the Petition, called a Complaint in some states. This document notifies the court and your spouse, when served, that you want the court to end your marriage. It also lists what you are asking for, such as child custody, child visitation, child support, spousal support, property division, attorney's fees and costs.

2. The Response

After a Petition is served, the other spouse is entitled to file opposing papers. In most states, if you are served with a Petition or a Complaint, you must file your opposing papers within a certain time or you will lose your right to present your side of the case to the court, and the court might give your spouse everything asked for in the Petition.

3. Temporary orders

Temporary orders, also called pendente lite orders, set the rules while the case is pending. Either party can ask the court to make temporary orders stating, for example, who stays in the house, who is responsible for the children, who pays which bills and restraining inappropriate conduct. It is in both spouses' best interest to agree upon reasonable arrangements while the case is pending rather than incur additional legal fees and add to bad feelings by having to go to court for temporary orders. In a few states, some temporary orders automatically go into effect when a divorce proceeding is filed or the other spouse is served.

4. Discovery

Each spouse is entitled to information from the other about the case. The legal procedures for obtaining that information are called discovery. Discovery may be a simple, speedy process or one consuming a great deal of time, energy and money.


There are several different discovery procedures, sometimes referred to as discovery devices. A list of questions known as interrogatories, requiring a formal written answer to each question, may be sent. By a request for production one party may obtain documents from the other. In a deposition, or examination before trial, the spouses and other persons, including experts, may be required to answer questions under oath in a lawyer's office while a court reporter takes down what is said and then prepares a transcript. If your deposition is to be taken, there will be advance notice and your lawyer will discuss the procedure with you.

Discovery may be conducted informally. It is often more efficient and less expensive for lawyers informally to exchange documents and information than to send and respond to interrogatories and requests for production and to take depositions.

5. Negotiated settlement

Most lawyers and judges agree that it is better to resolve a case by agreement than to have a trial in which a judge decides the outcome. Also, people who have been through a divorce value the privacy and control that a negotiated agreement gives them. People are more likely to obey a judgment which is based on their agreement than one which has been imposed on them by a judge. Voluntary compliance is important because enforcement procedures available from the court are usually expensive and sometimes inadequate. For

these reasons, following discovery — and at any time, even during trial — the spouses and their lawyers should try to negotiate a settlement.

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The attorney has demonstrated an active interest and competency in matrimonial law as evidenced by the fulfillment of criteria and standards as established by the AAML Board of Examiners and Board of Governors.

Because of the limited number of judges available to hear trials, most courts require the parties and their lawyers to attend a settlement conference in which a judge or other person tries to bring about a settlement. It is often very persuasive to hear from a judge how the judge would likely rule if the case went to trial.

Although your lawyer may recommend that you accept or reject a particular settlement proposal, the decision to settle or not to settle is yours. Your lawyer cannot and will not make that decision for you.

Even if a case is settled by agreement and you never see the inside of the courthouse, there are certain legal procedures that have to be followed to turn your agreement into a judgment and end your marriage. Your lawyer will see to completing this part of the process.

6. Trial

If you and your spouse cannot settle your case, it will go to trial. At trial you each tell your story to the judge. It is told through your testimony, the testimony of other witnesses, and documents called exhibits.

Trial is likely to be expensive and unpleasant. However, it can be the only alternative to never-ending unreasonable settlement demands. Still, trials are risky. No lawyer can predict the outcome of a trial because every case is different. A judge, a stranger -- possibly with a viewpoint, temperament and values very different from yours -- tells you and your spouse how to reorder your lives, divides your income and assets, and dictates when each of you may see your children.

Sometimes, a trial does not end the case. Each party may, within a limited period of time, appeal to a higher court. An appeal adds more time and expense to the divorce process and is hard to win.

7. Alternative Dispute Resolution

There are other methods of resolving your case. These methods are called alternative dispute resolution and include mediation and arbitration.

a. Mediation

In mediation, the parties meet with an impartial individual (who should have special training and qualifications) for the purpose of helping them reach an agreement. It is important to have independent representation throughout the mediation process. The parties should consult with their own lawyers about mediation and the legal ramifications of any proposed agreement. Mediation is required in some states.

b. Neutral Case Evaluation

Neutral case evaluation occurs within mediation or as a separate process entirely. In neutral case evaluation, each party, through his or her counsel presents his or her case to a neutral third party, who then assesses the strength and weakness of each party's position and sometimes suggests alternatives. This process often helps the parties to reach compromises and ultimately, an agreement. The benefit of such a process is each party hears the strengths of the case as presented by the opposing side and can better evaluate and strengths of his or her own case.

c. Arbitration

The spouses may agree to submit some or all of their disputes to an arbitrator, a person chosen to decide the issues that the parties present. An arbitrator should have special training and qualifications. The arbitrator's decision can be made into a court judgment. Although traditionally the decision of an arbitrator is binding and final, some variations have emerged in recent years. Your lawyer can discuss with you whether arbitration is advisable.

d. Collaborative Law

Collaborative Law is a relatively new concept in alternative dispute resolution. The goal of the Collaborative Law Practice is to provide a respectful and defined process, produce outcomes that meet the needs of all parties, and increase the parties' control, privacy and compliance with agreements. The parties sign a Participation Agreement that provides for full disclosure and stipulates that if the Collaborative Process fails, then both

Collaborative lawyers resign and the parties are required to obtain new counsel; the stated goal is to remove the threat of litigation and keep the parties working together toward a shared resolution. Collaborative Law Practice often involves a team of additional professionals such as a divorce coach for each party, a child specialist, and/or a neutral financial neutral. The parties, counsel, and any other professionals involved meet regularly to move through a defined process to reach a resolution that is directed by the parties' articulated goals. Collaborative Law Practice can provide a supportive system for resolving difficult issues and can improve how the parties interact and problem solve in the future, but it demands active participation from both parties to succeed and the possibility of having to obtain new counsel in the event an agreement is not reached can be intimidating to some clients as well as wasteful.

C. Your Conduct

Here are some good rules to follow during divorce:

- Do try to maintain good communication with your spouse and children.

- Do talk to your lawyer before agreeing to a settlement.
- Don't physically or verbally abuse your spouse or children.
- Don't say anything to others that you wouldn't want your spouse or the judge to hear.
- Don't go on a spending spree. Excessive spending on yourself or others may harm your case.
- Don't throw away financial records or other possible evidence.
- **Don't try to hide evidence or assets.**
- Do keep your perspective and try to be rational.

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Divorce is stressful, but not the end of the world. How you or your spouse feels during your divorce can change dramatically as the case progresses. It's normal to go through stages of denial, anger, guilt, depression and acceptance on the way to a resolution. These stages don't necessarily occur in any order or only once. So, if you're depressed, for example, you can take some comfort in knowing that you'll probably feel different next week.

D. After the Divorce

1. Modification

Whether the issues in your divorce are settled by you and your spouse or are decided by a judge, some things in your judgment can be modified (changed) by a judge after a hearing. Usually, child support, alimony, child custody, and child visitation can be modified, but only if one of you can show that there has been a change in circumstances. Examples of a change of circumstances are losing your job, inheriting substantial sums of money, or remarriage. Grounds to change child custody orders can include someone moving away, or the needs of the children changing as they grow older.

Some orders are not modifiable. Usually the division of your property is not subject to modification. And, if you and your spouse have agreed that alimony shall not be modifiable, the courts of most states will follow that agreement.

2. Enforcement

If you or your spouse disobeys an order that the court makes in your divorce judgment, there are ways to enforce those orders. Examples of disobedience of an order are failure to pay support, failure to turn over property that was awarded and refusal to allow the visitation that was ordered.

Orders to pay money can be enforced by garnishing wages or bank accounts or by having the sheriff or marshal seize and sell property belonging to the person who hasn't paid. Orders for support, to turn over property and for child visitation can usually be enforced by contempt of court proceedings. Papers are prepared and served on the disobedient person, ordering that person to appear in court. After a hearing, the judge can put the person in jail or impose a fine as necessary to make the person obey the order.

3. Omitted Property

If there is marital or community property that is not awarded to one or both spouses in the divorce judgment, some states allow further proceedings to divide those assets. Sometimes this can be done by making a motion in the divorce case and sometimes it requires a separate lawsuit.

E. Some Questions and Answers about the Divorce Process

1. Should I be the first to file? That depends. In some areas, the first person to file has a choice of more than one court. In that case, your lawyer may have a preference about which court would be best for you. Otherwise, it doesn't usually matter who files first. But to be sure, ask your lawyer.
2. Why did my spouse ask for so much in the Petition? I thought we agreed on some of those things. Before knowing what the issues will be and what might happen under the law and the facts of the case, no one wants to take the chance of asking for too little. So people tend to ask for more than they really expect. Like when you read in the newspaper that someone has filed a "10 million dollar lawsuit", what is demanded in the Petition or Complaint usually has little real meaning.
3. What are the chances my case can be settled? Most divorce cases are settled.
4. May I date? In some states, the court is not concerned with your private life. In others, a relationship with someone other than your spouse before you are divorced may hurt your case. Whatever your local law, dating someone else may anger your spouse and impede settlement. If you have children, you should get some professional advice about how much your children should know about your love life.
5. May I spend money on my lover? There are at least two possible reasons why you shouldn't. You may have to pay back the money when the property is divided. And your spouse may be very angry. That anger could lead to distrust that could complicate the divorce proceedings.
6. How long will my divorce take? That depends on a lot of things. Every divorce is different. Factors that can make a difference include the schedules of both parties, both lawyers and the court, the cooperation of witnesses, the speed of the appraisers, and the complexity of the case.
7. Nothing is happening in my case; what can I do? Talk to your lawyer. You are entitled to know the status of your case. There may be a very good reason for a pause or delay. For example, appraisals may not yet be completed. More information may be needed.

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