

Introduction to Divorce

The following material is intended to answer some of your questions about divorce proceedings in general. It is not intended to answer specific questions about your particular case, since each case is different.

The dissolution of a marriage can be a traumatic experience. Your attorney is well aware of the emotional involvement of the parties. Though I am not a behavioral specialist, I will try to relieve your anxiety by attempting to assist in solving the problems that you face during this case.

For me to properly represent you, it is necessary for you to give me all the facts concerning your case. I must also know your wishes. I welcome your viewpoints. Withholding information from your lawyer can affect the outcome of your case, so I advise you to be completely candid with me. Remember that a fiduciary relationship exists between attorney and client.

I want to stress that although I will counsel and advise you throughout the case, the final decisions regarding your case must be made by you. My experience has shown that most divorce cases are settled, which means that the parties reach an agreement that is placed on the court's record. **NEVER AGREE TO SOMETHING YOU DO NOT UNDERSTAND OR TO SOMETHING YOU FEEL YOU ARE FORCED TO AGREE TO. YOUR CONSENT TO AN AGREEMENT MUST BE VOLUNTARY, AFTER CONSULTATION WITH YOUR ATTORNEY.** After an agreement is placed on the record, it is extremely difficult and sometimes even impossible to change it.

Finally, as your representative, I am here to advise and inform you, cite the options and alternatives available to you, assist you in decision making, and cooperate with you in attempting to obtain the best possible results on your behalf.

Grounds for Divorce

Michigan is known as a "no fault" divorce state; however, the words, "no fault" can be misleading. If the parties reach a final settlement on all issues, fault is not a factor. If there is a dispute about property, child or spousal support, parenting time, or custody, fault may become an active ingredient in resolving these issues. For this reason I may go over the indiscretions of the parties with you.

Basically, Michigan has one ground for divorce: "There has been a breakdown of the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved." In court, some judges require only a recital of this assertion. No details need to be provided.

In Michigan, we have a form of legal separation that is known as *separate maintenance*. This arrangement is seldom done. The procedure is similar to a divorce, except that neither party may remarry. The law states that if one party institutes a separate maintenance suit and the other party files for divorce, the court will only consider the case as a divorce matter and may not enter a judgment of separate maintenance.

We also have annulment proceedings in Michigan, which invalidate a marriage. Marriages may be void from the beginning or be voidable, depending on the circumstances. The grounds include incapacity to marry (such as insanity, bigamy, or

under age) or any type of fraud that goes to the heart of the marriage. Parties wishing an annulment must not cohabit after having discovered the grounds for the annulment to the marriage.

If you have any questions about separate maintenance or annulment, please ask me. The following material basically concerns divorce (though there may be similarities between divorce and separate maintenance and annulment actions).

Divorce Procedure

The initial filing of a divorce case may include the following documents:

1. Summons.

This document notifies the other spouse that a suit has been started. He or she has 21 days if personally served in Michigan (28 days if served by mail or if the other spouse lives outside of Michigan) to respond, or a default may be taken.

2. Complaint.

This document states the names of the parties; where, when, and by whom you were married; the names and birthdays of children (if any); the wife's and the husband's names before marriage; the length of residence in the county and the state; the date of separation; the grounds for divorce; a statement about property; whether the wife is pregnant; and the relief requested. A party must reside in Michigan for at least 180 days and in the county where the suit is started for at least 10 days. There are some exceptions to the residency requirement.

3. Affidavit of Service and Return of Service.

This document is filed when service is made.

4. Affidavit of Previous Suit.

This informs the court whether the parties have filed for divorce before or had any case in another court.

5. Statement to the Friend of the Court.

This is to inform the Friend of the Court of the essential facts (it is unnecessary in cases in which Friend of the Court services are not required).

6. Affidavit.

This document lists the children's residences during the past five years and states that no custody action involving the child is pending (it is only needed when minor children are involved).

7. Record of Divorce.

This is a statistical record required by the Michigan Department of Health.

8. Injunctions.

An injunction is requested only when needed to restrain a spouse from committing certain acts. Your attorney will explain this procedure to you in detail and ask if you want an injunction.

9. Ex Parte Orders.

An ex parte order may be obtained for temporary custody, support, etc. A timely filed objection to the ex parte order will negate the effectiveness of the order until a hearing on the matter.

10. Affidavit for Ex Parte Order.

This sworn statement affirms that the facts stated to obtain the ex parte order are true.

11. Circuit Court Filing Fee.

The fee is set by court rule and changes periodically. There is also a charge for serving papers. Later on, there may be other costs for services such as appraisers, actuaries, accountants, depositions, etc. You will be advised before any of these expenses are incurred so that you may negate them. There may also be Friend of the Court and judgment fees. These are listed in Schedule A of the retainer agreement.

12. Notice of Hearing, Praecipe, Motions, and \$20 Filing Fee.

These are required for any motion that requires a hearing. A motion is a request to the court for some type of relief. A praecipe is a court form requesting that the matter be set for hearing. Notice of hearing advises that a hearing will be held.

13. Judgment of Divorce.

The judgment is the final document that grants the divorce and states the terms of the divorce. When children are involved, a fee is required.

The plaintiff is the party who starts the lawsuit. The defendant is the person against whom the suit is filed. The divorce is resolved by the family division of the circuit court. The office of the Friend of the Court makes recommendations for spousal support, child support, custody, and parenting time. This office also collects and distributes the spousal and child support payments. It may also request the enforcement of court orders dealing with child and spousal support as well as parenting time. The court may use the Friend of the Court for other miscellaneous duties, including a recommendation on property distribution.

After the complaint and summons are filed and served, the defendant may file an answer to the complaint, which is a paragraph-by-paragraph response to the complaint. Once the answer is filed, the case is contested. If no answer is filed by the defendant, an order of default is entered, indicating the defendant's lack of response. The matter becomes an uncontested divorce case. If the case is contested, the defendant may not only answer the complaint but also file his or her own counterclaim. The plaintiff must answer the counterclaim.

A divorce may not be granted in less than 60 days. When there are minor children, the parties must wait six months. However, the six-month period may be waived under certain circumstances. No divorce is granted without a court hearing to determine the truth of the statements made in the complaint.

Temporary orders for custody, child and spousal support, mortgage payments, medical payments, parenting time, injunctions, and other relief may be requested at any

time after your case is started and before a judgment of divorce is entered. A temporary injunction may restrain a party from doing something. There are also injunctions dealing with violence, called *personal protection orders (PPOs)*. Other injunctions may restrain a party from selling, disposing of, or dissipating assets. Other types of injunctions may be requested. Child support, custody, mutual injunctions, and PPOs are usually granted to the plaintiff without a hearing. Other orders require a hearing.

The court may also award temporary fees to assist a party with his or her costs of obtaining legal services. This is usually obtained in the same way as any other motion. Sometimes it may be part of a motion requesting other relief.

While Your Divorce Is Pending

This period is usually spent defining the issues and trying to resolve them. I will also attempt to find the net worth of the parties and the general financial status of the family. A verified financial statement or interrogatories may be sent out requiring answers under oath from the recipient. Complete financial data is usually requested. Depositions may be taken (with the consent of the client) to obtain further information from the other spouse or those who have the needed information. Appraisers, actuaries (if pensions are involved), accountants, or behavioral professionals may be used (with the client's prior consent). You and I, after the discovery work has been completed, will set final goals you wish to obtain. This will not be done hastily, and you will be given an opportunity to study the proposed settlement. I will advise you on the likelihood of acceptance of your proposals or what a court may do.

The attorneys may call a meeting, with both parties present, and try to resolve as many issues as possible. This is a voluntary process. Either party may decline to attend. If a settlement is not reached at this point, the court will appoint a mediator to help resolve the matter. If no agreement is reached at mediation, the mediator makes a recommendation that is not binding. The court may not see the recommendation.

In rare instances, an arbitrator is appointed, and the arbitrator's recommendation is binding on both parties and not appealable to the judge. The parties must agree to arbitration in writing or on the record in court.

In cases in which domestic violence is an issue, mediation may not be appropriate. Let your attorney know if there has been or continues to be domestic violence. PPOs may be necessary. There are different court protocols and resources that may be used with cases that have domestic violence.

If settlement is reached, the parties will be asked to sign a property settlement form containing all the provisions of the settlement. The parties may be required to approve the settlement in court, before the judge, after it is placed on the record.

Caution: This is not the time to engage in behavior which could be used against you. Do not set up a MySpace account, a profile on a dating website or anything else that will make you look less than sympathetic to the judge. I encourage you to refrain from moving on in your romantic life until the divorce is final.

Judgment

The judgment of divorce is the most important document you will receive. After a settlement is reached or the case is tried, the court will enter a judgment of divorce as the final decree granting you a divorce. It will also deal with such issues as spousal support, custody, child support, parenting time, insurance, dower rights, property settlement, and other miscellaneous clauses. If a settlement has been reached, you must carefully read and examine this judgment and have your attorney explain it to you before you approve it.

Spousal Support

Spousal support, also called alimony, is a sum of money usually paid by one spouse to another spouse for the support and maintenance of the spouse. The factors the court considers in awarding spousal support are as follows:

1. the past relations and conduct of the parties (fault)
2. the length of the marriage
3. the ability of the parties to work and their respective incomes
4. the source and amount of property awarded to the parties
5. the ability of the parties to pay spousal support
6. the present situation of the parties
7. the needs of the parties
8. the health of the parties
9. the prior standard of living of the parties and whether either is responsible for the support of others
10. the age and educational level of the person claiming spousal support

Generally judgments of divorce in which spousal support is not granted must either expressly reserve the question of spousal support or rule that neither party is entitled to spousal support.

Regular or periodic spousal support clauses in the judgment of divorce are modifiable at any time. When limitations are placed in the judgment regarding modification, specific language is necessary to try and ensure that the court will honor these limitations. Spousal support may be increased, decreased, or canceled. A modification is based on a showing of a change in circumstances that warrants a modification.

Regular or periodic spousal support is usually taxable to the recipient and is deductible by the payer. The phrase “payment until death” must be part of the spousal support clause for it to be considered as taxable spousal support. This type of spousal support is not dischargeable in bankruptcy. Qualifying clauses such as “payable until remarriage” may be included.

Another type of spousal support, referred to as *spousal support in gross*, has all the attributes of a property settlement; but it is not taxable to the recipient, not deductible by the payer, and not modifiable. However, it may be subject to being discharged in

bankruptcy. This type of spousal support is for an amount certain and has no qualifying clauses such as “payable until remarriage.” The court will look to the intent of the parties to determine the nature of the spousal support.

There are many tax consequences and restrictions in regard to spousal support and spousal support in gross, which your attorney or your accountant should explain to you. Because both federal and state tax laws and their interpretation continually change, your attorney cannot guarantee any tax consequences resulting from your divorce proceedings and the judgment of divorce.

Spousal support is usually paid through the office of the Friend of the Court. This enables a party to obtain an accurate record of these payments. It also makes it easier to request assistance from the Friend of the Court if payments are not forthcoming or a spouse denies receiving payments.

The enforcement of regular or periodic spousal support payments is usually instituted by an order to show cause. Your attorney will explain the procedure to you on request. Spousal support in gross is more difficult to enforce, and there are other procedures available for enforcement.

With respect to health care coverage, your attorney will explain to you, on request, your options, including your right, if applicable, to elect health care under COBRA (a federal law that makes health care insurance portable in some instances).

Property

The parties usually arrive at a settlement of all their property rights after negotiation or after mediation or a Friend of the Court referee hearing. If settlement is not reached, the matter will be decided by the court after the trial is concluded. Again, you are advised that you must be absolutely sure that you understand and accept the settlement as written or placed on the record in open court, because property settlements may not be modified, except in cases of fraud, clerical error, mistake, or gross unfairness in the initial trial. If your property includes retirement or pension plans, your attorney, on request, will explain your rights under the qualified domestic relations order procedures.

Property settlements in judgments may be enforced by execution, garnishment, show cause proceedings, etc. Your attorney will explain these procedures to you on request.

In determining property issues, the court will usually consider the following:

- the length of the marriage
- the contributions of the parties to the marital estate
- the ages of the parties
- the health of the parties
- the life status of the parties
- the necessities and circumstances of the parties
- the earning abilities of the parties
- the past relations and conduct of the parties

- general principles of equity

Generally, property of the marriage is divided 50-50.

Attorney Fees

Attorney fees are governed by the Michigan Rules of Professional Conduct. In a divorce case, a lawyer may not enter into an agreement for, charge, or collect a contingent fee (a fee based on a percentage of the monetary award to the client).

Attorney fees are based on a number of factors, including the amount and nature of the services rendered; the time, labor, and difficulty involved; the character and importance of the litigation; the amount of assets and value of the estate affected; and the requisite professional skill and expertise exercised by your attorney as well as the novelty and difficulty of the questions involved and the results obtained. You will be responsible for my hourly rate. You will also be responsible for disbursements made on your behalf by me for such items as court costs, filing fees, service of pleadings, appraisals, expert witness fees, etc. You will be charged for consultations, correspondence, phone calls, office and research work, court time, filing, and hearings.

If your spouse is ordered to contribute to your attorney's fees, you will be given credit for the amount your spouse pays.

Please note: We cannot tell you what the total fee for your divorce case will be because we have no way of knowing how much time must be spent on your case.

Miscellaneous

Many matters can arise after the case is concluded for which counsel should be retained. These matters may be for the enforcement of child support, spousal support, parenting time, or property provisions. Further, Michigan now permits personal injury actions for physical or emotional injuries inflicted by a spouse or former spouse during the marriage or afterwards.

Information Resources

During your divorce, you can expect to hear lots of advice from family and friends. Please keep in mind that each situation is unique and that agreements that parties reach together may be more generous than what we could expect a judge to order. There is a website which has useful information, www.divorceonline.com. Please do not hesitate to discuss questions or information you receive elsewhere with your attorney.

Conclusion

Many divorce cases end in a reconciliation of the parties. If there is a chance to save your marriage, I will be pleased to recommend marriage counselors to you and assist you in every possible way to effect reconciliation. If, on the other hand, you believe the marriage is over, I will do our utmost to obtain a judgment of divorce that is satisfactory to you.

This document should not to be considered the last word on the subject of divorce but should be viewed merely as a helpful guide. It is provided to give you an overview of divorce law and procedures. The law is constantly changing, so some of this discussion might be outdated. For the latest information, consult your attorney.

As your attorney, I have substantial experience and expertise in the field of family law. I am aware of the pressures and the personal difficulties faced by a person involved in the divorce process. I will attempt to ease these pressures and work toward eliminating the cause and effect of these problems. If you have any questions, please do not hesitate to call or arrange for an appointment.