

## 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 or attorneys are well aware of the emotional involvement of the parties. Though we are not behavioral specialists, we try to relieve your anxiety by attempting to assist in solving the problems that you face during this case.

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

We want to stress that although we will counsel and advise you throughout the case, the final decisions regarding your case must be made by you. Our 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 representatives, we are here to advise and inform you, cite the options and alternatives available to you, process your divorce matter, 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 your attorney 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 us. 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.

Temporary orders for child support are usually based on a state-recommended chart. Generally, spousal and child support is based on need and ability to pay. The lifestyles of the parties are also taken into consideration. For child custody disputes, you will be advised to study the 11 specific factors listed in the Child Custody Act (see “Child Custody” below). The procedures and preparations for such a case are too involved for this discussion and must be left to further discussions with your attorney.

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. Your attorney 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 your attorney, 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. Your attorney 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 an evaluative 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 rarely 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.

There are a number of procedures for trying to settle a case. The different methods will change the process.

**Facilitative Mediation.** The parties (and their attorneys, if they wish) meet with a trained mediator who is a neutral. Their professional training may be in law, mental health or finance. The parties agree to fully disclose all their assets and debts, making formal discovery unnecessary. They also agree to a "status quo." No one takes major unilateral steps without checking with the other. They agree to respectfully discuss all their issues with the help of the mediator and decide the best outcome for their family. The mediator does not suggest the outcome, though the parties can listen to their attorneys for recommendations. The mediator drafts an agreement that is reviewed by the parties and their lawyers before anyone signs the agreement. The signed agreement is incorporated into the Judgment of Divorce. This form of mediation can take place before the complaint is filed to allow the parties to work at their own pace without the pressure of the court schedule. This form of mediation is also referred to as "early stage mediation."

**Evaluative Mediation.** The parties (and their attorneys) meet with a trained mediator who is a neutral, generally a lawyer. Formal discovery has usually been completed. After hearing both parties' positions, the mediator suggests resolutions to the remaining issues. This is usually called late-stage mediation.

**Collaborative Practice.** The parties sign an agreement that they will decide the issues in their case without resorting to judicial decision-making. The process is confidential and full disclosure is required. The parties also agree to a "status quo." No one takes major unilateral steps without checking with the other. They agree to respectfully discuss all their issues with the help of the mediator or their attorneys and decide the best outcome for their family. If they feel it necessary and their attorneys recommend it, the parties work with other professionals to help resolve problems. These can include:

- Divorce Coaches—mental health professionals who confer with each party to help them work through the emotional impediments to settling their case. Each party has their own coach. This relieves the pressure on their attorney to provide emotional support.
- Parenting Specialists—mental health professionals who act as neutrals to help parents and children resolving parenting time and custody disputes.

- **Financial Consultants**—financial professionals who act as neutrals and help the parties budget, figure out tax issues and how best to divide their property.

Using these professionals can reduce the cost of having attorneys work in areas that they do not have specific training.

A mediator can act as the case manager and will draft the settlement agreement or the attorneys can draft the agreement.

**Arbitration.** The parties can appoint an arbitrator who will hear their case and decide the issues, in place of a judge. Arbitration can be limited to specific issues or cover all issues, though the court has the right to review child custody. There are very limited appeals from arbitration awards. This can be a tool to speed up receiving a decision.

**Litigation.** The attorneys conduct most of the negotiation and often speak for the clients. Attorneys engage in discovery. If this does produce a settlement agreement, the parties appear before the judge, who after hearing evidence, issues an opinion on the outstanding issues. Appeals are available, but the standard of review is high. Cases are seldom overturned. The particulars of this process are described below.

### **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. Some attorneys favor placing the details of the agreement into a settlement agreement and incorporating that into the judgment of divorce.

### **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 Michigan State Disbursement Unit (MiSDU). 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).

### **Child Support**

The custodial parent is entitled to take the minor children as dependents for all tax purposes. The parties may agree that the noncustodial parent have this allowance and enter this agreement into the judgment. If the judgment entitles the noncustodial parent to the allowance, that parent must obtain a signed IRS Form 8332 each year from the custodial parent and file it with the noncustodial parent's other federal income tax forms.

Child support is modifiable on the same basis as spousal support. This support is usually ordered until the child attains the age of 18 years or until the child graduates from high school so long as the minor child has not yet reached 19 years and 6 months and regularly attends high school full time with a reasonable expectation of completing sufficient credits to graduate from high school while residing full time with the payee of support or at an institution. The enforcement of payments is the same as for spousal support.

Child support is based mainly on the Child Support Formula Manual (the "Guidelines"). It is a formula relating to income. Nonpayment of court-ordered support may lead to a contempt of court citation, resulting in a jail term or a suspension of the delinquent parent's occupational or driver's license.

If there is an arrearage of child support payments, medical expenses, etc., at the time of the judgment, the judgment of divorce must contain a provision preserving this arrearage. The same holds true for any monies owing under any temporary order. To preserve a temporary order, the judgment of divorce must preserve the arrearage. If it does not, the temporary order is canceled.

Every child support order paid through the MiSDU now provides for the immediate and automatic withholding of child support payments from any source of the payer's income unless the court orders otherwise or approves an agreement by the parties.

A federal law now provides for group health care coverage for the noncustodial children of employees by their employers. The coverage is obtained through qualified medical child support orders. Your attorney will explain this to you if applicable.

### **Child Custody**

This issue is the most emotional and traumatic part of most divorce cases. There is *legal custody*—the decision-making part of raising the child—and *physical custody*—who physically raises the child. Sole or joint custody is possible for both of these types of custody. The basis for determining child custody is “the best interests of the child.” Due to the extensive nature of custody disputes and the laws involved, this subject is best left to an in-depth discussion with your attorney.

A party involved in a child custody matter should become acquainted with the Child Custody Act and study and be prepared to discuss the following factors:

- (a) The love, affection, and other emotional ties existing between the parties involved and the child.
- (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and continuation of the education and raising of the child in its religion or creed, if any.
- (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of the medical care, and other material needs.
- (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
- (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
- (f) The moral fitness of the parties involved.
- (g) The mental and physical health of the parties involved.
- (h) The home, school, and community record of the child.
- (i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.
- (j) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent.
- (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
- (l) Any other factor considered by the court to be relevant to a particular child custody dispute.

When there are custody disputes, the parents must be advised about joint custody:

(1) At the request of either parent, the court shall consider an award of joint custody, and shall state why joint custody may or may not be considered by the court. The court shall determine whether joint custody is in the best interest of the child by considering the following factors:

(a) The factors enumerated above.

(b) Whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child.

(2) If the parents agree on joint custody, the court shall award joint custody unless the court determines on the record, based upon clear and convincing evidence, that joint custody is not in the best interests of the child.

(3) That if the court awards joint custody, the court may include in its award a statement regarding when the child shall reside with each parent, or may provide that physical custody be shared by the parents in a manner to assure the child continuing contact with both parents.

(4) During the time the child resides with a parent, that parent shall decide all routine matters concerning the child.

(5) If there is a dispute regarding residence, the court shall state the basis for a residency award on the record in writing.

(6) Joint custody shall not eliminate the responsibility for child support. Each parent shall be responsible for child support based on the needs of the child and the actual resources of each parent. If a parent would otherwise be unable to maintain adequate housing for the child and the other parent has sufficient resources, the court may order modified support payments for a portion of housing expenses even during a period when the child is not residing in the home of the parent receiving support. An order of joint custody, in and of itself, shall not constitute grounds for modifying a support order.

(7) As used in this section, "joint custody" means an order of the court in which one or both of the following is specified:

(a) That the child shall reside alternately for specific periods with each of the parents.

(b) That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child.

Child custody orders are modifiable. The court will consider the time the child has lived in a stable custodial environment and what is in the best interests of the child. A court must first determine if there is an “established custodial environment.” That determines the burden of proof: clear and convincing evidence that there is a compelling reason to change custody if there is an established custodial environment or the preponderance of the evidence if there is no established custodial environment.

It should be remembered that the child’s preference, although an important factor, is just one factor to be considered of the twelve factors listed above; and it is not in the child’s best interests to try and convince a child to have a preference by promises or threats or to discuss the divorce case with the child.

### **Parenting Time**

Parenting time is the schedule by which the children spend time with their parents. The judgment may order general parenting time, leaving it up to the parties to decide the dates; or it may provide specific parenting time hours and dates. If long distances must be traveled to exercise this parenting time, arrangements may be made to share the cost. Parenting time rights may be enforced in the same manner as rights to child support. Judgments of divorce provide that the minor child may not be permanently removed from the jurisdiction of the court without the court’s approval. To move with the child from Michigan, the custodial parent must petition the court for an order. You may not move more than 100 miles (radial miles) in state from where the child resided when the divorce suit started, even if you do not have physical custody of the child, without court approval. There is also a provision in the law for the makeup of parenting time that has been wrongfully denied and for a contempt of court action against the offending parent that can lead to a fine or jail. Failure to pay child support is not an acceptable reason to deny parenting time. Parenting time orders may be modified on a showing of a change in circumstances.

### **Property**

The parties usually arrive at a settlement of all their property rights after negotiation or after mediation. 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. Your attorney will tell you what his or her hourly rate is, which can be helpful in assessing the amount of fees due. You will also be responsible for disbursements made on your behalf by your attorney 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.

### **Conclusion**

Many divorce cases end in a reconciliation of the parties. If there is a chance to save your marriage, we 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, we will do our utmost to obtain a judgment of divorce that is satisfactory to you.

As divorce proceedings today are difficult and extensive work may be necessary, we use a team effort: other attorneys, paralegals, and legal assistants in the office are available to assist us. However, your primary attorney will oversee and advise on all work performed.

This document should not 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 attorneys, we have substantial experience and expertise in the field of family law. We are aware of the pressures and the personal difficulties faced by a person involved in the divorce process. We 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.