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THE DIVORCE PROCESS: AN OVERVIEW

Studies have shown that the experience of separation and divorce are so traumatic as to rank second only to the death of a close loved one in terms of emotional turmoil and stress. Not only are separation and divorce accompanied by feelings of guilt, rejection, embarrassment, and anger, but the process also causes fear and uncertainty among those who experience it.

The first step to conquering fear of the unknown is to learn as much as possible about the process. A good lawyer can often explain the procedures clearly, assist in escalating goals and propose a positive strategy to achieve those realistic results. Set out below are questions and answers about the process of divorce and separation that will help take the mystery out of it.

Q. WHAT ISSUES CAN BE RESOLVED IN A DIVORCE?

A. The break-up of a marriage often involves five issues: property division, alimony, child support, custody/visitation, and divorce. And each of these can be resolved by consent (a negotiated agreement) or contested in court. Let's take a close look at how the process works.

At the outset it should be noted that not all states handle divorce the same. There are two different legal structures for divorce and dissolution that exist in the United States. In some states, such as New York and Wisconsin, the divorce is a "package deal." All issues must be resolved by the parties (through agreement) or by the court (through trial) before the divorce is granted. "My wife/husband won't give me a divorce," is sometimes the cry heard in these jurisdictions, because the only alternative to a long, messy and expensive trial is a settlement driven or guided by the other party. In these states, divorce is the end result of the process; when you get your divorce, everything else is already in place. The other issues in the case are raised mandatorily by law or court rule, and all issues regarding the marriage are before the court for decision whenever one party files for a divorce.

In other states, such as Delaware and North Carolina, the divorce case is not necessarily joined with the other issues and may be heard shortly after the filed lawsuit has been served on the other side. Custody may be contested (or settled) in a different lawsuit or joined in the divorce suit. The same applies to child support, alimony (also called maintenance or spousal support) and property division (or equitable distribution). In these states, divorce is not necessarily the end of the case; it may just as easily be the beginning of the case, to be followed by court decisions (or agreements) as to any issues in the marriage that are brought up by the parties in the lawsuit.

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Each of these issues can be heard on different timetables -- before or after the divorce -- by the court.

Q. WHERE DO I START?

A. Getting the right lawyer is often the first step for a husband or wife. There are many ways to select an attorney if you do not have one in mind already. In some cases, you may have been represented previously by an attorney who could help you in your present situation. Then again, there may be a friend or relative who has been represented by a good lawyer in a case similar to yours. It might be a good idea in either of these cases to see if that lawyer might be able to handle this matter for you. Another possibility is to utilize your local bar association's lawyer referral service. You can also choose a lawyer based on local advertising. The important thing is that you choose a lawyer who is able to handle your case and able to work with you. Any method of selecting a lawyer is satisfactory if it achieves these goals.

When speaking with your attorney it is important to remember that what you say to your lawyer is "privileged information." Generally speaking, what you tell your attorney must be held in confidence unless you give permission otherwise. In addition, your civilian attorney has the duty to:

- Let you make the major decisions in your case, such as pleading guilty in a criminal case or accepting a compromise or settlement in a civil case; and

- Remain open and honest with you in all aspects of your case, including the chances of success, the good and bad sides of your position, the time needed and the fee required.

Q. HOW MUCH WILL ALL OF THIS COST ME?

A. Lawyers set fees in a number of ways. The major types of fees are flat rates, contingency fees and hourly billing. Lawyers may use a flat fee in handling certain domestic cases where the work involved is straight forward, predictable and routine. Many lawyers use a flat rate or set fee in uncontested divorces, adoptions and name changes. A flat fee is paid in advance (ordinarily) and does not vary depending on the amount of time or work involved. No refund is due if the work takes less time than expected and no additional charge is made if the case is longer or more complex than usual.

An hourly rate is most common when the client's case will be substantial, but it is difficult to estimate how much time it will take. Thus, for example, a lawyer might charge on an hourly rate for a contested custody or alimony case. It is fairly common for the lawyer to require a retainer to be paid before starting on the case. This amounts to a deposit or down payment to make sure that the client is serious about the case and is financially prepared to cover the costs that may be incurred. The size of the retainer and whether any part of it is refundable will vary from case to case and lawyer to lawyer.

In certain family law cases, the court may order one party to pay some or all of the other's legal expenses. It is important to remember, however, that the award of attorney's fees in such cases is

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not mandatory or automatic. It depends on a variety of factors, such as good faith, need, lack of adequate support, and so on. The courts see these awards of attorney's fees as a way to pay back or reimburse people for attorney's fees already paid or presently due. It is very difficult to retain an attorney from the outset based on the promise or hope of court-awarded attorney's fees at a later date. This is especially true because many times a person will not obey the court's order to pay the other party's attorney and so further court work may be necessary.

Q. HOW CAN I MAKE SURE THAT MY LAWYER IS DOING THE JOB I WANT HIM/HER TO DO?

A. Here are some tips on the important matters that involve your lawyer and some areas where complaints are common:

- Be sure to insist that your lawyer explain specifically 1) what will be done in your case, and 2) how much it will cost. If you wish, you can ask the lawyer to put this in writing. This includes the contract that binds you and the attorney -- make sure you get a written contract and then read it before you sign it!

- Ask for an estimate of the total charges and ask what services are included in this estimate. Ask what your attorney expects to be the steps you go through and how much time (or expense) they might involve -- if you hire an experienced lawyer, he or she should be able to at least "outline" the process for you with a fair degree of accuracy. [Note: At the same time, please be aware that it is hard to tell what might happen or how long something might take in a legal dispute. It's impossible to predict with any degree of accuracy what will happen, for example, in a divorce and separation case. While many of these are resolved as standard "uncontested divorces" with no alimony, property or child-related issues involved, there are a great many cases that are completely unpredictable in this field of law, so don't expect a specific dollar amount to be quoted to you as "the entire fee" in anything but a standard uncontested divorce.]

- Clients should receive frequent case updates and regular communications from their attorneys; the rules of most state bars require this. Be sure to ask about this if you want to ensure that your lawyer knows you want to be kept current regarding your case.

- You should also get copies of the "pleadings" -- motions, complaints, counterclaims, petitions, that have been filed in your case, as well as any order or judgment that the judge signs.

- The lawyer should release your file to you upon request and with reasonable notice.

- Do not tolerate unreturned phone calls; nothing makes a client angrier (and justifiably so) than a lawyer who won't answer a phone call or a letter from a client requesting information.

- Consider hiring a lawyer who specializes in your particular kind of case. Many states allow lawyers to become specialists and list themselves as such if they meet certain qualifications. A specialist is usually more likely to know the "ins and outs" of your case than an attorney who is a "general practitioner." Many states have lawyers who are certified as specialists in family law by the state bar.

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When you first meet with your lawyer, make sure you go over the important facts of your case and outline for him or her the goals you have. While we all have hopes desires and dreams, it is vital to keep those goals realistic and achievable; don't expect your case to go anywhere if your goals are to embarrass the other side, bring her to her knees or "break her" financially. Your lawyer has a duty to be open and honest with you, explaining the pro's and con's of your case, the strengths and weaknesses. Make sure your lawyer is not going to get into a personality conflict with the other attorney; your money will be wasted on an unproductive "spitting contest." Consider your finances to decide "how much case you can afford."

Q. WHAT IS INVOLVED IN "GOING TO COURT"?

A. If you must go into litigation, you need to know something about the process -- you can't play ball if you do not know the rules! Litigation always starts with the filing of a complaint or petition, which states what the facts of the case are and what relief is requested, along with a summons, which states that the other side has been sued and has a certain period to respond. The other side usually files an answer or response within the 20-30 days following the service of these papers on him or her. Sometimes additional documents must be filed by the spouses, according to state or local rules. Examples might be financial affidavits or declarations, which state the incomes and expenses of each party, or property inventories, which show what each party claims to be marital or separate property, as well as the value placed on each item. Sometimes the courts also require parties to file a copy of tax returns or pay stubs with these declarations or affidavits.

Contested domestic cases can take a long time to resolve. While the entire case is still pending, the next stage in some cases is sometimes one involving temporary, interim or emergency hearings. A party may need the court to make an emergency ruling on issues of custody or visitation, especially where there is a "tug of war" going on between the parents or something occurs that is a serious danger to the children. The court often considers the need for interim spousal support or child support at a temporary hearing in the weeks or months after the case is filed; if the court didn't do this in some cases, the other party might be brought to her knees quickly without financial help. Some courts use the time after filing to conduct a hearing on interim allocation, which means a temporary division or distribution of marital assets pending the final hearing. This can also be useful in providing each party with sufficient means to pay the lawyers, psychologists or accountants that may be necessary to assist in resolving the case or preparing for trial.

Q. I THINK MY HUSBAND/WIFE IS HIDING INFORMATION, HOW CAN I FIND THIS OUT ?

A. You might find the answer in the "discovery" stage of litigation. Discovery is a word that means "finding out information that the other side has." Many court rules state that the process of discovery goes on in the first 90-120 days after the lawsuit is filed, or even longer in complex cases. This is probably the most important part of trial preparation -- finding out what the case is all about... from the other side's perspective.

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There's always "informal discovery," which usually means obtaining things yourself from the other side without formal notices or requests. This can be done surreptitiously, as when Mrs. Smith makes a copy of her husband's bank statements and then returns them to their file before leaving the home. It can also be done openly by the attorney's simply asking the other side for a copy of certain papers, receipts, titles or deeds; if the adversaries are friendly and the marital dispute is under control it is possible to save hundreds or even thousands of dollars by simply agreeing on a "discovery plan" to allow each party, within reason, to obtain relevant documents from the other side by requesting them in a letter. While there are no penalties or sanctions for failure to produce or reply, as exist with formal discovery, the savings in time and money can be substantial if the parties and their lawyers are willing to cooperate.

Formal or traditional discovery, on the other hand, has structures, deadlines, definitions and rules that must be obeyed. Here are some examples:

- Interrogatories are written questions that must be answered by the other side under oath within a certain number of days (usually around 30) from when they are served by mail on opposing counsel.
- Document requests require the other side to produce documents at a specified place and time for inspection and copying.
- You can use a request for entry upon land to get into the office or home of the other party to inspect, inventory and photograph (or videotape) what's there.
- A deposition is oral testimony given under oath in front of a court reporter. There is no judge present and it's usually done in a lawyer's office. It results in a typed transcript of the testimony and it can be very useful in exploring what facts or data the other side has, what accusations will be made, and how the other side is thinking about the case. It costs more, of course, than the use of interrogatories, but it usually produces better responses from the other side -- answers which are more complete and more spontaneous, as well as the ability for your lawyer to ask "follow-up questions."

Q. WHAT WILL HAPPEN IF WE END UP IN COURT?

A. Going to trial doesn't just happen. It's the end-point to a long process that includes getting the client ready (rehearsal for the hearing, overview of questions that will be asked and that may be asked, and reviewing documents that will be introduced as evidence), getting the client's witnesses ready, preparing exhibits for introduction and setting the case on the calendar for weeks, or even months, in the future. Lawyers frequently prepare written briefs for the trial, which summarize and explain points of law that may be involved in the case.

On the day of trial, the judge will usually "call the calendar," which means announce the names of the cases which are on the court calendar for that day. Yes, there are other people getting a divorce, and yes, they also have their cases set on your day! It is the job of the judge to figure out which ones can be tried that day and which ones must be continued. If a continuance is not ordered for your case, then it will be tried. The trial usually consists of several sections:

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- The plaintiff's (or petitioner's) case involves his or her testimony, immediately followed by cross-examination by the other side's lawyer. Here is where the plaintiff's exhibits and documents are often introduced. Then the witnesses for the plaintiff testify (and are cross-examined by the other side also), and they likewise may offer documents into evidence.
- The defendant (or respondent) has the same opportunity -- to give testimony and present evidence, and to offer witnesses. The same opportunity for a cross-examination by plaintiff's attorney exists too.
- Most domestic cases are heard in front of a judge alone, although there are occasionally cases that, by state law, are allowed to be tried before a jury.
- After the presentation of both sides, each side is given the opportunity for rebuttal, which is testimony that denies or contradicts what the other side has presented.
- The lawyers will have the opportunity for final argument or "closing statement," which allows them to summarize their evidence and argue for the results they seek.
- Then comes the decision by the court. This is sometimes right after closing statement, and sometimes occurs days or weeks after the trial has concluded (if the judge takes the case "under advisement").
- Once the decision has been made, it is noted in the court records and announced (formally in court or sometimes informally by phone conference). If the parties weren't at the decision conference, they will be notified by their respective attorneys.
- Entry of the order, judgment or decree is the next stage. Sometimes this is done by the court but, more often than not, it is the job of the attorneys to write up a decision for the judge to sign. This often means that they have to meet with each other or with the judge when they are preparing findings of fact for the judge on contested issues. This process alone can take days, weeks or even months in a complex or hotly contested case.

Q. ISN'T THERE ANY ALTERNATIVE TO A LONG TRIAL?

A. Why would anyone go through this, you might ask -- aren't there any alternatives? The answer is yes. There are three alternatives: mediation, arbitration and negotiation. These options are usually less expensive than going to trial and, if handled correctly, less time-consuming.

Arbitration is the process by which a neutral third party renders a binding decision on the issue or issues presented -- alimony, pension division, child support, etc. The arbitrator acts in much the same fashion as a judge in a civil trial, but he or she is usually paid by the parties (in equal or unequal shares) and the proceedings are usually faster and less formal than a trial. The arbitrator's job is not to choose sides but rather to listen to the facts of the case and then render a decision.

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Mediation is an informal dispute resolution where a neutral third party, a trained mediator, helps you and your spouse reach an agreement satisfactory to both of you. The mediator's role is to help the parties resolve their conflicts. Choosing sides or giving legal advice is not a mediator's duty. The mediator does not make any decisions for you, but rather encourages both parties to work together to make their own decisions. Mediation has become an increasingly more popular option to trial, not to mention a cheaper option (in some cases it's free). Every state has its own requirements for mediation. In some counties it can be required by the court and in others it is optional. And the parties, independently of the courts, can hire a mediator for a settlement conference with the cost to be shared by both of them.

A negotiated settlement, involving the parties and their lawyers, is a third option to trial. This can be a productive way to settle some or all of the issues on the table. If all of the issues cannot be settled, a meeting like this is a good way to decide a majority of the issues and reserve the issues in controversy for trial. Taking some of the issues off the table will likely make trial shorter and the process less expensive and stressful. It is also a good way to bargain through the items on the table and see if there is room for negotiation.

Mediation and negotiation are give-and-take situations. Nothing can be demanded from the other side, and usually a good deal of compromise is necessary. It is important to examine exactly what you want to happen in your case and to be aware of your "bottom line." Fair negotiations and an open mind between the parties are essential to the success of these alternate resolutions. Bringing your anger over past events into the ring will insure the failure of any settlement possibilities.

When will these alternatives to trial work? When both parties are willing to work together to form an amicable agreement in the best interest of all people concerned, these alternatives will be a success. When are these three options to trial not a good idea? When a case involves physical abuse, substance abuse or severe depression and anger, trying one of these settlement options may be a waste of time and money for both parties.

24. Q. IF I HAVE OTHER QUESTIONS, WHAT SHOULD I DO?

A. See a legal assistance attorney or private attorney as soon as possible. Your lawyer can answer many questions and help you to make a fair and intelligent decision about your choices, options and alternatives.

The USARAF/SETAF Legal Assistance Office number is DSN: 634-7041, Com: 0444-71-7041. If you need more information, please call for an appointment with one of our attorneys.