

## **DIVORCE**

By Larry Rice

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*The Complete Guide to Divorce Practice, 1st and 2nd editions*

also written by Larry Rice.

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### **DIVORCE**

Divorce is a part of life in this country. A divorce may be necessary to clear away a problem that blocks you from leading a better life. The biggest divorce I know of was when our country divorced itself from England in 1776. Divorce is not pleasant. Some divorces are more unpleasant than others. While I have lectured and worked with lawyers in many states, I am a Tennessee lawyer. I wrote this for my clients who are mostly Tennessee residents.

This booklet describes many things; some will apply in your case and some will not. However, knowing those that apply will help you avoid some problems and deal better with others. It does not and cannot cover all of the issues, laws, or rules involved.

This booklet summarizes the law, as I understood it, when I last re-wrote this booklet (June 2001). The law is always subject to amendment by the legislature, to reinterpretation by the courts, to different application by different judges, and to factual variation from case to case. Before acting on what you have read, talk to a lawyer in your area first—that is why they are there.

### **PRENUPTIAL OR ANTENUPTIAL AGREEMENTS**

Prenuptial and antenuptial (not anti [although it seems that way]) agreements are the same thing. They are different names for a document that sets out the terms of a dissolution of a marriage when there is a death or divorce. If you signed one of these prior to your marriage, let me know. That document should control the terms of the dissolution of your marriage. The law has changed several times in this area and there are some technical requirements and loopholes; so, it is important that we examine any premarital agreements.

### **GROUND**

Tennessee has two types of divorces: uncontested, (which are usually based on irreconcilable differences), and contested, (which require proof of grounds for divorce).

An irreconcilable differences divorce requires that the parties agree to be divorced. You must have a written Marital Dissolution Agreement that makes adequate and sufficient provisions in writing for the custody and support of the minor children of the marriage and makes a fair and equitable division of your property. There are also additional technical requirements, but the Marital Dissolution Agreement is the essence of an irreconcilable differences divorce (see Marital Dissolution Agreement section below). As for assessing fault for the marriage breakdown, you only need to say that differences have arisen that will prevent you from living together as husband and wife.

A traditional contested divorce is a case in which the parties cannot agree on some point (property division, alimony, custody, child support, or attorney's fees) and must go to trial. The grounds for a contested divorce are (in order of frequency of use in my experience):

- Adultery
- Habitual drunkenness or abuse of narcotic drugs that has worsened since the marriage
- Living separately and apart for two (2) years with no minor children
- Willful or malicious desertion for one (1) full year without a reasonable cause
- Conviction of a felony and sentencing to the penitentiary or conviction of an infamous crime
- Pregnancy of the wife by another before the marriage without the husband's knowledge
- Willful refusal to move to Tennessee with your spouse and living apart for two (2) years
- Malicious attempt upon the life of the other
- Lack of reconciliation for two (2) years after the entry of a decree of separate maintenance
- Impotency and sterility
- Bigamy
- Cruel and inhuman treatment (which may also be referred to as "inappropriate marital conduct")
- Indignities offered by one spouse to the other
- Abandonment of the wife in which the husband refuses or neglects to provide for her

If you are filing for divorce, you need to have your grounds before you file. If you cannot prove your grounds for divorce, accusing your spouse of these grounds may be grounds for divorce for your spouse. Pending the final divorce, you should not do anything to give your spouse any grounds for divorce because these actions can probably be used against you.

Recently the legislature amended the law and allowed parties to stipulate (agree) who is guilty of what grounds and inform the court of that stipulation.

Defenses to the grounds for divorce include:

Condonation—knowing what your spouse did wrong but forgiving him or her anyway; this is usually proven by showing that you and your spouse had sexual relations after you found out what your spouse did. This currently only applies to adultery.

Insanity—a defense to divorce if the person who is guilty of the grounds for divorce was insane when he or she committed the act. The insanity must be to the same degree as in a criminal case. If the person is insane at the time of trial, the case can still proceed against him or her but the court will appoint a lawyer to look after his or her interest.

The law of defenses is changing rapidly, and for technical reasons the defense that sounds as though it applies in your case might not apply. Ask your lawyer about it.

## **LEGAL SEPARATION**

Although legal separation is possible, I do not generally recommend it. You are still married for most purposes (you cannot date). You usually wind up divorced anyway, and instead of paying for one lawsuit, you pay for two. If you are not ready for a divorce but you want to talk things over with someone, I recommend counseling; and I will be glad to recommend some counselors. Do not use a “trial separation” as a substitute for effective marriage counseling. If you want the marriage to work, you will probably need counseling. If you do not want a divorce, try to avoid one if reasonably possible.

## **ANNULMENT**

Annulments are granted by the court only in certain rare cases. The legal effect is to void a marriage from the very beginning—as if the parties had never married. If for religious or other reasons you want an annulment, tell me before the divorce is filed.

## **RESIDENCE REQUIREMENTS**

Prior to filing your petition, you must have resided in Tennessee for six months or have been a bona fide resident of Tennessee when the grounds occurred here.

Some people wish to get divorced in another county; you can if both parties agree to it. At one time, this was faster than getting divorced in Shelby County; now, however, Shelby County is as fast, or faster. One advantage that still remains is that *The Commercial Appeal* does not publish out-of-county divorces. However, even your dimmest family member or friend will eventually figure out that you are divorced. One disadvantage is that if anything goes wrong—and there is much that can go wrong (alimony or support does not get paid, visitation is not working, property was not transferred)—it is more expensive and complicated to straighten problems out if the divorce was granted in another county.

## **FILING**

There are tactical advantages for the person who files first. The legal document that starts the proceeding is the Petition for Divorce or the Complaint. It also covers certain technical matters and asks the court for anything you might want.

If you and your spouse cannot agree on something (support, visitation, property division, attorney's fees, court costs, maiden name restored), then you must ask the court for it in the petition or the court cannot give it to you. If the list seems long or includes more than you think are appropriate, think of it as a wish list. If the wording seems strange, remember that it is a formal legal document and much of the wording is required by law. If your spouse has already filed, be sure that your lawyer has a copy of the petition as soon as possible.

The person who files first is the plaintiff or petitioner. The other person is the defendant or respondent and that person must respond to your petition in a formal document known as an answer. The defendant may also want to complain that the plaintiff was at fault. To do so the defendant files a Countercomplaint.

If possible, talk to your spouse about divorce before you file. It is hard to keep open lines of communication if your spouse has been surprised by the sheriff serving divorce papers on him or her at 4:00 A.M. (which is when the sheriff often serves papers).

## **DISCOVERY**

Discovery can include written questions, known as Interrogatories or Request for Production of Documents, or face-to-face questions before a court reporter known as a Deposition. See the [Deposition Appendix](#) for more information. Interrogatories and Request for Production of Documents must be responded to properly and the responses filed within thirty (30) days. It will take us some time to prepare your responses, so you have to get them back to us well within thirty (30) days. Request for Admissions are a list of specific facts you are requested to admit or deny. If you fail to deny a fact within thirty

(30) days, it is deemed admitted. If you deny a fact and the other side later proves the fact, then you must pay their expenses in proving that fact.

## **SEPARATION AND RECONCILIATION**

The legal requirement for separation before filing requires at least separate sleeping arrangements and a lack of physical relations. Renewing physical relations without notifying the court and first getting the court's permission (called an Order of Reconciliation) may destroy your grounds for divorce. Reconciliation after a divorce may have tax consequences you need to explore. However, I encourage reconciliation. If you and your spouse get back together, you only owe the retainer and payment for the services that you have used to that point.

## **DOMESTIC VIOLENCE AND ABUSE**

Violence within the family (domestic violence) is much more common than many of us believe. Each year, this occurs in 3 to 4 million families. Divorces often bring on an increase in such violence; 50 percent of serious assaults occur at or after the point of separation or divorce.

If there has been any violence in your family, we need to talk about that before anything is filed in court. Together we need to determine whether an injunction or protective order is needed to protect you or your children from future violence. Many spouses will simply stay away if such an order has been issued. Even if your spouse will not obey the order, it will help the police to physically remove your spouse if you can show the order to them.

If you need to go into any sort of "safe house" to protect yourself or your children from violence, tell me about this before you do so. We need to take steps in court so that your spouse cannot convince the judge you are kidnapping the children.

If there are allegations about your committing domestic abuse toward your spouse or children during the marriage, you need to tell me about it so that I can be prepared to deal with that issue. There is a good likelihood that your spouse will parade these allegations before the court. If you are innocent, we need to organize our proof to defend you. If this happened, there may be a good reason why things happened. If you committed abuse, you will need to get counseling and stop the abuse.

I had a man come into my office and explain that his son had been taken away because he hit the boy with a shoe. I was shocked but during the interview, the man explained that he began renovating and enlarging his home some time ago. Shortly thereafter his wife came down with cancer and despite the treatments and family care, she passed away. His wife's sister came to live with him to help care for the boys. She developed cancer and then

died. While he worked and cared for these women, the house remained unfinished. One morning before school, father and son got into an argument and in an isolated outburst, the father threw a “Hushpuppy shoe” that hit the boy in the face. When the boy went to school his eye was red and swollen, so the school officials reported the abuse. The son was taken away. When I saw the father he was visibly distraught. Was he guilty? Yes. Was he an abuser? No. The father got the counseling he needed, and his son was restored to him.

Child abuse is disgusting. It is an example of the weak being victimized by the strong. A false allegation of child abuse is just as disgusting. Both do damage that can continue through a family for generations.

Abuse can be clear cut or questionable. In some cases one person’s abuse is another person’s discipline. Some experts, such as psychologists, can be helpful; some can make the problem worse. A social worker once told me she knew a child was abused because she referred to a woman’s breast as “tatas.” This is a critical and difficult area for everyone involved.

## **INJUNCTIONS AND PROTECTIVE ORDERS**

Injunctions and protective orders are orders of the court that are issued to prevent harm pending further hearings. If you are afraid that your spouse will beat you, take your money out of the bank, or run off with your children, the court can enjoin or prohibit these things by issuing an injunction. In some cases, the court will issue an injunction when the case is filed; in other cases, the court may require a hearing before deciding on issuing the injunction. If you disobey an injunction or a protective order, the court can put you in jail. Even if the judge does not put you in jail, you can be fined and the judge may have a hard time trusting you later when you testify. The police do not want to get involved in problems between spouses; but, if you show them an injunction, they may run the other party off. They have to act if you have a protective order.

If you are under an Injunction or Protective Order, you must follow the order. Failure to follow the order can result in your being put in jail. A Criminal Court Judge can put you in jail for years for an assault on the person protected by the order after a protective order or possibly an injunction has been issued.

If you are under an Injunction or a Protective Order, you may be the same as a felon as far as the Federal Firearms Act is concerned. Being a felon, receiving or possessing a firearm is a serious federal crime. If you have guns and are under a protective order, get them out of your possession and do not acquire any while the order is in effect.

A protective order deals with domestic violence and is stronger than an injunction, but you need a more complex and expensive legal process to get a protective order. If you

need protection, I will get you an injunction. However, if you feel you need the extra protection of a protective order, tell me, and I will take the steps to get it issued.

If you are under a protective order, any assault on your spouse is an aggravated assault, which is a serious criminal felony. You must obey protective orders and injunctions even if your spouse tells you it is all right to ignore the order. That spouse may be setting you up for a trap. You must obey the order until the court modifies or vacates the order.

## **CONTEMPT**

In some cases it may be difficult to get your ex-spouse to comply with the court's orders. I recommend that you try to work out small differences yourself. The bigger problems, however, need to be brought to my attention. For example, if your ex-spouse does not pay child support, refuses to give visitation as ordered, or violates an order, there are a number of steps we can take to try to force compliance. One possible step would be to ask the court to find your ex-spouse in contempt. Contempt findings can ultimately lead to jail time if the judge believes that your ex-spouse is intentionally refusing to comply with a lawful court order. Another possibility would be an income assignment order.

If your spouse is at least a month behind in child support and is employed, you may be able to get an order that will take the child support directly out of your ex-spouse's pay and require the employer to pay it to the court clerk. (It will show up as a deduction on the employee's paystub). The clerk will then pay this money over to you. Catching up on delinquent support gets more and more difficult the further behind the payor gets. Therefore, if you are not receiving child support that you should, you ought to take steps to enforce the support before it gets too far behind.

## **PROPERTY DIVISION**

It is critical you tell me all you know about all the assets. The more I know, the more I may be able to get for you. In Tennessee, a statute covers property division. (See Tennessee Code Annotated 36-4-121 which is in [Appendix Property Division](#) for the exact wording of the statute.)

Property includes real estate, and personal property, (both tangible and intangible). Property can include houses, pensions, businesses, coin collections—almost anything. You should also consider that the legislature has set out criteria for alimony, child support, and property division. First, you must find and value the property (equity in the house, value of pensions, value of antique furniture). Next, you must determine whether the particular piece of property is separate property and remains with the person who owned it. Separate property is usually acquired before the marriage or outside the marriage, such as by gift or inheritance. Marital property is usually acquired during the

marriage. Marital property can include increases in separate property that occur during the marriage if your spouse contributed to its appreciation or preservation even if only indirectly.

To determine who gets what marital property, the court will consider:

- Length of the marriage;
- Age, health, skills, and abilities of the parties;
- Contribution to the education or to the earning power of the other;
- Relative ability of the parties to acquire property in the future;
- Contribution to the value of the marital property or the separate property;
- Amount of separate property owned by each spouse;
- Premarital property and postmarital property;
- Financial conditions of each party;
- Tax consequences;
- Social Security benefits;
- Allowing the custodian and children to continue to live in the home permanently or for a period of time (most often until remarriage of the custodian or until the children turn eighteen);
- Other factors that the court considers appropriate.

If you and your spouse can agree on how things will be divided and if your agreement is reasonable, it will be approved by the court. If you cannot agree, the court will divide the property, provided you can prove one of the grounds to divorce. If you cannot agree and cannot prove at least one of the grounds, you cannot get divorced.

Despite an agreement for one spouse to pay a debt that is in both parties' names, there can still be problems with the debt. If the party responsible for the debt does not pay the debt, the other party can still be sued for the debt.

For example, the wife gets the house and the husband agrees to pay the mortgage. The husband dies or goes bankrupt. The wife may or may not be able to sue the husband. In any case, the mortgage company can foreclose on the house if the payments go unpaid and sue the wife for any unpaid balance after foreclosure. The best way to protect the wife in this case would be for the husband to refinance the property and to remove the wife from the debt if possible. Sometimes this is financially impossible for large debts such as houses but can still be done with smaller debts such as second mortgages and car notes.

Do not hide assets. These assets are usually found; and if they are found, you will look like a crook to the court. The judge will have trouble believing what you say about anything after that, but the judge will not have too much trouble assessing attorney's fees against you for your behavior.

Sometimes there are important tax issues to consider. Transfer of property (such as a bank account) from spouse to spouse during a divorce is usually not taxable, but transfer of income (for example, interest) from an asset is taxable. Be careful about capital gains.

## DEBTS

Debts are the other side of assets and must be dealt with in a divorce. If you cannot agree, then the court will generally consider several factors in dividing debt obligations. Those factors include:

- Who made the original debt?
- For what purpose was the debt made?
- Who received the benefit of the debt proceeds?
- Who will receive as a part of the division of marital assets the particular asset (if any) connected with the debt?
- Who is better able to pay the debt?

## CREDIT

Close joint accounts and notify the banks, charge cards, and others by a certified, return receipt letter that you are no longer responsible for your spouse's expenses. You may want the company to reopen an account in your own name. This is a good time to request it. We will write these letters for you if you ask us.

At the bank you may want to divide joint accounts or put them in your name. This sometimes will make the judge angry with you, but it is often easier to give money back than to get it back. If you are the breadwinner, do not put your dependent spouse out in the cold without money to get by on. This will aggravate the judge, who will make you pay anyway.

Do not cut off the utilities on your spouse or your spouse and children without giving them plenty of notice. Make sure you can prove this notice to the court, because leaving your spouse and children home without heat or light in December seldom sits well with the judge.

Many people get into a lot of debt shortly before their marriage falls apart because they try to buy things hoping it will make the marriage better. If you have a lot of debt, you need to take steps to correct this problem as soon as possible. There will be less money to go around after you and your spouse separate because you will be supporting two households on the income that previously only had to pay for one.

During your marriage, most of your debts were probably incurred jointly. That means that both of you are responsible for the repayment of the debt. When your divorce is finalized, either through a settlement agreement or a court hearing, the court will make orders concerning who is to pay what debt. If your ex-spouse does not make the required payments, you can take your ex-spouse back into court, but you cannot stop the creditor from trying to collect from you. Your creditors are not parties to your divorce, so the order requiring your spouse to pay off the debt will not bind them. They agreed to loan money because you and your spouse both agreed to pay the money back. This means you can have a real problem if your spouse is financially irresponsible. If your debts are not too high, some creditors may be willing to refinance loans so that only one spouse is responsible for repayment. I recommend that you look into this option.

If there is any reason why your spouse may be considering bankruptcy, you need to discuss this with me so that we can take steps to protect you in the event that happens.

## **LIFE INSURANCE**

The cash value in life insurance is property. If you are receiving alimony or child support, you will want life insurance on the payor to insure the payment, should the payor die.

## **BANKRUPTCY**

Filing bankruptcy may relieve a debtor of many debts, but the responsibilities of paying alimony in futuro and child support should remain. However, if you get a notice that your spouse has filed for bankruptcy, contact me immediately. Although I do not handle bankruptcy matters, I have a partner who does; and we have dealt with this problem before.

## **TAXES**

The general rules outlined in the next few paragraphs are intended to alert you to issues and provide some general information. Before you sign any tax return or take any action with respect to your federal or state income returns, please review your situation with your tax advisor; that is not me.

You may officially notify the I.R.S. that you have changed your mailing address from the address used on your last tax return by filing I.R.S. Form 8822.

Subject to many qualifications, alimony in futuro paid in cash is deductible to the party

paying it and taxable to the party receiving it. Child support is not deductible to the party paying it or taxable to the party receiving it.

If you receive alimony you may need to make estimated quarterly tax payments. If you are employed you need to tell your employer about the divorce to change your tax filing status, which will increase your withholding.

Unless specifically addressed in your Decree, generally the custodial parent will be entitled to claim the dependency exemption on his or her income tax return. The custodial parent may execute I.R.S. Form 8332, releasing the dependency exemption to the noncustodial parent.

Generally, there is no tax gain or loss recognized as a result of the division of property between spouses upon divorce. Thus, there may be no tax incurred by dividing the property.

It is important to know the basis of the property that you receive in the division of your assets. The basis is generally the cost of acquiring, and, in some cases developing, a capital asset. If the asset has appreciated, the person who receives that asset will be responsible for tax on the appreciation when the asset is sold. Depreciation is deducting a portion of the basis of an asset. If an asset has been depreciated to a low basis, the sale of that asset can have very adverse tax consequences.

If your Decree provides that you and your former spouse will sell your jointly owned residence, you will each be responsible for reporting your portion of any capital gain. Capital gain is the profit resulting from the sale of capital investments, such as the marital real estate. Under new tax law there is a Five Hundred Thousand (\$500,000.00) Dollar exemption for capital gains for the sale of a home by a couple or Two Hundred Fifty Thousand (\$250,000.00) Dollars exemption for any single person. If you are going to sell your home, make sure you consult your tax advisor to see if you qualify for this exemption.

Beware of signing joint tax returns with your ex-spouse-to-be. Although your agreement may provide for your ex-spouse-to-be to be responsible for any tax liability, the IRS can turn to you. By the time the IRS does the audit, your ex-spouse may be bankrupt or dead and you may be the only one left to pay the taxes.

If you have moved, you need to file Form 8822 to notify the I.R.S. that you moved. Without that, the I.R.S. can send notices to your old address and you may not receive the notices, but the I.R.S. can hold you responsible for any missed deadlines.

The impact of taxes can make a great difference in divorces. I am not a tax lawyer. I do not give tax advice. If you need tax advice, we must associate a tax lawyer or a certified public accountant in your case.

## ALIMONY

Alimony is supposed to be temporary and rehabilitative, hence the term **rehabilitative alimony**. If temporary alimony cannot bring about rehabilitation, then the court can, in proper circumstances, order alimony on a long-term or indefinite basis. **Transitional alimony** is awarded when the court finds rehabilitation is not necessary, but a spouse still needs some assistance. Indefinite alimony (usually until the death or remarriage of the recipient) is called **alimony in futuro**. Alimony in futuro is granted less often these days. Alimony in futuro can be raised or lowered over time if there is a change of circumstances. Rehabilitative or transitional alimony may be modified if there is an unforeseen change of circumstances that occurs during the term of the payments. If the court does not change the payments before they terminate then the court normally loses the ability to modify the payments. If you do not get alimony at the time of the divorce, you cannot get alimony later on. **Alimony in solido** is a definite amount of money or property awarded instead of periodic payments, and it cannot be modified. Technically, husbands can get alimony from wives, but it seldom happens. In Tennessee, a statute applies to alimony. See the [Alimony Appendix](#) for the exact wording of the statute.

Alimony is based upon the relative needs and resources of the parties. The legislature set out criteria for the court to consider and they include the following:

- Relative earning capacity, needs and obligations, this includes income from pension, profit sharing and all sources;
- Education and ability of the parties, as well as opportunities for additional education;
- Length of the marriage;
- Age, physical, and mental condition of the two parties;
- Whether or not one of the parties should stay at home with the child(ren) of the parties instead of working;
- Separate property a person has;
- Marital property a person gets;
- Standard of living the parties enjoyed during the marriage;
- Tangible and intangible contributions of a homemaker and the tangible and intangible contributions of one party to the education, training, or increased earning power of the other party;
- Fault of one of the parties (if the court wants to);
- Tax consequences;
- Other factors that the court considers appropriate.

Living with someone after the divorce, regardless of whether you have sex or not, may cause alimony in futuro, transitional or rehabilitative alimony to be lowered or stopped. Death of one of the persons paying or receiving alimony or marriage of the person receiving alimony will terminate alimony in futuro, transitional and rehabilitative alimony unless the divorce settlement agreement provides otherwise. The court can require life insurance as a bond or put a lien on property to ensure the payment of alimony or child support.

## MEDICAL INSURANCE

If you cover your spouse or children on your insurance, do not drop them from the policy at least until the divorce is final. You are probably responsible for their medical bills until then anyway. Even after the divorce, the employed spouse may want to keep the spouse and children covered. If you are paying child support, a large unexpected medical expense for the child could be assessed against the noncustodial parent as additional child support. The same could happen with alimony and an ex-spouse.

You may have the right to apply for health benefits through your former spouse's current place of employment. Pursuant to COBRA legislation, nonemployee/spouses may be eligible after the divorce is final for certain insurance coverage at group rates. The insurance can continue up to 36 months, depending on your situation and the premiums should not exceed 105% of the current group rate. However, you must apply for this within 60 days of the date that the dissolution was final. Only if you file within that time period will you be eligible for COBRA coverage. Please check with your former spouse or through their employer immediately, as federal statutes and deadlines may change.

## CHILDREN

If you have children, the divorce will probably be as difficult for them as it is for you. Children will normally feel fear, confusion, guilt, depression, anger, and other emotions. Although you will be feeling these emotions too, you have a lifetime of experience to help you. The children only have two parents to whom they look up. Who now seem to be a source of distress rather than reassurance.

You need to take steps to ease the burden on your children. Part of this involves how you tell them about the divorce and what you say about your spouse. If possible, it is usually better if you tell the children about the divorce together. Do not dump your bad feelings about your spouse on your children. Simply tell them that the grown-ups have decided it is better to live apart. Tell the children that the divorce is not their fault and that they will still have both parents. Avoid talking badly about the other parent, if there is any possible way to do so. A child is made from both parents. If they are forced to look upon a parent as bad, they cannot help but feel badly about part of themselves. Also, the judges do not like it. Tell the children it is all right to love both parents. Never get mad and compare your child to the other parent. "You are just as bad as your no-good mother/father," are not words a child needs to hear.

In the Memphis area, you can attend a seminar entitled "**Children Cope with Divorce.**" I recommend that you take the seminar so that you can put its helpful advice into practice as early as possible.

Depending on your circumstances, you may also want to alert your children's counselors and teachers to the family change so that they can be on the lookout for behavior changes. Counseling can help many children as they adapt to life after their parents separate. I will be glad to recommend a counselor if you want one. There are also some good books out there to help your children cope with divorce. For younger children, **The Dinosaurs Divorce by Laurence Krasny Brown and Marc Brown** is helpful because they can relate to the pictures. For school-age children, **The Boys and Girls Book About Divorce by Richard A. Gardner** is a good choice. Your public library can also help you with reading material for your children. The American Bar Association publishes **My Parents Are Getting Divorced, A Handbook for Kids**. If you would like a copy of the booklet, ask me and I will give you one.

Try to counsel with your spouse about the children. Many parents stand together on issues involving the children even though they are separating in a divorce. Do not let the children play the parents off against each other. Try not to let the children talk badly about the other parent to you. Your divorce is not a reason to fail to give your children the discipline they need. Be ready to say “no” when appropriate. Try to preserve as much of your children’s normal schedule and activities as possible. This stability will help offset the instability of the divorce. Remember that married or divorced, you are not a perfect parent. Love your children and do not obsess over your mistakes.

Divorce proceedings are very emotional, and parties sometimes use children to seek revenge. If I believe you are using your children to get at your spouse, I will not represent you. Try to keep the children out of this; if they must be involved, prepare them properly without poisoning their minds about your spouse. Do not use a child as your counselor. The children are not equipped for this and it will devastate them. At best, they can only give you childish advice. Your friends, family members, minister or a professional can do this for you. This will be better for you and your children. I will be glad to recommend a counselor if you want one.

If you are in a relationship with a new person, do not introduce your children to this person until after the divorce and after they have adjusted to the separation. If the divorce is pending, then you may have made your children witnesses to your adultery.

Discuss support and property division with your spouse, not your children. Do not use the children as messengers or spies. Make a special effort to spend time with your children during this difficult time. Give them your full attention. Reassure them that both parents love them, even if you do not believe it. Give them extra love now—they need it. Although it is your divorce, the children’s needs come before yours.

## **CUSTODY**

The mother generally has an edge in custody litigation. Although the courts are supposed to favor joint custody, each judge will have an individual preference. Disagreement over

custody is almost guaranteed to put you right in the middle of a bitterly contested and expensive divorce. Custody cases are the most destructive litigation. Be sure that the children would be significantly better off with you than the other parent before you get involved in a custody fight. Custody cases are expensive in both emotional cost and in legal cost. The damage caused by winning a custody case is great; the damage caused by losing is terrifying.

Joint custody will usually be approved by the court if the parties do so by agreement and there is a “primary custodian.” The primary custodian is the one the child primarily lives with and has final decisions on issues such as school, medical care, and other issues. By agreement one parent can be responsible for some areas and the other parent can be responsible for other areas. Joint custody is more rarely awarded in contested cases.

The legal standard in deciding who will get custody is what is in the best interest of the children. Every judge sees it differently. If the judge's father abandoned his family and the judge's mother slaved day and night to help her son through law school, then the judge will have a hard time understanding why a father should have custody. Some judges are more moderate, but there are no courts in Memphis where the father has the advantage in custody litigation. If the court takes custody away from the mother, it usually has to have a good reason to do so.

The criteria for custody are set out in a statute, TCA 36-6-106, a copy of which is in the [Custody Appendix](#). They include the following:

- The love, affection and emotional ties existing between the parents and child;
- The disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary caregiver;
- The importance of continuity in the child’s life and the length of time the child has lived in a stable, satisfactory environment;
- The stability of the family unit of the parents;
- The mental and physical health of the parents;
- The home, school and community record of the child;
- The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preferences of older children should normally be given greater weight than those of younger children;
- Evidence of physical or emotional abuse to the child, to the other parent or to any other person;
- The character and behavior of any other person who resides in or frequents the home of a parent and such a person’s interactions with the child; and
- Each parent’s past and potential for future performance of parenting responsibilities, including 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, consistent with the best interest of the child.

If there is custody litigation, you must be able to show the judge that the child is better off with you. Photographs of you and your child having a good time doing things together is useful evidence. This is a good time to subscribe to publications such as *Parents* magazine. Buy some books about children, parenting, and getting children through divorce. Attend seminars and keep the brochures and literature. Do these things for your child and yourself, not just to impress the judge.

The Parenting Program was adopted as a pilot project in a few courts in Tennessee. It requires that the party starting the divorce process file a "Temporary Parenting Plan" which sets forth various issues from custody to parenting time, to child support, to vacations. This plan can be agreed to by the parties. If it is not a "joint plan," then mediation must be scheduled in an attempt to reach an agreement. If an agreement is not possible after mediation, then the Judge must hear proof and set the plan as the Judge sees fit. There is a provision in the law for "no visitation" and exemption from mediation in cases of spousal or child abuse. Both parents can be required to attend the "Children Cope with Divorce" seminar or one like it. Failure to participate in these programs can lead to a party's being found guilty of contempt of court.

If the litigation gets very bitter, the court may consider placing the children with someone other than the parent. However, the parents must be shown to be unfit before the children will be given to someone else.

The children may need their own lawyer. This is a Guardian Ad Litem. The Guardian Ad Litem is appointed by the court to look into the best interest of the children. This will add significantly to the cost of your case.

## VISITATION

If the mother and father can agree on visitation, the court will usually approve the plan. The best plans maximize the parents' (and in some cases grandparents') time with the children. You need to consider everyone's schedule, school time, outside activities, sports, church, vacation, and the fact that as the children become teenagers they will have a life of their own and will usually prefer to be with their friends rather than either parent. A typical pattern is alternating weekends, a few weeks in the summer, and alternating holidays. If the parties live far apart, this pattern will not work. The pattern then calls for fewer but longer visitation periods. If the parties live very far apart, you must deal with who will provide or pay for transportation. Psychologists, Judges, and I encourage visitation except in extraordinary circumstances. Try to keep the other parent involved in school activities and other events.

Sometimes when parents fight about visitation, they are really upset about something else that they do not believe they can fight about. It may be because they feel angry at the other spouse for leaving or it may be that they feel they gave up too much in the divorce agreement. But for whatever reason, they are involved in an argument about the children.

It is most often the custodial parent's wanting to restrict the other's visitation. This is normally not a good idea, because when the custodial parent says to the other, "I don't want you to visit at this time," that immediately becomes the time that the other parent wants to visit with the child. Usually the problem is that the custodial parent does not want the other parent to visit. In some cases the problem is that the custodial parent wants the noncustodial parent to visit, and they will not do it because the custodial parent is trying to force the other to visit with the children. The best thing to do if you do not want the noncustodial parent to visit is to say you do want them to visit. Bury the other with visitation, and remember in the back of your mind that they are a free babysitter. Also, you might remember that the non-custodial parent who visits regularly tends to be a parent who pays support regularly.

Even if your situation is that the noncustodial parent is a jerk, and you do not think it is the best thing in the world for the kids to be around the jerk, you still need to encourage visitation. The children need to know that the noncustodial parent is a jerk, and the best way for them to know it is to let them see it with their own eyes on a regular basis. Withholding visitation from the children or the noncustodial parent puts you against the child's imagination. If the children do not see the jerk, they soon forget what a jerk he or she is and begin to blame you for the noncustodial parent's having left. The child's imagination is then on the other parent's side. The children dream about a perfect parent; and since they do not see the absent parent they do not see any flaws in that parent. You might beat many things, but you will have a hard time beating your child's imagination.

Moving the child away has caused a great deal of litigation and conflicting rulings. Now there is a statute from the legislature, which can be changed every year for political reasons. Basically the moving custodial parent needs to notify the other parent that they intend to move and have a good reason to move that is not vindictive. Getting away from the other parent so that parent cannot visit is not a good reason. Being transferred by your company in a "move or lose your job" situation is usually a good reason. This will result in a modified visitation schedule that needs to be an order of the court.

## **PARENTAL KIDNAPPING**

Parental kidnapping is an issue that has received a lot of attention in the media during recent years. As a result of this publicity, legislation has been passed in every state and by the federal government trying to stop this ugly situation. If you are unhappy with a court ruling on custody or visitation, do not take the law into your own hands by taking or keeping your children in violation of a court order. Sooner or later, you will be caught. And when you are, the judge in your divorce case will not be pleased. Also, the judge in your criminal trial will not be happy to see you either.

Many parents who kidnap their children lose their custody and/or visitation rights for a period of time. Some go to jail, which also hampers visitation. The kidnapping parent can be limited to supervised visitation -- which means the children can only visit that parent

while under the supervision of an agency or other person that the court trusts - with the visiting parent usually required to pay a fee to the supervisor who is keeping an eye on that parent. You do not want this.

If your children have been taken or retained by their other parent in violation of a court order or against your will in the absence of any court order, you need to get legal help right away. There are many ways to track down kidnapping parents, and it is usually easier to find them when the trail is still fresh.

## **CHILD SUPPORT**

In arriving at a fair amount of child support, you should (and in the event of a contested trial, the court will) consider the needs of the children and the financial assets, earnings, and needs of each parent. In Tennessee, we use the Child Support Guidelines. See [Appendix](#) for a full copy of the Guidelines and the chart. Below is a rough guide for determining child support based on net income of the noncustodial parent (usually the father).

Children	Percentage
1	21%
2	32%
3	41%
4	46%
5 or more	50%

Net income is total income less only taxes and other court-ordered child support payments. The formula assumes that the noncustodial parent is providing health insurance for the children and is providing for the children during normal visitation. If there are any extraordinary expenses -- medical, educational, or other -- then the support could be higher. If the noncustodial parent does not visit with the children at least four (4) days a month, two (2) weeks in the summer, and two (2) weeks during the holidays, the court can order child support to be higher. The court can order the noncustodian to pay child support and provide such things as life or health insurance. The court can also order the support to be deducted from the payor's paycheck. If this goes through the clerk's office, there is a 5 percent charge.

The court can require support of a normal child only until the age of eighteen or until the child graduates with his or her regular high school class. You can provide for college, but you must do so by agreement as the court cannot order it. Tennessee does not require a parent to put a child through college. If you have a child with a mental or physical disability, be sure to let me know, as it may be possible to have support continue after

this child turns eighteen. If the children's needs or the parent's ability to pay support substantially and materially changes (defined by the Guidelines as 15 percent ), then child support can be raised or lowered. Child support, and sometimes alimony, can be assigned out of the paycheck of the person who is paying it. A bond can be required to ensure the payment of past, present, and future child support, or a lien may be placed on property for that purpose.

As with alimony, child support must be reasonable. Enough can be too much. If the custodial parent is awarded enough child support, it may be too much for the noncustodial parent to be able to pay. If this happens, the burden becomes too heavy; and if the ties to the children and to the community are too weak, then the noncustodial parent will leave. Once a noncustodial parent has left the state, it becomes very difficult to enforce child support rulings.

In a Memphis courtroom, a woman was divorcing her biker husband whom she had concluded was worthless—even on his best day. As the lawyer was going over the terms of the settlement in court, he got to child support and said, "Fifty dollars per month."

The judge interrupted, "Fifty dollars is not much money. Wouldn't one hundred dollars a month be more reasonable? I can award that if you want me to."

The woman responded, "I wish you wouldn't. I'm not going to get it anyway, and it only hurts half as much to not get fifty dollars a month as it would not to get one hundred a month."

## **RECORDS**

It is very important that you keep records of payments you make or receive for alimony and child support. If you are paying, pay by check and keep all canceled checks. If you cannot prove you paid it, you might as well have not paid it. If you are receiving payments, keep a running account in a permanent place. If you cannot prove what you did get, the court might not believe you when you testify about what you did not get. It is easier for both parties to have payments deducted from the paycheck of the person who is paying. I strongly recommend this.

## **TEMPORARY RELIEF (Pendente Lite)**

"Pendente lite" is Latin for "pending the litigation." There are things you may need for the court to do pending the final trial. The court, upon request, can set a hearing to determine the needs and the abilities of the parties and children and order support accordingly. This award is subject to rehearing at the final trial. The court can also order custody or specific visitation pending the final trial.

## **CHANGE OF WIFE'S NAME**

In Tennessee, a woman may go back to using her maiden name at any time. However, sometimes it is hard to convince the Social Security Administration that she has legally returned to her maiden name. A woman can have the court order the restoration of her maiden name in the final decree, even if she is not the plaintiff. I suggest that you go back to your maiden name only when there are no children, or go back to a former married name when there are children of that former marriage. If you want to do this, let me know.

## **TELEPHONE**

All too often people use the telephone not to communicate but to destroy communication. The angry spouse may call to scream insults or make hang-up calls.

The first case is the easiest to deal with—hang up. If you choose to stay on the telephone and to listen to the rude jerk that called, then you have made a bad choice. You can change that choice by simply hanging up—the sooner the better.

Hang-up calls are tough—once you pick up the telephone you have lost. The answer is technology. Get an answering machine. The machine will screen your calls, and you can return the calls of the people you want to talk to. If the jerk calls and curses at you over the machine, we can bring that tape to court for the judge to hear.

The telephone company offers services that may be very worthwhile to you at this time, including the following:

Caller identification— At a glance you can see who calls even before you pick up.

Call tracing—This traces calls so we can prove to the court who made the call.

Call block—This locks out calls from certain numbers. You can block out your ex-spouse-to-be and many of your ex-in-laws-to-be.

Call forwarding—I once had a client whose ex-spouse called every night at 3:00 A.M. to plead with her to come back. His offer of reconciliation was somewhat tarnished by his newly contracted venereal disease. His late-night pleadings both upset my client and deprived her of sleep. She solved the problem herself by ordering call forwarding. When she went to bed, she would forward her calls to Dial-A-Joke.

If the other side is abusing you with the telephone, keep a calendar with the calls documented by date, time, and number. You have the legal right to record phone calls that you are a party to.

## **AIDS AND OTHER MEDICAL ISSUES**

I recommend you have a complete physical examination as soon as possible. As a result of such an examination, one of my clients discovered she had a medical condition that would normally not have been diagnosed and would have been fatal if it was not treated. She underwent an expensive series of treatments. The cost of these treatments will be part of her case. If you have cancer or other medical problems, it can dramatically affect your case.

Your examination should include an HIV test. If you suspect your spouse may have been exposed to the AIDS virus or a sexually transmitted disease, you must have yourself tested. Your exposure is not only to your spouse but to everyone who had sex with anyone who had sex with your spouse. The most frequent avenue of exposure is sexual contact. However, that is not the only means of contracting AIDS; exposure to blood is also a risk. Therefore, spouses of physicians, dentists, undertakers, or any medical workers have a special concern. Consult your physician and let us know the results of any test.

## **DATING**

Do not date. You are married. Your spouse can use it against you. If you are divorced, moving in with your lover could cause problems with custody, visitation, or alimony. If you do date, be prepared to face the problems that may arise. Tell me about it because, if I am surprised by it in court, it will hurt your case.

Do Not Lie About Dating. Although Judges do not like people “fooling around,” they are not usually too angry when they hear about it. Judges are much more likely to get mad if they are being lied to. Lying under oath can result in your going to jail for contempt of court or the felony of perjury.

## **SNOOPING**

The Omnibus Crime Control and Safe Street Act of 1968 makes it a federal crime and a civil tort for anyone to listen in on a telephone conversation or to record any conversation if they are not a party to that conversation or do not have permission from someone who is a party. Such recordings are not admissible as evidence. If you record your spouse's

conversation with his or her "lover," you cannot use that tape in court and you could end up in a federal prison. It is lawful for a person to record a telephone conversation or other conversation in which you or one of the parties to the communication has given prior consent to record it. Your spouse can tape the conversation between you and your spouse then ask you if you will stop seeing your "lover." The tape with your answer would be admissible in court.

Tennessee law also makes unauthorized recording a crime and also makes it a crime to photograph a person who is in a place where that person has a reasonable expectation of privacy. It is also illegal to hire someone to do it for you.

## **FAMILY**

Your well-meaning family and friends may offer you advice about your case. Frequently such advice is not accurate, and you should be cautious in following it. The facts surrounding your marriage, divorce, children, and property are unique and are different from any other case. The only thing your divorce and your Aunt Harriet's divorce may have in common is that you and your Aunt Harriet are related to each other.

## **ONE ATTORNEY FOR BOTH OF YOU**

If there ever was a conflict of interest, it has to be two people getting a divorce. I do not represent both parties in a divorce, although some attorneys do. If you and your spouse have agreed on everything, it may be possible for me to do all the legal work, but I will represent only one of you. If you and your spouse disagree later, I will continue to represent that person unless I have been directed otherwise.

## **KEEPING YOU INFORMED**

You will receive copies of many of the documents that were prepared or received by me. Due to court appearances, trials, depositions, negotiations, and other commitments, I am difficult to reach on the telephone, and you may talk to my paralegal about your problems. The paralegal will be easy to reach and can give you information or take messages. The paralegal cannot answer your legal questions, but can relay them to me and get back to you with my answers. Try to work with her. It will make things easier, and it will hold down the cost of your divorce, since I bill for the paralegal's time at a much lower rate.

## COOPERATION

I expect you to be cooperative and truthful. If you are not, I will not represent you. I also expect you to handle your financial commitments to our office in a prompt and businesslike manner. Please notify me of any change of address or telephone number or of any new information that may affect your case.

## MARITAL DISSOLUTION AGREEMENT

Most likely the next document drawn up in your case will be a Marital Dissolution Agreement. Divorces usually settle in the beginning when both parties feel guilty or in the end when both are exhausted. I will draw up the agreement, but I need to know who gets what and who pays what. You can include many things in your agreement, some of which are listed below:

- **Court cost and attorney's fees**—Who pays?
- **Property**—Who gets the house? Who gets the note? How does the equity get divided if it is sold?
- **Personal property**—Who gets which car, what appliances, and what happens to the sofa in the den?
- **Retirement**—What happens to any retirement benefits that have accrued?
- **Debts**—Who pays what? Should the debts be paid off by refinancing?
- **Alimony**—How much? How long?
- **Custody**—Who gets which child? Should any aspects of custody be shared? The noncustodial parent may be the one who is a doctor and may be the one who should make medical decisions. Will joint custody work?
- **Child support**—How much? How long? Who carries health or life insurance on children? Who gets to claim the children as income tax deductions? Private school or college tuition?
- **Visitation**—Do you want a specific schedule or can you and your spouse work together on it?
- **Life insurance**— Who is insured? Who is the beneficiary? Term or cash value? How much?
- **Health insurance**— Who is covered? In many cases an employee's spouse can be covered up to thirty-six (36) months after the divorce by the employed spouse's insurance for a small additional premium.
- **Other**—Security for obligations in the agreement, for wills, for death, and for taxes. (You cannot avoid death or taxes, so you may need to provide for them.)

## NEGOTIATIONS WITH YOUR SPOUSE

If you try to work something out with your spouse, the following are some useful pointers to remember:

- **Meet on neutral ground**—Not at his office or at her mother's home, but some place where both parties will feel comfortable.
- **Put aside time**—A reasonable amount of time should be set aside to deal with the issues. If you leave to answer a telephone call just as you almost have things worked out, you may find that things have fallen apart when you get back. On the other hand, do not leave the meeting time open-ended. A meeting without a deadline will drag on and issues will not get resolved.
- **Set an agenda**—Decide what will be dealt with at the meeting. "This week we will decide on custody and child support, next week we will decide on the house."
- **Do not bog down**—Try to talk about what you agree on. No matter how bad it is, there are some things you agree on ("the marriage stinks" or "the kid is cute"). If you hit a point that gives you trouble, move on to something else and come back to the problem after you have resolved some other issues.
- **Reschedule as needed**—If things start to turn nasty, if someone gets angry, or if you think you are losing everything, reschedule the meeting for another time. It is important that both of you feel that the agreement is a good thing.
- **Keep the kids out of it**—Your children do not need to be involved in this. Do not have them around. They will interrupt you, and it will upset them.
- **Start talking early**—Divorces usually settle early on when both parties feel guilty and are not locked into a position, or divorces settle after much litigation when the parties are too exhausted to fight anymore. Sometimes you can get more with guilt than you can get at a trial.

If you and your spouse work out something and you make notes, do not sign the notes. This could be considered to be an agreement. If it is not in the correct legal language, you may be bound by something other than what you thought you agreed to.

## MEDIATION

Normally the parties will try to settle their case. See section on Marital Dissolution Agreement. If that does not work, the attorneys will normally try to settle the case. These approaches are dynamic and can both go on at the same time. Sometimes despite the best efforts of everyone, the case will not settle. Before going to the ultimate test of a trial, there is the alternative of mediation.

Mediation is negotiation with a neutral party's assistance. The mediator is not an advocate for either spouse. The mediator facilitates the process and does not "take sides" or make decisions for you. They merely facilitate settlement. I recommend this and urge you to ask me more about it for your specific case. Even if your spouse is opposed to mediation, the court can still order it.

You may want to consider arbitration. In arbitration, the arbitrator makes a final decision. This is like a judge, but you must pay the arbitrator and you are bound by the decision.

## **WAITING PERIOD**

Irreconcilable differences divorce cannot be granted until at least sixty (60) days after filing if the parties have no children and ninety (90) days if they have children. This is a minimum interval. My experience indicates a normal interval of about ten (10) days more than the minimum required for uncontested divorces. The waiting period for contested divorces is between nine (9) and twenty-four (24) months.

During the waiting period, we will try to help you work out the details of custody, visitation, support, and property settlement, or, if necessary, prepare for trial.

Certain circumstances may qualify for a quicker divorce, but I recommend a quicker divorce only in unusual situations.

## **COST AND EXPENSES**

There are different types of costs in divorce cases. The largest cost is usually attorney's fees, which is what I charge for the work I do on your case. See Attorney's Fee below. Court costs are the fees that are charged by the court for the filing of the divorce papers and various other papers.

In contested cases, attorney's fees and court costs are higher and there may be other costs for things such as depositions, private investigators, photographs, psychological evaluations, and tax consultants. You must pay these costs, as we are ethically prohibited from lending clients money.

Any discussion about what the costs or attorney's fees will be is the roughest of estimates. There are many variables in any divorce case, including some over which I have no control. Who your spouse will hire as a lawyer, how complex the financial records are, or what mood the judge is in on the day of trial will affect how I handle your case and, therefore, what it will cost you.

The emotional cost of a divorce can be greater than the dollar cost. The damage of having a broken marriage examined in court is something only those who have lived through it can understand.

## **ATTORNEY'S FEE**

The fee varies with the services you require, but it is based on the hourly rate set out in the contract you sign, and it is charged in fifteen minute units. The reason I charge in fifteen minute units is that to stop doing one thing, attend to your problem, make a record

of the time, and then get back to where I was usually takes at least fifteen minutes. The charge is twice as much at home because I enjoy my quiet at home, and I do not have your files, my law books, clerks, computer, and other necessities to help me deal with your problem.

A basic divorce includes the initial conference; the preparation and filing of the petition or the review of the petition filed by the other spouse; the preparation of the answer; the obtaining of information from you concerning your grounds for divorce, assets, liabilities, income, and expenses; the preparation of the marital dissolution agreement; the preparation or the review of a final decree of divorce; and the attendance of one court hearing to have the case disposed of as an uncontested divorce and to submit the appropriate mailings.

Additional time is spent for telephone conferences, negotiations, telephone calls, and other court appearances. If tax planning is needed, a tax lawyer must be associated, as I do not practice or advise clients in that area.

If there is a trial, one party can be ordered to pay some of the other party's attorney's fees. The court will rarely order a party to pay the full amount of the attorney's fees. You are responsible for paying the agreed fees, and I will give you full credit for any payments made by your spouse. You have probably heard of divorces in which the attorney representing the wife promises to collect the attorney's fees from the husband. This creates a conflict of interest between the attorney and the client, and the attorney might be tempted to compromise the wife's rights in other areas to protect the fee. I try to avoid this. We will negotiate about your attorney's fees with the opposition; however, our focus will be on the total picture. Any discussion about the total cost of a divorce is only an estimate. Because we do not have control over many things such as what your spouse's attorney may or may not do, we cannot tell you how much time your case will require.

I require a retainer to accept your case and to begin drawing up the necessary papers. If you decide not to retain me, you will only be charged for the office conference. If you retain me, you will sign a contract setting out the terms of representation in writing.

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During the waiting period, we will try to help you work out the details of custody, visitation, support, and property settlement, or, if necessary, prepare for trial.

Certain circumstances may qualify for a quicker divorce, but I recommend a quicker divorce only in unusual situations.

## **UNCONTESTED DIVORCE**

In an uncontested divorce case, the plaintiff needs to appear in court to testify. The defendant need only appear if it is what he or she wants to do. Unless it is a divorce on irreconcilable differences, you will need to bring two witnesses with you to testify on your grounds for divorce. You may want us to issue a subpoena to require your witnesses to appear in court. The subpoena helps your witnesses get off work and protects you if they do not appear.

## **FACTS**

I must have all the facts to represent you properly. **Tell me everything you know:** "My husband took a trip out of town—here is a copy of the ticket." **Tell me what you suspect:** "I bet he met his girlfriend down there." Something that may not seem important to you may be critical to your case. If the other side knows something that I do not, the information could be used against you, and I would be unprepared and unable to defend you against it. However, if you give me the information, no matter how bad it may appear, then I can take the proper steps to prepare a defense to avert what could otherwise turn out to be a disaster.

Anything you tell any member of my office is strictly confidential and will not be disclosed outside without your permission. However, I will not allow you to lie under oath nor allow you to plan to commit a crime. If someone outside of you or my officer overhears or reads communications, the privilege is lost as to those communications.

Do not discuss your case with anyone unless you have my permission. One of the best ways for the opposition to trip you up is to get a statement from you before trial that does not coincide exactly with your testimony at trial. When you do say something, be careful what you say. Anything you say may get played back to you on the stand. If you say something petty or wrong, it may hurt your case. Until the divorce is over, do not say anything you would not want the judge to hear.

Do not sign anything involving this case unless you have approval from me. You may be signing something that could harm you later on.

Furnish me immediately with the names, addresses, and telephone numbers of any and all witnesses, and tell me what they know. Advise me immediately if you hear of anything that might affect your case. If I am not in, you may leave this information with my secretary, paralegal, or associate.

## **NEVER LIE OR WITHHOLD INFORMATION FROM YOUR ATTORNEY.**

All papers filed in your case and all testimony in your case are theoretically matters of public record, and the public has a right to see or hear it. However, the only people you are likely to see at court are other people who are getting divorced themselves that day, and they are far more concerned with their own problems than with your case.

## **EVIDENCE**

If you have not done so already, start looking for evidence. Check desk drawers, safety-deposit boxes, bank boxes, or other places where documents might be hidden. This is a good time to visit with your family banker, stockbroker, or accountant to discuss the family financial situation, although you may not want to tell them about the divorce.

I will want you to supply me with copies of the following documents:

- Income tax returns;
- Financial statements (these are most often filed when borrowing money and are very important);
- Employment contracts or any explanations of benefits from you or your spouse's work;
- Canceled checks and charge records;
- Retirement plans, including IRAs;
- Deeds;
- Real estate tax bills or appraisals;
- Insurance policies, including life insurance, medical insurance, health insurance, or homeowners' insurance;
- Bank accounts and bank statements;
- Safety-deposit boxes (you will want the bank to verify an inventory if possible);
- Securities;
- Partnership agreements, corporations, or other documents showing any business interests;
- Any inheritance or trust interests;
- Wills by you or your spouse;
- Any written agreements or notes between you and your spouse;
- Any evidence you have such as photographs or letters.

## **WITNESSES**

When you must prove something in court, you must have legally admissible proof. Most proof comes from witnesses. If you are proceeding on grounds, you need to have corroboration (support) of your proof, even if your spouse is not disputing the grounds. Corroboration usually means two other witnesses. In a contested case you may need more than two witnesses. We can issue a subpoena for witnesses if you request it and give us their names and addresses. The subpoena will help the witnesses get off work to appear in court. If the witnesses do not appear in court, you can usually have the case put off until you can get them to appear in court.

An expert witness is a witness who has such training or expertise that the witness' opinion is valuable to the court. Psychologists, accountants, and doctors are often expert witnesses. Expert witnesses must be paid for the time they spend in preparation and at trial.

## TRIAL

Before you come to court, decide what you want to accomplish. Do you want to persuade the judge or do you want to vent your feelings so the judge will sympathize with you? The likelihood of the judge's paying attention to one more angry party to a divorce case is small; giving sympathy on the basis of an emotional rant is even less. Judges can be persuaded by facts clearly and appropriately presented. The following suggestions can increase the likelihood of persuasion:

Dress neatly and nicely for all court appearances, especially those in which you will be testifying. It is unfortunate that people judge other people by the clothes they wear, but they do. If you want the judge to think you are one of the "good guys," then dress like a good guy, not like a zombie biker. Women should wear little or no makeup or jewelry.

Stand and sit erect. When you take the oath, clearly say "I do." Do not slouch in the witness stand or slur your words. Be serious. When speaking, do not wave your arms. Do not ask the judge if you have to answer a question. If it should be objected to, I will object to it; otherwise, you must answer it. Never interrupt the judge. Do not speak unless spoken to. Do not cover your mouth or avert your eyes.

Look at the judge when you talk. Remember, you are trying to convince the judge. So talk to the judge and not to me. I already believe you. Don't talk to the other attorney, because he or she will never believe you. Do not look at me before you answer the question as if you are seeking help or after you answer the question as if you are seeking approval.

Do not react to other witnesses' testimony. Your reaction will aggravate the judge and you will look childish.

Be polite; it makes a good impression on the court. Answer "Yes sir" or "Madam" and address the judge as "Your Honor." Do not be a smart-aleck, or appear nervous or angry. If the other side baits you into becoming angry, it is probably trying to set you up for a trap, so keep your cool. Lose your temper, and you may lose your case.

Be nice. Judges tend to like nice people. If someone needs to get tough, let it be me. I have more experience in making that call.

If you want to tell me something, pass me a note. If you talk to me, I may miss something in court that I need to hear.

Tell the truth. It usually will come out eventually anyway, and it is better coming from you than from the other side. If the other side catches you in a lie, you may lose your case. However, make sure you told the truth to me before you tell it in court.

Listen carefully to all questions, whether posed by me or by the other side. Pause, make sure you understand the question, then take your time and answer that question. You cannot give a truthful and accurate answer if you do not understand the question. If you ask, the attorney will repeat the question. Do not tell the court "I think" or what it "must have been." The court does not normally care what you think or what could have happened. It wants to know what actually happened. However, if you estimate a time or a cost, make sure the court knows it is an estimate. If you make a mistake during your testimony, correct it as soon as possible. Politely say something such as, "May I correct something I said earlier?"

When the other side asks you a question you do not know the answer to, say "I do not know." Witnesses are often trapped by being led into areas about which their knowledge is inadequate. They try to save face and end up making a statement that is incorrect. This gives the other side what it needs to shoot them down. You can usually avoid the problem by saying "I do not know."

In cross-examinations most questions can be answered with "yes," "no," "I do not know," or with a simple sentence. Do not ever use "Watergate" words. Everybody in the United States believed the witnesses at the Watergate hearing were lying. So when you say "To the best of my recollection," people think you are getting ready to lie to them. If it is all you remember, say, "It is all I remember." If you remember something else later, tell us what you remember.

Do not volunteer information. Do not let the other attorney pull you into testifying more than you need to by standing there looking at you, waiting for you to add material. When you are finished with your answer, shut up.

One of the oldest tricks in the book is for the other side to ask you if you have discussed the case with your attorney or other witnesses. If the other side asks that tell the truth—you have. The other side is not asking you if you have fabricated the story, but is asking you if you have talked about it. Only a fool would go to court without having discussed the case with his or her attorney and his or her witnesses. If the other side asks you if I have told you what to say, say that I told you to tell the truth—because I have.

Do not let the other side trick you by asking you if you are willing to swear to what you are saying. You already did when you took the oath as a witness.

We are all afraid of things we do not understand. A visit to the court before your case may make you more comfortable about your court appearance. After you watch a few cases, you will see that no one dies or is seriously injured when testifying. You will feel better when it is your turn. To help yourself, you will want to review any documents you

will refer to during your testimony. Also, review any statement you made, and talk to friends, family, or coworkers to recall details you have forgotten.

Always check with my office the day before court to make sure your case will be heard. Often cases are continued by the court for one reason or another, and we do not want you to waste a trip downtown if it is avoidable.

## **FINAL DECREE**

The dissolution of marriage and orders contained in the Final Decree are final in thirty (30) days from the entry of the Final Decree. Your remedies to change the orders in the Final Decree are to file a Motion to Alter or Amend the Judgment within thirty (30) days, or notice of appeal of the court's decision to the Court of Appeals.

If you wish to appeal any of the orders of the court, you have thirty (30) days from the date of the Final Decree or the order on the Motion to Alter or Amend to file a notice of appeal. Failure to file one of these pleadings within thirty (30) days from the date the Decree was entered causes your right to appeal to be permanently lost. If you believe that you may wish to appeal, please contact me immediately by telephone and also schedule an appointment so that we will have ample time to evaluate the appeal and to prepare the necessary paperwork before the deadline. If you tell me less than ten (10) days before the appeal deadline runs, I may not be able to represent you properly. Orders of the court of division of property are not modifiable at any future date. They can be changed only by amending the Final Decree, an appeal to the Court of Appeals, or by written agreement signed by both parties and filed with the court as an order.

Orders of the Court for alimony futuro, rehabilitative alimony (but not alimony in solido), child support, custody, and visitation may be modified upon a showing of a substantial change of circumstances. Any modification of these orders must be done prospectively. This means that the court can only modify these orders from the date of the filing of a petition to do so forward. The court cannot retroactively modify any court orders. Any agreements to modify these orders must be in writing, executed by both parties and entered by the court as an order or such agreement is not binding.

## **REMARRIAGE**

Oscar Wilde described remarriages as the "triumph of hope over experience."

You may not marry anyone except your spouse for thirty (30) days after the final decree of divorce. If you do remarry, you may want a prenuptial agreement (also called premarital or antenuptial agreement). This is an agreement with your new spouse to be

made before the marriage. If you are interested in this, ask me. It can help you avoid problems in your next marriage.

## **CHANGES**

If you and your spouse or ex-spouse agree to change the terms of a court order (Temporary Support Order, Final Decree, or any other), you must change it with another order. If your spouse says, "You don't have to pay alimony for the next year if you will take the children to Disneyland this summer," you must get it in writing and entered in court for it to be binding on your spouse and to protect you from contempt.

If you need to change child support or certain types of alimony, you can petition the court for a change. If you show a change of circumstances, then the court may modify those provisions. The change of circumstances that most impress the court are those changes that you do not expect: "I lost my job because the company went bankrupt." The courts are less sympathetic to "I just don't want to work as hard as I used to work." Sometimes changes that everybody knew were coming are a change of circumstances: "When my children became teenagers, they were so much more expensive."

## **WILLS**

You probably need a new will now. If you wish to pursue this, ask me and I will give you the names of some attorneys who do wills.

If you have given your spouse a power of attorney, cancel it as soon as possible. Until you do, your spouse has control over your property and can sell it or give it away.

If you have a living will in which your ex-spouse has the right to tell the hospital to pull the plug and let you die, you may want to have that changed.

## **SOCIAL SECURITY**

If you and your former spouse were married for longer than ten (10) years and paid into the Social Security Trust Funds, you may be entitled to spouse's or survivor benefits on your former spouse's account upon reaching age 62, regardless of whether your former spouse has retired at that time. These benefits are provided by the federal government and are not usually addressed in a Decree.

The Social Security Administration advises contacting it three months in advance of your anticipated eligibility date. For survivor benefits, this could be as early as three months before turning age 60; for spouse's benefits, three months before turning age 62.

When applying for Social Security benefits, you should have your Social Security Number, Birth Certificate, Marriage Certificate and Final Decree, showing your marriage termination date. Social Security laws are constantly changing, and your future benefits may be affected by those changes. To be sure of the exact benefits to which you are entitled, and your earliest eligibility to receive the benefits, contact the Social Security Administration directly.

## **WORRY**

Human beings, among all the animals of the earth, have a unique ability for worry. Even during good times, people find things to worry about. When going through a divorce, you will find many things to worry about, and you will have good reason to worry. Even if I tell you not to worry, you will worry.

Let me suggest that instead of worrying about your problems, you worry at your problems. Instead of letting your mind be consumed with worrying about how bad the problem is, you should concern yourself with what you can do to solve the problems.

## **EMOTIONS**

If you are going through a divorce and you feel uncertain, insecure, or depressed, then you have a fairly normal problem. You may want some counseling for the problem.

If you are going through a divorce and you feel no uncertainty, insecurity, or depression, then you probably have a really big problem. You should get professional help immediately.

Divorce is an unpleasant time at best. You will be beset by a range of emotions including, denial, anger, guilt, depression, fear, resignation, ambivalence, and frustration. Remember this is normally only temporary. You probably will feel different next week. Instead of feeling angry next week you might feel fearful, next week indifferent, next week depressed, next week ambivalent, and so on until finally one week you are happy that it is all over.

## **OUTCOME**

After the divorce, you and your ex-spouse will have two separate households. You will have to maintain those two homes on the money with which you maintained one earlier. "Two" cannot live as cheaply as "one," especially when "two" are two separate households.

Furthermore, if your ex-spouse has been a jerk all of his or her life, it is very unlikely that going through a divorce will make him or her less of a jerk. A drunken wastrel will probably continue to be a drunken wastrel, and nothing the court nor I can do will be likely to cure the problem. After the divorce, you will be separated; but to the extent that you are still tied together by visitation, child support, alimony, or debt payments, you will still have to deal with the problems together.

If your ex-spouse-to-be is garbage, then no matter how hard we try or how well we succeed in court, your ex-spouse-to-be will probably still be garbage.

## CONCLUSION

Sometimes people get into big fights over small things. One couple tried to get divorced, the case went to court, the matter was tried, and the case was so bad the judge threw it out of court. The parties had to work out a settlement if they were going to get divorced at all. With the help of their very expensive attorneys, and after much yelling and fighting, they had sold their house, set alimony, sorted out custody, and agreed to child support. They got down to dividing the contents of the house, and as they were about to finish they came upon seven crystal goblets.

The wife said, "I want four and you can have three so that our two children and my dear mother can come over for dinner and discuss the problems you have left us with."

The husband responded, "I'll take the four goblets and you can have three so that I can have my two children over for dinner along with my girlfriend, and the children can see how a man and a woman who love each other behave."

The yelling and screaming began again. One of the attorneys had all that he could take. He grabbed a goblet, threw it into the fireplace, and shattered it. He said, "Now you each have three and you can bill me for the broken one."

That ended the case and it also ends this booklet.