DEAN & FULKERSON

Getting a Divorce in Michigan

You, a family member or friend may have questions about the divorce process. This pamphlet will give the reader a practical overview of divorce in Michigan. This is only an overview. It does not answer specific questions. Specific questions are best answered by consultation with an attorney specializing in domestic relations matters.

What is a “No Fault” Divorce?

Michigan is a “no-fault” divorce state. This means that the Court need not find misconduct on the part of a spouse to terminate the legal relationship between a husband and wife. To dissolve a marriage in our state only requires that the Court determine that there has been a “breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed and that there remains no reasonable likelihood that the marriage can be preserved.”

In most cases, the Court will accept a party’s statement under oath that there has been a breakdown in the marriage to grant the divorce. The underlying factual basis for this statement is rarely questioned. If a judge inquires about the reasons for the breakdown, a brief explanation usually suffices.

A divorce will be granted even though the other spouse may insist there has been no breakdown in the relationship or that a reconciliation is likely. When one spouse testifies under oath in Court that a breakdown has occurred, the judge must grant the divorce and terminate the legal relationship.

Although “fault” is not an issue in terminating the legal relationship between a husband and wife, marital misconduct or fault remains a consideration in property settlement and alimony matters and may, in some instances, be relevant in child custody matters as it bears on the “moral fitness” of a party seeking custody or parenting time.

How Does a Divorce Proceeding Start?

The party filing the Complaint for divorce is called the “Plaintiff”. The spouse against whom the Complaint is made is called the “Defendant”. The Complaint for divorce is filed in the circuit court of the county where the Plaintiff lives. The party filing the Complaint must have resided in the State of Michigan for 180 days immediately preceding the filing of the Complaint and in the county in which the Complaint is filed for 10 days immediately preceding the filing of the Complaint.

The Complaint gives the Court the following general information: names of the parties, date of the marriage, whether or not the parties have minor children, whether the parties have acquired real or personal property during the marriage, and whether custody, visitation, child support, alimony or other relief is sought. The Plaintiff asks the Court to grant a Judgment of Divorce incorporating an equitable distribution of all of the assets and obligations of the parties and whatever custody and support provisions the Plaintiff desires.

Upon filing the Complaint, the case is assigned to a judge in the Family Law Court of that circuit court. The judge is selected by blind draw. If the case proceeds to trial, it will be tried before a judge without a jury.

What are "Ex-Parte" Orders?

When the Plaintiff's attorney files the Complaint, he or she may ask the judge to enter ex-parte orders. An ex-parte order is an order issued by the court based upon the Plaintiff's affidavit that immediate relief is necessary to protect the parties, the children or the marital assets. The Court can prohibit a party from encumbering, hiding or transferring marital assets. It can award temporary custody of minor children to one of the parents and order the non-custodial parent to pay child support. Ex-parte orders are generally issued to preserve the financial status quo, protect the assets of the marital estate or protect the Plaintiff and the children.

The Summons, Complaint and any Ex-Parte Orders issued by the Court are then served upon the Defendant. If minor children are involved, a Friend of the Court pamphlet must also be provided to the Defendant. The Defendant has twenty-one (21) days after being personally served with the Summons and Complaint to file with the Court a written Answer to the Complaint. In the Answer, the Defendant admits or denies each factual allegation in the Complaint. The Defendant can also ask the Court to reconsider, vacate or amend any Ex-Parte Order that the Court entered when the Complaint was filed. The Defendant can also file a Counter-Complaint for Divorce.

What Factors Does the Court Consider When Determining Who Should Have Custody of Minor Children?

When the parties have minor children, there are typically physical and legal custody issues that need resolution. If the parties cannot agree on custody, the Court must decide who will be awarded physical and legal custody. The parent awarded physical custody is the parent with whom the children will reside and the person who will make the routine day-to-day decisions affecting the child's welfare.

Sole physical custody to one parent is the norm. Joint physical custody is rarely awarded by a Court unless the parties request it. Even in the case of joint physical custody, one or the other parent will likely be designated as the primary caretaker for the children and the children's primary residence will be with that parent.

When the parties cannot agree who should have physical or legal custody, the Court will decide. The Court must consider the child's "best interests" to determine to whom physical custody will be awarded. The following are the factors which the Court must consider:

(1) the love, affection and other emotional ties existing between the parties involved and the child;

(2) the capacity and disposition of the parties involved to give the child love, affection and guidance, and continuation of the educating and raising of the child in its religion or creed, if any;

(3) the capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs;

(4) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;

(5) the permanence, as a family unit, of the existing or proposed custodial home or homes;

(6) the moral fitness of the parties involved;

(7) the mental and physical health of the parties involved;

(8) the home, school and community record of the child;

(9) the reasonable preference of the child, if the Court deems the child to be of sufficient age to express preference;

(10) 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;

(11) incidents of domestic violence, whether directed against or witnessed by the child; and

(12) any other factor considered by the Court to be relevant to a particular child custody dispute.

A psychologist is often selected by the Court to interview and evaluate the parties and the children to assist the Court in this determination. The expert prepares a report and recommendation and can be called upon to testify at trial. The Friend of the Court Referee assigned to the case will also conduct an evidentiary hearing and make a written recommendation. The Friend of the Court Referee may also be asked to give its recommendation at trial.

The twelve statutory factors comprising the “best interests” of the child are not given equal weight. Each case is determined on its own merits. There is no overt gender bias. The Court makes its determination based on the “best interests” of the child, not on who is the “best” parent or the “best interests” of a parent.

Joint *legal* custody usually means that both parents will participate in important decisions regarding the child’s welfare. There is a strong presumption that joint legal custody is in the best interests of the child. If parties are unable to work together in the best interests of the child, the Court will be reluctant to order joint legal custody.

When joint legal custody is ordered, one of the parties may be designated by the Court as the final decision-maker should they be unable to agree. This provision eliminates the necessity of returning to Court for a decision by the judge each time there is a disagreement between the parents.

What Are Normal Parenting Time Arrangements?

Parenting time (formerly called “visitation”) by the non-custodial parent with a minor child is strongly encouraged and enforced by the courts. Most Judgments will have a provision giving the non-custodial parent “reasonable and liberal” parenting time. This generally includes, but is not limited to, time with the minor children from Friday evening to Sunday evening on alternate weekends, alternate holidays, and extended parenting time (usually two to four weeks) during the summer. Weekday parenting time which does not conflict with school work is also encouraged. The parties can be creative in devising mutually agreeable parenting time arrangements which maximize the time the children spend with the non-custodial parent.

Should parenting time ever present a danger to the child’s welfare, the Court can restrict parenting time to supervised settings or, in an extreme case, e.g., child abuse, eliminate parenting time entirely.

Will the Court Allow Children to Move From Michigan After the Divorce?

A custodial parent can ask the Court to change the residence of a child to a location outside the State of Michigan at any time during or after a divorce. Generally, the Court will approve the requested change provided that it is made for a bona-fide reason, e.g., the relocating party has obtained a new job or is transferred out of the state in connection with their current employment. The Court will also evaluate the impact of the proposal upon the existing parenting time arrangements. When appropriate, the Court will modify the parenting time provision in the Judgment to facilitate an ongoing relationship between the non-custodial parent and the child despite the geographical distance resulting from the move. The Court will also allocate the increased costs of transportation between the parties as it deems appropriate.

How is Child Support Calculated?

Each parent is under a duty to contribute to the financial support of the child. The Court is obliged to order child support in accordance with state-wide Child Support Guidelines. These guidelines calculate child support based upon the parties’ respective net incomes. As a general proposition for child support purposes, “net income” is gross income from all sources less federal, state and local income taxes. When a party is unemployed, the Court may impute income to that party based upon that party’s unexercised ability to earn.

Child support can be increased or decreased at the request of the Friend of the Court or upon a party’s request at any time after the divorce is granted until the non-custodial parent’s child support obligation terminates.

Child support is payable until a child reaches the age of 18 or graduates from high school, provided that the child lives with the custodial parent or in an institution and is enrolled in school on a full-time basis with the reasonable expectation of graduating, whichever occurs last. There is no child support obligation for children beyond the age of 19½ years.

The Court will issue an Order of Income Withholding to the payor's employer. Child support payments will be automatically deducted from the payor's paycheck and sent to the Friend of the Court. The Friend of the Court then remits the money to the custodial parent.

What is the Friend of the Court and What Does It Do?

The Friend of the Court is an administrative agency which has been created by our state legislature. It is charged with the duty of protecting the best interests of the child. It is frequently consulted by the Court with regard to custody, support and parenting time issues. Because of the Court's caseload, the Court generally refers disputed custody, support, visitation, child care and alimony matters to the Friend of the Court for an investigation, report and recommendation. The Friend of the Court can also be used to mediate parenting time disputes and changes in custody, child support, child care and visitation. Each county has its own staff of Friend of the Court referees, investigators, support specialists and family counselors. Each county publishes its own Friend of the Court Handbook describing its procedures.

Who Pays for Continuing Health Care for the Children and Ex-Spouse?

Each parent is under a statutory obligation to maintain health care insurance for a minor child provided that it is available to the party through their employer at no cost or at a reasonable cost. Normally, one party will be ordered to maintain health insurance for the children during their minority. Necessary and reasonable uninsured medical costs are usually allocated between the parties in accordance with their respective incomes.

In addition to health care insurance for minor children, a party may be required to provide health care insurance for an ex-spouse. Under federal law, health care insurers for employers with more than 25 employees are required to provide continuing health care coverage for the non-employee ex-spouse for a maximum of 36 months after the entry of the Judgment of Divorce. The Court can order a party to pay for health care coverage for a longer or shorter period. The Court can also order a party to pay the health care premiums and co-pay costs associated with coverage for the ex-spouse after the Judgment.

What Factors Are Considered in the Property Settlement?

During a marriage, a husband and wife acquire assets and liabilities. The assets and liabilities which comprise the "marital estate" are equitably divided between the parties in the Judgment of Divorce. If the parties cannot agree on a fair division of the assets and liabilities, the Court will decide. Absent serious fault, the Court is generally inclined to divide the marital estate equally between the parties. When making a property settlement, the Court considers the following factors:

(1) duration of the marriage;

(2) contribution of each party to the marital estate;

(3) age of the parties;

(4) health of the parties;

(5) station in life;

(6) necessities and circumstances;

(7) earning ability of the parties;

(8) past relations and conduct of the parties; and

(9) general principles of equity.

The Court is not obliged to make a mathematically equal division in every case. It is, however, obliged to order a division of assets and liabilities that is fair and equitable.

Are There Assets Which Are Not Included in the Marital Estate?

Some property held by a husband or wife may not be treated as part of the marital estate. There may be property or debts that a party acquired prior to the marriage. A party may have received an inheritance or gift during the marriage. Generally speaking, these kinds of property are not considered part of the marital estate unless they have been commingled in or with the marital estate. Absent special circumstances, these items will remain the property or liability of the party acquiring or incurring them and the other spouse will not receive an interest in the asset nor be liable for part of the debt. Whether an asset is part of the marital estate or an individual's separate estate will depend upon the facts of each case.

What Factors Are Considered in Awarding Alimony?

Alimony is ex-spousal support. There are two kinds of alimony: periodic alimony and alimony-in-gross. The amount and duration of periodic alimony can be modified or changed by the Court at any time after the Judgment is entered. Alimony-in-gross is not modifiable. The Judgment of Divorce should also specify whether alimony will be deductible to the payor and includible as income to the payee for income tax purposes.

Alimony-in-gross is generally favored by the courts when the marriage was not a long-term marriage. Alimony-in-gross is alimony paid for a limited period of time and for a fixed amount. The amount and duration of payments are usually related to the present needs of the recipient and time necessary for the recipient to acquire the skills or education to re-enter the workplace and become economically self-supporting.

When alimony is requested, the Court considers the following factors:

(1) the past relations and conduct of the parties;

(2) the length of the marriage;

(3) the ability of each party to work;

(4) the source and the amount of the property which will be awarded to that party from the property settlement;

(5) the ages of the parties;

(6) the other party's ability to pay alimony;

(7) the present situation of the parties;

(8) the requesting party's needs;

(9) the requesting party's health;

(10) the standard of living which the parties enjoyed during the marriage; and

(11) general equitable principles.

Alimony is determined on a case-by-case basis. Most judges also use mathematical guidelines or formulas to assist them in determining the duration and amount of alimony to award. Transitional rehabilitative alimony is presently the norm; awards of long-term or permanent (periodic) alimony are unusual except in cases of long-term marriage or other unique circumstances.

How and When Do the Parties Disclose All Assets and Liabilities?

To negotiate a fair and equitable settlement or try the case before the Court, all assets and obligations comprising the marital estate must be identified and valued. After the initial pleadings have been filed, the parties engage in a discovery process. The discovery process includes depositions at which a party or witness can be questioned orally under oath, written interrogatories (questions) that a party must answer in writing and under oath, and securing expert valuations of stock options, businesses, real estate and other specific assets in which the parties may have an interest. It may also include a vocational assessment of a party petitioning the Court for alimony and psychological evaluations of the parties and the children when custody is at issue.

What is a "Motion"?

While a divorce is pending, either party may petition the Court at any time for interim relief. To bring the matter before the Court, a party must file a "motion" (a written request) with the Court. The motion outlines the

requested relief and the reasons why the relief is requested. A copy of the motion is sent to the other party. The date for oral argument on the motion is scheduled with the Court. Days set for oral argument on these motions vary in each of the circuit courts. On the date set for the hearing, the attorney for the moving party has a brief opportunity to tell the Court the facts justifying the requested relief. The party opposing the requested relief will have an equally brief opportunity to give the Court the reasons for opposing the requested relief. The Court then makes its decision. The decision is reduced to writing and signed by the judge and becomes a court order which the parties must obey.

Does Mediation Help Settle Cases?

When the assets have been valued and the liabilities identified, the judge will order the case to mediation. Mediation is a non-binding advisory process designed to assist the parties at resolving all outstanding issues. It has proven useful in resolving a large number of domestic relations cases.

A mediator is usually selected by the parties' counsel. If the parties' counsel cannot agree, then the Court will appoint a mediator. The mediator is a domestic relations specialist knowledgeable about Michigan domestic relations law and the philosophical and judicial proclivities of the judge assigned to the case.

The attorneys for the parties prepare written summaries outlining their client's respective positions on property, alimony and related issues. These summaries are submitted to the mediator. The mediator meets with the parties and counsel, evaluates the parties' respective positions and works with the parties and their counsel to find a resolution acceptable to both parties.

Mediation successfully resolves about 60% to 75% of domestic relations cases. If the parties are unable to reach an agreement at mediation, the matter will continue on the Court's trial docket.

Sometimes, the parties reach an agreement after mediation but before trial. It is not uncommon for the parties to reach a settlement on the morning that trial is scheduled to begin. A significant number of divorce settlements are negotiated in court cafeterias and court hallways on the day of trial.

What is a "Judgment of Divorce"?

The document that embodies the parties' settlement (or the Court's decision when the parties cannot reach a settlement) is called a "Judgment of Divorce." It is a written multi-page document resolving all issues, including but not limited to, custody, parenting time, alimony, health care and property settlement.

There are two ways to obtain a Judgment of Divorce. The first way is to try the case before the judge. At trial, each party may testify and call fact or expert witnesses and cross-examine the other party's witnesses. Before and after the conclusion of the evidence, counsel for each party makes a statement outlining for the Court what that party intends to prove and why their proposed settlement is a fair and equitable resolution. The Court then makes its findings of fact and issues its opinion on custody, support, visitation, insurance, alimony and property settlement matters. Counsel for the parties prepare the Judgment of Divorce for the judge's signature. When signed by the judge, it becomes a Judgment of Divorce.

The Judgment terminates the legal relationship of marriage and will include custody, child support, visitation, health care, child care (where there are minor children), property settlement and alimony provisions. Only about 2% of all divorce cases actually are tried before a judge. The emotional and economic pressures on the parties usually

result in a negotiated settlement.

The second and more common way to obtain a Judgment of Divorce is the parties and their counsel negotiating a complete settlement of all issues. That settlement is then reduced to writing and signed by the Judge.

How Can a Party Determine Whether a Negotiated Settlement is Fair?

The Judgment of Divorce is negotiated against the backdrop of what the judge assigned to the case is likely to do if the case went to trial. For that reason, it is important to retain counsel with a working knowledge of the judges of the circuit court where the case is filed. Throughout the proceeding, the attorney will counsel a client on the client's available options, the risks and likely consequences associated with each decision. Clients save considerable costs and expenses by hiring knowledgeable, experienced and practical counsel.

Are There Any Waiting Periods Involved?

Yes. When minor children are not involved, the Court must wait 60 days from the date that a Complaint for Divorce is filed before it can terminate the parties' marriage. This is the mandatory waiting period in Michigan. It applies even in cases where the parties have already negotiated their agreement. When minor children are involved, the waiting period is six months from the date of filing. However, even in these cases, after the initial 60 day period has expired, the judge can waive the balance of the six month waiting period and enter the Judgment of Divorce if a party can show the Court that it is in the best interests of the minor children to enter the Judgment without delay.

How Does the Court's Case Docket Affect a Domestic Relations Case?

Each divorce case is only one of many new cases that are filed in our county circuit courts each day. Almost half of all new cases filed in our courts are domestic relations cases. Less than half of the judges on a circuit court's bench are assigned to family law. Domestic relations cases "continue" until all property settlements are fully implemented, alimony and child support obligations paid, and child custody provisions terminate.

The huge number of new cases and the growing backlog of existing cases severely limit the time and attention the Court can give to any one case. Each domestic relations case is scheduled for trial a number of times before it is actually tried by the Court. Each time a case is scheduled for trial, counsel, parties and witnesses may be required to appear in court. These delays are unavoidable. Economically and emotionally, the system encourages the parties to work out a mutually agreeable settlement rather than have the judge decide the issues.

How Much Does It Cost to Get a Divorce?

The expense of each divorce varies. Expenses include court costs, witness or subpoena fees, expert witness fees, costs of transcripts and court reporters and attorney fees. Some of the factors affecting the expenses are the reasonableness of each party's expectations, the degree of self-control that a party exercises and the degree

of self-control the other party exercises. Sometimes, even the attorney that the other party selects to represent them can have an impact on the cost of the divorce. The judge assigned to the case can have a direct impact on the expense of the proceeding.

The attorney fee reflects the extent of the client's need for guidance and counsel during the proceeding. An experienced and knowledgeable attorney will help the client develop reasonable expectations, set realistic goals, and assist the client in analyzing the range of options available to the client.

Divorce is more emotion than logic. The end of an intimate relationship is always traumatic and using a divorce proceeding as a vehicle for venting emotions is never cost effective.

As a general rule, the more focused a party is, the less expensive and time-consuming the proceedings will be. To minimize the expense, clients should be discrete and prudent in their words and actions during the proceedings and remain focused and goal-oriented at all times.

If you have any questions about family law issues in Michigan, feel free to contact Rob Figa.

PRACTICE AREAS

- Family Law

ATTORNEYS

- Robert J. Figa