# THE LEGAL EAGLE

## YOUR DIVORCE: AN OVERVIEW OF THE PROCESS

*INTRODUCTION: As a service to our legal assistance clients, we have prepared this handout with frequently asked questions involving the divorce processs. It is, of course, very general in nature since no handout can answer your specific questions. We do ask, however, that you read over these questions and answers carefully in connection with your visit to our legal assistance attorneys so that you may have the fullest information available to help you with your family law problem. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page.*

For many people, separation and divorce rank second only to the death of a loved one in terms of emotional turmoil, pain, and stress. To help our clients who are going through this difficult process, we have prepared this information letter to help them to learn as much as possible about the process. A good lawyer can clarify the legal procedures, help in establishing your goals, and propose a positive strategy to achieve realistic results.

Shown below are some common questions and answers about the separation or divorce process. If you have any additional questions after reading these explanations, don=t hesitate to ask your legal assistance attorney for more information.

**Q. WHAT ISSUES CAN BE RESOLVED IN A DIVORCE?**

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

At the outset it is important to note that not all states handle divorce in the same way. In some states, such as New York and Wisconsin, divorce is a Apackage deal.@ All issues must be resolved by the parties (through agreement) or by the court (through trial) before the divorce is granted. AMy wife/husband won=t give me a divorce@ is sometimes heard in these jurisdictions, because the only alternative to a long, messy and expensive trial is a settlement driven or guided by the other party. *Divorce* is the end result of the process. When you get your divorce, everything else is already in place. The other issues in the case are raised by law or court rule, and all issues are presented to the court for a decision when one party files for a divorce.

In other states, such as North Carolina, a divorce case is not necessarily joined with other issues. These other issues may be presented to the court before or after the lawsuit for divorce is filed. Custody may be contested or settled in a different lawsuit or joined in the divorce suit. The same applies to child

support, alimony (also called maintenance or spousal support) and property division (or equitable distribution). In these states, divorce is not necessarily the *end* of the case; it may be the *beginning*. Parties also may resolve other issues through court decision or agreements. Each of these issues can be heard by the court on different timetables, before or after the divorce. Understanding the type of state where your divorce is filed, the timetables and the deadlines, are the first steps for the newcomer.

**Q. WHERE DO I START?**

**A.** Getting the right lawyer is often the first step. Whether the attorney you select has represented you previously or has been recommended by a friend, relative, or bar association lawyer referral service, the important thing is that you communicate well with each other and that you have confidence in his or her ability to handle your case.

You may want to consider hiring a lawyer who specializes in your particular kind of case. Many states allow lawyers to become specialists and list themselves as such if they meet certain qualifications.

What you say to your lawyer is "privileged information." Generally speaking, this means that what you tell your attorney must be held in confidence unless you give permission otherwise. In addition, your attorney has the duty to:

- Allow you to make the major decisions in your case, such as pleading guilty in a criminal case or accepting a compromise or settlement in a civil case; and
- Remain open and honest with you in all aspects of your case, including your chances of success, the positives and negatives of your position, and the time and fee required.

**Q. HOW MUCH WILL ALL OF THIS COST ME?**

**A.** Lawyers set fees in a number of ways. The major types of fees are flat rates, contingency fee, and hourly billing. Lawyers may use a flat fee when the work involved is straightforward, predictable and routine. Thus, many lawyers use a flat rate or set fee in uncontested divorces, adoptions and name change cases.

A flat fee generally is paid in advance and does not vary depending on the time or work involved. No refund is due if the work takes less time than expected, and no additional charges are incurred if the case is longer or more complex.

An hourly rate is most common when the client's work will be substantial, but difficult to estimate. Thus, for example, a lawyer might charge an hourly rate in a contested custody or alimony case. It is fairly common for the lawyer to require part of the fee to be paid in advance, or Aup front.@ This Aretainer@ is a deposit or downpayment to make sure that the client is serious about the case and is

financially prepared to cover all costs. The size of the retainer and whether any part of it is refundable will vary from case to case and lawyer to lawyer.

In certain cases, the court may order one party to pay some or all of the other's legal expenses. For example, the court usually can make such an award in cases involving alimony, child support, custody, and paternity. Remember, however, that the award of attorney's fees in such cases is not mandatory or automatic. Such an award depends on a variety of factors, such as good faith, need, lack of adequate support, and so on. The courts see these awards as a way to pay back or reimburse for attorney's fees already paid or presently due. A client will have difficulty retaining a good attorney based on the promise or hope of court-awarded fees. This is especially true because court-ordered fees are not always paid and additional legal work may be required to force the other party to pay.

**Q. HOW CAN I MAKE SURE THAT MY LAWYER IS DOING WHAT I WANT?**

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

- Insist that your lawyer explain specifically 1) what will be done in your case, and 2) how much it will cost. If you wish, you can ask the lawyer to put this in writing. This includes the contract that binds you and the attorney -- make sure you get a written contract, and then read it before you sign!
- Ask for an estimate of the total charges and ask what services are included in this estimate. Ask what your attorney expects to be the steps you go through and how much time (or expense) they might involve -- if you hire an experienced lawyer, he or she should be able to at least "outline" the process for you with a fair degree of accuracy. [Note: At the same time, please be aware that it is hard to tell what might happen or how long something might take in a legal dispute. It's impossible to predict with any degree of accuracy what will happen, for example, in a divorce and separation case. While many of these are resolved as standard "uncontested divorces" with no alimony, property or child-related issues involved, there are a great many cases that are completely unpredictable in this field of law, so don't expect a specific dollar amount to be quoted to you as "the entire fee" in anything but a standard uncontested divorce. In fact, be wary of attorneys who promise to handle your entire case for a fixed sum, since it is impossible at the outset to tell what will occur in all except the most routine of uncontested divorce cases -- one in which both parties want to get divorced, there are no issues of alimony,

property division, custody or child support, and there is no problem serving the other party with the divorce papers.]

- Clients should receive frequent case updates and regular communications from their attorneys; the rules of most state bars require this. Be sure to ask about this if you want to ensure that your lawyer knows you want to be kept current regarding your case.
- You should also get copies of the "pleadings" -- motions, complaints, counterclaims, petitions -- that have been filed in your case, as well as any order or judgment that the judge signs.
- The lawyer should release your file to you upon request and with reasonable notice.
- Do not tolerate unreturned phone calls; nothing makes a client angrier (and justifiably so) than a lawyer who won't answer a phone call or a letter from a client requesting information.
- Consider hiring a lawyer who specializes in your particular kind of case. Many states allow lawyers to become specialists and list themselves as such if they meet certain qualifications. A specialist is usually more likely to know the "ins and outs" of your case than an attorney who is a "general practitioner." Many states have lawyers who are certified as specialists in family law by the state bar

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

**Q. WHAT IS INVOLVED IN aGOING TO COURT?@**

**A.** If you must litigate, you need to know something about the process. You can=t play ball if you do not know the rules. Litigation always starts with the filing of a complaint or petition which states the facts of the case and what relief is requested. It is accompanied by a summons, which states that the other side has been sued and has a certain period in which to respond. The other side usually files an answer following the service of these papers.

Depending on state or local rules, additional documents may have to be filed by the spouses. They include financial affidavits or declarations, stating the incomes and expenses of each party, or property inventories, showing what each party claims to be marital or separate property and debt, as well as the value claimed for each item. Sometimes courts also require parties to file a copy of tax returns, pay stubs, or other financial documents.

Contested divorce cases can take a long time to resolve. While the entire case is pending, temporary, interim or emergency hearings may be requested. For example, a party may ask for an emergency ruling on issues of custody or visitation, especially when the parents are engaged in a Atug of war@ or the children are in danger. Courts often consider the need for interim spousal support or child support at a temporary hearing in the weeks or months after a case is filed. This is done to protect the financially disadvantaged spouse during the divorce process. Some courts use the time after filing to conduct a hearing on *interim allocation*, which means a temporary division or distribution of marital assets pending the final hearing. This also can be useful in providing each party with sufficient means to pay the lawyers, psychologists or accountants required to assist in resolving the case or preparing for trial.

**Q. I THINK MY HUSBAND IS HIDING INFORMATION, BUT HOW CAN I BE SURE?**

**A.** You might find the answer in the Adiscovery@ stage of litigation. Discovery means Afinding out information that the other side has.@ Many court rules state allocate to discovery the first 90-120 days after the lawsuit has been filed. Even more time is allowed in complex cases. This is probably the most important part of trial preparation -- finding out what the case is all about from the other side=s perspective.

AInformal discovery,@ usually means obtaining information from the other side without formal notices or requests. This can be done surreptitiously by making a copy of a spouse=s bank statement and then returning the original to the home file. It can also involve getting copies of your joint bank statements or financial statements from the bank, your joint tax return from the tax accountant or IRS, or your joint deed and real estate closing statement from the attorney who handled your home loan. These are quick and inexpensive ways to get the documents your attorney needs.

Likewise, an attorney can request certain papers, receipts, titles, or deeds from the other side. If the adversaries are friendly and the marital dispute is under control (which often depends on the personalities of the attorneys and the level of animosity between the parties), it is possible to save hundreds or even thousands of dollars by agreeing on a Adiscovery plan.@ This allows each party to request in writing relevant documents, within reason, from the other side. Although no penalties or

sanctions are incurred for failure to produce or reply (as is the case with formal discovery), considerable time and money can be saved if the parties and their lawyers are willing to cooperate.

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

X *Interrogatories* are written questions that are sent by mail to opposing counsel. They must be answered by the opposing party under oath within a certain number of days (usually around 30).

X *Document requests* require the other side to produce documents at a specified place and time for inspection and photocopying.

X A *request for entry upon land* can be used to get into the office or home of the other party to inspect, inventory, photograph or make a video recording of what=s there.

X A *deposition* is oral testimony given under oath in front of a court reporter. Generally, the deposition is taken in a lawyer=s office and no judge is present. It results in a typed transcript of the testimony and it can be very useful in exploring what facts or data the other side has, what accusations (or defenses) will be made, and how the other side is thinking about the case. Although generally more expensive than interrogatories, a deposition tends to generate more complete and spontaneous responses. Also a deposition allows a lawyer to ask Afollow-up questions.@

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

**A.** Going to trial doesn=t just happen. It is the end to a long process that includes meeting with your attorney and rehearsing for the hearing, getting an overview of questions that *will* be asked and that *may* be asked, and reviewing documents that will be introduced as evidence. The process also involves preparing witnesses and exhibits for introduction, and setting the case on the court=s calendar for weeks or even months in the future. Lawyers frequently prepare written briefs that summarize and explain points of law that may be at issue in the case. Sometimes there is a pre-trial conference with the judge to organize the case and focus the issues.

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

X *The plaintiff=s (or petitioner=s) case* involves his or her testimony, immediately

followed by opposing counsel=s cross-examination. The plaintiff=s exhibits and documents will be offered in evidence. Then the witnesses for the plaintiff testify and are cross-examined by the other side. Likewise, they may offer documents into evidence.

X *The defendant (or respondent)* has the same opportunity -- to give testimony, present evidence, and offer witnesses. Likewise, the plaintiff=s attorney may cross-examine.

Most divorce or domestic relations cases are heard by a judge, although occasionally state law allows them to be tried before a jury.

After both sides present their case, each is given the opportunity for rebuttal, which is testimony that denies or contradicts what the other side has presented. The lawyers will have the opportunity for final argument or Aclosing statement,@ in which they summarize their evidence and argue for the results they seek.

Then comes the court=s decision. This may follow closing statements, or it may come days or weeks after the trial has concluded if the judge takes the case Aunder advisement.@

Once the decision has been made, it is noted in the court record and announced (formally in court or sometimes informally by telephone conference). If the parties do not attend the decision conference, they will be notified by their respective attorneys.

Entry of the order, judgment or decree is the next stage. Sometimes this is done by the court, but more often than not the attorneys write up a decision for the judge to sign. This often requires meeting together or with the judge while they are preparing *findings of fact* for the judge on contested issues. This process can take days, weeks, or even months in a complex or hotly contested case.

**Q. ISN=T THERE ANY ALTERNATIVE TO A LONG TRIAL?**

**A.** Yes, there are several other options worth considering: mediation, collaborative law, arbitration, coaching, and negotiation. If handled correctly, these options generally are less expensive and less time-consuming than a trial.

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

*Mediation* is informal dispute resolution in which a neutral third party, a trained mediator, helps you and your spouse reach an agreement. The mediator=s role is to assist the parties in resolving their conflicts. Choosing sides or giving legal advice is not a mediator=s role. The mediator does not make

decisions, but rather encourages both parties to work together to make their own decisions. Mediation is an increasingly popular option and generally cheaper than a trial. Sometimes a free or inexpensive court-sponsored mediation program is available for part or all of a case.

Every state has its own requirements for mediation. In some states or counties it is optional, in others the court may require it. Independent of the courts, the parties can hire a mediator to conduct a settlement conference if they can agree on who pays the cost.

A *negotiated settlement* can be a productive way to settle the parties= dispute. In this scenario, both parties and their lawyers attempt to resolve all or some issues in the case. Taking some of the issues off the table will likely make the trial shorter and the process less expensive and less stressful. It is also a good way to bargain through the items on the table and see if there is room for negotiation.

*Collaborative law* means agreeing to negotiate a settlement without going to court at all. The parties agree to cooperate fully in the settlement negotiation process and to provide freely and promptly any documents or information requested. The attorneys help to facilitate the negotiations and craft the settlement document, but they cannot go to court; they are fired and new counsel hired if litigation is desired by either party.

*Coaching* involves hiring an attorney to advise you on how to handle your own case without a lawyer. When a case is simple and straightforward, this can save you money while teaching you how to present your case to the judge on your own. If your case is a simple uncontested divorce without other issues, this could be effective. It could also be useful if your ex-spouse has charged you with missing a child support payment but you have a legal excuse, or if you want to defend yourself on a simple visitation dispute. It is *not* a good idea for complex cases.

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

When will these alternatives to trial work? They work best when both parties are willing to work together to reach an amicable settlement that is in the best interest of all concerned. When are these options not a good idea? They are less likely to be successful if a case involves physical abuse, substance abuse, persistent anger or passivity, or mental health problems for one or both spouses (such as severe depression). In these situations, attempting to reach agreement may be a waste of time and money for both parties.

**Q. IF I HAVE OTHER QUESTIONS ABOUT SEPARATION AGREEMENTS, WHAT SHOULD I DO?**

**A.** Please consult a legal assistance attorney or private attorney of your choice as soon as possible. Your lawyer can answer the many questions about separation agreements and help you to make a fair and intelligent decision about your choices, options and alternatives. Our legal assistance office stands ready, willing and able to help you in these matters. Be sure to bring along with you to the interview a copy of any documents or court papers that might be helpful to your attorney.

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THE LEGAL EAGLE SERIES OF CLIENT HANDOUTS IS PREPARED BY MARK E. SULLIVAN, CHAIR OF THE MILITARY COMMITTEE, ABA FAMILY LAW SECTION AND AUTHOR OF *THE MILITARY DIVORCE HANDBOOK* (AM. BAR ASSN. 2nd Ed., August 2011). COMMENTS AND SUGGESTIONS SHOULD BE SENT TO HIM AT: 2626 GLENWOOD AVENUE, STE. 195, RALEIGH, N.C. 27608 [919-832-8507]; E-MAIL— MARK.SULLIVAN@NCFAMILYLAW.COM