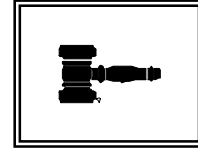




CO-COUNSEL BULLETIN



DI VORCE PROCEDURES

Grounds and Procedure

There are two grounds for absolute divorce in North Carolina, but only one is ever used. The latter is separation for more than one year with the intent that the separation be permanent, which is found at G.S. 50-6. The other ground, three years' incurable insanity under G.S. 50-5.1, is rarely pleaded.

It is important to remember that a complaint for divorce and a divorce judgment must be *verified* before a notary public and the divorce complaint and judgment must contain the names and ages of all minor children born of the marriage. The purpose of the latter is to avoid spurious denials of paternity and unnecessary paternity litigation. Clear and explicit advice about this and the effect of *res judicata* and collateral estoppel is very important for the client who might later decide to challenge the paternity of a child that was born during the marriage.

The complaint must be served on the spouse at least 30 days before the hearing. To be safe, wait an extra week or so to allow her/him to answer. Sometimes the spouse will ask for an extension of time by another 30 days, and the clerk can grant this without a hearing.

Common Misconceptions

Legal assistance attorneys must, at the outset, clarify the clients' understanding about certain divorce-related issues. The client who, for example, says "My husband won't give me a divorce" does not understand that it is the judge who gives you a divorce, not your husband or your wife. The husband and wife are merely parties to the lawsuit. Either party can set a hearing on the issue of divorce. Unless there is a mistake in the complaint or the defendant denies an allegation, the divorce should be granted routinely.

Another misconception is that "We can't get a divorce yet -- we don't have a legal separation." All the statute requires for a complaint for absolute divorce is living apart for more than one year, concurrent with the intent on the part of at least one of the parties that the separation be permanent. A separation agreement or other documentation will not slow down or speed up the process of divorce in North Carolina, although it probably will have many other benefits for the client in terms of settling out understandable and enforceable promises for the husband and wife. A separation means that the parties have been living under different roofs (not in the same building).

The major problem often involves the date of separation. As long as the date of separation is more than one year before the filing of the action, the divorce will be granted, even if the date found by the court upon oral testimony is not the same as the date set out in the complaint. It is important to remember that the client cannot file for divorce on the exact anniversary of the separation. The date of filing must be "more than one year" after the separation of the parties, meaning that at least one year plus one day of separation is required for filing of the divorce complaint. Anything earlier than this is a ticket to dismissal.

A Quick Divorce

Yet another misunderstanding is the idea that a quick divorce can be obtained by annulment or obtaining a foreign divorce. An annulment is not a "quickie divorce"--it is a judicial declaration that no marriage has ever occurred because of some recognized bar to existence of the marriage contract. Examples of such a bar would be a prior subsisting marriage of one of the parties (bigamy) or marriage to a person who is under the legal age of consent or within a prohibited degree of kinship. This is not the case with most soldiers who want a "quickie divorce."

What about a foreign divorce? The soldier who asks about divorce in the Dominican Republic (or some other West Indies island) must be given the same discouragement as one gives to the potential annulment plaintiff -- unless the military dient is a bona fide domiciliary of that jurisdiction (or the spouse is), its courts have no authority to grant a divorce. The dient can indeed go through an expensive charade to get a foreign divorce document, but the decree is (depending upon the prevailing law) void or voidable, and it is certainly subject to collateral attack by innocent third parties. The best advice to give the military dient is that foreign divorces are no good and will not be recognized by any legal authority as valid.

A Potential Trap

North Carolina, like other states, requires the domicile of one of the parties to be in this state. There is, however, a statute (G.S. 50-18) which states that:

In any action instituted and prosecuted under this Chapter, allegation and proof that the plaintiff or the defendant has resided or been stationed at a United States army, navy, marine corps, coast guard or air force installation or reservation or any other location pursuant to military duty within this State for a period of six months next preceding the institution of the action shall constitute compliance with the residence requirements set forth in this Chapter.

This would appear to allow SGT Smith, who has been stationed here for over 6 months but is domiciled elsewhere, to file here for divorce against his wife who does not live in North Carolina and is not domiciled here. Not true. A 1961 decision of the N.C. Supreme Court, Martin v. Martin, has construed this to mean that SGT Smith's living on base does not disqualify him from claiming that he is living in this state. The Court stated that this statute is not to be construed to mean that domicile is not required for the court to assert jurisdiction over the marriage of the parties. Domicile still is required, and this restrictive interpretation will mean that, when neither party is domiciled here, the suit for divorce or dissolution will have to be filed elsewhere. This means that a party must be domiciled in NC (and have indications of this domicile, such as paying taxes, home ownership or voting).

When you think about it, the only person who would be adversely affected by this restrictive interpretation is the servicemember who is domiciled elsewhere, wants to get a divorce here and has a spouse in another state. This dient could not get a divorce in North Carolina. Other points to remember are:

- a. As the Martin case points out, a servicemember may still claim North Carolina as his domicile (so long as he can prove it at the hearing on divorce). A key issue if this occurs will be whether the member has been paying state income and personal property taxes.
- b. A servicemember can still get a divorce here if the spouse is residing here and domiciled in North Carolina. In analyzing the spouse's domicile, remember that non-military spouses do not have the SSCRA's protections as to retention of their original domiciles -- each new state of residence is deemed to be their domicile under most states' laws.

Regardless of whether the divorce is contested or not (and almost no divorce in North Carolina is ever contested in the true sense of the word), the court will conduct a hearing. And the judge will listen to testimony (or review evidence) from one of the parties (ordinarily the plaintiff) before granting a judgment of absolute divorce. If the plaintiff is outside North Carolina or otherwise unavailable at the time of the divorce hearing, the opposing party may give the routine divorce testimony. Divorce by summary judgment is also available and this avoids the requirement of oral testimony in court. As to a soldier who is stationed overseas and wishes to obtain a judgment of divorce in North Carolina, see "Divorce American Style...Overseas," The Army Lawyer, October 1986.

Effects of Divorce

The effect of a judgment of absolute divorce is to make the parties single and unmarried. The judgment usually accomplishes nothing more, with matters of child support, custody, alimony and equitable distribution preserved (if raised in the pleadings) for further orders of the court.

The judgment of absolute divorce is effective upon the court's signing of same; there is no "waiting period" for the divorce to "become final" in North Carolina. Upon request of the plaintiff or defendant in the pleadings, the court can provide in the judgment for the wife to resume the use of her maiden name or that of a deceased prior husband. After the divorce is granted, the judgment is docketed in and filed with the Clerk of Superior Court, and the Clerk will usually give to the plaintiff one free certified copy for his or her permanent records.

Finally, it is essential to know what the granting of a divorce judgment destroys. In North Carolina, any claim for equitable distribution of marital property or for alimony, if not already asserted in the pleadings in the case (or in some other case) will be destroyed upon the rendering of a judgment of absolute divorce. It is especially important to tell those clients whose claims for pension division have been reserved under the terms of a separation agreement to go ahead now and hire a lawyer so they can file for equitable distribution of this asset. RESERVED does not mean that the spouse is entitled to it yet; it just means that it is saved until the divorce, but it must be claimed by then (in a counterclaim if the spouse is the defendant) or else it will be completely lost.

Here's a checklist. Make sure that the client has been advised:

✓	BASIC ADVICE
	Don't file for divorce until you've been separated for at least a year and a day.
	You (or your spouse) must be a legal resident of NC to file for divorce here.
	You must sign a verification of the divorce complaint before a notary public over a year after your separation.
	Don't calendar the hearing till at least a month has passed since the papers were served and there's no response from your spouse.
	Be sure to recite the names and ages of the children born of the marriage.
	State that the separation was intended to be permanent by at least one of the parties when it occurred.
	Serve the other side by certified mail, return receipt requested, or by sheriff or process-server, and then get proof of service for the court file.
	Pension, property division and alimony claims are GONE unless you assert them in a counterclaim to the divorce action.

(rev. 11/1/2004)

* * *

The CO-COUNSEL BULLETIN series of information papers for JAG officers in North Carolina is a product of the NC State Bar's Standing Committee on Legal Assistance for Military Personnel (LAMP). For comments or corrections, contact LAMP Committee member Mark E. Sullivan, 919-832-8507, or at law8507@aol.com.