

## A Roadmap for Divorce and Annulment

Mark E. Sullivan

2008 NC State Bar LAMP Conference

"I was married by a judge. I  
should have asked for a jury"

- Groucho Marx

"Marriage is an adventure, like  
going to war"

- G.K. Chesterton

"I don't think I'll get married  
again. I'll just find someone I  
don't like and give them a  
house."

- Lewis Grizzard

"Nothing says lovin' like marrying your cousin!"

- Al Bundy

## Divorce Basics

- Marriage
- Domicile
- Grounds

## Divorce Basics

### Overview of Process

- NY, Wisconsin -- "package deal"
- NC, Delaware -- "one claim at a time"

## Marriage

- Valid marriage = undo with a divorce
- Purported marriage, invalid mg contract = annulment
  - declaration that no marriage exists
  - common grounds: prior subsisting mg, nonage

## Domicile

### Williams v. NC, US Sup Ct, 1945

- One of the parties must be domiciled in state which grants divorce
  - domicile = where one lives [Andris, 309 SE2d 570 (NC App '83 )]
  - domicile if temporary absence
  - SSCRA and domicile
- State 2 is not bound by State 1's def'n of domicile

## Holding in Mayer

- Dom. Rep. divorce not valid, neither party domiciled there;
- But, by his own conduct, B is estopped to challenge validity of divorce.
- See also Atassi, 451 SE2d 37 1 (NC App '95): H did not clearly show that he was true domiciliary of Syria for purposes of recognition of purported decree of divorce from there.

## Domicile: An Example

### Mayer v. Mayer: 311 SE2d 659 (NC App '84)

- Mrs. Mayer and Boyfriend [B] fly to Dom. Republic to get her a divorce.
- Then they marry.
- Later they separate; Mrs. Mayer sues B for alimony.
- B defends: "We're not married!"

## Impact on the JA Today . . .

### NCGS 50-18

- Statute appears to say that SM stationed here for 6 months can file for divorce in NC.
- But see Martin, 118 SE2d 29 (NC '61)
  - Mere presence not enough
  - Domicile required
  - Statute really means that living on base is OK for domicile [if other aspects are also there]

## Impact on the JA Today

- Don't advise divorce in NC if neither party domiciled here!
- Examine the J/D basis for divorce if client brings you a decree.

## Top 10 Kids' Biblical Views on Family

7. Solomon, one of David's sons, had 300 wives and 700 porcupines.
6. Jesus was born because Mary had an immaculate contraption.
5. St. Paul converted to Christianity. He preached holy acrimony, which is another word for marriage.

## Top 10 Kids' Biblical Views on Family

10. Noah's wife was called Joan of Ark
9. Lot's wife was a pillar of salt by day, but a ball of fire by night
8. The greatest miracle in the Bible is when Joshua told his son to stand still and he obeyed him

## Top 10 Kids' Biblical Views on Family

4. The first commandment was when Eve told Adam to eat the apple.
3. The fifth commandment is to humor your mother and father.
2. The seventh commandment is thou shalt not admit adultery.

## Top 10 Kids' Biblical Views on Family

1. A Christian should have only one spouse. This is called . . .

**Monotony!**

## Common Questions:

- "Living apart in same house?"
- "Isolated acts of sexual relations during 1 year?"
- "File on 1-year anniversary?"

## Grounds for Divorce

### **NCGS 50-6**

- Parties have lived apart
- For more than a year
- With intention that it be permanent

## Effects of Divorce

- Single again
- Maiden name
- Bar to alimony, E/D if not claimed before divorce granted
- Snapshot of divorce hearing

## Snapshot of divorce hearing

- Done by summary judgment usually, no testimony
- If testimony
- Judgment effective immediately; no "waiting period"
- No separation agreement required
- Possible incorporation of sep. gr. (if requested)

## Change of Name

- To maiden name during divorce
- [same] after divorce
- Any other name change: before the Clerk
  - 10 days' notice
  - 2 affidavits of good character

## Incorporation of sep. agr.

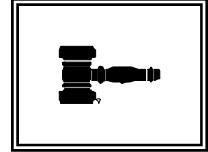
- Without incorporation – just a contract
  - No modification without joint consent
  - Enforcement mechanisms...
- With incorporation – becomes ct order
  - Violation is contempt of court
  - Court can modify
    - Executory promises
    - If change of circumstances

## The End

A "Divorce Road Map"



# CO-COUNSEL BULLETIN



## IMPORTANT ISSUES IN FAMILY LAW COUNSELING

.....FROM SILENT PARTNER, "HOT TIPS ON MIL DIV- A BAKER'S DOZEN"

1. DON'T SAVE THE PROPERTY DIVISION CLAIM TILL AFTER THE DIVORCE. In many states the claim must be asserted in court documents [answer, counterclaim, motion or complaint] before the divorce is granted; otherwise, it's lost. That's an expensive mistake!
2. GET A COURT ORDER FOR ALIMONY OR CHILD SUPPORT if you represent the recipient. Use a voluntary support agreement, a confession of judgment or some other form of court order, even if it means hiring civilian counsel for your client -- so that you'll have the remedies of contempt or garnishment if there's no payment.
3. KEEP A RECORD OF WHAT YOU DO. Outline everything on the computer -- for every client you see. Use "Bullets & Numbering" to set up an outline template. Save your work on the hard drive, then on a floppy disk, and be sure to back up every night!
4. "FLYING BLIND" IS DEFINITELY NOT A GOOD IDEA. If you don't know what you're doing, **STOP**. You cannot ethically practice law or advise clients if you don't know the law. Either decline the case or associate competent co-counsel -- these are ethical requirements for all JAGs and civilian attorneys. [see Sullivan, "When to Say NO," ABA Legal Assistance Newsletter, April 1984]
5. IF YOU'RE RESERVING PENSION DIVISION, EXPLAIN IT TO YOUR CLIENT. Most clients think reserving pension division means it's secured and they need do nothing more about it. Explain to the clients in plain English [and also write it down for them!] that this merely means that they'll have to get a lawyer when divorce time rolls around to help file the claim in court -- otherwise it's lost! Better yet, send them a certified letter explaining this -- it's all too easy to forget or misunderstand this important point. And remember, most of our clients are not lawyers!
6. "GOODBYE, ALIMONY" IF IT'S NOT CLAIMED (IN COURT) BEFORE DIVORCE. An alimony claim in many states must be asserted in the pleadings (such as a counterclaim to the other party's divorce complaint) in order to be preserved for after the divorce. Make sure you get a lawyer for Mrs. Jones if she's a dependent spouse; this is an important issue for many military spouses who are mainly homemakers or "military wives."
7. "REASONABLE VISITATION" IS MEANINGLESS IF PARENTS CANNOT AGREE, Be sure to use a "default solution" for structured visitation in case the parties cannot decide on

what's reasonable. That way, if they can agree on visitation, then the "reasonable option" governs -- and if they cannot agree, the noncustodial parent has something to fall back on.

8. KNOW HOW TO REFER A CLIENT TO A GOOD CIVILIAN ATTORNEY. Contact the state bar or bar association in the city or county where the lawsuit should be filed (or has been filed already). Use the Legal Assistance and Reserve Component Office Directory for the names of Reserve attorneys in the area. Call the bar association and ask for the staffer who works with the Family Law Section, so you can ask who might handle a "military case" in that state. See "Lawyer Referral... Do's and Taboos," in the June 1988 issue of The Army Lawyer. Call the state bar or bar association to see if they have a lawyer referral service. Check with them to see if there's a list of certified specialists in family law – over half the states have licensed specialists for specific areas of the law.
9. DIVORCE (IN SOME STATES) MAKES YOU SINGLE AGAIN -- NOTHING ELSE. There are two different approaches to divorce in the state. In places like New York, Wisconsin and Washington, the law requires the parties to resolve all the other marital issues at the divorce hearing (or before). In states such as South Carolina, North Carolina and Delaware, that's not the case – the other claims can precede or follow the divorce, but a divorce hearing is only a chance to change your marital status [and possibly get back your maiden name]. Know the difference!
10. "SILENCE IS GOLDEN?"... OR "SILENCE IS DANGEROUS"? What happens when you can't reach agreement on a contested issue in a separation agreement? When in doubt, write it out. Don't let silence be misinterpreted as agreement, and don't let the general release clause found in most agreements wipe out a good claim for alimony or property division.
11. WHEN IN DOUBT, ASK! Know your resources – SJA, deputy, section chief, head of the law center, civilian attorneys or Reservists. When you've got a tough nut to crack, be smart enough to ask around. The only dumb question is one you never ask!
12. DON'T FORGET THE SBP. You're not doing your job in dividing a military pension for the spouse unless you ensure she gets SBP coverage or equivalent insurance in the event of the service member's death. And don't settle for SGLI – under a 1983 U.S. Supreme Court case called Ridgway, the courts cannot enforce agreements to provide SGLI as part of a divorce settlement.
13. KNOW YOUR RESOURCES. Read The Army Lawyer and stay in touch with legal assistance issues through the Legal Assistance Forum on JAGCNET so you'll know what's happening. Keep current copies of the *Co-Counsel Bulletins* and *Silent Partner* infoletters (for JAGs) at your desk at all times; make sure you've read them thoroughly. The same goes for the client handouts: TAKE-1, *Legal Eagle* and *From Counsel*. Make sure you've read what your clients should be reading, so you'll know what printed advice they've been given. Know where your resources are on the Internet. Go to the bar association meetings as often as they are held – this will help you stay current on the law and on what's happening in the courts (which is just as important as what the law is, anyway). Attend CLE programs to stay current. Borrow videotapes from TJAGSA. You can't know too much!



.....

SEPARATION AGREEMENT POINTERS – Comments from Chief Dist. Court Judge Elizabeth Keever, 3/26/03

✓	QUESTION OR ISSUE	COMMENTS
<b>SEPARATION AGREEMENTS</b>		
	Are you practicing law or just acting as a scribe?	
	Write the separation agreement as a full and final agreement	Separation agreements do not terminate automatically upon divorce. They are intended as a permanent resolution of the parties' marital rights.
	The agreement should indicate whether it is an integrated or non-integrated agreement.	You should state whether the various agreements are interdependent and were based on the total agreement. (For example, the dependent spouse agreed to a lesser amount of alimony or child support based on the amount of property received.)
	The agreement should also indicate what happens if the parties reconcile after signing it.	
	Be sure that you don't have inconsistent statements in different sections.	For example, a provision under alimony that the supporting spouse will pay the Mastercard debt and under the property division section, that each party will pay the debts in their name (when the Mastercard debt is in the dependent spouse's name) or a provision that waives equitable distribution but reserves the issue of the military pension.
		North Carolina law allows the payment of alimony to a dependent spouse. Permanent alimony continues until the death of either spouse or the remarriage or cohabitation of the dependent spouse unless a shorter period of time is specifically agreed upon.
<b>CHILD CUSTODY/CHILD SUPPORT</b>		
	Information should be included in the agreement as to the parties' incomes and the basis for the child support.	
	If the amount is based on the North Carolina Child Support Guidelines, that should be indicated.	
	Specific amounts should be set out – not just "BAH"	
	If the child support is to continue past age 18 or graduation from high school, whichever is later, that should be specifically set out and the reason it may continue should be set out.	
	Make sure that the various provisions of the agreement are consistent.	For example, if you indicate in a provision on the residence that the noncustodial parent is to make the house payment as child support and then in the child support section indicate that he/she is to pay \$700.00, be sure that you mean that he/she is to pay both and not that the house payment is \$700.00 and you assume everyone understands that. Have a colleague review your separation

		agreement before signing.
	What happens if one of the parties relocates, what will visitation be, who will pay transportation costs?	
	If providing for joint custody, define what the parties mean by joint.	North Carolina has no definition of "joint custody".
<b>DIVISION OF PROPERTY</b>		
		North Carolina is an equitable distribution state not a community property state and not automatically a 50/50 state.
	If the parties own real property and they agree that it is to be sold, need specific provisions.	How will they agree on a real estate agent, how will they agree on an offer, who is to pay the mortgage until sold, who will pay for repairs, how will the proceeds be divided, what if it doesn't sell?
		Don't just say who gets to use or possess the residence, spell out who will own it and that they are required to sign the appropriate deeds
		Don't include a provision that simply says the custodial parent will continue to reside in the residence until the children are emancipated. You need to set out what happens then.
<b>MILITARY PENSION</b>		
		Under North Carolina law, all pensions earned during the marriage, whether vested or non-vested, are subject to division. If during the marriage, one party is in the military for 4 years, then the other party may be entitled to a portion of that pension.
		The ten-year provision often referred to in military pensions is a reference to a direct payout from the military, not a basis for entitlement to a portion of the pension. If a non-service member receives a portion of the military pension and was married to the service member for at least 10 years during service, then the pension may be paid directly to her/him from the Military Retirement Center. This direct pay option should be provided for in the agreement.
		Further, a provision should be included allowing entry of an order for direct pay as finance will not pay directly based only on a separation agreement.
		If the parties are in agreement that the non-military party is to receive her portion of the retirement, assuming the service member makes it to retirement, a formula can be placed directly into the agreement. This is a better option than saying that the right to the military pension will be determined upon retirement. This language is often inconsistent with other provisions

		indicating that this agreement contains a full and final settlement of all the property rights of the parties.
		Often referred to as the Seifert formula for the case in which it was set out, it provides for a payment equal to 50% X mo. of marriage during service ÷ total mo. of mil. svc. X Final Retired Pay
		It should require the military member to make the election at the time required by the Military Retirement Center.
<b>MALPRACTICE</b>		
		Remember that you and the government can be sued for malpractice under the Federal Tort Claims Act. In fact, local JAG attorneys have been sued and awards entered based on incorrect information provided to spouses in the preparation of separation agreements.

[rev. 10-17-08]