

A CLIENT'S INTRODUCTION TO DIVORCE

The following material is intended to answer some of your questions about divorce proceedings, generally. It is not intended to answer specific questions about your particular case, as each case is different.

The dissolution of a marriage may be a traumatic experience, and your attorney is well aware of the emotional involvement of the parties. Though we are not behavioral specialists, we attempt to relieve your anxiety by attempting to assist in solving the problems which confront you during these proceedings.

In order to properly represent you, it is absolutely necessary for you not only to provide us with all the facts concerning your matter, but we must know your wishes, and we welcome your viewpoints. Withholding information from your lawyer may affect the outcome of your case, so we advise you to be completely candid with us. Remember, that a fiduciary relationship exists between attorney and client.

Although we will counsel and advise you throughout the proceedings, the final decisions regarding your case must be made by you. Our experience has shown that most divorce cases are settled, which means in those matters, the parties eventually, through their attorneys, reach an agreement which is placed upon the court's record. NEVER AGREE TO SOMETHING YOU DO NOT UNDERSTAND NOR SOMETHING YOU FEEL YOU ARE **FORCED** TO AGREE TO. YOUR CONSENT TO AN AGREEMENT MUST BE VOLUNTARILY MADE, AFTER CONSULTATION WITH YOUR ATTORNEY. After an agreement is placed upon the record, it is extremely difficult if not impossible to change.

Finally, as your representatives, we are here to advise and inform you, cite the options and alternatives available to you, process your divorce matter, assist you in decision-making, and cooperate with you in attempting to obtain the best possible results in your behalf.

GROUND FOR DIVORCE

Michigan is known as a "no fault" divorce state; however, the words, "no fault" may be misleading. If the parties reach a final settlement on all issues, fault is not a factor. If there is a dispute as to alimony, property, support, visitations, or custody, fault may become an active ingredient in resolving these issues. That is the reason your attorney may go over with you the indiscretions of each party. It is extremely important to be open and honest with your attorney on these matters.

Basically, Michigan has one ground for divorce, which is as follows: "There has been a breakdown of the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved".

In Michigan, we have also provided for Separate Maintenance actions which are generally seldom processed. The procedure and cost is relatively the same as in a divorce matter, except that neither party may remarry. Further, the law provides that if one party institutes a Separate Maintenance suit, and the other party counter-files for divorce, the court will only consider the case as a divorce matter and cannot enter a Judgment of Separate Maintenance.

We also have Annulment proceedings in Michigan, which invalidates a marriage. Marriages may be void from the inception, or are voidable depending on the circumstances. The grounds include incapacity to marry such as insanity, bigamy, under age, or any type of fraud that goes to the heart of the marriage. Parties desiring an annulment must not cohabit, after having discovered the impediment to the marriage. If you have any questions about Separate Maintenance or Annulment, please advise us of same, as the following material basically concerns divorce (though there may be similarities with Divorce and Separate Maintenance and Annulment actions).

DIVORCE PROCEDURE

The initial filing of a divorce case may include the following documents:

1. **Summons.** This notified the other spouse that a suit has been started and he or she has 21 days, if personally served in Michigan, to respond or a default may be taken (28 days if served by mail or outside of Michigan).

2. **Complaint.** This document states the names of the parties, where, when, and by whom you were married, names and birthdays of children (if any), wife's and husband's name before marriage, length of residence in county and state, date of separation, grounds for divorce, a statement as to property, whether the wife is pregnant, and the relief requested. A party must reside in Michigan for at least 180 days and in the county where suit is started for at least 10 days. There are some exceptions to the residency requirements.

3. **Affidavit of Service and Return of Service** is filed when service is made.

4. **Affidavit of Previous Suit.** This informs the court as to whether a previous action of divorce between the parties has been filed.

5. **Verified Statement.** This is to inform the Friend of the Court of the essential facts (not necessary in cases where Friend of the Court Services are not required).

6. **Affidavit** concerning child's or children's living quarters during the past 5 years and that no custody action is pending regarding the child (only needed where there are minors).

7. **Record of Divorce.** This is a statistical record required by the state.

8. **Injunctions.** Only requested where needed to restrain spouse from committing certain acts. Your attorney will explain this procedure to you in detail and ask if you want an injunction.

9. **Ex Parte Orders.** This may be obtained for temporary custody, support, etc. An objection timely filed to the ex parte order will negate the effectiveness of the Order

until a hearing on this matter.

10. **Affidavit for Ex Parte Order.** A sworn statement that the facts stated in order to obtain the ex parte order are true.

11. **Filing Fee of \$100.00.** An additional \$30.00 is required if there are children. There is also the cost of serving papers and entry of Judgment. Later on, there may be other costs for services such as services from appraisers, actuaries, accountants, depositions, etc. You will be advised before any of these expenses are incurred, so you may negate them.

12. **Notice of Hearing On a Motion, Motions and \$20.00 Filing Fee** for interim relief which requires a hearing. A motion is a plea to the court for some type of relief. A Notice of Hearing On a Motion merely advises that a hearing will be held.

Procedure:

The Plaintiff is the party who starts the lawsuit and the Defendant is the person against whom the suit is filed. Generally speaking, this is no legal significance as to which party is Plaintiff, but this is a matter to be discussed on an individual basis with your attorney. All proceedings in the divorce matter are finally resolved by the Circuit Court in which the case is started. The Friend of the Court is an arm of the court which is used to assist the Court. They usually make recommendations as to alimony, support, custody, and visitation rights. They also collect and distribute alimony and support payments. They also may seek enforcement of court orders dealing with support, visitation rights, and alimony. The court may use the Friend of the Court for other miscellaneous duties.

After the Complaint and Summons are served, the Defendant may file an answer to the Complaint, which is, in effect, a paragraph by paragraph response to the Complaint.

Once the answer is filed, the case is contested (in some jurisdictions a praecipe must be filed with the answer). If no action is taken by the Defendant, a Default is entered, indicating the Defendant's lack of response, and the matter becomes an uncontested

divorce case. The Defendant may desire not only to answer the Complaint, but desire to file his or her own Complaint. This is known as a Counter-Claim and this must be answered by the Plaintiff.

A divorce cannot be granted in less than 60 days. Where there are minor children the parties must wait 6 months. However, the 6-month period may be waived upon a proper showing of circumstances, warranting same. No divorce is granted without a court hearing as to the truth of the statements made in the Complaint.

Temporary orders for custody, support, spousal support, mortgage payments, medical payments, parenting time, injunctions, and other relief may be requested at any time between the time you start your case and a Judgment of Divorce is entered. A temporary injunction restrains a party from doing something. One type of injunction deals with violence and another type restrains a party from selling, disposing or dissipating assets. If properly pleaded in the initial papers, these can sometimes be issued ex-parte; meaning without a hearing.

Temporary orders of child support are based on the statewide Child Support Guidelines. Generally, spousal support is based on needs and ability to pay. The life-style of the parties is also taken into consideration in awarding spousal support. Child custody disputes, involve a best interest of the minor children test, and require the Court to evaluate eleven factors listed in the child custody act (see CHILD CUSTODY below for the list of factors). The procedures and preparation of such a case is much too involved for this discussion, and must be left to individual conferences with your attorney.

The court may also award temporary attorney fees to assist a party with their costs of obtaining counsel. This is usually obtained in the same way as any other motion and may be part of a motion requesting other relief. It will nonetheless still be the responsibility of each client to pay their attorney an initial retainer or engagement fee which will vary with the complexity of the case. Retainers and engagement fees in our office are always a topic of discussion at the initial consultation.

DURING THE PENDENCY OF THE DIVORCE

This period is usually spent in defining the issues and trying to resolve them. We also attempt to find the net worth of the parties and the general financial status of the family. Interrogatories may be sent out requiring answers under oath from the recipient, which typically request complete financial data and supporting documents. Depositions may also be taken (with consent of client), to obtain further information from the other spouse or those that have the needed information. Appraisers, actuaries, (if pensions are involved), accountants or behavioral people may be used (with the client's prior consent). You and your attorney, after the discovery work has been completed, will set the goals you wish to attain. This will not be done hastily, and you will be given an opportunity to study the proposed settlement. The attorney will advise you as to the likelihood of acceptance of your proposals or what a court may do.

If a settlement is not reached at this point, the court may appoint a mediator to help resolve the matter or, the parties may agree to a mediation. If no agreement is reached, the mediator makes a recommendation that is not binding and the court may not see the recommendation. In rare instances, an arbitrator is appointed and his recommendation is binding on both parties.

The attorneys may call a meeting, with both parties present, and try to resolve as many issues as possible. This is a voluntary process, and either party may decline to attend.

If settlement is reached, the parties will be asked to sign a property settlement form containing all the provisions of the settlement. Further, the parties may be required to approve the settlement in court, before the Judge, after it is placed on the record.

JUDGMENT

The Judgment of Divorce is the most important document you will receive. After a settlement is reached and/or the case is tried, the Judgment of Divorce will be entered by the court, as your final decree, granting you a divorce. It will also contain clauses dealing

with such matters as spousal support, child custody, child support, parenting time, insurance, dower rights, property settlement and other miscellaneous clauses. If a settlement has been reached, you must carefully read and examine this Judgment, and have your attorney explain it to you before you approve it.

ALIMONY

Alimony, also called spousal support, is a sum of money paid by one spouse to the other spouse for the support and maintenance of a spouse. The factors considered by the court in awarding alimony are as follows:

1. The past relations and conduct of the parties.
2. The length of the marriage.
3. The ability of the parties to work.
4. The source and amount of property awarded to the parties.
5. The ability of the parties to pay alimony.
6. The present situation of the parties.
7. The needs of the parties.
8. The health of the parties.
9. The prior standard of living of the parties and whether either is responsible for the support of others.

Judgments of Divorce in which alimony is not granted must either expressly reserve the question of alimony or rule that neither party is entitled to alimony. Regular or periodic alimony clauses in the Judgment of Divorce are modifiable at any time and may be raised, lowered or cancelled. A modification is based upon a showing of a change in circumstances, which would warrant a modification. Regular or periodic alimony is usually taxable to the recipient, and is deductible by the payor. This type of alimony is not dischargeable in bankruptcy. It may have qualifying clauses such as "payable until remarriage".

Another type of alimony, referred to as Alimony in Gross, has all the attributes of a property settlement; however, it is not taxable to the recipient, it is not deductible by the payor, and is not modifiable; however, it may be subject to being discharged in bankruptcy. This type of alimony is for an amount certain and has no qualifying clauses such as

"payable until remarriage". The court will look to the intent of the parties to determine the nature of the alimony.

There are many tax consequences and restrictions in regard to alimony and Alimony in Gross, which should be explained to you by your attorney or your accountant. As tax laws and their interpretation continually change, as well as state laws and their interpretations, your attorney cannot guarantee any tax consequences resulting from your divorce proceedings and the Judgment of Divorce.

Alimony is usually paid through the office of the Friend of the Court. This enables a party to obtain an accurate record of these payments. Also, it makes it easier to request assistance from the Friend of the Court in the event that payments are not forthcoming, or if a spouse denies receiving said payments.

Enforcement of regular or periodic alimony payments is usually instituted by an Order to Show Cause. The procedure will be explained to you by your attorney, upon request. Alimony in gross is more difficult to enforce, and there are other types of procedures available for enforcement.

In regard to health care provisions, your attorney will explain to you, upon request, your options including your right, if applicable, to elect COBRA Health Care.

CHILD SUPPORT

The custodial parent is entitled to take the minor child or children, as dependents, for all tax purposes. The parties may agree that the noncustodial parent shall have this allowance and enter this agreement into the Judgment.

Child support is modifiable on the same basis as alimony. This support is usually ordered until the child attains the age of 18 years, or graduates from high school, so long as the minor child regularly attends high school on a full-time basis with a reasonable expectation of completing sufficient credits to graduate from high school while residing on

a full-time basis with the payee of support or at an institution, but in no case after the child reaches nineteen years and six months of age, or until further order of the court. Enforcement of payments is the same as for alimony. Non payment of court ordered support may lead to a contempt of court citation, resulting in a jail term.

If there is an arrearage of child support payments, medical expenses, etc. at the time of entry of Judgment, the Judgment of Divorce must contain a provision preserving this arrearage, or it will be lost. The same provision holds true for any monies owing under any temporary order. In order to preserve a temporary order, it must be so ordered in the Judgment of Divorce.

It should be further noted that every child support order now provides for the immediate and automatic withholding of child support payments from any source of the payor's income.

VISITATION

Visitation or parenting time is always granted to the noncustodial parent. The Judgment may state that general visitations are granted and leave it up to the parties to decide the dates; or specific visitation hours and dates may be written in the Judgment.

If long distances must be travelled to exercise this visitation, some arrangements can be made concerning the cost of same. Enforcement of visitation rights is made through contempt proceedings. Judgments of Divorce in Michigan must provide that the minor child may not be permanently removed from the jurisdiction of the court without the court's approval. To move with the child from the state, the custodial parent must petition the court for an Order granting same. Visitation orders are modifiable upon a showing of a change in circumstances warranting same. There is also a provision in the law for the makeup of visitations that have been wrongfully denied, and contempt of court action against the offending parent that can lead to a fine or jail term.

PROPERTY

The parties usually arrive at a settlement of all their property rights after negotiation or after mediation. If settlement is not reached, the matter will be decided by the court after the trial is concluded. Again, you are advised that you must be absolutely sure that you understand and accept the settlement as written, or placed on the record in open court, as property settlements are not modifiable, except in cases of fraud, clerical error, mistake, or gross unfairness in the initial trial. If your property includes retirement or pension plans, your attorney, upon request will explain your rights under the qualified domestic relations order (QDRO) procedures.

Enforcement of property settlements may be made through provisions provided in the Judgment by execution, show cause, garnishment, etc. Your attorney will explain these procedures to you, upon request.

In determining property issues, the court will usually consider the following:

1. duration of the marriage;
2. contributions of the parties to the marital estate;
3. age of the parties;
4. health of the parties;
5. life status of the parties;
6. necessities and circumstances of the parties;
7. earning abilities of the parties;
8. past relations and conduct of the parties; and
9. general principles of equity.

CHILD CUSTODY

This issue is the most emotional and traumatic part of the most divorce cases. There is sole custody, joint custody, "bird nest" custody, and many other forms. The basis for determining child custody is "what is in the best interest of the child". Due to the extensive nature of custody disputes and the laws involved, this subject is best left to an in-depth discussion with your attorney. You are advised to read and study the eleven factors which the court must consider in determining the best interest of the child:

- (a) The love, affection, and other emotional ties existing between the parties involved and the child.
- (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and continuation of the education and raising of the child in its religion or creed, if any.
- (c) 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 the medical care, and other material needs.
- (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
- (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
- (f) The moral fitness of the parties involved.
- (g) The mental and physical health of the parties involved.
- (h) The home, school, and community record of the child.
- (i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.
- (j) 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.
- (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
- (l) Any other factor considered by the court to be relevant to a particular child custody dispute.

When there are custody disputes, the parents must be advised as to joint custody:

- (1) At the request of either parent, the court shall consider an award of joint custody, and shall state why joint custody may or may not be considered by the court. The court shall determine whether joint custody is in the best interest of the child by considering the following factors:
 - (a) The factors enumerated above.
 - (b) Whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child.
- (2) If the parents agree on joint custody, the court shall award joint custody unless the court determines on the record, that clear and convincing evidence affecting the welfare of the child dictates otherwise.

- (3) That if the court awards joint custody, the court may include in its award a statement regarding when the child shall reside with each parent, or may provide that physical custody be shared by the parents in a manner to assure the child continuing contact with both parents.
- (4) During the time the child resides with a parent, that parent shall decide all routine matters concerning the child.
- (5) If there is a dispute regarding residence, the court shall state the basis for a residency award on the record in writing.
- (6) Joint custody shall not eliminate the responsibility for child support. Each parent shall be responsible for child support based on the needs of the child and the actual resources of each parent. If a parent would otherwise be unable to maintain adequate housing for the child and the other parent has sufficient sources, the court may order modified support payments for a portion of housing expenses, even during a period when the child is not residing in the home of the parent receiving support. An order of joint custody, in and of itself, shall not constitute grounds for modifying a support order.
- (7) As used in this section, "joint custody" means an order of the court in which one or both of the following is specified:
 - (a) That the child shall reside alternately for specific periods with each of the parents.
 - (b) That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child.

Child custody orders are modifiable. The court will consider the time the child has lived in a stable custodial environment and what is in the best interest of the child. It should be remembered that the child's preference, though an important factor, is just one factor to be considered in the 11 factors cited above.

ATTORNEY FEES

Our fees are based on the Rules of Professional Conduct, a copy of that part which deal with fees will be furnished to you upon request.

As your attorney has no way of knowing how much time must be spent on your case, we cannot estimate with specificity what your ultimate fee will be at the conclusion of your case. Our fees are based, pursuant to the aforementioned Rules, on a number of factors, which includes: the amount and nature of the services rendered, the time, labor

and difficulty involved, the character and importance of the litigation, the amount of assets and value of the estate affected, and the requisite professional skill and expertise exercised by your attorney as well as novelty and difficulty of the questions involved and the results obtained. An hourly rate will be quoted to you by your attorney, which may be helpful in assessing the amount of fees due. You will also be responsible for disbursements made on your behalf by your attorney for such items as court costs, filing fees, service of pleadings, appraisals, expert witness fees, etc. You will be charged for consultations, correspondence, phone calls, office and research work, court time, filing, and hearings. In the event your spouse is ordered to contribute to your attorney's fees, you will be given credit on the amount your spouse pays. A lawyer shall not enter into an agreement for, charge, or collect a contingent fee in a divorce case.

MISCELLANEOUS

Many matters may arise after the case is concluded for which counsel should be retained. These matters may be for enforcement of support, alimony, visitation, or property provisions. Further, Michigan now permits personal injury actions for physical or emotional injuries inflicted by a spouse or former spouse during the marriage or afterwards.

CONCLUSION

Many divorce cases end in a reconciliation of the parties. If there is viability in your marriage and a chance to save it, we will be pleased to recommend marriage counselors to you and assist you in every possible way to affect this reconciliation. If, on the other hand, you believe the marriage is over, we will do our utmost to obtain a Judgment of Divorce that is satisfactory to you.

Because divorce proceedings today are difficult, and extensive work may be necessary, we use a team approach which involves you, your attorney, your therapist and, if necessary and appropriate, your accountant or financial advisor.

This dissertation merely touches the basic elements of divorce and divorce

proceedings. It is not to be considered as the last word on the subject, but merely as a helpful guide. It is provided for the purpose of making you more aware of procedures and more knowledgeable about divorce laws generally. You must also be advised that family laws constantly change and some of the statements made may become obsolete. If this occurs while your case is pending, we will apprise you of same. Literature on divorce and divorce stress will be recommended to you upon request, as well as divorce matters dealing with children.

As your attorney, I have more than 30 years experience and expertise in the field of family law, and I am aware of the pressures and the personal difficulties faced by a person involved in the divorce process. I will attempt to ease and hopefully eliminate the cause and effect of these problems. If you have any questions, please do not hesitate to call or arrange for an appointment.

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Wayne C. Shehan, is a **1969 Juris Doctorate** graduate of the University of Detroit School of Law. Mr. Shehan has been licensed to practice law in **all courts** of the state of Michigan since 1969, and the **Federal court system** since 1972.

As a member of the State Bar of Michigan, Mr. Shehan holds membership in the Family Law section, the General Practice section, the Legal Economics section, and the Probate and Estate Planning section. He is also a member of the Macomb County Bar Association and the Michigan Trial Lawyers Association.

Mr. Shehan serves as both a **negligence mediator** and a **divorce mediator** in the Macomb County Circuit Court and an **arbitrator** throughout the metropolitan Detroit area.

Mr. Shehan has spoken throughout the metropolitan Detroit area on the subjects of **Divorce, Custody and other aspects of Family law**; Estate Planning; Drunk Driving; Personal Injury law; Real Estate law; the Michigan Court System; and the Legal System and the Family.

Mr. Shehan is a **member of a very select group of lawyers** who have been recognized for their legal expertise and professional reputation; having been bestowed **the highest rating possible** by the **MARTINDALE HUBBELL LAW DIRECTORY**. Mr. Shehan is listed in the eminent publications **WHO'S WHO IN AMERICAN LAW**, **WHO'S WHO IN AMERICA** and **WHO'S WHO IN THE WORLD**, in recognition of his outstanding achievements in the practice of law.