OFTEN-ASKED QUESTIONS CONCERNING DIVORCE LAW PROCEDURE

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The Typical Stages in a Divorce Proceeding

Complaint for Divorce

One spouse files a document that can be as short as a simple two- or three-page sworn Complaint asking for a divorce and stating the basic facts of the case. That Complaint, along with a summons, is served on the other spouse by a process server. Whoever files first becomes the "Plaintiff"; the other spouse becomes the "Defendant." There is no real procedural advantage or disadvantage to filing first.

Answer and Counterclaim

The spouse receiving the Complaint may file an Answer, with or without a Counterclaim, requesting that the court make a final order different from the one requested by the Plaintiff. If no Answer to the Complaint if filed by the Defendant within 20 days after he or she is served, the Plaintiff can file default against the Defendant and can usually get a judgment on whatever terms the Plaintiff wants.

Temporary Relief

Either party, when filing the Complaint or the Answer, may have the Clerk issue upon request a "Joint Preliminary Injunction" which provides that both parties are restrained from: (1) transferring, encumbering, concealing, selling or otherwise disposing of any joint, common or community property, except in the usual course of business or for the necessities of life, without the written consent of the parties or the permission of the Court; (2) molesting, harassing, disturbing the peace of or committing an assault or battery upon the other spouse or a child or step-child; and (3) removing any child of the parties then residing in Nevada with an intent or effect of depriving the court of jurisdiction as to the child, without prior written consent of the other party, or advance permission of the court.

With the divorce Complaint itself, or with the Answer, or separately from either, a spouse may file a request for a more specific court order to be in effect during the divorce process. Such a request for temporary relief asks the court to have a hearing at which time the court, on a temporary basis, may order:

Custody of the minor children.
That the other spouse leave the residence.
Payment of spousal support or child support during the proceedings.
That a party be prevented from selling or borrowing against marital property except in the usual course of business.
An award of preliminary attorney's fees and costs of the petitioning spouse, generally on the basis of who has more funds available.

That either or both spouses do some act, or refrain from some act or behavior that the other finds objectionable, usually relating to the children, house, or possessions.

Generally, the hearings on such preliminary motions are done on affidavits, including Affidavits of Financial Condition, and arguments of the attorneys only. While the clients usually attend, they do not usually testify. The court can decide, however, to set an "evidentiary hearing" on any contested issue, at which witnesses are called to the stand to testify. The issuance of a temporary order does not finally determine the rights of the parties. That occurs at the trial or by an agreed settlement of the parties. In reality, however, a "temporary" order regarding custody or possession of the residence can be given substantial weight later on in a case, especially if there is a long time between that order and the trial date.

In the event of a dispute about child custody or visitation, the parties are required by statute (in most cases) to go through the court's Family Mediation Center (FMC) for "mediation" (using a third party to try to get the parties to agreement on the issue). If mediation is impossible or fails, the case might be referred to an outside professional (therapist or psychologist) for "assessment" of the charges one or both spouses are making about the other's treatment of the children or fitness as a parent. The attorneys are not usually involved in the actual proceedings at FMC. The goal of these proceedings is to develop a Parenting Plan specifying legal custody, physical custody, and visitation issues. Other issues, such as money matters, are not included in FMC mediation in Clark County. The parties can mutually opt for a private mediator if they wish, and are free to mediate any part of the case if they both desire to do so.

If there are children involved in the case, both parties are also required to attend a three-to-four hour program called "Children Cope With Divorce" before a divorce can be granted. It is offered at various times and locations around town by different providers, and is intended to help both parties deal with the changes in the family structure and their impact on children.

Discovery

During litigation of the case, both parties can conduct "discovery" to gather evidence about whatever is in issue in the case. Types of discovery include the following:

A. *Interrogatories*

Written questions which the other spouse must answer under oath.

B. *Depositions*

A procedure in which the lawyers, without the judge being present, ask a witness questions under oath, and a court reporter makes a transcript of the testimony. A deposition is usually held at a lawyer's office.

C. *Requests for Production*

A written request that the other spouse or a third party provide copies of specified documents such as deeds, checks, tax returns and the like.

Discovery is a lengthy and often expensive phase of the litigation, but is necessary to make sure we are fully prepared to try your case without being surprised at trial, or to be sure that any settlement is based on a full understanding of all the available property and the facts.

Before any discovery can be started, a Joint Case Conference must be held by the attorneys for the parties. The conference is held in order to determine the length of time the discovery process should take, what types of discovery are expected to be needed, and to discuss the possible settlement of the case. Sometimes, on prior arrangement, the clients attend this meeting in an effort to reach settlement.

Final Hearing

If the parties reach a settlement, then may be a very short hearing where the judge approves the settlement and grants a decree of divorce; increasingly, courts are allowing all paperwork in such cases to be submitted without any hearing at all.

If the parties do not reach an agreed settlement, then a trial is held after discovery is finished and certain pre-trial papers are filed. The trial may take only a few hours, but if the issues are numerous and complex, it can go on for days, or even weeks. The judge sometimes renders a judgment at the close of trial; one or more issues can be taken under submission, however, for written decision after trial. The judge usually renders a decision within 60 days of the trial, but sometimes there are lengthy delays while awaiting a decision.

Appeals

Once a final judgment is entered, either party can appeal the judge's decision to the Nevada Supreme Court, but an appeal ***must*** be filed within thirty days of written notice of entry of judgment, or it is barred forever. An appeal is almost always an expensive endeavor taking at least a year to complete, although some matters can be moved more quickly. The Supreme Court can affirm the trial court, reverse its decision, or remand some or all of the dispute back to the court for further attention. Current rules set up an appellate-level settlement conference at the beginning of the appeal process.

It is sometimes possible to correct certain kinds of errors in the judgment at the district court level, but that requires establishing fraud, mutual mistake, coercion, etc., and is also time-limited as to when it can be brought to court. Some motions are limited to ten days, others to six months from the date of the order alleged to be in error. If you are ever not satisfied with a result obtained, you must discuss with your attorney what options might be available, immediately after entry of the order, so that no critical time deadlines pass.

Why Can't We Avoid Going To Court?

You can. The overwhelming majority of divorce cases, like all other cases, are settled. That is, there is no need for a trial.

Of course, to settle both parties must agree. There is usually bargaining, sometimes even posturing. Typically, parties settle out of a concern that they may do worse at trial. Since no one knows for sure how a judge will rule, the anticipated results are a matter of the attorney's judgment and experience.

Sometimes there are other factors which drive the case toward settlement, such as saving litigation costs, a desire for a prompt disposition of the case, or the feelings of the parties toward each other.

We usually advise that we should negotiate seriously, in good faith, with a view toward reaching resolution of the case. But negotiations should be carried on so that the other side does not sense that we are willing to sacrifice a reasonable result for a prompt settlement of the case. We should not be irrational or implacable in our demands, but on the other hand excessive demands on the other spouse's part must be met firmly and with an attitude that we are prepared to have the case tried if necessary. Settlement negotiations are usually not admissible evidence at trial for the very good reason that everyone would fear to negotiate.

We can't force anyone to be reasonable, but we can make it clear that we will try to extract a price for unreasonable behavior by our opponents. Of course, one should never threaten anything that person is unwilling to do; positions should be carefully discussed between attorney and client before being given to the other side, realizing that negotiation usually requires a balance of firmness and flexibility, trying to discern the actual motives, and goals, of both sides.

What If I Die While The Case Is Pending?

Usually, if you die while the case is pending, the case is terminated. There could be exceptions under various circumstances. In the usual case:

1. Your spouse keeps his or her property and most types of jointly held property.

2. Your spouse will also receive whatever you have provided for in your will. If your spouse wishes, he or she may elect to take against the will. This means your spouse will not receive property under your will.

3. If you die without a Will or your spouse elects to take against the Will, at a minimum, your spouse will probably receive one-half of your net probate estate. However, a precise answer to these matters can only be made case by case.

4. In any event, it is a very good idea to update your Will upon either marriage or divorce, to ensure that your wishes are followed in the event of your death. The law automatically "re-writes" your will upon marriage, divorce, and upon the birth of additional children, and you may or may not agree with those changes.

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