

DIVORCE IN GEORGIA

INFORMATION FOR A PROSPECTIVE CLIENT

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I. INTRODUCTION TO DIVORCE

A total divorce may be granted by the Superior Court of the county in which the divorce action is brought. Where one of the parties demands a trial by jury, the jury shall decide all issues of fact, excluding the issue of custody and visitation, which are determined by the trial judge. If no jury trial has been demanded, the judge alone shall be responsible for determining all issues of law and fact. The proper venue (i.e. - the particular county in which the divorce proceedings are filed and the trial held) is usually the county of the residence of the Defendant-spouse against whom the divorce action has been brought.

Due to the far-reaching implications surrounding divorce and its aftermath, it has become almost mandatory that either one, or both, of the parties seek expert legal counsel and guidance. Once retained, your attorney is there to advise you on the various economic, social, and other changes that will occur as a result of the divorce proceedings. Divorce actions require a resolution of those issues involving child custody, visitation, child support, alimony, debt allocation, as well as an equitable division and disbursement of marital property and assets. Your trained domestic attorney will also make every appropriate effort to insure that this occurs in as expeditious a manner as possible. A divorce must be considered one of the most trying, stressful and emotional periods of time in an individual's life; the assistance and guidance of legal counsel is always well advised.

II. GROUNDS FOR DIVORCE

Under Georgia law, there are thirteen (13) grounds upon which a petition for divorce may be brought by one spouse against the other. Twelve of the thirteen grounds involve some type of "fault" by one party (i.e.-adultery, abandonment, habitual intoxication, cruel treatment, etc.). The thirteenth ground involves a situation where the marriage is "irretrievably broken" and there exist "irreconcilable differences" between the parties. This is, by far, the most common ground for divorce in Georgia and is usually referred to as a "no-fault" divorce. In such a "no-fault" situation, the parties do not specifically complain of either party's conduct; they merely state that their marital differences are irreconcilable and they request that the court grant them a divorce due to their inability to live together as husband and wife.

III. IS THE DIVORCE CONTESTED OR UNCONTESTED

The general public often confuses a "no-fault" divorce with an "uncontested" divorce. These terms are not synonymous. The fact that a divorce may be brought on the ground that the marriage is irretrievably broken does not, of and by itself, mean that the divorce proceedings will be uncontested. In determining

whether the divorce will be handled as a contested or uncontested divorce, you must look at what you expect from your lawyer in the way of legal services to be rendered. Let us briefly explore the different aspects of legal representation associated with contested and uncontested divorces.

In an "uncontested" divorce, the parties have generally decided between themselves those issues that would otherwise be left for the judge or jury to decide (i.e. - custody, visitation, alimony, child support, post high school education, medical/dental/hospital expenses, insurance, division of real and personal property, debt allocation, tax liability, attorneys fees, etc.). In this situation, you are bringing the necessary information to the lawyer and requesting that appropriate documents be drafted so that a divorce may be obtained. **This scenario does not generally require the attorney to advise you as to the adequateness of any support payments (except child support), the reasonableness of the property division or anything else involving the finances of the parties.** This is because the attorney has not been given the opportunity to avail himself of the various legal tools and devices which would have enabled him to "discover" the opposing party's true financial condition, or other pertinent facts that he normally would have reviewed in a contested divorce action. Furthermore, strictly from the standpoint of court time involved, the attorney need only make one very short court appearance with you in order to obtain the divorce.

The situation is entirely different in a "contested" divorce action. This is true regardless of the ground upon which the divorce action is based. In such a situation, the parties are unable or unwilling to arrive at a mutually acceptable consensual arrangement. You are specifically seeking legal counsel and advice as to what would be an appropriate division of property, or a sufficient amount of support payments, or an equitable allocation of marital debt.

In order to accomplish this, the lawyer will utilize the "discovery process" permitted under the Georgia Civil Practice Act. Contrary to what may be portrayed on television, a trained domestic attorney does not normally ask a question in court to which he does not already know the answer. The gathering of such pertinent information is accomplished through this process called "discovery". This can involve such things as written interrogatories or questions to the other party (which must be answered by that party under oath), the production of financial records from the other party, or from the other party's employer, bank, accountant, etc., if relevant to the issues in the divorce (i.e.-tax returns, business or corporate records, expense accounts), the taking of depositions before a court reporter, as well as other available methods of fact investigation. If custody or visitation is at issue, your attorney may deem it appropriate or beneficial to request that the Court appoint a Guardian Ad Litem to perform an independent investigation and represent the interests of any minor children. If severe stress or emotional problems are part of the divorce, your attorney may request that either or both of the parties, along with the minor

children if appropriate, undergo a court ordered psychological evaluation. Each case is unique and must be handled depending upon the needs of the client.

Only after the attorney has had the opportunity to gather and analyze the information obtained, can he then intelligently advise you regarding those matters to which the parties could not previously reach a consensus. Furthermore, and again strictly from the standpoint of court time involved, there will usually be at least two court hearings. The first hearing, for "temporary" relief only, will usually occur within thirty (30) to forty-five (45) days from the date of the filing of Client's petition for divorce. The primary purpose for this hearing is to maintain the status quo that existed between the parties at the time of the filing of the divorce petition. At this hearing, one of the parties will be given temporary custody of the minor children, if any, and the other party will be granted visitation rights; one party may be required to pay temporary child support and/or alimony; one party may be awarded temporary and exclusive use and possession of the marital residence and furnishings; health and other type insurance will be ordered to be maintained pending trial; other issues, special to your case, may also be raised. Regardless of the "temporary" nature of this hearing, it is an extremely important step in the divorce proceedings, and great care and diligence should be utilized in properly preparing you for this day in court. Later on, there will also be a final hearing on the issues raised in the divorce petition. Many courts now require that the parties attend some sort of court ordered mediation in an attempt to resolve their differences before trial. In addition, there may be one or more interim hearings based upon various motions brought by the parties, as the circumstances of the case dictate.

In a contested divorce action, some type of restraining order is usually filed with your divorce petition. This prohibits either party from transferring real or personal property except in a bona fide transfer or in payment of pre-existing debts. Neither party can then transfer or sell the marital assets to the detriment of the other party. In addition, a "lis pendens" notice is often filed with the Clerk of the Superior Court to prevent the unauthorized transfer of any real property owned by the parties to an innocent third party, unaware of the claims being made in the divorce action. Furthermore, if appropriate to your case, such a restraining order will also prohibit either party from removing the minor children from the State of Georgia without a court order.

Although the parties are free to negotiate any exchange of property in arriving at an equitable division of property, it must be noted that the court's authority is somewhat more limited. A judge has no authority to take from one party and give to the other party, property that was acquired prior to the marriage, property that was received as a gift from a third party (gifts between parties are considered to be marital property), or property that was received by inheritance. However, this type of property may, nevertheless, be relevant to other issues raised in the divorce proceedings.

The fact that a divorce may initially be handled as a contested action does not mean that it must ultimately be tried in open court. It is quite possible, and even somewhat probable, that after the discovery process has begun and the initial shock of the divorce is over, the parties, by and through their respective legal counsel, can arrive at a mutually acceptable settlement agreement.

IV. ATTORNEY'S FEES

By now, it should be apparent to you that the fee charged for representation in a contested divorce will be drastically different from that charged in an uncontested divorce. In an uncontested divorce situation, a one-time "non-refundable" fee is charged based upon the anticipated complexity of the settlement agreement to be drafted. In a contested divorce situation, a "non-refundable" retainer is initially charged, against which the attorney will charge his then current hourly rate. This retainer, like a fee, is paid by you prior to the commencement of actual legal representation. Accurate and detailed time slips are kept by the attorney for all work performed on your behalf and a detailed statement of services rendered is sent to you on a monthly basis. In addition, a written contract of employment will be executed between the attorney and the Client evidencing this understanding and fee arrangement. Should the time expended at the agreed upon hourly rate exceed the retainer previously paid, you will be notified and an additional retainer will be required, unless other arrangements have been made to the contrary.

In a contested divorce situation, it is possible that the court may, in its sole and absolute discretion based upon the circumstances of each case, make an award of attorneys fees as a part of any alimony award. Assuming that the you are current and have not expended the previously paid retainer, then all sums so awarded by the Court and collected will go directly to you. No attempt will be made to "double-dip". Should you owe any monies for legal representation or other expenses, such sums will be deducted prior to reimbursement.

V. FACTORS TO CONSIDER IN YOUR PARTICULAR CASE

To assist you in arriving at a mutually acceptable settlement agreement and to facilitate an "uncontested" divorce, the following general areas have been listed for review and consideration. Not all of these will necessarily pertain to any one case; furthermore, there may be particular issues which require the special attention of the parties. The following is intended merely as a guide to be utilized as a beginning point for negotiations. Do not feel bound by its limitations. In addressing these various issues, the parties should always give thought to the realities of the situation and most importantly, to the best interests of any minor children involved.

1. Custody: Custody of the minor children can be sole or joint, legal or physical. Each situation is unique and deserving of your special attention. Please remember that children should never be "used" by either party as pawns to gain some imagined or real advantage or concession from the other party.

2. Visitation: The non-custodial parent is entitled to reasonable visitation with the minor children, unless there is some manifest reason for seeking restricted or supervised visitation. It can be extremely liberal and/or with fixed visitation periods and holidays. Visitation with the non-custodial parent should always be encouraged by the custodial parent.

3. Alimony: This is becoming a less dominant aspect of divorce proceedings as more and more women enter the work place and become more self-sufficient. However, this is not to imply that an award of alimony would not be appropriate under the special facts and circumstances of your particular case. Thought should carefully be given to actual need, as well as the length of time payments might be required.

4. Tax Consequences: It is imperative that both parties understand how the divorce and ensuing support payments, if any, may affect his/her tax liability. Support payments that qualify as alimony are deductible (for federal income tax purposes) by the spouse making payment and taxable as income to the spouse receiving the payments. Child support payments do not qualify as a deduction for the obligated spouse.

5. Child Support: Effective January 1, 2007, the trial courts began employing Georgia's new child support guidelines. The most significant change from the previous guidelines is that these new ones will insert both parents' incomes into an equation to determine a presumptive amount of child support to be pro-rated between the parents for the benefit of the minor child(ren). This differs greatly from the previous guidelines which typically only applied a percentage range to the non-custodial parent's income; the non-custodial parent's income was not usually factored into the equation. The new guidelines also apportion, between the parents, certain expenses such as health insurance, non-covered medical expenses, and work-related child care costs. In addition, as with the previous child support guidelines, the new guidelines have allowed for deviations to the presumptive amount of child support, depending upon the unique facts in each case.

6. Post-High School Education: Since the non-custodial parent can not be ordered, without his/her consent, to support the minor child after the age of eighteen, there must be a specific provision in the settlement agreement if the non-custodial parent is to be held responsible for any or all of college costs. Very often, the non-custodial parent will not want to obligate himself/herself for a future expense without some sort of guideline or restriction as to ultimate cost. A compromise might be that his/her obligation would be limited to the cost then

being charged for an "in-state" student at one of the state universities or colleges, to be further reduced by any scholarship or grant which may be available to the child. In addition, the non-custodial parent's obligation might be further limited to a specified limited time, so long as the children maintain a certain minimum grade point level.

7. Medical Costs: Hopefully, at least one of the parties will have some type of health and/or dental insurance coverage for the minor children. However, some provision should be made for payment of those medical expenses not covered by insurance (i.e. - yearly deductible, normal percentage not covered until certain threshold is reached, any required co-payment, specific treatment not covered by your insurance). Psychological expenses, as opposed to psychiatric expenses, should be specifically detailed since these are not typically considered to be "medical" expenses. Furthermore, please note that following a divorce, the non-insured ex-spouse is no longer considered a dependent, although coverage through COBRA will most likely be available. This is of paramount importance if a "pre-existing" condition exists. However, this type of insurance coverage is generally more expensive than normal health insurance coverage and only available for a limited period of time.

8. Life Insurance: If the obligated spouse has life insurance, it may be proper to require that such be used to guarantee the support obligations spelled out in the agreement for the benefit of the ex-spouse and minor children. If no such insurance presently exists, some type of "decreasing term" insurance coverage might be available or the parties may decide upon some type of collateral assignment of benefits for the protection of the minor children.

9. Real Property: This may be the single largest asset of the marriage (or the single largest liability). Obviously, only one party can continue to reside in the marital abode after the divorce. Due and careful consideration should be given to the needs of the minor children, as well as to which party will most likely be able to maintain the household. In many instances, it will be a financial necessity that the house be sold and the net profits divided or used to pay off marital debts. In any case, it is wise to decide these details and have them explicitly stated in the agreement.

10. Personal Property: Generally speaking, the parties themselves are in the best position to know who needs what items of personal property. Georgia recognizes the concept of "equitable division" of property. Please remember that personal property includes intangible property (i.e. - stocks, bonds, IRAs, 401(k)s, pension plans, etc.). If the parties can not reach an agreement, the court will divide the property for them. As previously stated, the court has no power or authority to award the following categories of property: (a) property that the spouse owned prior to the marriage, (b) property that was received by way of inheritance, and (c) property that was received by way of a gift to that spouse.

11. Attorney's Fees: The issue of attorney's fees in a "contested" divorce action has been previously discussed. Where the parties enter into a settlement agreement, there is no such court award, and the responsibility for payment should be determined and possibly included in the agreement.

VI. CONCLUSION

This outline and summary of a divorce is not intended to be exhaustive or complete. It is only intended to acquaint a prospective Client with divorce proceedings in Georgia and the manner in which this office will handle your particular divorce. We will be more than happy to answer any specific questions that you may have regarding the facts and circumstances of your particular case. If you desire, please feel free to schedule an appointment to discuss these matters in person. It is our policy to provide you with sufficient information so that you can make informed decisions regarding your case, and to then follow that with the best possible legal representation. Your understanding of the matters contained in this summary will help assure that commitment.

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