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INTRODUCTION TO DIVORCE

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

The dissolution of a marriage may be a traumatic experience. Your attorney or attorneys are well aware of the emotional involvement of the parties. Though we are not behavioral specialists, we try to relieve your anxiety by attempting to assist in solving the problems that you face during this case.

For us to properly represent you, it is necessary for you to give us all the facts concerning your case. We must also know your wishes. 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 the attorney and client.

We want to stress that, although we will counsel and advise you throughout the case, the final decisions regarding your case must be made by you. Our experience has shown that most divorce cases are settled, which means the parties reach an agreement that is placed on the court's record. *NEVER AGREE TO SOMETHING YOU DO NOT UNDERSTAND OR SOMETHING YOU FEEL YOU ARE FORCED TO AGREE TO. YOUR CONSENT TO AN AGREEMENT MUST BE VOLUNTARY AFTER CONSULTATION WITH YOUR ATTORNEY.* After an agreement is placed on the record, it is extremely difficult and sometimes even impossible to change it.

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 on your behalf.

GROUNDS 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 about alimony, property, support, parenting time, or custody, fault may become an active ingredient in resolving these issues. For this reason, your attorney may go over the indiscretions of the parties with you.

Basically, Michigan has one ground for divorce: "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 court, some judges require only a recital of this assertion. No details need to be provided.

In Michigan, we have legal separation that is known as "separate maintenance." This arrangement is seldom done. The procedure is similar to a divorce, except that neither party may remarry. The law states that if one party institutes a separate maintenance suit and the other party 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 invalidate a marriage. Marriages may be void from the outset or be 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 wishing an annulment must not cohabit after having discovered the grounds for the annulment to the marriage.

If you have any questions about separate maintenance or annulment, please ask us. The following material basically concerns divorce (though there may be similarities between divorce and separate maintenance and annulment actions).

DIVORCE PROCEDURE

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

1. **Summons.** This document notifies the other spouse that a suit has been started. 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 if the other spouse lives outside of Michigan).
2. **Complaint.** This document states the names of the parties, where, when, and by whom you were married, the names and birthdays of children (if any), the wife's and husband's names before marriage, the length of residence in the county and state, the date of separation, the 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 the suit is started for at least 10 days. There are some exceptions to the residency requirement.
3. **Affidavit of Service and Return of Service.** This is filed when service is made.
4. **Affidavit of Previous Suit.** This informs the court as to whether the parties have filed for divorce before or had any case in another court.
5. **Statement to the Friend of the Court.** This is to inform the Friend of the Court of the essential facts (it is unnecessary in cases where Friend of the Court services are not required).
6. **Affidavit.** Another affidavit lists the child's or children's residences during the past five years and states that no custody action involving the child is pending (it is only needed when minor children are involved).
7. **Record of Divorce.** This is a statistical record required by the Michigan Department of Health.
8. **Injunction.** This is only requested when needed to restrain a 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.** These may be obtained for temporary custody, support, etc. A timely filed objection to the ex parte order will negate the effectiveness of the order until a hearing on the matter.
10. **Affidavit for Ex Parte Order.** This sworn statement affirms that the facts stated to obtain the ex parte order are true.
11. **Circuit Court Filing Fee.** There is also a charge for serving papers. Later on, there may be other costs for services, such as the cost of appraisers, actuaries, accountants, depositions, etc. You will be advised before any of these expenses are incurred, so you may negate them. There may also be Friend of the Court and judgment fees. You are responsible for all costs pursuant to the Retainer Agreement.
12. **Notice of Hearing, Praecipe, Motions, and \$20 Filing Fee.** These are required for any motion that requires a hearing. A motion is a request to the court for some type of relief. A praecipe is a court form requesting that the matter be set for hearing. Notice of hearing advises that a hearing will be held.
13. **Judgment of Divorce.** This is the final document that grants the divorce and states the terms of the divorce. When there are children involved, a fee is required.

Procedure:

The plaintiff is the party who starts the lawsuit. The defendant is the person against whom the suit is filed. The divorce is resolved by the family division of the circuit court. The office of the Friend of the Court makes recommendations for spousal support, child support, custody, and parenting time. This office also collects and distributes the spousal and child support payments. It may also request enforcement of court orders dealing with child and spousal support as well as parenting time. The court may use the Friend of the Court for other miscellaneous duties, including a recommendation on property distribution.

After the complaint and summons are filed and served, the defendant may file an answer to the complaint, which is a paragraph-by-paragraph response to the complaint. Once the answer is filed, the case is contested. If no answer is filed by the defendant, an order of default is entered, indicating the defendant's lack of response. The matter becomes an uncontested divorce case. If the case is contested, the defendant may not only answer the complaint but also file his or her own counterclaim. This must be answered by the plaintiff.

A divorce cannot be granted in less than 60 days. When there are minor children, the parties must wait six months. However, the six-month period may be waived under certain circumstances. No divorce is granted without a court hearing to determine the truth of the statements made in the complaint.

Temporary orders for custody, child and spousal support, mortgage payments, medical payments, parenting time, injunctions, and other relief may be requested at any time after your case is started and before a judgment of divorce is entered. A temporary injunction can restrain a party from doing something. There are two types of injunctions to deal with violence: one authorizes immediate arrest (criminal); the other provides for an appearance before the judge to determine what action should be taken (civil). There is also an injunction restraining a party from selling, disposing of, or dissipating assets. Other types of injunctions may be requested. Child support, custody, mutual injunctions, and personal protection orders are usually granted to the plaintiff without a hearing. Other orders require a hearing.

Temporary orders for child support are usually based on a state-recommended chart. Generally, spousal and child support is based on need and ability to pay. The lifestyles of the parties are also taken into consideration. For child custody disputes, you will be advised to study the 11 specific factors listed in the Child Custody Act (see **Child Custody** below). The procedures and preparations for such a case are too involved for this discussion and must be left to further discussions with your attorney.

The court may also award temporary fees to assist a party with his or her costs of obtaining legal services. This is usually obtained in the same way as any other motion. Sometimes it may be part of a motion requesting other relief.

WHILE YOUR DIVORCE IS PENDING

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

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

SPOUSAL SUPPORT

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

1. Past relations and conduct of the parties (fault)
2. Length of the marriage

3. Ability of the parties to work and their respective incomes
4. Source and amount of property awarded to the parties
5. Ability of the parties to pay spousal support
6. Present situation of the parties
7. Needs of the parties
8. Health of the parties
9. Prior standard of living of the parties and whether either is responsible for the support of others
10. Age and educational level of the person claiming spousal support

Generally, judgments of divorce in which spousal support is not granted must either expressly reserve the question of spousal support or rule that neither party is entitled to spousal support.

Regular or periodic spousal support clauses in the judgment of divorce are modifiable at any time. When limitations are placed in the judgment regarding modification, it is questionable whether or not these limitations will be honored by the court. Spousal support may be increased, decreased or cancelled. A modification is based on a showing of a change in circumstances that warrants the modification.

Regular or periodic spousal support is usually taxable to the recipient and is deductible by the payer. The phrase "payment until death" must be part of the spousal support clause in order for it to be considered as taxable spousal support. This type of spousal support is not dischargeable in bankruptcy. Qualifying clauses such as "payable until remarriage" may be included.

Another type of spousal support, referred to as "spousal support in gross," has all the attributes of a property settlement; nonetheless, it is not taxable to the recipient, not deductible by the payor, and not modifiable. However, it may be subject to being discharged in bankruptcy. This type of spousal support 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 spousal support.

There are many tax consequences and restrictions applicable to spousal support and spousal support in gross that should be explained to you by your attorney or your accountant. Since both federal and state tax laws and the interpretation thereof continually change, your attorney cannot guarantee any tax consequences resulting from your divorce proceedings and the judgment of divorce.

Spousal support 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 a spouse denies receiving payments.

The enforcement of regular or periodic spousal support payments is usually instituted by an order to show cause. The procedure will be explained to you by your attorney upon request. Spousal support in gross is more difficult to enforce, and there are other types of procedures available for enforcement.

With respect to health care coverage, your attorney will explain your options to you upon request, including your right, if applicable, to elect health care under COBRA (a federal law that makes health care insurance portable in some instances).

CHILD SUPPORT

The custodial parent is entitled to claim the minor 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. If the noncustodial parent is entitled to the allowance by the judgment, that parent must obtain each year, from the custodial parent, a signed Form 8332, which must be filed with the noncustodial parent's other federal income tax forms. Only the parent taking the dependency exemption is entitled to claim the child tax credit and the interest deduction and tax credits for post-secondary education that are first available in 1998.

Child support is modifiable on the same basis as spousal support. This support is usually ordered until the child attains the age of 18 years, or graduates from high school, so long as the child as not yet reached 19 years and 6 months and 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. Enforcement of payments is the same as for spousal support.

Child support is based mainly on the child's needs (in conformity with the lifestyle of the parties and the ability to pay. Nonpayment of court-ordered support may lead to a contempt of court citation resulting in a jail term or a suspension of the delinquent parent's occupational or driver's license.

If there is an arrearage in child support payments, medical expenses, etc, the judgment of divorce must contain a provision preserving this arrearage. The same provision holds true for any monies owing under any temporary order. To preserve a temporary order, it must be so ordered in the judgment of divorce. If it is not so ordered, it is canceled.

Every child support order paid through the Friend of the Court now provides for the immediate and automatic withholding of child support payments from any source of the payor's income, unless the court orders otherwise or approves an agreement by the parties.

CHILD CUSTODY

This issue is the most emotional and traumatic part of most divorce cases. There is legal custody, i.e., the decision-making part of raising the child; and physical custody, i.e., who physically raises the child. There is also sole custody or joint custody under each of these headings. The basis for determining child custody is "the best interests 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.

A party involved in a child custody matter should become acquainted with the Child Custody Act and study and be prepared to discuss the following factors:

- (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 his or her 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 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 a 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, whether or not it occurred in the child's presence.
- (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) 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 on the record, in writing, the basis for a residency award.
- (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 resources, 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 effecting 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 specific child custody factors cited above.

PARENTING TIME

Parenting time is generally granted to the noncustodial parent. The judgment may order general parenting time, leaving it up to the parties to decide the dates, or it may provide specific parenting time hours and dates. If long distances must be traveled to exercise this parenting time, arrangements can be made to share the cost. Parenting time rights may be enforced in the same manner as rights to spousal support.

Judgments of divorce 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 Michigan, the custodial parent must petition the court for an order. Parenting time orders may be modified on a showing of a change in circumstances. If parenting time has been wrongfully denied, the law allows this time to be made up and permits a contempt of court action to be brought against the offending parent that can lead to a fine or jail term. Failure to pay child support is not an acceptable reason to deny parenting time.

PROPERTY

The parties usually arrive at a settlement of all their property rights after negotiation or after a Friend of the Court referee hearing. 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, because property settlements may not be modified, 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 procedures.

Property settlements in judgments may be enforced by execution, garnishment, show cause proceedings, etc. Your attorney will explain these procedures to you upon request.

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

1. Length 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
9. General principles of equity

Generally, property of the marriage is divided 50-50.

ATTORNEY FEES

Attorney fees are governed by the Michigan Rules of Professional Conduct. In a divorce case, a lawyer may not enter into an agreement for, charge, or collect a contingent fee (a fee based on a percentage of the monetary award to the client).

Attorney fees are based on a number of factors, including: 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 the novelty and difficulty of the questions involved and the results obtained. An hourly rate has been 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, appraisers, 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 for the amount your spouse pays.

Please note: We cannot tell you what the total fee for your divorce case will be because we have no way of knowing how much time must be spent on your case.

MISCELLANEOUS

Many matters may arise after the case is concluded for which counsel should be retained. These matters may be for enforcement of child support, spousal support, parenting time, or property provisions

CONCLUSION

Many divorce cases end in a reconciliation of the parties. If there is a chance to save your marriage, we will be pleased to recommend marriage counselors to you and assist you in every possible way to effect 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

As divorce proceedings today are difficult, and extensive work may be necessary, we use a team effort: other attorneys, paralegals, and legal assistants in the office are available to assist us.

This document should not be considered the last word on the subject of divorce but should merely be viewed as a helpful guide. It is provided to give you an overview of divorce law and procedures. The law is constantly changing, so some of this discussion might be outdated. For the latest information, consult your attorney.

As your attorneys, we have experience and expertise in the field of family law. We are aware of the pressures and the personal difficulties faced by a person involved in the divorce process. We will attempt to ease these pressures and work toward eliminating the cause and effect of these problems. If you have any questions, please do not hesitate to call or arrange for an appointment with attorney, James D. Hubbert, at the address and phone number listed previously.