

**I WANT A DIVORCE,  
*NOW WHAT?***

BY

ATTORNEY ALF LANGAN



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# I Want a Divorce, Now What?

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## INTRODUCTION

Divorce is a fact of life in our society today. According to some commentators, as many as 50% of all marriages will end that way. Personally, I think that's high. But regardless of the actual percentage, it's safe to say that all of us know someone whose life is affected by divorce. Despite these sobering statistics, there seems to be little practical information out there for people about to go through this life-transforming event.

If you're reading this, your marriage is probably in trouble. In fact, you may have decided that enough is enough, and you want out. Perhaps you've talked to friends and acquaintances that have been down the road you're about to travel. If so, you have probably heard all kinds of stories, and received plenty of advice, both solicited and unsolicited, from well meaning confidants. No matter what your friends have told you, however, you really do not know what you're about to undertake. It's kind of like listening to someone describe childbirth when you have never experienced it yourself: you might know what happens, but you don't really know what happens until it happens to you. And despite their individual adventures, your friends' experiences have little to do with what you are about to live through. Divorces are like snow flakes; no two are alike. Your case is unique to you.

You may know *why* you want out, but you probably don't know *how* to do it. That is, you won't know until you read this book. You need reliable information from a competent source, maybe now more than at any other time in your life.

In the following eight chapters, I'm going to cover what you need to know so you can plan for a successful divorce. Just because your marriage may be unsuccessful doesn't mean that your divorce should follow suit. In addition to the practical information you will find here, I recommend that you visit Amazon.com or BarnesandNoble.com and search for one of the several excellent resources out there to help you with the *emotional* aspects of going through a divorce.

That is beyond the scope of this book, although I will briefly discuss some of the emotional baggage that goes along with the dissolution of a marriage. Watching Dr. Phil on Oprah, reading self help books, and getting individual counseling are all terrific, but in the end you need to know how to prepare for and follow through with your divorce. That's what this book is about: it will show you how the process works and help you develop a common sense approach to getting through it with your wallet reasonably intact and your kids in tow.

So why should you listen to me? I am a licensed attorney who, since 1991 has represented hundreds of clients in family related actions. Over the course of my career I have represented both sides of just about every kind of issue one sees in a divorce case. I'm also a child of divorce myself. My parents divorced when I was quite young, and then my mother and stepfather divorced during my freshman year in college. (Now *that* was a lousy Christmas break.) I know what it's like to go through divorce personally as well as professionally.

Before we get started, I have to provide the following disclaimer. This book is intended for information purposes only. The information contained here is not legal advice, nor is it intended as a substitute for legal advice, but is intended to inform you in general regarding the topic discussed. You must determine whether you should obtain legal advice from a licensed attorney to discuss your specific matter, as your individual circumstance is unique to you. I recommend that you do seek legal advice, and use the information contained in this book to help you prepare for and understand the process you are about to undertake. Although I am confident the information contained in this book is accurate, I am not responsible for any loss, liability, or risk you may incur through your use of the information herein. Hire your own legal counsel and rely on them for advice. [Click here for a low cost way to find an attorney.](#)

The following is an understandable, practical map through the jungle of divorce. I have kept the legalese, or, as one of my clients referred to it, "that lawyer mumbo jumbo" at a minimum. The best information in the world is useless if you cannot understand it. I have also illustrated most of the concepts I describe with real examples of real case

situations. Perhaps you will recognize your particular circumstances somewhere in these pages.

I know it looks a little daunting from here. Most of the time we are afraid of what we do not understand. Your reading of this book will enable you to demystify the scary, complicated, and often frustrating process of severing your marital ties. Armed with the knowledge you'll gain through the following pages, you will be better prepared to start that journey. As the old Chinese proverb says, a journey of a thousand miles begins with a single step. You've already taken the first step, by finding this book. Now turn the page and start walking in earnest.

[Click Here For Chapter 1](#)

## I WANT A DIVORCE: NOW WHAT?

### CHAPTER ONE: GET YOUR FINANCIAL DUCKS IN A ROW OR YOU'LL GET SOAKED.

So where do you start? First, you should understand that divorces are primarily financial transactions. Think of it as the dissolution of a small corporation. Mr. and Mrs. Smith are going out of business. In this chapter, I'm going to cover the preliminary financial aspects you will have to face. In the next chapter, I'll discuss what you need to know when kids are involved, which is obviously the most important aspect of any divorce case. Not all divorce cases involve the custody and placement of minor children. Every divorce case does involve the division and allocation of the parties' financial assets and obligations, however. That's why I'm covering the financial ground first.

The first thing you should do is look around, literally and figuratively. What do you own, and how do you own it? List everything you can think of, including real estate, bank accounts, investment accounts, collectibles, antiques, jewelry, art, automobiles, boats, investment property, business property, retirement accounts, insurance policies, etc. Buy a ledger book from any office supply store, and use pencil—everyone forgets things and makes mistakes in the process! Walk around your house, making entries in your ledger book as you go. Don't forget furniture, tools, sporting goods, and all that stuff in your garage, closets, basement, and attic, known generally as personal property. You'll be surprised how much you really own. If you wish, you can later re-create the list on a database or spreadsheet on your computer.

Buy yourself a few disposable cameras and take pictures as you list your property in the ledger. This accomplishes two things: first, it fixes in time the quality of your property. The whole process of getting divorced can take several months, and sometimes several years. Suppose your ex destroys that couch in the rec room then claims it's worthless. A picture showing its condition before a vengeful ex used it as a trampoline will help you convince the judge that your valuation is correct. Second, pictures add meaning to your entries. How else is the court to know that "picture over fireplace" is your prized lithograph of dogs playing poker?

List all the assets you can think of in the left column. In the next column, indicate how that asset is held. For instance, if you own your home, do you own it as tenants in common (each of you owns 50% of the property with no right of survivorship) or as joint tenants (each of you owns 50% of the property with right of survivorship)? If Aunt Millie left a valuable antique set of china to you, indicate that you own the property individually because of the inheritance.

In the next column enter the market value of the asset. If you don't know the exact value, enter your best reasonable estimate. It's better to underestimate the value of your assets: if you think your house is worth between \$100,000.00 and \$110,000.00, use the \$100,000.00 number. When estimating the value of all that stuff from the basement, garage, etc., don't use replacement value, or what you paid for it when new. I always tell people to estimate what they think people would pay if these items were auctioned off. That's the value most property appraisers will use when valuing the marital estate once the divorce is pending. You might as well use a similar process now.

There are a few things you should keep in mind while making your list. Most states do not include property that you inherit or that someone gave to you. For instance, if Aunt Millie left her antique cuckoo clock to you, that clock is your individual property. Your soon to be ex has no claim on that clock—it's yours!

The same basic provision applies to gifts as well, but there are some exceptions. I like to call this issue the Custody Fight Over the Engagement Ring. Some people believe that when the marriage ends, they have the right to retrieve, or at least divide, any gifts they gave their spouse. I have seen cases where the parties agree on dividing everything else, affecting several hundred thousand dollars worth of assets, but fight like starving hyenas over carrion when it comes to who gets the engagement ring. In most states, the ring not only stays with the wife, it is counted as her individual property, and is not considered part of the divisible marital estate. Just so the men reading this don't feel too badly about this, remember that set of custom made golf clubs she gave you are yours as well.

Philosophically I think that is the correct solution. After listening to hundreds of divorce clients, I've concluded that the best way to put this issue to rest is to be generous with your ex. You're getting out of the relationship, you're moving on with your life. Why make it any more difficult than it already is? I'm not saying you should just roll over and let your ex have whatever they want, especially if they gave that item to you in the first place. What I am saying is to exercise your judgment, and choose your battles. Is that wrench set really worth all the hassle? There are some states that try to avoid the fight and put the ring into the mix of divisible property, but those are a minority. Check [Appendix A, "Summary of Divorce Laws by State"](#) to get an idea how your state handles this issue.

If anyone owes you money, you should consider that an asset, and list it. For instance, if you loaned your brother in law money to help him start a business, and you expect him to repay that debt, list the loan as an asset.

Remember to include any securities, stocks, bonds, certificates of deposit, stock options, Treasury notes and bonds, and commodity accounts that either of you own, jointly or individually.

If you have an ownership interest in a business, you should obtain a balance sheet from your accountant, and have him or her perform a business evaluation of your interest for you. If you don't have an accountant, you should consult with your attorney, who should be able to recommend several to you. Most of the time, your attorney will recommend accountants with whom they have worked in the past. A good accountant can help immeasurably in helping you construct your true financial picture. I remember a case involving a self-employed medical professional. On paper, he made almost \$1,000,000.00. The accountant found, however, that after paying for overhead, taxes, and deducting other legitimate business expenses that his actual income was much less than that. Although his net income was still very healthy, it was nowhere near as high as it first appeared.

After you've finished listing everything you own of value, turn to a new ledger page, and list your liabilities. Ask yourself a basic question: to whom do you owe money? Start with the big items first: mortgages, student loans, credit

cards, car loans, and other secured loans, including loans against your retirement fund. Don't forget unsecured loans from banks, credit unions, finance companies, and individuals (include friends and relatives who lent you money and expect to be repaid). Identify the creditor in the left column of the ledger. If the loan is secured by any property—like a car loan, for instance—indicate that in the next ledger column. Remember that credit card debt may be secured or unsecured. Most department store cards are secured, while most bank cards are not. For example, your Sears card is secured by that Kenmore washer and dryer you purchased with the card, while your Visa is unsecured by any property.

In the third column, indicate whether the debt is a joint debt, where you and your spouse are equally responsible for repaying it, or if it is one of your individual obligations. Make it simple: enter **J** for joint, **H** for husband, and **W** for wife. For example, both of you are probably obligated to pay your mortgage, but your college student loan is probably your own responsibility. The basic test whether an obligation is a joint or individual responsibility is if one or both of you signed the contract creating the debt. If you both signed the promissory note for the car, even if your spouse drives it most of the time, that debt is your joint responsibility. There are exceptions, however. For example, if you bought a car, and signed the note alone, in some states your spouse could be equally liable for the loan even though they didn't sign the note if the creditor provided proper notice to the spouse regarding the loan. The usual test is whether the loan was for a "family purpose." A "family purpose" is usually defined as that which benefits both of you or your dependents. Check with your accountant or future lawyer to see if your state has this exception.

In the next columns, enter the amount of the debt according to the classification of the responsibility. Put the joint debts in one column, and the individual debts in separate columns. Use the latest statements available, or, if you don't have a statement, contact the creditor and find out how much you owe.

Once you are finished, your worksheet should look something like the following:

### **Property Worksheet**

<b><u>ASSET</u></b> <b><u>(list each individually)</u></b>	<b><u>Column B</u></b> <b><u>How owned</u></b>	<b><u>Column C</u></b> <b><u>Market Value</u></b>	<b><u>Column D</u></b>
Real estate			
Automobiles & other motor vehicles			
Bank accounts			
Investment accounts			
Investment securities			
certificates of deposit			
stock options			
commodity accounts			
collectibles			
antiques			
jewelry			
art			
boats			
investment property			
retirement accounts			
life insurance policies			
personal property			
furniture			
clothing			
appliances			
books			
musical instruments			
firearms			
animals			
cemetery lots or other burial property			
tools			
sporting goods			
business interests			
business equipment			
accounts receivable			
inventory			
farm products			

Total Value:

**\$Column C**

<b><u>LIABILITIES</u></b> <b><u>(list individually)</u></b>	<b><u>Secured Property</u></b>	<b><u>Who owes?</u></b> <b><u>joint, H or W</u></b>	<b><u>Balance Due</u></b>
Mortgages			
Property taxes outstanding			
Automobile loans			
Secured loans, any source			

Unsecured loans, any source  
Secured credit cards  
Unsecured credit cards  
Federal Income Taxes  
State Income Taxes  
Accounts payable

Total Indebtedness:

\$Column D

### **ASSETS - LIABILITIES**

\$Column C - D

The next step is to start gathering records and information for your future attorney. Start a file system for yourself, where you can organize your records logically, both for yourself and for your future attorney's use. Here's a basic list of the records I look for:

- **Your latest credit report.** The big three national reporting services are Experian (they used to be TRW), Equifax, and Trans Union. If you're online (of course you are--this is an E-book!), you can get your credit report pretty easily. If you click back to my [web site](#), you will find a link to another web site where you can obtain your current credit report from the big three reporting services. Read the report carefully to make sure there are no errors, and that you haven't overlooked anything when you made your debt list in your ledger.
- Copies of your **state and federal income tax returns for the last three years**, including all schedules, W-2 forms, and 1099's.
- **Paycheck stubs or pay statements for the last three months.** Be sure they include year-to-date information for your income and withholding. If you are self-employed, then provide a year to date profit and loss statement for your business activities.
- Copy of any **financial or net worth statement you gave to a bank within the last 5 years** to secure a loan or line of credit. For instance, if you bought a house within that time, get a copy of your mortgage application from the bank through which you obtained your loan.

- If you are a participant in any profit sharing, pension, or **retirement plan** through your employer, contact the plan administrator to request a copy of the **summary plan description and a current statement of your accrued vested balance in the plan**. You can usually make this request through the Human Resources or Personnel office of your company.
- Copies of your latest account statements for any IRA's, certificates of deposit, investment, and savings accounts you or your spouse own.
- Make or obtain from the local Register of Deeds office a copy of the **deed to any real property you own**, along with a copy of the last paid tax bill for each parcel. Your attorney will need a complete legal description and tax parcel number for any real estate in which you have an ownership interest; these are the best documents for that information.
- If you own income property, a copy of your tenants' leases. If you are a renter yourself, a copy of **your lease**.
- A copy of any appraisal done within the last three years for any real estate in which you have an ownership interest.
- If you own any personal property that has been appraised in the last 3 years, such as jewelry, obtain a copy of the appraisal.
- For each life, real property, or automobile insurance policy you own (other than an employer sponsored life insurance policy), get a copy of the policy face sheet including the name and address of the insurance company, the face amount of the policy, the policy number, the owner of the policy, the beneficiary, the annual premium, and the policy terms and conditions.
- A copy of any identifying information, policy or group number for all health, dental, and medical insurance you have, including employer sponsored plans.

- A list of the contents and location of any **safe deposit boxes** you or your spouse own.
- Copies of **current bank, savings and loan or other financial institution accounts**. You should try to obtain all transaction records going back at least six months.
- Copies of any **loan statements**, including mortgages and credit card statements, on which either you or your ex are liable. Make sure the statements show the current balance due on the loans.
- Copies of current statements of all of the investment security instruments I mentioned above.
- If either you or your ex has been divorced before, try to get a copy of the other divorce judgment.
- And finally, if you were a party to a **bankruptcy** within the last seven years, obtain a copy of the **petition and schedules and any discharge issued** by the court. If you do not have these documents in your favorite papers box, you can get copies by contacting the clerk of the bankruptcy court in the district that granted your bankruptcy.

Now, after reading through this exhaustive list, you're probably wondering, "good grief, will my lawyer really need all of that stuff?" Yes. There is no such thing as giving your lawyer too much information, but there certainly is such a thing as not giving her enough.

After you've done all this, organize everything into a file for your future attorney, pour yourself a drink of your favorite beverage, put up your feet and find an old movie on the tube. You deserve a break.

## **Now It's Time To Protect Your Assets**

After you've hired your lawyer (see [Chapter Three: Meet Your New Best Friend, Your Divorce Lawyer](#)), give her your ledger book or the computer printout along with the file containing all of the supporting documents you've gathered. Then sit back and watch the look of pleasant surprise on

her face. I guarantee you most clients aren't nearly as organized as you will be.

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Most states' laws provide that once the divorce is filed neither party may dispose of, encumber, or destroy any of the marital assets. That protects you from your ex cleaning out the savings account or running up huge credit card bills after the divorce is filed. But what do you do about protecting yourself ahead of time from your ex disposing of your joint assets or spending money like there's no tomorrow? It is unfortunate but a fact that in many divorce cases one of the spouses tries hiding assets or runs up huge joint debt in anticipation of the break up. If you are thinking of doing that, don't. In the end that strategy usually backfires, and besides, if you play unfairly at the outset, you cannot later expect your ex to play fair with you once the case is underway.

However, if you are concerned that your spouse will play unfairly with you, there are some things you can do to protect yourself. You should take these precautionary steps even if you are unconcerned that your ex will play dirty: remember the old Boy Scout saying that an ounce of prevention is worth a pound of cure.

1. Go to the post office and open a post office box for yourself. That way your ex will be unable to intercept your mail.
2. Change the address of any credit cards or other installment credit obligations in your name to the post office box address. If you have credit cards that are held jointly, consider contacting the credit card company to remove your name from the card, and ask the credit card company to send duplicate statements to your P.O. Box. Removing your name from the credit card also removes your obligation to pay for any additional charges your ex may heap onto the card once they find out you have decided to end the marriage. Do not simply cancel the card, because your ex and you are jointly responsible.
3. At the same time, open your own Visa or MasterCard account with your credit card provider.

If you have joint bank accounts, follow the same process as you did with the credit cards. Open your own checking and savings account in the bank of your choice. If you are concerned that your ex is going to take the money from the savings, beat them to the draw, and make a withdrawal yourself. However, you should not take more than half the balance in the account. As for the checking, if you work and your employer direct deposits your paycheck, have your personnel people change the deposit to your new account. If you are the sole support for your family, or if your paycheck is otherwise vital to paying the household bills, you should deposit a sufficient amount into the joint checking account to pay those bills.

The object here is not to leave your ex penniless, but rather to protect yourself from he or she trying to do that to you. Until a court says otherwise remember that you and your ex have an equal interest in any assets you own, including your income. That is why you should not take more than half the savings and make sure there is sufficient money in the joint checking account to pay the regular household bills. You should also remember that at some point you will have to provide the court with an accounting of any assets you took control of. Be fair, even if you think your ex would not be fair with you if given half a chance. By taking control of the situation now you remove that chance.

What about other assets, such as investment accounts, automobiles, vacation properties, etc.? Gather as much information about each of these assets as you can. You should have uncovered most of the documentation while you assembled your financial inventory. If you are concerned that your ex may try to hide assets by temporarily titling them into a friend's or relative's name, get the titles yourself first, and put them in a safe place, preferably a safe deposit box. After you hire your divorce attorney, ask him or her if they want the titles: some will want them, and some will prefer that you keep them tucked away.

I should caution you against taking these precautions unless you believe that your ex will attempt to abscond with assets once they understand that you intend to divorce them. Trying to get an asset back in the heat of a divorce war is much more difficult than taking control of the asset ahead of time. If you are not worried that your ex will

try to seize control of your joint assets, then you probably do not need to take the precautions I describe above. Regardless whether you decide to use any of the other preventative measures I've described, you should go ahead and open your own bank accounts. Sooner or later you'll have to do that anyway. Just avoid raiding the joint savings account to fund them unless your ex agrees.

Now you have your financial ducks in a row. If you do not have kids, you can skip ahead to [Chapter Three](#). If you have kids, however, you should read the next chapter, where I'll discuss the custody and placement issues you'll face.

## **CHAPTER TWO: DON'T PLAY TUG OF WAR WITH YOUR KIDS.**

In this chapter I'll discuss what is the most important issue in divorce cases: the custody and placement of the children. If you do not have children, or, if your children are grown and living out of the house on their own, you can skip this chapter, and breathe a sigh of relief. For the rest of you, read on.

First, a little advice. You must come to terms with the idea that although your marriage is ending, you and your ex are still parents together. Ideally, divorced parents would put aside their differences and do what is best for their children. They would work together to continue raising their children to the best of their abilities. Unfortunately, that happens all too infrequently. Too many times people with children find themselves locked in heated battle. They fight over who will have custody of the kids, who will have placement, who has to pay child support, who gets the tax exemption, and on and on. When it comes right down to it, most of the time the fight has little to do with the children themselves. The kids are just the conduits for whatever the actual rift is between the parents. Don't let this happen to you. If you have to fight over something, fight over who gets that cuckoo clock Aunt Millie left to you: don't fight over your kids. In the end, everyone, especially your kids, lose.

I know that the temptation to respond to an ex's pointed barbs can be overwhelming. But resist the urge to rise to the bait. Let yourself get hooked and you'll spend the rest of the case and much of your remaining adult life expending energy fighting a pointless battle that you cannot win. Be reasonable with your ex, especially when it comes to your kids. Do it even if your ex isn't being reasonable with you. Someday your children will thank you. I'm not saying you should roll over and let your ex have his or her way. Be assertive, not aggressive: forceful, not combative. Stand up for yourself and protect your kids from harm. How do you do this? Develop an internal barometer: be honest with yourself. Are you motivated by a true desire to do what's best for your children, or are you looking for a convenient way to make your ex's life as miserable as you believe he or she is trying to make yours? Above all, keep your children's best interests in mind at all times, and pursue those interests without regard to your own personal feelings. This is not about you, and it

is not about your ex. It's about your children, and they deserve your best efforts. End of lecture.

Next, you need to understand your terms. The most commonly misunderstood word in all of divorce law is "custody." Most people, including some lawyers, use it as an all-inclusive term. "Custody," as that term is actually defined in most states' statutes, means the right and responsibility for making major decisions affecting your children's lives. These include:

1. Non-emergency medical care
2. Consent to marry
3. Permission to enter military service
4. Permission to obtain a driver's license
5. Religious or spiritual training
6. Schooling (home school, public, private or parochial school)

It is important to keep in mind that legal custody is a two-edged sword. The right to make major decisions for your child is a privilege not to be taken lightly. Most parents I've represented have no problem jumping at the opportunity to exercise their legal custody rights. However, the other edge of that sword is that once you are granted the privilege of making the major decisions for your child, you also have the responsibility, or obligation, for making those decisions. That is where I sometimes see difficulties. I have seen too many cases where a parent crows loudly that they want the right to exercise legal custody type decisions over their children, but when it comes time for them to actually put that into action they shrink from the obligation. In extreme circumstances, parents who fail to meet their obligations in this regard can even lose their custody rights. It turns out that what they really wanted was to beat their ex. They did not have their kids' best interests in mind when they insisted on joint or sole legal custody rights.

Most people mistakenly use the term "custody" to refer both to their decision-making responsibilities and to their placement rights. It is important that you think of them as different concepts. "Legal custody" refers to the rights and responsibilities to make major decisions for your children. "Placement" refers to where the children physically are at any one time, and to the right to make routine decisions for your children. Placement, depending

on where you live, is sometimes called "physical placement" or "physical custody." "Physical custody" is a clumsy attempt by some state legislatures to remove the confusion between the concepts of placement and legal custody. Then, adding even more confusion, every jurisdiction refers to the parent who has primary placement as the "custodial parent". Regardless of what they call it in your state, here I will refer it as placement.

"Placement," as a legal concept, simply refers to where the children physically live. The parent with whom the children live most of the time has primary placement. That parent has the right and responsibility to make routine decisions regarding the child's daily care. The other parent exercises secondary placement, which, many people commonly refer to as visitation.

In most cases, you will share joint legal custody of the children. One of you will have primary placement, and the other will exercise periodic and regular visitation. In the past, mothers usually were the designated primary caretakers, although that is changing. Officially, courts are gender neutral, which means they are not supposed to favor one parent over another simply because of their sex. The presumption that mothers make better parents than fathers is obsolete. We are seeing more and more Dads advocating and obtaining primary placement rights of their children. There is a movement toward a shared placement scenario, where the parents spend equal amounts of time with the children. I tend to agree that in many cases that is an appropriate arrangement, and studies show that the children benefit. Most courts still award primary placement to one parent, however.

While many times placement arrangements appear workable on paper, the reality of many parents' experiences is much different. Too many times the parent with primary placement ends up taking on more than their half of the major custody type decisions. The trouble starts when the line between major decisions and routine decisions becomes blurred. The result can be what I call the **What Do You Mean Johnny Needs Braces problem**.

The scenario usually goes like this: assume Mom and Dad share joint legal custody, with the kids living primarily with Mom, (although it could certainly be the other way around, for sake of this example Mom has primary

placement). Dad provides employer sponsored health and dental insurance for the children, and they split evenly any uninsured medical or dental costs for the children. Mom and Dad have been divorced for several years now, and over time Mom has taken on more and more of the decision-making responsibilities. She's become used to making decisions and letting Dad know about them later. Dad does not put up much of a fuss. No one knows why, exactly. Perhaps he's even secretly relieved that Mom is taking on more of the burden.

This works fine for everyone, but then Mom takes Johnny to the dentist for his regular six-month check up. Dr. Dentist tells Mom that it is time to correct Johnny's overbite and refers her to an orthodontist for a consult. Mom takes Johnny to Dr. Orthodontist without telling Dad. Dr. Orthodontist convinces her it is time to fit Johnny for braces. Thinking that Dad will understand that Johnny needs braces, Mom gives the go ahead. Dad's insurance covers \$2,000.00 of the \$3,500.00 bill. Mom sends a copy of Dr. Orthodontist's bill for the remaining \$1,500.00 to Dad with a note asking him to return it to her with a check for his share, \$750.00. This is the first that Dad learns about the braces. Dad becomes upset.

I've had clients on both sides of this issue. I think both parents are at fault. Johnny and his crooked teeth are their equal responsibility. Mom should not have given the go ahead to Dr. Orthodontist without bringing in Dad. Getting braces is one of those major decisions, which makes it a legal custody decision. If Johnny falls off his bike, breaking an arm, Mom can authorize emergency treatment at the local hospital without first tracking down Dad for the go-ahead to set Johnny's arm. Mom should certainly call Dad once things calm down to tell him that Johnny will be wearing a cast for the next several weeks. The braces consult and decision are different, however. It does not matter that Dad had slowly abrogated his custody responsibilities, although that was obviously his mistake. It also does not matter that Mom later claims that Dad would have vetoed the expenditure. Perhaps if Dad had been afforded the opportunity to come to the consult with Dr. Orthodontist, he would have recognized the necessity to repair Johnny's overbite. He deserves the chance to participate in the decision. Of course, if Dad historically allowed Mom to make the majority of the

custody type decisions alone, one could argue that he gets what he deserves.

The solution to this comes down to two words: communication and consistency. Communication must be a two way street. Mom must make sure she lets Dad know that Dr. Dentist thinks Johnny should be evaluated for braces. Dad must keep the lines of communication open with Mom, and treat her with respect when she does call him. Unfortunately, communication is usually the biggest problem: after all, if Mom and Dad communicated well, they might still be married. Yet the courts expect two people who, as an old mentor of mine used to say, can't agree that grass is green, to communicate effectively and cooperatively regarding Johnny's braces.

It is also vital that both parents remain consistent when dealing with each other regarding the kids. Dad cannot cry foul when Mom surprises him with the orthodontist bill when he's paid little attention to legal custody issues in the past. On the other hand, Mom should always try to bring Dad into the mix. If she makes the overture and Dad ignores or disregards it he will have difficulty justifying his indignation later.

Every situation is different, involving unique personality mixes, backgrounds, and perspectives. There is no easy answer to this conundrum, but both parents must honestly try to work together, or Johnny may have to have to live with an overbite until Mom forces the issue in a post judgment motion (see the Chapter 8 on post judgment matters, "**It Ain't Over Till It's Over**") or he's old enough to pay for braces himself.

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If custody and/or placement are at issue, you should know what the court looks for and how they decide this most important of matters. Almost every state employs something called the "best interests of the child standard." There are only a handful of states that use something other than the "best interests" standard to describe their custody standards. They are:

Alabama	Favors joint legal custody
Massachusetts	Either party can obtain custody if there has been no

	marital misconduct
Montana	Requires parenting plans, in addition to employing the best interests standard
New Hampshire	Presumes joint legal custody
New Jersey	Awards custody based on factors identified in statutes
Rhode Island	Awards custody based on factors identified in statutes
South Dakota	Employs judicial discretion, based on the best interests of the child
Virginia	Awards custody based on factors identified in statutes
West Virginia	Court uses no specific factors, but exercises its discretion in each case

Regardless of what these states call their custody standards, however, they are mere euphemisms for the best interests standard used by the majority of states.

Generally, courts give parents the benefit of the doubt, and assume that they will put what is best for the kids ahead of their own needs. Then how do courts choose between two equally well-meaning parents? They review each parent's respective strengths, weaknesses, and abilities to provide for their child's overall well being. Courts consider many factors, applying each of them to the individual facts and circumstances of the case. Some factors have more weight than others, but all are important. Although the following is not an exhaustive list, these are the **major factors considered by most courts in determining the best interests of the child:**

- **The wishes of the parents.** In some cases parents reach agreement and propose parenting plans to the court for approval. Where they do not agree, each parent will present their wishes through their respective attorneys at trial.
- **The wishes of the child.** If the child is mature enough to express their wishes, then the court will listen. Each case is different. There is no magic

age when the court deems the child too young to listen to and then, poof! the next day they cross some threshold and are suddenly old enough to be taken seriously. The court considers the individual maturity level of each child. I've seen cases where articulate ten year olds could express their wishes rationally, and others where fifteen year olds could not.

- **The relationship between the child and the parents,** both individually and as a family unit.
- **The amount and quality of time each parent has spent with the child in the past.** How much effort has the parent put into actually being with the child? There's a huge difference between being around your kid and being with your kid. Staring at a television together without speaking or interacting for hours at a time is much different than taking Johnny to the park or reading to him or letting him whip you on PlayStation. Let's not kid ourselves: he could whip you at PlayStation even if you were trying.
- **The child's adjustment to their environment,** including their home, school, religion and community.
- **The age of the child and their developmental needs.**
- **The mental and physical health of the parents and the child and anyone else who will live in the home with the child.**
- **The resources available to the parents.** One parent may have more financial resources available to them, while the other may be able to devote more time to the child's care.

Since most jurisdictions favor joint legal custody, meaning that both parents share in the major decisions, the real dispute usually centers on placement issues. Sole legal custody is usually awarded to one parent over another where there are unusual circumstances. One parent may suffer from serious psychological difficulties, for example, or there may be logistical problems. I had one case where the other parent was in prison: there, the court awarded my client sole legal custody, not because the other parent was a bad person, but because that parent was unavailable.

There are other cases of course, where the court awards sole legal custody to one parent because it finds that the other parent is unfit. Although these cases seem to garner more attention than the run of the mill custody and placement cases, they are actually pretty rare.

Judges do not like making custody or placement decisions. Along with the legislatures that write the laws, they recognize that the parents are usually the best qualified people to make these decisions for their kids. Toward that end, almost every jurisdiction requires that before the courts become involved in custody or placement disputes that the parties mediate the dispute themselves. During mediation the parties meet with a mediator, without their attorneys present, to discuss, negotiate, and perhaps settle their differences. Mediation services are provided through the local court system. The mediator is trained to facilitate discussion between the parties, with the goal of helping the parties reach an agreement. The mediator takes no sides, but a well trained mediator will point out to each party the relative strengths and weaknesses of their stated positions.

If the parents cannot agree, the mediator will issue an impasse statement declaring that the parties failed to reach a middle ground. At that point, the attorneys notify the court, and prepare for a contested custody/placement hearing. If the parties do reach agreement, the mediator will submit a memo of agreement that the parties then take to their attorneys. The agreement is memorialized into the parties' settlement agreement and is eventually made a part of the final divorce judgment.

If the parents do not reach an agreement with the mediator, they start the process of gathering information for the court about the parties' respective circumstances vis-à-vis their parenting abilities. Judges cannot physically visit every home. They don't have time to interview every parent, relative, neighbor, teacher, and clergyman who may have information relevant to their inquiry. Yet this information is necessary if the judge is going to make an informed, intelligent decision. They solve this problem by appointing a *Guardian ad Litem*, or GAL for short. GALs are lawyers who are appointed by the court in family cases involving custody disputes.

Before describing the GAL's function more fully, I should point out that many people, including several attorneys who should know better, do not fully understand what a GAL represents. Notice I said what they represent, not who. Many parents operate under the mistaken presumption that once a GAL is involved, the GAL represents the kids. They don't. Their job is to represent the best interests of the kids to the court. You need to understand that this is an important distinction. Your divorce attorney is your advocate: their job is to present your desires and perspectives to the court, and construct a logical, legal argument designed to convince the court that it should find in your favor. GALs do not advocate on behalf of their wards: they make recommendations based on what they conclude is in the best interest of the child.

I explain this to my clients by telling them that if Johnny tells the GAL that they want to live with Mom, the GAL can still decide that it is in Johnny's best interests that he lives with Dad. Certainly the GAL will consider Johnny's wishes, but a good GAL will look beyond what Johnny says he wants. Sometimes there is a hidden agenda. Perhaps Mom has promised Johnny a new bike if he comes to live with her. Or, maybe Johnny has figured out that Mom isn't as strict a disciplinarian as Dad. All things considered, he would just as soon have more freedom to stay out late with his buddies. But Ms. GAL determines in the course of her investigation that Johnny needs the structure that Dad seems more able to provide. Despite Johnny's wishes, Ms. GAL recommends to the court that he live primarily with Dad because it is in his best interests to do so.

I tell my clients that Guardians ad Litem are the eyes and ears for the judge. They go to places a judge could never visit. The GAL goes into the field, interviewing the parties, the kids (if they're old enough), and other relevant witnesses. The GAL visits the respective homes of the parents, goes to the child's school, and reviews pertinent medical records. They are neutral as between the parents. They have no stake in who "wins" the divorce litigation involving any of the financial issues. In my experience as a Guardian ad Litem, I consciously avoid knowing anything about the financial issues of the underlying divorce case. The only financial issue a GAL should be concerned with is whether the parent can adequately support their child.

There is one financial issue related to this issue the parents should be aware of, however. The parents usually split the fee for the Guardian ad Litem. Most jurisdictions require that parents deposit a down payment toward the fees with the local clerk of courts. Check with your local family court administration office: deposits range from \$500.00 to over \$2,000.00, depending on where you live. At the conclusion of the case the GAL submits an itemized statement to the parties' lawyers and to the court for approval. The lawyers review the statements for reasonableness. Unless they object to any of the charges, the court will usually approve the statement and order that the parties each pay half of the balance. In some jurisdictions the court will order the county clerk of courts to pay the GAL fees, then bill the parties, who reimburse the county. The court can assign more than half the fees to one of the parties if there are grounds to do so, including financial ability to pay, or misconduct by one party justifying that they pay a greater share of the GAL fees.

Sometimes, psychological issues surface that must be investigated. Perhaps Dad has a history of spousal abuse, or Mom has a problem with depression. Maybe Johnny's been acting out at school, causing disruptions in class or fighting with other kids since Mom and Dad split. I have yet to meet a lawyer qualified to diagnose or prescribe treatment for psychological problems that affect families going through divorce. In these cases, the GAL asks the court for permission to hire a qualified psychologist, who then performs an evaluation of the parties and children. Because the psychologist works for the GAL, she is also neutral as to the parties. Also, the parties usually pay for the psychologist separately. You should expect that a privately hired psychologist will charge anywhere from \$1,500.00 and up to perform a custody or placement related family evaluation.

The psychologist prepares a report for the GAL, who then distributes it to the other attorneys. If you and your lawyer disagree with the report, you can hire your own psychologist at your expense to perform a separate evaluation. Before spending another \$1,500.00 or more on a competing report, you should consider the possibility that the judge will assign less weight to your expert's report than he will to the presumably more neutral report from the GAL-hired psychologist.

When the Guardian ad Litem has completed her investigation, she prepares a report for the attorneys containing her recommendation. This report is eventually filed with the court and becomes a part of the record of the case. The attorneys review the report with their clients, and, now knowing which way the GAL is leaning, try to negotiate a settlement that both parents can live with. The attorneys know that if the GAL report is well reasoned and thorough, there is a good likelihood that the judge will accept the GAL's recommendations and incorporate them into the custody or placement order. It usually makes sense that the parties settle their differences if they can, rather than risk the possibility that the judge is going to impose upon them an arrangement that neither may find acceptable. Of course, the parent who comes out ahead in the recommendation negotiates from a position of strength.

You may wonder, then, whether it makes any sense to continue disputing a custody or placement matter when a GAL makes a recommendation in favor of the other parent. Without sounding glib, that's why they play the game on Sunday. Despite the GAL's recommendation, keep in mind it is only a recommendation. A well-prepared attorney advocating for his client can effectively counter even the strongest recommendation. No matter how well researched and prepared the GAL's report is, the most important information is that which comes from you during your testimony before the court. That is where the judge can look into your face and gain an insight into your character that is difficult to discern in the pages of any GAL report to the court or psychological evaluation.

By this point you may be thinking, all right, now I know how this works, but what can I do to make sure I come out ahead in a custody or placement battle with my ex? It is no surprise to anyone that disputes over custody and placement are the most hotly contested area of any divorce case. I meant the advice I opened with in this chapter: don't fight over your kids, but stand up for yourself and them when necessary. Unfortunately, that will not stop your ex from trying to start something, or from acting unreasonably. Your ex knows you as well or better than anyone in your life. They know what emotional buttons to push to upset you and elicit what they hope will be an inappropriate response.

You cannot control what anyone else does: you can only control your actions, and hopefully, your emotions. Keep the big picture in mind when dealing with an unreasonable ex. Here are some examples of what I'm talking about:

You want to leave your ex and get the divorce started. Assume you want primary placement of the children. What do you do? Do you stay in the home with them or do you leave them behind? Ideally, your ex would agree to move out. If they refuse, then you have to make a tough decision. Do you stay in a difficult environment in order to stay close to the children, do you move out of the house without them, or do you take them along with you when you move out?

There is no good general answer: there are variables that affect each individual case. Some jurisdictions frown on parents who move out of the marital residence without the kids and later ask the court for primary placement. The courts reason that the children are more important than your individual comfort. This sometimes puts an unreasonable burden on people. What if the parent is being abused? Are they supposed to stay behind for the sake of the children while their ex continues to emotionally or physically pummel them? If there is abuse, call the police. If the police are convinced that the situation is dangerous for you, they will arrest the abuser and remove him or her from the house. You can obtain a restraining order that will prevent the abuser from returning while the prosecutor decides whether to prosecute. That gives you time to hire an attorney, begin the divorce action, and obtain a temporary order awarding you exclusive use of the residence.

What if your ex is just intractable? They do not actually abuse you, but they make your life miserable in the home environment. This is a more difficult problem than the previous example. Don't make any decisions to move out with or without the children just yet. If you're in this situation, you should first read the next chapter, **Meet Your New Best Friend, Your Divorce Lawyer**. Then hire an attorney and get his or her advice. You need to find out if you live in one of those jurisdictions that penalize parents who leave the kids behind, or, if you live in a jurisdiction that penalizes parents who take the kids with them. Many states take the position that if you remove the children from the marital home without the other parent's consent you are guilty of interfering with that parent's

custodial rights. Remember, until a court rules otherwise, those kids belong to your ex as much as they belong to you. Be careful, and do not make any decision until you get competent legal advice. Take the advice of friends and neighbors with a grain of salt. They may mean well, and they may even know of other people who were in similar circumstances. But unless they're lawyers, it is unlikely that they will understand all of the potential consequences of your situation.

One last bit of advice: a judge will be more impressed with a parent who behaves reasonably than he will with a parent who does not. Keep tuned into that internal barometer I described earlier. Keep your children's best interests at the forefront of every decision you make. Their needs come before yours. If you do that, and force yourself to remain calm in the face of the onslaught that may come from your ex, more often than not you will prevail in the end.

Now you have a basic idea of the financial and child related issues that you should consider once you have decided to dissolve your marriage. In the next chapter I'll walk you through the actual process involved in getting you from unhappy married person to (I hope) a potentially happier unmarried person.

### **CHAPTER THREE: MEET YOUR NEW BEST FRIEND, YOUR DIVORCE LAWYER.**

I hope you don't think that I am being facetious with the title of this chapter: I'm serious. Let me explain. Do I think that you and your lawyer will become bosom buddies and establish a life long relationship? No, although I do have several former clients who seem genuinely happy to see me when we occasionally run into each other standing in line at the movie theater or at some restaurant. That isn't everyone's experience, however. I know that many people actually dislike lawyers. One of my favorite lawyer jokes illustrates the point: what do you call a thousand lawyers chained together at the bottom of the ocean? A good start. As a group, we lawyers are not known for our engaging personalities. Speaking as a member of the profession, I think that is somewhat unfair, although I admit most of us aren't exactly Robin Williams. I will also admit that there is a certain percentage of attorneys, which varies around the country, who are less than pleasant. Some are downright nasty. Some people actually hire attorneys based on that lawyer's reputation for being disagreeable. I think that is deplorable, and only fuels the popular perception that lawyers are a rude, distasteful lot.

There are several categories of matrimonial law attorneys, covering every style of practice methods imaginable. There are those who attack like human pit bulls, and some who are so passive one is tempted to check to see if they have a pulse. I guess my personal style is somewhere in the middle: I try to avoid starting the fireworks, because negotiations are easier when everyone is civil, but if the other side fires the first rocket they'll need a fire hose to put me out.

Regardless of our respective styles or personalities, all of us who practice divorce law have one thing in common: our clients depend on us to bring them through their divorce as cleanly and painlessly as possible. We deal with the most personal of issues, such as your finances, attitudes about parenting, and your plans for the future. We dissect your lives and examine all of the details of your financial circumstances. Then, while advising you during the liquidation of Mr. and Mrs. Smith, Inc., we help you re-construct your lives from the ground up. We ask lots of personal questions regarding your needs and

desires: often, I will ask my clients something like, "Assume you woke up this morning and it's the day after the court has granted your divorce. In a best case scenario, what does your life look like?"

While we attorneys are busy dissecting your lives, you experience emotions that are unfamiliar and probably unsettling. You are at the opposite end of the spectrum from where you were that happy day when you and your ex pledged to be together "till death do us part." No one gets married thinking it will someday end in a break up. Many are unprepared for the emotional turmoil this causes. Added to that is the hassle and expense of dealing with strangers in suits who tell you what you can and cannot expect to do from this point forward. In many ways this will be the most vulnerable period of your lives. I've told several of my clients (the ones who could take it) that in my opinion people involved in divorce litigation are temporarily insane. In such an environment, it's not surprising that my clients reveal things to me that they might not tell their actual best friends. I've heard so many confidences that sometimes I feel more like a therapist or a priest than I do an attorney.

You rely on us to assist you through this sometimes distasteful, sometimes confusing, sometimes frustrating, and always complicated process. If we do our job well, you come out of the other side of the process as prepared as possible, at least from a material and parental viewpoint, to begin the next chapter of your lives. Your emotional health is more up to you.

Sometimes that line becomes blurred. Many times a client will call me, complaining of something their ex has done to stress them out. I'm no psychologist, but I can recognize the signs of depression and psychic trauma. I tell them that other than bringing some appropriate motion designed to try to correct the irritating behavior of their ex, there is little I can do to help them with the emotional hurricane raging inside them besides lending a sympathetic ear. Occasionally I have clients who need the kind of help only a qualified therapist or psychologist can provide. In those cases I gently nudge them in that direction for help. For most, though, merely expressing their frustration seems cathartic enough. I have often thought during many cases that my clients sometimes feel as close to me as to anyone else in their lives. I consciously walk that balance beam

between the professional objectivity that is an imperative of my profession and the human impulse to help my clients because I empathize with them and want them to succeed. I believe any good matrimonial attorney does that as well. In my experience with working on the opposite side of hundreds of cases with other lawyers, I have found that the attorneys who seem to do the best job for their clients walk the same balance beam as me.

That is why I think a good divorce lawyer can be your new best friend.

So how do you find your lawyer? First, I should point out that there is no requirement in any jurisdiction of this country that you hire a lawyer. You have an absolute right to represent yourself. The term the courts use for this is *pro se*, which is Latin for "for yourself." In some divorce cases, people have successfully represented themselves. They are willing to put in the time and do the homework necessary to do at least a workmanlike job of dissolving their marriage and creating the foundation for the next chapter of their lives.

I know it sounds self-serving, but I think that is a mistake. I don't care how smart you are, or how motivated, or how much time you have to devote to working your own case. 99% of the *pro se* litigants I am aware of later regret their decision. The short term savings on attorney fees is usually later outweighed by some serious mistake they make during the divorce. For instance, I recently represented a former *pro se* divorce litigant. He hired me about eight years after his divorce was final to review his child support obligation and seek a modification. I analyzed his case, and determined that over that time he had overpaid his child support by approximately \$60,000.00! He practically fainted in my office when I told him. For reasons that I'll explain later in Chapter 5 (**Child Support and Alimony: Playing Checkers With Your Money**) he could not recover any of that money. So if you are considering not hiring an attorney, you should first go slam your head in the car door several times to give yourself a preview of how your *pro se* experience is likely to feel. After you regain consciousness, go find a good lawyer.

One place you may want to look for a lawyer is on the Internet. You can join a pre-paid legal program, where you can locate a good lawyer at discounted rates. Some of my

brethren will not like me for saying this, but it's unfair that lawyer fees should prevent people from obtaining competent legal counsel. You can find a good lawyer [by clicking here](#).

Referrals from your friends and acquaintances are among the best sources for attorneys. No doubt you know people who have either gone through a divorce themselves, or who know others who have. Ask them about their experience with their attorney. Were they responsive to their needs? Did they listen or lecture? Did they return phone calls within a reasonable time? Were they smart? Did they know the law? Were they willing to roll up their sleeves and spend the time necessary to know their case personally, or did they delegate much of the detail work to assistants and paralegals? When they called the lawyer's office, were they more likely to talk to the lawyer directly, or a staff person?

Another source of referrals is other attorneys. You should talk to two or three lawyers, unless of course you are completely comfortable with the first one you interview. Perhaps you used an attorney to represent you when you closed on the sale of your home, or someone drafted an estate plan for you, or helped you with that embarrassing traffic ticket. If you were happy with your experience, and respected and trusted that lawyer, call him. Ask him if he does matrimonial work himself, or if he could refer you to two or three lawyers who do. If he does matrimonial work, make an appointment and go interview him, but still ask for the referrals. Ask him to whom he would go if he were about to go through a divorce. Your former estate plan attorney will not be upset that you ask for other referrals. It happens all the time, and is part of the business.

If you either cannot or do not wish to use your contacts in seeking a lawyer, you can call your local bar. That's bar association, not Laverne's Tavern downtown. Most larger cities have an office, and can give you names of attorneys who work in the area. If you live in a less populous area, call your local Clerk of Courts, and ask if they know of any lawyer referral services in the area. Most state bar associations have something called a lawyer referral service. Since the state bar is located in the capital city of your state, you can usually find it by calling information for that city and ask for the number to the

state bar administration office. They can help you find a lawyer who lives in your area qualified to represent divorce litigants.

Other resources for finding a divorce lawyer are advertising on the web and in the yellow pages. I may be drummed out of the lawyer fraternity for what I am about to say, but I think these should be a last resort. A flashy web site or a full page color ad complete with pictures of the lawyer looking concerned at you from the page has little to do with whether that is the right lawyer for you. I am a big believer in word of mouth advertising when it comes to hiring legal counsel. Getting names and opinions from people you already know and trust is usually a much better resource than responding to someone's marketing campaign. For the record, I am not one of those attorneys who is against advertising. I think it has its place. However, I personally prefer the more substantive method of seeking direction from real people when you are searching for someone as potentially important to your life as a good divorce attorney.

You should make appointments with two or three lawyers. When making the appointment, ask the lawyer if they charge for the initial consult. Explain that you will be interviewing other attorneys, and will probably not decide whom to hire until you have concluded the interviews. In my practice, I usually do not charge for the initial consult, assuming it takes an hour or less. If we run over an hour, I usually do charge for that additional time.

This is a touchy subject for some people. You must understand that from the attorney's perspective, her time is her product. If she is not billing hours, she won't get paid. It's that simple. Most firms require quotas of associates and partners, who must bill "X" number of hours annually to justify their salaries and pay for the firm overhead. Those of us in solo practice cannot afford to spend too much unbillable time interviewing prospective clients, but at the same time, that is part of our business. It's a chicken and egg problem: without the interview the client won't hire us, we won't have any files to work on, and we will not generate the billable hours we must to survive. So, if the lawyer you call tells you that they will bill you for the interview, please understand their motivation is economics, which is not a bad thing. This is America, after all, and no one should have to

apologize for making a living. On the other hand, you should consider whether interviewing an attorney who will charge you while you are deciding whether you want to hire her in the first place makes you comfortable. If it does not, cancel the interview, and ask her to refer you to someone else.

While you are arranging the interview, ask the attorney or their staff person whether the attorney has a standard retainer, and whether that includes any filing fees. Most offices will gladly give you that information, because it helps them pre-qualify the prospective client. It's a mutual waste of time if you meet with a lawyer, decide during the course of the interview you want to hire him, and then discover you cannot afford his retainer. You should know ahead of time what the retainer is. If you cannot afford to pay it, do yourself and the lawyer a favor and cancel the interview.

What is a retainer anyway? Think of it as a down payment toward the attorney's legal fees. The attorney is required to put the retainer aside, and charge against it as he or she performs services. When the retainer is exhausted, the lawyer may either bill you for the balance due each month, or ask you to replenish the retainer with an additional deposit. In many jurisdictions, if you discharge the attorney before exhausting the retainer, the attorney must refund the unused portion of the retainer to you. That is not true across the country, however. Ask the attorney when you make the appointment if retainers are refundable.

What range of retainer should you expect? It varies widely across the country. I've heard of some places where retainers are under \$1,000.00, and others where they exceed \$10,000.00. Whatever the range is for your area, before you meet with your prospective attorney for the first time, you should make sure you can pay the retainer should you decide to hire him.

Between the time that you made the appointment and the interview itself, you should carry a pad with you, and jot down any questions or issues that occur to you. Before the meeting, organize your thoughts and be prepared to ask your questions. You should also bring the financial information you prepared if you paid attention to [Chapter One: Get Your Financial Ducks In a Row or You'll Get Soaked.](#)

What questions should you ask about the lawyer? Do not be intimidated or self-conscious about asking him about his background and experience. I don't care if you are sitting across a meeting table from some young buck fresh out of law school or a grizzled old veteran with a picture of him shaking John Kennedy's hand on the wall behind him. You are the consumer, and you have a right to ask the lawyer about himself. Besides, by asking him about his background and experience you are sending him the message that you intend to be an involved client who takes this process seriously. You should ask the attorney some or all of the following:

- **How long has he been practicing matrimonial law?** Be careful here, because long years of experience is only one factor that you should consider. Do not think that just because your lawyer has more experience than your ex's that you have the advantage. I've had several cases against older, more experienced attorneys where my clients feel they came out ahead.
- **Has the state bar ever disciplined him?** Attorneys are a self-regulating profession. We're the golfers of the professional world. Just as a golfer must call a penalty stroke on himself if he hits the ball sideways into the water even if no one else is around, we are required to do the same thing if we commit an infraction of our state rules of professional responsibility. Also, if we know of another lawyer who has violated the rules, we must report him or we can be disciplined for failing to notify the bar. Sometimes these rules as applied in practice have little to do with reality, but they nonetheless bind us. You should avoid a lawyer who has been disciplined by the state bar because of dishonesty. On the other hand, a lawyer who made an honest mistake that was a technical infraction and found himself disciplined can still be an effective advocate.
- **What percentage of his required CLE seminars are family law related?** CLE stands for Continuing Legal Education. Every state requires that attorneys stay current with the law. The law is a living, breathing animal that rarely stays put for long. If we do not keep abreast of developments we get left behind, and our clients suffer. Therefore, we are required by our respective state bars to attend a certain number of

hours of seminars, and report our compliance with this requirement to the state bar every year or two years. Failure to do this results in temporary suspension of the attorney's license until they have fulfilled the requisite hours. You want someone who has taken at least one family law update seminar in the last twelve months.

- **Does he belong to any family law related organizations?** There are a few national organizations out there, sponsored by the American Bar Association, but not every attorney belongs to the ABA. However, every state bar has sections devoted to a number of disciplines, including family law. By joining the family law section, the lawyer receives specialized publications and is exposed to specific training in that discipline. Membership in the state bar's family law section is an indicator that the lawyer devotes a significant portion of his practice to that area. In some larger cities, local bars have family law sections or organizations for attorneys that perform many of the same functions as the state sections.
  
- **Is he familiar with the local judges likely to hear your case and the major players who practice in the area?** This is kind of a double-edged sword. I have represented clients in several jurisdictions where I am unknown, and do not know the judges and other lawyers, and have done just fine. At times that has even been an advantage, because the other side didn't know what to expect from me. On the other hand, there is something to be said for hiring someone who knows the ropes down at the courthouse. Every county has its own quirks, practices, and local rules. You've heard the phrase, "ignorance of the law is not an excuse?" This especially applies to lawyers, and includes each county's local rules. A lawyer must be familiar with the local rules and procedures. Some of my clients have told me they feel less intimidated by the courthouse atmosphere when they hear the staff call me by my first name and treat me with familiarity.
  
- **What is his educational background?** Many attorneys, including me, have their various diplomas and licenses hanging in their offices. Mine are on the wall behind me, over my credenza. When I bring a client into my

office for the first time, I usually excuse myself for a minute after they're seated to get myself some water or a cup of coffee for them. That gives them a moment to look at the credentials on the wall. (For the record, I have a Bachelor of Arts degree from Northwestern University, and my law degree, a Juris Doctor, from Saint Louis University School of Law. I have yet to bring a client into my office who can read my law degree, because the whole thing is written in Latin.) Law degrees are hard to come by: to quote David Letterman, "they don't just give those things to chimps." I'm proud of my degrees, as I think most lawyers are. Knowing that your attorney attended a solid law school is a plus, mostly because it tends to contribute to your comfort level that he is qualified to run your case. To be honest, though, as far as we lawyers feel, whether someone went to Harvard or Jim Bob's School of Law matters little once the pleadings are filed and the litigation has begun. I've won cases against lawyers who went to some of the best law schools in the country, and lost a few to graduates of Jim Bob's. When the facts or the law are against you, despite our experience with the O.J. Simpson trial, most of the time you're going to lose no matter what law school you attended. The primary ingredients of a successful litigation are the attorney's level of preparation, his willingness to dig into the facts and circumstances of a case, to research the law thoroughly, his ability to think on the fly, and his creativity. You don't learn any of that in law school, but while practicing law.

- **What is his professional affiliation?** For instance, is he an associate or a partner in a law firm? If he's an associate, does he report to a partner who is ultimately responsible for the case, or does he have the autonomy to run the case the way he feels best? If he is a solo practitioner, what other resources are available to him? Are there other lawyers with whom he associates or consults with on a regular basis? There are strengths and weaknesses in every situation. It comes down to your comfort level. Some clients feel more comfortable dealing with a lawyer from a firm, while others like the usually more relaxed atmosphere surrounding a solo practitioner. It all depends on you, and how you feel.

- **How does the lawyer run his cases?** Does he draft the pleadings himself or does a paralegal do most of that? Does he do his own research or does he delegate that to someone else? Does he return his own telephone calls or does his assistant do that for him? Again, what matters is your comfort level. This is probably my own bias because I am a solo practitioner myself, but I would prefer working with a hands on lawyer who does most or all of his own work. The most effective lawyers tend to be those who prepare the best and know their cases better than the other lawyer. A lawyer who reads file memos drafted by paralegals to bring him up to speed cannot possibly know the case as well as a lawyer who did the research himself and drafted his own memo.
  
- **How does the attorney communicate with you?** Will he automatically send copies of everything he receives to you? Do you want him to do that? Will he send copies of all of his correspondence and documents he generates to you? A growing number of my clients prefer that I correspond to them via e-mail: does your prospective lawyer use this tool? Ask yourself if his practices are compatible with your expectations.

By the conclusion of the interview you will have had an opportunity to begin to develop a sense of how well you think you could work with the attorney. Vice versa, he should have developed the same sense about you. Do not be disappointed or take it personally if the attorney declines representing you. It does not mean you are a bad person, it usually means the attorney has determined that there are things about you or your case that dissuade him from being willing to take you on. For example, perhaps yours will be a labor intense case, and the attorney is already swamped and just can't take on another big project.

In the end, the decision to take on your case must be mutual: you must be satisfied that you will be comfortable with your chosen attorney, and he must be satisfied that you will be a responsive client. If the two of you reach what we lawyers call a "meeting of the minds," then arrange to retain him. The lawyer will present you with a fee agreement, which you should read carefully before signing. Do not be afraid to ask questions: remember, you are the consumer. If you are not comfortable or are unsatisfied with something, do not hesitate to ask for an explanation.

If you are still unsatisfied, then perhaps you should thank him for his time and move on to the next interview. If the agreement is acceptable, sign it and break out your checkbook. Make sure he or she gives a copy of the signed agreement to you along with a receipt for the retainer check. You can put that in the file you should have started from Chapter One. Some firms send retention letters to you, detailing what they will and will not do for you. Keep that handy, as it can help you avoid confusion and misunderstandings later.

I should say something about the divorce practice, and how many lawyers approach it. Some lawyers may get upset with me for what I am about to say, but who cares: I think too many lawyers approach divorce litigation as an adversarial process, where the most important thing is who wins and who loses. In the end, when the parties are at war, most of the time they both end up losing. I think this is the wrong way to approach divorce litigation. Regardless of why your marriage is ending, at one time you and your spouse were in love. Remember that when dissolving your union. This is especially important if you have children together. The break up is harder on them than you can imagine. Starting World War III during your divorce is more than they should have to bear.

Regardless, you may want a lawyer who uses a scorched earth approach. I hope not, especially if children are involved in the case, because in the end you are the one who will end up getting burned. Your kids will eventually grow up, and chances are they will resent the way you treated their other parent. Or, you may want a lawyer who avoids conflict at all costs. That can be just as bad, because if the fireworks start, you want someone who is willing and able to fight for you. I believe the best divorce lawyers are those who act as advisers, not adversaries, as counselors, not as consiglieri. Ask the lawyers you interview what their personal styles are, and pick the one with whom you are most comfortable.

I want to briefly discuss what you should and should not expect from your lawyer once you've hired him. You should expect that your lawyer will return your calls within a reasonable time. You should expect that your lawyer will keep you informed of developments in your case. You should expect that your lawyer will explain things to you in an understandable manner. If you do not understand something,

ask! Remember, you are the consumer. You should expect detailed billing statements each month so you can track how much of your retainer is left and how much the case is costing you. You should expect that your lawyer will be courteous and respectful toward you, that he should encourage you toward the reasonable goals you have relative to the divorce.

You should not expect that your lawyer is your therapist. As I wrote earlier, we are legal advocates; we aren't psychologists. You should not expect that your lawyer is non-responsive to you. You should not expect that your lawyer will treat you condescendingly or patronizingly. You should not expect that your lawyer will make you feel stupid for asking a question. I tell my clients that there are no stupid questions, although I may occasionally provide stupid answers! I hope they know I'm kidding about the stupid answers part. My point is this: if you feel intimidated by your lawyer, that's bad, and if you feel so intimidated that you avoid seeking answers to questions you have, that's really bad. Remember, you are the consumer.

If you become unsatisfied with your lawyer's services, you can discharge him or her. Every lawyer runs across an occasional client that decides for whatever reason that wants to change horses in mid-race. It's even happened to me once or twice. We don't take it personally because we know, like Lincoln said, that we cannot please all of the people all of the time. It's usually a good idea to have another attorney waiting in the wings to take over the reigns of your case before hitting the eject button on your current lawyer. You want to maintain the continuity of your case as well as you can.

Now you're ready. You have your financial ducks in a row, you have an idea how you would like your children's custody and placement issues resolved, and you have just hired competent legal counsel. Next, we'll look at the road you're about to travel through the family law court system.

## CHAPTER FOUR: DISCOVERY AND PRETRIAL PROCEDURE: UNFOLDING YOUR ROAD MAP TO FREEDOM.

The next step in your odyssey is to learn about "the system," and how it works. By "the system," I am referring to that monolith most lay people think about when they talk about the inter-relationship between the law, the courts, and the lawyers. How does it all work? For those of you on the outside looking in, it looks mysterious and daunting. My goal for the rest of this book is to answer this basic question for you and remove the veil. In this chapter, we begin the answer by exploring pretrial divorce procedure.

Jurisdiction. Jurisdiction is the power of a court to exercise its authority over the parties to a lawsuit. The first thing we lawyers have to establish in any case is that the court has jurisdiction to act. If the court does not have jurisdiction, it will decline to act, leaving the parties without a forum in which to litigate their case.

Why should you care about this? Because it's important that you understand from where the court derives its authority. Without proper authority, the court cannot act, you cannot get divorced, and you can get stuck in limbo.

There are two kinds of jurisdiction. The first is jurisdiction over a thing, called *in rem* jurisdiction. This refers to the power of a court to exercise authority over something, such as your marriage.

In divorce cases, *in rem* jurisdiction is usually conditioned upon the one of the parties' residency in the state. Either spouse can bring a divorce action in any state in which they have met the residency requirement, even if the other spouse does not live there. Most states have an additional residency requirement: you or your ex must also live in the specific county in which you wish to bring the action for a shorter period. For instance, my home state requires that one of the parties must live in the state for at least six months, and in the forum county for at least thirty days before filing the action. See [Appendix A, "Summary of Divorce Laws By State"](#) to see what your state's residency requirements are. Contact your local clerk of courts to find out what the county residency requirement may be.

The second kind of jurisdiction is the power of a court to exert authority over people. This is called *personal jurisdiction*. Personal jurisdiction is typically established by a party's presence in the forum state, or by the non-resident party's consent to the state's exercise of jurisdiction over them. If you're there, the court has personal jurisdiction over you. Every state has statutes that define personal jurisdiction.

Personal jurisdiction issues usually become important when we're dealing with nonresidents. Most states have laws allowing their residents to use their home state courts to determine their marital status when the spouse lives elsewhere. The court will have no ability to exercise personal jurisdiction over the non-resident spouse regarding property division, alimony, or debt payment, however. In short, you can get divorced in an *in rem* action, but the financial issues of your divorce are left open until you obtain personal jurisdiction over your ex.

Sound confusing? Well, suppose **A** lives in Illinois and wants to divorce his or her spouse, **B**, who lives in Arizona. If **A** meets the residency requirements in Illinois, **A** can file a divorce action there. Suppose **A** serves **B** in Arizona with service of process of the Illinois divorce action. (You'll read about service of process later in this chapter.) Illinois has *in rem* jurisdiction. If **B** does not object to the court's *in rem* jurisdiction, the Illinois court will grant the divorce, and dissolve the marriage. However, the financial issues will be left open. **A** will not be able to get any relief regarding property division, alimony, or debt payment.

Now suppose the same facts, except **A** obtains service of process on **B** while **B** is in Illinois, or, **A** serves **B** in Arizona, and **B** consents to the Illinois court's *personal jurisdiction*. Now **A** can divorce **B** and get orders regarding the other financial issues mentioned above.

Notice I said that the financial issues cannot be resolved until the Court can properly exercise personal jurisdiction over both **A** and **B**. That is not the case when we're dealing with custody and placement of your children, however. Most states have adopted with little modifications two model statutes that contain uniform rules for jurisdiction over nonresidents in family related cases. The first of these is something called the Uniform Child Custody Jurisdiction

Act, or UCCJA. If you have kids and your ex lives in another state, the court will use the UCCJA to determine jurisdiction over the child related issues in your divorce.

Basically, the UCCJA determines jurisdiction based not on where Mom and Dad live, but where Johnny lives. Generally, jurisdiction rests in Johnny's home state. Under the UCCJA, the state Johnny lives in at the beginning of an action affecting his custody and/or placement is his home state in most cases. Even if Johnny is not in your state, if the court determines that it is in his best interests that it exercises jurisdiction, then the court in your state can do so.

This sometimes leads to complicated and confusing scenarios. For example, as of the writing of this book, I am dealing with a case where my client lives in Wisconsin, the ex and their child live in North Carolina, and the divorce is being litigated in Colorado. My client has never lived in Colorado. Their child lived there for about six months with the ex's parents while the ex traveled for business reasons. Although we think the ex never actually resided in Colorado, the ex got around that state's 90-day residency requirement by using the grandparent's house as a mailing address for the requisite period. The ex filed a divorce action in Colorado just before moving to North Carolina with their child. Under the UCCJA, the Colorado court was able to exert jurisdiction over the child even though the child no longer lived there. My client consented to personal jurisdiction in Colorado because that court already exerted jurisdiction over their child via the UCCJA. My client has only visited Colorado for brief periods, and the parties have no property there. The ex will probably never move back to Colorado, which means that regardless of which parent ends up with placement the child will never live there again. All of this happened before my client hired me. I would have advised against my client's consent to Colorado's personal jurisdiction. It was too late, however. The Colorado court denied my motion to dismiss the case for lack of jurisdiction. The court cited the original UCCJA basis for jurisdiction over the child as a reason to continue exercising jurisdiction over the rest of the divorce case, as well as my client's earlier consent to personal jurisdiction. In short, the Colorado court decided to keep the entire case together, rather than have the custody issues litigated there while the property issues are litigated in either North Carolina

or Wisconsin. If this makes your head hurt, imagine how my client feels!

A second model statute that has been adopted uniformly by most states is the Uniform Interstate Family Support Act, or UIFSA for short. UIFSA gives us the rules for establishing, enforcing, or modifying a child or family support order over a nonresident of the forum state. So, if your case involves those issues but your ex lives in another state, you can obtain personal jurisdiction in your state if you can meet any of the criteria listed in the statute. These bases for exerting jurisdiction over a nonresident in UIFSA related cases are:

1. Personal service with a summons or other notice on the nonresident individual in this state;
2. The nonresident voluntarily submits to the court's jurisdiction;
3. The nonresident resided in this state with the child for whom you are seeking a support order;
4. The nonresident resided in this state and provided prenatal expenses or support for the child;
5. The child lives here with the consent or at the direction of the nonresident;
6. The nonresident engaged in sexual intercourse in this state which resulted in the conception of the child; and finally, the old catch-all
7. There is any other basis consistent with both the U.S. and this state's constitutions for exercising personal jurisdiction over the nonresident.

Note that both of these uniform statutes provide for consistent rules used throughout the country for establishing jurisdiction in cases involving either custody and placement (under the UCCJA) or child support (UIFSA). There are no uniform statutes designed to provide for the same kind of consistency in establishing personal jurisdiction over nonresidents for the purpose of obtaining a divorce judgment. However, in most states there is no requirement that a petitioner (that's the party who files the action) establish that grounds for personal

jurisdiction exist. All you have to do in most cases is to provide proof that you had the respondent (the other party) properly served with a summons and petition. Then it's up to the respondent to object to the court's jurisdiction. If the respondent does object, then the petitioner must prove that there are grounds for personal jurisdiction. That is usually done by showing that the respondent has "sufficient contacts" with the state to justify the court's jurisdiction.

Required and Discretionary Pleadings. What documents does your lawyer file with the court in order to start the case? These documents are called *pleadings*. When you file a lawsuit you're formally asking, or pleading, the court for something, whether it's money, as in the case of a personal injury action, or a remedy to a problem, such as granting you a divorce from your ex.

Filing a petition for divorce begins the case. Some jurisdictions have other names for the pleading, but they are called petitions in most places. The form and substance requirements vary from state to state, but all petitions for divorce, regardless of your jurisdiction, contain the following information:

- Name, address, occupation, date of birth, and Social Security Number of each party.
- Names and dates of birth for each child born to the parties during the marriage. This includes any children adopted by either or both of you while you were married. If either of you have custody of other children from a previous relationship, you may have to identify those children, depending on where you live.
- Whether the wife is pregnant. I can't count the number of times my female clients have smirked at me with that "are you kidding?" look when I ask them that question during my fact gathering interview. There is a logical reason behind the question, however. Just as nature abhors a vacuum, courts abhor the unintentional creation of bastard children. Every state has a statute presuming that if wife is pregnant at the time one of the parties files for divorce that husband is the presumed father of the child in utero. This is a rebuttable presumption, which means that the parties can present evidence that husband is not the

father. In such cases, the other man can be identified in the divorce judgment as the baby's father. However, he will not be identified legally as the baby's father unless he consents to it, or, failing that, wife can bring an action to establish paternity. For purposes of the divorce proceedings, however, the court will consider the matter settled.

- Information regarding the whereabouts of the children.
- Whether the divorce will affect the disposition of any real property owned by the parties, and if so, the location and legal identification of the property.
- The jurisdictional bases for the action that justifies the authority of the court.
- Date and place of your marriage.
- Grounds for dissolution of the marriage. This is an area of the law that has changed quite a bit over the last decade or so. When our parents wanted a divorce, most jurisdictions required that they state grounds, or reasons. These included such things as "extreme mental cruelty," "adultery," and "spousal abuse." Thankfully, state legislatures have come to recognize over the years that requiring people who no longer want to live together as husband and wife to air their dirty laundry served no purpose other than to stir an already boiling pot. So over the last several years, states have systematically removed that impediment. In most states, all you have to do is allege that you want the marriage dissolved.
- Whether either of the parties has been married before. If so, include information as to how and when the previous marriage(s) ended.

The parties to the petition are identified in the caption. The caption is the first thing you will see when you look at the pleading. It contains the name of the jurisdiction, the kind of action, and the names and addresses of the parties. The person filing the petition is called, surprise, the petitioner. The other party is called the respondent.

Along with the petition, your lawyer will file a summons with the clerk of courts. The summons is the notice to the other party that a lawsuit is pending. The summons contains information for the respondent, including where and how he or she must file an answer, what legal limitations they are subject to while the case is pending, and a brief description of the applicable law.

In many jurisdictions the petitioner may also file a pleading asking for a temporary order from the court. These are called various names, such as petition for temporary order, a motion for temporary order, or an order to show cause for temporary order.

What is a temporary order and why might you need one? In most states divorce is a lengthy process, taking anywhere from about four months to what seems like infinity. Many states require that you and your ex try to mediate your differences before the court will grant your divorce. See [Appendix A, "Summary of Divorce Laws by State."](#) I recently concluded a case that took over three years to resolve.

While your case is pending, who's going to be responsible for the household bills? Who's going to live in the house? Who's going to pay alimony or child support, and how much? How are the custody rights going to be assigned? Where are the kids going to live, and how much time will they spend with the other parent? Who's going to provide insurance coverage, and who's going to pay for the medical and dental related expenses that aren't covered? How should you file your taxes? In short, what is your life going to look like while you wait for the court to grant your divorce? These are the questions addressed at temporary order hearings.

Temporary orders are just that, temporary. They remain in effect only until the final hearing, when the divorce judgment cancels them. In most jurisdictions, quasi-judicial officials called court commissioners or magistrates conduct the hearings. These officials are not judges, but they have authority granted to them by state statutes or by the judges whom they serve. Judges have the final authority. Therefore, these temporary orders are not considered binding precedent on the judge who will later hear your case.

If you are disappointed by a particular provision of a temporary order, you have two basic options. First,

depending on your situation, you can elect to wait until the final divorce trial, when the judge will hear the evidence and make a decision without regard to the earlier temporary order. Or, if you do not want to wait until the trial, you can appeal the temporary order decision to the judge. These appeals are called *de novo*, or "brand new" hearings. The very name *de novo* indicates that the judge will take a fresh look at your temporary order request.

If you and your ex can reach agreement on the temporary issues mentioned above, you may not need a temporary order hearing. In these cases, I usually recommend that we put the agreement in writing and submit it to the court commissioner, who will sign it and convert the agreement into a temporary order. This avoids any potential misunderstanding vis-à-vis your and your ex's rights and responsibilities while you wait for the clock to tick toward your final hearing date.

Either party can petition for a temporary order at any time during the pendency of the case. Also, there is no limitation on the number of temporary orders you can seek. For instance, you can obtain a temporary order early in the case, but if circumstances change before the final hearing, you can ask the court to modify the existing temporary order.

If you petition for a temporary order, you must also file an affidavit in support of the request. An affidavit is a sworn written statement containing your reasons for seeking the temporary order. You must sign the affidavit; your lawyer or someone in her office can notarize your signature.

Service of Process. Assume your lawyer files all of the basic pleadings mentioned above, including the required pleadings (summons and petition), and the discretionary pleadings (petition, motion or order to show cause for temporary order and affidavit in support). The next step is to make sure your ex receives official copies of these documents. Your ex must receive the pleadings in a particular manner; your lawyer cannot simply send them in the mail. Each state requires that the pleadings must be personally served upon the respondent. Any adult resident of the state who is not a party to the action can serve the summons and attached pleadings. Most of the time your lawyer hires a professional to perform this function,

called a process server. The process server finds the respondent at home or work, and physically hands the pleadings over to them. The process server provides an affidavit describing how they accomplished service. Your lawyer will file the affidavit of service with the court.

The service of process starts the clock ticking on your divorce. Many states require that a certain amount of time pass before the court is authorized to grant a divorce. This time period can be anywhere from a few days to several months.

What if you don't know how to find your ex? How can you get them served and officially start the divorce action? You can obtain service by publication. Your attorney will place a special notice in the legal section of a newspaper in the area in which you think your ex probably lives. The ad must run for a certain period, usually at least three weeks. At the end of the period, the newspaper will provide an affidavit of publication, which your lawyer will file with the court. If your ex never responds or shows up, the court can find them in default, and grant your divorce.

Once the respondent has been served, he or she must file a formal answer with the clerk of courts within the time prescribed by his or her state's statute. The time frame can be anywhere from 20 to 60 days, depending on where you live. Typically, the respondent hires his or her own divorce lawyer, who takes him or her through the same process I described in the first two chapters of this book.

The respondent's lawyer will file several responsive pleadings. In addition to filing these with the clerk of courts, the lawyer will send copies to your attorney. They usually do not serve these documents on you personally, although they can if they wish. Getting them to your lawyer is good enough in most jurisdictions. The usual responsive pleadings include:

- **A Notice of Retainer.** This identifies your ex's legal counsel, and formally enters that attorney as your ex's counsel of record for the case.
- **A Response or Response and Counterclaim.** In the Response, or Answer, the respondent must admit or deny each of the allegations made in the Petition.

Sometimes the respondent's attorney will file a Counterclaim along with the Response, containing his or her own allegations. In that case, your lawyer may file a reply to the counterclaim, and send a copy to the respondent's lawyer, within the same time frame identified in the statute for filing answers.

- **An Affidavit of Rights Under Soldiers' and Sailors' Civil Relief Act.** If the respondent is an active member of the Armed Forces, their lawyer may file this special affidavit. There are special rules that apply in these situations, involving when and how an active service person can be subject to a divorce proceeding. This is fairly rare, but it does happen. Basically, the service person can delay the divorce action for certain periods while they are in active service. There are lots of little nuances to this law, so check with your lawyer if this situation applies to you.

Informational Documents for the Court. There are a number of other documents that your attorney will file with the court during the course of your case. The court uses them to gather information about you, your plans regarding your kids, and your marital estate. If you did your homework ahead of time getting your financial ducks in a row, your attorney can create many of these without any further input from you. Not all of these documents are required by every jurisdiction, but even where they are not required, it is usually a good idea to file them anyway. The following is a list of the most important of these informational documents:

**Your Parenting Plan.** A growing number of states require these documents. I think they should be mandatory everywhere. Mom and Dad have an opportunity to communicate directly with the court before the trial regarding their plans regarding the kids. This information helps the court identify the salient issues ahead of the trial. Sometimes a proactive judge will use this information to try to bring the parties toward an agreement. This saves them from having to make a decision that usually disappoints one or both parents.

A typical parenting plan asks the following questions:

- What legal custody or placement rights are you seeking?

- Have you either engaged in or been victimized by spousal battery, or have you been involved in a domestic abuse situation anytime within the last few years? Have any child abuse allegations been proved against you? If there is evidence that one of you has engaged in interspousal battery against the other party or domestic abuse, how will you transfer Johnny between you to ensure his safety and the safety of the victimized party?
- Where do you work? What is your work schedule?
- Who will provide childcare when you cannot, and who will pay for it?
- What will be the child support, family support, or alimony arrangements be?
- Where will Johnny go to school?
- Who are Johnny's doctor and dentist? What clinic do you usually take him to for medical care?
- How will Johnny's medical expenses be paid?
- What will Johnny's religious education, if any, be?
- Who will make decisions about Johnny's education, medical care, choice of childcare providers and extracurricular activities?
- How will you and your ex divide holiday placement? How will you handle the summer placement schedule?
- Will you allow Johnny to contact the other parent when you have physical placement, and if so, how and how often?
- How do you propose to resolve disagreements in those matters where the court wants you to make joint decisions?

**Financial Disclosure Statement.** Every state requires that you file a financial disclosure statement. Most states require that you file a preliminary statement within 60 to

90 days after commencement of the action. If you have a temporary hearing before then, you will have to file the preliminary statement at that hearing. You will have to file a final statement at the divorce hearing. You will have to testify under oath that the final statement is true and accurate to the best of your knowledge.

***Lis Pendens.*** If you own real estate, your attorney could file a *lis pendens* with the register of deeds in the county where the property is located. This puts everyone on notice that an action is pending that could affect the title to the real estate. It protects your interest in the property, because it prevents your ex from selling the property out from under you without your knowing about it.

**Child Support or Alimony Worksheet.** These are usually not required, but I think it's good practice to file these documents and make sure the other party has them. They put the court and the other party on notice regarding the parties' potential child support and alimony obligations. I'll discuss support issues more thoroughly in the next chapter, [Child Support and Alimony: Playing Checkers With Your Money](#).

Discovery and Pretrial Procedure. The pleadings have been filed and served, your ex has hired a lawyer and he has filed the response. Your attorney has prepared and filed the financial statement, parenting plan and alimony and child support worksheet, and if appropriate, a *lis pendens*. Now what?

The next step involves gathering and sharing all the information each side will need in order to negotiate a successful settlement of your case. This process is called discovery.

Every state has statutes that describe the formal rules lawyers must follow when conducting discovery. However, in many locations local custom favors informal discovery methods. Rather than going through the formality of depositions and interrogatories (I'll get to those in a minute), the attorneys agree to openly share information with each other and provide whatever each asks without hesitation.

Most people prefer informal discovery for several reasons. First, it's less expensive, because the lawyers don't have

to spend all that time putting together formal interrogatories and conducting depositions. Second, it's usually faster. If I promptly respond to another lawyer's request for information, it is more likely they will return the favor, and vice versa. Third, by removing some of the formality of the process, informal discovery promotes civility between the parties, which more often than not leads to successfully negotiated settlements.

Informal discovery methods work well if your lawyer has a good working relationship with the other attorney and your ex is not a sneak. Because I enjoy good relationships with most of the divorce lawyers in my city, I conduct a lot of informal discovery. I know whom I can trust to be straight with me, and I hope they know that I'll be straight with them. However, I have had several cases where I've had to revert to more formal discovery methods even with some of these attorneys because their client proved uncooperative. I've had a number of other cases where I've utilized formal discovery methods because that was the only way to gain cooperation from the other attorney. I always use formal discovery methods when I'm dealing with an unfamiliar attorney because that protects my client and me should I later find out that I should not have trusted the other attorney to be completely open and cooperative.

What are the most common formal discovery methods, and how do they work? The first of these is written interrogatories. These are written questions designed to elicit information about any number of issues salient to the divorce, such as employment and educational history, location of assets, identity of debts and obligations, etc. Each interrogatory is numbered, although several may contain several subsections. Most jurisdictions place limits on the number of interrogatories a party can ask, which prevents overly zealous attorneys from piling on and papering the other side to death.

The party responsible for answering the interrogatories must provide written answers or state specific objections as to why they do not believe they are required to give an answer. These written answers must be given under oath. If your ex answers an interrogatory, and then later at the trial answers the same question differently, your attorney can use his or her earlier interrogatory answer to impeach him or her, which damages his or her credibility. Each jurisdiction has time limits regarding when the written

answers or objections are due. The most common time limit is 30 days, but check with your lawyer, who will know what the limit is in your jurisdiction.

Many times the party responsible for answering the interrogatories must glean relevant information from documents and records in his or her possession. Obviously your attorney knows that when she's drafting the interrogatories. It makes sense that she will want to review those documents and records. That is why most of the time written interrogatories are accompanied by formal requests for production. The request for production may be made independently or in conjunction with a subpoena to a deposition. The party receiving the request for production must provide the records in the same time frame as they must provide answers to interrogatories. The request for production can also include permission to enter onto designated property to inspect it personally or with others.

When a lawyer wants to get into more detail than is possible in the written question and answer format of interrogatories he will subpoena the other party to a deposition. A deposition is an oral examination by an attorney with a court reporter recording everything said for posterity and possible future use at trial. The person answering the questions, called a deponent, is put under oath at the beginning of the examination. The deponent may have his or her lawyer present. The deponent's lawyer may make objections for the record just as they would in court, but the deponent in most cases must still answer the question. If that question and answer is made a part of the trial record, however, the court will review the objection and make a ruling. If the court sustains, or approves of the objection, the judge will order the answer stricken from the record and will not consider it any further.

I prepare my clients for depositions by meeting with them ahead of time. I go over what the other lawyer is likely to ask, and listen to their answers. I never suggest answers to them, but I will caution them to think before they answer a question. A deposition is not anything like a regular conversation. An offhanded comment can be the fulcrum on which the entire case can turn. It is imperative that anyone being deposed understands that, and be cognizant of everything that comes out of their mouths.

Part of my preparation is what I refer to as the Testimony Talk, or, *Langan's Laws About Testifying*. I repeat this to my clients when I'm preparing them for the trial. These are the rules I ask my clients to follow when they testify either at a deposition or in court:

- **Tell the truth.** I know that sounds obvious, but you would be amazed how many times otherwise honest people panic when they're under oath and start telling small lies to stay in their comfort level. Then, these small lies grow into larger ones, and sooner or later an experienced attorney will catch them. So, tell the truth even if you think it will hurt your case. I will get a chance to rehabilitate you during re-direct, and give you a chance to explain your answer.
- **Think before you answer the question.** Remember, this is not a regular conversation with an acquaintance or friend. The lawyer asking you questions is an advocate for the other side. Whether you like it or not, his job is to put you at a disadvantage relative to his client. Your job is to avoid that if possible. A clever lawyer will occasionally word a question in such a way that unless you are careful you could fall into a trap from which there is no escape. So think about what he is asking you before you answer him. Do not assume halfway through the question that you know where the lawyer is going. Give yourself a few seconds to absorb the actual meaning of the question before answering.
- **Answer using words.** Remember there is a court reporter recording everything anyone says. The record must be as clear as possible. Answering "uh-huh" or "uh-uh" may mean yes or no in regular conversation, but reading those responses in a record could lead to confusion as to what you actually meant.
- **Do not argue with counsel or take anything he says to you personally.** Remember the other lawyer is doing his job. He has no personal ax to grind with you, no matter how distasteful he may be toward you. Remember what I said in Chapter Three, some lawyers are just nasty. Even those who aren't can become aggressive. I've turned up the heat a number of times on witnesses when I know I can get their goat. They become more concerned about how steamed they are, drop their guard

and say things they probably wish they hadn't. It's one of the oldest tricks in the book, and it works like a charm. Don't let it happen to you. If you feel yourself becoming irritated or angry with the other counsel, stop yourself, take a few breaths and try to relax. If you're really uptight, you can ask for a break. You have an absolute right to take a break during a deposition. A judge may not grant your request, but you can buy yourself a few moments to compose yourself just by asking for the break.

- **Don't be afraid to ask the attorney to clarify their questions.** No one likes to feel stupid. Most of us, including me, have faked our way through awkward situations at least once or twice by pretending we understood what was going on, when in reality we were completely clueless. Don't let your ego get the better of you when you're testifying. If you don't understand something, ask about it, even if you think it will make you look dumb. Looking dumb because you asked the other lawyer to clarify his question is a lot better than trying to fake your way through and make an answer that later exposes your true ignorance.
- **During depositions you can ask to consult with your attorney before answering a particular question.** You cannot do that in a trial, however. For instance, if you feel you need to ask your attorney a question about something before answering a deposition question, you can ask for a break: the other lawyer will allow the consultation.

There are limitations on what questions one can ask or documents one can ask for. Inquiries must be limited to issues that are relevant to the divorce. Of course, when you're going through a divorce, just about every aspect of your life is laid bare, analyzed, dissected, and then reconstructed. So in the end there are probably few areas that are off limits. However, if an interrogatory, deposition question, or request for production crosses that line, there is a remedy. In such case, the party can ask the court for a protective order limiting the scope of the discovery sought by the other side. A motion for a protective order may be brought to protect against annoyance, embarrassment, oppression, or undue burden or expense. The party seeking the protective order has the

burden of showing good cause for limiting the scope of the discovery.

What happens if a party unreasonably delays answering the interrogatories or producing the requested documents? What can your lawyer do if the party refuses to provide answers to interrogatories or a question during a deposition or to produce requested documents? Your lawyer can file something called a motion to compel discovery with the court. The motion asks the court to order immediate compliance with the discovery demand or to show cause why the party cannot or will not provide the requested information. If the court finds in your favor, it can order the other party to comply with the discovery request, and impose sanctions, including attorney fees.

Now you've started the action, served your ex, received his or her answer, and your lawyer has conducted discovery, formally or informally. By now both sides should have all the information necessary to work toward either settling the case or preparing for a contested trial. You already understand the basic financial and child custody and placement issues. Now it's time to examine the other major issues in most divorce cases, support and property division. Although they are somewhat interrelated, the court considers these issues separately: therefore, I will do the same here.

CHAPTER FIVE: CHILD SUPPORT AND ALIMONY: PLAYING CHECKERS WITH YOUR MONEY

The financial issues of your divorce will be divided into two separate but related areas, support and property division. Support has to do with one of you providing income to the other for various purposes. Dividing all of the stuff you accumulated while you were married, with some exceptions, is, no pun intended, the stuff of property division. In this chapter you'll learn what you need to know about support. In the next chapter you'll learn what to expect regarding property division.

### Child Support

Child support is money paid by one parent to another for the benefit of the parties' children. The parent with whom the children live is called the custodial parent, as I mentioned in Chapter Two. Parents who share placement equally may in some circumstances be liable for child support to each other. Although payments are made to the custodial parent, the money is earmarked for the care and support of the children.

Before you read any further, I suggest you scan through [Appendix A: Summary of Divorce Laws by State](#) at the end of this book. Look at the column labeled "Child Support," and you'll notice that all but six states use so called "standard guidelines" for determining the child support obligation of the non-custodial parent. However, a review of individual states' laws reveals that there is little that is "standard" about these guidelines or about their application. In addition to determining how it establishes its individual guidelines, each state also has its own ideas as to how it applies those guidelines. The following is a brief sampling of seven states' basic approaches to their child support determinations:

	<u>How Guidelines are determined</u>	<u>Relevant statutory factors considered by court</u>
California	Uses formula based on each parent's income multiplied by percentage of time they spend with child	Interests of child are top priority; each parent is obligated to support their children according

		to their ability.
Colorado	Chart based on income to establish basic obligation	Parent's relative financial resources, standard of living child would have enjoyed if parents had stayed married
Florida	Chart based on income to establish basic obligation. Adds percentage of child care costs and health insurance costs	Deviation allowed by + or - 5% of guidelines if court convinced it is appropriate under circumstances
Missouri	Mo. Supreme Court Civil Procedure Form 14, found at on its website <a href="#">Supreme Court Homepage</a> (click on Orders/Rules, then click on Parenting Plan Guidelines link)	Completion of Form 14 creates rebuttable presumption support is correct
New York	Percentage guidelines based on number of children	Allows deviation if moving party can show it is appropriate under circumstances
Texas	Percentage guidelines based on number of children for first \$6,000 of income; thereafter, court uses discretion	Rebuttable presumption guidelines are in child's best interest
Wisconsin	Percentage guidelines based on number of children	Rebuttable presumption that guidelines are in child's best interests

I picked one or two states at random from each region of the country to give you a flavor for how child support is determined across the nation. I also included my home

state of Wisconsin, and plan to include it in the comparisons to come regarding alimony and property division. Going into the detail of each state's child support laws would require an encyclopedia, and is far beyond the scope of this book. Your lawyer will explain the details of your state's child support laws. However, if you want to quickly calculate what your basic child support obligation is likely to be, or, how much you should expect to receive from your ex for child support, [click here for the Child Support Calculator website](#). Regardless of how your individual state determines child support, however, there are some common threads that run through this area of the law.

First, every state is required to express child support as a fixed dollar amount, and not as a percentage of income. What about those percentage guidelines? Well, your state will use the percentage guidelines to calculate the child support amount, and then order that the payor pay that sum as a fixed amount. Why do they do this? You can thank Uncle Sam. Congress passed a law a few years ago conditioning certain types of state aid to the state's expression of child support as a fixed dollar amount. Apparently our federal government decided that such arrangements were more efficient, and therefore, would cost less to administer and enforce.

There is a big loophole in this law however. If the parents agree, the child support order can be expressed as a percentage of income. As long as the court does not initiate the percentage order the state keeps its federal aid. So, although federal law requires fixed child support orders, the loophole allowing for percentage orders as long as the parties initiate them is still commonly utilized.

Personally, I generally prefer percentage orders to fixed orders. They make more sense in the long run, and help the parties avoid the necessity of coming back to court years later to modify the order. Consider the following example. **Alan** and **Barb** divorce at the same time as **Craig** and **Donna**. Each couple has two kids. Barb and Donna are awarded primary placement of the kids. Alan and Craig each make \$5,000.00 per month as of the date of their respective divorces. Using percentage guidelines, Alan and Craig should each pay 25% of their incomes, or \$1,250.00, to Barb and Donna. Alan and Barb agree to set Alan's payments at

25% of his income, while Craig's order is set at the fixed amount of \$1,250.00.

A few years later Alan and Craig's incomes increase to \$7,500.00 per month. By operation of the percentage order, Alan's child support increases along with his income to \$1,875.00. Craig continues paying \$1,250.00, however. This will remain unless Craig either agrees to a modification, or Donna moves the court for a modification based on a change in circumstances. Donna could wait for the local child support agency to review the order, but years could pass before the agency starts an action. Craig and Donna will have to go through the time and expense of hiring attorneys and submitting financial information to the court, as well as attending at least one motion hearing. Of course, Craig probably won't mind because the expense of defending a post judgment motion is less than what Craig would have paid in child support had he been paying a percentage of income. However, the emotional cost on the continuing parental relationship between Craig and Donna can be incalculable. Also, remember child support is for the child, not the other parent. By under paying his child support, Craig has been shortchanging the kids. I do not understand how any savings can justify that.

But Craig has a potential problem as well. What happens if Craig loses his job while the fixed order is in effect? A fixed child support order is like the cab waiting for you outside of your house: that meter keeps running whether you're in the back seat being driven through town or it sits empty next to the curb waiting for you. Craig's job loss has no effect on his child support obligation. Craig is required to pay that \$1,250.00 even if his income is suddenly zero. Craig must seek relief through the court, which could take a few months, depending on how congested the docket is. By the time the court even considers Craig's petition he could owe several months' worth of support. This past due support is called an arrears. Even if the court grants Craig's petition and suspends the support obligation, the court does not have the power to forgive the arrears. Donna could agree to do so, but in my experience that rarely happens. The court usually requires that Craig's child support obligation be reviewed when he does return to work. At that point, the court usually encourages the parties to agree to set the order as a percentage of Craig's income, to avoid the problem from re-occurring. What about the arrears? Oh, neither the court

nor Donna forgets that. In addition to paying their regular support, Craig pays extra each month until paying off the arrears. The entire problem could have been avoided if Craig had agreed to a percentage order during the divorce. After all, 25% of zero is zero!

Regardless of where you live, there are certain basic factors considered by the court when establishing child support obligations. The differences between the states' individual approaches lie in the weight each state assigns to these factors. Those basic factors are:

- The financial resources available to the child and to the parents, including in some cases the parents' earning capacity.
- Whether one parent is also paying alimony to the other parent, and if so, how much.
- The standard of living the child would have enjoyed if the marriage had not ended.
- The standard of living of the parents.
- The amount of time the child spends with each parent.
- The cost of day care and health insurance for the child.
- And the catchall, the best interests of the child.

I have had a number of cases where the child support payor has the idea that the other parent uses the payments for his or her benefit, and not for the kids. I've been on both sides of this issue. Officially, the statutes in each state that address this say that they presume that parents will use the child support payments for the benefit of the children, and not for their own personal needs. Courts are loath to look into how parents spend child support money. That is a slippery slope that legislatures and courts avoid for obvious reasons. No one wants the courts to get into the business of determining whether a parent's spending habits are reasonable.

The line becomes blurred all the time, however. For instance, does using child support to help finance living in a certain house in a certain neighborhood for the

benefit of the kids or of the custodial parent? This is a major source of consternation and of seemingly endless litigation. There is caselaw in most states that prohibits parents' using child support to improve their financial position. Some states call such a circumstance hidden maintenance, or hidden alimony. I had a case involving a high-income payor who hated paying child support. He lives in a house worth more than twice the value of my client's home, replaces his luxury cars every year, and travels extensively. My client works part time so she can be available to their child, and had to sell her car to fix her roof. Nonetheless, he was convinced my client used her child support as hidden maintenance. Protracted litigation followed, involving all of the formal discovery methods I described in the last chapter, and a contested trial before a judge. After the judge found in my client's favor, he appealed the case to our state court of appeals. More months passed while I defended against his appeal. The court of appeals upheld the trial court. So, after more than a year of litigation and thousands of dollars in expense, my client's child support continued unabated.

Obviously, your attitude toward this issue depends whether you are the payor or the payee. If you are the payor, you should try to keep in mind that the support is for the kids, and is intended in part to put them as close as possible into the same standard of living they would have had if you had remained married. That does not mean that you shouldn't pay attention to your ex's lifestyle and spending habits. Although courts avoid that slippery slope, there are exceptions. Suppose your ex spends an inordinate amount of time at a local casino, and Johnny tells you there's no food in the house? That is an extreme example but it isn't unheard of. If your ex is clearly using the money recklessly, to fund gambling or drug habits, for example, you should do something about it, and most courts will listen.

If you are the payee, keep in mind that you have a responsibility regarding the child support paid by your ex. No, that responsibility isn't to your ex; it's to your kids. Make sure that their basic needs, food, clothing, and shelter, are more than adequately covered before you buy yourself that new snowmobile or take that trip to Aruba. Will that stop your ex from dragging you back into court seeking a reduction in the support? No, but it will make it more difficult for them to succeed.

Another common thread running through child support law involves the interrelationship between support obligations and placement rights. Listen carefully: you cannot condition one on the other. Suppose you pay support to your ex, who has primary placement of the kids. Suppose further that your ex won't agree to let you see the kids more often. You cannot threaten to cut off or reduce the support payments to induce your ex's compliance. Conversely, suppose your ex pays child support to you because you have primary placement of the kids. You cannot demand your ex pay more support to you by threatening to refuse to let them see the kids.

This issue is probably the most frustrating for parents on both sides. I've represented several child support payors whose exes withhold the kids. One's natural inclination is to play tit for tat: "Fine," this logic dictates, "if they won't let me see the kids I won't pay the support." In extreme cases, the local child support agency becomes involved, and these payors can be prosecuted for failure to pay child support. If convicted, they could end up with a criminal record and be sent to jail.

I've also seen the other side of this as well. "The crumb gets away with paying me peanuts, yet he/she demands on getting the kids every weekend!" So they withhold the children, and refuse to cooperate with the other parent. These parents, in extreme circumstances, can be prosecuted for interfering with the other parent's custody rights, and also be subject to jail.

Besides inappropriately mixing their metaphors, these people don't understand the larger picture. They focus so much on each other's behavior that they forget or overlook what they're really doing. Holding the kids ransom for child support, and vice versa, puts the kids in the middle of the parents' dispute. That is clearly wrong no matter how the parents try to justify their positions. It is NOT in your children's best interests to refuse to let their other parent see them because they haven't paid as much child support as you think they should. It is NOT in their best interests to refuse to pay child support just because your ex is being a stinker and keeps the kids from you. A parent in either circumstance should pursue an appropriate remedy in family court rather than subject the children to a tug of war with the other parent. Love your kids enough

to pay appropriate child support no matter how often your ex tries to interfere with your placement rights. Love your kids enough to let the crumb see them as often as is practicable even if you're trying to feed them on the peanuts he or she throws your way. Take appropriate action in court to correct the problem; don't use the kids as weapons.

A third common thread involves the tax treatment of child support. Under IRS regulations, payment of child support is not considered a taxable event. That's IRS-speak for "it isn't taxable." This means that if you are paying child support, you cannot deduct the payments from your income: if you are receiving child support, you are not required to declare the support as income and pay taxes on the amount. The basic reason behind this is that child support is considered payments on behalf of the child. IRS has created a regulatory fiction that even if you are divorced, your kids still somehow live in one household. Just as married parents can't deduct money they spend on their children's support from their income, child support payors cannot do so either. Because of this circumstance, it follows that there is no requirement that the parent who receives the support declares it as income and pays taxes on it.

There are a few more things you need to know about the tax treatment of child support. Child support remains non-taxable as long as:

- The divorce judgment or the marital settlement agreement incorporated into the judgment identifies the payments as "child support."
- Payments can be reduced upon the contingent occurrence of an event related to the child, such as the child reaching emancipation, marrying, dying, leaving school or getting a job.

If the payor pays both child support and alimony in one check, the child support counts first for tax purposes. For instance, if A pays B a total of \$500.00 per month, with \$350.00 earmarked for child support and \$150.00 earmarked for alimony, the child support gets counted first before A can claim the deduction for the \$150.00 alimony.

The tax issue I see most often regarding child support revolves around which parent gets to claim the kids as a deduction. Generally, IRS regulations provide that the custodial parent gets the deduction. For purposes of the regulations, "custodial parent" means the parent who has primary placement. A pays B, who has primary placement, child support, but B gets the deduction. The reasoning behind the general rule that B gets the deduction is that despite A's child support payments, IRS assumes that B still shoulders most of the financial burden of feeding, clothing, and providing shelter for the kids. This is a sore point for many who pay child support. Many child support payors feel that they should get the deduction, especially if they are also paying alimony and B is a stay at home parent.

There are various solutions to this problem if it makes sense that B may want to consider allowing A to take the exemption. Perhaps the parties have more than one child: in that case, they may split the deductions, with A claiming Johnny and B claiming Mary. Another solution is that A will get the deduction if it makes sense tax-wise that B concede that point. For instance, if B's taxable income (remember child support is not taxable to B as income) is below a certain level, B may not gain any advantage by claiming the kids. In those cases, B can negotiate allowing A to take the deduction without losing anything, and perhaps gaining some other concession from A in the process. Another solution is to alternate the dependency exemption by year: A will claim the kids this year, and B will claim them next year, etc.

If B agrees to give A the dependency exemption for the children, B must sign IRS Form 8332. This simple (a simple IRS form? Yes, Virginia, there is a Santa Claus) one paragraph form gets filed with A's tax return. B must sign Form 8332 waiving their right to the exemption every year that B agrees A may claim the children.

Assume you are B in this scenario, and you agree to waive your exemption. You should consider conditioning A's ability to take the exemption on A being current on his or her child support obligation both as of the end of the year and as of the time A files his or her taxes.

What if A and B share placement equally? In that case, the exemption is usually awarded to the parent who can benefit the most from it.

The final common thread running through child support law is that it ends. Hallelujah! the payors shout. Boo! the payees complain. The basic end point of child support is the earlier of Johnny's 19<sup>th</sup> birthday or his graduation date from high school, as long as he is at least 18 at that time. So, if Johnny graduates from high school before his 18<sup>th</sup> birthday, the support ends on his next birthday. The day Johnny is old enough that he is no longer eligible to receive child support is called his date of emancipation. Most child support payors think of it as their emancipation.

What if Johnny drops out of high school, but then attends GED classes at the local tech school? Do you still pay child support? Yes, as long as he is enrolled and actively pursuing a course of study designed to result in the awarding of a high school diploma or its equivalent.

There are a few jurisdictions that allow for payment of child support beyond the emancipation date. The usual circumstance involves providing support for Johnny while he's attending college. Note, however, that most jurisdictions do not obligate parents to provide support for their children beyond their normal emancipation dates. If your state law does not provide for post-emancipation child support, you cannot force the ex to pay support while Johnny attends State U. In these states, the only way a parent is obligated to pay child support to Johnny while he's in college is if the parent agrees to do so and signs a contract. One can argue that the parent has a moral obligation to support Johnny at State U, but once Johnny graduates from high school and is at least 18, and certainly by the time he's 19, the parent has no legal obligation to pay support while Johnny's in college.

## Alimony

The other kind of support refers to money paid by one spouse to another for the benefit of that spouse. This kind of support is called different things across the country: alimony, maintenance, and spousal support. Ask your lawyer what they call it in your state. For purposes

of this book I will refer to it as alimony, because that is the term I believe most people use across the country.

Review the "Alimony/Maintenance" column in [Appendix A: Summary of Divorce Laws by State](#). You should note that every state allows judges to set alimony based on their own discretion, although each state defines a set of factors to be used by the court. Some states allow the court to consider marital misconduct as a factor, while others do not. Check your state to see if that fling with the flirtatious neighbor will cost you an opportunity to receive the full amount of alimony you would have otherwise received. Hint: if you're going to fool around, don't do it in North Carolina.

The following is a random sampling of alimony laws across the country:

	Misconduct/fault considered?	Other most important factors
Arizona	Not considered	Standard of living during marriage; length of marriage; age and ability of spouse to support self
Connecticut	Looks at "causes" for divorce	Length of marriage; age and sources of income
Illinois	Not considered	Income & property of each party; needs of each party
North Carolina	No alimony if dependent spouse committed "illicit sexual behavior"	Relative incomes and earning capacities of each party; age and condition of each party
Washington	Not considered	Financial resources of party seeking maintenance, including their share of property
Wisconsin	Not considered	Length of marriage; earning capacity of party seeking maintenance

If you review each state's statutes, you will find the same factors used to determine alimony mentioned again and again. I'm going to discuss the most common of these factors considered by the courts. Each state assigns different weight to these factors: therefore, I'm going to discuss these in no particular order. Consult with your

attorney to determine which factors are assigned greater weight than others in your state.

**Length of marriage.** This factor impacts the duration of alimony, not its amount. Generally speaking, the longer the marriage, the longer one should expect to pay or receive alimony. Depending on where you live, if your marriage lasts beyond ten or fifteen years, the court will consider it a long-term marriage. This is important because it is extremely unlikely that the court would award alimony for more than the length of a short-term marriage. On the other hand, courts routinely award alimony lasting for the remainder of the payor's income producing life in long-term marriage situations.

You probably know that most cases are settled, with the parties reaching agreement on all of the salient issues. This is obviously a good thing; however, you need to be careful when you agree to a term of alimony. This is especially true when you are coming out of a long-term marriage. It is not uncommon that in such cases the parties agree to something called "lifetime" alimony. Beware! Lifetime means lifetime. In most jurisdictions, lifetime alimony agreements cannot be modified if (1) the parties freely and knowingly made the agreement, (2) the settlement was fair to both parties at the time it was made, (3) the agreement was not against public policy, and (4) the court could not have entered the order without the parties' agreement.

So whose lifetime are we talking about? There are cases in several jurisdictions that define lifetime as the lifetime of the payee spouse. There are cases that have held that if the payor dies first, his or her estate is liable to continue paying alimony to his or her ex until either the estate is exhausted or the ex finally passes away. So be careful if you're the one paying the alimony. If you agree to lifetime alimony your executor could be paying alimony to your ex long after you're pushing up daisies unless you're careful.

**Age and physical and emotional health of the parties.** This is another factor considered in determining the duration of alimony. Generally, the younger and healthier you are, the shorter your alimony award or liability is likely to be. The court presumes that you will either advance in your career, get remarried, or both, such that your need for

alimony will be short lived. There are exceptions to this. I represented a woman in her early 30's, who divorced her husband of the same general age after eight years of marriage. In that case, the court awarded her permanent alimony. Why? She suffered from a degenerative arthritic condition back condition that rendered her unable to work and become self-supporting.

**Property division.** Alimony is income, while property is assets. At first blush one may wonder whether it is proper that the property division should affect an award of alimony. However, alimony is also considered a financial asset for the payee and a financial obligation of the payor. I'll discuss property division in detail in the next chapter. For purposes of this discussion, you should know that if you receive income-producing property as part of the property division, the court will consider those assets when awarding alimony. For example, in one of my recent cases, the parties owned an apartment building as part of their marital estate. The spouse who received the apartment building took it in lieu of an award of alimony because of the anticipated income stream from the asset.

**Earning capacity and educational background of each spouse.** Every state's caselaw includes cases with the following basic facts: A and B marry. A goes to college or grad school while B works to support them. A receives a degree and embarks upon a successful career while B stays home with the babies. A and B divorce. B asks for alimony. The courts consider the contribution B made to A's ability to finish A's education so A could pursue a career. I have talked to many "A's" and "B's," and I think I understand both sides of the issue. Many times A resents that B wants to share in the income that A has worked so hard to earn while B "just stayed home." Some B's, on the other hand, have no desire to become self-supporting and expect that A will continue to support them after the marriage.

I think both sides have a point, but I also think both are wrong. Most of the time A and B agree that in order to maximize A's ability to devote time to "the career" that it made sense that B hold down the fort at home. A conveniently forgets that when the marriage ends. Many times B consciously chose to forego B's career aspirations in favor of A's. Furthermore, it's insulting when A attempts to depreciate B's contribution to the household. There is nothing more important than taking care of the

home and raising the children. I firmly believe that on that day we meet our maker we'll be judged not on how many successful surgeries we performed, but on how many successful children we have produced and nurtured. Without B's efforts on the home front, A would not have been as free to pursue A's successful career.

On the other hand, B unrealistically thinks that he or she is justified in expecting that A will continue to support them without B even attempting to become self sufficient. Many B's seem to have self esteem issues. I know of no better way to boost one's self esteem than by standing on one's own two feet, especially if there's an A out there who thinks you can't do it. There is no doubt that B is entitled to alimony. However, B should use that alimony as a springboard to a new life, and not as a way to hang on to the old one. Use the alimony as support while you go back to school or become trained in an area that interests you. Start a career of your own: you'll feel much better about yourself. I guarantee that A is moving on: you must do so as well.

**The sources of income of each party.** Do both parties work? Do they own income-producing property? Does either party receive income from a trust or property inherited from a relative? Does either party have unexercised stock options waiting for them somewhere? Does either party expect to receive periodic bonuses? The court will consider all of these when determining the incomes of each spouse for alimony purposes.

**The standard of living during the marriage.** Many states attempt to fashion an alimony award in an attempt to maintain the payee spouse's standard of living they enjoyed during the marriage. In most cases this is a practical impossibility: the reality of most cases is that the standard of living for both parties decreases after a divorce. This is especially true in two income households when it took both paychecks to maintain the household standard of living. So what the courts actually try to do is put the parties in an approximately equal financial position vis-à-vis their respective incomes. This way the parties will have approximately equal standards of living, at least during the alimony term.

Note that this factor permits the court to consider the parties' standard of living. In some cases involving

higher income families, the alimony payor tries to persuade the court that alimony should be set to allow the payee spouse to maintain a standard of living that is average for the community. This strategy usually fails. The court does not consider the community's average standard of living: the court wants to know what the parties' standard of living was, and fashions alimony to maintain that model as close as possible.

**The tax consequences to each party.** Unlike child support, alimony payments are tax deductible to the payor and taxable as income to the payee. If you receive alimony, you declare that amount on line 11 of Form 1040. If you paid alimony, you declare that amount on line 31a of Form 1040.

Those who receive alimony need to do some careful tax planning. If the alimony is your sole source of income, be careful to save a sufficient amount from each month's payment to cover your tax liability. I have often told clients to consider automatic transfers from their checking to a tax savings account each month. That way when tax time comes they aren't scrambling trying to find the money to pay Uncle Sam. For those who work, they should consider maximizing their tax withholding from their paychecks to offset the additional income they will have to declare because of the alimony payments.

If you expect to receive alimony, you or your lawyer should consult with a tax expert or accountant before agreeing on the amount of alimony to be paid. You should take into account the tax consequences of the alimony you will receive when negotiating the amount of your payments. For example, I use a software program that calculates the basic tax picture for the parties. I input their respective incomes, the amount of child support, the alimony, the number of exemptions each party claims, the amount of real estate taxes either party pays, and a few other variables. The program calculates the parties' respective net incomes for me, and shows me what each party's tax liability is likely to be.

Those who pay alimony should also do some tax planning. Alimony deductions are what tax people call "above line." This means that you decrease your taxable income by the amount of the alimony you pay, and then apply the tax tables to the net amount. I tell people alimony payments

have the same affect on one's income as their §401(K) plan contributions, because each reduces the person's taxable income.

Some jurisdictions allow for something called "family support." Family support is an amalgam of child support and alimony. A and B have two kids when they divorce. B gets primary placement of the kids and A pays alimony and child support. Instead of making separate payments for child support and alimony, A and B agree that A will make one payment called family support. The agreement must designate how much of that payment is attributable to support for the children, and how much is considered support for B. The portion of the payment that is earmarked for B's support is treated as alimony for tax purposes.

Every client asks me two questions about alimony, whether they are the payor or the payee: (1) how long it will last and (2) how much will the payments be? By now you know that the actual amount of the payments is determined on a case by case basis, set at the judge's discretion unless the parties otherwise agree. Although many cases deviate from this starting point, you should at least begin your analysis with the idea that alimony will operate to equalize your respective incomes. In other words, after A pays B alimony, both their taxable incomes will be approximately equal. Notice I said taxable incomes: in cases where A pays both child support and alimony, since child support is not taxable, there are courts that will not consider those payments when equalizing incomes. Most jurisdictions live in the real world, however, and the courts there consider all sources of income, taxable or not, when determining the equalizing amount. Then the court applies the factors I've described in this chapter and comes up with what it believes is a fair amount.

Alimony ends when:

- One or both of the parties dies, unless they made a lifetime agreement as discussed above;
- The payee spouse re-marries;
- The payee spouse cohabitates with another person. This is a huge source of litigation. B's new romantic interest moves in, and starts contributing financially

to the household. If this new arrangement changes B's economic status the court can reduce or even eliminate A's alimony obligation. Note that the court will usually not modify A's child support obligation, however. Child support is for the children, not for B, so courts take the position that it does not matter that B now lives with someone. There are a growing number of courts that look at the reality of the situation, however, and are more willing to modify child support. This is particularly true if it appears the only reason B has not remarried is to avoid a child support reduction.

- The parties agree. Since most cases settle, most people know at the time of their divorce how long their alimony payments or obligations will last. Most agreements contain provisions that prohibit either party from modifying the term unless one of the above circumstances occurs in the meantime.

Can the term or amount of alimony be modified absent an agreement? Yes, in some cases. If there is a significant change in circumstances, the court can modify the alimony provisions. What if A changes to a more lucrative job or gets a big promotion? Unless the parties previously agreed that the amount of alimony would not be modifiable, B can legitimately ask the court to increase the alimony award to reflect A's new circumstance. The court most often uses the "earning capacity of the parties" factor to justify the modification.

There is one final thing you should know about support, whether child support or alimony. Is a payor's obligation to pay support dischargeable in bankruptcy? No.

Whether you are a payor or a payee of either child support or alimony, you must carefully plan your strategy with your lawyer to avoid coming out on the short end financially. You are playing checkers with your ex, using your respective incomes as the pieces. Child support stops by operation of law: emancipation of the youngest child terminates the obligation. Alimony, however, is more open ended: it can last for a few years or for the rest of your life, depending on your circumstances. Consider the tax consequences and the affect the property division will have. I tell my clients to consider where they want to be financially five, ten, and fifteen years from now, and then

plan how to get there. Above all else, be realistic in your expectations, and reasonable with your ex. If you are careful, you won't have to king them.

## CHAPTER SIX: PROPERTY DIVISION: GRAB YOUR SLICE OF THE PIE

The other financial issue that your lawyer will negotiate for you is the division of your marital estate, commonly referred to as property division. In this chapter I'll describe how courts generally resolve this issue: what do judges consider when they decide how big a slice of the marital pie he or she will slip onto your plate.

Review one more time [Appendix A: Summary of Divorce Laws by State](#). You'll see that each state uses one of two basic types of property division methods. The most common of these is something called "equitable division," while others use "community property."

First, let's understand our terms. "Equitable," as the courts use that term, means "fair." Fair does not necessarily mean equal. On the other hand, in community property states, the courts try to divide the marital property as equally as possible unless certain circumstances apply. All right, that sounds understandable: you might think that if you live in an equitable distribution state your property division probably will be unequal, while it will be equal if you live in a community property state. Unfortunately, that isn't how it really works. You could live in an equitable distribution state and the court could impose an equal division of property upon you: meanwhile, your cousin who lives in a community property state could get a larger slice of the pie than their ex. Confused? Well, that's why you bought this book, isn't it? The purpose of this chapter is to unravel the mystery of property division.

No matter where you live, and no matter what term your state uses to describe its method of property division, courts use their discretion in determining what the property division will look like on a case-by-case basis. Every state has its own approach, and its own rules, but it comes down to one thing: what does that judge think is appropriate for that case given the set of unique circumstances of those parties. That is why it does not really matter what label your state assigns to its property division law. That is the most important thing that you should remember about this issue.

What factors does the court consider? First, let's look at another small sampling of different approaches across the country:

	Approach used by State
Georgia	Equitable distribution state. Encourages use of judicial discretion. There is no presumption that the parties are entitled to equal shares.
Iowa	Equitable distribution state. Although there is no requirement the court divide the estate 50/50, the "partners to a marriage are entitled to just and equitable share of property accumulated through their joint efforts."
New Hampshire	Equitable distribution state. Absent special circumstances, the distribution of marital assets should be as equal as the court can make it. (Doesn't that make New Hampshire a community property state?)
Nevada	Community property state. Promotes "just and equitable" division of the parties' community property. (Doesn't that make Nevada an equitable distribution state?)
Pennsylvania	Equitable distribution state. Court required to start with assumption the parties will divide their property equally, but can consider statutory factors to divide property unequally.
Wisconsin	Community property state. Rebuttable presumption that all marital property is divided equally.

There is a significant difference in the stated purposes of support and property division. The purpose of child support is to force the parents to share the financial burden of feeding, clothing, and housing their children. The main purpose of alimony is to put the payee spouse in an equitable income situation with the payor spouse, based on the payee spouse's post-divorce needs. The purpose of property division is to award each spouse their fair share of the marital assets and liabilities, without giving explicit consideration to each spouse's post-divorce needs.

This is an important point to understand. I bet that at least one out of every two or three cases I've had involves a spouse who cannot understand why A, who makes so much

more money than B, is entitled to a more or less equal division of their assets. The usual argument goes something like, "A earns much more than me, and will rebuild his or her estate much faster than I'll be able to given the pittance XYZ Company pays me. Why shouldn't I get a bigger piece of the pie?" In the meantime, A says, "I made the money, I paid for everything, why should I have to divide it equally with B?" The basic answer is that income levels have little or nothing to do with dividing your stuff, but they have much to do with dividing your incomes. That may sound unsatisfying to some, but that's just the way it is. I don't make up these rules, I just tell you what they are.

Before discussing how your property is divided we must determine what property will be divided. Doing this is called defining your marital estate. Your marital estate refers to all of the property, with a few exceptions, that you and your ex accumulated while you were married. Remember that ledger you created, where you designated each item of property as being owned by you jointly or individually? Here's where all that work you did getting your financial ducks in a row from Chapter One pays off, literally and figuratively. If you did your homework well, then you have maximized your opportunity for a "fair and just" division of your property. Keep in mind that your lawyer only knows what you tell him or her. They don't live with you, and they don't see your stuff. If you left something out, or if you inadequately described something, then you have only yourself to blame if it gets left out of the mix.

As I wrote in Chapter One, just about everything that you acquired while you were married is considered part of your marital estate. The three basic kinds of property that are excluded from your marital estate are gifts, inherited property, and separate property. The key to determining whether any of these kinds of property deserve to be treated as individual property depends on whether the property retains its individual identity.

What kinds of gifts do we mean? Anything your spouse gave to you is called an interspousal gift. In many jurisdictions, interspousal gifts are considered individual property, and are not part of the marital estate. Other states consider every interspousal gift marital property,

however. Check with your attorney to see how your state treats interspousal gifts.

Then there are states that fall in between. The keys in those states are whether your spouse intended that the gift was for you (singular, meaning just for you) or for you (plural, meaning that both of you were supposed to enjoy it) at the time he or she made the gift, and the purpose of the gift. Many times the gift itself helps us answer whether it should be included in the marital estate. Remember my example of the engagement ring from Chapter One? At the time you gave her the ring you probably intended that she was going to wear it: I doubt that little thing was going to fit over your big knob of a knuckle anyway. The ring is her individual property. On the other hand, you probably intended that you would both use that timeshare at Lake Holy Smokes you surprised her with a few Christmases ago. That is marital property.

Sometimes you or your ex will have received gifts from family members. Again, we look at purpose and intent, as well as timing. You have to determine whether the gift was made before or after you were married. For instance, if Aunt Millie gave you a car as a college graduation present, and a year later you married, if you still have that car when you divorce, it's your individual property. On the other hand, if Aunt Millie gave you the car as a wedding present, intending that you and your ex use it, that car is marital property.

One of the things a court will consider when determining whether a gift from Aunt Millie is marital property is whether that property retained its original identity. The inquiry the court makes is whether the gift property can be identified separately from other marital property. This tracing process can lead to some very strange results. Because of this, most courts avoid it: if you cannot point to a specific property item the court will most likely call the gift marital property. For example, suppose Aunt Millie gave you that car for a college graduation present before you were married. However, during the course of your marriage, you traded in that car as your down payment for that new minivan you bought once you started adding kids to the family. The car is gone. Then you divorce. Aunt Millie's gift has been absorbed into the value of the minivan. You cannot claim that the value of Aunt Millie's

gift should be excluded from the value of the van as your individual property.

Most cash gifts are untraceable, and are not considered individual property. By now you know that most rules have exceptions to them: this one does too. I had a case a few years ago where A's parents gave A \$40,000.00. A used the money as a down payment on the house A and B bought. At the time they made the gift, A's parents simultaneously gave A a letter indicating if A did not reimburse them for the gift before they died, the gift would be counted against A's share in their estate. On the other hand, A could return the gift anytime before Mom and Dad died, without interest, in which case the gift would not count against the estate. I laughed when A told me about this "gift," because it wasn't that at all, but actually an interest free loan from Mom and Dad! B disputed that the \$40,000.00 was a loan. I persuaded the judge with a copy of Mom and Dad's wills, which mentioned that the "gift" to A would be counted against A's share of their estate unless A reimbursed them before they died. The court decided in A's favor, and A recovered the first \$40,000.00 equity out of the house before dividing the remainder equally. A repaid Mom and Dad.

The second kind of property that is excluded from the marital estate is inherited property. Inherited property is property one receives because of the death of another. This exemption also includes property that you buy with inherited property. For example, Aunt Millie dies and leaves you a cuckoo clock and \$100,000.00. You hang the cuckoo clock in the den and use some of the money to buy yourself a fully loaded Land Rover, which you register in both your names and you put the rest into a joint checking account from which both you and your ex write checks and into which you both make deposits. A year or so later you and your ex divorce. Both the cuckoo clock and the Land Rover are individual property to you, because you can specifically identify them. It does not matter that you registered the Land Rover jointly because you bought it with inherited money. Expect your ex to put up a fight over the Land Rover—who wouldn't?—but he or she will probably lose. The money you put into the checking account has been commingled with other money that belonged to both you and your ex. The money you put into the checking account is not individual property, because that cash has

lost its identity. The balance in that account is marital property, subject to division with your ex.

Another kind of property that is excluded from the marital estate is separate property. Separate property usually refers to property that you brought to the marriage. Remember that great Pioneer stereo you bought that was totally out of place in your first rattrap apartment? Well, if you still have it, it's your individual property. Also, if you have income or appreciation from property purchased with separate assets, that income is also individual property. Suppose you invested your pre-marriage savings in a mutual fund that you kept in a separate account during your marriage. Upon divorce, the mutual fund, including any appreciation and its income are your individual property. However, if you purchased additional shares of the mutual fund with other money that you acquired during your marriage, then the mutual fund loses its individual identity and becomes marital property upon divorce.

There is one final category of property that is excluded from the marital estate. Sometimes couples enter into agreements either before or after they're married identifying certain property as individual. If made before the wedding, these are called prenuptial agreements. If made after the wedding, they are called postnuptial agreements. You may think that only rich people use these agreements because of several high profile cases involving their use over the last few years. However, there are many reasons that everyday folks like us may want to consider these agreements. I drafted a prenuptial agreement for a young couple recently. The bride's parents owned a business, which the groom worked for. The bride's parents wished to pass the family business to her alone. I put together a prenuptial agreement that provided that her future interest in her parents' business would be her individual property should she acquire that interest while they were married.

These property agreements may be challenged by the disenfranchised ex upon dissolution of the marriage. However, courts uphold the agreements unless the challenger can show that the agreement is unfair either at the time it was made or at the time of divorce. For example, if A can show that B influenced A to sign a prenuptial agreement

that was grossly unfair to A, A can get the agreement voided.

Now you know what property is included as part of your marital estate, and that the court, regardless of where you live, divides your property based on its idea of what is fair to each of you. What kinds of factors does the court consider when determining what is fair? As in the case of support, the courts in each state give varying weight to these factors, so they appear here in no particular order and are not intended to be all-inclusive.

**Marital misconduct.** There are several states that take into account marital misconduct when dividing property, just as several do when awarding alimony. Other states do not. What is marital misconduct? Infidelity, physical abuse, criminal conduct, and certain negligent behavior are the most often mentioned. Even in states that do not consider marital misconduct, the property division can be affected if one of the parties has destroyed or committed waste of the marital estate. As of the writing of this book, I represented a person whose ex went through about \$50,000.00 at a local casino. When the ex was \$30,000.00 in debt, the ex pleaded with my client to bail them out. Upon the ex's promise to stop gambling, my client took an early withdrawal from my client's §401(K) plan to pay off the gambling debts. Unfortunately, the ex wouldn't control her gambling habit, and ran up another \$20,000.00 in gambling debts before my client hired me and we filed the divorce action. We expect the court will award my client a larger share of the marital estate because of the ex's actions.

**The length of the marriage.** Generally, the longer the marriage the higher the probability that the court will equally divide the parties' property. The thinking behind this is that over a great deal of time the parties have shown that their joint and mutual efforts were responsible for the acquisition of their assets. This is true even if one of the parties was a stay at home parent. The same thinking goes into this as into the alimony issue as described in the last chapter.

**The relative contribution of each party to the marriage.** This is a huge issue, particularly when one of the parties was a stay at home parent while the other worked full time. A, who works full time, thinks that because B did not

contribute in a direct financial manner to the household that A should get a larger piece of the pie. A often discounts B's financial contribution vis-à-vis B's household services. B, on the other hand, often over estimates his or her contribution to the household, sometimes claiming it as equal. If you're a B, you should consider hiring an economic expert for trial. The expert could testify regarding what it would cost if A had to pay for all of the services you provide. I heard of one case where B's expert testified that B's services, which included housekeeper, chauffeur, childcare service, cooking, cleaning, errand running, home bookkeeper, etc., were worth approximately \$60,000.00 per year. The court was persuaded, and A practically gave himself a concussion while banging his head against the wall in the hallway outside the courtroom after the trial.

If you're an A who thinks that B has done nothing to assist you financially, think again. Be fair with B; don't try to shortchange him or her. On the other hand, if you're a B, don't over inflate your contribution to unrealistic proportions. Both parties need to be reasonable with the other.

**The resources available to each party.** These include each party's earning capacity, their educational background, training, and employable skills, length of absence from the job market, custodial responsibilities, and the length of time it may take for a party to become self-supporting at a standard of living that reasonably approximates what they enjoyed during the marriage.

**The contributions each party made to the other's education, training, or increased earning power.** If B worked while A attended medical school, for example, that will be considered when A later claims that B should not get an equal slice of the marital pie.

**The property each brought to the marriage.** Suppose A brought substantial assets to the marriage, and B brought relatively little. A and B commingled their assets and from there built a nice marital estate. It may be fair that A get a larger share of the divisible property because of A's earlier contribution to the party's asset base.

After considering the various factors affecting property division, the court must value the property. Here's where

your earlier work putting together the ledger and supporting documents comes in handy. The more information you can give your attorney the better prepared he or she will be.

No matter how detailed your ledger is, however, understand that it is only a starting point. A substantial starting point, but a starting point nonetheless. The strength of your ledger is its detail, but its weakness is that it reflects your idea regarding the value of your assets. Not that there is anything wrong with that: indeed, many times I have found that my clients' assessments of their assets is more accurate than an appraiser's. However, if the valuation of your assets is at all disputed, your lawyer will hire an appraiser. The appraiser will take your information and perform an evaluation. The appraiser's evaluation report is inserted into the record at trial. If the parties' agree regarding the report, then the report can be entered without testimony. Otherwise, your appraiser should appear and testify regarding his or her valuation methods.

There are good appraisers and not so good appraisers. If the court is unconvinced by your expert's opinion as to how much your stuff is worth, then you will have wasted your money paying the appraiser's fee. Every judge has his or her own preferences. Many times, I will ask the judge directly during the scheduling conference to list two or three appraisers in whom they have confidence. If the other side agrees to use one of those appraisers with me, our clients will split the cost of the appraiser.

What date is the valuation date of the property? Generally, the courts use the date of the divorce as the valuation date. As I wrote earlier, sometimes these cases take several months or even years. Property can change, and markets can fluctuate. However, unless the parties agree otherwise, courts usually look at the date of divorce as the date their property should be valued.

If you or your ex has an ownership interest in a closely held corporation or partnership, you have the proverbial can of worms waiting for you. There are many different methods for valuing business interests: fair market value, book value, earnings method, and comparable sales method. Sometimes lawyers try to take discounts for future tax liabilities.

Going into each of these valuation methods is beyond the scope of this book. Briefly, however, you should know that fair market value is the most commonly used method of valuing a company. Fair market value is defined by the American Society of Appraisers as "the amount at which property would change hands between a willing seller and a willing buyer when neither is acting under compulsion and when both have reasonable knowledge of the relevant facts." Reading things like that reminds me why I didn't become an accountant. Anyway, in English, fair market value is simply the amount a buyer would willingly pay for a business.

Book value is commonly thought of as the cost basis in a company. In other words, what would it cost to rebuild and restock a business? Earnings method refers to the income generated by a business: this is sometimes used to value service corporations. For example, the physical assets of my office consist of my share in the building, my desk, books, and my office equipment and supplies. I earn multiples of the values of those physical items each year, however, so it would make sense to value my practice using the earnings method.

Comparable sales method refers to the relative sales of the business in question versus other similar sized businesses in the same industry. I once used this method to uncover the true value of a construction company owned by my client's ex. You should check with your accountant and your lawyer if you or your ex possess an ownership interest in a closely held corporation or a limited liability company and follow their advice as to what valuation method is appropriate in your case.

IRS gives us some help here. In a revenue ruling, IRS describes the relevant valuation factors for a closely held business interest (these logically apply to partnership interests as well, although the ruling does not specifically include them):

- The nature of the business and the history of the enterprise from its inception.
- The economic outlook in general and the condition and outlook of the specific industry in particular.

- The book value of the stock and financial condition of the business.
- The earning capacity of the company.
- The dividend-paying capacity.
- Whether or not the enterprise has goodwill or other intangible value.
- Sales of stock and the size of the block of stock to be valued.
- The market price of stock of other corporations engaged in the same or similar line of business.

There are other potential complications, such as buy-sell agreements, which provide for the transfer of business interests among the other owners upon the occurrence of specific events. These would include death, retirement, or other departure from the firm. Another potential complication involves the calculation of a controlling interest in the business, and how that affects the party's valuation of their interest. What degree of control does the party exert over the enterprise? That is a question that must be answered in any closely held business situation.

Perhaps the most illusive of the business valuation issues is the calculation of goodwill in the business. Goodwill refers to that intangible value that one's mere presence in the business creates. I think of it as the branding of a business. For example, I am a solo practitioner. My business is my practice. If I sell my practice to some young lawyer fresh out of law school, part of the value of my practice involves the goodwill that I've established in the community. I created that goodwill during my years of practice in the community, building what I hope is a good reputation among other lawyers and former clients. Those other lawyers and former clients think of me when they come across someone who may need legal services, and refer those potential clients to me. That goodwill has substantial value to me. It is vital to the continued existence of my business. On the other hand, how much value does it have to Young Lawyer: what is he going to do, drum up business by telling people he took over for me? Clients hire me

because of me. Once I am gone, they probably won't come looking for the next guy sitting in my office.

For other businesses, goodwill is marketable and can be valued. A opens John Smith's Widget Store, and does very well. John Smith's Widget Store establishes a good reputation in the community as a premier provider of widgets. Once A leaves, he may sell his store to another party. That party will continue calling the store John Smith's Widget Store because that's how the community brands the store. In this kind of case, a proper expert can value the worth of the goodwill.

Going into the details of these business valuation issues is beyond the scope of this book. My main purpose here is to briefly describe them for you so you will know what kinds of questions to ask your lawyer if this applies to you. Your lawyer will probably hire a business valuation expert who will use at least one or two of the above described valuation methods.

Remember that in the last chapter you learned that support obligations are not dischargeable in bankruptcy. That is not true regarding property division obligations. According to the federal bankruptcy code, an obligation to make a property division or future payment is dischargeable in bankruptcy. Your lawyer can protect you, however. First, the marital settlement agreement can contain a provision wherein the parties agree that such obligations will survive a bankruptcy proceeding. This won't stop your ex from filing bankruptcy and getting the discharge. However, in that case you can enforce the marital settlement agreement in a breach of contract action. Courts have upheld these provisions subsequent to bankruptcy. The other thing your lawyer can do is to make sure that you receive property that would be exempt from being attached by a bankruptcy trustee. If your lawyer does his job well, he should inquire whether either party is considering a bankruptcy, and if so, do some planning to protect your interests accordingly.

The next thing you need to know about property division is the tax consequences. IRS regulations hold that property transfers between spouses either during the marriage or incident to divorce are not taxable. IRS considers them gifts. Your tax basis in the property is equal to its adjusted basis before the transfer. This is called a

carryover basis. Property transfers between spouses incident to divorce must be made within one year or they may lose their tax-exempt status, however. This can become a problem. Suppose A and B agree that A will remain in the marital residence until the kids are emancipated five years from now. B agrees that A will sell the home and transfer half the proceeds to B at the end of that period. In that circumstance, there have been cases where IRS has found that the property transfer is a taxable event, requiring that the parties pay not only capital gains (which they would have whenever they sold the house), but also income tax on the net proceeds.

The other tax issue involves the division of the parties' retirement plan assets. Under federal law, each spouse has an undivided 50% interest in the other's qualified retirement plan balance that accrued to that spouse's benefit during the marriage. A had \$5,000.00 in a §401(K) plan when A married B, and by the time they divorced A had \$35,000.00 in the plan. B is entitled to 50% of the \$30,000.00 increase in the plan balance, or \$15,000.00. A keeps the first \$5,000.00 plus the other half of the \$30,000.00 increase, or \$15,000.00.

If B rolls that money over into an IRA, B pays no income taxes. As long as the money stays in a qualified vehicle, neither party pays tax. If either takes a withdrawal before reaching retirement age, however, they will be subject to the early withdrawal penalty as well as income tax on the withdrawn amount. This could amount to as much as 35% or 40% of the withdrawn amount. Because of this potential tax effect, I have seen numerous cases where the other lawyer tries to discount the value of his client's retirement plan asset by some percentage, usually 25%.

This is one of my pet peeves. Retirement plan assets are different animals than other investment or savings assets the parties may own. First, there are two basic kinds of retirement plans, defined contribution and defined benefit plans. Defined contribution plans are easier to understand, because their values are based on the actual amount of money in the owner's account. These are profit sharing, IRA's, and §401(K) plans. Defined benefit plans, also called pension plans, are a mystery to everyone but the actuaries who calculate their valuations. Pension plan participants do not have account balances. They have contracts with the plan administrators that promise to pay

them a certain amount of money for a certain amount of time upon their retirement. It's up to the employer sponsor of the plan to deposit enough money into the plan to fund the annuity. Actuaries run obtuse calculations to determine what the plan contribution should be. Regardless of what kind of plan one has, the court divides them pursuant to a special kind of court order called a Qualified Domestic Relations Order, or QDRO for short. How can anyone justify discounting the value of such a plan by some arbitrary percentage to account for a tax liability that may not occur for several years? By then the tax laws may change, or the participant may die, and not get the money at all. Because of this, I usually insist that we separate retirement plan assets from the marital estate, and divide them via QDRO without regard to the division of the rest of the property and without subjecting them to some arbitrary discounting that has little basis in reality. The party receiving the QDRO can later decide to cash in his or her interest and pay taxes on his or her own. They should not have to take a discounted amount for something they might or might not do.

So far I have discussed the identification and division of your marital assets. What about debts? Indeed, in many cases the amount of the marital debts exceeds the value of the marital assets. In this situation, the parties have what is called a negative marital estate. Debt division follows the same general rules as property division. This means that with a few exceptions, any debts that you acquired while you were married are divisible between you when you divorce.

The other general rule is that the debt usually follows the asset. For instance, whoever gets the house usually gets the mortgage payment.

What if your ex obtained a new Visa after you separated and ran up the balance: is that debt divisible? Probably not. Generally, once you and your spouse separate, any debt either of you incurs is called an after acquired debt, and is considered your individual responsibility. This is especially true of debts incurred after filing the divorce action.

Now you're prepared to move toward either settling with your ex or a trial, where a judge will decide the matter for you. You're familiar with the custody and placement

issues, how support works, and what and how your property will likely be divided. We're on the home stretch. In the next chapter I'll discuss preparing for and participating in the trial, and closing out the case.

## CHAPTER SEVEN: THE TRIAL: THE ENDGAME

Now you're entering the final phase of your case. Negotiations become most heated during the last few weeks before the trial. Sometimes agreements are reached "on the courthouse steps" on the day the trial is set to begin. I've settled more than one case while the judge is literally putting on his robe.

Obviously this is not the best way to resolve issues that are so important to your future. Unfortunately, this last minute haggling takes place more often than not. I say unfortunately because the client many times becomes unhinged from stress. If this happens in your case, do not get too uptight. Last minute negotiations are not usually as haphazard as they may appear. If your lawyer knows your case inside and out (like he should), and you and he have prepared your case well, he should be able to weave his way through an eleventh hour negotiation without much trouble.

So do not get frustrated that after six months or longer your lawyer still has little idea how the other side proposes to resolve your case. Thorough preparation includes considering all of the possible outcomes, and being ready for each one. If your lawyer has prepared your end of the case thoroughly, he will be ready to effectively negotiate with the other side when they finally do get off the dime. So stay calm!

I wrote earlier that most cases settle, which means that there is a very good chance that yours will also. Having said that, the most effective divorce lawyers prepare their cases as if they will go to a contested trial. The preparation necessary for trial is more intense and thorough than for cases one knows will settle. The side effect is that your lawyer will probably know your case better than the other lawyer will know hers. This is an advantage when negotiating a settlement. Also, if the other side knows that your lawyer is ready and willing to take the case to trial, there is a better chance that she will try to settle your case. And if yours is one of the minority of cases that does go to trial, then your lawyer will be ready to go.

So what happens next? Your lawyer will have a settlement conference with you, where the two of you will work through all of the issues of your case. Once your lawyer knows

what you want, then he or she will sometimes prepare a settlement proposal for the other side. In some cases, however, your attorney will wait for the other side to make the first proposal. When I represent the party with the greater income, I usually wait for the other side's alimony proposal, because they may ask for less than my client would have offered. As an example, I recently represented the party who was going to be on the hook for alimony. The parties had a long term marriage, the other party had very little income, and my client made a healthy living. Based on the numbers I ran, I projected a worst case scenario that my client would have to pay as much as \$2,500.00 per month alimony for about fifteen years. I did not want to make the first proposal, because if I low-balled the other side, I was afraid they would come back with a demand for the worst case I projected. So we waited for the other side. When they surprised us by asking for \$800.00 per month for five years, my client jumped at it and breathed a heavy sigh of relief.

Reaching agreement on the salient issues of your divorce can be a frustrating process. The nature of most negotiations is that in order for you to get something you want, you have to give up something else to the other side. Most people do not want to compromise, especially when it involves issues that are personally important to them. Understand that as difficult as this is for you, it is just as difficult for your ex. Why should I care if this is difficult for him or her, you're probably thinking. Well, on one level you should not care how hard this is for him or her. On the other hand, understanding your ex's frame of reference sometimes makes it easier to try to work together toward a compromise that both of you can accept.

You may hear your lawyer use the terms "stipulation" and "agreement" when discussing settlement of your case. It's important that you understand these are two different terms, although many lawyers use them interchangeably. A stipulation is a type of agreement, but until the court formally incorporates it into the judgment, either party can change his or her mind and walk away. On the other hand, an agreement, as that term is used in the law, refers to a written meeting of the minds, signed by both parties. In short, an agreement is a contract, which means it can be enforced as a contract independent of a judge's blessing.

In divorce cases, these agreements are called marital settlement agreements. Marital settlement agreements (**MSA**) contain all of the terms that the parties agree to. The MSA can be a comprehensive agreement, covering all issues, or a partial agreement, covering only those issues the parties have resolved. The unresolved issues will then be tried in court. Whether the MSA is comprehensive or partial, its terms will be incorporated by reference into your final divorce judgment.

Why should you understand the difference between a stipulation and a MSA? Assume A and B negotiate a settlement of their case, but rather than reduce their understanding to a written marital settlement agreement, they decide to put the stipulation on the record before the judge. A and B go to the courthouse to begin the trial, but at the last minute A changes her mind on some issue. Thinking this is an attempt to extort a final concession out of him, B refuses to budge. If the parties stand firm, their entire bargain can blow apart like a house of cards in a tornado. B's lawyer tells the judge they thought they had an agreement, but now that A has changed her mind, and he needs additional time to prepare for a contested trial. If the judge refuses to adjourn the case to a future date, the parties go to trial that day, whether they are ready or not. The result is a potential mess for both sides.

In the meantime, C and D successfully negotiate a settlement, and they sign a written marital settlement agreement prepared by one of the lawyers before the trial. If C has second thoughts later on, unless D agrees to amend the marital settlement agreement, C is locked into the terms they reached earlier. The marital settlement agreement, once signed, is a contract that can be enforced by the court. Sure, C could go to trial and try to convince the judge that she should be let out of the contract. However, C will have the burden of proving one of the available contract defenses to the satisfaction of the court before the court will allow C to void the agreement.

Whether you negotiate a complete settlement or try one or more of the issues before the judge, you will have to testify in court at the final trial of your case. You must make a record for the court that you want the divorce and that you understand the issues you have agreed upon. If

you are trying any issues, the most important evidence is usually your testimony.

Your lawyer will prepare you for trial in much the same manner he did if you were deposed during the discovery process. Go back and re-read the last section of [Chapter Four](#): Discovery and Pretrial Procedure regarding *Langan's Laws About Testifying*. I am not going to repeat them here, but it is important that you understand and follow those rules plus whatever else your lawyer tells you to do.

You must file a final financial disclosure statement with the court on or before your final trial date. Some jurisdictions require that the final statement be filed several days or weeks before the trial, while others allow you to file the statement on the day of trial. Your lawyer will prepare the statement from information you provide. You sign the final financial disclosure statement under penalty of perjury; so make sure that everything in the statement is accurate to the best of your knowledge. If there's a mistake in the statement, you, not your lawyer, will be held responsible. When you testify at the final trial, your lawyer will ask you while you're under oath to identify your financial statement and verify that it is true and correct.

If you have completely settled your case, the final hearing will be fairly brief. You will have to testify regarding your understanding of the terms of the MSA or stipulation as well as verifying the contents of your financial disclosure statement. Your ex's attorney may cross-examine you regarding a few things, but mostly to clarify that you understand everything.

If your case is not fully settled, then you will go through a trial. Divorce trials are bench trials, which means you try the case before a judge, not a jury. The judge acts as both the finder of fact and the arbiter of the law. If the issue is custody or placement of your children, the Guardian ad Litem will be involved in the trial. Remember the GAL is an advocate for the children's best interests. In that regard, the GAL acts as a third party to the divorce action for trial purposes. The GAL can call his or her own witnesses to build a case in favor of his or her recommendation, and cross-examine any witnesses the other lawyers call. In most cases the children themselves do not attend the trial. However, depending on the children's age

and level of maturity, the court will sometimes grant an *in camera* interview. An *in camera* interview is a meeting between the judge, the child, and the GAL in the judge's chambers. The judge talks to the child, eliciting the child's insight on the custody and placement issues.

At a contested trial, your lawyer will present your case using your testimony, the exhibits she has prepared, and the testimony and related exhibits of any relevant witnesses. These can include the accountants, psychologists, and other professionals he employed to help construct your case. Other witnesses could include your friends and family members, or anyone else that your attorney believes is necessary to prove your side of the case to the court's satisfaction.

Understand this is a civil trial, which means the burden of proof is something less than the "beyond a reasonable doubt" burden that you've heard hundreds of times on movies and TV shows. Your burden is to convince the court by the greater weight of the credible evidence that it should rule in your favor. The burden of proof is one of persuasion. This is why they call it practicing law, and not just 'doing' law. Your lawyer will use her persuasive powers while presenting the evidence to the court in an effort to convince the judge to rule in your favor. Thus, when some of the evidence is open to interpretation, your lawyer's ability to persuade the judge to accept that interpretation that best supports your position is what you ultimately are paying your lawyer to do for you.

By the way, this is where your long days of patience and reasonable behavior should pay off. If you can testify regarding your calm behavior in the face of your ex's irrational and vindictive behavior, you will come off more credible than your ex. Your rational, reasonable behavior relative to your ex's will make your lawyer's job much easier. You will both thank each other when the case is over.

Do not be surprised if the judge does not make a decision immediately at the conclusion of the trial. In most cases the court takes the case under advisement. This means the judge wants to think about the evidence presented to him before making a final decision. The judge may issue his decision in writing or orally. If the judge issues an oral decision, he will call the parties back to court where he

will make his oral findings and orders from the bench. If the judge issues a written decision, he will send it to the lawyers, who will then share it with you and your ex.

Following the decision, one of the lawyers will prepare something called **Findings of Fact, Conclusions of Law and Judgment of Divorce**. Lay people commonly refer to this as one's "divorce papers". The document contains all of the court's jurisdictional and factual findings justifying the granting of the divorce, the court's rulings on the law, and the court's orders regarding the financial issues and the custody and placement of the children. If you had a marital settlement agreement, the document will contain language incorporating the terms of the marital settlement agreement into the judgment by reference. The lawyer who drafts the Findings, etc., forwards them to the other lawyers involved in the case for review. Once the other lawyers approve of the document, the attorney who drafted it files the original and several copies with the court. The judge does a final review. If the judge is satisfied, she will sign the document, and pass it along to her clerk for filing. The clerk will return file stamped copies to the lawyers and the parties.

There are several other documents that the lawyers may need to prepare, depending on the circumstances of each case, and in some cases, where you live:

- **Vital Statistics Form.** These are sometimes called Certificate of Divorce. This is a one page form filed with your state department of health and family services. The form contains information regarding the identity and addresses of the parties, the date of the divorce, the number of children, if any, involved in the case, and the name and address of at least one of the lawyers.
- **Medical History Questionnaire.** This form is usually required when there are children involved in the case. The purpose of the form is to provide information regarding the medical history of each of the parents for future reference, in case it is needed for the child. The form is filed with the court, and is sometimes forwarded to the child's pediatrician. The information in the form is confidential, and will not be disclosed except upon court order.

- **Interlocutory Judgment.** Sometimes there is a gap period between the date of the divorce and the filing of the Findings of Fact, Conclusions of Law and Judgment. During this gap period, it may be necessary that certain orders affecting the parties be carried out right away. For instance, if the court rules that child support or alimony payments are to begin with your ex's next paycheck, it may be appropriate to file an Interlocutory Judgment. The Interlocutory Judgment acts to give immediate effect to the court's orders while the parties wait for the formal, final Findings of Fact, Conclusions of Law and Judgment to be filed. That way, you will not have to wait for your first alimony or child support check.
  
- **Quit Claim Deed and Transfer Return Form.** If the court awards the marital residence or other real estate to one of the parties, the other party must sign off their interest in the property by executing a quitclaim deed. The deed, along with a transfer return form and a certified copy of the portion of the divorce judgment affecting the real estate is filed with the local Register of Deeds.
  
- **Qualified Domestic Relations Order.** This is the QDRO I described in Chapter 6 that divides the qualified retirement plan assets between the parties. Usually the attorney representing the party who is receiving the asset drafts the QDRO. He submits it to the other party's attorney (not the GAL; remember, they are not involved in the financial issues) for review. After the other attorney signs off indicating his approval, the drafting attorney forwards the QDRO to the court. Again, the judge reviews the document, and signs it if appropriate. Once the attorney receives the file stamped document he will submit it to the retirement plan administrator. If the plan administrator has a problem with the document, it is up to the drafting attorney to make the change and resubmit it to the court and back to the administrator.
  
- **Order for Income Assignment.** Sometimes these are called disbursement orders. If the court awards support payments or alimony someone must complete an order assigning the payor's income to the court to secure the payments. In some jurisdictions court

staff prepare these assignments, but in others the lawyers are responsible.

- **Release of Lis Pendens.** If one of the lawyers filed a *lis pendens* to protect the real estate during the pendency of the divorce, once the case is concluded they will file a release of *lis pendens* to remove the prohibition from transferring title.
- **Satisfaction of Judgment.** If a party is ordered to make a payment of money or deliver property to the other party as part of the property division, once that payment or transfer of property has occurred, it is a good idea to file a Satisfaction with the court acknowledging it.

After all the documents have been drafted and signed, the property re-titled and/or delivered, and support payment arrangements made, the case is ready to be closed. Your attorney will present you with a final statement for services.

Many lawyers send post-trial letters to their clients. These letters describe in summary fashion the terms of the divorce judgment, and remind the clients to consider doing certain things to get their new lives off to a fresh start. Some of the things you should do as soon as you can include:

- If you're a woman, you may have decided to resume using your maiden name: you should get a new driver's license, have new checks printed, change your name with Social Security (get a new card) and IRS (use Form 8822), and contact your credit card companies.
- Consider modifying your estate plan: you probably do not want to leave your estate to your ex any longer, do you? Change the beneficiary designation forms on your retirement plan and life insurance policies.
- If you're the one moving to a new address, remember to notify everyone. Notify the court within ten days of your move. Make sure your creditors and banks know your new address, along with IRS and your attorney.

- If you get continuation coverage under your spouse's health insurance, make sure you understand how that company's plan works. Execute all the appropriate forms necessary to guarantee that you have health insurance coverage.

A very small percentage of cases get appealed when the court's ruling disappoints one of the parties. Because so few cases get appealed, I am not going to cover this aspect of divorce cases here. The only thing I should mention is that if you believe the court made a legal or factual error that affects you in a materially adverse way, you have the right to seek relief on appeal. In most jurisdictions, the appeal must be initiated within 45 days of the entry of the judgment, but check with your attorney for your state's rule.

That's it: you are divorced.

Now that your case is finished you can start to reassemble your life and move on. However, sometimes things change, and it becomes necessary to correct or modify your judgment. That brings us to the last chapter of this book, **Post Judgment Matters: It Ain't Over Till It's Over.**

## CHAPTER EIGHT: IT AIN'T OVER TILL IT'S OVER

The title of this last chapter is a famous line from Baseball Hall of Fame catcher Yogi Berra. He was referring to how a baseball game that seemed beyond reach could suddenly turn around and the other team winds up victorious. Any baseball fan remembers the 2001 World Series, when the Yankees staged two late inning come from behind victories. But then Arizona Diamondback Luis Gonzalez hit the series winning RBI in the bottom of the 9<sup>th</sup> inning against the best clutch reliever in baseball, Mariano Rivera. This is what makes baseball so exciting to fans, because until that last out in the last inning, the game is never over.

Unfortunately, the same thing can happen in a divorce. You think your case is finished: the judge has granted the divorce, your support obligations have been defined, the property has been divided, and the kids are settled into a new status quo. But then something changes. You or your ex meet someone new and remarry. The children grow older. One of you gets a new job, or perhaps loses an old one. Your ex starts playing games with your placement of the kids or with your alimony (I say your ex, because you would never do anything like that, would you?). Someone moves to another city or state. In short, life goes on, and as you probably know by now, the only thing that does not change is change itself. The terms of your divorce judgment no longer fit your new reality. You have to fix the problem. Like Al Pacino in "The Godfather III," just when you thought you were out *they pull you back in*.

This final chapter explores what you need to know regarding maintaining your divorce judgment. When circumstances change you should review your judgment to ensure that the terms still fit your new situation. If they do not, you should do something about it, or you risk the chance that someday you will seriously regret it. Remember the old ounce of prevention is worth a pound of cure saying, and apply it here. The real point of this chapter is to warn you to keep Yogi's saying tucked away in the back of your mind. If you someday find yourself back in court you should not be too surprised or disappointed.

Reconciliation. It's a few months after the divorce. Your ex and you no longer have anything to fight about, and now you are getting along better than you have in years. You

start feeling those old feelings again, and after awhile you start to wonder why you ever broke up with the big lug in the first place. You are divorced, but now you both realize that you want to be together again. In most jurisdictions, if this happens within six months of the divorce, you do not have to remarry. You can apply for a vacation of the judgment, which returns you to your prior marital status. Most jurisdictions allow for reconciliation post divorce, but check with your attorney to find out if you are within the applicable time frame in your state.

What happens if you reconcile after the statutory period in your state expires? You can simply remarry, which I tell people represents a triumph of hope over experience, and restart your lives together. However, what happens if you remarry, and shortly afterward you realize you made a terrible mistake, and you break up again? Can you enforce the terms of your earlier marital settlement agreement? No, that earlier agreement is no longer in effect upon your remarriage to each other. You will have to go through the whole process all over again.

Problems with Child Support. Your ex fails to pay his or her court ordered child support for whatever reason. Maybe he or she moved without notifying you or the court. Perhaps he or she changes jobs and an income assignment is never put into place. If you need help, you can apply to your local child support agency for assistance. This is a good news/bad news situation. The good news is that the federal government, through the Social Security Act of 1974, provides funding for state child support enforcement agencies. Uncle Sam decided that if more parents pay their child support obligations there would be fewer families receiving government aid, such as AFDC.

Every state has such an agency, whose function is to enforce child support orders, locate missing parents, and help secure child support obligations from non-custodial parents. These agencies have the authority to intercept a delinquent child support payor's tax refund or unemployment benefits and apply the money to their arrearages. They can impose liens on their assets and property to secure the payments. Here's the best part: they do this all without any cost to you except a small application fee and related court costs.

As I said, however, there is a bad news side to this as well. You are dealing with a bureaucracy that is in many cities overburdened and under staffed. Yours will be one of hundreds or even thousands of similar cases being handled by the agency in your city. I have heard stories from people who waited a year or more from their first application before they even met with a staff attorney, let alone attended an enforcement hearing.

You could re-hire your divorce attorney to bring an enforcement action for you. Your private attorney should be able to get your case in front of a magistrate much sooner than the well-meaning but swamped child support agency. Unfortunately, if you do not have the funds available to hire a lawyer, you will have to wait until your file floats to the top of the stack. In the meantime, you could be doing without thousands of dollars of child support.

If you find yourself in this situation, check with your local child support agency first. Ask how long it takes to initiate an enforcement action, and to get the case before an appropriate magistrate or court commissioner. If the wait time is acceptable, then you will usually come out ahead if you apply for their help. If you do decide to take this route, the best thing you can do thereafter is to keep bugging them. Call weekly for status updates. This is one of those circumstances where the squeaky wheel gets the grease. Remember yours is one of several cases pending at any one time. The cases that get moved through the system fastest tend to be those where the client consistently demands attention.

If the wait time is unacceptable, then you must decide whether to hire a lawyer. If you cannot afford to hire a lawyer, you could try the *pro se* route. (Before you decide to go it alone, re-read [Chapter Three](#) again. I think you should hire an attorney for post judgment matters, because they can be just as complicated as 'regular' divorce cases.) Weigh the cost of the legal fees against what you will lose in child support during the interim. In most jurisdictions you can ask for fees, but most of the time the court will not award them.

While most arrears are eventually collected, they are collected in much smaller increments than what the payor should have paid. For instance, assume A is ordered to pay

\$500.00 monthly child support to B. A changes jobs and stops paying. Eight months pass before the local child support agency B wins an enforcement order. By now A is \$4,000.00 in arrears. Depending on A's financial circumstances, a court could order that A pay the \$500.00 originally ordered, plus an additional amount, usually in the \$50.00 to \$200.00 range, toward the arrears. It will take years before A is caught up and B recoups what A should have paid. Suppose on the other hand B hires a lawyer after A misses his or her first payment. In most jurisdictions a petitioner can get a hearing within 45 to 60 days of filing the action. B gets a judgment against A three or four months after A first stopped paying. Sure, A will pay on the arrears, but that arrears could be half what it otherwise would have been if B had waited for child support agency enforcement. I've seen this scenario play itself out several times.

If your ex moves to another state and stops paying child support, either the child support agency or your lawyer can file an enforcement action using the Uniform Interstate Family Support Act, called UIFSA. You may remember I briefly discussed UIFSA in the context of gaining jurisdiction over an ex living in another state in [Chapter Four](#). Your representative starts the action by filing a petition in your state, then sending that petition to the state where your ex lives.

Changes affecting custody, placement or child support of children. Suppose Johnny was 8 years old when his parents divorce. They agreed that Mom should have primary placement because of Dad's career obligations. Dad pays child support via income assignment and spends alternate weekends and one or two evenings per week with Johnny, plus holidays and vacations. But now Johnny is 14, and he wants to live with Dad. Mom agrees that due to the changes in their respective lives it would be in Johnny's best interest that he move to Dad's. Unless they turn off the child support faucet Dad will continue paying Mom even though Johnny now lives with him.

Dad hires an attorney, who drafts a Stipulation and Order Amending Judgment. The pleading would contain recitals describing why an amendment is appropriate or necessary. The next section would contain the terms of the stipulation, which in this case would be that Dad's child support obligation is terminated effective on X date, and

if appropriate, what Mom's child support obligation will be. After the parties both sign the Stipulation and Order, the attorney will then submit it to the court for approval. Once the court commissioner or judge signs off their approval, the clerk will return officially stamped copies of the document to the attorney and the respective parties.

If Dad was paying child support via an income assignment order, he should make sure that the payroll department at his employer adjusts their records and stops the withholding. He should provide them with a copy of his officially stamped copy as soon as he receives it. Although the clerk of courts will notify Dad's payroll department of the change, that notification could take a few weeks, during which child support will continue being withheld. If Dad can provide earlier notification, the payroll department may decide to adjust their records before the official notice from the court.

Now, suppose Mom does not agree to let Johnny move to Dad's? If Dad believes that it is in Johnny's best interests that he lives with him, then Dad may decide to seek a revision of the judgment. The first thing Dad should do is ask Mom to mediate the dispute. If they successfully work out their differences, the mediator will draft a memorandum of agreement. If the agreement resulted in Johnny moving in with Dad, then the parties would submit the memorandum of agreement to the court along with a Stipulation and Order for Amendment of Judgment as described above.

If mediation is unsuccessful, however, Mom and Dad will retreat to their respective corners and get ready for a boxing match over Johnny's place of residence. Each parent will (or should) hire an attorney. Since Dad is the one seeking the change, his attorney will begin the action by filing a Motion for Revision of Judgment. At the first hearing, the magistrate will appoint a Guardian ad Litem for Johnny, and entertain Dad's motion for a temporary order changing the status quo. (If the parties have not already tried mediation, the court will order them to go through that process first.) If the court appointed a Guardian ad Litem during the parties' earlier divorce, the court can re-appoint him or her for this post judgment matter unless one of the parties would prefer someone else.

Courts presume that the original child placement order is in the child's best interests. Therefore, it is unlikely that the court will grant Dad's motion to make any substantive change to the status quo at the first hearing. The court usually wants to wait for the GAL to complete their investigation and their report to the court. However, sometimes the court may decide to make some small changes in the current placement schedule, so it doesn't hurt for Dad to seek some change in placement right away at the first hearing.

From that point forward the proceedings follow the same track as I described earlier in [Chapter Two](#). Reread the last several pages of that chapter to reacquaint yourself with what happens next and why.

What if A, who has primary placement of the children, decides to move to another city far away, or to another state? The first thing A must do is provide proper notice of his or her intent to move to B. In many jurisdictions, A must provide written notice of his or her intention to remove the children from the jurisdiction if A intends to move more than 150 miles away, or, if A intends to move to another state. If A's move is within that radius in the same state, A is not required to provide notice. There are a few variations on this, however, so check with your attorney to find out your state's specific rule.

If A is moving out of state, regardless of how far away that is, A must give B notice of the intended move. Most commonly, A must provide notice to B at least 60 days before his or her intended move. Upon receiving the notice, B has a certain period set by statute in which to object to the proposed removal of the children. This varies by jurisdiction, but usually B must object within 15 to 20 days of receiving the notice. If A intends to move out of the state, the terms of the UCCJA apply. Check with your lawyer to find out what the specific requirements are in your state, as they vary widely. The bottom line is that the custodial parent must give the other parent adequate notice of their intent to move the children so that the noncustodial parent can decide what, if anything, to do about it.

The court usually expedites the proceedings to accommodate A's possible move. In most states the court presumes that

it is in the children's best interests to remain with the custodial parent and move with A.

Changes affecting alimony. A pays B alimony. A's job situation changes, via layoff, involuntary termination, retirement, or a change of employer. A can no longer afford to pay alimony because A's income has either been reduced or eliminated. However, A is still required to pay alimony. If A stops making their ordered payments, B would have to force the issue and file an enforcement action against A. A should file a motion for revision of judgment, seeking a suspension or elimination of A's alimony obligation. Unfortunately, in my experience most people in A's position simply stop paying, which puts the onus on B.

I believe A makes a mistake by waiting for B to start an action. Whether A files a motion for revision or B files a motion for enforcement, A will have the burden of proving his or her inability to pay the ordered alimony. If A is the one initiating the action, there is a greater likelihood the court will give credence to A's position. On the other hand, if A waits for B, there is a good chance the court's first question will be, why A didn't come forward first? A better have a good explanation or the court may not agree to modify the terms of A's alimony order.

The court will require A to submit a new financial disclosure statement, along with supporting documentation of A's new status. The court will presume that A's support obligation should remain intact. However, if A presents credible evidence to the court, the court will most likely order a change. Even if A has lost a job, however, there is a good chance the court will decline A's request. The court will consider several factors, including:

- Did A lose his or her job for cause, or because of a downturn in the economy or company?
- Is another job available in the same industry at the same pay level in the same general geographic area for A?
- Does A have any other sources of income?

- Is A living with another adult who is assisting A pay his or her household bills?
- If A has another, lesser paying job, is that the best paying job A could have found given the local economy and A's previous education, training, and skills?

If the court believes that A is purposely avoiding his or her obligation, it could find that A is shirking his or her responsibility. In that circumstance, the court will not only decline to modify A's alimony payments, but could order A to pay B's attorney fees and sanctions to the court.

Suppose A's status remains the same, but B's changes. B meets someone, and at some point they move in together. B does not marry his or her new "friend," but they do set up housekeeping together and pool their resources just as a married couple would do. The courts call this cohabitation. In such circumstances, A will probably be successful if he or she seeks a revision of the judgment. It isn't that court commissioners and judges are prudes: they make no moral judgments regarding B's situation. However, if B is sharing a household with another adult who contributes to the economic life of that household, B's economic circumstances have changed. In that case, the courts will take a close look at B's new situation. Although B's situation has changed, A still has the burden of proof. The general rule in any support action, whether for enforcement or revision, is that the payor has the burden of proof.

I believe these are the most common post divorce scenarios that result in a post judgment action. Regardless of your situation, the bottom line is this: if your circumstances change, review your judgment. If the terms of the judgment no longer fit, you should seriously consider doing something about it. You can always bring an action to enforce a provision your ex is failing to honor, or to modify a provision that needs fixing.

Your toolbox is now full. You have all the basic information necessary to prepare for and follow through the process of dissolving your broken marriage. I hope that as you work through the process that you also experience a healing of the pain that brought you to this point, and that you will certainly experience as you proceed. Rely on

the support of your family and friends. Nurture your kids, and be fair and reasonable with your ex, even if they are unreasonable with you. The best revenge is to show your ex they don't deserve you. Good luck.

