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**DIVORCE :**

**THINGS TO CONSIDER**

This pamphlet on divorce is meant to give a broad overview of some of the areas of concern which might arise during a divorce proceeding. It is by no means comprehensive and should not be construed as legal advice. Divorce by its nature is personal and each case is different; therefore, it is strongly recommended that you obtain an attorney to properly represent your interests in any of the matters mentioned herein or any others that may arise. The following is meant to give you a guide to typical areas for discussion with your attorney.

**OVERVIEW OF DIVORCE PROCEDURE**

Iowa has what is known as a "no-fault" divorce law. This means that one party is no longer required to prove in an adversarial proceeding that the other party was "at fault" or caused the marriage break-up. Instead of proving fault, a person must simply show there has been a breakdown in the marriage relationship, the "legitimate objects of matrimony" have been destroyed, and there remains no reasonable likelihood that the marriage can be preserved. The party seeking the divorce is the only one who needs to testify.

The first step in obtaining a divorce is to file a petition with the court for "dissolution of marriage" -- defined as a "termination of the marriage relationship" and synonymous with the term divorce. Notice is given to the spouse which shows a breakdown has occurred in the marriage. Before a person can file a petition for dissolution, he or she must have resided in the state for at least one year, or the person's spouse must be a resident of Iowa and be personally served (notified in person).

After the petition has been filed, and the other spouse is served with (receives a copy of) the petition, a waiting period of 90 days is required before the divorce decree is granted. This waiting period can be waived only for good cause and a showing of

emergency or necessity to satisfy the Court that immediate action is required. During the 90 days, temporary orders may be obtained by either spouse which will give her or him attorney's fees, temporary custody of children, child support, alimony or the right to occupy the family home. It is also possible to get an injunction to prevent a spouse from disposing of marital property prior to the final settlement. If one spouse has harassed or physically abused the other, a temporary injunction may be obtained to prevent these acts from reoccurring.

On request of either spouse the Court will provide for a 60-day counseling period -- known as conciliation -- during the 90-day waiting period. The conciliator may be someone requested by the parties or one of the following: clergy, physician, public or private marriage counselor, or representatives from family service agencies or community health centers.

The 90-day waiting period is also used by the parties to negotiate a settlement of such matters as property ownership, child support, spousal support (alimony), and child custody. In most cases settlements are agreed upon through this negotiation process and approved by the Court at a final hearing. In cases where the parties cannot reach an agreement, a Pre-Trial Conference is scheduled. At this Pre-Trial Conference the parties and their attorneys meet with the Court law clerk or judge to determine which issues the Court will resolve. A trial will be scheduled sometime after the Pre-Trial Conference and at least 90 days after the petition was filed. Divorce cases are heard by a judge without a jury and generally these trials are closed to the public.

Ordinarily, questions of wrongdoing and fault will not be heard. However, the question of personal fitness of each party will be considered if custody of the children is at issue. The Court may, on its own initiative or at the request of either party, appoint an impartial third attorney to represent the interests of the child(ren) at the hearing. The Court may also order that a home study or child custody evaluation be made to assist the Court in resolving the issue of child custody.

## SPECIFIC ISSUES

### CUSTODY

In making a custody decision, the Court's paramount concern is the "best interests of the child." In deciding what is in the "best interests of the child," the Court should try to assure the opportunity for maximum continuing physical and emotional contact with both parents unless circumstances such as harm to the child(ren) dictate otherwise. Therefore, the Court will consider joint legal custody of the child(ren) upon application of either party. In fact, if the Court denies joint legal custody, it must state its reasons for doing so. Joint legal custody does not require joint physical custody. Physical custody may still be

given to one parent, subject to visitation rights of the other parent.

Some of the factors the Court will look at in determining the "best interests of the child" include:

1. Whether each parent would be a suitable custodian for the child;
2. Whether the psychological and emotional needs and development of the child will suffer due to lack of active contact with and attention from both parents;
3. Whether the parents can communicate with each other regarding the child's needs and each parent can support the other's relationship with the child;
4. Whether both parents have actively cared for the child before and since the separation;
5. Whether the custody arrangement is in accordance with the child's wishes or whether the child has strong opposition, taking into consideration the child's age and maturity;
6. Whether one or both the parents agree or are opposed to joint custody;
7. The geographic proximity of the parents;
8. Whether the safety of the child, other children, or the other parent will be jeopardized by the awarding of joint custody or by unsupervised or unrestricted visitation.

If legal and physical custody are awarded to one parent, the other parent is usually granted visitation rights. Also, the Court will seldom separate siblings into different homes.

Once the custody determination is made by the Court, it is very difficult to change or modify the decree.

### VISITATION

Either general or specific visitation rights may be granted to the noncustodial spouse. It is usually preferable to spell out visitation rights in the agreement or decree. Consideration should be given to visitation on some weekends, holidays, children's and parent's birthdays, and school/summer vacations. Grandparents may also have visitation rights and provisions should be included in the decree as to their exercise of these rights.

### CHILD SUPPORT

It is difficult to determine what is a satisfactory amount of child support. Generally, the Court will consider the following:

1. The financial resources of both parents and the child;

2. The standard of living the child would have enjoyed had there not been an annulment, dissolution, or separate maintenance;
3. The physical and emotional health needs of the child;
4. The educational needs of the child;
5. The desirability that the custodian remain in the home as a full-time parent;
6. The cost of day care if the custodian works outside the home, or the value of custodial services performed by the custodian if the custodian remains in the home;
7. The tax consequences to each party;
8. Other factors the court may determine to be relevant in an individual case.

Practically, the Court must balance the needs of the custodial parent to raise the child with the financial ability of the noncustodial parent. Also, if requested, the Court will usually order temporary child support while the dissolution is pending.

Women as well as men may be required to pay child support, and both parents' earnings are considered as part of the funds available for raising a child.

Child support can be changed or modified, but it must be shown that there is a "material change of circumstances" not contemplated by the Court at the time of the decree. From a tax standpoint, child support payments are usually not deductible to the person paying them or taxable to the recipient.

### SPOUSAL SUPPORT

Spousal support or alimony may be awarded to either a husband or a wife. Some of the factors the Court will consider in granting such support include:

1. The length of the marriage;
2. The age and physical and emotional health of the parties;
3. The distribution of property made pursuant to subsection 1;
4. The educational level of each party at the time of marriage and at the time the action is commenced;
5. The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment;
6. The feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage; and the length of time necessary to achieve this goal;
7. The tax consequences to each party;

8. Any mutual agreement made by parties concerning financial or service contributions by one party with the expectation of future reciprocation or compensation by the other party;
9. The provision of an antenuptial agreement;
10. Other factors the court may determine to be relevant in an individual case.

Spousal support or alimony is usually terminated upon remarriage of the spouse receiving it or death of the spouse paying it. Statistics show that only a small number of women receive alimony one year after divorce, and that alimony is most frequently awarded after a long marriage for a woman who is unskilled.

Spousal support is generally taxable to the recipient and deductible to the payor if certain conditions are met. Therefore, it may be beneficial to the custodial parent to receive child support, if there is a choice. Child support may continue for a longer period of time than alimony and will not usually be taxable to the recipient. However, consideration should be given to including at least the minimum amount of alimony in a dissolution decree - usually one dollar - because alimony can be raised later only if it was included in the original decree. A divorced woman may also collect Social Security based upon her husband's income, but only if their marriage was at least ten years in duration and the husband is collecting Social Security.

#### PROPERTY SETTLEMENTS

Once determined, property settlements cannot be changed unless there are extraordinary circumstances (e.g., fraud). Generally, Iowa Courts provide for "equitable distribution" - a distribution that is fair based upon all the facts and circumstances involved. Equitable distribution does not always equate with "equal" distribution. In determining an equitable division of the parties' assets, the Court will consider:

1. The property brought into the marriage by each party;
2. The age and physical and emotional health of the parties;
3. The length of the marriage;
4. The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care service;
5. The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage;
6. The desirability of awarding the family home or the right to live in the family home for a reasonable period to the party having custody of any children. Or, if the parties

- have joint legal custody, to the party having physical care of the children;
7. The amount and duration of an order granting support payments to either party pursuant to subsection 2 and whether the property division should be in lieu of such payments;
  8. Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests;
  9. The tax consequences to each party;
  10. Any written agreement made by the parties concerning property distribution;
  11. The provisions of any antenuptial agreement;
  12. Other factors the court may determine to be relevant in an individual case;
  13. The contribution by one party to the education, training or increased earning power of the other.

Inherited property and gifts received by either party are generally not divided between the parties. Also, it may be more difficult to identify the assets than to convince the Court to divide them equitably. Often special legal procedures and the services of an accountant are required to determine the extent of such assets as a spouse's business interest.

#### DEBTS

Determining debt liability may be more important than property division, and usually this is done as part of the equitable distribution. Sometimes one spouse will declare bankruptcy after the divorce, but the other spouse will not do so. The creditors can, and will in many cases, attempt to collect the debts from the spouse not declaring bankruptcy. Unfortunately, the Court in a dissolution proceeding cannot prevent a creditor from collecting joint debts from either spouse. The Court can only decide which spouse is liable for the debt as between the parties, but creditors are not bound by that decision.

#### HOMESTEAD

Often the parties' sole asset is the equity in the home. It may be impossible for the person assuming ownership to immediately pay his or her share of the equity. Periodic payments may be arranged, or a lump sum payment may be made after sale of the house or at a future date, such as the date the youngest child reaches majority or the custodial spouse remarries.

#### LIFE INSURANCE

Sometimes the Court will require each party to maintain a life insurance policy as guarantee of child support payments. The beneficiary may be the spouse for the benefit of the children, or a trustee, since, under Iowa Probate Law, a minor child may not

receive outright in excess of \$4,000 from inheritance. It may be difficult to determine that the required life insurance policy is being maintained after the divorce. A provision should be included in the agreement requiring annual proof of policy premiums payment and prohibiting borrowing against the policy, which depreciates its death benefit.

### HEALTH INSURANCE

Generally, it is the noncustodial spouse who is required to provide health insurance in addition to his/her support obligations. The agreement between the parties or the decree should specify what the insurance covers (e.g., hospitalizations, eyeglasses, dental and orthodontic work, and prescription drugs) and how the noncovered expenses and deductibles are to be paid.

### COLLEGE EDUCATION

Usually child support will not be awarded past a child's 18th birthday or completion of high school. The exception occurs when a child goes on to a college or trade school. However, the parties may agree that both will contribute to college education costs and this agreement is enforceable. In families where college is anticipated, care should be taken that both parties maintain their obligation at the same level they would have maintained if the divorce had not occurred.

### REMOVAL OF CHILDREN FROM THE STATE

Depending on the individual case, the Court can prohibit a custodial parent from moving children out of state without giving the other parent notice and an opportunity to request a hearing. It is generally advisable to provide for this specifically in the decree.

### ACCESS TO RECORDS

Both parents, regardless of who has custody, have a legal right to access to a child's medical, school and law enforcement records.

### MAIDEN NAME

A provision may be made in the divorce decree for the wife to regain her maiden name, and no other legal action is necessary. Some women prefer to retain their married names, however, so they will have the same surname as their minor children.

### ATTORNEY FEES

In cases where one spouse has a significantly higher income than the other, the Court may require the former to pay the latter's attorney fees in the divorce proceeding. If there is a

trial, these fees can be sizable and should be considered in determining the ultimate award of property.

### TAX EXEMPTIONS

The IRS provides that a parent who has custody of a child for the greater part of the calendar year may claim the child as an income tax dependent exemption if he or she provides more than half the dependent's support. The exceptions to this rule arise when (a) parents sign a multiple support agreement, (b) custodial parent releases in writing the right to claim the exemption or (c) there is a contrary provision in a pre-1985 decree or separation agreement. The settlement should spell out any agreements. It is also possible for the parents to split the exemptions when there is more than one child. As a rule, you should consult someone well-briefed in the tax aspects, since taxes are a very important part of any divorce proceeding.

### INCOME TAX RETURNS

Marital status for filing income tax returns is determined on the last day of the fiscal year for each taxpayer. Anyone who files on a calendar year basis (January 1 - December 31) must file as a married person unless the divorce is final by the end of the year. Provision should be made in the decree for the division of any tax refunds.

### WILLS

It is advisable to review a will or write a new one during a divorce proceeding. If the spouse dies before the divorce is final, the property will be distributed as if the spouse were married, unless the will provides differently. Even if the will does not provide for a surviving spouse, if still married at the time of death a surviving spouse may elect against the will and receive a statutory share of the property or approximately one-third of the property.

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### OUR THANKS TO:

May 1978 - Patricia Kamath, Iowa City attorney  
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March 1986 (revised) - Claire Patin, Indianola attorney  
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Todd Jansen, Drake Law School student  
October 1988 (revised) - Janice Becker, Iowa City attorney  
Jill Pitsenbarger, U of I law student



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