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Divorce Law Practice (Part 3)

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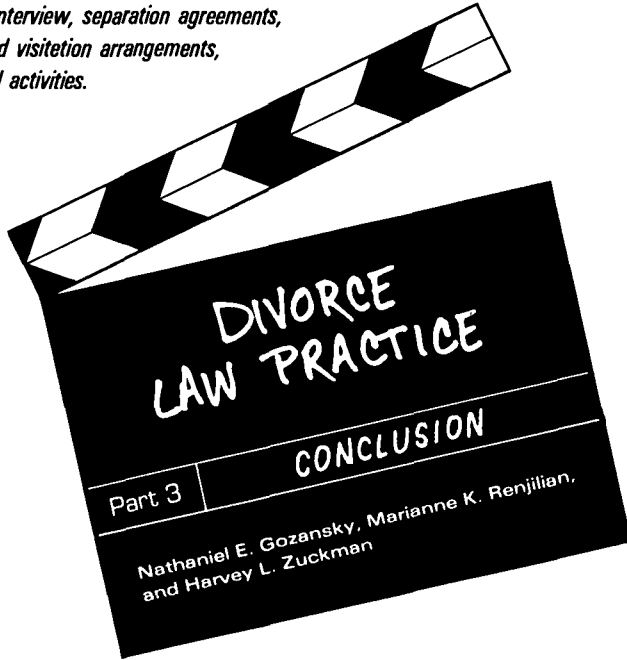
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Part 3 of an overview of divorce law practice deals with contested and uncontested divorce trials, postdivorce litigation, and multistate complications. Parts 1 and 2 discussed the initial interview, separation agreements, custody and visitation arrangements, and pretrial activities.



THE TRIAL

If the parties cannot agree on all the aspects of a case, the unresolved

issues will eventually proceed to trial. Even when full agreement is reached, a trial will be held before a decree of

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divorce is entered, though the uncontested trial is different in both procedure and substance from a contested one.

THE CONTESTED TRIAL • Whether custody is at issue or not will have a substantial impact upon the length and the tone of a contested trial. A conflict over custody will usually delay a final disposition, as the court may seek an investigative report and recommendation from a caseworker — who is often employed by the court or a county agency—and may wish to interview the children in chambers. In addition, during the trial, substantial time will be spent probing the basic, and comparative, competence of each parent to be primarily responsible for the children.

Important strategic decisions must be made in the context of a custody trial. Should counsel stipulate to the confidential use of an investigative report by the court, should he agree to a form of quasicontidentiality, or should he insist on the investigator being available as a witness? Should counsel call as witnesses the people who are interviewed by the investigator? With regard to the children, should they be called as witnesses or should counsel acquiesce to the judge's interview with the children in chambers, privately or in the presence of counsel? Some of these determinations will be influenced by the court's preferences and the de-

gree to which counsel is willing to alienate the court, given its extraordinary discretion in such matters.

Obviously, when custody is not an issue, the differences will be largely economic, and while this will not necessarily ensure a less vitriolic hearing, at least the children will not be involved directly and there will be no public questioning of each spouse's competence as a parent.

The Procedure

Local practice determines how a contested case is set for trial. In some jurisdictions, the case is calendared automatically by the court clerk; in others, a party must request the clerk or assignment office to set a trial date.

Trials of domestic relations cases are, in most respects, very similar to trials in any other civil case. Since historically they have been actions in equity, usually there is no jury. Practices vary from state to state, but the ordinary rules of evidence generally apply. Witnesses are called, sworn, examined, and cross-examined. The elements of the grounds for relief must be established in accordance with local statute and case law. The marriage of the parties and the grounds for divorce and the other relief sought must be proven, generally by a preponderance of the evidence.

Other witnesses may be needed to corroborate the testimony of a party, though the requirements for corroboration are often different in

domestic cases and vary from state to state. Witnesses other than the parties may include friends or relatives to testify to the marriage, the separation or other grounds for divorce, and the fitness of a party as a parent. Custodians of records may be called to verify employment or income records. Expert witnesses might include physicians, psychiatrists, economists, and home economists.

Documentary evidence may be introduced through identification and authentication by the parties or other witnesses, as necessary. Financial statements may be required in the same way as in *pendente lite* hearings. Even if not required, financial statements, charts, and other organized ways of presenting financial information may be very helpful, especially in relatively complex cases.

In deciding whether to use expert witnesses and which ones to call, a witness's vulnerability to cross-examination must be considered. The existence and waiver of a privilege with respect to communications with physicians, psychiatrists, social workers, or other professionals should also be weighed in deciding whether to call them to the stand. Of course, experts, including home economists, may prove useful even if they do not ultimately testify.

THE UNCONTESTED TRIAL •
When an action is uncontested, ordinarily both counsel must indicate in writing that it is

in fact uncontested as to all issues and request the court to set it for trial on the uncontested calendar, even when the pleadings are clear that there are no contested issues.

Uncontested cases are often heard by a master or commissioner, rather than a judge. In some jurisdictions, this is done automatically; in others, counsel must move the court for an order referring the case to a master or commissioner.

Hearings in uncontested cases in which a separation and property settlement agreement has been reached are very brief if plaintiff has been properly prepared, ranging from a few minutes to half an hour or so. In many states, the defendant need not personally appear; it is advisable, however, for his counsel to attend. Examination of witnesses may be conducted by the master or commissioner or by counsel, as local practice dictates.

In general, in most jurisdictions where the form, if not the content, of an adversary system applies, plaintiff's counsel must produce at the hearing:

- The plaintiff;
- A corroborating witness;
- A copy of the parties' marriage certificate;
- A copy of the separation and property settlement agreement; and
- Usually, a proposed judgment or decree.

The Hearing

Ordinarily, the plaintiff must testify to the fact, date, and place of the parties' marriage, identifying the marriage certificate; the birth dates, names, and ages of the children; the fact of the separation or the facts giving rise to other grounds for divorce; the existence of an agreement, identifying the copy introduced; and the like. An example will be found in the Appendix. The precise questions will depend on applicable law. Plaintiff's counsel should prepare his client for the questions, so that the hearing may proceed smoothly.

The corroborating witness will ordinarily be asked if he knows the plaintiff, for how long, and in what capacity; and whether he knows plaintiff to be married. If separation is the ground alleged, he will be asked whether he is aware that plaintiff is separated from his spouse, for how long, and the basis for his knowledge — *e.g.*, whether he has visited plaintiff at home and has not seen defendant. If there are children, he will be asked if he knows plaintiff's children, if the children appear to be doing well, and if the custodial parent is, in his opinion, a fit and proper person to have custody. Additional questions may be put if the facts warrant them.

Ordinarily, a marriage certificate must be produced and identified by the plaintiff. A properly prepared client will respond, "This is the

certificate of my marriage to defendant," not merely "This is my marriage certificate."

Plaintiff should identify the copy of the agreement, which should then be introduced into evidence. Testimony may also be given that the agreement disposes of all the rights and claims between the parties arising out of their marriage, including such matters as alimony, custody, support of the parties and their minor children, division of property, and the like.

The Judgment

In many jurisdictions, a proposed judgment or decree is prepared and signed as "seen and approved" by both counsel, offered to the master or commissioner for his approval of the findings of fact, and presented to the court by the master or commissioner for signature by the judge. Local rules and practice govern the form of the decree. It normally contains findings of fact, conclusions of law, the decree itself, and provisions for taking effect.

In many jurisdictions, the parties will have an opportunity before the decree is signed to request a rehearing. When a prompt final divorce is desired, the parties should waive in writing the right to a rehearing.

The Appeal

In some states, divorce decrees become final upon signature by the judge, subject to later appeal. In

other states, decrees are final only after the disposition of an appeal or the expiration of the time for taking one. If prompt finality is desired in the latter states, each party should file a notice of appeal and then dismiss it.

Appellate procedure and the standards for appellate review are generally the same for divorce cases as for any other civil case. An appeal is taken by filing a notice of appeal in the trial court within a specified period of time following entry of the decree. The time may be extended under the applicable rules by the filing of motions for a new trial or to vacate, alter, or amend the decree. After an appeal is taken, the record is transmitted to the appellate court and briefs are submitted. Like other stages of litigation, the appellate process may present opportunities and leverage for settlement purposes that should not be ignored.

POSTDIVORCE LITIGATION

Even after the divorce decree is in force, the client may still need representation. In a large percentage of divorce cases, one of the former spouses fails to meet the terms of the decree or desires modification of his obligation.

Trouble is most likely to arise when the parties were unable to agree and the court resolved their differences for them. The reasons are fairly obvious. First, the parties will feel bound if they agreed upon

the terms themselves, and, second, counsel can foresee future problems and plan for them. For instance, postdecree litigation may be discouraged by provisions in the separation agreement requiring the party who violates its terms to pay all the costs and expenses of any necessary enforcement litigation and the appointment by each party of someone to accept service of process on his or her behalf.

Almost any type of clause can be negotiated to reduce the likelihood of future litigation so long as it is not against public policy. Detailed support and visitation schedules, for instance, can prevent future misunderstandings between the parties leading to court proceedings. Any attempt to prevent the court from modifying the arrangements for child support, custody, and visitation are, however, against public policy and will be disregarded.

If counsel wants to avoid trouble later and fully protect his client's interests, he should insist on drafting the agreement himself, or, at the least, on joint drafting with opposing counsel. Also, since many judges, when asked to enforce a separation agreement or any support or custody order, will follow its terms literally, the language should be as unambiguous as possible.



ALIMONY AND SUPPORT •
Unfortunately, postdecree problems cannot always

be avoided even by the best drafting. Requests for changes in support payments, failure to make payments, and violations of custody and visitation arrangements are not uncommon. When support payments are provided by contract, alterations should be negotiated by the parties. If agreement cannot be reached, the party seeking modification will have to petition the court to order the change on a showing that the original provisions must be set aside. Support payments provided by court order can only be varied by petitioning a court with jurisdiction to modify the order because circumstances have changed.

If a party fails to make alimony or child support payments, the type of enforcement will depend on whether the obligation is contractually or judicially imposed. If an agreement for alimony or child support was merged into the divorce decree or the court itself ordered alimony or child support, enforcement will be through contempt proceedings initiated by a show cause order. These proceedings are well structured, generally require simple, preprinted court forms, are narrowly focused on the issue of obedience to the support order, and have priority on a court's calendar.

While the merger of a voluntary agreement into a judicial decree permits enforcement by contempt, it also allows the court, in its own discretion, to change the terms of the agreement, perhaps not to the liking

of either party. Moreover, the parties are no longer free to negotiate changes, since the agreement is legally extinguished; instead, they must petition the court to approve all modifications.

In some jurisdictions, however, the court may incorporate a voluntary support agreement in its decree without merger. There, the agreement can be enforced by contempt while the parties continue to control the terms of the contract. Either party could also sue in contract for damages, but a contract action normally does not have calendar priority, may not come to trial for years, and may prove to be an ineffective remedy. If the voluntary support agreement is neither merged nor incorporated in the judicial decree but simply approved by the judge or family division commissioner, a suit for damages in contract will be the only recourse.

Obviously, the merger or incorporation of a voluntary agreement into the judicial decree will affect postdecree litigation substantially. Because local jurisdictions are at variance as to the effect incorporation has, counsel must look carefully at local law and practice. In addition, since enforcement of voluntary separation agreements through contempt proceedings is only in the interest of the obligee, counsel must keep in mind whom he is representing in deciding whether to seek to incorporate the agreement in the decree.

In some jurisdictions, the court will mandate that the obligor make alimony and support payments through a special registry administered by the clerk of court or a special court trustee. If the obligor is late in making payment, the clerk or trustee mails a warning letter on the letterhead of the court. If the warning is ignored, the clerk or trustee sends the recalcitrant obligor a summons to appear at the courthouse with the money or to show cause why he should not be jailed. A small percentage of the money collected is deducted to cover administration costs.

One advantage of this method of collection is that counsel does not have to get involved and will not need to explain to the client the necessity for additional legal fees to collect what is already legally due.

CUSTODY AND VISITATION • Other postdecree litigation arises when the custodial parent infringes upon the non-custodial parent's visitation rights or the noncustodial parent attempts to exercise custody de facto. Since the welfare of the children is always of paramount importance to the court, any voluntary custody arrangement will almost certainly be merged or incorporated in the court's decree. Enforcement of the agreement will then be through contempt proceedings or an action for injunctive relief requiring the errant party to observe the arrangement.

Alterations in custody and visitation arrangements are handled by a petition to the court to review its earlier order and by establishing at the evidentiary hearing sufficiently substantial changes in circumstances to justify modification. The court will not alter its earlier order unless it is convinced that the best interests of the children require the change.

CHANGED CIRCUMSTANCES • Whether the subject is support payments or custody and visitation, the "changed circumstances" justifying judicial modification of a voluntary agreement or court order have not always been well articulated in the cases. Generally, those variations in the situation of the parties that have a strong impact and are not capable of anticipation or are beyond the individual's control, such as serious illness, a job transfer, or involuntary unemployment, may warrant modification. On the other hand, foreseeable or voluntary shifts, like increased expenses for teenage children, resigning from a job, or remarrying, may not constitute sufficient change. Related to the appraisal of changes in circumstances is the tendency of judges to modify judicial decrees more readily than voluntary agreements because of the difference in control the parties had over the original terms.

In sum, the judge exercises vast discretion in handling postdecree en-

forcement and modification proceedings. Counsel should try to know the predilections of the judge hearing the matter and fashion his tactics accordingly. Moreover, counsel should prepare the client in advance for the rigors of the particular courtroom. If the judge who will handle the hearing is impatient with long and rambling answers, the client should be concise in his responses.

MULTISTATE PROBLEMS • Some postdecree litigation may have multistate aspects. Therefore, counsel will have to be familiar with conflict of law concepts, and particularly the uniform laws that provide procedures for enforcing decrees in sister states.

A common problem is the unwillingness of an out-of-state obligor to make alimony or child support payments pursuant to a local decree. The matter can be referred to the local district or state's attorney for civil enforcement; these officials, however, give family matters very low priority, and the dependent spouse and children could become charity cases, with further family disintegration before any relief is obtained. Therefore, counsel should invoke the Uniform Reciprocal Enforcement of Support Act ("URES A") and the Reformed Act ("RURES A"), whichever is in force in the local jurisdiction, and assist the client in using it. These statutes provide a simplified

method of enforcing and registering the local decree in a sister state.

The URES A process is started by filling out a preprinted petition to the local court with jurisdiction over support and alimony awards, asking it to seek enforcement of its decree in another state where the obligor is located. After the local "initiating" court has satisfied itself of the validity of the support obligation and the likely presence of the obligor in the sister state, it will forward the petition and supporting papers to the "responding" court in the sister state for an evidentiary hearing and eventual enforcement. In this procedure, about all counsel need do is direct the client to the statute, help him to fill out the preprinted petition initiating the process, and see that the petition gets filed properly. Very rarely will private counsel be retained to defend an obligor in the evidentiary hearing. Normally, this hearing is limited to the narrow question of whether the support obligation does exist.

RURES A and some of the URES A statutes provide for an even more simplified process—registration of the local support order in the sister state, with the "registering" court then enforcing the order on its own. Private counsel's main responsibility is either to petition the local court to send the order to the sister state court or to assist the client in registering the order directly in the appropriate sister state court.

Custody and Visitation

Other areas of multistate post-decree litigation are custody and visitation. After divorce and the determination of custody and visitation rights, the custodial parent may decide to leave the decreeing jurisdiction, thus making the exercise of the other parent's visitation rights difficult or impossible, or the non-custodial parent, dissatisfied with the custody award, may snatch the child and flee to another state.

In the past, the decree violator could ask the courts of the new jurisdiction to ignore the decreeing jurisdiction's orders and to readjudicate custody and visitation, which the second jurisdiction would do, thereby encouraging continued lawlessness by parents.

Now, in most states, a parent can rely upon the Uniform Child Custody

and Jurisdiction Act ("UCCJA") to prevent the issuance of a conflicting order and to gain enforcement of the original custody and visitation decree. Where the UCCJA is in force, counsel will be required to petition the court to enforce the original decree, file a certified copy thereof in the office of the clerk of the court having jurisdiction of such matters, and represent the client in any discovery, deposition, or evidentiary proceeding that may be ordered.

CONCLUSION • The practice of family law calls for acumen, understanding, and perseverance. Proper representation of a client and reasonable agreements over financial matters and custody and visitation arrangements should be a source of professional fulfillment.

APPENDIX

Q. What is your name?

A. Joseph X.

Q. Are you the plaintiff in this lawsuit?

A. Yes, I am.

Q. What is your address?

A. 1234 Elm Street, Elmville.

Q. How long have you lived at that address?

A. Four years.

Q. Have you been a resident of this state and considered it your permanent home for a period in excess of

one year [statutory residency requirement]?

A. Yes, I have.

Q. Are you married, Mr. X?

A. Yes, I am.

Q. When and where were you married?

A. In Elmville, on July 3, 1976.

Q. To whom are you married?

A. The defendant, Mary X, formerly Mary Y.

Q. Can you identify this document [proffering marriage license]?

A. Yes, it is the certificate of my marriage to Mary Y.

Your Honor, we offer this marriage certificate into evidence as Plaintiff's Exhibit One.

Q. Mr. X, were any children born of your marriage to Mary?

A. Yes, we have two children.

Q. Would you state their names and birth dates?

A. John X, born January 4, 1978, and Jennifer X, born February 1, 1979.

Q. Did there come a time when you and Mrs. X separated and ceased living together as man and wife?

A. Yes.

Q. When was that?

A. March 9, 1979.

Q. Was that separation voluntary and agreeable to both you and your wife, and deliberate and final?

A. Yes, it was.

Q. Have you and your wife lived separate and apart continuously and without interruption since March 9, 1979?

A. Yes, we have.

Q. Have you had sexual relations with your wife since March 9, 1979?

A. No, I have not.

Q. Since March 9, 1979, have either you or your wife requested the other to return to the marital home or to resume or continue the marital relationship?

A. No.

Q. Is there any hope of a reconciliation between you and your wife?

A. No, there is not.

Q. With whom are your children now living?

A. With my wife.

Q. Is your wife, in your opinion, a fit and proper person to have custody of the children?

A. Yes, she is.

Q. Mr. X, I show you this document [proffering separation and property settlement agreement]—can you identify it?

A. Yes, this is the voluntary separation and property settlement agreement that my wife and I signed on December 31, 1980.

Q. Turning to the last page of that document, can you identify the signatures which appear on that page?

A. Yes, that is my signature and my wife's signature.

Your Honor, we offer this document into evidence as Plaintiff's Exhibit Two.

Q. Mr. X, does the voluntary separation and property settlement agreement that has been introduced as Plaintiff's Exhibit Two resolve and dispose of all matters arising out of your marriage to Mary X, including such matters as alimony, custody, visitation, maintenance and support of the spouses and their minor children, the division of real and personal property, and the rights of either spouse to take from the estate of the other, so that no matters remain to be adjudicated by the Court?

A. Yes.

Q. No further questions.