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Divorce Law Practice (Part 1)

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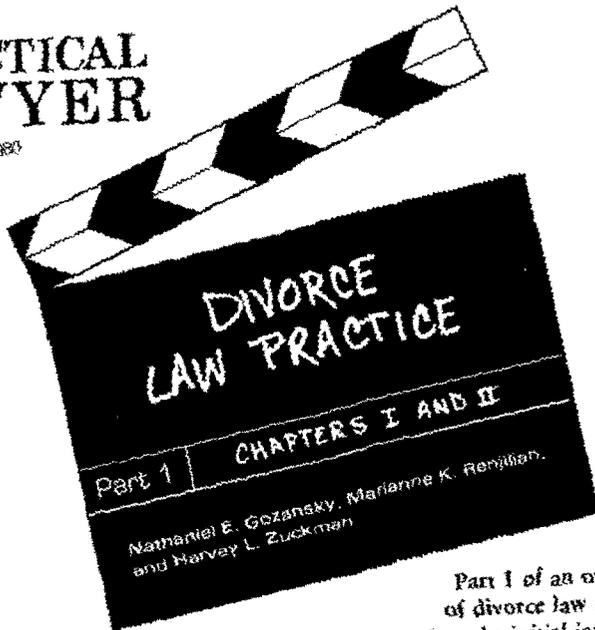
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THE PRACTICAL LAWYER

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Part I of an overview of divorce law practice explains how to conduct the initial interview, deal with emotional problems, guard against unprofessional conduct, discuss fees, and draw separation agreements.

This article is concerned with the handling of all aspects of a divorce case, from the original contact by a client, through the acquisition of a divorce decree, to the handling of postdivorce litigation.

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Currently, the divorce laws of the various jurisdictions in the United States vary significantly. Fifteen states attempt to eliminate the consideration of fault from all aspects of divorce — not only as grounds for divorce, but also with regard to the redistribution of assets and the allocation of responsibilities for dependent minors. An additional 22 jurisdictions provide the complainant with the choice of filing his petition for divorce — or “dissolution,” as divorce is referred to in some states — on grounds that either allow exploration of responsibility for the deterioration of the marital relationship or limit the consideration of fault. The remaining states generally continue the tradition of requiring the plaintiff to establish that the defendant is in fact responsible for the deterioration of the marital relationship, albeit in 15 of those jurisdictions, an extended separation is, in fact, a no-fault base for dissolving the marriage.

These differences in the legislative patterns would seem to suggest that a general article on the subject of divorce would be impossible. However, it has been estimated that as many as 90 to 95 per cent of all marital breakups end in negotiated settlements, only a few becoming the subject of actual litigation. Since so many of these conflicts are resolved extrajudicially and because most lawyers seek a fair resolution of the rights and liabilities of all parties, it

is not unreasonable to generalize. Of course, either as a result of undesirable lawyering techniques or inability to deal with an unreasonable client, opposing counsel may, at times, be combative, disruptive, and dilatory. This article offers no special guidance for that situation other than to urge lawyers to be firm and unaccepting of such conduct.

Divorce is not an area where traditional legal research is difficult. Virtually every state covers all of its law of divorce in a single section of its code. Resort to an annotated code quickly gives access to relevant case law. There is a brief list of additional readings at the conclusion of this article.

THE INITIAL STEPS

Divorce is a “no-win” situation. Rarely will either spouse emerge the victor. Cutting the client’s losses is the best a lawyer can hope to do. Even in this age of rising divorce statistics, the demise of a marriage continues to be a very emotional, traumatic event for those involved. It symbolizes a failure in mate selection and often raises deep unconscious doubts in the individual’s mind as to his sexuality. Most persons involved in a divorce are unprepared for the social and economic changes they will experience once their marital status is altered.

The exceptions tend to be marriages of short duration between parties of fairly equal socioeconomic

background where children and career interruption have not entered the picture. This article omits any discussion of this relatively problem-free category.

THE INITIAL CONTACT • Because of the emotional problems that are often a part of divorce proceedings, many lawyers refuse to represent a party in a marital breakup. Thus, divorce clients may be referred by other lawyers. Very often, they may have been clients of the lawyer or the firm for other matters, or they may come because the lawyer advertised the provision of divorce services or through the referral of other clients or friends of the lawyer.

No matter how the client reaches the office, there is a very real possibility that he has already discussed this matter with another lawyer and has either retained him or, at least, led that other lawyer to believe that he was retained. Divorce candidates all too often not only "shop," but switch, or attempt to switch, when the preliminary proceedings are not to their liking. Thus, it is important to establish early in the initial interview whether the client has seen other counsel.

It is equally important to determine whether the client has seen any nonlawyer professional. If the client has devoted substantial time and energy exploring marital and personal difficulties with a marriage counselor, minister, social worker,

psychologist, or psychiatrist, his desire to end the marriage likely is the result of thoughtful consideration.

If, however, the lawyer is the first professional contact, the statement "I want a divorce," may actually mean, "Help, my marriage is in trouble." The client may not have considered alternatives, or carefully weighed the implications of a divorce. Since lawyers are people who get divorces rather than salvage failing marriages, the client is not likely to couch his request in terms other than "I want a divorce."

Therefore, in the absence of therapeutic counseling, some effort to establish the client's true goal would seem to be both morally and professionally in order. Probably the ideal is for the client to be coping with the trauma of the marital breakup through a therapeutic relationship, saving the lawyer's time and energies for protecting legal rights and interests. When such a tripartite relationship is impossible because of the client's resistance to therapy, the lawyer must bear the additional burden of helping the client cope with his trauma.

The Listening Function

All this underscores the fact that often the client is emotionally upset when he first meets the lawyer and this behavioral dynamic must not be overlooked during the initial interview. The lawyer should allow the

client long periods of uninterrupted discourse, focusing on establishing a rapport between himself and the client, with less emphasis on gathering hard data. The development of a relationship of trust and confidence is critical. Of course, how much empathy is necessary will depend not only on the client's emotional state, but also on whether he has already been involved in productive therapeutic treatment.

When there has been prior representation, the lawyer might feel less pressure to give the client an opportunity for some catharsis. However, few situations require clients to speak of matters as intimate as those that will be explored during the divorce proceeding. Prior representation may make the arrangements less difficult to discuss, but it will have done little to reduce the anger that is most likely smoldering within a client.

FEES • Most clients are very much aware that fees are charged for legal services, and that lawyers, as professionals, are not inexpensive. The matter of fees is important and should be settled before the client finally determines to retain counsel.

Some lawyers advertise that the initial interview is without charge. Other lawyers, as a matter of ordinary office procedure, inform clients at the time an appointment is made that there is an initial fee for an

interview. A growing number of prospective clients will inquire as to fees and billing practices before scheduling an appointment.

Whether or not there is a charge for the initial interview, the interview should involve some discussion about the fee arrangements, not at the very beginning, but some time prior to the end. The lawyer should be the first to raise the subject, ideally at the time that the client was thinking of doing so. If that magic moment is caught, there will be a slight look of relief on the client's face. More and more today, if the lawyer does not speak of the matter, the client will do so.

The Billing Format

Generally, legal time is billed on an hourly rate, a flat fee, a flat fee with an hourly override, or a contingent fee arrangement. With the exception of Texas, no jurisdiction approves contingent fees for divorce matters. Thus, the choices are an hourly rate, a flat fee, or a combination.

For certain kinds of services, flat fees have the potential of being financially rewarding. For example, in an automated law office, forming a corporation for a flat fee can be highly profitable. A residential real estate closing can offer the lawyer a high return on his time investment. But these kinds of activities tend to be routine and the time spent on counseling the client is about the same for every case.

In divorce matters, it is considerably more difficult to predict the total hours involved. Because the situation is emotionally charged and often fueled by well-intentioned friends and relatives of the client, there may be an unanticipated demand for consultation. In addition, it is difficult to foresee how much time and energy will be devoted to negotiating a settlement. There should be serious reservations, therefore, about the use of the flat fee. However, community custom may dictate the method that a neophyte lawyer selects in computing or setting a fee.

Whatever the preferred billing format, the attorney should have determined it before meeting the client and should discuss it gingerly. If the charge is a fair reflection of the value of the services, given the time invested in training and the quality of service to be provided, there is no reason for any embarrassment. If the billing rate or method possibly may be unduly burdensome for a particular client, the lawyer should make sure that any agreement to reduce fees is supported in fact by the client's situation.

If the lawyer has volunteered to reduce the fee or has undertaken representation for a flat fee only to find that he has underestimated the time demands, he is nevertheless professionally bound to provide the full measure of zealous representation to the client.

A Written Contract

When the client chooses to retain the lawyer and the lawyer is willing to represent the client, the fee arrangements should be recorded in a written contract. A written statement will serve to set the tone of the representation, as well as insure that there will be no later misunderstanding. Furthermore, since parties to a divorce never really win, it is not unusual for clients to vent their anger and frustration by disputing the final bill for professional services, sometimes even filing grievances with the bar. Thus, there is an additional advantage to having a contract in writing.

The contract should carefully spell out the exact terms of compensation. The client should understand the financial arrangements, particularly what his obligations will be in the event that he terminates the employment as a result of a reconciliation, the matter is settled sooner than anticipated, or the matter is concluded only after unanticipated and extended litigation.

The act of paying some money to the lawyer on account — a “retainer”—is symbolically important in firming the lawyer-client relationship and underscoring the gravity of the situation. Thus, business necessity aside, some portion of the fee should be paid in advance.

Grievance committees maintain that the bulk of complaints filed against lawyers result from the

failure to communicate effectively and frequently with the client. Therefore, it is good office practice, regardless of the nature of representation, to send the client a monthly statement summarizing the activity to date, possibly in connection with a billing for the fee.

Whether the arrangement is for an hourly rate or a flat fee, time records are important. Not only will they facilitate the monthly or periodic written communication with the client, they will build a data base for future decisions as to fee arrangements. Be careful to note the time devoted to tax considerations. That portion of the final fee which can be allocated to tax matters is deductible from the client's income under the Internal Revenue Code.

Virtually every state allows the award of attorneys' fees to the dependent spouse in a divorce. In many instances, dependent spouses feel that they have no financial responsibility to their counsel. If the lawyer is willing to accept the representation for whatever fee the court awards, if any, and subject to whatever collection difficulties may be entailed, he is free to do so. Most lawyers, however, expect the client to be primarily responsible for the fee and to be relieved only to the extent that a court award is actually paid. If the dependent spouse is to have the primary obligation, that point should be clearly made in the contract. The contract should also

provide specifically for the possibility that the court will award a fee exceeding the amount originally agreed upon.

GATHERING DATA • After establishing the lawyer-client relationship, the next step is to gather a broad range of data enabling the lawyer to understand both economic and noneconomic aspects of the marriage. He must have insight into each of the family members in terms of their age, educational background, careers, religious preference, hobbies, and other interests. In addition, he must have access to various documents, such as antenuptial contracts, tax returns, insurance policies and the like. Also, it is helpful to get a comprehensive financial picture of the spouses and the children, as well as an idea of the normal family operating expenses.

The lawyer will also need a history of the marriage and the client's perception of the cause of the breakup, as well as the client's perceived goals for the divorce and thereafter. The client's goals may be a way of identifying his sense of reality. Unrealistic aims signal one of three things—the lack of information, the receipt of misinformation, or the inability to accept and understand realistic information. A client who is so emotionally distraught as to be unable to face facts or who is constantly being provided with misinformation by

nonlawyer contacts can be very difficult to handle.

Client Involvement

How to collect all of this information depends upon the situation and the lawyer's perception of the client's abilities. In the case of some clients, the information should be gathered in part during an interview, with specific requests made for various documents. If a client seems to be capable of individual effort, it might be desirable to give him a take-home assignment. A list of the kinds of documents needed and an explanation of the type of narrative desired may suffice, with an appointment scheduled for several days hence to allow him to gather and prepare the factual details and documentation. The client may even be asked to supply the material prior to the conference so that it may be reviewed beforehand.

Giving the client an assignment can help involve him in the case and get him to understand that the lawyer-client relationship is not an abdication of responsibility by the client and the exclusive burden of the lawyer. Furthermore, by gathering the data himself, the client will save the lawyer time and save himself legal fees.

Before sending the client home to collect the information, a structure or guideline should be provided. A standardized form should list the documents that are desired. Some

budget outlines will call for the fixed and discretionary expenses of the family. Finally, with regard to the history of the marriage, some questions should be raised to guide the client's discourse. For example, education successfully completed after marriage or education that was not completed due to the marriage can prove important in assessing the "value" of the marriage. The distribution of child-care responsibilities is another helpful area, both for counseling the client and for preparing for a possible contest for the award of custody. See *THE PRACTICAL LAWYER*, June 1977, p. 78.

O **THER AID** • While assembling this picture of the marriage, one of the spouses may already have secreted assets or may soon move to do so. If there is such a possibility, the lawyer should take immediate action to secure a preliminary court order restraining the other spouse from such activity. Every jurisdiction has some kind of protective procedure available.

The first test of a lawyer's ethical mettle may come at this point in the representation. The client might either seek guidance on how to hide assets effectively or he may disclose that this is being done. The marriage is a fiduciary relationship, and fraudulent representations could invalidate a negotiated settlement. The client must understand this fact. The client's cooperation in this area may affect

the lawyer's decision on whether to continue the representation.

Virtually any client who is altering his marital status needs to revise his estate plan, or if he has yet to prepare one, he should consider a plan at the conclusion of the divorce proceedings. Counsel should point out this need, as well as offer legal services in this area at an appropriate time. The change from divorce lawyer to estate planner can help establish a lasting lawyer-client relationship, leading to the rendering of comprehensive professional services while building future business.

THERAPY • At this stage of the representation, the lawyer should seriously explore the possibility that the client either begin, return to, or continue with therapeutic counseling. If no counseling has occurred as yet, it may be appropriate to refer the client, and possibly the other spouse, to a therapist who can help validate the decision to dissolve the marriage.

Even if the decision to divorce is irreversible, there are still good reasons for the client to undertake therapy. He can be assisted in coping with the trauma of the legal activities in progress, in resolving goals, particularly when child custody may be at issue, and in dealing with the transition from married to single adult. In addition, ongoing therapy will greatly reduce the client's dependence on the lawyer for emotional support.

Since lawyering is often the more expensive professional service, particularly when the therapist is connected with the ministry or an agency, the overall costs to the client will also be reduced.

Lawyers practicing in the family law area should be familiar with as many professional therapists as possible, be they Ph.D.'s, M.D.'s, ministers, or social workers. Knowing a variety of professionals and their training, personalities, and biases will facilitate matching the client's needs with the appropriate kind of therapist. In addition, to the extent that cost is a factor, it will facilitate selection of an affordable therapist. Furthermore, not only are these people potentially very helpful witnesses, particularly in custody disputes, but because more and more clients seek some form of marital counseling before approaching a lawyer, they can prove to be potentially significant sources of case referrals.

The suggestion of a psychiatrist, psychologist, or marriage counselor may not appeal to some clients who are uncomfortable with the idea of treatment by mental health professionals. The client, however, may be an active church-goer, and trained family counselors in the ministry may be able to give the needed assistance without the discomfort that may go with seeing a secular advisor. If the client is already in therapy or has concluded it, the

lawyer should get permission from the client to discuss the case with the therapist.

USE OF STAFF • Many lawyers believe that interviewing for the purpose of gathering data, so called "investigative interviewing," can be done by trained nonlawyers, who meet with the client to gather data, assist in the preparation of budgets, and organize financial records.

The client's first contact of any substantial nature should be with the lawyer. Once a lawyer-client relationship is established and a good rapport achieved, then, and only then, is it appropriate to introduce the client to a member of the lawyer's staff for data collection. These nonlawyers must understand the attorney-client privilege and the obligation to maintain the confidences of the client. The staff members must also be aware of the difference between collecting data and giving counsel. Clients will often ask questions that really call for legal advice, and over-zealous paralegals, legal secretaries, or law clerks must refrain from answering those kinds of questions, which risk creating problems of misperception on the part of the client.

The person who is to aid in the representation of divorce clients should have some familiarity with basic accounting and the fiscal management of a household. Then

he can prove most helpful, not only in assisting a client to present data to the lawyer and later, if necessary, to a court, but also in giving the client a better understanding of the economic realities involved in a change in life-style.

MULTIPLE CLIENTS • The American Bar Association Code of Professional Responsibility generally counsels against multiple representations, because of the need to maintain independent professional judgment on behalf of the client, be a zealous advocate for the client's cause, and protect the confidentiality of the attorney-client relationship. However, DR 5-105(C) provides that "a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

Except in limited circumstances, it is doubtful that the representation of both spouses in a divorce case will come within either the letter or the spirit of this disciplinary rule. In cases involving marriages of relatively short duration between persons without dependent children who have continued to work after the marriage and who have completed their education, or in the even rarer situation of spouses who have been

married for some time and throughout pursued relatively equal, financially rewarding careers, multiple representation might be appropriate.

As a practical matter, many lawyers have found that, in most instances, no matter how much the parties think they are in full accord as to the dissolution of the marriage and the distribution of their assets, once the process of articulating those understandings begins, the consensus either breaks down or is very difficult to maintain. The lawyer thus becomes a mediator and represents no one. It is probably true that the longer the duration of the marriage, the more likely are the parties to discover they do not agree on how to dissolve it.

Meeting the Other Spouse

A problem closely related to multiple representation is the propriety of the lawyer retained by one spouse interviewing the other spouse who has as yet failed to retain counsel. The Code of Professional Responsibility would require that no such interview take place unless the unrepresented spouse has decided to proceed *pro se*. Many lawyers would argue that they cannot achieve the goal of providing a more therapeutic than adversarial form of representation if they adhere to this Code provision. Since, apparently, there is no reported case of discipline for this particular activity, it is arguable that the choice is the lawyer's.

Whether lawyers should view themselves in a therapeutic, rather than adversarial, role is questionable. Most lawyers have not been trained in therapeutic counseling. Furthermore, the nature of the practice is to maintain an adversarial environment. Neither by training nor experience is the individual lawyer well-equipped to function as the therapeutic counselor for a couple going through divorce.

It seems more realistic to hope that, in representing clients, lawyers will apply humanistic methods and will recognize in dealing with opposing counsel the unique fiduciary relationship of the parties. If both lawyers pursue their representation with this in mind, they will collectively add a therapeutic tone to the process. That, of course, augurs against either multiple representation or meeting with the unrepresented spouse, at least until it is clear that the spouse intends to remain unrepresented.

If counsel does meet with the spouses jointly—they may come to the office together and the joint meeting may be unavoidable—the better course of action would seem to be not to accept the representation of either, but to provide some legal counseling services and refer them to individual counsel—unless this is the rare case when multiple representation seems justified. Perhaps the lawyer could help the clients structure a trial separation to facilitate the

beginning of their new life-style and then refer both spouses to new and separate counsel.

SEPARATION AGREEMENTS

The term "separation agreement" may be applied to three different kinds of instruments. The first is an agreement between spouses that provides for their living separate and apart on a "permanent" basis, a guide for those who do not presently or prospectively plan to dissolve their marriage legally but who do intend to cease sharing a household. The second form covers a "trial" separation. While not used frequently, this experiment is often suggested by therapists and might be appropriate when a lawyer is counseling persons who are ambivalent about their future as a married couple. The third type of agreement is prepared for the purpose of finally dissolving the marriage. At that point, the agreement is important not as an instrument governing the period of separation, but as an alternative to a judicial decision relating to the distribution of marital assets, custody, and other rights and duties. It is often called a "property settlement."

C LARITY • Regardless of the purpose of the separation agreement, certain principles are always applicable. First and foremost, the author of the document should strive for clarity of

expression. When archaic and legalistic "boiler plate" of one kind or another is incorporated, these documents become difficult to understand, and may even be found, in part or in whole, void as against public policy. There is a distinction between flowery phrases that add words with no meaning and paragraphs that effectively resolve legal issues. When necessary, an additional sentence or two to ensure lay understanding may be advisable.

Good standard language is available in each jurisdiction, based on the statutory and case law there. A new practitioner can use as a guide sample agreements obtained from experienced lawyers or court files.

C OVERAGE • Every topic lends itself to some form of standard language, but modifications are invariably required to suit the particular settlement. Consideration should be given to developing standard paragraphs for the following topics:

- Recitals and explanatory statement.
- Grounds.
- Terms of separation.
- Support and maintenance of spouse.
- Support and maintenance of children.
- Custody and visitation.

- Real property and occupancy of home.
- Personal property.
- Life insurance.
- Settlement of debts and pledges of credit.
- Testamentary disposition.
- Discontinuance of suit, if pending.
- No molestation.
- Counsel fees.
- Default.
- Tax consequences.
- Mutual releases.
- Further assurances.
- Incorporation in decree.
- Integration clause.
- Independence of counsel.
- Parties fully informed.
- Fairness of terms.
- Nonmodifiability
- Controlling law.
- Conclusion, signatures, and affidavits.

Because of the confidential or fiduciary relationship existing between husband and wife, any agreement should be premised on full disclosure and ought to make adequate provision for the dependent

family members affected by the agreement. Failure to make full disclosure or adequate provision may result in the agreement being ruled unenforceable by a court of equity.

Most courts will not enforce these agreements if they are found to induce dissolution or separation. Wording, perhaps more than anything else, creates this aura of inducement. Thus, the preamble should indicate that the decision to separate or to dissolve the marriage has been made by the parties, that they are in fact living separate and apart, and that the document seeks to resolve the differences between them. Such a statement lays an evidentiary base for the validity of the document.

EFFECT • Since a separation agreement reflects a mutual accord to live separate and apart, it usually precludes subsequent allegations of desertion or abandonment in a divorce action. A few cases suggest that a spouse who was coerced into accepting the agreement does not lose the right to assert subsequently desertion or abandonment as a ground for divorce. Obviously, difficult evidentiary problems arise once there has been an acceptance of an agreement reflecting both disclosure and adequate provision.

A separation agreement is only effective if the parties are living sepa-

rate and apart. The document cannot have prospective significance. The parties cannot enter into the agreement in order that, should they decide at some future time to separate, the terms will already have been arranged. A separation agreement not intended to take effect immediately is viewed as designed to induce separation and therefore is void as against public policy. The analogy is to antenuptial agreements that provide for the distribution of rights and liabilities upon divorce, though now a few jurisdictions uphold such antenuptial agreements when they are fair and adequate.

On similar reasoning, courts generally hold that the reconciliation of the parties terminates the efficacy of a separation agreement. Consequently, if the reconciliation proves ineffective, the parties must enter into a wholly new agreement. What amounts to a reconciliation is a question of fact. The old rule seemed to be that any kind of cohabitation effectuated a reconciliation for legal purposes. The better rule, and the modern view, focuses on the intentions of the parties and whether they have actually resumed a marital lifestyle. Thus, the parties have some latitude with regard to their interaction and the possibilities of a real reconciliation.

If, as a result of the separation agreement, title to property has been transferred, in most jurisdictions, a subsequent reconciliation will not result in redistribution of the proper-

ty. Particularly in non-community property states, the nonredistribution of property may be a matter of some significance. An obvious solution is to make provisions for retransfer of property in the event of reconciliation. However, because of the tax consequences involved in the transfer of property, redistributions can result in financial hardship and unnecessary losses.

PERMANENT SEPARATION AGREEMENTS • When the parties intend a permanent separation, the agreement is similar to the document prepared for submission to the court as part of the final disposition of the divorce action. The separation agreement will then require as much effort and skill as would go into the planning of a document in contemplation of divorce. It will involve transfers of property, support and custody arrangements, and, usually, provisions with regard to rights of inheritance, including voluntary waiver of the spousal rights provided in the state's inheritance law.

From the vantage point of the Internal Revenue Service, once effectuated, such a separation allows the parties to treat themselves for tax purposes as though they were unmarried taxpayers—regardless of whether or not there is a court decree for separate maintenance that incorporates the agreement.

Oftentimes, the agreement will be

submitted to the court in an action for separate maintenance. Incorporation of the agreement into a court decree will allow the use of the contempt power, if and when necessary, to enforce the spousal and child support provisions.

Because of the substantial alteration of the relationship of the spouses as the result of a permanent separation and since these changes are intended to be of a long-lasting nature, representation of both spouses would appear to be ill-advised. This kind of separation is so similar to a divorce that the factors determining whether to represent both of the spouses in a divorce proceeding would equally obtain here.

TRIAL SEPARATION AGREEMENTS • An agreement for a trial separation has a limited purpose—to provide the couple with a contractual structure for separate living while they evaluate their options and long-term goals. It is not frequently utilized nor is it a source of litigation; arguably, it may not even be legally enforceable. Courts generally hesitate to enter into intrafamily disputes in the absence of a suit for separate maintenance or divorce. However, the utility of a separation agreement ought not to be overlooked, regardless of the technicalities of enforceability.

Because of its limited purpose, such an agreement should be of limited duration and should not

transfer title to property or in any other way create permanent changes. Since the goal is not to guide indefinitely the couple's relationship but rather to pave the way toward a relatively lasting decision, some time frame in which ultimate decisions must be made is consistent with the couple's interests.

Because of the nature of a trial agreement, one lawyer ought to be able to represent both spouses temporarily. However, should there be a subsequent decision to proceed with a divorce or permanent separation, he could not properly represent either spouse. The attorney-client privilege would mandate that the clients find separate and independent counsel to implement their decision to end the marriage.

A trial agreement will usually provide for the use of the marital household, furnishings, and automobile, custody of the children, visitation rights, and spousal and child support payments. In addition, it should state that it is not to have any legal effect in a subsequent proceeding to dissolve the marriage. Usually, it will contain some form of nonmolestation clause, attempting to ensure each party with noninterference with its privacy and freedom. Finally, a paragraph should deal with the effect of a reconciliation.

There should be a provision that an attempted reconciliation which is not successful does not terminate the

agreement. However, if the agreement is enforceable at all, that provision probably would not be binding.

The formulation of the custodial, visitation, and financial rights and liabilities should put the parties in a position that is as nearly alike as possible to the situation which might be anticipated should there be a divorce. That way, the "trial" will truly help the parties to appreciate better the full implications of permanently altering their marital status.

PROPERTY SETTLEMENTS • The purpose of an agreement in contemplation of a divorce is to resolve most, if not all, of the issues regarding the rights and duties of the parties after a divorce. The parties cannot determine by themselves that a divorce should be granted. However, they can agree on all the incidents of a marital dissolution and present them to the court that will rule on the petition for divorce. The court will usually incorporate this agreement into the final decree.

It is important that these agreements avoid the appearance of contributing to a collusive divorce. They cannot be premised on a commitment to rely on fabricated grounds for the divorce itself, albeit in most jurisdictions they can include a stipulation by one party not to challenge the divorce petition.

Courts are not required to incorporate the entire contract into a

decree. A court has a right to make its own independent determination as to whether the support and child care provisions are fair and protect the interests of minor children. As a practical matter, however, unless the terms are clearly unreasonable, the courts will accept them.

The effect of incorporating the agreement into the decree is to allow enforcement by contempt, as well as in an action at law, of those provisions that would have been subject to enforcement by contempt had they been ordered by the court on its own initiative. Once incorporated, future voluntary modifications should have court approval. On the other hand, court-ordered modifications with which the parties do not voluntarily agree will modify the decree but not the original contract.

While these contracts can affect the right of an alimony recipient to seek modification of the alimony terms, they cannot limit the right to seek changes in the child support, custody, and visitation arrangements.

The Advantages

There are a number of advantages to entering into a comprehensive agreement when the parties are firmly committed to dissolving their marriage:

- Predictability;
- The allocation of economic interests in the most efficient manner

under the tax laws and to meet the unique psychological needs of the parties;

- The development of a spirit of compromise;
- The elimination of the possibility of a “win-loss” result; and
- If reached in a reasonably short period of time, a reduction in the size of the lawyers’ fees.

To many, the advantage is the potential to set terms that the court cannot impose. While the children cannot be shortchanged, a property distribution or a spousal support agreement can be clearly different from what might have been determined by the court. For example, while alimony is usually modifiable, it can by agreement become non-modifiable.

The parties may also provide for:

- Automatic adjustments in the support payments based upon changes in the cost of living or earning power;
- Child support obligations beyond the age of majority, whether that be 18 as in most states, or 21;
- The responsibility to support the postsecondary education of the children, a matter subject to the court’s jurisdiction only during the child’s minority;
- Binding the estate of the obligor to continue support payments, be they spousal or child;

- A lump-sum alimony payment to the dependent spouse;
- The maintenance of life insurance; or
- The continuation of the former spouse’s interest in the estate of the other.

This flexibility can play a significant role in achieving a fair outcome, as well as in removing some of the substantial anxiety of the dependent spouse, particularly if he will be the custodian of the children—anxiety that may lead him to resist the divorce, not because he sees the marriage as beneficial in the emotional sense, but only because of the economic uncertainties.

When the parties are domiciled in different states or a “migratory divorce” is planned, these agreements often include provisions for waiver of service and for the entrance of a personal appearance by the defendant in the out-of-state court, thus assuring that neither party will be able to contest the jurisdiction of the court granting the divorce at some future date.

Coverage

Specifically, the items covered usually include the following:

- A division of the property, including provisions for the maintenance of life insurance policies;
- Spousal support;

- Custody and visitation terms;
- Child support, with specific provisions for medical and dental care; and
- Obligations for the college education of the children.

It is not unusual for parties to be unable to agree on some of these items. When that occurs, if the parties will put into writing the matters on which they are in accord, they will reduce the number of issues to be tried before the court.

Division of Property

Proper property division calls for careful classification of the property involved. At a minimum, the assets brought by each party to the marriage and those acquired during the marriage must be identified and the source of the latter assets determined. In many jurisdictions, property that was separately owned prior to the marriage continues to be separate property after the marriage, and property acquired by inheritance or family gifts during marriage is also separate property. These rules are simple to state, but sometimes they are difficult to apply.

In a state that treats the wife's property and earnings during the marriage as separate, counsel for the husband should either obtain a concession by the wife not to rely on the state law or consider an action to declare the state law unconstitutional

because it violates the equal protection clause of the federal constitution. While such an action would probably be successful, whether to pursue it depends on the amount of property involved.

The tax laws in this area are many and too often insufficiently considered by counsel. See L. Thomas, *Tax Consequences of Marriage, Separation, and Divorce* (ALI-ABA, Philadelphia, 2d ed. 1976). In brief, any transfers of property pursuant to a property settlement will be treated as a taxable sale by the transferor. The transferee will take the property at its current fair market value.

Obviously, the tax burden can affect the timing, the number of transfers, and the kind of property transferred. The transferor is likely to transfer recently-acquired, nonappreciating or nondepreciating property in order to minimize or eliminate the tax consequences.

Obligatory, regular, periodic cash payments for a period in excess of ten years that are required by a settlement are treated as alimony for tax purposes and are taxable to the recipient as ordinary income. Because they are excluded from the gross income of the obligor, they can provide a particularly attractive tax incentive to an obligor with a high annual income. Of course, the arrangement will be acceptable only to an obligee who is not in a high tax bracket.

Recently, vested pension benefits have come to be recognized as property. These rights can be very valuable, yet, because they often lack current liquidity, they also may look good on the accountant's balance sheet but raise serious questions of fairness otherwise. Life insurance may offer a way to the dependent spouse to relinquish any claims to pension benefits. Since the ownership of the life insurance policies will affect the tax liabilities when the proceeds are paid, the dependent spouse should own the policies and thus be spared the payment of taxes on the proceeds.

Finally, Social Security benefits vest in a wife after ten years of marriage, so that she is protected after the divorce as though she remained married to the husband. This rule may affect the timing of the divorce and minimize the wife's claims to the retirement benefits of the husband.

Life Insurance

Since a child has a legal right to support from his parents only so long as he is a minor and the parents are alive, the death of a parent before the child reaches majority ends the claim for child support. Life insurance can also be used to guarantee that the children will be adequately provided for until they can be expected to be self-supporting.

In addition, when the children are the beneficiaries of life insurance, the fears of the custodial parent that

the noncustodial parent will fail to provide for them in his will may be alleviated, particularly if a subsequent marriage is anticipated. Because a parent is not legally obligated to remember his children in his will, in most jurisdictions, a court cannot order that life insurance policies be maintained for the benefit of the children.

When the noncustodial parent is the father and the higher wage earner—the usual situation—he will, as a rule, accept responsibility for the children's medical needs, at least for the extraordinary medical needs, in addition to a fixed support obligation. Usually, he will undertake to continue the same medical insurance for the benefit of the children that he possessed during marriage. Since a divorce does not change the parent-child relation for insurance purposes, there is no serious burden in carrying the coverage already in force. However, once there is a divorce, the wife is no longer covered by family insurance.

Spousal Support

Currently, there are three general forms of spousal support:

- Permanent;
- Rehabilitative; and
- Lump-sum.

Permanent alimony usually means regular payments until the death or remarriage of the obligee. The obli-

gation terminates on the death of the obligor, unless there is an agreement to bind the obligor's estate. Rehabilitative alimony is utilized when the divorce is between parties of relatively young age who were married for a short period. The payments are expected to facilitate the dependent spouse's reeducation and financial independence. By its nature, it ends after the passage of a stated period of time, upon the remarriage of the obligee, or, unless otherwise provided, upon the death of the obligor. Lump-sum alimony is a single payment of a sufficiently substantial sum that, properly invested and managed, will give the dependent spouse financial security.

While permanent or rehabilitative alimony usually is taxable as ordinary income to the obligee and deductible from the adjusted gross income of the obligor, the lump-sum alimony payment is treated as a simple transfer of funds with no deduction to the obligor and no taxable consequence to the obligee. Obviously, lump-sum payments are rare, usually utilized by people of substantial wealth who are willing to forego tax benefits in order to speed the termination of their relationship and future contact.

Generally, permanent alimony is subject to modification for changed circumstances, unless the parties agree otherwise. Rehabilitative alimony cannot be altered. However, the mercurial behavior of the econ-

omy and its effect on the job market may cause courts to reconsider this nonmodifiability approach. Finally, the lump-sum alimony award obviously is not subject to change.

Custody and Visitation

Vague arrangements that allow visitation by the noncustodial parent according to an *ad hoc* agreement with the custodial parent are unacceptable. Both parents and children have a right to plan their schedules on the basis of foreseeable expectations as to the demands and needs of others. A fixed program of reasonably frequent access by the noncustodial parent that can be varied by mutual agreement is the best approach.

The schedule should not call for unrealistically excessive contact between the noncustodial parent and the children. Except in the most unusual circumstances, equally divided custody is unrealistic. Children need to have a stable environment, and they must be able to define easily where their home is and which parent has the primary responsibility for their development and discipline.

Child Support

Both parents are responsible for the support of their minor children, with each one being expected to contribute in light of his or her current and prospective earning power.

Regardless of the agreement of the

parties, this support obligation is always subject to modification because of changed circumstances during the children's minority. Unlike alimony, child support is not deductible by the obligor nor includable as ordinary income by the obligee.

The dependency deduction goes to the parent who provides more than one-half of the support of the child. The Internal Revenue Service assumes that payments in excess of \$100 a month or \$1,200 a year overcome the presumption that the custodial parent has a right to the dependent deduction. However, the assumption is rebuttable. For purposes of computing the contribution made by the noncustodial parent to the support of a child, the sums spent over and above the amounts specifically agreed to, or ordered by the court, are not taken into account. The noncustodial parent does not get any credit for acts of generosity.

The parties can, by agreement, designate who shall have the benefit of the dependent deduction. The courts do not have this power, and the ability to designate sometimes facilitates negotiations to settle the matter of child support.

The parties are also allowed to allocate periodic payments to alimony instead of child support and then, upon the remarriage of the custodial parent and the automatic termination of alimony, have the periodic obligation labeled as child support.

Thus, the parties do have a significant amount of flexibility with regard to the tax law in this area.

College Education

With most jurisdictions now treating minority as ending at age 18, a legally binding commitment to provide for the college education of children can only be achieved by agreement. All too often the parties accept some vague clause like "the father shall be responsible for the reasonable costs of a college education for the children." Such a provision sets the stage for substantial friction as the end of a child's high school education approaches. What happens if the child seeks to enter a technical school rather than a college? Suppose the child wishes to attend a very expensive private school? Suppose that after commencing college, the child leaves for a term or two and then seeks to reenroll? The list of questions can go on, without even touching on the possibility of substantial dispute over what are "reasonable costs."

Obviously, the parties must provide sufficient detail to make later disagreement unlikely. For example, the father should be obligated for some minimum amount, with the state university's estimate for tuition, room, board, books, and the like perhaps serving as the base figure. In addition, it ought to be clear for how much education a parent is contractually responsible.

A bachelor's degree? A graduate degree? The agreement should also state the total amount of time for which the obligation is being assumed and who is ultimately to determine the school.

Of course, the parties are free to be more generous if they wish.

Conflict of Laws

As a general rule, the place where

the contract is made controls its interpretation. Once the agreement is incorporated into a court decree, however, any suit on the decree will be controlled by the law of the jurisdiction where the decree was entered. If, for some reason, the suit is on the contract rather than pursuant to the decree, then the law of the place where the contract was completed would apply.

[To be continued]

Additional Readings

The Law of Domestic Relations in the United States, by Homer H. Clark, Jr. (West Publishing, St. Paul, 1968).

Family Law in a Nutshell, by Harry D. Krause (West Publishing, St. Paul, 1977).

Divorce in America, Marriage in an Age of Possibility, by Joseph Epstein (E.P. Dutton, New York City, 1974).

Tax Consequences of Marriage, Separation, and Divorce, by Lowell S. Thomas, Jr. (ALI-ABA, Philadelphia, 2d ed. 1976, with supplement).

During the interview, take few notes, jotting down key areas only. You will want to observe the prospective new client closely in order to judge the possible difficulties in the case; the demeanor of the individual, any possible personality problems, any irritable traits which may grate on you, the integrity and sincerity of the person, the degree of vengeance and hostility seething within—in short, the entire menu of potential problems with the prospect and with the case itself.

N. HUROWITZ, **PENNSYLVANIA SUPPORT PRACTICE 4**
(George T. Bisel, Philadelphia, 1980).

For Further Study

Articles in *The Practical Lawyer*

How to Settle a Support Case, by Neil Hurowitz, *THE PRACTICAL LAWYER*, July 1980, p. 27.

Interstate Aspects of Divorce Law, by Richard E. Crouch, *THE PRACTICAL LAWYER*, September 1978, p. 27.

Economic Guidelines for Child Support, by Philip Eden, *THE PRACTICAL LAWYER*, January 1978, p. 25.

The Initial Interview with a Divorce Client, by Leo J. Barrett, *THE PRACTICAL LAWYER*, June 1977, p. 75.

Some Basic Techniques for the Support Case, by Neil Hurowitz, *THE PRACTICAL LAWYER*, July 1976, p. 13.

The Initial Interview in a Domestic Relations Case, by Milton O. Moss, *THE PRACTICAL LAWYER*, January 1976, p. 59.

Representing the Husband in a Divorce, by Kenneth P. Griswold, *THE PRACTICAL LAWYER*, November 1969, p. 39.

Discovery Techniques in Divorce Cases, by Robert Bugdanowitz, *THE PRACTICAL LAWYER*, October 1968, p. 35.

Depositions and Divorce Actions, by Herbert A. Glieberman, *THE PRACTICAL LAWYER*, October 1966, p. 53.

Toward Better Separation Agreements, by Mitchell Salem Fisher, *THE PRACTICAL LAWYER*, January 1965, p. 65.

The Lawyer's Role in Divorce Reconciliation, by Marie W. Kargan, *THE PRACTICAL LAWYER*, March 1960, p. 21.

An ALI-ABA Cassette

Separation and Divorce, an audiocassette recorded at a 1975 ALI-ABA Course of Study, with study outline.