

**RHOADES, McKEE, P.C.**

***A Full Service Law Firm***

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**THE DIVORCE PROCEEDING**

***A Step By Step Guide***

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## **I. INTRODUCTION**

Divorce cases involve people of widely differing backgrounds, economic situations and family relationships. Therefore, when a married couple decide to dissolve their marriage, each case is unique. Nonetheless, it is our hope that this article will provide sufficient information about common divorce-related issues to provide you with a better understanding of how a divorce case is handled in the State of Michigan.



## **II. NO-FAULT DIVORCE AND RELATED PROCEEDINGS**

Generally, there are three distinct ways of legally ending a marriage relationship in Michigan. In addition to an action for Divorce, there are also the alternatives of Separate Maintenance and Annulment. In a Separate Maintenance action, the party filing this proceeding (the "Plaintiff") is asking the Court's help in providing for the division of marital property and, if there are children, for the custody and support of the children. A party may also request spousal support, commonly known as alimony. However, in an action for Separate Maintenance, the Plaintiff does not seek to have the marriage dissolved. Since a Separate Maintenance action does not dissolve the marriage, there are very few actions for Separate Maintenance. In Michigan, if the other party (the "Defendant") requests a divorce, instead of Separate Maintenance, the Court is required to grant this request for a divorce. In an Annulment proceeding, the Plaintiff asks the Court to declare that the marriage never existed and is void. The "grounds" for Annulment include bigamy, fraud, insanity or the attempted marriage of a minor. Obviously, Annulment is a rarely used remedy for most persons, especially if children have been born of the relationship.

The most common way to end the marriage is through the process of Divorce. Since 1972, the Michigan No-Fault Divorce Act has allowed the Court to grant a "Judgment of Divorce" to a person who files a "Complaint" alleging that "there has been a breakdown of the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved." In the early days of "No-Fault," some judges in Michigan would occasionally require very strong evidence that there was no hope of reconciliation. However, today, the simple testimony by one of the parties that they do not wish to continue the marriage is usually sufficient.

There have been bills pending from time to time before the Michigan Legislature which would seek to repeal Michigan's No-Fault Divorce Act and require a person seeking a divorce to prove that there are "grounds" for the divorce such as physical or mental cruelty. There is substantial support for such legislation and it is possible that Michigan will once again have "fault-based" divorce in the future.

In addition to alleging that there has been a breakdown in the marriage relationship, the Plaintiff in a Divorce action must also show that he or she has been a resident of the State of Michigan for 180 days, and of the County where the divorce action is filed for 10 days, immediately prior to the filing of the Complaint. In Michigan, a Divorce action is filed in the *Family Division* of the Circuit Court which is a court of general jurisdiction located in each county of the state. This court is commonly called the *Family Court*.



### **III. STEP BY STEP THROUGH THE DIVORCE**

#### ***STEP ONE - FILING THE COMPLAINT***

The Divorce action is started by the filing of a Divorce Complaint with the local Circuit Court. The person filing the Complaint is called the Plaintiff and the person responding to the Complaint is called the Defendant. Under Michigan law, the Complaint must include the following: (1) the complete names of the parties, and their names prior to the marriage; (2) the complete names and birth dates of any minor children of the parties; (3) whether the wife is pregnant; (4) an allegation that there has been a breakdown of the marriage relationship; (5) that the Plaintiff has met the residency requirement; and (6) that there is property to be divided between the Plaintiff and the Defendant. The Complaint must be signed by the Plaintiff and the Plaintiff must swear in the Complaint that the facts stated in the Complaint are true. Typically, at the end of the Complaint, the Plaintiff requests that the Court dissolve the marriage, divide the marital property and determine any issues of spousal support (alimony). If there are minor children, issues of custody, support and visitation must be decided.

The Complaint is filed with the Family Court which issues an order called a Summons. The Summons requires the Defendant to answer (respond in writing) the Complaint within 21 days. Often, a copy of the Complaint and Summons is sent to the Defendant by certified mail, or delivered to the Defendant's attorney. In some instances, the Complaint and Summons are served on the Defendant by a process server.

Despite the 21 day period noted in the Summons, a final Judgment of Divorce may not be entered by the Court in a case involving minor children for a period of 180 days after the Complaint is filed. If there are no minor children, the Judgment may not be entered for a period of 60 days. As a practical matter, it is difficult for most divorce cases to be completely resolved in a period of 180 days. However, in many uncontested cases, the Judgment is entered soon after the running of the statutory waiting period.

#### ***STEP TWO - THE DEFENDANT ANSWERS***

After the Defendant has been served with the Complaint and Summons, he or she files an Answer to the Complaint. Often the Defendant's Answer acknowledges that there has been a breakdown of the marriage and approves the granting of a Judgment of Divorce. In some cases, the Defendant will even file a Counter-complaint asking that a divorce be granted to the Defendant. This is often done by Defendants who are fearful that the Plaintiff will seek to dismiss the Complaint and attempt to continue the marriage.

#### ***STEP THREE - RESOLVING IMMEDIATE CONCERNS***

After the filing of the Complaint and Answer, the parties must attempt to resolve many issues prior to the entry of the final Judgment of Divorce. Some of these issues are: (1) where will the parties reside? (2) who will have custody of minor children and how will the children be supported? (3) who will have possession of personal property owned by the parties during the pendency of the Divorce action? (4) how will the debts of the parties be paid during the pendency of the Divorce action? (5) Is there a need for injunctions or other orders to protect either of the parties from physical abuse or loss of property? If the parties are unable to agree on any of these issues, either party may file a Motion with the Court asking the Court to hold a hearing and enter Temporary Orders to resolve the disputed issues. Such hearings are often heard on short notice and, in some counties, with very little advance study and consideration by the Family Court Judge. For this reason, most attorneys will attempt to negotiate a resolution of the disputed issues. Once these issues are resolved, either by the parties or by the Judge, a Temporary Order is submitted to the Judge for signing and entry with the Court. It should be noted that some Family

Courts require that a Temporary Order be submitted in virtually every Divorce action, especially if there are children involved.

Under current law, divorcing parties who have minor children are required to appear at a *Conciliation Conference* at the office of the Friend of the Court. This conference is held shortly after the filing of the divorce action and is designed to assist parents in reaching agreement on issues of temporary child custody, parenting time and child support. Often, a Temporary Order will result from this conference.

#### **STEP FOUR - DISCOVERY**

After the resolution of any disputes regarding temporary possession of property, custody of minor children and other issues, the Divorce case enters a Discovery phase in which the parties and their attorneys seek to obtain all relevant information regarding the assets and debts of the parties. The Attorneys for the husband and wife will typically want to see income tax returns, wage statements, bank account statements, real estate records, titles to cars and other vehicles, copies of bills, statements pertaining to the status of IRA's and retirement accounts, and many other documents which are necessary in order to make an accurate determination of the assets and debts of the parties. If a party fails to produce such items at the request of the other party's attorney, the attorneys will have the option of issuing a Subpoena which is a Court order requiring production of documents by the husband or wife, their employers, their banks, or any other person or entity having possession of relevant information. The attorney may also wish to require the other party, or any other person with relevant information to submit to a Deposition in which the deposed party is put under oath and required to testify before a certified court reporter. After the court reporter prepares a typewritten transcript of the deponent's testimony, the transcript can be used by the attorney at trial as part of his client's case.

#### **STEP FIVE - ATTEMPTING TO SETTLE**

In order to avoid the uncertainty and expense of a divorce trial, most husbands and wives will attempt to negotiate an agreement on the disputed issues in their divorce case. How such negotiations take place will vary from case to case. In some cases, the parties and their attorneys will meet together and attempt to negotiate disputed issues. In other cases, direct contact between the parties may not be advisable and proposals will be exchanged primarily in written form.

#### **STEP SIX - ENTRY OF A FINAL JUDGMENT BY STIPULATION**

If the parties are able to successfully negotiate the issues in their divorce case, the attorneys will prepare a proposed Judgment of divorce containing all of the agreements of the parties relating to division of property, alimony, child custody, child support, visitation and other issues. However, even if the case is settled in this manner, Michigan law still requires that one of the parties physically appear before the Court and testify under oath that there has been a breakdown of the marriage relationship.

#### **STEP SEVEN - THE TRIAL AND OPINION OF THE COURT**

If the parties are not able to negotiate a settlement, the Court will schedule a Trial in which the parties and their attorneys must appear and present testimony and documentary evidence in support of their respective positions. At the conclusion of the Trial, the Family Court Judge will render an Opinion on the disputed issues (sometimes verbally from the bench and, sometimes, in writing). One of the attorneys will then be directed by the Judge to draft a Judgment of Divorce including the terms and provisions required by the Judge's Opinion. Obviously this Judgment is not signed by the Judge until it has been reviewed by both of the parties and their attorneys in order to be sure that it accurately represents the Judge's Opinion.

When the Family Court Judge signs the Judgment of Divorce, the marriage is officially dissolved.



## **V. GUIDELINES FOR DETERMINING THE OUTCOME**

The "outcome" in every divorce case is going to depend on a multitude of factors. One of these is the name of the Judge assigned to your case! Every Judge brings his or her own background, experience, biases and concerns to the bench. An experienced attorney who practices frequently before the local Family Court in your county should be able to give you some idea as to what arguments are likely to be "convincing" with the particular Judge assigned to your divorce case. Subject to the fact that we are unable to "look into a crystal ball," we think the following information will be helpful to your understanding of the factors which must be considered in resolving the important issues in a divorce case.

### ***THE ROLE OF THE "FRIEND OF THE COURT"***

In Michigan, the Friend of the Court ("FOC") is a separate agency which helps the Family Court in family law matters. The FOC is the agency which is given the responsibility of receiving and disbursing alimony and child support payments and its is given broad powers to seek recovery of past due alimony and child support. It is also important to know that the FOC is also used by the Court to make investigations and recommendations regarding the custody of minor children, the level of child support and the amount and type of visitation between the minor children and the non-custodial parent. There are Mediators in the office of the FOC who hold meetings with the parties and Referees who hold hearings for the purpose of attempting to resolve disputes involving custody, support and visitation of minor children.

As noted above, the FOC also requires parents of minor children to appear at a *Conciliation Conference* shortly after the divorce action is filed in order to assist the parents in reaching agreement on issues of child custody, parenting time and child support.

Although a determination by the FOC can be appealed to the Family Court Judge, it is clear that most Judges will give great weight to the findings and recommendations of the FOC.

### ***CUSTODY OF MINOR CHILDREN***

Under Michigan law, the Court must determine the best interests of the child in deciding disputes regarding custody of a minor child. The best interests of the child means the sum total of the following factors:

1. The love, affection, and other emotional ties existing between the parties involved and the child;
2. The capacity and disposition of the parties involved to give the child love, affection and guidance and continuation of the educating and raising of the child in the child's religion or creed, if any;
3. The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care and other material needs;
4. The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity;
5. The permanence, as a family unit, of the existing or proposed custodial home or homes;
6. The moral fitness of the parties involved;

7. The mental and physical health of the parties involved;
8. The home, school and community record of the child;
9. The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference;
10. The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent; and
11. Any other factor considered by the Court to be relevant to a particular child custody dispute.

In deciding child custody disputes, the Court is required by law to consider joint custody as an option. However, the Court is not required to order joint custody unless the best interests of the child require such joint custody and it is apparent that the parents are able to cooperate and agree on important decisions affecting the child. If parents agree on joint custody, the Court is required to order it unless, based on clear and convincing evidence, the Court believes that such joint custody is not in the child's best interests. Joint custody does not always mean that each parent has the child an equal amount of time. In most cases, this would not be reasonable or possible. In many cases, joint custody simply means that each parent has an equal voice in making important decisions relative to the child.

#### ***ALIMONY (SPOUSAL SUPPORT)***

Alimony (now commonly called "Spousal Support") is financial support for the other spouse. Payments of alimony are in such sums as are deemed appropriate in each case. In considering alimony, the Court is required to consider the following factors:

1. Need;
2. Ability to pay;
3. Length of marriage;
4. Health and earning capacity of the person seeking alimony;
5. Fault of the parties;
6. Source and amount of property awarded to the parties in the Divorce;
7. Age of the parties;
8. Prior standard of living; and
9. Equity (i.e. "fairness" based on all of the circumstances involved)

It is rare to see alimony awarded in a marriage of short duration. Although there is no fixed standard, most attorneys will tell their clients that alimony is quite rare in a marriage of less than 15 - 20 years duration.

#### ***CHILD SUPPORT AND VISITATION (PARENTING TIME)***

Michigan has a Child Support Guideline Manual which the Friend of the Court uses to recommend child support in Divorce cases. The Guidelines became effective in 1987 and have been revised from time to time. Probably, the most important factor under the Guidelines is the net income of the non-custodial parent. The Guidelines are somewhat complicated and quite lengthy, but they are clearly used as a standard for setting child support by most Judges.

Under the Guidelines, income includes not only base wages received from employment, but also includes such things as overtime, shift premiums, cost of living allowances, bonuses, annuities, certain dividends and even gambling winnings. The Guidelines also look at such things as second families, step children, health of the children, and child care expenses.

Visitation (now referred to as Parenting Time) between the minor children and the non-custodial parent is also primarily based on what the Court believes is in the best interests of the minor children. The amount of parenting time can often vary greatly depending on the predilections of the particular Judge assigned to your Divorce case. However, unless there are unusual circumstances, most non-custodial parents can expect to have parenting time with their children on alternate weekends, one evening each week, alternate holidays, and for an extended period in the summer vacation (4 - 6 weeks is common). If the parents do not live close to one another, the Court may also have to decide how the travel expenses are to be allocated between the father and mother. Commonly, the Judge will order the non-custodial parent to pay for the travel to the home of the non-custodial parent, and will order the custodial parent to pay for the return trip. Parenting time is often a hotly contested and emotional issue. If the Court believes that the custodial parent is discouraging the child from visiting the other parent, the custodial parent may eventually suffer loss of custody if the Court believes that is necessary in order to insure that the child has regular contact with both parents.

### ***DIVISION OF PROPERTY***

The division of marital property depends to a great extent upon the nature of the property owned. As a general rule, the Court will start with the presumption that the marital property should be split equally between the parties. However, Judges are required to divide the property in a fair and equitable manner. In some cases, this requires that the property not be divided equally. As in the case of Alimony, the Court is also allowed by Michigan law to consider the relative fault or wrongdoing by the husband and wife in awarding property.

Some of the other circumstances which may be considered by the Court in dividing the marital property are as follows:

1. Duration of the marriage;
2. Contribution of the parties to the accumulation of the property;
3. Age of the parties;
4. Health of the parties;
5. Earning ability of the parties; and
6. Special or unusual necessities and circumstances.

The Court is also required to consider pensions, annuities, profit sharing plans, annuities and other retirement plans as part of the marital property. The determination of the present value of such benefits may be very complicated and require the testimony of a CPA or other expert. The same can be true if the marital property includes ownership of a business or other equity interest which is difficult to value. Too often, such cases become a "battle of the experts" and this can add significantly to the cost of a divorce. A full and complete exchange of financial information regarding such property, and a serious attempt to negotiate a fair determination of value, can avoid a lengthy and costly divorce for both parties.

### ***MEDIATION AS AN ALTERNATIVE***

In addition to the traditional legal divorce process discussed above, there are two specific types of mediation available to help resolve disputed issues. Mediation is a process in which the husband and wife attempt to negotiate the terms of their Divorce with the assistance of Mediators from the office of the Friend of the Court, or private Mediators. Mediators with the FOC are often quite successful in resolving custody, child support and visitation issues between the parties. Obviously, private Mediators will generally charge a fee for their services. However, in difficult cases, they can often avoid a prolonged and expensive litigation process.



## **VI. FAQ (Frequently Asked Questions)**

### **1. *How long will it take to finalize my divorce if my spouse and I are unable to agree?***

Many Family Courts in Michigan are backlogged, especially in more urban areas. If a trial is necessary in a divorce case, it is not uncommon to face a delay of 8 to 18 months or more from the filing of the Complaint. Depending on the complexity of the case, it also may not be possible to complete the trial in one day. In some cases, the next day of trial may be months away. This process can obviously be quite frustrating and is a strong incentive for husbands and wives to attempt to resolve their disputes through the process of negotiation.

### **2. *My spouse is a monster and I can prove it! I assume the Court will do the right thing and award me most of the marital property and a lot of alimony?***

Needless to say, most people have a tendency to focus the blame for a bad marriage on the other party. Sometimes they want to make it "simple" and blame the entire breakdown on one unhappy event. You can probably be sure that your allegations of wrongdoing will be similar to those heard by the Judge in many other cases. While the Court has the authority under Michigan law to divide property, and award alimony, on the basis of fault and wrongdoing, the fact is that most judges are reluctant to order a significant deviation from a 50/50 division of the marital property unless they find the "fault" to be quite significant. Similarly, alimony is rarely awarded in a marriage of short duration, even if one of the parties is more "at fault" than the other. The tendency of the Court to divide the marital property equally between the parties may be considered unfair by a party who believes that his or her spouse was the "wrongdoer" in the broken marriage.

### **3. *Will the Court require my spouse and me to go to counseling?***

While there is some limited counseling through the Friend of The Court at the Conciliation Conference regarding issues of custody, support and parenting time, there is really no court-ordered counseling designed to seek a reconciliation between the parties. On the other hand, there are many excellent counselors in our community to assist persons with family related problems, including divorce and separation. Even if a divorce is inevitable, professional counseling can be invaluable in helping the parties to work through the emotional difficulties of a divorce and in reaching mature agreements with the other spouse regarding the welfare and best interests of the children.

### **4. *What about inherited property?***

Judges vary on the extent to which they give credit for property which was inherited by either husband or wife. Generally, however, if the inheritance was received within a period of less than 1 or 2 years prior to the divorce (and, especially, if the marriage has been of short duration), the Court is likely to give credit to the spouse who inherited such property. In any case, it is highly unlikely that the Court would award family heirlooms to the opposing party if there is other property of equal value which can be awarded to such party. If the inheritance is only prospective (in other words, dad or mom has not yet died), most judges are unwilling to complicate the divorce process by taking the possibility (or even, probability) of a future inheritance into account.

### **5. *My kids do not want to visit their [father/mother]. Do I have to force them to go to visitation?***

All too often, the Judge and the Friend of the Court hear custodial parents complaining that their children do not want to visit the other parent. The custodial parent may say that they are simply unable to "force" their kids to comply with a Parenting Time order. Very frankly, this argument may not be well received,

especially if the children are relatively young. The Court and FOC will clearly expect a custodial parent to do everything reasonably possible to encourage the children to have Parenting Time with the non-custodial parent. If the Court believes that the custodial parent is discouraging Parenting Time with the non-custodial parent, the custodial parent faces a risk that the Court will believe that custody of the children should be given to the other parent! In the case of teenagers, the Court and FOC realize that there are limitations in forcing the child to comply. However, even in this situation, it should be evident that you have cooperated fully in seeking a resolution of the conflicts between the teenager and the other parent. Do not make the mistake of always allowing your teenager to use you as his or her "spokesperson" in dealings with the other parent. If counseling between parent(s) and child is necessary, you should not discourage this process. Both parents must make every effort to avoid making the child the proverbial "pawn" between two bitter and angry parents.

**6. *At what age will my child be able to choose which parent will have custody?***

Many people assume for some reason that any child over 12 years of age has a legal right to determine which parent is to have custody. This is not the case. While Michigan law requires the Judge to consider the child's "preferences," the Judge is not required to always go along with such preference. On the other hand, as a practical matter, most parents and most Judges realize that, as the child gets older, it is very difficult to "require" the child to live in a custodial environment which is objectionable to the child.

**7. *Who gets to live in the marital home while the divorce is pending?***

Many years ago, it was not uncommon to see husbands, in particular, being served with an order requiring them to vacate the marital residence at the same time they were served with the Complaint and Summons. Today, more and more judges are not willing to "take sides" on this issue at an early stage in the Divorce. Naturally, if there is physical or emotional abuse, the guilty party can often expect to be removed from the marital home. However, in the absence of such circumstances, most Judges expect to husband and wife to resolve this issue by negotiation.

**8. *What will it cost to get divorced?***

The attorneys at Rhoades, McKee, P.C., who handle divorce cases will be happy to discuss their hourly rates with you in the first interview. Obviously, the fee will depend, in part, on the level of experience of a particular lawyer. The total fee charge in the divorce will be based on the amount of work required, the difficulty of the services required, and the results obtained. Usually, a retainer deposit is required prior to the filing of the Complaint. In most cases, an estimate can be given to you of the probable cost of the divorce. Your fee agreement will be put in writing to avoid misunderstandings and you will be given a copy for your records. Clients are billed on a monthly basis and payment is expected within a period of 30 days of the time a bill is sent.

**9. *Will my case be kept confidential?***

By law, a lawyer cannot be compelled to divulge information given by a client unless the client agrees to allow the lawyer to do so. Our staff knows the importance of keeping your legal matters confidential. Any information given to us will not be disclosed without your permission.

**10. *Will I be kept informed?***

It is the policy of our office to send our clients copies of significant documents, pleadings, briefs, or other materials that we receive or send out on your behalf. In addition, we will make every effort to keep you advised at all times about the status of your case. If your lawyer is not available when you call, you will have the option of leaving a message on his or her voice mail and he or she will attempt to contact you as soon as reasonably possible. Alternatively, you may talk to one of our capable legal assistants who are trained to assist you and keep you informed.



## **VII. CONCLUSION**

At Rhoades, McKee, P.C., we pride ourselves on representing our clients in divorce and other family law cases in a manner which will make this often unhappy process as smooth and economical as possible. We recognize that the people we serve have very different circumstances. Since no divorce case is identical to any other, we recognize that you and your file need (and deserve) personal attention from our lawyers and staff. We recognize that divorce cases, especially those involving minor children, can be very painful and difficult. We hope that the above information will help you to understand some of the "basics" in the divorce process. If you have additional questions, please feel free to contact us.

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