

## **FLORIDA DIVORCE: A Client's Guide**

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## **INTRODUCTION**

This is not a do-it-yourself manual so that you can represent yourself. There are a lot of those. If you do have one of those situations where the issues between you and your spouse are minimal, and the two of you are of the same mind, by all means, save the cost of an attorney.

This is not a legal manual for attorneys.

This book is intended to be an overview of the divorce process in the State of Florida. Your attorney does not have the time to tutor you in every nuance of what is happening in your case. Do you really want to be billed at a rate of \$250 to \$350 per hour for every little question about what happens in your case when the answers are available for your review without calling your lawyer? I'm sure some of those attorneys would hate me saying that, but personally I am probably too busy working on the real meat of your case and trying to give you the best bang for your buck. This little book may save you hundreds of dollars by answering some basic questions about what happens in a divorce case in the State of Florida.

This book will give you a broad overview of the different areas and procedures that relate to your divorce according to Florida Statute 61 and case law. Don't worry, I am not going to cite cases to you. Each attorney and judge has his own views on the issues. That being said, you will find some lawyers who may agree with me and others that may not. It is the nature of the legal beast.

A sample of the areas to be covered are the standards such as alimony, child support, division of assets and liabilities of the marital relationship, child custody and or visitation which has been renamed "time sharing".

Read this book but don't study it. This is not a course in family law 101, but a book to give you some stress relief in what is happening during a bad time in your life. Keep in mind, the light at the end of the tunnel is not always a train coming at you.

## CHAPTER 1            WHAT IS DIVORCE ?

“Florida Statute 61.031    Dissolution of marriage to be a vinculo.—No dissolution of marriage is from bed and board, but is from bonds of matrimony.”

Divorce in Florida is called a **Dissolution of Marriage**. People have their different ideas of what a marriage is, but there is little argument that it is a partnership. This partnership includes, but is not limited to emotions, finances, children, problems, good and bad times. Believe it or not, most of this stuff is subject to the review by the court presiding over your divorce case if you and your spouse can't work it out.

The objective of dissolution of marriage is to resolve these issues so that the two of you can move on with the rest of your lives. Some of these issues may be as follows:

- Dividing up the marital assets and property: Who gets what based on what idea. It's not as easy as it seems many times. What may not seem like an asset to one person, is to another.
- Alimony awards: It isn't always ordered by the judge and there are many types of alimony.
- Child custody: “Time sharing” is the new term to express both spouse's rights to being a parent and meant to take some of the bite out of who “wins”.
- Child support: The Florida legislature decides how much it takes to raise children, and the lawyers fight as to dividing up each parties' share of that amount determined by your elected officials.

These are only some of the issues that a divorce seeks to resolve ,and send each party on their way, hopefully, to a happier time.

The issues, however, can be very complex to resolve. You ask: “Well, if there are rules on how to do it, why can't I just follow the rules ?” Answer: those black and white rules are subject to interpretations and fights by us meddlesome lawyers !

There are always questions how things get divided up, how much child support or alimony should be really paid, and what is considered income for those purposes.

It is a popular but partial saying from Shakespeare's King Henry VI, 'First thing, kill all the lawyers.'" The actual, paraphrased saying, "If we want to create chaos, first thing to do is kill all the lawyers.' This isn't intended to be self-laudatory about the legal profession. The laws governing dissolution of marriage are complex and it takes trained and experienced legal professionals to navigate through the process.

Bottom line, divorce is about resolving all your issues and sending each party on their own way. It is not just burning a piece of paper and giving you back your freedom.

## CHAPTER 2            WHEN AND WHERE CAN YOU FILE FOR DIVORCE IN FLORIDA ?

You can file anywhere so long as no one objects. Maybe, a particular judge might not allow the case to proceed because the case is not in the proper geographic jurisdiction. To file in Florida, one spouse or the other must have been living in Florida for six months or longer. "Forum shopping" means looking for the best state laws that work for your side of the divorce case.

As usual, there are always exceptions to the basic rule. Did you leave your spouse in the other state where you lived with them, and with a minor child of the marriage ? **The Uniform Child Custody Jurisdiction And Enforcement Act ("UCCJEA")** was enacted in 1997 to try and provide rules for all states in the United States to follow when it comes to where a family law case takes place when children are involved. Presently, only Massachusetts is the only state that does not follow the guidelines of the UCCJEA.

You may be able to get a divorce in Florida, but if you and your spouse own real property in another state, it may require sending any court order assigning or selling the property to that

state's court to enforce. It is called **Domesticating a Foreign Judgement**. This is not to be confused with a judgment not only from a foreign country, but also from another state.

You may have to go to another state to enforce a condition of your Florida Dissolution of Marriage Judgment. Again, you must get your judgment domesticated there, and vice versa for a foreign judgment in Florida.

Another "subpart" of where you can file is venue. **Venue** is what county you can file in Florida. Again, it is either where the opposing spouse lives, where you live or where neither party will object.

This is an example of a third county filing : you live in St. Johns County. Your spouse lives in Volusia County. Flagler County lies between the two. If no one objects, you could file in Flagler County, the halfway point. Usually, the spouses fight about proper venue and seek the home court advantage.

At times, a case may be transferred to another county because one spouse or the other knows all the judges, or there is some other conflict of interest. Generally, it will stay in the same **circuit**, or a group of counties. For example, Volusia, Flagler, Putnam and St. Johns Counties are part of the Seventh Judicial Circuit of the state of Florida. There are 22 circuits in Florida.

## CHAPTER 3            STARTING A DIVORCE.

Remember, the proper name of this action in Florida court is called a "**Dissolution of Marriage**". It is a lawsuit. In order to get a judge to hear anything in the legal world, you have to file an initial "**pleading**" called a complaint or petition. This document states why you are coming to the judge to ask his help to resolve a certain situation. In the case of divorce, the pleading is titled "Petition for Dissolution of Marriage". If children are involved, the lawyer will add "...With Minor Children".            The reason for titling the petition this way is so that the judge, and the clerk of the court (the administrative people who run the operations of the court), may easily identify when minor children are involved. The best interests of the minor children

are always examined in whatever happens in the divorce. Your attorney has to comply with the requirements of certain allegations or "**averments**" that must be put into your petition. Some of these averments are as follows:

Some of these averments are as follows:

- This particular court has jurisdiction to preside over your case. Usually, it is because you and your spouse had been living in that area, and that a divorce is handled by the Circuit Courts of Florida and not in County Court or Small Claims Court.
- That neither one of you are in the military and or on deployment out of the country. If your spouse is in the military and out of the country in service, you can still file but the court will not do anything with your case until he or she returns.
- The marriage is over due to "irreconcilable differences". Florida is a "**no fault**" divorce state which means neither party has to point a finger at the other and "win" a divorce. If you want to get divorced, you'll get divorced. Some judges will ask you what are some examples of the "differences" for wanting the divorce.

Some of these differences may have an effect on any alimony orders from one spouse to the other. It may also have an effect of the distribution of assets. For example, though adultery may be a reason for the divorce, it would not affect the division of assets unless marital money or assets was squandered on a paramour. It may be a consideration in the amount of alimony awarded. If a spouse fraudulently incurs a debt in the other's name, it may be deemed a non-marital debt belonging to the perpetrator.

When there are minor children involved, your attorney will provide more information on the children and your request for what you want in the way of "time share" (remember, old terms are custody and visitation) and child support. Of course, there are many other issues when children are involved. For example:

How should the marital assets such as the house, bank accounts, cars, and everything else should be divided up. If there is some special reason why one

should get more than the other, the lawyer has to tell the court that you want unequal distribution of marital assets and why.

This is the same for all the liabilities accumulated during the marriage. The credit card and personal loan debts, the mortgage, car loan and the like.

Attorneys fees and costs may be awarded against one spouse or the other. Again, it is one of those things that must be asked for in writing before trial. When I say in writing, it is usually put in your **initial petition**, also called "**pleading**".

These are some of the basic allegations that required in your petition for dissolution of marriage. There may be others added to your petition at the professional judgment of your attorney in consideration of special issues in your case. For instance, if you want the marital home to be sold and the proceeds divided, a request for "**partition**" must be added.

With the petition being written and filed with the clerk of the court, it has to be served on your spouse within 180 days . This officially binds your spouse to recognize the case and respond to it. This filing puts the case in front of the judge.

Your spouse has 20 days to respond to your petition in a document called an "**answer**". This is where they admit or deny each allegation you make in your petition. If he or she does not respond to your service within 20 days, then you can get what is called a **default judgement** from the clerk. You still have to go to a final hearing and make your requests of how things are handled afterwards.

If your spouse wants to make his or her claims in the divorce, he or she usually accompany their answer with a "**counter-petition**". It will look a lot like yours but may vary as to what he or she is looking to get out of the marital issues. You have to answer theirs within 10 days. And with this, the process of litigation continues

The next step in your divorce is discovering what each side has in finances, abilities, and needs. Both parties are obligated to disclose their financial background in compliance with Florida Family Law Rule 12.285. This is to insure a fair and educated distribution of the marital assets and liabilities, and determine what child support should be as well as alimony, or responsibility paying the accumulated debt.

Each spouse has to fill out a form called a **Financial Affidavit**. It is the first form filled out in disclosure and usually done early on. It is a sworn affidavit so you must be honest and open in its completion. There is the long form for a person who makes over \$50,000. If under \$50,000, you would use the short form.

The materials that you would have to supply to your attorney to give to the other side besides your financial affidavit is listed in Florida Family Law Rule 12.285. Both of you have the same standard to comply the materials best you can. The list of materials are as follows:

- All federal and state income tax returns, gift tax returns, and intangible personal property tax returns filed by the party or on the party's behalf for the past 3 years.
- IRS forms W-2, 1099, and K-1 for the past year, if the income tax return for that year has not been prepared.
- Pay stubs or other evidence of earned income for the 3 months prior to service of the financial affidavit.
- A statement by the producing party identifying the amount and source of all income received from any source during the 3 months preceding the service of the financial affidavit required by the disclosure rule if not reflected on spouse's pay stubs provided by his or her employer.
- All loan applications and financial statements prepared or used within the 12 months preceding service of that party's financial affidavit required by this rule,

whether for the purpose of obtaining or attempting to obtain credit or for any other purpose.

- All deeds within the last 3 years, all promissory notes within the last 12 months, and all present leases, in which the party owns or owned an interest, whether held in the party's name individually, in the party's name jointly with any other person or entity, in the party's name as trustee or guardian for any other person, or in someone else's name on the party's behalf.
- All periodic statements from the last 3 months for all checking accounts, and from the last 12 months for all other accounts (for example, savings accounts, money market funds, certificates of deposit, etc.), regardless of whether or not the account has been closed, including those held in the party's name individually, in the party's name jointly with any other person or entity, in the party's name as trustee or guardian for any other person, or in someone else's name on the party's behalf.
- All brokerage account statements in which either party to this action held within the last 12 months or holds an interest including those held in the party's name individually, in the party's name jointly with any person or entity, in the party's name as trustee or guardian for any other person, or in someone else's name on the party's behalf.
- The most recent statement for any profit sharing, retirement, deferred compensation, or pension plan (for example, IRA, 401(k), 403(b), SEP, KEOGH, or other similar account) in which the party is a participant or alternate payee. As well as the summary plan description

for any retirement, profit sharing, or pension plan in which the party is a participant or an alternate payee. (The summary plan description must be furnished to the party on request by the plan administrator as required by 29 U.S.C. § 1024(b)(4).)

- The declarations page, the last periodic statement, and the certificate for all life insurance policies insuring the party's life or the life of the party's spouse, whether group insurance or otherwise. All current health and dental insurance cards covering either of the parties and/or their dependent children.
- Corporate, partnership, and trust tax returns for the last 3 tax years if the party has an ownership or interest in a corporation, partnership, or trust greater than or equal to 30%.
- All promissory notes for the last 12 months, all credit card and charge account statements and other records showing the party's indebtedness as of the date of the filing of this action. The last 3 months, and all present lease agreements, whether owed in the party's name individually, in the party's name jointly with any other person or entity, in the party's name as trustee or guardian for any other person, or in someone else's name on the party's behalf.
- All written premarital or marital agreements entered into at any time between the parties to this marriage, whether before or during the marriage. Additionally, in any modification proceeding, each party shall serve on the opposing party all written agreements entered into between them at any time since the order to be modified was entered.
- All documents and tangible evidence supporting the producing party's claim that an asset or liability is **nonmarital** or not part of the marriage, for enhancement or appreciation of nonmarital property, or for an unequal distribution of marital property. The documents and tangible evidence produced shall be for the time period from the date of acquisition of the asset or debt to the date of production or from the date of the marriage, if based on premarital acquisition. An example of this is when one party has a house prior to the marriage but the spouses lived in it during the marriage and the other spouse somehow contributed to the principal of

the mortgage payments or helped in the house's appreciated value during the time of the marriage.

- Any court orders directing a party to pay or receive spousal or child support.

**Financial disclosure** is a continuing process during the course of your divorce. If you have a change in income or obtain additional investments or receive any kind of windfall, you have to tell your lawyer. In turn, he may have to amend your financial affidavit and or supply new documentation of your situation.

I know the list looks daunting. However, you are not required to provide things that you don't have or are not in your possession. You have to supply these items if they are in your possession or readily obtainable. These days, a lot of your bank or investment statements are available on the internet. What I have done in the past is download the statements onto a disc and supply them to opposing counsel. Your attorney will have to print them out for his use in court. You may want to print them out and save money.

Again, they should be reasonable obtainable. If they are beyond your reach, the other side can get them by a **subpoena duces tecum (subpoena for documents)**. You will be given a 10 day notice by the other side before this happens.

Another couple of tools for disclosure is the use of **written interrogatories** (questions) and requests for production of documents. The interrogatories are standard questions laid out by the Florida Supreme Court. Additional questions may be added for certain special situations. The question sheet is signed by the client and sworn to and notarized. The request for production of documents is a bit redundant of the required production under Florida Family Law Rule 12.285 . In light of the rule, some attorney do not use the request in certain cases, and it saves the client money. If the financial picture is complex, an attorney will use the request and may add items of special interests.

After all the materials are received, the attorneys may see a need to conduct **depositions** to clear up vague information or to explore further. A deposition is a question and answer session before a certified court reporter (stenographer) done under oath. The questions asked may not conform to the Florida Rules of Evidence but are allowed if they are intended to lead to relevant evidence. For instance, hearsay statements (one's made by other people other than the parties), is not normally allowed in court but can be repeated in deposition. If an attorney does not want you to answer for some reason, he or she will specifically tell you not to. The instruction may be fought over in court later.

A deposition may not be used nor a question asked if its only intent is to harass the party. A minor child can't testify in court unless the judge first grants permission to the requesting party. This is done by written motion and the child shouldn't even be in the courthouse until the judge okays it. However, one can depose a minor child prior to asking the judge to allow testimony to see if the child has relevant information that he may need to hear.

## CHAPTER 5 YOU HAVE NO MONEY FOR A LAWYER.

There are many times a client, usually a wife, comes into the office and says that the spouse has control of all the marital money or has money of his or her own and has left him or her without means to hire a lawyer. The attorney has two choice; he will or will not take the case or, he can evaluate the situation and decide that the opposing spouse does have money to pay the lawyer's initial retainer.

The lawyer can file a "**motion for attorney's fees and costs petit lite**" meaning his fees and costs to be paid by the other spouse in advance. He will require the minimum disclosure from your spouse to present at a hearing to show that he or she has the money to pay your attorney's projected fees and cost.

Usually, your attorney will try and have the case referred to a **general magistrate** who is an assistant to the judge. He takes testimony, and makes findings of facts. He recommends to the judge what the judge should do. Lawyers sometimes call the general magistrate a “**judge lite**”. The reason for wanting to use a general magistrate is to get your motion heard faster given how crowded the judges’ calendars are with divorce cases. This will be addressed more later on.

The use of a general magistrate is only an option. If one side or the other objects to the use of the general magistrate, then you have to wait to get onto the judge’s calendar for your hearing. That might be for a very long time. A spouse may object to the use of a general magistrate for that specific purpose of delay, or the attorney may feel that the judge must hear the motions for attorney’s fees or temporary alimony because he wants the judge to meet the parties. This may be the first time you see the judge.

The bottom line is that the lawyer takes a risk that he starts a case without getting upfront money from your spouse, and has to decide if he tries again to get attorney’s fees at final trial. You can pay him, or he withdraws from your case and bills you for the work he has already done.

## CHAPTER 6 DIVIDING UP THE MARITAL ASSETS AND DEBTS.

Full discovery of all the marital assets, bank accounts, real property, pension plans, stock shares and the like are now on the table. Hopefully, you know about everything your spouse has and vice versa. The Cayman Islands bank accounts have been found ! The parties have to agree or the judge decides who gets what. This includes the family dog.

Florida Statute 61.075 is the “**equitable distribution**” **statute** which instructs the judge as to how to divide the marital assets after he figures out what is or isn’t a marital asset. It should start out as a presumption that each spouse gets one half. But first, is it a marital asset ?

The judge has to weigh numerous factors in how would divide these assets. There may be arguments for “**unequal distribution**”. In other words, giving one spouse more money or

property than to the other because of some circumstances which are outlined in F.S. 61.075. However, if you want this special consideration from the judge, it has to be in your petition ! If you don't ask for it in that document, you don't get it .

What you had before the marriage is still yours. If you had a paid-in-full car, titled in your name and purchased before the marriage, it is still your car. The judge can't give it to your spouse. A house that was yours before the marriage is still yours but that can become tricky at times.

If you used any marital money, including your salary, to pay down the principle, your spouse may have a financial interest in your house. If you re-titled the house into both of your names, again, your spouse may have a strong financial interest in your home. When you re-titled, and probably re-mortgaged the house, you changed the character of the asset from pre-marital to marital.

The judge may order the sale of the house. However, you would be entitled to the equity that was there prior to the marriage and one half the additional equity acquired after the marriage. If it is just a pay down in principle on the house and you have other marital cash assets, the judge may just give your spouse more of the cash to compensate him/her for that interest in your house.

There are many other conditions that the judge may consider in distributing the marital assets as listed in Florida Statute 61.075, such as follows:

- The contribution to the marriage by each spouse, including contributions to the care and education of the children and services as homemaker. Yes ladies, your work as a housewife is worth something.
- The economic circumstances of the parties and the duration of the marriage: the longer one is married and there is an unequal earning capacity, the more likely there could be an award of some type of alimony.

- Any interruption of personal careers or educational opportunities of either party: if you gave your career as a professional or gave up a course of education to a good paying career, that is something you sacrificed for your spouse.
- The contribution of one spouse to the personal career or educational opportunity of the other spouse: did you put your spouse through medical school, college or vocational school ?
- The desirability of retaining any asset, including an interest in a business, corporation, or professional practice, intact and free from any claim or interference by the other party.
- The contribution of each spouse to the acquisition, enhancement, and production of income or the improvement of, or the incurring of liabilities to, both the marital assets and the nonmarital assets of the parties. Did you pay for an additional room added to your spouse's premarital house ?
- The judge can give the marital home to the spouse who has the majority timeshare of the minor children if it is economically feasible and it is in the best interest of the minor children. Lots of conditions there to be examined.
- The intentional dissipation, waste, depletion, or destruction of marital assets after the filing of the petition or within 2 years prior to the filing of the petition; did the spouse intentionally divest marital assets to put the other at a disadvantage ?
- Any other factors necessary to do equity and justice between the parties; is the judge's catch all to do what he believes justice requires. After the statute, prior cases or case law defines what the judge can do or not do.

At the very end, the judge can award lump sum alimony to help equalize the distribution of the assets. In other words, one spouse gets the house, the other may get more of the savings account.

Some examples of assets that are not marital or nonmarital assets are as follows:

- The engagement ring; it was given before the marriage as a conditional gift for the promise of marriage. Get married and it's hers.
- Inter-spousal gifts or gifts given to each other during the marriage. Specific gifts to one spouse is his or hers.
- One spouse's inheritance during the course of the marriage belongs to that spouse if it was directed specifically to him or her.
- If you have passive income from a nonmarital asset, such as a stock portfolio, it's yours. However, if you use it to support the family, it can be considered a source for alimony. That will be addressed later.
- If the spouse is entitled to pension funds or government retirement plans such as the military, those benefits are marital property. Florida Statute 61.076 outlines information required in a final judgment of dissolution of marriage for it to be effective in dividing up a military pension.
- The non-participating spouse is entitled to one half of the pension which was accumulated or earned during the course of the marriage. For example, you are married to a military member for 10 years out of the 20 years of his or her service, you would be entitled to  $\frac{1}{4}$  of his or her pension or  $\frac{1}{2}$  of the 10 years.

- Retirement investments that have a cash value are much easier to deal with. If your spouse has a 401K or similar, he or she can assign one half of it to be transferred to a new or existing similar account of yours. That way, no taxes are paid.

There are many other types of benefits that an experienced family law attorney can identify when investigating the financial backgrounds of the parties. Make sure you provide him or her with any knowledge you may have about your spouse's financial background and occupation.

## CHAPTER 7 WHAT ABOUT THE DEBT ?

These days, there is a lot of debt accumulated during the course of marriage; from the home mortgage and car loan to the credit cards. It is a great source of stress. How will be handled ? Who will get saddled with it ?

As a general rule, **marital debt** is defined as that which is accumulated from the start of the marriage to the date of the filing of your divorce action. An exception may be if a specific debt was acquired by one spouse that was fraudulent in nature or unfairly detrimental to the other.

A tax debt by one spouse that is unfairly filed with the other spouse may be assigned to the responsible party. Additionally, the Internal Revenue Service may forgive a tax debt against an innocent spouse as well.

Again, the judge will conduct a weighing of factors in deciding who will be responsible for the marital debt, in part or in whole.

When it comes to the house and mortgage, the judge may give one spouse the house but make him or her responsible for the mortgage. He may assign payments to the non-possessing

spouse as a form of alimony. He may require the spouse who gets the house to apply for his or her own mortgage, making best efforts to get the other off the mortgage and promissory note. The same principles apply to car loans and some other secured debts.

Unsecured debt are loans like credit card bills or bank signature loans.

The judge will look at the amount of liquid assets (money) the spouses have and distribute the debt accordingly. If one has the responsibility to pay but both are on the loan, it is that spouse's responsibility to indemnify the other from financial harm.

Some of divorce attorneys also practice in bankruptcy law. If a couple can cooperate and they qualify, a Chapter 7 bankruptcy proceeding in federal bankruptcy court can be very beneficial in clearing out the unsecured marital debt. Bankruptcy can be used to surrender toxic or upside down assets back to the bank, or assets that are not worth the loan. If it is done as a couple, the bankruptcy petition has to be filed before the entry of a final judgment of dissolution of marriage.

Of course, the couple must be cooperative. If the two can agree, it can be put in the final judgment that neither party objects to a bankruptcy discharge of marital debt. If one or the other or both file separately, then you file for bankruptcy after the divorce is final.

Just beware. Even if one files for bankruptcy, the creditor can go after the other for the debt if both names are on that debt.

A short note on bankruptcy discharges in general: alimony, child support, attorneys fees and in most instances, marital debt are not dischargeable when the divorce judgment says one side or the other applying for the bankruptcy is responsible. The non-discharging spouse has to be protected and the state court has "concurrent" or equal jurisdiction to address the issue as the federal court. A bankruptcy judge "discharges" a debt which means relieving the debtor of the responsibility of paying.

## CHAPTER EIGHT A LITTLE MORE ABOUT THE MARITAL HOUSE.

The house deemed as a piece of marital property presents a number of challenges. Especially, if there are minor children involved and you have had the house for a good part of their lives.

As stated earlier, if each party is entitled to one half of the equity of the house and there is available marital cash or funds available, the judge can give more of the funds to one and the house to the other. Or, the judge can just order the house to be sold and divide up the profits.

If there are minor children involved, the judge can order that the major timeshare spouse keeps the house until the youngest child turns 18 and then the house be sold. The mortgage payments have to be determined. If alimony is due, it could be part of the alimony considerations.

Other considerations, as mentioned earlier: Did one spouse use non-marital funds to pay down the mortgage or make improvements which increased the value of the house? If so, he or she may be entitled to a bit more of the equity, even if it is a non-marital home.

Last, but probably not. If you decide to leave the house to try and make things easier during a divorce, or even if you don't want to live in it after divorce, you don't lose your interest in it when litigating your case. If you have a share in the equity, you have a share in the equity.

## CHAPTER 9 PREMARITAL AGREEMENTS; WHO SHOULD HAVE ONE ?

Always a nice test of a relationship before the actual wedding day. If a spouse gives you a dirty look when you mention it, ask yourself "Why?" .

A premarital agreement outlines what each person owns before the marriage and how it would be handled after the wedding. It should completely disclose the financial background of

each of you. It may also show an agreement as to how marital property is to be disposed of in the event of divorce.

This agreement can also address the issue of alimony. It may lay out a schedule and duration of payments. It may do away with a spouse's right to any alimony altogether.

**What a premarital agreement can't do, is negatively affect child support when it is an issue.** Child support is strictly governed in the state of Florida. Always, the ultimate consideration is in the best interest of the minor children.

A premarital agreement becomes effective upon marriage. It must be authored and signed knowingly, intelligently and voluntarily. It must be free of fraud and or coercion. The signing parties must have ample opportunity to examine and think about the agreement. If not, there might be a chance that a spouse can have it found ineffective or invalid by a judge in the course of a contested divorce.

As with every other statute or rule, prior cases define the issues not addressed by statutory law. The premarital agreement must be very clear and specific when written. Your lawyer should be very familiar with drafting this agreement for the protection of both spouses.

Certain conditions in the prenuptial agreement may require certain signing requirements such as real estate interests and trust and estate matters.

When the question of a premarital agreement arises in the process of a Florida divorce, be sure to discuss all the surrounding circumstances and facts in the writing, and signing of this agreement.

## CHAPTER 10            ALIMONY

Support for a spouse during a divorce or after marriage is called “**alimony**”, and has undergone major changes in 2010 in Florida. The intent was to give judges better and more uniform guidelines when it is at issue in a divorce. Prior to the changes, the judges used prior history of other cases in their geographic areas to guide their decisions as to the issue of support.

Alimony is based on the receiving party’s need for financial assistance, the paying party’s ability to provide that support, and the length of the marriage. There are numerous other considerations, such as marital misconduct or the availability of marital assets which are to be divided as addressed in Chapter 6.

First, let’s talk about the length of the marriage. It is broken down into three categories; short- term, moderate- term, and long- term marriages. This is defined and referenced in Florida Statute 61.08.

A **short-term marriage** is defined as to a length of up to, but not including 7 years. Just shy of your 8<sup>th</sup> anniversary even by one day, it is short-term. A **moderate-term marriage** is a length of 7 to 17 years. After 17 years, the marriage is considered **long-term**. These guidelines of the length and their respective entitlements are considered to be “**rebuttable**”. This means evidence can be presented, and the attorneys can argue against these classifications for some special reason such as separation prior to the actual filing of a divorce action.

Alimony applies to these three situations as follows:

Short-term marriages incur the least amount of spousal obligation. The maximum length of time for the payment of alimony in this situation is no more than two years. It is called **Bridge-The-Gap** alimony, and it is not modifiable or changeable after final judgment as to the amount to be paid or its length. The purpose of it is to help the spouse needing financial assistance to transition from married life to being single again.

**Durational alimony** is available for moderate-term marriages, and can be the length of the marriage itself. It can be modified during its effective payment term regarding amount of payments or its length. However, it cannot exceed the length of the marriage.

A marriage that has lasted in excess of 17 years will involve the issue of **permanent alimony** depending on each spouse's need and or ability to pay. It can be modified as to amount or even terminated if the receiving spouse becomes independently self-supporting.

Permanent alimony can be awarded even in short term or intermediate-term marriages under exceptional or unusually circumstances. For instance, a spouse becomes disabled after one year of marriage and can never work. Permanent alimony is the only recourse for a judge to provide for that person. The judge has to make very specific findings as to why he or she has ordered permanent alimony for a marriage less than 17 years.

All of these types of alimony can terminate upon remarriage of the receiving spouse or death of either party. The law also allows for exceptions as to the length of the term of alimony to be extended but only under very special circumstances that have to be stated in the judge's order. Given that these are new alimony rules, expect many appeals to the higher courts to determine what these special circumstances are.

**Rehabilitative alimony** is a type of alimony that is used when a spouse has a set course of training that he or she can complete in order to become self-sufficient. For instance, a spouse is attending college while getting divorced. The judge can order alimony while that person is completing his or her studies. This alimony is also modifiable.

The problem with all new laws is that they are subject to different interpretations, how judges and lawyers think they should be applied or what they mean. We can expect many appeals to the higher courts to define how these new rules of alimony will be applied.

In determining alimony, the first thing the judge looks at is the standard of living that the parties enjoyed during the course of the marriage. Can that be maintained for the spouse who is to receive alimony? Have the couple suffered a downturn in their standard because of the economy or other situations beyond their control? If the income of the parties doesn't support the

former lifestyle, logic dictates that they better start buying their groceries at a supermarket and not a boutique grocery store. The judge may suggest that.

**Need versus ability.** The spouse seeking alimony payments must demonstrate a financial need. Can he or she earn any kind of income ? If so, that is taken into consideration when asking for support from the other. It must be a demonstrated need. The spouse can't just come into court and tell the judge, "I think my rent will be ....." The spouse's expenditures must be real and the spouse must come up short after his or her income minus expenditures. The receiving spouse is not entitled to deposits to a savings account. Of course, that may be an argument by attorneys if the supporting spouse was previously making regular deposits to the other's savings account.

Once the judge determines a need, then the other spouse's ability is examined. What sources of funds of the paying spouse or former husband can the judge consider when determining his or her ability to pay alimony ? Obviously, a person's salary from a job is the first thing. This would also include commissions that are received on a regular basis. If it fluctuates, the average of past commissions may be taken into considerations. Bonuses awarded or about to be paid are really marital assets subject to division but are considered. Even non-marital funds that were accumulated before a marriage may be considered as a source for an ability to pay alimony. The key is liquidity. Equity in your non-marital house is not liquid and not for consideration the amount or ability to pay alimony.

It is not uncommon for a supporting or paying spouse not to have enough to provide to the other. The court is limited as to how far it can cut into a spouse's income to pay alimony. The judge can't give the receiving spouse a greater net income than the paying spouse except in special circumstances. Those circumstances have to be noted in the support order.

If there is a need but no ability, the judge will assigned an amount of payment called **nominal alimony**. It could be a dollar a month. This is particularly done when permanent alimony would be appropriate. It keeps the window open for modification or increase later on when the payer becomes more solvent.

If alimony is not awarded by a proper order of the judge, you can't go back and ask for a modification of the final judgment to get it. It is a done deal. However, if the judge made some legal mistake in his or her findings or rulings regarding alimony, you can appeal the final judgment regarding that issue. Keep in mind these appeals are expensive.

## **MODIFICATION OF ALIMONY**

Right now, the only types of alimony which are not modifiable are bridge the gap alimony for short term marriages, and lump sum alimony which is to redistribute marital assets.

As what will be addressed later on under child support, an order of alimony which is subject to modification is done by a supplemental petition to modify a final judgment or by motion during the course of ongoing litigation of a divorce.

A substantial change of financial circumstances would be the basis for a modification. Whether it is an increase of income to meet the other's needs, or an increase of income of the one in need which results in a reduction in need. The change can be in either direction, up or down.

After a divorce is final, an order for some temporary support, such as rehabilitative alimony or transitional alimony, can be modified as to amount or duration (length of time paid). Under certain circumstances, a temporary order can be made into a permanent periodic alimony support order. The most common reason is if the recipient becomes permanently disabled and unable to work during the alimony pay period. Rehabilitative alimony may be for education or training. If the training is delayed for some reason not of the recipient's making, the court can extend the period which support is paid. Transitional alimony is to help the recipient move into financial single life on a temporary basis.

Another consideration is the spouse's education and experience. Does he or she have the potential to increase their earning capacity and maybe needs a little push from the judge ? Is the spouse requesting alimony working towards an education in college or vocational training school. Is the spouse under-employed? Has the spouse purposely diminished his or her employment position to try and gain more alimony ? The same could be said about the paying spouse's employment status. Did he or she lessen his or her earning capacity to minimize his or her ability to pay alimony ? What has the spouse who is the "homemaker" contributed to keeping the home, being a parent or helping the other spouse in the building of his or her career or business? There are many other factors that the judge under Florida Statute 61.08(2) and as determined by prior cases in Florida. Your attorney may know many other considerations.

In some situations, the judge may order the paying spouse to maintain life insurance of a certain amount with the receiving spouse as the beneficiary. This is most common in permanent alimony cases to insure that the dependent former spouse will be taken care of in the event of a premature death. Again, the amount of the policy is at the judgment and discretion of the Court.

As far as the situation of a spouse being left with a greater net income than the paying spouse has after alimony is paid, a judge can't leave the paying spouse with a significantly lesser amount than the receiving spouse except in special situations. Maybe the receiving spouse has greater medical needs and, the paying spouse is a Rockefeller, Trump or Gates.

Alimony payments may be deducted from the paying former spouse's salary by use of an **Income Deduction Order**. The payments may be directly to the recipient, or through the Florida Disbursement Order in Tallahassee to be distributed to the former spouse. This would insure timely payments, and helps keep a record and accounting which always helps if there is a future complaint of failure to pay.

A big problem with spouses who are self-employed or operate on a cash basis, is determining what their true income is. A common saying among attorneys is that it is sometimes like throwing jello against the wall. Sometimes, proving to the judge how much your spouse

makes is difficult in the absence of documentary evidence, such as W-2 forms or cancelled checks. Sometimes, the spouse's lifestyle or bank deposits can make your case for imputing an income. It is common practice for attorneys to be amateur forensic accountants, or to hire one in high dollar divorces. An experienced attorney knows what tools are available to explore the possibilities of hidden income.

## CHAPTER 11 TIME SHARING (visitation) AND PARENTING COORDINATION

Another major change in divorce with minor children involved is the changing of each parent will have access to the minor children, both in being with the children and having parental responsibilities ( a say in education, religion, medical care, etc.). The terms "primary custodial parent" or "visitation" are no longer used in Florida Statute 61.30 or in court.

The overall consideration in any issue concerning minor children is whether or not whatever is being considered is in the best interest of the minor child(ren). Each parent is to have as much access to their children as feasible while providing for a safe, stable, loving and promoting environment. Each parent is supposed to promote a good relationship between the child and the other parent. No disparaging remarks about each other or interference with scheduled contact. Unfortunately, we don't always see a true intent on behalf of divorcing or divorced parents to cooperate in the best interests of the minor children enough. The judge can't be present everyday but will have little patience with the spouse or former spouse who seeks to alienate the affections of a child from the other parent.

The Florida courts are increasingly using the services of a "**parenting coordinator**" in accordance with Florida Statute 61.125. This is an appointed officer of the court whose job is to investigate and evaluate the parental situation, and suitability of the spouses as to their relationship with the minor children of the marriage. He or she reports to the judge and makes recommendations regarding the time share plan, and any problems with either spouse's abilities in parental responsibility; the ability of making decisions as to the care and raising of the minor children (education, medical care, religion, etc.).

A coordinator may be a family psychologist or a family law attorney, both of which undergo training and have certain qualifications as outlined in this section of the statutes. They are neutral, independent parties whom report to the judge as to their findings and recommendations. Sometimes, a coordinator may need additional qualifications as determined by the judge. For instance, if a minor child has a disability, the judge may want a coordinator experienced with that specific disability, and to determine which parent, or both, is better equipped to handle its special needs.

A parenting coordinator will recommend a time sharing plan which will insure stability for the minor children of the marriage after it is dissolved and the parents are living apart. This plan could be instituted during the litigation of the spouses' divorce, especially in a lengthy, highly contested action. Family counseling may be recommended.

Aside from the recommendations of the parenting coordinator, most courts have class or session requirements for the parents to participate in so that they may attempt to get along better for the sake of the children. The children have a course or class to go to so they understand that the divorce is not their fault and how to handle that some things that may occur. Usually, the children have to be at least 6 years old before being required to attend.

Parental responsibility is a different part of the time share and parenting coordinating picture. As stated earlier, it has to do with one's ability to act as a guiding, caring parent in the best interests of the minor child(ren). This is a right highly protected by the court. A spouse can be the most dishonest, sleazy, rudest, offensive person. We all can't be born into the Ozzie and Harriet family. Even bad judgment regarding education or medical choices would not be grounds for a judge to separate a parent from rights to be a parent.

Considerations as to spouses' suitability regarding parental rights and responsibilities are outlined in Florida Statute 61.13.

Things that may cause a judge to temporarily stop a spouse's right to be a parent would be domestic violence, drug or alcohol abuse in front of the minor child(ren), and other activities that may put the child(ren) at risk. Something that can permanently terminate a spouse's right may be a prolonged prison sentence, or a history of domestic violence which would not seem to end.

Lets go back to time sharing plans, which can be defined as visitation. Traditionally, one parent is deemed to be the majority time sharing parent. The other has time share at a specific schedule. The usual is like it has always been. The non-majority time share parent would have the child(ren) every other weekend, and one or two days during the week. Holidays, birthdays and other annual events are alternated from year to year and summers are divided in half.

This schedule is not set in stone. The spouses can work out their own schedule and then it is at the discretion of the judge whether he or she approves it. If the former spouses live close together, and get along well enough in a post-dissolution situation, they may be able to agree and get approved a 50/50 time share plan (week on, week off). Some judges don't like it because it may represent some instability in how the child(ren) live.

As always, whatever is decided, it must be guided by the idea that it is in the best interests of the minor children.

## CHAPTER 12 CHILD SUPPORT

The issue of child support is probably one of the easier issues to resolve. Especially, if both the spouses are employed and on regular salaries and the children have no special issues, like special educational needs or health problems.

Basically, child support continues until the minor child reaches the age of 18 years old. If the child reaches his or her 18<sup>th</sup> birthday and is still in his or her last year of school and will be on a course to graduate in that year, child support will end at graduation. If the child is 18 and in his or her junior year of school, it will still end on his or her birthday unless the parents agree otherwise. Parents are not responsible for college. They may agree to it and put it in the final order of dissolution of marriage. Then it becomes binding and enforceable by the judge.

Under Florida Statute 61.29-Child support guidelines, each parent is financially obligated to take care of their children. Guidelines for support are laid out under Florida Statute 61.30. The math of it all has been figured out in the infinite wisdom of the Florida State legislature and is reviewed and revised every 4 years.

In Florida Statute 61.30, a chart is laid out for the calculation of child support considering the net monthly income of both parents together, and the number of minor children they have together. Under the coordinated charts, it gives a dollar amount as to what is supposedly costs to raise those children according to the parents' income. Don't blame the attorneys. As stated, Tallahassee figures that out.

Generally, net income is after taxes, Medicare, social security withdrawals, and some mandatory retirement deductions. Attorneys use a child support guidelines worksheet which he or she then supplies to the judge in support of an argument for a certain amount of child support from one parent if the two parents can't agree.

A parent's share of that amount required to raise the children is a ratio of what each parent earns. If both parents earn the same amount, then they share equally in the burden. This is presuming a standard time sharing plan of how much time the children spend with each parent. If there is a major deviation from the standard time share plan, then the amount of child support obligation of the parents will change. Many family law attorneys have software programs to help them calculate the amounts required from each parent.

There are some credits that can be assigned to one parent or another. For instance, if one parent is paying all of required day care or the children's health insurance, he or she will get an adjustment in their favor. As a general rule, 75% of daycare costs are added to the required amount of money to raise the minor child(ren) and then is proportionally divided.

If a child has a special need or has been involved in a special activity, like ballet or piano lessons, and has been for a length of time before the parents decided to divorce, those costs may be taken into consideration as to the support requirements. If the child has a continuing chronic disability of which there is a monthly cost, that will be added to the support requirements.

Now, it may seem that calculating child support is pure black and white procedure. Not true. Sometimes, there are more considerations if the spouses are more than just basic salary employees. The question becomes "What other sources of income does the parent have?" The following is a list of resources that may be considered:

- Wages, bonuses, commissions, allowances, overtime, tips, and other similar payments.
- Business income from sources such as self-employment, partnership, close corporations, and independent contracts. "Business income" means gross receipts minus ordinary and necessary expenses required to produce income.
- Disability benefits: all workers' compensation benefits and settlements unemployment compensation, pension, retirement, or annuity payments, social security benefits.
- Spousal support received from a previous marriage or court ordered in the marriage before the court.

- Interest and dividends distributed on a regular basis from investments, income from royalties, trusts, or estates, such as an inheritance that produces income, not the inheritance itself.
- Rental income, which is gross receipts minus ordinary and necessary expenses required to produce the income.
- Reimbursed expenses or in kind (similar) payments to the extent that they reduce living expenses. That is, covering the hotel expense on a business trip plus a little extra.
- Gains derived from dealings in property, unless the gain is nonrecurring. In other words, no one-time garage sale income unless you have a garage sale every week or month.

Some spouses try and hide income if they have a risk of paying alimony to the other. However, when the issue is child support and one is trying to do this, it will only serve to truly alienate the judge against that party when there is a fight on other issues. Fraud on the court is never a good thing. Especially, when you are talking about the best interest of the minor children.

A complaint often heard by attorneys is that one parent is not taking enough time sharing with the children as outlined in the plan. This means the other parent ends up spending more money. The court can review and adjust payments to compensate for this difference. It also should be noted that this principle extends to non-standard time sharing plans where the children spend more of an equal time with both parents. Again, the child support would be calculated accordingly.

Modification of child support after a previously entered order of support from a judge is possible when one or both parents undergo a substantial change in their incomes. It could be an

increase or a decrease in income. If the amount of support required is subject to a change of 5% or greater, then the court can review its previous support order.

There are many other factors which your attorney take into account when determining what he or she believes is the appropriate amount of child support. **Ask them. You are the client.**

Once each parent's obligation is determined and who pays who, it is now mandatory that payments are made through the **State of Florida Disbursement Unit** in Tallahassee. The paying parent sends his or her check to this unit. The purpose of this unit is to insure proper accounting of child support paid and payment to reach the other parent. The one major problem of this is the delay of getting the money to the children. The added bureaucracy causes delay.

Another tool for the court is the **income deduction order**. If the parent who is obligated to pay is a salaried employee, the judge can use this order to have the employer deduct child support from the paying parent and send it to the Disbursement Unit.

## **MODIFICATION OF CHILD SUPPORT**

There may be times when a paying parent loses his or her job, or has some other downturn in income and can't make the payments of monthly child support according to the existing order. If your divorce litigation is still ongoing and has not reached a final judgment, your attorney can file a motion to reduce the payments after a hearing with proper evidence.

If the support order is part of a final judgment of dissolution of marriage, you have to file and serve a **supplemental petition** to reopen your divorce case regarding child support. The supplemental petition must be served on your former spouse. It must contain the grounds for the modification. The term commonly used is "**substantial**".

**Substantial change** in income is when there is difference between the existing amount being paid from the new projected amount of 15% or \$50, whichever is greater. This also is the

standard if you are seeking an increase of child support because the paying party has a substantial increase in income. After all, should the children benefit by having a better standard of care.

Okay. Here's the catch. The change has to be for reasons not of your making when you are asking for a decrease in child support payments. You quit a job or get fired for cause, that won't work. Lose your job because you are arrested or come to work late constantly or fight with the boss, no change in the support. Move to a new town because of your new friend or spouse, no change. Get laid off because of a downsizing of the company, okay.

When does child support obligations start ? It can be retroactive to the time the parents first separated. However, it cannot be greater than 24 months prior to the filing of a petition for dissolution of marriage. If one files for divorce in April, 2010, the furthest back a judge can go in awarding retroactive child support for a separated couple would be May, 2008.

What if you are paying support on another minor child from a previous relationship ? That amount can be deducted from your gross income when calculating the present support for the child of the current relationship in a child support guidelines worksheet. Sorry, but the younger child suffers financially because of this.

Finally, each parent is required to go to one session course called **Positive Divorce Resolution**. Its intent is to try and make parents understand to focus together regarding the best interests of the minor children above all else, and to keep their issues apart and away from the children. Children over 6 years old go to a course called "**Stepping Stones**" in efforts to help them understand and deal with their parents' divorce.

## CHAPTER 13            MEDIATION AND MARITAL SETTLEMENT AGREEMENTS

Most, if not all judges in Florida, require mediation before a dissolution of marriage case goes to an actual final trial. **Mediation** is a meeting with an independent and certified person, trained to conduct negotiations between the parties of a divorce. The objective is to see if the

spouses can reach an agreement about the issues addressed in this book, and have a final judgment of dissolution of marriage without the aggravating, emotionally drain and expense of having a trial.

All or part of the issues can be settled at mediation. The agreement is reduced to a written agreement and submitted to the court to be included in the final judgment. In other words, it becomes the final judgment upon approval of the court. It can settle all issues from dividing marital assets and debts, alimony, child support and time share, to name some. Even if all the issues are not settled, some can be, and the remaining can be addressed at trial.

At a point in time, after disclosure is completed, the judge will appoint a mediator. The mediator will be contacted and a date will be arranged between the parties and their respective attorneys. The parties will meet with the mediator at his or one of the attorney's office.

The parties may start in the same room, stating their positions , the history of the marriage, and what they may be looking for in the settlement. Before that, the mediator will introduce himself and explain the purpose of mediation and explain carefully that he is not a judge or an advocate for one side or another. His purpose is there to help the parties get to "yes".

The mediator will explain the advantages of mediation. First is that the parties decide how this divorce case will end. Second is the savings in attorney's fees costs by avoiding what may be an unnecessary trial which could be a couple of hours long to weeks long. In settling the case in mediation, the parties control the final judgment. The judge will just review it for legal sufficiency before signing the final judgment of dissolution of marriage.

Most of the times, after the initial meeting, the parties will split up into two separate rooms. Sometimes, the parties start off that way because they just don't get along, or one may have a domestic violence injunction for protection against the other. In that case, they are not allowed to be close together. With this separation, this is where the mediator gets a workout. She ferries offers and counter-offers between rooms. She may make proposals in helping to formulate

these offers, like finding solutions to certain problems. The mediator sometimes has to be very imaginative.

There are different types of mediators, meaning their personalities and how they approach their job. When suggesting, choosing or agreeing to a mediator, the lawyers will look at the personalities of the clients. Maybe one spouse needs a more direct and “take charge” mediator to shake him or her up, and bring reality to the table. If the parties are the sensitive type, or need his or her ego catered to, the attorneys may want a mediator who knows how to play to them. Sometimes, the attorneys don’t really like each other, so the mediator has the displeasure of dealing with them.

As stated earlier, most divorce cases do settle in mediation. The key is compromise. Both parties must come to the table with a give and take attitude. The mediator wants to settle the case. It helps his or her reputation with the lawyers and the judges in that he or she can get it done, and save everybody future aggravation.

A law professor walked into class and asked, “Who do you think controls in a divorce?” All the eager little future lawyers hands bolted up. “The judge does!” , “The wife does !” , “The husband does because he has all the money !” , “the lawyers do!”. Of course, they were all wrong. The answer a lot of times is the one who wants out the most. The reason is that he or she will sacrifice the most to get out of the marriage.

## CHAPTER 15            FINAL TRIAL

Mediation has failed. Disclosure and depositions are done. Witness and evidence lists are submitted. Barring a last minute settlement on the courthouse steps the morning of trial, a trial to present evidence and testimony is laid out before the judge. He or she is the referee, fact finder and decision maker. The spouses’ futures will now be in the hands of the court.

After opening statements, the **petitioner** (the one who filed first) presents his or her side of why they want a divorce, what the assets and liabilities are, their particular needs for alimony

or not, child time share, child support and all the other little issues, to the judge. The **respondent** (the person answering the allegations) who is also the counter-petitioner, does the same next, and can present rebuttal information if something was not truthful earlier.

Your attorney will go over the evidence and course of the trial with you. Your testimony must be forthright and truthful to the best of your knowledge. If you have to give a different answer than one you gave in written interrogatories or depositions, you have to give a plausible explanation as to why. If you are unsuccessful about your reasons for changing answers, the judge with doubt your credibility, and it may put your interests at risk.

**If you are going to commit fraud by lying on the stand, all that can be said about it is don't !** There are new rules for lawyers that if they know you are going to commit fraud on the court, the lawyer has a positive duty to report it to the judge. And obviously, he or she will probably withdraw from your case.

Charts, diagrams, and spreadsheets may aid the judge in understanding the financial picture of a case that has complex financial holdings to resolve. These items can be presented to the court in aid of arguments but not as pieces of evidence themselves. Leave the rules of evidence to the lawyers. That's why they went to law school.

At the end of the trial, each lawyer will make a closing statement, and make requests as to what his or her client should be entitled to in the final judgment. They may present a proposed draft of a final judgment to aid in their own closing arguments, and also to present to the judge to help him decide.

The judge may make some decision on the spot but most of the time, he will take the case “**under advisement**”. That means he wants time to think it over and or write his own order in his chambers. It may take a day, it may take weeks. That depends on the case and the judge.

Once the final judgment of dissolution is signed and entered into the court clerk records, its orders are the judge's orders, and must be followed by the parties. If an attorney sees

something that is legally wrong in the order or during the course of trial, he or she has 30 days to file an appeal to the Florida District Court of Appeals in that jurisdiction. This the superior court that reviews problems that may have occurred before your judge. An example would be if the judge allowed evidence or excluded evidence from trial when the rules say it should be allowed. He or she may try a motion for reconsideration or rehearing. A lot of times, those motions fail.

If the court of appeals finds that there was an error, they will send the case back to the judge to review it with instructions on how to correct it.

## CHAPTER 16 AFTER THE FINAL JUDGMENT

The excessively hard part is done. And if you are lucky, and the divorce had minimal and simple issues, that is the end of it. The final judgment should spell out the obligations of each former spouse and it is each one's duty to fulfill his or her duties under the judge's final order. Property has to be divided, alimony and or child support must be paid, time share must be adhered to, etc., etc. . Each final judgment of dissolution of marriage may be a bit different to suit the situation.

What happens if former spouses dispute the meaning of a specific obligation in the order because it may appear vague or they just argue about it ? If the parties can't work it out, then one lawyer or the other involved will submit a **motion** in aid of final judgment to get the judge to say what he intended. Motions are generally used to ask a judge to do something in your case, such as asking for temporary alimony or exclusive use of a marital home during the divorce proceedings.

## CONTEMPT

If one former spouse refuses, or can't fulfill his or her obligation, then he or she may be subject to a contempt action. **Contempt** is when there is an order by the judge because the person is failing in his or her obligation to perform. It can be unintentional, such as when parent has lost his or her job and can't pay child support or a former spouse can't pay alimony.

In order for a party to avoid a situation where he or she may be in contempt for failure to some form of support because they have had a loss of income, that person should consult an attorney about filing a motion to abate, or temporarily stop that obligation. This is also supplemental petition to modify the final judgment regarding those payments. Better to be proactive than suffer the wraith of the court.

If a person fails to live up to his or her obligation pursuant to the judge's order, the other party can file a motion for contempt. There are two types of contempt, civil and criminal. For the purposes of this book, I will stick with **civil contempt**.

If a party fails to pay his or her child support or alimony payments, and a motion for contempt is filed, it would be best that if at all possible, the back payments are paid in full prior to any hearing on the motion. A popular saying is that "money is the key to the jailhouse door". If one is behind on his or her support obligations, that person runs the risk of having his or her driver's license suspended until otherwise determined by the court.

If a person just does not have the means to pay his or her obligations, and it is clearly obvious to the judge, the judge can not send that person to jail. If the person does have means to pay support, the judge may order him or her to do so within a certain period of time, or have them report to jail. Then, the only way out of jail is to somehow get that "purge" amount paid, and the sheriff will let that person out. Purge amount is that sum of money needed to be paid to erase the requirement of the spouse having to go to jail.

The offending party may be held liable for the other's attorney's fees and costs in connection with this motion, and they may be ordered to reimburse the other. or his or her attorney directly.

The principles of contempt are not just limited to the support issues but all aspects of the final judgment. If you don't do what you are supposed to, then that is problem between you and

the judge as much as between you and your former spouse. After all, you are violating the judge's order. Judges don't like that kind of indifference.

So, if you owe support, get it done. If you need to give back property to your former spouse, get it done. If you have any problems in complying with a judge's order, talk to your attorney.

## CHAPTER 17 CHOOSING AND USING A FAMILY LAW ATTORNEY

I get many people into my office who go as far as the Yellow Pages only when looking for an attorney to represent them in a divorce case or other family law matter. Some go to the internet. Though it is a bit better for getting information from an attorney's website, it is still not enough. Divorce and family law are too important to a person to hap hazardly choose an attorney to do battle in court.

Once you find an attorney in the Yellow Pages, look him or her up on the internet. Look their website. Mind you, those are authored by the attorneys themselves, but The Florida Bar forbids an attorney from false or misleading advertising. See what that attorney's major areas of practice are. If a good part of his or her practice is not devoted to family law, be wary. If you have a simple divorce case with no children or assets, he or she may be satisfactory.

Google his or her name for other information about that attorney. You may find articles or reviews about that attorney. Also, contact the Florida Bar and make sure they are in good standing. Do they have any "grievances" or complaints against them? What is the nature of those complaints? Cursing, unless majorly offensive to you, is not fatal to choosing an attorney, but failure to attend hearings or maintaining contact with clients or stealing from the office trust account is.

How long has the attorney been in practice and practicing in the area of family law? The more complicated your divorce may present, the more experience you want your attorney to have. If an attorney has 4 or 5 years in the practice of family law, and it is a good part of his or

her practice, they should have the right experience for handling the average divorce with the average issues such as alimony, and minor children issues. If there are more complex issues, such as one of the spouses owns his or her own successful business, or there are many assets involved, you are going to want an attorney with experience in assets evaluation and who has access to expert tax advisors.

I asked perspective clients who come in how they found me. I love it when they say their friends or family members have used me. It is not only a matter of tracking advertising, but knowing that people were satisfied enough with my services to recommend me. If someone just says that got me off the internet or the Yellow Pages, I ask them to ask around. I also tell them that in interviewing attorneys, if one promises you anything, run out the door.

There is also the use of the term “expert”. An attorney is not allowed to use that term or the term, “specialize” unless he or she is “board certified” by The Florida Bar. This shows a certain level of participation in his or her practice. The attorney has to have had a certain amount of trials under his or her belt, take certain courses, and pass a rigorous certification test. This is at the discretion of the attorney whether or not he or she gets certified. However, some of the best family law attorneys I know in North Florida are not certified, and I would have no problem using them in a case against “board certified” attorneys. The one thing you can be sure of is this; the “board certified” attorney will probably be more expensive.

Sometimes, it is not a good correlation that the more expensive an attorney is, the better he or she is. Good representation is not cheap, but you should get the proper services for your money. A good and ethical attorney will not “churn” billable hours to increase his fees. Each event undertaken by an attorney should be in good faith, and in best interests of the client. The attorney should periodically give you an itemized invoice of what he or she has done, and maintain contact with you.

In keeping contact with a client, please understand that the attorney may be very busy. They do have an obligation to return telephone calls and emails within an appropriate amount of time. I try to reply within 24 hours unless I am out of town. But the client must understand that

the attorney can't constantly handhold him or her, and if the attorney does, the client will probably get billed for it. Calling 5 days a week for non-emergency issues is not advisable. I suggest saving up a lot of questions for one session when necessary. Save yourself some money. If you have to call for an emergency, call. If you actually need the police, call them, such as in a true child-knapping or domestic violation situation. Then, call your attorney.

The bottom line question will be if you are comfortable with your attorney and have faith in him or her. Also, keep in mind that it is a team effort between you and your attorney. You will have your homework and obligations in helping them prepare for your case. This is the way it is. The attorney can't do everything. They will need your cooperation. Listen to their advice. If there are real problems in trust, you may not be with the right person.

If you seek another consultation during your divorce, don't tell the consulting attorney who you are dealing with. He may be shopping hard for another client. Just ask them about the situation. I always first recommend to a consulting perspective client to try and speak to his or her attorney to clarify any confusing issues, or to attempt to fix the attorney client relationship.

## **FEES AND COSTS**

A fee is the actual money that the attorney receives from his or her personal labors. It is usually on a per hour rate with a minimum initial retainer which hours are deducted from. The attorney may have a different rate for when their secretary or paralegal are used or contacted by a client. That may help your money last longer. When the retainer is used up, the attorney may require further "up front" money to continue work, or bill you periodically. If it is case where the opposing spouse has sufficient funds, the attorney may try and get the remaining fees by order of the court or in settlement.

Costs are items like court filing fees, sheriff's fees for subpoena service, court reporters, and or deposition transcripts. These are separate from attorney's fees. They can be handled two ways. First, the client provides an attorney with a certain amount of money which is put into the attorney's trust account. As a cost is incurred, the attorney draws from that amount to pay it. The

second way is that arrangements are made for the client to pay them directly. The first way is the most common practice. The attorney must provide you an accounting of what he uses that trust money for and give you back any unused portion at the end of your case.

Attorneys' trust accounts are strictly governed by The Florida Bar. The fastest way for an attorney to be penalized by the Bar by suspension or even disbarment, is to wrongly use or abuse that trust account.

## CHAPTER 18            IN SUMMATION

As stated in the introduction of this book, this is not a tutorial manual as to how to conduct a divorce proceeding or to instruct other attorneys. There are no charts or sample forms for use. To provide those would create more confusion and problems between you and an attorney who is performing well. By creating more questions, it defeats one of the intentions of this book which is to reduce your questions your attorney would bill you for in client-attorney conferences where the clock is running on your billable hours.

Be patient with your attorney. Yours is not the only case he is working on. It is okay to ask questions. Many issues are not addressed in the book. This is an overview. Also, your case may be different than the next. Rarely, is there a cookie cutter case. Have a good working relationship with your lawyer. He or she is on your side. Make sure you have a relationship on well-earned faith and trust.

If you have questions that are not of an emergency, you can try and look them up on the internet. You may even ask friends, however, beware of the "sidewalk attorney". They are not lawyers and quite often, have an inaccurate view of the law.

Hopefully, when your case is done and your dissolution of marriage is final, you can move on to more happier days and put this dark time in your life behind you. Remember, divorce is about ending a bad relationship, not revenge.

## AUTHOR'S BACKRGROUND



JAMES S. WERTER

Born April 17, 1954, and raised in New York City, James S. Werter, graduated from John Jay College of Criminal Justice, New York, after finishing an enlistment with the U.S. Air Force as a Security Policeman. He continued his law enforcement career as a Detective Investigator with the Brooklyn District Attorney's Office and as a Senior Investigator with the N.Y.C. Mayor's Office before re-entering the military as an officer in 1981.

James S. Werter entered the U.S. Navy as an Officer/Pilot with collateral duties in security, eventually cross-training in Naval Intelligence, assigned to Naval Investigative Service as a Reserve Officer/Agent while attending law school.

Upon his separation from active duty, James S. Werter, attended University of Bridgeport School of Law, Connecticut, graduating in 1990, receiving his Juris Doctorate and winning awards for Outstanding Legal Scholarship and Excellence in Legal Writing. Immediately after graduating, he returned to Florida where he spent his Navy career, beginning his law career as a prosecutor for the State Attorney's Office, Seventh Judicial Circuit, Daytona Beach, Florida. After three years, he opened his private practice and stayed in the northeast Florida area. Additionally, he taught law classes at Daytona Beach Community College.

Over the years, James S. Werter, J.D., has handled a great number of family law cases, such as divorce/dissolution, paternity, child support, domestic violence. He has prosecuted and

defended a wide range of criminal offenses, practicing in both misdemeanor and felony courts throughout the Seventh Judicial Circuit of Florida. He counsels in the areas of bankruptcy and debt relief in the U. S. District Court, Middle District-Jacksonville.

James S. Werter has made numerous media appearances, such as the Nancy Grace Show, “Issues” with Jane Velez Mitchell, and The Dr. Phil Show, as well as appearances on CNN, HLN and local Jacksonville news shows.