

SILENT PARTNER

DIVORCE

*INTRODUCTION: **SILENT PARTNER** is a lawyer-to-lawyer resource for military legal assistance attorneys. It is an attempt to explain broad generalities about the law of domestic relations. It is, of course, very general in nature since no handout can answer every specific question. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page. The text below is based on the TJAGSA outline of family law.*

DIVORCE PROCEDURES IN GENERAL

At the outset it is essential to know that there are *two kinds of divorce jurisdictions* in the United States:

- “One Claim at a Time” One type of jurisdiction, represented by states such as Delaware and North Carolina, allows the granting of a divorce without reference to any other claims for relief. Once the no-fault grounds exist, the plaintiff can file for divorce and, within proper time, have a divorce granted to him or her.
- “The Package Approach” The other type of jurisdiction, represented by New York and Wisconsin, only allows a divorce after all marital claims have been settled or tried. The resolution of these marital issues -- property division, alimony, custody and child support -- must have been accomplished by agreement or litigation before the court will grant a divorce to the parties. It is in these cases where we hear the client say, “she won’t give me a divorce.” This means that the other party will not settle the case, thus allowing a divorce to be granted. In reality, however, it is always the judge who grants the divorce, not the other party. If the other side will not settle, then the only alternative for the one who wants the divorce is to press his case and ask for a trial.

JURISDICTION

The first issue in divorce is jurisdiction. The fundamental prerequisite for divorce is that the court must have due process minimum contacts with one of the parties in order to exercise jurisdiction over the marriage for the purpose of marital dissolution. The exercise of jurisdiction is usually based on specific statutory language which addresses either domicile, residency or both within the state for a specified period of time.

Some states have specific provisions allowing military personnel assigned within the state to maintain a divorce action if they meet a period-of-residency requirement, regardless of domicile. Be wary of such statutes, however, and be sure to research them in your jurisdiction to find out whether they truly allow “waiver of domicile,” since the domicile of one of the parties is essential to the valid divorce. To give but one example, in North Carolina this statute appears to provide for the granting of a divorce to military personnel who have been stationed in North Carolina for at least six months pursuant to military orders. A close reading of the cases that interpret this, however, indicate that it was not meant to waive domicile as a requirement for divorce; it was simply intended to state that a military member who resides on a base in North Carolina, which is subject to exclusive federal jurisdiction, is still deemed to be “within the state” for purposes of filing for divorce so long as his or her domicile remains in North Carolina.

The court's in personam jurisdiction over a defendant is not required to terminate the marriage. In rem jurisdiction is sufficient since the court is merely adjudicating a status (marriage), rather than creating or dissolving specific duties and obligations.

In personam jurisdiction is necessary in matters of property division and spousal support. There are specific jurisdictional provisions set out under the Uniform Child Custody Jurisdiction Act (UCCJA) regarding custody, and the Uniform Interstate Family Support Act (UIFSA) for child support.

There are also specific federal jurisdictional rules for the division of military retired pay under USFSPA. A court may not exercise jurisdiction over the division of retired pay as property unless this jurisdiction is based on the soldier's consent, the soldier's domicile in that jurisdiction or the soldier's presence there for reasons other than military orders.

GROUND FOR MARITAL TERMINATION

Some of the more common fault grounds that are used for divorce dissolution include adultery, drug addiction or habitual drunkenness, abandonment or willful desertion, cruel or inhuman treatment (also called "indignities"), lengthy imprisonment for conviction of a felony, sodomy (or "crime against nature"), and commitment to a mental hospital. Once any of these grounds is proven, a divorce may be granted.

DEFENSES

Occasionally a client wishes to contest a divorce based on fault grounds. Some states allow such a defense based on one of the following three doctrines:

- Collusion (the "innocent party" assists the guilty party in committing the fault);
- Recrimination (the defendant is "equally at fault" due to some bad act by him or her); and
- Reconciliation (although the wrongful act occurred, the "innocent party" has forgiven the guilty party, either expressly by words or implicitly by continued cohabitation).

It is much harder to defend against a no-fault divorce. All states now have some form of no-fault divorce or dissolution. Many states are "pure no-fault" states, meaning that a no-fault ground is the only basis for dissolution of the marriage. These states include Arizona, California, Colorado, Florida, Hawaii, Iowa, Kentucky, Michigan, Minnesota, Montana, Nebraska, Oregon, Washington, Wisconsin and Wyoming. The remaining states are "hybrid no-fault" states, meaning that they have added a no-fault provision to their other statutory fault grounds.

PROCEDURE

It is relatively easy to establish and proceed with no-fault grounds for a divorce. At a minimum, this simply consists of one party asking for a divorce. Most states add as a condition that the parties live separate and apart for a period of time, varying from six months to two years. Some states also require that the parties enter into a separation agreement in order to proceed on a no-fault basis. The procedure for obtaining a divorce, in general, is as follows:

1. One party (or that party's lawyer) prepares a petition or complaint for divorce or dissolution. It's signed by the party and/or the attorney, and it sometimes must be "verified" (sworn to before a notary public);
2. This is then filed at the courthouse and a summons is issued by the clerk, directing that the defendant or respondent has a certain period of time in which to answer the complaint or

petition after it has been served on him or her (usually 20-30 days);

3. The summons and complaint or petition are served on the defendant/respondent, usually by certified mail, return receipt requested, or by process-server or sheriff (although sometimes defendant is served by first-class mail and accepts service of process, which is also valid);
4. If the defendant chooses to answer, he may admit or deny the specific allegations set out in the complaint (simply by listing "admit" or "deny" next to each of the numbers corresponding to the allegations in the complaint), and then serving his answer on the plaintiff and filing a copy at the court.
5. If the defendant does not respond, a divorce will be granted by default;
6. In some states the defendant may obtain an extension of time through the clerk to allow an additional 20 or 30 days in which to file an answer.

It is at this point also when the defendant needs to consider filing a counterclaim. In many states the issues of equitable distribution and alimony are foregone if they are not asserted before the granting of a divorce. In the case of a military pension, in particular, it is vitally important to assert this claim as soon as the divorce complaint is served. Consult with competent co-counsel from the jurisdiction involved so that no mistakes are made. A mistake in this area can amount to a very expensive claim against the government for malpractice.

Once the responsive pleading is finished, it needs to be signed by the party or his or her lawyer and it must be served on the plaintiff/petitioner or, if represented by counsel, that party's attorney. One must also prepare a "certificate of service" to be filed in the court case, showing that such service upon plaintiff/petitioner or that party's attorney was accomplished. The responsive pleading is mailed back to the clerk's office (original plus one copy) to be filed and so that the additional copy, once it is "clocked in" and date-stamped, can be returned to the responding party. One additional unfiled copy is served on plaintiff/petitioner or the attorney for that party.

DEFENDING AGAINST NO-FAULT DIVORCE

There's usually no defense to a no-fault divorce, other than in some jurisdictions the requirement for short-term marital counseling. This doesn't mean, however, that a no-fault divorce must go through as quickly as plaintiff desires. Few defendants really want to contest a divorce; sometimes they just need more time. This can be accomplished in most jurisdictions by a request for extension of time. If this is requested before the answer is due, an additional period of time will usually be allowed by the clerk.

In addition, since divorce complaints are so routine these days, occasionally one is missing an essential element and may be subject to a motion to dismiss. Rather than attempting to accomplish this sort of "microscopic examination" under the divorce statutes and the rules of civil procedure, the legal assistance attorney should refer this client to a competent divorce lawyer for assistance.

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