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Shepherding you safely through difficult family transitions!

DIVORCE IN NEW YORK – THE DIVORCE-LITIGATION PROCESS

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THE DIVORCE-LITIGATION PROCESS

An Overview of the Litigation Process

In a nutshell, a divorce starts with a summons, the parties then go through a period of "discovery" (explained below) to prepare for trial, go to trial and await a decision by the judge. The judge's decision forms the basis for a "judgment" which then gets "entered" by the court. At any time the parties can voluntarily reach an agreement or "settlement," and a judgment can then be based on that and entered (*see* Stages of Litigation).

The typical issues parties deal with in a divorce include determining what is their joint marital property and what is only one party's separate property; how much their marital property is worth and how it should be fairly distributed; with which parent should the children live, which parent should make the important decisions concerning them, and how much time and when the children should be with the other parent; how much child support should be paid by whom and

to whom; and should one spouse pay temporary and/or post-divorce spousal support (called "maintenance" in New York) to the other, and in what amount.

Required residence: In order to get divorced in New York, New York State needs to have a substantial connection to your marriage. That means that you either had to: (1) have been married in New York State and you or your spouse be living here for at least a year when one of you started the divorce action; (2) have lived here with your spouse as a married couple and one of you still lives here and has lived here for at least a year; (3) have grounds for divorce arise within New York State and one of you have lived here for the year immediately preceding the commencement of the action; (4) have the grounds for divorce arise within New York State and you are both living here at the time the divorce action is commenced; or (5) lived here yourself, or your spouse lived here, for at least two years. *Domestic Relations Law* § 230. Aside from this residency requirement, there is no waiting period to get divorced. Some of the grounds for divorce, however, do include some time constraints. So, for example, when suing for divorce based on the "irretrievable breakdown of the marriage," DRL § 170(7), the breakdown had to last for at least six months.

Confidentiality of the Records: By law, all matrimonial records are sealed and confidential for one-hundred years, DRL § 235, and the Court and its personnel may not release them to anyone but the parties themselves or their attorneys of record. (That does not, however, prevent one spouse from plastering the neighborhood with information that is pejorative to the other. To combat that, Courts have typically put limitations on who has access to the forensic evaluator's reports.)

Uncontested Divorces: If the parties can agree on all of the terms of their divorce, then lawyers can prepare the paperwork and submit the papers to the Court for the judge's signature without the parties ever having to step foot inside the courthouse. Obviously, this is much more convenient and, assuming the parties do not fight endlessly to reach an agreement, usually cheaper than litigating the issues to a judge.

Obviously, each of these issues can be extremely complicated or can be made so, intentionally or inadvertently. Thus, the choice of counsel is critical (*see* Choosing the Right Lawyer and The Superior Lawyer).

The Litigation Process In More (though not all of its) Detail

A divorce begins when one spouse files a summons with notice (or a summons and complaint) in the Supreme Court, typically in the county in which the parties live, thereby "commencing" an "action." The summons and accompanying papers must be served upon the other spouse, who then has a certain limited number of days (depending on how and where the person was served) to formally "appear in the action" or file an "answer" in response to the complaint (if one was served). (The person commencing the action is known as the plaintiff. The person against whom the action was filed is the defendant. Together they are called the "parties,"

and each a "party.")

When this occurs, the parties are then subject to what is known as the "Automatic Orders." Pursuant to Domestic Relations Law ("DRL") § 236[B][2][b], the parties are then restricted from transferring money, making unusual purchases, terminating the other party's insurance coverage, or taking other specified actions to harm the other spouse or conceal or spend their money.

Typically, the parties are then summoned to appear in court at a preliminary conference.

Each party is required to give the other and to file with the court a fully-completed statement of net worth prior to the preliminary conference. The statement of net worth is the financial equivalent of a colonoscopy, declaring all of the party's income and expenses, assets and liabilities.

At the preliminary conference, the judge will issue a preliminary conference order setting out the discovery schedule and a tentative date for the divorce trial.

The parties then proceed to discovery. Discovery is the method of obtaining from the other party all of the information you need to successfully present your case to the court. It also provides your spouse an opportunity to obtain from you all of the information your spouse needs to present their case successfully to the court. Obviously, the discovery you need depends on the case you want to mount and the defenses you intend to assert. Thus it is particular to the facts of your case.

There are four primary ways of obtaining discovery, all controlled by article 31 of the Civil Practice Law and Rules (the "CPLR"). There are "interrogatories," document requests, depositions and demands for admissions. When utilized wisely, they are invoked in the following order and manner: "Interrogatories" are questions that must be answered by the party in writing and under oath. Wisely used, interrogatories ask only for "hard" information and not anything that requires a subjective response. Proper interrogatory questions might be "Who was present when [a particular contract] was signed?" "What are the names and addresses of the owners of the [XYZ Company]?" "Did you receive an employment contract when you were hired by [the XYZ Company]?"

After the existence of critical documents are established and identified by the interrogatories, a party should issue a demand for the necessary identified documents (known in parlance as a "Notice for Discovery and Inspection"). Such a demand requires the responding party to assemble and produce copies of all of the requested documents.

After a party has had an opportunity to examine and digest all of the relevant documents, the party should "notice," *i.e.,* schedule, the deposition of the opposing party and

subpoena other required witnesses to appear for deposition. Depositions require the person to be deposed to show up at a designated time and location (usually the office of the lawyer issuing the deposition notice), swear to tell the truth, and answer the attorney's questions while a stenographer records the questions and answers.

Preparing smart interrogatories and later document demands requires some thought and consideration. That pales, however, to the preparation required for the taking of a deposition. Preparing a deposition, like preparing for trial, is like choreographing a play that will have a very limited run and a very limited audience . . . but could be critical to the outcome of the litigation. There are several reasons to take the deposition of an adverse party and witnesses and, if none of them apply, then perhaps you should forego taking that person's deposition.

First, a deposition should be used to obtain information that is needed for trial. Any information that is more nuanced, subjective, or involved than "Who was present at the Tuesday, July 17, 2019, meeting at the Law Firm?" cannot practically be obtained by interrogatories and, therefore, requires a deposition.

Depositions should also be used to "lock down" the witness's testimony on any information they might testify to at trial. By locking in their testimony, the lawyers can then prepare for trial by assembling impeachment material and knowing what the other parties and witnesses will have to say.

Finally depositions can be used to give the other party at taste of things to come. Many delude themselves into thinking and believing that they can proceed to litigation with even a weak case. They are accustomed to squirming out of tight situations and they therefore believe that they can talk themselves out of anything. "Noticing" or subpoenaing them for a deposition and then confronting them with the evidence that contradicts their testimony is a strong motivator for a party to settle rather than face a grueling cross-examination in open-court in front of a judge and several court officers.

Thus, to prepare for an effective deposition, counsel must have intimate knowledge of all of the relevant facts of the case, the law and decisional authority that control the facts, the claims and defenses of each party, and each party's "theory of the case." A litigator who makes sure to be well-prepared will assemble all of the relevant material into a deposition binder so that, when a witness gives a "wrong" answer, the litigator can confront the witness immediately with the contradictory evidence. (This demonstrates powerfully to the other side that the litigator is always prepared, has mastered the law and facts, and is not to be trifled with.)

Finally, after all the depositions are taken, a party might issue requests for admission to cleanly establish facts that aren't really in dispute, so that they can quickly and easily be submitted to the court as part of the party's case.

When discovery is complete, a party files a Note of Issue and Certificate of

Readiness, certifying that the case is fully prepared and ready to go onto the court's trial calendar. A trial is then ready to be set. After a Note of Issue has been filed, the lawyers lose the power to conduct further discovery unless the Court grants them "leave" to do so.

At trial, the lawyers may make opening statements laying out the case they intend to present. When both lawyers (or all three, if the court has appointed an attorney for the children) have done so (or waived their rights to do so), the plaintiff, going first, calls its first witness. Plaintiff's lawyer asks the witness questions (any questioning of a "friendly" witness is called direct examination; questioning of an adverse witness is called "cross-examination"), until the plaintiff's lawyer has elicited all of the information from the witness that the plaintiff wants, and has introduced all of the exhibits that this witness can authenticate and establish a foundation for. The defendant's lawyer then has an opportunity to cross-examine the witness on any matters the witness has testified to. When the defendant's lawyer is done, the plaintiff's lawyer can rehabilitate the witness through "redirect examination," the defendant's lawyer then gets to "re-cross," the plaintiff's lawyer gets to re-re-direct, and so on, until either the lawyers say they are done or the judge cuts off the examination as being unproductive.

When the first witness is done, the plaintiff then calls the plaintiff's second witness and the same process is repeated with the second witness. Then the third, and so on, until the plaintiff has called all of its witnesses. The plaintiff then "rests" and the action shifts to the defendant. The defendant then calls defendant's first witness, utilizes direct examination to elicit favorable testimony, and the plaintiff cross-examines. The process used for plaintiff's witnesses are reversed for the defendant's witnesses and repeated again and again, until the defendant has established all of its claims and defenses. When the defendant has completed doing so, the defendant rests. The plaintiff is then given an opportunity to call "rebuttal" witnesses, and then the defendant, until they are all done or the court is satisfied that each has had a full and fair opportunity to present their cases.

When it is all presented, the lawyers may be given an opportunity to make closing arguments either in person or, more likely in divorce cases here in New York City, by post-trail memoranda. The court accepts them all and, ultimately issues a decision. The lawyers then prepare a judgment in accordance with the judge's decision and the judge signs it. Assuming the divorce is granted, the parties are then divorced.

Obviously, this is a general overview with overarching descriptions. There are tomes justifiably written on each minute aspect of each of the elements listed above and we happily share those, and the tactical and strategic implications of the procedural and substantive machinations with our clients so that they are well-positioned and knowledgeable about what is going on and what to expect in the courtroom.

As chair of the American Bar Association's Family Law Section Custody Committee and a member of the Executive Committee of the New York State Bar Association's Family Law Section, Chaim is uniquely qualified to help you through this immensely complicated and intricate

process.

NOTE: *This monograph is intended as an educational guide and <u>not</u> as legal advice. Legal advice should only be obtained from a qualified lawyer who is familiar with all of the facts and circumstances of your matter.*