

CAUTION

This booklet is intended only as an overview of the general law related to divorce in the State of Mississippi. It is not intended to replace the advice of a lawyer and is not a guide for handling your own divorce. The information provided is intended to familiarize you with the laws and procedures governing divorce in Mississippi, which are probably foreign to you, but it is not intended to be advice related directly to your particular situation. This booklet is designed to compliment your relationship with your attorney and not to replace your attorney. If you rely on this booklet, and not upon the advice of a competent attorney, experienced in domestic relations law, you are courting disaster.

This booklet was drafted in February of 2002 and it covers the laws governing divorce and some other domestic relations matters as of that date. I hope that it will answer a lot of your questions and give you a great deal of useful information about the road you are about to travel. However, it is important to remember the shortcomings of any short legal article of this type. Some of those are as follows:

-This booklet covers only Mississippi law and the law of any other state may be substantially different.

-Almost daily, the law of the State of Mississippi changes as a result of new statutes, amendments to old statutes, new decisions by our appeals courts and changes to the rules governing practice in the courts.

-There are differences in the way that matters are handled in different judicial districts within the state of Mississippi and there are even differences in the ways particular judges perceive and rule on matters before them.

-Most of the legal concepts and rules stated here are general in nature and may have exceptions that are not covered here but which may have great impact on your particular situation.

-Your case will depend on your particular fact situation and, although there may be similarities in many domestic relations cases, virtually all have differences that make them unique.

-The facts of each case are decided by a Judge and what you believe to be the facts may or may not be what is ultimately considered by your Judge.

INTRODUCTION

Divorce is, even under the best of circumstances, traumatic. It ranks with loss of a loved one or loss of long-term employment when you look at the stress caused by an

event. It is something that most people wish to avoid but when they finally make the decision to act, they want to get it over with as quickly as possible. Unfortunately, that may not be in your best interest and is frequently not possible.

The first thing you need to decide is whether or not you really want a divorce. If you want to preserve your marriage, that is exactly what you should try to do. If you think there is some chance of saving your marriage and you wish to do so, please talk with your husband or wife and explore counseling. There are many individuals and agencies who may be able to help you through whatever crisis you are experiencing in your marriage. All efforts to save your relationship should be exhausted before turning to the legal process.

Attorneys are not marriage counselors and the advice you get from your attorney may be incompatible with your desire to save your marriage. If and when you are convinced that living apart from your husband or wife is best for you, talk to an attorney before you make any drastic changes in your life. Obviously, if there is danger, it may be necessary to move out of the home or take other steps dictated by the need to protect yourself or your loved ones.

The balance of this booklet is based on the assumption that you have decided that divorce is inevitable and you are ready to act. This means that you are seeking representation by an attorney and need to know something about the mysterious legal process and what you can expect. If that is where you are today, please read on.

CAN YOU GET A DIVORCE?

Unlike many other states, Mississippi is fairly strict when it comes to divorce. It has been said that this state "jealously protects" the marital relationship by preventing married couples from dissolving their marriage unless there is a specific justifiable reason for divorcing. There is a good argument that this is an antiquated notion but our Supreme Court has made it clear that until the Legislature acts, divorces will be granted only in limited circumstances. There are 13 grounds for divorce in Mississippi and those are as follows:

1. Natural impotency;
2. Adultery, unless it should appear that it was committed by collusion of the parties for the purpose of procuring a divorce, or unless the parties cohabited after a knowledge by complainant of adultery;
3. Being sentenced to a penitentiary, and not pardoned before being sent there;

4. Willful, continued and obstinate desertion for the space of one year;
5. Habitual drunkenness;
6. Habitual and excess use of opium, morphine or other like drug;
7. Habitual cruel and inhuman treatment;
8. Insanity or idiocy at the time of the marriage, if the party complaining did not know of such infirmity;
9. Marriage to some other person at the time of the pretended marriage between the parties;
10. Pregnancy of the wife by another person at the time of the marriage, if the husband did not know of such pregnancy;
11. Either party may have a divorce if they be related to each other within the degrees of kindred between whom marriage is prohibited by law;
12. Incurable insanity;
13. Irreconcilable differences.

The first twelve grounds listed above are quite different from the last, irreconcilable differences. They are grounds that cannot be used by agreement of the parties. Irreconcilable differences, on the other hand, requires at least some agreement by the parties and is the preferred ground for divorce because it does not require that one party prove wrongdoing or fault by the other.

A divorce on the ground of irreconcilable differences, which is often called "no-fault," may be obtained if the parties can agree on resolution of all issues they have between them. This includes everything involving children (custody, visitation, support, medical expenses, etc.) if you have them, as well as the division of property and the payment of debts. It is also possible to agree upon a divorce on the ground of irreconcilable differences and submit some or all of the unresolved issues to a judge.

The other twelve grounds set forth above require proof of entitlement. Your testimony alone will not be sufficient to obtain a divorce on one of those grounds because, in Mississippi, you must have corroboration. That is, there must be some outside evidence to support your claims. That may be provided by other witnesses, photographs, videotapes, audio tapes, or combinations of these things. This, of course,

creates problems because frequently the conduct, which would be the basis for a divorce, is not seen by others, except possibly children of the marriage. Very young children cannot be witnesses and many are reluctant to use older children for fear of the damage it may do to the child or to the relationship between the child and the other parent. You will need to discuss all potential grounds for divorce with your attorney thoroughly and consider all potential witnesses so that your attorney can make an assessment as to whether or not you can prove your grounds.

Although the first twelve grounds for divorce listed above are fairly self-explanatory, there is some confusion about No. 7, habitual cruel and inhuman treatment. In Mississippi, that normally refers to conduct that either (1) endangers life, limb or health, or creates a reasonable apprehension of such danger, rendering the relationship unsafe for the party seeking relief or (2) is so unnatural and infamous as to make the marriage revolting to the non-offending spouse and to render it impossible for that spouse to discharge the duties of marriage, thus destroying any basis for its continuance.

ANNULMENT

Annulment of a marriage is different from a divorce. If annulled, it is as if the marriage never occurred. Most fact situations entitling a person to annulment are unusual and you need to discuss your particular facts with your attorney.

LEGAL SEPARATION

There is no "legal separation" in the State of Mississippi. Some people confuse "separate maintenance," which is available, with a legal separation. They are not the same. In Mississippi, a person can sue for separate maintenance when they have been deserted by a spouse or when they have been driven from the home by conduct, which would normally give rise to a divorce. When a court in Mississippi orders separate maintenance, it is actually ordering the offending spouse to return home or to cease inappropriate conduct so that the other can return home. Pending that change of heart by the spouse at fault, he or she may be ordered to assist in the support of the other as well as any children born to the marriage. Except in the most unusual circumstances, we recommend that our clients not seek separate maintenance. It usually turns into a divorce and you simply increase your expenses and the time involved by engaging in two separate lawsuits; one for separate maintenance and one for divorce.

CHILDREN'S ISSUES

If you and your current spouse have one or more children who are not "emancipated," that may well be an issue in your divorce and frequently it is the issue

which causes the most frustration and anger. A child is "emancipated" when the child reaches twenty-one years of age. Prior to that, the child may also be emancipated in other ways, including quitting school and becoming self-supporting, marrying or joining the service. Once emancipated, the parents are generally not responsible for support of the child.

If child custody is an issue in your divorce, without the agreement of the parents, the Judge will decide child custody based upon his or her determination of what would be in the best interest of the child. In making a child custody determination, the Judge is required to consider the following factors:

1. Age, health and sex of the child;
2. A determination of the parent that has the continuity of care prior to the separation;
3. Which has the best parenting skills and which has the willingness and capacity to provide primary child care;
4. The employment of the parent and responsibilities of that employment;
5. Physical and mental health and age of the parents;
6. Emotional ties of parent and child;
7. Moral fitness of the parents;
8. The home, school, and community record of the child;
9. The preference of the child at the age sufficient to express a preference by law (age 12 and above);
10. The stability of home environment and employment of each parent; and
11. Any other factors relevant to the parent/child relationship.

It is also possible for parents to be awarded joint custody of children but that is usually by agreement. Joint custody can take many forms but it generally refers to an equal sharing of time with the child and sharing expenses associated with raising the child. Many lawyers and judges do not like joint custody, primarily because it is often difficult for divorcing parents to maintain a relationship which will allow the joint custody arrangement to work. On the other hand, other judges and lawyers do like joint custody

because it gives the child much more time with each parent and the influences of both parents on a child, regardless of the child's age or sex, are important.

If your divorce results in a more traditional arrangement whereby one parent has primary custody of a child and the other has visitation, the visitation schedule for the non-custodial parent will depend upon many factors. Assuming that the parents live close together after the marriage and that both have reasonable work schedules, the following visitation schedule is normally used in the First Chancery Judicial District in Mississippi:

1. Every other weekend, from Friday evening until Sunday evening;
2. Division of the Christmas holidays;
3. Alternation of major holidays;
4. Substantial extended visitation periods during the summer.

Although most judicial districts in Mississippi have somewhat "standard" schedules for visitation, they vary from district to district and even Judge to Judge. Any "standard" schedule may be altered substantially based on the parties' circumstances and should only be considered a place to start.

If one parent is granted full physical custody of a child or children, the non-custodial parent is normally required to pay child support to that parent. Child support is not intended to be the total cost of caring for the children but only the non-custodial parent's portion. Child support in Mississippi is governed largely by statutory guidelines which depend on the number of children subject to the custody order. Child support is based on a percentage of the non-custodial parent's adjusted gross income and the current guidelines are as follows:

- One child-14%
- Two children-20%
- Three children-22%
- Four children-24%
- Five or more children-26%

Adjusted gross income is the non-custodial parent's total income, from all sources, less social security contributions, income and Medicare taxes paid to the federal government and income taxes paid to the state. Mississippi state retirement is also a mandatory deduction and there may be a few others. In the event that the non-custodial parent has children from a prior marriage, he or she may also be entitled to credit for support payable to those other children.

The statutory guidelines are just that; guidelines. If the Judge determines that the amount calculated is too great or too small, the child support can be set at a different level. This might occur where a non-custodial parent's income is either unusually low or unusually high. Extraordinary or special needs of a child or children might also be considered. The Judge has considerable discretion in this area so long as he or she makes it clear why the guidelines are not appropriate.

ALIMONY

Alimony is support payable by one spouse to the other. Unlike child support, alimony is not routine.

There is more than one type of alimony. Most laymen think of alimony as referring to monthly payments continuing until the former spouse dies or remarries. This is normally referred to as "periodic alimony." The Judge deciding whether alimony is appropriate must consider the following factors, which have been identified by our Supreme Court:

1. The income and expenses of the parties;
2. The health and earning capacities of the parties;
3. The needs of each party;
4. The obligations and assets of each party;
5. The length of the marriage;
6. The presence or absence of minor children in the home, which may require that one or both of the parties either pay, or personally provide, child care;
7. The age of the parties;
8. The standard of living of the parties, both during the marriage and at the time of the support determination;
9. The tax consequences of the spousal support order;
10. Fault or misconduct;
11. Wasteful dissipation of assets by either party; or

12. Any other factor deemed by the court to be "just and equitable" in connection with the setting of spousal support.

If granted by the Judge, periodic alimony can normally be increased, decreased or completely stopped based on changes in the parties' circumstances. Generally, alimony is only ordered where the marriage of the parties has been long-term, the income (or earning power) of one spouse is far greater than the other and one spouse has a substantially greater estate (assets) than the other.

"Lump-sum" alimony may also be awarded instead of periodic alimony or in addition to periodic alimony. The factors generally considered by the Judge when deciding whether or not to award lump-sum alimony and, if so, in what amount, are as follows:

1. Substantial contribution to the accumulation of total wealth of the payor either by quitting a job to become a housewife, or by assisting in the spouse's business;

2. A long marriage;

3. Where recipient spouse has no separate income or the separate income is meager by comparison;

4. Without the lump sum award the receiving spouse would lack any financial security.

As you can see, some of the factors applicable to lump-sum alimony are the same as, or similar to, those which are relevant to periodic alimony. Unlike periodic alimony, lump-sum alimony normally cannot be modified in the future and is payable regardless of whether the recipient spouse remarries or dies. This is true even though the lump-sum alimony may be paid in installments.

"Rehabilitative" alimony is another variation of alimony. It is usually awarded to a spouse who needs income for a limited period of time to either gain employment or to obtain education or training so that he or she can be self-supporting. Depending on the circumstances of the case, rehabilitative alimony may be paid for a few months but is rarely payable over a long period of time.

It is frequently very difficult for an attorney to advise his client as to whether or not alimony is likely and, if so, what the amount might be. Alimony can be awarded to either spouse, man or wife, from the other, but, as indicated above, alimony in any form is unusual.

PROPERTY DIVISION

How property is divided by Mississippi Courts has changed more in the last decade than any other area of domestic relations law. The Appeals Courts has given trial judges such great latitude in the use and division of property that it is difficult to predict exactly the distribution in a given case.

As a general rule, there are two kinds of property. "Marital" property is generally defined as property accumulated during a marriage and "non-marital" property is generally defined as property one person either brought into the marriage or that the person received by gift or inheritance from his or her family or others during the marriage. Generally, any non-marital property will be set aside to the owner and the marital property will be equitably divided between the divorcing spouses. However, property that starts out as non-marital property may be changed to marital property if it is commingled with marital property or the other spouse's property or in some instances if it is simply used by the family. There are many fact situations which are impossible to cover here which can change the nature of property from non-marital to marital.

Title to property has little meaning in Mississippi now. Whether the property is in your name, your spouse's name or in both names is really only one factor to be considered in determining what will happen to the property as a result of the divorce. The Court has authority to take title from one person and give it to the other and has the right to sell property and divide the proceeds of the sale in any fashion. Additionally, the property can be owned by one but, by Court Order, the other can have the use and possession of it. Regardless of title, once the property is determined by the Court to be marital property, it can then be divided equitably. Many people erroneously believe that equitable division means equal shares. The Judge can divide any specific asset any way he or she feels is equitable or can take a group of assets and then divide those equitably between the parties. The Court can also award assets to one party and require that party to pay the other lump-sum alimony, discussed above, as an alternative method of distribution. Once each spouse has been provided his or her portion of the marital assets and the non-marital assets belonging to each have been identified, comparison of the assets owned by each may then have an impact on whether or not alimony, also described above, is appropriate.

THE DIVORCE PROCEEDING

A divorce case is begun with the filing of a Complaint. The Complaint is a pleading filed with the Court in which one spouse seeks a divorce from the other. The spouse filing the Complaint will state the reasons that he or she is entitled to a divorce and ask the Court for certain relief. The relief requested can be many things but almost always involves the matters described above. Those are child custody, child support,

alimony and division of property. Once the Complaint has been formally delivered to (served on) the other spouse, that spouse has thirty days in which to file an Answer and he or she can also file their own Complaint which is designated by the Rules of Court as a Counter-Complaint. An Answer to that Counter-Complaint must then be prepared and filed.

After the divorce proceeding is started, the parties can engage in discovery. Discovery covers several tools that allow the parties and their attorneys to find out what each other have in the way of proof to present to the Court. It also allows the parties and their attorneys to better understand the positions of everyone. Briefly described, the discovery most often used is as follows:

1. Interrogatories. This is nothing more than a series of written questions which one party sends to the other (acting through their attorneys) and it is usually designed to obtain information about potential witnesses and to find out what documents or other property a party may intend to use at trial.

2. Request for Production of Documents. Each party can inspect and copy, if necessary, documents which are related to any of the issues pending in the divorce.

3. Depositions. A party may take the deposition of another party or any other person they wish. Generally, a deposition refers to taking the live testimony of a party or a witness under oath and in the presence of a court reporter. This is generally conducted in an attorney's office or at a neutral location, such as the courthouse. Depositions are most often used to find out what the testimony of a particular person will be in Court but depositions can also be used to preserve testimony where a potential witness is ill or may for some other reason be unavailable during trial.

4. Entry of Premises. Sometimes, it is important to go on real estate to appraise it, photograph it or to simply be sure that it is being maintained. Therefore, parties have the right to enter premises which are owned by, or under the control of, another party.

Once all pleadings (Complaint, Answer, Counterclaim, Answer to Counterclaim, etc.) have been filed and served on the parties and all discovery is completed, the trial can be scheduled. The Chancery Court dockets in the First Judicial District of Mississippi are crowded and it is not unusual to schedule cases 90 to 120 days in the future so that you have a good chance of getting a trial on the date scheduled. This is because several cases are normally scheduled on any given day and they are taken up in the order in which they are scheduled, except for certain emergency matters which are handled as a preference.

Sometimes, it may be absolutely essential to have certain matters considered by the Judge well before the final trial date. This would normally arise where there is a dispute between the parties as to who will use the home or where one spouse has abandoned the home and is refusing to support a spouse or children. Therefore, parties are allowed to seek a hearing on "the temporary features" of a divorce within a matter of days after the divorce is initially filed. Generally, the Judge will only tolerate a brief hearing which deals with the issues that cannot wait without putting one or both parties, or their children, into an adverse situation. Most hearings on the temporary features resolve issues involving child custody, child support, and the use of a home and/or a vehicle. The basis for divorce is not an issue in a hearing on the temporary features. Frequently, this has the unfortunate result of displacing a parent who is not guilty of conduct which entitles the other to a divorce and it may limit that parent's time with his or her children. Unnecessary expenses can also result because two households must be maintained until the divorce can be heard. Since there is no meaningful appeal from the Judge's decision on temporary features, the "losing" spouse has no future recourse.

After a trial, the Judge will normally render an opinion which deals with all of the issues raised by the parties in their pleadings. The Judge's opinion will then be translated into a written Judgment which will be signed by the Judge and filed with the Chancery Clerk in the County where the divorce was pending. Either party can extend the proceeding by filing several different types of Motions and ultimately an appeal. If appealed, it will generally take a minimum of one year for the Appeals Court to rule. It is even possible that this ruling can be reconsidered by the Appeals Court or sometimes appealed to another court.

DO'S AND DON'TS

1. Do retain an attorney to advise and represent you as soon as possible. The earlier you talk to a lawyer, even before talking to your spouse or to friends and family, the better off you will be. You and your lawyer can then make plans on how best to proceed with your divorce.

2. Don't select an attorney based upon cost. The cheapest divorce is rarely if ever the best divorce. Lawyers charge a broad range of fees or hourly rates for divorces and there are generally good reasons for the difference. You will increase your chances of a good result if you select a lawyer who has a good reputation and experience.

3. Don't talk to friends, family or co-workers about your divorce without first consulting your attorney. Frequently, things that people say, believing them to be in confidence, are relayed to a spouse or brought up in court.

4. Don't confront your spouse prematurely. It is tempting when you find a love letter written to your spouse or a friend tells you about seeing your spouse with another man or woman, as the case may be, to confront your spouse with this new information. This may make it impossible for you and your attorney to later gather additional information which will help you in your divorce.

5. Don't warn your spouse that you are leaving and filing for a divorce until you have talked with an attorney. This can result in assets being hidden or moved (for example, checking accounts, certificates of deposit, savings accounts, etc.) or even children being spirited away. Nothing good can come from your announcement and much can happen which will complicate your life and your divorce.

6. Don't use your children as a weapon. Hiding children from their other parent or telling your children horrible things about your spouse may bring you temporary satisfaction. Your spouse may suffer as a result of it but his or her suffering will be nothing compared to the damage you are doing to the children. Children should be insulated as much as possible from the war between their parents and they must never be allowed to believe that they are in any way responsible for the break-up of the marriage. If your spouse is as worthless and as bad an example for the children as you may think, the children will figure that out themselves.

7. Do be absolutely truthful with your attorney at all times. Without knowing the actual facts, your attorney cannot advise you as to how to proceed or represent you adequately during trial. Withholding information from your attorney, or being less than truthful with your attorney, will only hurt you.

8. Do tell your attorney everything that you want as a result of the divorce. Those things must be included in your pleadings and, if they are not, you may not be allowed to bring them up at trial. If it is important to you, it needs to be in the pleadings or needs to be part of your agreement with your spouse.

9. Do truthfully and fully answer all discovery, such as Interrogatories or Requests for Production of Documents. You must give your attorney all information and documents necessary to respond and let the attorney make the final decision about what information is provided and what documents are produced. There are deadlines for answering discovery and you need to provide your attorney with everything he or she needs well in advance of those deadlines so that your case is not delayed. Failure to cooperate in discovery can result in being prohibited from introducing evidence or even the loss of your case in extreme circumstances.

10. Do give your attorney the names of witnesses who can support your side of the case. These of course will depend upon the issues which are contested. Names,

plus addresses and telephone numbers for witnesses are essential. Information about witnesses must be provided to your attorney well in advance of trial and probably earlier so that he or she can respond to discovery.

11. Do provide your attorney with all documents that are necessary for handling your case. If there are documents you do not have, be sure that your attorney knows about those and has all of the information you can provide about how to locate them. Documents in your possession or under your control should be delivered to your attorney as far in advance of trial as possible and maybe even earlier so that he or she can respond to discovery. If you do not have the needed documents, or cannot get them, your attorney can subpoena documents which are in the possession of others, but the subpoena must be issued well in advance of trial to ensure that the documents are available.

12. Do fill out all forms at your attorney's request. Some of these are required by the rules of the court and others may simply be necessary to allow your attorney to prepare for trial. The information you provide will be important to your case and therefore must be accurate, complete and timely.

13. Do heed your attorney's advice. You are paying an attorney to advise you and he or she has probably been involved in numerous divorce cases. That experience allows the attorney to reasonably predict, or at least make an educated guess, as to how the Judge will rule in any given circumstances. Your attorney's knowledge and experience are a great deal of what you are paying for so think long and hard before you ignore your attorney's advice about how best to proceed or what type of settlement will be most beneficial to you.

14. Do be patient. Unfortunately, the Chancery Courts in the State of Mississippi are all busy. In order to get a trial, the parties must have filed all of their pleadings and all of the discovery should be completed. This will generally be a minimum of 90 days and frequently longer. Trials can only be scheduled at the time all important persons (parties, judges, lawyers and witnesses) can be available. When you involve that many people, it is also understandable that cases frequently are not tried when scheduled because of death or illness.

CONCLUSION

Again, if you are interested in a divorce, please remember that this Handbook is not intended as a substitute for an attorney. A divorce can have a tremendous and long-lasting impact on you as well as minor children of the marriage if there are any. As soon as possible, seek the advice of an attorney who is experienced in domestic relations matters and who you feel comfortable with. A good place to start, when

selecting an attorney, is to talk to friends and family who have been through a divorce or who have been intimately involved in the case of someone close to them. Once you have selected a lawyer, tell him everything he needs to know, ask every question you have and try to be patient. If you and your lawyer work together, he or she should be able to get the best results possible for you.