

GUIDE TO DIVORCE LAW IN KENTUCKY

When a Circuit Court presides over a divorce or custody action, it is sitting as a Court of Equity. Equity does not necessarily have its common sense and every day meaning of right verses wrong. In fact, the parties to a divorce or custody action will most likely leave Court, regardless of how successful they are, with less than they had at the start of the case. Therefore, your most important steps at the outset of your divorce are to set goals and manage expectations.

CUSTODY

A Court of Equity is a Court which is governed by a statutory scheme. In our statutes, the Court must first address the issue of custody. This is true whether the parties to the action are married and have children together or are unmarried and have children they are unable to continue to raise together.

Although the Court is charged with the task of dissolving your relationship for all other reasons, it must first consider that you and opposing party can continue to raise your child or children together. The concept the Court must first consider is joint custody. Joint custody means that the parties will continue to cooperate to make all care and control decisions (i.e. health, education, religious upbringing, welfare, and all other important and unimportant decisions you make for your children).

If the Court does not believe that joint custody will work, the Court may then consider a joint custody arrangement in which one party is the primary decision maker. Typically, a Court will call the primary decision maker a residential or primary custodian. The residential or primary custodian may unilaterally decide care and control issues if, after first consulting with the other party, no joint decision may be reached.

Finally, if the Court does not believe that any joint custody arrangement will work, the Court will assign one party sole custody of the children. Sole custody means that one party makes all of the decisions without consultation regarding the care and control of the child or children.

The Court is charged with the responsibility of making custody decisions in the best interest of the children. In doing so, the Court is directed to several factors. The Court may consider the wishes of the children; the wishes of each parent; the mental, physical, emotional, and moral wellbeing of each of the parties; the adjustment of the children to each parties' home, school, community, and extended family; the relationship that each child has with each parent; the relationship that each child has with the extended members of the parties' families; and the existence of domestic violence.

Usually, both parties to a divorce or custody suit wish to have some custodial say in the life of their child. Also, the Court is not in the practice of putting children on the spot by

requiring them to choose one parent or the other. Therefore, many custody cases boil down to a question of who has historically been the party to make care and control decisions for the children.

Often, the Court will appoint a forensic psychologist to render an opinion in a high conflict custody case. The parties are also free to retain their own experts. Sometimes, but rarely, the Court will appoint an attorney for the children, known as a Guardian Ad Litem.

A forensic psychologist will most usually render an opinion after a two part review process. The first part of the review process tends to be an objective review. The psychologist will give each party, and sometimes the children, a battery of psychological tests. Those tests are then scored by the psychologist or a qualified third party to give the psychologist some insight into the personalities in the case.

The psychologist will then conduct a subjective review in which he or she interviews each of the parties, each of the parties with the children, and, often times, the parties together with the children. If a child is of an advanced age, the psychologist may wish to interview the child. Finally, the psychologist will conduct collateral source interviews with any individual who has significant information regarding the children in question (such as therapists, teachers, step-parents, and daycare or other child care providers).

At the end of the review process, the psychologist will issue a report. Most often that report will review the data collected by the psychologist and the conclusions that he or she reaches upon a review of that data. The psychologist will then make a recommendation to the Court as to whether joint custody will work in the particular case. If joint custody is not likely to succeed, the psychologist may recommend custody be awarded to one parent. Finally, the psychologist may make a recommendation regarding the parenting time each party will spend with the children.

PARENTING SCHEDULE

The Court must next set a parenting schedule for the parties. The Court has two goals in mind when establishing a schedule. The Court must consider the best interest of the children and attempt to maximize each parent's time with the children.

With regard to holidays and vacation time, the Court most usually awards an equal amount of holiday and vacation time to each party on an alternating basis. Remember to speak up if you have a particular holiday tradition between your extended families which you have regularly observed.

MODIFICATION OF CUSTODY AND PARENTING SCHEDULES

The Court retains the power to modify and enforce custody and parenting schedules. This power is retained until each child is emancipated, whether by reaching the age of eighteen or otherwise. The authority of the Court may extend past normal emancipation if the child has special needs.

Within the first two years of entry of any custody Judgment, the Court may not make changes unless the environment in which the child lives poses an immediate threat to the physical, emotional, mental, or moral wellbeing of the child. The Court usually refrains from making changes during this period of time. However, after two years have past, the Court may address the issue of custody according to the best interest of the child.

When seeking a modification beyond the two year deadline, the party seeking modification must generally point to some change in circumstances which occurred after entry of the last custody decree. Once that hurdle has been cleared, the Court returns to the best interest consideration described above.

Regardless of the custody determination made by the Court, each parent has an obligation to keep the other as completely informed as possible about the significant events in the life of their child. If the Court becomes aware that either party is making an effort to restrict information to the other parent or diminish the other parent in the eyes of the children, the Court may intervene and take some or all of the custodial authority away from one parent.

Over the course of a child's life, the child's needs will change. The same is true of the parents. Therefore, the Court remains available to adjust parenting schedules (or visitation) while the child remains a minor. However, the Court may not restrict a parent's visitation without making a finding that the parent poses an immediate threat to the physical, emotional, mental, or moral wellbeing of the child in question.

The most difficult custody modifications often involve a relocation of one parent. When the parties share true joint custody, the Court has the authority to decide whether a child will relocate with a parent or not. That decision is made according to the best interest of the child. The parent relocating must inform the other as soon as is practicable about the possibility of relocation. If no joint decision can be made, the Court can and will intervene.

When one party is a primary residential custodian in a joint custody relationship and must relocate, the obligation on that parent is to inform the other that a relocation is impending as soon as is practicable. However, the parent does not need of the permission of the Court to relocate if an objection is raised. The aggrieved parent may go to the Court and ask that relocation be prohibited. At that point, the Court has the authority to decide where your child will reside.

Finally, a sole custodian must inform the other parent when a relocation is pending, but the Court may not have any authority to stop the relocation without changing custody.

CHILD SUPPORT

In the Commonwealth of Kentucky, most child support cases are decided by an application of the Kentucky Child Support Guidelines. If you receive a W-2 at the end of each tax year, the Court will take your gross earnings, combine them with those of your spouse, and direct that child support be paid according to the Kentucky Child Support Guidelines. However, not all cases are addressed to easily by the Child Support Guidelines.

If you are self-employed, you are entitled to deduct from your gross earnings reasonable and necessary business expenses. Although the tax code has some influence on the definition of reasonable and necessary business expenses, it is not dispositive. The Court tries to limit those deductible expenses to those which have only a business impact.

If your spouse is not employed on weeks part-time only, the Court may impute income to him or her. If your children are at a sufficiently advanced age and each of you is free to work, the trial court may consider the ability of an unemployed parent to work and treat that parent, for the purpose of calculating child support, as though they were earning at their highest level.

If the combined earnings of you and your spouse exceed \$15,000.00 per month, the guidelines do not apply. The trial court may resolve the issue of child support any number of ways. The Court may consider the actual financial needs spent on the children. The Court may devise the same formula for calculating child support. Essentially, the Court is granted the authority to make any reasonable decision which meets the support needs of your children.

If you have children from a prior relationship, you are entitled to deduct support actually expended on the children from your gross income. Additionally, the Court will divide between the parties, in proportion to their income, the cost of health insurance attributable to the children and work education related day care.

Finally, the Kentucky Child Support Guidelines apply where the paying party has one third or less of the children's time. If the parties have a more equal parenting schedule or have split custody of children they have together, the guidelines may no longer apply.

MODIFICATION OF CHILD SUPPORT

The Court has the authority to modify child support. However, the party seeking modification must demonstrate a substantial continuing change in circumstances. Specifically, the Court will change child support if application of the guidelines results in the fifteen percent increase or decrease in the amount of child support due.

PROPERTY

Often the most difficult issue in any divorce after all issues regarding children have been resolved is the assignment of property between the divorcing parties. Again, the Court is directed to accomplish this task according to statute.

The Court must first restore to each party their non marital property. While the Court presumes that all property is marital, the Court will restore your non marital property if you can demonstrate that you acquired it prior to the date of marriage or by gift, bequest, devise, or descent. Also, the Court will restore property to you acquired after the date of marriage if you can demonstrate it was acquired in exchange for property owned prior to the date of marriage or acquired by gift, bequest, devise, or descent.

Restoration of non marital property is most often accomplished through documentation. For instance, if you own a home prior to the date of marriage, a deed demonstrates the date you acquired the property precedes your marriage.

There are two general areas of complication in a restoration of non marital property case. First, is the situation in which a currently existing piece of property has both marital and non marital components. Usually, this is a marital residence in which one party has expended non marital funds. For instance, if you owned a residence prior to the date of marriage which you sold to use the proceeds to purchase the marital residence, a portion of the marital residence has become your non marital property. In these cases, the Court will attempt to apportion the equity between the parties in connection with its character. This usually involves application of a mathematical model to the equity remaining in the property.

Second, when a non marital asset appreciates in value during the marriage because of marital efforts, the Court must consider how to award the marriage for the increase in value. The usual example is when a party brings into the marriage a pre-existing business or profession which appreciates in value due to there joint efforts, the Court must consider what portion of the increase is attributable to the marital efforts and then devise a method through which the contributing spouse is rewarded.

MARITAL PROPERTY

The obligation of the Court is to equitably divide marital property. Equitably does not mean equal. However, in practice, an equal division is what the Court will do.

The Court will try to divide your property in a manner which poses the least threat to its value. Additionally, the Court will divide property in such a way that it imposes as little cost on you as possible. Basically, the practice in which the Court engages is to create a balance sheet in which each property is awarded to a particular party. If there is an equitable

difference between the value and property assigned to the parties, the Court will try to make up for that disparity by awarding the disenfranchised party cash or other property in kind.

INDEBTEDNESS

While the Court is under an obligation to equitably divide marital property, no such obligation exists for debt. The Court will assign debt according to its marital purpose. Most debt is secured by a piece of property. The party retaining the property retains responsibility for the debt. However, on unsecured indebtedness (usually credit card debts) the Court will divide the debt between the parties in conjunction with their ability to pay and the marital nature of the debt. In other words, clothes you buy for the children are usually apportioned equally between the parties, but the therapeutic golf trip is not.

SPOUSAL SUPPORT, MAINTENANCE, OR ALIMONY

The Court has the authority to award you spousal support (also known as maintenance and formerly known as alimony) if you are not able to meet your own monthly expenses. Once the Court determines that it can award spousal support, it must consider a variety of factors, including the length of the marriage, the lifestyle you enjoyed during the marriage, the health of the parties, the age of the parties, and the ability of the paying party to meet his or her own monthly needs while paying maintenance.

While most issues in a divorce do not have an impact on taxes, maintenance is usually deductible to the party paying it and taxable to the party receiving it. Therefore, the Court has a variety of options when structuring maintenance. If maintenance is a likely issue in your case, you will most certainly want legal and, most probably, financial help.

MODIFICATION OF SPOUSAL SUPPORT

The Court may modify maintenance. Typically, maintenance terminates upon the death or cohabitation of the party receiving maintenance. Most maintenance is known as term of years maintenance. That maintenance is designed to financially rehabilitate you after the end of their marriage. Term of years maintenance may not be modifiable before the expiration of the term. However, life time, or open ended spousal support, may be modifiable upon any substantial and continuing change in circumstances.

Modification of maintenance is currently one of the more hotly contested issues. The status of the law has changed several times in the past five years. If you are confronted with a change to maintenance, you will want to consult an attorney.

FEES AND COSTS

Unlike most other areas of law, the Court may direct you to pay the fees and costs incurred by your former spouse. The Court is authorized to direct a contribution if you lack the financial resources of your spouse. The Court may grade the contribution according to the tactics used by you or your spouse. In other words, if you waste the Court's time, you may be required to pay your former spouse there fees and costs.

You may expect to incur costs to a variety of experts. A custodial expert will charge between \$1,000 and \$3,000 per party to conduct a custodial evaluation. A business appraiser may charge \$1,000 to \$10,000 or more to appraise your family or small business. A real estate appraiser may charge \$300 to \$500 per property or period of time for which an appraisal is done. Finally, a personal property appraiser will charge according to the amount property reviewed and the length of time to do so. Normally, these expenses are divided at the outset of the case with the Court reserving the right to apportion the expenses at the end of the case.

AGREEMENTS

All of the above information assumes that you and your spouse or other parents have been unable to reach an agreement. However, the Court will encourage you to try to reach and agreement. Usually such an agreement is reached at mediation.

Mediation is an alternative dispute resolution process through which the parties and their attorney meet with a qualified and trained mediator appointed by the Court or agreed upon by the parties. The Court will support any agreement which it believes to be the product of fair bargaining and which is not manifestly unfair and unjust.

Often times, parties enter into the marriage only upon negotiation of an agreement. These agreements are known as pre or antenuptial contracts. The Court will enforce these contracts so long as they are free from fraud or duress and are not manifestly unfair and unjust at the time of signing and enforcement. If you wish to have a antenuptial contract drafted, you will most certainly most want to contact an attorney. If you have an antenuptial agreement, you will most certainly want to contact an attorney to review its possible impact on your divorce.