

This divorce guide was adapted with permission from ["Civil War: A Dad's Guide to Custody"](#) by Joseph E. Cordell, J.D., founding partner of the Cordell & Cordell, P.C. law firm headquartered in St. Louis, Missouri. Although not specific to any particular state, this guide should help divorced and divorcing dads maximize their role in their kids lives.

## Introduction

Many dads face divorce feeling angry, bewildered, confused, and uninformed. The break up of a long-term relationship is often even more traumatic when coupled with the need to deal with issues such as custody, support, and division of assets, property and debts.

The inherent bias of the court system in favor of women further exacerbates divorce for many men. The result is that the judicial system - lawyers, judges, social workers, and the administration - is prone to assume, without proof, that moms should be the primary custodial parent, that men accused of abuse are guilty of abuse, and conversely, that men alleging abuse are lying or overreacting. The "system" assumes that women are not as capable of generating income as men are, and that a man is less deserving of assets earned by a woman than when the reverse circumstances exist.

Given that you will be fighting an uphill battle, your overarching objective must be to obtain the best possible result. You owe to your kids the most they can have of you - your time, your wisdom, and your participation in their lives. You owe them the best possible outcome.

This site is a hardheaded and pragmatic information source and instruction manual for divorced and divorcing dads seeking to maximize their role in their children's lives. The information contained in this site will provide useful guidance and insight into the divorce process, which will in turn enable you to provide invaluable assistance to your attorney in building your case. This site teaches you the ways to ensure that the courts award you the most time and the most influence possible in the aftermath of your divorce.

Even when you cannot commence play on the 50-yard line, you can still often win. You simply have to work harder than your opponent. Besides, if you are a determined dad, throwing down your helmet and walking off the field is not an option. The game will go on without you.

## Custody (Part 1)

Like most material things couples accumulate during their marriage, custody of the children must also be divided during a divorce. By "custody" lawyers actually mean two related but different concepts.

**Physical custody** pertains to the living arrangement of the children. Either parent may become the *sole physical custodian*, in which case the other parent will be relegated to the so-called *non-custodial visitation schedule* and will be able to visit with the child only during specified times. It is also possible, though less common, to share physical custody of the children through a *joint custody arrangement*. While this split may not be 50/50, the child will live with each parent for a period of time during the year.

**Legal custody** has to do with the authority to make decisions respecting the major issues in your kids' lives, most importantly their health and education. There are basically three ways to apportion *Legal custody*: either parent can have the *Sole Legal Custody* and will be the only one making these decisions. Alternatively, the parents will have *Joint Legal Custody*, which theoretically means that they have to agree on joint decisions.

It should be noted that in some states the terminology is different; for example, in Texas instead of physical and legal custodians the law refers to "sole managing conservator," "joint managing conservators," and "possessory conservators." However, the concepts are basically the same from state to state.

### *Is Joint Custody Good for you?*

At the outset, it is important for you to decide whether to pursue joint legal custody with your wife. While the concept of two parents having an equal voice in all child-rearing decisions has some intuitive appeal, in practice it has some serious difficulties because nature of divorce is unfriendly. Any exceptions you may know serve to prove the rule. Often, one party is left feeling betrayed and exploited, while the other party moves on to a better deal. Many divorces involve bitter battles about the division of property and assets. It is unrealistic to expect that either - much less both - parents can put the bitterness and animosity aside to come to a rational consensus regarding what is best for the kids. The bitterness and strife present at the conclusion of a divorce does not evaporate like an ugly spill. More often than not, it corrodes further the relationship as lifestyles change and parties again begin to date. This is the milieu from which is to emerge, theoretically, a cooperative and productive co-parenting arrangement. In practice, joint legal would mean that the parents can agree on schools, extracurricular activities, health care providers, health care, place of worship, other religious matters, etc. As you might expect, many judges and lawyers, hard-bitten by experience, view the concept of *joint legal custody* skeptically.

Despite its practical limitations, however, joint legal custody does give the non-custodial parent - usually a dad - substantially greater leverage than he would otherwise have. By exercising his veto power, he can put the brakes on unilateral decisions the mom may be inclined to make respecting major issues.

Furthermore, if the mom does not cooperate with a joint custody arrangement, the dad always has the threat of action for contempt. Additionally, if the primary physical custodian shows a repeated disregard for the court's allocation of parenting authority, courts may, and with increasing frequency do, transfer custody.

In summary, a dad should seek joint legal custody if he is not likely to obtain primary physical custody of the child. In the absence of primary physical custody, joint legal custody becomes an important mechanism to prevent the mom from reducing him to providing child support and baby-sitting on weekends.

## Custody (Part 2)

### Joint Physical Custody:

As already mentioned, this is a custody arrangement which allows a child to reside with each parent for a substantial amount of time during the course of a calendar year. But this arrangement does not denote a 50/50 allocation of time the child spends with each parent. "Joint custody" may, in fact, refer to a schedule in which one parent receives time that is anywhere along the spectrum of 1 % to 99%. The word "joint" simply means either a schedule agreed to by the parties or a plan the court or legislature has chosen to characterize as "joint." Courts are not often inclined to establish an arrangement that involves moving, with frequent changes for a child. This is so because a large body of professional literature argues that children need a primary residence for optimal emotional health. Rather than debate the merit of this position, suffice it to say that if you go to trial seeking a joint physical custody arrangement, expect to battle with various experts critical of your position. That is not to say, however, that you cannot win such a battle. I have fought and won them despite opposing expert testimony.

In the early stages of a divorce, when clients and I strategize regarding custody, I always discuss the potential for a "50/50" order. Many dads find themselves without a realistic shot at sole custody, and are therefore torn between the two remaining possibilities of 50/50 or the more traditional non-custodial schedule. (There are of course, an infinite number of gradations in between, but for analytical purposes it is simpler to view these as discrete categories). Generally, 50/50 custody is an exception rather than a rule, and there must be exceptional circumstances militating in its favor. These factors might help you decide whether to seek a 50/50 custody arrangement.

**Who is the judge:** I would first want to know whether we have a judge who will fairly consider this option. If not, the best of arguments and evidence will fail.

**Record:** is there a history of sharing of duties between two parents, or a very close bond between a dad and a child, which can be maintained only by a co-parenting arrangement.

**Logistics:** the proximity of the parties' homes and employment as well as the compatibility of schedules.

**Good relationship:** the relationship between the parties must be good. In fact, it is particularly helpful if, during the separation, the parties actually implement such a plan and it works - the kids appear to benefit from the arrangement.

**Children:** Where there are older children (adolescent or teen), it is also important that the children understand the situation and cooperate with their parents.

## Custody (Part 3)

### When and why do courts award sole custody?

After the sometimes agonizing decision as to what you consider the best custody arrangement given the fact of divorce, you next must decide whether that preferred scenario is achievable in the courts. The list of factors most courts utilize in deciding custody disputes is common sense; courts consider the same facts you would contemplate if you wore the black robe.

Custody battles are street-fights, not abstract discussions. The issues are pragmatic, the effects real. While experts such as psychologists, education experts and physicians do play important roles, usually the outcome can be predicted by a sort of common sense tangible analysis- past parenting role, kids preferences, and work schedules.

To make this discussion more comprehensible, it is helpful to view the relevant evidence as falling into one of four categories: 1) historical picture; 2) prospective picture; 3) status concerns and 4) child preferences.

**The Historical Picture:** The historical picture examines each parent's role in nurturing the child since birth. These are some of the activities that a court could consider to determine which parent performed the nuts and bolts of child rearing in the past: getting the child up in morning, getting child dressed, preparing breakfast, taking to school, bathing, playing with children in evening, assistance with homework, attendance at school functions.

While a change in family circumstances may make the past "division of labor" impractical, judges often reasonably find that an arrangement that had worked in the past should continue to work in the future. The fact of divorce is not usually a sufficient reason to transfer primary parental responsibilities from one parent to another.

**The Prospective Picture:** regardless of what has been done in the past, sometimes new circumstances require change. Therefore, to make a sound decision regarding custody, the court must consider each parent' situation going into the future. A court will probably consider:

1. *Schools:* is one parent going to remain in the same school district the children presently attend? If so, that is generally helpful. Conversely, is one parent going to have access to a school substantially superior to the school available to the other parent?
2. *Employment:* judges prefer to grant primary custody to a parent with a predictable work schedule that is also compatible with the children's school and sleep routines. A work schedule requiring fewer hours is better than one requiring more (including commuting time) and more job stability is better than less. Jobs with lower risk of transfer are preferred. Work-time flexibility is certainly a plus.

3. *Residence*: generally, courts prefer good neighborhoods to bad, permanence to transience, houses to apartments, proximity to school and work over distance therefrom, ownership to renting (again, more predictability), and large quarters over small.
4. *Family Circumstances*: the presence of half-siblings or even step siblings may be a factor if there is a close relationship with your marital kids. Courts prefer to keep sibling relationships intact.
5. *The dating scene*: a judge may dislike an arrangement where a boyfriend or girlfriend will be cohabiting with the parent seeking custody. It only makes sense that, in weighing the relative circumstances of the parties, the court would consider a third party intending to reside with either spouse.

**Personality/Behavioral Traits:** a court may also consider whether the prospective custodial parent is heterosexual, homosexual, schizophrenic, depressive, alcoholic, angry, violent, or sexually perverted. These factors may well determine the outcome of a custody battle. For example, evidence of one parent's closet drug addiction or a consuming sexual addiction would definitely sway the judge to award custody to the ex-spouse.

Of course, your wife will be certain to point the finger at all of your shortcomings.

Commonly, one parent will allege that the other is not equipped mentally to be a primary custodian. With the recent increase of people seeking psychological help, the fact that your wife takes an antidepressant or other such medication carries little weight without accompanying significant negative behavior. Additionally, a conscientious judge may view with disfavor evidence that one parent consistently criticizes and denigrates the other parent in front of the children.

**The Child's Preferences:** While a child's opinion is virtually always relevant, it is almost never determinative. If you assume all other factors are equal, then a child's preference will typically tilt the scales. But in reality all other things are never equal. Often other considerations may conflict with the child's preference so the court has to examine the child's mind set closely to determine what weight it should be given.

The court must first determine if the child's stated preference is real. You probably will not be shocked to learn that parents often undertake propaganda campaigns during a divorce to win the hearts and minds of their kids. To determine the mindset and genuine wishes of a child, a judge may interview the child in camera (in chambers) to ask questions in a manner intended to be least stressful, usually without the parents present.

Additionally, the judge may appoint a Guardian Ad Litem, an attorney whose job it is to protect the child's interest and to determine what the child wants. Finally, many jurisdictions have available social workers or other professionals to conduct, among other things, custody evaluations.

In making a determination, judges consider the age of the child and typically weigh heavier the preferences of older children. Judges also consider the reasoning underlying the child's opinions. A

closer relationship to one parent is understandable, as is a greater willingness to help with school or closer proximity to school and friends or dislike of an anticipated stepparent. Conversely, if the reason is that the preferred parent does not discipline, has no curfew, or does not enforce homework, then the child's preference will likely be ignored.

## Child Support (Part 1)

Regardless of the results of your fight to gain custody of your children, child support will be an issue in your case. Unlike the issue of custody, where courts make discretionary decisions, there is substantially less "wiggle room" in setting the amount of child support. This is so because most states must follow uniform standards in their child support statutes to qualify for federal aid. Although the exact procedures and details vary from state to state, there is a certain basic pattern no matter where you live.

Generally, there will be a chart setting forth the base "presumed" amount of support to be paid. In making this determination, the chart will take into account income levels and the number of children to be supported. The charts assume that one parent will be the primary custodian, while the other will be paying child support.

There are a number of technical differences in exactly what numbers are plugged into the chart to arrive at the presumed support amount, depending on the particular state. Some states will plug in gross income, i.e. before taxes, into the chart (for example, Missouri), while others utilize net income, i.e. after taxes (for example, Texas). Many states use the combined income of both parties (for example, Missouri), and then apportion the presumed support amount pro-rata. Others use the income only of the party paying support (for example, Illinois and Texas). In Texas, it's even more complicated: only the income of the party paying support is considered in the chart, but if that party has more than \$6,000 per month in net (not gross) income, then both parties' incomes are considered in calculating additional support.

At least in theory, all the different variations on the chart should make no difference and child support amounts should be adjusted up or down to account for the source of the information being plugged in. In practice, however, the amounts vary from state to state. Further, it is important to understand that the child support amount is not set to only meet the basic needs of the child. Rather, the child support amount increases as income levels increase, on the theory that the household in which the child lives should get a shot at approaching the standard of living the child would have had if the marriage had not ended.

After the support has been calculated, additional amounts are added into account for the cost of day care and medical expenses. If the child has any extraordinary expenses (for example, unusually high medical expenses), they may also be accounted for. Finally, some states (like Missouri) allow a downward adjustment to the presumed support to account to a certain extent for money spent during the time the party paying support has custody of the children. The result of all these calculations is the presumed child support amount.

Once the chart has been used to calculate the presumed support amount, if either party (payor or payee) wants to deviate from it, either up or down, that party has the burden of proving that the presumed support amount is unjust or inappropriate. This is generally not an easy task. "I have too many bills to

pay that much support" won't cut it. The judge will be looking for specific reasons, tailored to the needs of the child and not the needs of the payor, to justify ordering an amount other than chart support. Unless both parties agree to a different amount that the judge thinks is reasonable, most of the time chart support or something close to it is the end result.

One exception to this is the situation in which the physical custody of the children is split relatively evenly between dad and mom. In such a case, both parents incur child care expenses at about the same rate. However, remember that the child support chart is designed around the assumption that one party will have custody of the children the majority of the time and as a result, incur a majority of the children's expenses. As a result, where that assumption is false, the amount calculated pursuant to the chart may well be unjust and inappropriate. In fact, the Missouri child support laws specifically set forth this situation as one in which a deviation from chart support may be warranted.

If the judge is convinced that the presumed support amount is unjust or inappropriate, he then has fairly broad discretion to fashion an appropriate support order taking into account factors such as the incomes and resources of the parties, the custody arrangements, extraordinary custodial expenses.

## **Child Support (Part 2)**

### **Does the mom have to actually use the money to support the kids?**

After all, the amounts of support ordered pursuant to the chart can seem well in excess of the cost of the children's needs, and we all can picture situations in which, although the kids aren't starving or neglected, mom also has a nice new wardrobe courtesy of the support money. In general, courts presume that the party receiving child support spends the money to support the children, and the burden is on you to prove otherwise. Because just about everyone paying support complains of paying "too much," judges have a tendency to take a cynical view of parties coming into court with this kind of an issue.

Further, it is difficult to prove that expenditures do not benefit the children. For instance, if mom buys a nice new house and uses some support money for it, that would benefit the kids even if it benefits mom more. As a result, it takes fairly direct evidence to get the party receiving support in trouble for not using it properly. Some states have statutes that can require the recipient of support to provide the payor with an accounting of where the support money went; it is difficult, however, to convince a judge to actually make this happen.

### **When do I stop paying?**

One issue that varies from state to state is the question of when support terminates. Although all states terminate support when the child dies, marries, enters the military, or becomes emancipated (self-supporting and living on his own), in the absence of these circumstances the age at which support terminates varies. Some states allow child support to continue past the age of 18 (generally to the child's 22<sup>nd</sup> birthday) if the child is attending college. On the other hand, some states, like Texas, terminate support when the child turns age 18 unless he or she is still in high school.

# The First Legal Steps

## The Petition, Answer and Cross-Petition

To obtain a divorce, either the husband or the wife must petition a court for a judgment of divorce (in some states, dissolution). To begin the court procedure, the first step is for the husband or wife to formally request a divorce from the court by filing a Petition for Dissolution. In the majority of states, the person filing such petition is called the Petitioner. These documents are almost always drawn up by attorneys.

Once the petition has been filed, the other spouse is officially notified by written legal documentation of the Petitioner's intention to divorce. The petition is "served upon" (delivered to) the Respondent by a sheriff or process server. The person receiving the petition is the Respondent. In some states, the parties are simply called Plaintiff and Defendant. The State legislatures that label the parties to a divorce proceeding "Petitioner" and "Respondent" probably do so to distinguish between divorce litigation and other types of lawsuits.

The petition is typically a short, simple document stating the basic facts (i.e. date of marriage, separation date, addresses of the parties, names and dates of birth of children, etc.), and a request for relief sought (e.g. divorce, child support, maintenance (a.k.a alimony) and property division). The Respondent typically has 30 days from the date of service to file an answer. The answer is usually also brief; the Respondent admits or denies each assertion in the Petition and asks the court to deny the Petitioner's request.

Such exaggerated allegations are especially common in "fault" states, which require the existence of "misconduct" (such as adultery, physical abuse or extreme and repeated mental cruelty) as a condition for granting a divorce. Naturally, a good husband and dad may be incensed at these allegations. Again, I tell him that his wife inserted the sentence solely because the law requires her to make these allegations in order to obtain a divorce. It is likely that neither she nor the court will give unsubstantiated allegations any further attention.

With the Answer, the Respondent often files a Cross-petition. This document is similar in form to the original Petition, and sets forth the Respondent's position about the basic facts and the relief Respondent seeks. Whether or not the Respondent actually desires a divorce, it is a good idea to file a Cross-petition. In order for the Respondent to mount a proper defense, he must have his own demands before the court in the form of a petition. If he does not file a Cross-petition setting out his expectations from a divorce, he could easily find himself at trial with the agenda being set by his wife's inflated wish list. The Petitioner usually has 30 days to file an answer responding to the Cross-petition.

— **Insider Tip** —

The initial petition does not give the Respondent much information about what the Petitioner is actually seeking; it is common to demand much more than one may actually expect or want. Husbands are often outraged to read that their wives claim to be incapable of supporting themselves and therefore want all attorney fees paid by their husbands. Wives also typically ask for sole physical custody of the kids and, possibly, a disproportionate share of the assets. I tell clients not to panic or be offended. While your wife may in fact go to war for everything requested in her petition, it is often a standardized "prayer," a Christmas wish list her attorney puts in every such petition.

**When should you file for divorce?**

If your wife has not already filed for divorce, consider whether a delay in filing your petition is to your benefit or detriment. In deciding whether to delay filing, consider your and your wife's relative positions given the criteria for awarding custody (Custody Section). Then estimate whether additional time would enable you to improve your relative position as a parent, or, alternatively, whether time is your enemy regardless of your interim efforts. If you want primary custody, it is possible that a delay could provide a period of time when you are aware of what lies around the corner while your wife is not. This waiting period may afford you an opportunity to solidify your position as the primary nurturer, as well as to gather information and evidence. Obviously, these opportunities do not exist to the same extent once your wife has been served with a summons. Typically she will quickly circle the wagons and prepare for battle.

## Temporary Motions (Part 1)

Early in the legal process, parties may file motions for "*temporary orders*" with the court. In some states, these motions may bear an arcane Latin name, such as Missouri's *Motion Pendente Lite* (pending litigation). The purpose of temporary orders is to establish temporary custody, support and property arrangements while the case is pending (i.e. until the parties agree on an acceptable final settlement or a judge orders one after a trial). A temporary order normally will be in force for the balance of the case. Often, a temporary order will address possession of the marital home, custody, and support of kids, maintenance, protection of assets, payment on debts, and any other pressing issue that cannot wait until the conclusion of the divorce.

A temporary motion hearing may be necessary for several reasons. First, in many states the filing of a divorce petition triggers laws designed to prevent either party from changing the status quo. While a divorce is pending, many states forbid either parent from removing children from the state and may even prohibit removing children from the "jurisdiction of the court," a much smaller territory (usually a county). Also, usually the parent who had custody of the children at the time of filing continues to retain custody while the divorce is pending. In states where such statutes exist, parties to a divorce naturally have fewer things to argue about in temporary motions. However, in states where no such laws are in effect, a judge must decide the question of temporary custody at a hearing.

In addition to the question of custody, many unanswered concerns persist and may need to be resolved in a hearing. For example, kids may be facing the "tug of war," seized by one party or another, or denied entirely to one party by the other. Funds could be squandered. One party may withhold necessary financial support to punish the other for going through with the divorce. In this case, the court will hold a temporary motion hearing because this precarious state of affairs simply cannot wait until the final trial date, which is perhaps a year or more down the road.

### — Insider Tip —

While litigating temporary orders in court is one way to establish a temporary arrangement between you and your spouse, most parties and their attorneys normally make serious efforts to arrive at an acceptable temporary arrangement without going to court. In fact, as many as half of all divorces may be completed without a temporary order. There are several reasons for you to try to avoid litigating temporary motions:

1. *Proximity* of the final hearing may eliminate the need for a temporary arrangement.
2. *Making a good impression* on the judge deciding your case is an important part of winning a more favorable settlement in the end. Therefore, you may conclude that a reasonable temporary arrangement, while not ideal, will make a good impression on the judge. Moreover, convincing a judge that you are a rational, even-tempered person may be especially important if your spouse has alleged abuse. In addition, peacefully establishing a temporary compromise may

avoid inflaming the opposing party unnecessarily, especially where the prospect of a favorable final settlement exists.

3. *Attorney fees* are always a paramount concern. An attorney may charge you several thousand dollars to prepare and argue temporary motions. You have to decide whether the possibility of a slightly more favorable temporary arrangement is worth the money.
4. *Court time*: the hearing on a motion for a temporary order may be at best perfunctory. Often, the evidence necessary to convince the judge to grant you temporary custody of the kids will be similar to the evidence that will be introduced at trial. This is particularly true regarding custody and support matters. So, if heard, the judge essentially tries the same case twice. This is not only very inefficient, but also very expensive. Therefore, most judges do not want to hear the same evidence twice in any divorce proceeding and may not give your arguments significant weight.

#### — Another Insider Tip —

There are nonetheless cases where matters must be tried. If you are seeking primary or joint (50/50) custody, the temporary arrangement may be strategically critical to your success. This tends to be true particularly where the final trial date is in the distant future; a judge deciding your case a year or more down the road might be very reluctant to disturb an already established custodial arrangement. Also, where mom and dad are in different school districts, dad may be disadvantaged if his children commence a new school while in mom's care. In summary, you and your attorney must carefully weigh the costs and benefits of seeking a temporary order at the outset of a divorce and decide whether to compromise or fight. Of course, the other side may pursue its own temporary order and take positions that would force you into a court fight.

## **Temporary Motions (Part 2)**

### **Custody Issues**

Depending upon the waiting period for a trial, the interim custodial arrangement could substantially advance or reduce your chances of victory at the final hearing. Often, a case remains pending in excess of one year before it actually goes to trial. This affords an opportunity to the interim custodial parent to create a record of exemplary parenting. This period may also be necessary for you to rehabilitate your image as a parent. Additionally the interim parent benefits by creating a somewhat settled family situation going into trial. A judge will likely be substantially influenced by the fact that the child at trial is established in a home, a neighborhood, and a school.

It should be noted that for dads in particular there is often a need to prove their ability to be a primary caregiver. Moms will often allege that dad did not provide much child-rearing assistance during the marriage. However, even in those jurisdictions that permit it, it is not always practical for a dad to obtain interim primary care. The reasons are varied: 1) mom may file first, in which case temporary custody is determined at the time of filing, (2) there may be no appropriate place for dad to reside with the children, while mom is still in the home, and 3) dad's present work schedule vis-a-vis mom's militates against interim primary with dad. Keep in mind that the pendency period (the time during which the case is pending) provides as much opportunity for loss as for gain.

### **Should you continue to reside in the marital home?**

If for logistical or other reasons you conclude that you cannot obtain interim primary custody, your fall back position must be joint physical custody. However, parties are rarely able to agree on a temporary joint custodial arrangement at this stage in the process. Most often, a court's temporary custodial arrangement gives the dad non-custodial visitation rights. Therefore, in order to obtain the best possible custodial arrangement at the final hearing, the optimum arrangement is for you to continue living in the marital home while the case is pending and seize and properly document every opportunity to nurture your children.

## Temporary Motions (Part 3)

### Adult abuse orders

However, a caveat is in order here if you decide to continue living in the home. Virtually every state has its own version of an adult abuse order. These are devices intended to protect victims of domestic violence. The unfortunate reality, however, is that they are often used as tools by women in divorce. While nominally gender-neutral, the truth is that men have a heavier burden than women do in trying to get such an order issued.

These legal devices consist of two stages. The first is the *ex parte* order, which issues on the applicant's word alone without the opposing party being given an opportunity to be heard. If an *ex parte* order granted, the defendant is ejected from his home with only his personal effects. He is forbidden to return to his home or anywhere else that his wife may be. He also will be deprived of custody of his children and his access will be narrowly restricted, if not eliminated entirely. He must live this way until stage two, which is the full order hearing. This hearing typically occurs 10-15 days, and sometimes up to 30 days, after an *ex parte* order is issued.

The full order hearing provides this process with a cloak of constitutionality, in that it is the theatrical point at which a citizen is afforded his "due process." However, as any experienced lawyer will tell you, the cold reality is that, in the vast majority of courts, the "hearing" is summary in nature with a presumption against the defendant. The good legislative intentions and the vigilance of constitutional theory are of little assistance to the accused, as he stands in a crowded courtroom in rural Missouri before a judge determined to err on the side of caution. Despite law to the contrary, the reality is that *ex parte* orders and full orders of protection are casually granted to women in many, if not most, courtrooms across America.

With that in mind, any dad choosing to reside in the marital home with his wife while a case is pending assumes some risk. Naturally, the degree at risk varies from case to case. Having an order of protection issued against you will almost certainly hurt your case for custody; in fact, in many jurisdictions it is held against you by statute.

In summary, when weighing the option of staying in the marital home, you must perform a balancing test. On the one hand, consider the opportunities it affords you to continue parenting while the case is pending. On the other hand, consider the risk associated with that strategy, as well as your accompanying misery and frustration.

If you opt to attempt to stay in the home with your wife, you **must** walk on eggshells, bite your lip when baited, and refuse to be drawn into any confrontation. This is easier said than done. Many men cannot help but be drawn into confrontations with their ex-spouses. Grand strategy dims in the heat of argument at 1:00 a.m. on Saturday morning. If you think you are significantly vulnerable to such manipulation and/

or fabrication, I recommend that you consider a strategic retreat. Rather than being forced out of the house by a court order, it may make more sense to move from the house voluntarily, taking what property you want, and to continue to parent during the time you are allocated.

## Discovery & Depositions (Part 1)

### What is "Discovery"?

*Discovery* is the process of gathering information in preparation for trial. It begins after the petitions have been exchanged. Discovery is the means by which you build and strengthen your case; it occurs at various points and at various rates from the beginning to the end of a divorce. Several factors determine the extent and length of discovery:

1. *Individual preferences*: naturally, some people are more eager to "dig up dirt" than others. Also, the lives of some people are significantly more full of past incidents and misdeeds—or, alternatively, of selfless parental devotion.
2. *Complexity of the case*: discovery is naturally more thorough and lengthy when there is a custody battle, marital misconduct, bad parenting allegations, or accusations of substance abuse.
3. *The attorneys*: some attorneys favor meticulous and expensive litigation and feel unprepared unless they know absolutely all even arguably important facts in a case. Other lawyers prefer to look for ways to settle a case early in the process without the time and expense of lengthy discovery. And, of course, there are all points in between.

#### — Insider Tip —

If you want primary custody, your attorney's job is essentially to persuade a judge that **you are better than your ex-wife**. Aside from some minimal threshold of fitness, you do not have to convince the judge you are an exceptional parent. You must simply appear better than the alternative. In some cases—not yours, I hope—the judge more or less holds his nose and picks the parent he finds less disgusting. However, you can usually improve your relative position by playing up your strengths as a parent and by diminishing your opponent's. Naturally, you should proceed along both paths simultaneously.

Therefore, during discovery our clients focus on gathering *positive* information about themselves for us to present to the court. Obviously this is important. But equally important is anticipating your opponent's case. Remember, winning a favorable custody or financial arrangement simply means beating your wife. To do this you have to be prepared to deal with her facts and her allegations.

## Discovery & Depositions (Part 2)

### Assembling a Witness List:

Your input is essential here. At trial, you will be telling a story to the court and you will need additional voices to make your story as vivid and credible as possible. Witnesses fall into one of two categories: lay and expert. Lay witnesses are sometimes called "fact" witnesses because they testify to facts they know or events they witnessed (in contrast, an expert witnesses give the court their opinions, based on scientific knowledge). To assemble a list of lay witnesses, I often ask clients for names of people who have been around the parties and the kids a lot, most importantly in the home. These witnesses need to be credible, articulate, neat, and sincere. School employees, such as teachers and counselors, are often credible witnesses. They can often discuss the level of participation and interest of each parent. They may also have observed the kids interacting with parents. Also depending on possible evidentiary constraints, they may be able to discuss statements made to them by the kids and the kids' academic performance.

Health care providers for both parents and kids can also be useful witnesses if there are allegations related to health. It should be noted, however, that federal and state laws severely restrict access to medical records. Typically "good cause" must be shown - abuse or neglect of children is usually sufficient.

Clients often ask, "How many witnesses should I have?" The answer depends in part on how many good witnesses are available and in part on the time constraints imposed by the court. Obviously if you do not have to ration time, you would put on all available helpful witnesses -- both expert and lay. In busier courts, particularly in urban areas, judges will prescribe a fixed amount of time to present your entire case. Obviously the time allotted will vary with the number and complexity of issues. For example, if only custody is in dispute, judges in St. Louis County, Missouri will often assign a dissolution case one day for trial, which means 3-4 hours for each party. I should add that apart from express time limitations, there is an implicit expectation on the part of all courts that you not fritter away time with cumulative or marginally relevant evidence.

Subject to these conditions, however, my personal view is to err on the side of too many witnesses rather than too few. I often have more witnesses present than I in fact end up using. When in doubt, I subpoena or otherwise assure the presence of a witness, then decide as the trial unfolds whether to call this witness to the stand. I shall warn you that this approach sometimes offends witnesses who come to the courthouse and sit around only to be told to go home at the end of the day. But my duty is to my client. Therefore I give little consideration to the possible inconvenience of a potential witness.

Once a client has identified the people who could give favorable testimony on his behalf, or the documents that support his arguments, lawyers can use the formal "tools" of discovery:

1. **Interrogatories:** These are written questions sent to the other attorney for his client to answer under oath. For the most part, any question is fair game, so long as it is relevant to the case. The written answers must be provided within a designated time period, usually 30 days.
2. **Requests to Produce Documents and Things:** this is simply a written request submitted to the other side listing various documents you would like to be copied and made available for your review. Again, you can ask for almost anything so long as it is relevant to the case. The other party must comply within a fixed period of time.
3. **Subpoenas:** These are documents sent to non-parties asking them to provide documents or testimony in a formal deposition. While your lawyer may subpoena some individuals for the trial date, subpoenas are most commonly used to gather information well in advance of the trial date. For example, employers, psychologists, and/or school officials may be called on to give documents or testimony prior to trial.
4. **Deposition of a Party:** This is a device by which your attorney can ask questions of your wife under oath with a court reporter present. Obviously her attorney may depose you. This is typically done in the office of one of the attorney's.

If you and your attorney are pursuing a particular piece of information, you must creatively decide on the best device to obtain it.

## Discovery & Depositions (Part 3)

### What is a "deposition"?

A "deposition" is a legal term for "asking questions." Essentially, it allows both parties to prepare for trial by asking questions of the other in order to gather information. Parties to the suit and witnesses may be deposed. The deposition serves essentially two critical and overlapping purposes in a divorce case.

*A peek behind the curtain:* a deposition presents you and your attorney with a preview of what the deponent will say at trial. When the deponent is your wife, the value of this sneak preview cannot be over-estimated. If the deposition goes as planned, you are given a unique opportunity to hear your wife's trial testimony weeks or months before trial — her accusations, her arguments, her specific demands, and each event or circumstance (real or contrived) underling particular allegations. While she can change her testimony at trial, you don't have to be a lawyer to predict that by doing so she will pay a heavy price of loosing of her credibility with the court. Her deposition testimony can be used with great dramatic effect at trial to expose contradictions.

This preview also allows you to observe and assess the credibility of your wife and other witnesses. No transcript can substitute for this impression. By observing the other side's demeanor and tone, you can see what the judge will see. Does your wife come across as sincere? Is she articulate? Does she appear fair-minded? Can she be provoked? The fact is that some people testify poorly; some are neither likable nor believable. Attorneys can help such clients or other witnesses by carefully preparing them beforehand, but this approach obviously has its limitations. Therefore, since the impact of deposition testimony on the trial can be decisive, some cases are settled right after a deposition.

*Obtaining information:* the other purpose of a deposition is to obtain information. Names and addresses of important actors: boyfriends, supervisors, customers, witnesses, health care providers, sources of income, etc. It is important to get this information prior to trial so that you and your lawyer can pursue additional information to strengthen you case. The information obtained may be used offensively or defensively. Hopefully, you will have sufficient time to locate evidence confirming your claims and contradicting the claims made by your spouse. As discussed earlier, your case is built primarily of facts. A deposition is a useful means of obtaining them.

## Discovery & Depositions (Part 4)

### What happens during a deposition?

During the deposition, lawyers ask questions of the deponents. Typically, depositions of both parties are conducted on the same day. The total time necessary for both depositions varies widely depending on the number and complexity of the issues. The custody issues themselves could require four hours for each party. But for the vast majority of divorces, depositions of both parties are completed in less than 8 hours. If a deposition is not completed on the scheduled date, it is continued to another date.

An attorney's personality and strategy determine the atmosphere of any given deposition. The tenor of a deposition can be informal, unstructured, and even friendly. Alternatively it can be very formal and regimented with numerous exhibits (e.g. documents the deponent is questioned about) and heated examination. Most depositions lie somewhere between these two extremes. Some lawyers will seek to intimidate or embarrass you or your witnesses at a deposition. Most attorneys, thankfully, do not behave this way. The best lawyers will make a determination at the outset about the tone and style best suited to obtain information from the deponent. There are occasions when an aggressive confrontational demeanor at a deposition is the most effective. Most often, a kinder, gentler tone in a deposition produces more yardage.

### What you can expect

Your and your wife's depositions may cover any or all of the following topics:

*Background:* name, address, employment, age.

*Health:* Is your health good? Any problems? Names and addresses of health care providers over past 5 years. When and why you have seen doctors? Your treatment and prognosis?

*Spouse's Health:* Is her health good? If not, explain. If spouse's health is at issue, you will be asked in detail about her history, as you understand it.

*Your living conditions:* Do you live in a house or in an apartment? Do you own or rent? Plans to move? Describe your floor plan, sleeping arrangements.

*Your employment:* employment history, duration of each employment, reason for leaving, work schedule for each job, location of present employer, future plans?

*Children:* names, ages. Are you seeking primary custody? Why? Identify each reason.

Children's education (as to each child), grade, teachers to date, counselor(s), principal(s), academic history (as specific as possible), communications with teachers, attendance at school events.

*Children's health care (as to each child):* Each doctor or other provider seen to date, reason for each identified visit. Who scheduled appointments? Who took the child?

*Children's care (ratios as to each child):* Who changed diapers? Who prepared breakfast? Who served breakfast? Who got the child dressed in morning? Who prepared dinner? Who served dinner? Who prepared the child for bed? Who gave baths? Who took to daycare/school? Who picked up from daycare/school? Who helped with homework? Who spent more time with child? Who disciplined? How?

*Children's activities:* identify extracurricular activities? Did you or your wife coach? How many events? How many did you attend? How many did your wife attend?

*Decision-making:* Do you and wife agree on issues affecting the children's health, education and welfare? Do you feel you are capable of agreeing on such matters in the future? If not, why?

*Financial:* expect detailed questions about any income sources.

*Allegations by you (cite specific incident):* Abuse? Neglect? Alcohol problems? Drug abuse? Physical abuse by her? Alienation by wife? Does wife have any good parenting traits? Describe.

It may not be obvious that the above outline can easily turn into a 3-4 hour deposition. Keep in mind that a good attorney will not allow a deponent, particularly a party to a divorce, to get away with sweeping buzz phrases or generalizations. For example, if you state that your wife was "violent" on "numerous" occasions, expect to be asked to define the word "violent" specifically. Then expect the attorney to ask you to identify and describe each and every occasion on which such an event occurred.

— **Hint** —

One of your primary purposes of a deposition is to *obtain* information, not *disburse* it. In taking your wife's deposition your attorney must exercise caution in selecting the topics he will raise. Clients eager to confront their spouses with the damning evidence of their misdeeds are sometimes disappointed when these topics are not raised in a deposition. This is because the attorney must weigh the benefit of inquiring about a matter your wife does not expect to be raised at trial (and therefore would otherwise be unprepared for) against loss of the element of surprise. For example, if you can establish that an incriminating fact exists without any admission from your wife and if you do not expect an effective denial, you may choose to present such evidence for the first time at trial. Or, better, your attorney may ask a broad question, encompassing the incriminating acts, and let her take the seductive path of a sweeping denial. Then you adroitly drop the matter until trial.

Therefore, here as elsewhere in trial preparation, keep in mind your objective — your goal is to win at trial. As tempting as it is to immediately confront your wife with the salacious and incriminating goods you may have on her, don't jeopardize long-term victory for short-term satisfaction.

## **Giving Your Deposition**

Since the primary objectives of a deposition is to preview the other side's case and obtain information, your task during your deposition is to give as little information as possible. This refers not only to raw data, but also to the tone, style, and manner of your presentation as well.

You may face a difficult dilemma in your deposition. On the one hand, you have a duty to answer questions, unless your attorney instructs you otherwise. If at trial the judge finds out that you did not disclose information you had a duty to disclose, the penalty can be harsh. Similarly, if you lie, you are subject to criminal prosecution for perjury. On the other hand, absent some overarching settlement strategy, you *want to communicate only what you must*.

In some cases, as the above outline reveals, you will be asked questions regarding which you will need to give knowledgeable answers. For example, questioning concerning the details of the children's education, health care, etc., you will want to give complete or informed answers. Paradoxically, this category of questions is intended to reveal your lack of knowledge and hence your lack of involvement in nurturing. Your performance in your deposition is crucial. You should prepare accordingly.

## Discovery & Depositions (Part 5)

**Pay particular attention to the following, they are often key topics:**

- Know by heart the names of all daycare providers and/or teachers past and present.
- Know your children's grades class by class.
- Know from memory all health care providers your children have seen, the reasons for such visits and any treatment that followed. Know any medication your children take.
- If you and your wife are proposing different school systems, know comparative data: class sizes, SAT & PSAT scores, awards, rankings, etc. Be sure you have visited both schools.
- Expect the question: Why do you believe you should have primary physical custody?
- Do not unduly demonize mom — give her credit where credit is due. It harms your case to swing wildly, to make claims you cannot back up, and, more importantly, to do so in a tone betraying bitterness or anger. You don't want to distract the court from what you say to why you say it. For example, you usually only build your credibility by saying: "of course she loves the kids," or "of course the kids love her," and "she is always a good mom."
- Go into the deposition with a plan for the future. Be prepared to discuss the logistics if you are awarded primary custody: your work schedule, the time you leave in the morning, breakfast, know your day care provider, time of pickup each day, bus stop, etc. If you do not have a plan by the time you are in depositions, you may need to reconsider the seriousness of your intent.
- If you are alleging misconduct relating to your child, expect to be asked for specifics. While you should not volunteer them, if pressed you should be prepared to identify specific instances.

**Also, remember the following ground rules regarding all your answers:**

*Just answer the question:* Provide only enough information to answer the question. Don't volunteer anything. Be succinct. Make the other lawyer work for the information he gets. Once you feel you have answered a question, stop. Silence in the room is okay. It is even good — it means you are not handing over information.

*Do not "make arguments:"* Remember your opponent's objective. She wants to watch you testify and observe your demeanor, your passion, your best arguments. You likely will have a lip-biting temptation "to give it to her." If you succumb, you have given her the ability to undermine your claims at trial. You cannot win your case in a deposition, but you may lose it if you are not

careful.

*Take a break if you need one:* If you become tired or your concentration starts wondering, simply ask for a brief break.

*Ask to speak with counsel if faced with a crisis:* If you face a pivotal question regarding a pivotal issue and you are completely stumped, you **may** ask to speak with your counsel. While this practice is disfavored and the opposing attorney may huff and puff on the record, it is the clearly the lesser of two evils, the other being that your case self-destructs before you and your lawyer's eyes.

*Don't be intimidated:* Clients often have this "bigger than life" view of the other attorney. They think he knows more than he knows, is smarter than he is, and is going to harm them more than he actually can. If are prepared as instructed and are truthful in your answers, you can enter the depositions confidently, knowing you will do the best you can.

*If you don't know, say so:* You have no obligation to know the answers to all questions. If you don't know the answer, simply say so, or, if you think you are going to have an answer in the future, you might in some cases say, "I don't recall at this time." These are valid responses. In no event should you allow opposing counsel to lure you into speculating or guessing. If the opposing counsel persists, politely repeat your answer.

*Don't be lead:* Your questioner will subtly direct you toward points he wants to establish. It is to some extent human nature to seek to agree. He may in fact assume the demeanor of a friend. The bottom line is that the opposing attorney is your arch enemy. When he makes a statement or asks a question that assumes something untrue, interject a correction. Within the bounds of courtesy, make sure your point is made. You should also interrupt opposing counsel if you need to correct a misimpression or misstatement.

*Maintain a professional demeanor at all times:* The other attorney may attempt to anger you, to rattle your cage. He may be rude or sarcastic. However he treats you, you do not allow your anger to show. Such repayment in kind reflects badly on you. Leave it to your attorney to intervene when appropriate.

*Answer the questions as accurately as you can:* This means being truthful. But beyond that, it means not exaggerating your case. Be careful about powerful claims you cannot back up. This hurts your credibility on the claims you can backup. Don't bring your records or notes to the deposition unless your attorney specifically tells you to bring them. When you refer to records during a deposition, the other attorney has a right to see them.

*Feel free to pause and consider your answer:* The transcript is the only record and, unless counsel orally notes the pause, the transcript will give no indication of how long you took to

answer. Unlike during trial, in a deposition thinking time is without penalty or prejudice. Feel free to use it.

*If you do not understand a question, say so:* You are not punished for asking that the question be rephrased or repeated. In fact, you may misstep seriously if you proceed as if you understand the question when you are really unsure.

*Do not rush to answer:* It is important to pause a few seconds after every question to allow your attorney time to insert an objection. (Additionally, your attorney, like you, could use a second or so to consider *his* response as well).

## Settlement (Part 1)

### Should discussions take place?

Clients often wonder whether they should take the initiative to negotiate with their wives. While these discussions can sometimes produce settlements and can serve to improve your relationship with your wife, you should also be careful. If your rapport is such that you are capable of reaching an agreement, I would not discourage discussion **so long as** you do it in tandem with your attorney. Bear in mind that it can be disastrous to make concessions or cut deals which turn out to be overly lavish or, conversely, grossly unreasonable. These "deals" are ultimately deal-killers. They create expectations, which calcify into intractable positions. Bad blood results if you renounce a deal after consulting with your lawyer and realizing that you gave up too much. Moreover, if you back out of an agreement, your wife may persist in pursuing the putative "deal," figuring that you agree to it at heart, despite what your lawyer says. In addition to the practical complications described, the litigation fallout from the miscommunication can easily double your attorney fees.

For the majority of the cases in my office, however, it is a mistake for clients to negotiate directly even when I am "in the loop." The foremost reason is that there is often no prospect for agreement when you are the father demanding primary or even joint custody of your kids. Typically, this matter is not open for peaceful discussion or negotiation, either because the mom has a visceral proprietary claim to the children and/or because she figures that, if she stands firm, the court will, in the end, give her primary custody.

Nonetheless, the parties—through their attorneys or on their own—are free to settle the case any time prior to the conclusion of the trial, at which point the judge decides all disputed issues. "*Settlement*" simply means that both parties have agreed to certain terms that resolve all of their disputes. Sometimes, parties settle some of the issues and have a trial only on those issues which are still disputed (such settlements are called "*partial*").

### — Insider Tip —

A partial settlement can be beneficial because it focuses your dispute on the heart of your disagreement, saving you and your spouse time and money. However, you should never allow a partial settlement to undermine your overall goals. For example, let's assume that the only issues in your divorce are the house and custody of the children. You happen to know that one of your wife's main concerns is to be able to continue living in the marital home after the divorce, but it is unclear what the judge will do at trial. You, on the other hand, have moved into another home and are indifferent about the matter. Your main concern, in contrast, is a joint custody schedule, which your wife opposes. Somewhere along the way, her lawyer will likely propose to your lawyer to settle the property issue and hear only the custody issues at trial. Although simple, this settlement will

undermine your goals; if you insist on a package deal ( i.e. all issues or none), you have more leverage to get what is important to you.

If no property, assets, or children are involved, it may not be necessary to have a formal written agreement. Most couples, however, create a fairly lengthy document. Typically, a settlement agreement will incorporate issues relating to both physical and legal custody, income, property, debt, and spousal and/or child support. Occasionally, cases are settled prior to either party's filing a petition. Far more common are cases that settle on the day of trial — in some cases even **during** trial. The settlement agreement has important advantages. If a judge chooses to accept it, it will be incorporated into the *Judgment*. A reasonable settlement agreement—one that is not entirely one-sided—may allow you and your wife more control over your *Judgment*.

Although a settlement, by definition, means an agreement, this deal in fact may not be entirely consensual. A settlement normally simply represents the intersection of each party's assessment of the best result he/she can achieve at trial. Often, these respective projections are based on fairly reliable information. Most influential, perhaps, are the judge's views as expressed in this and previous cases, and the applicable law in your jurisdiction. Not all cases settle for such rational reasons, however. Real world factors such as fear of embarrassing disclosures, lack of money for attorney fees, and the hope of eventual reconciliation may significantly contribute to producing settlement. Additionally, people prefer certainty. Unless the judge's position is known unequivocally, there is some level of uncertainty on both sides. Many clients prefer to avoid the anxiety of wagering their lives on a judge's decision. Additionally there are the factors of time and money to consider. In many jurisdictions, you will wait one to two years for your trial. Meanwhile, both you and your wife's attorneys' fees will continue to climb. You may also be interested in settling because in some jurisdictions you may be held responsible for some portion of your wife's fees. These fees normally increase dramatically as you approach your trial date.

## Settlement (Part 2)

### Making a deal with your spouse

*Physical custodial arrangement:* everything must be spelled out in detail. *Do not* assume any good faith will exist — if it does, great, but do not bet your and your kids' future on it. Hand-shakes mean nothing between divorcing spouses. Specify who picks up and drops off children, the specific times, notification deadlines if someone is late, telephone contact, etc.

*Joint parenting issues:* specify the duties and obligation of each parent as to the children's health care, education, religious training, and extracurricular activities. Typically, if one parent is awarded primary custody, that parent at a minimum has a duty to consult and confer with the other regarding significant issues in the children's lives. Of course, if you have agreed on joint legal custody, greater cooperation is required. In either case, it is not enough to have these matters covered summarily in a few simple sentences. To be enforceable, the agreement **must be sufficiently specific for a court to be able to hold the non-complying party in contempt**. This means that a judge must be able determine precisely what the non-complying ex-spouse agreed to do. Normally, such detail requires at least several paragraphs.

*Be prepared!* In virtually all states a panoply of legislative and administrative provisions automatically is triggered when a child support order is entered. Many state and federal laws assure that moms receive financial contribution from fathers. However, the legislatures have shown no corresponding interest in assuring that dads have access to their kids. Therefore, if you are not being awarded primary custody, it is up to you to fastidiously scrutinize the provisions of your settlement agreement to assure it is free from gaps and ambiguities.

### When is the deal binding?

"If my wife and I do come to terms," clients commonly ask, "when is the deal binding?" "When is she locked in?" First, oral agreements regarding these issues are almost never enforceable. Second, a court may, under certain circumstances, even refuse to enforce a *written* settlement agreement.

Here is why: in contract law, almost any agreement between two people is enforceable, assuming it meets the legal requirements of a "contract." Courts allow rational people to make all kinds of bargains and normally will not inquire about the relative worth of what is being exchanged between the parties. Courts commonly consider marriage as a type of contract and apply the principles of contract law, where necessary, to determine the rights and obligations of parties. However, courts also recognize that marriage is a special type of contract, where agreement may be driven more by passion than by hard-headed calculations. In other words, the law understands that matters of the heart do not usually lend themselves to rational decision-making. Therefore, courts have historically viewed with suspicion deals made between spouses, whether it is a pre-nuptial agreement (prior to marriage) or a settlement

agreement (prior to divorce). In both cases, courts take an interest in assuring fundamental fairness. Prenuptial agreements, in particular, are legendary for their failure rate. While settlement agreements are subject to different rules, they, too, are often set aside. The most common basis for doing is "unconscionability" – where a Court concludes that an agreement is grossly unfair (it may be said to "shock the conscience of a judge"). Courts are especially solicitous when faced with custody settlements. Remember that a judge's task is to create an arrangement that is good for the kids, not only for the parents.

### **Will the judge know she made this deal and backed out?**

A judge may take the broken agreement into account if you file a motion to enforce settlement. Even if the judge rejects your motion, you may still argue that you are entitled to the award of attorney's fees. However, the agreement will normally not be accepted as evidence of what your spouse really believes is good for your kids. For public policy reasons, at trial courts do not admit into evidence settlement discussions between the parties. The fear is that people would not pursue settlement if what they say is repeated during trial. In short, such evidence may indeed be presented to the judge but the judge may only consider it for certain permissible purposes (e.g. attorney fees, enforceability).

## Motions

In addition to the previously discussed major intersections along the road to divorce, there will likely be various other peripheral legal activities. Usually these take the form of motions, which are simply a device to call the court's attention to some pressing matter

Each of these motions consists of filing a document with the Court and requesting the desired order, then giving proper notice to the opposing party of the motion and hearing date. Usually these matters can be heard fairly promptly, often in less than 15 days. Unless resolved prior to the hearing date, the attorneys (and sometimes their clients, depending on the motion) must make a court appearance.

### Motion for Protective Order:

While this motion may be incorporated into the original temporary order, the "victim" may also file a separate motion, usually denominated as a *Petition for an Order of Protection*. This is a tool routinely used by women prior to filing for divorce. Upon allegation of abuse—a term most judges construe broadly—a judge issues an interim or *ex parte* order. This order normally awards the ex-spouse immediate and exclusive possession of the house and kids. The displaced and dispossessed dad finds himself out on the street without so much as a hearing. This practice passes constitutional muster because it purportedly gives the dad a prompt hearing, typically within 10-15 days.

The eventual "hearing" is in fact usually a summary proceeding. The dad shows up to find that he is one of 15 other guys on the docket that morning. He finds out that the judge set aside only two hours for the entire docket. That allotment assumes an average of 8 minutes per case. Such scheduling is typical. Furthermore, the "hearing" is typically reduced to each spouse standing informally before the judge and briefly stating his/her case. If mom says the right things, she will usually get the order. This is partially attributable to the judge's survival instincts. Denying this motion in a case where actual abuse occurs may result in unfavorable consequences both for the victim and the judge. So most judges choose "to play it safe."

Upon finding of abuse at the hearing, the judge typically issues a full order of protection (sometimes called a *plenum* or permanent order) which will remain in effect from 6 months to 2 years depending on your state statute.

### Motions for Physical and Mental Examinations

While most clients would like to have their spouses undergo the humiliating court-ordered physical or mental examination, few such examinations are actually ordered. A party desiring

to have one ordered must jump over a high legal hurdle to persuade a court to subject a spouse to such involuntary intrusions. While the stringency may vary from one jurisdiction to another, you usually need a smoking gun — substantial evidence that your spouse is either physically or mentally unfit to parent.

## Motion to Compel Discovery

This motion is necessary when one spouse does not produce the answers or documents requested by the other within the time provided. Alternatively, the cantankerous spouse may object to providing such information, claiming that it is privileged or demanded with intent to harass. If the court finds for the moving party, it has the power to strike (throw out) the wrongdoer's pleadings and/or award the moving party its attorney's fees. In the real world, if this is the first offense and the opposing attorney offers some minimally plausible excuse, the court will simply give the non-complying party a new deadline to produce the documents in question and will not impose sanctions. Many clients are naturally angered to have paid an attorney to argue the motion while "she does what she pleases without penalty." However, when the shoe is on the other foot, the practice seems imminently fair.

## Motion for contempt

A party to a divorce lawsuit may file this motion if the opponent has deliberately violated a previous order of the Court. Usually such motions allege a violation of a temporary order. For example, a mom may allege that she was denied court-ordered visitation. A dad may allege that the mom is encumbering assets in violation of a specific provision forbidding such acts in the temporary order.

### — Insider Tip —

In recent years, orders of protection have gained importance beyond being simply domestic matters. Now, a finding of abuse by a court carries with it professional and other repercussions. It may affect one's eligibility for certain state and federal jobs, as well as employment in the private sector. Because of these grave implications, if your case appears shaky, in most jurisdictions you may decide to agree to a *consent order* by which you admit no wrongdoing. Its disadvantage is that the order is issued. The advantage is that it preempts any finding of abuse by the court.

If issued, the full order will likely forbid you from being present where your wife works, lives, or may otherwise be found. The order of protection may or may not deal with custodial and support issues. If a divorce is pending, the court will understandably pass those issues over to the divorce court for a temporary order.

### — Insider Tip —

The penalties for contempt can be substantial. Unlike noncompliance with discovery deadlines, contempt often carries with it stern action by the judge. The judge may award attorney's fees in addition to other remedies tailored to stimulate compliance. In exceptional circumstances, a judge may even order the wrongdoer to jail. The lesson here, however, is simple: consider carefully the potential consequences before violating a court's order. Judges tend to take it personally.

## Pre-Trial Conference

While settlement discussions can take place informally between you and your wife, perhaps with one or both attorneys present at any time, before trial you will probably also attend at least one mandatory "*settlement conference*" (also called a *pre-trial conference*). The conference is a mandatory court appearance — a sort of forced peace talk. Your attendance will likely be required. The conference itself typically consists of the attorneys sitting down across the desk from the judge in the judge's chambers and discussing the case. You and your wife will likely have to wait in the courtroom or in the hallway. You probably will not even see the judge on these occasions. Alternatively, both you and your wife may be interviewed by the judge or a panel of attorneys acting as mediators.

These conferences serve two purposes. They force the attorneys for both parties to discuss the merits of the case, with the added benefit of receiving input from the judge. The other purpose is to deal with trial-related issues such as length of trial, order of evidence, stipulations (i.e. items that can be agreed on), etc. Often, both sides begin to fully realize the emotional and financial expenses of a trial during pre-trial conferences. This, in turn, may encourage them to approach negotiations more rationally. If negotiations develop further, more than one pre-trial hearing may be held. Always bear in mind that attorneys are invaluable in advising their clients, but in the end it is the individuals who must agree to accept the terms of a settlement.

### — Insider Tip —

You and your attorney must be especially sensitive to the demeanor of your judge during these hearings. Some judges—and your attorney should know which ones—are dictatorial and formulaic. After hearing an overview of the facts, they unequivocally state their position on each issue and may even warn the resistant party that insisting on a trial may result in being ordered to pay the opposing party's attorney's fees. While the result in such courtrooms is not always just, its trains do run on time. Furthermore, if the judge endorses your position, you may think that the process is inherently wise as well. While you always have a right to a trial, and the judge must withhold final judgment until after all evidence is presented, you may sense at the conference that the judge has already decided the case against you. In this case, you may want to seriously consider concentrating on settling your case to save the aggravation and expenses of going to trial. At this point, your chances of getting more favorable terms from your spouse may be significantly greater than getting them in the judge's order.

In most cases my firm handles, these conferences do not produce a settlement, especially where a custody dispute exists. This may be so because we frequently represent dads and moms do not voluntarily surrender primary or even joint custody. However, under the right circumstances, with the right judge, these conferences can be very effective and helpful and may produce a settlement. For a settlement conference to be productive, each party must be willing to rationally assess its chances of

success and must not be blindly riveted to its positions. Additionally, the parties must not have fundamentally divergent views on the basic facts. Obviously, the judge cannot be helpful if attorneys present radically different versions of what the evidence will be. For the settlement conference to succeed, the judge must be without bias (particularly as to gender), cautious in forming an opinion, but sufficiently decisive to form one where appropriate, and adequately emboldened to express it without concern for offending either attorneys or litigants. In other words, Solomon would do nicely.

## The Trial (Part 1)

The final major event in the divorce process is the trial. Although fewer than 5% of all divorces go to trial, this statistic, like many such numbers, is misleading. If only the divorces of middle and upper class clients with children were included, the percentage would at least double. If the sample were limited further to include only cases where the mom is a homemaker and the marriage lasted in excess of 10 years, the percentage of cases that reach trial would probably double again. The length and complexity of your trial will depend on the time the court allocates and the number and complexity of issues to be decided. Your trial may last anywhere from a few hours to a few days, and—in rare cases—a few weeks.

**Custody Litigation:** certain issues are notoriously litigious in divorces, even where both parties are being reasonable. While money inspires a lot of conflict, no issue is more fertile for litigation than custody of the children. A dispute over child custody is prone to be tried because the criteria for awarding custody are vague and subjective. In essence, if you succeed at persuading the judge that you will be a better parent, you will have custody. The parties may also have a genuine disagreement about what type of custody arrangement is in the child's best interest. Most often, a custody battle involves a dad competing with his ex-wife for additional time with his child. Women often fight these battles without regard for the probability of success. My impressionistic theory is that moms fear family and friends will stigmatize them for having "lost custody" of their kids. Men, unburdened by such cultural baggage, are rarely motivated by what others may think.

**Financial Matters:** remember that the trial will likely cover more than child custody and support. A large part of your trial may be consumed by evidence relating to maintenance and/or property division. The evidence normally includes various financial documents, coupled with detailed testimony regarding both parties' statements of income and expenses, assets and liabilities, and testimony of various experts.

**Court Time:** some jurisdictions significantly restrict time permitted for trial. Additionally, individual judges may apply their own limitations. On several occasions, judges have limited me to only a half-day (4 hours) to present my client's case. While such heavy-handed tactics are of dubious legality, the sensible approach is to not anger the judge.

The trial is your opportunity to present your best evidence to the judge in the most persuasive way possible. Therefore, given time limitations, an effective advocate will usually select only the most favorable evidence to present a vivid and comprehensible picture. Your evidence may consist of testimony by various witnesses, tangible objects (e.g. a gun), various documents (e.g. school and health records), and visual aids.

During the trial itself, you and your attorney will be seated together (usually at your own table), as will your wife and her attorney. While clients envision a courtroom full of onlookers, most divorces do not command much public interest. Often, apart from the parties and their attorneys, only the judge, a court reporter, and a bailiff are present. Witnesses may or may not be present. Some states may require closed

hearings under certain circumstances, especially where minors are involved. Also, either party may: make a motion to the court to exclude witnesses from the court room altogether.

## The Trial (Part 2)

If your wife was the *Petitioner* filing for divorce, she will present her evidence first by calling witnesses and presenting exhibits. Your attorney can cross-examine her witnesses and object, where appropriate, to her evidence. If the court sustains the objection, the information is not admitted into evidence, which theoretically means that the judge will not consider it in the decision.

After your wife finishes presenting her case, announcing that she "rests," you will then present your case. After you rest, the Court may permit the *Petitioner* to present "rebuttal" testimony. Your wife is then limited to refuting your evidence. The purpose of rebuttal, as the name implies, is simply to give the petitioner a chance to respond to the respondent's evidence. So, for example, if your brother testifies to seeing you take the kids to school every day of the week, your wife will be able to put on a witness to contradict that testimony, perhaps to testify that you drove the kids only three times a week. Thereafter, testimony is concluded.

While opening and closing arguments are permitted in divorce proceedings as in any other trial, most lawyers do not use them. Since judges, not juries, decide divorce cases in most states, attorneys rightly find it unnecessary to give impassioned orations in front of a battle-hardened and sophisticated judge. Additionally, opening and closing arguments are often used to simplify and summarize complex or voluminous evidence. The evidence in divorces is usually neither voluminous nor complex. Furthermore, an experienced Divorce Court judge probably does not need the assistance of your attorney to understand the evidence and arguments, and may in fact be annoyed by a closing argument. As a result, I will make a closing argument only if I sense that the judge is unclear either about my client's objectives or about the importance of a piece of evidence central to my client's case.

## Modification (Part 1)

For some dads, it is possible to predict at the beginning of a divorce that fighting in court will not result in a more favorable custody arrangement. The evidence may simply not exist to support a dad's claim to primary custody or even a to joint custody schedule. If this is your case, your strategy should be to settle along the best lines possible in your circumstances and begin positioning yourself for the next engagement.

What if you have been divorced and your wife has primary custody of your kids? Or what if you became embroiled in an ugly custody dispute, you fought the good fight, but you lost? Is this the end of the story? In a word, No.

In most states, custody orders may be changed through modification. Technically a modification can be pursued at any time after the last court order. In order to obtain a modification, the party seeking the change (the "movant") generally has the burden of showing a "substantial change of circumstances" from the time of the original order.

Although the specific language of the "change of circumstances" test varies from state to state, the purpose is always the same: after a divorce is concluded, the court system cannot permit one or both parties to subject the judicial system, the other party, and the kids to a repetition of the first trial when there have been no significant new developments. The standard makes sense. If the standard were less strict, at least one of the parties in most divorces would come back the next day for another "bite at the apple."

Given these concerns, although you could theoretically have a "substantial change of circumstances" within 6 months of your divorce, courts view motions filed soon after a divorce with suspicion. In fact, in some states the burden is made greater if you file a motion to modify within one year of the divorce.

Subject to this significant limitation, however, virtually all custodial and financial issues are subject to modification. This is true because, whatever the circumstances of the children and the parties at the time of the divorce, things change. What constitutes a "substantial and continuing change" is a judgment call, but a major change in income of one or both parties almost definitely qualifies. A "change in circumstances" obviously occurs as the children mature and their expenses increase. Your ex-wife's activities after the divorce may also produce a change in circumstances. For example, she may be indiscreet in her affairs, may have a wild lifestyle, and may continually depend on others to "watch the kids."

If you decide to come back and file another day, you should have a calculated strategy to improve your relative position over time. If attaining primary custody is your goal, you should use all opportunities to create a record of exemplary parenting, fastidiously exercising all the custodial time afforded by your decree and volunteering to assist with the kids while your ex-wife is out partying. Moreover, since a

"substantial change" may occur with respect to both your and your wife's circumstances, you should try to improve your position and be on alert for a pattern of misdeeds on the part of your wife. Abiding by these rules might increase your chances winning primary custody or a better custody arrangement in the future:

**Pay child support:** Always stay current on child support payments, including indirect payments such as those for health care, daycare, etc. If possible, make all such payments through an intermediary to adequately document both the fact and time of payments (most states provide for wage assignments and/or payment through the court system). Remember, the burden of proving payment will be on you.

**Be a good parent:** Always exercise all the time afforded to you in the decree. Do not "blow off" any weekends, summer weeks, holidays, etc. Participate as fully as your decree permits in all decisions affecting your kids' health, education, and welfare. Initiate communications with teachers, doctors, and counselors.

**Be agreeable and courteous:** Always demonstrate a willingness to include your wife as a co-parent. Inform her of important incidents relating to your child's health, education and welfare occurring while the child is in your care. Do not argue with your ex in front of the kids. Do not send threatening letters. Do not disparage your ex in front of the kids.

**Look ahead:** Be mindful of the suitability and stability of your residence for primary custody. A good neighborhood and a good school system may prove influential if you seek a modification. Be mindful of the suitability of your employment for primary custody: commuting time, travel and work schedule are influential.

**Be a peacemaker:** Try to control your new wife; new wives can be deal killers in modification actions. They tend to be notoriously confrontational with the mom and reckless in their remarks in the kids' presence. Ironically, step-moms are often the moving force behind dad's motion to modify.

**Document all matters relating to your kids:** Be sure you are doing this at your attorney's behest (so that it may be privileged and therefore non-discoverable by the other side in a subsequent action). Specifically, document every time you have additional time with your kids and when they are left in the care of others. Also, document communications with mom. Document all of your ex-wife's misdeeds that you witness. This journalizing exercise should be brief; no more than 5-10 minutes a day. Remember, the judge probably won't endure "War and Peace" from cover to cover.

**Leave the kids out of it:** Do not drill the kids about what is going on in mom's house. Do not attempt to win over the kids by criticizing their mom. If the kids volunteer information, that is OK, but do not solicit such alignment.

## **Modification (Part 2)**

### **If your ex doesn't follow the divorce decree**

What if your ex-wife refuses to follow the decree despite your charm, patience and diplomacy? What if, despite your winsome and cooperative ways, your ex tampers with your rightful role in your kids' lives? After attempting to resolve the matter amicably by correspondence, a full retaliatory strike may be appropriate. Pause only long enough to ensure a solid record of the trespasses exists.

Bear in mind, however, that when in doubt, it is better to feign a determination to fix things amicably than to precipitously plunge into court with comparatively minor and premature complaints. The court's sympathy may lie with your ex-spouse when you jump the gun or are otherwise perceived as reactionary.

However, if you decide to go to court, you may file a Motion for Contempt (usually civil contempt) to remedy the other party's non-compliance. Technically, a contempt action is appropriate anytime a party "contemptuously" violates any provision of the decree. As a practical matter, however, the violation(s) should be significant. Remember that to be found guilty of contempt, it is not enough for the court to conclude that the accused party did not act in accordance with the decree. The court must also conclude that the accused party did so deliberately and without good reason. Your burden in most states is simply to show that mom did not comply with a court order, whether regarding temporary custody, consulting with you on issues regarding the children, or any other provisions of the court order. It is then up to the mom to present evidence that she did not have the ability to comply or that it was an "honest mistake." Often, a motion for contempt will be filed in tandem with a motion to modify. If the contempt motion is well supported by facts, this approach can enhance the credibility of your modification claims. A court may decide to modify any portion your divorce decree.

If you succeed in proving your case for contempt, the court has a whole range of remedies which you can request, ranging from incarceration to attorney fees to compensatory custody time to other, more customized remedies. Contempt can be a very powerful lever if the evidence is there.

## Guardian Ad Litem

In any divorce proceeding, a judge may appoint a *guardian ad litem*. This is an attorney who represents the interests of the children, assesses what custody arrangement would best for them, and reports to the judge. The circumstances in which a judge would appoint a *guardian ad litem* vary state-by-state. Typically, a *guardian ad litem* will be appointed if there are allegations of abuse or neglect. Also, a judge may wish to obtain an independent assessment of the situation if the parties are highly polarized and hold widely divergent views on custody questions. Upon the appointment of a *guardian ad litem*, the court will typically order one or both parties to pay a deposit for the fees. Often the fees are apportioned based on each litigant's ability to pay, which typically amounts to a ratio of the respective incomes of the parties.

Although many attorneys and divorce litigants think of a *guardian ad litem* as the "children's attorney," this is not exactly the case. In particular, while an attorney must generally follow his client's wishes, the *guardian ad litem* is not at all obligated to do what the children want. Rather, the *guardian ad litem* serves as the eyes and ears of the judge with regard to custody matters. A *guardian ad litem* has the power to be present and ask questions at depositions, interview witnesses, draw conclusions, and place those conclusions before the judge. If the *guardian ad litem* takes your side by recommending to the judge the position that you seeking, it can be a big help in negotiating a favorable custody settlement; conversely, if the guardian seems to take the other side, it can be a major stumbling block.

However, some practitioners think that guardians ad litem are neither appropriate nor helpful. A *guardian ad litem* is most often an attorney and there is no reason to believe that an attorney is well equipped to determine what is in a child's best interests. Instead of truly identifying a custody arrangement beneficial to the children, *guardians at litem* are often used by many judges and attorneys to force settlements in custody disputes, thereby avoiding a trial. Judges, in particular, are prone to avoid, where possible, the stress, effort and appellate risk of a trial. Some argue that the better solution, which some courts pursue, is appointing a psychologist with expertise in the field to independently evaluate the parents and the child and determine what custody arrangement would most benefit the child.

# Experts (Part 1)

## Use of Experts

During the course of custody litigation, experts often become involved for purposes of evaluation. In fact, the trend in child custody litigation shows an explosion in the use of expert witnesses since 1920. A prominent study has shown that experts were rarely used in such cases in the first half of this century. By 1995, however, the percentage of divorces where experts are used had risen to 38%. It has probably increased since, and now as many as half of all divorces utilize an expert in some capacity. Furthermore, surveys of judges have demonstrated that judges regard expert testimony as very influential in their ultimate decision, particularly where the court appoints the expert.

A professional expert involved for evaluation purposes is someone who is not a "treating" professional. It is generally agreed that a treating professional, such as a counselor whom the parties may have been seeing, cannot evaluate objectively. In fact, the ethical principles of psychologists and a Code of Conduct of the American Psychological Association expressly disapprove of such a dual role. Your evaluation may be performed by an "expert," who may hold any these occupations:

**Counselor** — This is a very broad term, like investment advisor. In most states, counselors are licensed, though a license may not be required. Most states do not require counselors to have attained an undergraduate college degree. As a result, a "counselor" could be anything from a highly qualified professional to a transient and inept opportunist.

**Social Worker** — typically has attained a master's degree in social work. Social workers usually work for governmental entities and many county judicial systems have a corps of social workers available for use in custody and other family conflicts. Social workers typically have an educational background in sociology and learn more about how groups of people behave than about individuals, especially children. In my experience, they tend to be liberal and inexorably confident in the power of government (legislature or judicial) to solve people's problems. At the risk of generalizing unfairly, my experience has been that conservative assertive males do not relate warmly to social workers.

**Psychologist** (not to be confused with psychiatrist)— is a mental health care professional with a Ph.D. in psychology. Psychologists are far and away the most commonly utilized experts in custody litigation. Psychologists have completed hundreds of hours of undergraduate and graduate study in the field of psychology and are accredited by the American Psychological Association. There are five areas of practice: counseling, school, industrial, experimental, and clinical. Of these, only clinical psychologists are properly trained to perform custody evaluations. Unfortunately, it is common for psychologists to practice in several fields, though they have no specialized training in all of them. According to a leading child custody psychologist, to be an effective custody evaluator, a psychologist should have a degree at the doctoral level in

psychology, at least several years of hands on experience as a clinician post doctoral, a solid base of experience and knowledge relating to child, adolescent and adult development, including both normal and abnormal psychology, and a full understanding of family dynamics including the effects of divorce. Additionally, a good custody evaluator will be current on the latest research and studies in the field. To be effective, the evaluator must also understand the ethical canons of the profession relating to custody evaluations.

**Psychiatrist** — is a medical doctor who has chosen to specialize in psychiatry. Psychiatrists, while lagging far behind psychologists in usage, are nonetheless the second most commonly used experts in custody litigation. Unfortunately, psychiatrists are not very well trained to do intensive patient evaluations or extensive talk therapy. They typically have an undergraduate major in science. Thereafter, they spend 8 years in medical school, including residency. Only after their residency is complete, do they receive specialized mental health training, which is condensed into a two-year residency. Much of this period, however, is devoted to biological and psychopharmacological issues. In fact, many psychiatrists will readily concede that little opportunity exists to study clinical and counseling issues. Psychiatrists focus primarily on diagnosis of mental illness, prescription of medication and regulation of the medication.

Obviously, a psychiatrist is not normally your expert of choice in a custody battle. Aside from being notoriously expensive, they are also frequently unavailable to testify at trial and, as other doctors, have to submit a record of deposition testimony to the court. Clearly, a dry transcript is usually not as persuasive as a witness testifying in person.

## **Experts (Part 2)**

### **The Professional Evaluation**

At some point prior to trial, the court may order you to undergo an expert evaluation. While the judge can order evaluations on its own initiative, the motion of one of the parties typically triggers it. In some jurisdictions, because of constitutional concerns, courts are reluctant to order the parties to submit themselves to such an evaluation absent a showing of good cause. This expert will evaluate both parents and will usually render an opinion, based on tests and expertise, about who will be the "better" parent to have primary custody.

Alternatively, where the court does not issue such an order to the parties, each party is free to hire experts to testify at trial. While an expert retained by one of the parties will not be able to opine about who should be the primary custodial parent, they can still add a great deal. For example, having evaluated you as a parent, your expert can comment on your mental health, personality, and positive parenting attributes. An expert can render an opinion about whether allegations of alcoholism or spousal abuse are likely to be true. If the permitted to evaluate the children, the expert can comment on your relationship with the them, their personalities and needs, and your ability to meet those needs, as well as on other matters pertaining to the dispute.

## Experts (Part 3)

### Stages of an evaluation:

A. *"Setup:"* the evaluator first becomes acquainted with the case. Most evaluators prefer to communicate initially with a client representative or one of the attorneys to determine: the basic facts of the case, whether one or both parents will participate, whether the children will be evaluated, and the scope of evaluation.

If both parties participate, payment is normally allocated based on ratios of income. In either case, money must be deposited with the evaluator (unless, of course, the evaluator is paid from some other source such as the court system). The setup may also include an initial meeting with the client(s) for purposes of getting the necessary documents signed, consisting of a retainer agreement (contract for services), payment of retainer, "informed consent" statement, waiver confidentiality (giving evaluator right to disclose findings to court and opposing counsel), as well as various medical, educational and other releases.

B. *Information gathering and an analysis of the results:* during this stage the evaluator meets the client (s) on a substantive level and often will talk further with counsel, or both counsel if both parties are to be included. Based upon these interviews and the scope of the evaluation, the evaluator then develops a plan for determining his conclusions. In developing the plan, the psychologist will determine whose interviews would be helpful. This of course will vary depending upon the objective and the individual case. If there is a custody dispute, a conscientious psychologist will typically talk to the children's day care providers, teachers, extended family members, prior counselors, treating physicians, and, where a factor, new spouses or significant others. Again, the information sought will vary with the objective. Commonly, however, the psychologist will inquire as to the children's behavior, their health and their attitudes.

The interview will ask about each parent's interaction with the interviewee, and the interviewee's familiarity with each parent. The interviewer may investigate alleged incidents during these interviews. A psychologist will commonly invest 5 to 8 hours in interviews. Psychologists term the information gleaned from this method "subjective data." But such sources are immensely useful in giving a fuller and more accurate picture. The evaluator must be able to get third party perspectives to test the validity of what he hears from the parties as well as to gain insight and knowledge the parties do not possess.

In addition to interviews, a psychologist will administer certain tests to the client(s) and the children. The appropriate tests are, of course, determined by the objective. Where there is a custody battle, the psychologist will typically give a battery of tests. The tests are either objective, for example, multiple choice where the individual has no room for discretion beyond stated choices, or projective, which gives latitude in the response and considers behavior and other factors. As a result, a projective test is more difficult to score. An example of a projective test is one where the individual is asked to draw pictures.

In addition to interviews and testing, it is helpful to give the evaluator other sources of information, which make his conclusions more credible at trial. Examples include journals kept by either party, letters and notes by either party. Another important source which many lawyers neglect is the discovery materials obtained during the pendency of the case -- interrogatories, requests for admissions, deposition transcripts, etc. The expert's authority is greatly enhanced by having considered this additional information.

*C. Analysis and conclusions phase:* the evaluator analyses the data and arrives at opinions. Often, an evaluator prepares a report, 15-25 pages in length, which summarizes the evaluator's the opinions and their basis. The report will identify all sources of information used: interviews, tests, discovery materials such as depositions, original documents such as letters, journals, etc. The report will likely provide a brief statement of the problem or task. It will recount briefly the history of the relationship and data such as length of marriage and ages of children. Each subject evaluated, parent or child, should be discussed individually as well as his/her relationship with the other subjects.

A well-written report will also contain references to the custody criteria of the governing statute in detailing the basis for any custodial opinion.

#### — Insider Tip —

It is often to your advantage to have the report prepared closer to trial. Remember that the more information your wife has regarding your position and the sooner she has it, the better she will be able to counter it. For example, I certainly prefer that my expert have a copy of my opponent's expert's report prior to writing his. However, you will probably be forced to identify your experts sooner than you might wish in an answer to an interrogatory, in a deposition, or by a court rule. Once identified, your expert is subject to deposition and any report can be obtained by opposing counsel.

Note, however, that your lawyers may retain a specialist for the purpose of determining whether the person would be helpful as an expert. Your lawyer will carefully refrain from naming such specialist as an "expert." While the specialist is not officially an "expert," the other side cannot obtain any information or have access to the opinions your specialist issues because it is considered "attorney work-product" ( which means it is privileged and non-discoverable). Of course, once you decide to use the specialist as an expert for the purpose of doing an evaluation, he is susceptible to inquiry as previously discussed.

A recent study showed that an average hourly fee of \$120 for conducting the evaluation and an hourly rate of \$155 for testifying at trial. The total fees for evaluations — range from \$650 to \$15,000.

# The Role of Private Investigators

Parties to a divorce sometimes decide to hire a private investigator (PI) to document marital misconduct, such as infidelity, dissipation of assets, and fraud. However, PIs are generally not used in custody disputes, because misconduct is often not relevant to the issue of custody. To be relevant to custody, the conduct must relate tangibly to the quality of one's parenting. Nonetheless, there are occasions where a PI is useful in a custody dispute.

Substance abuse, for instance, may be one occasion where hiring a PI may be helpful. If alcoholism is alleged, it is necessary to observe the amount of alcohol consumed and to note whether the parent drives while intoxicated. This isn't as difficult as it sounds. If the mom goes to a bar, the PI simply follows her, observes, and takes notes. He can thereafter follow the vehicle and later testify not only to seeing the quantity of alcohol consumed, but also to the manner in which the vehicle is driven. He may contact law enforcement officials if the alcohol consumption is substantial.

Also, where it is alleged that mom is not caring for children in her custody, a PI can document the evenings she goes out and whether the children are left alone. Videotape can also quickly expose a mom who claims that she cannot work because of physical limitations.

A mom's boyfriend may be relevant to custody if he consumes much of her time or if he is "a bad guy," especially if mom concedes that her relationship with the boyfriend is serious (believe it or not, this is commonly admitted). In this case, a PI can investigate the boyfriend to find out whether he is also divorced and, if so, whether the allegations his wife made in their divorce had any factual basis. The PI might also have his police record checked.

In considering hiring a PI, you must be able to prescribe as narrowly as possible the time the PI is to be on the job. Remember, his meter is running at a rate of \$40-\$60 per hour. Therefore, you need to identify windows of time during which the conduct you suspect will occur. There may be some things the PI can do for you on a project basis for a fixed fee. These include checking driving records, police records, or locating addresses.

## Some Parting Words

As you have seen, there is a lot for a dad facing divorce to consider. As this guide makes clear, when considering custody matters, your decisions are based largely (if not entirely) on impalpable almost intuitive factors that you cannot be reduced to matters of arithmetic.

This is untrue of the other matters you must deal with in your divorce because everything else is financial (eg, debts, assets, and maintenance). Although forecasts regarding such matters may be difficult, they are nonetheless numerical.

Regarding your children, however, the decision-making process is less clean. Your objective, as you know, is to do the best thing possible for your kids. That is an easy statement to make, but what exactly does it mean for your children? What is "best" and what is "possible"?

To answer these questions, you have to think about a host of factors already discussed. You have to weigh these intangible, often gray factors and make the right call.

Having said that, I want to emphasize this point in closing. Much has been said in this guide about the torrent of emotions accompanying divorce from anger to anxiety to depression. Yet despite these potentially crippling influences on your judgment, you cannot simply call in sick, and therefore your and your children's interests hinge on your ability to pierce the haze and make rational decisions. Resist the impulse to settle scores with your wife on custody battlefields. This means that you must compartmentalize your grievances and separate those meaningfully related to your children's welfare from those that are offenses to you personally, however grave.

Hopefully, you are not walking this path alone. In most cases your attorney will be your key advisor, but many of the pivotal considerations are not within his province. For example, under the umbrella of what is "best" are psychological, familial, educational, and other elements with which your attorney is likely unfamiliar.

Therefore it is usually helpful to have the advice of others whose knowledge and judgment you respect. This may include a mental health professional, such as a counselor. However, if you choose this route, first talk to your attorney. Certain friends and family members may be helpful, but select from these pools carefully. Such "advisors" are notorious for pouring gasoline on the fire. Knowing who to tune in also means knowing who to tune out.

I hope this guide has proven useful to you and your children through the divorce process. I wish you and yours the best possible future.

## About The Author

I founded [Cordell & Cordell](#) in 1990 after a brief stint with a major law firm. Originally a general practice firm focusing its attention on domestic relations matters, Cordell & Cordell has evolved into a firm practicing exclusively domestic relations law, with an overwhelming emphasis on fathers' rights. Men represent approximately 90% of our clientele. We serve the greater St. Louis metropolitan area, practicing in both Missouri and Illinois, as well as Kansas City. We presently employ seven lawyers and to date have served thousands of men. To my knowledge, Cordell & Cordell is the largest firm of its kind in America. We unapologetically market and advertise ourselves as a firm devoted to men's interests.

I have been asked to comment as an authority on men's issues in legal and other periodicals and have been interviewed on both radio and television with respect to various matters relating to men and divorce.

Men come to Cordell & Cordell because they want to feel that their interests and the interests of their children are aggressively championed. Too often lawyers, and even judges, have resigned themselves to stereotypes and a perpetuation of the status quo. I am not suggesting this mentality is malicious or even conscious, but it is prevalent. Exacerbating things further is the feminist movement and its shrill insistence on women's interests to the utter exclusion of the underlying merits of a given case.

The result is that the judicial system (ie, lawyers, judges, social workers, and the administration) is prone to assume without proof that moms should be the primary custodial parents, that men accused of abuse are guilty of abuse, that men alleging abuse are lying or overreacting, that women are not as capable of generating income as men, and that a man is less deserving of assets earned by a woman than when the reverse circumstance exists.

Naturally, no law firm can completely rectify these deep-seated and multifarious injustices, and we do not promise our clients transcendent justice. All we can promise our clients is their best chance. At Cordell & Cordell, we have cultivated a reputation for challenging fallacious assumptions, for calling the court's attention to inequalities, and for advancing, without equivocation, bold arguments from which other attorneys might shrink. Sometimes it is necessary to insist on a hearing on the record when the result proposed by the court in chambers is contrary to the law as properly construed. Although such positions occasionally cause conflict, they nonetheless engender respect and encourage more reasonable positions from the court, as well as from the other side.

The task of representing men is a challenging one requiring skill and experience. In a system seemingly predisposed against them, men can only hope to succeed by using all the help available to them, both legally and strategically. Cordell & Cordell has built its practice on helping men do just that.