Chapter Fourteen

WHAT HAPPENS IF WE GO TO COURT?

Sometimes you need to stop being so nice. If your generosity is not appreciated or reciprocated and you're the only one giving in, you may simply be letting yourself be taken advantage of. Mediation, collaboration and negotiation are not options if your spouse's participation would only be in bad faith. If your case just won't settle, despite all your best efforts, and if there are reasons to go forward with litigation, off you will go. As you journey down that path, you may want to know what "going to court" will entail, which is described for you below.

As you will see, litigation involves a tremendous amount of time, effort and cost. Don't litigate if you can't commit to that time, effort and cost, or you will lose. You need to be very involved in the process, you will have a lot of work to do, and you will have many meetings and hearings to attend. You can't just leave it all with your lawyer.

If you are employed, you will miss hours and days of work. If you are a clear thinker, and are good with the computer, your attorney should let you do as much analysis and document reviews as you are able. For every hour or so you spend doing summaries of documents, or preparing exhibits for your attorney, you can pay that much less to your attorney. Your attorney, however, can't just leave it all with you either. Be sure you are comfortable working closely with your lawyer.

You and your lawyer will work together very hard to get ready for THE BIG DAY. Below are set forth the steps you will take to get there.

1. Filing and Service of the Case

First, a case must be filed with the court alleging fault or no-fault divorce grounds. The papers will ask for a divorce, and for any other relief you may seek, such as spousal support, property and debt division, a restraint on the dissipation of assets, custody, visitation, child support and for an award of attorney's fees. There may also be a request for a restraining order, or for exclusive possession of the former marital home. Usually everything is thrown in there by the lawyer "just in case." The case may allege fault grounds which an attorney somewhat inflated, so as to be able to file suit without having to wait a year, planning to amend the grounds later on to no-fault grounds, or the suit may be a simple request for a divorce based on living separate and apart for the requisite time period.

The case has to be served. You may come home one day to see that the Sheriff has taped a bright yellow plastic bag containing papers to your front door, serving you by posting. Or, for impact, you may be personally served by private process server at work, at a party or at some other embarrassing locale. Perhaps service of a one-half inch thick lawsuit will be made upon you at the office Christmas party, at the club on your birthday, or at home on Valentine's Day. You may never have realized your spouse could be so creative and thoughtful.

You may be served with only the initial document, or with lots of additional documents, such as discovery requests, a Motion for Temporary Relief, and a Notice of the date on which that initial Motion will be heard in court. The papers may include a Notice of Deposition for you to appear in your spouse's attorney's office, along with your paramour, to be deposed under oath before a certified court reporter. The more stuff you're served with, the more money you will be

charged when you go to hire an attorney. Your spouse's lawyer knows that. You know that your spouse, in a very real sense, wants to make you pay.

There will be deadlines by which you will be told you have to respond to the suit, or else you will have to get leave of court to file late pleadings, and you will be all worried about these deadlines. Some deadlines, however, can usually be extended. But be very careful about the deadline for responding to any Requests for Admissions. If you miss that deadline, and if your spouse's attorney won't grant you an extension, your case may be weakened considerably.

2. Discovery

At the beginning of the case, each side will conduct discovery, so as to "discover" all the facts of the case. You may have to answer thirty written Interrogatories under oath, and will have to send those written answers to your spouse's attorney within 21 or 28 days of when served upon you. You may receive Requests to either admit or deny various statements, also under oath.

There will be a Request for Production of Documents. You will have to produce those documents by the deadline for receipt, or face a Motion to Compel Production. Requests for documents such as pay-stubs, tax returns, retirement statements, account information, mortgage information, your credit card receipts and statements, copies of your check registers and bank statements, notebooks and diaries, and maybe even a copy of your computer hard drive may all be permissible, standard requests.

If you think you can get out of producing all of that, think again. If you don't answer and turn over what was asked for, a Motion to Compel may be filed, and the court will make you respond. You may then even have to pay your spouse's attorney's fees for their having to compel you to

comply with their requests. If you don't have the requested information anymore, you may be ordered to go and get it.

If you say you just don't have and therefore can't produce requested information, (really because you're hoping to hide that information), or if you try to misstate information, understand that verifiable documentation can usually be obtained by your spouse elsewhere. Subpoenas for documents may be sent to instate entities such as banks and financial institutions, to your current and former employers and to the credit card companies, seeking copies of all of your files. In some cases, requests for documents can also be sent out of state. Computer server records and telephone records may perhaps be obtained.

Notices of Depositions may be filed with the court, and served upon you. Subpoenas may be issued summoning your friends, family, paramour, paramour's spouse, coworkers, neighbors and acquaintances to your spouse's attorney's office, to answer questions under oath before a court reporter. Those people may then feel the need to hire attorneys on each of their own individual behalf. Your paramour may be worried about incriminating himself or herself if adultery is still on the books as a state crime. He or she may be worried about any impact on his or her security clearances, or public reputation.

Your final trial date may be set early on in the case, or may be set later on. That final hearing date will probably be six, eight or ten months from the date the case is filed, when the court has an unscheduled day or two free on the docket, and by when your attorneys feel they will be ready for trial. The date also has to be set for when neither attorney has any conflicts with hearing dates in other cases, and not set too close to their scheduled vacations.

Prior to that, you may have a short (less than one-half day) hearing on a Motion for Temporary Relief, seeking entry of a Temporary Order granting either of you temporary custody, visitation, child support, spousal support

or a restraint to keep things calm until THE BIG DAY. You may also have other hearings on other motions prior to trial. You may have one final all-day custody hearing, at some point between the initial filing of the case, and the date of the final hearing.

Perhaps you forget what is in the house you vacated over a year ago, and you therefore want to inventory and videotape the interior and the contents of the house. Then you can figure out what to ask the judge to make your spouse give back to you at the final hearing. How long you can stay in the house during such an inventory, whether you can open drawers and closets, and whom you and your spouse may have present as witnesses during the inventory, will all have to be negotiated or litigated. Perhaps someone is violating the Temporary Order. Your attorneys will find lots of things to call to the court's attention prior to the final hearing.

Although your trial date is six months or more away, you and your attorneys will all hardly have enough time to do discovery, analyze all the documents and deposition transcripts, line up expert witnesses, get property appraised, do a business valuation if applicable and analyze all the numbers regarding separate and marital shares of all the finances. You will all be very busy.

3. Experts

You, and those like you, mere "lay" witnesses, can only testify in court as to facts. Only "expert" witnesses can render opinions. You are certainly not qualified in the eyes of the law to give opinion testimony as to anything. Although on a philosophical level it could be argued whether the statement, "The sky is blue" is fact or opinion, the lawyers and the judge will usually have similar ideas as to which matters you can talk about, and which matters will require expert testimony.

If you want to value a house, a business or certain other assets, or if you want to talk about someone's mental or physical health, point out that

someone could be earning more money, or testify that for mental health reasons the children should live with you and not with your spouse, you will usually have to hire someone to come to court and say what you want him or her to say. Of course the learned expert is objective, and there is only one true answer. But if both you and your spouse's experts had reached the same conclusions, you wouldn't be paying them each to come to court, now would you?

4. Pretrial Matters

Your local court may set a Pretrial Conference, during which you all inform the court of which matters will be heard at trial on THE BIG DAY. The judge may want to know how long your case will take, in order to have a firm idea as to when to schedule a tee time on that day. Or the judge would like an idea as to how long he or she will be on the bench that day, so as to determine when he or she can get back to Chambers and do some of the other work piled up on the desk, or to know whether he or she can make the committed-to public service event which is scheduled for early evening on the day of your trial.

Counsel may enter into a few stipulations, or agreements, as to some values or issues. Various motions regarding evidence may be argued and ruled on at various times prior to THE BIG DAY. The court may order you to attend a Settlement Conference with a retired judge, to try to get you to work out your differences. You may both be required to attend a parenting class. In some jurisdictions, the judges will try to put as many requirements and hoops to jump through as they can, between the filing of your case and the final hearing date, to try to get you to settle, to streamline the process and to eliminate surprise.

There will be a date by which you must each identify all of your witnesses, disclose what your experts will say and identify every document you intend to introduce into evidence at trial. There will be another date by which you must object to any evidence the other side

proposes to submit, that you feel they should not be entitled to submit. If you miss that date, you may have missed your right to object at trial. An inadvertent waiver of that right could be very damaging, if not fatal, to your case.

5. Preparation of Testimony

All of the witnesses must be prepared. That means the testimony should be discussed and rehearsed. Your witnesses should know what they will be asked. You need to know what they will say. You don't want to contradict them. They must be educated as to the avoidance of hearsay evidence. Your attorney wants each witness to understand the progression of the questioning, so testimony follows some logical order and has impact. The witnesses must be educated as to the process, how to talk, how to dress, what to say and what need not be said. The attorney gets to paint a picture, but not all the spaces in the picture have to be filled in. That's the job of the other side. Some things are better left unsaid.

Your testimony must be prepared. For every request you will make of the judge, the judge is required by statute to consider certain factors. Those factors are all listed in the state law books. You need to be familiarized with those factors, and all of the things you want to tell the judge must be pigeon-holed into the right spots, so your testimony flows right down the lists. You need to become very educated as to the law by your attorney, so you know what the judge wants to hear about, and what the judge does not want to hear about.

You also want to come across as likeable to the judge. Do you keep saying "my" son or "my" children, and not "our?" The court notices these things. The court will judge you, perhaps harshly. You probably won't fool the judge much. Chances are you and your spouse probably wouldn't be in court to begin with if both of you were reasonable, rational people. Judges know this.

All of the documents must be organized, copied and labeled. In some jurisdictions trial notebooks are required, wherein each side has an indexed listing of documents, and all of the documents are neatly arranged behind numbered tabs. Each lawyer, the judge and the witness on the stand all have a notebook from each side to refer to. Or instead, the attorneys may be operating with labeled folders, or with piles of papers with post-it labels attached.

Given that the documents in your case will typically easily fill at least two banker's boxes, and sometimes many more, it is vital that your attorney is organized, and knows exactly where each piece of paper is located. It is also important that the exhibits don't get all mixed up on the floor, if dropped in the crowded elevator by your attorney.

6. Attorney Discussions

Any offers of settlement made by one lawyer to the other lawyer, are supposed to be conveyed to the other party by his or her lawyer. If an attorney doesn't pass on a settlement offer, he or she is probably committing a violation of attorney ethics. Your attorneys may be trying to settle the case all the while it is being prepared, or a bad attorney may be trying his or her level best to prevent a settlement. Perhaps you will reach agreement on some of the issues, on some of the facts or as to some of the values. You may narrow the issues for trial.

The attorneys may agree to admit hearsay documents, such as appraisals and retirement statements, without forcing each other to subpoena for cross-examination the experts, or individuals known as "Custodians of Records," who prepared those documents. Or an attorney may wait to see if the other attorney remembered to file the necessary subpoenas for Custodians, and if that other attorney forgot, will happily make hearsay objections to try to keep important information out of evidence.

Your attorney may discuss strategy with you before the fact, or after. You may try to second guess the other side. Maybe your case will even settle sometime before trial. Maybe one or both lawyers are deliberately being obstinate, because of a determination to try the case. They may be determined to be your champion and to fight for your rights, or they may be determined to bill you for as much work as they can get away with.

7. THE BIG DAY

The night before THE BIG DAY you should try to get some sleep. The morning of THE BIG DAY you should eat, and you should drink some water. It isn't helpful to be fuzzy, incoherent or dizzy during the hearing. You may want to put some breath mints in your pocket, so when you lean over to whisper something important to your attorney during the trial, he or she doesn't back away.

You should know how to get to the courthouse, and through security, as should your witnesses. In some counties you may wait in line for more than half an hour to enter the building, only to learn that you must then go put your camera cell phone and nail clippers back in your car on the fourth floor of the parking garage, and that you will then have to get back in line. You need to know how to find your courtroom out of the maybe fifteen or so courtrooms located on three of the floors of the five storey building in the courthouse complex.

You may be asked to carry two of the four boxes of documents needed at trial. There may be one or two boxes of discovery documents and court papers, one box of trial notebooks and one box of legal references and trial notes for the attorney. You and your attorney each wheel your luggage carriers down the sidewalk, into the building, into the elevators and through the grand halls of the courthouse. You will feel that you must be very important, what with all of that information someone will be hearing all about.

Your attorney may have stayed up late into the night reviewing the pertinent case law, reviewing the evidence, and putting the finishing touches on the witness questions and on the opening statement. He or she also probably spent many late nights and weekends in the office the month before trial, making sure that discovery was supplemented on both sides, that all necessary witnesses and documents were subpoenaed, that all court exhibits were prepared and that all the calculations were done, checked, rechecked and checked again.

The bill you will get for all the work done by your attorney the month before trial will make your eyes pop.

8. The Hearing

Now you all somberly file into the courtroom in your nice suits. The private certified verbatim court reporter is sworn in by the court clerk. The lawyers would have already argued over who should pay the appearance fee for the reporter's services. The judge's law clerk may be in the courtroom. The bailiffs are standing by, guns holstered, ready to tell you to remove your purse, bags and briefcase from the table, to keep your hands out of your pockets and that your cell phone will be confiscated if it goes off.

Your witnesses are all sworn in, and are then sent out into the hallway, with instructions not to discuss their testimony, to wait to be called back in later on in the day. Be sure to tell each of them to bring a book or a magazine, unless staggered times have been arranged for them to arrive. You may also instruct them not to glare too much at the other side's witnesses, not to make faces and comments once they finish testifying if they remain in the courtroom, and not to cause a scene at the end of the day, whichever way the case turns out.

The judge will inquire as to any "preliminary matters." There will always be something the lawyers will want to tell or ask the judge right

before getting started. Then you will get started.

Each side makes an opening statement. The first side calls a witness to testify. That witness may then be cross-examined. There may be some testimony on redirect in response to the cross-examination. All of the first side's witnesses are called and cross-examined, perhaps with some redirect, one by one.

You will discover that blood is thicker than water, and that to your surprise, your in-laws may not be all that helpful to your case. You will learn which of your and your spouse's "mutual" friends really aren't. You will hear lies.

The other side then calls witnesses one by one for testimony and cross-examination. The first side may call rebuttal witnesses, who may also be cross-examined. Objections fly right and left, rulings are made sustaining and overruling the objections, tears are shed, documents are introduced and admitted into evidence or excluded, and the judge may ask a question or two.

After the last document and last word of testimony is submitted, each side may present a closing argument. Or if it is too late in the day, the judge may ask for written closing statements. If written closing statements are requested, your attorney will go back to the office, and will spend a lot of time summarizing the evidence, making arguments and preparing a nice long document for the judge to read. He or she will bill you for all of that time.

The trial may be one day long, two days long or longer, unless you got bumped by an emergency case that had to be heard immediately, and you had to reschedule. You may start at 9:00 a.m. or later each day, and will end at 4:00 or 5:00 p.m. each day. There will be a break of about one hour each day for lunch. If your trial is more than one day long, your

attorney, and possibly you, will be working late into the night after each day of trial, locating and preparing rebuttal evidence.

9. The Rulings

The judge may present rulings verbally right at the end of the hearing, or may take the matter "under advisement." If the judge does not rule right away, you may have to come back another day to hear the rulings, or the judge and his or her law clerk may prepare a letter opinion, and fax it to both counsel.

It is the perception of most divorce attorneys that most judges rule in a consistent way on similar facts. That is a nice way of saying that the judge's mind was already made up before you even entered the courtroom. While your and your spouse's views are clouded by one-sided outlooks and by emotion, judges base their rulings upon the principles which they believe should govern in situations such as yours.

It is also the perception of many divorce attorneys that most judges really don't want to hear ugly divorce suits, and will try hard to encourage you to settle. We have that perception because the judges tell us that you, and not they, should decide how to parent your children, that neither of you will be entirely happy with the result of a trial, that you will each pay a fortune to fight with each other through your attorneys when you could instead use that money for your family, and that high conflict divorces cause irreparable harm to your children. Often they will see your children a few years later, on the days the criminal docket is heard. They know that your children, your children's children, and society as a whole, will be the casualties of your little war.

So the reality is that somewhere along the way, whether before, during or just after opening statements, or somewhere during the trial, the judge made up his or her mind on some of the facts and on the crucial main

facts, and then just listened to the rest of the case to hear whether or not there was a good reason to change that opinion.

Then the judge will issue his or her rulings. Simply with the delivery of those rulings, however, you are not yet done. "The court speaks through its orders."

10. The Order

One of the attorneys must then write the judge's rulings into one or more court orders. There may be a comprehensive final decree of divorce, or separate orders on property, spousal support, custody and child support. Pension orders may have to be prepared.

Before the written final decree of divorce is submitted to the judge for entry, you must decide if you want to appeal anything. If you do, your specific objections must be written into the order that the judge will sign. If you don't object to the specific rulings with which you disagree at the time the judge signs the order, preserving those particular objections, you can't appeal.

If the judge made verbal rulings, and if the two attorneys disagree over the wording of the proposed written order, the private certified verbatim court reporter must be paid to prepare a transcript of the court's rulings, and everyone goes back to court with a copy of that expensive transcript to clarify with the judge exactly what he or she said, or to clarify what the words actually meant. It was mentioned earlier on in this *Guide* that attorneys can argue both sides of anything. They can also find anything to argue about.

Eventually, an order or orders will be prepared that everyone can agree upon, or must accept, and which the judge will enter. When the pen is lifted from the paper, you are divorced. Yay!

11. Are We Done?

No.

As long as there is no Motion for a Rehearing, or Motion to Reconsider, and assuming neither of you have filed an appeal, now you have to implement the rulings. Property must be sold, refinanced, conveyed or divided. A new deed to the former marital home may need to be prepared, to avoid unintended survivorship or inheritance consequences. If you die after you are divorced without a Will, before retitling the former marital home, your new spouse and your ex-spouse could each own half of that home together. How cozy. Visitation arrangements must be put into effect. Payroll withholding orders for support may have to be entered, and pension funds may have to be transferred.

And THE FINAL BILL must be paid to each attorney for all of the fine hard work done on your behalf, regardless of whether you "won" or "lost." If you don't pay, you may find yourself after the word "versus" before the word "Defendant" in a suit to recover attorney's fees. Your attorney's name will be on the other side of the "v."

Then, after having gone through all of that, if you and your now ex-spouse have children together, you will have to sit with each other at their graduations and at their weddings, and you will have to smile happily for the cameras. The looks on your faces will express the wreckage your family has become.

Was it worth it? Will you ever remarry? Will you now marry the "paramour" and drift happily off into the sunset? If so, get a Prenuptial Agreement done, so that you don't have to go through all of this ever again.

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