McFARLING LAW GROUP

DIVORCE/CUSTODY PROCEDURE 101

The Typical Stages in a Divorce or Custody Proceeding

Complaint
The first step to the litigation process is filing a Complaint. This will either be a Complaint for Divorce or if you were never married - a Complaint for Custody or Paternity.

Nevada is a Notice Pleading State. This means that Complaints are usually very generic stating only generally what the Plaintiff wants. For instance, you would likely plead that you want Primary physical custody but usually would not then list a complete timeshare. Another example would be you would likely plead for an equal division of community property but not specifically itemize out a list of every item in the Complaint. There are situations where you would want a more detail Complaint, such as an anticipated default or settlement for the terms proposed in the Complaint.

After the Complaint is filed the filing party asks the Court Clerk to issue a Summons. This Summons is then personally served along with the Complaint on the opposing party. The Plaintiff is suing the Defendant at this point for Divorce or Custody.

Under Nevada Law, the Complaint must be personally served by a non-interested party over the age of 18. Personal service can be waived by the Defendant. Normally our office serves Complaints through the use of a process server.

The Defendant has 21 calendar days to file an Answer and/or Counterclaim to the Complaint after being served.

Answer and Counterclaim
The Answer is a legal pleading acknowledging participation in the lawsuit and specifically addressing each claim made in the Complaint as to whether they Admit or Deny.

The Counterclaim
In most cases, an answering party will want to assert Counterclaims similar to those in the Complaint. For instance, if the Complaint is for primary physical Custody you may want to Counterclaim for primary or joint custody yourself.
If the Defendant files a counterclaim, then the Plaintiff must answer that counterclaim within 10 days.

Temporary Relief
If you are in need of child support, spousal support, a visitation schedule with your child or other matters, you can file a motion immediately after the filing of the Complaint or Answer for temporary orders that will get you through the divorce or litigation case. You cannot file a Motion with the Court without first filing a Complaint or Answer.

After the opposing party is served with a Motion, they have 14 judicial days to file an Opposition to this Motion. A countermotion for related requests can be included with the opposition and will be heard at the same time as the motion. Then the initiating party has the option of filing a Reply to this opposition at least 7 judicial days prior to the scheduled hearing.

If a party fails to file an Opposition to a Motion the Court can grant everything requested in the Motion and consider the non-opposition as an agreement with the requests in the Motion. Only in the case of a Motion being heard on Order Shortening Time is the opposing party not required to file an Opposition to a Motion.

A Motion, Opposition, and Reply to Opposition are generally the only pleadings filed with the Court that actually immediately get in front of the Judge for consideration for a pending hearing.

Temporary Motions can deal with, amongst other things, the following:

- Temporary Physical and Legal Custody of the minor children.
- Temporary Exclusive Possession of the marital residence.
- Spousal support or child support during the pendency of the action.
- An order enjoining the parties from buying, selling, or transferring certain property.
- A request for attorney's fees by a party based on a disparity in income between the parties.
- An order directing on or both parties to do something, or refrain from doing something.

Motions hearings are called argument hearings as generally only the attorneys speak and the judge only takes arguments, not actual evidence. As a result, the things the judge can do at such hearings are limited. Most argument hearings are limited to certain issues or timeframes. This is not the time to litigate your entire case.

The argument hearing that follows a motion varies depending on the facts and circumstances of the case as well the presiding judge. Every judge is different. Some already have a decision before we walk in the door. Others allow extensive argument from each attorney. Others will ask questions of the parties themselves. Some judges are very consistent in their procedure and some vary from hearing to hearing. The most common scenario is that the attorney who filed the motion will argue, the other attorney will argue, and then the judge will issue his/her orders.

At the conclusion of the hearing on the motion for temporary orders, the Judge will usually have issued temporary orders addressing all the issues in the motion and countermotion. In cases involving disputed child custody or visitation, the parties will likely be ordered to go to the Family Mediation Center (FMC) to attempt to resolve the dispute following the first court hearing. Attorneys are not involved with this mediation. If the Parties reach an agreement at mediation, the judge will sign off on

the parenting plan at a Return Hearing scheduled at the first hearing. If the parties fail to come to an agreement in mediation, the Court will decide on its own after a trial.
Prior to a trial, the Court could also refer the parties to another outside professional to perform a custody evaluation or for child interviews.

In cases involving custody, both parties will be required to attend the COPE co-parenting class.

Discovery
In a family law case discovery begins after the service of the Complaint and Summons and continues until the Court sets a Discovery close date, usually at least 30 days before trial.

Initial Disclosures:
NRCP 16.2 provides that each party has a duty to disclose within 45 days of service of the Complaint and Summons the names, address, and telephone number of any party that is likely to have discoverable information (witnesses or potential witnesses) and a copy of all documents likely to contain discoverable information.

This also includes a Financial Disclosure Form listing all income, assets, and debts.

These are the items each party has an obligation to provide on their own. The discovery process is usually thought of as the process where information and documents are actually obtained by one party with or without the other party's consent.

The following are all elements of discovery:

Requests for Production of Documents: A party can request the opposing party provide documents that are relevant to the case or likely to lead to information relevant to the case. In a divorce and/or custody case examples of these would be bank records, business ledgers, mortgage statements, tax returns, retirement account statements, etc.

A period of 3-5 years is usually standard although this can be modified up or down if the situation warrants. A party can object to requests for production of documents if they feel they are not relevant or not likely to lead to relevant information or unduly burdensome.

Interrogatories: Up to 40 interrogatories can be served on an opposing party. Interrogatories are written questions. An example of an interrogatory would be "List all current bank accounts including bank name, account number, account type, and current balances".

You can see that interrogatories are similar to Requests for Documents in the type of information they retrieve but interrogatories only ask for the information, not the supporting documents. Interrogatories provide useful information at a glance but if information is questionable, you will likely need supporting documentation also.

Requests for Admissions: In this type of discovery written questions are posed to the opposing party that has to be answered with simply admit or deny. One must be careful not to pose questions that are too specific that allow denials on technicalities. Example: Admit that on July, 1 2009 at 6:45 p.m. If

the question refers to an event that the other party acknowledges but they allege it was at 7:00 p.m. this could allow them to reasonably deny the admission. You want to be specific, but not too specific.

A party is allowed to serve 30 requests for admissions with the opposing party having 30 days to respond or object. If the admissions are not responded to within 30 days they can all be deemed admitted. This is very important, if you are served with Requests for Admissions, you must respond timely or the opposing party can ask the Court that every single request is admitted, which could be very damaging to your case.

Deposition: A party to the case or other party that is expected to testify in the matter can be deposed during the discovery phase. A deposition is an oral examination wherein a court reporter is present documenting the question and answer session. The person being deposed is under oath and their deposition transcript can be introduced at trial as rebuttal evidence if their testimony changes.

The advantage of a deposition of course is knowing what a party is going to testify to prior to a trial. If the party states something in a deposition that can be rebutted by documentation, there is enough time before the trial to establish this. Without a deposition a party can say something at a trial that although untrue, evidence is not readily available to refute.

Subpoena Duces Tecum: A subpoena duces tecum is basically a request for documents or information. If the other party is not willfully providing documents or they are in the possession of a third party such as phone records or police reports, they can be obtained via subpoena duces tecum. Subpoenas can also be sent even if you are not sure if records exist. For instance, if you suspect hidden bank accounts you could send subpoenas to suspected banks and see if accounts exist.

Subpoenas must be personally served, and the party being served can also charge for producing the records. These service and copying fees should be considered when deciding if and how many subpoenas to send. Documents that a client can obtain on their own such as their own bank records, phone records, police reports where they are a party etc., should be gotten by the client to reduce costs.

Final Hearing/Trial

If an agreement is reached between the parties the agreement can be drafted by the counsel for the parties and submitted to the Court for approval. In some cases, the parties appear in Court and will put the settlement on the record.

In instances where settlement cannot be reached a trial will be necessary. The trial will occur after discovery is completed. Prior to trial the attorney will need to prepare a pre-trial memorandum, trial exhibits, and possibly other obligatory items as ordered by the Court. The trial will last anywhere from a few hours to several days depending on the complexity of the case. A decision will either be rendered on the spot or sometime thereafter.

Appeals

Only once a final judgment is entered can a party initiate an appeal to the Nevada Supreme Court. This appeal must be filed within 30 days of the entry of the judgment. Failure to timely file an appeal will bar the party from appealing forever, no matter what. Appeals are expensive and often take years. The

end result will be the Nevada Supreme Court affirming the lower court's decision, remanding the case back to the District Court, or remanding a part of the case.

A settlement conference is mandatory between the parties at the beginning of the appeals process to determine if a resolution can be reached.

If you are dissatisfied with the outcome of your trial, an appeal is likely your only remedy. Remedies at the District Court level are very limited and also time sensitive. The District court remedies have between 14 days and 6 months as time restraints depending the remedy.

It is extremely important that if you are dissatisfied with your trial outcome you must consult with your attorney immediately as to your options. The time restrains for post-trial remedies are extremely rigid and even being one day past them will likely bar you forever.

Is This All Really Necessary?
Going to trial or going through significant litigation is not required. Most cases settle at some point prior to trial. However, settlement requires an agreement to be reached by **both** parties.

Our goal is always to settle a case that can be settled with a fair result for our client. Some matters are more inclined to settle than others depending on the facts of the case or the demands of the parties. Unfortunately, if the other party is not settlement minded this can impede a settlement.

Reaching a good settlement is an art form. You want to be settlement minded but not seem as if you are willing to sacrifice on major issues just to reach a resolution. It is important to be reasonable and rational in your demands but also send the message that if the other party is not also reasonable we are prepared to go to trial and are confident we will win.

Settlement conferences and mediation are excellent ways to broker a settlement. Your attorney will evaluate your case based on their experience with the law as well as their experience with your particular Judge and the Judge's tendencies. Based on this, your attorney should be able to provide you with a range of expectations should the matter go to trial. This will aid in settlement negotiations. You should trust your attorney's opinion on what a reasonable settlement is as your attorney knows the law and knows the Judge.

Financial Management
Nevada law provides for a final division of property and debt to be at the date of divorce, which is at the conclusion of divorce proceedings. How you handle your finances during divorce proceedings can be very significant since all property and debt accrued during the proceedings is still potentially community property to be divided equally between you and your spouse. Any continuing contributions to a 401K plan or savings will still be divided equally at the end of the divorce. Any reasonable debt accrued on credit cards will also still be divided equally at the end of the divorce. You should take this into account in determining how you manage your money during divorce proceedings. In addition, most divorce cases include the filing of a Joint Preliminary Injunction at the beginning of the case. This document restricts both parties from financial transactions that are outside the scope of normal practice. You should not withdraw from a 401K, open new credit or other significant transactions without speaking to your attorney first.