THE DIVORCE PROCESS IN NEW YORK

THE PROCESS – AN OVERVIEW

In a nutshell, a divorce starts with a summons, the parties then go through a period of "discovery" (explained below) to prepare for trial, go to trial and await a decision by the judge. The judge's decision forms the basis for a "judgment" which then gets "entered" by the court. At any time the parties can voluntarily reach an agreement or "settlement," and a judgment can be based on that as well. (See our Stages Of Litigation video on our Videos & Podcasts page)
The typical issues parties deal with in a divorce include determining what is their joint marital property and what is only one party's separate property; how much their marital property is worth and how it should be fairly distributed; with which parent should the children live, which parent should make the important decisions concerning them, and how much time and when the children should be with the other parent; how much child support should be paid and by whom and to whom; and should one spouse pay temporary and/or post-divorce spousal support to the other, and in what amount.

Obviously, each of these issues can be extremely complicated or can be made so, intentionally or inadvertently. Thus, the choice of counsel is critical.

THE PROCESS – IN MORE (THOUGH NOT ALL OF ITS) DETAIL

A divorce begins when one spouse files a summons with notice (or a summons and complaint) in the Supreme Court, typically in the county in

which the parties live, thereby “commencing” an “action.” The summons and accompanying papers must be served upon the other spouse, who then has a certain limited number of days (depending on how and where the person was served) to formally “appear in the action” or file an “answer” in response to the complaint (if one was served). (The person commencing the action is known as the plaintiff. The person against whom the action was filed is the defendant. Together they are called the “parties,” and each a “party.”)

When this occurs, the parties are then subject to what is known as the “Automatic Orders.” Pursuant to Domestic Relations Law (“DRL”) § 236[B][2][b], the parties are then restricted from transferring money, making unusual purchases, terminating the other party’s insurance coverage, or taking other specified actions to harm the other spouse or conceal or spend their money.

Typically, the parties are then summoned to appear in court at a preliminary conference.

Each party is required to give the other and the court a fully- completed statement of net worth prior to the preliminary conference. The statement of net worth is the financial equivalent of a colonoscopy, declaring all of the party’s income and expenses, assets, and liabilities.

At the preliminary conference, the judge will issue a preliminary conference order setting out the discovery schedule and a tentative date for the divorce trial.

The parties then proceed to discovery. Discovery is the method of obtaining, from the other party, all of the information you need to successfully present

your case to the court. It also provides your spouse an opportunity to obtain from you all of the information your spouse needs to present their case successfully to the court.

There are four primary ways of obtaining discovery, all controlled by article 31 of the Civil Practice Law and Rules (the “CPLR”). They are “interrogatories,” document requests, depositions and demands for admissions. When utilized wisely, they are invoked in the preceding order. “Interrogatories” are questions that must be answered by the party in writing and under oath. Wisely used, interrogatories ask only for hard information and not anything that requires a subjective response. Proper interrogatory questions might be “Who was present when [a particular contract] was signed?” “What are the names and addresses of the owners of the [XYZ Company]?” “Did you receive an employment contract when you were hired by [the XYZ Company]?”

After the existence of critical documents is established and identified by the interrogatories, a party should issue a demand for documents (known in parlance as a “Notice for Discovery and Inspection”). Such a demand requires the responding party to assemble and produce copies of all of the requested documents.

After a party has had an opportunity to examine all of the relevant documents, the party should “notice” and schedule the deposition of the opposing party. Depositions require the party to be deposed to show up at a designated time and location (usually the office of the lawyer issuing the deposition notice), take an oath to tell the truth, and answer the attorney’s questions while a stenographer records the questions and answers.

Preparing smart interrogatories, and later document demands, requires some thought and consideration. That pales, however, to the preparation required for the taking of a deposition. Preparing a deposition, like preparing for trial, is like choreographing a play that will have a very limited run and a very limited audience . . . but could be critical to the outcome of the litigation. There are several reasons to take the deposition of an adverse party and, if none of them apply, then perhaps you should forego taking that person's deposition.

First, a deposition should be used to obtain information that is needed for trial. Any information that is more nuanced, subjective, or involved than "Who was present at the Tuesday, July 17, 2019, meeting at the Law Firm?" cannot reasonably be obtained by interrogatories and, therefore, requires a deposition.

Depositions should also be used to "lock down" the witness's testimony on any information they might testify to at trial. By locking in their testimony, the lawyers can then prepare for trial by assembling impeachment material and knowing what the other parties and witnesses will say.

Finally, depositions can be used to give the other party a taste of things to come. Many delude themselves into thinking and believing that they can proceed to litigation with even a weak case. They are accustomed to squirming out of tight situations and they, therefore, believe that they can talk themselves out of anything. "Noticing" or subpoenaing them for a deposition and then confronting them with the evidence that contradicts their testimony is a strong motivator for a party to settle rather than face a grueling cross-examination in open court in front of a judge and several court officers.

Thus, to prepare for an effective deposition, counsel must have intimate knowledge of all of the relevant facts of the case, the law and decisional authority that control the facts, the claims and defenses of each party, and each party's "theory of the case." A litigator who makes sure to be well-prepared will assemble all of the relevant material into a deposition binder so that, when a witness gives a "wrong" answer, the litigator can confront the witness immediately with the contradictory evidence. (This demonstrates powerfully to the other side that the litigator is always prepared, has mastered the law and facts, and is not to be trifled with.)

Finally, after all the depositions are taken, a party might issue requests for admission to cleanly establish facts that aren't really in dispute, so that they can quickly and easily be submitted to the court as part of the party's case.

When discovery is complete, a party files a Note of Issue and Certificate of Readiness, certifying that the case is fully prepared and ready to go onto the court's trial calendar. A trial is ready to be set.

At trial, the lawyers may make opening statements laying out the case they intend to present. When both lawyers (or all three, if the court has appointed an attorney for the children) have done so (or waived their rights to do so), the plaintiff goes first, calling its first witness. Plaintiff's lawyer asks the witness questions (any questioning of a "friendly" witness is called direct examination; questioning of an adverse witness is called "cross-examination"), until the plaintiff's lawyer has elicited all of the information from the witness that the plaintiff wants, and has introduced all of the exhibits that this witness can authenticate. The defendant's lawyer then has an opportunity to cross-examine the witness on any matters the witness has testified to. When the defendant's lawyer is done, the plaintiff's lawyer can rehabilitate the witness

through “redirect examination,” the defendant’s lawyer then gets to “re-cross,” the plaintiff’s lawyer gets to re-re-direct, and so on, until either the lawyers say they are done or the judge cuts off the examination as being unproductive.

When the first witness is done, the plaintiff calls the plaintiff’s second witness and the process is repeated with the second witness. Then the third, and so on, until the plaintiff has called all of its witnesses establishing all of the elements of the claims and defenses it intends to make. The plaintiff then “rests” and the action shifts to the defendant. The defendant then calls defendant’s first witness, utilizes direct examination to elicit favorable testimony, and the plaintiff cross-examines. The process used for plaintiff’s witnesses are reversed for the defendant’s witnesses and repeated again until the defendant has established all of its claims and defenses. When the defendant has completed doing so, the defendant rests. The plaintiff is then given an opportunity to call “rebuttal” witnesses, and then the defendant, until they are all done or the court is satisfied that each has had a full and fair opportunity to present their cases.

When it is all presented, the lawyers may be given an opportunity to make closing arguments either in person or, more likely in divorce cases, by paper. The court accepts them all and, ultimately issues a decision. The lawyers then prepare a judgment in accordance with the judge’s decision and the judge signs it. Assuming the divorce is granted, the parties are then divorced.

Obviously, this is a general overview with overarching descriptions. There are tomes justifiably written on each minute aspect of each of the elements listed above and we happily share those, and the tactical and strategic implications of the procedural and substantive machinations with our clients.