

# WHAT YOU NEED TO KNOW ABOUT DIVORCE

by Shelburne Ferguson, Jr., Attorney at Law

## ACKNOWLEDGMENT

It is with appreciation that I thank G. Lawrence (Larry) Rice, III, of the Memphis Tennessee Bar for his recommendation at an American Bar Association conference that we “divorce lawyers” should write such a booklet as this. I am also grateful to the excellent work of the ABA Family Law Section for keeping us family attorneys so well informed.

I thank my wife of 42 years, Beulah Mercer Ferguson, for her patience and boundless love.  
—Shelburne

## NOTICE

This booklet is not intended to be a substitute for the legal advice of a qualified attorney. The information it contains is general in nature and may not apply fully to your situation. So please do not attempt to use this booklet as a “do-it-yourself-lawyer” because you may be greatly disappointed in your representation and in the outcome.

I will be pleased to set an appointment with you to assess your situation and to offer you the best advice I can provide learned over nearly forty years of concentrated effort to represent my clients to the fullest extent that the law, ethics and good common sense allow.

My mission: I assist people who want to improve their lives or businesses by helping them become comfortable with the legal system.

My promise to you: I will always be fair, honest and straight with you.

Not certified as a domestic relation's specialist by the Tennessee Commission on Continuing Legal Education and Specialization. Admitted to practice in Tennessee in 1965.

## How a Divorce is Started

A divorce is started by filing a “Complaint” in the clerk’s office in one of the State courts in the county of your residence. A Complaint is a formal document which contains factual information which you have supplied to me as your attorney, a statement of the grounds for the divorce, together with information regarding property, children, custody, support, etc.

After all of the required divorce documents are filed and the court costs paid, the clerk’s office issues a “summons” which will be served upon your spouse either by a process server -- like a sheriff's deputy, or "served" by your spouse accepting service at your attorney's office or at the clerk’s office. There is a small court cost savings if your spouse agrees to accept service of the summons.

Acceptance of service is an acknowledgement of the receipt of the suit papers. It is not an admission by your spouse of any wrongdoing and it does not mean that he agrees with the terms of any proposed property settlement or visitation arrangement. Your spouse has thirty (30) days after service of the summons in which to file an “answer” to the Complaint. Often, an attorney representing your spouse will request a short extension of time to file an answer. This is usually agreed to as a matter of courtesy to the other attorney.

As I mentioned above, you must pay the court costs when filing for a divorce. The court costs vary from county to county. I will advise you what your court costs will be.

## The Grounds for a Divorce

You must state in your Complaint your “ground” for needing a divorce.

The two most-frequently used grounds for a divorce in **Tennessee** are:

- (1) "Inappropriate Marital Conduct" (formerly called, “cruel and inhuman treatment”),  
and
- (2) "Irreconcilable Differences"

The ground of "inappropriate marital conduct" is a "catch-all" ground. This ground covers conduct ranging from loss of love in the marriage through actual physical or mental abuse. Other conduct such as adultery, failure to support, holding you out to public ridicule, etc. can also be proven under the ground of "inappropriate marital conduct." In addition, there are other grounds for a divorce which include:

- Habitual drunkenness or substance abuse since the marriage.
- Willful desertion for more than one year.
- Conviction of a felony and being sentenced to at least one year in prison.
- Pregnancy by someone other than the husband without his knowledge.
- Refusal to move to Tennessee with spouse and being apart for 2 years.
- Malicious attempt on the life of the other spouse.
- Impotency.
- Living apart for two years.
- Bigamy.
- Abandonment and neglect in support.
- Indignities suffered at “hands of spouse.”

You do have to prove fault under the ground of inappropriate marital conduct. In other words, you will have to testify in open court to enough facts that the judge will be satisfied that you have proven your ground for a divorce and that your spouse is the one at fault in causing the divorce.

The ground of “irreconcilable differences” is the closest thing we have in Tennessee to a “no fault divorce.” You do not have to place the blame on your spouse to obtain a divorce on the ground of “irreconcilable differences.” You do not have to testify as to any of the facts regarding the break up of your marriage.

There are, however, three significant requirements to obtaining a divorce on the ground of “irreconcilable differences”:

- (1) You and your spouse must enter into a written “Marital Dissolution Agreement” which will be signed and sworn to by both of you. This document resolves the division of all property, support issues (if any) as well as how your debt obligations will be handled.
- (2) If you have minor children, you must also agree to a Permanent Parenting Plan that provides for shared parenting time, child support based upon the child support worksheet and how the support is to be paid to the recipient parent, i.e., directly by check, by direct deposit to the recipient’s bank or by wage assignment.
- (3) There is a sixty (60) day waiting period from the date the Complaint is filed until a hearing can be held if there are no minor children of the marriage. The waiting period is ninety (90) days if there are minor children of this marriage.

Obviously, a negotiated agreement is the “best” way for you to dissolve your marriage and to settle the property, support and visitation issues related to the marriage. In this way, it is your and your spouse’s agreement, not what a judge awards. It will also save money in attorneys’ fees and court costs. However, if a settlement cannot be worked out in advance, then the matter will proceed on a contested basis.

By recent legislation all cases in which minor children are involved require a ninety-day (90) waiting period between the filing of the Complaint and the earliest you can have a hearing and sixty (60) days where there are no minor children involved.

### **What makes a Divorce Action contested?**

A contested divorce is one in which the parties have not or cannot agree upon one or more issue such as the property division, alimony, child support, visitation, custody, debt assumption or even the payment of attorney's fees for the other spouse. In a contested case, the court will ultimately be called upon to decide these issues.

It is in everyone's best interest to avoid a contested divorce. Contested divorces are more stressful on the parties and on the children. They take longer. They can become very expensive. Because of the nature of a contested case, bitterness often surfaces that may never be resolved. Therefore, it is in everyone’s best interest to resolve the issues, work out a settlement and avoid a contested trial if at all possible.

Nevertheless, a contested divorce often cannot be avoided. This results when either your spouse will not agree to negotiate terms or you are unwilling to agree. When this happens, there is no alternative but to present the issues to a mediator or to the judge.

### **Legal Separation**

The Tennessee legislature several years ago provided for a process called a “legal separation.” While a legal separation is now allowed, it is rarely used and is often not helpful in resolving marital issues. A legal separation generally results in adding more expense to the process of ultimately obtaining a divorce.

If you are having problems in your marriage or with issues that you cannot resolve together, you should seek outside, qualified counseling. Do not wait until the issues cause irreparable harm to your relationship. Seek help immediately. Don't use a “trial separation” as a substitute for effective marriage counseling. Solving marital issues requires the guidance of an effective marriage counselor and the mutual hard work by you and your spouse. If, however, you feel a legal separation may be of benefit, I will be happy to discuss the process with you.

### **Annulment**

Tennessee does recognize an annulment in a few very narrow situations. The difference between a divorce and annulment is that an annulment is like the marriage never occurred. It is declared void from the beginning.

You should discuss your desire for an annulment with me as soon as you possibly can so it can be determined whether you would legally qualify for an annulment.

### **Residency Requirement**

Generally, you must have lived in the State of Tennessee for at least six months prior to filing a divorce complaint here. There is a narrow exception where the grounds for the divorce occurred in Tennessee, which could allow the action to be filed sooner than six months.

## **The Parenting Plan**

The legislature enacted legislation a number of years ago that requires divorcing parties with minor children to enter into a “Permanent Parenting Plan” and to attend parenting classes when there are minor children in the home. If a parent does not attend the parenting classes, then his/her parenting time with the children may be restricted or denied by the court until the classes are completed. The Court can also send a parent to jail for not attending the parenting classes. You must arrange to take the parenting classes within thirty days of the filing of the divorce or its service upon you if you are the Defendant.

The procedures involving the Parenting Plan and parenting classes sometimes vary from county to county. Please ask for specific information about the county of your residence. I will supply you with a sample copy of a parenting plan so you can review it and complete it for filing. I will be happy assist you in its preparation.

The parenting classes are designed to reduce the stress on children in the family because of divorce. It also forces parents to attempt to work together for the benefit of their children.

To sign up for the parenting classes, call the office in your county:

For 1<sup>st</sup> District/Washington, Carter and Unicoi Counties call:  
(423) 753-1680 or (423) 928-6581

For Sullivan County call:

Sullivan Co. Extension Service – (423) 279-2723 or  
Frontier Health – (423) 224-1000

For Hawkins County call: (423) 272-7241

For Greene County call: (423) 798-1710

There is a sliding scale charge for the parenting sessions, which is based upon your “ability to pay.”

## **Separation and Reconciliation**

You should not file for a divorce and continue to live together as husband and wife. It is also best that one party physically move from the marital residence. Occasionally, parties will “separate” with one living in one bedroom and the other in another in the same home. Sometimes that works, most of the time it does not. It is usually very stressful on both the parties and the children for all parties to remain in the same home.

Please keep in mind that once you file for a divorce and then go back to living together as husband and wife (and having sexual relations) the law views that as what is called “condonation.” In other words, you have forgiven each other for whatever “grounds for divorce” you once had. The legal effect of “condonation” is that your Complaint can be dismissed and you would have to refile for a divorce with new grounds.

While nothing would please me more than for you and your spouse to reconcile, I would highly recommend that if you want to attempt reconciliation before your divorce is final you let me know immediately. Please advise me of your desire to reconcile even before you begin living together as husband and wife, so that we can enter a “Reconciliation Order.”

A “Reconciliation Order” will allow the two of you to resume living together as husband and wife, and if the reconciliation does not work out, it will permit you to reactivate your divorce without having to file a new Complaint.

The entering of a “Reconciliation Order” will avoid this problem. If you feel comfortable with your reconciliation, then the Complaint can be subsequently dismissed.

### **How Long Will it be Before you are Divorced?**

If you file on the ground of inappropriate marital conduct and your spouse contests the divorce, it is difficult to speculate how long it will take. On the average, a contested divorce will take six (6) to nine (9) months to have a court schedule a hearing and enter a judgment.

If you are proceeding on the ground of irreconcilable differences and there are no minor children of the marriage, it will take approximately 70 to 80 days from the time the Complaint is filed until the divorce is heard if both of you cooperate. If there are minor children involved, it will take 100 to 120 days to be heard following the filing of the Complaint.

No judgment for divorce is final in Tennessee until 30 days after the judge signs the judgment **and** it is entered on the record in the clerk’s office. One consequence of this rule is that if you were to marry during the thirty days before the judgment is final your marriage would be bigamous and illegal.

It is our usual practice to file the judgment on the day of the divorce hearing unless the action is contested. In contested cases, the judgment usually takes about a week following the hearing to be drafted and signed by the attorneys, approved by the Court and filed by the clerk.

### **Can I Assure You that What You Ask For You Will Get in the Divorce?**

No lawyer can guarantee you that you will receive everything that you are asking for in your divorce demands. If you consult a lawyer who does make those promises to you, you should be very careful. (In fact, ask the lawyer to put those “promises” in writing. I doubt that he/she will.) A lawyer cannot promise you everything you want. Only the parties through agreement or a judge by judicial decision can decide that.

The point is divorces are very complicated, multi-issue lawsuits that are not easily resolved. Therefore, it is only possible for an attorney to rely on his or her years of experience, knowledge of the law and negotiating abilities to “predict” what may happen. You also need to realize that an attorney has an obligation to tell you when your demands are unreasonable or unrealistic. You can expect me to do that.

### **Dealing with your Expectations**

Occasionally, usually a female, will come to my office for a consultation to find out what her legal rights are if there is a divorce. During this discussion, she may tell me, “I want to take my jerk of a husband for every dime he’s got.” Or a male may visit my office and advise me that he has no intention of ever sharing any of his retirement benefits with his soon-to-be-ex wife.

In both of these incidents, I will tell these potential clients that they need to find another attorney if that is their demand for success. I don’t mean to be unkind or turn down representing people, but I must be frank and honest with my clients. If your expectation is something that the law or ethics won’t allow me to do or I can’t deliver, I will tell you.

The reality in the two scenarios above is: marital assets in Tennessee, which include retirement benefits, will be distributed “equitably” by the court. An equitable division of marital assets means that neither spouse will end up with all the assets and no one will be able to arbitrarily remove any marital asset from consideration in the division of the marital assets. Divorces are not like an automobile wreck where a plaintiff may be entitled to damages for the wrongdoing. Divorces just don’t work that way

This is why I spend as much as an hour and a half with you at your initial office visit. At this visit, I will explain the law generally and will deal specifically with your particular issues and questions. One reason for this is so that I can deal with your expectations “up front” so we won’t have any misunderstandings later. We both want this relationship of client and attorney to be an honest and effective one. That is why I will tell you when your expectations are unrealistic, whether they deal with money, assets, child visitation, child custody or other issues.

### **Expenses versus Results**

In most domestic relations cases, no matter how much money is involved, a decision will need to be made as to whether the expense of pursuing discovery or expert testimony or even surveillance is worth the hoped-for benefit. In business we call this a “cost-benefit analysis.”

For example, a client may suspect that his or her spouse has been hiding income or assets for several years in anticipation of a divorce. While a client may want and should pursue discovery to learn as much as possible about the other spouse’s finances, eventually, the cost of such a pursuit may not be a good use of the client’s funds. It is at this point that you will need to set emotion aside and assess whether such an effort will reap more than the cost of finding out through formal discovery what has been going on.

### **Abuse and Violence**

Unfortunately, millions of families are victims of domestic violence each year. The laws and the courts are very intolerant toward violence in the home. Should there be any history of violence in your home, you need to let me know before any Complaint for divorce is filed in your case. Often there is an outburst of violence when there is a separation or when a divorce is filed. We need to know about your history of abuse so we can anticipate and prepare for that type of response.

There are laws and procedures designed to protect you and your children from violence. Restraining Orders and Protective Orders can be obtained through the Courts. Most spouses will obey these Orders after they are issued by a court. Those who violate an Injunction or Protective Order are subject to arrest and punishment for contempt of court including jail time.

Also, if you have been violent in your marriage toward your spouse or children, then you need to advise me so that issue can be dealt with. Such conduct is not overlooked when you go to court.

If an Order of Protection or Restraining Order is issued against you, then OBEY THE ORDER even if your spouse tells you that it is okay for you to ignore the Order. **Do not** ignore a Restraining Order until the court removes or modifies the Order in writing. It is necessary to have a hearing before the judge for such orders to be removed.

The attitude of our country is against those who commit domestic violence. We even have federal laws now to protect and punish for domestic violence. It is serious

conduct and must be avoided.

An automatic restraining order is issued in divorce cases against both parties. The restraining order prohibits violence, threats, the canceling of insurance, cutting off utilities, relocating with children to another state and a variety of other conduct. I will show you a copy of the restraining order that will be entered. If you have any question about whether what you are planning to do is restrained, ask me first before doing what you have in mind

## **Surveillance and Eavesdropping**

Most all states and the federal government have laws regarding wiretapping, eavesdropping and downloading computer information. Some of these laws have criminal implications. In most cases the law restricts the use of illegally obtained evidence.

What this means is that you should protect “sensitive” information you don’t want your spouse to have.

You should not consider any means of eavesdropping, wiretapping, downloading computer information or listening in on cell phone or regular phone communications without first discussing those issues with your attorney.

Also, you should change your passwords and codes to your answering machines, separate bank accounts and other “private information.”

## **Kidnapping**

Each of the fifty states as well as the federal government now has laws against the parental kidnapping of children. You should therefore, **never** attempt to take the law into our own hands.

All of the punishments that can be handed out for kidnapping are unpleasant and can restrict your ability to be with your children as well as confine you to jail.

Should your children be the subject of a kidnapping by a parent or someone acting on your spouse's behalf, contact the authorities and me right away. Delay can make recovery more difficult.

## **A Division of Marital Assets**

Tennessee is what is called an “equitable distribution state” which means that the court is not obligated to divide the marital assets “down the middle.” The court is allowed to “equitably distribute” the marital property based on equity or fairness. For example, if one spouse has begun to waste the marital assets through gambling or by spending lavishly on a girl or boy friend or by squandering money or by incurring unreasonable debts, the court can consider that conduct and give the innocent spouse more than fifty percent of the assets.

Most divorces involve a division of the marital assets of the parties. In simple terms “marital assets” are those physical and non-physical assets (like cars, homes, boats, stocks, bonds, retirement benefits, furniture, etc.) that you and your spouse have acquired during your marriage.

Tennessee recognizes another classification of property called “separate property.” Separate property consists of assets, which were acquired prior to your marriage or came to you outside of the marriage, for example, by an inheritance or gift. If you

believe you have or expect to have one of these situations you need to let me know that.

Assets in a marriage can also be intangible, such as life insurance cash values, equities, and retirement benefits. A separate legal document called a “Qualified Domestic Relations Order” is required to transfer or divide employer-provided investment and other retirement benefits.

The assets in a marriage are generally valued on the basis of their “fair market value.” Fair market value is not the cost to you when you purchased the asset. It is not the cost of replacement. Fair market value attempts to set a “price” on the asset which it would bring if you wanted to sell it, but did not have to, and the potential purchaser wanted to buy, but was not obligated to buy. If you and your spouse cannot agree on the fair market value, then there are qualified appraisers who can advise us and the Court of the fair market value of each asset.

There are numerous issues of value and classification involving separate as well as marital assets. You and I will discuss these at length if they are involved in your divorce.

Of course, if you and your spouse can agree on how your assets will be divided and if the two of you have been fair and reasonable, the court will approve your agreed-upon-division.

The issue of “Who gets the home?” is an important one. The answer to that question depends on too numerous factors to discuss completely here. Suffice it to say that the courts today attempt, where there are minor children involved, to allow the parent with primary parenting time (what used to be called “custody”) to remain in the residence with the children. Obviously, this arrangement depends on the finances and the division of the remaining assets of the marriage.

A large variety of “arrangements” can be agreed to by the parties regarding the residence including selling it and dividing the equity, to postponing a sale until the last child becomes an adult. Be certain to talk this issue out completely with me.

## **Debts**

Most divorcing couples have to deal with a division of their marital and personal debts as a part of their divorce. Obviously, if you can agree to such a debt division then you should do so. A court will approve what is shown to be reasonable.

If you and your spouse can't agree, then the court will generally consider a number of factors in dividing debt obligations. Those factors include:

- Who made the original debt?
- For what purpose was the debt made?
- Who received the benefit of the debt proceeds?
- Who will receive as a part of the division of marital assets the particular asset (if any) connected with the debt?
- Who is better able to pay the debt?

## **Medical Coverage**

If you currently have your spouse and/or children on your medical coverage, you should not change or cancel this coverage until the divorce is final or a court approves the change.

As a part of the settlement or the judgment, some arrangement is generally made for health coverage for dependent children. In addition, a federal law (COBRA) allows most employees whose spouse is covered by health insurance to continue that coverage for up to 36 months following the divorce at about the same premium cost. You should discuss this issue with me.

## **Life Insurance**

Do not make any change in your life insurance coverage without talking to me. It is typical to require continued life insurance coverage by the alimony or child support obligor (the one ordered to pay). There is no set amount of insurance required under any law. It is usually a negotiated issue and is used to protect the support should something happen to the one ordered to pay the support.

## **Alimony or Spousal Support**

There are various types of alimony today. We have:

**Alimony pendente lite** or temporary alimony which is support given pending the outcome of the final divorce hearing.

**Rehabilitative alimony** which is awarded to one spouse to provide training or “rehabilitation” to allow that spouse to become self-supporting. Rehabilitation alimony is usually for a fixed period of time depending on the training required and the length of the marriage.

**Alimony in Futuro also known as Periodic Alimony** is the payment of support on a long term basis or until the death or remarriage of the recipient. On a showing of a substantial change of circumstances the court can modify Periodic Support by increasing it, decreasing, terminating or extending it.

**Transitional Alimony** is support paid for a definite, set period of time. It is usually paid to an “economically disadvantaged spouse” to help that spouse adjust to the economic consequences of the divorce. Transitional alimony is not generally modifiable once set.

**Alimony in solido** or lump sum alimony is calculated as of the date the judgment of divorce is entered and is not terminable at the death of the recipient or the death of the payor. It is not modifiable unless agreed in advance. Often one spouse or the other is declared to be an “economically disadvantaged spouse,” which means that the income of the disadvantaged spouse is significantly lower than the proportionate income while the parties were “happily married.” This is usually shown through prior and current income tax returns.

Both husbands and wives can receive alimony. While it is rarer for a husband to be awarded alimony, it does happen.

There are numerous factors set out in the law for a court to consider in awarding alimony. Those include economic factors as well as health, standard of living, fault, tax consequences and related distribution of assets issues.

Alimony is generally taxable to the recipient and a deduction for the payor. Child support on the other hand is not taxable to the recipient.

## **Credit Cards and Accounts**

Prior to filing for a divorce, you may want to consider closing all joint accounts, charge cards and open accounts by written notice by certified mail. If you fail to do this, you may be obligated for charges by your spouse subsequent to your separation. Of course, it is best, if you can, to talk with your spouse about these card cancellations.

As I mentioned earlier, under Tennessee law today there is an automatic restraining order that is issued against both of you. This restraining order prevents you from closing or changing certain accounts and insurance policies, from threats or actual violence against each other, hiding or squandering assets. You must not violate the court's restraining order. To do so can get you in serious trouble with the judge and can lead to a fine and jail time.

Avoid cutting off essential services like power, water, gas, etc. Such action is also a part of the automatic restraining order and courts do not look with favor on this practice. You should talk with me before even thinking about doing that. If you have already cut off these services, then let me know immediately or reinstate them on your own.

## **Parenting Time and Visitation**

The courts today are obligated by law to favor joint parenting. Joint parenting involves the issue of who makes the "important decisions" about the children. It really does not have anything to do with how much visitation one has with children.

The parties, if they can, should fashion visitation that will maximize each parent's opportunities to parent the children. Of course, work schedules and vacation times will need to be considered. Mediation is available to assist with working out visitation arrangements.

The typical visitation for the non-primary parent is every other weekend from Friday evening until Sunday evening. This is generally the minimum amount of visitation unless there are issues of abuse or neglect involved. In addition, this parent generally receives one night in the week when there is no weekend parenting time. The typical, standard summer visitation is two or three weeks. Spring Break is generally split between the parents as well as is the Christmas Break from school. The holidays and special days will need to be divided or alternated from year to year.

If parenting time is something that the parents can work out together and if the children are at least school age, you should discuss the children's visitation preferences with them. Some older children prefer longer stays with the one parent before moving back to the other parent. In this way the children's friends can know where they are more easily.

Some parents (though it is rare) move back and forth into the home thus allowing the children to not be uprooted each week.

The legal standard for who is the "primary residential parent" for the children is based on "with whom do the children reside a majority of the time."

Decision making and visitation can be denied a parent who is abusive or who fails to abide by the orders of the court, particularly those related to child support or violence or refuses to communicate with the other spouse.

After a child reaches age 12, and indicates a desire to live with one parent or the other or to change the visitation schedule, the court is obligated to consider the child's desire after a Petition is filed. The court is not obligated to do what the child is asking but the courts generally do try to accommodate the child if there is no compelling reason not to do so.

### **Relocating to Another State**

The matter of relocating to another state or more than 100 miles within the state creates a challenge for rearranging parenting time (visitation). The primary parent (the one with whom the children reside most of the time) and the other parent are both under a statutory obligation to give a 60-day written notice to the other parent prior to the move from the state.

Obviously, if the parents can agree on satisfactory modifications of the visitation schedule, that is the most desirable solution. If they cannot, then either mediation or court intervention is required.

By statute, the court considers several factors regarding whether the relocating parent can move with the children. One of the major concerns is whether the move is motivated out of vindictiveness toward the non-relocating parent. If vindictiveness is proven, then it is likely that the move will not be approved.

Regardless of whether a modified visitation schedule is agreed to by the parties or decided by the court, a written order must be entered by the court for the agreement to be enforceable.

If you have any notion of moving with the children either before or after the divorce, please do talk with me about that. Even after the divorce is final, a move such as this must be agreed to or approved by the court and an order entered.

I will say more about exercising visitation over the distances later, but do keep in mind that most children need more frequent contact of some type to remain connected to their parents. Plan on creative ways to "stay in touch" with your children.

### **Child Support**

Child support in Tennessee, as in all states, is determined by "Child Support Guidelines." Tennessee recently modified its way of calculating the amount of child support by taking into consideration both parents' incomes. The new system also considers the number of days of visitation each parent will have with each child, who is paying for after school care and the cost medical coverage, the amount of uncovered medical expenses annually and the annual income of each parent.

All of this data is typed into the child support computer calculator that provides the specific amount of the child support obligation and which parent is obligated to pay the support.

Let me point out that under current Tennessee law there is no legal child support obligation on a parent past the child's eighteenth birthday or graduation from high school, whichever is later or to send a child through college. Nothing, however, prevents parents from negotiating a provision for payment for college expenses.

I will supply you with a copy of the current child support website address so you can calculate the amount of child support for yourself.

## **Support pending the final hearing**

The law provides for temporary support for a spouse and children pending the final trial. If there is no agreement between the parties for support then the party needing support will generally have to ask the court for temporary support. Such support is based upon need and can be modified at the final hearing. Please let me know if you will need temporary support.

## **Marriage, family and psychological counseling**

I don't need to tell you, if you are in the first or last stages of a divorce, such experience has a severe emotional impact on you and other family members. In those circumstances, some form of counseling is appropriate, not only for you, but perhaps for any minor children involved.

Children often blame themselves for what may be occurring in the marriage breakup. A child may need a counselor to help him or her develop coping skills or simply to gain insight into what is happening.

I encourage you to seek help for both you and any children involved. The choice, of course, is ultimately yours, but I would be pleased to help you with that decision.

## **Mediation**

Mediation is required in all cases in most counties when the parties have been unable to resolve their difference regarding any issue in the marriage. In other words, if the parties can't agree on the parenting plan and the division of assets or obligations then you will have to go to mediation before you can "go to court"

Mediation is a good process and is favored. A large majority of my cases are resolved in mediation. Mediation resolution allows the parties to "self-determine" the outcome of their divorce and parenting plan. If the parties don't come to an agreement then a judge will impose a decision that generally satisfies neither party.

There are a number of very qualified mediators in our area who have received training in the mediation process. Beyond that, they have a vast amount of practical experience in resolving conflicts. Most mediators charge between \$110 and \$150 per hour for their time. This cost is generally divided equally between the parties at the conclusion of the mediation. It is a process that I highly recommend to you.

The mediation process is informal. Both parties are present with their counsel. No "outside persons" other than the mediator are allowed to participate in the actual mediation. Most mediators proceed with a brief introduction to the process and then ask for each party or their counsel to outline the issues to be resolved. The parties then separate into different rooms. The process generally then follows the path of what I call "shuttle diplomacy" with the mediator going back and forth between the parties attempting to negotiate their differences.

The process is confidential which means any offers not ultimately agreed to and reduced to a written, signed agreement can not be used against the other party or brought up in court. Neither can the mediator be called to testify about what happened in negotiations.

Once an agreement is reached, it is reduced to writing and signed by the parties and counsel. This agreement is binding on the parties and can be enforced in court if a party refuses to abide by it. I will go over the process with you before any mediation is conducted.

## **Restoration of Maiden Name**

A woman may be restored to her former married name or her maiden name even though she may have children bearing the name of their current husband. Such restoration does have to be asked for and ordered formally by the court. If you have children with this name, it might be better to retain your married name so as to avoid confusion. However, that decision is yours to make.

## **No Alienation of Affections Action in Tennessee**

Until 1989, Tennessee permitted an action for damages for “alienation of affections.” The legislature in 1989 abolished the action for alienation of affections, which means that there is no way to collect damages from someone who “breaks up a marriage” in which the responding married person was passive and initially innocent in the relationship.

One reason the legislature did away with this action was the difficulty in showing that the spouse of the plaintiff in the action was not initially, actively participating in the relationship. A second reason was that there were so few cases of this type filed.

## **Witnesses**

If your trial will be contested, you may want to present part of your proof through witnesses. Even if your case is uncontested but is proceeding on the ground of inappropriate marital conduct, you may still have to have two character witnesses who vouch for your truthfulness.

You should supply me with the names, addresses and telephone numbers of the witnesses you want to use together with a summary of what they will testify. A subpoena will generally be issued and served upon the witness. This is done so that if a witness were to become ill or not be able to attend the hearing, the court can authorize a postponement of the hearing. The court will generally refuse a continuance if no subpoena has been served on an absent witness.

## **Bankruptcy**

Should your spouse file bankruptcy during your case or even after it, you should immediately contact your attorney. Generally, bankruptcy will not relieve the bankrupt of paying alimony or child support. It may, however, relieve the bankrupt from paying certain debts, including joint debts. You should speak with a qualified bankruptcy attorney if you must file for bankruptcy or have a bankruptcy question.

## **It is Never Too Early to Prepare**

The initial preparation for a divorce should begin as soon as you suspect that your marriage may end in divorce. The amount of preparation you need to do obviously depends on the circumstances.

At a minimum, however, you need to know as much about your family finances as possible. You should secure copies of at least the last three to five years of Federal Tax Returns. It is important to know what assets you and your spouse have, including stocks, bonds, retirement benefits as well as life insurance and other employer provided benefits.

Consider using a video camera to record the household furnishings, silverware, clothing, bedding, etc., to preserve the amount and quality should that be an issue.

Keep a record of all checking, savings, and other financial accounts along with the bank name, branch location, and account number. It is a good idea to record balances as well.

You need to know what credit cards each of you has as well as if they are joint cards allowing either party to use them. Keep records of the charges and balances.

### **Keeping a Diary**

I also recommend that you keep a diary of the relevant events involving you and your spouse as well as with the children. You will find a diary will help you refresh your memory later. Also, it is impressive if you have a contemporary record of events and your spouse does not. The court will tend to give more weight to testimony that is supported by a report that was made at the time of the incident.

When making a diary, you should keep in mind that “the other side” will have a right to see it and obtain a copy if you intend to use it at the trial or to refresh your memory. Be careful what you put in the diary because it may be seen by your spouse and his/her attorney.

Let me also caution you that you should protect your own communications. Remember to change your password to your email access. Change the password to your voicemail messages on both your home phone as well as your cellular telephone.

### **Preparation for the Hearing**

If your divorce is uncontested, you and your spouse will have most likely agreed upon the issues of parenting time, custody, division of assets and debts, etc. If your spouse, on the other hand, has simply ignored the divorce action or has moved from the state and is not making any contest at all, then you will simply present your side of the case and ask the court to order what you want.

If your divorce is contested in whole or in part, time will need to be devoted by you and me to prepare for the hearing. You can save yourself a great deal of time and money if you will pull together the documentation you will need to prove your case. This would include tax returns for 3 to 5 years, investment accounts, appraisals, proof of infidelity (if that is the issue), vehicle titles, videos, tape recordings, loan papers and balances, deeds, to mention a few. You and I will discuss what you will need.

I will generally want to interview your witnesses in advance of the hearing and perhaps even take written statements. It will not be necessary to interview character witnesses. **During the preparation process, be certain to tell me the bad along with the good.** Unless I know the truth of what your spouse may attempt to prove, it will be difficult to be adequately prepared. Rest assured that whatever you tell me as your attorney will be kept confidential and not discussed with anyone without your specific permission. In that regard, occasionally, family members, such as parents, adult children or a friend will attempt to call me to ask about your case. Unless you give me written authorization or specific oral authorization to talk with one of these persons, I cannot and will not be able to tell them anything about your case.

In regard to preparation, I will expect your attention and your cooperation. You must be truthful with me. You should also be prompt for any meeting we schedule.

## **Giving a Deposition**

Under the rules of civil procedure, attorneys can obtain “discovery” of the evidence that the other side plans to present. One means of “discovery” is through depositions.

A deposition is actually the transcript of the oral testimony of a witness taken prior to the trial of the case. A deposition is taken before a court reporter hired by the parties who will take down the questions asked by the attorneys and answered by the witnesses. This is done typically by electronic recording or by stenographic typing.

The witness is put under oath to tell the truth. The attorney seeking the deposition will ask background questions as well as questions about the facts you plan to present at the hearing and who your witnesses will be.

I will set a time prior to the scheduled deposition for us to go over the process of your giving a deposition. I generally will ask you sample questions to give you a feel for what to expect.

In addition, I will supply you with a reprint of an article from the American Bar Association publication, the *Family Advocate* on how to handle yourself at the deposition. This along with my meetings with you should make you feel comfortable with the discovery process.

Let me remind you, however, that it is important to tell the truth, particularly when you have been put under oath (sworn as a witness). If it is proven that you lied under oath then you can be prosecuted for perjury.

## **Appearing in Court**

You should dress appropriately for going to court. If you would feel more comfortable in typical business attire then wear business attire. If you would feel more comfortable in casual business attire, then that is acceptable. As a rule of thumb, you should wear what you would wear to “go to church” as we say.

Most judges will **not** allow shorts, tank tops or T-shirts with slogans. Avoid these. The point is: you do not want your clothes to distract from your case presentation. You should also advise anyone who will be appearing as a witness on our behalf to dress appropriately.

You should always stand or sit without slouching. Speak slowly and clearly. Always be serious and not silly or funny.

Speak courteously to the judge. It is appropriate to respond to the judge with, “Yes, sir or ma'am” or “No, Your Honor.”

If the judge asks you a question, look at him or her. Do not interrupt the judge. Wait until you hear the entire question before answering.

Keep your hands away from your mouth and do not use your hands too much when testifying.

Be polite and courteous to everyone. You do want to come across as reasonable and level headed, not erratic and demanding.

Do not wear your emotions on your sleeve. Do not react outwardly to the testimony of others, even if you want the judge to realize the person is lying.

Don't allow the opposing counsel to bait you into becoming visibly angry. This usually will work against you.

Listen carefully to every question you're asked no matter who has asked it. Make sure you understand the question before you try to answer it. If you do not understand, there is nothing wrong with asking for a clarification or that the question is rephrased.

Do not try to give an answer to a question that you do not have an answer for. There is nothing wrong with legitimately saying, "I do not know." That is far better than getting caught making up the answer you think needs to be given.

Avoid volunteering information. If I feel that there is additional testimony that needs to be brought out then I will ask you on redirect or cross-examination.

Don't "play games" with your testimony. Everyone in the courtroom, beginning with the judge, realizes when a witness is trying to be "cute" in his or her testimony. Play it straight.

Avoid asking questions back to the attorney who is asking you questions. It won't work and the judge will eventually order you to not do that.

While it is permissible to use notes to refresh your memory, it is generally not advisable. In the first place it gives the appearance that you may have trouble sticking to your story. Also, if you use notes, the opposing counsel has a right to look at your notes. Therefore, if you must use notes, be careful what you write down, because your spouse's attorney will be reading your notes.

I often recommend to those who feel uncomfortable about their court appearance that they attend a trial a few days or a week before your case is scheduled. It can help you see for yourself how a case progresses and can have a calming affect on you. Ask me and I can schedule you to attend another hearing.

In most cases the judge will make a decision after the end of all the proof from both sides. Remain calm during that process. Do not allow yourself any emotional outbursts.

Generally, a court reporter will be recording the judge's decision and often it is typed up to make sure of the details of the decision. Occasionally, the judge and all the parties may overlook some facet of the decision. It may be necessary for a second hearing to clear up any defects or misunderstandings. It isn't until the Final Decree is signed that the case is fully decided.

The Final Decree of Divorce is not final for 30 days after the court signs it and it is entered in the Clerk's record. This allows time for an appeal by one or both parties if they are dissatisfied with the outcome. It also means that you are still married until the Judgment is final in 30 days. Do not remarry anyone but your spouse during this 30 day period because it would be bigamous.

Also, should you and your spouse reconcile during this 30 day period, please let me know and we can dismiss the action by an appropriate order and you will remain married. If the action becomes final before such an order is entered, then you would have to remarry should you reconcile.

### **The Importance of Communication**

Disputes arise between clients and their attorneys primarily because of a lack of communication. I assure you that I will respond to your calls. I will send you copies of all correspondence and papers that are generated in your file.

Communication, however, is a two-way task. I will need to hear from you on occasion about new developments or issues that have come up.

You also need to be upfront, frank and honest with me. I cannot prepare for some potential issue if you hide it from me.

Money is also a matter that can become an issue between a client and the attorney. If you feel that a statement for services is incorrect, please let us know. If you feel that the expenses are “getting out of hand,” tell us. While we need to be paid according to our agreement, we do not want a “falling out” over money if it can be avoided.

So let’s agree that if I take your case we will communicate with each other.

### **After the Divorce**

If you have moved from the residence you will need to file Form 8822 with the Internal Revenue Service to notify them of your change of address. This is the only change of address form the IRS accepts. If you do not file this form and a notice comes to your old address (and is not forwarded to you) then an important deadline may be missed. Be sure you file this form.

Under current tax law, if you are a “non-custodial parent” and are entitled to claim the dependency exemption for a dependent child you must file IRS form 8332 with your annual tax return. Failure to do so can result in the loss of the exemption. Please remind your tax return preparer of that requirement.

If as a result of your divorce you are obligated to pay both child support as well as alimony there is an important tax implication to remember. If you are delinquent in paying your child support but continue to pay your alimony requirement, you may not be able to deduct the alimony payments from your IRS return. So it is essential that you pay all obligations ordered by the court.

Once your divorce is final you will want to file a new IRS W-4 form with your employer so your changed status as a taxpayer will be reflected in the amount of your withholding.

If you will be receiving alimony payments as a part of your divorce settlement or judgment, you should consult your tax adviser to see if you will need to pay quarterly estimated tax payments.

Please let me know if your or your spouse is a non-resident alien. This fact can affect the taxability of the property transfers in connection with your divorce.

I strongly recommend that you take any marital dissolution agreement to your tax adviser or tax professional for review prior to signing it. There are many new regulations that may affect the terms of your agreement.

You should prepare a post-divorce budget. Living on one income may be difficult for you regardless of whether you must rely on or pay child support.

Keep a copy of your divorce decree and marital dissolution agreement handy. Review it periodically to make certain that it is being followed by you or your former spouse. I would recommend that you make a will following your divorce. You should also review your insurance and benefit beneficiary designations. These will likely need to be changed.

I suggest that you have me or another attorney prepare a new will for you. You certainly want to be able to control what happens with what you have after your

death, particularly if it involves minor children and a former spouse.

## **Changing your Will and other Financial Documents**

You should review your Will during the divorce process and depending on its current status; consider what changes need to be made. For example, some provisions may need to be made to cover how your property will be distributed should you die before the divorce is final

Remember that typically your spouse is named the beneficiary in most employer-provided retirement plans and benefits. While some of these plans may not be able to be changed during the pendency of the divorce, you should consider changing them at the first legal opportunity.

It is best to review each of your benefits and retirement documents with an eye toward changing those that need to be changed. Don't delay on this consideration.

## **Keeping in Touch over Long Distances**

If you cannot exercise more frequent visitation with your children because of the distance between you and them then investigate creative ways of staying in their lives between physical visits. For example, if you can afford it buy the child a simple still camera or video camera so they can take "shots" of whatever they want to "show and tell" you.

Or purchase an inexpensive voice recorder for them and you and send tapes back and forth to provide them the sound of your voice. Certainly even very small children today can use a computer to keep in touch. Cut out pictures from the news or magazines to show them where you will be taking them on vacation. Better still let them send you pictures of where they want to go. And don't just be a "Disney Dad or Mom." Plan on "life activities," not just having fun times. Perhaps you could take them to where you were born or where your grand parents lived so they can get a sense of history and heritage.

The Tennessee law gives the non-residential parent a minimum of two calls a week to children, so take advantage of that opportunity. Plan out what you will talk with them about. Be prepared to share with them what you are doing. You are also entitled to copies of schools grades and activities so use those to offer positive praise or help.

If the residential parent makes these contacts difficult or impossible, then you should consider going back to court to obtain them. The courts are far more open today to providing appropriate access to parents who legitimately want a relationship with a child whether over a long or short distance.

## **About "next time"**

Most of my clients do remarry even though many of them protest when I predict remarriage. Let me give you some friendly advice on how to handle the next person in your life.

Think back to when you were dating and considering marrying the person you are now divorcing. Did anyone in your family try to tell you or did any of your friends attempt to warn you that you were making a mistake?

***Next time, listen to them.***

Sometimes our closest friends and family can see what that person is really like when you are blinded by infatuation. Listening to their concerns could save you a great deal of heartache next time.

## **What You Can Expect from me as Your Attorney**

- I and all of the personnel in the office will treat you with respect, politeness and courtesy.
- You will be kept informed of the progress of your matter including copies of all correspondence (incoming and outgoing), motions, petitions, orders and other relevant documents related to your file as they are created or received.
- Your matter will be kept in confidence by us, which means, that we will never discuss your case in public or with anyone not first authorized by you for us to share or discuss any information about your case.
- At all times, I will give you my best energy, effort, know how and skill to achieve the agreed upon goals in your case.
- At an initial meeting with you we will discuss at length our fee arrangement and will generally put our understanding into an “Engagement Letter.” I do not want any future misunderstandings regarding fees or expenses.
- I promise to conduct myself ethically with you, the opposing counsel and the Court in compliance with the Code of Professional Responsibility.
- Even though we will be working cooperatively together to achieve the hoped for end results in your legal matter, you will have the final say as to whether your matter is tried, settled, compromised or dismissed.
- Occasionally, a conflict of interest may arise in a case. A “conflict of interest” is a situation in which it may appear that my objectivity might be compromised because I do or have previously represented a person involved in your case or to whom I may be related, who may be called, for example, as a material witness in your case. Should that happen you will be immediately notified and the matter discussed at length to determine if I should withdraw as your counsel.
- Your inquiries, whether by telephone, email or letter will be responded to promptly or you will be advised when I will be able to get back to you if I am tied up in litigation or am out of the office.
- When you refer family, friends or acquaintances to me, I assure you that I will not discuss the nature of or any information about your matter with your referral.
- At the conclusion of your matter I will schedule a convenient time for you and me to sit down (at no cost to you) and cover anything that you need to know or do in the future as a result of your matter.

Shelburne Ferguson, Jr., December 2007

### Brief Biography

## **Shelburne Ferguson, Jr.**

- Graduate of the Milligan College with Majors in English and Sociology
- Graduate of the University of Tennessee, College of Law with the degree of Doctor of Jurisprudence
- Currently a member of the American Bar Association, Tennessee Bar Association and Kingsport Bar Association
- Member of the Family Law Sections of the Tennessee and American Bar Associations
- Recently served on the Executive Board of the Tennessee Bar Association Family Law Section
- Recently served on the Tennessee Bar Association Family Law Code Commission
- Appointed by Tennessee Governor Bredesen as Commissioner on the Tennessee Commission on Aging and Disability

Mr. Ferguson participates in numerous hours of Continuing Legal Education courses each year in order to remain current on the business, wills and estate and divorce and family law issues he handles for clients. He is a contributor to the Family Law Section newsletter.

In addition to practicing in the field of Family Law, Mr. Ferguson practices Business Law assisting clients in starting, organizing and managing their businesses and with clients' wills and estate matters.

- A member of the Business Law Section of the American Bar Association
- Has served as Vice President of the Kingsport Area Chamber representing small business
- Former Chair of the Kingsport Area Chamber of Commerce Small Business Council and remains a member of the Council
- Formerly Vice President and Board Member of Kingsport Area Chamber of Commerce
- Founder and originator of the Small Business Council Small Business Start-up Contest
- Founder and Originator of the Northeast Tennessee Technology Council TechStar Award honoring the innovative utilization of technology
- Co-owns and manages an entertainment promotions and advertising firm
- Hosted a business talk show on WJCW radio
- Kingsport Community Foundation Board Member
- Recipient of Toastmasters International Communication & Leadership Award, 2003 Chair, Downtown Kingsport Branding Task Force
- Board of Directors of Northeast Tennessee Technology Council
- Business and Law columnist for the *Kingsport Times-News*. Sunday Business Section

Mr. Ferguson also practices in the field of wills and estates as well as in the area of guardianships and conservatorships.

Shelburne is significantly involved in his community having served on numerous boards of nonprofits and in his church as an Elder, Chairman of the Church Board and Sunday School Teacher. He has been married to his high school sweetheart since 1965. They have four adult children and nine grandchildren.

—Shelburne Ferguson, Jr.  
February 2008

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