

SUGGESTED CHECKLIST OF ISSUES TO BE ADDRESSED IN DIVORCE FOR USE BY FAMILY SERVICE

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The topics and comments contained in this list are one judge's view of the issues, ways to frame those issues, and approaches that can be considered in resolving some of those issues. It is not an exhaustive list and is intended only as a guide for Family Service Officers involved in dispute interventions, whether on temporary orders, pretrial conferences, or otherwise.

I. CUSTODY AND VISITATION

A. Legal custody (joint decision making)

- do the parties have the ability to communicate for the child's best interests;
- even if they have trouble communicating, is the input of **both** important (because each has something to offer); if so, consider a parent coordinator;
- is there a 209A order in effect (thus precluding any type of communication).

B. Physical custody

- historically, who has been the primary caretaker, who has had responsibility for medical appointments, attended school meetings, transported the children to and from activities, etc.
- if there has been a primary caretaker, is there any reason to change that (i.e. is that parent abusing drugs, physically abusive to the child, unavailable, has trouble handling the child/ren, etc.);
- what is the work schedule of each parent (i.e. does one work on weekends or nights; does one travel a lot; does one not work outside the home; etc.);

C. Visitation schedule (parenting plan)

- availability of non-custodial parent;
- are mid-week visits (for dinner or overnight) advisable - are mid-week overnights too disruptive to the child's schedule; or does non-custodial parent help with school work.
- who else resides in the household of the non-custodial parent;
- do the children have their own room(s);

- in establishing a schedule, include time as well as days of the week and when the schedule starts to avoid lack of compliance and confusion.

D. Removal

- reason for wanting to move with child (remarriage; new job, family support system);
- involvement of non-custodial parent since the parties' separation (and/or divorce);
- crafting a visitation schedule that gives the non-custodial parent greater blocks of time in Massachusetts (i.e. longer visits in the summer; school vacations; one or two weekends a month if near enough; visits in the other state when the non-custodial parent can get there).
- recognition that if they agree to have the child move, this court loses jurisdiction six months after judgment. (Once the child resides in another state for 6 months, that state becomes the "home state" and all custody/visitation matters must be brought there unless both parties subject themselves to the jurisdiction of our court or the home state defers to our court after the judges in both states talk to each other.)

II. CHILD SUPPORT AND ALIMONY

A. Child Support (not taxable to recipient and not deductible by payor)

- Child Support Guidelines. Does the case come within the Guidelines. (When combined incomes are no greater than \$100,000; or if only payor is employed, his/her income is under \$75,000.)

- Deviation from the Guidelines (up or down). Court can deviate if it finds that application of the Guidelines would be unjust or inappropriate. In ordering less than guidelines, the Court could consider situations where recipient lives with family and incurs no "overhead" expenses at this time but payor has other financial obligations that need to take precedence; or payor lives with family and has limited overhead expenses and recipient needs more support because of high child care or other expenses or to maintain the home during this transition period; or payor is married and has other children. In those instances, can inquire of whether his new wife earns income -- how much -- which helps defray the cost of his household expenses and allows him to pay guidelines support).

- Attribution of Income. Court can attribute income to a person who is unemployed or underemployed and is capable of working. In making that determination, Court considers education, training, and past employment history of the party. Exception is custodial parent with children who are under the age of 6 living in the home. However, if such child or children are not the children of the payor, then the Court can attribute income to the recipient if he/she has the education, training, and past employment history.

- Emancipation. Child support ends when a child is emancipated. Emancipation can be as early as age 18 if the child is not in school and not principally dependent on the custodial parent for support (meaning the child is earning income or has moved away from the home of the custodial parent). If a child is not in school after 18 and if the child is still dependent upon the parent, support can continue until age 21. Support can only continue after age 21 if the child is in school. At 23, all right to support ends even if the child is still in school.

- Modification of child support. Child support can be modified upon showing a discrepancy of 20% or more between an established order and a proposed new order calculated under the guidelines.

B. Alimony (taxable to recipient and deductible by payor)

- After application of the Guidelines. Is there enough money to pay alimony? If payor earns under \$75,000 or their combined incomes are under \$100,000, it is unlikely alimony would be awarded since payor would be paying full support under the child support guidelines. A reason to consider alimony under those circumstances, however, would be whether there is a tax advantage to payor (and no tax disadvantage to payee) in designating all or part of the support as alimony.

- Alimony waiver - when appropriate. Even if no alimony paid at present, if a long term marriage, usually not appropriate to waive future alimony unless it is "bought" by a property division substantially in favor of potential alimony recipient (which means large dollars since smaller dollars, if needed to be used for support, would not last long).
If case goes to trial, can't waive alimony in future.

- Reductions in alimony. When and if, such as when recipient becomes employed or earns more than \$ _____ per year there will be a reduction. Can be written into an agreement, but it may be better to leave it for a later modification. Or, agreement can state that no modification will be sought to reduce alimony until the recipient earns at least \$ _____.

- Duration of alimony payment. If a long term marriage, no end date. If short term, may be a period of a few years to give recipient time to transition out of marriage, obtain employment, or alter living expenses.

- Termination of alimony. Death of either spouse; remarriage (not cohabitation - that could give rise to a modification but should not trigger an automatic termination since the new mate may not have sufficient income to contribute to the household); or a time certain.

- Calculating alimony after a long term marriage. Theory is to have the parties leave the marriage with somewhat equal incomes. A suggested approach is a formula created by Judge Ginsburg as follows: determine total gross income of the parties (either by combining their gross incomes or using only payor's if recipient has no income); divide that total (or individual amount) by 1.8; deduct the result of that calculation from the payor's gross income;

the balance is what he would pay for alimony.

III. DIVISION OF MARITAL ASSETS

A. Marital Home

- Continued use and occupancy of a marital home is a child support consideration and there is no requirement that the non-custodial parent be bought out through a refinance.

- Buy-out now or in near future. Not always a good idea, because a refinance could increase the debt service on the house (mortgage) and the custodial parent should not have to incur that greater expense because the non-custodial parent wants his/her money out now. It would be different if there were no children and one party wanted to keep the house by buying out the other.

- Conveyance to one spouse in exchange for some other asset(s). Concern here is whether person getting the house (usually the wife) is giving up a share of the husband's pension which she will need later to help support herself. It is often short-sighted for a party to make that exchange (and usually an emotional decision because of an attachment to the house) because the house is an illiquid asset and would likely have to be sold later to fund the person's retirement if she did not have sufficient income. Even with a sale, there may not be enough equity to sustain the former wife.

- Sell upon the happening of certain events:

(a) when youngest child is emancipated or graduates high school (depending on whether the equity is seen as the source of funding college); (b) a date certain; (c) some parties may push for a sale at remarriage or cohabitation, but those events should not determine whether the children should be allowed to stay in the house.

- Dividing proceeds from the sale:

- equally or a disproportionate amount of the actual net proceeds (based on what has happened with other assets or whether there is a reason to divide unequally such as short term marriage with greater contribution by one spouse toward the house);

- fix the amount now with or without interest (some people want to hedge their bets and not give more later since they expect the property to go up and don't want to share increase); a mortgage would be placed on the home now securing the interest of the person waiting for his/her money; need to determine whether it makes sense to fix now or rise or fall with the market at time of sale (which may make sense since value could go down and a fixed amount with interest could be more than just a sharing of net equity).

- Mortgage:

- Who pays (non-custodial parent often wants to pay directly to ensure it is being paid, to maintain control, and/or to get the tax deduction). In-house parent should be given first consideration for paying it out of her/his income and support as a way of ensuring that it is being paid and to also be in control of finances. That person could also benefit from the tax deductions attendant to paying a mortgage (interest payments and real estate tax deductions) if she/he has sufficient income through employment or alimony to need the tax relief.

- Remedies if person paying defaults: if it is the in-house person and the payor is worried about his/her credit, a sale of the house could be required after two missed payments to avoid foreclosure or ruined credit; OR the payor could take control of paying the mortgage and deducting it from the support payments.

B. Other Assets

- Money funds; savings accounts; stocks; stock options; etc.

- Pension plans; profit-sharing plans; deferred compensation; 401K; federal or state retirement funds, etc. A federal, state, or municipal employee will often put a "value" on his/her financial statement. The number they include is usually just what they have contributed to the pension plus interest to date which is actually not the present value. In order to determine present value, they need to engage an actuary (or contact an organization like LawData for a quick read). By unknowingly using only the amount of the contributions, the other spouse often gets short-changed in a division of assets. It is more equitable to do a QDRO or DRO to split the pension and then split the equity in the house upon sale. That way each gets their fair share.

- Closely-held corporations and professional practices (may need to be valued);

- Personal property (including vehicles, boats, jewelry, furniture or furnishings of value such as antiques, oriental rugs or fine arts). Used furniture is not usually valuable; the fair market value of such items is what a willing buyer would pay a willing seller today in an arms' length transaction for such items. Not much!!

- Tort suits (a/k/a choses in action) - are another form of property that is divisible. Someone may have an action pending for a personal injury that occurred during marriage or after separation. The facts will determine whether any portion of the hoped-for recovery should be shared with the other spouse and if so how much. Often better to leave it on an if and when basis that it will be divided.

- Date for valuing an asset. Typically the date of divorce is the date used for assigning value. One of the parties may insist that it be valued at the date of separation because the asset has substantially increased in value since then and he/she does not want the increase shared.

Only in rare circumstances should date of separation control.

NOTE: All property from any source, whenever or however acquired, is subject to division upon divorce (i.e. inheritances, gifts, property acquired before the marriage). Rice v. Rice 372 Mass. 398 (1977). However, even though all of the assets must be put into the pot for consideration, it does not mean that they will be shared with the other party. As usual, it depends on the facts of the case.

IV. COLLEGE EDUCATION

- What costs are included. Typically, tuition, room and board, books, fees, health insurance, transportation to and from school - designate the number of trips a year

- Who pays. If the non-custodial parent will still be paying child support for other child/ren, it is likely that the child support will be reduced since one child is now in college and the non-custodial parent will be contributing to college. If a parent cannot afford college and child support, the child support will prevail. Without agreement, should a parent be ordered to go into debt to pay for college? Unlikely unless the child is in his/her last year of college when the parties divorce and should not be forced to leave.

- If the children are not near college age at the time of the divorce, the parties should state in an agreement that they will review their financial circumstances at the time the child is ready and contribute according to their financial abilities to do so. That will leave open the issue so that if they cannot agree, the matter can be brought back before the court. The Court has no authority to order payment of college at trial if the children are not near college age. It is considered premature.

- If the parties have sufficient resources at the time of the divorce, to voluntarily put some funds into an education account, they should do so. However, the Court has no authority to require them to do so.

V. DEBTS

- Who incurred the debt. Is it joint because it was for the household or the children or a joint trip; is it individual because it was charged for one or the other party's own personal goods or trips; did it purchase an item that will remain in the house and one of the parties will be keeping the house (e.g. new refrigerator); was it incurred at a time one of the parties was out of work and more expenses had to be charged. If they dispute the origin, the credit card bills should be able to tell the story.

- Who pays. Usually the person who incurred the debt unless there is reason to do something else.

- Indemnification. There is always a concern on joint debt (from joint credit cards or jointly signed contracts), that even though one person agrees to take on repayment, if that person declares bankruptcy, the credit card company will go after the other person to collect. There should be indemnification language in the agreement so that if that happens, the person who gets stuck can bring an action against the other for alimony or child support based upon increased need since he/she now has to pay a debt he/she had bargained away.

- Cancellation and surrender of charge plates. To ensure no further incurring of debt for which the other party will be responsible.

- Are there funds available with which to pay off any or all of the debt. This is always a preferred option because the high interest payments alone will keep one or both of the parties on the hook for a long time and end up costing them more money over time.

VI. INCOME TAX RETURNS

- Joint vs. Individual Returns. Parties have the right to file jointly in any year as long as their divorce is not final (91 days after a 1B or fault divorce). The Court has no authority to order them to file jointly, so they must agree to it. However, if one refuses to file jointly for no justifiable reason, thereby causing the other to incur high tax payments, the Court after trial can award some additional money to the aggrieved spouse in the property division because he/she should not have had to incur the high taxes. Parties should be advised to consult an accountant to determine actual tax liability filing jointly or individually.

- Reason not to file jointly. Typically in cases where the other spouse is not declaring income or is taking some questionable deductions. By filing jointly, both parties are responsible for tax deficiencies, penalties and interest. So, if the IRS cannot get it from one, it will go after the other. Even though there is an "innocent spouse rule" under which an aggrieved spouse can be relieved of liability, it can be hard to prove.

- Disposition of any tax refund. A refund is considered an asset (a form of forced savings). As a general rule, refunds should be shared equally, unless there are facts which warrant a different result.

- Dependency exemptions. A form of tax relief that will depend on the numbers in each case. (Remember, a payor pays child support in after-tax dollars and the recipient pays no taxes on child support.) In the first instance, the exemption should go to custodial parent if she/he needs it to maximize disposable income. Also, recipient should get it if the payor is paying alimony as well as child support, because the payor will get a tax deduction for alimony. But, if payor needs some tax relief and the recipient is paying a mortgage and gets tax relief that way, it should go to payor. Likewise, if the payor is paying very high support and has no other tax shelter and the exemption does not have any real value to the recipient, it should go to payor.

VI. MEDICAL AND DENTAL

- Who carries the insurance. Typically, the person who has it through employment, because it usually costs less than obtaining insurance privately.

- Who is covered. The children and the spouse, unless he/she can get his/her own insurance as an individual at no cost. Coverage ends when children are emancipated or no longer eligible. Coverage for a spouse ends upon remarriage, a date certain, or no longer eligible.

- Who pays. In the first instance insurance is deducted from the employee-spouse's pay. Credit is given for one-half in calculating the child support guidelines. If the guidelines are not applicable, there can still be a sharing of the cost if circumstances warrant. If there is an extra premium charged for carrying the former spouse, she/he is often responsible for that cost.

- Uninsured medical and dental. Under the child support guidelines, the custodial parent pays the first \$100 per year per child before the parties split the rest. Specify what happens regarding extraordinary medical and dental such as orthodontia and psychotherapy and whether prescriptions are covered. Each party usually pays his/her own uninsured expenses.

VIII. LIFE INSURANCE

- Amount to be carried. For payor, what, if any, life insurance does the payor have now. Should it be increased? Depends on ages of the children, amount of support being paid, and cost of additional insurance. Should recipient of support be required to carry life insurance? Depends on whether she/he can afford it and/or whether she/he also has an income that helps contribute to the children's support and would have to be replaced upon her/his early death.

- For how long. For as long as payor (or recipient, if applicable) has a support obligation since it is meant to be security for those payments if payor dies prior to expiration of support obligation.

- Beneficiary of insurance proceeds. The insured often wants the proceeds to go to a trustee on behalf of the children rather than to the former spouse. That view may be appropriate if the former spouse is unable to manage money, but it is often a way of the payor wanting to control the funds. One option is to have a portion go to the spouse outright and the balance go to the spouse as trustee for the children so that there is accountability for the funds directed to the children. Or if the former spouse is not an appropriate person to designate as trustee, a neutral should be selected. Can also consider a family member as long as no known difficulty between that family member and the former spouse.

IX. MERGER VS. SURVIVAL - General Rule

- If separation agreement merges, the Court can modify all terms except property division upon a showing that there has been a substantial change in circumstances since the entry of the divorce judgment (or the entry of a prior modification judgment if one was already allowed). Property division is always final and is thus not modifiable.

- If the agreement survives, Court cannot modify except child support or custodial arrangements. With regard to alimony, Court can only modify if the recipient is on or about to go on welfare. And even in those circumstances, the modification can only be enough to take her/him off of welfare.

IX. MISCELLANEOUS

A. When does divorce become final.

- Fault or no fault (1B) - 91 days after judgment nisi.

- No fault (1A) - Judgment nisi enters 30 days after hearing (when court approves the agreement) and becomes final 91 days later. Thus, 121 days from hearing.

- Waiting period means that neither party can remarry until final divorce. Also, if divorce not final until after December 31, parties can still file a joint tax return in the year the judgment entered. (e.g. Judgment nisi entered October 5, 2000 - will not be final until early January, 2001. Parties can still file jointly for 2000.)

B. Wage Assignments. What if recipient requests a wage assignment, but payor does not want it. What consideration should be given to payor's request? Depends on payment history; what his/her reason is (often embarrassment); should he/she be given one chance to mail payments directly on time before a wage assignment is implemented. As an alternative, should payor be allowed to pay by electronic transfer from his/her account to the recipient's account.

C. Contempts. In order for the Court to find a defendant in contempt, there must be a "clear and unequivocal order" that the defendant has not obeyed. At the start of a dispute intervention, look at the court order to which plaintiff refers to see if the language is clear and not ambiguous or even whether there even is such an order. Especially with pro se litigants, there are contempts brought that are not based upon specific orders.

D. Temporary Orders. The terms of a temporary order are extinguished when the case goes to judgment. Thus, if money is owed under a temporary order and is not paid, unless it is preserved in the final judgment, or has already been addressed in a separate contempt action, plaintiff can make no claim to those monies after a judgment for divorce has entered.