McKINLEY & IRVIN, PLLC
ATTORNEYS

FAMILY LAW
IN WASHINGTON STATE

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Contents

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I. DIVORCE

A. How do I start a divorce, when will it be over, and what happens in the interim?

A divorce action is commenced by filing a Summons and a Petition for Dissolution of Marriage in Superior Court, usually in the county where either party resides.

There is a mandatory 90-day waiting period after the commencement of the divorce action. After the 90 days have passed, the parties may finalize their divorce by agreement. In the event of an agreed resolution, Findings of Fact and Conclusions of Law and a Decree of Dissolution are presented to the court without the necessity of a trial. If the parties are unable to reach an agreed resolution of the issues presented in their divorce, the Court will decide the unresolved issues at trial.

Because final resolution of a divorce can take anywhere from 90 days to over a year, temporary orders are normally entered. Temporary orders may be requested by one or both parties to resolve issues that need to be immediately addressed while awaiting the final divorce decree.

The issues that can be addressed at a Temporary Orders hearing are similar to the issues that need to be resolved to finalize the divorce action. These issues range from child support to the distribution of property and liabilities, which will be discussed in detail below.

In addition to divorce actions, there are several other family law related legal actions available. Legal Separation is an action available to married couples who wish to divide property, liabilities, and live separate and apart without getting divorced. Parenting plans may also be established if there are children of the marriage.

A Decree of Invalidity of Marriage may only be obtained by an individual who was married under false or fraudulent circumstances, or if there is a legal defect in the validity of the marriage.

B. Child Custody/Parenting Plans

In a divorce action where a minor child is involved, a residential schedule for the child needs to be established. A residential schedule names one parent as the primary residential parent. This is the parent with whom the child will reside the majority of the time. The other parent is normally awarded residential time with the child, which is commonly referred to as "visitation." The extent and nature of the residential time with the child is dependent on the facts and circumstances of each particular case. The residential schedule not only addresses the residential provisions for the child on a weekly basis, but also for holidays, special occasions, and vacations. The parenting plan also addresses matters such as how parents will make particular decisions concerning the child and the dispute resolution process if a provision in the parenting plan becomes an issue of dispute in the future.

Because the matter of establishing a temporary or permanent parenting plan is one of the most stressful and expensive matters involved in a divorce, it is best if the parties can resolve this issue by agreement. However, in the event that the parties are unable to reach an agreement, there are several factors that the court weighs to determine which parent should be named the primary parent and what the residential provisions for the child will be.

Ultimately, the court will try to determine what is in the best interests of the child. To help determine what is in the best interests of the child the court will consider the following factors:

- The relative strength, nature, and stability of the child's relationship with each parent, including whether one parent has had greater responsibility for caring for the daily needs of the child;
- Each parent's potential for future performance of parenting functions;
- The emotional needs and development level of the child;
- The child's relationship with siblings and other significant adults;
- The child's involvement with his or her school, physical surroundings, or other significant activities;

- The wishes of the parents and the wishes of the child, if he or she is sufficiently mature to express his or her wishes regarding the residential schedule; and,
- Each parent's employment schedule.

When the court issues a temporary parenting plan it takes the factors above into consideration as well as the following factors:

- Which parent has taken the greater responsibility for the daily care of the child in the past twelve months; and,
- Which parenting arrangement would cause the least disruption to the child's emotional stability while the dissolution action is pending.

As the above synopsis illustrates, the matter of establishing a temporary and permanent parenting plan can be complicated and highly emotional. As with all other issues concerning a divorce, a family law attorney should be consulted to ensure the protection of your rights, and to help protect the best interests of your child.

For additional details and specific statutory language regarding parenting plans, please see RCW 26.09.184.

C. Child Support

In Washington, child support is calculated by using a standardized formula and support schedule. Only the monthly income of the parents is used to calculate the basic child support obligation.

Monthly income includes not only the gross monthly wages of the parent but also includes recurring overtime pay, dividends, trust income, severance pay, capital gains, pension retirement benefits, unemployment benefits, bonuses, and social security benefits.

The court may take factors other than the income of the parents into consideration when establishing a parent's child support obligation and may deviate from the calculated amount. Some factors considered for a "deviation" from the basic calculation of child support include, but are not limited to, the income of a new spouse or other adult in the

household, child support received from other relationships, possession of wealth, or the extraordinary income of a child. A deviation can be used to either increase or decrease a parent's child support obligation.

In addition to the basic child support obligation, parents are normally required to contribute to other child related expenses, such as daycare, educational costs, and uninsured health and dental costs. As with the child support obligation, each parent is obligated to contribute to these child related expenses in proportion to their respective incomes.

The Washington State Department of Child Support provides collection assistance for parents entitled to receive child support. Presently, unless ordered otherwise, a paying parent's child support payment may be withheld directly from his or her pay, and sent to the receiving parent by the Department of Child Support.

Every parent has a financial duty to support his or her child. In the event the primary residential parent receives state aid to assist in supporting the child, the state may have a cause of action against the non-primary residential parent for reimbursement of any child support left unpaid, past or present.

A parent can also be ordered by the Court to pay for the post secondary educational expenses of a child. These expenses include such things as the child's tuition, books, and living expenses. There are numerous factors the Court considers when determining whether a parent will be ordered to pay for the child's post secondary educational expenses, as well as several conditions that the child must satisfy.

As with any other issue involved in a divorce, a qualified family law attorney should be consulted to ensure that child support obligations are determined fairly and accurately, and that the child receives the financial support that he or she needs.

For specific statutory language regarding the child support schedule please refer to RCW 26.19.

D. Maintenance

Either party in a divorce may request spousal maintenance from the other party. Maintenance can be requested at a temporary orders hearing or provided for in the final

dissolution decree. The maintenance award must be for such an amount and for such a period of time that the Court deems just, without regard to marital misconduct. There are a variety of factors that the Court takes into consideration when determining whether an order of spousal maintenance should be awarded to a requesting spouse. Although the analysis is somewhat involved, the fundamental question is, "does the requesting spouse have a need for spousal maintenance, and does the proposed paying spouse have the ability to pay?" Other factors that the Court considers are:

- The standard of living established during the marriage;
- The duration of the marriage;
- The age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; and,
- The time necessary for the spouse seeking maintenance to acquire sufficient education or training to enable the party seeking maintenance to find suitable employment.

After taking these factors into consideration, a maintenance award may or may not be awarded.

Spousal maintenance is normally ordered, when appropriate, for short periods of time (anywhere from a few months to a few years). The primary purpose of spousal maintenance is to assist a spouse in obtaining a better ability to support him or herself. In rare cases, the Court will order long term spousal maintenance, or even spousal maintenance for the duration of the life of the receiving and/or paying spouse.

If child support has also been ordered, and the Department of Child Support is collecting that support, the Department of Child Support may assist a spouse in collecting spousal maintenance payments.

For specific statutory language concerning maintenance please refer to RCW 26.09.090.

E. Property and Debt Distribution

Washington is a community property state. This means that each spouse has a property interest in community property acquired during the marriage. There are also certain instances when property owned prior to the marriage, which is normally considered separate property, becomes community property during the marriage.

One of the largest misconceptions is that the law requires a 50/50 division of property and debt. This is not the law in Washington. The legal test for dividing property and debt between spouses is a "fair and equitable" distribution of property and debt. This test sometimes results in a 50/50 division, but can also result in a division that awards one spouse a greater share of the property or debt. The factors which are considered by the Court to assist it in determining what is "fair and equitable" in a given case vary widely given the circumstances of each case.

Community property not only includes community assets such as the family home, automobiles, and savings accounts, but also retirement benefits, 401(k) plans, VIP plans, stock portfolios, and business partnerships (to name just a few). These benefits are community property insofar as the benefits accrued during the marriage.

Separate property normally includes those items or interests that were acquired by a party prior to marriage, after separation, or by way of gift or inheritance. Although there is a preference to keep separate property separate, the Court has jurisdiction over all property, both community and separate, and must distribute such property in a “fair and equitable” manner.

It is quite simple in some instances to determine the value of certain property. In other instances, determining the true value is an arduous process. For example, determining the value of a party’s retirement account can be straightforward if the fund has an actual dollar amount assigned to it, which the party and/or his or her employer has contributed. On the other hand, if a retirement account is valued is based on a monthly dollar amount for the life of the participant upon retirement, the value of the retirement is not as easy to ascertain. Such factors as a person’s life expectancy, inflation, and age of disbursement are crucial to determining the value of the retirement account. This is only one example of how difficult it can be to place a fixed value on an asset. Valuing a

business, including “good will,” or determining the value of your contributions to your spouse’s higher education can also be difficult. Because of this difficulty, it is often necessary to hire experts to determine asset values.

Community debt normally includes any liability incurred during the marriage. Separate debt includes liabilities incurred before marriage and after separation. The Court has jurisdiction over all debt, both community and separate. The Court must make a “fair and equitable” division of the debt.

An interesting point to note is that third party creditors are not bound by divorce decrees with respect to distribution of debts and liabilities. If your spouse fails to pay a debt that has been distributed to him or her, the creditor may have the right to seek payment from you if contractual privity exists between you and the third party creditor, or if the marital community benefited from the debt. This is very important to consider if your spouse has considered or may be considering filing for bankruptcy in the future. Such actions can have direct ramifications on the non-debtor spouse.

There are numerous other considerations to take into account when dividing property and liabilities. How and when assets are transferred and divided can have significant tax consequences. Documents must be drafted properly to effectuate a transfer of certain property. There may have to be deed transfers between the parties on refinancing of assets. If the parties own a business, the business may have to be sold or dissolved. All of these situations present legal issues that vary from one case to another.

If the parties to a divorce have substantial assets, there is an even greater need for professional help in determining the true value of an asset, the consequences of distribution, and the fair and equitable distribution of the estate. The following are just a few factors that may need to be considered:

- Tax consequences of the property distribution;
- Hiring of experts to determine actual value of particular assets;
- Determination of retirement benefits, stock options, and stock portfolios;
- Financial planning to assist in formulating financial needs and requirements; and,
- Vocational counseling and training for displaced homemakers.

It is of great importance that a party is aware of the extent and the value of the property owned by the community, as well as the separate property owned by each party. It is also imperative that a party be aware of the debt acquired by the community and the separate debt of each party. Once a final decision concerning the property and debt distribution between the parties has been made the order cannot be modified, except in very limited circumstances. Because of the complex and confusing nature of property and debt valuation and distribution, a qualified family law attorney should be consulted before finalizing and property and debt distribution arrangements.

For specific statutory language regarding the distribution of community debt and liabilities please refer to RCW 26.09.080.

F. Restraining Orders

Depending on the circumstances of the case, restraining orders may or may not be obtained in a divorce action.

A restraining order may prohibit one or more of the following: contact between the parties, contact between a party and a child, dissipation of assets, harassment, as well as certain other actions. However, the court has the discretion to craft restraining orders to fit the needs and circumstances of a particular case.

A party may seek a restraining order with or without giving notice to the other party. When no notice is given to the other party (this process is called “ex parte”), the restraining order is entered on an emergency basis. However, the other party must have actual notice of the restraints before they become effective. Normally, a return hearing is set for a certain number of days after the ex parte restraining order is entered so that the restrained party can answer and/or contest the allegations made by the other party. As mentioned above, an ex parte restraining order may be obtained to prevent irreparable harm to either the requesting spouse or a child, or to prevent dissipation of community assets.

Whether a party can obtain an ex parte restraining order is fact-specific. However, mutual restraining orders, which provide for “standard” restraints intended to protect the rights of both parties and to maintain the status quo, are common in most cases.

II. MODIFICATION OF PRIOR ORDERS

A. Major Modification of a Final Parenting Plan

Once a final parenting plan is established there is a presumption against major modifications to the parenting plan because changes in parenting plans can be very disruptive to the children. Major modifications to a parenting plan include changing the designated primary parent, or significantly altering the residential schedule.

A party may seek to modify a parenting plan if a substantial change has occurred in the circumstances of the child or the nonmoving parent since the prior parenting plan was entered, or if the circumstances of the child or the nonmoving party were unknown to the court at the time the prior parenting plan was entered. The modification must also be necessary to serve the best interests of the child. Some factors that can serve as a basis for major modification of a parenting plan include the following:

- The parties agree to the modification;
- The child has been integrated into the family of the party seeking modification with the consent of the other party; or,
- The child's present residential environment is detrimental to the child's physical, mental, or emotional health; and, the harm that will likely be caused by a change in environment is outweighed by the advantage of change to the child.

Because this is not an exhaustive list of factors that may serve to modify a parenting plan, a qualified family law attorney should be consulted to discuss any other matters that a party believes may justify a modification in the parenting plan.

For specific statutory language regarding major modifications of parenting plans please refer to RCW 26.09.260.

B. Minor Modification of a Final Parenting Plan

Minor modifications may be sought upon a showing of substantial change of circumstances of either parent or the child. Such circumstances may include a change of residence of one parent, or a change in one parent's work schedule. Minor modifications

include issues such as modification of the dispute resolution process or minor modifications in the residential schedule that do not change the primary residence of the child.

For specific statutory language regarding minor modifications of parenting plans please refer to RCW 26.09.260.

C. Relocation of a Custodial Parent

Once a final parenting plan is entered, the person with whom the child resides a majority of the time may find that he or she needs to change residences. Sometimes that intended move is only across town; however, other times the intended move is so far away that the residential schedule in the parenting plan will have to be changed. As a result, Washington law provides that the relocating person must give notice of his or her intended move to every other person entitled to court ordered time with the child.

If the intended move is within the same school district, the relocating person need only provide actual notice by any reasonable means. A person entitled to time with the child may not object to the move but may petition for a major or minor modification of the parenting plan pursuant to RCW 26.09.260.

If the intended move is outside the child's school district, the relocating person must give notice to all other persons by personal service or by certified mail, return receipt requested. The notice must generally be at least 60 days before the intended move, or, if the relocating person could not have known about the move in time to give 60 days' notice, then within 5 days after learning of the move. There are exceptions which delay these notice requirements in cases where the relocating person's or any child's health or safety may be in danger (for instance, due to domestic violence) or where there is a court order protecting address confidentiality.

Except for cases where the relocating person's or child's health or safety is of concern, the notice of intended relocation must contain the following information, as well as additional statutory language:

- An address for the relocating person at which service of process may be accomplished during the period for objection;

- A brief statement of the specific reasons for the intended relocation of the child;
- A notice to the non-relocating person that an objection to the intended relocation of the child or to the relocating person's proposed revised residential schedule must be filed with the court and served on the opposing party within thirty days.
- The specific street address of the intended new residence, if known, or as much of the intended address as is known, such as city and state;
- The new mailing address, if different from the intended new residence address;
- The new home telephone number;
- The name and address of the child's new school and day care facility, if applicable; and
- The date of the intended relocation of the child.

If the relocating person wishes to change the residential schedule or visitation with a child, a proposed parenting plan must also accompany the notice. Failure to give the required notice may be grounds for sanctions, including contempt.

The relocating person cannot move the child during the time for objection unless the delayed notice provisions apply or a court order allows the move. If the objecting person schedules a hearing for a date within 15 days of timely service of the objection, the relocating person may not move the child before the hearing unless there is a clear, immediate, and unreasonable risk to the health or safety of that person or the child.

If the non-relocating person or persons fail to file an objection within 30 days after service of the notice of intended relocation, the court may permit the relocation. The court may also confirm the proposed revised residential schedule contained in the proposed parenting plan that accompanied the notice, if applicable.

For specific statutory language regarding relocation please refer to RCW 26.09.430 through 26.09.480.

D. Modification of Child Support

An order of child support that has been in effect for less than one year may not be modified except upon a showing of a substantial change in circumstances. However, if

one year or more has passed since the order of support was entered, a party may seek a modification without showing a substantial change in circumstances if one of the following factors exists:

- Where the current order of child support works a severe economic hardship on either party or on the child;
- Where the age of a child being supported under the current order has changed to a different category ; or,
- Where the child is still in high school and there is a need to extend support beyond the child's eighteenth birthday to complete high school.

All child support decrees may be modified once every twenty-four months based upon changes in the income of the parents without a showing of substantially changed circumstances. Either party may initiate the modification by filing a petition and child support worksheets with the court.

As with all the other issues previously discussed, there are many factors to consider with respect to modifying child support. A qualified family law attorney should be consulted to better inform a parent of his or her rights and obligations concerning child support.

For specific statutory language regarding child support modifications please refer to RCW 26.09.170.

III. OTHER FAMILY LAW RELATED MATTERS

A. Protection Orders

Protection orders may be obtained under the domestic violence statute. This relief may be requested whether a party is seeking a divorce or not. Both Pierce and King Counties have developed procedures by which parties may obtain protection and no-contact orders without hiring attorneys. King and Pierce Counties have *domestic violence advocates* who are available to assist an individual seeking a protection order by helping the individual fill out paperwork, and to otherwise request an order from the Court.

Other relief may be ordered by the Court under the domestic violence statute, such as drug and alcohol treatment, batterer's treatment, and parenting plan evaluations. However, one may only obtain relief under this statute when domestic violence has occurred, or a serious threat of domestic violence exists.

For specific statutory language regarding Protection Orders, please refer to RCW 26.50.

B. Alternative Dispute Resolution (ADR)

In most final parenting plans, there is a provision for determining how the parties will resolve disagreements that arise in carrying out the terms of the parenting plan. These disagreements may involve the residential schedule of the child or any other provision in the parenting plan. Mediation or arbitration are the most common types of ADR ordered. If ADR is required, it must be completed prior to petitioning the court for relief. If ADR is unsuccessful, the parties may then petition the court to resolve the dispute.

A party who is concerned about a disagreement regarding the parenting plan should consult the Dispute Resolution Section of the Parenting Plan and determine how he or she must proceed with commencing dispute resolution. A qualified family law attorney should be consulted if any questions arise regarding the dispute resolution provision or process. A qualified family law attorney can be helpful in resolving disputes and protecting a party's rights out of court as well as in the courtroom.

C. Prenuptial Agreements

A prenuptial agreement is a written contract entered into by a husband and wife prior to the couple's marriage. The prenuptial agreement addresses issues such as property and debt classification and distribution in the event of a future divorce. A prenuptial agreement cannot contain provisions regarding a future parenting plan for a child, and it cannot purport to waive one of the couple's right to future spousal maintenance or child support.

The courts scrutinize prenuptial agreements very closely. A prenuptial agreement will be deemed invalid if it is patently unfair to one party or if there was procedural

unfairness involved in the signing of the agreement. For example, each party must be advised that he or she has the right to seek independent legal counsel. There must also be adequate time given to each party to consider the legal ramifications of signing the agreement. If the court determines that either the agreement is unfair on its face or that procedural unfairness was involved in the signing of the agreement, the agreement will be deemed invalid.

A qualified family law attorney should be consulted before a party drafts or signs any prenuptial agreement.

D. Separation Contracts

Upon a filing for dissolution, legal separation, or declaration of invalidity of marriage, the married parties may enter into a separation contract. This contract may provide for maintenance of either party, distribution of the parties' property and liabilities, parenting plan, or child support. The provisions in the separation contract will be binding upon the parties at the time a final decree is entered unless the court finds that the contract was unfair to one party at the time it was entered into.

Entering into a written separation contract may be appropriate for parties who have reached agreement on the issues involved in their divorce before the divorce is finalized or the 90 day waiting period has elapsed. This helps ensure that the oral agreements reached by the parties have a binding effect. However, before a party drafts or signs a separation contract, a qualified family law attorney should be consulted. There are many issues concerning one's rights and obligations that should be discussed and considered before a party enters into a separation contract.

Please see RCW 26.09.070 for specific statutory language.

E. Adoption

Adopting a child can be a wonderful and rewarding experience. However, there are many legal considerations a person should consider before placing a child for adoption or before adopting a child.

There are several different ways in which a party can adopt a child. For example, there are domestic adoptions, international adoptions, stepparent adoptions with the biological mother's/father's consent, and step-parent adoptions without the biological parents' consent. Depending on the type of adoption, the legal requirements and processes vary significantly. In most cases, the state will become involved and will investigate your private life, your background, and perform pre-placement and post-placement investigations.

Washington State allows the biological parent(s) and adoptive parent(s) to enter into a binding agreement allowing continued communication and contact between the child and biological parent(s) even though the parental rights of the biological parent(s) have been extinguished. Both parties should understand the legal ramifications of relinquishing parental rights and allowing continued communication. This is just one issue of many that should be considered and discussed with a qualified family law attorney before participating in the adoption process.

The adoption laws in Washington State were established to protect the rights of the biological parents, the rights of the adoptive parents, and most importantly, the rights of the child. A qualified family law attorney should be consulted prior to adopting a child or prior to placing your child for adoption to protect your interests and the interests of the child.

Please see RCW 26.33 for specific statutory language regarding adoptions.

F. Parentage/Paternity

A paternity or parentage action is an action commenced to establish or disestablish paternity and provide for a parenting plan and financial support of a child born to an unmarried couple.

A paternity action may be brought by the mother or the father of the child. A father may wish to establish that he is the legal father of the child for many reasons ranging from having his name placed on the child's birth certificate to establishing a parenting plan for the child. A mother may wish to establish paternity for many reasons including establishing support for the child.

A paternity action may also be commenced by the state on behalf of the child if the mother is receiving assistance from the state, or if otherwise requested. Paternity is normally determined through DNA genetic testing of the parties and the child.

Establishing paternity involves many legal nuances and consequences. A qualified family law attorney should be consulted before a paternity action is commenced so that the party can be informed of his or her legal rights and interests.

For specific statutory language regarding paternity please refer to RCW 26.26.

G. Non-parental Custody Actions

Individuals who are not the parents of a child, but who wish to obtain legal custody of that child may commence a Non-Parental Custody action. This procedure is sometimes referred to as a "grandparents' custody action" because it is frequently used by grandparents seeking custody of a grandchild whom they believe is being mistreated or abused. A party other than a parent can seek custody of a child only when the child is not residing with either parent, or if the party alleges that neither parent is a suitable custodian.

If a party is awarded custody of a child, that party may seek to have temporary orders entered. The temporary orders may include provisions for child support, residential schedules, restraining orders, and payment of attorneys' fees and costs. The parents of the child may be granted residential time with the child, but the extent and nature of the residential time is dependent on the particular circumstances of each case.

There are many issues to consider when attempting to gain custody of a child who is not your own. There are also many issues to consider and legal avenues to pursue if your child has been removed from your custody. Several parties may be involved as well as state agencies. An experienced family law attorney should be consulted regarding non-parental custody disputes to help determine the legal rights of the parties and the child.

Please see RCW 26.10 for more specific statutory language regarding non-parental custody actions.

H. Non-parental Visitation Rights

Until the Washington State Legislature acts, there is currently no statutory basis for non-parental visitation outside a non-parental custody action as described above. RCW 26.09.240 and RCW 26.10.160(3), which formerly granted non-parental visitation, were declared unconstitutional. The Court reasoned that parents have a constitutionally protected right to rear their children. Therefore, at present, non-parental visitation may only be accomplished by agreement between the parties involved.

As with all other areas of family law, non-parental visitation actions can be confusing, complex, and highly emotional. A qualified family law attorney should be consulted before seeking non-parental visitation to ensure that the rights of the parents, third parties, and the child are protected.

IV. PREPARING TO MEET WITH A FAMILY LAW ATTORNEY

If you reach a decision to retain a family law attorney, there are several things to remember. First, the attorney must have free and unfettered access to the client and information affecting the client's case to best promote the client's rights and interests. A family law client is an active participant in all matters and proceedings that the attorney pursues on the client's behalf. Second, the more organized the client is in providing information to the attorney, the smoother and more economical the case tends to be. The following is a list of items that the client should bring with him or her when meeting with a family law attorney:

- Tax Return's and W-2's for the previous three years;
- Pay stubs for the past twelve months;
- Any existing court orders or documents relating to the action in question;
- Copies of all current financial records, such as retirement account statements, 401(k) statements, mutual fund statements, etc.;
- Documentation regarding major assets; and,
- All documents and account statements concerning debt and financial responsibilities.

V. CONCLUSION

Family law matters can be highly emotional and stressful. There are many rights and interests at stake, and many responsibilities that must be addressed. Once orders are entered, it is very difficult to undo what has been done. The consequences of these orders can continue for the duration of the lives of not only the adults involved, but also for the children. For these reasons, the assistance of a qualified family law attorney should be strongly considered by any individual faced with a family law action.

To contact McKinley & Irvin, PLLC, please call 253.838.7003 (South King County), 206.625.9600 (Seattle), 425.454.2220 (Bellevue), and 253.848.7988 (Pierce County). You may also visit our web site at www.mckinleyirvin.com.