



Minnesota Continuing
Legal Education

The Complete **Family** Lawyer's

Quick Answer Book

Answers to 100+
Critical Questions
in 13 Areas of
Family Law

The Complete Family Lawyer's Quick Answer Book



**Minnesota State Bar Association
Continuing Legal Education**

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Table of Contents

- 1 Client Relations**
 - *R. Leigh Frost*
- 2 Domestic Violence**
 - *Rana S. Alexander*
- 3 Alternative Dispute Resolution**
 - *Dana K. McKenzie*
- 4 Child Support**
 - *Alex J. González-Mazurek*
- 5 Agreements Between Married and Unmarried Couples**
 - *James J. Vedder*
- 6 Spousal Maintenance**
 - *Jana Aune Deach*
- 7 Property**
 - *Ben M. Henschel & Katie E. Merkel*
- 8 Taxes**
 - *Elizabeth L. Juelich*
- 9 Retirement Accounts**
 - *Debra J. Linder*
- 10 Child Custody and Parenting Time**
 - *Sonja M. Nyberg*
- 11 Paternity**
 - *Autumn L. Ladd*
- 12 Unmarried and Same-Sex Couples**
 - *Mary Pat Byrn & J. Lee Novelli*
- 13 Interstate and International Issues**
 - *Valerie D. Arnold*

Client Relations

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Chapter 1

Client Relations

Table of Contents

1. I have a potential new family law client— what do I do?	1
2. Should I offer an initial consultation? If so, why? Do I charge a fee for this?	2
3. What happens at the initial consultation?	3
4. How do you manage client expectations?.....	4
5. Do I start planning discovery and trial strategy at the first conference? Why?	5
6. When/how do I address the retainer agreement?.....	6
7. What should I include in the retainer agreement?	7
8. How do I know whether a potential new client is involved in a domestic abuse situation?	8
9. How do I assess mental health and chemical dependency issues? Should I ever suggest counseling? Evaluations? How do I protect that from discovery?.....	10
10. Should the potential new client bring documents to the initial consultation? If so, what should I request?.....	11
11. What if the potential new client wants a friend, relative, or spouse to sit in on the initial conference? Do you lose the attorney/client privilege?.....	12
12. If I do not want to be retained by a potential new client, can I decline representation?	13

1. I have a potential new family law client— what do I do?

Answer

A potential new client will typically contact your firm via phone or email; and if your firm has a website with a contact tab, then that is another method by which a potential new client may contact you. Upon receipt of a voice message, email, or notice of the contact via the website, it is good policy to complete an intake questionnaire.

The questionnaire should ask for initial information such as name and contact information of the potential new client and the other party. In addition, take information about the matter, including but not limited to the type of proceeding and whether there is an attorney for the other party. The purpose of this questionnaire is so that the attorney or firm may run a conflict check before proceeding further.

Assuming the potential new client has passed the conflicts check, contact the potential new client to schedule an initial consultation. You can offer in-office or telephone conference for the initial consultation.

It is always a good idea to advise the potential new client of the attorney's billable hourly rate, as well as the billable hourly rate of associate attorneys or legal assistants and paralegals who may work on the case.

Authorities

- Minn. R. Prof'l Conduct 1.18.

Comment

A potential new client will have limited rights to confidentiality and conflicts of interests pursuant to Minnesota Rule of Professional Conduct 1.18. In other words, the potential new client's rights to confidentiality and conflicts of interests are not absolute because they have yet to retain the attorney or firm to represent their matter. However, you have a duty to protect potential new client information. See Minn. R. Prof'l Conduct 1.18(b).

Practice Tip

A sample intake questionnaire is provided in the *Minnesota Divorce Practice Deskbook* eFormbook under Form 2-01: Initial Client Interview Sheet.

Related Reading

- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Client Relations Deskbook with eFormbook, 4th ed., (Minnesota CLE 2024).

2. Should I offer an initial consultation? If so, why? Do I charge a fee for this?

Answer

You should always provide an initial consultation to determine three things: 1) the potential case matter, such as dissolution of marriage or post-decree modification of the same; 2) whether the client is a good fit for you and your practice; and 3) whether you and your practice are a good fit for the potential new client. There are rarely, if any, situations in which a lawyer would not initially consult with a potential new client prior to being retained on a case matter, namely because there is no better way to determine the merits of a case.

Whether or not to charge a fee depends on the preference of the attorney. Many law offices will spend a lot of time with a potential new client during an initial consultation and therefore bill the potential new client at the billable hourly rate of the individual conducting the initial consultation.

Some attorneys offer a half-hour initial consultation at no fee. At the initial consultation, you can address the potential new client's immediate concerns (those issues that keep the potential new client up at night, such as custody and financial support). Once the immediate concerns are addressed during the initial consultation, the potential new client is better equipped to manage additional information provided to them during the initial consultation and/or following the same, such as potential procedural and related issues.

Authorities

- Minnesota Rules of Professional Conduct.
- *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980).

Comment

Even if there is no fee for the initial consultation, an attorney-client relationship may be formed. See *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980).

Practice Tip

At the conclusion of the initial consultation, some attorneys provide the potential new client with a firm folder, which includes the following enclosed items: hourly retainer agreement, marital questionnaire, budget worksheet, a list of "documents needed by your attorney" form, and "for your information" (which lists office hours and office-related procedures).

Related Reading

- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Client Relations Deskbook with eFormbook, 4th ed., (Minnesota CLE 2024).

3. What happens at the initial consultation?

Answer

In addition to addressing the immediate “keep you up at night” and related concerns (see Question 2, *supra*), the initial consultation should include obtaining detailed information related to the case matter, such as custody and parenting-time preferences; information about assets and liabilities, real and personal property; etc. The initial consultation may include a discussion of the court procedure and related issues.

The initial consultation is going to be directed, for the most part, by the potential new client since they are seeking representation of their case matter. I will often direct the initial consultation based upon what I am learning from the client. For example, if a potential new client appears to be overwhelmed by the process, I will direct the client to those issues that may provide information which puts their mind at ease. Another example is to listen for and inquire about domestic violence circumstances, of which the potential new client may not be aware (see Question 8, *infra*).

Attorneys who spend more time with the potential new client, at their billable rate, may go through the marital questionnaire and complete the same during the initial consultation. The attorney may also review the best interest factors on those matters where custody and parenting time are at issue. Or, the attorney may run child support and/or spousal maintenance calculations based on information provided by the potential new client. In addition, many attorneys review, in detail, the retainer agreement, so that the potential new client may ask questions during the initial meeting and/or the attorney can make clear the obligations set forth in the retainer agreement.

Authorities

- Minnesota Rules of Professional Conduct.
- Minn. Stat. §§ 518.17, 518.552, 518.58.
- Minn. Stat. Ch. 518A (child support).

Comment

The initial consultation provides an opportunity for both the potential new client and attorney to get to know each other, the merits of the case, and determine whether you can and should work together.

Practice Tip

If you work for a firm, you will likely have the opportunity to sit in on initial consultations with an attorney handling family law cases. If you are a solo attorney, you may consider obtaining a mentor so that you have access to someone with more experience who could help guide you through the initial consultation process.

Related Reading

- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Client Relations Deskbook with eFormbook, 4th ed., (Minnesota CLE 2024).

4. How do you manage client expectations?

Answer

Prior to the initial consultation, my office advises the potential new client to think about those issues that keep the potential new client “up at night,” such as custody and financial support. In other words, those issues that cause the most worry and concern. By advising the potential new client to be prepared to address those issues during the initial consultation, you are enabling the potential new client to prepare to direct the initial consultation toward addressing their immediate needs. During the initial consultation and upon addressing the potential new client’s immediate needs, it is a good practice to advise the potential new client of the process. And, in advising the potential new client of the process, it is further good practice to advise the potential new client of her or his obligations and/or responsibilities related to the process.

For example, should the potential new client retain my office, we advise that upon receipt of the retainer agreement together with the retainer fee, we will draft the initial pleadings and forward the same to the client for review. This is a process that involves the attorney and client together with the expectations of each of their roles in this exchange.

Authorities

- Minnesota Rules of Professional Conduct.

Comment

Other expectations that you may need to manage include potential new clients who come into the initial consultation with a lot of information, some relevant and some irrelevant, that they researched online and/or received from well-meaning friends and family. It is a good practice to immediately advise the client that each case is unique and without the direct, first-hand knowledge of the facts and circumstances, it is impossible to predict whether their case will have the same outcome.

Practice Tip

If you learn during the initial consultation that you will not be able to manage the client’s expectation, it is best not to take on the case, as to do so may set the matter up for disappointment to both the client and the attorney.

Related Reading

- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Client Relations Deskbook with eFormbook, 4th ed., (Minnesota CLE 2024).

5. Do I start planning discovery and trial strategy at the first conference? Why?

Answer

The answer to this question is dependent upon the county in which the case is venued, as most urban counties require initial case management conferences which either suspend or deny formal discovery in lieu of informal discovery.

When meeting with the potential new client during the initial consultation and learning more about their circumstances, an attorney cannot help but think about the documents and/or information necessary to support the initial impression for their theory of the case. In considering the initial impression for their theory of the case and the documents related to the same, the attorney is already engaging in trial strategy. Both the discovery process and trial strategy are subject to change depending on how the case unfolds from the initial consultation until the trial.

Authorities

- Minn. R. Civ. P. 26–37.

Comment

Too often, I have encountered a potential new client who is concerned that the other party removed documents from the home and/or has control over the documents. I advise the potential new client that the information will ultimately be disclosed as we go through the legal process, regardless of whether that process utilizes informal or formal discovery.

Practice Tip

A sample of formal discovery documents are provided in the *Minnesota Divorce Practice Deskbook* eFormbook under Forms 7-01 through 7-15.

Related Reading

- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Minnesota State District Court Civil Practice Deskbook, 4th ed., (Minnesota CLE 2024).

6. When/how do I address the retainer agreement?

Answer

During the initial consultation, it is a good practice to provide and address the retainer agreement. Many potential new clients conduct the bulk of their personal business via email; accordingly, some attorneys or firms will provide the potential new client with an email that has the following documents enclosed: hourly retainer agreement, marital questionnaire, budget worksheet, a list of “documents needed by your attorney” form, and “for your information” (which lists office hours and office related procedures).

There are a variety of retainer agreements, such as hourly, flat fee, and contingent fee retainer agreements. Family law attorneys are specifically prohibited from using a contingent fee retainer agreement, as the use of the same is void as against public policy.

An hourly retainer agreement includes the hourly rate of the attorney, and the final cost will depend on the amount of work completed on the case. Most attorneys who utilize an hourly retainer agreement will require an initial retainer fee, which is typically based on the hourly rate of the attorney and the hours of anticipated work that the attorney will complete, at minimum.

A flat fee retainer agreement is set on a specific dollar amount regardless of the amount of work completed on the case. If you utilize a flat fee retainer agreement, be sure to include exactly what the flat fee covers.

Authorities

- Minn. R. Prof'l Conduct 1.5(b).
- *Baskerville v. Baskerville*, 75 N.W.2d 762 (Minn. 1956).

Comment

Another type of representation includes “bundled,” “unbundled,” or “ala carte” services. This type of representation breaks down the tasks included in a legal matter and charges for each discrete task. For example, an individual who participated in mediation that resulted in an agreement may be seeking to have the agreement reduced to a writing accepted by the court, or simply a review of the agreement. My practice includes limited scope representation, which is clearly defined in either the retainer agreement or letter of engagement, including but not limited to a notice of the hourly rate, work to be included, and work to be excluded.

Practice Tip

Bundled, unbundled, or ala carte services is a great way to expand any type of practice, whether you are just starting out or are well-established.

Related Reading

- Client Relations Deskbook with eFormbook, 4th ed., (Minnesota CLE 2024).

7. What should I include in the retainer agreement?

Answer

The Minnesota Rules of Professional Conduct do not specifically provide what should be included in the retainer agreement. Rule 1.5 addresses the reasonableness of fees and factors related to the same. In addition, the rule provides a bright line that “[t]he scope of the representation and the basis or rate of fee and expenses for which the client will be responsible shall be communicated to the client.” See Minn. R. Prof'l Conduct 1.5(b). Finally, it provides a preference that the communication be “in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate.” *Id.*

Authorities

- Minnesota Rules of Professional Conduct.

Comment

My hourly retainer agreement includes the following notices: legal fees; costs and advances; periodic billing; objections or requests regarding amounts on invoices; initial retainer fee (required); minimum retainer balance (also known as “evergreen” retainer); additional trial retainer; payment of fees; withdrawal of attorney; services to be performed; file copying costs; and file closing procedure. It is signed by the client and the attorney. In addition, my office provides clients with a copy of the schedule of hourly fees, which includes the attorney hourly fee, paralegal hourly fee, and law clerk hourly fee, together with minimum hourly fees. Finally, my office provides clients with a privacy notice.

Should my rates, or that of my legal assistant and/or paralegal increase during representation, my office sends out a letter advising the client(s) of the rate increase and effective date of the same no less than 30 days prior to the increase. The hourly retainer agreement does not lock in the rates.

Practice Tip

It is a good practice to require a retainer agreement in all matters because it provides the right and responsibilities of the client and attorney.

Related Reading

- Client Relations Deskbook with eFormbook, 4th ed., (Minnesota CLE 2024).

8. How do I know whether a potential new client is involved in a domestic abuse situation?

Answer

Lawyers in the practice of family law will inevitably represent a matter (or matters) that has a history of (or is currently active with) domestic abuse. The longer you practice family law, the better you will become at developing highly tuned skills to recognize domestic abuse. Until and unless you develop those skills, best practices encourage the use of domestic abuse screening.

Minnesota Statutes section 518B.01, subdivision 2, defines “domestic abuse” as follows:

if committed against a family or household member against a family or household member:

1. physical harm, bodily injury, or assault;
2. the infliction of fear of physical harm, bodily injury, or assault; or
3. terroristic threats, within the meaning of 609.173, subdivision 1; criminal sexual conduct, within the meaning of section 609.342, 609.343, 609.344, or 609.3451; or interference with an emergency call within the meaning of section 609.78, subdivision 2.

This definition is very narrow and does not include the more typical and less obvious forms of domestic abuse such as intimidation, threats, isolation, and other dominating tactics utilized to keep a family or household member in their place (which is to say, under the control of the party utilizing such methods).

It is because the Minnesota statute is so narrow in its definition that a family law attorney should screen for domestic abuse. *See* Chapter 2, Domestic Violence.

Authorities

- Minnesota Rules of Professional Conduct.
- Minn. Stat. Ch. 518B (domestic abuse).

Comment

Advocates working with victims of domestic abuse, as well as Minnesota courts, consider it an ethical duty of the lawyer to screen for domestic abuse in accordance with the Minnesota Rules of Professional Conduct, specifically Rule 1.1, which states: “A lawyer shall provide competent representation to a client. Competent representation requires the knowledge, skill, thoroughness, and preparation reasonably necessary for representation.” Often cited with this rule is the comment to the same, namely: “Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge.” *See* 2013 Domestic Abuse Committee of the Family Law Section of the Minnesota State Bar Association, “Client Screening to Identify Domestic Violence Victimization.”

Practice Tip

There are several resources and tools available, including but not limited to, presentations through Minnesota Continuing Legal Education, the Minnesota State Bar Association, and Tubman Safety Project. You would do your practice a tremendous service to avail yourself of the same.

Related Reading

- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Screening for Domestic Violence, Summary Guide (Minnesota CLE 2013).
- Orders For Protection, Harassment Restraining Orders LQS (Minnesota CLE 2023).

9. How do I assess mental health and chemical dependency issues? Should I ever suggest counseling? Evaluations? How do I protect that from discovery?

Answer

Mental health and chemical dependency issues will typically arise during the initial consultation in two ways, either the potential new client raises the issues about him or herself, or client raises the issues about the other party. Unlike domestic abuse, where it is highly recommended that an attorney screen for the same, there is no recommendation for the screening of mental health and chemical dependency issues.

Many potential new clients are experiencing a situational mental health disorder, typically depression, at the ending of their marriage. I encourage those clients to reach out to a mental health professional to assist in the process of resolving their sadness, hurt, and/or anger.

If a potential new client is seeking a mental health and/or chemical dependency evaluation of the other party, I advise the client that they too may be subject to the same request. The potential new client's response to the potential for participating in the same evaluation he or she may be seeking from the other party provides great insight to the lawyer as to the veracity of the client's mental health or chemical dependency concerns regarding the other party.

It is important for clients to understand that whenever custody and parenting-time issues are in dispute, the parties' mental health will also be at issue, as it is one of the statutory best interest factors. As a result, there may be issues of who has access to the parties' mental health records. Whether and how that information gets shared with the court, with the other party, and with the attorneys is an important and complex matter. There may be requests for signed authorizations allowing access and it may be subject to various protective orders and discovery disputes. Since most courts feel it is vitally important for parties and their children to seek out mental health therapy, most judicial officers are eager to assist in that process, making sure the therapy occurs, that the therapeutic process is protected, and that the relevant information gets where it needs to go to address the issues. This topic needs to be repeatedly discussed with clients throughout the representation, from the initial intake meeting to the final court hearing.

Authorities

- Minn. Gen. R. Prac. 114.
- Minn. R. Civ. P. 26–37.

Comment

Many courts require some form of alternative dispute resolution, such as mediation or an evaluative process. These processes are subject to confidentiality.

Practice Tip

There is great information in the *Minnesota Divorce Practice Deskbook* about the discovery process and a sample of formal discovery documents are provided in the eFormbook under Forms 7-01 through 7-15.

Related Reading

- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Minnesota State District Court Civil Practice Deskbook, 4th ed., (Minnesota CLE 2024).

10. Should the potential new client bring documents to the initial consultation? If so, what should I request?

Answer

If the potential new client has been served with initial pleadings, they should bring those to the initial consultation. Every attorney has his or her own preference for what, if anything, the client should bring to the initial consultation. It is my preference that the client brings those documents that may be troubling him or her, such as initial or motion pleadings, or correspondence from the other party/other attorney's party. It is my practice to provide potential new clients with at least a free 30 minute initial consultation, following which I provide the client with a folder from my office containing documents for the client's review and consideration, together with a list of documents that I would like the client to bring to me should he or she retain my services. *See* Question 6, *supra*.

Authorities

- Minnesota Rules of Professional Conduct.

Comment

You will develop your own style and preference for managing documents reviewed and/or received during the initial consultation. Unless a client retains my services, I will not keep or make copies of documents that may have been provided by the potential new client during the initial consultation.

Practice Tip

Lawyers have a duty to protect information received by potential new clients pursuant to Minnesota Rule of Professional Conduct 1.18(b). It is best to keep good notes of the initial consultation in lieu of receiving and retaining documents from a potential new client.

Related Reading

- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).

11. What if the potential new client wants a friend, relative, or spouse to sit in on the initial conference? Do you lose the attorney/client privilege?

Answer

Often a potential new client will bring a supportive person to sit in during the initial consultation. If you are lucky, the client will inquire whether they may bring the supportive person prior to the initial consultation. More often, you will be surprised when the supportive person simply shows up at the initial consultation with the client. Regardless of whether I receive advance notice or no notice at all, I advise the client that I have a duty to maintain client confidentiality (a.k.a. attorney-client privilege). Minn. R. Prof'l Conduct 1.6. The presence of a friend, relative, or spouse during the initial consultation will likely result in the loss of client confidentiality/ attorney-client privilege and subject the client and/or attorney to testifying about the initial consultation. It is up to the client whether they wish to take that step and possibly jeopardize the attorney-client privilege, and if they do, you want to document your discussion with the client.

Authorities

- Minn. R. Prof'l Conduct 1.6.

Comment

If the potential client wants a third-party present, whether requested prior to or at the initial consultation, the attorney may assume the client provided consent for the same, which is permissible pursuant to Minnesota Rule of Professional Conduct 1.6.

Practice Tip

It is best practice to obtain the consent of the potential new client for the participation of the supportive person during the initial consultation, including but not limited to the potential for the loss of attorney-client privilege.

Related Reading

- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).

12. If I do not want to be retained by a potential new client, can I decline representation?

Answer

Simply, yes. You can and should decline representation if you do not want to be retained by a potential new client. You are not required to work for a potential new client unless you want to and have been retained to do so. Should you decide that you do not want to work with a client, it is best to advise the client of your decision, albeit not required. The best form of non-representation or declination of representation is via non-engagement letter commonly known as the “*Togstad* letter.” *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980).

Remember, you are required to “provide competent representation to a client” pursuant to Minnesota Rule of Professional Conduct 1.1. If you are unable to provide competent representation, then you should decline representation.

Authorities

- Minnesota Rules of Professional Conduct.
- *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980).

Comment

A sample *Togstad* letter is provided in the *Minnesota Divorce Practice Deskbook eFormbook* under Form 2-08: *Togstad* Letter Declining Representation.

Practice Tip

It is my practice to send out letters to clients regardless of who decided not to proceed with the representation. My *Togstad* letter may confirm that the potential new client has not retained my office or that my office has decided not to proceed with representation of their matter. Whatever the situation, the presence of a copy of the *Togstad* letter ensures that the matter is appropriately filed in my office under “closed cases/never filed.”

Related Reading

- Client Relations Deskbook with eFormbook, 4th ed., (Minnesota CLE 2024).
- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).

Domestic Violence

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Chapter 2

Domestic Violence

Table of Contents

1. What's the difference between an order for protection and a harassment restraining order?	1
2. What is a domestic abuse no contact order?	4
3. How does an allegation of domestic abuse affect custody and parenting-time issues in my case?.....	5
4. Do domestic violence victims have to mediate divorce cases with their abusers?.....	6
5. What affect does an order for protection, a harassment restraining order, or a domestic abuse no contact order have on the respondent's right to possess firearms?.....	8
6. Can custody, parenting time, and paternity determinations be made in an order for protection? How does an OFP interplay with the divorce, custody, or paternity case?	10
7. What is the impact of an entry of an order for protection or harassment restraining order without findings?	11
8. Do I have a right to a trial/evidentiary hearing in an order for protection proceeding?	12
9. Can I file an order for protection or harassment restraining order petition on behalf of my minor child?..	13

1. What's the difference between an order for protection and a harassment restraining order?

Answer

An order for protection (OFP) is a protective order issued out of family court. To obtain an OFP, the petitioner needs to prove, by a preponderance of the evidence, two things: 1) that the respondent committed “domestic abuse” against the petitioner, and 2) that there is a “family or household” relationship between the petitioner and the respondent. “Domestic abuse” is defined in statute as: 1) physical harm; 2) imminent fear of physical harm; 3) terroristic threats; 4) criminal sexual conduct first through fifth degrees; 5) sexual extortion; or 6) interference with an emergency call. Minn. Stat. § 518B.01, subd. 2(a). “Family or household member” is broadly defined in Minnesota as: 1) spouses, former spouses, blood relatives; 2) people who currently or used to reside together; 3) people who have a child together; 4) people who have a pregnancy in common; or 5) dating partners in a significant romantic or sexual relationship. Minn. Stat. § 518B.01, subd. 2(b). The relief the petitioner can obtain in an OFP is very broad and includes that the respondent cannot contact the petitioner, establishing temporary custody, parenting time, or child support, and exclusion from house/work/daycare.

A harassment restraining order (HRO) is a protective order issued out of civil court. To obtain an HRO, the petitioner needs to prove, by reasonable grounds to believe, one thing: that the respondent harassed the petitioner. “Harassment” is defined as: 1) a single incident of physical or sexual assault; 2) a single incident of nonconsensual use of another's personal information to invite, encourage, or solicit a third party to engage in a sexual act with the person under section 609.749, subdivision 2, clause (8); 3) a single incident of nonconsensual dissemination of private sexual images under section 617.261; 4) repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of the petitioner; 5) targeted residential picketing; or 6) a pattern of attending public events after being notified that the actor's presence at the event is harassing to the petitioner. Minn. Stat. § 609.748, subd. 1(a). Unlike an OFP, there is no relationship requirement that needs to exist between the petitioner and the respondent. A petitioner can get an HRO against anyone, including a neighbor or a stranger. The relief the petitioner can obtain is very narrow and includes no further harassment and that the respondent cannot contact the petitioner.

Authorities

- Minn. Stat. § 518B.01.
- Minn. Stat. § 609.748.

Comment

A protection order is a useful tool that provides safety for many victims of domestic abuse. Yet, it is not the safest, wisest option for every person. Time should always be taken to discuss the option of a protective order within a larger context of other available options. A victim may voice fear that a protective order may only escalate violence and place the victim or the victim's children in increased danger. Listen to the concerns, provide specifics about the process, and help your client reach their own decision as to whether filing a protective order is the right choice. Attorneys should discuss the importance of reporting all violations of the order, because law enforcement cannot enforce the order if violations are not reported. If your client has concerns about reporting a violation, then other options should be explored. For some clients, filing for an HRO instead of an OFP may be the better choice from a tactical standpoint. Any decision to obtain or not to obtain any type of protective order should be thoroughly discussed and the pros and cons weighed.

Practice Tip

Unlike HROs, OFPs have strict timeline requirements on service; be familiar with the requirements.

Unlike OFPs, HROs cannot be extended. The petitioner must prove new incidence of harassment.

A petitioner may get an OFP before, during, or after a divorce involving the respondent. The OFP action is separate from the divorce action. A person can file for an OFP even if there is an ongoing divorce, criminal, and/or juvenile case concerning the abuse.

A petitioner can file for a protective order on their own behalf, on behalf of minor child(ren), or both on their own behalf and on behalf of the child(ren). However, any petitioner (including orders that are sought on behalf of a petitioner) for a protective order must prove that the respondent committed domestic abuse/harassment against the petitioner(s). Remember that a child does not have to be a petitioner in the OFP for the court to order custody or parenting-time provisions.

If there are children between the petitioner and respondent, prepare the client with options regarding parenting time. If the petitioner would like supervised parenting time, is that going to happen at a supervised parenting-time center? Which one? When? If someone else is going to supervise parenting time, who? Has that person agreed to be the supervisor? Having a specific plan will help the court know what to order.

Serve a notice of filing on the respondent and file with the court to limit time for appeal.

Advise the client to always carry a copy of the protective order.

Remind the client to notify the court of any address changes while the protective order is valid.

Think about Safe at Home, the Minnesota address confidentiality program, as an option for the client.

Walk the client through what to do if a violation occurs.

Warn your client that the affidavit will become a publicly accessible document (e.g., use of the petitioner's affidavit in child protection or criminal proceedings).

If the client is a witness in a pending criminal matter based on abuse, consider talking to prosecutor about the testimony, and get a copy of the criminal complaint and police report.

A respondent's testimony in an OFP cannot be used in a criminal proceeding, however there is not a similar exception for the petitioner in an OFP or for either party in an HRO.

Even if the OFP or HRO is dismissed, there still could be a domestic abuse no contact order (DANCO) or other criminal no contact order.

Further Reading

- *Anderson v. Lake*, 536 N.W.2d 909 (Minn. Ct. App. 1995) (apply OFP case law to HRO context; hearing includes examining and cross-examining witnesses while under oath).
- *Ayala v. Ayala*, 749 N.W.2d 817 (Minn. Ct. App. 2008) (service by publication is not justified when a respondent refuses to disclose his or her address).
- *Baker v. Baker*, 494 N.W.2d 282 (Minn. 1992) (best interest findings not required).
- *Beardsley v. Garcia*, 753 N.W.2d 735 (Minn. 2008) (district court has authority to award temporary parenting time to an ROP father).
- *Boniek v. Boniek*, 443 N.W.2d 196 (Minn. Ct. App. 1989) (infer intent to harm).

- *Borth v. Borth*, 970 N.W.2d 699 (Minn. Ct. App. 2022) (a finding of intent to have a substantial adverse effect on safety, security, or privacy only applies to “repeated incidents of intrusive or unwanted acts, words, or gestures” under the HRO statute).
- *Braend v. Braend*, 721 N.W.2d 924 (Minn. Ct. App. 2006) (present harm or intent to do present harm only necessary for initial OFP).
- *Butler v. Jakes*, 977 N.W.2d 867 (Minn. Ct. App. 2022) (verbal threats constitute domestic abuse if they inflict fear of imminent physical harm).
- *Dayton Hudson Corp. v. Johnson*, 528 N.W.2d 260 (Minn. Ct. App. 1995) (a corporation fit the statutory definition of a party entitled to a restraining order against a shoplifter under the anti-harassment statute because the legislature generally defined "person" to include corporations).
- *Fitzgerald v. Fitzgerald*, 406 N.W.2d 52 (Minn. Ct. App. 1987) (no OFP unless petition filed).
- *Hall v. Hall*, 408 N.W.2d 626 (Minn. Ct. App. 1987) (context of relationship, no overt act needed).
- *Harris OBO Banks v. Gellerman*, 954 N.W.2d 604 (Minn. Ct. App. Jan. 25, 2021) (affirmative duty to determine the rights retained by a person under guardianship and enforce those rights).
- *Hughs v. Cole*, 572 N.W.2d 747 (Minn. Ct. App. 1997) (personal jurisdiction of out-of-state respondent).
- *Pechovnik v. Pechovnik*, 765 N.W.2d 94 (Minn. Ct. App. 2009) (evidence sufficient for district court to infer appellant's present intent to inflict fear of imminent physical harm, bodily injury or assault based on the totality of the circumstances).
- *Rew v. Bergstrom*, 845 N.W.2d 764 (Minn. 2014) (OFP may be extended without a demonstration of present harm or the intent to inflict present harm).
- *Roer v. Dunham*, 682 N.W.2d 179 (Minn. Ct. App. 2004) (no extension for HRO).
- *Schmidt ex rel. P.M.S. v. Coons*, 818 N.W.2d 523 (Minn. 2012) (statute requires the family or household member on whose behalf the OFP petition is initiated must have suffered domestic abuse).
- *State v. Andersen*, 946 N.W.2d 627 (Minn. Ct. App. 2020) (the state has to prove the defendant knew the location of the victim's residence to establish he violated the HRO).
- *Swenson v. Swenson*, 490 N.W.2d 668 (Minn. Ct. App. 1992) (petitioner cannot be excluded from home).
- *Thompson v. Schrimsher*, 906 N.W.2d 495 (Minn. 2018) (a temporal requirement is only required in Minn. Stat. 518B.01, subd. (2)(a)(2), not subd. 2(a)(1), and a petition for an OFP requires only a showing of past domestic abuse).
- *Weigel v. Miller*, 574 N.W.2d 759 (Minn. Ct. App. 1998) (prevailing party cannot appeal).

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).

2. What is a domestic abuse no contact order?

Answer

A domestic abuse no contact order (DANCO) is a specific type of criminal no contact order that can be issued in any criminal proceeding against a defendant in which pretrial release or sentencing issues are decided and where the criminal charges or conviction are for: 1) domestic abuse as defined in Minn. Stat. § 518B.01, subd. 2; 2) harassment or stalking, as defined in Minn. Stat. § 609.749, which occurred against a family or household member as defined in Minn. Stat. § 518B.01, subd. 2; 3) a violation of an order for protection; or 4) a violation of a prior DANCO.

Authorities

- Minn. Stat. § 629.75.

Comment

For some victims, it makes sense to have both a DANCO and an OFP. A DANCO only provides for one type of relief, no contact. OFPs, on the other hand, provide for many forms of relief.

In addition, a DANCO is completely reliant on the criminal case and the criminal court has to have jurisdiction over the defendant. If the criminal case is dismissed, the DANCO will also be dismissed. If the defendant completes probation, the DANCO will be dismissed. If the defendant goes to prison, the DANCO will be dismissed. While an OFP can be extended or subsequent orders issued, a DANCO cannot. If a victim would like to continue to have no contact with the defendant, then the victim would have to apply for an OFP after the DANCO is dismissed.

Practice Tip

Unlike other types of criminal no contact orders, violation of a DANCO is a misdemeanor offense. In addition, a violation of a DANCO is a “qualified domestic violence-related offense” and therefore qualifies as a crime that can enhance the level of the charge.

Even if the DANCO is dismissed, there still could be an OFP or HRO. Family court cannot modify a DANCO.

Further Reading

- *State v. Ness*, 834 N.W.2d 177 (Minn. 2013) (DANCOs are constitutional).

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Judges Criminal Benchbook, 8th ed. (Minnesota CLE Updated 2024).

3. How does an allegation of domestic abuse affect custody and parenting-time issues in my case?

Answer

Domestic abuse affects several aspects of a custody and parenting-time case. It can affect whether or not any form of alternative dispute resolution is recommended and if recommended, what type should be used. Domestic abuse affects the best interests of the child. Under the best interest factors the court needs to not only consider whether domestic abuse has occurred, but what the nature and context of the domestic abuse is and what the implications of the domestic abuse are for parenting and for the child's safety, well-being, and developmental needs. There is a presumption against joint legal and physical custody when there is domestic abuse. If the court finds that the person requesting permission to move out of state with joint children has been a victim of domestic abuse by the other parent, the burden of proof is upon the parent opposing the move.

Authorities

- Minn. Gen. R. Prac. 310(b).
- Minn. Stat. § 518.17, subd. 1(a)(4).
- Minn. Stat. § 518.17, subd. 1(b)(9).
- Minn. Stat. § 518.175, subd. 1a.
- Minn. Stat. § 518.175, subd. 3(c).

Comment

Attorneys in most areas of practice have already had or will have a client who is a victim or perpetrator of domestic violence. Most people experiencing or perpetrating domestic violence are reluctant to share that information with anyone, including their counsel; therefore, attorneys may not realize just how many of their clients are affected by domestic violence. However, to effectively represent the client, a family law attorney must be knowledgeable about domestic violence because domestic violence needs to be taken into consideration when determining custody, relocation, parenting time, child support, distribution of assets, whether or not to participate in forms of alternative dispute resolution, and the type of parent education. Therefore, screening for domestic violence with every client, every time, is crucial to every attorney's practice.

Practice Tip

Always screen for domestic violence.

Further Reading

- *Thornton v. Bosquez*, 933 N.W.2d 781 (Minn. 2019) (The statutory rebuttable presumption against an award of joint custody when domestic violence has occurred between the parents applies only against a joint physical or legal custodial arrangement, and not against a particular party).
- Screening for Domestic Violence, Summary Guide (Minn. CLE).

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).

4. Do domestic violence victims have to mediate divorce cases with their abusers?

Answer

The court cannot require any party who claims to be a domestic abuse victim to participate in any alternative dispute resolution (ADR) procedure in any proceeding that is governed by the Minnesota General Rules of Practice. This includes not only dissolutions, but also custody and parenting time, child support, OFPs, paternity, and third-party custody proceedings.

Authorities

- Minn. Stat. § 518.091.
- Minn. Stat. § 518.619, subd. 2.
- Minn. Stat. § 518.1751, subd. 1a.
- Minn. Gen. R. Prac. 303.03(c).
- Minn. Gen. R. Prac. 310(b).

Comment

Whether or not to engage in any form of ADR when the client is a domestic abuse victim is highly context dependent. If the attorney and the client decide to use a form of ADR, it is very important for the attorney to extensively prepare themselves and the client for the session. An abuser rarely comes to the table in good faith. Therefore, an attorney must be prepared for an abuser to lie and to fail to produce documents. The attorney must be prepared to counter the lies and know what documents are not being produced.

Practice Tip

Simply being in separate rooms does not solve the many concerns about using any form of ADR with an abuser.

Develop floor and ceilings with the client:

- What is negotiable?
- What is NOT negotiable?

Generally, prepare your case and the client:

- What does the neutral need to know?
- What does the neutral not need to know?
- What should be avoided when possible?

Encourage the client to continue to follow court orders.

Talk to the client about conducting themselves appropriately.

Rehearse having the client articulate their position and WHY:

- Make list of concerns.
- Make sure to have any information need to back up the “why” if possible.

Develop cues and code words between the attorney and the client in case the client is feeling scared or needs a break.

Explore how the abuser might intimidate the client.

Know your case: "What is the worst thing the abuser is going to say about you, true or false?"

- Have a safety plan:
- How is the client going to safely get to the mediation site?
- How is the client going to get in and out of the building?
- Is there a separate waiting room available?

Consider referring the client to a domestic violence advocate.

Learn if the abuser has any "hot button" issues. Does the client have any "hot button" issues?

Pay close attention to the client's body language, verbal language, facial expressions, and change in demeanor.

Take breaks. Stop the session if the client is giving away too much.

Consider not letting the client sign the agreement until she or he has had time to reflect on it.

Further Reading

- Anne Fuchs & Azure Schermerhorn Snyder, *Considering the Needs of Domestic Violence Victims: The Exceptions to Minnesota's Alternative Dispute Resolution Rule 114*, Battered Women's Justice Project (Apr. 2011), available at <www.bwjp.org/assets/documents/pdfs/considering_the_needs_of_domestic_violence_victims_mediation.pdf>.

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).

5. What affect does an order for protection, a harassment restraining order, or a domestic abuse no contact order have on the respondent's right to possess firearms?

Answer

A qualifying OFP that has been issued after the respondent receives notice of a hearing and has been provided an opportunity to be heard does prohibit the respondent from possessing firearms as long as the OFP is in effect.

An HRO does not affect the respondent's right to possess firearms.

A DANCO, by itself, does not affect the defendant's right to possess firearms.

Authorities

- 18 U.S.C. § 922(g)(8).
- Minn. Stat. § 518B.01, subd. 6(g).
- Minn. Stat. § 624.713, subd. 1(10)(viii).

Comment

A qualifying protective order needs to do two things to be able to prohibit the respondent from possessing firearms: 1) restrain the respondent from harassing, stalking, or threatening an intimate partner of the respondent or child of the intimate partner or child of the respondent, or engaging in other conduct that would place the respondent's intimate partner in reasonable fear of bodily injury to the partner or the child, and 2) includes a finding that the respondent represents a credible threat to the physical safety of the intimate partner or child; or by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury.

Practice Tip

Ex parte OFPs that become final without a hearing do not implicate firearm prohibitions.

Minnesota's law has specific requirements on the surrendering of firearms. Surrender must be done within three days and notice of surrender must be filed within two days of the surrender. If the court finds that the respondent poses an "imminent risk" to the petitioner, then the court can order the respondent to surrender firearms immediately to law enforcement.

Federal law provides an exemption for law enforcement and the military to be able to possess their service weapon, but not other firearms. Minnesota law does not provide for this exemption.

If firearm possession is of particular concern for your client, you and the client may want to consider an Extreme Risk Protection Order (ERPO). An ERPO's sole purpose is to enjoin and prohibit the respondent from possessing or purchasing firearms for as long as the order is in effect. It also requires law enforcement to either accept the surrender of the respondent's firearms or, depending on the circumstance, could require law enforcement to obtain a search warrant to seize the respondent's firearms. An ERPO is not a stay-away order; rather it is an order requiring the surrender of firearms and prohibits the purchase of firearms only. In certain circumstances, an ERPO might be preferable to an OFP/HRO or an ERPO might be in conjunction with an OFP/HRO/DANCO. For more information, please review Minn. Stat. §§ 624.7171-624.7178.

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).

6. Can custody, parenting time, and paternity determinations be made in an order for protection? How does an OFP interplay with the divorce, custody, or paternity case?

Answer

The court can establish temporary custody and parenting time in an OFP between married couples or for a father who has a valid recognition of parentage (ROP). The court cannot establish paternity in an OFP.

An OFP can modify a temporary or permanent custody or parenting-time order.

Authorities

- Minn. Stat. § 257.541, subd. 3.
- Minn. Stat. § 518B.01, subd. 4.

Comment

In a dissolution, the court cannot modify or vacate a provision restraining the respondent from committing acts of domestic abuse in an OFP. The court can otherwise modify an OFP within a dissolution proceeding with a notice of motion and motion. Notice cannot be waived and if the request to modify the OFP is granted, the court shall issue a modified OFP.

Practice Tip

Minnesota statutes require that primary consideration is given to the safety of the victim and the child(ren) when establishing or modifying custody or parenting time. In addition to safety, the court can, but is not required to, consider the best interest factors.

The court can also order supervised parenting time, supervised exchange, or deny parenting time if needed to protect the safety of the victim and/or the child(ren).

Prepare the client with options around parenting time. If the client would like supervised parenting time, is that going to happen at a supervised parenting time center? Which one? When? If someone else is going to supervised parenting time, who? Has that person agreed to provide the supervision? Having a specific plan will help the court know what to order.

Further Reading

- *Beardsley v. Garcia*, 753 N.W.2d 735 (Minn. 2008) (district court has authority to award
- temporary parenting time to an ROP father).
- *Rigwald v. Rigwald*, 423 N.W.2d 701 (Minn. Ct. App. 1988) (custody relief temporary
- until divorce or best interest findings).

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).

7. What is the impact of an entry of an order for protection or harassment restraining order without findings?

Answer

Any protective order issued without findings is still an enforceable order, i.e., it is still a crime to violate the order. However, the advantage of agreeing to the issuance of a protective order without findings is that there is no testimony on the abuse/harassment and no court opinion/decision that the abuse/harassment occurred.

Practice Tip

Unlike OFPs, any testimony in an HRO evidentiary hearing can be used against the respondent in a criminal case.

Further Reading

- *Bunda v. Bunda*, No. C5-97-570, 1998 WL 2415 (Minn. Ct. App. Jan. 6, 1998).

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).

8. Do I have a right to a trial/evidentiary hearing in an order for protection proceeding?

Answer

The petitioner may request a hearing in the petition. The respondent in an OFP proceeding has the right to request and receive an evidentiary hearing. If the respondent agrees to the issuance of an OFP without an evidentiary hearing, and the respondent agrees to *all* the relief requested by the petitioner, the petitioner does not have the right to an evidentiary hearing.

Authorities

- Minn. Stat. § 518B.01, subd. 5.
- Minn. Stat. § 609.748, subd. 3.
- Minn. Stat. § 609.748, subd. 4(f).
- *Andrasko v. Andrasko*, 443 N.W.2d 228 (Minn. Ct. App. 1989) (evidentiary hearing and particularized findings required).
- *Weigel v. Miller*, 574 N.W.2d 759 (Minn. Ct. App. 1998) (prevailing party cannot appeal).
- *Bunda v. Bunda*, No. C5-97-570, 1998 WL 2415 (Minn. Ct. App. Jan. 6, 1998) (no right to hearing if stipulation).

Comment

Under Minn. Stat. § 518B.01, subd. 7, if a petitioner only requests specific limited relief, a hearing will not be automatically scheduled. The petitioner can request a hearing be scheduled in this situation or the respondent can request a hearing. If neither party requests a hearing, the OFP will become final five days after the respondent is served.

If the petitioner asks for certain expanded relief in an OFP, such as parenting time or child support, a hearing will automatically be scheduled without the need for the respondent to request one.

Under Minn. Stat. § 609.748, subd. 4(d) and (e) the petitioner can request a hearing be held in the petition or the respondent can request a hearing after being served. If neither party requests a hearing, the HRO will become final.

Practice Tip

In considering whether to request an evidentiary hearing or not, keep in mind that simply scheduling a hearing can trigger prohibitions on firearm possession for the respondent.

Having an evidentiary hearing may lead to findings that domestic abuse occurred, which can have implications for other court actions such as custody and parenting-time actions.

Both the OFP and the HRO statutes have strict deadlines for when the respondent should request a hearing. If the respondent does not request a hearing by the deadline, the protective order will become final.

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).

9. Can I file an order for protection or harassment restraining order petition on behalf of my minor child?

Answer

Yes, both the OFP statute and the HRO statute allow a parent to petition for a protective order on their child's behalf.

Authorities

- Minn. Stat. § 518.01, subd. 4(a).
- Minn. Stat. § 609.748, subd. 2.

Comment

The OFP statute allows for a parent, a family or household member, guardian, or a reputable adult 25 years or older file on the minor's behalf.

The HRO statute only allows for a parent, guardian, or stepparent of a minor to petition on the minor's behalf.

Practice Tip

Whenever filing a petition for an OFP/HRO on behalf of a child, the petition must allege domestic abuse/harassment by the respondent against the child who is petitioning. For an OFP, the respondent also must be a family or household member of the child. For an HRO, the petition would need to allege harassment of the child by the respondent. This is true even if the OFP or HRO is being filed by a parent on their own behalf and on the behalf of the child. Each listed petitioner must be a victim of domestic abuse for an OFP or harassment for an HRO.

For an OFP, even if the order is not issued on behalf of a child, if a parent is petitioning for an OFP, the court can still grant relief in respect to the child including custody, parenting time, order the respondent stay away from the child's daycare or school, and any other relief the court deems necessary to protect the child or the petitioner from domestic abuse.

Further Reading

- *Schmidt ex rel. P.M.S. v. Coons*, 818 N.W.2d 523 (Minn. 2012) (statute requires the family or household member on whose behalf the OFP petition is initiated must have suffered domestic abuse).

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).

Alternative Dispute Resolution

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We would like to acknowledge and thank Deborah N. DeWalt as the previous author of this chapter.

Chapter 3

Alternative Dispute Resolution

Table of Contents

1. Can the court require use of a particular ADR process in a given case?	1
2. When does a family law agreement reached in a facilitative ADR session become binding?	3
3. Is it permissible for the party or an attorney of a party to disclose to the court an oral agreement reached in a facilitative process or other confidential information?	5
4. What are the obligations of an attorney working with a pro se party within an ADR process?.....	8
5. Are ADR neutrals protected from liability for their “mistakes”?.....	10
6. Do any Rule 114 or other decision-making processes used in family law result in decisions which are final and not subject to subsequent challenge?	12
7. Does the court have the authority to appoint a parenting consultant over the objection of a party?.....	14
8. How much preparation should an attorney do to prepare for an early neutral evaluation or mediation?	16

1. Can the court require use of a particular ADR process in a given case?

Answer

The court has the authority to require nonbinding ADR in appropriate cases and to require use of a parenting time expediter (PTE) subject to certain exceptions.

Authorities

- Minn. Gen. R. Prac. 114.04(b), 310.01.
- Minn. Stat. § 518.1751 (parenting time expedition).

Comment

If the parties cannot agree on an ADR process, the court can select an appropriate nonbinding ADR process and can determine other issues, such as selection of a neutral, in the absence of party agreement. Minn. Gen. R. Prac. 114.04(b).

The court shall not approve any ADR process if it finds that ADR is not appropriate or if it amounts to a sanction on a non-moving party. Ordinarily, the court should not order further ADR processes if the parties have already attempted to resolve their case using ADR or a collaborative law process. Minn. Gen. R. Prac. 114.04(b), 310.01(b). See also the Implementation Committee Comments (1993) to Rule 114.04.

The court may not require ADR if a party is proceeding in forma pauperis or is unable to pay for ADR services and free or low-cost services are not available. Minn. Gen. R. Prac. 114.11(d).

In addition, in family court matters, the court may not require parties to participate in any facilitative process if one of the parties claims to be the victim of domestic abuse by the other party, or if the court determines there is probable cause that a party or a child of the parties has been physically abused or threatened with physical abuse by the other party. Minn. Gen. R. Prac. 310.01(b). In circumstances when the court is satisfied that the parties have been advised by counsel and have agreed to an ADR process established in Rule 114 that will not require face-to-face meeting of the parties, the court may direct that the ADR process be used. Minn. Gen. R. Prac. 310.01(b).

Cases under the Domestic Abuse Act; contempt actions; maintenance, support, and parentage cases involving the child support enforcement agency; and, proceeding conducted by a special master appointed under Rule 53 of the Rules of Civil procedure are not subject to ADR.

In any given case, the court can appoint a Parenting Time Expediter neutral on its own motion, Minn. Stat. § 518.1751, subd. 1, subject to certain exceptions similar to those in Rule 114, Minn. Stat. § 518.1751, subd. 1a.

Practice Tip

Another form of “mandatory” ADR occurs frequently in family court orders and decrees, that is, a provision requiring the parties to mediate an issue before bringing a motion.

The consequence of not attempting mediation before the motion hearing may be that the court declines to hear the motion in order to allow mediation to occur. In several cases, where pro se litigants brought claims without merit or yet another frivolous claim, failure to comply with mediation requirements resulted in an award of conduct-based fees against the moving party. *Braun v. Braun*, No. A14-0274, 2015 WL 3648850 (Minn. Ct. App. June 15, 2015); *Yager v. Fox*, No. A14-0457, 2014 WL 7011243 (Minn. Ct. App. Dec. 15, 2014).

Conversely, the court has the discretion to waive the requirement of attempting mediation before bringing a motion. See *Hietpas v. Reed*, No. A14-0105, 2014 WL 6863173 (Minn. Ct. App. Dec. 8, 2014). It was not abuse of discretion to do so when the court made specific findings as to the parties' inability to resolve issues without court intervention and when the moving party invited the other party to mediation after serving the motion papers, the other party declined to participate in mediation. *Id.*

Further Reading

- Minnesota Statutes section 518.1751 permits a judicial district to establish a mandatory system of parenting-time dispute resolution. This varies from county to county and attorneys should check what is available in a given county.

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).

3. When does a family law agreement reached in a facilitative ADR session become binding?

Answer

Such an agreement becomes binding, i.e., legally enforceable, when it is formally presented to the court and approved by court order.

Authorities

- *Dent v. Casaga*, 208 N.W.2d 734 (Minn. 1973).

Comment

The court is a third party to dissolution actions. *Karon v. Karon*, 435 N.W.2d 501 (Minn. 1989). It has a duty to protect the interests of both parties and sua sponte can approve or disapprove all or part of the parties' stipulations which the court questions or determines are not fair and reasonable to all. *Id.*; *Toughill v. Toughill*, 609 N.W.2d 634 (Minn. Ct. App. 2000). The court cannot "fix" a flawed stipulation by imposing conditions on the parties to which they did not stipulate; the stipulation needs to be returned to the parties for further negotiation or re-negotiation. *Toughill, supra*. Thus, until the court has approved an agreement of the parties and entered an order or decree, there is a possibility that the agreement will not be legally enforceable (i.e., become an order or decree).

Prior to entry of judgment or order based on a stipulation, a dissolution stipulation is a contract, and a party to it cannot withdraw from or repudiate it without obtaining either the other party's consent or leave of the court for good cause shown. *Shirk v. Shirk*, 561 N.W.2d 519 (Minn. 1997). The proper method for obtaining the court's permission to be relieved of a stipulation is to bring a motion. *Toughill, supra*.

Factors the court is to look to in determining whether to set aside a stipulation include:

- Whether a party was represented by competent counsel, though pro se representation is not by itself decisive on the validity of the agreement. *See Gamble v. Gamble*, No. A13-2182, 2014 WL 3558316, at
- *4 (Minn. Ct. App. July 21, 2014) (citing *Toughill*, 609 N.W.2d at 640) ("There is nothing inherently coercive or fraudulent about knowingly choosing to proceed without counsel, and, as a result, being somewhat intimidated by being forced to deal directly with another party's attorney").
- Whether extensive and detailed negotiations occurred. *Crinze v. Kulver*, 498 N.W.2d 55, 57 (Minn. Ct. App. 1993) ("Whether a contract is formed is judged objectively by the conduct of the parties, not by their subjective intent.").
- Whether there was a meeting of the minds on the essential terms of the agreement, *Ryan v. Ryan*, 193 N.W.2d 295 (Minn. 1971).
- Whether a party had the capacity to enter into a contract, and so on.

A party can also attack the proposed judgment or order alleging that the proposed judgment does not accurately reflect the parties' stipulation. *See* Minn. Gen. R. Prac. 307(b) (oral agreement, proposed decree not approved by both attorneys). A letter setting out objections to a proposed judgment is sufficient under Rule 307(b); no motion is required. *Clark v. Clark*, 642 N.W.2d 459 (Minn. Ct. App. 2002).

After the stipulation is an order or decree, the only authority for asking the court to re-open or vacate an order or decree is Minnesota Statutes section 518.145 and not the case law above.

Practice Tip

A common complaint about the facilitative ADR processes used in family law is the delay and difficulty in transforming an oral agreement made during the process into a written stipulation acceptable to both parties. While the Minnesota Mediation Act permits binding mediation agreements in civil litigation if certain formalities are met, Minn. Stat. § 572.35, subd. 1, mediations for most family court actions are specifically not governed by this act. Minn. Stat. § 572.40.

Strategies for troubleshooting problems with reducing an oral agreement to writing include:

- Bring a rough draft of a written agreement to the ADR session and be willing to make such interlineations as are necessary to have a final written agreement. If there is a desire not to have a “messy” looking order or decree, a “clean” copy can be prepared based on the initial written agreement.
- Schedule a second ADR session or a four-way meeting or attend any event which will garner the attention of the parties and counsel to work out language issues and fine-tune the agreement. Consider prompting the pretrial conference as a possible event for this purpose.
- Adopt the mediated agreement as the position or requested outcome of the client (without disclosing that it was a mediated agreement) in further proceedings.
- Locate an ADR session at the courthouse with notice to a judge so as to be able to make a record of the oral agreement—this is done routinely when the court schedules the moderated settlement conferences through a program of the state chapter of the American Academy of Matrimonial Lawyers. A similar result could occur in connection with taking a party deposition.
- Ask the neutral or the court to help schedule the process of drafting and monitor it with reports back by email or conference call.
- A neutral may not draft a decree, stipulation or other legal document intended to be submitted to the court as a court order to be signed by the judicial officer. (114.13.A., Subd. 7(c)(1). However, it is common practice for neutrals to help create settlement agreements that are intended to memorialize a settlement and bind the parties to an agreement, with the understanding that all settlements are subject to the review and approval of the court.

In general, the longer the time between the parties reaching a facilitated agreement and getting it down on paper, the more likely one or both of the parties will begin seeing additional issues and/or requesting changes.

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).

4. Is it permissible for the party or an attorney of a party to disclose to the court an oral agreement reached in a facilitative process or other confidential information?

Answer

The general rule is no, though there are exceptions.

Authorities

- If the case is settled through ADR, the attorneys are to complete the appropriate court documents to bring the case to final disposition. Minn. Gen. R. Prac. 114.05 (attorney communication about settlement).

The neutral may communicate that the case has been settled and may include a copy of the written agreement, that the case has not been settled and, with the written consent of the parties or their counsel, “that resolution of pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate resolution or the dispute”, that some or all of the fees for the ADR session have not been paid, and required notice of any parenting time adjustments per Rule 310.03(c)(3) (i.e.—orders from PTEs or PCs). (Rule 114.10(d))

Subject to Minnesota Statutes section 595.02 and the rest of Rule 114.08, no statements made nor documents produced in non-binding ADR processes which are not otherwise discoverable shall be subject to discovery or other disclosure. Such evidence is inadmissible for any purpose at the trial, including impeachment. Minn. Gen.R. Prac. 114.08 (a). No agreements reached in an ADR process are binding unless the agreements are put into writing and are signed by the parties and counsel. Minn. R. Gen. Prac. 114.13, subd. 7.

A mediator or collaborative law attorney cannot be examined as to any communication or document, including work notes made or used in the course of or because of mediation pursuant to an agreement to mediate or participate in a collaborative law (CL) process. Minn. Stat. § 595.02 (so-called mediator’s privilege). A communication or document otherwise not privileged does not become privileged pursuant to this statute. This statute is not intended to limit the privilege accorded to communication during mediation or CL by the common law. However, the above mediator privilege does not apply in a dispute between mediating or CL process parties brought by one of the parties to have a settlement agreement resulting from mediation or the CL process set aside or reformed.

Evidence of conduct or statements made in settlement negotiations is inadmissible to prove liability for, invalidity of, or value of a claim. Minn. R. Evid. 408 (evidence of settlement negotiations). However, such evidence may be admissible for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. That being said, even evidence offered for a proper purpose may be excluded if it is cumulative. Minn. R. Evid. 403.

A mediated custody agreement may not be presented to the court nor made enforceable unless the parties and their counsel, if any, consent to its presentation to the court, and the court adopts the agreement. Minn. Stat. § 518.619, subd. 7 (mediated custody agreements).

Hybrid processes unique to family law include:

- Parenting Time Expeditor (PTE) Minn. Stat. § 518.1752, subd. 4(a) – The same rule as set above in Rule 114.08(b) applies to the facilitative phase of this mediation/arbitration process. But see Minnesota Statutes section 518.1751, subdivision 2(a) regarding PTE neutral may provide information for court re-apportionment of fees.
- Parenting Consultant (PC) – Confidentiality of a facilitative phase of the PC process depends on terms of the appointment order and parties’ agreement; however, it is common for the parenting consultant process to be not confidential as to any of its phases or tasks.

Comment

In general, Minnesota courts have held firm to the rule that facilitative ADR processes should be accorded confidentiality. From a practical standpoint, if a party or counsel attempts to introduce an agreement that they claim was reached in mediation, but has not been reduced to writing and signed by all parties and counsel of record, an objection should be made pursuant to Minn.R.Evid 408 (offers of compromise or settlement are not admissible) and Minn.Gen.R.Prac. 114.07(b) (inadmissibility of statements made and documents produced in non-binding ADR processes).

In *Hietpas v. Reed*, No. A14-0105, 2014 WL 6863173 (Minn. Ct. App. Dec. 8, 2014), a party attempted to introduce evidence of an oral agreement that was later reneged; such evidence was excluded by the trial court. On appeal, that party attempted to qualify the evidence for admissibility based on the exceptions to Minnesota Rule of Evidence 408 as set out above, but the appellate court affirmed the trial court finding that even if an exception applied, the pro-offered evidence was cumulative based on Minnesota Rule of Evidence 403 and exclusion was not prejudicial.

In *Stutler v. Moreno*, Nos. A13-0056, A13-0460, 2014 WL 349617 (Minn. Ct. App. Feb. 3, 2014), the court appointed a consensual special magistrate (CSM) to determine the maintenance and child support not resolved by the parties' divorce stipulation. In deciding those issues, the CSM had relied on information which the CSM obtained during conversations with counsel off the record. The CSM found that there was an oral agreement to make support and maintenance retroactive. The appellate court ruled that this finding was impermissible, inter alia, because it was based on information outside of the record. The CSM also relied on facts outside of the record in making a finding on the parties' standard of living. Here the appellate court called the off-the-record conversations "mediation" and ruled that the evidence not on the record was confidential and not admissible based on Rule 114.08(a) and (e) and case law regarding mediator privilege.

The appellate court in *Stutler* emphasized the similarity between the function of a CSM and a judge early in its opinion. One would think that both the oral agreement and the facts going to standard of living would be excluded based on the same criteria of being outside of the record. Instead this appointment of a CSM morphed into a mediation/CSM process, which might be a realistic description but it was not a documented one in the appointment order. Cf. *Lundquist v. Lundquist*, No. A07-1625, 2008 WL 2578722 (Minn. Ct. App. July 1, 2008) (appointment order for CSM – neutral was involved in the settlement negotiation by virtue of his role as mediator and later explicitly donned his CSM hat).

Practice Tip

Rule 114 does not include any remedy for an attorney or party who discloses confidential information to the court. Possible remedies include:

- Make a motion for the court to order the court administrator to unfile the document or for the court to strike portions of the document or argument.
- Seek attorney's fees for party or attorney misconduct. Minn. R. Civ. P. 11; Minn. Stat. § 518.14; Minn. Stat. § 549.211.
- Ask the court to recuse itself. Minn. Gen. R. Prac. 106.
- Object to introduction of the evidence, raising all possible authority for exclusion.

Further Reading

- In the case of *Cassell v. Superior Court*, 51 Cal. 4th 113 (Cal. 2011), the California Supreme Court ruled that statements made during mediation by an attorney to the attorney's own client were confidential and not admissible for any purpose in a legal malpractice action brought by the client against the attorney. See also, *William K. Mills, So You Think You Know the 'Mediation Privilege,' California Bar Journal, Jan. 2014* (discussing what is mediation).

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).

5. What are the obligations of an attorney working with a pro se party within an ADR process?

Answer

If the attorney is representing the other party, the attorney must not state or imply to an unrepresented party that the lawyer is disinterested. The lawyer shall clearly disclose that his or her client's interests are adverse to the unrepresented person. A lawyer must correct any misunderstandings that a pro se opposing party may have about the lawyer's role in the matter. An attorney may not give legal advice to an unrepresented opposing party except for the advice to retain a lawyer.

If the attorney is acting as a neutral in the proceeding, the attorney must inform unrepresented parties that he or she is not representing them. When the lawyer knows or should know that the unrepresented party does not understand the lawyer's neutral role, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Authorities

- Minn. R. Prof'l Conduct 4.3 (applying to attorneys representing parties and Rule 2.4 applying to attorneys who are neutrals).
- Minn. R. Prof'l Conduct, Preamble (2) (as negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others).

Comment

Parties become pro se for various reasons and at various times in a case. Consider the following situations which may require special handling:

- Party previously represented and now claiming to be unrepresented. An attorney continues to represent a party until he or she serves all parties and the client with a notice of withdrawal and files the notice with the court administrator. Minn. Gen. R. Prac. 105.
- Party pro se on some issues or legal tasks and retaining an attorney for limited scope representation, such as with drafting motions and affidavits. Minnesota Rule of Professional Responsibility 4.2 prohibits an attorney communicating with a represented party unless that attorney has the consent of the other attorney or is authorized by law to do so.
- An attorney who is a party representing him or herself in a family law matter. Martin Cole, Ethics Rules and Pro Se Lawyers, Bench & Bar of Minnesota, Sept. 12, 2014.

Within an ADR process, particularly a facilitative one, an attorney needs to balance being polite to a pro se party while conducting the case in a cooperative manner and not creating confusion as to the attorney's role vis a vis the pro se party. The more readily parties identify win-win solutions and reach agreement, the more difficult it can be to strike this balance. Yet, the Minnesota Rules of Professional Responsibility differ from the ABA Model Rules of Professional Responsibility in that Minnesota places an affirmative duty on the lawyer to "clearly disclose" that his or her client's interests are "adverse" to a pro se opposing party.

On the other hand, becoming highly adversarial to the point of taking advantage of or becoming abusive to a pro se opposing party is not in order. See Minn. R. Prof'l Conduct 4.4 ("in representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person"). This rule was used as the basis for a private admonition issued for abusive language by an attorney to a pro se opposing party. See Kenneth Jorgenson, Summary of Admonitions, Bench & Bar of Minnesota, Apr. 2003. The Minnesota Professionalism Aspirations, section III set out guidelines for working civilly and productively with opposing counsel and would serve as well for a pro se opposing party.

Minnesota General Rule of Practice 1.04 requires a pro se individual to comply with the rules as if an attorney. See also Form OTH 101 – Rights and Duties of Self-Represented Parties, Minn. Stat. § 549.211 (available in the self-help forms on the Minnesota Judicial Branch website). As a practical matter, pro se parties vary in their ability to advocate for themselves and work with the opposing side on information exchanges, option generation, and resolution. Some cases with pro se parties will not move towards resolution without the attorney doing more than his or her part. Here is where the fine line between legal advice and legal information comes into play. In an ADR session, it is legal information to say “This is the deal” but it is legal advice to say “This is a good deal for you.” What about saying, “We believe this deal meets your goal of”?

If an agreement has been reached in ADR with a pro se party, the neutral and the other party's attorney should make it clear that the pro se party has the right to consult with an attorney of his or her own choosing before signing any paperwork memorializing the agreement and that signing can be delayed to allow that opportunity. In fact, Minnesota Rule of Professional Responsibility 4.3 states that the pro se party should be advised to retain an attorney.

Minnesota General Rule of Practice 306.01(c) requires an affirmative waiver of counsel by pro se parties to be part of or attached to any stipulations in family court matters submitted for court approval.

Practice Tip

Be diligent about giving actual notice with perhaps extra time to pro se parties, whether the notice is required by the rules or a communication is necessary or desirable to case development.

Give repeated reminders of your adverse role to the pro se party and encouragement and time to consult with an attorney. Memorialize those reminders in writing (correspondence or finding in a stipulation) or on the record.

Use a waiver of counsel on anything signed by a pro se party, including a written summary agreement reached in an ADR process. Consider adding to the waiver an acknowledgement that the attorney and/or ADR neutral has given the pro se party no legal advice and has encouraged him or her to retain their own attorney.

Prefer written communications with a pro se party and oral communications with other persons present (the court, an ADR neutral, etc.).

Use third parties (the court, an ADR neutral, etc.) to provide legal information or confirm legal information that the attorney has provided to the pro se party.

Cite rules, statutes, and cases rather than interpreting them for the pro se party. Provide copies of same or information as to where the pro se party could obtain or review the cited law.

Err on the side of openness and transparency, especially in providing to the pro se information on which agreements might be based and in drafting findings of fact. Avoid legalese.

When in doubt, err on the side of formality, which tends to create structural distance and also sounds respectful to the pro se party – “Mr. Smith.”

Further Reading

- Julie Macfarlane, *The New Lawyer: How Settlement Is Transforming the Practice of Law* (2008).
- *Unbundling Legal Services*, 35(2) ABA Family Advocate (Fall 2012).
- Minnesota Family Support and Recovery Council, *Ethics and Pro Se Litigants* (Sept. 21, 2010), available at <www.mfsrc.org/Conferences_files/2010/211315C.pdf>.

6. Are ADR neutrals protected from liability for their “mistakes”?

Answer

It depends on the type of ADR process over which the ADR neutral is presiding; some ADR neutrals have quasi-judicial immunity.

Authorities

The following ADR neutrals are entitled to quasi-judicial immunity by virtue of a specific statute or a case granting it:

- Neutral expert – Minn. R. Evid. 706; *Peterka v. Dennis*, 764 N.W.2d 829 (Minn. 2009).
- Binding arbitration – Minn. Stat. § 572B.14b (Minnesota Arbitration Act); *see also L&H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372 (Minn. 1989).
- Parenting consultant – *VanGelder v. Johnson*, 827 N.W.2d 430 (Minn. Ct. App. 2012).
- Parenting time expeditor – Minn. Stat. § 518.1751, subd. 5.

Comment

Judicial immunity protects judges from liability for damages arising from acts they perform in the exercise of their judicial authority. It also protects persons who are appointed by the court to assist the court by making discretionary decisions or judgments or recommendations. *Peterka*, supra; *Zagaros v. Erickson*, 558 N.W.2d 516 (Minn. Ct. App. 1997), rev. denied (Minn. Apr. 17, 1997) (no quasi-judicial immunity to custody evaluators without a court appointment).

In *Peterka*, supra, the Minnesota Supreme Court noted that the integrity and independence of the judiciary depends on the ability of court-appointed experts to make unbiased decisions or recommendations to the court uninfluenced by any fear or apprehension of personal consequences, including harassing litigation by dissatisfied parties.

The ADR processes for which the neutral has quasi-immunity are also backed by the safeguards built into the judicial process, according to *Peterka*. For example, with the Rule 706 expert, the neutral expert is subject to cross-examination, each party can present his or her own witnesses to testify contrary to the neutral expert, and the trial judge is not bound by the appointed expert's recommendations. In addition, the *Peterka* court stated that experts appointed by Rule 706 may be subject to professional disciplinary proceedings for any misconduct.

ADR neutrals who have quasi-judicial immunity can still be found liable for misconduct if that misconduct occurred prior to the appointment and resulted in the appointment. *Kuberka v. Anoka Mediation, Inc.*, No. A05-2490, 2007 WL 3525 (Minn. Ct. App. Jan. 2, 2007). Quasi-judicial immunity would also not apply to acts performed outside of the scope of duties assigned by the appointment order. *See dicta in Shimota v. Phipps-Yonas*, No. A11-2167, 2012 WL 3641027 (Minn. Ct. App. Aug. 27, 2012).

Minnesota has ethical standards which govern neutrals in ADR processes and an enforcement process. Minn. Gen. R. Prac. 114, Appendix – Code of Ethics and Code of Ethics Enforcement Procedure. The ADR Ethics Board posts information about the process for filing a complaint and reports those neutrals who have been publicly remanded. Historically, the largest number of complaints received by the ADR Review Board has involved the practice area of family law and the ADR processes of parenting time expedition and parenting consulting.

Practice Tip

Appointment orders are not required for neutrals to provide ADR services. See *Lundquist v. Lundquist*, No. A07-1625, 2008 WL 2578722 (Minn. Ct. App. July 1, 2008). However, practitioners should expect neutrals in ADR processes that result in decisions, recommendations, and evaluative opinions to require an appointment order before they render any services. The order should state the type of ADR process to be used, the name of the neutral for the process, the rules that will govern the process (whether by reference to statute or rule or by detailed description), the general issue(s) that will be the subject of the process, and the expectation of the court as to any report from the neutral to the court. Neutrals must also require a signed fee agreement and written agreement for ADR services before or at the commencement of the ADR process. Minn. R. Gen. Prac. 114.13, subd. 7 (a) and (b). The written agreement for ADR services must explain the role of the neutral, whether the neutral's role includes decision-making, whether the decision made by the neutral is binding or non-binding, the amount of compensation and that the neutral can seek remedies from the court for non-payment, the rules for any adjudicative process, that the neutral must follow the Code of Ethics for Court-Annexed ADR Neutrals and is subject to the jurisdiction of the ADR Ethics Board, and required language to inform the parties that the neutral has no duty to protect the interests of the parties or provide them with information about their legal rights, that no agreement reached in the process is binding unless the agreement is put into writing, states that it is binding, and is signed by the parties and counsel, states that a settlement agreement may adversely affect the party's rights, and that the party should consult with an attorney before signing a settlement agreement if they are uncertain about their rights.

Further Reading

- See *Mediation Quarterly*, Vol. 1989, Issue 23, Spring 1989 for two related articles:
 - Gracine Hufnagle, *Mediator Malpractice Liability*, 1989(23) *Med. Q.* 33–36 (2008).
 - Nancy H. Rogers & Craig A. McEwen, *Mediation and the Unauthorized Practice of Law*, 1989(23) *Med. Q.* 23–32 (2008).

Related Reading

- *The New Minnesota Rule 114 – 14 Questions and Answers Legal QuickSheet*, 1st ed., (Minnesota CLE 2023).

7. Do any Rule 114 or other decision-making processes used in family law result in decisions which are final and not subject to subsequent challenge?

Answer

No.

Authorities

Consensual Special Magistrate: A CSM order is filed with the court and usually countersigned by a judge. Minn. Stat. § 484.74; cf. Buller v. Minn. Lawyers Mut., 648 N.W.2d 704 (Minn. Ct. App. 2002), rev. denied (Minn. Aug. 20, 2002). It is appealable as of right. Minn. Gen. R. Prac. 114.02(2); Minn. Stat. § 484.74. The appeal may be taken directly from the CSM order or from the order countersigned by the court. Stutler v. Moreno, Nos. A13-0056, A13-0460, 2014 WL 349617 (Minn. Ct. App. Feb. 3, 2014).

Nonbinding Arbitration (parties silent as to which rules apply): The arbitration award is filed with the Court. Minn. Gen. R. Prac. 114.09(e)(1). Within 20 days, a party may request a de novo trial by the court. Minn. Gen. R. Prac. 114.09(e)(2). If no such request is made, judgment is entered and is not subject to appeal and may not be attacked or set aside. *Id.* Within 90 days after entry of judgment on the arbitration award, a party may move to vacate the judgment but only on those grounds set out in Minnesota Statutes chapter 572 (Minnesota Arbitration Act, see *infra*).

Binding Arbitration (parties silent as to which rules apply): The arbitrator must provide notice and copy of the arbitration award to the parties. Minn. Stat. 572B.19(a). A party may bring a motion for the court to confirm and order the award, or vacate, modify or correct it. Minn. Stat. §§ 572B.22, 572B.24. After judgment is entered, an appeal may be taken on specified grounds. Minn. Stat. §§ 572B.25, 572B.28.

Parenting Time Expeditor: The neutral is to provide a copy of the parties' agreements or the neutral's decisions to the parties. Minn. Stat. § 518.1751. A decision made by a neutral in the PTE process can be enforced or challenged in a motion made to the district court. Minn. Stat. § 518.1751, subd. 3(d). A copy of the PC decision is to be attached to the motion. *Id.*

Parenting Consultant: Depends on the terms of the appointment order; often similar to the PTE statute.

Special Master: Depends on the terms of the appointment order; often similar to the PTE statute.

Other "Wild Card" Options: Depends on the design of the process.

Comment

The choice of an ADR process is also a choice on related rights, such as the right to challenge a decision. Some ADR processes are clearly defined, such as arbitration; others are less so, such as the CSM process. Stutler, *supra*. Parties' rights can be inadvertently not preserved if the process is not carefully denominated. It is preferable to refer to the rules and statutes which define the process that the parties intend to use. Buller, *supra*.

Rule 114 allows the parties to non-binding or binding arbitration to select their own rules to govern the process. Minn. Gen. R. Prac. 114.09(a). If an agreement to arbitrate does not specifically state what rules will govern the arbitration process, then non-binding arbitration is governed by Rule 114.09 and binding arbitration is governed by the Minnesota Arbitration Act, Minnesota Statutes chapter 572B.

Some PC appointment orders have stated that PC decisions may be reversed only for an abuse of discretion (the standard of review that the court of appeals applies to custody and parenting-time orders). Generally speaking, decisions involving review of a PC decision have

emphasized that district court's oversight of PC decisions was based on the best interests of the child standard and the court's judgment as to the best interests of the children takes precedence over the PC's decision. *Champlin v. Champlin*, No. A12-0501, 2012 WL 6734460 (Minn. Ct. App. Dec. 31, 2012); *Kerr v. Kerr*, No. A12-1663, 2013 WL 1859116 (Minn. Ct. App. May 6, 2013) (removal of PC who was not acting in children's best interest despite absence of a removal term in the appointment order).

In the case of *Schultz v. Ruff*, No. A14-1762, 2015 WL 4715189 (Minn. Ct. App. Aug. 10, 2015), the court of appeals appeared to honor the abuse of discretion standard in the PC appointment order, stating at one point that if the district court had not found the PC's decision in the best interests of the children, then the district court would have also found an abuse of discretion by the PC. Note that this is not the same definition of an abuse of discretion that would be applied to appellate review of district court decision relating to children and parenting time.

Typically a district court is found to abuse its discretion by making findings unsupported by the evidence or improperly applying the law. *Hagen v. Schirmers*, 783 N.W.2d 212 (Minn. Ct. App. 2010). The district court's factual findings are reviewed under a clearly erroneous standard and there is deference to the district court's credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203 (Minn. 1988).

Note also at one point in the *Schultz* decision, the appellate court states "[b]ecause the district court adopted the parenting consultant's order, the parenting consultant's findings are referred to as the district court's findings." *Schultz*, 2015 WL 4715189, at *2. In substance, it would appear that the appellate court is still saying a district court's judgment as to best interests takes precedence over the parties' stipulated abuse of discretion standard.

Practice Tip

It is rare that the scope of authority for an ADR decisionmaker includes the power of enforcement. A limited exception exists with the authority of a neutral in a PTE process to "enforce" an existing order. Minn. Stat. § 518.1751, subd. 1b(a). The PTE neutral may award compensatory parenting time and recommend to the court that the non-complying party pay attorney's fees, court costs, and other costs under Minnesota Statutes section 518.175, subdivision 6(d). PC neutrals are frequently given the same authority. In the PTE and PC processes, decisions may exist which were filed and which may affect the understanding of a current issue. It is sometimes difficult and time-consuming to compile a complete set of PC decisions from one or a series of PTE and PC neutrals. Some of these types of neutrals come from backgrounds other than law and at times it can be uncertain whether a given writing is a decision. PTE and PC neutrals on occasion give guidance and provide coaching.

Related Reading

- The New Minnesota Rule 114 – 14 Questions and Answers Legal QuickSheet, 1st ed., (Minnesota CLE 2023).

8. Does the court have the authority to appoint a parenting consultant over the objection of a party?

Answer

No.

Authorities

- *Szarzynski v. Szarzynski*, 732 N.W.2d 285 (Minn. Ct. App. 2007).

Comment

The parenting consultant (PC) process usually includes the authority to making binding decisions on specified issues. The court does not have the authority to require parties to use a binding Rule 114 ADR process. See Minn. Gen. R. Prac. 114.04(b); but see, Minn. Stat. § 518.1751 (parenting time expedition—binding process limited to parenting time disputes can be required by the court in appropriate cases). In addition, the sole authority for the parenting consulting process is the so-called “wild card” option in Rule 114, which permits parties—not the court—to create an ADR process. Minn. Gen. R. Prac. 114.02(a)(10).

In Minnesota, one should read the order appointing a PC and defining the PC process for the particular case to determine what the PC neutral is to do. PC neutral functions frequently include one or more of the following:

- providing a mediation/arbitration process;
- conducting an investigation and making recommendations or a decision;
- monitoring and managing a progressive parenting situation;
- identifying and acting in the child's interests; and/or
- providing coaching and education on parenting and co-parenting issues.

In addition, the PC appointment might be ongoing during the minority of the child, for a specified period of years, or for only one issue.

The parties have the duty to define the PC process that they wish to use for their particular case. The court has no authority to impose its own definition of the process on the parties. See, e.g., *McGraw v. McGraw*, No. A13-0825, 2014 WL 1875788 (Minn. Ct. App. May 12, 2014) (dispute over whether PC neutral should have the authority to decide a school choice issue); *Marxen v. Jacobs*, No. A12-1817, 2013 WL 4404575 (Minn. Ct. App. Aug. 19, 2013) (dispute over continuing the use of a PC beyond the two years agreed upon by the parties). But see, *Kerr v. Kerr*, No. A12-1663, 2013 WL 1859116 (Minn. Ct. App. May 6, 2013) (court removed PC despite absence of a removal term in the appointment order).

A parenting consultant cannot be appointed by the court without agreement of the parties. At times, a party may be unwilling to agree to the appointment of a PC, and the court finds that the case is using an inordinate amount of court resources. A recent trend involves the court, either by request of a party or sua sponte, appointing a Special Master (“SM”) to serve in a decision-making role similar to that of a PC. See, Minn. R. Civ. Proc. 53.01(a)(3); *Burdette v. Raiche*, A18-0626, Minn. Ct. App. November 5, 2018.

Practice Tip

Common complaints about the PC process include the following:

- One or both parties ask the PC neutral to make many changes in the parenting order rather than help them make the order work smoothly so the process seems ineffective.

- One or both parties do not comply with PC directions and decisions.
- The PC neutral is slow, not available on short notice, or is otherwise not able to respond immediately to issues.
- One or both parties do not want to work with this PC neutral any more or no longer want to use the PC process.
- The PC is not decisive—or alternatively, is more interested in decisions than facilitation.
- The process is too costly and beyond one or both of the parties' means.
- There are still problems with communication and cooperation.

Some of the above complaints can be addressed by the terms of an appointment order; others by educating clients to be realistic about the PC process; and others by determining that there is not a good match between the case and what the PC process involves.

Further Reading

- (AFCC) Guidelines for Parenting Coordination, which can be found in the “Practice Guidelines” section of the website for the Association of (AFCC) [Family and Conciliation Courts].
- In other jurisdictions, a PC process is defined by statute or rule authorizing the court to appoint a special magistrate or special master. An equivalent neutral in Minnesota would be a consensual special magistrate. Minn. Gen. R. Prac. 114.02(2); Minn. Stat. § 484.74 (Second and Fourth Judicial Districts). However, because the CSM process is binding, a court cannot require use of it. Minn. Gen. R. Prac. 114.04(b).
- Another equivalent neutral in Minnesota law would be the appointment of a master pursuant to Minnesota Rule of Civil Procedure 53. Unless the parties consent to using a Master, the court may require use of a master only when an exceptional condition exists or the matters cannot be addressed effectively and timely by an available judge. Minn. R. Civ. P. 53.01. In addition, the court must consider the fairness of imposing the likely expenses on the parties, protect against unreasonable expense or delay, and give the parties an opportunity to object to the appointment. Minn. R. Civ. P. 53.01(c), 53.02(a). The benefit of using Rule 53 as the basis for a PC neutral appointment would be the procedural clarity provided in Rule 53.

Related Reading

- The New Minnesota Rule 114 – 14 Questions and Answers Legal QuickSheet, 1st ed., (Minnesota CLE 2023).

9. How much preparation should an attorney do to prepare for an early neutral evaluation or mediation?

Answer

Enough to move the case forward to partial or full agreement.

Authorities

- Minn. Gen. R. Prac. 114.02(a)(4) (early neutral evaluation is to occur after the case is filed but before discovery is conducted). The core dispute is presented by attorneys and if the neutral's feedback does not resolve the dispute, the neutral helps narrow the dispute and suggests guidelines for managing discovery.

Comment

In family law, early neutral evaluation (ENE) is part of the Early Case Management System deemed a best practice by the Minnesota Supreme Court in 2004. While Rule 114 describes ENE as evaluative, as used in family court the process is expressly fine-tuned to be a confidential hybrid evaluative and facilitative process. Practitioners should review any information and standing orders issued by the district courts in the counties for which they take cases. There are small but significant differences between the county district court practices with regard to certain details (for example: is the date of the initial case management conference (ICMC) deemed to be the date of valuation?). The counties also vary on the court's expectations of the ENE neutrals (for example: is the neutral to provide a summary of agreements reached to the court?).

Historic estimates are that approximately 65–70 percent of the cases participating in family law ENE settle. Use of ENEs has expanded from dissolutions to post-decree cases, initial custody cases based on ROPs, and the like.

The paradigm model of ENE requires the participation of attorneys to help the clients “tell their story” with a focus on relevant information and to enhance the content and durability of agreements reached during the ENE sessions. The thought is that if attorneys provide legal advice to their clients during the ENE session, clients will not change their minds about agreements made in session.

For financial early neutral evaluation (FENE) there is usually only one neutral. For social early neutral evaluation (SENE) there are ideally two neutrals. For cost reasons, in some cases, only one neutral is used for SENE cases or one neutral is used for both FENE and SENE.

Whether FENE or SENE, most family law ENEs are set for approximately three hours. The combined total cost of attorneys and neutrals can be high for the majority of families in the family court system. Nonetheless, the total cost of resolving the case using ENE(s) can be significantly less than a trial, providing that both attorneys and their clients are prepared to be productive.

Not all cases and clients are ready for early resolutions. Readiness, some flexibility, and an ability to see the other side's point of view are basic client characteristics for facilitative processes. Highly complex matters might benefit from formal discovery and expert evaluations before an ADR process is undertaken.

A recent trend is for evaluative mediations, which are very similar to ENEs. Preparation of the client for an evaluative mediation should be like that of an ENE. It is a good practice to prepare the client for any ADR process regarding what to expect, what information to be prepared to share, and the like.

Practice Tip

Preparation with a client for a SENE, a FENE, or an evaluative mediation may include:

- Describing the ENE process and the style of the neutral, if known.
- Educating the client generally about controlling law.
- Eliciting facts from the client which are relevant to the controlling law and helping the client organize those facts. For an FENE, an attorney might rough out a property balance sheet, calculate gross income if there are special issues such as bonuses or overtime, summarize the tracing of a non-marital claim, and estimate various amounts of child support and spousal maintenance. For an SENE, an attorney might make a basic timeline of events relating to the children and family, identify three or four bullet point type themes for a client to particularly keep in mind, and rough out a parenting plan or provide the client with a sample parenting plan.
- Addressing ahead of time things that might be difficult for the client such as embarrassing facts, a disappointing recommendation, emotional behavior from the other side, etc.

Preparation with the opposing attorney for a SENE or FENE may include:

- Early exchange of financial information—this can be done even before the ICMC.
- Communication as to the other side's general ideas on financial and custody issues—which might lead to additional exchange of information.

Preparation with the FENE neutral may include:

- summary of issues;
- balance sheets, income calculations, support worksheets, etc.; and/or
- rough out a financial agreement.

Preparation with the SENE neutral(s) may be done per their request.

Both SENE and FENE neutrals, as well as mediators, should be informed of any characteristics of client or case which will require adaptations such as interpreters, no stairs, more time than is typical, etc.

Further Reading

- Kevin McGrath & Joani C. Moberg, Using Early Neutral Evaluations for Effective Representation, *The Hennepin Lawyer*, Apr. 19, 2007.

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- The New Minnesota Rule 114 – 14 Questions and Answers Legal QuickSheet, 1st ed., (Minnesota CLE 2023).

Child Support

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We would like to acknowledge and thank Theresa Farrell-Strauss as the previous author of this chapter.

Chapter 4

Child Support

Table of Contents

1. How is child support calculated?.....	1
2. Is there a cap on the amount of child support calculated?	3
3. How does the court consider extracurricular expenses, tuition payments at private schools, and the like?	4
4. How is child support set in split-custody situations?	5
5. When are deviations appropriate and how are they determined?.....	9
6. How is child support modified?	11
7. What happens if an obligor is disabled and receives Social Security benefits?	13
8. What are the administrative remedies for the enforcement of child support?	14
9. What is contempt of court for non-payment of child support?.....	16
10. How do you enforce child support for cases where the parents reside in different states?.....	17

1. How is child support calculated?

Answer

Minnesota's child support guidelines are based on an income-shares model. The parents' respective gross incomes are compared proportionately. The Minnesota child support calculator has built in levels of support, based on economic data about the amount of money spent by parents with comparable incomes. The amount determined is split proportionately, based on the parents' respective incomes.

Authorities

- Minn. Stat. § 518A.34 (computation of support).
- Minn. Stat. § 518A.42 (ability to pay; self-support reserve)
- See Minnesota Department of Human Services, Minnesota Child Support Calculator, *available at*
- <www.childsupportcalculator.dhs.state.mn.us>.

Comment

There are three separate components of child support: basic support, medical support, and childcare support. There is a parenting-time adjustment available to reduce basic support, but it does not reduce medical or childcare support. The guidelines provide for deductions for non-joint children and court-ordered spousal maintenance.

The calculator has prompts to give definitions of terms, such as income and potential income. Income is defined expansively to include any forms of period payments. Cash public assistance and other types of public assistance are not income.

When considering social security benefits, Retirement, Survivors, and Disability Insurance ("RSDI") is considered income. Supplemental Security Income ("SSI") is not considered income.

Practice Tip

Minnesota Statutes § 518A.32 addresses potential income using 3 methods:

1. The parent's probable earnings based on employment potential, recent work history, and occupational qualifications in light of the opportunities and earning levels in the community, or
2. The amount of unemployment compensation or workers compensation received, or
3. The amount of income a parent could receive working 30 hours per week at 100% of the current federal or state minimum wage, whichever is higher.

In Minnesota, the minimum wage is \$10.85 per hour. If a parent lives out of state, that state's minimum wage should be used. The statute does not contemplate using a city's minimum wage.

A minimum order of \$50 per month is presumed in most circumstances to be the lowest amount of child support that can be ordered. The minimum order no longer applies when a noncustodial parent is a recipient of general assistance, SSI, TANF, or MFIP. The Court can also find the minimum order does not apply if the noncustodial parent receives no income and "completely lacks the ability to earn income."

One common mistake made by practitioners is in the childcare section of the calculator. If a client receives a childcare subsidy, the entire amount of childcare should be entered, not the copay. The other parent's contribution will be calculated as though that person is being

assessed a copay. Another common mistake is to offset the childcare support against basic support. There is no legal basis to offset childcare support.

If MFIP-cash is being provided, basic support is assigned to the county. If medical assistance is being provided, medical support is assigned to the county. If a childcare subsidy is provided, the childcare support is assigned to the county.

In addition to addressing the medical and dental coverage, it is important to address the uncovered medical and dental expenses.

Self-employed obligors present the greatest challenge for the determination of gross income. Minnesota Statutes § 518A.30 provides that “gross income” is defined as gross receipts, minus costs of goods sold, minus ordinary and necessary expenses required for self-employment. The statute goes on to specifically exclude certain expenses that are allowed by the IRS for tax purposes. Failure to supply financial information justifies an adverse inference when determining gross income. *Spooner v. Spooner*, 410 N.W.2d 412 (Minn. Ct. App. 1987). Opportunity for a self-employed obligor to support him or herself on negligible income is too well known to require exposition. *Ferguson v. Ferguson*, 357 N.W.2d 104 (Minn. Ct. App. 1984).

Often when self-employment income cannot be determined, it is helpful to supply the court with salary survey information from the Minnesota Department of Employment and Economic Development’s website, *available at* <<https://mn.gov/deed/business/locating-minnesota/data/wage-data.jsp>>

Courts can analyze cash flow to determine income. *Coady v. Jurek*, 366 N.W.2d 715 (Minn. Ct. App. 1985).

Minnesota Statutes § 518A.36 provides for a parenting time adjustment for court ordered parenting time.

If parenting time cannot be determined from the existing order, there is a right to modify it. Minn. Stat. §518A.175, subd. 5.

What is next for child support?

Many changes have been enacted from 2022 to 2025 updating the child support guidelines. The guidelines were updated to:

1. Use current economic data to lower child support amounts especially for low-income families and increasing the income cap from \$15,000 per month to \$20,000 per month;
2. Increase the cap for non-joint children from 2 to 6;
3. Apply the deduction for non- joint children for whom the parent does not have a court ordered obligation or custody;
4. Change medical support in substantial ways, including no longer requiring the Court to order private coverage over public coverage, and allowing the child support agencies to administratively turn off medical support despite whether it is ordered as an offset.
5. Create a deviation for out of home placement cases where reunification is the goal; and create a permanent advisory body and a process for routinely updating the guidelines.

Further Reading

- Jane Venohr, Child Support Guidelines and Guidelines Reviews; *State Differences and Common Issues*, 47(3) Fam. L. Q. 327–52 (Fall 2013).

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Minnesota Family Law Financial Deskbook with eFormbook, 3rd ed., (Minnesota CLE Updated 2024).

2. Is there a cap on the amount of child support calculated?

Answer

Yes, the child support calculator has caps for basic support. The maximum monthly gross income is \$20,000 per month.

One child	\$1,839
Two children	\$2,575
Three children	\$2,935
Four children	\$3,170
Five children	\$3,359
Six children	\$3,492

Authorities

- Minn. Stat. § 518A.35, subd. 2 (child support guidelines).
- Minn. Stat. § 518A.35, subd. 3 (income cap on determining child support).
- Minn. Stat. § 518A.35, subd. 4 (more than six children).

Comment

It is extremely common for parents with high income to deviate upward from the guidelines.

Practice Tip

If the parties have more than six joint children, the Court can calculate child support without considering the guidelines. However, support should still be based on the “basic principles encompassed by the guidelines.” Minn. Stat. § 518A.35, subd. 4.

Further Reading

- Most states have a cap between \$20,000–\$30,000 per month. See the Child Support Task Force Report.
- Minnesota Family Law Child Custody Deskbook (Minn. CLE 2024) (see Chapter 15, Child Support).

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Minnesota Family Law Financial Deskbook with eFormbook, 3rd ed., (Minnesota CLE Updated 2024).

3. How does the court consider extracurricular expenses, tuition payments at private schools, and the like?

Answer

Minnesota Statutes § 518A.26, subd. 4, defines “basic support” as an amount ordered for “a child’s housing, food, transportation, and education costs, and other expenses related to the child’s care.” Medical support and childcare support are separately defined.

Minnesota Statutes § 518A.43 addresses deviations. In dissolution proceedings, the standard-of-living factor is significant. For example, if the family supported children in playing hockey during the marriage, there is a good argument for an upward departure from the guidelines, if the parent can afford it.

Authorities

- *McNulty v. McNulty*, 495 N.W.2d 471 (Minn. Ct. App. 1993) (Daughter had private school tuition, dancing lessons, etc. The father admitted he had the ability to pay, but did not think he should pay in excess of the guidelines. The appellate court disagreed based on the argument that the father had the ability to maintain the lifestyle that the child had during the marriage.)

Comment

Even though the courts favor trying to maintain the child’s standard of living, there is a limit. *In re Marriage of Patterson*, 920 P.2d 450, 455 (Kan. Ct. App. 1996) (“No child, no matter how wealthy the parents, needs to be provided more than three ponies.”) Child support should be set at an amount rationally related to realistic needs of children.

Practice Tip

When preparing a case, it’s important to specifically identify the expenses related to the children, such as private school tuition, costs of extracurricular activities, out of pocket medical expenses, etc. Often, these additional expenses can be a reason for a deviation in child support. The Court will need verification of these expenses.

Further Reading

- Laura Raatjes, High Income Child Support Guidelines: Harmonizing the Need for Limits in the Best Interests of the Child, 86 Chi.-Kent. L. Rev. 317 (2011).

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Minnesota Family Law Financial Deskbook with eFormbook, 3rd ed., (Minnesota CLE Updated 2024).

4. How is child support set in split-custody situations?

Answer

Minnesota Statutes § 518A.34 provides a guidelines calculation for split custody cases. The online calculator provides for a parenting time calculation for each child of the parties and the amount of parenting time each child has with each parent.

Scenario: Mom and dad have 3 children: #1 is a 15-year-old girl who will live with Dad 300 days of the year and 65 days with Mom. #2 is a boy who is 7 years old and will live with Mom 200 days of the year and 165 with Dad. #3 is a girl who is 5 years old who will live with Mom 300 days and 65 days with Dad. Dad earns \$6,000 gross per month and Mom earns \$3000 gross per month. Dad covers the medical and dental insurance at a cost of \$350 per month.

Child Support Guidelines Worksheet

Parent A: Dad

IV-D Case Number:

Number of Joint Children: 3

Parent B: Mom

Court File Number:

Date: 8/16/2024

		Parent A	Parent B	Combined
Income	1a. Monthly Income Received	\$6000	\$3000	----
	1b. Child(ren)'s Social Security/Veterans' Benefits Derived From a Parent's Eligibility	\$0	\$0	----
	1c. Potential Income	\$0	\$0	----
	1d. Spousal Maintenance Orders Obligated to be Paid	\$0	\$0	----
	1e. Monthly Gross Income (1a+1b+1c-1d)	\$6000	\$3000	----
Adjustments	2a. Number of Nonjoint Child(ren) without a support order (Maximum number allowed is 6)	0	0	----
	2b. Deduction for Nonjoint Child(ren) without a support order	\$0	\$0	----
	2c. Child Support Order(s) Obligated to be Paid for Nonjoint Child(ren)			----
	3. Parental Income for Determining Child Support (PICS)	\$6000	\$3000	\$9000
	4. Percentage Share of Combined PICS	67%	33%	----
5. Combined Basic Support Obligation		----	----	\$1864

	6. Pro Rata Basic Support Obligation	\$1249	\$615	----
Basic Child Support Obligation	7. Basic Support Obligation After Parenting Expense Adjustment (if applicable)	\$406		----
Child Care Obligation	8. Child Care Support Obligation for Joint Child(ren)			----
Medical Support Obligation	9a. Monthly Cost of Health Care Coverage for Joint Child(ren)	\$350	\$0	----
	9b. Pro Rata Share of Health Care Coverage Costs	\$234	\$116	----
Appropriate Coverage Available	9c. Contribution to Health Care Coverage		\$116	----
	9d. Monthly Cost of Dental Coverage for Joint Child(ren)	\$0	\$0	----
	9e. Pro Rata Share of Dental Coverage Costs	\$0	\$0	----
	9f. Contribution to Dental Coverage			----
	9g. Medical Support Obligation-Appropriate Coverage Available		\$116	----
No Appropriate Insurance Available	10. Medical Support Obligation for Public Coverage			----
Uninsured/Unreimbursed Expenses	11. Share of Uninsured and/or Unreimbursed Medical Expenses	67%	33%	----
	12. Net Child Support Obligation	\$406	\$116	----
Benefits Adjustment	13. Child(ren)'s Social Security/Veterans' Benefits Derived from Parent's Eligibility			----
Computing a Final Obligation	14. Total Child Support Obligation	\$406	\$116	----
	15a. Parental Income for Determining Child Support (PICS)	\$6000	\$3000	

Parenting Expense Adjustment Supplement

	Parent A	Parent B	Combined
1. Number of Annual Overnights for joint child(ren)	176.67	188.33	
2. Percentage of Parenting Time	48%	52%	----

3. Basic Support Obligation	\$1249	\$615	\$1864
4a. Percentage of Adjustment for Parenting Time between 10% and 45%			
4b. Amount of Adjustment for Parenting Time			
4c. Obligation after Parenting Expense Adjustment			
5a. Percentage of Parenting Time is at Least 45.1% for Both Parents			
5b. Each Parent's Percentage Share of Combined PICS			
5c. Each Parent's Pro Rata Basic Child Support Obligation			
5d. Obligation After Parenting Expense Adjustment			
6a. Obligation after Parenting Expense Adjustment Based on the Number of Annual Overnights	\$406		----
6b. Greater than 55% Parenting Time Adjustment			----

Authorities

- Minn. Stat. § 518A.36
- Minn. Stat. § 518A.34.

Comment

The Court can only consider court ordered parenting time when calculating the guidelines support obligation. However, the Court can consider a deviation in support if the parties have an informal agreement for support.

If there is court ordered parenting time of more than 55%, there is a rebuttable presumption that the parent with that time won't pay support to the other parent. Minn. Stat. § 518A.26. The presumption can be overcome if it creates an unjust or inappropriate result.

Practice Tip

If counsel is arguing that the parties have an informal agreement for child support, it is much more persuasive that the agreement has been consistently in place for a specific period prior to the hearing. The Court is less likely to consider prospective informal agreements.

The parenting time expense adjustment was previously calculated in percentages. The child support calculator can still calculate support if an old order only addresses parenting time in terms of a percentage. However, the parties should work to calculate the number of overnights.

The statute also refers to “overnight equivalents.” However, most courts focus on the number of nights a child sleeps at each parent’s home. There is no good case law that defines “overnight equivalents,” so that should generally be avoided.

Further Reading

- Minnesota Family Law Child Custody Deskbook (Minn. CLE 2024) (*see* Chapter 15, Child Support).

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Minnesota Family Law Financial Deskbook with eFormbook, 3rd ed., (Minnesota CLE Updated 2024).

5. When are deviations appropriate and how are they determined?

Answer

The Minnesota Legislature recognized that the judiciary must be able to exercise its discretion and not mechanically apply the child support guidelines in every case. Minnesota Statutes § 518A.43, subdivision 1 states that “deviation [...] is intended to encourage prompt and regular payments of child support and to prevent either party from living in poverty.” The statute continues with factors to be considered:

1. all earnings, income, circumstances, and resources of each parent, including real and personal property [...];
2. the extraordinary financial needs and resources, physical and emotional condition, and educational needs of the child to be supported;
3. the standard-of-living which the child would enjoy if the parents were currently living together, but recognizing that the parents now have separate households;
4. whether the child resides in a foreign country for more than one year that has substantially higher or lower cost-of-living than this country;
5. which parent receives the income tax dependency exemption and the financial benefit that the parent derives from it;
6. the parents' debts as provided in subdivision 2; and
7. the obligor's total payments for court-ordered child support exceed the limitations in section 571.922. [65% is maximum collection amount]; and
8. in cases involving child protection, whether ordering a parent to contribute to the costs would compromise a parent's ability to reunify with their child.

Minn. Stat. § 518A.43, subd. 1(1)–(8).

If, after payment of income and payroll taxes, the obligor can establish that he or she nets less than the self-support reserve (currently 120 percent of the federal poverty amount), a downward deviation may be allowed.

When one party has parenting time between 10 and 45 percent, and there is a disparity of income between the parties that would make payment of basic support detrimental to the child, zero support may be ordered.

Authorities

- Minn. Stat. § 518A.43.
- Minn. Stat. § 518A.43, subd. 1(1)–(7).
- “If the child support payments are assigned to the public authority [...], the court may not deviate downward from the child support guidelines unless the court specifically finds that the failure to deviate downward would impose an extreme hardship on the obligor.” Minn. Stat. § 518A.43, subd. 4.

Comment

For obligors, earning \$9–\$15 per hour in particular, the guidelines usually bring their income down to 120 percent of the federal poverty amount. The statute clearly says one of the reasons to deviate is to prevent either parent from living in poverty.

Practice Tip

It is good practice to prepare an argument for deviation, depending on your facts. Judicial officers do not generally deviate unless it is requested. Frankly, most self-represented parties do not know to ask about deviation.

Although not explicitly stated in the statute, the overarching concern is the best interest of the child. Parties should focus on how a deviation would be in the child's best interest.

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Minnesota Family Law Financial Deskbook with eFormbook, 3rd ed., (Minnesota CLE Updated 2024).

6. How is child support modified?

Answer

The party seeking modification must show a change of circumstances which makes the existing terms unreasonable and unfair. Changed circumstances include: substantially increased or decreased income of the obligor or obligee; substantially increased or decreased need of an obligor or obligee; receipt of public assistance; a change in the cost-of-living for either party; extraordinary medical expenses; a change in the availability or cost of health insurance; the addition or substantial change in the cost of work or school related childcare expenses; and the emancipation of a child.

There is a presumption of a substantial change in circumstances if the application of the guidelines to the current circumstances results in a calculation that is at least 20 percent and at least \$75 per month higher or lower than the existing order. If that presumption is met, the existing order is also presumed to be unfair.

The modification can only be granted as of the date of service of the motion, unless the parties agree to an earlier date.

If a child has been integrated into an obligor's home with the consent of the obligee, satisfaction may apply to reduce arrears retroactively.

If an obligor takes on the responsibility of additional children, that is not a basis for reduction of child support. However, if another factor applies, such as a reduction in income, then the obligor receives credit for non-joint children under a new guideline calculation.

Authorities

- Minn. Stat. § 518A.39 (modification of support).
- Minn. Stat. § 518A.38, subd. 3 (satisfaction).
- Minn. Stat. § 518A.33 (deduction from income for non-joint children).
- Minn. Stat. § 518A.32 (potential income).
- Minn. Stat. § 518A.40 (change in childcare expenses).

Comment

Child support agencies can modify childcare support back to an earlier date if childcare expenses reduced or terminated, and the facts are clear. Otherwise, a court order is needed.

If there is no parenting plan, and the existing order gave a parenting time adjustment, there is a presumption the credit will continue if there is a request to modify the child support.

Practice Tip

Counsel for parties should consider a future modification when initially establishing support. Ensure that the court's findings of facts include all relevant information about each parent's current circumstances. This will help prove a future change in circumstances.

If a parent is indigent and the court is considering not ordering a child support contribution, the court can either set a \$0 support order or reserve the issue. A \$0 order is a child support order and needs to meet the burden for a modification. "Modifying" a reserved order does not require meeting the modification standard. Either position may be beneficial depending on the parties' circumstances. A \$0 support order is suggested when circumstances underlying the order are likely to remain, for example, a physical disability of the parent. However, a reserved order is suggested when the circumstances are transient, for example a parent's incarceration.

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Minnesota Family Law Financial Deskbook with eFormbook, 3rd ed., (Minnesota CLE Updated 2024).

7. What happens if an obligor is disabled and receives Social Security benefits?

Answer

If an obligor is disabled and receives Social Security (including RSDI) benefits, there is usually a separate benefit for the child payable to the obligee (custodial parent). The child support guidelines calculation allows for a credit of the benefit amount against the amount of the support obligation. There is a dollar-for-dollar reduction in the child support amount. In order for the child support order to be modified, a court order is needed. When child support agencies become aware of the receipt of Social Security benefits, the case is reviewed for modification. Alternatively, obligors may bring motions. In either instance, the court recalculates support according to the Minnesota Child Support Guidelines. Usually, there is a reduction in the amount of child support.

The more complex issue is when a lump sum is awarded to the obligor and to the obligee on the child's behalf. In *Dakota County v. Gillespie*, 866 N.W.2d 905 (Minn. 2015), the Minnesota Supreme Court ruled that a motion to modify was required prior to the receipt of the lump sum derivative benefit in order to receive a credit toward existing arrears. This decision was a clear reversal of prior law and practice.

Authorities

- Minn. Stat. § 518A.31.
- Minn. Stat. § 518A.39.
- *Holmberg v. Holmberg*, 578 N.W.2d 817 (Minn. Ct. App. 1988), aff'd, 588 N.W.2d 720 (Minn 1999).

Comment

The Minnesota Supreme Court decision in *Gillespie* makes it very difficult, if not impossible, for an obligor to satisfy unpaid child support during a period of disability. It can take months, if not longer, to be awarded Social Security benefits. Once approved, there is a lump-sum payment back to the time of application and an ongoing monthly benefit. The obligee also receives a lump sum award and the ongoing benefit on behalf of the child(ren). Based on *Gillespie*, the obligee is entitled to the arrears, unless the obligor filed a motion to modify prior to the receipt of Social Security. The court mechanistically interpreted Minnesota Statutes § 518A.39, which does not allow for retroactive modification. Prior to this decision, credit was given for lump-sum payments.

Practice Tip

A disabled parent can receive either RSDI, SSI, or a blend of both, depending on their work history. As stated above, RSDI is considered income for the child support calculation. SSI is not considered income.

If an obligor is disabled and unable to pay child support, he or she should immediately file a motion to modify and specifically request credit if derivative benefits are eventually provided. Also, Minnesota Statutes § 518A.39, subdivision 7 allows for parties to agree to a modification date prior to the date of service of the modification.

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Minnesota Family Law Financial Deskbook with eFormbook, 3rd ed., (Minnesota CLE Updated 2024).

8. What are the administrative remedies for the enforcement of child support?

Answer

The public authority, which is the entity responsible for child support enforcement at the county level, has a long list of administrative remedies available for the enforcement of child support orders.

Income withholding, Minn. Stat. § 518A.53, is the method used to collect about 70 percent of child support paid in this state.

Revenue recapture, Minn. Stat. § 518A.61, allows collection of arrears from state tax returns, property tax refunds, or political contribution refunds if the obligor is in arrears or if there is a judgment entered and docketed.

Federal intercept, 45 C.F.R. § 303.72, allows collection of federal tax refunds if public assistance arrears are at least \$150, and non-public assistance arrears are at least \$500. Public assistance arrears are paid first, and then non-public assistance arrears are paid.

Driver's license suspension, Minn. Stat. § 518A.65, provides for the suspension of a driver's license if the obligor is delinquent in an amount greater than three times the monthly child support due, and is not in compliance with a written payment plan. The obligor is given notice prior to the suspension and has the opportunity to enter a payment plan, or be heard by the court. If the suspension occurs, the obligor may move the court for reinstatement of his or her license. The court can set a new payment plan.

Occupational license suspension, Minn. Stat. § 518A.66, applies to any obligor who is licensed in Minnesota or another state, the child support arrearage is greater than three times the monthly child support due, and the obligor is not in compliance with a written payment plan. The statute specifically outlines the process for suspension of an attorney's license.

Motor vehicle lien, Minn. Stat. § 518A.67, provides for a lien on motor vehicles for child support debt reduced to judgment. The process is similar to driver's license and occupational license suspension.

Recreational license suspension, Minn. Stat. § 518A.68, requires a motion and the opportunity to be heard. The arrears must be six times the monthly child support due. The use of other enforcement mechanisms is an additional prerequisite. This remedy is really judicial, not administrative.

Publication of names, Minn. Stat. § 518A.74, allows the Minnesota Department of Human Services ("DHS") to publish the names of obligors who are at least \$10,000 in arrears, not in compliance with a payment agreement, cannot be located, and have not made payment in the past year. This remedy has not been used by DHS for several years.

Beginning August 1, 2022, interest no longer accumulates on past, current, or future child support. Minn. Stat. § 548.091, subd. 1(a).

Passport Denial. 42 U.S.C. §§ 652(k), 654(31). There is no state statute on this topic. When an obligor is more than \$2,500 in arrears, and has stopped making payments on them, the agency can ask the State Department to deny an application for a new passport or renew an old one. The state child support office has the authority to decide contests, but the counties do not. The contact at the state is 651-431-4400.

Student loan denial, Minn. Stat. § 518A.69, allows denial of state grants if an obligor is more than 30 days in arrears. The report of child support delinquency is made to the Minnesota Higher Education Service.

Financial institution data match ("FIDM"), Minn. Stat. § 13B.06, allows state agencies to freeze assets in financial institutions for 45 days. The obligor must be more than five months in arrears of the monthly amount due and not in compliance with a payment plan. Obligor are matched electronically with records from financial institutions, based on their names, dates of birth, and Social Security numbers. There is a litany of exemptions and the right to a hearing before the funds are released to the public authority to be paid toward arrearages.

Authorities

- Minn. Stat. § 270A (revenue recapture).
- Minn. Stat. § 136A.121, subd. 2 (state grant program).
- Minn. Stat. §§ 550.37, 552.01–552.06, 528.091, 256.978 (all relevant to FIDM).

Comment

Child support agencies usually exhaust relevant administrative remedies prior to bringing a contempt action. Some of the remedies are highly automated, such as income withholding. The agencies receive information about employment called “new hire reports” from the state. The state child support computer, called PRISM, automatically generates income-withholding to the employer. Agencies have the ability to suppress some of the administrative remedies.

Practice Tip

Review Minnesota Statutes § 518A.65 for the different procedures for driver’s license suspension by the public authority or by the obligee.

Some counties changed their contempt practice during the pandemic and use the practice much more infrequently. Contact the county that is enforcing the child support order to see if the public authority is regularly bringing contempt actions. If not, a private contempt action can be considered.

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
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- Minnesota Family Law Financial Deskbook with eFormbook, 3rd ed., (Minnesota CLE Updated 2024).

9. What is contempt of court for non-payment of child support?

Answer

If an obligor is 90 days delinquent in his or her child support obligation, the remedy of civil contempt of court is available. The purpose of civil contempt is not to punish, but to induce compliance with the court's order for support. The contemnor (obligor) must be personally served and given the opportunity to be heard. The first hearing is referred to as a "*Hopp* hearing." To be found in contempt, the obligor must be aware of the order and have the ability to comply with the order to a greater extent than done. The court must also find that confinement is likely to produce compliance. With the contempt finding, the court enters a sentence up to 180 days, but stays imposition with a purge-requirement. The purge may be the court-ordered support or a lesser amount, or even non-monetary such as job search. The contemnor is given the opportunity to comply with the purge requirement. If he or she does not comply, there is a second stage hearing called a "*Mahady* hearing." There is a right to counsel because of the possibility of incarceration. Practices vary between counties as to when a public defender is appointed for indigent contemnors. The contemnor is entitled to testify as to why he or she did not comply. It is proper to look beyond the contemnor's immediate earnings and disregard a willful inability to pay. If the court determines that the contemnor did not have a legitimate excuse for non-payment, the stay is revoked and the sentence is imposed. The contemnor must be given the "keys to the jailhouse door," which is an amount of money to be paid to get out of jail. If the contemnor is released but does not fully comply with the purge, the court has the authority to continue the matter until all arrears are paid. Practically, most courts look for a shorter period of compliance.

Authorities

- Minn. Stat. § 518A.72.
- Minn. Stat. § 588.
- Minnesota General Rules of Practice.
- *Hopp v. Hopp*, 156 N.W.2d 212 (Minn. 1968).
- *Mahady v. Mahady*, 448 N.W.2d 888 (Minn. Ct. App. 1989).
- Mower County Human Services o.b.o. *Swancutt v. Swancutt*, 551 N.W.2d 219 (Minn. 1996).

Comment

For obligors who are unemployed, the main issue is the willfulness of the unemployment. There are a variety of facts to consider: education, past employment history, health, criminal record, lifestyle, and the credibility of witnesses.

Practice Tip

The obligor should be required to complete a financial statement to prove inability to pay. An order to show cause can be used to compel the production of financial evidence. Bank records can also be subpoenaed to see the deposits and withdrawals from financial accounts.

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
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- Minnesota Family Law Financial Deskbook with eFormbook, 3rd ed., (Minnesota CLE Updated 2024).

10. How do you enforce child support for cases where the parents reside in different states?

Answer

The Uniform Interstate Family Support Act (UIFSA) has been adopted in all 50 States. Minnesota's version is found at Minnesota Statutes chapter 518C. Minnesota adopted the 2008 version of the uniform law. The purpose of the uniform law is to provide for proceedings to establish, modify, or enforce child support and establish paternity. UIFSA does not address custody or parenting time. There are certain concepts essential to UIFSA, including:

1. Long arm jurisdiction. If a parent and child live in Minnesota, and Minnesota has long arm jurisdiction over the other parent in a different state, child support can be established in this state. See Minnesota Statutes § 818C.201 for bases for jurisdiction over a nonresident. (Note, if a child is conceived in Minnesota as a result of sexual relations with a man who is not a resident of Minnesota, there is long arm jurisdiction over the man residing out of the state. The conception in the state provides a sufficient nexus to require him to defend himself in a lawsuit here.) If there is a hearing in the expedited process in Minnesota, the parent in the other state can appear by phone. A Minnesota order can be enforced by direct income withholding to an employer in another state.
2. Initiation of action in another state. If Minnesota does not have long arm jurisdiction over the nonresident, a petition can be sent to the other state. Minnesota Statutes § 518C.401 explains the petition process and Minnesota Statutes § 518C.304 outlines all of the duties and responsibilities of the initiating jurisdiction. Minnesota Statutes § 518C.305 outlines the duties and powers of the responding tribunal.
3. Continuing exclusive jurisdiction (CEJ). Perhaps the most important concept of UIFSA is that only one state has CEJ. Minn. Stat. § 518C.205. Once a state has CEJ, it continues as long as it remains the residence of the obligor, the obligee, or the child for whose benefit the order was issued. When a state has CEJ, it has the controlling order and retains the right to modify it.
4. Registration for enforcement. If an order is entered in State A, and the obligor moves to State B, State A can ask State B to register the order for enforcement only. Minn. Stat. §§ 518C.601– 518C.608. The obligor has the opportunity to object for limited reasons outlined in Minnesota Statutes § 518C.607. Once registered, the order is enforceable in the same manner as an order issued in the same state. However, the order cannot be modified.
5. Registration for modification. Minnesota Statutes § 518C.611 outlines when a state may modify an order from another state:
 - a) child, obligee, and obligor do not reside in the issuing state;
 - b) the party seeking modification is not a resident of the state where it is being registered; or
 - c) one of the parties is subject to the personal jurisdiction of this state and all of the parties have filed consents for this tribunal to modify the order.

Once modified, the modifying state has CEJ.

Authorities

- Minn. Stat. § 518C.

Comment

A child support order from a different state can be administratively enforced, or it can be registered in the state where the obligor resides for enforcement only or for modification.

Practice Tip

County child support offices routinely initiate and respond to UIFSA petitions in all 50 states and from certain countries. *See* Chapter 11, Interstate and International Issues, *infra*. Likely, this is the best resource for the majority of clients. The child support agencies are able to use all their enforcement remedies in the state where the obligor resides. A client loses control on the available recourse, but it is much less costly than hiring counsel in the state where the child resides.

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- Minnesota Family Law Financial Deskbook with eFormbook, 3rd ed., (Minnesota CLE Updated 2024).

Agreements Between Married and Unmarried Couples

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Chapter 5

Agreements Between Married and Unmarried Couples

Table of Contents

1.	What are antenuptial, postnuptial, and cohabitation agreements?.....	1
2.	What are the procedural fairness requirements for an antenuptial agreement to be enforceable?	3
3.	What are the procedural fairness requirements for a postnuptial agreement?	5
4.	What are the substantive fairness requirements for an antenuptial and postnuptial agreement to be enforceable?	6
5.	What is required for a cohabitation agreement to be enforceable?	8
6.	How do antenuptial, postnuptial or cohabitation agreements get resolved if the parties do not agree on their application?.....	9
7.	How do you amend or revoke an antenuptial agreement?	10

1. What are antenuptial, postnuptial, and cohabitation agreements?

Answer

An antenuptial agreement is a contract between two individuals of legal age in contemplation of marriage to set forth their respective rights with respect to the division of assets and income upon the dissolution of their marriage or the death of either party. A postnuptial agreement is a contract between two individuals of legal age after they have been legally married to set forth their respective rights with respect to the division of assets and income upon the dissolution of their marriage or the death of either party. A cohabitation agreement is a contract between two parties, who are not married, to set forth their respective rights to assets and income after the termination of their relationship.

Authorities

- Minn. Stat. § 519.11 (antenuptial agreements and postnuptial agreements).
- Minn. Stat. §§ 513.075, 513.076 (cohabitation agreements).

Comment

Antenuptial agreements, postnuptial agreements, and cohabitation agreements play an important role in establishing parties' rights to income, assets, and debts as a result of their relationship. There are very key distinctions between the three types of agreements, both procedurally and substantively, which are discussed in this material.

An antenuptial agreement allows parties to establish their rights prior to getting married with respect to the division of their income, assets, and debts which is often an important consideration for the parties prior to entering into marriage. Antenuptial agreements frequently address the division of assets, debts, and income both at the time of the dissolution of marriage and the death of a party. The agreement will typically define what is to be considered nonmarital property, which will typically be awarded to the party designated to be awarded it in the agreement, and marital property, which will typically be divided between the parties. Antenuptial agreements cannot address custody, parenting-time, or child support issues.

Postnuptial agreements allow parties to establish their rights to income, assets, and debts after they are married. Postnuptial agreements allow parties to address both financial issues occurring as a result of the dissolution of a marriage and upon the death of a party. Postnuptial agreements allow parties to define what will be considered nonmarital property, typically awarded to the party designated in the agreement, and marital property, typically divided between the parties. There are extra procedural safeguards for a postnuptial agreement that are not present for an antenuptial agreement. Postnuptial agreements cannot address custody, parenting time, or child support.

Cohabitation agreements are contracts between parties who live together but are not married. The parties can establish how their assets will be divided upon the ending of their relationship and whether either party will pay any support to the other party, often referred to as "palimony." Cohabitation agreements cannot address issues of custody, parenting time, or child support if the parties have children. Rather, those issues would have to be addressed as part of a paternity, custody, or child support proceeding.

Practice Tip

Be careful to select the correct agreement for the parties' situation. If the parties do not intend to get married, but want to contract with respect to their income, assets, and debts, then a cohabitation agreement is appropriate. If the parties are intending to get married, then they should use an antenuptial agreement. If the parties are already married, then they should use a postnuptial agreement. The laws are different for all three of these types of agreements, so make sure that the parties understand the contract they are entering into and the consequences both of entering into it and not entering into it.

Related Reading

- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Minnesota Family Law Financial Deskbook with eFormbook, 3rd ed., (Minnesota CLE 2024).

2. What are the procedural fairness requirements for an antenuptial agreement to be enforceable?

Answer

The procedural fairness requirements for an antenuptial agreement from and after August 1, 2024, are: (1) full and fair disclosure of the current income and property of each party; (2) each party has a meaningful opportunity to consult with independent legal counsel of the party's choosing; (3) the agreement is in writing, executed in the presence of two witnesses, and acknowledged by the parties before a person authorized to administer an oath under the laws of the State of Minnesota; (4) the agreement is entered into voluntarily and free of duress; and (5) the agreement is entered into and executed no less than seven days before the marriage. The full and fair financial disclosure requirement is defined as: (1) each party has provided a reasonably accurate description of all material facts of their income; (2) each party has provided good faith estimates of the value of their property; and (3) each party has disclosed the basis for their disclosures. The full financial disclosure requirement cannot be waived.

If the antenuptial agreement was executed prior to August 1, 2024, there are currently two different sets of procedural fairness requirements in Minnesota, one for Agreements covering nonmarital property, which are covered by Minn. Stat. § 519.11, and another for marital property, which is covered under common law (i.e. *Kremer v. Kremer*, 912 N.W.2d 617 (Minn. 2018)). The statutory procedural fairness requirements under Minn. Stat. § 519.11 for Agreements covering nonmarital property are: (1) there must be full and fair disclosure of the parties' earnings and property; (2) the parties must have had the opportunity to consult with legal counsel of their own choice; (3) the agreement must be in writing; (4) the agreement must be executed in the presence of two witnesses; (5) the agreement must be acknowledged by the parties executing the same before an officer or person authorized to administer an oath under the laws of Minnesota; and (6) the agreement must be entered into and executed prior to the day of solemnization of the marriage. The common law procedural fairness requirements under *Kremer* for Agreements covering marital property are: (1) whether there was fair and full disclosure of the parties assets; (2) whether the agreement was supported by adequate consideration; (3) whether both parties had knowledge of the material particulars of the agreement and how those provisions impacted the parties' rights in the absence of the agreement; and (4) whether the agreement was procured by an abuse of fiduciary relations, undue influence, or duress. Under the common law procedural fairness test, the opportunity to consult with independent legal counsel is a relevant factor, but is not determinative of whether an agreement is procedurally fair.

Authorities

- Minn. Stat. § 519.11, subd. 1b.
- *Siewert v. Siewert*, 691 N.W.2d 504, 505 (Minn. Ct. App. 2005).
- *Pollock-Halvarson v. McGuire*, 576 N.W.2d 451 (Minn. Ct. App. 1998).
- *Rudbeck v. Rudbeck*, 365 N.W.2d 330 (Minn. Ct. App. 1985).
- *Hill v. Hill*, 356 N.W.2d 49 (Minn. Ct. App. 1984).
- *Marnach v. Marnach*, No. A09-379, 2009 WL 4573847 (Minn. Ct. App. Dec. 8, 2009).
- *Kremer v. Kremer*, 912 N.W.2d 617 (Minn. 2018).

Comment

Minnesota courts require strict compliance with the procedural fairness requirements. There is no leeway with respect to compliance. The easiest way to invalidate an antenuptial agreement is to show noncompliance with one of the procedural fairness requirements. The practitioner should review the statute and the case law carefully to make sure there is strict compliance with the procedural fairness requirements.

The practitioner should make sure that they are familiar with the new procedural fairness requirements for antenuptial agreements, particularly the new requirement that the agreement must be signed at least seven days before the wedding and the more stringent financial disclosure requirements.

Practice Tip

- The attorney drafting the antenuptial agreement can protect the enforceability of the document with respect to the procedural fairness requirements in a number of ways.
- With respect to full and fair disclosure of the parties' earnings and property, it is highly recommended the parties attach a financial statement to the antenuptial agreement listing their assets, liabilities, and income. The parties can go even further and attach copies of bank statements, investment account statements, retirement statements, and other documents showing value, although this would be beyond what would typically be considered reasonable. The practitioner should at the very least have copies of these documents in the file should a question come up at the time of enforcement about the financial disclosure. The parties should also make disclosure of their financial circumstances well in advance of the execution of the agreement so that both parties have adequate time to study the documents and ask any questions that may arise.
- It is recommended both parties actually consult with an attorney as part of an antenuptial agreement. To be clear, the statute only requires the parties have the ability to consult with an attorney of their choice, but to protect the enforceability of the agreement it is better if both parties are represented. It is recommended that the parties have both a family law attorney and an estate attorney review the agreement, as these documents typically impact both areas of the law. Also, make sure that both parties receive the agreement far enough in advance of the marriage date so that the parties' meetings with their respective attorneys are meaningful. Giving a party the agreement eight days before the marriage does not provide a meaningful opportunity to consult with an attorney. Although there is no set deadline in the statute or case law for the amount of time that the agreement needs to be received by a party prior to the marriage to give them adequate time to consult with an attorney, it is recommended that a party be given as much time as possible.
- An antenuptial agreement must be in writing and executed prior to the parties' marriage. The courts cannot enforce an oral agreement. The written agreement must be executed in the presence of two witnesses and must be acknowledged under oath. It is not recommended that one of the witnesses also be the notary. Although this may not be fatal to the agreement, it is not a best practice. These requirements are absolute and cannot be waived.
- It is also strongly recommended that the consideration for the agreement be spelled out in the agreement. While the marriage itself is consideration for the agreement, it is best to list out additional consideration that is provided to address any claims that the agreement is one-sided and unconscionable.

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- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
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3. What are the procedural fairness requirements for a postnuptial agreement?

Answer

The procedural fairness requirements for a postnuptial agreement are the same as those for an antenuptial agreement, except that there are two additional requirements: (1) both parties must be represented by attorneys; and (2) the agreement is presumed unenforceable if either party commences a marital dissolution proceeding within two years of the execution, unless the party seeking enforcement can prove the agreement is fair and equitable.

Authorities

- Minn. Stat. § 519.11, subd. 1d.

Comment

The additional procedural fairness requirements for a postnuptial agreement are absolute and cannot be waived. There must be compliance.

Practice Tip

Both parties must find their own independent attorneys for the postnuptial agreement. It is recommended that the parties and attorneys discuss the agreement before it is drafted to go over the terms and the needed financial documents to assess the agreement.

The parties cannot waive the provision for postnuptial agreements that provides it is rebuttably presumed to be unenforceable if either party commences a marital dissolution proceeding within two years of the execution of the agreement. The attorneys should talk with the parties to see if a marital dissolution proceeding is imminent. If it is, a postnuptial agreement may not be the right course of action for the parties.

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- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Minnesota Family Law Financial Deskbook with eFormbook, 3rd ed., (Minnesota CLE 2024).

4. What are the substantive fairness requirements for an antenuptial and postnuptial agreement to be enforceable?

Answer

Substantive fairness review for Antenuptial Agreements executed from and after August 1, 2024, requires that the Court determine whether all or part of the agreement is substantively unfair as to be unconscionable to either party by the agreement's terms or as the result of drastically changed circumstances originally not foreseen when the agreement was created, such that enforcement would no longer comport with the reasonable expectations of the parties at the time that the parties executed the agreement.

For antenuptial agreements executed prior to August 1, 2024, substantive fairness analysis occurs both at the time of execution of the contract and at its enforcement. At enforcement, the question is whether the circumstances have changed in a way not foreseeable to the parties when they entered into the contract, rendering the contract so one-sided as to be unconscionable at enforcement. At the time of execution, the court will look at whether there was adequate consideration and whether it was unconscionable at that time.

Authorities

- Minn. Stat. § 519.11, subd. 1c.
- *McKee-Johnson v. Johnson*, 444 N.W.2d 259 (Minn. 1989).
- *In re Estate of Kinney*, 733 N.W.2d 118 (Minn. 2007).
- *Hill v. Hill*, 356 N.W.2d 49 (Minn. Ct. App. 1984).
- *Holmes v. Holmes*, No. A11-2273, 2012 WL 4052543 (Minn. Ct. App. Sept. 17, 2012).
- *Marnach v. Marnach*, No. A09-379, 2009 WL 4573847 (Minn. Ct. App. Dec. 8, 2009).

Comment

Substantive fairness is an amorphous concept, but it is not a question of equity as it pertains to antenuptial agreements. The question of substantive fairness for antenuptial agreements is: Have the parties' intentions become so frustrated from the time of execution to the time of enforcement that it would be unconscionable to enforce the agreement? This standard is very high. The unconscionability is not to be measured by whether the antenuptial agreement comports with the division of assets, liabilities, and income as set forth in Minnesota statutes. The very purpose of antenuptial agreements is to avoid the division of assets and income as set forth in the marital dissolution statutes, which is now included in the antenuptial agreement statute. Keep in mind that when looking at adequate consideration under the common law procedural fairness test that the court may compare what is provided in the agreement versus what would be received in the absence of the agreement.

When it comes to postnuptial agreements, the substantive fairness standard is the same as it is for antenuptial agreements.

The new statutory law for antenuptial and postnuptial agreements expressly allows for parties to agree to provisions regarding spousal maintenance. When it comes to spousal maintenance, there has historically been a higher level of protection and analysis of substantive fairness. Unconscionability as applied to maintenance agreements exists when enforcement of the terms of the agreement results in a payor-spouse having insufficient property to provide for his or her reasonable needs and who is otherwise unable to support him or herself through appropriate employment. A maintenance award is unenforceable if it would provide a standard of living far below that which was enjoyed both before and during the marriage.

Practice Tip

A few tips with respect to substantive fairness are as follows.

- Do not make these agreements so one-sided that they become unconscionable. The attorney is not doing the client a service by providing that all of the premarital assets and assets accumulated during the marriage are one parties' nonmarital property and not subject to division. There must be consideration to both parties as part of these contracts.
- Try to list the foreseeable future circumstances of the parties. For instance, are they planning to have children, and if so how many? Will one of the parties give up their career to stay home with the child(ren) or for other reasons? Is this a second marriage, and if so, are there adult children to whom one of the parties will be gifting or transferring assets during the marriage? Does either party have health issues that require special attention? Will one party receive a significant inheritance during the marriage? The attorney should talk directly with the client to determine the facts of their case so that as many of the foreseeable future events as possible can be addressed.
- Use percentages on the division of assets so that the asset award increases or decreases consistent with the market or other factors impacting value.
- When it comes to spousal maintenance, tread very carefully. Percentages of income can be a solution, although our law does not favor spousal maintenance awards stated as a percentage. Unless it is a second marriage of two financially established individuals, it may be best to reserve the issue of spousal maintenance. If the issue of spousal maintenance is not reserved, make sure there is a severability clause in the agreement so that the entire agreement is not held unenforceable if the court finds the spousal maintenance provision to be unenforceable.

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5. What is required for a cohabitation agreement to be enforceable?

Answer

The agreement must meet the basic requirements for a contract, including, offer, acceptance, and consideration. The contract must be in a written document, signed by the parties to the contract, and enforcement must not be sought until after termination of the relationship.

Authorities

- Minn. Stat. §§ 513.075, 513.076.
- *In re Estate of Palmen*, 588 N.W.2d 493 (Minn. 1999).
- *Roatch v. Puera*, 534 N.W.2d 560 (Minn. Ct. App. 1995).

Comment

Cohabitation agreements must strictly comply with the requirements of the statute of frauds. Specifically, the agreement must be in writing and there must be adequate consideration for both parties in entering into the agreement. Finally, the court cannot enforce the agreement until the parties' relationship is terminated.

Practice Tip

In drafting a cohabitation agreement, it is recommended that both parties at the very least receive the monies they contributed to the assets of the relationship. By way of example, if the parties own a house together then each should receive the money they put in for the down payment or used to pay down the principal owing on the home during the relationship. Similarly, if the parties are jointly contributing to an investment or retirement account, they each should receive the monies they contributed.

The parties can negotiate for one party to pay the other party support after the relationship ends, which is commonly referred to as "palimony." The only way a party can receive this type of support in Minnesota is if there is a written contract that provides for it. There is no common law right to support from a nonmarried individual as a result of their relationship.

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- Minnesota Family Law Financial Deskbook with eFormbook, 3rd ed., (Minnesota CLE 2024).

6. How do antenuptial, postnuptial or cohabitation agreements get resolved if the parties do not agree on their application?

Answer

The parties have to go to court to determine the enforcement of these agreements if they cannot agree to them.

Authorities

- Minn. Stat. § 519.11, subds. 1a(d), 5.
- *McKee-Johnson v. Johnson*, 444 N.W.2d 259 (Minn. 1989).
- *In re Estate of Kinney*, 733 N.W.2d 118 (Minn. 2007).
- *Hill v. Hill*, 356 N.W.2d 49 (Minn. Ct. App. 1984).

Comment

With respect to antenuptial agreements, the burden is on the party contesting the antenuptial agreement to prove that it does not meet the procedural and substantive fairness requirements. The agreement itself is prima facie proof of the matters acknowledged in the document.

With respect to postnuptial agreements, there is a rebuttable presumption that the agreement is unenforceable if a divorce is commenced within two years of its execution. Thus, within the first two years the burden is on the party seeking to enforce the postnuptial agreement to prove it is fair and equitable. After the two-year period passes, the burden is on the party contesting the postnuptial agreement to prove it is substantively or procedurally unfair. The agreement itself is prima facie proof of the matters acknowledged in the agreement.

With respect to cohabitation agreements, the burden is on the party contesting the agreement to show that it does not comport with the statute of frauds and contract law generally. If the contract is in writing and enforcement is sought after the termination of the relationship, then the party contesting it must show that there was no offer, acceptance, or consideration. The contesting party can also show duress, coercion, unconscionability, and other defenses to a contract.

Practice Tip

These agreements are typically difficult to contest if drafted properly. There are few appellate cases in Minnesota where one of these agreements have not been upheld. The vast majority of the cases result in enforcement.

One key to remember is that fairness is not measured by what would have happened under the law if the antenuptial agreement did not exist. Rather, fairness is to be measured for antenuptial agreements by whether the expectations of the parties at the time of execution where so frustrated at the time of enforcement that it would be unconscionable to uphold the agreement. With respect to postnuptial agreements, the question comes up about whether the “equity” and “fair” language creates a higher standard of proof.

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7. How do you amend or revoke an antenuptial agreement?

Answer

The parties need to enter into a postnuptial agreement to modify an antenuptial agreement or a postnuptial agreement.

Authorities

- Minn. Stat. § 519.11, subd. 2a.

Comment

The only way to modify or revoke an antenuptial agreement or postnuptial agreement is to enter into a valid postnuptial agreement. A verbal or even written agreement that does not comply with the requirements for a postnuptial agreement will not be enforceable.

Additionally, the parties cannot tear up a copy of the agreement and intend for that to revoke the agreement. As long as there is one copy of the agreement in existence, which will typically be found at one of the attorneys' offices, then it can be enforced, even if both parties indicated verbally at one time an intention to revoke it.

Practice Tip

In the event the parties want to modify an antenuptial agreement they should speak with their respective attorneys to discuss how best to do so. It is suggested that the parties specifically reference in the postnuptial agreement which portions of the antenuptial agreement that they are seeking to modify. It may be useful to attach the antenuptial agreement to the postnuptial agreement so that there is no question that is the document being amended.

If the parties wish to revoke the agreement, they should talk with their respective attorneys to draft a postnuptial agreement that specifically revokes the agreement. Absent a written postnuptial agreement revoking the prior agreement, either party is free to seek enforcement of the agreement.

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Spousal Maintenance

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We would like to acknowledge and thank Susan Rhode as the previous author of this chapter.

Chapter 6

Spousal Maintenance

Table of Contents

1. What do I have to prove to get spousal maintenance for my client?.....	1
2. How long does spousal maintenance typically last?	3
3. How is the amount of spousal maintenance determined?.....	5
4. What is a “Karon” waiver?	7
5. Are there any spousal maintenance guidelines?.....	9
6. What if my client is receiving spousal maintenance and the payor quits his or her job?.....	10
7. What if the payor of spousal maintenance retires?.....	11
8. What happens if the recipient of spousal maintenance wins the lottery or inherits a lot of money?.....	13
9. Does a recipient of spousal maintenance have an obligation to work or try to increase his or her income?.....	14
10. If the recipient lives with someone but does not get married, does the paying spouse still have to pay spousal maintenance?	16

1. What do I have to prove to get spousal maintenance for my client?

Answer

You will have to prove all of the elements of Minnesota Statutes section 518.552, subdivisions 1 and 2. Subdivision 1 requires that you prove a need for spousal maintenance by meeting one of two thresholds. The client meets the threshold if he or she lacks sufficient property, specifically the income from that property, to provide for reasonable needs at the marital standard of living. The client also meets the threshold if he or she cannot be self-supporting, after consideration of the marital standard of living, with income from appropriate employment or is the custodian of a child whose condition makes it appropriate for the client not to be employed outside the home.

If you can prove spousal maintenance is warranted under subdivision 1, then subdivision 2 lists eight factors the court must consider in setting the amount and duration of spousal maintenance.

Authorities

- Minn. Stat. § 518.552.
- *Nardini v. Nardini*, 414 N.W.2d 184 (Minn. 1987) (must consider appropriate employment based on age and experience).
- *Passolt v. Passolt*, 804 N.W.2d 18 (Minn. Ct. App. 2011), *rev. denied* (Minn. Nov. 15, 2011) (wife in 30-year marriage at age 52 should be employed full time—despite marital history of not being employed).
- *Fink v. Fink*, 366 N.W.2d 340 (Minn. Ct. App. 1985) (only income from assets included).
- *Flynn v. Flynn*, 402 N.W.2d 111 (Minn. Ct. App. 1987) (typically do not have to liquidate home to meet expenses).
- *Curtis v. Curtis*, 887 N.W.2d 249 (Minn. 2016) (can require spouse to invest assets in manner to produce higher income).
- *Muschik v. Conner Muschik*, 920 N.W.2d 215 (Minn. Ct. App. 2018) (spousal maintenance denied because wife could reduce her needs by using her assets to pay off her mortgage).

Comment

The most challenging proof issues at present include (1) how to consider property in meeting needs, and (2) what is appropriate employment. Proving the marital standard of living remains a challenge as well.

Although the statute talks about “property” rather than income from property, the case law is clear that a recipient of spousal maintenance is not required to spend his or her assets awarded in the divorce, to live. Rather, the court typically can only consider the income from the assets. What income reasonably can be imputed and what assets can be considered are a frequent subject of appellate decisions.

What is included in the marital standard of living has been the subject of long debate. This analysis is typically hampered by the reality of supporting two households rather than one. Judges are also prone to insert their own sensibilities into the analysis of what is reasonable, rather than relying on what the family actually spent.

Most recently, the courts have scrutinized the issue of appropriate employment. The long-held belief was that a spouse in a long-term marriage who had not been working outside the home did not necessarily have to secure employment upon divorce. The *Passolt* decision negated that assumption. The Minnesota Court of Appeals applied a much more literal reading of the statute to look at what work the dependent spouse can do. Although each case differs depending on the skills of the spouse seeking maintenance, the age of the spouse, and what retraining would be necessary, the trend now is to consider each spouse's income from appropriate employment, even if that spouse did not work during the marriage.

Practice Tip

If you represent the recipient, she or he may come to you with some firm beliefs about what they are entitled to based on their understanding of spousal maintenance. Recipients often believe that nothing will change after the divorce because they are entitled to the “marital standard of living.” Practice breaking the bad news to your client.

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2. How long does spousal maintenance typically last?

Answer

The amount of spousal maintenance is based on the factors in Minnesota Statutes section 518.552, subdivision 2. This includes the length of the marriage, the age of the spouse, the physical and emotional health of the spouse seeking maintenance, the ability to prepare for retirement, the earnings and other employment opportunities lost by the party seeking maintenance, and the future income and employment of the recipient.

The Minnesota State Legislature enacted a significant overhaul of the spousal maintenance statute that became effective on August 1, 2024. One of the most significant changes to Minnesota Statutes section 518.552, subdivision 3 is the terminology regarding the duration of spousal maintenance. Spousal maintenance is now characterized as transitional or indefinite. An award of temporary spousal maintenance issued before August 1, 2024, is deemed transitional maintenance. An award of permanent spousal maintenance issued before August 1, 2024 is deemed indefinite maintenance. Spousal maintenance awarded during the pendency of a dissolution proceeding is deemed temporary maintenance.

Based on the length of the marriage (defined as the date of marriage until the date of commencement of the action), the court must determine the duration of maintenance as follows:

1. When the length of marriage is less than five years, it is rebuttably presumed that no maintenance should be awarded;
2. When the length of marriage is at least five years and less than 20 years, it is rebuttably presumed that transitional maintenance should be awarded with a duration of no longer than one-half the length of the marriage if the factors set forth in subdivision 1 support an award of maintenance; and
3. When the length of marriage is 20 years or more, it is rebuttably presumed that indefinite maintenance should be awarded if the factors set forth in subdivision 1 support an award of maintenance.

Authorities

- Minn. Stat. § 518.552, subd. 3
- *Nardini v. Nardini*, 414 N.W.2d 184 (Minn. 1987) (no future likelihood for self-support means permanent).
- *Dobrin v. Dobrin*, 569 N.W.2d 199 (Minn. 1997) (permanent spousal maintenance discourages self-support).
- *Passolt v. Passolt*, 804 N.W.2d 18 (Minn. Ct. App. 2011), *rev. denied* (Minn. Nov. 15, 2011) (step-down in spousal maintenance amount encourages employment).

Comment

The designation of indefinite spousal maintenance does not mean it is guaranteed forever; rather, it means that the burden of proof to change the amount is placed on the payor to prove that something has changed. Typically, this would be the loss of a job or retirement. Recipients frequently have misplaced confidence in the designation of “permanent,” now “indefinite,” and do little to protect against the inevitable changes that will occur.

A designation of “transitional” puts the burden of proof on the recipient to show why spousal maintenance should continue beyond the designated term. The court will then look at the good-faith efforts of the recipient to obtain self-sufficiency. A long held view has been that permanent or indefinite spousal maintenance discourages diligent efforts by the recipient to contribute to his or her own support. This can be overcome by step-downs or scheduled reviews or reservation after a term of spousal maintenance.

Practice Tip

It is critical to clearly state in the original agreement what both spouses expect to occur in the future. This sets a baseline for modification of the duration if those expectations are not met.

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3. How is the amount of spousal maintenance determined?

Answer

The ultimate answer may turn on simple math: what does the recipient need and what can the payor afford to pay? It most certainly turns on the discretion of the trial court, which has broad discretion in setting spousal maintenance.

Minnesota Statutes section 518.552, subdivision 2 sets out the factors to consider in setting the amount. The amount looks at the financial resources of the recipient, the ability of the recipient to earn income, the marital standard of living, the duration of the marriage, the recipient's age and health, the amount of time the recipient has been out of the work force, and finally the payor's ability to pay. Historically, the marital standard of living has been a key factor in setting spousal maintenance.

The Minnesota State Legislature revised Minnesota Statute sec. 518.552, subdivision 2 that sets for the factors the courts must use to analyze the amount of spousal maintenance. The revisions to the spousal maintenance statute now specifically require at factor 3 that the court must consider the extent to which the marital standard of living was supported by debt. The Legislature combined factors 4 and 5 so that the court must consider the earnings, seniority, and other employment opportunities were foregone by the spouse seeking maintenance. Factor 6 was expanded to consider the health of both parties. Factor 8 was revised to eliminate language regarding the acquisition, preservation, depreciation, or appreciation of marital property, and the court is only to consider the contribution of a spouse in furtherance of the other party's employment or business. Finally, factor 9 was added which requires the court to consider the need and ability of each spouse to prepare for retirement and the anticipated time of retirement.

Authorities

- Minn. Stat. § 518.552, subd. 2.
- *Lyon v. Lyon*, 439 N.W.2d 18 (Minn. 1989) (no spousal maintenance warranted if sufficient assets).
- *Laumann v. Laumann*, 400 N.W.2d 355 (Minn. Ct. App. 1987) (error to leave wife at a much lower standard of living).
- *Nardini v. Nardini*, 414 N.W.2d 184 (Minn. 1987) (standard of living key in statutory scheme).
- *Chamberlain v. Chamberlain*, 615 N.W.2d 405 (Minn. Ct. App. 2000) (spousal maintenance to sustain marital standard of living).
- *Passolt v. Passolt*, 804 N.W.2d 18 (Minn. Ct. App. 2011), *rev. denied* (Minn. Nov. 15, 2011) (step-down in spousal maintenance approved).
- *Schreck v. Schreck*, 445 N.W.2d 861 (Minn. Ct. App. 1989) (percentage of income for spousal maintenance approved).

Comment

The amount of spousal maintenance requires a careful balance between the pure language of the statute and the realities of a family's economics. The basic approach to each spousal maintenance case is what one spouse needs and what the other spouse can afford to pay. Even a spouse who has been working outside the home for some time may qualify for spousal maintenance if the other spouse earns a great deal more and the marital standard of living has been high. Alternatively, a spouse may receive no spousal maintenance because the income from property is sufficient. The amount will depend on all financial resources and the recipient's need.

Too often, advocates focus on the marital standard of living to create a budget that meets every conceivable need of a recipient and ignore the fact that those expenses have to be duplicated in the payor's home. Add up the budgets and compare them to the combined net incomes. If there is more need than income, then something has to go.

In contrast, the recipient gets only what he or she needs. If the payor has income in excess of his or her needs, that alone is not a reason to award more spousal maintenance to the other spouse.

The amount of spousal maintenance may be established based on future assumptions so that it adjusts over time. This type of step-down approach has enjoyed increased favor in the courts. The amount may also have to be based on a percentage of the payor's income if the income stream is unreliable. If circumstances are not certain, spousal maintenance may be reserved to be considered at a future time.

Practice Tip

A budget should be a simple summary of what a spouse spent during the marriage adjusted for changes in costs that are greater or less because of the divorce. However, all too often, the budget becomes an emotional vehicle to validate a spouse's worth or to inflict economic harm on a spouse. If the economics justify the cost, it may be worthwhile to employ an expert who can help your client create a budget that makes economic sense, is based on an analysis of the marital standard of living, or to analyze the other party's budget.

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4. What is a “*Karon*” waiver?

Answer

A “*Karon*” waiver is an agreement to waive the right to seek a modification of spousal maintenance. In *Karon*, the Minnesota Supreme Court announced that it would enforce private agreements that limited the court’s jurisdiction to modify spousal maintenance if the agreement met certain criteria.

The ability to waive modification of spousal maintenance is now codified at Minnesota Statutes section 518.552, subdivision 5. Parties can preclude or limit modification of maintenance by stipulation if the court approves the stipulation as fair and equitable, there is adequate consideration, there is full disclosure of each party’s financial circumstances, there is an express, immediate, contractual waiver of the right to modify, and the court is divested of jurisdiction.

Authorities

- Minn. Stat. § 518.552, subd. 5.
- *Karon v. Karon*, 435 N.W.2d 501 (Minn. 1989) (upholds waiver of modification in stipulation).
- *Loo v. Loo*, 520 N.W.2d 740 (Minn. 1994) (standard for waivers under Minn. Stat. § 518.552, subd. 5).
- *Butt v. Schmidt*, 747 N.W.2d 566 (Minn. 2008) (error not to uphold waiver that met all criteria of Minn. Stat. § 518.552, subd. 5 and Loo).

Comment

Be sure to reference and follow Minnesota Statutes section 518.552, subdivision 5 whenever waiving or limiting modification of spousal maintenance. Further, be sure all the elements are met so there is no future ability to overturn the waiver. This includes the subdivision 5 factors as well as a contractual waiver of the right to modify maintenance and express language divesting the court of jurisdiction.

The court of appeals decided that once parties agreed to preclude the court from further jurisdiction over spousal maintenance, the court could not revisit the issue even if the parties agreed. The legislature overturned that view in an amendment to Minnesota Statutes section 518.552, subdivision 5, which states “[t]he parties may restore the court’s authority or jurisdiction to award or modify maintenance through a binding stipulation.”

Practice Tip

Minnesota Statutes section 518.552, subdivision 5 specifically refers to modification of spousal maintenance. Be sure to incorporate the elements of the statute, plus the criteria set forth in *Loo*. Calling something a *Karon* waiver does not make it one.

Do not confuse a waiver of modification with a waiver of spousal maintenance because no spousal maintenance was warranted. If both parties are self-supporting at the marital standard of living, then no spousal maintenance is warranted and none is awarded. If you reference “*Karon*” or section 518.552, subdivision 5, then you are invoking the criteria for enforcement of that waiver of modification, which requires consideration, disclosure, and the court’s finding that it is fair and equitable or the possibility to restore the court’s authority to award spousal maintenance in the future. Some courts, however, require *Karon* waiver language even if no spousal maintenance is awarded.

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5. Are there any spousal maintenance guidelines?

Answer

The amendments to the spousal maintenance statute now implement guidelines on the duration of spousal maintenance based on the length of the marriage.

Minnesota Statutes section 518.552, subdivision 5a terminates spousal maintenance obligations upon the death of either party or the remarriage of the party receiving maintenance, unless the parties have specifically agreed otherwise in writing. This leaves the recipient with little recourse upon death or remarriage unless there are private agreements to ensure some ongoing support.

Authorities

- *Rask v. Rask*, 445 N.W.2d 849 (Minn. Ct. App. 1989) (54 percent of payor's income too much absent unusual circumstances).
- *Gales v. Gales*, 553 N.W.2d 416 (Minn. 1996) (11-year childless marriage does not warrant permanent spousal maintenance).

Comment

Spousal maintenance is rooted deep in the district court's discretion. Maintenance awards also tend to be subject to shifts in the courts' and society's attitudes. Review the appellate court decisions frequently to know which way this issue is trending.

Practice Tip

Many times, clients have an expectation that income will be divided equally. This is not the law in Minnesota. There is, however, a theory of "share the pain," when there is not enough money to go around. This approach is used frequently by courts and may create a de facto equalization.

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6. What if my client is receiving spousal maintenance and the payor quits his or her job?

Answer

The outcome will depend on whether the payor's reason for quitting was in good faith or bad faith. The burden of proof is on the payor to show that quitting his or her job was not due to his or her own misconduct or choosing. If the payor quit working to avoid paying support, that would be in bad faith. If the payor quit due to health reasons, that may be considered in good faith. In addition, it may depend on whether there was a generous severance package or other benefits received.

The burden of proof will be on the payor to show that he or she had a good-faith reason for quitting his or her job. If the court finds that the payor quit in bad faith, the court may then impute income to the payor and order spousal maintenance at the existing level or a reduced level based on the payor's earning capacity.

Authorities

- *Melius v. Melius*, 765 N.W.2d 411 (Minn. Ct. App. 2009) (no income imputed where no finding of bad faith despite prior income of \$1 to 3 million).

Comment

Courts tend to have the recipient of spousal maintenance share in the risk if the payor's employment changes just as if the couple had remained married. The persuasiveness of the argument will depend on the overall circumstances, but there is some inherent sympathy for someone who has been working in a difficult field, such as surgeon, dentist, or air traffic controller.

However, even "winning" the motion so that income is imputed to the payor and spousal maintenance continues may be a short lived victory. If someone truly does not want to work and pay, the options for enforcement may be limited.

Practice Tip

If the payor quits due to health issues, there may be other income options such as disability payments. Health claims typically are measured by medical reports and disability determinations.

Frequently the claim will be that the payor is "burnt out" or the industry has changed and he or she just does not want to or cannot do the job anymore. This may be persuasive depending on the circumstances and depending on what life changes the payor makes to show that he or she is accommodating a reduced standard of living. The key is to distinguish quitting a job from taking early retirement. Although both have a good-faith component, there is less leeway where leaving the job is strictly voluntary with no attendant benefit.

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7. What if the payor of spousal maintenance retires?

Answer

The recent legislative amendments to the spousal maintenance statute now address the issue of retirement and how that may impact a request to modify a spousal maintenance obligation. The spousal maintenance statute now identifies the “normal retirement age” for modification of spousal maintenance as the definition in the Social Security Act. Under the Social Security Act, to receive full benefits a party must reach full retirement age, which is age 66 if born prior to 1954 and age 67 for those born after 1954. As part of a motion to modify spousal maintenance based on retirement, the court now must consider if the payor is eligible to receive full retirement benefits based on their age. Or, the customary age for retirement in that party’s occupation. The court will presume that a party has retired in good faith if they have or will be retiring at normal retirement age. A motion to modify spousal maintenance based on retirement may be brought before a party actually retires provided that the moving party specifies their retirement age. The court may modify spousal maintenance as of the actual date of retirement. A modification of spousal maintenance may consist of a reduction, suspension, reservation, or termination of maintenance.

Importantly, the statute now clarifies that if a party has attained the age to receive full social security benefits the party will use both income and assets to meet a party’s need. Case law on this issue conflicted as to whether both parties were required to use assets, primarily retirement assets, to fund their living expenses.

Just as when the payor quits, upon retirement, the payor has the burden to prove he or she has retired in good faith. The payor also will have to prove that there has been a substantial change in circumstances that makes the amount of maintenance unreasonable and unfair according to Minnesota Statutes section 518A.39, subdivision 2. In most instances, the payor will be able to show that his or her gross income has substantially decreased.

If the court finds that there is a substantial change in circumstances as a result of the retirement, then the court conducts yet another analysis under Minnesota Statutes section 518.552, subdivision 2 to determine what, if any, spousal maintenance should be paid based on the new circumstances.

Authorities

- *Lee v. Lee*, 775 N.W.2d 631 (Minn. 2009) (apportions each pension payment between marital and nonmarital).
- *Richards v. Richards*, 472 N.W.2d 162 (Minn. Ct. App. 1991).
- *Winer v. Winer*, A15-0039, (Minn. Ct. App., February 8, 2016)
- Minn. Stat. § 518A.39.
- Minn. Stat. § 518.552, subd. 7.

Comment

The more complex question is what income from retirement assets should be considered and should both parties be treated the same? These questions have not been answered, by case law or the legislature. There have been cases that deal with defined benefit pension plans that pay a monthly benefit. In that instance, only the income that was not divided in the divorce can be considered for the payor. There is no guidance on what income from a defined contribution plan such as a 401(k) can be considered for the recipient or the payor. Should this be a combination of income and principal or just investment income? Should there be a statutorily imputed investment rate?

There is also no guidance on how to treat a defined contribution plan such as a 401(k) if part of the account was divided in the divorce and part was acquired after the divorce. Should each party have to spend their nonmarital portion first? There is no clear guidance.

Practice Tip

If you can, plan for retirement when you initially settle the spousal maintenance issue. This is often easier to do the closer you are to retirement. If you are trying a spousal maintenance case where the parties are close to retirement, consider making a proposal for maintenance that includes a review of maintenance upon retirement.

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8. What happens if the recipient of spousal maintenance wins the lottery or inherits a lot of money?

Answer

Minnesota Statutes section 518A.39 allows for modification of spousal maintenance if the recipient has substantially increased income that makes the present amount of maintenance unreasonable and unfair. This could well be one of those circumstances. At a minimum, the court would consider the investment income from the asset, which could substantially increase the recipient's income and consequently substantially decrease the recipient's need for spousal maintenance. The recipient's need may also be reduced if the recipient purchases a house with no mortgage.

It is an open question if the court could consider the principal from the asset. The guiding case law says you do not have to spend the assets you were awarded in the divorce, but there is no law about after acquired assets such as an inheritance.

Authorities

- Minn. Stat. § 518A.39.

Comment

This is an interesting question, once again with no clear answer as to how the asset is treated. For example, the definition of "gross income" includes "any form of periodic payment to an individual, including, but not limited to, salaries, wages, commissions, self-employment income [...] workers' compensation, unemployment benefits, annuity payments [...]." Minn. Stat. § 518A.29, subd. (a). Considering that many personal injury claims are structured as annuity payments, it could be that the entire payment would be considered income. In addition, lottery winnings can be paid out over several years, much like an annuity.

Also, Minnesota Statutes section 518.552, subdivisions 1 and 2 require the court to consider whether a spouse "lacks sufficient property" to meet needs and all "the financial resources of the party seeking maintenance." Under this language, it may be that not just the income the asset can generate but the asset itself should be considered. This is not settled law by any measure.

Practice Tip

If you know your client is likely to receive an inheritance, include this in your negotiations. Set out how the asset will be treated when received. For example, include an interest rate to be imputed or include that the mortgage will be paid off or include a step-down in spousal maintenance if the approximate amount is known. Planning for the lottery is more challenging.

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9. Does a recipient of spousal maintenance have an obligation to work or try to increase his or her income?

Answer

In many instances, a recipient will have an obligation to work. Minnesota Statutes section 518.552, subdivision 1 requires the court to consider the spouse's income from appropriate employment. What is "appropriate" is a question that has been posed many times and depends on age, health, education, and the job market. However, assuming the spouse is of an age where employment is appropriate and he or she has the capacity to work, the spouse has an obligation to work.

Minnesota Statutes section 518.552, subdivision 2(b) requires the court to consider "the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment [...]." This element adds some standard of reasonableness to what training the spouse should be required to take. The section directs the court to consider "the probability, given the party's age and skills, of completing education or training and becoming fully or partially self-supporting." Minn. Stat. § 518.552, subd. 2(b).

If a spouse has been working only part time during the marriage, that spouse will likely have an obligation to increase his or her income through full-time employment in most instances. The full-time employment should be at "appropriate" employment, not just any employment.

Authorities

- Minn. Stat. § 518.552, subd. 2.
- *Passolt v. Passolt*, 804 N.W.2d 18 (Minn. Ct. App. 2011), *rev. denied* (Minn. Nov. 15, 2011) (marital standard of employment not dispositive).
- *Flynn v. Flynn*, 402 N.W.2d 111 (Minn. Ct. App. 1987) (spouse may not work but earning ability can be considered).
- *Madden v. Madden*, 923 N.W.2d 688 (Minn. Ct. App. 2019) (if permanent spousal maintenance is granted with no obligation to be employed, court cannot impute income in the future).

Comment

In the recent past, there was a prevailing belief that if a spouse did not work during a relatively long term marriage, that spouse should not have to work after the divorce or at least should not have to do more than he or she had done during the marriage. In *Passolt*, the court of appeals clarified that this is not the case. If full-time work is possible and appropriate, then full time it is.

Practice Tip

If you have a client who is going to go from part time or no work to full time, and income is being imputed to the recipient at some point, consider a safety net. For example, have a review of the maintenance amount once full-time work is achieved rather than making the recipient come back and prove he or she needs more support. Use a formula rather than an automatic step-down to accommodate for the speculative nature of a step-down.

If you represent the payor, consider building in some safeguards to ensure a good-faith effort on the recipient's part. For example, hire a vocational expert to assist in the job search and to ensure a good placement.

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10. If the recipient lives with someone but does not get married, does the paying spouse still have to pay spousal maintenance?

Answer

It will depend on the circumstances of the living arrangement. Merely cohabitating does not constitute a reason to modify. Rather, the payor will have to prove the factors in Minn. Stat. § 518.552, subd. 6, which include length of the cohabitation, whether the obligee would marry but for the spousal maintenance, and the economic benefit the obligee receives from the cohabitation. The subdivision also precludes a motion to modify based on cohabitation within one year of entry of the Dissolution Judgment and Decree.

The requisite proof will have to be economic, showing that the recipient's needs have reduced because of the cohabitation. This typically requires more than showing that the couple will share groceries. It requires a showing that there is a significant financial commitment by the new partner to pay a portion of the expenses. This may be shown by cosigning on a mortgage, purchasing a home together, sharing bank accounts, and the like.

Authorities

- Minn. Stat. § 518A.39.
- Minn. Stat. § 518.552, subd. 6.
- *Aaker v. Aaker*, 447 N.W.2d 607, 610-11 (Minn. Ct. App. 1989) (court allowed to put in cohabitation clause).
- *Abbott v. Abbott*, 282 N.W.2d 561, 566 (Minn. 1979) (mere cohabitation does not terminate maintenance).
- *Mertens v. Mertens*, 285 N.W.2d 490 (Minn. 1979).
- *Sieber v. Sieber*, 258 N.W.2d 754, 757 (Minn. 1977) (meretricious relationship not dispositive).
- *Sinda v. Sinda*, 949 N.W.2d 170 (Minn. Ct. App. 2020)

Comment

What, if any, effect the existence of a “meretricious relationship” should have on spousal maintenance has been the topic of several past supreme court opinions. The days of terminating alimony for immoral conduct are gone. However, the emotional debate lingers.

The emotional perspective of the payor is understandable. In essence, the payor may be supporting an unrelated third party to whom he or she has no legal obligation. However if you consider this from the recipient's perspective, the threat of losing maintenance as the result of cohabitation is the equivalent of a super noncompete. The payor is free to live with anyone or remarry. The recipient, on the other hand, may not be able do the same and still retain his or her maintenance.

Practice Tip

One option is to try to build into the judgment and decree a cohabitation clause. It is difficult to define what type of cohabitation and with whom will trigger the modification. In addition, what if the cohabitation ends? Should there be a reservation rather than a termination? Minn. Stat. § 518.552, subd. 6 may give better guidance on these issues.

Related Reading

- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Minnesota Family Law Financial Deskbook with eFormbook, 3rd ed., (Minnesota CLE 2024).

Property

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Chapter 7

Property

Table of Contents

1.	When is an equitable division of property not equal?	1
2.	When is income divided as property?	3
3.	The double-dip: When can income be inappropriately characterized as property?	5
4.	How is personal goodwill treated in a business valuation?	7
5.	What tracing is necessary in order to prove a nonmarital claim?	9
6.	How does marital effort impact the treatment of increases in value of nonmarital property?	11
7.	What is the difference between dissipation and depletion of property?	13

1. When is an equitable division of property not equal?

Answer

Minnesota Statutes section 518.58 charges courts with determining a “just and equitable division of the marital property of the parties without regard to marital misconduct.” The court is required to consider several factors in analyzing an appropriate division of marital property including “the length of the marriage, any prior marriage of a party, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, needs, opportunity for future acquisition of capital assets, and income of each party.” Minn. Stat. § 518.58. In addition, the “court shall also consider the contribution of each in the acquisition, preservation, depreciation or appreciation in the amount or value of the marital property, as well as the contribution of a spouse as a homemaker.” Id.

It is conclusively presumed that each spouse made a substantial contribution to the acquisition of income and property while they were living together as husband and wife. *Id.* But a “just and equitable” division is not necessarily an equal division. *See Nazar v. Nazar*, 505 N.W.2d 628 (Minn. Ct. App. 1993) (distribution of marital property need not be mathematically equal); *Crosby v. Crosby*, 587 N.W.2d 292 (Minn. Ct. App. 1998) (unequal division of marital property in favor of wife); *Stassen v. Stassen*, 351 N.W.2d 20 (Minn. Ct. App. 1984) (unequal division of marital estate in part based on husband’s failure to contribute to the marriage). Moreover, a court is not required to determine that a contribution which is substantial is equal. *See Nazar*, 505 N.W.2d 628; *Crosby*, 587 N.W.2d 292; *Stassen*, 351 N.W.2d 20.

The parties’ respective contributions to the acquisition of marital property impact the division of property. Where both parties have contributed to the effort, an equal division of marital property is appropriate. *See Miller v. Miller*, 352 N.W.2d 738 (Minn. 1984); *Kaste v. Kaste*, 399 N.W.2d 128 (Minn. Ct. App. 1987). Conversely, where one party significantly contributed to the acquisition of marital property, such efforts may warrant an unequal division of such property. *See McKee-Johnson v. Johnson*, 429 N.W.2d 689 (Minn. Ct. App. 1988); *McCormick v. McCormick*, No. A07-1638, 2008 WL 4470819 (Minn. Ct. App. Oct. 7, 2008).

Minnesota law does not support a complete denial of marital property to one party. *See Zeimer v. Zeimer*, 386 N.W.2d 348 (Minn. Ct. App. 1986). While there is no definitive statement regarding an acceptable unequal division of marital property, the appellate courts have demonstrated a willingness to uphold an unequal property division where it does not exceed a 66/33 percent division. Indeed, the following divisions have been affirmed as appropriate and within the court’s discretion: 58/42 percent; 60/40 percent; 63/37 percent. *See McCormick v. McCormick*, No. A07-1638, 2008 WL 4470819 (Minn. Ct. App. Oct. 7, 2008) (one party’s extraordinary efforts to preserve home from foreclosure as premise for unequal but equitable property division); *Nemitz v. Nemitz*, 376 N.W.2d 243, 248 (Minn. Ct. App. 1985), *rev. denied* (Minn. Dec. 30, 1985) (affirming 58/42 percent division); *Kramer v. Kramer*, 372 N.W.2d 364, 367 (Minn. Ct. App. 1985) (affirming 60/40 percent division where party receiving more of marital estate has limited vocational skills and other party had 25 years of business experience); *Olness v. Olness*, 364 N.W.2d 912, 914 (Minn. Ct. App. 1985) (affirming 63/37 percent division where party awarded more of marital estate received assets more vulnerable to future decrease).

Authorities

- Minn. Stat. § 518.58.
- *Varland v. Varland*, 311 Minn. 540, 248 N.W.2d 746 (Minn. 1976).
- *Hensel v. Hensel*, 266 N.W.2d 712 (Minn. 1978).
- *Miller v. Miller*, 352 N.W.2d 738 (Minn. 1984).
- *Montgomery v. Montgomery*, 358 N.W.2d 169 (Minn. Ct. App. 1984).
- *Stassen v. Stassen*, 351 N.W.2d 20 (Minn. Ct. App. 1984).
- *Gummow v. Gummow*, 375 N.W.2d 30 (Minn. 1985).
- *Kowalzek v. Kowalzek*, 360 N.W.2d 423 (Minn. Ct. App. 1985).
- *Kramer v. Kramer*, 372 N.W.2d 364 (Minn. Ct. App. 1985).

- *Nemitz v. Nemitz*, 376 N.W.2d 243 (Minn. Ct. App. 1985).
- *Olness v. Olness*, 364 N.W.2d 921 (Minn. Ct. App. 1985).
- *Zeimer v. Zeimer*, 386 N.W.2d 348 (Minn. Ct. App. 1986).
- *Batsell v. Batsell*, 410 N.W.2d 14 (Minn. Ct. App. 1987).
- *Kaste v. Kaste*, 399 N.W.2d 128 (Minn. Ct. App. 1987).
- *Letsch v. Letsch*, 409 N.W.2d 239 (Minn. Ct. App. 1987).
- *McKee-Johnson v. Johnson*, 429 N.W.2d 689 (Minn. Ct. App. 1988).
- *Nazar v. Nazar*, 505 N.W.2d 628 (Minn. Ct. App. 1993).
- *Crosby v. Crosby*, 587 N.W.2d 292 (Minn. Ct. App. 1998).
- *McCormick v. McCormick*, No. A07-1638, 2008 WL 4479819 (Minn. Ct. App. Oct. 7, 2008).
- *Davis v. Davis*, Nos. A08-1682, A08-1684, 2009 WL 1587229 (Minn. Ct. App. June 9, 2009).

Comment

Ultimately each case must be considered on its unique facts and circumstances, requiring a careful analysis of the statutory factors as set forth in Minnesota Statutes section 518.58.

Practice Tip

Although the majority of cases will resolve based on an equal distribution of marital property, an equitable but unequal division should be considered in early case evaluation.

Further Reading

- David N. Hofstein, Scott J.G. Finger & Ellen Goldberg Weiner, *Update to Equitable Distribution in Large Marital Estate Cases*, 21 J. Am. Acad. Matrim. Law. 439 (2008).

Related Reading

- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Minnesota Family Law Financial Deskbook with eFormbook, 3rd ed., (Minnesota CLE Updated 2024).

2. When is income divided as property?

Answer

“Marital property” is expansively defined as property acquired by the parties, individually or jointly, at any time during the existence of the marriage relation between them. Minn. Stat. § 518.003, subd. 3b. The Minnesota Supreme Court has determined the framework for analyzing when income is divided as property.

In *Janssen v. Janssen*, 331 N.W.2d 752, 753 (Minn. 1983), the Minnesota Supreme Court considered “whether a nonvested, unmatured pension [of one of the parties] is marital property which can be divided in a marital dissolution proceeding.” The court determined that such a pension interest can be property for dissolution purposes because (1) the employed spouse had, during the marriage, entered a pension contract under which that spouse acquired certain rights, albeit contingent, to benefits; and (2) the contractual nature of the right to receive benefits under the pension meant that the employed spouse had more than a mere expectancy in pension benefits, and therefore that the contingent nature of the contractual right to receive benefits did not preclude the right from falling within the “expansive” definition of “marital property.”

This rationale has been applied to the treatment of other assets, including contingent fees for work in progress as of the valuation date, incentive stock options, deferred compensation, and disability annuities. See *Stageberg v. Stageberg*, 695 N.W.2d 609 (Minn. Ct. App. 2005). (the portion of contingent fee for work in progress on the valuation date that is attributable to work done before the valuation date may be treated as marital property for dissolution purposes); *Salstrom v. Salstrom*, 404 N.W.2d 848, 850–51 (Minn. Ct. App. 1987) (stock options exercisable after the date of dissolution are similar to vested pension plans and concluded that these options “are an economic resource acquired during the marriage constituting a marital asset”); *Davey v. Davey*, 415 N.W.2d 84, 88 (Minn. Ct. App. 1987) (accounts receivable are generally considered marital property); *Marshall v. Marshall*, 350 N.W.2d 463, 466 (Minn. Ct. App. 1984) (the trial court properly found deferred compensation plan to be marital property as such a plan is more analogous to a pension plan than to income); *VanderLeest v. VanderLeest*, 352 N.W.2d 54, 57–58 (Minn. Ct. App. 1984) (disability annuity can be construed as a marital asset as such a benefit does not have to be fully vested and fully matured to be considered divisible).

Authorities

- Minn. Stat. § 518.003, subd. 3b.
- *Janssen v. Janssen*, 331 N.W.2d 752 (Minn. 1983).
- *Marshall v. Marshall*, 350 N.W.2d 463, 466 (Minn. Ct. App. 1984).
- *VanderLeest v. VanderLeest*, 352 N.W.2d 54, 57–58 (Minn. Ct. App. 1984).
- *Davey v. Davey*, 415 N.W.2d 84, 88 (Minn. Ct. App. 1987).
- *Salstrom v. Salstrom*, 404 N.W.2d 848, 850–51 (Minn. Ct. App. 1987).
- *Stageberg v. Stageberg*, 695 N.W.2d 609 (Minn. Ct. App. 2005).

Practice Tip

Carefully analyze the character of the asset in order to determine whether it is appropriately treated as income or property.

Further Reading

- *Christensen v. Minneapolis Municipal Employees Retirement Board*, 331 N.W.2d 740 (Minn. 1983).
- *Gibbs v. Minneapolis Fire Dept. Relief Ass’n*, 145 N.W. 1075 (Minn. 1914).

Related Reading

- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Minnesota Family Law Financial Deskbook with eFormbook, 3rd ed., (Minnesota CLE Updated 2024).

3. The double-dip: When can income be inappropriately characterized as property?

Answer

Income can be inappropriately characterized as property where it is “double-dipped”—meaning the income stream is considered in a valuation as part of a property division and in determining income for a support obligation. Double-dipping is inequitable.

Authorities

- *O'Brien v. O'Brien*, 343 N.W.2d 850 (Minn. 1984).
- *Kruschel v. Kruschel*, 419 N.W.2d 119, 122 (Minn. Ct. App. 1988).
- *Walker v. Walker*, 553 N.W.2d 90, 94 (Minn. Ct. App. 1996).
- *Tournier v. Tournier*, No. C0-01-2135, 2002 WL 2004645 (Minn. Ct. App. Sept. 3, 2002).
- *Lee v. Lee*, 775 N.W.2d 631, 640 (Minn. 2009).
- *Sweat v. Sweat*, No. A10-447, 2011 WL 1833010 (Minn. Ct. App. May 16, 2011).
- *Myhre v. Myhre*, No. A14-1937, 2015 WL 4171758 (Minn. Ct. App. July 13, 2015).

Comment

This issue has been addressed as it relates to retirement benefits. Such assets which are awarded as property in a dissolution action cannot later be extracted from for purposes of support. The premise for such limitation is the finality of property settlements. *See Walker v. Walker*, 553 N.W.2d 90, 94 (Minn. Ct. App. 1996); *Kruschel v. Kruschel*, 419 N.W.2d 119, 122 (Minn. Ct. App. 1988). Indeed, the court in *Lee* stated:

Including marital pension benefits previously awarded as property in [Husband's] income would potentially increase the total amount of [Husband's] maintenance obligation. This is akin to putting money into [Husband's] left pocket while simultaneously removing money from his right pocket, in effect modifying the prior property division without [reopening under 518.145].

Lee v. Lee, 775 N.W.2d 631, 640 (Minn. 2009).

The Minnesota Supreme Court has addressed this issue insofar as income from a duplex must be excluded when determining ability to pay spousal maintenance. *See O'Brien v. O'Brien*, 343 N.W.2d 850 (Minn. 1984).

The issue has resurfaced in several unpublished opinions since *O'Brien*. In *Tournier v. Tournier*, No. C0-01-2135, 2002 WL 2004645, (Minn. Ct. App. Sept. 3, 2002), the court cited several retirement cases for the proposition that a double-dip is impermissible but affirmed the trial court's decision stating that it “did not consider the potentially underreported income when determining the value of the [business], but only when determining husband's maintenance obligations.” In *Sweat*, the obligor argued he was unable to pay his support obligation because such income was earmarked for payment of his property settlement. But the court was not so persuaded and instead found “[n]ot only would [obligee] have to wait 15 years for her portion of the property settlement to be fully satisfied, but she would be providing the financing for the payments.” *Sweat*, 2011 WL 1833010, at *2.

Most recently, the *Myhre* court was faced with the issue. *See Myhre v. Myhre*, No. A14-1937, 2015 WL 4171758 (Minn. Ct. App. July 13, 2015); *Myhre v. Myhre*, No. A12-2276, 2013 WL 5976065 (Minn. Ct. App. Nov. 12, 2013). The court did not find that a double-dip occurred but the facts of the case suggest it may have been an issue. In *Myhre*, the parties stipulated to the husband's income of \$150,000. The husband stated that this was because “the appraisal of his telecommunications business was based on the assumption that any income above \$150,000 would be retained by or reinvested back into the business.” 2015 WL 4171758, at *3. The court rejected the parties' stipulation and found the husband's income to exceed \$150,000. In addition, the court adopted the appraisal as part of the

business valuation and found that “during the period in review [in the appraisal], the company distributed 97.4% of its net income” thereby avoiding any double counting. *Id.* Based on the limited information contained within the opinions, we cannot be certain of the approach used in valuing the business. If an income approach was used and adopted by the court, that holding coupled with the increased income assigned to the husband raises a concern that the decision may have resulted in a double-dip.

A significant issue with unpublished cases is the lack of factual analysis contained within the decisions. In spite of *Myhre*, there is case law support for the proposition that a double-dip creates an unjust result. Indeed, logically, a double-dip would produce an inequitable result.

Practice Tip

Know what a double-dip is and avoid it.

Further Reading

Noteworthy case law in other jurisdictions includes:

- *McSparron v. McSparron*, 662 N.E.2d 745 (N.Y. 1995).
- *Grunfeld v. Grunfeld*, 731 N.E.2d 142 (N.Y. 2000).
- *Steneken v. Steneken*, 873 A.2d 501 (N.J. 2005).
- *Rodriguez v. Rodriguez*, 894 N.Y.S.2d 147 (N.Y. App. Div. 2010).
- *Heller v. Heller*, No. 07AP-871, 2008 WL 2588064 (Ohio Ct. App. June 30, 2008).
- *McReath v. McReath*, 800 N.W.2d 399 (Wis. 2011).

Related Reading

- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Minnesota Family Law Financial Deskbook with eFormbook, 3rd ed., (Minnesota CLE Updated 2024).

4. How is personal goodwill treated in a business valuation?

Answer

Goodwill value is a “transferable property right,” generally defined as “the amount a willing buyer would pay for a going concern above the book value of the assets.” *Roth v. Roth*, 406 N.W.2d 77 (Minn. Ct. App. 1987). Business/enterprise goodwill is a marital asset subject to equitable distribution, whereas personal goodwill is not a marital asset as it includes the unique skills, talents, and qualities of the individual.

The inclusion of personal goodwill in a business valuation inappropriately includes the value of the professional's reputation—a personal attribute. The various qualities that contribute to a professional's reputation include educational background, specialized training, and relationship in the community and with clients. It is individual to the professional; it is not transferrable.

There are concepts that allow for valuation of a business while recognizing personal goodwill. The key person discount contemplates the impact on the value of a business where it sustains the loss of the unique skills, talents, and qualities of key personnel who would not be retained in a change in ownership of the organization. In addition, a non-compete agreement can provide an avenue for the valuation of personal goodwill.

Authorities

- *Mikkelsen v. Mikkelsen*, 174 N.W.2d 241, 243 (Minn. 1970).
- *Hertz v. Hertz*, 229 N.W.2d 42, 44 (Minn. 1975).
- *Rogers v. Rogers*, 296 N.W.2d 849 (Minn. 1980).
- *Lowe v. Lowe*, 372 N.W.2d 65 (Minn. Ct. App. 1985).
- *Bateman v. Bateman*, 382 N.W.2d 240 (Minn. Ct. App. 1986).
- *Roth v. Roth*, 406 N.W.2d 77 (Minn. Ct. App. 1987).
- *Sweere v. Gilbert-Sweere*, 534 N.W.2d 294, 297–98 (Minn. Ct. App. 1995).
- *Trebtoske v. Trebtoske*, No. C1-94-2205, 1995 WL 296071 (Minn. Ct. App. May 16, 1995).
- *Rolfe v. Rolfe*, No. C2-00-19, 2000 WL 1146132 (Minn. Ct. App. Aug. 15, 2000).
- *Grigsby v. Grigsby*, 648 N.W.2d 716, 722 (Minn. Ct. App. 2002).
- *Baker v. Baker*, 733 N.W.2d 815 (Minn. Ct. App. 2007).

Comment

See Practice Tip and Further Reading, *infra*.

Practice Tip

Personal goodwill is not limited to solo practitioners. Regardless of the size of a business, it is important to carefully assess whether personal goodwill is an issue in any valuation.

Further Reading

- In *Nelson v. Nelson*, 411 N.W.2d 868 (Minn. Ct. App. 1987), the court provides a framework for analyzing whether an individual is a key person.

Related Reading

- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Minnesota Family Law Financial Deskbook with eFormbook, 3rd ed., (Minnesota CLE Updated 2024).

5. What tracing is necessary in order to prove a nonmarital claim?

Answer

“Marital property” is defined as property acquired by the parties, individually or jointly, at any time during the existence of the marriage relation between them. Minn. Stat. § 518.003, subd. 3b. As such, all property acquired by either spouse subsequent to the marriage and before the valuation date is presumed to be marital property regardless of how the property is titled. *Id.*

“Nonmarital property” includes real or personal property acquired by either spouse before, during, or after the existence of their marriage, which:

- (a) is acquired as a gift, bequest, devise, or inheritance made by a third party to one but not to the other spouse;
- (b) is acquired before the marriage;
- (c) is acquired in exchange for or is the increase in value of property which is described in clauses (a), (b), (d), and (e);
- (d) is acquired by a spouse after the valuation date; or
- (e) is excluded by a valid antenuptial contract.

Id.

The presumption of marital property is overcome by a showing that the property is nonmarital property. The burden of proof is with the party making the nonmarital claim. That party is charged with demonstrating the property originated from an established nonmarital source by a preponderance of the evidence. *Wopata v. Wopata*, 498 N.W.2d 478 (Minn. Ct. App. 1993); *Freking v. Freking*, 479 N.W.2d 736 (Minn. Ct. App. 1992).

The Minnesota Supreme Court defines the “preponderance of the evidence standard” as follows:

A fair preponderance of the evidence means the greater weight of evidence. That is, to establish a fact by a fair preponderance of the evidence, the evidence must satisfy you that it is more reasonable, more probable, more credible that such fact exists than that the contrary exists. If the evidence is equally balanced on such issue, then the fact has not been established by a fair preponderance of the evidence. If the greater weight of evidence is against such fact, then also that fact has not been established by a fair preponderance of the evidence. But if in any appreciable degree there is greater weight in support of the claim of the party having the burden of proof, then that burden has been sustained and that fact has been established by a fair preponderance of the evidence.

Netzer v. N. Pac. Ry. Co., 57 N.W.2d 247 (Minn. 1953).

The required documentation includes statements of value at the time of the marriage, throughout the marriage, and as of the valuation date. If the property in question is commingled with any other property or fluctuates in value, all statements related to those transactions must also be produced. Ultimately, the tracing necessary to prove a nonmarital claim must persuade the trier of fact that the property in question is more likely than not nonmarital in nature.

Authorities

- Minn. Stat. § 518.003, subd. 3b.
- *Netzer v. Northern Pacific Railway Co.*, 57 N.W.2d 247 (Minn. 1953).
- *Freking v. Freking*, 479 N.W.2d 736 (Minn. Ct. App. 1992).
- *Wopata v. Wopata*, 498 N.W.2d 478 (Minn. Ct. App. 1993).

Comment

Proving a nonmarital claim can be a complex task. It requires proof of the nonmarital claim, proper allocation of the asset to consider any commingling, and an analysis of the nature of the property along with any growth. The cases listed in the Further Reading section, *infra*, provide the framework for how commingling and the character of nonmarital property impact tracing.

Practice Tip

Work closely with the client to obtain all available tracing documentation. In addition, discuss and work through the sequence of events regarding the nonmarital property. The client's credible testimony regarding the history of the nonmarital property may be what secures the court's determination that the preponderance of the evidence standard has been met.

Further Reading

- *Doering v. Doering*, 385 N.W.2d 387 (Minn. Ct. App. 1986).
- *Moore v. Moore*, 391 N.W.2d 42 (Minn. Ct. App. 1986).
- *Griffith v. Griffith*, 415 N.W.2d 763 (Minn. Ct. App. 1987).
- *Schmitz v. Schmitz*, 309 N.W.2d 748 (Minn. 1981).
- *Janssen v. Janssen*, 331 N.W.2d 752 (Minn. 1983).
- *Salstrom v. Salstrom*, 404 N.W.2d 848 (Minn. Ct. App. 1987).
- *Sundermeyer v. Sundermeyer*, No. C7-90-675, 1990 WL 128291 (Minn. Ct. App. Sept. 14, 1990).
- *Swick v. Swick*, 467 N.W.2d 328 (Minn. Ct. App. 1991).
- *Shiely v. Shiely*, No. C4-93-2396, 1994 WL 149454 (Minn. Ct. App. Apr. 19, 1994).
- *White v. White*, 521 N.W.2d 874 (Minn. Ct. App. 1994).
- *Carrick v. Carrick*, 560 N.W.2d 407 (Minn. Ct. App. 1997).
- *Hodysky v. Hodysky*, No. C4-96-1506, 1997 WL 76443 (Minn. Ct. App. Feb. 25, 1997).
- *Prahl v. Prahl*, 627 N.W.2d 698 (Minn. Ct. App. 2001).
- *Antone v. Antone*, 645 N.W.2d 96 (Minn. 2002).
- *Baker v. Baker*, No. A06-1252, 2008 WL 5135117 (Minn. Ct. App. Dec. 9, 2008).
- *Olson v. Olson*, No. A08-0171, 2009 WL 173762 (Minn. Ct. App. Jan. 27, 2009).
- *Peppler v. Peppler*, No. A09-86, 2009 WL 3818361 (Minn. Ct. App. Nov. 17, 2009).

Related Reading

- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Minnesota Family Law Financial Deskbook with eFormbook, 3rd ed., (Minnesota CLE Updated 2024).

6. How does marital effort impact the treatment of increases in value of nonmarital property?

Answer

Insofar as marital effort precipitated the increase in the value of the nonmarital property, such increase is marital. While this issue has been the subject of significant debate in the appellate courts, the Minnesota Supreme Court has concluded that:

[C]entral to the classification of appreciation of nonmarital property as marital or nonmarital is the principle that effort expended to generate property during the marriage – that is, “marital effort” – should benefit both parties rather than one of the parties to the exclusion of the other. In all of the cases where we have held appreciation of nonmarital property to be marital, significant effort that otherwise could have been devoted to the generation of marital property was diverted and applied toward nonmarital property instead.

Baker v. Baker, 753 N.W.2d 644, 646 (Minn. 2008). Indeed, the Supreme Court pronounced that:

[T]he single test for whether appreciation in the value of nonmarital property is marital or nonmarital is the extent to which marital effort—the financial or nonfinancial efforts of one or both spouses during the marriage—generated the increase.

Id.

A related issue has arisen in a few unpublished opinions focusing on whether the district court appropriately distinguished between appreciation, dividend and interest income in determining the nonmarital and marital portions of certain assets. In *Jacobs v. Jacobs*, A11-1683, 2012 WL 2874011, at *4-5 (Minn. Ct. App. July 16, 2012), the Court of Appeals found the district court erred in its determination that the total increase in value of certain accounts was nonmarital because “the district court failed to distinguish between income produced by the accounts in the form of interest and reinvestment of dividends, and the increase due to appreciation of the value of assets held in the accounts.” Similarly, in *Bienemann v. Bienemann*, A21-0340, 2022 WL 664838, at *3, (Minn. Ct. App. March 7, 2022), the Court of Appeals determined “the district court did not distinguish the principal of the investments and their growth due to appreciation, which are nonmarital property, from the dividend and interest income earned from the investments, which is marital property” and therefore erred by concluding the total increase of such account was nonmarital property resulting in a remand to the district court to “determine what increase in the accounts came from reinvested dividends or interest and to apportion it to the marital estate.”

Authorities

- *Nardini v. Nardini*, 414 N.W.2d 184 (Minn. 1987).
- *Baker v. Baker*, 753 N.W.2d 644 (Minn. 2008).
- *Jacobs v. Jacobs*, A11-1683, 2012 WL 2874011, (Minn. Ct. App. July 16, 2012).
- *Bienemann v. Bienemann*, A21-0340, 2022 WL 664838, (Minn. Ct. App. March 7, 2022).

Comment

The *Baker* holding has concluded a 20-year debate as to the role of marital effort in valuing nonmarital property. A review of the case law that comprises this progression is helpful in understanding this concept.

Practice Tip

Do not get distracted by whether the increase is “active” or “passive.” The question is whether it was caused by marital effort.

Further Reading

- *Swick v. Swick*, 467 N.W.2d 328 (Minn. Ct. App. 1991).
- *White v. White*, 521 N.W.2d 874 (Minn. Ct. App. 1994).
- *Prahl v. Prahl*, 627 N.W.2d 698 (Minn. Ct. App. 2001).
- *Gottsacker v. Gottsacker*, 664 N.W.2d 848 (Minn. 2003).
- *Baker v. Baker*, 733 N.W.2d 815 (Minn. Ct. App. 2007).

Related Reading

- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Minnesota Family Law Financial Deskbook with eFormbook, 3rd ed., (Minnesota CLE Updated 2024).

7. What is the difference between dissipation and depletion of property?

Answer

Depletion and dissipation carry different literal meaning, as follows: Depletion [is] an emptying, exhausting, or waiving of an asset[...]. Dissipation [is] the use of an asset for an illegal or inequitable purpose.

See Black's Law Dictionary (2014). Minnesota case law also defines "dissipation" as "wasting or expending funds foolishly." See *Volesky v. Volesky*, 412 N.W.2d 750 (Minn. Ct. App. 1987).

Minnesota case law uses these terms synonymously. Such actions are prohibited because as parties to a divorce action, individuals are charged with a fiduciary duty to one another, as follows:

[D]uring the pendency of a marriage dissolution, separation, or annulment proceeding, or in contemplation of commencing a marriage dissolution, separation or annulment proceeding, each party owes a fiduciary duty to the other for any profit or loss derived by the party, without the consent of the other, from a transaction from any use by the party of the marital assets.

Minn. Stat. § 518.58, subd. 1a (emphasis added).

It is the responsibility of the individual claiming dissipation or depletion to prove the claim as:

[T]he burden of proof lies with the party claiming that the other party transferred, encumbered, concealed, or disposed of marital assets in contemplation of commencing or during the pendency of the current dissolution, separation or annulment proceeding, without the consent of the claiming party, and that the transfer, encumbrance, concealment, or disposal was not in the usual course of business or for the necessities of life.

Id.

The court has the authority to find that a party to a dissolution has dissipated resources and may hold the bad actor responsible, as follows:

If the court finds that a party to a marriage, without consent of the other party, has in contemplation of commencing, or during the pendency of, the current dissolution, separation, or annulment proceeding, transferred, encumbered, concealed, or disposed of marital assets except in the usual course of business or for the necessities of life, the court shall compensate the other party by placing both parties in the same position that they would have been in had the transfer, encumbrance, concealment, or disposal not occurred ... In compensating a party under this section, the court, in dividing the marital property, may impute the entire value of an asset and a fair return on the asset to the party who transferred, encumbered, concealed, or disposed of it.

Id. (emphasis added).

The court may "charge" an individual found to have dissipated or depleted marital resources. See *Carrick v. Carrick*, 560 N.W.2d 407 (Minn. Ct. App. 1997) (significant funds spent on gambling constituted dissipation); *Lynch v. Lynch*, 411 N.W.2d 263 (Minn. Ct. App. 1987) (cash advance appropriately charged to party who dissipated assets); *Holder v. Holder*, 403 N.W.2d 269 (Minn. Ct. App. 1987) (party must be charged for depletion of savings account); *Justis v. Justis*, 384 N.W.2d 885 (Minn. Ct. App. 1986) (husband's disposal of funds from daughter's trust account immediately prior to divorce must be considered in property division).

The issue of depletion/dissipation is not isolated to property division. The issue may arise in the context of the parties' standard of living wherein a potential obligee may be excessively spending leading up to a dissolution action in an attempt to demonstrate a higher standard of living. Similarly, such action is prohibited in the context of support issues. See *Bollenbach v. Bollenbach*, 175 N.W.2d 148 (Minn. 1970).

Authorities

- Minn. Stat. § 518.58, subd. 1a.
- *Bollenbach v. Bollenbach*, 175 N.W.2d 148 (Minn. 1970).
- *Justis v. Justis*, 384 N.W.2d 885 (Minn. Ct. App. 1986).
- *Holder v. Holder*, 403 N.W.2d 269 (Minn. Ct. App. 1987).
- *Lynch v. Lynch*, 411 N.W.2d 263 (Minn. Ct. App. 1987).
- *Volesky v. Volesky*, 412 N.W.2d 750 (Minn. Ct. App. 1987).
- *Carrick v. Carrick*, 560 N.W.2d 407 (Minn. Ct. App. 1997).

Comment

Minnesota is a no-fault state. Minnesota Statutes section 518.58, subdivision 1 specifically provides that “the court shall make a just and equitable division of the marital property of the parties without regard to marital misconduct...” However, the analysis of whether a party engaged in depletion or dissipation of assets interjects the issue of fault within these concepts.

Practice Tip

A careful analysis of any depletion or dissipation in any context is required in order to determine whether the issue is present in the realms of property or support issues in any case. This includes but is not limited to cash, investment, and retirement accounts, as well as any debts (i.e., credit card spending as claimed reasonable needs).

Related Reading

- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Minnesota Family Law Financial Deskbook with eFormbook, 3rd ed., (Minnesota CLE Updated 2024).

Taxes

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We would like to acknowledge and thank M. Boulette and Sonja Eayrs as the previous authors of this chapter.

Chapter 8

Taxes

Table of Contents

1.	How are dependency exemptions and child tax credits divided between divorced or unmarried individuals?	1
2.	Which parent is entitled to head of household filing status and can it be changed by court order?	3
3.	Can a family court require married parties to file a joint return, and what are the consequences of filing a joint return? ...	5
4.	When are spousal maintenance payments deductible to the payor and taxable to the recipient?.....	7
5.	How do the taxing authorities distinguish between spousal maintenance and child support payments?.....	9
6.	What possible tax consequences are associated with property division in divorce?.....	11
7.	What are the tax implications of the Affordable Care Act (ACA) and how are dependency exemptions and other tax issues affected by the ACA?.....	13

1. How are dependency exemptions and child tax credits divided between divorced or unmarried individuals?

Answer

Effective January 1, 2019, the \$4,050 personal exemption that individuals claim for themselves, spouses or dependents is no longer available. In the absence of a controlling child support order, the federal tax code will determine which parent is entitled to claim certain child tax credits, based on which parent provides financial support for the child and the majority of the child's care. However, Minnesota courts retain authority to allocate such tax credits by way of orders regarding dependency exemptions as part of a child support order. Such allocations are not binding on the Internal Revenue Service (IRS).

Authorities

- I.R.C. § 152(e)(1), 26 U.S.C. § 152(e)(1) (regarding “custodial parents”); see also *Maier v. Commissioner*, 85 T.C.M. (CCH) 1053 (2003).
- I.R.C. § 21(b)(1)(A), 26 U.S.C. § 21(b)(1)(A) (regarding the child and dependent care tax credit).
- I.R.C. § 24(c)(1)(A), 26 U.S.C. § 24(c)(1)(A) (regarding the child tax credit).
- I.R.C. § 32(c)(3)(A), 26 U.S.C. § 32(c)(3)(A) (regarding the earned income credit).
- *Armstrong v. Commissioner*, 745 F.3d 890 (8th Cir. 2014) (regarding the necessity of Form 8332).
- Minn. Stat. § 518A.38, subd. 7 (regarding criteria for allocating dependency exemptions).

Comment

Under the Internal Revenue Code (I.R.C.), certain tax credits and exemptions are available to parents. Prior to 2018, the dependency exemption provided parents a valuable tax incentive which could be allocated by court order. However, from 2018–2025, the value of the dependency exemption has been reduced to \$0, making the benefit meaningless until at least 2025. However, to the extent that other tax benefits—most notably the child tax credit—continue to follow the rules for dependency exemptions, these exemptions essentially serve as proxies for their accompanying tax credit.

In the absence of a controlling order, a taxpayer may claim the child tax credit for a “qualifying child.” A “qualifying child” means: 1) a child or descendant of the taxpayer, 2) who has the same principal place of abode as the taxpayer for more than one-half of the taxable year, 3) who is under the age of 19 (or a student under the age of 24), and 4) who has not provided over one-half of his or her own support during the taxable year.

The I.R.C. also creates a special rule in the case of divorced or separated parents. Under this rule, a child is “qualified” if the child is in the custody of one or both parents for more than half the calendar year, and the child receives over one-half of his or her support during the calendar year from the parents. In this case, the child is treated as the qualifying child of the custodial parent.

Whether or not a taxpayer is a custodial parent does not hinge on the custody labels (sole physical custody, primary physical custody, joint physical custody, etc.). Instead, I.R.C. § 152 defines the “custodial parent” as “the parent having custody for the greater portion of the year.” Where a child resides depends solely on overnights. *But* a child who is temporarily absent (e.g. at a friend's house, visiting grandparents, etc.) is treated as residing with the parent with whom they would have stayed. If the child is not scheduled to reside with either parent, the night is not counted for either parent.

Because “custodial” for the IRS purposes is based solely on overnights rather than custody labels, this may result in the parent with physical custody still being the “non-custodial parent” if the child lives elsewhere the majority of the year.

Certain tax benefits, such as the child and dependent care credit (also known as the childcare tax credit) and the earned income credit, may only be claimed by the custodial parent. Conversely, the child tax credit may only be claimed by the parent who claims the dependency exemption (notwithstanding that such exemptions presently have no value).

However, the I.R.C. specifically allows the non-custodial parent to claim the dependency exemption and child tax credit for a child if the custodial parent executes a release of the exemption, referred to as Form 8332. The IRS will *not* allow a non-custodial parent to claim a dependency exemption without a fully executed Form 8332, even if a state court order specifically allows the non-custodial parent to take the exemption.

As part of a child support order, Minnesota permits courts to allocate dependency exemptions between parties. A court may also modify a previously ordered allocation based on a substantial change in circumstances. In allocating the exemption, a court should consider: 1) the financial resources of each party, 2) if not awarding the dependency exemption negatively impacts a parent's ability to provide for the needs of the child, 3) if only one or both parties receive a tax benefit from the dependency exemption, and 4) the impact of the dependent exemption on either party's ability to claim a premium tax credit or a premium subsidy under the federal Patient Protection and Affordable Care Act. The court may not award a dependency exemption to a parent with less than 10-percent parenting time. Though the statute does not speak specifically to the allocation of the child tax credit, such credits are effectively transferred by way of the exemption.

Practice Tip

When allocating dependency exemptions and related credits as part of a child support order or judgment and decree, it is not enough to simply award the exemption to a parent. Rather, the custodial parent should also be ordered to sign Form 8332 release for any year in which the non-custodial parent is entitled to claim the dependency exemption. Only the execution of Form 8332 will make the allocation enforceable in the eyes of the taxing authorities.

Where a custodial parent wrongfully claims a dependency exemption allocated to the other parent under a child support order, the non-custodial parents should seek relief from the family court and not from the taxing authority. Minnesota Statutes section 518A.38, subdivision 7(g) governs relief from the court including an award of reasonable attorney's fees. Such motions must be brought within a "reasonable time" but no later than three years from the date the improper return was filed.

Further Reading

- For questions regarding counting overnights for the purposes of determining who is the "custodial parent", see Treas. Reg. § 1.152-4.
- Children of Divorced or Separated Parents, I.R.S. Pub. 17, available at <www.irs.gov/publications/>.

Related Resources

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Family Law Financial Deskbook 3rd ed., (Minnesota CLE Updated 2024).

2. Which parent is entitled to head of household filing status and can it be changed by court order?

Answer

To qualify for head of household status, a parent must be a “custodial parent” to a “qualifying child” as explained in Question 1, *supra*.

Authorities

- I.R.C. § 2(b), 26 U.S.C. § 2(b) (regarding eligibility of head of household filing status).

Comment

Head of household filing status usually provides lower tax rates and higher standard deductions than single or married filing separately rates. A taxpayer may qualify for head of household filing status if: 1) he or she is unmarried, 2) he or she paid more than half the cost of keeping up a home for the year, and 3) he or she has one or more qualifying person (including a qualified child) living with him or her for more than half the year.

As with the dependent care credit or earned income credit, head of household status is the absolute right of the custodial parent and cannot be transferred or allocated by family court order. This is true even if the custodial parent waives the exemption for a given year. Waiving the exemption does not affect the rights of a custodial parent to elect head of household status. Thus, the parent with whom the child resides 182 or fewer overnights per year will not qualify for head of household filing status unless that parent has another qualifying child.

However, parents with equal parenting time schedules (e.g., week-on-week-off, 5/2/2/5 or 2/2/3) may have a unique opportunity for tax planning, as they can adjust the parenting schedule to ensure that one parent or the other has 183 overnights or more per year, thus entitling that parent to head of household status.

Where the parents share more than one child, they may consider adjusting the parenting-time schedule so that each parent cares for one of the children 183 overnights per year (thus allowing both parents a “qualifying child” for the purposes of head of household filing status). However, parents must actually adhere to these arrangements in order for them to be effective.

It should also be remembered that use of certain pre-tax accounts may only be used by the custodial parent for the qualifying child. For example, pre-tax dependent care accounts may only be used by the custodial parent for work-related child care expenses for a qualifying child. The non-custodial parent cannot treat the child as a qualifying person even if that parent is entitled to claim the child as a dependent. See I.R.S. Pub. 503. However, a taxpayer may pay medical expenses for his or her child out of a health savings account regardless of whether he or she is the custodial or non-custodial parent. For the purposes of qualified medical expenses (which may be paid out of a health savings account), a child is treated as the dependent of both parents, whether or not the dependency exemption is released. See I.R.S. Pub. 969.

Practice Tip

In cases where parents share approximately equal parenting time, consider including the following language to allow both parents to take advantage of the more beneficial filing status (assuming there are two minor children):

The parties shall adjust the parenting time schedule so that in each calendar year Parent 1 has at least 183 overnights with Child 1, and Parent 2 has at least 183 overnights with Child 2 so that each party may qualify for the head of household tax filing status. When Child 1 is no longer a child as defined by Minn. Stat. § 518A.26, subd. 5, the parties shall adjust the parenting time schedule so that Parent 1 has at least 183 overnights with Child 2 in even years and Parent 2 has at least 183 overnights with Child 2 in odd years.

When parents with only one child have an equal parenting time schedule, consider linking the filing status to whichever parent is awarded more holiday or school break time.

Be sure to address how, if at all, the arrangement should shift in the event either parent remarries and is unable to take advantage of head of household status.

Related Resources

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Family Law Financial Deskbook 3rd ed., (Minnesota CLE Updated 2024).

3. Can a family court require married parties to file a joint return, and what are the consequences of filing a joint return?

Answer

Where a joint return is filed, the parties bear joint and several liability with respect to any deficiencies that result from the filing of the return. Nonetheless, Minnesota family courts have authority to require a spouse to file a joint return.

Authorities

- I.R.C. § 6013(d), 26 U.S.C. § 6013(d) (regarding joint and several liability).
- I.R.C. § 6015, 26 U.S.C. § 6015 (regarding relief from joint and several liability).
- *Theroux v. Boehmler*, 410 N.W.2d 354 (Minn. Ct. App. 1987) (regarding order to file a joint return).
- *Southwell v. Southwell*, 413 N.W.2d 580 (Minn. Ct. App. 1987) (same).
- *Hedelius v. Hedelius*, 361 N.W.2d 421 (Minn. Ct. App. 1985) (same).
- *Ellingson v. Ellingson*, Nos. A06-1522, A06-1221, 2007 WL 1893174 (Minn. Ct. App. Jul. 3, 2007) (same).
- *Strand v. Strand*, No. A07-1240, 2008 WL 2574496 (Minn. Ct. App. July 1, 2008).

Comment

When spouses file a joint income tax return, they bear joint and several liability with respect to any deficiencies owed. Such joint and several liability rightly leaves many divorcing spouses hesitant to file a joint income tax return with their soon-to-be former spouse, particularly if both spouses are not W-2 wage earners and accurate reporting of all income and deductions are of concern.

However, there is often a financial benefit to filing a joint return, as married filing jointly status typically provides more favorable rate schedules than married filing separately. Where there is an overall financial benefit to a joint filing, Minnesota courts may order parties to a marriage dissolution to file a joint income tax return over the objection of a spouse even though joint and several liability will result. Other jurisdictions are divided on the issue. *See Sweeney v. Sweeney*, 583 So. 2d 398 (Fla. 1991); *Teich v. Teich*, 658 N.Y.S.2d 599 (N.Y. App. Div. 1997); *Matlock v. Matlock*, 750 P.2d 1145 (Okla. Civ. App. 1988).

In lieu of ordering parties to file a joint income tax return, a court may instead permit the parties to file separately but hold the objecting spouse financially responsible for the less favorable tax treatment resulting from the parties filing as married separate. Alternatively, a court may consider ordering the parties to file a joint return but ordering one spouse to indemnify and hold the other spouse harmless. Such indemnification clauses will not bind the taxing authorities, but they will be enforceable between the parties in family court.

Once the parties file a joint return, it is not possible to subsequently amend a joint return and file separately. However, if spouses have already signed a joint return at the time of the divorce, some potential remedies exist.

I.R.C. § 6105 provides equitable and “innocent spouse” relief. If a spouse successfully establishes that he or she signed a tax return under duress, the return is not a joint return, and he or she will not be jointly and severally liable. *See* Treas. Reg. § 1.6013-4(d). Whether or not a return was signed under duress is a question of fact. There is little guidance in the case law as to whether the threat of a contempt sanction from a family court is sufficient to constitute duress in the eyes of the taxing authorities.

Practice Tip

Practitioners should identify early in a case whether joint filing is likely to expose a client to possible tax liabilities or penalties. This is particularly true where one spouse is a business owner and the other spouse questions whether personal or other improper expenses have been claimed as business expenses.

Before deciding whether to file a joint or separate return, both parties should receive advice from independent CPAs.

Further Reading

- Brian C. Vertz and Melvyn B. Frumkes, *Divorce Taxation* § 9.6 (18th ed. 2019).

Related Resources

- Minnesota Family Law Financial Deskbook 3rd ed., (Minnesota CLE Updated 2024).

4. When are spousal maintenance payments deductible to the payor and taxable to the recipient?

Answer

Generally, spousal maintenance established after December 31, 2018 is not taxable to the recipient or deductible to the beneficiary. Instead, spousal maintenance is only deductible if the obligation was established by a valid "separation instrument" on or before December 31, 2018. To the extent a pre-existing obligation is modified after that date, the parties or the court must specifically elect to preserve deductibility.

Authorities

- I.R.C. § 215, 26 U.S.C. § 215.
- I.R.C. § 71, 26 U.S.C. § 71.
- Treas. Reg. § 1.71-1T A-6

Comment

Effective January 1, 2019, alimony payments are no longer deductible to the payor or taxable to the recipient, and in essence receive the same tax-treatment as child support. The repeal of 26 U.S.C. §§ 71 and 215 changed the previous rule that allowed the deduction of alimony for the payor and required the recipient to include such alimony as taxable income.

There are only two exceptions to this rule. First, separation agreements executed before January 1, 2019 may continue to benefit from the prior rule so long as the award is not modified. Notably, a separation instrument need not be a fully executed decree; it may take some other form (see no. 2 below). Second, in the event a pre-2019 award is modified, deductibility will only be preserved if the modification expressly provides for application of the earlier deductibility rules.

Even where pre-2019 standards apply, to qualify as tax deductible payments, spousal maintenance payments must meet seven specific requirements.

Payments must be in cash to a spouse or former spouse. To be deductible, payments must be in cash or cash equivalent such as a check or money order. Transfers of services or the use of the payor's property do not qualify. These cash payments must also be made to a spouse or former spouse or on behalf of that spouse (such as for medical insurance premiums). However, if the payor is required to pay the mortgage on a *jointly*-owned home that the recipient lives in, the payor will only be permitted to deduct one-half of the payments.

Payments must be made in a divorce or separation instrument. Payments must also be made in a "written instrument." Such instruments will often be a judgment and decree or order, however other written instruments can qualify. A spouse's written proposal relative to spousal maintenance is insufficient in the absence of clear acceptance by the other spouse. *Leventhal v. Commissioner*, 79 T.C.M. (CCH) 1670 (2000). In order to be deductible, the amount paid cannot exceed the amount specified in the written instrument.

Payments must not be designated as "non-deductible" by the payor spouse. In some instances, a payor spouse may not benefit from a spousal maintenance deduction. In such cases, the parties may agree that payments will be non-taxable to the payee and non-deductible by the payor. The taxing authorities will honor such agreements.

The parties must not be members of the same household. To qualify as deductible spousal maintenance, the parties must maintain separate households. If the parties are living together at the time spousal maintenance is paid, the deduction may still be allowed "if one spouse is preparing to depart from the household of the other spouse and does depart not more than one month after the date payment is made."²⁶ C.F.R. § 1.71-1T.

Payments must terminate on death. Payments must terminate upon death either under the terms of the instrument or by operation of law. Typically, this requirement will be easily met as Minnesota law provides for automatic termination of spousal maintenance upon death or abatement of a proceeding (in the case of a temporary spousal maintenance order). *See* Minn. Stat. § 518A.39, subd. 3; *Risk ex rel. Miller v. Stark*, 787 N.W.2d 690 (Minn. Ct. App. 2010). However, if a decree specifically provides that payments do not cease on death, all spousal maintenance payments, including those made while the payee is alive, are non-deductible. Similarly, once past due spousal maintenance has been entered as a judgment against the payor, payments made to satisfy the judgment are no longer tax deductible. This is true even if the original spousal maintenance obligation would have been deductible because judgments, unlike spousal maintenance, do not terminate upon death. *See* Minn. Stat. § 549.091, subd. 1; *Iglicki v. Commissioner*, 109 T.C. Memo 2015-80 (2015).

Payments must not be in the nature of child support. In order to be deductible, spousal maintenance payments may not be child support. In some instances, payments designated as spousal maintenance may be re-characterized by the taxing authority if they are tied to certain child-related contingencies. *See* Question 5, *infra*.

The parties must file separate returns. A deduction is only available if the parties file separate income tax returns. If the parties' dissolution will not be finalized until after December 31, the parties must elect a married filing separately status for spousal maintenance to be tax deductible.

Practice Tip

While maintenance deductibility is far less relevant than in prior years, practitioners should be mindful when modifying previously deductible awards. Maintaining ongoing deductibility will require specific language in the order for modification as well as meeting all of the above requirements for deductibility under prior law.

Further Reading

- Brian C. Vertz and Melvyn B. Frumkes, *Divorce Taxation* § 9.6 (18th ed. 2019).
- Elizabeth L. Juelich, *Top 10 Spousal Maintenance Tax Rules*, 22 *Fam. L. F.* 1 (Winter 2013–2014).

Related Resources

- *Minnesota Family Law Financial Deskbook* 3rd ed., (Minnesota CLE Updated 2024).

5. How do the taxing authorities distinguish between spousal maintenance and child support payments?

Answer

Spousal maintenance ordered prior to January 1, 2019 may still receive preferential tax treatment by permitting the shifting of taxable income from a higher-earning obligor to a lower-earning recipient. However, such benefits are only available if they are not “disguised” child support.

Authorities

- I.R.C. § 71(c), 26 U.S.C. § 71(c).
- Treas. Reg. § 1.71-1(c)
- *Johnson v. Commissioner*, 107 T.C.M. (CCH) 1358 (2014).
- *Hill v. Commissioner*, 71 T.C.M. (CCH) 2759 (1996).
- *Shepherd v. Commissioner*, 79 T.C.M. (CCH) 2078 (2000).
- *Kean v. Commissioner*, 407 F.3d 186 (3d Cir. 2005).
- *Hazam v. Commissioner*, 79 T.C.M. (CCH) 1597 (2000).

Comment

While pre-2019 spousal maintenance obligations may be deductible by the payor and taxable to the payee, child support payments are neither taxable nor deductible regardless of the date of entry.

In situations where an order or decree does not distinguish between child support and spousal maintenance, but instead orders payment of family support, such payments will likely be entirely deductible.

However, where spousal maintenance or family support payments reduce or terminate based on, or in close proximity to, a child-related contingency, the payments may be presumed to be disguised child support payments and declared non-deductible. Thus, if an order provides that payments shall reduce when the child reaches a particular age, dies, marries, graduates, etc., the payment will be treated as non-deductible child support regardless of the other terms of the order. If a reduction or termination occurs within six months before or after a child reaches 18, 21, or the local age of majority, the payments are also presumed to be child support. The same presumption will arise if payments are reduced on two or more occasions, which occur within a year before or after a different child reaches a “certain age” (which is the same for each child) between 18 and 24.

When payments in a tax year are not sufficient to cover both the spousal maintenance and the child support obligations, payments will be allocated first to child support and only then to spousal maintenance.

Practice Tip

Practitioners should be sure to clearly differentiate between non-deductible child support payments and deductible spousal maintenance payments. Where spousal maintenance payments terminate or reduce in close proximity to a child-related contingency it is important to make clear that the rationale for the termination or reduction is independent of the child-related event. It may also be wise to provide for a reservation of jurisdiction to address any unforeseen tax consequences (an obligation for the payor and a refund to the payee) that may arise if spousal maintenance is re-characterized.

Further Reading

- Brian C. Vertz and Melvyn B. Frumkes, *Divorce Taxation* § 3.8 (18th ed. 2019).
- Elizabeth L. Juelich, *Top 10 Spousal Maintenance Tax Rules*, 22 *Fam. L. F.* 1 (Winter 2013–2014).

Related Resources

- *Minnesota Child Custody Deskbook*, 4th ed., (Minnesota CLE Updated 2023).
- *Minnesota Family Law Financial Deskbook* 3rd ed., (Minnesota CLE Updated 2024).

6. What possible tax consequences are associated with property division in divorce?

Answer

A divorce typically involves a transfer of cash or other property between spouses. So long as “the transfer is incident to the divorce,” I.R.C. § 1041 provides that there shall be no gain or loss recognized on a transfer of property from one spouse to the other. Upon the transfer of property, the transferor does not recognize gain and the transferee assumes the seller’s income tax basis under I.R.C. § 1041. The tax basis of the property remains the same in the hands of the transferee, and the transfer is treated as a gift. Nonrecognition treatment is mandatory if I.R.C. § 1041 applies. Treas. Reg. § 1.1041-1T. A transfer between spouses will be treated as related to the cessation of the marriage if the transfer is pursuant to a divorce or separation instrument, and the transfer occurs not more than six years after the marriage ceases.

Authorities

- I.R.C. § 1041, 26 U.S.C. § 1041.
- Treas. Reg. § 1.1041.
- *Lucas v. Earl*, 281 U.S. 111 (1930).
- *Harrison v. Schaffner*, 312 U.S. 579 (1941).
- *Craven v. U.S.*, 215 F.3d 1201 (11th Cir. 2000).

Comment

I.R.C. § 1041 contemplates transfers of property between spouses and former spouses (and trusts for their benefit), so long as the transfer is incident to divorce. However, if in connection with a divorce, a court orders the sale of marital property, the conveyance is not considered to be incident to the divorce within the definition of I.R.C. § 1041(a)(2). As a result, any tax consequences of the sale, such as gain, loss, or depreciation recapture, are recognized by the record owner (if titled in only one spouse’s name) or owners (if titled jointly).

While I.R.C. § 1041 has broad application, it does not cover every divorce-related transfer or other transfer between spouses. I.R.C. § 1041 fails to address the tax treatment of such transfer when the transferred assets include the right to future income, e.g., accounts receivable, certain contingent fees and awards, deferred compensation, and other “assets” that may represent the right to receive income. A taxpayer who possesses a current or future right to receive income may not shift the tax on such income by transferring the right to receive the income to another taxpayer. *Lucas v. Earl*, 281 U.S. 111 (1930); *Harrison v. Schaffner*, 312 U.S. 579, 580 (1941).

Large cash property settlements are frequently payable in installments, with interest, over a period of time.

I.R.C. § 1041 has no application to the interest portion of the payments, which must be included in the taxpayer’s gross income in the year received. *Craven v. U.S.*, 215 F.3d 1201 (11th Cir. 2000).

Practice Tip

While I.R.C. § 1041 has broad application, it does not cover every divorce-related transfer or other transfer between spouses. In addition to I.R.C. § 1041, familiarize yourself with assignment of income principles as well as the tax consequences of installment obligations.

Encourage the client to seek tax advice. Nonrecognition under I.R.C. § 1041 can be employed effectively to achieve net tax savings where the spouses are in different tax brackets. It may be beneficial to allocate assets with greater built-in capital gain to the lower-bracket spouse. And, conversely, it may be beneficial to allocate assets with lower built-in capital gain to the higher-bracket spouse.

Also, in light of the limitation on the deductibility of capital losses, if a party contemplates selling stock at a loss shortly after the divorce, it may be advantageous to transfer sufficient capital assets that, if sold or exchanged, would give that spouse gain sufficient to absorb such losses.

The parties may wish to assign potential gains and losses between themselves in order to maximize the net dollars available to each party. For example, if the parties have a stock portfolio which includes low basis stock, it may be prudent to equally apportion the low basis stock. That way, each party will pay any capital gains upon sale of the underlying stock, thus allocating potential tax consequences equally.

Further Reading

- Brian C. Vertz and Melvyn B. Frumkes, *Divorce Taxation* § 2.1 (18th ed. 2019).
- Cindy Lynn Wofford, *Divorce and Separation (Portfolio 515-2nd)*, IV Property Transfers Between Spouses and Former Spouses – § 1041 (BNA Tax Management Portfolio).

Related Resources

- *Minnesota Family Law Financial Deskbook* 3rd ed., (Minnesota CLE Updated 2024).

7. What are the tax implications of the Affordable Care Act (ACA) and how are dependency exemptions and other tax issues affected by the ACA?

Answer

Under the Affordable Care Act (ACA) the custodial parent is responsible for ensuring the minor child has appropriate health insurance, even if he or she is not the parent ordered to provide health care coverage under a child support order. Allocation of the dependency exemption in a child support order also directly affects the parent's household size for the purpose of claiming premium tax credits under the ACA.

Authorities

- 26 U.S.C. § 5000A (regarding the shared-responsibility payment).
- Minn. Stat. § 518A.39, subd. 8 (regarding medical support-only modifications).
- Minn. Stat. § 518A.38, subd. 7(b)(4) (regarding consideration of premium tax credits in allocating dependency exemptions).

Comment

Under the ACA, a parent is responsible for “ensuring” that his or her dependents have minimum essential health care coverage, though there are no longer any negative implications for failure to do so.

Divorced or separated parents who obtain coverage through state health care exchanges will also need to consider the effect of dependency exemptions on qualifying for the premium tax credit. Under the ACA, the premium tax credit is designed to help low- and middle-income families afford health care coverage purchased through public exchanges. The amount and availability of a premium tax credit is based, in part, on household size. Generally, the larger the household size the greater the available tax credit and the higher the income caps for receiving a credit.

Unlike determining which parent is required to provide minimum essential coverage, household size for the purpose of determining income limitations is based not on eligibility for the exemption, but on the exemptions “expected to be claimed” in the current tax year. Thus, if the non-custodial parent is supposed to claim the child under the terms of the child support order, that child is included in the non-custodial parent's household for determining eligibility for the premium tax credit in that year. However, as discussed above, the custodial parent remains responsible to “ensure” that the child has appropriate health care coverage and bears the liability for the tax penalty if coverage is not provided. (For low-income families, the Medicaid expansion rules are similar but have some important caveats).

To address both of the above issues, Minnesota's child support modification statute was amended in 2015 to provide for medical support-only modifications where one of the following circumstances exist: 1) there has been a change in the availability of appropriate health care coverage or a substantial increase or decrease in health care coverage costs; 2) there has been a change in the eligibility for medical assistance under Minnesota Statutes chapter 256B; 3) a party fails to carry court-ordered coverage, or to provide other medical support as ordered; 4) the federal child dependency tax credit is not ordered for the same parent who is ordered to carry health care coverage; or 5) the federal child dependency tax credit is not addressed in the order and the noncustodial parent is ordered to carry health care coverage.

Practice Tip

When the non-custodial parent is also the parent providing health care coverage, practitioners should be mindful to craft a streamlined procedure for the custodial parent to recoup any penalties incurred from failing to maintain appropriate health care coverage. Similarly, where parties receive health insurance through a state-sponsored exchange, determining the value of a dependency exemption to each parent must include a consideration of the exemptions' effect on the availability of health insurance premium tax credits.

Further Reading

- Shared Responsibility Payment for Not Maintaining Minimum Essential Coverage, 26 CFR 1, 602 (Aug. 13, 2013), available at <www.gpo.gov/fdsys/pkg/FR-2013-08-30/pdf/2013-21157.pdf>.
- Determining Households for Medicaid and Premium Tax Credits: Beyond the Basics, Center on Budget and Policy Priorities (Aug. 7, 2013), available at <www.healthreformbeyondthebasics.org/wp-content/uploads/2013/08/Household-Definitions-Webinar-7Aug13.pdf>.

Related Resources

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Family Law Financial Deskbook 3rd ed., (Minnesota CLE Updated 2024).

Retirement Accounts

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Chapter 9

Retirement Accounts

Table of Contents

1. Is a qualified domestic relations order (QDRO) required to divide an individual retirement account (IRA) in a divorce? .1	
2. If a former spouse takes a distribution of an IRA award before their age 59½, is the amount subject to the 10-percent excise tax?	2
3. Can a QDRO be entered before a decree is entered?	3
4. Can a QDRO be entered after the death of the plan participant?	4
5. Can the award of a portion of a public employee retirement benefit (PERA) benefit to a former spouse be subject to increases for earnings?	5
6. Can a PERA survivor benefit election be changed in a divorce that occurs after the participant's retirement?	6
7. Can a non-qualified deferred compensation plan benefit be divided by a QDRO?	7

1. Is a qualified domestic relations order (QDRO) required to divide an individual retirement account (IRA) in a divorce?

Answer

No, but a “divorce or separation instrument” is required.

Authorities

- I.R.C. § 408(d)(6), 26 U.S.C. § 408(d)(6).

Comment

An IRA is not governed by the QDRO provisions of federal law. The Internal Revenue Code (I.R.C.) does provide that a transfer of an individual's interest in an IRA under a divorce instrument to his or her spouse or former spouse is not a taxable event and is to be treated as establishing a second IRA.

Practice Tip

Whenever possible, draft the decree to identify: 1) the IRA account to be divided by account name and number, 2) the percentage or dollar amount as of a specific division date to be transferred, 3) whether earnings and losses from the division date to the transfer date are to be calculated, and 4) if the assets should be transferred pro rata from a particular IRA investment or in cash as liquidated from the account investments by the IRA owner.

Further Reading

- Marcia C. Fidis, Tax Free Transfer of IRA to Divide Marital Property Revisited: Separation Agreement Must be Incident to Decree of Divorce, Family Law News (Maryland State Bar Association, Jan. 2008).

Related Resources

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Family Law Financial Deskbook 3rd ed., (Minnesota CLE Updated 2024).

2. If a former spouse takes a distribution of an IRA award before their age 59½, is the amount subject to the 10-percent excise tax?

Answer

Yes, unless they qualify for a different exemption from the 10-percent excise tax.

Authorities

- I.R.C. § 72(t)(3)(A), 26 U.S.C. § 72(t)(3)(A).

Comment

If a withdrawal from an IRA is made before the taxpayer's age is 59½, the 10-percent federal excise tax for early withdrawals will apply unless another exception under I.R.C. § 72 applies. For example, limited exceptions exist for disability, medical expenses, higher education expenses, active duty military call up, a first time home buyer, federally declared disasters and the birth or adoption of a child. *See* I.R.C. § 72(t).

Practice Tip

If retirement funds from an employer's qualified retirement plan that is not an IRA are being awarded as part of a marriage dissolution, have the alternate payee receive directly any funds needed before the alternate payee's age is 59½ from the employer plan before any rollover to an IRA. While that direct distribution is taxable to the alternate payee for federal and state income tax purposes, it avoids the 10-percent excise tax that will apply if funds are withdrawn from the IRA the next week.

Related Resources

- Minnesota Family Law Financial Deskbook 3rd ed., (Minnesota CLE Updated 2024).

3. Can a QDRO be entered before a decree is entered?

Answer

Yes, a QDRO only need be a court order made pursuant to state domestic relations law.

Authorities

- I.R.C. § 414(p)(1)(B), 26 U.S.C. § 414(p)(1)(B).

Comment

The law does not require that a decree of marriage dissolution have been entered for a QDRO to be qualified. A QDRO could be used in a legal separation case. Some judges do require that all the property division matters are agreed to before they will sign a QDRO.

Practice Tip

If marital property division is agreed upon, and QDRO proceeds are urgently needed by the alternate payee, complete the QDRO and have it approved without waiting for the remaining matters to be finalized in the decree.

Related Resources

- Minnesota Family Law Financial Deskbook 3rd ed., (Minnesota CLE Updated 2024).

4. Can a QDRO be entered after the death of the plan participant?

Answer

Yes, U.S. Department of Labor (DOL) regulations now allow it.

Authorities

- Interim final rule from the U.S. Department of Labor (DOL) Employee Benefits Security Administration, 29 C.F.R. § 2530.206.
- Section 1001 of the Pension Protection Act of 2006, Pub. L. 109-280, 120 Stat. 780 (Aug. 17, 2006).

Comment

The pension laws have been changed to provide that the timing of the issuance of a QDRO will not disqualify a QDRO if it meets the other QDRO requirements. The DOL has indicated that this includes an order that is issued after the participant's death.

Further Reading

- United States Department of Labor, *QDROs: The Division of Retirement Benefits Through Qualified Domestic Relations Orders*, available at <www.dol.gov/ebsa/publications/qdros.html>.

Related Resources

- Minnesota Family Law Financial Deskbook 3rd ed., (Minnesota CLE Updated 2024).

5. Can the award of a portion of a public employee retirement benefit (PERA) benefit to a former spouse be subject to increases for earnings?

Answer

No, the normal PERA benefit is a defined benefit monthly payment at retirement.

Authorities

- Minn. Stat. ch. 356.

Comment

The balance of employee contributions is often mistaken as the actual value of the most valuable benefit available under a PERA plan. A PERA participant would most often choose the default benefit, which is a monthly payment derived from a formula based on years of service, highest average compensation, and other factors not related to the employee contributions. In most cases, employee contributions are relevant only if a participant chooses a less valuable refund in lieu of the monthly formula derived benefit.

Practice Tip

When evaluating a PERA benefit, review the estimates of the monthly benefit at retirement ages that are available from PERA.

Further Reading

- Public Employees Retirement Association of Minnesota website, <www.mnpera.org>.

Related Resources

- Minnesota Family Law Financial Deskbook 3rd ed., (Minnesota CLE Updated 2024).

6. Can a PERA survivor benefit election be changed in a divorce that occurs after the participant's retirement?

Answer

Yes, if the order from the family law court specially provides so.

Authorities

- Minn. Stat. § 356.48.

Comment

In 2010, the law was changed to permit retirees in certain public retirement plans to revoke a survivor benefit election in favor of their spouse made at their retirement if the parties later divorce. It only applies to public employer retirement plans that allow a retiree's benefit amount to "pop-up" if the retiree's survivor dies before the retiree.

Practice Tip

The statute only applies if the family court decree of marriage dissolution or annulment (not legal separation) specifies that the election of the survivor annuity is revoked using specific language from the statute. A form signed by both parties, along with a certified copy of the decree, must be sent to the plan.

Related Resources

- Minnesota Family Law Financial Deskbook 3rd ed., (Minnesota CLE Updated 2024).

7. Can a non-qualified deferred compensation plan benefit be divided by a QDRO?

Answer

Yes, but it is up to the employer sponsoring such plan if they will honor an order dividing the benefit payable to the participant under such plan.

Authorities

- IRC § 414(p), 26 U.S.C. § 414(p).
- Treas. Reg. § 1.409A-3(j)(4)(ii).

Comment

Some employers have accommodated divorcing executives by honoring a clear direction by the court to pay the former spouse's share of the deferred compensation benefit directly to the former spouse. The executive should not be taxed for income tax purposes (but will for employment tax purposes) on the share paid to the former spouse.

Practice Tip

A participant's attorney should ask a decision maker in the employer's human resource area if the employer has amended their practices to allow direct payment to the former spouse, if, as, and when the employer will pay the non-qualified deferred compensation to the participant.

Related Resources

- Minnesota Family Law Financial Deskbook 3rd ed., (Minnesota CLE Updated 2024).

Child Custody and Parenting Time

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We would like to acknowledge and thank Nancy Zalusky Berg as the previous author of this chapter.

Chapter 10

Child Custody and Parenting Time

Table of Contents

1. What is the difference between legal and physical custody? Is one more important than the other?	1
2. How do custody labels affect child support?	3
3. What are the best interest factors and how are they used to decide custody and parenting time?	4
4. What is a parenting plan and how is it different from custody and parenting-time provisions in a divorce or paternity decree? How does it work if parties decide to forego custody labels, except for interstate enforcement purposes as provided in the parenting plan statute?	7
5. Does joint physical custody assume equal amounts of parenting time with each parent? What is joint physical custody and why do so many parents pursue it? Does it affect child support? Ability to relocate? Where the children attend school?	8
6. At what age and under what circumstances does the child get to decide when they see the other parent? How does a child's preference get conveyed to a judicial officer?	10
7. How does domestic violence affect custody and parenting-time determinations?	12
8. Is it easier to move within the state than out of state? What standard is applied to each situation and how difficult is it to relocate? Is it better to bring this issue up at the start of the court proceeding or through a modification proceeding after the decree has been entered?	14
9. What do I do if my child refuses to spend time with the other parent? Is this impacted by the age of the child? Can I get custody if the other parent is interfering with my parenting time?	16
10. How will it affect custody if I am the parent who moves out of the house when we separate? Can I take the children with me when I move out and before the court gets involved? Can I move out of the house and not risk custody of the children? ..	18

1. What is the difference between legal and physical custody? Is one more important than the other?

Answer

Minnesota Statutes section 518.003 defines “legal custody” as the right to determine the child’s upbringing, including education, health care, and religious training and is presumptively joint. Joint legal custody means that both parents have equal rights and responsibilities including the right to participate in major decisions determining the child’s upbringing, including education, health care, and religious training.

Section 518.003 defines “physical custody and residence” as the routine daily care and control and residence of a child. The label of physical custody has arguably become less significant, and in certain circumstances, there is no designation of physical custody. When there is a parenting plan and no designation of physical custody, the law requires designation of a “primary residence” for enforcement of the final judgment and decree where this designation is required for enforcement in another state. The characterization “primary residence” also appears in the modification statute, Minnesota Statutes section 518.18. The failure to have a designation of “primary residence” may affect subsequent request to modify the parenting plan or custody designation. What is arguably much more important than designation of physical custody is the parenting-time schedule, namely the schedule outlining when each parent has the children in his or her care.

Is one label more important than the other? Yes, if one party is awarded sole legal custody, despite the presumption that both parents should share the right to participate in major decisions for the child, that party has sole decision-making authority regarding the minor child’s upbringing.

Authorities

- Minn. Stat. §§ 518.003, 518.17, 518.1705, 518B.01.

Comment

There is a rebuttable presumption in favor of joint legal custody. If parties have joint legal custody and have a disagreement they cannot resolve on their own or by using alternative dispute resolution, the remedy is to bring a motion to request that the court make the decision. In order to overcome the presumption of joint legal custody, the requesting party must persuade the court that the conflict between the parents is so severe that the parents are unable to make decisions jointly, such that it will harm the child. There is a rebuttable presumption that if domestic abuse has occurred as defined by statute, joint legal and/or joint physical custody is not in the best interests of the child. “Domestic abuse” is defined, in part, by statute, as inflicting physical harm or fear of physical harm and bodily injury. Minn. Stat. § 518B.01. There may be verbal and emotional abuse that could justify an award of sole legal custody, but that is not expressly recognized by the statute. It is up to the court’s discretion to determine whether a history of verbal and emotional abuse will hinder the parties’ abilities to make decisions together. If awarded sole legal custody, the custodian can make major life decisions on behalf of the child without the input of the other parent and over the other parent’s objection. When there are issues of power and control between parents, the ability of one parent to make decisions on his or her own can be of critical importance. While the statute does not require an order for protection be issued to document domestic violence, many judges take that position, and in those situations, it may be difficult to establish that domestic abuse has occurred if there is not an order for protection in place.

Practice Tip

The best interests statute, Minnesota Statutes section 518.17, which went into law August 1, 2015, very much changed the dialogue on child custody. Pursuant to subdivision 1(b)(9), the court shall use a rebuttable presumption that upon request of either or both parties, joint legal custody is in the best interests of the child. In conjunction with Minnesota Statutes section 518.175, subdivision 1(g), which provides there is a rebuttable presumption that a child must receive a minimum of at least 25-percent for both parents. Minnesota law makes it clear that joint legal and joint physical will be preferred by the court. Additionally, best practice is to include a designation of primary residence for purpose of future modification— which more or less “defeats” the goal of no custody designation in the parenting plan statute.

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).

2. How do custody labels affect child support?

Answer

Custody designations do not affect child support. Instead, both parents' respective support obligations are directly affected by the amount of parenting time he or she has with the children. When applying the child support guidelines and utilizing the Department of Human Services' child support calculator, you will be required to input the amount of overnight parenting time each parent has and this, rather than the custody labels, will affect the child support amount.

Authorities

- Minn. Stat. §§ 518A.27, 518A.34, 518A.36

Comment

The Minnesota online child support calculator allows for input of court ordered parenting time. Custody labels are not included. There is a parenting expense adjustment to a party's support obligation that is based on the number of overnights each parent has on an annual basis. This expense adjustment assumes that a parent will incur costs on the children's behalf during his or her parenting time with the children, and the support obligation should reflect this.

Practice Tip

There are a range of potential issues when calculating child support, such as the amount of income imputed for a stay-at-home parent and the number of overnights each parent has with the children on an annual basis, based on a two-year average. It is worth noting that there is no consequence for failure to exercise parenting time. You may want to insert a financial consequence for failure to exercise parenting time, such as cost of childcare.

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).

3. What are the best interest factors and how are they used to decide custody and parenting time?

Answer

Minnesota Statutes section 518.17 was first revised effective August 1, 2015 and most predominantly again August 1, 2024, modifying the tone and discourse on a court's determination of child custody. Presumptions are created that suggest equal parenting time is in the best interests of the child, such as subdivision 1(a)(10) below, which expressly outlines a factor about the "benefit to the child in maximizing parenting time with both parents and the detriment to the child in limiting parenting time with either parent." Minn. Stat. § 518.17, subd. 1(a)(10). There are also nine principles that must be applied when considering the factors. The judge will issue the final judgment and decree of dissolution or parentage, making detailed findings of fact about each of the 12 factors below.

The factors the court must consider and evaluate are:

1. a child's physical, emotional, cultural, spiritual, and other needs, and the effect of the proposed arrangements on the child's needs and development;
2. any special medical, mental health, developmental disability, or educational needs that the child may have that may require special parenting arrangements or access to recommended services;
3. the reasonable preference of the child, if the court deems the child to be of sufficient ability, age, and maturity to express an independent, reliable preference;
4. whether domestic abuse, as defined in section 518B.01, has occurred in the parents' or either parent's household or relationship; the nature and context of the domestic abuse; and the implications of the domestic abuse for parenting and for the child's safety, well-being, and developmental needs;
5. any physical, mental, or chemical health issue of a parent that affects the child's safety or developmental needs;
6. the history and nature of each parent's participation in providing care for the child;
7. the willingness and ability of each parent to provide ongoing care for the child; to meet the child's ongoing developmental, emotional, spiritual, and cultural needs; and to maintain consistency and follow through with parenting time;
8. the effect on the child's well-being and development of changes to home, school, and community;
9. the effect of the proposed arrangements on the ongoing relationships between the child and each parent, siblings, and other significant persons in the child's life;
10. the benefit to the child in maximizing parenting time with both parents and the detriment to the child in limiting parenting time with either parent;
11. except in cases in which domestic abuse as described in clause (4) has occurred, the disposition of each parent to support the child's relationship with the other parent and to encourage and permit frequent and continuing contact between the child and the other parent; and
12. the willingness and ability of parents to cooperate in the rearing of their child; to maximize sharing information and minimize exposure of the child to parental conflict; and to utilize methods for resolving disputes regarding any major decision concerning the life of the child.

Minn. Stat. § 518.17, subd. 1(a)(1)–(12).

The principles the court must apply when evaluating the factors are:

1. The court must make detailed findings on each of the factors in paragraph (a) based on the evidence presented and explain how each factor led to its conclusions and to the determination of custody and parenting time. The court may not use one factor to the exclusion of all others, and the court shall consider that the factors may be interrelated.
2. The court shall consider that it is in the best interests of the child to promote the child's healthy growth and development through safe, stable, nurturing relationships between a child and both parents. In determining custody, the court must consider the best interests of the child and must not prefer one parent over the other solely on the basis of the gender of the other parent.
3. The court shall consider both parents as having the capacity to develop and sustain nurturing relationships with their children unless there are substantial reasons to believe otherwise. In assessing whether parents are capable of sustaining nurturing relationships with their children, the court shall recognize that there are many ways that parents can respond to a child's needs with sensitivity and provide the child love and guidance, and these may differ between parents and among cultures.
4. The court shall not consider conduct of a party that does not affect the party's relationship with the child.
5. Disability alone, as defined in section 363A.03, of a proposed custodian or the child shall not be determinative of the custody of the child.
6. The court shall consider evidence of a violation of section 609.507 in determining the best interests of the child.
7. There is no presumption for or against joint physical custody, except as provided in clause (9).
8. Joint physical custody does not require an absolutely equal division of time.
9. The court shall use a rebuttable presumption that upon request of either or both parties, joint legal custody is in the best interests of the child. However, the court shall use a rebuttable presumption that joint legal custody or joint physical custody is not in the best interests of the child if domestic abuse, as defined in section 518B.01, has occurred between the parents. In determining whether the presumption is rebutted, the court shall consider the nature and context of the domestic abuse and the implications of the domestic abuse for parenting and for the child's safety, well-being, and developmental needs. Disagreement alone over whether to grant sole or joint custody does not constitute an inability of parents to cooperate in the rearing of their children as referenced in paragraph (a), clause (12).

* * *

- c) In a proceeding involving the custodial responsibility of a service member's child, a court may not consider only a parent's past deployment or possible future deployment in determining the best interests of the child. For purposes of this paragraph, "custodial responsibility" has the meaning given in section 518E.102, paragraph (f).

Minn. Stat. § 518.17, subd. 1(b)(1)–(9), 1(c).

Authorities

- Minn. Stat. § 518.17.

Comment

The overriding theme of Minnesota Statutes section 518.17 is to ensure the safety, stability, and nurturing of children. The court must consider that the 12 best interest factors can be related, and there is a holistic approach to identify the best interests of a child. The court must also consider the 12 factors in relation to the parents' and child's cultural backgrounds. The existence of domestic abuse as stated in the factor outlined in Minn. Stat. § 518.17, subd. 1(a)(4) is broadly studied as to how it impacts the child's safety, well-being, and developmental needs. The court also must weigh the benefit to the child of maximizing time with both parents and the detriment to the child of limiting time with either parent. The 2015 statute incorporated updates that make it much more forward looking into the child's future stability, in comparison to the previous statute, that, in part, analyzed the past primary caretaking functions of each parent. The

2024 statute takes this further and creates a stronger presumption that it is in a child's best interests to "maximize parenting time" with both parents, regardless of the parent's gender.

Practice Tip

When seeking an order for protection in a case in which domestic abuse has occurred and there are minor children involved, the client and the children are better served if the children are all included as petitioners. 50/50 shared parenting time has become the default with many early neutral evaluators and judges, even in situations where domestic abuse has occurred between the parties. Research is clear that simply witnessing domestic violence is harmful to children; it is not necessary for children to be direct victims of abuse to experience detrimental effects. The developmental needs of the child should be considered in all parenting-time decisions.

Further Reading

- Nancy Ver Steegh, *Differentiating Types of Domestic Violence: Implications for Child Custody*, 65 La. L. Rev. 1379 (2005).
- Sarah E. Evans, Corrie Davies, David DiLillo, *Exposure to Domestic Violence: A Meta-Analysis of Child and Adolescent Outcomes*, 13(2) *Aggression and Violent Behavior*, 131–40 (2008).
- Dale Bagshaw, et. al, *The Effect of Family Violence on Post-Separation Parenting Arrangements: The Experiences and Views of Children and Adults From Families Who Separated Post-1995 and Post-2006*, 86 *Fam. Matters* 49–61 (2011).
- See all of Jenn McIntosh's work on children's developmental needs during family separation at her website,
- <www.familytransitions.com.au/Family_Transitions/Family_Transitions.html>, and her research at
- <www.familytransitions.com.au/Family_Transitions/Publications.html>.

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).

4. What is a parenting plan and how is it different from custody and parenting-time provisions in a divorce or paternity decree? How does it work if parties decide to forego custody labels, except for interstate enforcement purposes as provided in the parenting plan statute?

Answer

A parenting plan is an agreement/contract between parents that governs co-parenting their children for years to come. Within the plan, there are designations of decision-making duties. These areas of decision-making can be as broad as choice of school or as specific as which extracurricular activities a child participates in during the school year. The parenting plan also outlines a method for resolving disputes between the parents. A parenting plan enables parents to address virtually all issues and matters relating to their children. The parents can also agree to substitute terms for physical and legal custody.

The parenting plan differs from a custody or parenting-time order in a judgment and decree because, unlike a court order that outlines in detail the statutory best interest factors, designates custody labels, and sets forth a concise parenting-time schedule, a parenting plan agreement is a more elaborate document that memorializes in great detail the various parenting arrangements the parties have negotiated and committed to writing to address their particular concerns and interests regarding co-parenting their children.

A good parenting plan provides specific methods for resolution of disputes; the most comprehensive is the use of a parenting consultant (PC), known in other jurisdictions as a parenting coordinator.

Authorities

- Minn. Stat. § 518.1705.

Comment

The parenting plan is an opportunity to create flexibility with co-parenting for years to come. It allows co-parents to plan for areas that may give rise to potential disputes, such as a new step-parent or their children's teenage years. Many issues that might never have been considered by young parents going through a divorce can be considered, anticipated, and addressed in the parenting plan.

Practice Tip

The parenting plan should be as prospective as possible. All people and parents change; they get remarried, they move, they change jobs, and they can even change religious beliefs. Moreover, no one is ever fully prepared for their children going through adolescence.

Further Reading

- Coates, et al, *Parenting Coordination for High-Conflict Families*, 42 Fam. Ct. Rev., 246–62 (2004).
-

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).

5. Does joint physical custody assume equal amounts of parenting time with each parent? What is joint physical custody and why do so many parents pursue it? Does it affect child support? Ability to relocate? Where the children attend school?

Answer

The amount of parenting time each parent has is determined by the parenting time schedule, rather than the custodial designation. Physical custody is defined as the routine daily care and control of the child. Minnesota Statute §518.003, subd. 3(c). Joint physical custody does not require an equal division of time. Minnesota Statute §518.17, subd 1(b) (8). The physical custody designation was once very important to the amount of child support received and the ability to move to another state. All that has changed in recent decades, but vestiges of those beliefs continue today. Child support is not affected by the custodial designations, nor does physical custody impact the ability to relocate. It is likely to affect school attendance to some extent. Under Minnesota Statute 518.175, subd. 1(g), in the absence of other evidence, there is a rebuttable presumption that a child must receive a minimum of at least 25 percent of the parenting time with each parent.

Authorities

- Minn. Stat. §518.003, subd. 3(c)
- Minn. Stat. § 518.17.
- Minn. Stat. § 518.003, subd. 3(c).
- Minn. Stat. § 518.175, subd. 1(g).

Comment

Be aware of the term “shared parenting,” which is still often used by professionals but has no legal meaning. Everything now resides in the parenting time schedule and/or parenting plan.

Practice Tip

It is important to investigate whether there are any domestic violence issues present in the case, as that may affect the court's approach to and consideration of custody matters. However, the court shall use a rebuttable presumption that joint legal custody or joint physical custody is not in the best interests of the child if domestic abuse, as defined in Minnesota Statutes section 518B.01, has occurred between the parents. In determining whether the presumption is rebutted, the court shall consider the nature and context of the domestic abuse and the implications of the domestic abuse for parenting and for the child's safety, well-being, and developmental needs. Minn. Stat. § 518.17, subd. 1(b)(9).

Further Reading

- Parenting Plan Evaluations: Applied Research for the Family Court (Kathryn Kuehnle & Leslie Drozd, eds., 2012).

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).

6. At what age and under what circumstances does the child get to decide when they see the other parent? How does a child's preference get conveyed to a judicial officer?

Answer

There is no hard and fast rule at what age the child's preference should be considered. While the child may be granted an opportunity to express his or her wishes with regard to parenting time they spend with their parent, the ultimate decision lies with the parents and, if the parents cannot agree, with the courts. Whether a child sees their parent is an issue of custody and parenting time and is decided according to the rules governing custody and parenting matters. When making custody and parenting-time determinations, the courts must consider the best interest factors as outlined in Minnesota Statutes section 518.17. The reasonable preference of the child must be considered by the court, if the court deems the child to be of sufficient ability, age, and maturity to express an independent, reliable preference. Minn. Stat. § 518.17. It is challenging to determine what that age will be. There is precedent for consideration of the preferences of a child ages 7 years, 10 months, and for a child 10 years old. *Mowers v. Mowers*, 406 N.W.2d 60, 64 (Minn. Ct. App. 1987); *Maxfield v. Maxfield*, 452 N.W.2d, 219, 223 (Minn. 1990). At eight years old, if requested by the parents, the court is permitted to inform a child of the rights of the child and each parent under the order or decree or any substantial amendment thereof. Minn. Stat. § 518.175. Generally, the preference of an older teenager is given great weight. A child's stated preference may be given little to no weight if the court finds the preference is unreasonable or results from one parent's undue influence, coaching, or manipulation.

The child's preference is most often communicated to a court through a report or testimony of a neutral third party, such as a custody evaluator, guardian ad litem, or therapist. A court may interview the child in chambers or allow a child to testify, but this rarely occurs. Similarly, parents may also opt to utilize child-inclusive mediation to allow their children to express an opinion, through a Child Consultant, for the parents to consider during mediation.

Authorities

- Minn. Stat. §§ 518.17, 518.175.

Comment

Koop v. Koop, 378 N.W.2d 121, 124 (Minn. Ct. App. 1985) (desire of 17-year-old son to visit his imprisoned father should be given due consideration).

Schultz v. Schultz, 383 N.W.2d 379, 382 (Minn. Ct. App. 1986) (Minnesota Court of Appeals upheld trial court's finding that children, ages 16 and 12, were not too young to express a preference for a particular parent).

Wilkus-Schmidt-Hight v. Wilkus, 398 N.W.2d 44, 48 (Minn. App. 1986). (A child's strong preference to change their residence can constitute a change in circumstances to warrant a change of custody. Further, a substantial change in the child's behavior may be sufficient to prove the changed-circumstances element.)

Steinke v. Steinke, 428 N.W.2d 579, 583–84 (Minn. Ct. App. 1988) (criticizing trial court for failing to consider the clearly expressed preference of the ten-year-old child, where a guardian ad litem testified that the child was "a fairly mature 10-year-old," that the issue of custody was an important issue for him, and that the child reported having "more of a relationship" with his mother).

Barrett v. Barrett, 394 N.W.2d 274, 279 (Minn. Ct. App. 1986) (unlike with general expressions of preference regarding custody, the *Barrett* case provides guidance as to the child's ability to set a specific parenting schedule... In *Barrett*, a court order left the days and time of visitation to be agreed upon between the noncustodial parent and the children. The court said that "that sort of an ongoing, specific

role should not be delegated to the children, but that their choices and preferences must be seriously considered in determining visitation in general.”).

Lundell v. Lundell, 387 N.W.2d 654, 658 (Minn. Ct. App. 1986) (While “important to consider the wishes of a child of suitable age, it is seldom in a child’s best interest to place upon him or her the entire burden of such a difficult decision as custody.”)

In re Weber, 653 N.W.2d 804, 810 (Minn. Ct. App. 2002) (The child’s “expressed preference for a change in custody resulted from manipulation by his father.”)

Utilization of the child inclusive mediation process as envisioned by Jenn McIntosh, <<https://familytransitions.com.au/mediation/>>, and resourced locally at <<https://mediationcentermn.org/resources-professionals/>> is an ideal means to have the voice of the child heard in family law matters.

Practice Tip

A child’s preference to live with a different parent may constitute a change in circumstances sufficient to warrant an evidentiary hearing but does not by itself mandate it. *In re Weber*, 653 N.W.2d 804 (Minn. Ct. App. 2002) (citing *Geibe v. Geibe*, 571 N.W.2d 774, 778 (Minn. Ct. App. 1997)).

If a party is asking the court to interview the child, a motion indicating this request must be filed. No child under the age of 14 years will be allowed to testify without prior written notice to the other party and court approval. Minn. Gen. R. Prac. 303.03(d)(7).

“The practitioner should not rely upon the issue of preference alone when arguing the issue of custody to the court. There is still too much conflict in the appellate decisions.” 14 MINN. PRAC., FAMILY LAW § 6:17 (3d ed.).

Be very cautious in pursuing any change in custody or parenting time based solely on the client’s report of what the child wants. Children of divorce are caught in a loyalty conflict between their parents, two people they love in their own way, and often will say things to their parent that they know that parent wants to hear. Courts and attorneys are seeing more cases of parental alienation, in which one parent plants ideas in the child’s head to estrange the child from the other parent.

Further Reading

- Minnesota Child Custody Deskbook (Minn. CLE 2016, updated 2018).
- 14 Minn. Prac., Family Law § 8:9 (3d ed.)

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).

7. How does domestic violence affect custody and parenting-time determinations?

Answer

The court is required to consider domestic abuse when making a determination on custody and/or parenting time. Best interest factor number 4 requires the court determine, “whether domestic abuse, as defined in Minnesota Statutes section 518B.01, has occurred in the parents’ or either parent’s household or relationship; the nature and context of the domestic abuse; and the implications of the domestic abuse for parenting and for the child’s safety, well-being, and developmental needs.” Minn. Stat. § 518.17, subd. 1(a)(4). When determining if domestic abuse occurred, the court must review the facts and testimony of the parties and determine if the alleged abuse being raised is considered domestic abuse under Minnesota Statutes section 518B.01, the current order for protection (OFP) standard for defining domestic abuse. Even if an order for protection has not been issued, this does not preclude the court from determining whether domestic abuse likely occurred.

In this analysis, domestic abuse can be viewed more expansively. For example, domestic abuse between the alleged perpetrator and any person can be considered by the court in its analysis of custody and parenting time. The court will then decide whether the domestic abuse that occurred at the hands of the abuser will affect the child and the abuser’s ability to parent. The court will also consider the conduct of the victim of the domestic abuse. If the abuse occurred between the parents/parties, the court will determine if co-parenting is possible given the level, type, and frequency of abuse, amongst other factors. It is possible that due to the nature of the abuse, that the victim may be hostile and uncooperative in dealing with the other parent. Finally, most courts include an ADR clause in a final order requiring the parties to attempt some form of settlement prior to bringing any post-decree motions; if the parties are not capable of meeting in person, either due to an OFP, domestic abuse no-contact order (DANCO), or due to the nature of the relationship, it is important that the court not include a clause requiring the parties to attend a form of ADR prior to any further litigation. This does not preclude the parties from agreeing to an ADR process; rather, it keeps the victim safe from further abuse that could occur during an ADR process. *See*, Chapter 2, Domestic Violence, *infra*.

Authorities

- Minn. Stat. § 518.17.
- Minn. Stat. § 518B.01.
- Minn. Gen. R. Prac. 114.
- Minn. Gen. R. Prac. 310.
- Minn. Gen. R. Prac. 303.03.

Comment

At your initial interview and throughout the representation, always ask your client if he or she feels safe and feels the children are safe with the other parent. Be observant of the dynamics between the parties. Most persons who suffer abuse will not initially acknowledge the fact because their survival mechanism is denial. While coercive control is not identified in the statute as an aspect of domestic violence, it is often a precursor to - and dynamic of - domestic violence. Financial abuse, such as limiting and controlling access to basic necessities, such as a phone or credit card for purchase of groceries. As an example, group or “family” phone plans are quite dangerous, as they often allow individuals on a group plan to access records of other plan members’ text messages and phone calls. A client who has been a victim of domestic abuse must receive mental health help in order to successfully cooperate in the handling of their case. If not, they may very well torpedo their own best interests.

It is important in conversations with your client that you candidly discuss past acts of domestic abuse. Often clients do not disclose their status as either abuser or victim. If your client is the abuser, you will need to further examine the impacts of any abuse perpetrated on a

third party, any other acts of violence, review police reports, and do a search for active OFPs and DANCOs. Understanding the terms of any no-contact orders will help ensure that your client does not violate any orders currently in place. In addition, other services for your client, such as domestic abuse counseling or co-parenting classes geared towards parents with a domestic abuse history, should be considered.

If you represent the victim, it is important that your client has appropriate resources in place to ensure continued safety and well-being. Keep in mind that your client may be required to co-parent with their abuser if the court finds that the abuse does not impact their ability to communicate regarding the children. Often courts rely on the ability for virtual contact, such as email or text messaging, as a form of communication appropriate to keep the victim safe. Of course, abuse can occur in these forums as well, so it will be helpful to include a clause in the order requiring the conversations to be solely about the children, and if possible, monitored by a third party, such as Our Family Wizard; 2Houses, or AppClose. Individual therapy specific to surviving domestic abuse may be appropriate, as well as family therapy for the children if they witnessed the abuse or were abused as well. Programs such as the Domestic Abuse Project (DAP) offer a wide array of services for families.

Further Reading

- Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (2009), available at
- <www.powerandcontrolfilm.com/the-topics/academics/evan-stark>.
- National Coalition Against Domestic Violence, <www.ncadv.org>.
- The National Domestic Abuse Hotline, <www.thehotline.org>.
- The Domestic Abuse Project, <www.domesticabuseproject.com> (Minneapolis based).
- The Battered Women's Justice Project, <www.bwjp.org/index.html> (Minneapolis based).

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).

8. Is it easier to move within the state than out of state? What standard is applied to each situation and how difficult is it to relocate? Is it better to bring this issue up at the start of the court proceeding or through a modification proceeding after the decree has been entered?

Answer

The threshold question is whether the other parent's parenting time will be affected by a move. If the parenting time will not be affected and the move is within the state, then the parent who has sole physical custody would likely be able to move the child's residence. If the parenting time of the other parent will be affected or the move is out of state, the affected parent will have to consent to the move and the parenting schedule will have to be modified pursuant to Minnesota Statutes section 518.18. However, if the other parent does not consent to the move, the parent with whom the child resides "shall not move the residence of the child to another state except upon order of the court" Minn. Stat. § 518.175, subd. 3.

Furthermore, if the purpose of the move is to interfere with the parenting time of the other parent, the court will not permit the child's residence to be moved to another state. When determining whether to modify a custody order or parenting plan, the court looks at what is in the best interests of the child. Minn. Stat. § 518.75, subd. 3(b). The burden of proof is on the parent requesting to move the child's residence, except when the parent requesting permission to move has been a victim of domestic abuse by the other parent, in which case the burden switches to the parent opposing the move. Minn. Stat. § 518.75, subd. 3(c).

If the issue of a move is known at the start of the court proceedings, it should be brought up then. However, if the need or desire to move arises after a parenting plan has been agreed to and/or approved by the court, the parent who is seeking to move the child will need to bring a motion to request to move the child's residence and to modify parenting time. Different legal standards may apply.

Authorities

- Minn. Stat. § 518.17.
- Minn. Stat. § 518.1705.
- Minn. Stat. § 518.175.
- Minn. Stat. § 518.18.
- 14 Minn. Prac., Family Law § 8:23 (3d ed.).

Comment

"Sole physical custody" is a custody designation formally defined as "physical custody and residence," Minn. Stat. § 518.003, subd. 3(c), and which means routine daily care, control, and residence of the child. It does not mean the parent with sole physical custody may move the residence of the child wherever that parent wants if it will affect the other parent's parenting time with the child. The burden of proof lies with the parent requesting the move.

The court will apply the best interest standard when considering the parent's request to move the child's residence out of state. The factors to be considered when considering a request to move the child's residence out of state include but are not limited to the specific factors listed in Minnesota Statute 518.175, subd. 3, which consider the impact on the child and the child's relationships. The district court will consider the child's move within the state based on best interest factors as set out in Minnesota Statutes section 518.17, subdivision 1. "The district court has the authority to restrict the in-state geographical residence of minor children in a marriage dissolution, provided that a restriction is necessary to serve the children's best interests." *Schisel v. Schisel*, 762 N.W.2d 265, 267 (Minn. Ct. App. 2009).

Practice Tip

Even under the most egregious circumstances, a move out of state is rarely allowed if both parties do not agree to the move. The belief by family law professionals that it is in the best interests of children to have a relationship with both parents mitigates against allowing a move. A move within the state or, indeed, within the Twin Cities metropolitan area, becomes more of a practical issue regarding how to maintain attendance at the children's school. Often a parenting consultant can assist in a decision regarding a move within the metropolitan area that will affect school attendance.

Further Reading

- Minnesota Child Custody Deskbook (Minn. CLE 2016, updated 2018).

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).

9. What do I do if my child refuses to spend time with the other parent? Is this impacted by the age of the child? Can I get custody if the other parent is interfering with my parenting time?

Answer

Minnesota Statutes section 518.175, subdivision 2 states that “[t]he parent with whom the child resides shall present the child for parenting time with the other parent, at such times as the court directs.” Remedies, such as civil penalties and costs, modification of custody, an award of compensatory parenting time, or fees, are available if a parent can prove they have been deprived of a substantial amount of court-ordered parenting time. Minnesota Statute §518.17, subd. 6. The Minnesota Supreme Court has held that evidence supported a finding that change of custody was necessary to thwart a sustained course of conduct and manifest purpose of the mother and her husband to alienate children from affection and influence of their father. *Henrikson v. Henrikson*, 179 N.W.2d 284 (Minn. 1970). Proof of unwarranted denial or interference with duly established parenting time may also constitute contempt of court. Minnesota Statute §518.17, subd. 6.

The court’s primary focus is on the best interests of the child. Therefore, if there is a legitimate concern about the other parent placing the child in danger of harm, the court will hold a hearing to determine if there is a need to modify the order granting parenting time. Minn. Stat. § 518.175, subd. 5(c).

Authorities

- Minn. Stat. § 518.175.
- Minn. Stat. §518.17.
- Minn. Stat. § 518.18.
- 14 Minn. Prac., Family Law § 8:21 (3d ed.).

Comment

Although typically a motion to modify an existing custody order or parenting plan may not be made earlier than one year from the date of entry of the order, this time limitation is inapplicable to motions to modify when the court finds that there is persistent and willful denial or interference with parenting time. Minn. Stat. § 518.18.

Historically, interference with or unwarranted denial of parenting time was not a controlling factor, and must have been considered along with Minnesota Statutes section 518.18(d). *Grein v. Grein*, 364 N.W.2d 383, 386 (Minn. 1985). Since the changes made in 2015 and again in 2024, it has been treated more seriously. Beware parental alienation, either making the allegation or engaging in the behavior. While not recognized as a legitimate behavioral condition, there are many mental health professionals and legal professionals who believe in the concept and will advocate parental alienation as a basis for a change of custody.

Practice Tip

Even if a custody modification may not be attainable in a case where one parent has interfered with or engaged in unwarranted denial of parenting time, the deprived parent can seek other remedies. Minnesota Statutes section 518.175, subdivision 6 provides for compensatory parenting time of at least the same type and duration to be taken within one year after the deprived parenting time, and at a time acceptable to the deprived parent. Further, where the court finds that a party has wrongfully failed to comply with a parenting-time agreement, the court may impose a civil sanction of up to \$500, require the party to post bond with the court, award the deprived parent reasonable attorney's fees and costs, require reimbursements to the deprived parent of any costs associated with the violation of the order or agreement, and award any other remedy the court deems appropriate and in the best interest of the child. Minn. Stat. § 518.175, subd. 6.

Further Reading

- One of the leading proponents of parental alienation is Richard A. Warshak,
- <www.warshak.com/publications/what-is-parental-alienation.html>.

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).

10. How will it affect custody if I am the parent who moves out of the house when we separate? Can I take the children with me when I move out and before the court gets involved? Can I move out of the house and not risk custody of the children?

Answer

Generally, the factors governing the best interests of the children control regardless of occupancy of the home. However, once separation has occurred, it is critical to get a plan for parenting time in place.

Comment

There is no doubt that once parties separate, the party leaving the home and children loses some immediate control of the situation, unless the parents have already agreed to a parenting time schedule both parents want. The parent who is with the children tends to be the gatekeeper for the schedule until the parties have attorneys or get into court.

Practice Tip

The commencement of the divorce proceeding is the most difficult time for lawyers and their clients. Feelings run high and actions taken to separate often get blown out of proportion. Always acting to avoid harm and disruption to the children is critical. If there is domestic violence in the home and the victim intends to leave, that person should not leave the children behind, as they may become hostages to the negotiations.

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).

Paternity

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We would like to acknowledge and thank Melissa Rossow as one of the previous authors of this chapter.

Chapter 11

Paternity

Table of Contents

1. Who are the required or permissive parties in a paternity action?	2
2. What are the required elements of a paternity adjudication?	4
3. Do certain paternity presumptions outweigh others?	6
4. Are genetic tests required before a paternity adjudication?.....	7
5. What are the differences between an adjudication based on a recognition of parentage and a court ordered paternity adjudication? Do you need, and can you get, a parentage adjudication order if the parents sign a ROP?	9
6. Are there any statutes of limitations relating to paternity cases?	11
7. Is there a way to “disestablish” paternity?.....	13
8. What are the differences between commencing a paternity action in the expedited process versus in district court?	15
9. Why are paternity cases still confidential? How will this be impacted by e-filing?	17
10. What if a paternity issue is raised during a dissolution proceeding?	18
ATTACHMENT A – Paternity Adjudication by Court Action Versus a Recognition of Parentage	20

1. Who are the required or permissive parties in a paternity action?

Answer

The required parties are the biological mother, each presumed father, each alleged father, and the public authority if child support is assigned due to the child receiving public assistance as defined by Minnesota Statutes section 256.741 or if non-public assistance child support services are provided. The child must also be made a party when the case involves a compromise under Minnesota Statutes section 257.64, subdivision 1, when the case involves the declaration of the nonexistence of the father-child relationship and the child is a minor, when the mother or child denies the existence of the father-child relationship, and when a presumed or alleged father pursues a paternity action and the mother or child deny the existence of the father-child relationship. In limited circumstances the child will be appointed a guardian, for example when the action is to declare the nonexistence of the father-child relationship. *See also In re the Welfare of C.F.N.*, 923 N.W.2d 325 (Minn. Ct. App. 2018). Permissive parties include: the child or the personal representative of the child, personal representative of the mother, or personal representative of the father when they initiate the action.

See also *Witso v. Overby*, 627 N.W.2d 63 (Minn. 2001), which held that an alleged father has standing to bring a paternity action even without genetic testing, for a child born to the mother during her marriage with another man, if the alleged father has pled the required sexual contact.

If a mother was married at the time a child was conceived or born, her husband is a presumed father of the child even if there was no requisite sexual contact. The husband must be a party to the paternity action in addition to the alleged biological father. *See Cnty. of Dakota v. Blackwell*, 809 N.W.2d 226 (Minn. Ct. App. 2011).

A person allowed to bring an action under Minnesota Statutes section 257.57 may be made a party to the paternity action.

Required parties who are not subject to the jurisdiction of the court must be given notice in a manner prescribed by the court, and given an opportunity to be heard. *See* Minn. Stat. § 257.60.

Authorities

- Minn. Stat. §§ 257.60, 257.55, 257.57.
- *In re the Welfare of C.F.N.*, 923 N.W.2d 325 (Minn. Ct. App. 2018) (biological father has standing to bring action declaring the existence of his own father-child relationship and may have had standing to bring action declaring the non-existence of a ROP father's father-child relationship. The court also held that a child was required to be made a party since the result of the action was to declare the non-existence of a father-child relationship).
- *Witso v. Overby*, 627 N.W.2d 63 (Minn. 2001).
- *County of Dakota v. Blackwell*, 809 N.W.2d 226 (Minn. Ct. App. 2011) (husband is a required party despite genetic testing results including another man as the biological father).
- *Dorman v. Steffen*, 666 N.W.2d 409 (Minn. Ct. App. 2003) (public authority has standing to bring paternity action against an alleged father and a presumed father, even without prior genetic testing).

Comment

It is important that a paternity action includes all required parties. If a required party is not added and given notice of the proceedings, the resulting paternity order could be vulnerable to attack many years later. If the non-initiating party is aware of any additional, required parties that have not been included in the action, the non-initiating party should immediately make the court aware of this and file the appropriate pleadings to add that required party.

Practice Tip

There are no Minnesota Judicial Branch example forms for paternity actions, likely due to the complexity of a paternity action. There are other family law related forms, and instructions that can be found at the Minnesota Judicial Branch website at <www.mncourts.gov/Help-Topics/GetForms.aspx>.

If you need assistance when initiating a paternity action, you can seek guidance from a fellow family law practitioner or from the county attorney's office in the local county where the paternity action would be brought.

Make sure you ask your client if there are any additional presumed or alleged fathers so that they are added as parties as early as possible in the paternity action. Since they do not understand the legal requirements, they may not provide names unless specifically told they have to. Also, check for any third-party custody, domestic abuse, or other court orders that may already address custody of the minor child.

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Minnesota Family Law Financial Deskbook with eFormbook, 3rd ed., (Minnesota CLE Updated 2024).

2. What are the required elements of a paternity adjudication?

Answer

Prior to issuing a paternity order, each party must be informed of the following rights: right to a jury trial, right to counsel, right to court-appointed counsel if they financially qualify, and right to genetic testing.

The paternity adjudication order must include all of the following: (1) parent-child relationship; (2) legal custody;

(3) physical custody; (4) name of the child; (5) parenting time with the child (including number of overnights for both parents); (6) ongoing child support (basic support, medical support, childcare support); (7) past support back to the child's date of birth but no more than two years preceding the commencement of the paternity action;

(8) pregnancy and confinement expenses owed to the mother or the public authority (this may include the mother's lost wages due to medical necessity); (9) genetic testing costs; (10) Social Security numbers of the child, mother, and father filed on the confidential information form (also known as Form 11.1); and (11) full names, dates of birth, and places of birth for the mother, father, and child for updating the child's birth record.

In addition, the court shall order that a new birth record be issued.

For cases where the child and current custodial parent live in another state for at least six consecutive months immediately preceding the paternity action, but the alleged father lives in Minnesota, Minnesota has jurisdiction on the issues of the father-child relationship, child support, and the child's legal name. However, Minnesota does not have jurisdiction on the issues of custody and parenting time.

It is important to complete the paternity adjudication process by filing a certified copy of the paternity court order with the Minnesota Department of Health, Vital Statistics (if the child was born in Minnesota) or with the child's birth state's vital records office.

Authorities

- Minn. Stat. § 257.69, subd.1 (right to counsel; right to court-appointed counsel in limited circumstances).
- Minn. Stat. § 257.62 (if requested, the court shall require the child, mother, and alleged father to submit to genetic tests).
- Minn. Stat. § 257.66 (paternity order requirements, including a two-year time period for past support).
- Minn. Stat. § 518D.201 (child custody jurisdiction for cases where the child lives in another state).
- *Smith v. Bailen*, 258 N.W.2d 118 (Minn. 1977).
- Minn. Gen. R. Prac. 314(c) (right to a jury trial).
- Minn. Gen. R. Prac. 371 (paternity pleading requirements).

Comment

Pursuant to Minnesota Statutes section 257.69, subdivision 1, the right to court-appointed counsel when a party qualifies is limited to the establishment of the father-child relationship, and not the entire paternity case. This limitation was added to the statute in August 2012. Minnesota General Rule of Practice 357.03 (cases in the expedited process) was updated in 2019 to reflect this limited duration. So far, the decision on whether to limit the duration of court-appointed counsel has been made at the district court level in each particular county. Some district courts allow the court-appointed counsel to remain on the case for contested issues beyond the father-child relationship, while others do not.

Practice Tip

It is important to include all elements of the paternity adjudication in the order, as it has great impact on the child and parents' daily lives and the future. For example, the full names of the child, mother, and father, including any middle names, are needed to update the child's birth record at the Minnesota Department of Health, Office of Vital Records. If any of the middle names are missing, a last name is incorrect, or initials are used instead of full names, the Minnesota Department of Health (MDH) might not be able to update the birth record until the paternity order is amended.

Make sure that the child is properly identified in the pleadings and the court order, by using the child's first, middle, and last name(s). This will ensure that the paternity adjudication order involves the correct child as well as identifying the correct child in the process of updating the child's birth record.

If the parties have an open IV-D child support case, check with the local child support office to confirm the information that is presently on the birth record (prior to obtaining the paternity order). Another option is to request a non-certified copy of the birth record directly from MDH; there is a fee imposed by MDH for both non-certified and certified copies of the birth record.

Once the paternity order is obtained, your client needs to request a certified copy so that the client can file it with MDH to update the birth record. This step does not happen automatically. It is almost certain that if the order is not filed with MDH and the birth record is not updated, the child will have problems in the future relating to school, student loans, driver's license, passports, and other issues.

The birth state of the child "owns" the birth record for the child even if the child does not reside in that state anymore. Any updates or changes included in the paternity order must be sent to the birth state's vital records office to request an updated birth record. There may be hurdles with the other state in updating an out-of-state birth record, including a requirement to amend the paternity order to include provisions required by the birth state.

Due to the 2018 changes in the Parenting Expense Adjustment (PEA) for child support calculations, it is very important to include in the court order the total number (or average number) of overnights (and any overnight equivalents) that each parent has with the child.

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Minnesota Family Law Financial Deskbook with eFormbook, 3rd ed., (Minnesota CLE Updated 2024).

3. Do certain paternity presumptions outweigh others?

Answer

No. Minnesota Statutes section 257.55, subdivision 2 states that “[i]f two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.”

Authorities

- Minn. Stat. § 257.55 (paternity presumptions).
- Minn. Stat. § 257.62, subd. 5 (evidentiary presumption created with 99 percent or greater genetic test results).
- *Dorman v. Steffen*, 666 N.W.2d 409 (Minn. Ct. App. 2003) (court allowed paternity action with biological father even though ex-husband was presumed father and that presumption could no longer be rebutted).
- *State v. D.E.A.*, No. A06-2426, 2007 WL 1816471 (Minn. Ct. App. June 26, 2007) (court affirmed the adjudication of the non-biological father who was the ex-husband despite the mother arguing for adjudication of the biological father).
- *In re the Welfare of C.M.G.*, 516 N.W.2d 555 (Minn. Ct. App. 1994) (court affirmed paternity adjudication of non-biological father who had established a bond with the child and was able and willing to support the child).
- *In re the Custody of D.T.R.*, No. A10-1098, 2012 WL 1914058 (Minn. Ct. App. May 29, 2012) (court affirmed the lower court's finding that ex-husband would be the legal father of the child based on the established relationship between ex-husband and child despite genetic testing including another man, who initially filed the paternity action).

Comment

Although there have been some legislative attempts to make the genetic testing presumption weightier than other presumptions, this has not become law in Minnesota. See *State v. D.E.A.*, No. A06-2426, 2007 WL 1816471, at *3 (Minn. Ct. App. June 26, 2007). In addition, there is case law that strongly urges genetic testing prior to a paternity adjudication (see Question 4, *infra*). However, the current law is that the court must determine which paternity presumption, based on the facts of the specific case, is weightier based on policy and logic.

The courts have stated that the “child’s best interests is a valid policy factor in resolving conflict between competing paternity presumptions.” See *C.M.G.*, 516 N.W.2d at 560.

Practice Tip

Since the Minnesota courts and legislature have continued the long tradition of allowing paternity adjudications based on presumptions other than marriage and biology, this emphasizes the importance of having all required parties included in the paternity action. Even if one presumed father is included by genetic testing as the biological father, another presumption may be found to outweigh biology, and another man may be adjudicated as the legal father.

Further Reading

- *State v. Thomas and Nyman*, 584 N.W.2d 421, 424 (Minn. Ct. App. 1998) (“Thus, when choosing between two conflicting presumptions of paternity, in addition to considering the best interests of the child, district courts must weight historic policy considerations on the importance of protecting the marriage relationship and the importance of blood relationships.”).

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
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4. Are genetic tests required before a paternity adjudication?

Answer

No, but Minnesota Statutes section 257.62 indicates that if any party, including the public authority, requests genetic testing, the court shall order it. In addition, there are many appellate cases, dating back to 1979, that strongly urge the use of blood/genetic testing to make the paternity adjudication with accuracy and reliability. The Minnesota Supreme Court has stated: “[w]e can imagine no situation in which it would not be in the interest of a paternity plaintiff, whether it be the county, the mother or the child, to have blood tests taken. When such reliable evidence is available, it is no longer sensible to rely solely on customary, less reliable evidentiary techniques. We therefore believe that in every paternity case, the party bringing the action should request the court to order blood tests as early as possible in the litigation.” *Cnty. of Ramsey v. S.M.F.*, 298 N.W.2d 40, 44 (Minn. 1980). In *Berrisford*, the Minnesota Supreme Court stated that the “public policy of the state is to encourage use of blood tests when paternity is in issue.” *Berrisford v. Berrisford*, 322 N.W.2d 742, 745 (Minn. 1982).

The use of genetic testing in paternity adjudication cases is already used in many counties across the state; however, not every county makes it mandatory prior to an adjudication of paternity. The court is allowed to proceed by default in a paternity action after proper service, without genetic testing or even an appearance by the alleged or presumed father. *See* Minn. Stat. § 257.651. However, the Minnesota Court of Appeals has vacated a paternity order when the father obtained genetic test results that excluded him as the biological father. Even though the father expressly waived genetic testing at the paternity hearing and agreed to the initial adjudication, the court still vacated the paternity order and indicated that this could have all been avoided if genetic testing had been done. *Turner v. Suggs*, 653 N.W.2d 458 (Minn. Ct. App. 2002).

There are risks associated with genetic tests, so a thorough analysis of the risks and benefits should be explored before advising your client to voluntarily submit to genetic tests or to request genetic tests. For example, one risk is that if a recognition of parentage (ROP) was signed and the ROP father is excluded by genetic testing, the court shall vacate the ROP. *See* Minn. Stat. § 257.75, subd. 4. One benefit is that the genetic history can be known as it relates to medical history and genealogy.

Authorities

- Minn. Stat. § 257.62 (if requested, the court shall order genetic testing).
- *Ortloff v. Hanson*, 277 N.W.2d 205 (Minn. 1979).
- *Hepfel v. Bradshaw*, 279 N.W.2d 342 (Minn. 1979).
- *County of Ramsey v. S.M.F.*, 298 N.W.2d 40 (Minn. 1980).
- *Berrisford v. Berrisford*, 322 N.W.2d 742 (Minn. 1982).
- *Kremin v. Graham*, 318 N.W.2d 853 (Minn. 1982).
- *Turner v. Suggs*, 653 N.W.2d 458 (Minn. Ct. App. 2002) (case law that urges the use of genetic testing/ blood testing prior to a paternity adjudication).

Comment

Although the paternity statutes still refer to genetic testing as “blood tests,” the most common practice utilized is a buccal/cotton swab of the inner cheek. This is a painless, efficient, scientifically reliable, and less invasive process.

As indicated previously, there are risks and benefits associated with the decision of whether to do genetic testing. Some of the benefits include: (1) the cost and time to obtain results for genetic testing has decreased. Currently, many counties have contracts for genetic testing that cost approximately \$30 per person tested. The sample is easily collected and chain of custody documents are maintained throughout the process. Results are typically available within one to two weeks of collecting all parties' samples; (2) scientific truth and certainty from the beginning;

(3) genetic testing is readily available, inexpensive, painless, and very accurate; (4) the child has a right to know valuable genetic information; (5) cleans unclean hands (whether intentionally unclean or not); and (6) children should not be kept in the dark about the importance of their parentage.

Some of the risks include: (1) let the family decide (do not tear families apart); (2) family relationships vary, and reasons for decisions vary, and it is not for the government to dictate; and (3) after the adjudication by court order or ROP: finality of judgments, waived genetic testing—no two bites at the apple, and unless you are willing to vacate the ROP or adjudication, genetic testing is risky.

It appears that the appellate courts in Minnesota favor genetic testing before paternity adjudications; however, these same courts do not necessarily favor biology over other social and psychological factors. There is no one-size fits all answer. But, it is hard to ignore the statutes, case law, and studies that support the establishment of paternity by providing all available evidence to the court early in the child's life, and all of the problems that occur when that is not done. "The law is clearly not one mind when it comes to weighing the respective claims of blood, marriage, caregiving, and voluntary assumption of parental duty in defining the basis of parenthood." David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 Am. J. Comp. L. 125, 137 (Fall 2006).

Practice Tip

If there is an IV-D child support case open for the parties, it may be possible to have the county facilitate the genetic testing prior to a paternity action. The parties should contact their county's child support office and apply for services, and the county will initiate a paternity action. If genetic testing is requested, let the county know that early in the process. As part of a paternity action, ongoing and past child support will also be addressed. In addition, the parties may still be liable for some or all of the expense for genetic testing, but it would be at a lower cost than going through a private laboratory. The genetic test results are processed by an American Association of Blood Banks (AABB) certified lab with chain of custody documents and certified for use in a legal proceeding.

Further Reading

- Ruth Padawer, *Who Knew I Was Not the Father?*, New York Times Magazine, Nov. 17, 2009.
- *Michael H. v. Gerald D.*, 491 U.S. 110, 140 (1989) (Brennan, J., dissenting) ("the original reasons for the conclusive presumption of paternity are out of place in a world in which blood tests can prove virtually beyond a shadow of a doubt who sired a particular child").
- *In the Interest of J.W.T.*, 872 S.W.2d 189, 197 (Tex. 1994) ("that the biological mother...has chosen to engage in sexual relations outside of marriage is proof itself that the integrity and solemnity of the family unit has been damaged at least to some degree. Resolution of these difficulties by the husband and wife does not, we feel, give license to the state to perpetuate the myth of 'presumption of paternity' so as to deprive the biological father of at least a chance to being able to exercise those rights, duties, privileges, and responsibilities that all civilized societies have recognized to be fundamentally ingrained in the concept of parenthood.").
- Video: Little White Lie, Lacey Schwartz, et al. (Truth Aid, Nov. 21, 2014).

Related Reading

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5. What are the differences between an adjudication based on a recognition of parentage and a court ordered paternity adjudication? Do you need, and can you get, a parentage adjudication order if the parents sign a ROP?

Answer

There are only two similarities between an adjudication based on a ROP and a court-ordered paternity adjudication: (1) a father is adjudicated as the legal father of a child, and (2) the child's legal name is determined.

Other than these two similarities, there are many differences between a ROP and a paternity adjudication order, including:

1. a paternity order requires court action but a ROP can be signed at the hospital or county office;
2. a paternity adjudication order must be filed with the vital records office by one of the parties to update the child's birth record, but a ROP is filed with the vital records office by the county or hospital, which automatically updates the child's birth record;
3. custody and parenting-time rights must be included as part of a paternity order, but a ROP does not give the legal father any custody or parenting-time rights—it only provides standing to file a custody and parenting-time action with the court;
4. child support must be included as part of a paternity order, but a ROP does not establish child support—it only provides a basis to file a child support action with the court;
5. a paternity action may take a few months from beginning to end with a court order, but a ROP can be signed and filed in a couple days;
6. parents have the right to request court-appointed counsel in a paternity court action if they financially qualify, but once a ROP is signed, the parents do not have a right to request court-appointed counsel;
7. if requested, the court shall order genetic testing in a paternity action, but the parents waive their rights to request genetic testing when they sign the ROP. It is possible to request genetic testing after a ROP is signed, but it is in the court's discretion based on the facts of the case;
8. it is possible to challenge a paternity order based on fraud, duress, or mistake of fact within time limitations, but a ROP can only be revoked up to 60 days after it's executed; however, it is possible to vacate a ROP after 60 days with exclusionary genetic testing results under certain circumstances and time limitations.

If a paternity action involves a minor parent, the court will appoint a family member or other adult to act as a guardian ad litem for the minor parent. A minor parent can sign a ROP, which only creates a presumption of paternity.

Once a ROP is signed and filed, it has the force and effect of a paternity order. If a ROP is signed and filed, and there are no competing presumptions, the court must not allow a paternity adjudication. See Minn. Stat. § 257.75, subd. 3. The next appropriate actions following a ROP include: (1) a Minnesota Statutes section 256.87 establishment of child support action, or (2) a Minnesota Statutes section 518.156 custody and parenting-time action; not a paternity action.

If a paternity action is filed after a ROP is signed and filed and the action should have been for the establishment of child support and/or custody a parenting time, some courts will allow the case type to be changed in the hearing while others will dismiss the case and require a new action to be filed. It may depend on whether all parties are present at the hearing.

Authorities

- Minn. Stat. §§ 256.87, 257.541, subd. 3, 257.57, 257.62, 257.66, 257.75, 518.156.
- *Ramsey County v. X.L.*, 853 N.W.2d 813 (Minn. Ct. App. 2014) (paternity action may be commenced when a minor parent signs a ROP since only a presumption of paternity exists).

Comment

The ROP has some important benefits with the quick and efficient process to establish the legal father, but it does not address custody, parenting time, or child support. Even though a paternity action with the court may take longer than a ROP, it provides more benefits to both parties because it includes the adjudication, custody, parenting time, and child support. In addition, it is possible for the parents to enter into a stipulated paternity order with genetic testing completed within a couple weeks.

Minor Parent ROP: When there is an open IV-D child support case, some counties will initiate a paternity action when a minor parent signs a ROP, since only a presumption of paternity is created. This is supported by recent case law in Minnesota, which indicated that the county's decision to initiate parentage actions to conclusively determine paternity is supported not only by the relevant statutory provisions, but by case law and common law. See *Ramsey County v. X.L.*, 853 N.W.2d 813 (Minn. Ct. App. 2014). However, since the court of appeals did not mandate the initiation of a paternity action subsequent to a ROP signed by a minor parent, some counties have continued to initiate child support only actions rather than paternity actions.

Practice Tip

If a client asks your opinion about whether or not to sign a ROP, be sure to explain both the positive aspects and the negative aspects. ROPs work for many families, but can be a disaster for other families.

Inform your client that if he or she waives the right to genetic testing by signing a ROP or agreeing to a court-ordered adjudication without genetic testing, it will be a long, expensive, and possibly emotionally-damaging process to undo the adjudication. Additionally, there are statute of limitations that may apply. See Question 6, *infra*.

Further Reading

- See Attachment A – Paternity Adjudication by Court Action Versus a Recognition of Parentage, *infra*, for a chart comparing a ROP and a paternity adjudication order.
- Central Minnesota Legal Services, *Unmarried Father's Guide to Paternity, Custody, Parenting Time and Child Support in Minnesota* (5th ed., Oct. 2018).

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
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6. Are there any statutes of limitations relating to paternity cases?

Answer

An action to declare the existence of the father-child relationship may be brought at any time. When there is no presumed father, a paternity action is barred one year after the child reaches the age of majority.

An action to declare the non-existence of the father-child relationship is limited based on the presumption of paternity:

1. marriage presumption – within two years after reason to believe he is not the father but no later than three years after the child's birth;
2. holding out presumption – any time;
3. ROP with another presumption – within six months after obtaining genetic test results;
4. genetic testing presumption – within three years after obtaining genetic test results;
5. minor parent ROP – within six months after the minor signator turns 18 years of age.

A ROP may be revoked within 60 days of execution. A parent may bring a court action to vacate a ROP with genetic test results, but only within one year of the execution of the ROP or within six months of obtaining genetic test results that excluded the ROP father as the biological father. There appears to be no time limitation on when the public authority may bring a court action to vacate a ROP with genetic test results.

A motion for relief from judgment or order may be brought under Minnesota Rule of Civil Procedure 60.02. This rule allows a party to file a motion for relief because there was mistake, inadvertence, newly discovered evidence, fraud, duress, or misrepresentation; however the rule indicates that the motion must be brought within a "reasonable time" but no more than one year after the judgment for the aforementioned reasons. There is a "catch-all" provision in Rule 60.02 of "for any reason justifying relief from the operation of the judgment" which does not have a time limit in the rule. However, case law seems to indicate that if there is a statutory time limit imposed based on the specific presumption of paternity, that statute of limitations will bar any relief under Rule 60.02. In *DeGrande v. Demby*, 529 N.W.2d 340 (Minn. Ct. App. 1995), the Minnesota Court of Appeals upheld the denial of a motion to vacate the paternity adjudication as there was a three-year limitation for Demby's presumption of paternity (declaration of parentage was signed). In comparison, the Minnesota Court of Appeals indicated in *Losoya v. Richardson*, 584 N.W.2d 425 (Minn. Ct. App. 1998) that when the county did not oppose the father's request for genetic testing after a default paternity order had been entered, the county essentially waived its right to argue timeliness of the motion to vacate on appeal. See Question 7, *infra*.

There is a two-year time limitation on requesting past support in a paternity action. In addition, the court may deviate in determining the parent's liability for past support based on certain circumstances in Minnesota Statutes section 257.66, subdivision 4.

There is a two-year time limitation on a parent requesting reimbursement of unreimbursed or uninsured health-related expenses, from the date the expense was incurred.

Authorities

- Minn. Stat. §§ 257.55, 257.57, 257.66, subd. 4, 257.75, 518A.41, subd. 17(b).
- Minn. R. Civ. P. 60.02.
- *DeGrande v. Demby*, 529 N.W.2d 340 (Minn. Ct. App. 1995).
- *Losoya v. Richardson*, 584 N.W.2d 425 (Minn. Ct. App. 1998).

Comment

The statute of limitations in paternity actions can be complex and confusing, as they cross-reference each other and have specific time frames for each paternity presumption. In addition, there are different time frames for declaring the existence of the father-child relationship versus the non-existence of the relationship.

Practice Tip

It is important to determine the actual basis of paternity in a case and then to figure out what is the statute of limitations. In addition, the procedural posture of the action may have an impact on whether the court determines that a statute of limitation exists—an action to declare the non-existence of the father-child relationship may be time barred, but a motion for relief under Minnesota Rule of Civil Procedure 60 may not be time barred (essentially reopening a judgment and raising a defense).

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
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7. Is there a way to “disestablish” paternity?

Answer

Minnesota does not have a specific “disestablishment of paternity” statute; however, there are a couple different avenues that address this issue.

If parties sign a ROP and the 60 days to revoke it have passed, they may bring an action to vacate the ROP within one year of the execution of the ROP or within six months of obtaining genetic test results that excluded the ROP father as the biological father. There appears to be no time limitation on when the public authority may bring a court action to vacate a ROP with genetic test results. If the genetic testing results establish that the man who executed the ROP is not the father, the court shall vacate the ROP. See Minn. Stat. § 257.75, subd. 4.

An action to declare the non-existence of the father-child relationship may be brought by specific individuals based on the presumption of paternity as outlined in Minnesota Statutes section 257.57, subdivisions 1(b) and 2. There are different time limitations and requirements that apply to this action. See Question 6, *supra*.

Another avenue is a motion for relief from judgment or order under Minnesota Rule of Civil Procedure 60.02 as referenced in Question 6, *supra*. Rule 60.02 allows a party to file a motion for relief because there was mistake, inadvertence, newly discovered evidence, fraud, duress, or misrepresentation; however the rule indicates that the motion must be brought within a “reasonable time” but no more than one year after the judgment for the aforementioned reasons. There is a “catch-all” provision in Rule 60.02 which may not have a time limitation except for certain circumstances. See Question 6, *supra*.

See also Minnesota Statutes section 518.145, subdivision 2 for relief from a judgment or order under chapter 518, which has similar language to Minnesota Rule of Civil Procedure 60.02. However, there is case law that limits the ability to challenge a paternity adjudication in a divorcee decree due to *res judicata*. See *Clay v. Clay*, 397 N.W.2d 571, 577–78 (Minn. Ct. App. 1986) (paternity adjudicated in divorce decree and the court denied relief, stating that the district courts lack jurisdiction to consider Rule 60.02 motions, except for fraud).

Since a paternity adjudication order is considered a judgment, the courts have vacated paternity orders under Rule

60.02. See *Turner v. Suggs*, 653 N.W.2d 458 (Minn. Ct. App. 2002), in which the Minnesota Court of Appeals vacated a paternity order many years later when the father obtained genetic test results that excluded him as the biological father. The order was vacated despite the fact that the father expressly waived genetic testing at the paternity hearing and agreed to the initial adjudication. The court indicated that this could have all been avoided if genetic testing had been done. Also, in *Wessels v. Swanson*, 289 N.W.2d 469, 470 (Minn. 1979), the court stated that blood tests “furnish a reason justifying relief from the operation of the judgment pursuant to [Minn. R. Civ. P. 60.02(f)],” even if the father has failed to meet the stricter time limits set forth in Minnesota Rule of Civil Procedure 60.02(a)–(c).

Authorities

- Minn. Stat. §§ 257.57, 257.75, subd. 4, 257.60(2), 518.145, subd. 2.
- Minn. R. Civ. P. 60.02.
- *DeGrande v. Demby*, 529 N.W.2d 340 (Minn. Ct. App. 1995).
- *Losoya v. Richardson*, 584 N.W.2d 425 (Minn. Ct. App. 1998).
- *Turner v. Suggs*, 653 N.W.2d 458 (Minn. Ct. App. 2002).
- *Wessels v. Swanson*, 289 N.W.2d 469, 470 (Minn. 1979).
- *Clay v. Clay*, 397 N.W.2d 571, 577–78 (Minn. Ct. App. 1986) (paternity adjudicated in divorce decree and the court denied relief, stating that the district courts lack jurisdiction to consider Rule 60.02 motions, except for fraud, based on *res judicata*).

Comment

The case law has shown that the Minnesota courts encourage the use of genetic testing prior to, and even after, a paternity adjudication, so the biology answer is known even though that presumption is not weightier. The direction given by the appellate courts must be considered in determining whether to pursue an action to “disestablish” paternity, or respond to a motion.

If a ROP is vacated, the court shall terminate the ongoing child support obligation of the party retroactive only to the date of service of the motion, and it shall not be suspended while the action is pending unless good cause exists. The statutes do not give any relief from past support arrears that may have accrued, or any past child support payments that were made. Minnesota Statutes section 518A.39, subdivision 2(f) also states that the court is not allowed to grant any retroactive relief prior to service of the pending motion.

Practice Tip

It is important to know the paternity presumption(s) applicable to your case and review the statutory provisions for the time limitations and requirements. In addition, most courts do not want to leave a child as “fatherless,” so that aspect needs to be taken into consideration when filing an action, and who to include as parties.

There seems to be varying case law on whether an action may be time barred, depending on how the action is pled—an action to declare the non-existence of the father-child relationship versus a Rule 60 motion for relief from a judgment (essentially reopening the judgment and raising a defense).

Further Reading

- Kristen K. Jacobs, *If the Genes Don't Fit: An Overview of Paternity Disestablishment Statutes*, 24 J. Am. Acad. Matrim. Law. 249 (2011).
- Kristen Santillo, *Disestablishment of Paternity and the Future of Child Support Obligations*, 37 Fam. L.Q. 503 (Fall 2003).

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8. What are the differences between commencing a paternity action in the expedited process versus in district court?

Answer

Each county agency, with consultation with their respective court, decides whether to initiate paternity cases in expedited process or district court.

The substantive law for paternity actions, in either the expedited process or district court, is the same; only the procedural rules are different.

The procedural differences include: (1) the child support magistrate (CSM) has limited jurisdiction to adjudicate paternity when there is a full agreement of the parties or if a party fails to appear at the hearing or file a responsive pleading; (2) if there is no agreement as to custody, parenting time, or the child's legal name, the CSM is divested of jurisdiction and must refer the case to district court; (3) if the case is referred to district court, the CSM may order temporary child support based on a genetic testing presumption of 92 percent or greater; (4) discovery rules are more limited than in district court (Minn. Gen. R. Prac. 361.03); (5) in the expedited process, a CSM is required to issue an order within 30 days of the close of the record; (6) a CSM may ask questions of witnesses in order to make the required findings; (7) court administration is required to file a notice of filing for all CSM orders; and

(8) any party may file a motion to correct clerical mistakes or a motion for review of a CSM order, which they can request be reviewed by the issuing CSM or the district court.

Minnesota General Rule of Practice 353.01, subdivision 2(b) indicates that a CSM may rule on the issues of the parent-child relationship, custody, parenting time, and the child's legal name in two situations: (1) the parties appear and agree to all of these issues, or (2) a party fails to appear at the hearing or file a response as long as the pleadings specifically address these issues. If there is no agreement, these issues shall be referred to district court.

If a paternity case is initiated in the expedited process with genetic testing results of 92 percent or greater and the parties agree to the parent-child relationship and temporary or permanent physical custody, but the case is being referred to district court for contested issues, the court shall, upon proper motion, set temporary child support pursuant to Minnesota Statutes section 257.62, subdivision 5(a). See also Minn. Gen. R. Prac. 371.11, subd. 2.

Authorities

- Minn. Gen. R. Prac. 301.01, 302, 307, 308, 314, 351.02, 353.01, subd. 2, 353.02, 361.03, 364.13, 365.02, 371.01–371.15, 375–377.
- Minn. Stat. § 257.62, subd. 5(a).

Comment

The individual county (usually the court and the county attorney's office) makes the determination of whether the IV-D child support paternity adjudication cases will be commenced in the expedited process or in district court. Paternity actions are a permissive action in the expedited process according to Minnesota General Rule of Practice 353.01, subdivision 2(a)(1). The determination is usually based on resources and availability of calendars, as IV-D cases must be heard in an expedited manner.

Practice Tip

For a case to be heard in the expedited process, there must be an open IV-D child support case (either public assistance is open or an individual has applied for non-public assistance services). While in some counties it may be more efficient for a county agency to bring all of their paternity actions in the expedited process, it may not be the most efficient process for some cases if there is a likelihood that custody or parenting time will be disputed. In this type of situation, the county and parties can agree to commence the case in district court even though all other paternities are commenced in the expedited process.

If a paternity action is commenced in the expedited process but some of the issues are referred to district court for resolution, the initial service of the summons and complaint is sufficient for the case to proceed in district court. No further motions are necessary. See Minn. Gen. R. Prac. 353.01, subd. 2(b).

Related Reading

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9. Why are paternity cases still confidential? How will this be impacted by e-filing?

Answer

Minnesota Statutes section 257.70 states that paternity court hearings (sections 257.51 to 257.74) shall be held in closed court without admittance of any person other than those necessary to the action. All hearings in a paternity court file, but after the final paternity adjudication, are open to the public.

All papers and records, other than the final judgment, are confidential and can only be released with consent or court order. All documents filed into a paternity court file, after the final adjudication, are public.

The statutory provision indicates that the final judgment is not subject to the same confidentiality. The interpretation has been that the findings of fact in that same order remain confidential even though the final judgment section is public.

This provision was enacted in 1980 and has remained unchanged since then. Prior to 1980, paternity actions were confidential due to the somewhat delicate and controversial facts in some cases. If a child is not made a party to the action, the child cannot access anything in the paternity court file prior to the final judgment, unless the child obtains a court order otherwise.

Authorities

- Minn. Stat. § 257.70.
- Minn. R. Gen. Prac. 371.10, subd. 1.
- Minn. R. Pub. Access, Rule 4, subd. 1(n).

Comment

Currently, each judicial district's court administration has used their discretion in how best to enforce the "final judgment is public" provision. Some counties deem the final paternity order as "public" and other counties have indicated that the whole order is confidential because it contains findings of fact that remain confidential. The State Court Administration Office may be working towards consistency on this issue. To determine a specific county's practice, you would need to contact the local court administration office.

Practice Tip

E-filing has thrown a complicated wrench into the already complex area of data privacy relating to the confidentiality of paternity cases. Contact the local court administration if you have questions about the public access court rules.

Related Reading

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10. What if a paternity issue is raised during a dissolution proceeding?

Answer

If the child was born during the marriage, or within 280 days after the divorce, the husband is a presumed father. However, the mother, presumed father, or child may bring an action to declare the non-existence of the father-child relationship within two years after the person has reason to believe that the presumed father is not the biological father, but no later than three years after the child's birth.

If the child is over three years old, the court may not declare the husband not to be the father even if he is excluded as the biological father unless all parties agree. Without an affirmative finding in the dissolution judgment and decree that the husband is not the father of the child, the husband will be included as a party in all future child support or paternity actions. If there is no "father" to step in, depending on the facts of the case, the court may not make such an affirmative finding.

If a paternity issue is identified while a dissolution action is pending, the issue should be raised to the court and the paternity issue should be resolved prior to a final dissolution decree. It may be possible to address the paternity issue within the dissolution action, but most likely a paternity action will need to be commenced separately and addressed at the same time as the dissolution.

If a mother is married and has a child with another man during the marriage, they have the option of signing a ROP for the child if the spouse also signs the "Spouse's Non-Parentage Statement" within one year of the child's birth, and the documents are filed with the Minnesota Department of Health, Vital Statistics. This document is also referred to as a "joinder" under Minnesota Statutes section 257.75, subdivision 1a. If the ROP and the joinder are not filed with the vital records, there is a competing presumptions with the husband, biological father, and possibly the man who signed the ROP.

Authorities

- Minn. Stat. §§ 257.55, 257.57, subd. 1, 257.75, subd. 1a.
- *County of Dakota v. Blackwell*, 809 N.W.2d 226 (Minn. Ct. App. 2011).
- *Clay v. Clay*, 397 N.W.2d 571, 577–78 (Minn. Ct. App. 1986) (paternity adjudicated in divorce decree and the court denied relief, stating that the district courts lack jurisdiction to consider Rule 60.02 motions, except for fraud, based on res judicata).

Comment

If there are paternity issues in a dissolution case, it would be beneficial to raise them early in the process. Even with the limitations of the statutes, the court may be willing to grant a request for genetic testing and then determine the next step after the results come back. It's typically best to know the biological father early in the process, including the best interests of the child.

Practice Tip

Whether to interplead another presumed or alleged father into the dissolution is a strategic decision. Sometimes that may be the best way to proceed, but sometimes it is best to proceed by commencing a simultaneous paternity adjudication action to sort out the paternity issues separately from the dissolution.

If the child is born during the marriage or within 280 days of the dissolution, it is best to address the paternity issue either before or during the dissolution action. If the issue is not addressed it could cause confusion and take significant legal intervention to address it after the dissolution. If the paternity issue is not addressed before or during the dissolution, the husband is the presumed father until or unless a court order says otherwise, no matter how much time has passed. The court may require the dissolution to be put on "hold" while the paternity action is commenced and completed.

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
- Minnesota Divorce Practice Deskbook with eFormbook, 2nd ed., (Minnesota CLE Updated 2023).
- Minnesota Family Law Financial Deskbook with eFormbook, 3rd ed., (Minnesota CLE Updated 2024).

ATTACHMENT A – Paternity Adjudication by Court Action Versus a Recognition of Parentage

This document was originally drafted by the Anoka County Attorney's Office, and adopted and modified by the Dakota and Ramsey County Attorney's Offices.

	Paternity Adjudication Court Action	Recognition of Parentage (ROP)
How is paternity established?	By a paternity adjudication action in court that results in a court order.	By both of the biological parents signing a ROP that is filed with the Minnesota Department of Health.
What if a parent is a minor?	A family member or another responsible adult will be appointed by the court to represent the minor parent's interests as a guardian ad litem.	Minors can sign a ROP, but when one or both parents are a minor at the time of signature, some counties pursue a paternity adjudication based on a court of appeals case and consider the ROP to be a presumption of paternity, even after both parents are no longer minors. Other counties proceed directly with an establishment of support action six months after the youngest parent is no longer a minor.
How does the child's birth record get updated?	A party has to file a certified copy of the paternity adjudication order with the birth state's vital records office and pay the appropriate fees.	If the ROP is signed at a county child support office or at the hospital, the ROP will be filed with the vital records office and the birth record will be updated automatically.
Are custody and parenting-time rights established?	Yes. If the child lives in Minnesota, the paternity order will address both parents' custody and parenting time rights. A separate court action <i>is not required</i> . Either parent can ask the court for custody and/or parenting time in the paternity court action. The court will make its decision based on the child's best interests.	No. In Minnesota, the mother starts out with sole legal and sole physical custody of the child when parents are unmarried at the time of the child's birth. Signing a ROP does not change that. A separate court action <i>is required</i> to request a court order establishing the father's custody, parenting time, or access rights. The ROP provides a <i>basis</i> for bringing this separate court action. It does not establish any of these rights. A child support action brought by the county based on a ROP cannot include custody and parenting time as an issue.

	Paternity Adjudication Court Action	Recognition of Parentage (ROP)
Is child support established?	<p>The paternity order will address ongoing and past child support. Child support includes basic (cash) support, medical support (insurance or a dollar amount towards the cost of insurance or public assistance), and childcare support. A court action separate from the paternity court action <i>is not required</i>.</p> <p>A parenting-time adjustment to the amount of support may be ordered, depending on the amount of parenting time ordered. There is also another calculation for parents who have court ordered equal parenting time.</p>	<p>Ongoing and past child support is not established unless the county or a party files a court action.</p> <p>A court action <i>is required</i> to obtain a court order establishing ongoing and past child support. The ROP provides a <i>basis</i> for a parent or the county to bring a support action.</p> <p>A parenting-time adjustment to the amount of support or an equal parenting-time calculation is not applicable, unless there is already an order establishing custody and parenting time.</p> <p>A child support action brought by the county based on a ROP does not include custody or parenting time. If the parents want custody and parenting time addressed, they will need to file a separate court action.</p>
How long is the process?	<p>The time it takes depends on the facts of each case. In a paternity action, all issues could be resolved very quickly by agreement. If genetic testing is needed and/or some of the issues are contested, it may take longer. The final order must address all issues.</p>	<p>A ROP can be signed before a notary public at a hospital or county office. The ROP can quickly resolve the paternity adjudication. However, the ROP is <i>not</i> effective until it is filed with the Minnesota Department of Health. A separate court action is required to establish custody/parenting-time rights or support.</p>
Can genetic tests be done?	<p>Yes. The mother, the alleged or presumed father, or the county can ask for genetic tests in paternity adjudications. If there is an open IV-D case, the county will initially pay for the tests. The county may ask for contribution to the cost of the testing or may elect to waive contribution by the parents. The cost for testing through the county is typically less than privately arranged tests, as the negotiated rate is less due to the county's high volume of cases.</p>	<p><i>Before the ROP is signed</i>, the parents may agree to genetic testing. Contact the child support office to ask about getting genetic tests done. If there is an open IV-D case, the county may pay for all or part of the testing costs.</p> <p>Once the ROP is signed and filed, a parent seeking to vacate the ROP must bring a court action, seek a court order for testing, and pay for the tests. The court will decide whether or not it is in the child's best interests to order genetic testing.</p>

	Paternity Adjudication Court Action	Recognition of Parentage (ROP)
Can I change my mind after I sign the ROP?	N/A	<p>There are 60 days after the ROP to revoke the ROP. The revocation must be in writing and must be signed before a notary public by the party requesting the ROP to be revoked, and the party must file the revocation with the Minnesota Department of Health.</p> <p>After the 60 days have passed, if a party wants to vacate the ROP, the party must file a separate court action within six months of receiving genetic testing results that show that the man whose name is on the ROP is not the biological father, or if no genetic testing has been done, within one year of signing and filing the ROP.</p>
What is the process for same-sex parents?	The language in current Minnesota statutes on the paternity adjudication reference the "mother" and presumed or alleged "father". However, the Uniform Parentage Act (2018) is currently being considered in many different states including Minnesota. This may result in changes to the language in paternity statutes.	The current version of the Minnesota Recognition of Parentage is limited to the biological parents. However, as indicated, if Minnesota adopts parts of the Uniform Parentage Act, there may be changes or additions to the ROP statutes and process.

Unmarried and Same-Sex Couples

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We would like to acknowledge and thank Elizabeth E. Due as one of the previous authors of this chapter.

Chapter 12
Unmarried and Same-Sex Couples

Table of Contents

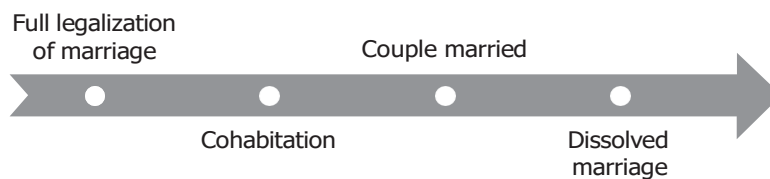
1. When a cohabiting, same-sex couple ends their relationship, how is property divided?.....	1
2. Can unmarried same-sex parents assert custody/visitation and property division/ support claims in one court action?	5
3. Can a birth certificate or Recognition of Parentage establish parentage for same-sex couples?	7
4. If a child is born to a married same-sex couple, are both spouses legal parents?.....	8
5. If a child is born to an unmarried same-sex couple, are both parties legal parents?	10
6. What other options do same-sex couples have to establish custody or visitation with their children when only one party is the legal parent?	12

1. When a cohabiting, same-sex couple ends their relationship, how is property divided?

Answer

For heterosexual couples who live together, whether married or unmarried, there is a long history of statutory and case law addressing how property should be divided at the time the couple ends their relationship. For same-sex couples, however, because legal marriage has been available for only a short time, the statutory and case law that should be applied varies depending on the timeline of the couple's choices and the full legalization of marriage. Four different timelines regarding same-sex couples must be considered.

- A. Married same-sex couple who began living together after marriage was legal, then married, and then decided to end their relationship.



For this couple, their entire relationship took place within the context of legal marriage. As such, they are similarly situated to heterosexual couples and would be treated the same in Minnesota. Their marriage will need to be legally dissolved, and their marital property divided, pursuant to the marriage dissolution statutes in chapter 518. If the couple entered into an ante- or post-nuptial agreement, Minnesota statute section 519.11 would also apply. The property acquired before the same-sex couple's marriage would be considered that spouse's nonmarital property as defined by Minn. Stat. § 518.003 even if they cohabitated prior to marriage.

- B. Unmarried same-sex couple who began living together after marriage was legal, chose to not get married, and then decided to end their relationship.



For this couple, their entire relationship also took place after legal marriage was an option for them, making them similarly situated to cohabiting heterosexual couples who made the choice not to get married. For these couples, Minnesota's "cohabitation statutes," sections 513.075 and 513.076, may apply. Please note that while Minn. Stat. § 518.075 describes a contract between a "man and a woman who are living together in this state out of wedlock" the statute would be construed by the courts "in a neutral manner to refer to a person of either gender" pursuant to Minn. Stat. § 517.201, subd. 2 (2022). As discussed in Question 1.C., *infra*, however, in the view of the authors, the cohabitation statutes should only apply to same-sex couples who had the option to marry during the entirety of their cohabitation—which is the case for the couple being discussed in this second scenario.

These cohabitation statutes require financial agreements between unmarried cohabitants living together in contemplation of sexual relations to be in writing. In most relationships, unmarried cohabitants do not have written financial agreements, which leaves very few protections for preserving interest in property beyond equitable remedies and partition for real property pursuant to Minn. Stat. § 558.01.

According to the cohabitation statutes, any financial agreements, such as to the property or earnings of the cohabitant, between this couple must be in writing in order to be enforceable after the termination of their relationship. It is important to note, however, that the Minnesota Supreme Court has held that these statutes do not “operate to automatically divest unmarried couples living together of all legal remedies.” *In re Estate of Palmen*, 588 N.W.2d 493, 496 (Minn. 1999). If, for example, an individual seeks to “recover, preserve, or protect” their own property, as opposed to asserting a right in the property of the cohabitant, the cohabitation statutes do not apply. *Id.* at 495.

In addition, the Minnesota Court of Appeals has held that the cohabitation statutes only apply where the “sexual relationship constitutes the sole consideration for the property agreements.” *Obert v. Dahl*, 574 N.W.2d 747, 749 (Minn. Ct. App. 1998), *aff'd* 587 N.W.2d 844 (Minn. 1999). As such, the cohabitation statutes do not prohibit an individual from asserting equitable remedies, such as unjust enrichment or constructive trust, if they can establish that the claim is “based on an agreement supported by consideration independent of the couple’s ‘living together in contemplation of sexual relations . . . out of wedlock.’” *Palmen*, 588 N.W.2d at 496 (quoting § 513.075).

C. Unmarried same-sex couple who began living together before marriage was legal, did not get married after it was available to them, and ended their relationship after marriage was legal.

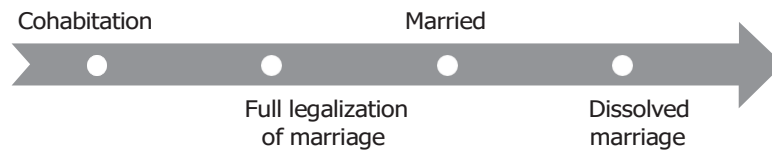


Although it might appear that this couple is similarly situated to the couple discussed in section B, *supra*, that is not the case. Minnesota’s cohabitation statutes are premised, in part, on the fact that the couple *could* have gotten married and chose not to do so. The statutes refer specifically to couples who choose to live “out of wedlock”—that is, outside “the state of being married”—and were not written with couples who could not legally marry in mind. Unlike the same-sex couple discussed in section B, this couple did not have the option to organize their relationship within a legal marriage at the time they began cohabiting. As such, they are not similarly situated to other unmarried couples who had the choice to marry during the entirety of their relationship.

Applying statutes that were clearly intended for couples who could marry to a same-sex couple who could not marry would be inequitable. The only option these same-sex couples had for organizing their financial lives in the context of their relationship was through agreements, promises, and other actions warranting consideration, whether oral or written. To limit their remedies to only those based on a written agreement would be inequitable and inappropriate.

For these same-sex couples, the authors are aware of several cases in which attorneys have appropriately, and persuasively, argued in court that the cohabitation statutes should not apply to couples who could not marry. Instead, if these couples made agreements with, or promises to, each other over the course of their relationships, whether in writing or orally, and the couples organized their lives based on those agreements or promises, then equitable remedies, such as promissory estoppel and constructive trust, should be available and not barred by the cohabitation statutes. In addition, partition actions for division of real property pursuant to Minn. Stat. § 558.01 are available where same-sex couples held real property in either joint tenancy or tenancy in common.

D. Married same-sex couple who began living together before marriage was fully legal, then married, and then ended their relationship.



These cases are the most nuanced. The divorce statutes in Chapter 518 only apply to the marital period, restricting property division to property acquired during the marriage and considering only the marital standard of living when analyzing spousal maintenance. Practitioners may feel compelled to apply the marriage dissolution statutes beginning at the time this couple was legally married, and ignore the existence of the cohabiting relationship prior to the marriage, even though the couple may have comingled assets and made agreements and promises to one another without expectation they could ever legally marry. Courts should be encouraged to take into account the parties' intentions and agreements with regard to organizing their financial lives in the context of their relationship for the time period before the parties were able to marry when dividing property and analyzing spousal maintenance. For a same-sex couple, they were likely very aware that marriage was not an option for them and certainly would not have organized their financial relations in contemplation that down the road the rules regarding marriage would apply to them. For example, it may be appropriate to consider whether they took steps to financially protect the other party available to them before they could legally marry, whether any oral or written agreements made prior to the legal marriage existed, or whether the couple significantly changed their financial arrangements after they were legally married. These considerations may not fit neatly into the dissolution statutes and likely will be considered relatively novel legal arguments, but would likely be increasingly persuasive depending on the length of time the relationship existed before marriage was legal and the specific intentions and actions of the parties prior to marriage being an option for them.

Authorities

- Minn. Stat. §§ 513.075–513.076, 518.58 Subd. 2, 558.01, 605.08 and Chapter 518 generally.
- *In re Estate of Palmen*, 588 N.W.2d 493 (Minn. 1999).
- *Obert v. Dahl*, 574 N.W.2d 747 (Minn. Ct. App. 1998), *aff'd* 587 N.W.2d 844 (Minn. 1999).
- *In re Estate of Eriksen*, 337 N.W.2d 671 (Minn. 1983).

Comment

Minnesota's cohabitation statute was passed in the early 1980s as a response to *Marvin v. Marvin*, 18 Cal. 3d 660 (Cal. 1976). In *Marvin*, the California Supreme Court held that an oral contract between an unmarried cohabiting couple to pool earnings and share property was enforceable so long as it did not rest on illegal consideration.

Practice Tip

Given the present existence of marriage for same-sex couples, with all of the legal ramifications that marriage entails, Judges are increasingly thoughtful about considering property rights for same-sex couples during the period of time before same-sex marriage was legalized, but these arguments must involve principles of equity that are less common and require a higher degree of persuasion and argument.

Such equitable claims could also, under the right set of facts, be a basis for recovering on-going support. If the parties had an agreement regarding support payments in the event they should end their relationship, evidence of such an agreement should also not be barred by the cohabitation statutes.

A court is authorized to award up to one-half of the nonmarital property of a spouse to the other spouse to prevent an “unfair hardship” considering “all the relevant circumstances.” *See* Minn. Stat. § 518.58 Subd. 2. In situations where the parties were in a long-term, committed relationship prior to same-sex marriage being legalized and immediately married but divorced after a relatively short marriage, Minn. Stat. § 518.58 Subd. 2 would likely offer some financial protections for the spouse leaving the marriage with significantly fewer assets and/or income.

Disputes over finances and property in cohabitation and dissolution matters are expensive and time consuming for litigants. It is important to understand the prolonged nature of the litigation and to help a client determine whether the dispute is financially or emotionally driven and to do a cost-benefit analysis given the complexity of the arguments and the cost of the litigation. In order to effectively represent same-sex couples with fact patterns that may be complicated and do not fit neatly into the more common legal arguments, the family lawyer must be well versed in the cohabitation and dissolution statutes as well as the common law theories of recovery and defenses for effective and efficient representation.

Further Reading

- Kim Kantorowicz, *Contracts-Cohabitation in Minnesota: From Love to Contract-Public Policy Gone Awry in Re Estate of Palmen*, 588 N.W.2d 493 (Minn. 1999), 26 Wm. Mitchell L. Rev. 213, 222 (2000).

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
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2. Can unmarried same-sex parents assert custody/visitation and property division/ support claims in one court action?

Answer

In the context of dissolving a legal marriage, Minnesota courts can determine property division and spousal support, as well as child custody, child support, and parenting time all in one family law action under Minnesota statutes chapter 518. When an unmarried couple are both the legal parents of a child or can establish legal parentage and they seek a judicial determination regarding child custody, child support and/or or parenting time, these can also be addressed through a custody or parentage action pursuant to Minnesota statute Chapters 257 and 518. When an unmarried couple seeks a judicial determination regarding only a property dispute, the couple will likely find themselves in civil court asserting a breach of contract claim, whether relying on a cohabitation agreement pursuant to Minnesota statute section 513.075, as discussed in Question 1.B., *supra*, or an equitable remedy as discussed in Question 1.C., *supra*. There are situations, however, in which an unmarried couple may be ending a relationship that gives rise to issues regarding both property division and child custody, support, and parenting time.

A strict reading of Minnesota statutes may suggest that claims for both property division and child custody, support, and parenting time cannot be brought together outside the context of dissolving a legal marriage. In practice, however, courts have been willing to hear such claims *in toto* when both parties consent to the family court hearing all of the claims. The authors are aware of several cases in the metropolitan area in which, at the request of all parties, a family court judge, recognizing the close connection between property division and child support matters when a family is breaking up, was willing to hear all the claims even in the absence of the need for a dissolution of marriage. The authors recommend beginning the case in family court pursuant to Chapter 257, rather than a civil action around property, and requesting that the family court also address the property claims. If the family court refuses, it may be necessary to bring the property claims in a separate civil filing. The opportunity to bring all of the claims in one file may also be available in counties where the divisions between civil and family court are not so defined.

As for the availability of “spousal” support to unmarried couples, such claims are not *per se* prohibited from being brought with other property or child support claims that arise when a cohabiting couple ends their relationship. (See Questions 1.B. and 1.C. *supra*.) A claim for “spousal” support may be possible pursuant to the cohabitation statutes if the agreement is in writing. If, however, an individual seeks to assert equitable claims of support against a cohabitant, whether the court has jurisdiction to hear equitable claims should be taken into consideration before filing.

Authorities

- Minn. Gen. R. Prac. 301–314.
- Minn. R. Civ. P. 3–26.
- Minn. Stat. § 513.075 and Chapters 257 and 518 of the Minnesota statutes
- *In re Estate of Palmen*, 588 N.W.2d 493 (Minn. 1999).
- *Obert v. Dahl*, 574 N.W.2d 747 (Minn. Ct. App. 1998), *aff'd* 587 N.W.2d 844 (Minn. 1999).
- *In re Estate of Eriksen*, 337 N.W.2d 671 (Minn. 1983).

Comment

While property division in dissolutions of marriage are relatively straight forward, property division for unmarried parties, particularly when there is no written agreement, involve complex civil claims that differ greatly from traditional family law concepts of property division. The practitioner often has to educate not only their client, but also the courts, who do not hear these types of arguments frequently and may be unfamiliar or less

familiar with the applicable arguments and remedies. Practitioners should review common law theories of recovery and equitable remedies and the Minnesota Rules of Civil Procedure and Practice for timelines related to filing and disclosures.

Related Reading

- Minnesota Child Custody Deskbook, 4th ed., (Minnesota CLE Updated 2023).
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- Minnesota Family Law Financial Deskbook with eFormbook, 3rd ed., (Minnesota CLE Updated 2024).

3. Can a birth certificate or Recognition of Parentage establish parentage for same-sex couples?

Answer

Since the recognition of same-sex marriage, and the acknowledgement that the marital presumption of parentage applies to married same-sex couples, the Minnesota Department of Health has been issuing birth certificates naming the birth mother and the same-sex spouse as parents. The legal impact of a birth certificate, however, is more limited than is often presumed. A birth certificate records the fact of parentage as reported by others, but does not constitute a legal determination of parentage, nor does it independently create or terminate parental rights. Therefore, a birth certificate, as a public record and not a court order, is not sufficient to establish legal parentage and is not subject to Full Faith and Credit by other jurisdictions. Therefore, some same-sex couples choose to obtain an adjudication of parentage or a co-parent adoption even if they are named as parents on the child's original birth certificate. *See* Questions 4 and 5, *infra*, for further discussion.

A Recognition of Parentage (ROP) is an official state form that can be used to establish the legal relationship between a father and his child when the father and mother are not married. *See* Chapter 6, Paternity, *supra*. In some jurisdictions, same-sex couples may sign ROPs to declare themselves parents of a child. In Minnesota, however, those signing a ROP must attest to the fact that they are “biologically” related to the child.

Authorities

- Minn. Stat. § 144.215.
- Minn. Stat. § 257, et seq.
- *Paczkowski v. Paczkowski*, 10 N.Y.S.3d 270 (N.Y. App. Div. 2015).

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4. If a child is born to a married same-sex couple, are both spouses legal parents?

Answer

If a married person gives birth to a child, the person's spouse is presumed to be a legal parent under Minnesota Statutes section 257.55, subdivision 1(a). This "marital presumption," which has long applied to heterosexual married couples, also applies to same-sex married couples in Minnesota. *See* Minn. Stat. § 517.201, subd. 2 (providing that "when necessary to implement the rights and responsibilities of spouses or parents in a civil marriage between persons of the same sex under the laws of this state, including those to establish parentage presumptions based on civil marriage, gender specific terminology such as 'husband,' 'wife,' 'mother,' 'father,' . . . or similar terms must be construed in a neutral manner"). The application of the marital presumption to same-sex couples, however, is complicated by that fact that a third party is typically involved in the conception of the child either as a gamete donor, gestational carrier, or both.

When a married same-sex couple relies on a third-party to gestate the child, such as when a gay couple uses a surrogate to carry their child, they cannot rely on the marital presumption because it is a presumption that flows to the spouse of the birth parent. Instead, these couples almost always need to obtain an adoption to establish parentage for one, or perhaps both, of the parents, and to terminate the presumed parentage rights of the egg provider and/or gestational carrier.

When a same-sex couple conceives a child using a donated gamete, but one of the spouses is able to gestate the child – such as when a lesbian couple uses donated sperm for insemination – the married couple benefits from the marital presumption and the Minnesota Department of Health will issue a birth certificate naming both parents. The couple must consider, however, whether the sperm donor will attempt to assert parentage. If the sperm was obtained from an anonymous sperm donor, as a practical matter, the chances of that donor making a parentage claim is very slim. In situations where a lesbian couple conceived a child using sperm from a known sperm donor, however, some have questioned whether the known donor would be able to assert any rights or responsibilities based on a genetic relationship to the child. In a very recent unpublished opinion, the Minnesota Court of Appeals held that Minn. Stat. § 257.62, subd. 5(c) "precludes sperm donors from using genetic testing to assert paternity." *Edrington v. Sheridan*, No. A23-1782 (Minn. Ct. App. August 12, 2024). In that case, a married lesbian couple conceived a child via at-home insemination using sperm provided by a known donor. The donor was a friend of the couple and often spent time socializing with the couple and their family, and, at times, babysat for the child. When the child was four years old, the donor filed a paternity action seeking a genetic test to prove paternity, joint legal custody, and parenting time. The lesbian couple filed a Motion to Dismiss which was denied by the district court. The Court of Appeals reversed, finding that Minn. Stat. § 257.62, subd. 5(c) precludes both sperm and egg donors from claiming parentage based on a genetic test. The Court of Appeals, however, did consider the sperm donor's claim that he had a presumption of paternity under the "holding out" presumption. Minn. Stat. § 257.55, subd. 1(d). The Court ultimately determined that the donor did not allege sufficient facts to establish standing to assert a claim under the "holding out" presumption, but, notably, the Court did not state that donors are precluded from ever relying on this presumption. As such, in cases involving known donors, it is important to discuss with clients the impact of the marital presumption, and the possibility of a donor asserting the "holding out" presumption. In situations where sperm from a known donor is used, it is best practice for the intended parents and donor to enter a known donor agreement prior to conception as evidence of the intention of the parties. In addition, especially in situations where the known donor is a close friend or family member (which is often the case), and will spend time with the child, the parents can complete a co-parent adoption to obtain a court order affirming their rights as legal parents. In addition, for children born after July 31, 2024, their parents will also be able to obtain an adjudication of parentage as an alternative to a co-parent adoption. *See* Minn. Stat. §257E, *et. seq.*

It is also worth noting that not all states have explicitly extended the marital presumption to same-sex married couples in the same way as Minnesota. In today's unpredictable political climate, many same-sex couples who qualify for the marital presumption worry that they will lose that benefit in Minnesota, or experience difficulties if they move or travel to another jurisdiction. Many of these couples still choose to obtain a co-parent adoption (sometimes referred to as a "step-parent" or "second parent" adoption) to obtain a court order affirming the legal

parentage rights of both parents. As discussed in Question 5, *infra*, for children born after July 31, 2024, these parents will also be able to obtain an adjudication of parentage as an alternative to a co-parent adoption. See Minn. Stat. § 257E, *et. seq.*

Authorities

- Minn. Stat. § 257.55.
- Minn. Stat. § 257.62.
- Minn. Stat. § 257E, *et seq.*
- Minn. Stat. § 517.201.
- *Edrington v. Sheridan*, No. A23-1782 (Minn. Ct. App. August 12, 2024).

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5. If a child is born to an unmarried same-sex couple, are both parties legal parents?

Answer

As discussed in Question 3 *supra*, a Recognition of Parentage, the administrative process to easily and reliably determine legal parentage for unwed fathers is not available to unwed, non-birth mothers in Minnesota. As such, unmarried same-sex couples in Minnesota must obtain a court order to determine parentage for both parties. How this is done, however, will depend on whether the child is born before or after the enactment of Article 4 of the Minnesota Parentage Act, entitled Assisted Reproduction, on August 1, 2024. Minn. Stat. Chap. 257E.

For children born prior to July 31, 2024, the primary means of establishing legal parentage when a same-sex couple is not married is a co-parent adoption. Alternatively, the unwed couple may be able to bring a parentage action and stipulate to an adjudication of parentage for the non-birth/non-legal parent. Obtaining a court order through one of these actions will result in the Department of Health issuing a birth certificate with both parents' names. Importantly, once the court order is obtained, both parties are legal parents with equal rights and responsibilities. Both of these options, however, require the participation and consent of the birth/legal parent. (Note: The consent of the gamete donor is not required.) If the birth/legal parent does not consent to the same-sex partner being a legal parent, such as when the parties end their relationship, the non-birth/non-legal parent may have a difficult time establishing legal parentage. Although some district courts have adjudicated parentage in such cases, in an unpublished opinion, the Minnesota Court of Appeals refused to do so. *In re Custody of N.S.V.*, No. A18-0990, 2019 WL 4412722 (Minn. Ct. App. Sept. 16, 2019). In that case, an unmarried lesbian parent (Appellant) tried to establish parentage of three children she and her former partner, the birth mother, had raised together. The Appellant argued that she was a presumptive legal parent under the "holding-out" provision of the Minnesota Parentage Act. That provision provides that a "man is presumed to be the biological father of a child if...while the child is under the age of majority, he receives the child into his home and openly holds out the child as his biological child." Minn. Stat. § 257.55, subd. 1(d). Appellant argued that the holding-out presumption applied to her as she lived with and actively co-parented the three children for several years. The Court of Appeals, however, reasoned that because the Respondent was the biological mother of the three children, Appellant could not "hold out" the children as her "biological" children and thus she could not meet the presumption. *Id.* Importantly, *In re Custody of N.S.V.* is an unpublished opinion and, therefore, is non-precedential. As such, district courts are not bound to the holding and can, like other district courts have already done, find that a non-birth/non-legal parent in an unmarried same-sex couple can be recognized as a legal parent.

For children born after July 31, 2024, new statutory provisions drafted specifically to determine parentage of children conceived via assisted reproduction would apply. Minn. Stat. Chap. 257E. This new statute vests parentage rights of children conceived via assisted reproduction (and not to a surrogate) in the intended parents. *Id.* at § 257E.22. The statute defines "intended parent" as "an individual, married or unmarried, who manifests an intent to be legally bound as a parent of a child conceived by assisted reproduction." *Id.* at 257E.10, subd. 8. The statute also defines "donor" as "an individual who provides gametes intended for use in assisted reproduction" who does not also meet the definition of intended parent. *Id.* at subd. 5. Best practice under the statute would require that the intended parents express their intent to both be legal parents in a written record. *Id.* at 257E.23. Furthermore, when using sperm from a known donor, best practice would include a written agreement with the donor clearly stating his intention to be a donor as defined by the statute and acknowledging that he will have no legal rights or responsibilities to the child under the statute. The statute allows either intended parents to seek an adjudication of parentage before or after the child is born. Minn. Stat. § 257E.15. There is nothing in the statute that appears to preclude an unmarried same-sex couple from still seeking a co-parent adoption, but the adjudication of parentage may be preferred because: (a) it can be obtained prior to birth; (b) does not require a search of the Father's Adoption Registry or a background check of the non-birth parent; and (c) does not require the consent of the birth/legal parent.

Authorities

- Minn. Stat. § 257.55.
- Minn. Stat. §257E, *et seq.*
- *In re Custody of N.S.V.*, No. A18-0990, 2019 WL 4412722 (Minn. Ct. App. Sept. 16, 2019).

Related Reading

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6. What other options do same-sex couples have to establish custody or visitation with their children when only one party is the legal parent?

Answer

If a party is ending a same-sex relationship, whether they are married or not, and they wish to have custody or visitation established for a child that is not legally theirs (was not born during the marriage or adopted by them), they may seek custody or visitation as a de facto custodian or may be awarded more limited rights of visitation as an interested third party pursuant to Minn. Stat. § 257C.08.

Minn. Stat. § 257C.01 Subd. 2 defines a “de facto custodian” as an individual that has:

- a) been the primary caretaker for a child under the age of three who has resided with them for six months or more in the 24 months prior to filing, or
- b) been the primary caretaker for a child over the age of three who has resided with the individual for one year or more (does not have to be consecutive) within the 24 months prior to filing

as long as there has been no demonstrated consistent participation by a parent. A lack of demonstrated consistent participation is defined as a parent's “...refusal or neglect to comply with the duties imposed upon the parent by the parent-child relationship, including, but not limited to, providing the child necessary food, clothing, shelter, health care, education, creating a nurturing and consistent relationship, and other care and control necessary for the child's physical, mental, or emotional health and development.” See Minn. Stat. § 257C.01.

Minn. Stat. § 257C.01 Subd. 3 defines a “interested third party” as an individual who is not a de facto custodian and who can provide at least one of the following factors pursuant to Minn. Stat. 257C.03 Subd. 7(a):

- i. the parent has abandoned, neglected, or otherwise exhibited disregard for the child's well-being to the extent that the child will be harmed by living with the parent;
- ii. placement of the child with the individual takes priority over preserving the day-to-day parent-child relationship because of the presence of physical or emotional danger to the child, or both; or
- iii. other extraordinary circumstances;

If a party can establish themselves as a de facto custody or interested third party, they may request custody and/or visitation of a minor child. As detailed above, however, the requirements for these designations are very specific and often challenging to meet for most parties.

If a party cannot meet the requirements for de facto custody or interest third party status, but they have resided with the legal parent for two years or more then they may request visitation with minor child pursuant to Minn. Stat. § 257C.08 if they can show that visitation would be in the best interests of the child, that they had established emotional ties creating a parenting and child relationship and their visitation would not interest with custodial parents relationship with the child. This was formerly known as the “grandparent statute” and it still has provision regarding contact with a child for grandparents.

Authorities

- Minn. Stat. §§ 257C.01, 257C.08.
- *SooHoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007).
- *LaChapelle v. Mitten*, 607 N.W.2d 151 (Minn. Ct. App. 2000).
- *In re C.D.G.D.*, 800 N.W.2d 652 (Minn. Ct. App. 2011).
- *N.S.V. v. Vetter*, No. A18-0990 (Minn. Ct. App. Sep. 16, 2019).

Comment

This area of practice is one of the more complicated in family law and requires a high degree of legal analysis and understanding of case law to be successful.

Practice Tip

The legal elements of Minnesota Statutes sections 257C.01 and 257C.08 require extremely careful pleading of facts sufficient to meet both the residency requirements and relationship with the minor child as well as complicated arguments around a parent's decisions and behavior toward a child and the child's best interests with regard to the party bringing the action. To avoid a motion to dismiss or motion for summary judgment, an attorney should plead with detailed particularity and carefully scrutinize the caselaw in this area.

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Interstate and International Issues

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Chapter 13

Interstate and International Issues

Table of Contents

1.	What is the process for commencing a family court action against someone who lives out of state or out of the country?	1
2.	What is the interplay between subject matter and personal jurisdiction in interstate and international family law cases? ..	3
3.	What are strategies to address jurisdictional conflicts in interstate and international divorce or child custody cases?	5
4.	What is the legal standard for determining out-of-state or out-of-the-country parenting time/travel with children?	7
5.	In cases of a parental child abduction, when should enforcement remedies under the Uniform Child Custody Jurisdiction and Enforcement Act be used versus bringing an action under the Hague Convention on the Civil Aspects of International Child Abduction?	9
6.	What is the process to have an international divorce decree recognized and enforced in Minnesota?	11

1. What is the process for commencing a family court action against someone who lives out of state or out of the country?

Answer

Dissolution of marriage, paternity, and child support proceedings, which involve a party who lives in another state, are commenced no differently than a proceeding where both parties reside in Minnesota. Commencement of the proceeding occurs by personal service of the summons and petition or complaint on the responding party, by the responding party waiving service of the summons and petition or complaint, or by accomplishing service via a court ordered alternate means. Personal service of a summons and a petition or complaint is accomplished by a person not party to the action who is not less than 18 years of age personally delivering a copy to the individual personally or by leaving a copy at the individual's usual place of abode with some person of suitable age and discretion then residing therein.

An exception to a family court proceeding commencing upon service is found in child custody or other proceedings, which fall under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Under the UCCJEA, the term "commencement" is defined as the filing of the first pleading in a proceeding. Minn. Stat. §518D.102(f).

In cases involving a responding party who lives outside of the United States, commencement of an action may require compliance with the Hague Service Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention") or the Additional Protocol to the Inter-American Convention on Letters Rogatory ("Inter-American Convention"). ABC Legal Services (<https://www.abclegal.com>) located in Seattle, Washington, contracts with the U.S. Department of Justice's Office of International Judicial Assistance (OIIA), which serves as the Central Authority for both Conventions, to accomplish service of process as the agent of the OIIA.

In cases where there is no internationally agreed means of service of process or if other means are ineffective, other means of service may be allowed if reasonably calculated to give notice such as in the manner of the law of the foreign country; as directed by a foreign authority; personal service, unless prohibited by the law of the foreign country; or mail requiring a signed receipt to be dispatched by the court administrator to the party to be served, or by a court ordered service by alternate means.

Service by other means not prohibited by international agreement as may be directed by the court may also commence an action.

Authorities

- Minn. R. Civ. P. 3.01, 4.01, 4.04, 4.05.
- Minn. Stat, 518D.102(f)("Commencement" means the filing of the first pleading in a proceeding).
- Hague Service Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.
- Minn. Stat. § 518.11.
- *Abu-Dalbouh v. Abu-Dalbouh*, 547 N.W.2d 700 (Minn. Ct. App. 1996).

Comment

In interstate cases, there is no effective difference between the commencement of a family court action for an in-state respondent verses a respondent residing in another state. However, in international cases, accomplishing effective service of process abroad can be time consuming, complex, and expensive.

In attempting to serve a party residing out of the country, a first step should be to determine if the country is a party to a treaty with the United States regarding service of process. If there is no applicable treaty for service of process, ABC Legal Services is a helpful resource

for determining service requirements for foreign countries. Consultation with counsel in the foreign jurisdiction is strongly recommended to expedite service of process and to verify legal methods of service of process within that jurisdiction.

Practice Tip

No summons shall be required if a joint petition is filed and the action will be deemed commenced when both parties have signed the verified petition. Minn. Gen. R. Prac. 302.01(c).

Service of process on a responding party residing abroad can be accomplished if consistent with the laws of the jurisdiction where that party is actually served.

Further Reading

- *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988) (by virtue of the Supremacy Clause, U.S. Const., art. VI, The Hague Service Convention “pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies”).
- See also *Shults v. Shults*, 2012 WL 245496 (Minn. Ct. App. 2012).
- See also *Shults v. Shults*, 2014 WL 2807709 (Minn. Ct. App. 2014).

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2. What is the interplay between subject matter and personal jurisdiction in interstate and international family law cases?

Answer

In general terms, subject matter jurisdiction is a court's ability to exercise its authority over a subject such as dissolving the bonds of matrimony or determining child custody. Subject matter jurisdiction exists by virtue of a statute or other source of law authorizing a court to hear a particular family law issue.

Personal jurisdiction, including long-arm jurisdiction, pertains to the court's authority to exercise jurisdiction over an individual and to require that individual to perform certain acts or to restrain an individual from performing certain acts. Unlike subject matter jurisdiction, a party may consent to or waive into personal jurisdiction. However, absent consent or waiver, there are constitutional requirements of minimum contacts for a court to exercise personal jurisdiction over an individual.

Family law cases may include determinations as to parentage, marital status, child custody and parenting time, child support, spousal support, property division, and attorney's fees and costs. Jurisdictional requirements for the court's exercise of jurisdiction to adjudicate each sub-issue may require subject matter and/or personal jurisdiction.

In interstate and international family law matters, more than one jurisdiction may need to exercise jurisdiction to adjudicate all claims and/or to enforce family law orders.

Authorities

- Minn. Stat. Ch. 518D Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).
- Minn. Stat. Ch. 518C Uniform Interstate Family Support Act (UIFSA).
- Minn. Stat. § 518.07 Residence of Parties.
- Minn. Stat. § 543.19 Personal Jurisdiction Over Nonresidents.
- Minn. Stat. Ch. 260C Juvenile Safety and Placement.
- Minn. Stat. Ch. 257 Child; Custody, Legitimacy.

Comment

Depending upon the family matter to be determined, a party may have more than one jurisdiction where their claim may be heard. For example, Minnesota law has subject matter jurisdiction to dissolve the bonds of matrimony between two individuals even if only one of the spouses has residency or domicile in Minnesota. In some cases, where neither spouse has residency or domicile, but the civil marriage was performed in this state, the court may also exercise subject matter jurisdiction to dissolve the bonds of matrimony. Minn. Stat. § 518.07, subd. 2. At the same time, another state or country may simultaneously have jurisdiction to dissolve the bonds of matrimony under the laws of that state or country. In contrast, if the family law matter includes adjudication of custody or parenting time, state or international law may dictate that one state or country would have jurisdictional supremacy, independent from the analysis regarding the parties' marriage, and may require a separate jurisdictional analysis.

In navigating the interplay between personal and subject matter jurisdiction, practitioners should consider the following:

- What are the jurisdictional requirements for each element of the family law matter?
- If a matter can be brought in more than one jurisdiction, what are the advantages or disadvantages to filing in each jurisdiction, including post-decree enforcement issues?
- If bifurcation of claims is going to be required to proceed on all issues, would there be a basis to consolidate cases after commencement based upon an inconvenient forum analysis?

In most cases, consultation with counsel in the foreign jurisdiction will be necessary to properly advise the client(s) on how to proceed with their case(s).

Practice Tip

While subject matter jurisdiction exists by virtue of state or other law, the court may have the authority to decline jurisdiction for transfer to another jurisdiction based upon inconvenient forum or other factors.

In cases of domestic violence, the UCCJEA cites “whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child” as the first factor to consider in an inconvenient forum analysis. Minn. Stat. § 518D.207(b)(1).

A party may waive the right to challenge a court's personal jurisdiction by entering a general appearance and/or failing to raise lack of personal jurisdiction as a defense. Minn. R. Civ. P. 12.08. “[U]nlike a court's subject matter jurisdiction, which can be raised at any time, personal jurisdiction must be raised in the district court early in the proceedings. Minn. R. Civ. P. 12.08(a), (c). The defense of lack of personal jurisdiction is waived if not raised by motion in a responsive pleading or in an amendment to a responsive pleading. Minn. R. Civ. P. 12.08(a).” *Majestic Inc. v. Berry*, 593 N.W.2d 251, 258 (Minn. Ct. App. 1999).

Reserve. Reserve. Reserve! If a court lacks jurisdiction to adjudicate an issue in a dissolution proceeding, be sure to reserve that issue for adjudication in the appropriate jurisdiction. If the attorney fails to do so, that claim may be waived.

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3. What are strategies to address jurisdictional conflicts in interstate and international divorce or child custody cases?

Answer

In managing jurisdictional issues in either interstate or international cases, an important preliminary step is to identify counsel in the foreign jurisdiction. Consultation with foreign counsel is necessary to identify potential areas for jurisdictional conflict or concurrent jurisdiction. In addition, in the event that jurisdictional challenges arise, local counsel would then be available to act in the foreign jurisdiction and to provide legal authority in support of the client's jurisdictional position.

In assessing where to initiate the action, the substantive law in each jurisdiction, as well as the practicalities of initiating in each jurisdiction, should be considered.

In cases involving child custody or parenting-time proceedings, it is critical to distinguish between the proper jurisdiction to commence an action and the more appropriate or convenient forum. If the proper jurisdiction for filing is not the most appropriate/convenient forum, an effective strategy may be to raise the jurisdictional issue in the initial pleading. Additionally, affirmative steps should be taken to initiate communication between the initial and the more appropriate forum court. Minn. Stat. § 518D.110. This option may not be available in international child custody cases.

Including very specific averments to support jurisdiction and notice in initial pleadings may be helpful in addressing jurisdictional conflict including averments as to:

1. subject matter jurisdiction, as applicable for each issue;
2. personal jurisdiction, as appropriate;
3. whether other proceedings have been commenced raising jurisdictional deficiencies, if any; and/or
4. inconvenient forum factors as appropriate.

In cases relying upon UCCJEA or UIFSA for jurisdiction, all statutorily required elements should be included to support assertion of jurisdiction. See Minn. Stat. § 518D.209; Minn. Stat. § 518C.311.

Authorities

- Minn. Stat. Ch. 518D Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).
- Minn. Stat. Ch. 518C Uniform Interstate Family Support Act (UIFSA).
- Hague Convention on the Civil Aspects of International Child Abduction.

Comment

“Winning” a jurisdictional dispute may be less significant in today's family law proceedings. Enhanced provisions for cooperation between the courts, under the UCCJEA and UIFSA, allow parties to streamline proceedings, and gather and produce evidence including custody evaluations in other states. Additionally, parties are more fully able to participate in interstate/international proceedings at minimal additional expense through advanced audio-visual technology for communication between counsel and the court, for depositions and, in some cases, to present testimony.

In many cases, resolution of jurisdictional conflict and establishment of interstate/international cooperation may ultimately be more valuable to clients. In cases where both parties may have valid arguments for maintaining a proceeding in one jurisdiction or another, compromises may be reached that provide for mirror image recognition and enforcement in the competing jurisdictions. When parties feel

confident that orders will be recognized and enforced in both jurisdictions, this may help to reduce conflict and support stipulated resolutions in interstate or international family law disputes.

Practice Tip

In cases of concurrent jurisdiction, many jurisdictions follow a “first filed” rule to resolve jurisdictional disputes.

In UCCJEA and/or UIFSA cases, the “first filed” rule may be dispositive in determining which proceeding will retain jurisdiction.

In challenging a case of concurrent jurisdiction, procedural deficiencies should be considered as well as inconvenient forum arguments.

In negotiating international agreements, foreign counsel should be used to ensure that the intent of an agreement will be enforced in the foreign jurisdiction.

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4. What is the legal standard for determining out-of-state or out-of-the-country parenting time/travel with children?

Answer

Under Minnesota law, the court has broad discretion to establish parenting time that “will enable the child and parent to maintain a child to parent relationship that will be in the best interests of the child” and to restrict or condition access if parenting time “is likely to endanger the child’s physical or emotional health or impair the child’s emotional development.” Minn. Stat. § 518.175, subd. 1. Often, the concern with allowing interstate or international parenting time is the risk that the child will not be returned. In these cases, the court must balance the risk of flight against the best interests of the minor child. *Al-Zouhayli v. Al-Zouhayli*, 486 N.W.2d 10 (Minn. Ct. App. 1992); see *Tischendorf v. Tischendorf*, 321 N.W.2d 405 (Minn. 1982). To this end, the court may require compliance with specified conditions before out-of-state parenting time is allowed or may disallow interstate/international parenting time all together. Some options to consider for international parenting time or travel may be:

- holding a parent’s passport during parenting time;
- holding the child’s passport during parenting time;
- parenting time may be conditioned on the at-risk parent posting a bond;
- domestication of the Minnesota custody determination abroad or a mirror image order may be required prior to travel; and/or
- the custody and parenting-time order may require other specific acts or set specific conditions on travel to be exercised outside of the state or country.

The U.S. Department of Justice’s A Family Guide on International Parental Child Abduction provides information to help parties and courts assess risk of flight concerns as well as information on measures to help prevent parental child abduction.

Authorities

- Minn. Stat. § 518.175, subd. 1.
- *Tischendorf v. Tischendorf*, 321 N.W.2d 405 (Minn. 1982).
- *Al-Zouhayli v. Al-Zouhayli*, 486 N.W.2d 10 (Minn. Ct. App. 1992).

Comment

Beyond the best interest and risk of flight analysis, the court may consider whether the proposed parenting time/ travel destination is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction, which has 103 contracting countries. If the destination country is a signatory, compliance with the Hague Convention should also be considered.

By April 30th of each year, the U.S. State Department publishes an annual report on international parental child abductions, which includes information about countries compliance in returning wrongfully removed or retained children. See Sean and David Goldman International Child Abduction Prevention and Return Act of 2014.

The U.S. State Department – Office of Children’s Issues and the National Center for Missing and Exploited Children may also provide country-specific information for both Hague Convention and Non-Hague Convention countries relative to return of children either taken or wrongfully retained in a foreign country.

Practice Tip

In assessing risk factors, it may be significant to distinguish between “risk factors” which may exist simply by virtue being an international family law matter, and affirmative steps/actions taken by a parent.

A child's best interests with regard to international parenting time/travel, factors should be considered, not in isolation, but in their unique context.

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5. In cases of a parental child abduction, when should enforcement remedies under the Uniform Child Custody Jurisdiction and Enforcement Act be used versus bringing an action under the Hague Convention on the Civil Aspects of International Child Abduction?

Answer

In general terms, UCCJEA remedies provide mechanisms to enforce preexisting custody or parenting-time determinations. UCCJEA enforcement remedies may be applied to foreign child custody determinations so long as the determination was made in substantial conformity with UCCJEA jurisdictional requirements. Minn. Stat. § 518D.105. Under the UCCJEA, enforcement remedies include registration of a child custody determination, expedited enforcement of a child custody determination, and the issuance of a warrant to take physical custody of a child based upon an existing child custody determination. Minn. Stat. §§ 518D.305, 518D.308, 518D.311. In some cases, the UCCJEA may also serve as legal authority for a prosecutor or other public official to take action to locate a child, obtain the return of a child, or enforce a child custody determination. Minn. Stat. § 518D.315.

Depending upon risk of flight and other factors, UCCJEA enforcement remedies in international child abduction matters may be used independently or in conjunction with a Hague Convention action to secure return of a child to the jurisdiction of the child's habitual residence. However, in cases where a parent has rights of custody but no custody determination, UCCJEA remedies will not be available to the left-behind parent. In that case, an action under the Hague Convention may be required to secure the return of the child to its place of habitual residence.

Authorities

- Minn. Stat. Ch. 518D Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).
- The Hague Convention on the Civil Aspects of International Parental Child Abduction.
- 42 U.S.C. §§ 11601–11610 International Child Abductions Remedy Act (ICARA).

Comment

State and federal courts have concurrent jurisdiction to hear Hague Convention matters. If the Hague Convention proceeding is commenced in federal court, UCCJEA remedies will not be available. However, the federal court will have the authority to issue its own provisional—and in some circumstances *ex parte*—orders to prevent the child from being removed or endangered during the pendency of the Hague proceeding. This would include the authority to have a child removed from one parent and transferred to the other parent or a designated custodian, pending completion of the Hague proceeding. Therefore, separate UCCJEA remedies may not be necessary or available in some Hague proceedings.

Practice Tip

Expedited enforcement under the UCCJEA requires “next day” enforcement, whereas Hague Convention proceedings are expedited but do not have a specific deadline for completion.

UCCJEA enforcement remedies have very limited defenses, whereas responding parties in a Hague Convention proceeding have both a variety of defenses and allow for judicial discretion in returning a child in certain circumstances.

The Hague Convention applies to children under age 16, whereas UCCJEA enforcement mechanisms can be used until the child is age 18.

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6. What is the process to have an international divorce decree recognized and enforced in Minnesota?

Answer

As a matter of comity between sovereign nations, Minnesota courts will recognize and enforce, inter alia, foreign divorces, provided that the divorce proceedings in the issuing nation satisfy basic due process and fundamental fairness requirements. As with any other civil action, an action for recognition and enforcement may be accomplished by service of a summons and petition in conformity with Minnesota Rules of Civil Procedure and/or the Hague Service Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The petition must contain a properly authenticated or certified copy of the foreign decree to be enforced, along with a certified translation of the decree, if needed. In addition, the petition must allege a sufficient factual basis to be entitled to recognition and enforcement under the doctrine of comity by establishing basic due process and fundamental fairness requirements.

Authorities

- *Nicol v. Tanner*, 256 N.W.2d 796, 797 (Minn. 1976)
- *Ma v. Ma*, 483 N.W.2d 732, 735 (Minn. Ct. App. 1992)

Comment

The UCCJEA and UIFSA have separate processes for registration of a foreign decree with respect to child custody or child support provisions. If it is only necessary to register the document for enforcement or modification purposes as to one or both of these issues, the registration processes under the UCCJEA and UIFSA may be used. However, if recognition of the dissolution itself or enforcement of other issues such as a property award are desired, the more formal process of seeking recognition and enforcement by petition would be required.

Practice Tip

The process for recognition and enforcement under the doctrine of comity may be accomplished via joint petition, which would eliminate the need for service of process of a party located in a foreign jurisdiction.

In cases where a party anticipates that registration of their foreign decree may be required in Minnesota, it is advisable for foreign counsel to incorporate language pertaining to due process and other requirements of comity as well as any specific terminology relative to rights to be recognized and enforced in the U.S. proceeding, such as obligations to cooperate with requirements to transfer of real estate or other property located in Minnesota or the U.S., which may not normally be incorporated in the foreign decree.

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