FUNDAMENTAL TECHNIQUES IN THE TRIAL OF A DIVORCE CASE

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I. Introduction

Divorce cases are tried when settlement negotiations fail to bring the husband and wife to agreement. Lawyers should make every effort to settle a divorce case without a trial, an adversarial proceeding. Trials in divorce cases exacerbate anger, anguish, and agony between the parties. Hostility between the mother and father affects the well-being of their children. The trial method of resolving divorce cases should be the method of last resort.

A divorce case is tried before a circuit court judge. There is no constitutional or statutory right to a jury trial. Under MCR 2.517(A)(1), the Court at the conclusion of the trial is required to make findings of fact and conclusions of law.

THERE ARE FOUR BASIC WAYS A DIVORCE CASE CAN BE TRIED

FIRST – ARBITRATION: The parties to an action for divorce may agree to binding arbitration for the resolution of any issues such as child custody, alimony, property division and child support. *Dick v Dick*, 210 Mich App 576; 534 NW2d 185 (1995).

In *Dick*, the Court of Appeals struck provisions in an arbitration agreement that allowed for an appeal of substantive issues to the Court of Appeals in the same manner as if the appeal were taken from the Circuit Court Trial. The Court of Appeals determined that having invoked binding arbitration, the parties were required to proceed according to the arbitration statute and court rule. Under MCR 3.602(J), a divorce judgment based upon an arbitrator's award will not be set aside on appeal unless:

> The award was procured by corruption, fraud, or other undue means, or
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> The arbitrator showed partiality, corruption, or misconduct prejudicing a party's rights; or
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> The arbitrator exceeded his or her powers; or
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> The arbitrator refused to postpone the hearing on a showing of sufficient cause; or
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> The arbitrator refused to hear material evidence; or
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> The arbitrator conducted the hearing in a way which substantially prejudiced a party's rights.

If binding arbitration is elected by the parties as the trial mode, the parties should agree on the rules of evidence applicable to the arbitration hearing. Will the arbitrator apply the Michigan Rules of Evidence? Will the arbitrator apply more liberalized rules of evidence?

SECOND – CONFERENCE METHOD HEARING: The circuit court judge may use modified mediation or other settlement procedures such as a "conference method hearing" instead of conducting a traditional trial to resolve contested issues in a divorce case provided the parties stipulate to such a procedure. *Watson v Watson*, 204 Mich App 318; 514 NW2d 533 (1994).

THIRD – EVIDENTIARY HEARING BEFORE FRIEND OF THE COURT REFEREE: The parties stipulate that an evidentiary hearing or trial of the divorce case will take place before a Friend of the Court Referee. The stipulated order for this procedure provides that the Circuit Court Judge will decide the case based upon a review of the transcript of testimony taken at the Referee hearing and rule on any objections or disputes which develop before the Friend of the Court Referee.

FOURTH – TRADITIONAL BENCH TRIAL: The Circuit Court Judge assigned to the case conducts a non-jury trial applying the Michigan Rules of Evidence and under MCR 2.517(A)(1) at the conclusion of the trial makes findings of fact and conclusions of law.

Due to the congested condition of most circuit court dockets, lawyers should make every effort to present their client's cases at trial in an efficient and economical manner.

Before the actual divorce trial begins, the lawyers representing the parties should stipulate to as many matters as possible:

> **First:** Facts, such as residency, jurisdiction, the parties' and children's names, ages, birthdates, marriage date and relevant financial data should be agreed upon, on the court record, without the necessity of testimony.
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> **Second:** Any relevant temporary orders or court proceedings should be agreed upon and placed upon the court record.

Third: Each lawyer should state the disputed issues which the Court will be called upon to decide.

Fourth: Each lawyer should state and explain to the Court the burden of proof on each contested issue.

Fifth: Each lawyer should stipulate as to which exhibits are admissible into evidence.

Sixth: Each lawyer should state which statutes, court rules and case law are applicable to the case.

Lawyers for each party should make a determined effort to narrow the scope of the trial to specific disputed issues so that precious court time can be utilized efficiently.

SOME METHODS TO NARROW THE SCOPE OF THE TRIAL

First: Stipulations by the lawyers representing the parties as set forth above.

Second: Under MCR 2.312(A), each lawyer well in advance of trial should serve upon the opposing lawyer, a written request for admissions.

Third: Under MRE 201, the Circuit Court Judge should be requested to take judicial notice of adjudicative facts. For example, a Court can take judicial notice of the elevation of the Consumer Price Index over a period of time. *Thomas v Thomas*, (On Remand) 176 Mich App 90; 439 NW2d 270 (1989).

II. Preparation for Trial

A. In General

In any divorce trial, the crucial and determining factors are:

(1) Who succeeds with the burden of persuasion?

(2) Who presents the most convincing testimony, exhibits and arguments in favor of a client's position?

B. Determining the Issues: The Theme of the Case

(1) The first step in representing the client and properly preparing for trial is the intelligent assessment of relevant facts and legal issues. A client's position on each of the issues should be discussed, analyzed and determined.

Each case should have a theme which represents the thrust of the case, such as, this is a case of a displaced homemaker requiring an award of spousal support or alimony. This theme should be used in the opening statement, examination of witnesses and closing argument.

C. Planning the Trial

Before trial, an overall plan or strategy must be developed. The entire case should be organized and summarized in outline form.

D. Trial Notebook

In preparing for trial and during the trial, a three-ring notebook with tab dividers should be used for efficient trial preparation and trial presentation. The trial notebook should be organized into these sections:

First: Pretrial motions such as Motion in Limine

Second: Opening Statement

Third: Direct Examination of all witnesses (including a list of all lay and expert witnesses in the order in which they will be called to testify).

Fourth: Exhibits to be offered into evidence (including a list of all exhibits in the order in which the exhibits will be offered into evidence).

Fifth: Points to be made on cross-examination of the witnesses to be called by the opposing lawyer.

Sixth: Closing argument.

E. Exhibits

Before the trial begins, the lawyer should have each proposed exhibit marked with a sticker at the bottom right hand corner of the exhibit which indicates the exhibit number and date the exhibit will be offered into evidence.

Exhibits should be chronologically organized and offered into evidence as closely as possible to the order of testimony of witnesses during the trial.

Before the trial begins, each lawyer should submit to the Court a list of exhibits numbered in chronological order. The list should state which exhibits have been stipulated as admissible into evidence and which exhibits have not been stipulated as admissible into evidence.

F. Trial Brief

Before the trial begins, each lawyer should submit to the Trial Judge, a short and concise Trial Brief setting forth the facts, issues and relief requested by each party.

If the opposing lawyer submits in his or her trial brief, facts, exhibits or any information which are objectionable, the objections to these materials should be raised before the trial begins.

III. The Trial

A. In General

The trial of a divorce case is analogous to a dramatic play that must be presented in an interesting and convincing manner to an audience of one person – an arbitrator or trial judge. Boring and repetitious presentations of facts, exhibits and direct and cross-examination of witnesses should be avoided.

A trial in a divorce case includes the following:

1. The court rules on any pretrial motions.

2. The plaintiff's lawyer makes an opening statement. The defendant's lawyer makes an opening statement or reserves the right to make an opening statement at the beginning of his or her case.

3. The plaintiff's lawyer presents witnesses on direct examination subject to cross-examination by the defense counsel. The plaintiff's lawyer conducts redirect examination after the defendant's cross-examination. Rebuttal and surrebuttal testimony is permitted by the trial court depending on the circumstances.

4. Exhibits are offered for admission into evidence. The court rules on the admissibility of the exhibits.

5. In the event the trial court does not admit any testimony or exhibits into evidence, an offer of proof should be made to preserve the issue on appeal.

6. The plaintiff rests.

7. Under MCR 2.515, the defendant's lawyer may move for a directed verdict at the close of evidence offered by the plaintiff. Although motions for a directed verdict (really motions for a directed judgment) are not used very often in trials of divorce cases, there are opportunities for such an approach. For example, if the non-custodial parent in a contested child custody hearing fails to make a prima facie case showing by clear and convincing evidence that it would be in the child's best interests to change custody, a motion for a directed verdict would be appropriate.

8. The defendant presents his or her case in the same manner as the plaintiff.

9. The plaintiff makes his or her closing argument.

10. The defendant makes his or her closing argument.

11. The plaintiff makes his or her rebuttal argument.

12. Pursuant to the Court's ruling, the lawyers representing the parties may have an opportunity to present findings of fact and conclusions of law under MCR 2.517(A)(1).

13. The court decides the case at the conclusion of closing arguments or takes the case under advisement and makes its decision at a later date.

B. Stipulations

The lawyers place their stipulations on the Court record.

C. Pretrial Motions

Before the trial begins, each lawyer should make any relevant pretrial motions. An example would be a motion in limine requesting the Court to make a ruling on which burden of proof, the trial court will require in a contested child custody case, namely preponderance of evidence or clear and convincing evidence. *Berman v Berman*, 84 Mich App 740; 270 NW2d 680 (1978).

D. Trial Court's Control of Trial

Under MRE 611, the trial court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrogation and presentation effective for the ascertainment of the truth, and

(2) Avoid needless consumption of time, and

(3) Protect witnesses from harassment or undue embarrassment. Under the same rule of evidence, the court controls the scope of cross-examination and leading questions.

E. Exclusion of Witnesses

At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

F. Opening Statements

Each party, through his or her lawyer, should make an opening statement to the Trial Court covering these aspects of the client's case:

(1) Description of the parties and proceedings, and

(2) facts involved in the case, and

(3) Issues which the Court will be called upon to decide, and

(4) The client's position on the issues and the proofs which will be presented in support of the client's position on the issues, and

(5) Relief requested by the client.

G. Divorce Trial Presentation

(1) Lawyer's Role:

Under the Michigan Rules of Professional Conduct and Standards of Practice, the lawyer for each party must represent his or her client, competently with legal knowledge, skill, thoroughness and preparation. MRPC 1.1. The lawyer must also act with reasonable diligence and promptness to pursue the trial zealously within the bounds of the law. MRPC 1.3.

Timely, organized and enthusiastic preparation and presentation is crucial in representing the client successfully. Even if the result is not all that the client had hoped, he or she will appreciate the lawyer's dedicated commitment to the client's cause of action. During the trial, a lawyer's note taking should be limited to crucial facts and points in opposing counsel's opening statement, testimony of witnesses and closing argument. Lawyers are not scriveners or court reporters. Key body language can be missed if there is too much dedication to note taking.

If the lawyer is representing a defendant in a divorce trial, the defendant should be advised that he or she may be called for cross-examination under the Adverse Party Statute. MSA 27A.2161, MCL 600.2161.

(2) Direct Examination of Client and Witnesses:

Before the trial begins, the lawyer should have prepared his or her client and witnesses for their courtroom testimony. The persons who testify at trial are judged by what they wear. A person should be dressed conservatively.

The lawyer should decide when during the trial direct examination of the client will be most effective. The lawyer should present the client's testimony in chronological or logical order so it is easy for the judge to follow and understand. Any negative aspects of the client's case should be addressed and answered in the client's direct examination.

The divorce trial lawyer should frame questions on direct examination so that opposing counsel cannot interpose objections that the court will sustain. *Avoid asking questions that violate the rules of evidence.* K. Sinclair, Jr., *Michigan Rules of Evidence and Trial Objections at a Glance* (adapted for Michigan by J. K. Robinson, ICLE 1985, and revised by L. M. Collins, ICLE 1991) is a five-page summary that is useful for quick courtroom reference.

However, the attorney should anticipate any evidentiary objections and be prepared to confront them. If opposing counsel objects to a question and the objection is overruled, the lawyer should ask the court reporter to repeat the question or ask essentially the same question that he or she had asked before the objection. The trial lawyer should not be distracted by a barrage of objections but should stay with the question asked so the appropriate answer can be elicited.

When the judge sustains an objection to the admissibility of testimony or an exhibit, the lawyer must make an offer of proof. The substance of the evidence must be made known to the court by the offer of proof or must be apparent from the context within which questions were asked. MRE 103(a)(2). Without the offer of proof, any objections to the court's ruling are waived on appeal since the appellate court has no testimonial record on which to decide whether the trial court committed reversible error.

(3) Direct Examination of Expert Witnesses:

Lawyers must exercise great care in the direct examination of expert witnesses. The testimony of expert witnesses should be presented in a way that makes it believable and persuasive.

According to Judge Steven Andrews, an experienced Oakland County Circuit Court Judge, trial judges in the State of Michigan view the testimony of expert witnesses with a jaundiced eye based upon their experience and observations that experts will undoubtedly testify favorably for the party who pays his or her bill.

The divorce trial practitioner should meet this judicial suspicion in these ways:

a. Engage experts who are not "professional witnesses," that is, make their living or earn substantial fees from testifying as an expert witness.

b. Engage experts who have demonstrated competency in their field of expertise.

c. Engage experts who will do a complete evaluation and analysis of the facts and issues related to their field of expertise looking at both sides of the controversy.

d. Engage experts who have an open mind and do not have demonstrated bias for or against certain parties or subjects.

e. Engage experts who charge reasonable fees for services rendered.

f. Engage experts who have professional expertise within their specialized areas that will assist the trial court in understanding the evidence or determining facts in issue.

g. Engage experts whose testimony makes more sense than that of the expert witnesses produced by the opposing spouse; and

h. Engage experts who do not steadfastly maintain an untenable position out of loyalty to their client, his or her lawyer or the subject matter of the litigation.

Expert witnesses should be carefully selected. Does the expert witness have the necessary expertise and trial experience to make a convincing presentation in court? How will the expert witness hold up under intense cross-examination? Has the expert witness appeared previously before the trial judge? What impression did the expert witness make on the trial judge? What opinion does the trial judge have of the expert witness?

A divorce trial lawyer must be careful to assure the admissibility of his or her experts' opinions. While expert witnesses may base opinions or inferences on facts or data perceived by or made known to them at or before the hearing, the court may require that underlying facts or data essential to an opinion or inference be in evidence. MRE 703. An expert may give the reasons for an opinion or inference without disclosing the underlying facts or data unless the court requires otherwise. MRE 705. The safest way to assure the admissibility of an expert's opinion is to make sure that all underlying facts or data essential to his or her opinion or inference have been admitted into evidence.

The client's expert witness should be prepared for cross-examination. Any areas of vulnerability should be covered in direct examination to reduce the impact of unfavorable evidence when the expert is cross-examined.

H. Cross Examination

In General

The objectives of cross-examination are to:

(1) secure admissions supportive of the client's version of the facts and theory of the case;

(2) impeach or minimize the credibility of the opposing spouse's testimony and other testimony offered in support of his or her position;

(3) minimize the credibility of witnesses testifying for the opposing spouse and other testimony offered in support of the opponent's case; and

(4) evoke a favorable intellectual and emotional response from the trial judge, that is, persuade the trial judge to make a decision favorable to the client.

Under MRE 611, a witness may be cross-examined on any matter relevant to any issue in the case, including credibility. The judge may limit cross-examination with respect to matters not testified to on direct examination. Leading questions are ordinarily permitted on cross-examination.

Preparation Of Your Client's Expert Witness for Cross Examination

In the preparation for the cross-examination of your expert witness, these areas should be covered with the expert witness:

a. Is the expert qualified, a true expert in his or her field or specialty?

b. Does the expert have a correct understanding of the facts involved in the case?

c. Will the expert's opinion assist the trial court in understanding the evidence or determining facts at issue?

d. Does the expert have any bias or prejudices for or against a party or a lawyer? In *In re Baby M*, 217 NJ Super 313, 525 A2d 1128 (1987) rev'd on other grounds, 109 NJ 396, 537 A2d 1227 (1988), Judge Harvey Sorkow, the New Jersey trial judge, found that the expert testimony of Dr. Phyllis Silverman, a professor of social work at the Massachusetts General Hospital Institute of Health Professionals and called by Mary Beth Whitehead, was to be given minimal weight because of her stated bias against men.