

DIVORCE 101

by Mark A. Chinn

There are two basic ways to obtain a divorce in Mississippi. The first way is by agreement of the parties. This type of divorce is based upon “irreconcilable differences” between the parties and is often popularly referred to as a “No-Fault” divorce. The second way to divorce is by force. In other words, one party has grounds for a divorce to be awarded to them by the court whether or not the other party agrees.

This article will briefly outline both of the methods for divorcing in this state and it will also discuss a unique strategy that can result from the interplay between the different ways to divorce.

The first way to divorce is by agreement to the existence of irreconcilable differences (ID).

An ID divorce can occur in one of two ways. The first way is for the parties to agree to obtain a divorce on irreconcilable differences, and then to also agree to every single aspect of the divorce, including the division of their assets, the payment of alimony, the custody and visitation of children, and the payment of support for the children. This agreement must be in writing and be signed by both parties. The agreement is commonly referred to as a child custody and property settlement agreement, or PSA. Under this method, every issue must be agreed upon by the parties or they will not be able to divorce.

A second way to get an ID divorce is to have a “trial on irreconcilable differences.” Under this method, the parties agree that they want to divorce and they make a written list of all of the issues they can agree upon and all of the issues that they cannot agree upon (contested issues). The parties then agree to have a trial with the Court deciding all contested issues. Under this method, the parties are not actually divorced, even though they have agreed to divorce, until the trial has been held and the Court has ruled upon all of the contested issues and entered its final judgment.

The way the Court decides matters in a “trial on irreconcilable differences” is the same as in any other trial in Chancery Court. The chancellor (judge) hears all of the evidence and usually issues a written opinion for each case. There are no jury trials for divorces in this state. Both parties submit proof on the issues upon which they cannot agree. Often there are questions as to whether evidence regarding marital fault (i.e., extramarital affairs, cruelty to the other spouse, etc.) is admissible during a trial on irreconcilable differences, because there is no need to prove the existence of marital fault since the parties have agreed to divorce. However, under Mississippi law marital fault is a factor that should be considered by the Court in divorce cases when determining how to divide assets, when deciding whether to award alimony, and when ruling on custody issues. But since the entitlement of one spouse to a divorce is not at issue in a “trial on irreconcilable differences,” the trial Courts are generally required to limit the amount of proof that can be presented regarding fault.

The second method for divorcing is based on “fault grounds.”

The state legislature has set out twelve “fault grounds” for divorce in Mississippi, which include the following: adultery, habitual cruel and inhuman treatment, drunkenness, use of drugs, and desertion. These are the standard, basic fault grounds which are most commonly asserted in divorce actions. A

party who has sufficient proof of marital fault by the other spouse can have a trial and be awarded a divorce from the other party without their spouse's agreement

As many as 9 out of 10 divorce cases in this state are resolved on the basis of irreconcilable differences. Many cases begin as "fault" divorces that also include an alternative request to divorce on irreconcilable differences. This approach to filing for divorce allows the parties to convert their case from a "fault-based" divorce to an ID divorce if they can reach an agreement to all or some of the issues. Agreeing to divorce on irreconcilable differences instead of litigating fault grounds can reduce the parties' expenses for investigation, discovery, and trial, as issues of fault will not need to be addressed in great depth. Another reason to pursue an ID divorce instead of a fault-based divorce is to avoid unnecessary strain on the parties, their families and witnesses. Often pursuing, investigating, and going through a trial on the issue of fault leads to long-term, and often irrevocable, tension, disagreements, pain and suffering for those involved. For that reason, most experts advise people when possible to "let go" of the grounds for divorce and pursue an ID divorce so that a more positive long-term result can be achieved.

One caveat to the notion that divorces are best handled by pursuing an ID divorce, instead of one based on fault, is that at any time prior to the entry of divorce one party may decide to withdraw their consent to divorce on irreconcilable differences. Withdrawal of consent does happen on occasion, and it usually happens when one party wants a better result than they would be entitled to get if there were no agreement to an ID divorce. For example, negotiations are proceeding on a PSA for an ID divorce, with substantial time and money being invested in resolving all of the issues between the parties, when one of the parties withdraws their consent to divorce. That party's withdrawal of consent will cause the other party to have needlessly spent a lot of time and money negotiating a settlement when there is no longer an agreement to get an ID divorce, and it will also create fear that the non-withdrawing party may not be able to get divorced at all if there is not sufficient proof regarding fault grounds against the party whose consent was withdrawn. This type of "tactical maneuver" is most often designed as a means to "extort" a favorable financial, visitation, and/or custody agreement from the party who wants to divorce.

The "withdrawal of consent" maneuver illustrates one of the most important factors involved in divorce negotiations, which is the matter of "leverage." Divorce by irreconcilable differences requires both parties to agree. Since a divorce cannot be obtained without either agreement or fault grounds for divorce, if one party really wants out of the marriage but the other spouse is either ambivalent or does not want a divorce and fault grounds against them do not exist or cannot be proven, the spouse who wants out cannot get divorced. As a result, leverage plays quite a significant role in divorce negotiations.

The role that leverage plays under Mississippi's current divorce laws (no divorce without agreement or proven fault grounds) cannot be over emphasized. I have had many, many clients who had difficulty understanding why they could not obtain a divorce on the ground of irreconcilable differences simply because they wanted to be divorced. They would have had that absolute right to a divorce in at least half of the states of the United States, but not in Mississippi. Accordingly, the basic concepts discussed in this article related to obtaining a divorce in Mississippi provide the initial basis for the analysis of all issues related to divorce in this state.