2014 FAMILY LAW SEMINAR

100 Days Before Trial – No Time to Lose and No Money to Waste

8:00 a.m.- 9:00 a.m.

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Introduction

A trial in a family law case can be very complicated involving issues ranging from a party's physical or mental health to the value of a closely held corporation. There are numerous factors that relate to the best interests of the children and other factors to assist the court in determining an equitable distribution of assets and liabilities. It is critical to effectively prepare for a family law trial.

Pleadings

Trial preparation does not begin 100 days prior to trial. It begins with the filing of the Petition for Dissolution of Marriage. The Petition should be your roadmap of the issues involved in the case. For example, if your client is requesting spousal support, then the request should be in the petition. If the petition does not discuss a specific issue your client is bringing before the Court, then amend your petition prior to trial. While the Court may allow you to amend your petition at trial, the better course of action is to file a Motion to Amend the Petition prior to trial. (Iowa R. Civ. P. 1.457). Failure to properly notify the Court and the opposing party that an issue is in dispute can lead to your client waiving relief on such an issue or a continuance of the trial. (Iowa R. Civ. P. 1.457, Dutcher v. Randall Foods, 546 N.W.2d 889 (Iowa 1996).

If a party does not object to an issue being tried, then

the Court may consider the issue by consent of the parties. Dutcher v. Randall Foods, 546 N.W.2d 889 (Iowa 1996), and Holland v. Holland, 161 N.W.2d 744 (Iowa 1968). It is important to not only amend your petition when necessary, but to object to the other side's attempt to have issues heard without giving you proper notice prior to trial.

Read the file. When you are done, read it again. It sounds simple, but the Petition, Answer, and affidavits have a wealth of information to assist you in trial preparation. You have addresses to look into a person's past, dates of birth, social security numbers, names of friends and family, etc. For example you could find old neighbors to testify on behalf of your client. You could also look at public records to find out more information about a witness, party, or property. Finally, if the parties had a temporary hearing, the affidavits will give you a lot of information on the other side's theory of the case, the evidence they intend to present, and potential witnesses at trial. You can use the affidavits to prepare your discovery requests, interviews of witnesses, and cross-examination at trial.

Discovery – General

Critical to all trial preparation is having a mastery of the facts. The acquisition of the facts begins with consultations with your client, witness interviews, and

disclosures in discovery. Several of the Iowa Judicial Districts have a standard Family Case Law Requirements Order entered in each dissolution of marriage case. The Order directs the parties to exchange certain information within a certain number of days. However, this standard order is rarely sufficient to get you all the information you will need to settle or try the case.

All of the facts you gather will provide a complete picture of the case. Attempt to see both sides of the case in order to compensate for weaknesses in your case or minimize them. During discovery you should develop one or two central themes and keep testing these themes against the facts.

Prepare your case as a positive statement. For example, “Why is it in the children=s best interests to be placed in your client’s physical care?” Do not fall into the trap of so emphasizing the negative qualities of the other parties to the extent that the court does not see the positive aspects of your own client. As you develop your case in discovery you should focus on acquiring facts to present your positive case. While cross-examination and impeachment of witnesses can be fun and beneficial at trial, more cases are won or lost during direct examination than through effective cross-examination.

As you review your discovery file, make sure to discuss the approach you and your client want to take in preparing for

trial. Some clients need and want the “Cadillac” Approach to discovery, while most only need a more moderate amount of discovery. Not every child custody case needs an attorney for the child, depositions of multiple witnesses, or an expert witness to prepare a child custody evaluation. It is important to discuss the realities of discovery with a client. You should help a client understand the expense of acquiring information versus the actual use and benefit of the information in settlement or trial. For example, a lot of money can be spent to determine a person’s infidelity, but if there are no children and your dissipation of assets and liability claim is weak, there is no real benefit to finding out how many girlfriends a party had during the marriage.

The Rules of Discovery

As you near trial, send supplemental requests for information. This can be in the form of asking interrogatories (Iowa R. Civ. P. 1.509), Request for Production of Documents (Iowa R. Civ. P. 1.512), or Request for Admissions (Iowa R. Civ. P. 1.510). Be prepared to answer supplemental requests from the other side, so ask for updated information from your own client as well. If you send interrogatories make sure to include requests for trial exhibits, designation of experts, and a list of the other side’s trial witnesses.

You must designate an expert witness at least 30 days prior

to trial. Iowa R. Civ. P. 1.508. This designation is done a month prior to trial so that the other party is not surprised by the use of an expert at trial. It also allows you a chance to take the experts deposition, research the expert's qualifications, review the report and/or opinion of the expert, and otherwise prepare for cross-examination of the expert at trial.

A deposition can be a very useful tool in preparing for trial. The deposition can help you gather information, lock a witness in on an answer for later impeachment, be used in lieu of live testimony in certain circumstances, and encourage settlement. Iowa R. Civ. P. 1.701 and 1.704(5). You should also remember that you need special permission from the Court to request a deposition of certain medical and/or mental health professionals. See Iowa Code §622.10(5). Make sure to file your motion well in advance of trial so that the Court has the chance to rule on your motion prior to the deposition. Furthermore, medical and mental health professionals frequently have busy schedules, so allow several months advance notice to schedule a time for the deposition that is convenient to all involved.

Another method of discovery useful in preparing for trial is a request to Enter the Premises to Inspect. Iowa R. Civ. P. 1.512(1)(c). Sometimes you represent the spouse who moved out

of the marital home and they need to get an appraiser into the home. Other times the parties disagree on the value of personal property. The request to Enter Premises to Inspect can be used to take photographs of or appraise personal property in the possession of the other party, to gain access to real estate in the control of the other party, or to search for evidence and/or assets that went "missing" during the pendency of the divorce. (See In re the Marriage of Williams, 421 N.W.2d 160 (Iowa Ct. App. 1988).

Trial Scheduling Order

When you receive the Trial Scheduling Order, put the deadlines on your calendar. Then put additional reminders on your calendar. Many attorneys have calendaring programs such as Amicus, Clio, MyCase, etc. Others use Microsoft Office or another program to keep their appointments and calendar entries organized. The program you use to keep track of these deadlines is not as important as simply having a reliable method to stay on top of things. If possible you want to remind yourself of discovery deadlines such as responding to a supplemental request for production of documents. You will also want to have a reminder of the date discovery closes as well as the date to designate an expert witness, exchange trial notebooks, or file an updated financial affidavit and child support guideline worksheets. If possible, remind yourself several days prior to

the actual deadline so that you have time to complete the task if necessary.

When preparing for a trial, sometimes you have to make time instead of simply scheduling it. Many potential witnesses are unable to talk to you during normal business hours. You may have to interview witnesses in the evenings or on weekends. Witnesses may intentionally screen calls or otherwise attempt to dodge your attempts to speak with them. You should expect to interview witnesses several weeks in advance of trial so that you can adequately prepare for trial, issue subpoenas if necessary, update discovery if necessary, or simply to give your witnesses advance notice so that they can take off of work and be available for your trial.

Interviewing your witnesses well in advance of trial will also make it easier to discuss issues with opposing counsel such as taking a witness out of order at trial. It can also alert you to the need to file a special motion prior to trial. For example, you may want to file a Motion in Limine to prevent someone from testifying or a Motion to Allow Someone to Testify. See Iowa Code §622.10(5)(requiring permission of court for the medical or mental health professional to testify against a patient). If one of your witnesses is a minor, you will want to get permission prior to that witness's testimony. Further, if your witness in a child custody action lives in another state,

you can get permission to allow the witness to testify by telephone or for the testimony to be taken in the other state. Iowa Code §598B.111.

Research

Research can and should be done during all phases of the representation. However, as you learn the facts of the case, you might come across unique issues that need additional research. As you complete your research be prepared to change the theme(s) of the case and your requested relief if necessary.

Legal briefs are a useful tool in trial. Use briefs to further support the theme(s) of the case you present. A short brief is better than no brief. Prepare the brief before trial, but allow yourself time to add to it while the trial is in progress. Because of the nature of trials, new facts or important arguments sometimes develop during the trial and they should be included in your brief.

Use the basic concepts in your brief to construct a short, concise opening statement. Opening statements are often waived in dissolution trials, however they can be invaluable in setting the tone for a custody case. Request that the court accept your brief as a supplement to or in lieu of closing arguments.

You want to keep the vast majority of your trial briefs 1) concise, 2) covering only the key issues in the case, and 3) covering any issues likely to be appealed. Many trial judges do

not have the time to read long trial briefs. A short brief can pack a lot of punch and be more effective than a long treatise. The judge is more likely to read the entire brief if you keep it brief and concise.

The case you take to trial could have numerous issues such as 1) physical care, 2) child support, 3) spousal support, 4) gift and inheritance claims, and 5) equitable distribution of assets and liabilities. You want to include research on the key issues at trial, not something on everything. If equitable distribution is straight forward, then you may want to focus only on physical care and spousal support. Furthermore, if you brief the issues that are most likely to be appealed, you can use that research in an appellate brief. Briefing these key topics also provides evidence to the appellate courts that an issue was properly presented to the trial court.

In our changing legal system, our trial briefs will be treated differently under the new EDMS rules than under the current Iowa Rules of Civil Procedure. Under Iowa Rule of Civil Procedure 1.442(4) a party should not file legal memoranda unless ordered by the Court. However, Iowa Court Rule 16.404 for EDMS requires legal briefs to be filed with the Court. Since EDMS rules have precedence over the rules of Civil Procedure, it is important to determine whether you have an EDMS case or not. Iowa Court Rule 16.103.

Explore Settlement Options

Nothing prevents a party from simultaneously preparing for trial and attempting to settle the case. In fact, preparing for trial helps a party organizes their facts and determine effective ways to present them that can be used in settlement as well as the courtroom. Some Judicial Districts in Iowa require mediation while others have left it voluntary. Depending on the Judicial District the mediation requirement may be early in the process (6th Judicial District) or shortly before trial (5th Judicial District). Regardless of whether mediation is mandatory and when it occurs, the parties should feel free to settle issues prior to trial.

If you are nearing your trial date, mediation should probably be with attorneys present and follow the Caucus Style of mediation – where the parties are in separate rooms with his or her attorney and the mediator travels back and forth between rooms. This allows clients the ability to fully discuss settlement proposals with their attorneys during the mediation. If mediation occurs close to the date of trial, then the parties also are aware of the relative strengths and weaknesses of their cases. The more prepared for trial you are when you go to mediation, the better you will be able to advise your client about the pros, cons, and risks of settlement offers and trial.

An alternative to mediation is a settlement conference.

Settlement Conferences can be between parties or Court supervised. In some cases, the Guardian Ad Litem or Attorney for the Child may want to be involved or assist in the settlement efforts. Court Supervised Settlement Conferences are regularly scheduled approximately one month before trial in the 7th Judicial District. It is important to check in with the judge in the 7th Judicial District to determine the procedure he or she wants to follow for the settlement conference.

In the 6th Judicial District, a party may file a motion to request a Court Supervised Settlement Conference. The Settlement Conference will be held with a Senior Judge. The judge can facilitate the settlement conference in the manner he or she sees fit. In some cases the judge may give the parties a strong evaluation of the strength of the competing claims in an effort to promote settlement. If a senior judge is willing to give more evaluative feedback on your case during a settlement conference, listen to it. First, it will give you insight into how a judge would consider and hopefully resolve your competing claims. Second, it can give you insight into a more effective way to present your case at trial, if you are unable to settle the case.

Whether you go to trial or are in settlement negotiations, it would be beneficial to create an exhibit to visually show the proposed distributions of the assets and liabilities in the

case. Use a simple chart with the assets and liabilities listed on the left hand side in one column. Then there is a column for the assets and debts the Petitioner is to receive and another column for the Respondent to receive. The chart is beneficial for several reasons. First, some people are visual learners and it is easier for them to grasp the concept of equitable distribution if they see it visually. Second, it is an easy to use chart that clients can understand, replicate, and follow along with if changes are made. Third, the chart can and should be used at trial. It can easily show the differences in proposals between the parties and organizes the valuations and calculations into one exhibit.

The Asset & Liability Chart can be used to draft a settlement proposal. It can also be used to prepare a Requested Relief for trial. It is important that at trial your client's Requested Relief and Asset & Liability Chart match. They should also include all the assets and debts found on the financial affidavit. If all these documents match, they show a level of professionalism, organization, and logic to your client's presentation of evidence. If they do not match, they can be an area for cross-examination by the other side.

Experts

The rules of evidence in Iowa are fairly liberal regarding opinion testimony by lay witnesses. However, a witness's

testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of a witness's testimony or the determination of a fact in issue. Iowa Rule of Evidence 5.701. If scientific, technical or other specialized knowledge will assist the prior fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise. Iowa Rule of Evidence 5.702. If you are not sure if your witness is an "expert witness" or not, it is better to err on the side of caution and designate that witness as an expert. Under the rules of civil procedure and most trial scheduling orders, there will be a deadline for designating experts. You should at the beginning of the case and at each review consider a. whether or not an expert is necessary and b. make arrangements to retain that expert well in advance of trial.

You should clearly disclose your experts, the subject matter on which the expert is expected to testify, the expert's qualifications and the mental impressions and opinions held by the expert well in the advance of trial. Two things are more devastating to trial preparation than to have retained an expert, paid for the opinion, and not be able to have it admitted at trial.

100 Days Out

As a family law practitioner, it is important to regularly review your files so you are aware of the status of each pending matter. You should note on your calendar approximately 100 days prior to trial to thoroughly review the file with a view towards trial preparation. You should also note on your calendar deadlines for designating experts, completing discovery, filing lists of witness and lists of exhibits, and filing trial briefs. It is also good practice to list reminder deadlines a week or two before the actual deadlines.

At this time, if you have not already begun compiling your trial notebook or your system for presentation, you should do so. It is always helpful to identify trial issues and trial themes, as those can help focus your presentation. It is also worthwhile to attempt to identify or anticipate what themes or issues will be emphasized by the opponent, in order to anticipate the proof needed on those matters.

If you have done legal research already at this point, this is the time to begin organizing your trial brief if you have not already done so. At this point, you should have a pretty good grasp of the facts and it may be helpful just to dictate a narrative statement of facts without worrying about the format, which you can then edit for your brief. This would be a good time to review the facts with a colleague or the client in order

to “brain storm” regarding other issues that you have not yet identified.

In nearly every case, you will be required to submit the form Affidavit of Financial Status. If you have not yet provided a sworn affidavit, this would be the time to get one ready to go. If you have previously provided a sworn affidavit, now is the time to review the affidavit with your client in order to see if there are any changes. It is important to have as accurate as a “snapshot” as possible of your client’s financial status to present at trial with current information.

In many cases, your client due to other obligations or their own psychological or emotional issues may be the type not to check in regularly. This the time for you to make every effort to communicate with the client regarding status of the case, trial preparation, and the status the retainer and account. Hopefully you will be successful in contacting the client and therefore prepared for trial with account and a current status. However, if you have tried to contact the client and have been unsuccessful, you will then have the necessary documentation if you determine that it is necessary for you to withdraw from representation.

This is the time to review the documents and other items in the file and make sure you have all of the exhibits that you will need. You should start thinking about the order of

presentation of the exhibits. There may be exhibits missing or updates needed, and at this stage you can consider use of the subpoena duces tecum in order to compel the other party or witnesses to bring documents with them for trial.

It is important to begin working on your exhibit list as soon as possible. On your exhibit list, you should identify the exhibit, the witness that will be supplying the foundation, and any foundational requirements. Most judges will appreciate if the parties will stipulate to the admission of as many of the exhibits as possible, and you should consider doing so in the interest of judicial economy.

Once you have a good handle on the status of the case and the status of trial preparation, you should contact your client to schedule a meeting with the client and the main witnesses. This is not for the purpose of rehearsing testimony. Rather, it is helpful to have a discussion your client and any main witnesses regarding the trial procedure and what to expect in court. You will also probably learn additional useful information from an informal discussion of matters with your client and witnesses. You should limit your discussions with your client with other persons present, however, as that may affect the attorney client privilege. If there is a guardian ad litem or attorney for the child in the case, you should contact that individual to check in on the status of a report or if the

individual is planning on testifying. If there is not currently a guardian ad litem or attorney for the child, this is one stage of trial preparation time when you can consider asking the court to appoint such an individual.

Next, you should review an outline of your direct and cross examination for all witnesses. Most attorneys do not write lists of questions, but rather subject headings and topics and exhibits that will be discussed with the witness. To the extent possible, you should be thinking at this time about what your backup plan is if a crucial witness or exhibit is not available at trial.

Most if not all judicial districts in Iowa require some sort of pretrial stipulation to be prepared and presented to the court identifying the issues that are not contested, issues that are contested and valuations that are either agreed or not agreed. Even if you are not required to do so, I believe the court would appreciate having this information ahead of time and this can be part of your pretrial submissions. Ideally, this would be the time to prepare an “wish list” version of either a settlement agreement or proposed decree that sets out your client’s best case scenario. This may be useful in the event that “last minute” settlement discussions occur or if the court allows you to present a proposed decree.

At least two weeks before trial, you should plan on having

an extended meeting with the client to discuss preparation for trial, the client's goals, and give your client a realistic evaluation of the possible outcomes at trial. It is also important to document this discussion in the form of a letter after the fact to the client that the discussion took place.

As part of your final pretrial preparation you should make sure that the following forms are ready to go:

1. Child Support Guidelines Worksheets
2. Affidavit of Financial Status
3. Mediation Release (if required)
4. Children in the Middle Certificate
5. Pretrial Stipulation
6. Exhibits
7. Trial Notebook
8. Trial Brief

Nearly every case in a family law practice involves the dual track of preparation for trial and negotiation with a view towards settlement. Fortunately, the tasks that are necessary to accomplish these goals are really the same. In other words, the more time you spend preparing for trial, the more prepared you will be to negotiate a fair and reasonable settlement on behalf of your client.