

FAMILY LAW PRACTICE AND PROCEDURE
Calhoun Cleburne Bar Association

January 15, 2015

COMPLAINT

Be somewhat specific in your allegations. Cover all of the grounds and areas for the court to consider: age; residency; date of marriage and separation; children; custody and placement; child support and health insurance; assets; debts; etc..

If there are children born of the marriage, or if the wife is pregnant at the time of divorce, then the husband is the legal father and the children **must** be addressed in the divorce.

In your conversations with your client in evaluating and throughout their case, be truthful as to what the applicable law is.

ANSWER

An answer should be filed within 30 days from the date of service, unless it is a JU case, then the same should be filed within 14 days. Remember CS cases are under the Juvenile Statutes, therefore run on a 14 day time frame.

When answering, it is permissible to admit a portion of an allegation and deny a portion of the same allegation. For example: The Defendant admits that there are two children born to the parties, however, the Defendant denies that the Plaintiff should have full custody of the children and demands strict legal proof thereof.

Be sure to assert any and all affirmative defenses that apply to your case in the initial answer. Failure to assert affirmative defenses at the onset may constitute a waiver of the same.

DISCOVERY

Utilize discovery in each case, however, be case specific when doing so. For example, if you have a child support case, with a child age one, you probably don't need four years of tax information.

File discovery early in the case, so as to avoid delay with the Court docket.

Calendar when the discovery is due back to your office, and if you don't have it, contact the other attorney - and follow up with a letter in the event that you need to file a Motion to Compel. See *Alabama Rules of Civil Procedure, Rule 37. Failure to make discovery: Sanctions.*

Review what is submitted by your client, and have them come in to supplement their answers if need be. If your client is asking for full custody and responds in a generic way to a question as to why their spouse is not proper to hold custody, then your client needs to be specific in the response to discovery. Failure to do so may result in the Court excluding testimony or evidence.

You are under a continuing duty to update your discovery responses.

File a Discovery certificate and email or mail the responses to opposing counsel. It is best to not file your entire discovery packet online. When you file your client's responses on AlaFile, you have potentially made your client's personal information readily available to anyone that wants to review it.

EMERGENCY RELIEF

When asking the Court for emergency relief, be sure to follow *Alabama Rules of Civil Procedure, Rule 65.* Failure to follow the Rule will possibly result in you not getting the emergency relief requested. Be date specific and detailed when filing your client's affidavit in support of the motion.

Remember the standard of Immediate and Irreparable Harm when filing for temporary custody. See Ex Parte Franks 7 So.3d 391, 395 (Ala.Civ.App. 2008) where the Court of Civil Appeals considered the applicable standard to apply when presented with a request for *pendente lite* request for temporary custody of a child. Also, see Ex Parte Couey 110 So.3d 378 (Ala.Civ.App. 2012) where the Court addressed the lapse of time between the alleged danger and the request for *ex parte* relief.

The Court may set a hearing quickly, so be prepared to present the emergency issues that you are requesting relief on. If the Court does not set a hearing, file a request for one. Remember, this is a motion hearing, not a trial. Hearsay is admissible.

SETTLEMENT

Use every effort to settle (letters, settlement conferences, etc.) if not all, at least a portion of your case and try only the issues that need to be tried.

Trial setting means be ready to try your case, not showing up with a first attempt at settlement. If you plan to utilize trial time to "shotgun" a settlement, then it is best set your case as a back-up.

PRETRIAL DOCUMENTS

Remember to complete the pretrial documents and exchange with opposing counsel, preferably earlier in the process rather than 10 days before trial. Exchanging these documents early gives everyone an idea of how close the parties are as to property settlements. Do not file these with the Court on AlaFile, simply file a Notice of Compliance with the Court that you have completed them. Remember that these are separate documents from discovery. If you do not have a copy of the standard pretrial documents, then you may get one from the Judge's office.

WITNESS AND EXHIBIT LISTS

A list of witnesses that will testify at trial as well as a list of Exhibits anticipated to be used should be filed on AlaFile. Remember that there are timeframes to give adequate notice as to expert witnesses. Failure to follow this may result in testimony or evidence being excluded.

TRIAL BRIEFS

Trial briefs should be filed prior to the trial, and they should be filed through AlaFile utilizing the Trial Brief setting. Trial briefs are not a mechanism to get a shot in to the Judge about the facts of the case and supporting argument, they are a document for you to define points of law and how they may be applicable to your case. For example, you are requesting that the Court separate half siblings. It would be appropriate to brief the law on this issue. If a Judge requests that you file a trial brief on the issues after a hearing, be timely in doing so.

TRIAL

Appear for Court early.

Be prepared to try your case. Organize and mark exhibits on the available tables in the courtroom, so to avoid scratching through your file for a document that you need.

Make your objections timely and clearly, so as to protect the record.

Ask the Court to take a moment to confer with your client prior to closing your case, so that you assure yourself that you have covered everything. It is counsel's job to get the facts into evidence for the Court to consider, and if you close your case (without opposing counsel allowing you to go into something that you forgot) then it is too late. If you don't present evidence to the trial court for consideration, then the Appellate Court

cannot address it. See Wilson v. Wilson, 941 So. 2d 967 (Ala. Civ. App. 2005)

There is one issue that can be raised after the close of a case, even for the first time on appeal, and that is the issue of jurisdiction. Health Care Authority for Baptist Health v. Davis, No. 1090084 (Ala. Jan, 14, 2011).

POST TRIAL MOTIONS

Post trial motions should be filed within 30 days in Civil cases and 14 days in Juvenile cases. They should be specific as to the reasons, and not generic. Request a hearing. Civil motions are deemed denied by operation of law after 90 days, and Juvenile after 14.

For detailed information and applicable rules and law on this issue please visit that Bar website to review a copy of a handout on this issue presented at an earlier meeting. <http://calhouncleburnebar.org/links-resources/>

RELACATION STATUTE

Alabama Relocation Statute, is codified at *Ala. Code* § 30-3-160 et seq. It applies to all relocations of children occurring after September 1, 2003.

On a relocation case, the Court can issue a temporary order for the child to remain within the jurisdiction of the Court - not the parent.

When preparing for a relocation case, it is helpful to print off a copy of the 17 points of the statute located at § 30-3-169.3, and building your case as to each point of the statute. I also found it helpful to have a copy of these points in court when my client testified, so that I made certain that each point was covered for the Court to consider.

CHILD SUPPORT

a. Disestablishment of Paternity

Affidavits of Paternity executed prior to January 1, 2009 create a presumption of paternity (under the old *Ala. Code 1975*, §26-17-5(a)(6)). Under the new UPA, effective January 1, 2009, *Ala. Code 1975*, §26-17-201(b)(2) an acknowledgement of paternity is an establishment of paternity, and is a legally sufficient basis for establishing an obligation of child support per *Ala. Code 1975*, §26-17-305(b). Affidavits of paternity may be rescinded within the earlier of 60 days or the date of a judicial proceeding relating to the child. *Ala. Code 1975*, §26-17-307. After 60 days the affidavit may only be challenged in Court in limited situations.

If the presumed father persists in the presumption that he is the father, then neither the mother, nor another man have standing to disestablish the presumed father's paternity. *Ala. Code 1975*, §26-17-607(a), Ex Parte Presse 554 So.2d 406 (Ala.1989).

Many times there are cases where there is a legal father, and the Court gives him leave for a DNA test. If he is excluded by the test, the same must still be presented to the Court as evidence, and the Court can disestablish paternity. Don't just get a DNA test excluding the father and ask that the case be dismissed - this does nothing except dismiss the Court action, and the legal father is still the legal father.

Even if paternity is disestablished, *Ala. Code 1975*, §26-17A-2 specifically provides that any child support paid cannot be reimbursed. In addition, any child support arrears that accrued through the date of the disestablishment are not modifiable, as child support payments become final money judgments of the dates that they accrue and are thereafter immune from change or modification. Frasemer v. Frasemer, 578 So.2d 1346, 1348 (Ala.Civ.App. 1991).

b. DHR Administrative Enforcement

Often you will have a situation where a client has had one of the following administrative enforcement procedures applied to them (note this is not a complete list, but are the most common):

Driver's license suspension

Federal Statute 42 U.S.C. 666(a) (16)

Ala. Code 1975, §30-3-170 through 179

Income Tax Offset

Federal Statute 42 U.S.C. 666(a) (3)

Ala. Code 1975, §26-18-100 through 109

Financial Institute Data Match(FIDM)

Federal Statute 42 U.S.C. 666(a) (17)

Ala. Code 1975, §30-3-192

If your client is subject to an administrative issue, then the proper remedy is to request an Administrative Review through the Department of Human Resources. Once the review process is exhausted with the Department one may then request a Judicial Review under the Alabama Administrative Procedure Act. The trial Court does not have authority to override and administrative process, as the same is a separation of powers issue. See Alabama Dept. of Human Resources ex rel Yancey v. Yancey 54 So.3d415 (Ala.Civ.App. 2010)

c. DHR attorneys/ client relationship

DHR attorneys represent the Department, not the individual. *Ala. Code 1975*, §38-10-7.1

When filing counter petitions, the same must be served on the individual NOT the Department. Likewise discovery must be served on the individual.