

CHAPTER 62

STOCKBRIDGE-MUNSEE TRIBAL LAW DISSOLUTION OF MARRIAGE

Section 62.1 Authorization

The Stockbridge-Munsee Tribal Court is authorized to dissolve a marriage by divorce when the parties are incompatible for any reason when either party is a resident of the Stockbridge-Munsee Community for at least six (6) months or is a member of the Stockbridge-Munsee Band of Mohicans who has resided within the state of Wisconsin for at least six (6) months.

Section 62.2 Petition and Response

(A) Except as otherwise provided, in a dissolution of marriage action the petition shall state:

- (1) The name and birth date of the parties, the social security numbers of the husband and wife and their occupations, the date and place of marriage and the facts relating to the residence of both parties.
- (2) The name and birth date of each minor child of the parties and each other born to the wife during the marriage, and whether the wife is pregnant.
- (3) That the marriage is irretrievably broken or that the parties agree it is irretrievably broken.
- (4) Whether or not an action for divorce or legal separation by either of the parties was or has been at any time commenced, or is pending in any other court or before any judge, in the State of Wisconsin, in another tribal court, or elsewhere.
- (5) Whether the parties have entered into any written agreement as to support, legal custody and physical placement of the children, maintenance of either party, and property division; and if so, the written agreement shall be attached.
- (6) The relief requested.
- (7) That during the pendency of the action, the parties are prohibited from, and may be held in contempt of court for, harassing, intimidating, physically abusing or imposing any restraint on the personal liberty of the other party or a minor child of either party.
- (8) That during the pendency of the action, without the consent of the other party or an order from the court, the parties are prohibited from, and may be held in

contempt of court for, encumbering, concealing, damaging, destroying, transferring, or otherwise disposing of property owned by either or both of the parties, except in the usual course of business, in order to secure necessities or in order to pay reasonable costs and expenses of the action, including attorney fees.

(9) That during the pendency of the action, the parties are prohibited from, and may be held in contempt of court for, doing any of the following without the consent of the other party or an order of the court:

- (a) Establishing a residence with a minor child of the parties outside the state of Wisconsin or more than 150 miles from the residence of the other party within the state.
- (b) Removing a minor child of the parties from the state of Wisconsin for more than 90 consecutive days.

(B) Either or both parties to the marriage may initiate the action. The party initiating the action or his or her attorney or advocate shall sign the petition. Both parties or their respective attorneys or advocates shall sign a joint petition if the parties are filing together.

(C) The summons shall be in the form of a regular summons used by the tribal court for civil cases.

(D) Service shall be made in accordance with regular court procedures. If only one party initiates the action, the other party may serve a response and/or counterclaim within 20 business days after the date of service.

Section 62.3 Prohibited Acts during the Pendency of Divorce

(A) In an action for divorce, the petitioner upon filing the petition, the joint petitioners upon filing the joint petition and the respondent upon service of the petition are prohibited from doing any of the following:

- (1) Harassing, intimidating, physically abusing or imposing any restraint on the personal liberty of the other party or a minor child of either of the parties.
- (2) Encumbering, concealing, damaging, destroying, transferring, or otherwise disposing of property owned by either or both of the parties, except in the usual course of business, in order to secure necessities or in order to pay reasonable costs and expenses of the action, including attorney fees.
- (3) Without the consent of the other party or an order of the court, establishing a residence with a minor child of the parties outside the state of Wisconsin or more than 150 miles from the residence of the other party within the state, removing a minor child of the parties from the state of Wisconsin for more than 90 consecutive days.

(B) The prohibitions listed in this section shall apply until the action is dismissed, until a final judgment in the action is entered or until the court orders otherwise.

(C) Any person violating the provisions of this section will be subject to the regular contempt provision in the Stockbridge-Munsee Court Code.

Section 62.4 Judgment of Divorce

The Tribal Court shall grant a judgment of divorce if:

(A) The requirements of this chapter as to marriage counseling have been complied with and the court finds that the marriage is irretrievably broken under Section 62.3.

(B) To the extent it has jurisdiction to do so, the court has considered, approved, or made provision under Section 62.5 for legal custody and physical placement of any minor children of the marriage, the support of any child of the marriage entitled to support, the maintenance of either spouse, the support of the family and the disposition of property.

Section 62.5 Irretrievable Breakdown

(A) If both of the parties by petition or otherwise have stated under oath or affirmation that the marriage is irretrievably broken, or if the parties have voluntarily lived apart continuously for twelve (12) months or more immediately prior to commencement of the divorce action and one party has so stated, the court, after hearing, shall make a finding that the marriage is irretrievably broken.

(B) If the parties have not voluntarily lived apart for at least twelve (12) months immediately prior to commencement of the action and if only one party has stated under oath or affirmation that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to filing the petition and the prospect of reconciliation.

(1) If the court finds no reasonable prospect of reconciliation, it shall make a finding that the marriage is irretrievably broken; or

(2) If the court finds that there is a reasonable prospect of reconciliation, it shall continue the matter for further hearing not fewer than thirty (30) nor more than sixty (60) days later, or as soon thereafter as the matter may be reached on the court's calendar, and may suggest to the parties that they seek counseling. The court, at the request of either party or on its own motion, may order counseling. At the adjourned hearing, if either party states under oath or affirmation that the marriage is irretrievably broken, the court shall make a finding that the marriage is irretrievably broken.

Section 62.6 Actions of the Court Pending Divorce

The Tribal Court may order:

- (A) The husband and wife to provide for the separate maintenance of his or her spouse and children as the court may deem just upon application therefore or in the disposition of a divorce proceeding.
- (B) The care, custody and maintenance of the minor children of the marriage during the pendency of the proceedings.
- (C) The restraint of either spouse from, in any manner, molesting or interfering with the other or the minor children.
- (D) The restraint and enjoining of either spouse or both from disposing of their individually or jointly owned property during the pendency of the action except as approved by the Court.

Section 62.7 Provision for Judgment

In addition to voiding or dissolving the marriage, the Court shall have the power to impose judgment as follows:

- (A) For the future legal custody and physical placement and care of the minor children of the marriage as may be in the best interest of the children and in accordance with Section 62.55.
- (B) Approve any agreement between the parties as to the legal custody and physical placement and care of minor children if deemed by the Court to be in the best interests of the children.
- (C) For the recovery from either spouse to allow for the care ~~and custody~~ of the minor children an amount of money as may be just and proper for the party to contribute toward their education and support.
- (D) For the recovery from either spouse an amount of money or other personal property as may be just and proper for the maintenance of the other.

(1) In considering an order under this subsection, the Court shall consider the following:

- (a) the length of the marriage.
- (b) the age and physical and emotional health of the parties.
- (c) the division of property made under (E).
- (d) the educational level of each party at the time of marriage and at the time the action is commenced.

- (e) the earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
- (f) the feasibility that the party seeking maintenance can become self-supporting as a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
- (g) the tax consequences to each party.
- (h) any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial service contributions to the other with the expectation of reciprocation or other compensation in the future, where such repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.
- (i) the contribution by one party to the education, training or increased earning power of the other.
- (j) such other factors as the court may in each individual case determine to be relevant.

(E) For the approval of any property settlement between the parties or recovery and delivery to each of the parties any of their personal property in the possession or control of the other at the time of the giving of the judgment.

(1) Except as provided in (2), any property shown to have been acquired by either party prior to or during the course of the marriage in any of the following ways shall remain the property of that party and is not subject to a property division under this section:

- (a) as a gift from a person other than the other party;
- (b) by reason of the death of another, including, but not limited to life insurance proceeds; payments made under a deferred employment benefit plan, or an individual retirement account; a property acquired by right of survivorship, by a trust distribution, by bequest or inheritance or by a payable on death or a transfer on death arrangement
- (c) with funds acquired in a manner under (a) or (b).
- (d) a per capita payment from a tribal government.

(2) The court shall presume that all property not described in (1) is to be equally divided between the parties, but may alter this distribution without regard to marital misconduct after considering all of the following:

- (a) the length of the marriage.

- (b) the property brought to the marriage by each party
- (c) whether one party has substantial assets not subject to division by the court.
- (d) the contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.
- (e) the age and physical and emotional health of the parties.
- (f) the contribution by one party to the education, training or increased earning power of the other.
- (g) the earning capacity of the party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
- (h) the desirability of awarding the family home or the right to live therein for a reasonable period to the party having physical placement for the greater period of time.
- (I) the tax consequences to each party.
- (j) any written agreement made by the parties before or during the marriage concerning any arrangements for property distribution; such agreements shall be binding upon.
- (k) such other factors as the court may in each individual case determine to be relevant.

(3) For the purposes of this chapter, a land assignment issued by the Stockbridge-Munsee Community is not the real or personal property of the individual. Land assignments shall not be subject to the Court's division of property between the parties. The Court may not alter a person's right to his or her land assignment in any way. EXCEPT in accordance with the following:

- (a) In a divorce where both parties are Stockbridge-Munsee tribal members, the Court may, if it deems in the best interest of the children and after consideration of all factors listed in (2), award a party's land assignment to the other party where the second party has physical placement of the minor children for the greater period of time.
- (b) In considering whether to award the land assignment and home to a spouse under (a), the Court shall consider the following:
 - (i) Whether severe economic hardship that would result on either party;
 - (ii) Whether the party who is denied the residence and land assignment has other arrangements for a residence;
 - (iii) The current availability of tribal land assignments.

(F) To restore a former legal surname, if requested.

Section 62.8 Custody and Physical Placement

(A) In rendering a judgment of divorce the court shall make such provisions as it deems just and reasonable concerning the legal custody and physical placement of any minor child of the parties, as provided in this section.

(B) (1) Subject to (2), based on the best interest of the child and after considering the factors under (E), the court may give joint legal custody or sole legal custody of a minor child.

(2) The court may give joint legal custody only if it finds that doing so is in the child's best interest and that either of the following applies:

(a) Both parties agree to joint legal custody

(b) The parties do not agree to joint legal custody, but one party requests joint legal custody and the court specifically finds all of the following:

(i) Both parties are capable of performing parental duties and responsibilities and wish to have an active role in raising the child

(ii) No conditions exist at that time which would substantially interfere with the exercise of joint legal custody.

(iii) The parties will be able to cooperate in the future decision making required under an award of joint legal custody. In making this finding the court shall consider, along with any other pertinent items, any reasons offered by a party objecting to joint legal custody. Evidence that either party engaged in abuse of the child or evidence of interspousal battery creates a rebuttable presumption that the parties will not be able to cooperate. This presumption may be rebutted by clear and convincing evidence that the abuse will not interfere with the parties' ability to cooperate in the future decision making required.

(C) (1) Except as provided under (2), if the court orders sole or joint legal custody under (B), the court shall allocate periods of physical placement between the parties in accordance with this section. In determining the allocation of periods of physical placement, the court shall consider each case on the basis of the factors listed in (D).

(2) A child is entitled to periods of physical placement with both parents unless, after a hearing, the court finds that physical placement with a parent would endanger the child's physical, mental or emotional health.

(3) No court may deny periods of physical placement for failure to meet, or grant periods of physical placement for meeting, any financial obligation to the child or the former spouse.

(D) In determining legal custody and periods of physical placement, the court shall consider all facts relevant to the best interest of the child. The court may not prefer one potential custodian over the other on the basis of the sex or race of the custodian. The court shall consider reports of appropriate professionals if admitted into evidence when legal custody or physical placement is contested. The court shall consider the following factors in making its determination:

- (1) The wishes of the child's parent or parents.
 - (2) The wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.
 - (3) The interaction and interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest.
 - (4) The child's adjustment to the home, school, religion and community.
 - (5) The mental and physical health of the parties, the minor children and other persons living in a proposed custodial household.
 - (6) The availability of public or private child care services.
 - (7) Whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party.
 - (8) Whether there is evidence that a party engaged in abuse of the child.
 - (9) Whether there is evidence of interspousal battery.
 - (10) Whether either party has or had a significant problem with alcohol or drug abuse.
 - (11) Such other factors as the court may in each individual case determine to be relevant.
- (E)
- (1) If legal custody or physical placement is contested, the court shall state in writing why its findings relating to legal custody or physical placement are in the best interest of the child.
 - (2) The court may give one party sole power to make specified decisions, while both parties retain equal rights and responsibilities for other decisions.
 - (3) In making an order of joint legal custody and periods of physical placement, the court may specify one parent as the primary caretaker of the child and one home as the primary home of the child, for the purpose of determining eligibility

for aid under any financial assistance program or for any other purpose the court considers appropriate.

(4) No party awarded joint legal custody may take any action inconsistent with any applicable physical placement order, unless the court expressly authorizes that action.

(5) In an order for physical placement, the court shall specify the right of each party to the physical control of the child in sufficient detail to enable a party deprived of that control to implement any law providing relief for interference with custody or parental rights.

Section 62.9 Revision of Legal Custody and Physical Placement Order

(A) The following provisions are applicable to modifications of legal custody and physical placement orders:

(1) Substantial modifications.

(a) *Within 2 years after initial order.* Except as provided under sub. (2), a court may not modify any of the following orders before 2 years after the initial order is entered, unless a party seeking the modification, upon petition, motion, or order to show cause shows by substantial evidence that the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child:

(i) An order of legal custody.

(ii) An order of physical placement if the modification would substantially alter the time a parent may spend with his or her child.

(b) *After 2-year period.*

(i) Except as provided under par. (a) and sub. (2), upon petition, motion or order to show cause by a party, a court may modify an order of legal custody or an order of physical placement where the modification would substantially alter the time a parent may spend with his or her child if the court finds all of the following:

a. The modification is in the best interest of the child.

b. There has been a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.

(ii) With respect to sub. (I), there is a rebuttable presumption that:

- a. Continuing the current allocation of decision making under a legal custody order is in the best interest of the child.
- b. Continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child.

(iii) A change in the economic circumstances or marital status of either party is not sufficient to meet the standards for modification under sub. (1).

(2) Modification of substantially equal physical placement orders. Notwithstanding sub. (1):

(a) If the parties have substantially equal periods of physical placement pursuant to a court order and circumstances make it impractical for the parties to continue to have substantially equal physical placement, a court, upon petition, motion or order to show cause by a party, may modify such an order if it is in the best interest of the child.

(b) In any case in which par. (a) does not apply and in which the parties have substantially equal periods of physical placement pursuant to a court order, a court, upon petition, motion or order to show cause of a party, may modify such an order based on the appropriate standard under sub. (1). However, under sub. (1) (b) 2, there is a rebuttable presumption that having substantially equal periods of physical placement is in the best interest of the child.

(3) Modification of other physical placement orders. Except as provided under subs. (1) and (2), upon petition, motion or order to show cause by a party, a court may modify an order of physical placement which does not substantially alter the amount of time a parent may spend with his or her child if the court finds that the modification is in the best interest of the child.

(4) Denial of physical placement. Upon petition, motion or order to show cause by a party or on its own motion, a court may deny a parent's physical placement rights at any time if it finds that the physical placement rights would endanger the child's physical, mental or emotional health.

(5) Reasons for modification. If either party opposes modification or termination of a legal custody or physical placement order under this section the court shall state, in writing, its reasons for the modification or termination.

(6) Notice. No court may enter an order for modification under this section until notice of the petition, motion or order to show cause requesting modification has

been given to the child's parents, if they can be found, and to any relative or agency having custody of the child.

(7) Transfer to department. The court may order custody transferred to the Tribal Social Services only if that department agrees to accept custody.

Section 62.10 Effect of Judgment

(A) In any action affecting the family under this Chapter, if the court orders maintenance payments or other allowances for a party or children or retains jurisdiction in such matters, the written judgment shall include a provision that disobedience of the court order with respect to the same is punishable in accordance with the Mohican Judiciary Act, Chapter 1, Tribal Court Code until such judgment is complied with.

(B) The court has the power to vacate or modify the judgment for sufficient cause shown, upon its own motion, or upon the application of both parties to the action, at any time within six (6) months from the granting of such judgment. If the judgment is vacated it shall restore the parties to the marital relation that existed before the granting of such judgment.

(C) When a judgment of divorce is granted it shall be effective immediately except as provided in Chapter 61, section 61.4(D). The judge granting the divorce shall inform the parties appearing in court that the judgment is effective immediately, except as provided in Chapter 61, section 61.4(D).

Section 62.11 Visitation Rights of Certain Persons

Upon petition by a grandparent, great-grandparent, stepparent or person who has maintained a relationship similar to a parent-child relationship with the child, the court may grant reasonable visitation rights to that person if the parents have notice of the hearing and if the court determined that visitation is in the best interest of the child.

Whenever possible, in making a determination under this section, the court shall consider the wishes of the child.

Section 62.12 Fees

The filing fee for a petition for a dissolution of marriage shall be seventy-five (75) dollars.

Section 62.13 Regulations

(A) In order to consistently and fairly implement the provisions of this chapter, the Tribal Council may, in conjunction with the personnel deemed relevant by the Council, draft regulations which will provide the public and the Tribal Court more specific rules on the matters addressed in this chapter.

(B) If regulations addressing a certain area of this chapter have not been enacted and the Court is faced with a question, the Court may, in its discretion, refer to the corresponding State of Wisconsin regulations or law, or to other states or to other Indian tribes guidance.

LEGISLATIVE HISTORY

Dissolution of Marriage Ordinance adopted by Resolution #109-97, on February 18, 1997. BIA Approval February 27, 1997.