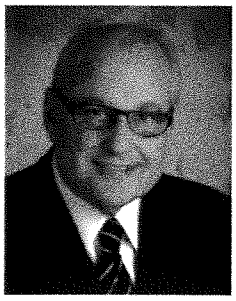
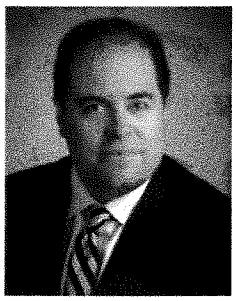

Professor Lex

By Harvey I. Hauer and Mark A. Snover
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Dear Professor Lex,

Recently, I was in court and observed a number of pro cons being taken. One case, in which there were minor children involved, piqued my interest. The attorneys for the parties set forth the parties' settlement agreement on the record. The parties acknowledged the accuracy of their attorneys' representations regarding the settlement. The court approved the settlement agreement. The attorneys then represented to the court that each of the parties had plans on moving to another state and requested that the court permit them to take proofs as to the statutory jurisdictional requirements on that day, even though the case was only one month old. The court granted the request and allowed the proofs to be taken. I thought this constituted a violation of the statute relating to the taking of proofs in such matters. If I am correct, and a judgment was entered as a result of said proofs, is that judgment valid?

Dear Practitioner,

The timing and circumstances relative to the taking of proofs in a divorce case where there are minor children is governed by MCL 552.9f. Said statute provides, in part:

> No proofs or testimony shall be taken in any case for divorce until the expiration of 60 days from the time of filing the bill of complaint, except where the cause for divorce is desertion, or when the testimony is taken conditionally for the purpose of perpetuating such testimony. In every case where there are dependent minor children under the age of 18 years, no proofs or testimony shall be taken in such cases for divorce until the expiration of 6 months from the day the bill of complaint is filed. In cases of unusual hardship or such compelling necessity as shall appeal to the conscience of the court, upon petition and proper showing, it may take testimony at any time after the expiration of 60 days from the time of filing the bill of complaint. Testimony may be taken conditionally at any time for the purpose of perpetuating such testimony.

In *Calo v. Calo*, 143 Mich. App. 749, 373 N.W.2d 207 (1985):

> Plaintiff filed a complaint for divorce ... after a 27-year marriage which produced five children, one of whom was still a minor at the time of judgment. A hearing on the complaint was held within six months of its filing.... At that time, a stipulation regarding the property settlement was read into the record. The divorce was then granted.
>
> Plaintiff subsequently became dissatisfied with the terms of the property settlement and requested a hearing to determine whether the judgment should be entered. The trial court determined the terms of the proposed judgment accurately reflected the proceedings of December 27, 1983, and entered the judgment....Plaintiff [then][] alleged that the judgment was improper because it was entered in violation of the statutory prohibition against the taking of proofs or testimony within six months of the filing of the complaint for divorce where there exist dependent children under the age of 18. M.C.L. § 552.9f. The motion was denied.
>
> On appeal, plaintiff argue[d] that due to the violation of the statutory waiting period, the trial court did not have jurisdiction over the parties and, thus, the judgment was void ab initio. This argument fails to distinguish an absence of jurisdiction from an error in the exercise of jurisdiction. As addressed in *Jackson City Bank & Trust Co. v. Fredrick*, 271 Mich. 538, 545–546, 260 N.W. 908 (1935):
>
> > " 'Where jurisdiction has once attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void, and until set aside it is valid and binding for all purposes and cannot be collaterally attacked. Error in the

> determination of questions of law or fact upon which the court's jurisdiction in the particular case depends, the court having general jurisdiction of the cause and the person, is error in the exercise of jurisdiction. Jurisdiction to make a determination is not dependent upon the correctness of the determination made.' 33 CJ, Judgments, § 39, pp 1078–1079."

Here, by virtue of the residence of the parties, the trial court had jurisdiction over the parties, as well as over the subject matter before it. *Alexander v. Alexander*, 103 Mich.App. 263, 266, 303 N.W.2d 202 (1981); M.C.L. § 552.9. Consequently, the judgment was not void ab initio.

However, by taking testimony prior to the expiration of the six-month waiting period, the trial court violated the provisions of M.C.L. § 552.9f. The language of § 9f is unambiguous and allows noncompliance with the statutory mandate only where the extenuating circumstances specified in the statute are present. Without question, the case at hand did not involve "undue hardship" nor "such compelling necessity as shall appeal to the conscience of the court."

The failure to comply with the statute does not render the judgment of divorce void ab initio, but renders it voidable in a proper proceeding for that purpose. See *Jackson City Bank*, *supra*. Since we are persuaded that the judgment is voidable for failure to comply with M.C.L. § 552.9f, the judgment of divorce must be set aside. We have considered the argument that since potential reconciliation is not implicated in this case, the error is harmless. Such a conclusion requires a quantum leap we would be unwilling to make in the case of a marriage of modest duration let alone a 27-year marriage as here. Particularly with minor children, a modicum stabilization period with attendant tranquility just might alter the atmosphere. *Id.* at 751-753.

Hopefully, your review of *Calo* and the applicable statute will be helpful to you should you ever be involved in a case such as you described in your question.

The above response is not meant to serve as a solution to a case. That would require complete disclosure of all of the facts in the case, including client consultation. Rather, the intent is to provide informal guidance based upon the facts that have been presented. The inquiring lawyer bears full legal responsibility for determining the validity and use of the advice provided herein.

Please send questions for Professor Lex to Hhauer@hauer-snover.com. Include "Professor Lex" in the e-mail's subject line.

About the Authors

Harvey I. Hauer, *Hauer & Snover, PC, is a Fellow of the American Academy of Matrimonial Lawyers and the former president of the Michigan Chapter. He has also served as chairperson of the State Bar of Michigan Family Law Section, the Michigan Supreme Court Domestic Relations Court Rule Committee and the Oakland County Bar Association Family Law Committee. He has been named by his peers to Best Lawyers in America, Super Lawyers and Leading Lawyers. He is a co-author of Michigan Family Law.*

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