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Legal Questions About Divorce

Answering your legal questions about divorce

**What are my rights? How do I petition for divorce?
How does child custody and/or support work?**

Everyone hopes to never have to endure a divorce, one of life's most traumatic experiences. But some marriages deteriorate beyond repair. If you're facing a divorce, you need to know what lies ahead in the legal process. This pamphlet will answer many of your questions.

What are the grounds for divorce in Wisconsin?

The only basis for divorce in Wisconsin is that the marriage is "irretrievably broken." This means the husband and wife can find no way to work out their differences. A judge usually will find a marriage irretrievably broken even if only one spouse wants a divorce.

What is the difference between a divorce and a legal separation?

Divorce ends a marriage. Legal separation involves the same procedures as divorce, but the separated spouses can't marry others. Legal separation is an alternative for people who wish to avoid divorce for religious or other reasons. The court grants a legal separation on the ground that the marriage relationship is broken.

Like a divorce, a legal separation requires property division and determination of child custody and placement. The court may order maintenance and child support payments. (More on these topics later in this pamphlet.)

After one year, either spouse can seek to have a legal separation converted into a divorce without the other spouse's consent. Spouses who reconcile after a legal separation may apply to have the separation revoked.

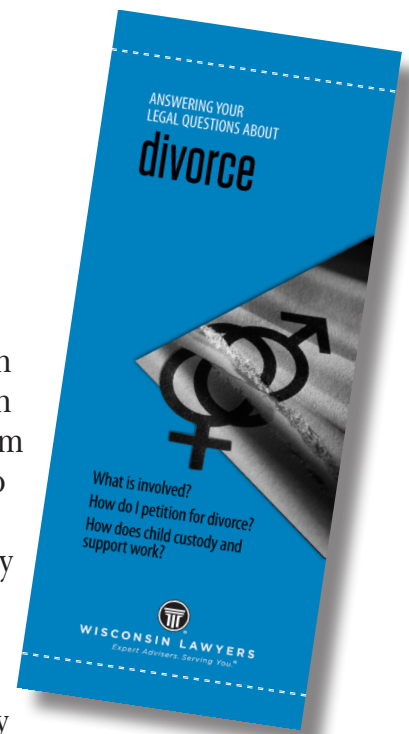
What is an annulment?

An annulment dissolves a marriage that was invalid from the beginning. For instance, one spouse may have been too young, unable to have sexual intercourse, incapable of consenting to the marriage, or induced to marry by fraud or force.

How long must I live in Wisconsin before filing for divorce?

You must have been a Wisconsin resident for at least six months before filing for divorce here. Also, you must have lived at least 30 days in the county where you file.

This pamphlet, which is based on Wisconsin law, is issued to inform and not to advise. No person should ever apply or interpret any law without the aid of a trained expert who knows the facts, because the facts may change the application of the law. Last revised: 7/2011



How does either spouse start a divorce action?

Divorce usually begins with the filing of a *petition for divorce* and a *summons*. The petition for divorce gives the factual history of the marriage and states the desired outcome of the divorce. The summons states that a response must be filed within 20 days.

Sometimes the court finds it necessary to issue temporary orders, which are orders laying out the ground rules that each spouse must follow until the final divorce hearing. If temporary orders are necessary, two additional documents must be filed. The *affidavit for temporary relief* requests temporary arrangements for child custody, placement, or support, as well as any other needed provisions. The *order to show cause* contains the time and date of the hearing before the family court commissioner, who establishes the temporary orders.

After one spouse files the petition and summons with the clerk of court, these documents are served upon the family court commissioner (in certain counties) and the other spouse. The person asking for a divorce is called the *petitioner*, and the other spouse is the *respondent*. Both spouses are *parties* to the divorce action.

Can I get divorced if I don't know where my spouse is?

Yes, but you have to show the court that you made reasonable efforts to locate your spouse. You also must publish a notice in a local newspaper in an attempt to inform your spouse that you have started a divorce.

If it is at all possible to find an address, you must attempt to have notice of the divorce action served upon your spouse. The court has no power to order child support or maintenance unless your spouse has been personally served with notice.

How long does it take to get a divorce?

Unless the court makes an exception for an emergency, at least four months (120 days) must pass between the serving of the initial papers and the final hearing. Most divorces take longer than four months. Several factors affect the length of the process: the complexity of the case, the ability of the spouses to agree on the issues, and the amount of other business before the trial court.

A divorce isn't effective until the final hearing. Once the divorce is final, both parties must wait at least six months before marrying other people.

Can my rights be protected between the start of a divorce action and the final hearing?

Yes. Every divorce includes an order that neither spouse can harass, intimidate, physically abuse, or impose restraints on the personal liberty of the other spouse or minor children (under age 18) of either spouse. In addition, neither spouse can encumber, conceal, destroy, damage, transfer, or otherwise dispose of property owned by either or both of the spouses, without the other spouse's consent or a prior order of the court or family court commissioner. There are exceptions for actions taken in the usual course of business, in order to buy necessities, or to pay reasonable divorce expenses, including attorney fees.

Parents who have minor children together have additional responsibilities. Neither parent can move minor children outside Wisconsin or more than 150 miles from the other parent within the state. Neither parent can remove minor children from Wisconsin for more than 90 consecutive days without the other parent's consent or an order of the court or family court commissioner. Also, neither parent can conceal minor children from the other parent.

These restraining orders apply until dismissal of the divorce action or until the final judgment, unless the court orders otherwise. The court may punish a spouse who violates restraining orders.

In addition, the judge or family court commissioner may issue other temporary orders that protect your rights during the divorce process. For example, temporary orders

may determine child custody and physical placement, who lives in the family home, payment of maintenance and child support, and payment of debts.

A person disobeying a temporary order can be fined, jailed, or both. Some law enforcement agencies, though, are reluctant to arrest a spouse for violating a divorce temporary restraining order. In cases involving violence, one spouse may seek to restrain the other by filing a domestic abuse injunction. Law enforcement agencies generally are more willing to act immediately on violations of an abuse injunction.

How does the court decide who gets custody and physical placement of a child?

The term *custody* refers to the right to make legal decisions regarding a child, such as school choice, religious training, medical care, and so on. The court must presume that *joint* legal custody is in the child's best interests – that is, both parents have decision-making authority – unless there is evidence of interspousal battery or domestic abuse.

The term *physical placement* refers to how much time a child spends with each parent. You often hear of "visitation," but physical placement is now the correct legal term.

Many couples manage to work out their own agreement on child custody and physical placement. This is the best solution for all concerned. The two of you will no longer be spouses after divorce, but you still are parents of your children. By agreeing on custody and placement, you will be better able to communicate with each other for years to come. And your children are less likely to be caught in the middle of parental disputes, one of the worst after-effects of divorce.

When couples have trouble agreeing on custody or placement, the judge or family court commissioner refers them to family court counseling. If the spouses still fail to work out their differences, the judge decides on custody and placement based on the child's best interests.

To make this decision, the judge weighs several factors. The court may appoint a guardian ad litem, an attorney who represents the child's interests. To learn more, see the State Bar's pamphlets, "Answering Your Legal Questions About Custody and Placement" and "Answering Your Legal Questions About Guardians Ad Litem in Family Court."

How does the court determine child support payments?

If a parent has physical placement with the child less than 25 percent of the time, the court usually bases child support on a percentage of that parent's gross (pre-tax) income. The standard support percentages are: 17 percent for one child, 25 percent for two children, 29 percent for three children, 31 percent for four children, and 34 percent for five or more children. However, these percentages

may be reduced for higher income levels. In addition, the court may adjust the standard support percentages upward or downward, if it determines that applying the standard percentages would be unfair in a particular case.

If each parent has at least 25 percent physical placement with the child, which is known as shared placement, each parent's gross income is considered in setting child support. Though the standard support percentages discussed above are part of the equation, the calculation is much more complex because it also considers the amount of physical placement each parent has with the child. In addition to the child support amount set by this calculation, shared placement parents also are responsible for the child's variable costs (such as child care, tuition, and special needs) typically in proportion to the time that the parent has physical placement with the child.

Sometimes one or both parents are paying child support already due to a previous divorce or paternity judgment. Under those circumstances, the court may reduce that parent's gross income available for child support in this new case before applying the standard support percentages and calculations discussed above.

If the court believes that either parent is shirking his or her obligation, the court may use the shirking parent's earning capacity, instead of actual earnings, as the income from which to set child support.

Even if the parent who receives child support fails to follow the physical placement schedule, the parent paying child support may not legally reduce or stop payments, unless that modification is specifically approved and ordered by the court. Doing so only hurts the child.

What is maintenance?

Maintenance, formerly called alimony, is money one spouse pays to the other during or after a divorce.

Maintenance and child support are treated differently for tax purposes. A parent paying child support can't deduct it on his or her income tax return. And the parent receiving child support doesn't report it as income. By contrast, the person paying maintenance can deduct it on taxes, and the person receiving maintenance must report it as income.

How does the court decide whether to award maintenance?

A husband and wife may agree on whether maintenance is appropriate and, if so, what the maintenance amount and duration will be. If they don't agree, the judge decides these issues. The judge will consider:

- the length of the marriage;
- each spouse's age and physical and emotional health;
- how property was divided;
- each spouse's educational level;
- each spouse's earning capacity;

• the likelihood that the spouse seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and how long it would take to achieve this goal;

- tax consequences;
- any agreement of the spouses;
- one spouse's contribution to the education, training, or increased earning power of the other; and any other factor the court finds relevant.

What is a wage assignment?

A wage assignment is an order to an employer to deduct child support or maintenance payments from an employee's pay.

When the court orders a person in a divorce to pay support or maintenance, the order includes a wage assignment order for his or her employer. But if a wage assignment order would cause the payer irreparable harm, the court may allow the person to pay directly to the State Child Support Collection Fund, which forwards the money to the other spouse.

How does the court divide property?

Most of a couple's property, including assets such as retirement interests, can be divided in a divorce. One exception is property received either as a gift from a third party or as an inheritance, although even gifts and inheritances may be divided in some circumstances.

If the couple can't agree on how to divide property, the court decides. The court starts with the presumption that equal division is fair and proper. But the court may alter this by considering:

- the length of the marriage;
- the property owned by either spouse when they married;
- whether one spouse has substantial assets the court can't divide;
- each spouse's contribution to the marriage;
- each spouse's age and physical and emotional health;
- one spouse's contribution to the increased earning power of the other;
- each spouse's earning capacity; the desirability of awarding the family home, or the right to live there, to the parent with primary placement of minor children;
- tax consequences;
- agreements of the spouses; and
- any other factor the court finds relevant.

What is a default divorce?

A default divorce is one in which you and your spouse have no contested issues for the court to decide. A default hearing usually occurs soon after you file a final marital settlement agreement. This spells out all your arrangements for support, maintenance, and asset and liability distribution.

The default hearing cannot occur until after the 120-day waiting period expires, unless there is an emergency. At the hearing, upon approval of your agreement, the court will grant an absolute judgment of divorce.

Don't confuse "default divorce" with "no-fault divorce." A no-fault divorce means that the petitioner need not prove wrongdoing on the part of the other spouse in order to file for divorce. Wisconsin is a no-fault state. As noted earlier in this pamphlet, the only legal basis for divorce in this state is that the marriage is "irretrievably broken."

What if my spouse and I can't reach an agreement?

If you can't reach a final agreement, your case goes to trial. The trial date depends on the length of time needed for the hearing and the court's other business. Contested divorce trials are costly and involved. The court enforces rules of evidence, which contain many pitfalls for the unwary. The best way to avoid these is to hire an attorney.

Can spouses use the same divorce lawyer?

Ethical rules prohibit an attorney from representing both spouses in a divorce.

Occasionally an attorney represents one spouse, and the other spouse chooses to represent himself or herself. Divorces in which neither spouse uses an attorney also occur, particularly when the couple has no children and/or little or no property.

Exercise caution if you go through a divorce without a lawyer. Divorce is a lawsuit, often having hidden consequences. If you have little or no income to pay for an attorney, you may qualify for free help from a legal services agency.

Will the court order my spouse to pay for my attorney?

Under certain limited circumstances, the court may order your spouse to help pay your attorney fees. One example would be if your spouse violated a court order during the divorce. Usually, however, each party pays for his or her own lawyer.

May a woman use her former name after a divorce?

If a woman wants to resume using her maiden name or a former legal name, the court restores it as part of the divorce action. Or she may continue to use her married name, if she wishes.

What can I do if I'm dissatisfied with the final divorce judgment?

You can ask the court to reconsider its decision. You also can appeal to the Wisconsin Court of Appeals. Strict time limits exist for filing an appeal (usually 45 days).

If you are dissatisfied with a decision about maintenance, however, you should be aware of certain limits. The court can't revise a judgment that waives maintenance. If you want the court to reconsider an award of limited-term maintenance, you must file a motion before the maintenance period ends.

Can the final divorce judgment be changed in the future?

The trial court can modify certain orders, such as child support and physical placement, in the future, although usually you must show that a substantial change in circumstances has occurred since the current orders went into effect before a trial court can revise a judgment. In most cases, orders regarding property division cannot be changed, once the orders are approved by the court.

Can I move to a new location after the divorce?

If you have children, you may face limits on where you can move after a divorce, just as you do during a pending divorce. If you want to move out of state or more than 150 miles away from the other parent, you must provide notice by certified mail of your plans at least 60 days before the planned move. The other parent may file a written objection within 15 days of receiving the notice. The court then will refer you and your former spouse to mediation. The court also may appoint a guardian ad litem for your children.

What can I do if my former spouse disobeys a court order regarding custody, physical placement, child support, maintenance, or debt payments?

You must petition the court to enforce its order. This is known as a *contempt motion*. After receiving the court papers, your former spouse must appear in court to report whether he or she has followed the court's orders and to explain any lapses.

After hearing the facts, the court decides whether your former spouse willfully disobeyed. The court may find your former spouse in contempt and grant him or her an opportunity to correct the contempt. Failure to do so can result in as much as six months in jail. The court also may issue other orders as necessary to remedy the contempt.

If the other parent denies or substantially interferes with one or more periods of physical placement, you may bring a *petition for enforcement of physical placement order*.

Usually the court must hold a hearing on such a petition no later than 30 days after it is served on the other parent. If the court finds that your former spouse intentionally and unreasonably denied you of one or more periods of physical placement, the court can issue various orders. These might include granting additional periods of physical placement to replace those denied or hindered, as well as awarding you money and attorney fees.

If my spouse fails to pay bills as ordered by the court, can the creditor sue both of us?

Yes. The court's order doesn't change your relationship with creditors – that is, the parties to whom you owe money. Creditors may sue either spouse and may repossess any property pledged as security. If the creditor sues only one spouse, that spouse may bring the other into the lawsuit.

What is mediation?

A mediator takes no one's side. His or her role is to help a couple to communicate and arrive at mutual agreements. Through mediation, you may be able to resolve disputes faster, with less bitterness, and at less cost than battling in court.

As mentioned earlier, the family court's counseling services provide mediation for couples needing help to settle child custody and placement issues. Family court counseling usually doesn't address property settlements, maintenance, or child support – unless these issues relate directly to child custody or placement. But you may discuss these issues if both of you agree in writing to do so.

Usually, the spouses split most of the family court counseling costs. For more information on family court counseling, see the State Bar's brochure, "Answering Your Legal Questions About Custody and Placement."

Private mediation services also are available. Here a couple can discuss any issues pertaining to their divorce, and they pay all the mediation costs. Your lawyer can refer you to an appropriate service. See also the State Bar's pamphlet, "Answering Your Legal Questions About Alternative Dispute Resolution."

What are cooperative and collaborative divorce?

In these processes, the focus is on settlement of issues. The goal is to reduce the emotional and financial effects of divorce by avoiding formal discovery and individual appraisal of assets. In a collaborative divorce, if the process fails, the attorneys for both spouses must withdraw and turn the case over to other attorneys. For more information on collaborative divorce in Wisconsin, go to www.collabdivorce.com. In a cooperative divorce, although the emphasis is on settlement, court is still available as an option, but only if all efforts at settlement fail. For more information about cooperative divorce in Wisconsin, go to www.cooperativedivorce.org.

What should I look for in a divorce lawyer?

Contrary to what many people believe, good divorce lawyers don't push their clients into full-scale war. This only leaves behind damage and resentments that can linger for years.

The best outcome is a divorce that allows two people to begin to heal and get on with their lives. Toward that end, divorce attorneys help their clients to settle their divorce, if at all possible, rather than to go to trial. As you ask for recommendations, you should seek a divorce lawyer who will:

- act as a problem-solver and peacemaker;
- be courageous enough to tell you things you may not want to hear; and
- be courteous and cooperative in working with your spouse's attorney.

This is one in a series of consumer information pamphlets published by the State Bar of Wisconsin. Bulk print copies and display racks also are available, for a charge, by contacting the State Bar of Wisconsin.

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