

# DIVORCE 101

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If you are thinking about divorce, this guide can help you understand what you need to consider, and what your rights and obligations are under the law in Indiana. Before making such an important decision, you should know what to expect during the divorce process.

This guide is broken into four areas: the divorce procedure, the financial aspects of divorce, parents with children and subsequent issues, and the mental aspect of divorce.

## **The Divorce Procedure**

Under Indiana law, a divorce cannot be finalized until 60 days after the filing of the divorce Petition. After filing the Petition, there is a 60- day waiting/cooling-off period, also known as the provisional period. Most divorces, amicable or otherwise, do not take place in 60 days. As a general rule, most divorces are finalized somewhere between 120 and 300 days after filing.

There is a certain amount of fact finding or what we call “discovery” which occurs during the provisional period. The marital assets as well as the marital liabilities must be determined in order that the marital estate can be fairly divided. When there are issues surrounding the children, such as who will have primary custody of the children, the process can be more time consuming.

### **Provisional Hearing**

The first hearing after the Petition is filed is called the Provisional Hearing. In most counties in southwest Indiana, this entails a meeting at the courthouse with your attorney, your spouse, and his/her attorney to discuss the case. Items discussed at the Provisional Hearing include temporary custody and visitation of the children, if any, and the financial obligations of the parties during the provisional period. If the parties cannot agree on custody, visitation, support, living arrangements, or bills/financial obligations, then the divorce is set for a “contested” Provisional Hearing. That means the Court will have a hearing on the unresolved issues. A contested Provisional Hearing may take anywhere from half an hour up to to half a day.

For the most part, there are not many “contested” Provisional Hearings because there is typically such a backlog that parties will not be able to find contested trial time available for eight to ten weeks. As such, most parties choose to have a contested “Final Hearing” to decide the various issues. Before allowing a contested Final Hearing, most Courts will mandate that the parties attempt to mediate their issues.

## **Mediation**

Mediation involves a certified mediator. There are a number of attorneys in the Evansville area that have taken additional legal training in mediation. Your attorney and your spouse's attorney typically agree upon this third attorney (mediator) to help with the case. The parties then sit down with the mediator and attempt to go through their disagreements.

The mediator's function is not to arbitrate or decide issues but rather attempt to drive the parties toward agreement. The mediator's goal is simply to drive the parties to come to an agreement about the issues at hand. If the parties cannot come to an agreement, the mediator would declare an impasse and the case would be set on the Court's calendar for trial by the Judge, typically three or four months after the mediation.

## **Trial**

If it comes to a trial, the trial will involve you, your attorney, your spouse, and your spouse's attorney. The Court may simply take evidence from the two parties as presented by their lawyers. In other instances, witnesses may be called to testify as to issues. In trial, you are trying to present to the Judge your issues and facts, as well as trying to persuade the Judge as to what is a fair and equitable distribution of marital assets. In the case of child custody, the Judge will also be deciding which parent should be the custodial parent and what the child support should be.

# **Looking at the Financial Picture**

What did you bring into the marriage? What is the marital estate worth today? Marital worth is defined as assets – liabilities = financial net worth. The Courts try to arrive at a "fair and equitable" distribution of the marital assets.

## **Assets**

Assets typically considered are: equity in the marital residence; value of the vehicles; value of pensions, 401(k)s, IRAs, self-employment programs; cash in the bank; brokerage accounts; household items; antique collections; etc. Inheritances are also added to the marital net worth. However, at the discretion of the Court, the inheritance may be set off to the receiving party.

In the case of a highly compensated individual, it is not unreasonable that the Court may award the other spouse 60% or 70% of the marital estate. The issue is wrapped around the words "fair and equitable." If you have one individual making in excess of \$250,000 and the other spouse is making minimum wage, it is not inconceivable that

more assets may be set off to the economically challenged spouse. Every case is unique and the assets will be divided at the discretion of the judge.

## **Liabilities**

Liabilities are just that – liabilities. Those would typically include the mortgage on the marital residence, the loans on the vehicles, and the credit card balances. On occasion, people get into the issue of whether credit card debt is a marital debt. If the debt was incurred for marital items such as groceries, clothes for the children, or joint vacations, it would typically be considered marital debt. Non-marital debt would be considered a vacation that you or your spouse took with their/your “new friend.” If your spouse decides to buy his/her new girlfriend/boyfriend a new wardrobe, a fancy ring, watch, vacation, etc. you should not be penalized and have to pay one-half of that debt.

## **Situation with Children**

Unlike property, you cannot divide a child. In most cases, the parents are in agreement as to where the children are going to live and who is going to be the primary custodial parent (the parent with whom the children will reside the majority of the time). The Court’s directive as to where the children will live is, “What is in the best interest of the children.”

In my experience, most people can agree upon where the children will reside. The issue becomes what to do on holidays, summer vacations, etc. Fortunately, Indiana’s Visitation Guidelines are very specific on these items detailing where the children will be on the various holidays, vacation, etc. However, if custody is contested, it can be lengthy, expensive and often exasperating. In essence, one side is trying to prove the children are better off with one parent. This denigrates, unfortunately, into one parent portraying the other parent as a “bad” parent.

## **Child Support**

Indiana has a formula entitled the Supreme Court Support Guidelines that is used to determine the amount of child support due the custodial parent. The formula uses the Husband’s gross pay, the Wife’s gross pay, the cost of daycare (if any), the cost of health insurance for the children, together with the number of overnights the non-custodial parent will exercise as visitation to calculate the payments.

The greater number of days the non-custodial parent exercises visitation, he/she is granted a greater allowance/parenting credit. The Guidelines now include a formula which calculates this credit taking into account the number of overnights the non-custodial parent exercises.

When it comes to the cost of health insurance for the child, the cost is found by calculating the difference in the group health insurance premium paid by the employee, custodial or non-custodial parent, and the premium being paid to insure the children.

## **Custody**

Another question most people have is the issue of custody – joint, sole or shared custody. My experience is that joint custody and sole custody are nearly identical. In both instances, one parent is named the custodial parent but the other parent is allowed equal access to grades, health records and major life decisions. Shared, on the other hand, is the child living approximately 50% of the time at each parent's home.

## **Life Decisions**

Whether Johnny gets his ears pierced is not considered a major life decision. However, the courts are available should the parents be unable to agree. For example, in the case of a proposed medical procedure that the parents cannot decide, the court is available to make the decision. It has been my experience that if a couple keeps running back to court on issues such as the length of Johnny's hair, the couple will eventually make the court angry and the court may rule in a manner in which neither parent is happy.

# **Mental Aspect of Divorce**

While I believe I am supportive, as well as an understanding "counselor at law," one must remember an attorney is not trained in counseling. I focus extensively with my clients on the mental aspect of the divorce. I remind them that divorce is not going to be a fun process. There is going to be a lot of hurt, anger, bitterness, and depression. I stress to my clients that they have to "get right between their ears" in order to get through the process.

People are concerned that if they turn to a counselor that this can be used against them in a custody trial. I tell these clients that their mental health must first be on an even keel if we have any chance of being successful in a custody fight. If the other side wants to try to use the fact that my client has sought the services of a medical professional in the mental health area, I think this merely bites the other side in the back side. My reaction and I believe the Court's reaction to this is, "So what?"

Divorce can be a complex and emotionally draining legal process. Hopefully this guide has given you an overview of how the process works and some of the issues that may come up. Please feel free to contact Foster, O'Daniel, Hambidge & Lynch to set up a consultation to discuss your options.

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