

FAMILY LAW

DIVORCE and Child Custody Frequently Asked Questions

A Legal Guidebook
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INTRODUCTION

Divorce is both an emotional and a legal process. Your attorney will work closely with you to achieve your goals. Your attorney will assist you and your children in meeting your present and future financial needs and in resolving problems dealing with custody, visitation, support and dividing financial assets.

USE OF THE GUIDEBOOK

This guidebook contains a brief explanation of the legal terms and procedures you may encounter in the divorce process. It also contains answers to some of the most commonly asked questions. When you are a well-informed client, actively participating in your own case, you are most likely to achieve whatever goals you and your attorney decide are appropriate.

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I. THE LEGAL PROCESS

Either party may begin the divorce process or other family law action by filing a Complaint. The Complaint, also known as a pleading, officially announces your requests, such as custody and alimony, to the Court. The party who first files this Complaint becomes the plaintiff and the other party becomes the defendant. If the defendant also wishes to file for divorce, he or she files a set of papers called a Counterclaim.

Each party to a divorce action prepares a Case Information Statement (C.I.S.) that describes his or her income, expenses, assets and liabilities. You and your attorney will get more information about marital finances through the discovery process by way of interrogatories (questions answered on paper), depositions (questions asked in person) and by showing other relevant documents. You may work closely with financial experts to assign value to other assets such as real estate, businesses, or deferred retirement plans. The information gained during discovery may help you and your attorney try to settle the issues in your case. When trying to settle your case, you may schedule a conference with both parties and their lawyers, or appear before the Early Settlement Panel, or your attorneys will negotiate with each other.

In addition to financial issues, you may have child custody and visitation matters that must be resolved. Your attorney should discuss with you the use of mental health professionals, such as custody experts.

Sometimes problems occur before trial and require immediate attention. These issues could include a need for support or visitation. You and your attorney may file an application to the Court for relief pending the outcome of a trial. This application is called a Notice of Motion or an Order to Show Cause and results in a temporary court order.

Mediation is an alternative to the traditional adversarial litigation process for settling divorce-related issues. Ask about the pros and cons of mediation and whether it is right for you and your spouse.

When and if a settlement is reached, both parties briefly appear in court for an uncontested divorce. If both parties cannot agree upon a settlement, a trial is scheduled. Because of the time and expense involved, few cases actually go to trial. However, there may be a more limited trial, or hearing, on a specific issue such as support.

II. FREQUENTLY ASKED QUESTIONS

1. How soon will I be divorced?

Many factors affect the length of time it takes for a divorce to become final. Some matters are concluded in a few months; others take much longer. Sometimes mediation of one or more issues can expedite a case. The extent and type of assets subject to distribution may determine how soon you will be divorced, as well as how crowded the court calendars are and how cooperative both parties are. In most cases your divorce will occur shortly after you and your spouse reach an agreement.

2. How can I shorten the divorce process?

Your assistance in providing documents, cooperating with discovery, and responding promptly to your attorney's requests concerning motions and certifications filed by the other party, will avoid delays and speed settlement. If a settlement is reached, the case proceeds as uncontested, and the Court promptly assigns a hearing date. At that time, the Court grants a divorce to the parties and incorporates the agreement into a judgment if it determines that you both reached the agreement voluntarily.

3. On what basis may a divorce be granted?

New Jersey law provides the following grounds for divorce:

separation for 18 consecutive months ("no fault") _ parties must live in separate residences during this time;

extreme cruelty (physical or mental);

adultery;

willful desertion for at least 12 months;

habitual drunkenness or voluntary addiction;

institutionalization for mental illness for at least 24 consecutive months;

imprisonment for at least 18 consecutive months;

deviant sexual conduct.

4. Does fault make a difference?

The fault or wrongdoing of a party in a divorce action has no bearing on how assets will be divided that were acquired during the marriage. The Court may, but rarely does, consider the grounds for divorce as a factor in determining alimony. So even though fault is an emotional factor in a divorce, it has little influence on the terms of a final settlement.

5. What are my rights in divorce?

You have the right to seek support for yourself and your children, custody of or visitation with your children, equitable distribution of assets, counsel fees and, for women, resumption of the use of a maiden name. Depending upon individual circumstances, you may be entitled to additional rights.

6. What are the Child Support Guidelines?

The Court has adopted guidelines intended to provide guidance about what it actually costs to raise children. The Guidelines fix a range of support that should be paid by both parents, proportionate to their incomes. The Court presumes that the Guidelines are correct. However, you may negotiate child support amounts beyond or even below those in the Guidelines. The Court may modify the levels in the Guidelines if it decides that, due to the particular circumstances of your family, the amount is unjust or inappropriate. The Court may deviate from the guidelines if the combined net income of both parties is more than \$1,000 per week. Child care costs are considered separately.

7. What is equitable distribution?

Equitable distribution means a fair division of the assets and liabilities acquired during the marriage. The Court has the discretion to divide the assets in any manner that it determines is fair __ although not necessarily equal __ based on the following criteria:

the duration of the marriage;

the age and physical and emotional health of the parties;

the income or property brought to the marriage by each party;

the standard of living established during the marriage;

any written agreement made by the parties before the marriage concerning an arrangement of property distribution;

the economic circumstances of each party at the time the division of property becomes effective;

the income and earning capacity of each 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 become self supporting at a standard of living reasonably comparable to that enjoyed during the marriage;

the contribution by each party to the education, training or earning power of the other;

the contribution of each party to the acquisition, dissipation, preservation, depreciation or appreciation in the amount or value of the marital property, and the contribution of a party as a homemaker;

the tax consequences of the proposed distribution to each party;

the present value of the marital property;

the need of a parent who has physical custody of a child to own or occupy the marital residence and to use or own the household effects;

the debts and liabilities of the parties;

the need for creation, now or in the future, of a trust fund to secure reasonably foreseeable medical or educational costs for a spouse or children;

any other factors the Court may deem relevant.

Depending on your goals, you and your attorney may seek to convince the Court that these factors dictate that you receive the highest possible percentage distribution of assets.

8. What is a legal separation?

Although New Jersey law does not provide for a formal legal separation, it is possible for you and your spouse to agree to live separately and to resolve all financial and child-related issues in a written agreement. This agreement may be incorporated into a Judgment of Divorce in the event you or your spouse files for divorce at a later time. If you cannot reach an agreement, you can obtain a divorce from "bed and board." This means that you will continue to be married although the courts grant all other rights normally incidental to divorce, such as equitable distribution of assets.

9. May I leave the marital home?

You are free to leave the home, but you should speak with your attorney before making this or any other major change in your circumstances. In some situations, physical separation is advisable. However, in many cases, leaving the home may have serious negative consequences to you, particularly if you are seeking custody of the children and they remain with your spouse in the marital home. Your departure from the home may also create a financial burden for you and your spouse.

10. Can I make my spouse leave the marital home?

The Court will rarely compel either party to leave the marital home until the divorce is final, except in the event of domestic violence. Only in unique circumstances would a party be compelled to leave the home in the absence of domestic violence. If you are the victim of physical abuse or verbal harassment, you should call the police for protection. You may get an emergent order from either a Municipal or Family Court judge to exclude your spouse immediately from the marital home. A hearing is supposed to be held within ten days to determine whether there is enough evidence to keep your spouse from returning to the home on a permanent basis. If such an order is granted, your spouse will not be permitted to return to the home except to retrieve personal belongings, and then, only with a police escort.

11. How does the Court determine custody?

When the parties cannot reach an agreement regarding the custody of children, the Court determines the custodial arrangement that is in the best interests of the children. To make its determination of custody and visitation, the Court hears testimony from both parties, any experts they want to present, and any other parties who have direct knowledge of the ability of each spouse to parent the children. The Court may also interview the children themselves or appoint a guardian to represent their interests. The Court considers the following factors in awarding custody:

- the parents' ability to agree, communicate and cooperate on matters relating to the children;
- the parents' willingness to accept custody and any history of unwillingness to allow visitation, unless such unwillingness was based on substantiated abuse;
- the interaction and relationship of the children with their parents and siblings;
- any history of domestic violence;
- the safety of the children and the safety of either parent from physical abuse by the other;
- the preference of the children when they are of sufficient age and capacity to form an intelligent decision;
- the needs of the children;
- the stability of the home environment offered;
- the quality and continuity of the children's education;
- the fitness of the parents;
- the geographical proximity of the parents' homes;
- the extent and quality of the time spent with the children prior to and subsequent to the separation;
- the parents' employment responsibilities;
- the ages and number of the children.

12. Can my spouse and I use the same attorney?

No matter how amicable your divorce may be, any divorce proceeding is adversarial. There are certain results you may desire that are not in the best interests of, or desired by, your spouse. As soon as differences develop, a conflict arises. Thus, an attorney can represent only one person's best interests. If the parties reach an agreement between themselves, they still need independent counsel to review their agreement. This will assure each party that their rights have been protected and that the agreement reflects their intentions.

13. Will the Court award alimony?

The Court may award permanent alimony to a dependent spouse. It may also award rehabilitative alimony, which is support for a fixed period of time ___ calculated to permit a spouse to reenter the job market. The Court may also combine the two types of alimony. The following factors are considered by the Court in making an alimony or maintenance award:

the actual need and ability of the parties to pay;

the duration of the marriage;

the age, physical and emotional health of the parties;

the standard of living established in the marriage and the likelihood that each party can maintain a reasonably comparable standard of living;

the earning capacities, educational levels, vocational skills and employability of the parties;

the length of absence from the job market and custodial responsibilities for the children of the party seeking alimony;

the time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, the availability of training and employment, and the opportunity for future acquisitions of capital assets and income;

the history of the contributions to the marriage by each party, including financial support and contributions to the care and education of the children and interruption of personal careers or educational opportunities;

the equitable distribution of property ordered and any payouts on equitable distribution out of current income;

any other factors that the Court deems relevant.

14. What is divorce mediation?

Divorce mediation is an alternative to the traditional adversarial litigation process for resolving the issues in a divorce. Mediation tries to help the parties settle the issues themselves. The mediator will try to do this by facilitating direct negotiations. These direct negotiations are a way to try to limit reliance on courts and adversarial attorneys. A mediator can, with the cooperation of the parties, conduct the same discovery (investigation of relevant facts concerning assets, etc.) as a litigator. Each party has his or her own attorney, but the attorneys' roles are limited in a successful mediation. Mediation is often far less hostile than litigation, which is a particular benefit when there are children. Thus, mediation has the potential to be considerably less expensive than a traditional adversarial divorce as long as the parties are relatively confident that the other is being truthful and forthcoming with the presentation of the facts.

15. How much will my divorce cost?