

## **DIVORCE**

This page will explain what a divorce is and some basic information you need to know before you see an attorney about a divorce. Often in our society marriages fall apart and husbands and wives can no longer live together. A divorce can be traumatic for the parties. It can also be traumatic for children of the parties. Decisions have to be made regarding with whom the children will live and what kind of visitation arrangements can be made with the non-custodial parent. There is also property and debts that need to be divided between the parties. Some times a party is entitled to alimony. Child support has to be determined. Sometimes the parties can agree on these issues. More times than not a court has to decide these issues.

### **WHAT IS A DIVORCE**

A marriage can only be dissolved in two ways. The first is the death of one of the parties to the marriage. The other is by judgment of a court decreeing a divorce of the parties. Therefore, a divorce must be ordered by a court with jurisdiction. A divorce restores the parties of a marriage to the state of unmarried persons. If there is property acquired and debts accumulated during the marriage and children were born during the course of the marriage, the court can divide the property and debt between the parties, give custody of the children to one party, order visitation and order child support be paid to the custodial parent.

### **WHAT ARE THE GROUNDS FOR A DIVORCE**

In South Dakota and on the various Indian reservations a divorce can only be granted if there are grounds or causes for divorce. These include adultery, extreme cruelty, willful desertion, willful neglect, habitual intemperance, conviction for a felony and irreconcilable differences. In order to get a divorce one of these grounds or causes must exist.

### **WHAT ARE THE GROUNDS FOR DENIAL OF A DIVORCE**

A court can deny your request for a divorce. One reason might be that you failed to show grounds or cause of divorce explained above. Another reason might be that the other party can prove to the court a defense to the other parties grounds for divorce. In South Dakota divorce must be denied upon a showing of connivance, collusion, condonation, or for limitation and lapse of time.

### **WHERE WILL YOUR DIVORCE TAKE PLACE**

South Dakota law requires that the person who files for divorce (plaintiff) must be a resident of the state or stationed in the state while a member of the armed services and that person must maintain their residence in the state until the decree of divorce is final.

The divorce can be started in the county where either party to the divorce resides. The other party (defendant) has the right to have the trial moved to the county where defendant lives.

### **HOW IS A DIVORCE ACTION STARTED**

A divorce action is started by filing a summons and complaint in the county where either party lives. The summons and complaint must be served upon the defendant.

South Dakota law provides for an automatic temporary restraining order against both parties once

the defendant is served. The temporary restraining order remains in effect until the case is disposed of. The temporary restraining order prevents either party from selling, concealing or encumbering any marital asset, from disturbing the peace the other party and from removing any minor child(ren) from the state without written consent from the other party or order of the court.

South Dakota law also provides that if the parties to a divorce action have minor children the person filing for divorce (plaintiff) must serve a copy of the state's Supreme Court's standard child visitation upon the other party (defendant) with the summons and complaint for divorce. These visitation guidelines can be found at [www.sdjudicial.com](http://www.sdjudicial.com) then click on to **Procedures** at the top right. The parties should endeavor to follow these guidelines or the court will impose their own.

There is a 60 day waiting period before a divorce action can be heard by the court.

The court can award alimony for the support of a party or the parties minor children before the divorce action is heard.

### **WHAT IS A DECREE OF DIVORCE**

A decree of divorce is the final judgment of the court. The court can grant a decree upon agreement of the parties on the issues in the divorce or if no agreement then after a trial. The decree will state whether the divorce is granted and on what grounds it is based. If there are minor children of the marriage the decree will set out who has custody, visitation to the other parent and a child support award. The decree will also divide and distribute the marital property and debts between the parties. The decree can also restore the woman's maiden name.

### **HOW DOES A COURT DETERMINE CUSTODY, CHILD SUPPORT AND VISITATION**

If there are minor children of the marriage the court will give the custody, care and education of the children to one party or both. Custody means with which party the children will live. The court will look at what is in the best interest of the children to determine custody and visitation. This means the court will look at the child(ren)'s temporal, mental and moral welfare. It does not mean what is in the parent's best interest. And it does not mean which parent has more money or can provide a better life for the child(ren). The courts primary concern when awarding custody is the best interest of the child(ren) and not the shortcomings of the parents. What this means is that the court will consider who cares for the child(ren) such as bathing, cleaning for, sheltering, feeding and generally caring for the children. Evidence or testimony of alleged immoral conduct of the opposing party is not relevant unless it has a direct bearing or effects the best interest of the child(ren). For example, if the opposing party abuses alcohol this would not be relevant unless you can show that the opposing party neglected or abused the child(ren) while abusing alcohol.

The court will normally grant the other party visitation unless there are good reasons not to. See the visitation guidelines at [www.sdjudicial.com](http://www.sdjudicial.com).

The court will enter a child support order where the non-custodial parent must pay the custodial

parent money for the support and care of their children. This is normally done by a support obligation schedule where the court looks at each parties income and the number of children to determine a support amount.

The court will not take fault for the divorce into consideration in awarding custody or awarding property unless it is relevant to the those issues.

The court can modify child custody, support and visitation at any time after the decree of divorce. There is a separate page on Modification of Custody, Visitation and Child Support.

### **HOW DOES A COURT DISTRIBUTE MARITAL PROPERTY AND ALLOCATE MARITAL DEBT**

A court will make an equitable (fair) division of property belonging to either party or both. This can be done whether title to the property is in the name of the husband or the wife. In dividing the property the court will look at the equity and circumstances of the parties.

### **WHAT IS COURT ORDERED MEDIATION**

South Dakota law provides for court ordered mediation in any custody or visitation dispute between the parties. If the parties cannot agree on these issues the court will order mediation unless the court deems it inappropriate.

Mediation helps the parties come up with plan for custody or visitation. The cost is allocated between the parties by the court.

The parties will meet with a court approved mediator who will assist in coming up with a plan. If the parties agree to a plan the mediator will write up the agreement and the parties will sign it. The agreement will then be presented to the court for approval. The agreement is not binding on the parties until approved by the court. If the parties cannot agree on a plan the mediator will let the court know. The mediator cannot make a recommendation to the court concerning which party should have custody or what type of visitation is appropriate unless agreed to by the parties.