

# “DIVORCE 101”

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***Thinking about divorce? What do you need to consider? What are your rights and obligations under the law?***

Whether you hire Olsen, White & Hambidge or another firm, you need to know what to expect during the divorce process.

When I speak with my clients about divorce, I characterize the discussion as “**Divorce 101.**”

“**Divorce 101**” is broken into four areas: 1) The Divorce Procedure Itself; 2) The Financial Aspects of Divorce; 3) Parents with Children and the subsequent issues of child support and visitation; and 4) The Mental Aspect of Divorce.

1. **The Divorce Procedure Itself** – Under Indiana law, a divorce cannot be finalized until 60 days after the filing of the divorce Petition. The Petition is the pleading (paperwork) that asks the Court for a divorce. After filing the Petition there is a 60-day waiting/cooling-off period, also known as the provisional period.

Most divorces, amiable 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. This is not to say a divorce cannot take place on the 60<sup>th</sup> day, but it is unusual.

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.

**Is a trial involved?** 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 is, the Court will have a hearing on the unresolved issues. A contested Provisional Hearing may take anywhere from one-half hour up to one-half day.

For the most part, there are not many “contested” Provisional Hearings because there is typically such a back-log 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.

Assuming you and your spouse cannot agree upon final living arrangements and final financial arrangements for the divorce, the discovery process is involved.

The discovery process entails Interrogatories (written questions to your spouse); depositions, on occasion (sworn questions and answers of the parties); and Requests for Production to Third Parties (employer, medical providers, etc.).

Both sides need to have a clear financial picture of the marriage. What are all the assets and liabilities? The Court is ultimately looking for a fair and equitable distribution of the marital estate.

Sometimes parties attempt to hide assets and this is what discovery tries to avoid.

When children are involved, the process gets more complex. For example, if the parties cannot decide who will be the primary custodial parent, the Court is the ultimate decision maker. Making that decision, the Court is guided by, “what is in the best interest of the child(ren).” If one party has medical or psychological issues, which could possibly affect the child or the child’s upbringing, this needs to be brought to the Court’s attention.

As was previously mentioned, most contested Final Hearings must go through the process of mediation. In order to help alleviate the Court’s back log, the Courts are mandating the parties attempt to mediate (work out) their issues.

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.

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. One side may subpoena a school teacher to give evidence as to how many days the child has been tardy; likewise, medical records or doctors may be subpoenaed to give testimony about the medical conditions of the children or of the parties. Accountants may be asked to testify in response to value of businesses.

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 and in the case of child custody, which parent should be the custodial parent and what the child support should be (all further discussed below).

2. **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 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.

**What becomes of inheritances?** Inheritances are added to the marital net worth. However, at the discretion of the Court, the inheritance may be set off to the receiving party. For example, if you inherited a family farm, kept the farm separate in your name alone, there is a distinct possibility that even though the farm is included in the marital net worth, it would be set off to you prior to division of the marital assets. Likewise, if you inherited money and subsequently bought a house in both names, and co-mingled the money over the course of the years, that inheritance may be considered a marital asset and divided by two.

The simplest example I can give on the division of marital assets would be if the husband came into the marriage with \$2 and the wife came into the marriage with \$1, the day they walk down the aisle they were worth \$3. Assuming five years later they have a net worth of \$6. All things being equal, it would be expected that the husband would get his \$2 and the wife would get her \$1 and the remaining \$3 appreciation would be divided 50/50 between the parties. Again, the division of the marital estate is at the discretion of the Court.

On the other hand, 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. Again, 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.

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.” This would normally be labeled dissipation of marital assets. 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.

3. **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.
4. **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, together with the cost of day care, if any, the cost of health insurance for the children, together with the number of overnights the non-custodial parent will exercise as visitation, and the Guidelines calculate the child support. Of note to many parents is the fact that the greater number of days the non-custodial parent exercises visitation he/she is granted a greater allowance/parenting credit. In the past, it was a straight 10% credit if the non-custodial parent exercised visitation pursuant to the guidelines. The Guidelines now include a formula which calculates this credit taking into account the number of overnights the non-custodial parent exercises.

### **Link to support guidelines and holiday**

I have instructed custodial parent clients that for the first year they should agree with the given figure of 98 overnights but keep track of the number of overnights that are exercised by the former spouse. If it becomes apparent, after a year, that your spouse is exercising only 15 to 20 days as opposed to the 98 overnights envisioned by the

Guidelines, then I believe a Petition to Modify the Support and Visitation credit is in order. Most Courts will give the non-custodial parent the benefit of the doubt the first year with the 98 overnights. It is only with proof, which typically takes a year to accumulate before you can try to persuade the court to cut a visitation credit to match the actual overnights exercised by the non-custodial parent.

When it comes to the cost of health insurance for the child, this is 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. We get into situations where we will prorate the cost or the premium if there are children from a combined family. A Wife has two children covered under the plan and Husband may have three children covered under the plan. The amount attributable to the Father's child support would be on a pro rata basis or in this case 60% of the health insurance premium would be used in the formula.

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 the couple that keeps running back to court on issues such as the length of Johnny's hair or whether Susie should have contacts or glasses is the couple that will eventually make the court angry and the court may rule in a manner in which neither parent is happy.

5. **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. That is 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?"

**Decision on an Attorney.** I hope this article helps in a small way to explain a rather complex and stressful time in your life. I have provided links from this article to the Indiana Supreme Court Visitation and Support Guidelines for your perusal. Again, if I can be of assistance in helping you, please feel free to contact the firm and set up a consultation.