



State Bar of South Dakota

Divorce

what is a divorce?

A divorce is a legal action which dissolves a marriage.

The divorce proceeding will also provide for minor children, if any, determine whether any support will be paid, and will equitably divide the couple's property and debts.

for what reason may a divorce be granted?

Under South Dakota law a divorce may be granted for any of the following grounds: adultery, extreme cruelty (including bodily injury or grievous mental suffering), willful desertion, willful neglect, habitual intemperance, conviction of a felony, chronic mental illness or irreconcilable differences. The grounds of irreconcilable differences may be used only if both parties agree to use it or if there is a default.

If there are any questions, talk to your attorney about this matter.

what is the residency requirement?

To obtain a divorce in South Dakota, no length of residency or waiting period before beginning the action is required. However, you must be a resident in good faith and once the proceeding is commenced you must remain a resident of the state until the divorce is final.

what if my spouse is in another state?

If your spouse does not reside in South Dakota, you can still begin a divorce action in South Dakota. The South Dakota court has the authority to grant a divorce, provide for custody of the children who are in South Dakota and divide property located in South Dakota. The court in South Dakota generally does not have the authority to award you custody of the children that are residing in another state.

If your spouse is in another state, you can obtain child support or have child support obligations enforced through the state's attorney's office, or through the Department of Social Services, Office of Child Support Enforcement.

how do I start a divorce action?

After you hire an attorney, the attorney will prepare a summons and complaint, which must be served upon your spouse in order to start the divorce action. The complaint simply asks the court to grant a divorce and states your grounds. The complaint also states what you want the court to do about such matters as child custody, child support and visitation, alimony, and division of property and debts of the marriage.

The summons demands that your spouse answer the complaint within thirty (30) days or a default judgment may be entered against him or her after sixty (60) days. The complaint for divorce must be answered if the spouse wishes to contest the divorce, custody of the children, child support, alimony, division of property and debts, or any other statement in the complaint.

how does my spouse find out about the divorce?

The summons and complaint must be "served," that is, personally delivered, to your spouse in order to notify him or her of the divorce action. If your spouse wishes, he or she may sign an "admission of service" which simply states that he or she received the divorce papers. This will save the expense of having the papers served. If your spouse is not agreeable to signing the admission of service, then the sheriff or a process server in the county where your spouse resides can serve the papers.

If your spouse cannot be found through diligent efforts, your attorney may "serve" your spouse by publishing a summons of the divorce in a newspaper. However, every effort should be made to locate your spouse personally before resorting to this method of service.

Your spouse has thirty (30) days from the date of the service of the summons and complaint to file a formal answer in writing to the court. Filing an answer means your spouse is contesting such things as the divorce, child custody, child support, alimony or division of property or debts. They may also file a counterclaim, which is the equivalent of a complaint.

is there a waiting period?

In both a contested and uncontested divorce, you must wait sixty (60) days after the serving of the summons and complaint before you and your attorney can finalize the divorce.

what happens during the divorce?

The divorce may proceed in one of four ways:

1) **DEFAULT:** This means your spouse does not answer, respond or in any way contest the divorce or other related matters such as child custody, support, alimony or division of property and debts. In other words, if your attorney hears nothing from your spouse, a divorce can be granted and you can get what you have asked for in your complaint on your testimony alone.

2) **STIPULATION:** Where it is possible for the parties to agree on the custody of the children, division of property and debts, child support and alimony, a written agreement called a "stipulation" is prepared and signed by both parties. In such a situation, the divorce is handled like a default divorce and is granted on your testimony alone. The stipulation is presented to the court for the judge's approval and you are bound by it. Note: there is also a provision for entry of a divorce without the appearance of either party if both consent, all the terms are set forth in the stipulation, and both parties agree the grounds for the divorce is irreconcilable differences.

3) **CONTESTED:** If your spouse has filed a formal answer and does not agree to the divorce, showing there is a dispute on such matters as custody, child support or division of property and debts, a trial will be held. The judge will decide these matters on the basis of evidence, including the testimony of both parties and other witnesses. The court will decide on all matters not previously agreed to by the parties.

4) **MEDIATION AND EVALUATIONS:** In any custody or visitation dispute between parents, the court shall, unless deemed inappropriate, order mediation to assist the parties in developing a parenting plan. The parenting plan will address custody and/or visitation to be formulated by the parents with the assistance of a qualified mediator. The court may also direct that an evaluation be conducted to assist the court in making custody and/or visitation orders. The cost of mediation and evaluations are allocated by the court, unless agreed upon by the parties.

what about restraining orders?

A temporary restraining order is automatically in effect against both parties from the filing of a summons and complaint and service on the spouse until the final decree is entered, the complaint dismissed or it is otherwise ordered by the court. The parties are restrained from: 1) disposing of any marital assets; 2) molesting or disturbing the peace of the other party; and 3) removing any minor child of the parties from the state without written consent of the other party or a court order. Other restraining orders or protection orders may also be granted by the court upon application of either party. If your spouse disobeys a restraining order or a protection order, the court after a hearing can hold him or her in contempt of the court.

what is included in a divorce?

Final decree: If the divorce is granted, the decree dissolves the marriage and each of you is returned to the status of a single person.

Child custody: If there is a dispute, the court will decide which parent is the better custodian of the child at this point in the child's life. This is based upon which parent the judge finds is the most fit to care for the child and what is in the best interests of the child. The relative fault of either party may only be considered if it is relevant to the fitness of the parent. Joint custody provisions are also allowed in certain cases. The court may order that you attend a class to understand the effects of your divorce upon your children.

Child support: The spouse who does not have primary custody of the child is generally required to pay child support. The amount of child support is set by statute in accordance with both

parents' income, and can be increased or decreased in the future. The Department of Social Services also has procedures for increasing and decreasing child support by having a hearing. You should check with the Department of Social Services, Office of Child Support Enforcement, to see if you are eligible for this service, which is an alternative to returning to court. If primary custody of the children changes, you immediately should have child support reevaluated. If you do not, it may mean you will pay support even though the children are living in your home on a primary basis.

Alimony: Alimony is the payment of a sum of money directly to the spouse for his/her support or as reimbursement or restitution and may be awarded to either spouse. The court considers a number of factors in deciding whether or not to award alimony. These factors include: the length of the marriage; the value of the property of each of the parties; the ages of the parties; their health and competency to work; the contributions of each of the parties to the accumulations of the marital property and the relative fault of the parties for the breakup of the marriage. Alimony may be set for a term of years, until remarriage of the receiving spouse, or until the death of either spouse. Alimony, if originally awarded, may be increased or decreased either by agreement of the parties or by court order. Alimony cannot be awarded later if it is not awarded in the divorce.

Division of Property and Debts: Where a divorce is granted the court has full power to divide the property belonging to the parties located within this state, regardless of whose possession it is in. The parties may agree to a division of the property and debts in their stipulation. If there is disagreement, the judge will make the decision. Generally the court will divide the property and debts equitably between the parties. Equitably does not necessarily mean equally. The fault of the parties as to the breakdown of the marriage is not a factor when the court divides the property. It is important to keep in mind that the final decree is final as to the property division and cannot be modified by the court in the future.

You should be aware that if your spouse is ordered to pay a certain bill, the creditor can still bring action against you for the amount of any bill originally in your name. You can bring a court action against your former spouse who can be held in contempt of court for failure to obey the court's order and be required to pay you.

Attorney's fees: The court can order either party to pay all or part of the attorney's fees and costs of the other party.

A woman's former or maiden name: The divorce decree may include a provision restoring the woman's former or maiden name.

how much will a divorce cost?

Each party will be responsible for his or her attorney's fees unless otherwise ordered by the court. Attorney's fees are the amount an attorney charges a client for the time and work expended on the case. In addition, each party is also responsible for the costs incurred. Costs are: filing fees for filing your case with the clerk of courts, and service fees or publication costs for serving your spouse with necessary legal documents, long distance phone calls, mediation fees, custody

evaluation fees, depositions, costs to obtain records, or any other expense incurred on your behalf. In certain cases, filing fees and sheriff's fees may be waived for persons whose sole source or primary source of income is:

- 1) aid to dependent children
- 2) social security
- 3) county poor relief; or
- 4) at a level determined by the court to be so low that the person cannot afford to pay the fees.

what about alternatives to divorce?

SEPARATE MAINTENANCE: There is no such thing as a "legal separation" in South Dakota. South Dakota does have a proceeding for separate maintenance. The procedure for such an action is the same as that for a divorce. The only difference between a separate maintenance and a divorce action is that separate maintenance does not dissolve the marriage, nor does the court make a final decision regarding property. If you desire to terminate the marriage after a separate maintenance, you must go through the entire procedure again.

ANNULMENT: South Dakota law allows a legal annulment in certain, limited cases. An annulment makes the marriage null and void from the beginning, unlike a divorce which simply terminates the marriage.

This brochure is based in South Dakota law and is designed to inform, not to advise. No person should ever apply or interpret any law without the aid of an attorney who knows the facts and may be aware of any changes in the law.

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