

FUNDAMENTALS OF DIVORCE IN ARKANSAS

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INTRODUCTION

The general principles of divorce and separation proceedings in Arkansas are the subject of this pamphlet. The purpose of it is to help you understand the legal advice we give you and to alert you to issues and facts which you need to discuss with us. This pamphlet is a generalized summary, it does not and cannot cover all of the issues, laws and rules involved. The law is always subject to amendment by the legislature, reinterpretation by the courts, different application by different judges, and factual variation from case to case. Do not act on this information without first discussing it with us.

I. TYPES OF DIVORCE OR SEPARATION

A. ABSOLUTE DIVORCE, DIVORCE FROM BED AND BOARD, SEPARATE MAINTENANCE AND ANNULMENT

The laws of Arkansas provide four options for one wishing to change his or her legal relationship with their spouse. The four types of actions are **Absolute Divorce, Divorce from Bed and Board, Separate Maintenance** and **Annulment**. An **Absolute Divorce** fully and finally dissolves the bonds of marriage and allocates ownership of the parties' property. A **Divorce from Bed and Board** also fully and finally divides ownership of the parties' property, but it does not dissolve the marriage. A **Separate Maintenance** does not dissolve the marriage and merely allocates possession of property for the duration of the separation. **Separate Maintenance** is only a temporary solution. **Annulments** void a marriage from the very beginning as if the parties had never married. However, they are granted only in rare cases. If you want an annulment, tell me before the case is filed. Generally, if at the time of marrying, both spouses are physically able to perform sex, neither is still married to another, both are sober enough to give valid consent to the marriage, neither is forced into the marriage at gunpoint and neither is the victim of fraud, no annulment is possible.

B. CONTESTED vs. UNCONTESTED

All of these actions fall into another of two categories, contested or uncontested. A contested case is a case in which the defendant hires a lawyer and the lawyer files an answer with the court. In contested cases, the lawyers and parties negotiate a settlement or a trial is held. An uncontested case is a case in which the Defendant does not formally respond to the suit. In uncontested divorce cases, only a five minute hearing is required and grounds for divorce need not be corroborated. Uncontested cases are much cheaper than contested cases.

i. CONTESTED CASES

In contested cases, you must prove your grounds for divorce, unless your spouse waives proof of the grounds. For grounds of divorce to be proven, the law requires that the existence of grounds be corroborated by at least some evidence other than the testimony of either spouse. The defending side will often waive proof of the grounds for divorce. Most often, only property and custody issues are contested.

(a) **Grounds for Divorce.** The grounds for a divorce are:

Adultery;

Habitual drunkenness for a period of one year or more;

Willful desertion for one (1) full year without reasonable cause;

Felony conviction or criminal conviction for another infamous crime;

Cruel or barbarous treatment endangering life of spouse;

General Indignities- Treatment of spouse with such indignity that spouse's condition is rendered intolerable;

Separation, without any cohabitation, for a period of 18 months or more.

To be valid, the acts constituting your grounds for divorce must have occurred within the past five years.

(b) **Defenses.** Defenses to the grounds for divorce include:

Condonation - knowing what your spouse did wrong but forgiving him or her. This is usually proven by showing that you and your spouse had sexual relations after you knew what he or she had done.

Recrimination- where your conduct has been as deplorable as your spouse's.

Even if you prove your grounds for divorce, if your spouse proves condonation or recrimination, the judge will usually not grant you a divorce. However, condonation is not always fatal to your case, and conditional condonation will not prevent a divorce.

ii. **UNCONTESTED CASES**

Grounds for divorce must be alleged, but need not be corroborated in uncontested cases. An uncontested divorce hearing takes five minutes or less and only the petitioner and one witness need appear. The witness needs to testify only that the petitioner has resided in Arkansas ninety days or more and has not lived with his or her spouse since filing for divorce.

II. ARKANSAS JURISDICTION

If you wish Arkansas to exercise jurisdiction over your marriage, you must live in Arkansas for sixty days prior to filing the divorce case, or your spouse must live here. If you and your child have recently moved to Arkansas, and your spouse still resides elsewhere, the child may need to live in Arkansas for six months before Arkansas can exercise valid jurisdiction over custody issues.

III. SEPARATION REQUIREMENT FOR DIVORCE

The legal requirement for separation before filing requires at least separate sleeping arrangements and a lack of physical relations. Renewing physical relations may destroy your grounds for divorce. The Arkansas Supreme Court has indicated that persons who do not live in separate residences after the filing of a divorce may still be entitled to a divorce, if the grounds for divorce are general indignities. However, if you are still living with your spouse, it can be difficult to convince a judge that your spouse's conduct has rendered your marriage intolerable,

and that you are therefore entitled to a divorce. It is best to maintain separate residences.

IV. COURSE OF LEGAL PROCEEDINGS

A. THE COMPLAINT

The first step in a divorce is the preparation and filing of a complaint. The complaint states the grounds for divorce and the vital statistics of the parties and the marriage. It also covers certain technical matters and asks the court for anything that you might want. Categories of things are asked for; often amounts are not mentioned.

B. SERVICE OF SUMMONS

The court clerk issues a summons when a complaint is filed. The summons must then be served upon the defendant. Actual service is obtained by having a Sheriff or licensed process server physically deliver the summons and complaint to the defendant, or by having the defendant sign a certified mail restricted delivery receipt card. If actual service cannot be obtained, constructive service must be had. Constructive service is obtained by mailing a certified letter to the defendant's last known address and publishing a warning order in a newspaper. If only constructive service is obtained, certain property rights may not be decided by the court.

C. ANSWER AND COUNTERCLAIM

The summons notifies the defendant that he has only 20 days from the date of service, or 30 days if he is not an Arkansas resident, to contest the case. To contest the case, the defendant must have his lawyer file an answer with the court clerk, within the allotted time. An answer merely denies the allegations contained in the complaint. The defendant may also ask his attorney to allege that while the plaintiff is not entitled to a divorce, the defendant is entitled to a divorce. His lawyer would do this in a document called a counterclaim. A counterclaim is very similar to a complaint.

D. DISCOVERY

The filing of an answer leads to a stage called "discovery", if a party does not have all of the information he or she needs about the assets etc. held by the other party. Discovery is a stage in which one or each party requires the other to disclose information. This can be done through written questions, known as "Interrogatories" or "Requests for Production of Documents," or through face to face questions before a court reporter, answered under oath, known as "depositions".

E. Property settlement agreement

Hopefully, discovery will lead to the drafting of a property settlement agreement. A property settlement agreement is a contract signed by both parties, which fully and finally allocates all of the property. Child support, custody, and alimony may also be set out in the property settlement agreement. However, those three items may sometimes be changed by the court at a later date, as circumstances change. A property settlement agreement often specifies the following elements:

Court Costs and Attorney Fees - Who pays?

Property - Real estate, who gets the house? Who gets the note? If the house is sold, how does the equity get divided?

Personal Property - Who gets which car, what appliances, and what happens to the sofa in the den?

Retirement - What happens to any retirement benefits that have accrued?

Debts - Who pays what? Should the debts be paid off by refinancing?

Alimony How much, if any? How long, if at all?

Custody Who gets which child? Should any aspects of custody be shared? Will joint custody work?

Child Support - How much? How long? Health or life insurance on children? Who gets to claim the children as income tax deductions? Private school or college tuition?

Visitation - Do you want a specific schedule or can you and your spouse work together on it?

Insurance - Life insurance. Who is insured? Who is the beneficiary? Term or cash value? How much?

Insurance - Health insurance. Who is covered? Who should be covered?

Other - Security for obligations in the agreement, wills, death, and taxes.

You should not sign a property settlement agreement until you have evaluated what the court will give you if you go to trial. Consider what the law would provide for you in the following areas:

i. **PROPERTY DIVISION**

It is critical that you and your lawyer know about all assets held by the other party. Property includes assets and liabilities, real estate and personal property, both tangible and intangible. This can consist of houses, pensions, IRA's, 401k's, profit sharing plans, stock options, businesses, coin collections or almost anything. All property of either party must be classified as "separate property" or "marital property". Separate property is usually acquired before the marriage or outside the marriage, such as by gift or inheritance. Marital property usually consists of all other property acquired during the marriage.

Separate property normally remains with the spouse whose separate property it is. Marital property is almost always divided in half. If the Court wishes to divide the marital property in unequal shares, and the parties have not agreed to an unequal distribution, the Court must first find that the

- (i) length of the marriage;
- (ii) Age, health, and station in life of the parties;
- (iii) Occupation of the parties;
- (iv) Amount and sources of income;
- (v) Vocational skills of each party;
- (vi) Employability of each party;
- (vii) Estate, liabilities, and needs of each party and the opportunity of each for further acquisition of capital assets and income;
- (viii) Contribution of each party in the acquisition, preservation, or appreciation of marital property, including services as a homemaker; and
- (ix) The federal income tax consequences of the court's division of property justify unequal distribution of the marital property. It is not customary for an Arkansas judge to make an unequal distribution of marital property, but it does happen.

If you and your spouse can agree on how things will be divided, your agreement will almost always be approved by the court. If you cannot agree, the court will divide the property.

Despite an agreement or order for one spouse to pay a debt that is in both parties names, if the party responsible for the debt does not pay the debt, then the other party can still be sued for the debt. Take a case where the wife receives the house and the husband agrees to pay the mortgage. The husband dies or goes bankrupt. The wife may be able to sue the husband for violation of the court's order, but the mortgage company can still foreclose on the house and sue the wife for any deficiency.

ii. ALIMONY

Alimony is usually designed to be temporary and rehabilitative. If temporary alimony cannot bring about rehabilitation, the court can, in proper circumstances, order alimony on a long term or indefinite basis. Indefinite alimony is called alimony in futuro. Alimony in futuro is granted less often these days. Technically, husbands can get alimony from wives, but it rarely happens. Alimony is based upon the relative needs and resources of the parties. In deciding whether to award alimony, the court will consider three primary factors:

ABILITY: The ability of a spouse to pay alimony;

NEED: The need of the other spouse to receive alimony, including his or her ability to support himself or herself.

ACCUSTOMED STANDARD OF LIVING: The husband's and wife's standard of living and their station in life.

In evaluating those three factors, the Court will look to:

Salary and investment income of each party.

Pension, profit sharing, and retirement plans of each party.

Education and abilities of each party, as well as each party's opportunities for additional education.

Length of the marriage.

Age, physical and mental condition of each party.

Separate and marital property which each spouse will be receiving.

Tangible and intangible contributions of a homemaker and the tangible and intangible contributions of one party to the education, training, or increased earning power of the other party.

Tax consequences.

Other factors that the Court considers appropriate.

Alimony in futuro can be raised or lowered over time, if there is a change of circumstances. If you do not get alimony at the time of the divorce, you cannot get alimony later on. Alimony in solido is a definite lump sum of money or property awarded, instead of periodic payments, and it cannot be modified.

Living with someone after the divorce, regardless of whether you have sex or not, may cause alimony to be lowered or stopped. Remarriage of the person receiving alimony will terminate alimony. The Court can require a bond or put a lien on property to insure the payment of alimony

or child support.

iii. INSURANCE

If you cover your spouse or children on your insurance, do not drop them from the policy until the divorce is final. You are probably responsible for their medical bills until then. Even after the divorce, an employed spouse may want to keep the children covered. If you are paying child support, a large unexpected medical expense for the child could be assessed against the non-custodial parent as additional child support. A federal law allows most employees to cover their spouses for up to 18 months after a divorce, for an additional premium.

iv. CUSTODY

As a technical legal point, a preference for the mother receiving custody no longer exists. However, most lawyers feel that the mother still has an edge in custody litigation. Joint custody is seldom awarded in contested cases.

The legal standard in deciding who will get custody is "the best interest of the children". Every judge sees a child's best interest differently. There are certain legal doctrines and presumptions which aid the Court in determining the best interest of the child:

Parental rights - Parents must be shown to be unfit before the children will be given to someone else, such as grandparents.

Continuity of Placement - If children are doing well where they are, do not mess things up by moving them.

Children's Preference - There is no age at which a Judge must consider who the children want to live with. A Judge may talk to a child in private or in the courtroom. A Judge is not bound by what any child of any age wants, but will normally strongly consider the preferences of children in high school.

Other - The Court can consider the custodian's age, health, wealth, where other brothers and sisters live, religious beliefs, conduct, sexual conduct, type of home, psychological evaluations, the child's school performance, or anything the Court considers important.

v. CHILD SUPPORT

Except in very unusual situations, Arkansas courts set child support by referring to an official chart. The payor's net income, his total income less only taxes and other child support deductions, is the factor which is used in referring to the chart. If there are any extraordinary expenses on either side, either medical, educational, or otherwise, then the support could be higher or lower.

The Court can order the non-custodian to pay child support and to provide such things as life or health insurance. The Court will usually require support of a normal child only until the age of eighteen (18), or until the child graduates with his regular high school graduation class, whichever comes last. You can provide for college, but you must do so by agreement, as absent an agreement the Court generally will not order it. If you have a child with a mental or physical disability, be sure to let me know, as it may be possible to have support continue after this child becomes eighteen (18) or graduates from high school. If the children's needs or the parent's ability to pay support substantially and materially change, then child support can be raised or lowered. Child support, and sometimes alimony, can be assigned out of the paycheck of the person who is paying for it. A bond can sometimes be required to ensure the payment of past, present and future child support, or a lien may be placed on property for that purpose.

vi. VISITATION

If the mother and father agree on visitation, the court will almost always approve their plan. A typical pattern is alternating weekends, a few weeks in the summer, alternate Christmases, and alternate other holidays. A week at Spring Break and a week at Christmas are also sometimes provided. If the parties live far apart, responsibility for transportation should be dealt with. Even if your belief is that the non-custodial parent is a jerk, and you do not think it is the best thing in the world for the kids to be around the jerk, you still need to allow visitation. Not only will this keep you out of jail, but also the children need to know that the non-custodial parent is a jerk. If the children do not see the jerk, they soon forget what a jerk he or she is, and they begin to blame you for the non-custodial parent's absence. The child's imagination is then on the other parent's side. The children dream about a perfect parent, and since they do not see the absent parent, they do not see any flaws in that parent. You might win against many things, but you will lose against your child's imagination.

In Arkansas, grandparents can petition the court for visitation. The court is to grant that visitation if it is in the best interest of the grandchildren.

vii. TAXES

Subject to many qualifications, alimony paid in cash is deductible to the party paying it and taxable to the party receiving it. Child support is not deductible to the party paying it and it is not taxable to the party receiving it. Taxes can make a great difference in divorces. I am not a tax attorney. I do not give tax advice. If you need tax advice, we must associate a tax attorney or a Certified Public Accountant in your case.

V. FINAL HEARING

A. UNCONTESTED HEARING

In an uncontested divorce case, the plaintiff needs to appear in Court to testify. The defendant need not appear. If you are the plaintiff, you will need to bring one witness with you, so that he can testify that you have lived in Arkansas 90 days or more, and that you have not lived with your spouse since a time more than 30 days prior to the hearing. You may want us to issue a subpoena to require your witness to appear for Court. This can help your witness get time off from work.

B. CONTESTED HEARING, TRIAL

In a contested case, a trial must be held, and the plaintiff must prove all issues which have not been waived by the other side.

i. EVIDENCE

If your case is contested, evidence which proves your case must be presented. To enable me to prove your case, I may want you to supply me with copies of the following documents:

Income Tax Returns;

Financial contracts or any explanations of benefits from your work or your spouse's work;

Employment contracts or any explanations of benefits from your work or your spouse's work;

Canceled checks and charge records;

Retirement plans, including IRA's
Deeds
Real estate tax bills or appraisals;
Insurance policies, including life, medical, health, or homeowners;
Bank accounts and bank statements;
Inventory of safety deposit boxes (you will want the bank to verify the inventory if possible);
Securities;
Partnership agreements, corporation papers or other documents showing any business interests;
Any inheritance or trust interests;
Any written agreements between you and your spouse;
Any other evidence you have, such as photographs, letters, etc.

ii. WITNESSES

When you must prove something in Court, you need witnesses. If you have to prove grounds for divorce, you need to have corroboration (support) of your testimony. The corroboration is usually testimony of a witness other than a spouse. In a contested case, you may need more than one other witness. We can issue a subpoena for witnesses, if you request it, and if you give us their names and addresses. The subpoena will help the witnesses take time off from work to appear in Court. If subpoenaed witnesses do not appear in Court, you can usually have the case continued until you can get them to appear in Court. If witnesses are not subpoenaed, their absence is usually not grounds for a continuance.

iii. APPEARANCE AND CONDUCT AT TRIAL

Dress neatly and nicely (church clothes) for all court appearances, especially those in which you will be testifying. It may be unfortunate that people judge others by their clothes, but they do. If you want the Judge to think that you are one of the "good guys" then dress like a good guy, and like not some biker or dooper. Do not chew gum. Walk and stand erect. Do not slouch or slur your words. Be serious and forceful. Never interrupt the judge, and do not talk in the courtroom unless spoken to. If you cannot control yourself the judge will be less likely to let you control your children or assets.

Remember that you are trying to convince the judge, so talk to him, not to me. I already believe you, and the other attorney never will believe you.

When sitting in court do not react to the witness's testimony with sighs or gestures. That behavior aggravates the judge.

If you want me to know something, pass me a note. If you try to talk to me when I am trying to listen to the witness then I may miss something that I need to hear. Unless I hear the other side lie on the witness stand, I cannot catch them and show it to the judge.

Be polite; it makes a good impression on the court. Answer "yes sir" or "ma'am", and address the judge as "your honor". Do not be smart-aleck, argumentative, or angry. If the other side baits you into becoming angry, they are probably trying to set you up for a trap, so keep your cool. Lose your temper, and you may lose your case.

Tell the Truth. It is going to come out eventually anyway, and it is better coming from you than the other side. If the other side catches you in a lie it will hurt your case.

Listen carefully to all questions, whether posed by me or the other side. Pause, make sure you understand the question, and then take your time and answer that question. If you ask, the attorney will repeat the question. Do not tell the court "I think" or "it must have been". The court normally does not care what you think or what might have happened. It wants to know what actually happened. However, if you make an estimate of time or cost, make sure that the court knows that it is an estimate. If you make a mistake during your testimony, correct it as soon as possible. Politely say something such as "May I correct something I said earlier".

When the other side asks you a question that you do not know the answer to, say "I do not know". Witnesses are often trapped by being led into guessing. They try to save face and end up making a statement that is then shown to be false. Credibility is lost on more than that one statement. Saying, "I do not know ", when you don't know, usually avoids the problem.

Do not volunteer information to the other attorney. Do not let the other attorney pull you into testifying more than you need to by standing there looking at you, waiting for you add material. When you are finished with your answer, shut up.

One of the oldest tricks in the book is for the other side to ask you if you have discussed the case with your attorney or other witnesses. If they ask you, then tell them the truth -- you have. They are not asking if you have fabricated the story, but they are asking you if you have talked about it. Only a fool would go to court without having discussed the case with his attorney and his witnesses. If they ask if I have told you what to say, tell them that I told you to tell the truth -- because I have.

We are all afraid of things we do not understand. To help yourself, you should review any documents which you will refer to during your testimony. Also review any statement which you have made, and talk to friends, family, and co-workers to aid recall of details which you have forgotten.

FINANCIAL ACCOUNTS - IMMEDIATE ACTIONS You should close joint accounts as soon as possible. You should also notify banks, charge card companies, and others, by a certified letter, that you are no longer responsible for your spouse's expenses. At the bank, you should divide joint accounts or put them in your name. This sometimes will make the judge mad at you, but it is often easier to give money back then get it back. If you are the breadwinner, do not put your dependent spouse out in the cold without some money to get by on. Doing so would anger the court and not work to your advantage.

VI. TEMPORARY RELIEF (Pendente Lite)

"Pendente Lite" is Latin for "pending the litigation," and there are things you may need the court to do pending the final trial. The court, upon request, can set a hearing to determine the temporary needs and abilities of the parties and children and order temporary support. This award is subject to rehearing at the final trial. The court can also order temporary custody and temporary visitation.

VII. RESTRAINING ORDERS

Restraining Orders are orders of the court that are issued to prevent harm, pending further hearings. If you are afraid that your spouse will beat you, take your money out of the bank, or run off with your children, then the court can enjoin or prohibit it by issuing a restraining order. In some cases, the court may issue a restraining order when the case is filed; in others, the court may require a hearing before deciding on the injunction. If you disobey an injunction, the court can put you in jail. Even if the judge does not put you in jail, you can be fined, and the judge will have a hard time believing you when you testify. Police are often unwilling to get involved in problems between spouses, but if you show them a restraining order they will usually run the other party off.

If you need protection, tell me, and I will get you a restraining order.

VIII. CHANGE OF NAME

In Arkansas, a person may change his name at any time, without legal procedures. However, sometimes it is hard to convince the Social Security Administration that one has legally changed his name. A woman can therefore have the Court order the restoration of her maiden name in the final divorce decree.

IX. EFFECT OF BANKRUPTCY ON DIVORCE

Filing bankruptcy may relieve a debtor of many debts, but the responsibilities of paying alimony and child support should still remain. However, if you get a notice that your spouse has filed bankruptcy, contact me immediately. I have dealt with this problem before.

X. COURT COSTS AND EXPENSES

There are different types of costs in divorce cases. The largest cost is usually attorney fees, which is what I charge for the work I do on your case. Court costs are the fees charged by the court, court reporters, process servers, witnesses and others. In contested cases, attorney fees and court costs are high, and there may be costs for depositions, a private investigator, photographs, psychological evaluations, tax consultants, etc. You must pay these costs, as we are ethically prohibited from lending clients money. Any discussion about costs is only the roughest of estimates. There are many variables in any divorce case, including some over which I have no control; such as who your spouse will hire as an attorney and how complex the financial records are.

XI. ATTORNEY FEE

If there is a trial, one party can be ordered to pay some of the other's attorney fee. However, the order will rarely be for the full amount. You are responsible for paying your attorney's fees, and will get a full credit for any payments made to me by the other party. You have probably heard of divorces in which the attorney representing the wife promises to collect

the attorney fee from the husband. This creates a conflict of interest between the attorney and his client, as the attorney might be tempted to compromise the wife's rights in other areas to protect his fee. I try to avoid this if possible. If it appears to be in your best interest, we will negotiate and argue for your attorney fees; however, our focus will be on the total picture.

XII. SEPARATE ATTORNEYS, NO JOINT REPRESENTATION

If there ever was a conflict of interest, it has to be one lawyer representing two people getting a divorce. If you and your spouse have agreed on everything, it may be possible for me to do all of the legal work, but I will represent **ONLY** one of you. If you and your spouse disagree later, I will continue to represent that person, unless they direct otherwise.

XIII. EFFECT OF DATING ON DIVORCE

Do not -- you are still married. Your spouse can use it against you. Even if you are already divorced, moving in with your lover could cause problems with custody, visitation, or alimony. If you do date, be prepared to face the problems that may arise. Tell me about it, because if I am surprised by it in court, it will hurt your case.

XIV. CONTACT WITH OFFICE OF ATTORNEY

You will receive copies of many of the documents prepared or received by me. Due to court appearances, trials, depositions, negotiations, and other commitments, I am hard to reach on the telephone. My secretary will be easy to reach, and she can give you information or take messages. She **CANNOT** answer your legal questions, but she can relay them to me and get back to you with my answer.

XV. PAYMENT OF ATTORNEY FEES

I expect you to handle your financial commitments to our office in a prompt and businesslike manner. I cannot represent you if I am not paid. If you are having trouble paying, please call my office and ask for a payment plan. Please notify my office any change of address or telephone number.

XVI. COMMUNICATION WITH THE CHILDREN

Divorce proceedings are very emotional, and parties sometime use children to seek revenge. If the children must be involved, prepare them properly, without poisoning their minds about your spouse. Few things irritate judges more than a parent who has poisoned the mind of a child against the other parent. Discuss support and property division directly with your spouse. **Do not use the children as messengers.** Make a special effort to spend time with your children. Reassure them that both parents love them, even if you do not believe it.

XVII. REMARRIAGE

If there is no appeal, your divorce will be final as soon as the decree is entered in the court's records. You are then free to marry.