

DIVORCE PROCEDURE IN A NUTSHELL

How a divorce is handled by the courts depends on several factors. The key factors are the legal grounds for the divorce and whether or not the divorce itself or any issues within the divorce are contested.

GROUND FOR DIVORCE

A spouse can seek a divorce on the grounds of cruel and abusive treatment, utter desertion, adultery (which is also a crime in Massachusetts!), gross and confirmed habits of intoxication (by drugs or alcohol), impotency, refusal to support, confinement for a crime and irretrievable breakdown of the marriage.

The grounds for divorce in Massachusetts are controlled by statute. Consequently, the only way to get a divorce in Massachusetts is to fit your situation into the possible grounds listed above. The ground of irretrievable breakdown is relatively new in Massachusetts. This ground was "added" by the Legislature in 1975. Prior to that addition most divorces were sought on the ground of cruel and abusive treatment. It was not unusual for the parties to create or exaggerate some incident to fit their case into the cruel and abusive category. The ground of cruel and abusive treatment was "popular"; because, it was the fastest route to a divorce.

The other grounds recognized by the law are self explanatory. The most common ground for divorce now is irretrievable breakdown of the marriage. Divorce on the grounds of irretrievable breakdown of the marriage is similar to what is commonly referred to in other states as no fault divorce. This description is actually pretty accurate. The key feature of divorce for irretrievable breakdown of the marriage is that, unlike the other legal grounds, there is no need to "blame" one spouse or the other for the destruction of the marriage. Also, there is no need to accuse one or the other spouse of embarrassing or inappropriate conduct.

CONTESTED DIVORCE

No divorce can be granted under law unless the court is satisfied that legal grounds exist. In other words, if you decide to file for divorce on the grounds of adultery, you had better be prepared to prove adultery in court. If a spouse decides to disagree with the grounds chosen by the spouse that filed first, the case will eventually go through a full trial.

A full trial on the question of whether a divorce should be granted at all is very expensive (in legal fees), takes a very long time to be scheduled before the court and is, fortunately, very rare. Nowadays, with the availability of the ground of irretrievable breakdown, trials over whether there should be a divorce at all is almost unheard of.

Usually when people talk about a contested divorce they mean a divorce case where the parties cannot agree regarding one or more of the major issues (child custody, child support, visitation, alimony or property division) that must be decided before a divorce will be granted. If the parties truly cannot agree on some point, the court will decide for them.

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The court will not make such a decision *on a permanent basis* until a full trial has been held on the issues the parties cannot agree on.

GETTING STARTED

No matter what legal ground might be the basis for the divorce, certain steps should be taken as soon as one or both spouses have decided the marriage is over. First, a lot of information needs to be gathered together. The court requires a certified copy of the marriage certificate and certified copies of the birth certificates for any children of the marriage. Detailed information about income, assets, liabilities and employment of both spouses is also required (see pink and purple forms included with this package). Thought should be given as to how to fairly divide up assets and liabilities. If necessary, steps should be taken to prevent one spouse or the other from hiding, spending or destroying assets or incurring further debt. Also, if the decision to seek a divorce by one spouse might result in violence, then steps such as alternate living quarters, a restraining order or both *should be examined and taken before any announcement of intentions is made.*

TEMPORARY ORDERS

Despite the name, temporary orders are often the most important events in a divorce case. These orders often set the stage for how important issues are ultimately resolved. As soon as a divorce action is started, by the filing of a complaint, the court has the power to make orders about the issues in the divorce *pending full trial or approval of a separation agreement.*

Often times the parties separate without deciding how important issues such as child support and visitation will be handled. Either party can, at the time the divorce complaint is filed or any time thereafter, file a *motion for temporary orders* asking the court to decide these issues until there is a final judgment in the case. The party filing the motion must give the other side at least seven days notice, except in emergencies, of the date that the motion will be heard by the court. Unless the parties agree on the temporary order, the court will, after a brief hearing, make a decision on the motion that will be binding on the parties until a different order is issued or there is a final judgment in the case. Such orders are most often sought and given regarding child custody, support and visitation issues. However, these orders can be used to preserve assets, prevent a spouse from incurring further debt or even to have one spouse pay some or all of the legal fees of the other spouse.

Anything that needs to be done prior to the final resolution of the case can be the subject of a temporary order. Very often temporary orders will form the framework for the later final judgment; therefore, such orders must be viewed in the context of their effect on the case as a whole, not just as a way to solve an immediate problem.

PROCEDURES FOR PARTICULAR GROUNDS FOR DIVORCE

Irretrievable Breakdown of the Marriage (Uncontested)

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If the parties have mutually decided that the marriage is over and both believe that they will be able to agree on how to handle all the applicable issues that must be decided in any divorce (child custody, child support, visitation, alimony or property division), then the best way to proceed will usually be an uncontested irrevocable breakdown of the marriage divorce. Once this decision has been made each spouse should retain his or her own attorney¹ and provide that attorney with the information mentioned above.

Once all the necessary information has been obtained you and your lawyer will fill out a financial statement (the pink form or the purple form) and, if applicable, the child support guidelines worksheet (the yellow form). Then copies of the forms are exchanged, usually through the lawyers, and work on the separation agreement begins.

The separation agreement is the written "agreement" that tells the court how you and your spouse want matters in your divorce settled. The negotiations necessary to arrive at a final separation agreement can sometimes take a long time. Your attorney can conduct the negotiations for you or he or she can simply advise you, as you and your spouse talk directly, or some negotiations can be directly and others handled by the lawyers. Some couples prefer to use an independent mediator to help them arrive at agreement. The parties' lawyers then get involved to shepherd the mediated agreement through the court system as described below. The key to successful and efficient negotiations is clear and open communication between you and your lawyer. The only thing your lawyer cannot do is speak directly to your spouse, if your spouse has a lawyer, unless your spouse's lawyer gives permission for direct contact by your lawyer.

As soon as a final separation agreement is signed by both spouses, that separation agreement, the various documents required by the court (such as the financial statements) and a filing fee are filed with the court. The court will then send a notice of hearing to the parties and the lawyers telling them when and where the hearing before the Judge will be held.

¹Although the law does not require that a person seeking a divorce have a lawyer represent them, your own attorney will make sure you are fully informed regarding your rights and responsibilities. Also, an attorney will know precisely what information is needed by the court and how to best organize and present that information to the court. Lastly, your attorney is *required* to protect *your* rights and can help you make the many decisions that must be made in preparing for and proceeding through a divorce.

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If there are children of the marriage each spouse will be required to attend a program sponsored by the court about the effect of divorce on children and how to help the children deal with the fact of the divorce.

On the day of the hearing the case will be called and the parties and their attorneys will go before a Judge of the Family and Probate Court. The purpose of this hearing is to satisfy the judge that everyone has been honest and open, that everyone understands the contents and impact of the separation agreement and, most important, that the agreement is fair and reasonable. Although different judges like to do things in different ways, most of the time the hearing consists of each spouse being asked a series of questions about the agreement terms and the grounds for the divorce by his or her own lawyer. Sometimes the judge will also ask a few questions. If the judge is satisfied that there has been full disclosure and that the separation agreement is fair and reasonable, the judge will say that the divorce is granted right there in court. A written copy of that order will follow a few days later in the mail. If the judge is not satisfied for some reason he or she will say so and may offer a suggestion as to what needs to be done to "fix" things. Sometimes the parties cannot come up with an agreement that satisfies the judge. In that case the matter becomes contested and must be scheduled for a full trial. Fortunately, this type of problem is rare.

The judge's order granting the divorce does not make the parties divorced instantly. In the case of an irretrievable breakdown of the marriage, 120 days must pass before the divorce judgment becomes final and binding. This time period is often referred to as the *nisi* period. Once the *nisi* period has passed the divorce judgment is final and the parties can legally marry again.

Irretrievable Breakdown of the Marriage (Contested)

If one spouse has decided that the marriage is over; but, the other does not agree or they cannot agree as to the issues that must be decided (child custody, child support, visitation, alimony or property division), a divorce can still be obtained on the ground of irretrievable breakdown of the marriage. However, a different procedure must be used.

In such cases most of the same documentation and information is provided to the court. However, in this case no separation agreement is filed. Also, one spouse is doing the filing with the court and the other spouse will have to be served with a summons, obtained from the court, and copies of all the papers filed by the spouse taking action. In these cases a longer hearing (a full trial) is scheduled for a date *not less than six months* from the initial filing of the divorce action.

If there are children of the marriage each spouse will be required to attend a program sponsored by the court about the effect of divorce on children and how to help the children deal with the fact of the divorce.

Once the six months has passed, one or both of the parties must file a document called a request for pretrial conference stating that the case is ready for trial. The court then sends the parties a notice of pretrial conference. At that conference a court clerk or the judge will meet with the parties to try to get the parties to settle their differences. If

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settlement is impossible, the clerk or the judge will make sure that the case is truly ready for trial. A notice of trial date will follow by mail.

At the trial, each spouse, through testimony and evidence presented by his or her lawyer², tries to convince the judge to do what he or she wants regarding the issues (child custody, child support, visitation, alimony or property division) that must now be decided by the judge. After the trial is over the judge will not give his or her decision right away. The judge will issue a written decision sometime later. That written decision will become the divorce judgment and will become final 90 days after the date it was issued by the judge. However, at any time during this process the parties can, by the filing of a separation agreement, convert a contested irretrievable breakdown divorce into an uncontested one.

Contested fault grounds (cruel and abusive treatment, utter desertion, adultery, gross and confirmed habits of intoxication (by drugs or alcohol), impotency, refusal to support, confinement for a crime) divorce.

The procedure for what is commonly known as a fault grounds divorce is similar to that for a contested irretrievable breakdown of the marriage divorce; except, there is no requirement that six months pass between the filing of the divorce complaint and the hearing or trial. A number of documents must be filed with the court, along with the filing fee, to get things started. Here again, the non-filing spouse must be served with a summons and copies of all the papers filed.

In these types of contested cases either party may file the request for pretrial conference as soon as he or she believes that the case is ready for trial. The court then sends the parties a notice of pretrial conference. At that conference a court clerk or the judge will meet with the parties to try to get the parties to settle their differences. If settlement is impossible the clerk or the judge will make sure that the case is truly ready for trial. A notice of trial date will follow by mail.

²See footnote 1.

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At this trial, each spouse, through testimony and evidence presented by his or her lawyer³, tries to convince the judge to do what he or she wants regarding the issues (child custody, child support, visitation, alimony or property division) that must now be decided by the judge. After the trial is over the judge will not give his or her decision right away. The judge will issue a written decision sometime later. That written decision will become the divorce judgment and will become final 90 days after the date it was issued by the judge. Here as before, at any time during this process the parties can, by the filing of a separation agreement, convert a contested case into an uncontested one or even an uncontested irretrievable breakdown of the marriage divorce.

Uncontested fault grounds (cruel and abusive treatment, utter desertion, adultery, gross and confirmed habits of intoxication (by drugs or alcohol), impotency, refusal to support, confinement for a crime) divorce.

Uncontested fault grounds divorces are fairly rare. They are mostly found in cases where one spouse is trying to get a divorce based on fault grounds and the other spouse is missing or parts unknown. Also, sometimes the parties in a contested fault grounds case resolve their differences verbally at trial and the court simply makes the verbal agreement the judgment instead of sending the parties away to draft a separation agreement.

Procedurally, uncontested fault ground divorces usually begin as contested cases that wind up being resolved by agreement and conversion to an uncontested fault grounds divorce or an uncontested irretrievable breakdown of the marriage divorce. Consequently, these cases are a "mix" of contested case and uncontested case procedures. Please refer to the procedural information for each type of case, noted above, for further information.

THE FINANCIAL ISSUES

As you can see from the financial statement (pink form or purple form) and the child support guidelines worksheet (yellow form) the court requires a great deal of detailed information about each spouse's finances. Each spouse must fill out and file a financial statement. *All* the information sought on the form *must* be provided. Those questions that do not apply must be marked "none". Any significant change in the financial picture requires filing of an updated statement. It is not unusual for two or three financial statements to be filed for each spouse in the course of a divorce. The judge will examine the statement carefully for an indication of the person's honesty as well as to learn about that person's finances. Expenses that far exceed income, missing assets or overstated

³See footnote 1.

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liabilities may cause the judge to disbelieve that party's testimony on financial *and other* issues.

At least one child support guidelines worksheet must be filed if there are children of the marriage that might be eligible for child support. Often, if there is a dispute about income attributable to one or both spouses, conflicting worksheets may be filed. The dispute will be resolved by the court if the parties cannot agree or *convince the court that their agreement on this issue is reasonable*. The court protects the interests of the children of a divorcing couple above all else. Attempts to reduce or eliminate child support that the court believes are less than honest will do great harm to that party's credibility with the court. The results of the child support guidelines worksheet will control the amount of child support awarded in almost all cases in which the guidelines apply. The instructions on the yellow form give a basic idea of when the guidelines usually apply. Child support is usually collected directly from the paying spouse's employer as a mandatory deduction from each paycheck.

Alimony is far less common than it used to be. Nowadays, with both spouses in many marriages working outside the home, there is less need for alimony upon the breakup of a marriage. When alimony is awarded, the amount is based primarily on the need of the spouse seeking alimony, the ability of the other spouse to pay and the standard of living of the parties during the marriage. When alimony is awarded it is not uncommon for the court to include in the alimony order an automatic end on a certain date or after a certain amount of time. Also, lump sums, as part of the division of property, can be a "substitute" for regular alimony payments. Even if an alimony award has no automatic end date the payments will end, except in unusual cases, if the spouse receiving alimony remarries.

Division of property can be a difficult issue in divorce. Under the applicable law, specifically Massachusetts General Laws chapter 208 §34, the court considers various factors⁴ in deciding to award alimony and/or dividing the property of the spouses. Predicting what a court is likely to do in a particular case can be difficult due to the number of factors considered and unique circumstances of each case. Lawyers study past cases that have applied these factors in various situations to try to learn how the court will act in the future. This study is the essence of how lawyers try to advise their clients who are facing divorce. The only clear general principal in property division is that the court will not allow one spouse to be made destitute by the divorce while the other prospers. Also, the division of property is the only issue in divorce that, in the absence of fraud, cannot be reopened once the court's decision has been made.

⁴M.G.L.c. 208 Sec. 34, Alimony or assignment of estate; determination of amount; health insurance...
"...In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any, of each party, shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. In fixing the nature and value of the property to be so assigned, the court shall also consider the present and future needs of the dependent children of the marriage. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit...."

CHILD ISSUES

There is one overriding rule that the courts apply in deciding child custody and visitation issues. That rule is the best interests of the child. People often speak of custody "rights" and visitation "rights". In truth there are no such rights. All that matters to the court is that the best interests of the child are served. However, certain trends do appear in the past decisions of the courts.

The courts prefer to see the child stay in the marital home, assuming that it is a fit home. The courts prefer frequent contact, through visitation or shared custody arrangements, between the child(ren) and *both* parents. The courts do not like to see a divorce result in the child(ren) being cut off from the extended family of one or the other parent. The courts expect that both parents will put their own interests and hostility aside when dealing with the children. Parents that the court believes are manipulating or using the children to gain the upper hand or simply to inflict pain on the other parent will be dealt with harshly by the court.

The most difficult, expensive and time consuming divorces are those where the parties fight over custody and visitation. Unless abuse or serious neglect is proved to the satisfaction of the court, the court *will not* prevent contact between a child and a parent. It is always better for the parties to settle these issues between themselves. If custody or visitation cannot be agreed upon, both sides must be prepared to prove that they are right through independent testimony or other evidence. Mere accusations will be ignored by the court and may convince the court that the accuser is vindictive or dishonest.