

Navigating the Law: The Art of the Deal

This article offers advice on the divorce process, with tips on how to cut both costs and time when going through the divorcing process. Find out the silver linings in negotiating your divorce settlement.

By Pamela Weintraub and Terry Hillman Updated: August 29, 2014

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Most divorces end not with a bang, but with a whimper. After months or even years of negotiating, spouses reach agreements without anyone ever setting foot in a courthouse. This article tries to help you reach this goal quickly, saving tens of thousands of dollars and untold years.

“No-Fault” Divorce

In many states, provided you’ve resided in the state for a minimum amount of time (anywhere from six weeks, as in Nevada, to 18 months), you do not have to prove grounds to get divorced. All you have to plead is incompatibility or irreconcilable differences leading to the irremediable breakdown of the marriage, and a judge will grant you a divorce. This is quite a change from the days when private detectives hid in hotel room closets with cameras to prove adultery. Some states, however, still maintain a “fault” system. You have to prove one of several grounds to get divorced. Grounds usually include mental cruelty, abandonment, adultery, or imprisonment. When people living in “fault” states cannot prove grounds, they sometimes move to no-fault states to get their divorce.

You might qualify for a no-fault divorce, but that doesn’t mean the real issues — custody, support, visitation — are going to be easily resolved. If any of those areas presents a problem, you might still need a judge, even though the divorce itself is a given. Areas of fault, meanwhile, vary by state. For instance, in Illinois, desertion for two years and alcoholism for one year qualifies as fault. In Connecticut, insanity for five years is fault, as is imprisonment for life. In New York, insanity is grounds for annulment. With the specifics of each state so variable, and so subject to change, we hesitate to list every last detail here. Please be advised to educate yourself on the “fault” rules in the jurisdiction where you reside.

Grounds are legally sufficient reasons why a person is entitled to a divorce. Although many states are “no-fault” states, where no grounds need be asserted other than incompatibility or irreconcilable difference, others require the plaintiff to prove grounds, including adultery, abandonment, or mental cruelty.

Quick and Easy

Regardless of whether you live in a fault or a no-fault state, the real measure of how quickly you'll get your divorce through the courts is how quickly you and your spouse agree on the issues that exist between you. If you have no assets or debt, if you have no children, and if you've only been married a short time, your divorce should be relatively quick and easy. We know several couples who lived together peacefully for years, got married, and were divorced two or three years later. Maybe it was being married, or maybe the relationship had run its course. Whatever the reason, for those individuals, the divorce was merely a matter of filling out the right papers and submitting them to the court. As long as you and your spouse agree that your marriage is over, you both know what assets and debt you have, and you agree on how you'll divide them, a quick divorce could work for you.

Not So Quick and Easy

A woman who had been married to a wealthy businessman for 12 years left him for her son's ninth-grade history teacher. She insisted that all she wanted was the Farberware. Her lawyer begged her to demand a fairer deal, wrote her letters stating she was making a mistake, and even threatened to stop working as her attorney if she took the deal. But she ran off with her new love and the pots and pans. Four months later, when her relationship with the teacher ended, she wanted to reopen her case — but it was four months too late. She got a quick divorce, but hardly a fair one.

What's the moral of the story? A quick divorce works fine if it's fair, but not when it occurs because one side feels guilty or pressured. Remember, never sign papers dividing assets or debt without first consulting an attorney. Never sign such papers while you are in an overly emotional state. It's okay to sign papers if you feel sad or even somewhat depressed about the breakup, but if you're in a major depression, or you're enraged, spiteful, or blinded by love, wait until the sound and fury in your mind and heart have simmered down before you commit yourself to a deal you might regret later.

Working Through the Issues

What if you and your spouse just can't agree? What if issues ranging from custody of the children and ownership of the dog to an inability of one spouse to let go promise to complicate the situation for years to come? Can you get a quick divorce anyway? Sometimes you can, with the help of a judge, but it depends on where you live.

In major metropolitan areas, where the court dockets are crowded, it could be months, even as long as a year, before your case can be tried. In smaller communities, it is possible you can get your day in court **much sooner**.

Silver Linings

If you have gotten the short end of the stick in a divorce decision, you will almost always get another chance. If you haven't received what you want in the divorce decision in terms of custody or property, you will usually have the right to appeal. If you have been treated unfairly by the judge, the situation

might be rectified. However, depending on how backlogged the appellate court is, it could take months or years to get back in front of a judge.

Bargaining and Compromise

It's difficult to negotiate for yourself, particularly when emotions are involved, as they tend to be in a divorce. For many couples, trying to negotiate is like reliving the worst moments of the marriage. After all, if the two of you got along well enough to work out a divorce, you might not be divorcing in the first place. Does this mean you have to abandon all hope and leave everything to the attorneys? Not necessarily. Here are some tips that might help you reach a settlement without going to court:

- Never present your bottom line early in the negotiations. It might sound childish, but it happens to be true. When negotiating, don't present your bottom line first; that could end up being the high figure, and it can drop from there.
- Argue issues, not positions. It might sound obvious, but it isn't always. For example, you and your spouse are discussing who will pay for your children's college education. Your spouse says the two girls will go to state schools. You say they'll go to the best school they get into. The two of you are arguing positions, not issues. The issue is the cost of college and how you'll finance it.
- Make rules for your discussion. If you and your spouse are meeting alone, write out a schedule of topics to be covered and stick to it. Agree that neither of you will interrupt the other. If you're meeting with your spouse and with the lawyers (commonly called a four-way meeting), you and your attorney should plan the meeting. You should have an agenda, preferably in writing, and you should know when to talk and when not to talk.

Before one four-way meeting, one husband's lawyer asked him not to talk to his wife. Within three minutes of the meeting's start, the husband was shouting at his wife, and she was yelling right back. The husband's lawyer was doodling, and the wife's lawyer was trying to calm her client. Considering that the combined hourly billing rate of the two lawyers probably exceeded \$500 an hour, the husband (and wife, for that matter) was spending their money at a rapid rate.

- Be flexible. That doesn't mean cave in. It means be ready to compromise. Remember the example about the two girls and what college they'd attend? Suppose you don't want to pay anything for college, and your spouse wants you to pay half. What about paying one third? What about paying half only if your income is at a certain level by the time the girls go to college? What about agreeing to pay half but also stipulating that any loans or scholarships the girls receive offset your half? As long as you stay locked into one position, it will be hard to settle your case. Be open to ideas. You might have to get some from your attorney, from your accountant, or from friends who have been divorced.
- Be ready to trade. Say that you really want the gold necklace your husband bought you on your third wedding anniversary, and he really wants the cookware. You want the cookware, too. Decide which one you want most, and, if the values are about equal, make the trade. It sounds obvious, but when emotions are running high, it might not be.

- Leave heated issues for last. This is a lawyer's trick. Resolve everything you can and save the heavy issues for last. Maybe you both want custody of your child. If you start off discussing that sore point, you'll get nowhere with any other issues. If you first sort out the house, the car, and the debts, you might make better progress on the last, toughest issue. After all, you've both spent so much time already, it would be a shame if you couldn't work it all out.

- Have a judge or neutral third party, like a mediator, help resolve the issues you can't resolve. Maybe you and your spouse have worked out everything except custody. A custody trial will still be cheaper than a trial on all the other issues, too. Don't throw in the towel on your settlement agreement just because you can't resolve everything.

- If things get too emotional, step back. Maybe you and your spouse have met with the best intentions, but before you know it, you're back to the old routine that never got you anywhere in your marriage. Break for a few minutes or a few days before trying to hammer out an agreement again.

- Don't expect more than you had in the marriage. Some spouses suddenly "forget" when getting divorced that they were married to the man who blew his paycheck every few weeks at the race track. When there's a missed support check, they're shocked. Maybe the two of you decided to put any extra money into your house over the years. Suddenly, your spouse is shocked that there are no savings. Remember, getting divorced does not turn a frog into a prince. If you negotiate in good faith but lose track of who you are dealing with on the other side of the table, you could be in for disappointment.

- Give up if you're getting nowhere. Maybe you've met alone, maybe with lawyers, maybe with a priest or an accountant, and you've agreed on nothing. It might be time to move on to the next step, which could be a trial in front of a judge. Some spouses need to be told by a judge the way it's going to be. In one case, the father would not voluntarily relinquish custody of the children (teenagers who wanted to live with their mother), no matter what. If a judge had told him he had to let them go, however, he would have complied. As it turned out, the case did not go to the court. The lawyers finally worked out an agreement without using the word "custody." The children stayed with their mother during the week and with their father most weekends. The father could live with this arrangement because technically both parties still had custody.

You Can Do It!

Focus on the problem, not on your feelings. Say you want to live in the family home until your youngest child graduates from college, but your husband wants to sell the house now. The issue is whether you can afford the house and whether your spouse needs the sale proceeds, but your husband's real concern might be that you'll remarry and have someone else move into "his" house. If that issue surfaces, it can be addressed by agreeing that if you remarry, the house would then be sold.

Impediments to Settlement

Once you both feel you know what is and is not in the marital pot, the biggest impediment to settlement usually is emotion.

Maybe you're not ready to see the marriage end, so just when it seems like you're about to make a deal, you find a problem with the agreement. If the real problem is that you do not want the marriage to end (whether it's because you still want to be married or you don't want to give her the satisfaction of being divorced), then you should tell your lawyer to stop negotiating for a while. You need time to think things through, and there is no sense incurring legal fees by having lawyers draft and redraft the agreement when you know you're never going to sign it.

Maybe you're ready to be divorced — maybe it was your idea — but you're convinced your spouse would not agree to a deal unless he was hiding something. Despite all the financial disclosure, you're just not sure that you really know what assets your spouse has.

If this is the problem, tell your lawyer you want a representation in the agreement that your spouse has fully disclosed assets and debt, and if it later turns out your spouse lied, you have the right to reopen the deal.

Some people reject settlements because they don't understand the law, and they think they'll do better in court. For many spouses living in states where no-fault divorce is available, it is difficult to understand how a spouse can just walk out of the marriage without paying some kind of penalty. The "penalty" sought is usually an extra share of the marital assets. The law might provide, however, that no matter the reason for the divorce, assets are to be divided on a nearly 50/50 basis. An individual who refuses to accept this will never be able to settle on a 50/50 basis and might have to go through the expense of a trial just to hear a judge say the exact same thing.

Some people reject settlements because they feel the deal has been "shoved down their throats." Perhaps a lawyer was too pushy, and although the client didn't complain during the negotiations, she balks when it comes time to signing. Whatever the problem, discuss it with your lawyer. If yours is a case that needs to be decided by a judge because you just can't work out or sign a settlement agreement, stop the settlement process now before any more money is spent.

Silver Linings

As Freud once said, "Sometimes, a cigar is just a cigar." If your spouse isn't getting back to you about the agreement, saying he's too busy right now to look at it, maybe he is. One couple was on the verge of settling their case when tax season began. The husband was an accountant who relied heavily on returns for his income. He said he was just too busy to review the agreement; his wife was sure he was delaying. The truth was that the husband was too busy working to focus on the agreement, and negotiations had to wait until early May.

No Deal!

At what point is it worth throwing in the towel during settlement negotiations? Here are some criteria to consider:

- You think your spouse is hiding assets. You can have an expert locate them and testify to their existence in court. Remember, if you're sure that he's hiding assets but you can't prove it, a judge probably is not going to accept your position. Always consult with an attorney.
- The deal is too vague. For example, the proposal is that "visitation will be agreed upon later" or that "bank accounts will be divided according to the parties' wishes." Any proposal that's merely an agreement to agree is just putting off conflict, not resolving it. Reject it in favor of a specific proposal.
- The deal is unfair. Although that might seem obvious, it's not always easy to know when a deal is unfair. Here are some examples:
 - You and your spouse ran up the credit card bills together, buying things for the family, but only one of you is going to be responsible for all the debt.
 - You filed "aggressive" joint tax returns, but now only one of you is expected to pay the debt.
 - You own two apartments, and your spouse wants both of them.
- The test lawyers use for fairness is the law and the case law. You can use the "objective test": If you were not involved in this case, would you think the proposal was fair?

It's a Deal Accepting the Package and Moving on

If the problem holding up the deal is your feeling that your spouse is hiding assets, but you can't prove it, you probably should take the deal.

If you're running out of money to pay a lawyer and the deal is reasonably fair, you probably should take it.

If neither one of you is completely happy — in fact, you're a little unhappy with the deal — you should probably take it. It's been said many times that the best deal is the one where both sides leave the table a little dissatisfied.

What Happens When the Settlement Is Reached?

When everyone agrees on the settlement, an attorney hired by one partner usually writes it up in a document called the settlement agreement or stipulation of settlement. Most of the agreement will have boilerplate language — language lawyers use all the time in agreements. For example, there's usually a provision that neither side will bother the other or that each side is responsible for his or her own debts. Lawyers can write the boilerplate provisions of the agreement very easily; the language is usually on a computer.

The heart of the agreement — usually custody, visitation, child support, or property distribution — can take a lawyer longer to draft. The agreement will be binding, just as though a judge had arrived at the decision after trial, so the lawyers need to make sure that there are no mistakes.

If your lawyer is the one who has drafted the agreement, he will review it with you and then send it to the other lawyer, who reviews it with your spouse. Finally, when the terms and language of the agreement are acceptable to everyone, you both sign on the dotted line. Usually, you need to sign five copies — one for the court, one for each lawyer, one for you, and one for your spouse. Some lawyers like clients to initial every page in addition to signing the agreement. That way, no one can later claim they didn't know what was written.

Silver Linings

Sometimes, when a divorce settlement is ready for signature, one or both parties will look for excuses not to sign. Experienced attorneys have seen this often. It represents a sudden, deep realization that the marriage has truly ended. It is not uncommon for one or both attorneys to encourage their clients to put pen to paper, have it done with, and go on with their lives.

This moment calls for reflection. It is a bittersweet moment — bitter because of the anger and hurt dragged out, perhaps to keep the relationship going at whatever level; sweet because a great weight has miraculously lifted from the shoulders of the embattled couple. Perhaps years of fighting and torturous nights are about to come to an end. Oh, there will be flashbacks. But, over time, those will fade into a daily routine that includes new projects and people.

So pick up the pen, and sign the agreement. It's okay to cry (or have a drink!).

The Cost of a Quick Divorce

Many couples we know have gotten their divorce for the cost of the court filing fees (usually under \$300) and some photocopies. Others still needed a lawyer to work out the language of an agreement setting out their rights and responsibilities, tallying up costs of some \$3,000 between the two of them.

In general, the less work the lawyers have to do, the cheaper your divorce will be.

Your Lawyer's Role

Even without a trial, if you have important issues to resolve, it's best to have a written agreement that you and your spouse can sign. The lawyer will draft that agreement, go over it with you, and send it to your spouse's lawyer who will review it and then go over it with your spouse. After the document is agreeable to everyone, one of the lawyers will probably also have to draft papers that can be submitted to a judge who will sign them and grant the divorce.

In some states, even when everything is agreed on, one of you might still have to go to court to testify. Your lawyer would conduct your examination, asking you legally required questions about the breakdown of your marriage, while you sit witness in front of a judge.

Do you really need a lawyer if you and your spouse have agreed on everything? In that instance, is there really anything for an attorney to do? Of course, you can get a quick divorce without a lawyer. However, if there's a chance you and your spouse will have outstanding issues, you're better off having legal counsel from the start.

The Default Divorce

Some spouses never answer the divorce papers they receive. They just don't care, or they figure they'll let you do all the work to get the divorce (maybe the way it was in the marriage). Do you have to wait until your spouse responds before you can move ahead?

Usually not. If you can prove that your spouse personally received the papers the law requires you to have served, you can probably get a divorce on default — your spouse's failure to respond. Although, by law, your spouse might have had 20 or 30 days to respond to the divorce papers before you are entitled to a default judgment, your judge might want you to wait three months before actually submitting the rest of the papers you need to be granted a divorce, just in case your spouse decides to respond after all.

There are some downsides to a default divorce:

- In some jurisdictions, your spouse can open the default within one year of its being granted if he or she can show "good cause"; why it should be opened. That means your spouse can march into court and claim she never got the papers, or was sick at the time, or didn't understand them, and she wants a second chance. If the judge agrees that there is a reason to open the default, he will, and your divorce will in effect have to start all over again.
- People tend to follow agreements more than they follow orders. If you and your spouse negotiated an agreement, the chances are better that your spouse will abide by it than if a judge set down in an order what your spouse has to pay because he didn't come to court.
- You might actually do better if your spouse shows up in court. Maybe you can't prove how much money she earns, but if she were there, your lawyer could cross-examine her in such a way as to let the judge know that the tax return does not reflect all her income.
- The judge might refer certain issues to another judge, such as a special referee or master, thereby prolonging the amount of time it will take to get the case over with. Maybe the judge wants to give your spouse another chance to show up, so he refers the support hearing to another judge and tells you to notify your spouse about the new date. It's not fair, but courts tend to try to ensure that everyone has his day in court, even when the person who's getting the second chance is the defaulting party.

The scenarios described in this chapter provide some insight into what it takes to make a settlement happen. If you think you can settle and avoid litigation, it is in your best interest to make that settlement happen. Remember, the only winners in a protracted litigation are the lawyers! Judges in a trial will often try to give something to each party in the divorce, thereby imposing a form of settlement. Why not work out the issues yourselves? You and your spouse know better than anyone what's most important to each of you. If your marriage is at an end, orchestrate its conclusion in the least expensive, most expeditious way possible. Compromise where you feel comfortable — and weigh the cost of waging an all-out war. Push your pride and hard stance aside, but don't give up what's most important to you.

The Least You Need to Know

- Even if you qualify for a no-fault divorce, you might still need to resolve other issues, such as custody, visitation, and support.
- Never sign important papers without first consulting an attorney.
- In negotiations, be flexible; come up with new ideas. Argue issues rather than positions.
- Even with a quick divorce, you might still need a lawyer to draft documents.
- If you want to reject a deal, make sure that the basis for the rejection is rational, not purely emotional.

Pamela Weintraub and Terry Hillman are co-founders of Divorce Central, an online service. Ms. Weintraub is the author of more than a dozen books and was previously editor-in-chief of OMNI Internet. Ms. Hillman owns a business that produces multimedia educational programs for professionals. This article has been excerpted from their book *The Complete Idiot's Guide to Surviving Divorce* (Third Edition, Alpha Books).

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