What You Need To Know Before You Hire A Shark

INDIANA DIVORCE LAW 101

By Carol Jean Romine

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Romine Family Law

Avoid Court - Divorce With Dignity

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"One hundred years from now it will not matter what my bank account was, how big my house was, or what kind of car I drove. But the world may be a little better because I was important in the life of a child."

Forest Witcraft

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An Introduction

My name is Carol Romine and I can vouch from personal experience that 1) divorce does not have to be awful and 2) the degree of "awfulness" will most likely be determined, not by your soon-to-be-ex-spouse, but by the kind of lawyer you hire. Your friends and relatives may advise you to hire a real "shark" because your spouse is certainly going to hire one. Unfortunately, that may be the worst advice you could receive. A "shark" is defined as a predatory fish that eats smaller fish and is sometimes dangerous to human beings. An attorney who is known as a "shark" will definitely be dangerous to human beings and most especially dangerous to the pocketbooks, spouses, and children of human beings. While you may, indeed, need an attorney with litigation experience, your pending divorce will be the worst kind of "awfulness" if you hire a shark.

For the vast majority of divorces, there is virtually no reason to go down the adversarial path of litigation (going to court). Yet almost every advertisement you see for divorce lawyers talks about his or her "aggressive" representation – not necessarily a good thing. The worst example of this kind of ad is one I saw recently on the side of a bus: "Hire us before your spouse does!"

Like most new attorneys, I spent my early years honing my skills in the court room. After all, we aren't taught how to collaborate or cooperate or negotiate in law school! We are taught rules of evidence and trial procedure. Worse yet, like many attorneys, I discovered that litigation is not only very lucrative - it can become addictive. You spend hours in preparation, you know all the case law relevant to your case, you are convinced your client is right on all issues, you put on your best suit, your adrenalin is racing, and you put on a great show (it really is a lot like what you see on TV). Your client is in awe of your talents and so are you!

I always left the courtroom feeling certain my client would get everything I argued for even though I had argued the exact opposite position with equal skill and passion in a prior case. I'm pretty sure opposing counsel felt the same way. And more often than not, each party won a little of this and a little of that – just enough that both attorneys felt vindicated and the clients were broke but satisfied. Over time, I came to realize that

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there was rarely a "bad guy" in a divorce hearing and that judges almost always crafted an order that gave each party some wins and some losses. I came to believe there HAD to be a better and less expensive way to get to a middle point between what two people wanted.

I had always "tried" to settle my cases before preparing for trial. But I realized many years ago that I wasn't trying hard enough. The turning point came when I tried a case against an ex-husband who was a real jerk and who was represented by a shark. The lawyer refused to negotiate. So – I got ready for trial. I was ready and I was on a roll. I knew exactly what questions to ask that would cause this guy to exhibit his "jerkiness.' And he did – over and over again. The judge was so angry at this guy that he rendered his decision right then and there – rarely done in a complicated case. And my client won on every single issue. I can't recall a trial I enjoyed more! On that day, though, I was the only happy person in the room. My client burst into tears! She said between sobs "I never dreamed I would have to say these things about my children's father in a public forum. I would never have brought this case if I had known it would be like this." Lesson to be learned – your attorney may be the only person who benefits from litigation.

I never "tried" to settle a case again. I "determined" to settle my cases and it made all the difference. It was a mind-set on my part and I rarely have to try cases now. Instead, I have become an expert at helping clients determine what's really important for their family and then helping the parties find their common interests (which is always the children). I sometimes do that through formal or informal collaboration with the other party and/or the other attorney and I sometimes do it by mediating with two parties who may or may not have attorneys. While I miss the adrenalin rush and personal satisfaction of litigation, I'll happily settle for the contentment that comes with helping people find a better way.

I have written this book in the hopes that a little information about divorce might help you select the right kind of attorney. There are some cases that really do require litigation (such as when physical abuse is present or when one party has been diagnosed with a personality disorder). However, none of them require a "shark." The majority of divorces occur between perfectly normal, kind, and loving parents who

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can and WILL put their children's needs above their own. These folks need to know enough about the law to ask the right questions when interviewing attorneys. Unlike lawsuits between strangers, divorcing parents will have a relationship after the dispute is over for as long as they have children or grandchildren together! The quality of that relationship will be determined by the quality of representation they receive during a divorce or other family dispute. Most of all, these folks need an attorney who will help them divorce with dignity.

I wish you the best.

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PART I – WHAT YOU NEED TO KNOW

A. WHY YOU SHOULD READ THIS BOOK BEFORE YOU HIRE A FAMILY LAW ATTORNEY (SHARK OR OTHERWISE).

A lawyer has many different functions during a divorce action including, among other things, those of advisor, negotiator, intermediary, and advocate. However, as the lawyer performs these various functions, he or she MUST operate under the rules of the legal system, which is, by its very nature, an adversarial system. The most adversarial attorneys are frequently referred to as "sharks" and are not interested in keeping you out of court. On the other hand, some lawyers have been trained in collaborative representation or as family law mediators or arbitrators. Their goal is always to keep the parties out of court and to reduce the adversarial nature of the divorce process. You need to know which of these kinds of lawyers would be best for YOUR case. This book will arm you with enough divorce law basics to make that decision.

While the adversarial system works as intended when a crime has been committed or a personal injury has occurred, it is a destructive system for most families who are in the process of divorce. Obviously, if a couple has children, they will have some kind of relationship for many years after the divorce is granted. The quality of that relationship, while perhaps the most important determining factor in how children experience their lives, will be determined by the degree of adversarial representation each parent chooses in the early stages of divorce. While the "law" has not evolved yet to a system that is appropriate for divorce, there are options that limit the damage done during the legal process. Collaboration, negotiation and mediation are all good options. But it starts with clients who know enough to ask their attorneys the right questions.

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As an example of how an attorney might inadvertently lead you astray, consider this scenario. Your attorney tells you that you deserve and could get more than 50% of the marital assets if you go to court. Your spouse earns a little more money than you do, so that sounds like a fair deal. But the attorney is not obligated to educate you about every aspect of the law! Hence, he or she may fail to tell you what you need to know before you make this decision. At a minimum, you need to ask the following questions if your attorney wants to take you to court:

1) what is my best case scenario if we go to court,
2) what is my worst case scenario if we go to court, and
3) how much more is it going to COST to go to court (be sure to include the cost of formal discovery, depositions, expert witnesses, and trial preparation)?

Failure to ask these three questions has resulted in couples spending MANY thousands of dollars on litigation fees that far outweighed the value of the thing they were fighting about. For instance, let's say you have a marital estate worth $200,000.00 and you would get $100,000 without going to court. You ask the right questions and your attorneys admits that your best case scenario might be $120,000 and your worst case scenario is the $100,000 your spouse has already agreed to. That $20,000.00 sounds good, right? But it's a no-brainer. Your attorney also admits that you will spend a minimum of $10,000.00 more in attorney fees if you have to go to court and so will your spouse. So – if the judge awards you the midway point between what you want and what your spouse wants, you will have won just enough money to pay your attorney. On the other hand, If the judge awards you the statutory 50% ($100,000), then you and your spouse have EACH wasted $10,000.00 and two attorneys will each be $10,000.00 richer.

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Notwithstanding everything I just said, while the majority of divorces could be accomplished without the adversarial process, there are some exceptions to the rule. For instance, you need a litigation attorney if there has been physical abuse in the family, if one of the parties has been diagnosed with a personality disorder, or if either party believes the other is hiding assets. But you don't need a shark.

I hope the information in this book will help you select the right process and the right attorney. Your decision to transition from married life to single life may be difficult – it need not be the worst experience of your life and will rarely require litigation, much less a "shark."

B. SOME DEFINITIONS

Family Law Litigation Attorney - An attorney who has limited his or her practice to family law matters and who represents one of the parties in a court of law. Good family law litigators will also be trained in non-litigation skills and will steer you towards the right strategy based on the facts of your case. Just be aware that litigation is far more expensive than any other means of resolving a family law dispute.

Collaborative Family Law Practitioner - An attorney trained in collaborative law who represents one spouse while another attorney trained in collaborative law represents the other spouse. The parties and both attorneys contract, in writing, to collaborate towards a common goal without going to court.

Family Law Arbitrator - An attorney who is trained in family law and will render a decision after hearing evidence without the necessity of going to court. While this process is less adversarial than going to court and eliminates the need for parties to air their dirty laundry in a public forum, it is still an adversarial process that pits one party against the other. The parties' attorneys may select the arbitrator for you or you may hire the arbitrator instead of two attorneys.

Registered Family Law Mediator - A neutral person who is trained in mediation skills and family law. The mediator helps you reach agreements without going to court. If the parties are represented by an attorney, the attorneys select the mediator. If the parties do not have attorneys, they select their own mediator.

Pro-Se Divorce - A Pro-Se Divorce is one in which neither party is represented by an attorney.

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C. WHAT DOES A FAMILY LAW ATTORNEY DO?

The decision to dissolve a marriage is one of the biggest decisions a husband or wife will ever make. Depending on the unique circumstances of each case, a good family law attorney will help you decide whether an adversarial approach is necessary or whether a collaborative approach is possible. In either case, the attorney must be knowledgeable about the law concerning property divisions, custody, parenting time, child support, alimony, spousal maintenance and many other factors related to divorce. Look for an attorney who will help you determine the best way to proceed while keeping your most precious assets, your children, out of harm's way.

A good family law attorney is dedicated to helping families settle their disputes without going to court. However, he or she should also vigorously litigate your case when collaboration, negotiation, or mediation is inappropriate. The attorney you hire should have extensive experience in negotiating and collaborating towards a positive outcome and should be able to testify from his or her own experience that families CAN and DO survive family law disputes when they treat each other with dignity and respect.

As you are interviewing attorneys in search of the right kind of representation, be sure to ask what percentage of the attorney's cases are litigated. That will give you a pretty good idea of whether the attorney is appropriate for YOUR case.

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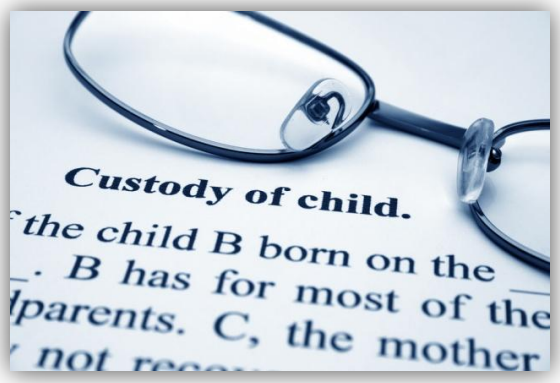
PART II - DIVORCE LAW 101

CHAPTER 1. CUSTODY



Child custody is one of the most hotly contested issues in family law because it involves one of the most important parts of YOUR life – your children. Consequently, this is an issue that is frequently litigated in a court of law and you will want an attorney with plenty of litigation experience. However, as you search for that attorney, be sure he or she will make every attempt to negotiate a compromise before putting your family through a custody fight. A custody fight is awful for you but even more awful for your children. More importantly, unless your children's safety is at risk, make sure you are open to compromise about parenting time because that might be the factor that will satisfy all parties.

Some things you should know about child custody before you decide to litigate:

LEGAL AND PHYSICAL CUSTODY

"Legal custody" refers to the parents' right to make major decisions for or on behalf of the children while "physical custody" refers to the parents' right to provide the child's primary residence. Neither category refers to the amount of time the child spends with each parent, which is referred to as "parenting time." In fact, it is entirely possible that the parties might have joint legal custody with one parent having primary physical custody subject to the other parent's right to reasonable parenting time. It is also entirely possible for the parties to have joint legal and joint physical custody. Joint legal custody is appropriate for parents who had a history of communicating and cooperating with each other during the marriage. Joint physical custody will only be appropriate if the parents intend to reside in close proximity to each other.

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BURDEN OF PROOF IN A CUSTODY PROCEEDING

A parent seeking custody in a dissolution action has the burden of proving it is in the child's best interests for that parent to have sole physical custody. And - having more income will never be a consideration in this decision! The primary factor a court will consider in a custody fight is which parent provided the child's primary care during the marriage. And that parent is, more often than not, the lower income parent.

A parent seeking to modify an existing custody order, however, has the additional burden of proving that a substantial and continuing change of circumstance has occurred in the custodial home such that the existing custody order is no longer in the child's best interests. The change of circumstance cannot be that the noncustodial parent seeking custody has a better job or a bigger house or a new spouse to care for the children. In the event of litigation, the Court will render a decision only after weighing the statutory factors set forth in I.C. 31-17-2-8. That website may be found at www.in.gov/legislative/ic/code/title31/ar17/ch2.html.

But remember this before initiating a custody fight! Absent proof of some kind of danger to the child, the noncustodial parent is going to have overnight parenting time with the children up to 41% of the time even if you have sole physical custody. The minimum parenting time set forth in the Indiana Parenting time Guidelines will include alternating weekends, alternating holidays, half of the summer and one midweek overnight each week for children over five (151 overnights per year). The 9% difference between equal parenting time and Guideline parenting time is the equivalent of 3 extra overnights per month). How much money are you willing to spend and how much heartache are you willing to cause to prevent your spouse from having 3 extra overnights per month?

Be aware that a willingness to share parenting time on a 50/50 basis will frequently prevent the incredible heartache, ugliness, and expense of a custody fight and will give your children the benefit of having equal access to the two people they love the most.

You will need an experienced litigator if your circumstances require a custody fight. However, do not let a "shark" talk you into a custody fight if you and your spouse are both good parents, live in close proximity to each other, and are capable of valuing the role each parent plays in the lives of their children.

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AVOIDING CUSTODY PROCEEDINGS

There are several websites that help parents avoid the adversarial process and teach them how to co-parent as they move through the separation process and beyond.

www.uptoparents.org is intended to help divorcing parents.

www.proudtoparent.org is intended to help never married but separating couples with children.

www.nodivorcetoday.org is intended to help parents who are contemplating separation but wish to save their marriage.

www.collaborativepractice.com is a website that explains the legal process of formal collaboration.

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CHAPTER 2. PARENTING TIME

Parenting Time refers to the time children spend with their parents when they are no longer living in one home. Unfortunately, divorcing couples frequently refer to parenting time as "their" right, as does the law. I think it more appropriate to think of parenting time as the CHILD'S right to have frequent and consistent access to both parents. The Indiana Parenting Time Guidelines may be found at www.in.gov/judiciary/rules/parenting/.

The parties may agree on a parenting time schedule or a court may hear evidence before deciding what parenting time schedule would be in the child's best interests. While both may rely on the recommendations of the Indiana Parenting Time Guidelines, those recommendations represent the minimum time a child should have with the noncustodial parent. An experienced family law attorney will help you find the best parenting time schedule for your family and will help you think outside the box if you have equal parenting time or an unusual work schedule.

In a nutshell, "Guideline" parenting time for the noncustodial parent (for children over five) will be alternating weekends, alternating holidays, and half of the summer. When the parties live in close proximity, there may be a midweek overnight. This schedule tends to put all the parenting tasks on the custodial parent, limiting their opportunities for education or career advancement, while the noncustodial parent is left out of the picture except for weekends and vacations. This schedule simply does not lend itself to good parenting plans for either parent and especially not for the children.

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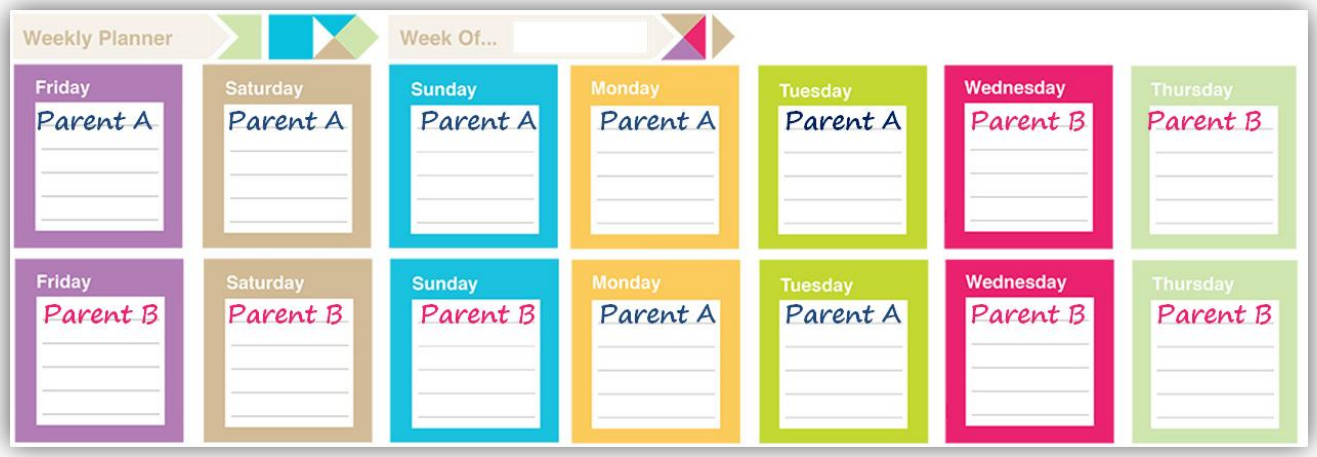
An alternative schedule that would allow career or educational growth for both parents, and equal parenting time for the children, is when each parent has the same two consecutive days each week, alternating weekends from Friday to Monday, and alternating Holidays. This parenting plan allows the children to have more consistency in their lives (they know where they will be Monday through Thursday without checking a calendar!) and equal access to both parents. Further, and perhaps just as importantly, it gives both parents an equal "opportunity" to be responsible for parenting tasks such as homework, laundry, and cooking, and the freedom to be without such responsibilities on two days one week and five days the next.

An equal parenting plan might look like this:



Parent A has Friday, Saturday, Sunday, Monday and Tuesday,

Parent B has Wednesday, Thursday, Friday, Saturday and Sunday,

Parent A has Monday and Tuesday,

Parent B has Wednesday and Thursday, and then the rotation starts all over again.

It's called the 5-5-2-2 Parenting Plan.

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CHAPTER 3. CHILD SUPPORT

Divorcing couples should not let themselves get roped into litigation because of ignorance about child support laws. Except in the case of self-employed people, the factors that go into a child support calculation are easily available to both parties and the calculation is simple. Indeed, you can get a pretty good idea of what your child support would be by going to the Child Support Calculator located at www.in.gov/judiciary/2625.htm. Just follow the instructions.

If both parties are employed, you need to know the gross income of each parent, the number of overnights each parent will exercise with the children, the child's portion of the health insurance premium, and the cost of work-related child care. If either party is self-employed, start with gross receipts and subtract necessary business expenses (not depreciation or lunch with friends). Your tax returns will not be an accurate indication of the income a court will use for calculation of child support if you are self-employed.

Child Support in Indiana is based on an Income Shares Model, which results in a child receiving the same proportion of parental income that he or she would have received had the parents remained married.

CHILD SUPPORT CALCULATION

The Guidelines are revised every four years to account for cost of living increases and takes into consideration the division of the child's expenses between the parents. The expenses that are considered in such calculation are controlled expenses, transferred expenses, and shared duplicated expenses.

Controlled expenses are typically paid by the custodial parent, and include, among other things, uninsured medical expenses, school expenses and children's clothing.

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Transferred expenses are those that are transferred back and forth between the parents because they go with the children, such as food expenses.

Duplicated expenses are duplicated by both parents, such as shelter and utilities. The expenses incurred by the noncustodial parent are accounted for in the parenting time credit he or she receives based on the number of overnights the children spend with that parent. The expenses incurred by the custodial parent are paid from his or her share of the support calculation as well as the support received from the noncustodial parent.

CHILD SUPPORT WHEN PARTIES HAVE EQUAL TIME

The recommendations of the Indiana Child Support Rules and Guidelines typically do not render an adequate child support obligation when the children have equal time with their parents. In that event, you may want to deviate from the support recommendations and share the children's expenses on a pro-rata basis. In other words, if mom makes 30% of the total income and dad makes 70% of the total income, they would share all children's expenses on a 70/30 basis. You can find your pro-rata share of income at Line 2 of the Child Support Obligation Worksheet. Since parents do not have the right to waive their children's right to support, you will need to have an attorney draft this agreement for you.

MODIFICATION OF CHILD SUPPORT

In order to modify child support, a parent must show a change of circumstance so substantial and continuing as to make the existing order unreasonable. A 20% difference would be considered unreasonable if the current order was issued at least twelve months prior to the new petition to modify. Except in very rare circumstances, the court may not modify support prior to the date a petition to modify was filed with the Court.

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I recently heard of a child support case in which the mother's attorney fees were $11,000.00 and the father's were close to $6,000.00. I suspect that one of the parties in that case believed the other parent was hiding income and that neither of them were willing to collaborate towards finding out the truth. I can't help but wonder if either parent benefited enough to justify the cost of this litigation.

Be sure to ask the "best case" "worst case" question as you interview attorneys for a child support disagreement. And, oh yeah – be sure to ask what your attorney fees will be if the case isn't settled out of court.

CHAPTER 4. OTHER CHILD RELATED MATTERS

MEDICAL EXPENSES

As a rule, the parent who can obtain the least expensive health insurance with the best benefits will be ordered to maintain the children on that insurance plan. Generally, that parent already has the children insured. Further, that parent will receive a child support credit for the child's share of the insurance premium such that the parents are, in effect, sharing the expense on a pro-rata basis (the income percentage of total income between the parties).

By statute, the parent who did not take the parenting time credit, usually the custodial parent, will be ordered to pay the first 6% of the Basic Child Support Obligation towards the children's uninsured medical expenses. Once that parent reaches his or her 6% Obligation each year, the parties will share the remaining expenses on a pro-rata basis. The pro-rata amounts for each party can be found on Line 2 of the Child Support Obligation Worksheet.

EXTRACURRICULAR AND EXTRAORDINARY EXPENSES

Agreed upon extracurricular and extraordinary expenses are generally shared on a pro-rata basis as determined by their incomes. See Line 2 of the Child Support Obligation Worksheet.

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HEAD OF HOUSEHOLD STATUS

You can only claim head of household status if you are single and have a child in your custody 51% of the time. Therefore, if your agreement states that each party will have custody of the children 50% of the time, neither party will be able to claim head of household status. With proper drafting of your agreement, each party will be able to claim that status 1) every other year if there is only one child and 2) every year if there are two or more children. Be sure your attorney considers these factors in the drafting process.

CHAPTER 5. SPOUSAL MAINTENANCE AND ALIMONY

Indiana Courts have the jurisdictional authority to order spousal maintenance under certain circumstances but do NOT have the authority to order alimony absent agreement of the parties.

SPOUSAL MAINTENANCE

A court in Indiana may order spousal maintenance under the following circumstances:

1. Disability of Spouse. If a spouse is physically or mentally disabled to the extent that the ability of that person to support himself or herself is materially affected, the court may order maintenance during the period of incapacity.

2. Disability of Child. If a spouse has insufficient property or income to support herself or himself and that spouse is the custodian of a disabled child that requires the custodial parent to forego employment, the court may order maintenance for an appropriate amount of time.

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3. Rehabilitation of Spouse. After considering various factors, considering among other things whether an interruption in the education, training or employment of a spouse occurred during the marriage as a result of homemaking or child care responsibility, a court may order rehabilitative maintenance for a time not to exceed three (3) years.

Unlike alimony, which cannot be modified, a court in Indiana may modify spousal maintenance obligations. You can learn more about the Spousal Maintenance Statute at www.in.gov/legislative/code/title31/ar15/ch7.html.

ALIMONY

An alimony provision in a divorce agreement provides for the support and maintenance of a spouse for a set period of time or until a particular event occurs, such as remarriage. Alimony is generally paid out of the obligor's future income rather than marital assets, and is not considered a property division.

Alimony must terminate upon the death of the spouse receiving alimony in order to qualify as a deduction for income tax purposes. If the person paying alimony qualifies to take the expense as a deduction, the person receiving alimony must include the payment as income on his or her income tax return.

Indiana courts do not have the jurisdiction to order alimony absent agreement of the parties. Therefore, absent agreement of the parties, the court does not have the authority to modify an alimony obligation.

Given that an alimony obligation is always a voluntary decision on the part of the paying spouse, hiring a shark that begins the process in an adversarial way is likely to guarantee you will not receive an alimony payment that might otherwise have come your way.

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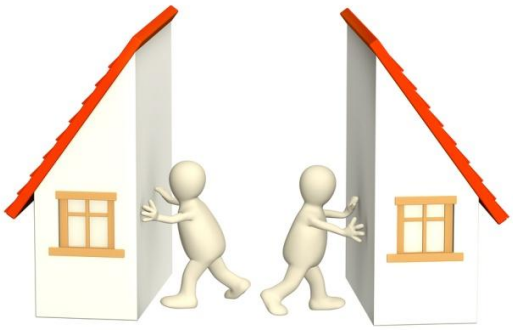
CHAPTER 6. PROPERTY DIVISION



Be sure to visit a family law court in your County before you decide to hire an attorney to fight about "stuff." You will quickly learn whether the "things" you think you want in a divorce are worth the ugliness you will have to endure or inflict in order to get them. Call the court and ask what days and hours they hear family law cases. Plan on staying all day or go several times in order to get a realistic picture of what you can expect in family court.

Some of the basics about property are as follows:

The marital estate is made up of all the property you own individual or jointly and all the debts you owe individually or jointly on the date one of the parties files a petition for dissolution of marriage. This includes such things as retirement accounts and property held by the parties prior to the marriage. It does not include debts or assets that are incurred or obtained after the date of filing.

A court in Indiana must presume that an equal division of the marital estate is just and reasonable. However, this presumption may be rebutted by either party based on the specific circumstances of their case. Some of the circumstances that might rebut the 50/50 presumption are as follows:

1. The contribution of each spouse to the acquisition of property, regardless of whether the contribution was income producing,
2. The extent to which the property was acquired by each spouse before the marriage or through inheritance or gift,
3. The economic circumstances of each spouse at the time the property is to be divided, including the desirability of awarding the family residence or the right to dwell in the family residence for a period of time the court considers just to the spouse having custody of the children.

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4. The earnings or earning ability of the parties as related to a final division of property and a final determination of the property rights of the parties.

It has been my experience that courts are unlikely to bump very far off of a 50/50 division except in extreme cases of income disparity and the existence of significant pre-marital assets that were not co-mingled during the marriage. Be sure to ask your attorney the "best case" "worst case" question if he or she suggests that you could get a better deal by going to court. And, oh yeah – be sure to ask what your attorney fees will be if the case isn't settled out of court.

You can find out more about the division of property at www.in.gov/legislative/code/title31/ar15/ch7.html

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PART III - OTHER FAMILY LAW MATTERS

CHAPTER 7. PATERNITY

One of the biggest mistakes unmarried parents make is to NOT have a DNA test done. The consequences of signing a Paternity Affidavit are so great that every potential father should hire an attorney or request a DNA test before signing that document.

IS DNA TESTING MANDATORY?

DNA Testing is only mandatory if the potential parents have requested joint legal custody on an Indiana Paternity Affidavit. In all other cases, the parties need merely sign a Paternity Affidavit stating under penalty of perjury that a particular person is the father.

That Paternity Affidavit, if not rescinded within sixty (60) days of execution, will result in the person who signed it having a decades-long legal and financial obligation for a child that may not be his own. Indeed, even in the face of subsequent DNA proof that such person is not the biological parent, his legal and financial obligations will continue until another person is ordered in a court of law to be legally and financially responsible for the child.

The law seems harsh in this regard, but it is based on the fact that the person who signed the Affidavit had the opportunity to have DNA testing done and chose not to do so. Further, new boyfriends have been known to sign a Paternity Affidavit with full knowledge that the child was not his. Unfortunately, the reason boyfriends lie on paternity affidavits is to keep the child's real father out of the mother's life. In other words, that person and the mother have prevented the child from knowing or being supported by his or her biological father. They have committed fraud on the State of Indiana and on an innocent child who deserved better. For the reasons above, it is this attorney's opinion that DNA testing should be mandatory at the birth of every out-of-wedlock child.

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THE DILEMMA

Unfortunately, in the absence of mandatory testing, pregnant mothers and potential fathers who are in relationship with each other are under extreme pressure to NOT seek proof of paternity.

The dilemma for the potential father is that his lady-love will think he doesn't trust her if he requests a DNA test. Mandatory testing would prevent this quandary. Until then, another way might be for important others (such as parents who are offering advice or financial assistance to the couple) insist that a DNA test be performed. This would take the heat off of the prospective father since he could continue to proclaim his absolute trust of the new mother-to-be while giving in to the wishes of his parents or other benefactors.

The mother, of course, needs no proof that she is the biological mother. She also knows whether anyone OTHER than her knight-in-shining armor could be the father. So her dilemma is that a request for DNA testing on HER part is an admission that she was not faithful during the parties' relationship! With mandatory DNA testing, this dilemma would be taken out of her hands.

Fathers to be are at great risk of taking on a very long financial obligation that is nearly impossible to reverse. Not to mention the damage that is done to a child who is prevented from knowing his or her biological father. Until DNA testing becomes mandatory, I plead with the parents of soon-to-be fathers (frequently children themselves) to insist upon DNA testing. If you are still supporting your son, you are in a position to make this demand. The cost of an attorney will be nothing compared to the heartbreak you will experience when your grandchild's mother decides to bring the real dad into the picture.

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CHAPTER 8. STEP PARENT ADOPTION

Step-parent adoptions are one of the happy things a family law attorney gets to do! Absent an objection by the noncustodial parent, it is a fairly simple task. As with grandparent adoptions, the court will frequently waive the statutory requirement for a home study, resulting in a short and friendly fifteen-minute hearing.

As a rule, the noncustodial parent must consent to the adoption of his or her child. However, there are exceptions to the rule such as when that parent is deceased. The most common exception, however, occurs when the biological parent, for a period of one (1) year,

1. fails without justifiable cause to communicate significantly with the child when able to do so; or

2. knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree.

While consent is not required under these circumstances, the noncustodial parent must still be given written Notice of the adoption. In the event the noncustodial parent objects to the adoption, you will want to find an experienced litigator.

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CHAPTER 9. GRANDPARENT RIGHTS

Pursuant to Indiana Code 31-17-5-1, the court may grant visitation rights to grandparents if the court determines visitation rights are in the best interests of the child and:

1. the child's parent is deceased;

2. the marriage of the child's parents has been dissolved in Indiana; or

3. the child was born out of wedlock and the child's father has already established paternity of the child.

THE DILEMMA

While there is a legislative remedy in Indiana if grandparents are being denied visitation with their grandchildren after the child's parent dies or is divorced, the outcome in a court of law is rarely what the grandparents expected. And if the child's parents are still alive and married, grandparents have no standing whatsoever to seek visitation with their grandchildren.

Notwithstanding the Grandparent Rights set forth above, the United States Supreme Court has ruled that the Fourteenth Amendment's Due Process Clause protects the fundamental right of parents to make decisions concerning the care, custody and control of their children. Specifically, the Court stated that "so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." Troxel v. Granville, 530 U.S. 57, 120 S.Ct., 2054, 2060, 147 L.Ed2d 49 (2000).

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In other words, grandparents will not be awarded additional visitation time with the child if the biological parent is "fit" and has decided it is in the child's best interests to limit the amount of time the child spends with the grandparent. One exception may be when the parents allow the grandparent NO time with the children.

Unfortunately, the consequences of alleging that the parent is unfit are so great, and the burden of proof so high, that many grandparents wisely choose not to sue for grandparent's rights. And those who DO, frequently burn bridges that can't be rebuilt.

THE REMEDY

There are things grandparents can do to avoid conflicts with the child's parents and it is imperative that these things occur while the parent's marriage is still intact. By understanding and acknowledging the proper role of a grandparent to a grandchild, most grandparents will maintain the relationship they want with their grandchildren in the event a marriage is dissolved by either death or divorce. Here are a few suggestions:

1. While the marriage is still intact, offer to keep the children so the parents can have a date night every week. Pick them up for dinner and keep them overnight!
2. Don't "take sides" when a grandchild is mad at his or her parents.
3. Don't "take sides" when the parents are mad at each other.
4. Don't buy things for the grandchildren that their parents said they couldn't have.
5. If the parents are heading for divorce, let them both know you will always love them. Do not take sides. Find the right words that keep you neutral, such as "I understand how you must feel" or "I'm so sorry you are going through this." It will be important to not discount their feelings during this difficult time, but you don't have to adopt those feelings for yourself. It is not disloyal to preserve your relationship with your own child as well as your son or daughter-in-law! THEY ARE BOTH KEY to having a future relationship with your grandchildren.

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6. Don't feel that you are being "used" when the parents only let you have the kids when it is convenient for them. Both parents will have less time with their children once the parents separate, so understand that your time is likely to be reduced as well – at least for a while.

7. Be prepared to lose some grandparent visitation when your son or daughter-in-law remarry after the death of your child. That new step-parent may be threatened by your closeness to the children and may believe you are comparing him or her to the parent that died. This is a difficult time for everyone involved and especially for the grandparent who lost a child and who may have stepped in as a substitute parent for a number of months or years. You can prevent this loss by opening your heart to the new step-parent.

The key to having an ongoing relationship with your grandchildren is to maintain and nourish your relationship with both of their parents, to value the decisions they make as parents, and to value the importance of subsequent spouses.

Unfortunately, grandparents are at the mercy of the attorneys they interview and can be bilked out of many thousands of dollars simply because they didn't ask the "best case" "worst case" question. Also – ask your attorney to explain what the United States Supreme Court had to say about grandparent visitation. If he or she doesn't know the answer, find another attorney. Or hire the attorney for the sole purpose of researching this area of Indiana law and ask for a written recommendation before deciding how to proceed. And, oh yeah – be sure to ask what your attorney fees will be if the case isn't settled out of court.

CHAPTER 10. RELOCATION

You may or may not need an attorney in the event of relocation. Both parents must give written notice of their intention to relocate at least ninety (90) days prior to his or her intended move, even if it is just across the street. The notice must be sent by certified mail to the Court that has jurisdiction over the children and to the other parent of your

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children. It must include the information set forth in the statute, including but not limited to the reason for the move, the new address and phone number, and how parenting time might be impacted by the move. Be sure to check the statute to make sure you include all the necessary information in your Notice.

If the other parent has no objection to the move, he or she need do nothing and the existing custody, parenting time and child support orders will remain in effect. In this case, no attorney is needed.

If the other parent objects, he or she may seek modification of custody, parenting time and child support based on that party's belief that relocation is not in the child's best interests. In that event, both parties will need the assistance of an attorney and you are most likely looking at litigation.

The burden of proof falls first to the moving party, who must show that the relocation is made for a good reason. If the moving party meets that burden, then the burden of proof switches to the objecting party, who must show that it is not in the child's best interests to relocate. In such case, the court then must consider all the factors that go into custody modification as set forth at Indiana Code 31-17- 2- 8.
Learn more at www.in.gov/legislative/ic/code/title31/ar17/ch2.html. See my blog about this topic at www.familylawfishersindiana.com.

Be sure the attorney you are interviewing is familiar with the case law concerning this topic. While you won't need a "shark," you will most likely need an attorney with successful litigation experience.

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Part IV. Conclusion

Divorce and other family transitions are challenging, but having the knowledge set forth in this book will help you find the attorney who will help you face the challenge without making matters worse. A family law attorney who is not a shark will not only help you with the legal ramifications of your decisions, but also provide guidance and expertise during one of the most emotional phases of your life. Working with someone who has the knowledge to point out the consequences of your actions makes it easier to take action. This gives you confidence in your choices during a difficult time and is one of the greatest gifts you can give yourself and your children.

In addition to competent legal advice, an experienced family law attorney is able to help you decide which path works best for your situation – one that is collaborative or one that is adversarial. The right attorney will review your case and help you determine the best option for you. Each family is different and it is these specific needs and desires that should dictate how a family law attorney proceeds.

Regardless of which path you choose, you need an attorney that understands the most important legal aspects of family transitions. Decisions about child custody, support, maintenance, alimony and property division have a long-term impact on you and your family, and should not be taken lightly.

I hope this brief overview gives you the basic understanding of what the law says. It is my hope that once armed with some basic divorce knowledge, you will be able to worry less about pursuing your “rights” and more about pursuing the right outcome for your family. I wish you well.

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