

Divorce

A divorce is a legal action that ends a marriage. During a divorce, parties divide assets and debts. It may also give spousal support, which is sometimes called alimony. The divorce proceeding will also give support for the minor children, if any. This is done by establishing child support, a division of the children's expenses (such as health insurance, out-of-pocket health care expenses, and daycare) and set up a schedule for parenting time. It is best to have a lawyer for a divorce, but you can do it without one.

For what reason may a divorce be granted?

South Dakota does not have the traditional "no fault" divorce. Under South Dakota law a divorce may be granted for any of these grounds: adultery, extreme cruelty (including bodily injury or grievous mental suffering), willful desertion, willful neglect, habitual intemperance, conviction of a felony, chronic mental illness or irreconcilable differences. The grounds of irreconcilable differences may only be used if both parties agree to it or if there is a default (one party does not answer or respond).

What is the residency requirement?

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

If there are minor children, keep in mind that even if the divorce may be properly set in South Dakota, the custody action may not be. The Uniform Child Custody Jurisdiction and Enforcement Act, which has been adopted by all 50 states, requires that jurisdiction of any custody action must be where the child lives. If the child does not live in South Dakota, or has not been here for at least six months (assuming the child is over six months old), the jurisdiction will probably not be

South Dakota.

What if my spouse is in another state?

If your spouse does not live in South Dakota, you can still begin a divorce action in South Dakota, so long as the other party can be served. The South Dakota court has the authority to grant a divorce, determine custody over children who live in South Dakota and divide property located in South Dakota. The parties can also consent to jurisdiction within the state.

But remember, with very few exceptions, the court in South Dakota generally does not have the authority to award custody of the children that are residing in another state.

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

How do I start a divorce action?

A summons and complaint must be served upon your spouse to start the divorce action. Serving the complaint officially starts the divorce process. The complaint simply asks the court to grant a divorce and states your grounds or reason for the request. The complaint also states what you want the court to do about such matters as child custody, child support, parenting time, spousal support, and division of property (assets and debts) of the marriage.

The summons demands that your spouse answer the complaint within thirty (30) days of service or a default judgment may be entered against them. But keep in mind that the default judgment cannot be entered until after sixty (60) days has passed. There is a 60-day waiting period in South Dakota, which prevents any final disposition, even settlement, until after the period has lapsed. The complaint for divorce must be answered if the spouse wishes to contest the divorce, child custody or any other allegations in the complaint.

How does my spouse find out about the divorce?

The summons and complaint must be "served," that is, personally delivered, to your spouse to tell them of the divorce action. This personal service can be done in many ways. For example, if your spouse wishes, the documents may be hand-delivered or mailed and your spouse may sign an "admission of service." The admission of service simply states that your spouse admits they received the divorce papers, not that they agree with their contents. This will save the expense of having the papers served by a sheriff or process server. If your spouse is not agreeable to signing the admission of service, then the sheriff or a qualified process server will personally deliver the documents to your spouse where they live and proof of service is filed with the court.

If your spouse cannot be found through diligent efforts, your spouse may be served by publication in a newspaper in the area of your spouse's last known residence. However, every effort should be made to locate your spouse personally before resorting to this method of service. Your spouse has thirty (30) days from the date of the service to file a formal written answer with the court. Filing an answer means your spouse is contesting such things as the divorce, child custody, child support, spousal support or division of assets or debts.

Is there a waiting period?

Yes, in both a contested and uncontested divorce, you must wait sixty (60) days after service of the summons and complaint before you can complete the divorce. If the parties have reached an amicable resolution, settlement documents may be signed before the end of the 60 days, but the court will not enter the judgment and decree of divorce until the 61st day.

What happens during the divorce?

The divorce may go ahead in one of four ways:

1. **DEFAULT:** This means your spouse does not answer, respond or in any way contest the divorce or other related matters alleged in the complaint. In other words, if you hear nothing from your spouse, a divorce can be granted and you can get what you have asked for in your complaint on your testimony alone.

2. **STIPULATION:** Where it is possible for the parties to agree on the custody of the children, a parenting schedule, division of assets and debts, child support and spousal support (if any), a written agreement called a "stipulation" is prepared and signed by both parties. In such a situation, the divorce is handled like a default divorce and is granted on your testimony alone. The stipulation is presented to the court for the judge's approval and you are bound by it. **Note:** There is also a provision for entry of a divorce without the appearance of either party if both consent, all the terms in the stipulation, and both parties agree on the grounds for the divorce. If irreconcilable differences is used, an affidavit (sworn written testimony) to this effect must be submitted to the court in advance.

3. **CONTESTED:** If your spouse has filed a formal answer and does not agree to the divorce, showing there is a dispute on such matters as child custody, parenting time, child support, spousal support or division of assets and debts, a court trial (no jury) will be held. The judge will decide these matters from evidence, including the testimony of both parties and other witnesses. The court will decide on all matters not agreed upon by the parties.

4. **MEDIATION AND EVALUATIONS:** In South Dakota, mediation is generally required for all custody and parenting time disputes. There are a few exceptions, largely centered on a conviction or history of domestic violence or abuse between parents, which may prevent mediation. But in all other cases, South Dakota courts order mediation to help the parties in developing a parenting plan. The parenting plan will address custody and/or parenting time, to be formulated by the parents with the aid of a qualified mediator. The court may also direct that a custody evaluation, which may include both a home study and a psychological evaluation, be conducted to help the court in making custody and/or parenting time decisions. The court will apportion the cost of mediation and evaluations between the parties, unless otherwise agreed upon by the parties.

How is the divorce Finalized?

The divorce is completed with the entry of a judgment and decree of divorce. If a settlement is reached, the judgment and decree will incorporate the terms of the settlement agreement. If a contested court decision is rendered, then findings of fact and conclusions of law must also be entered. Once notice of entry of the judgment and decree is filed, the parties have a limited time to appeal from the

court's decision. The judgment and decree of divorce is an important document. For example, you may need it for changing a married name on a social security card or driver's license, establishing support, or enforcing custody or property rights, so it is important to keep this document in a safe place.

What about restraining orders?

In South Dakota, with the filing of every summons for divorce, there is an automatic temporary restraining order that prevents the parties from transferring, encumbering, concealing, dissipating, or otherwise disposing of marital assets without a court order or written consent of the other party. There are special exceptions for necessary expenses in the ordinary course of business. In particular, the parties cannot change or end the other's insurance policies.

This restraining order is different than a protection order, which may be granted for harassment, stalking, or abuse; it does not prohibit a party from coming within so many feet/yards of a protected person. Instead, this temporary automatic restraining order only lasts for the duration of the divorce and merely instructs the parties not to disturb one another's peace.

If the parties have children, and in the absence of an agreement to the contrary, the automatic temporary restraining order provides that the person who was the primary caregiver of the children for most of the 12 months preceding the divorce has primary physical custody, while the other party has parenting time as provided in the South Dakota Parenting Guidelines. The parties are also prohibited from taking the children outside the jurisdiction of the court (i.e. state) without the other's written consent or a court order.

How much will a divorce cost?

In 2018, the filing fee for a divorce is \$95, while the filing fee for the Answer is \$25. Attorneys' fees will vary widely, depending upon the amount of disagreement between the parties, the work involved, the complexity of the issues (custody, property, support), the need for experts (appraisals, custody evaluations, etc.), and the experience/skill of the attorney. Generally, your attorney will need a retainer to start the case, but the retainer should not be treated as a guaranteed limit of fees, unless specifically in the fee agreement. In addition, retainers are usually treated

like a deposit on an apartment; just like the deposit cannot be used to pay rent, the retainer usually cannot be used to pay your monthly bill. Be sure to work these details out with your attorney in advance.

South Dakota also provides that in any case involving divorce, custody, parenting time or child/spousal support, either party can ask the court to make the other party to reimburse their attorney's fees. These are very case-specific requests and there are some factors the court will consider in deciding the matter. While attorney's fees are rarely awarded in routine divorce cases, you should talk to your attorney about the likelihood of a reimbursement, given the facts of your particular case.

What about alternatives to divorce?

South Dakota also has provisions for legal separation and separate maintenance, which can address property division and continued spousal support.

An annulment is also an option. It can only be granted upon the statutory grounds of: the existence of a former marriage, unsoundness of mind, underage spouse, forced consent, fraud, or physical incapacity. Many of these grounds have a warning that the annulment can only be granted if the parties did not "freely cohabit" after discovery of the grounds for annulment. In addition, there is usually a limitations period, depending on the grounds for the annulment. For these reasons, very few contested annulments will be successful.

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