

Overview of Indiana Divorce and Family Law

by Cordell & Cordell Attorney, Jason P. Hopper

DISSOLUTION AND LEGAL SEPARATION IN INDIANA

Residency Requirements

- In order for an Indiana Court to have jurisdiction over a legal separation or dissolution of marriage matter, at least one (1) party must be a resident of the State of Indiana, or stationed at a US military installation within Indiana for a period of six (6) months prior to the date of filing.
- In order for a particular Superior or Circuit Court to have the proper or “preferred” venue to hear the matter, either party must reside within that county for a period of three (3) months prior to the date of filing.
- In instances where a husband and a wife reside in different counties for more than three (3) months prior to filing, their respective counties of residence would have concurrent jurisdiction and the first in time party to file their action would have the preferred venue.
- Grounds for Approving Legal Separation or Dissolution
 - In order for an Indiana Court to issue a Decree of Legal Separation or a Decree of Dissolution, the court must find that the residency requirements have been met, that at least sixty (60) days have elapsed since the time of filing of the petition, and that conditions exist which make continued cohabitation intolerable but that the marriage should be maintained (for a decree of legal separation), or that there has been an irretrievable breakdown of the marital relationship and that there is no reasonable likelihood that the marriage can be preserved. Additionally, the parties must either waive their rights to a final hearing, and present a written and executed “Property Settlement Agreement” on all child and property related issues, or appear before the court for a contested final hearing.
 - Indiana is a no-fault state. What this means is that it is not necessary to show that either one of the parties was at fault for the irreconcilable differences. In short, if one party wishes to file for dissolution, the court will grant the dissolution.
- Emergency and Provisional Orders
 - Often, parties to a dissolution or legal separation are not initially able to resolve issues of child custody and parenting time, or payment of marital bills by agreement. As these issues are of paramount importance, either party to an action may petition the court for emergency or provisional orders, requesting temporary maintenance, temporary support or custody of a child of the marriage entitled to support, temporary possession of property, orders for counseling or protective orders, temporary restraining orders, etc.

All emergency and provisional orders are temporary in nature and are “without prejudice” to any orders which can be made at a final hearing. Quite simply, temporary orders are often treated as the glue that holds things together until a final determination may be made. As often as emergency or provisional hearings are requested of the court, parties may choose to instead enter into a provisional or “temporary” agreement on any of the issues set forth above.

- Common issues involved in Legal Separation and Dissolution

For any issue involved in a legal separation or dissolution, the parties have the power to agree on any terms they see fit. Often, parties are able to resolve some or all issues via a settlement agreement. However, there are times when even the most reasonable settlement offers are met with an unreasonable response and parties are required to litigate the matters before a family law judge, magistrate, or commissioner. The common issues litigated in a contested final hearing include:

Division of Marital Assets and Liabilities

- In an action for dissolution of marriage, the court may divide the property of the parties, whether it was owned by either spouse before the marriage, acquired during the marriage but prior to the parties’ separation, or acquired by joint efforts. This means, there is a presumption that all assets and all liabilities owned by either party is allocated as a marital asset or a marital liability. This presumption may be rebutted and certain assets and certain liabilities may be argued to be non-marital assets or liabilities.
- The Court may divide marital assets and liabilities by dividing “in kind”; setting the property over to one spouse and requiring the other spouse to pay an amount in gross or in installments that is just and proper; order the property be sold and the proceeds divided; or order a distribution of benefits payable after the dissolution of the marriage by setting aside a percentage of those payments by assignment or in kind at the time of receipt.
- There is a presumption that the net marital estate, that is the value of the estate after marital liabilities are subtracted from the marital assets, will be divided equally. It can be argued that the presumption for an equal division is not equitable depending on several factors, including if the asset was acquired prior to the marriage or through inheritance, due to conduct related to disposition or dissipation, due to the parties economic circumstances, including a preference to award a marital residence to a custodial parent; and the parties relative earnings or earning abilities as related to the final division of property and final determination of property rights of the parties.

Spousal Maintenance

- Indiana Courts may award permanent maintenance in one of two scenarios:

- the court finds that a spouse is physically or mentally incapacitated to the extent that the incapacitated spouse's ability to support him or herself to be "materially affected."
- the court finds that a spouse lacks sufficient property to provide for that spouse's needs and the spouse is the custodian of a child whose physical or mental incapacity requires the custodian to forgo employment
- Indiana Courts may award rehabilitative maintenance for up to three (3) years if the court finds that there had been an interruption in education, training, or employment as a result of homemaker or child care responsibilities and that the spouse requires time to "get back on their feet" or further their education to reenter the workforce.

Legal and Physical Custody of Children

- Divorcing parents have two (2) separate determinations on their respective rights to their children, legal custody and physical custody. Legal custody concerns the decision making power a parent has over the child, whereas Physical custody concerns with whom the children will reside primarily with.
- In making either determination in contested child custody matters, Indiana Courts use certain statutory "best interest" factors found under Indiana Code 31-17-2-8 which include:
 - The age and sex of the child.
 - The wishes of the child's parent or parents.
 - The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
 - The interaction and interrelationship of the child with:
 - the child's parent or parents;
 - the child's sibling; and
 - any other person who may significantly affect the child's best interests.
 - The child's adjustment to the child's:
 - home;
 - school; and
 - community.

- The mental and physical health of all individuals involved.
- Evidence of a pattern of domestic or family violence by either parent.
- Evidence that the child has been cared for by a de facto custodian.
- A legal custodian of a child will make decisions regarding a child's education, discipline, religious upbringing, and medical procedures. Legal custody may be shared jointly held solely by one parent. Often, regardless of the physical custody wishes of either parent, parties will stipulate to a joint legal custody award of their children. However, in situations where one or both parties seek an award of sole legal custody of their child or children, the Court will consider, in addition to whether the parents agree to a joint award:
 - the fitness and suitability of each of the persons awarded joint custody;
 - whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child's welfare;
 - the wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age;
 - whether the child has established a close and beneficial relationship with both of the persons awarded joint custody;
 - whether the persons awarded joint custody:
 - live in close proximity to each other; and
 - plan to continue to do so; and
 - the nature of the physical and emotional environment in the home of each of the persons awarded joint custody.
- A physical custodian is the parent with whom the child resides primarily with. In Indiana, there is no statutory definition for parents to be joint physical custodians, however, it is common for parents who do not seek for the other spouse to be a "part-time parent" to stipulate to shared parenting time plans, and to hold "physical" and "non-physical" custodian labels, simply for identification purposes only.

Parenting Time of Children

- In Indiana, the time a non-custodial parent spends with their children is called "parenting time" (formerly labeled the less politically correct "visitation"). Parents ultimately have the ability to stipulate to a shared parenting time plan in which each parent can spend equal time with the children. In shared parenting time plans, the parents

are free to devise a plan which works best for each parent and the children, allowing for flexibility and shared parenting. However, in situations where each parent seeks to be a primary custodian or to have one primary household for the children to reside, the Indiana Parenting Time Guidelines will be the resultant parenting time schedule.

- A copy of the Indiana Parenting Time Guidelines is found at <http://www.in.gov/judiciary/rules/parenting/index.html>. In relevant portion, the guidelines have a stair-stepping device for infants and toddlers, with the non-custodial parents “parenting time” increasing until the child reaches age 3, at such time, the non-custodial parent may exercise parenting time on alternating weekends, typically one mid-week visit or overnight, alternating holidays, and one-half of the child’s summer wherein the schedule is flip-flopped with the custodial parent.

Child Support, Post-Secondary Obligations

- In Indiana, parents have an obligation to support their non-emancipated children until age twenty-one (21). The child support obligation is determined by the parties respective gross weekly income, the amount of overnights the child spends with the non-custodial parent (or the parent who does not pay controlled expenses in shared parenting time schedules), evidence of subsequently born children or separate support or maintenance obligations, work related child care expenses, and the amounts that a party pays in health insurance premiums for the children. Often, the support obligation is paid from the non-custodial parent to the custodial parent, however, in situations where the custodial parent’s income far exceeds that of the non-custodial parent, the custodial parent can have a support obligation to the non-custodial parent.

- Both parents have a separate, post-secondary obligation for the support of their children. Often, the post-secondary obligation is split pro-rata of income, after factoring in the child’s contribution to his or her post-secondary expenses in the form of scholarships or grants.

POST-DIVORCE OR DISSOLUTION ISSUES

Often, after the decree for dissolution has been entered, certain “post-dissolution” or “post-decree” issues will arise which require the court’s continued intervention.

- Common post-dissolution issues

- Rule to Show Cause / Contempt proceedings – The most common area of post-dissolution litigation is in the form of a “rule to show cause” or “contempt” proceeding. As the court’s decree is an order by the court, it is to be strictly followed by the parties. If either party fails in their obligations, the other party may ask the court to order the defaulting party into court to “show cause” or explain themselves as to why they should not be subject to the court’s contempt powers which can include payment of the non-defaulting party’s attorneys fees, modification of the prior orders, or even incarceration.

- Modification of Child Custody – After the custody determinations are made by the court at the dissolution proceedings, certain events can happen in the course of life which may result in the ordered custody arrangements to no longer operate in the “best interests” of the children. Generally, in order to obtain a modification of child custody, the moving party must show that there has been a substantial and continuing change in one of the statutory “best interest” factors.

- Modification of Child Support – After the support obligation has been determined, it is not unusual for parties to change jobs or to have an increase or decrease in their wages. Generally, in order to obtain a modification of child support obligation, the moving party must show either that there has been a substantial and continuing change which makes the current support obligation unreasonable, or that one year has passed from the previous support determination and the payor spouse is either overpaying or underpaying by 20% of what the actual recommended amount is.