

## 8.

# What are the legal options for divorce? What should I expect during the divorce process?

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*Do not file for divorce in haste. Explore all options and make a conscientious decision, contemplating the short-term and long-term consequences. Once a decision to divorce has been made, remember the law of integrity. What you put into the divorce will surely be what comes out of the divorce. Aggression is normally combated with aggression and compromise is normally embraced with compromise. In the beginning of the separation, although difficult, invest the time and energy to build cooperative patterns for a long-term benefit for you and your children.*

—Tamara Fackrell, domestic attorney & mediator

**Overview.** Utah law requires divorcing parents to attend two classes before finalizing a divorce: a divorce orientation education class and an education for divorcing parents' class. The divorce process can take anywhere from two months to several years. Most people use lawyers when going through the divorce process. The divorce process can be expensive. There are some services available to help low-income individuals with their divorces, especially if there has been abuse in the marriage. For straightforward and “uncontested” divorces, there is an Online Court Assistance Program with the legal forms needed for divorce that individuals can fill out themselves. All contested divorces in Utah are required to go through mediation, in which a trained, neutral mediator will try to help couples reach agreements about issues related to their divorce. Divorcing spouses can still use their lawyers during the mediation process. Mediation is usually less

expensive and faster than litigation. Some divorcing couples use “collaborative law,” in which they use lawyers who agree to work cooperatively to resolve issues surrounding divorce rather than in an adversarial manner. One spouse may not want the divorce, but it is futile to try and challenge the divorce in court because of the way our laws are written and interpreted by the courts.

If a divorce is on the horizon for you, whether you want it or not, it is best to understand the legal process that you are about to experience. And there are some legal choices you need to make. This chapter will help you understand what lies ahead.

## **A. What should I expect going through the negotiated divorce process?**

For most people, the legal process of divorce is an emotionally and financially draining process. When children are involved, parents need to try and be their best selves for the benefit of the children, despite the stresses and challenges.

If a couple has children, Utah law requires them to attend two classes—a Divorce Orientation Education class and an Education for Divorcing Parents class—before the divorce can be finalized.<sup>293</sup> (Those who have not filed for a divorce are welcome to attend, as well.) More information about these classes, including times and locations, is available on the web at [www.utcourts.gov/specproj/dived.htm](http://www.utcourts.gov/specproj/dived.htm). If the couple does not have children, these courses are not required, but the law requires a 90-day waiting period before a divorce can be finalized.<sup>294</sup>

Some couples may decide to reconcile after they have filed the divorce. The divorce process is not final until the Decree of Divorce has been filed with the court. Anytime before the Divorce Decree is filed, a couple can reconcile and their marriage is still legal and binding. Other couples choose an alternate route to divorce and have a time of separation. Separation can be done formally through the court or can be done more informally with agreement between the spouses. For informal separations, agreements made on financial obligations, support, and visitation are best done in writing and signed by both parties. Some parties choose to involve the Office of Recovery Services (ORS) to help with their case for child support even when they have decided just to separate and not divorce. (See the Resource List at the end of Chapter 8 for ORS contact information.)

The divorce process can take anywhere from 90 days to several years, depending on how many issues can be resolved between spouses. Issues to be settled in divorce are commonly parenting time, division of financial assets and debts, child support, and alimony.<sup>295</sup> And within each of these issues there are many things to be considered. You may benefit from doing exercise 8.1, “Thinking About Parenting Time With Children,” at the end of this chapter. Exercise 7.1, “Thinking About the Financial Consequences of

Divorce,” at the end of Chapter 7, will help you think about all the details associated with dividing your finances. We recommend that you do that exercise. Then, you may benefit from doing exercise 8.2, “Thinking About Child Support and Alimony,” at the end of this chapter.

The logistics of taking one family and dividing it into two households can be difficult. Most of the time, this requires both parents to be employed. Even if a person decides not to work and stay home, the court may “impute”<sup>296</sup> income to that parent for child support calculation. Imputation assigns a potential yearly wage to each parent, even though the parent is not currently working. The court also requires each spouse to show proof of income through current pay stubs and the previous years’ taxes.<sup>297</sup> Attorneys or mediators will also require documentation for all assets and debts in order to gather the legal information needed to distribute all your financial assets.

## **B. Does getting a divorce require a lawyer or can I get a divorce without the help of a lawyer?**

In the State of Utah, approximately 50% of divorcing couples<sup>298</sup> use lawyers when going through the divorce process. People who have a low income and who have experienced physical abuse from their spouse can qualify for a free attorney through Utah Legal Services (see [www.andjusticeforall.org/uls](http://www.andjusticeforall.org/uls) or call 1-800-662-4245). Others choose to use a service such as Legal Aid (<http://legalaidsocietyofsaltlake.org> or 801-328-8849) to get initial consultations for divorce. But free, long-term legal services are available

You may be able to qualify for a free attorney. See the Resource List at the end of this chapter for legal service options.

only if there is domestic violence involved in the marriage and if lawyers are available. (Agencies such as Utah Legal Services are often swamped with cases. Please see the Resource List at the end of Chapter 8 for information about legal service options within your county.) Low-income individuals also can file paperwork in order to waive the filing fees associated with divorce.<sup>299</sup> (Paperwork called the “Affidavit of Impecuniosity” will waive the filing fees. These can be printed off of the

Online Court Assistance Program [OCAP] System [see below]. Of course, attorneys also have these forms. Often, the clerks of the court also will be able to give you information on filing the “Affidavit of Impecuniosity.”)

But you do not have to use a lawyer to divorce. Sometimes people choose to act pro se, which means people represent themselves in court without a lawyer. This is usually done in simple divorce cases where all matters are agreed upon. If the case has unresolved issues, this can be overwhelming and you will need to do a lot of research in order to file the correct legal pleadings. Further, if your finances involve self-employment businesses or large retirement funds, you may find it very difficult to proceed without a lawyer.

If the divorce is uncontested, which means that both spouses agree on every issue in the divorce, there is the Online Court Assistance Program (OCAP) service provided by Utah Courts and the Utah State Legislature, where people can get access to legal forms and do their own paperwork (see [www.utcourts.gov/ocap](http://www.utcourts.gov/ocap)). If the divorce is contested, mediation can be used to try to resolve the contested issues before or after hiring lawyers. These options are discussed in further detail below.

## C. What does it cost to get a divorce?

It is no secret that divorces can be very expensive. Many attorneys require a retainer of several thousand dollars before taking the case. The more spouses disagree, the more expensive the divorce process will cost. If the case goes to litigation in court, the process can cost anywhere from \$3,000 to \$10,000 dollars or even more for each spouse. Courts rarely, if ever, order one spouse to pay the other spouse's attorney's fees and costs, even if one of the spouses is or was engaged in infidelity, abuse, or other activities that undermined the marriage.

Having an uncontested divorce, where divorcing spouses agree on every item in the divorce, is the least expensive option. Some spouses will choose to have a "kitchen table negotiation" where they work out all of the details of the divorce themselves. Then an attorney can be hired to file "uncontested paperwork," which usually costs between \$800 and \$2,000.

If a person does file "uncontested paperwork," the question arises whether the couple should hire a single attorney or each spouse should hire his or her own attorney.

An attorney cannot represent both the divorcing husband and wife.

According to the rules of ethics for attorneys, an attorney cannot represent both the divorcing husband and wife.<sup>300</sup> Legally, the attorney is required to represent just one spouse. It is wise for the other spouse to at least get a one-hour consultation with an attorney to review the uncontested paperwork. Sometimes, attorneys will give a free initial consultation. Depending on the facts of the case, a person may not need to get an attorney, but at least having a minimum consultation is a good idea. Another option in these cases is using an Attorney-Mediator. If the mediator you choose is also an attorney, then the law allows the Attorney-Mediator to file the divorce paperwork.<sup>301</sup> However, a consultation with an independent attorney is still a good idea.

The OCAP system (described above) is also an affordable way to file uncontested divorce paperwork. This online system is only meant for those having uncontested issues with simple financial assets and debts, standard child visitation agreements, and court-dictated child support. This system works well for simple divorce cases where few adjustments need to be made. As a caution, however, many people will use the OCAP

system and not phrase the contract language correctly. This may result in future problems that require going back to court, which can be very expensive. If you or your spouse is unwilling or unable to agree on some items, divorce mediation may be a less expensive option to get the divorce issues resolved. (See the next section for more information.)

If you and your spouse cannot or will not agree, the Utah Legislature has written a partial divorce decree for you. The Utah Child Support Guidelines require that a certain amount of child support be paid (usually by the noncustodial parent only) based on the number of children and each parent's income. No parents can agree that a parent pay less than the guidelines provide, although they can agree to higher payments. Similarly, detailed visitation guidelines provide for the noncustodial parent to spend time with the children, based on the age of the child and a complicated system that alternates years (even or odd) for how the child divides time between parents on Christmas, the child's birthday, school holidays, etc. Parents may want to take a look at these guidelines, which specify times for pick up and return of the child, before they decide they can't come up with something easier on the child. The court can order supervised visitation (often by a social worker at a place with activities or toys for the child, for a fee) if a parent can be shown to be a potential threat to the child. The court can also order that the child be picked up and dropped off at a neutral site (such as the local police station) if parents fight or express hostility when the child is picked up or dropped off at the child's home.

#### **D. What is divorce mediation? And what are the financial consequences of choosing mediation services for a divorce?**

In May 2005, Utah legislation required that all family-related court cases that are contested go through mediation.<sup>302</sup> Mediation is legally defined as “a private forum in which one or more impartial persons facilitate communication between parties to a civil action to promote a mutually acceptable resolution or settlement.”<sup>303</sup> So, mediation is a process where a neutral person goes through all of the legal issues of the divorce with the divorcing spouses. This neutral person is called a mediator. The mediator is not a decision maker but will try to help the spouses negotiate the terms of their divorce. This includes dividing financial assets and debts, parenting time and custody, alimony, and child support. The mediator can help the divorcing spouses, if they are willing, to settle every issue in the divorce. The mediator will draft a “Memorandum of Understanding” detailing all of the agreements between the two divorcing spouses. This memorandum can be filed with the court and used to enforce agreements.<sup>304</sup> However, divorcing spouses must still file all of their legal paperwork to finalize the divorce.

A mediator can be an attorney, a counselor, or another person specifically trained in mediation and approved on the court roster.<sup>305</sup> If mediators are attorneys, they will not be acting in their role as attorneys and will not give legal advice to either of the divorcing spouses. However, mediators are skilled in divorce law and this knowledge can be helpful to the process. A listing of court-approved mediators can be found at [www.utcourts.gov/mediation](http://www.utcourts.gov/mediation). Those mediators who have MM (Master Mediator) next to their name are very experienced mediators; they have at least 300 hours of mediation experience. The

designation of DM is for a Domestic Mentor, which is a mediator who has at least 300 hours of mediating issues specifically related to families. Finally, the designation of DV (Domestic Violence) means the mediator has gone through specialized training in dealing with domestic violence.

Mediation for a divorce usually takes 2 to 7 hours and is done in several two-hour sessions. The more divorcing parents are able to agree upon, the faster the process will go. So it is a good idea to do a lot of thinking about the issues you will need to settle before you begin meeting with a mediator. You may benefit from doing exercise 8.3, “Preparing for Divorce Mediation,” at the end of this chapter.

Mediators who deal with family issues usually charge from \$100 to \$300 an hour. The cost of divorce mediation therefore generally ranges from about \$200 to \$2,000 dollars. Traditionally, this cost is divided evenly between the divorcing spouses. Using mediation forums, which require co-mediation, is usually not cost effective because you are paying for two mediators instead of just one. Often people have attorneys and use them for legal counsel during mediation. Some people choose to bring their attorneys to mediation sessions, while others choose to conference by telephone with their attorneys at the end of the mediation before making a formal agreement. Other times, divorcing spouses choose to mediate before officially hiring an attorney. Mediators who are also attorneys—Attorney-Mediators—can also draft the legal documentation.<sup>306</sup> The divorcing parents’ attorneys also can draft the legal documentation or the parents can use the OCAP system (described above in section B).

Mediators can save you time and money; be prepared with the issues you will need to settle beforehand.

Compared to litigation in divorce proceedings, mediation appears to have several benefits. An important study found that mediation helps to decrease conflict between parents after divorce, increase some aspects of positive co-parenting after divorce, and improve satisfaction with how the divorce was handled.<sup>307</sup> Other studies suggest that, compared to litigation, mediation is better at helping divorcing parents work through their anger, accept the loss of divorce, and attain some realistic hope regarding future relationships.<sup>308</sup> One very affluent couple we know used the divorce mediation process to divide up extensive property, develop a parenting plan, and decide on alimony and child support. The full range of issues was resolved in mediation so they could file uncontested paperwork through the courts. Although they had difficult circumstances with the husband having a “girlfriend” waiting for the divorce process to finish, the mediation process helped to open up the communication lines for the couple to be effective in co-parenting their three children. Both spouses were able to feel that their many financial assets were fairly distributed and each was able to give input to one another about their needs and wants. The opportunity to be heard by the other spouse was especially needed in this case for the spouse who was still coping with the idea of being divorced. Because divorce mediation focuses on the future co-parenting relationship, they were able to see

hope in their future as parents, since they would be tied together for the rest of their lives through the children. They were very satisfied with the mediation process because of the reduced time and cost, as well as the voice they had in making decisions.

You may benefit from a public website offering a wealth of information to residents of Utah on divorce, mediation, custody evaluation, and other related topics: [utahcustody.com](http://utahcustody.com).

## **E. What is collaborative law? How does it work in a divorce?**

Collaborative law is where two attorneys are hired who are designated as “collaborative lawyers.” Collaborative law is defined as “a legal process where the attorneys for the parties in a family dispute agree to assist them in resolving the conflict by using cooperative strategies rather than adversarial techniques and litigation. Early, non-adversarial participation by the attorneys allows them to use practices of good lawyering not often used in the usual adversarial proceedings, such as use of analysis and reasoning to solve problems, generation of options and creation of a positive context for settlement.”<sup>309</sup> These collaborative lawyers have the divorcing spouses sign an agreement where they indicate they understand the attorneys are hired in order to come to an agreement outside of court or formal litigation. The attorneys work together with the divorcing spouses to try and come to a full agreement through negotiations.

Collaborative attorneys can be found through CFLU (Collaborative Family Lawyers of Utah) located at [www.cflutah.org](http://www.cflutah.org). The benefits of Collaborative Lawyering, as defined by CFLU, are as follows: “This process is generally less costly than litigation. You are a vital part of the settlement team (consisting of both parties and both attorneys). You are each supported by your lawyers and yet you work cooperatively with your spouse and his/her lawyer in resolving your issues. The process is much less fear and anxiety

Collaborative lawyering is generally less costly, and much less fear and anxiety producing.

producing than utilizing Court proceedings or the threat of such proceedings. Everyone can focus on settlement without the imminent threat of ‘going to Court.’ The possibility exists that the participants can create a climate that facilitates ‘win-win’ settlements. The proceeding is much less time consuming. It can be finalized within a short time following the parties reaching agreement, rather than getting bogged down for many months

waiting for a court date. You control the proceedings—your destiny is in your hands rather than in the hands of a third party (the courts).”<sup>310</sup>

If the divorcing parents cannot agree on every issue, they will hire two new attorneys to go through the litigation process. This is rarely needed, however, as a well-known statistic shows that 96% of collaborative law cases settle outside of court.<sup>311</sup>



Not much research on collaborative law has been done yet. But one early investigation of divorcing parents who used collaborative law suggested that it may produce higher satisfaction with negotiations, more cooperation in negotiating, more creative solutions that meet family needs, and better communication between divorcing parents.<sup>312</sup> A prominent collaborative attorney in the State of Utah, Brian Florence, says that, “When lawyers and parties commit to the collaborative process, by implication and to some extent, by specific terms in the signed Collaborative Participation Agreement, they understand and embrace these process concepts.”

According to Florence, “using all of these concepts, it has been my experience that, compared to court ordered outcomes, the result in a collaborative divorce is more unique and personally tailored to the divorcing couple and their family. It will generally be more enduring and when modifications might be necessary the parties have experienced a process that they can hopefully repeat in crafting changes without having to resort to court processes.”

## **F. What if I don't want the divorce? Can I challenge a divorce in court?**

Although it takes two people to agree to marry, it only takes one person to divorce. Historically, the law required a major reason for divorce, such as insanity or adultery, but now the law only requires one person to assert that there are “irreconcilable differences” in the marriage.<sup>313</sup> Once one spouse has filed for a divorce, it is futile for the other spouse to challenge the divorce in court. In this situation, the only option is for the spouse who wants to save the marriage to seek help to reconcile the marriage before divorcing, such as marriage counseling.

However, there is a provision in Utah law that allows you to stop a filing of a divorce for 60 days while you work with counselors. But this “Petition of Conciliation” must be filed before your spouse files for divorce; it doesn't work after a divorce has been filed. In our experience, many attorneys do not know about the provision in the law regarding the Petition of Conciliation. Some attorneys know about the law but rarely use it and feel that it doesn't work well to require another person to go to counseling. A few attorneys think the Petition is very helpful to allow parties to reconcile or to give time for them to decide what should happen in the divorce so they could have an uncontested divorce. If you want to make use of this law, however, you may need to provide an attorney the details in this endnote.<sup>314</sup>

Once the divorce is final, a person can make modifications only because of a “substantial change in circumstances.”<sup>315</sup> Custody and parenting time can be modified through this substantial change in circumstances.<sup>316</sup> Assets and debts are rarely changed, but it is possible if a substantial change in circumstances is present.<sup>317</sup> A rule of thumb for child support changes is that a parent must have a 25% change (increase or decrease) in income. For alimony changes, the court requires a substantial change “not foreseeable at the time of divorce.”<sup>318</sup> Also, a person may feel that the court order is not in compliance with the actual law. In this case, the court order can be challenged through appeal within



a specified amount of time after the divorce is final. Of course, these legal processes can be very costly. When a modification is needed, it is usually a good idea for people to try to use mediation before litigating them with an attorney in court. Child support obligations cannot be avoided through bankruptcy.

## Exercises for Chapter 8

### 8.1: Thinking About Parenting Time with Children.

One of the most important issues to settle in a divorce, if there are children involved, is how the children will allocate their time with each parent. It's important that parents try to decide this with the best interests of their children in mind rather than just consider their own wishes. Below, think about a possible responsibility and time-sharing plan that you feel would be in the best interests of your children and, as much as possible, fair to both parents. First think about who will have custody of the children. Then, consider time-sharing during the school year and time-sharing when children are out of school, such as the summer months. Then think about time-sharing on special occasions, such as birthdays and holidays.

**A. CUSTODY.** In the best interests of your children, who will have custody of the children or will you share custody of the children? Why is the best situation for your children? Write down your thoughts here:

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**B. TIME SHARING CALENDAR—SCHOOL YEAR.** On the calendar below, map out a possible time-sharing schedule for your children for those times of the year when they are in school.

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

**C. TIME SHARING CALENDAR—SUMMER.** On the calendar below, map out a possible time-sharing schedule for your children for those times of the year when they are not in school.

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

**D. TIME-SHARING ON SPECIAL OCCASIONS.** Sometimes it can be difficult to decide who will have the children on special occasions, such as birthdays and holidays. Below, make a list of possible special days and indicate how time with children will be shared or allocated on these occasions. Think of the best interests of your children.

Special Occasion (e.g., birthdays, holidays):	How could time with children be shared or allocated?
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Special Occasion (e.g., birthdays, holidays):	How could time with children be shared or allocated?
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## 8.2: Thinking About Child Support and Alimony.

**A. CHILD SUPPORT.** How much money would you receive in child support? Go to the Internet site <http://www.utcourts.gov/childsupport/calculator>. Calculate support twice, once for Sole Custody and another calculation for Joint Custody with the hypothetical amount of 115 nights. (It is easiest to just fill in line 1 with the number of children you have and then line 2a with your income and your spouse’s income. Then, for line 7, the joint calculator, only choose 115 nights for the appropriate parent.) Then press calculate. If your case is more complex, you can access the directions online as well.

Remember, child support is taxed to the person paying the support. Often the amount of child support awarded by the court is not the same as the amount expected and received.

Would you have enough to provide for yourself and your family? How would you supplement your income, if needed? What does this mean for your children as far as ample visitation? Write down your thoughts here:

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**B. ALIMONY.** Alimony is rarely given in marriages of short duration and rarely goes for longer than the length of the marriage.<sup>319</sup> Alimony is taxed to the person who is receiving the support and is cannot be set aside in bankruptcy.<sup>320</sup> Men or women can pay alimony depending on which spouse is the higher wage earner and how much discrepancy there is in their incomes.<sup>321</sup> There is no set formula for alimony. Some people choose to go back to school after getting divorced. For financial aid for “displaced homemakers” (those who have devoted themselves to full-time homemaking rather than employment outside the home), contact the Utah Department of Workforce Services.

Review your answers on Exercise 7.1 F (BUDGET) or do the exercise now. After reviewing your budget, add together the expected amount of monthly income and the estimated child support paid or received. Is there a deficit? If so, how much? How will you make modifications in your budget to meet your finances? How do you feel about paying or receiving alimony? What would be a reasonable time frame? Write down your thoughts here:

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## 8.3: Preparing for Divorce Mediation.

The more thinking you do ahead of time about the issues you will need to settle in divorce mediation, the smoother things will go, the less time it will take, and the less it will cost. So, to help with this, answer the questions below as best you can.

<p><b>Problem Definition:</b> What are main items for mediation from your perspective?</p> <ol style="list-style-type: none"> <li>1.</li> <li>2.</li> <li>3.</li> <li>4.</li> <li>5.</li> </ol> <p>What are your goals for mediation?</p> <ol style="list-style-type: none"> <li>1.</li> <li>2.</li> <li>3.</li> </ol>	<p>How do you think the other person is defining the items for mediation?</p> <ol style="list-style-type: none"> <li>1.</li> <li>2.</li> <li>3.</li> <li>4.</li> <li>5.</li> </ol> <p>What are your goals for your children?</p> <ol style="list-style-type: none"> <li>1.</li> <li>2.</li> <li>3.</li> </ol>
<p><b>Option 1: Status Quo Continues</b> What options are you considering if there are no changes in current temporary arrangement?</p> <ol style="list-style-type: none"> <li>1.</li> <li>2.</li> <li>3.</li> <li>4.</li> <li>5.</li> </ol>	<p>What options do you think the other side is considering if there are no changes in temporary arrangement?</p> <ol style="list-style-type: none"> <li>1.</li> <li>2.</li> <li>3.</li> <li>4.</li> <li>5.</li> </ol>
<p><b>Option 2: Listing Non-Negotiables: An item about which you are not willing to make any concessions.</b> What is non-negotiable for you?</p>	<p>What do you think is non-negotiable for the other side?</p>
<p><b>Option 3: Creating New Options</b> What options would make you satisfied?</p> <ol style="list-style-type: none"> <li>1.</li> <li>2.</li> <li>3.</li> <li>4.</li> <li>5.</li> </ol>	<p>What options do you think would make the other party satisfied?</p> <ol style="list-style-type: none"> <li>1.</li> <li>2.</li> <li>3.</li> <li>4.</li> <li>5.</li> </ol>

<p>Option 4: Commitment to Process          What are you willing to offer and make a commitment to?</p>	<p>How would you like to communicate with the other person if a future problem arises?</p>
<p>Option 5: Learning from the past.          If you could go back in time what would you do differently?           Why?</p>	<p>Are you willing to learn from the past problem and move forward?           Are you willing to move forward with a cooperative “co-parenting” relationship?</p>