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A GUIDE TO THE LAW IN ALBERTA REGARDING



DIVORCE

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GENERAL

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VOCABULARY

Access - A spouse with “access” has the right to visit the children of the marriage, who are currently living with the other spouse. Access and Visitation mean the same thing.

Certificate of Divorce - This is the final document in a divorce action. This document proves that the divorce has been finalized, and will be required if either spouse wishes to re-marry.

Common Law Marriage - A common-law relationship exists when two people live together as husband and wife but are not legally married. A “common-law” marriage will never become a true marriage unless the couple actually gets married.

Contested vs. Uncontested Divorce - An *uncontested* divorce means that both spouses agree on everything dealing with the divorce. This includes agreements on:

- a. The fact that they both want a divorce.
- b. How the property is to be divided.
- c. Who will have custody of the children.
- d. When and how the spouse who doesn’t have custody of the children will be able to see them (this is referred to as “access” to the children).
- e. How much money the spouse who doesn’t have custody of the children will pay in child maintenance.
- f. How much money will be paid as spousal maintenance.

If the spouses cannot reach an agreement on any of these things the divorce is called a *contested divorce*. A contested divorce will take much longer to get because the a court application or trial may be required to settle the matters the spouses do not agree upon.

Custody - The spouse who has an order from the court that he or she can keep the children has “custody” of the children.

Divorce Judgment - An order of the court which ends a marriage between a couple.

Legal Separation - This means the spouses are not living together with the intention not to live together. A couple is “legally separated” simply by living apart in this way. There is no formal process or legal document needed for you to be considered legally separated.

Maintenance - This refers to payments made from one spouse to the other to support any children or that spouse.

Plaintiff vs. Defendant - The spouse who starts the divorce action is known as the Plaintiff, the other spouse is the Defendant.

Separation - This means the spouses are not living together, with at least one of them having the intention to be separated.

Spouse - This is the person you are married to.

Visitation - A spouse with “visitation” rights has the right to visit the children in a specified way at a specified time. Visitation and access mean the same thing.

SHOULD I GET A DIVORCE?

A divorce is a serious matter. It ends a marriage and leaves each person free to re-marry. Divorce is something to be thought over carefully, perhaps with the help of a professional counsellor.

If you and your spouse decide to separate, there is no need to start a divorce right away. Some time apart may give the two of you a chance to work out some of your problems. If you need money to help support yourself and/or your children while separated, you can apply to Family Court to get an order from a Judge to force your spouse to help you out. Family Court Services can help you do this. Family Court will also handle disputes over

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who gets the children during the separation and when and how often the other spouse may see the children. Family Court Services can also help you do this in Family Court.

CAN I GET A DIVORCE?

The Divorce Act covers most areas of divorce law: the grounds for divorce, bars to divorce action (reasons why people cannot get a divorce), maintenance and support, custody and access, jurisdiction, recognition of foreign decrees, reconciliation and mediation, and the decrees and procedures themselves.

The Divorce Act says there is only one ground for divorce: Marriage Breakdown. There are 3 ways in which marriage breakdown can happen.

1. Separation

This is the simplest way to get a divorce. The spouses must have lived separate and apart for at least one year prior to the Divorce Judgment. The divorce action may be started before the one year period has ended, but the spouses must still wait the full year before the judgment will be granted.

Under certain circumstances, it is possible to live separate and apart even though both spouses live under the same roof. This is possible if the spouses sleep in separate bedrooms, there is little or no communication between the spouses; there are no sexual relations; the parties do not perform domestic services (i.e. cooking or cleaning) for each other in the absence of a contract for those services; meals are eaten separately; and the spouses do not share any social or recreational activities. Every situation is different, and this list is not exhaustive.

2. Adultery

If the husband or wife had sexual intercourse with someone else of the **opposite** sex during the marriage, the law defines this as adultery. Only the spouse who did not commit adultery can file for

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divorce; a spouse cannot use his or her own adultery as grounds for a divorce. Adultery must be proven to the judge, and to do this the spouse who committed adultery must admit to his or her act in the form of a sworn statement called an affidavit. If he or she refuses, in rare cases substantial evidence and the testimony of witnesses may be used to prove adultery to the court. However, the Alberta Evidence Act limits the availability of evidence of adultery.

If you are using adultery as the reason you are getting a divorce, you do not have to wait a year before starting or completing the divorce proceedings.

3. Cruelty

A divorce will be granted if there is cruelty of either a physical or mental nature. Cruelty needs to only happen once before a spouse may ask a judge for a divorce. However, the other spouse's cruelty must be so severe that it makes living together unbearable. Examples of mental cruelty include a spouse consistently coming home drunk, constant verbal abuse, and excessive drug abuse. Only the spouse complaining of the cruelty can file for divorce. Like adultery, cruelty must be proven. This is most easily done by the spouse complaining of cruelty swearing an affidavit that his or her spouse was cruel.

If you are using cruelty as the reason you are getting a divorce, you do not have to wait a year before starting or completing the divorce proceedings. It is recommended that you consult with a lawyer before starting divorce proceedings on the grounds of either cruelty or adultery.

REASONS WHY A JUDGE MAY NOT LET YOU GET A DIVORCE

There are several situations where a Judge may not let you get a divorce:

1. Collusion

Collusion is defined as an agreement between spouses to invent evidence or to deceive the Court in order to make a divorce possible or easier to get. Collusion is an absolute bar to a divorce, which means that spouses who are guilty of collusion will not be allowed to divorce. An example of collusion would be two spouses agreeing to state that they have been separated for one year when in fact they have only been separated for one month.

2. Connivance

Connivance is defined as a situation where one spouse agrees to or encourages the actions of the other spouse that would result in a “marriage breakdown”. An example of connivance would be one spouse encouraging the other to have an affair and then seeking a divorce on the basis of adultery.

If spouses are guilty of connivance, it is at the Judge’s discretion whether or not to grant the divorce, based on all of the facts.

3. Condonation

Generally, if one spouse forgives the other spouse’s matrimonial offence (adultery or cruelty), that adultery or cruelty cannot be used as a basis for divorce. If past behaviour of adultery or cruelty has been allowed and the spouse still wants a divorce, he or she may have to wait for a one year separation period to end.

As with connivance, if the court finds that there has been condonation, the Judge has discretion whether or not to grant the divorce.

4. Outstanding Issues Regarding

a. Children

If you and your spouse have children, the Judge must be satisfied that reasonable arrangements have been made to take care of or support the children financially. What is reasonable will depend on each couple’s circumstances, but

the Judge will decide if the arrangements that have been made are fair.

b. Property

The Judge must be satisfied that all matrimonial property has been divided between the spouses, either through an agreement or a court order. If the property was divided by an agreement between the spouses, each spouse must have had independent legal advice before entering into that agreement.

If the Judge finds that there are not reasonable arrangements for the children or that the property has not been properly divided, the Judge will not actually *disallow* the divorce (as is the case for collusion, connivance or condonation). The Judge will simply not grant the divorce until these arrangements are made.

RECONCILIATION

When a lawyer is retained to begin the divorce action, that lawyer is under a duty to discuss with the spouses the possibility of reconciliation. Under the Divorce Act, it is also the duty of the lawyer to advise the spouses of any available reconciliation and mediation services in the community.

A spouse who is seeking a divorce based on a one year separation may reconcile with his or her spouse for a period or periods of no longer than ninety days. If there is a reconciliation between spouses that is longer than ninety days, the one year separation period will be interrupted and the spouses will no longer have grounds for divorce. If this occurs, spouses will have to wait another twelve months from the date of the last separation before applying for a divorce.

HOW CAN I GET A DIVORCE? - YOUR OPTIONS

1. Do-It-Yourself

Only the most straightforward divorces should be done without professional legal assistance. This usually means the divorce is “uncontested”. An “uncontested divorce” means that the couple has agreed on everything to do with their divorce. In particular, they have reached agreements on:

- a. The fact that they both want a divorce.
- b. How the property is to be divided.
- c. Who will have custody of the children.
- d. When and how the spouse who doesn't have custody of the children will be able to see them.
- e. How much money the spouse who doesn't have custody of the children will pay in child maintenance.
- f. How much money will be paid as spousal maintenance.

(PLEASE NOTE: It is also **very** important that you know exactly where your spouse is living so that you can have them served with your divorce papers.)

If you decide to do your own divorce, there are several booklets and kits available in bookstores.

OR

For those who qualify, Student Legal Services of Edmonton offers a clinic that provides instruction on how to do your own divorce. For more information call the Family Law office at [780] 492-8244.

A do-it-yourself divorce usually costs between \$250 and \$350 in Court and process server costs, plus the cost of the kit or forms you need.

2. Hiring a Lawyer

If a lawyer handles your divorce, the cost will likely be at least \$1000. This cost estimate is for an uncontested divorce; a contested divorce will require a great deal more of the lawyer's time and will undoubtedly cost more.

The services and advice of a lawyer may save you thousands of dollars in the long run. Most lawyers base their fees on the amount of time they spend on your case. You should talk to your lawyer about his or her fees during your first interview so that you know what to expect. You can help your lawyer and save yourself money by preparing a written list of questions that you want answered before your appointment.

As part of your divorce case, you may ask the Judge to order that your spouse pay you for some of the costs of the divorce. Your lawyer will discuss with you whether you should ask for this type of order in your particular circumstances.

You may wish to call the Lawyer Referral Service, and get the names of three divorce lawyers in your area who you can talk to, for free, for the first half hour.

If you need a divorce and cannot afford a lawyer, contact Legal Aid. All agencies mentioned in this pamphlet are listed in the back. To apply for Legal Aid you need go down to their office in person and pay a \$10.00 application fee (although this fee can be waived by the Legal aid intake worker in cases of financial hardship). You may be granted a lawyer if you are financially eligible, depending on the urgency of your situation.

CAN I GET A DIVORCE IN ALBERTA?

Under the Divorce Act, one spouse must be ordinarily resident in Alberta for one year immediately before the divorce action. To be “ordinarily resident” means that you are employed or are looking for a job, have set up a home, and have transferred any bank accounts you have to Alberta. If you do not meet this requirement for Alberta, you may start your divorce in any province where you meet these requirements.

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If you do not meet these requirements anywhere, you must wait until you have been “ordinarily resident” in Alberta for one year before a divorce action can be started.

STEPS IN A DIVORCE

A divorce is started with a document called a “Statement of Claim for Divorce”. In the divorce documents you will be the Plaintiff and your spouse will be the Defendant. Once the Statement of Claim is completed, signed and taken to the Courthouse to be put in a file which is opened by the Clerk of the Court, it must be “served” on the Defendant (your spouse). This means it must be delivered personally to the other spouse. NOTE: the Statement of Claim must be delivered by someone OTHER than the plaintiff. After service of the Statement of Claim, the Defendant has 15 days (40 days if out of province) to dispute the Statement of Claim. If he or she does not file a dispute (Statement of Defence), this means the divorce is uncontested. The Plaintiff may then file an Affidavit of Service, Praecipe to Note in Default, Request for Divorce, Affidavit of Applicant and a proposed Divorce Judgment with the Clerk of the Court.

The Clerk will then give the divorce file to a Judge to look at. If the Judge does not accept some of the evidence given or is unclear on anything, he or she may request that the Plaintiff (and the Defendant) go to court to present more evidence or answer any questions.

Once the Judge is satisfied with the documents and evidence presented, he or she will sign the Divorce Judgment, which will then be returned to the Clerk, who will mail one copy each to the Plaintiff and the Defendant at the addresses given in the Request for Divorce.

Under the Divorce Act, a Judge in the Court of Queen’s Bench can make corollary relief orders when the divorce judgment is made. This means that a Judge can make orders dealing with

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maintenance, child support, child custody and access at the same time as he or she grants the spouses their divorce. The Judge has the power to order that money be paid by either spouse for the support of the other spouse and/or the children.

Corollary relief orders under the Divorce Act may be made while the spouses are waiting for their divorce or they may be made at the time when the divorce judgment is handed down. Corollary relief orders can be made for a limited time or they can be made into a final order.

Thirty-one days after the Divorce Judgment has been signed, the Plaintiff can make a request for a Certificate of Divorce, which is the final document of the divorce action.

Other steps may be needed if the Defendant resides outside of Canada, if the Defendant cannot be located, or if the Plaintiff is asking for maintenance or costs. There may be many more steps in a contested divorce.

DOES IT MATTER WHERE I WAS MARRIED?

You may get divorced in Alberta no matter where you were married. If you were married outside of Canada, the Court will need some proof that the marriage was valid according to the law of that place; for example, a marriage certificate issued by the government of that place.

WHAT IF I CANNOT FIND MY SPOUSE?

If you or your lawyer have made all reasonable efforts to locate your spouse without success, a Judge will usually give permission to serve the Statement of Claim for Divorce by advertising in the newspaper, or service on a relative, or some other means. However, you must obtain the Judge’s permission first before doing any sort of substitutional service.

HOW LONG WILL IT TAKE?

The length of time from start to finish of a divorce action depends upon how quickly you (or your lawyer) finish the paperwork, how easy it is to locate and serve the documents on your spouse, and how many complications there are in the case. An uncontested divorce will generally take between 3-5 months. A contested divorce could take as long as a few years.

THE PARENTING AFTER SEPARATION SEMINAR

If you and your spouse have children and the Parenting After Separation Seminar or the Parenting After Separation video tape is offered in the area where you live, you will be required to attend the seminar or watch the video tape before making any application to the court or applying for a Divorce Judgment. Call to register for this free seminar, which will hopefully give you and your spouse a new perspective on the divorce process and the impact it may have upon your child.

THE WAITING PERIOD

Several things might happen during the thirty-one day waiting period before a spouse can apply for the Certificate of Divorce.

1. The spouses might reconcile. If so they should apply at court to set aside the Divorce Judgment. They would then once again be considered married to each other.
2. One spouse might appeal the Divorce Judgment. If so, no Certificate of Divorce could be issued until the appeal was over.

NOTE: No appeal can be started after the Certificate of Divorce has been issued.

3. An application might be made by anyone to set aside the Divorce Judgment because it was obtained as a result of fraud

or collusion. This application would have to be finished before a Certificate of Divorce could be issued.

The thirty-one day waiting period may be waived if there are special circumstances that make it in the public interest to grant the divorce earlier. An example of special circumstances would be one spouse wanting to remarry within a short period of time due to the impending birth of a child.

Normally, none of these occur, and the Certificate of Divorce is granted 31 days after the Divorce Judgment, on application to the Clerk of the Court.

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REFERRAL NUMBERS

- Child Support Services [780] 415-6400
- Family Violence Prevention Centre [780] 423-1635
- Family Violence Info Line [780] 310-1818
- Lawyer Referral Service 1-800-661-1095
www.lawsocietyalberta.com/publicservices/lawyerreferralservice.cfm
- Legal Aid Society of Alberta [780] 427-7575
. www.legalaid.ab.ca
- Maintenance Enforcement Program [780] 422-5555
. www.justice.gov.ab.ca/mep
- Parenting After Separation Seminar [780] 413-9805
. www.albertacourts.ab.ca/go.aspx?tabid=547
- Queen's Bench Divorce Clerks [780] 422-2425

Marriage Counselling

- Catholic Social Services [780] 432-1137
. or 424-3545 or 471-1122
. www.catholicsocialservices.ab.ca
- Alberta Family Mediation Society 1-877-233-0143
. www.jfsc.org
- Canadian Mental Health Association [780] 414-6300
- Community Counselling Centre [780] 482-3711
. www.pastcoun.com