We all know that divorces happen far too often. For each new client I meet, I always explore with them the possibility of trying to save their marriage. In a few situations, I am happy to say that my clients were able to work out their differences and create a stable marriage. However, staying together is not always an option, particularly in cases where one spouse is abusive or unfaithful.

Nothing in life prepares us for a divorce. For most people, the thought of getting a divorce is highly emotional and, in a word, scary. Everything appears to be at stake and, all at once, unstable - your finances, your relationship with your children, and the future of your family. Your head may be swirling with so many concerns at once. You may be looking for answers to set your mind at ease and to help you understand what you are facing in your divorce. That’s why I’ve put together this book to help guide you through the process of a divorce in South Carolina and to explore some other important issues that typically arise in family court. It’s my sincere hope that after you’ve read it, many of your concerns will be laid to rest and many of your questions will be answered.

Best wishes,

Stephan Futeral, Esq.
About the Author

Stephan Futeral has been a family law attorney since 1993. He was a judicial clerk for the Honorable C. Tolbert Goolsby, Jr., Judge of the South Carolina Court of Appeals, and he has been a law professor at the Charleston School of Law. He serves as a Guardian Ad Litem for children in family court and he is a certified family court mediator. He practices law in Charleston, South Carolina with the law firm of Futeral & Nelson, LLC.

For more information on Stephan Futeral’s professional background, please tap here.

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“Divorce is a declaration of independence with only two signers.”
~ Gerald F. Lieberman

Family court is the last place anyone wants to visit. The laws can be confusing and intimidating. To make the right choices in your divorce, you need an understanding of the law. In this chapter, we’ll cover all the basic legal issues involved in a divorce so you can begin to take the right steps in your divorce.
There are five (5) grounds for divorce in South Carolina - adultery, habitual drunkenness or narcotics abuse, physical cruelty, and desertion for one year are “fault” grounds for divorce. The fifth ground, one year’s continuous separation, is considered a “no-fault” ground for divorce.

1. FAULT GROUNDS FOR DIVORCE

These grounds are based on the fault of one or more of the parties. If there is a determination of fault, that can impact whether one spouse pays for the other spouse’s attorneys fees and can also be a factor in deciding how much alimony should be paid and how to divide the parties’ assets.

Adultery

To establish adultery, you don’t need to prove it actually happened. Instead, you can prove adultery by showing “inclination and opportunity.” Inclination is established when you can show that a spouse had a romantic interest outside of the marriage. For example, if the spouse joined online dating sites or sent romantic texts and emails to another person, that is “inclination.” Opportunity is established when you can demonstrate that the spouse had a chance to act upon their inclination. For example, if a husband spends the night in a hotel room with a woman other than his wife, that is opportunity.
Habitual drunkenness or narcotics abuse

To prove this ground, you must show that your spouse’s habitual abuse (not on a single occasion or rare occasions) of alcohol or narcotic drugs caused the marriage’s breakdown and that the abuse existed at or near the time of filing for divorce. There are many ways to prove that the abuse caused the marriage’s breakdown. For example, your spouse may have lost their job due to drinking or drugs or your spouse may be spending the family’s money on drugs or alcohol.

Physical cruelty

Physical cruelty are acts of physical violence (hitting with a baseball bat) or circumstances where a spouse’s conduct created a substantial risk of death or serious bodily harm (swinging a baseball bat but missing). Recently, the South Carolina Court of Appeals decided that a wife was entitled to a divorce on the grounds of physical cruelty based on a single assault by her husband when he shoved her into a wall, verbally abused her, and then broke her telephone when she tried to call for help which left the wife fearful for her safety. The Court also noted that the wife had testified to other threatening events that ended in the assault all of which indicated that the husband had intent to seriously harm his wife.

In South Carolina, the spouse alleging physical abuse must prove his or her case by a “preponderance of the evidence,” which is evidence that convinces the court of its truth. The family court judge will make the ultimate determination, and your divorce lawyer will be able to review the facts of your case and what evidence you have and to help you decide if you have enough to evidence to prove your case.

Under South Carolina law, to be a ground for divorce, the physical cruelty must be “actual personal violence, or such a course of physical treatment as endangers life, limb or health, and renders cohabitation unsafe.” A single incident of assault can be sufficient physical cruelty. Also, actual physical contact or bodily injury isn’t required to seek a divorce for physical cruelty if the act was (1) life threatening, (2) indicative of an intention to do serious bodily harm, or (3) of such a degree that there appears to be a risk of serious bodily harm in the future. The family court will consider whether the abuse was provoked by the victim, but even if provoked, it will consider whether the abuse was proportionate to the provocation. For example, in one South Carolina case, the court denied a divorce on the ground of physical cruelty. The court found that “the altercation leading to the parties’ estrangement was the only incident of alleged physical cruelty” and that the spouse who alleged abuse “may have been the aggressor in another incident.”

Evidence of physical cruelty can come in many forms. Of course, the abused spouse may testify about the other spouse’s actions. Others may have witnessed the event(s). Witnesses who didn’t actually see the event might still be able to testify that the alleged victim was distraught or frantic just moments after the alleged incident or might testify that they saw fresh injuries. These witnesses are used to corroborate the
testimony of the victim. Sometimes, photographs of injuries may be introduced into evidence. It is possible that the 911 recording of the call to the police is introduced, although we have seen these calls actually disprove the claims as well. For example, if a spouse calls 911 and says that he or she was just attacked seconds ago, but the person is calm and collected, it can hurt that person’s credibility. Evidence can come in many shapes and forms, and if you are seeking to prove physical cruelty, use your common sense and give your lawyer ideas to help find valuable evidence in your particular case.

If the alleged abuser is criminally charged with criminal domestic violence (CDV) or assault, sometimes the person will be convicted of the charge or plead guilty. In either event, that person won’t be able to take a different position in family court and claim that the abuse never occurred.

Other than being a ground for divorce, physical cruelty can have drastic effects on a divorce case. If custody is involved, the abuser is unlikely to get custody and their visitation may be severely restricted or they may have none. Also, physical abuse is a factor for the court to consider when awarding alimony or when dividing the marital property. For example, in one South Carolina case, the family court awarded permanent alimony on a marriage that was barely over one year long where one spouse was abusive on repeated occasions. Also, at a temporary hearing, the non-abusive spouse might have a better chance of getting possession of the home while the case is pending.

Desertion for one year

This is not a ground that we see in family court. Instead, we usually see spouses assert one year’s continuous separation.

You can seek a divorce on fault grounds even though you aren’t yet separated from your spouse. If the divorce is based on fault, the family court can’t conduct a hearing until sixty (60) days after filing for a divorce and it can’t grant the divorce until ninety (90) days after filing for the divorce.

2. NO-FAULT GROUND FOR DIVORCE

One year’s continuous separation

To obtain a divorce on the ground of one year’s separation, the year starts to run the moment the parties separate. Proof requires testimony by the spouse asking for the divorce establishing that the parties haven’t cohabited (lived together in the same house) for more than one year and an independent witness who testifies to the same thing.

3. DEFENSES TO FAULT

Condonation

Condonation is when a spouse remains in the marriage even though they are aware that the other spouse committed adultery, abused drugs or alcohol, or is physical abusive. If you condone the act(s), then you may not be entitled to a divorce on fault grounds. However, if the forgiven spouse
returns to their bad behaviors in the future, those events can create a new claim for divorce on fault grounds.

Condonation requires proof of “forgiveness, express or implied, by one spouse for a breach of marital duty by the other” and reconciliation. In most cases, reconciliation can be proved by showing the normal cohabitation of the husband and wife in the family home. If the injured party has full knowledge of the misconduct such as adultery, and the couple resumes or continues living together for “any considerable period of time,” then this act of living together conclusively shows an intention to forgive or condone the marital misconduct. However, even if the parties continue to live together, a lack of sex is a pertinent factor in determining the existence of condonation. For example, in one case the court did not find proof of reconciliation where the husband continued to stay in the home on the advice of his lawyer but the couple didn't have sex with each other.

South Carolina law doesn’t specify exactly what a “considerable period of time” is for purposes of condonation. However, several South Carolina cases give some guidance. For example, continuing to live together for five (5) months is proof of condonation according to two family law cases in South Carolina:

1. In one case the wife continued living with her husband for approximately five months before the couple separated. Our supreme court noted that although the relationship between the couple appeared to have been strained during that time, the evidence of five months' continued cohabitation convinced the court that the wife condoned the husband's misconduct.

2. In another case, the court found that the husband condoned the wife's adultery when the couple continued to live together and voluntarily engage in sexual relations for approximately five months.

Two nights of staying together wouldn't likely be evidence of condonation. In that case, the evidence was insufficient to prove the husband condoned the wife's adultery by spending two nights in the home after the wife confessed her adultery when they did not sleep together and there was no agreement to reconcile.

In a recent case, despite continuing to maintain separate bedrooms after the wife admitted adultery, a couple went to marriage counseling twice, they engaged in sex at least once a month for 10 months, and they lived together for 14 months after her admission. Although the family court judge found that there was insufficient evidence of condonation, our appellate court disagreed and found that there was enough evidence to show that the husband forgave the wife for her adultery.

**Recrimination**

Recrimination is where the other party also has engaged in marital misconduct (adultery, etc.) that would be fault-based grounds for a divorce. If both spouses are at fault, then neither can get a divorce based upon fault.
4. ANNULMENT

The vast majority of marriages end in divorce as opposed to annulment. Annulment isn’t technically a ground for divorce. Many people seeking annulment do so because they had “cold feet” shortly after the marriage and do not want to go through the divorce process. Interestingly, annulment comes up in other contexts. For example, if a marriage is annulled, neither party can seek alimony. In rare instances, the family court can grant an annulment if the marriage was not "consummated" and if there was no valid marriage contract.

Consummated Marriage

First, the marriage cannot have been “consummated.” Many people believe that consummation means having sexual intercourse. However, in South Carolina, the leading case on annulment implies that consummation is made by the parties "cohabiting" or living together. So, after the wedding ceremony, if the couple begins staying under the same roof, even for one night, it is possible that a family court judge would decide that they have cohabited and will not grant an annulment. There is no hard rule on this issue, and even if the spouses stayed together for a short time, it is possible under the facts of the case that a court may find that they did not live together.

Valid Marriage Contract

If a court determines that there was no consummation, the court must then determine whether a valid marriage contract was made. There are several ways to show that one or both parties did not consent to the contract. One example is where a spouse committed fraud and misled the other person as to an important fact to trick that person into marrying him or her. However, the South Carolina Supreme Court has declared false representations regarding one’s character, social standing, or fortune are insufficient to annul a marriage. That same court left open the question of whether the concealment of sexual dysfunction qualifies as a ground for annulment.

Void Marriage

A separate consideration, different from divorce and annulment, is where a marriage is void from the beginning. For example, South Carolina does not recognize a marriage if either or both of the parties is already married. So, if a woman marries a man who separated from his previous wife ten years ago but never divorced, then the marriage is void. In other words, even though the woman and her believed-to-be husband filled out the marriage license and went through a ceremony, the marriage is not recognized by our state. Even though no court action is technically necessary in this context, some people decide to file an action and go before a family court judge to formally have the marriage declared void. Otherwise, the public record may be confusing. Marriages could also be considered void if one of the spouses is found to have been legally incompetent at the time of the marriage.
5. RECONCILIATION

You should be on your guard concerning any phony attempts at reconciliation (getting “back together”) by your spouse. Your spouse's attorney may have told your spouse that the quickest and most effective way to defeat your case would be to "court" you and thus get you back into the marital relationship, thus causing you to lose all your grounds, no matter how strong they may have been. This in no way should be taken to mean that you shouldn’t consider salvaging your marriage through reconciliation if it is bona fide. No one should ever push you into getting a divorce. You are the best judge what is good for you and your family. However, you need to decide if the attempt at reconciliation is phony or is a reasonable hope for change.
I’ve seen adultery have great effects on some cases and little effects on others. Regarding child custody, division of assets, alimony, and attorney’s fees, there are just too many factors in play to give a blanket rule on how adultery can affect any given case. The bottom line is that the safest route is to not expose yourself by committing adultery.

1. ADULTERY IS A BAR TO ALIMONY

If a spouse gets caught in adultery, that spouse is “barred” (permanently prevented) from receiving alimony from the other spouse. The only exceptions to this rule are (1) if the parties have already formally signed a written property or marital settlement agreement and (2) if the court has issued a permanent order of separate support and maintenance or approved a property or marital settlement agreement between the parties. So, if the parties are merely separated but planning to divorce, the spouse seeking alimony can bar him or herself from receiving alimony if he or she engages in a romantic relationship with another person. We regularly advise our clients to hold off on dating until we get the case resolved, and we caution them not to put themselves in a situation where an innocent “friendly” relationship could be construed the wrong way. Click here to learn how to prove adultery in South Carolina.
2. EFFECT ON THE EQUITABLE DIVISION OF MARITAL DEBTS AND ASSETS

One of the things that the family court must do in a divorce case is to divide the marital assets and debts. South Carolina law gives a list of factors for the judge to consider when making this division. One of the factors is the “marital misconduct or fault of either or both parties, whether or not used as a basis for a divorce as such, if the misconduct affects or has affected the economic circumstances of the parties, or contributed to the breakup of the marriage.” Adultery counts as “marital misconduct or fault.” So, a party guilty of adultery may have his or her share of the marital estate reduced because of the adultery. It’s important to remember that “marital misconduct or fault” is only one factor of many for the court to consider. In some cases, the adultery does not make a huge difference in the division of the marital estate. In others, it makes a huge difference. To see the complete list of factors for dividing marital property in South Carolina, click here. To learn the difference between marital and non-marital property, click here.

3. EFFECT ON THE CALCULATION OF ALIMONY

Like the division of assets, the family court must consider a list of factors when deciding how much alimony one party must pay to the other. Like the division of assets, one of the factors is “marital misconduct or fault,” and the court may increase the alimony amount if it feels doing so is fair and equitable because of the supporting party’s adultery.

4. EFFECT ON CHILD CUSTODY AND VISITATION

When deciding who should have custody of a child, the family court must do what it believes is in the child’s best interests. Just because a spouse commits adultery, it doesn’t necessarily mean that that parent shouldn’t have custody. However, when a family court judge has to make a close call between two good parents, it is possible that the judge uses one parent’s adultery as the tiebreaker. A parent’s morality is something to be considered, and while adultery is not a “major” factor in many cases, it is still a factor.

5. EFFECT ON ATTORNEY’S FEES

Family court judges have discretion to award attorney’s fees in divorce cases. To determine whether to award fees, the judge must consider (1) the parties’ ability to pay their own fee, (2) the beneficial results obtained by counsel, (3) the respective financial conditions of the parties, and (3) the effect of the fee on each party’s standard of living. If a court decides to award attorney’s fees, when deciding how much, the judge must consider (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) beneficial results obtained; and (6) the customary legal fees for similar services.
In a 2006 case, our Court of Appeals stated that “fault” isn’t something for the family courts to consider when awarding fees. However, if a party denies the adultery and forces the other spouse to go through the expense of proving it, a family court could order that the cheating spouse pay the fees and costs incurred in proving the adultery. We’ve regularly seen family court judges order a cheating spouse to pay the private investigator’s costs in obtaining evidence, even if it was done before the case was filed. Finally, even though “fault” is not considered, the cheating spouse’s adultery might always be in the back of the judge’s head when awarding fees or making any other decisions in the case.

6. SUING THE “LOVER” IN CIVIL COURT

South Carolina does not recognize claims for “alienation of affection” or “criminal conversation.” So, you can’t sue your spouse’s lover for breaking up the marriage. However, if the adultery occurred in a state that does still recognize these types of claims, it is possible one could sue their spouse’s lover in that state, obtain a judgment, and then enforce the judgment in South Carolina.

7. ADULTERY IS A CRIME IN SOUTH CAROLINA

Many people don’t realize that adultery is actually a crime in South Carolina, although the criminal definition is different from the family court definition. Criminal adultery is “the living together and carnal intercourse with each other without living together of a man and woman when either is lawfully married to some other person.” Technically, criminal adultery can lead to jail time of between 6 months and one year, although we don’t frequently see the police enforce this law. That doesn’t mean they couldn’t prosecute such a case if they wanted to.
In previous decades, the family court would place minor children of “tender years” with the mother and the only way for the father to obtain such custody was by proof of the mother's severe neglect or her unfitness (on the basis of morals or health) to care for the children. The general rule now is: what is in the best interest of the child? However, many judges still remember the old ways of favoring mothers.

In making a determination of child custody, the court may order that the child be appointed a neutral third party, known as a guardian ad litem, to investigate anything concerning the child such as the child’s home environment, medical and education records, investigation into each parent and their families, and so on. The guardian ad litem will meet with the child and each parent, the child's family members and teachers, and other witnesses. Additionally, the court, the guardian ad litem, or the parties may request that a licensed professional prepare a "custody evaluation" based, in large part, on the psychological profiles of the parents and their motivations for custody. Additionally, the guardian ad litem may request that court appoint an attorney to represent him or her in the trial of the case. Importantly, besides paying attorney fees, the parties may be required to split the cost of the guardian ad litem's fees and the fees of the guardian's attorney.

1. TYPES OF CUSTODY

In family law courts in Charleston and elsewhere in South Carolina, child custody is made up of two parts – legal custody
and physical custody. Legal custody is, essentially, the ability to make decisions for the minor child. Physical custody deals with where the child primarily lives. Custody itself, whether legal, physical, or both, can be either “sole” or “joint”:

**Sole (Full) Custody** - Where one parent is awarded the right to live with the children and make legal decisions on their behalf. The noncustodial parent has rights to visit with the child. "Sole custody" describes the most common form of custody. One parent (the custodial parent) is awarded sole custody of the child and the other parent (the noncustodial parent) has visitation with the child, typically on alternating weekends, portions of holidays, and a few weeks in the summer.

**Joint Custody** - Joint custody can refer to physical custody, to legal custody, or to both physical and legal custody. When parents have joint physical custody (otherwise known as shared custody), the children live with both parents for a portion of the time which may be split equally or unequally between parents based on issues such as each parent’s work schedule or whether the parents live in the same school district. When parents have joint legal custody, then both parents share in major decisions regarding the children’s education, health, and welfare, even if the children live with one parent.

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**2. FACTORS FOR WHO GETS CUSTODY**

In South Carolina, a family court judge decides which parent should have custody based on what the court views as being in the children’s best interests. In making its decision, the family court considers several factors and issues which include:

**Parent’s Fitness** - Some of the specific things that tend to show unfitness are drug and alcohol abuse, emotional and mental instability, and immoral conduct such as exposing the children to an adulterous relationship.

**Parenting Skills** - Good parenting skills include consistency and fairness in discipline, teaching independence, establishing family routines such as meals and study times, setting good examples, teaching respect for other adults and authority, stressing the importance of education, showing affection, being involved with school and extracurricular activities, planning good nutrition, reading together, providing regular medical and dental care, and other skills.

**Primary Caregiver** - The family court will consider which parent has traditionally been the primary caregiver to the children.

**Parents’ Time for the Children** - The family court often considers which parent will have more time available to spend with the children.

**Parental Alienation** - The family court will consider whether a parent is making attempts to damage the children’s
relationships with the other parent. Such attempts typically include making negative comments to the children about the parent and interfering with the children’s ability to communicate with and to spend time with the other parent.

**Opinions of Others** - A family court judge may consider the opinions of others such as social service agencies, doctors and other medical providers, psychologists, and psychiatrists to name a few.

**Children’s Preferences** - A family court judge is required to consider the children’s preference for custody. Contrary to popular belief, there is no specific age when a child may somehow decide where the child should live. The greater the child’s age, experience, maturity, and judgment, the more likely the child’s preference will have some impact on the family court’s decision.

Just because a child has a preference doesn’t mean that that family court will agree with the child’s wishes. Instead, the court decides how much importance to give the child’s preferences based upon the child’s age, experience, maturity, judgment, and ability to express a preference.

- **Children Under 12 Years Old** - There are no South Carolina cases indicating that the family court will give great weight to the wishes of a child under the age of 12.

- **Children Ages 12 to 14-years Old** - In one case, the family court gave great weight to the preference of a 12-year-old child because the court noted that she was mature for her age. In another case, the family court judge gave weight to the wishes of a 14-year-old who didn’t want to move away with his mother because he wanted to remain in the neighborhood and school in South Carolina.

- **Children Over the Age of 14** - Based on my professional experience, at this age the court begins to give more weight to the child’s preference especially in cases where the child is 16 or older. In a recent case I was involved with, my client’s 16-year-old son refused to return with her after her son had an extended holiday with the father. During court, we argued that despite the boy’s desire to stay with his father, this wasn’t in the boy’s best interest based upon the father’s past criminal and drug abuse history. Unfortunately, the family court expressed that there was little the court could do. Specifically, the judge wasn’t going to order the father or some law enforcement officer to physically force the boy in the mother’s car to drive home. The court was concerned that forcing the boy to return with his mother would cause more (emotional) harm than good and that enforcing the order granting the mother custody wasn’t in the child’s best interest.

**Financial Resources** - Greater financial ability to provide for the children can be a very important factor considered by the family court.

**Home Environment** - The family court will consider which parent provides a more stable and consistent home environment.
Relatives - The family court may look with favor upon the availability of relatives to help care for the children unless it appears that the involvement of relatives is too much.

Domestic Violence - Under the South Carolina law, a family court judge must consider evidence of domestic violence in deciding which parent should have custody.

Child's Age, Health, and Sex - Years ago, the family court often gave mothers the custody of their young children. This was known as the “Tender Years Doctrine.” In South Carolina, since 1995, the Tender Years Doctrine can no longer be considered in deciding child custody cases, and both mother and father are considered to be equally capable for caring for an infant or young child unless the court is shown otherwise. Regarding health, the family court may consider whether the child has any special needs and which parent is more able to meet those needs. Lastly, the court may consider the impact a parent's gender may have, in relation to the child's gender, on rearing the child.

Religious Beliefs - The family court may consider which parent supports and fosters a religious upbringing for the children.

3. GUARDIAN AD LITEM’S ROLE IN A CUSTODY BATTLE

Whenever there is a dispute between parents over a child's custody, the family court appoints a guardian ad litem to become involved in the case. In South Carolina, a guardian ad litem (GAL) is a formal advocate for a child involved in a court proceeding such as family court. Although the GAL generally is appointed in the beginning of a case, the court can appoint a GAL any time in the legal proceeding when the best interests of the children are at issue.

The Guardian Ad Litem’s Job - The guardian ad litem's job is to impartially investigate matters concerning the child and to communicate to the court about a child's welfare and about what would be in the child's best interest. The GAL will investigate the facts, participate in negotiations, and take a position in court as to the child's welfare. The GAL also may become involved in the financial issues of a case when those issues affect the children.

Investigation by the Guardian - In the investigation, the GAL interviews the parties in the case, reviews the paperwork filed with the court (the pleadings), visits the child's home or proposed home, interviews the child, and interviews other witnesses. The GAL may also review relevant records, such as school, medical, or mental health records. The GAL may ask other experts, such as a social worker or a psychologist, to provide input and possible future testimony regarding the case. If there are problems with alcohol or drugs, the GAL may ask the judge to order a parent to have screening tests.

Recommendations by the Guardian - The GAL may make recommendations to the court to help the child's welfare and to protect the child from some of the conflict that may arise between the parties such as between divorcing parents.
The GAL also helps the child understand the court process and the role of every person in the courtroom such as the judge, the bailiffs, the court reporter, and the attorneys. In investigating and developing input for the court's consideration, the GAL may consider the child's wishes, the wishes of both parents, the child's interaction and relationship with family members, the child's adjustment to home, school, religion, and community, the child's age and developmental and educational needs at various ages, the mental or physical health of a parent, the child, or other person living in the proposed custodial household, the cooperation and the communication between parents and whether either one unreasonably refuses to cooperate or communicate with the other, a parent's likelihood to interfere in the other parent's continuing relationship with the child, any physical abuse or problems with alcohol or drugs, and other significant factors that would affect the child's well-being.

The Guardian's Preliminary Report - After the investigation, the GAL will give the parents and their attorneys a preliminary summary report of what the GAL will present to the judge. Later, the report could change depending on additional evidence or facts that are uncovered. Afterwards, if the parents can't agree how to settle their dispute, the case is prepared for trial before the judge, who will make the final decision.

The Guardian's Fees - The judge decides who pays for the GAL's services. Often, each parent is responsible for one-half of the GAL's total costs, including the GAL's time and investigation costs, such as tests and experts. The court also may require the parents to pay an initial deposit and periodic payments to the GAL during the case.

4. GETTING CUSTODY OF YOUR CHILDREN

If you are trying to get custody of your child in South Carolina, you should know that the family court's decision rests on what is in the "best interest of the child." In determining who should have custody or whether the parents should share joint custody, the family court carefully scrutinizes each parent's behaviors both before and after separation. Essentially, if you are seeking custody in South Carolina of your child or children, you must convince the family court of your strengths as a parent and, in some cases, the other parent's weaknesses.

Parenting Strengths - Here are some of the factors the family court consider's to be strengths regarding your parenting abilities:

Primary Caregiver - The family court will consider which parent has traditionally been the primary caregiver to the children.

Good Parenting Skills - Good parenting skills include consistency and fairness in discipline, teaching independence, establishing family routines such as meals and study times, setting good examples, teaching respect for other adults and authority, stressing the importance of education, showing affection, being involved with school and extracurricular
activities, planning good nutrition, reading together, providing regular medical and dental care, and other skills.

**Financial Resources** - Greater financial ability to provide for the children can be a very important factor considered by the family court.

**Religious Training** - The family court may consider which parent supports and fosters a religious upbringing for the children.

**Parents’ Time for the Children** - The family court often considers which parent will have more time available to spend with the children.

**Stable Home Environment** - The family court will consider which parent provides a more stable and consistent home environment.

**Extended Family** - The family court may look with favor upon the availability of relatives to help care for the children unless it appears that the involvement of relatives is too much.

**Parenting Weaknesses** - Here are some of the factors the family court considers to be weaknesses regarding your parenting abilities:

1. **Parent’s Unfitness** - Some of the specific things that tend to show unfitness are drug and alcohol abuse; emotional and mental instability; and immoral conduct such as exposing the children to an adulterous relationship.

2. **Parental Alienation** - The family court will consider whether a parent is making attempts to damage the children’s relationships with the other parent. Such attempts typically include making negative comments to the children about the parent and interfering with the children’s ability to communicate with and to spend time with the other parent.

3. **Domestic Violence** - Under the South Carolina law, a family court judge must consider evidence of domestic violence in deciding which parent should have custody.

5. **CHANGING CUSTODY**

In South Carolina, the family court always has the power to modify a previous court order of custody whether the order is for sole or joint custody. Asking the family court to change custody is different from asking the family court to grant you custody in the first place. To persuade the family court to change custody, a parent must prove three things:

1. A material change in circumstances;

2. The material change in circumstances happened AFTER the initial family court custody order; and

3. The material change substantially affects the child’s best interests.
In my experience, it isn't enough for one parent to show that they've become the better parent. For example, a parent may remarry and create a more stable home than the parent who “has custody (the custodial parent).” In and of itself, remarriage isn't a basis for changing custody. Also, the fact that parents aren't getting along with each other after their divorce isn't a basis for changing custody unless their disagreements are substantially impacting the child's wellbeing.

Generally, to justify a change of custody, the family court looks to see whether there have been negative changes in the custodial parent's skills or lifestyle. Here are a few examples of poor parenting or lifestyle choices that may cause the family court to change custody:

**Interfering with the Relationship Between the Child and the Noncustodial Parent** - Unfortunately, some custodial parents try to drive a wedge between the child and the other parent. Examples of this include bad-mouthing the other parent in the child's presence, obstructing visitation and communication between the parent and child, and making false allegations against the other parent to restrict their visitation. Most family court judges will give the custodial parent an opportunity to change their negative behaviors, but if their conduct continues, then the court may change custody.

**Immoral Conduct** - The family court will change custody if the custodial parent engages in immoral conduct that impacts the child's welfare. Examples of immoral conduct include exposing the child to overnight romantic guests, exposing the child to pornography or other age-inappropriate materials or behaviors, drug use, and alcohol abuse.

**Educational Problems** - If a child performs poorly at school, and the custodial parent is contributing to the problem or does little to help the child, then the court may change custody. Examples include excessive tardiness or absences from school or failing to get tutoring or other assistance for a child that is struggling with their courses.

**Unstable Home Environment** - Many things can negatively impact the stability of a child's home environment based on the custodial parent's choices. Examples include excessively moving from home to home, lack of job and income stability, and the custodial parent's over-dependence on their family for support.

**Poor Parenting Skills** - Poor parenting skills come in many different forms. Examples include behaviors that keep the child from developing independence, responsibility, or maturity, elevation by the custodial parent of their own happiness over that of their child, and improper or no supervision of the child, and mental or physical abuse of the child.

**Relocation** - As South Carolina's courts have stated, cases involving the relocation of a custodial parent present some of "the knottiest and most disturbing problems that our courts are called upon to resolve." Years ago, our family courts were guided by the presumption against relocation. These days, the
courts struggle to determine what is in the child's best interest by focusing on various factors including the following:

1. Each parent's reason for seeking or opposing the relocation;

2. The relationship between the children and each parent;

3. The impact of the relocation on the quality of the children's future contact with the noncustodial parent;

4. The economic, emotional, and educational enhancements of the move;

5. The feasibility of preserving the children's relationship with the non-custodial parent through visitation arrangements; and

6. The likelihood the move would substantially improve the quality of life for the custodial parent and the children and is not the result of a whim of the custodial parent.
Section 4
Child Support

1. CHILD SUPPORT GUIDELINES & CALCULATING SUPPORT

Child support is calculated based on formulas and tables created by the South Carolina Department of Social Services, which are called the “Child Support Guidelines.” The support calculation is based on several factors:

1. Prior support obligation
2. The number of children being supported
3. The income (or earning capacities) of both parents
4. The percentage of combined income each parent has
5. The number of other children each parent has living in their own home
6. The work-related day care expenses either party has for the children
7. The health insurance expenses either party has for the child or children

When both parents have custody of one or more of their children, the “split custody” guidelines apply. In cases where a parent has the children at least 109 overnights, the “shared custody” guidelines may be applied.
If the supporting parent doesn’t pay child support on time, then the family court can order that parent to pay by way of wage withholding and/or through the family court. If payment is made through the family court, then an “administrative” charge is tacked on. At present, the administrative fee is 5%. Also, if paid through the court, then the clerk of family court keeps a payment record and will seek judicial enforcement if the parent misses a payment.

The South Carolina Department of Social Services has an online child support calculator that provides a very close estimate of any child support obligation.

2. DEVIATION FROM THE CHILD SUPPORT GUIDELINES

Under certain circumstances, the Family Court can set child support at an amount that is different from the Child Support Guidelines. Deviation from the Guidelines is the exception and not the norm. Here are the factors a family court considers in deciding whether to deviate from the Guidelines:

1. The educational expenses for the children or spouse including private, parochial or trade schools, other secondary schools, or higher education
2. The equitable distribution of property
3. The parties’ consumer debts
4. Whether the family has more than six children
5. Unreimbursed extraordinary medical expenses for either parent
6. Unreimbursed extraordinary medical expenses for the children
7. Mandatory deduction of retirement pensions and union fees
8. Support obligations for other dependent children living with the noncustodial parent
9. Monthly fixed payments imposed by a court or operation of law
10. Whether the child has significant income
11. Whether the noncustodial parent’s income is significantly less than the custodial parent’s income, making it
12. Whether a parent pays alimony

13. Non-court-ordered child support from another relationship

The family court has the discretion to consider other factors not listed here. For example, if the custodial parent relocates to another state, and the noncustodial parent incurs substantial costs in traveling and lodging to spend time with the children, then the family court may reduce the noncustodial parent’s child support payment.

3. MODIFICATION OF CHILD SUPPORT

The family court has the power to modify child support at any time if a parent proves that there has been “a substantial change in circumstances” or “a substantial change in the financial ability of either party.” Overall, there are three factors the family court considers in deciding whether there has been a change in circumstances:

1. Changes in the parents’ finances
2. Remarriage that results in a termination of alimony
3. Changes in the child’s needs

For example, if the child becomes disabled, the additional cost of medical treatment may be considered a substantial change in circumstances. As another example, if a parent is involuntarily laid off from work, or they become disabled and are no longer able to work, that may be considered a substantial change in the parent’s financial abilities.

4. TERMINATION OF CHILD SUPPORT

Under South Carolina law, typically child support ends if the child dies, marries, or the child reaches 18 years of age or the child graduates from high school, whichever occurs later. Some people assume that they can stop paying court-ordered child support when one of those conditions occur. However, many family court judges take the position that unless your court order specifically states when child support ends, you must return to court to get the support order modified and until you do so, you must continue to pay.

5. COLLEGE EXPENSES

In South Carolina, the family court can order a parent or parents to pay for college. Typically, our family courts do not order college tuition and expenses unless the parents agree to this support. However, the court may order support for a higher education if the child’s educational aptitude shows that the child will uniquely benefit from higher education, the child demonstrates an ability to make good grades, the child couldn’t otherwise attend college (no loans or grants), and the supporting parent has the financial ability to help pay for college.
The South Carolina Supreme Court issued a family court decision wherein the court decided that ordering a noncustodial parent to pay college expenses violated equal protection. The court compared those parents subject to a child support order at the time the child is emancipated versus those parents who were not. The court “concluded that there is no rational basis for treating parents subject to such an order different than those not subject to one with respect to the payment of college expenses.” However, less than two years later, the South Carolina Supreme Court reversed itself in another case and held that “requiring a parent to pay, as an incident of child support, for post-secondary education under the appropriate and limited circumstances outlined by [other family court cases] is rationally related to the State’s interest. While it is certainly true that not all married couples send their children to college, that does not detract from the State’s interest in having college-educated citizens and attempting to alleviate the potential disadvantages placed upon children of divorced parents. Although the decision to send a child to college may be a personal one, it is not one we wish to foreclose to a child simply because his parents are divorced. It is of no moment that not every married parent sends his children to college or that not every divorced parent refuses to do so.”

6. THE CONSEQUENCES OF FAILING TO PAY CHILD SUPPORT

The consequences can be very severe if you don’t make your court-ordered child support payments as scheduled. Some of the penalties for nonpayment of child support include:

- Finding of contempt of court
- Fines, jail, or both
- Garnishment of wages, including unemployment and worker’s compensation
- Exclusion from receipt of certain government benefits
- Effect on Military Standing

If a parent is paying child support through the court and falls behind, the clerk of the family court will issue a ‘bookkeeping’ rule to show cause. In a rule to show cause, the must appear before the family court to show cause why they shouldn’t be held in contempt. In many instances, the family court will place the parent in jail until they can purge themselves by paying all of their support. If the parent is paying child support directly to the other parent, and the parent falls behind, then the other parent can file for a rule to show cause just like the clerk of court does.
7. MOVING OUT-OF-STATE TO AVOID PAYMENTS

In some instances, a parent may move out of South Carolina to avoid being brought before the family court for contempt proceedings. However, if a parent moves away to avoid child support, then they are subject to the Deadbeat Parents Punishment Act which is a federal law designed to punish parents who move across state lines to avoid child support payments. Under the Deadbeat Parents Punish Act, a parent can be liable if the parent:

1. Willfully fails to pay a support obligation concerning a child who resides in another State, if such obligation has remained unpaid for a period longer than 1 year, or is greater than $5,000;

2. Travels in interstate or foreign commerce with the intent to evade a support obligation, if such obligation has remained unpaid for a period longer than 1 year, or is greater than $5,000; or

3. Willfully fails to pay a support obligation concerning a child who resides in another State, if such obligation has remained unpaid for a period longer than 2 years, or is greater than $10,000.

The punishment for an offense under this law can be up to six months in jail for a first offense and two years in jail for a second offense. Additionally, the parent must also pay all of their unpaid child support.

8. FINANCIAL HARDSHIP AND CHILD SUPPORT

Perhaps one of the most unfortunate situations is when parents fall on tough financial times and can’t make their regularly scheduled child-support payments. In this situation, the parent finds themselves between a rock and a hard place. They can’t afford to hire attorney because they don’t have enough money, and yet they need to go to family court to ask the court to reduce their child support payments.

Nevertheless, being proactive is the best way to keep from being thrown in jail for falling behind on support. In the end, it is better to fall behind on credit card or installment payments and use that money to either catch up or hire an attorney than to face a rule to show cause and possible jail time.

If a parent fails behind, they can petition the family court to do one of two things. First, they may ask the court to place them on a payment program to allow them to catch up over time on their arrearages. If the parent’s financial situation has taken a more permanent turn for the worse, then they can petition the court to reduce their support obligation based on a “material change in circumstances.” In many cases, simply showing a loss of income isn’t enough to reduce support. The parent must also show that they have done all they can to reduce their living and personal expenses to try to meet their current child support obligation.
9. DELINQUENT PAYMENTS AND VISITATION RIGHTS

In South Carolina, visitation is an entirely separate issue from child support obligations. In other words, a parent who fails to make child support payments may still exercise their visitation rights, and the custodial parent may not restrict access. The right to receive support rests with the child, and neither parent may use support to control or punish the other parent.
Tax Exemptions for Children

1. The General Rule for Claiming a Tax Exemption for Your Children

Generally, the parent who has custody of the children for a greater period of time within the tax year will be allowed to claim the exemption for their children. [NOTE: Claiming an EXEMPTION for a child ISN’T the same thing as claiming a child tax CREDIT for a child which allows a taxpayer to claim a credit for expenses paid for the care of children under the age of 13.] If the parents had the children for an equal period of time during the tax year, then the parent who earned more money will be allowed to claim the children. IRS Publication 17 provides the guidance on this issue, and South Carolina’s DSS Child Support Guidelines suggest that the custodial parent takes the exemption.

2. The Family Court’s Discretion Regarding Who Gets the Exemption

South Carolina Family Courts may give the child tax exemption to the noncustodial parent. However, there has not been much guidance from South Carolina appellate courts what circumstances would prompt the family court to do this. For example, if for some reason the custodial parent would benefit little from the exemption, but the noncustodial parent could benefit from the tax break, then perhaps a South Carolina family court judge would reallocate the tax exemption for the children. At the same time, the family court judge could, in theory, increase the amount of child support to
make up for the custodial parent’s loss in net income from not being allowed to claim the children on their taxes.

3. FILING YOUR TAXES IN THE MIDDLE OF A CUSTODY CASE

Sometimes the issue of which parent gets to claim the children on their taxes arises in the middle of a case. For example, a judge at a temporary hearing may award custody to one parent, or at least award joint custody but give one parent much greater than 50% of the overnights. However, many temporary orders do not address the tax exemption. In this situation, the IRS accepts the return of the parent who files first and rejects the return of the parent who files second, even if the parent filing second had a better legal claim or need for the exemption. We caution noncustodial parents against claiming their children this way because you could be violating IRS rules and you may cause yourself costly problems in family court.

4. SETTLEMENT OPPORTUNITIES FOR WHICH PARENT TAKES THE EXEMPTION FOR THE CHILDREN

Every family court case in South Carolina, including divorces, ends by either trial or settlement (unless the parties reconcile and dismiss their case for a divorce). The good news is that the majority of these family court cases settle without a trial. So, it’s best to work out the issue of who taxes the exemption for your children as part of your divorce settlement. By agreement, it is even possible to allow one parent to claim one child and to allow the other parent to claim another or to alternate throughout the years.
1. OVERVIEW OF ALIMONY

Under South Carolina family law, alimony is considered a substitute for the support a spouse receives while married and is designed to place that spouse, as nearly as practical, in the position of support he or she received during the marriage. Instead, the Charleston family court will consider various factors about each party and their marriage:

(1) Income and Property of Each Party. The greater the income and property a divorced spouse has, the less likely it is that the spouse will need alimony. Otherwise, the less income and property a spouse has, the more she or he will need alimony. Payment of alimony also depends on the ability of one spouse to pay. Alimony is most likely when there is a substantial difference in the property and income of one spouse versus the other. If the spouses’ levels of property and income are similar, alimony is less likely. In looking at the difference in property held by the spouses, family courts consider the equitable division of property in connection with the divorce. Some courts order a larger share of property to the less prosperous spouse to avoid or reduce the need for alimony to the less prosperous spouse.

(2) Earning Capacity of Each Spouse. A related factor is the present and future earning capacity of each spouse. If one spouse’s earning capacity is much larger than the other spouse’s earning capacity, that is a significant factor in favor of payment of alimony. To the extent that the earning capacities of the spouses may come closer together by giving
the spouse with lower earnings additional time to pursue training, the court may use that as a factor for granting rehabilitative maintenance.

(3) Impairments in Earning Capacity. If a spouse has little or no earning capacity, that’s a basis for the family court to grant alimony -- probably permanent alimony. Common examples of such impairments are advanced age or chronic illness. Some courts also will note that earning capacity may be limited because of the number of years the spouse spent working as a homemaker. During that time, the spouse who was the homemaker delayed or gave up the opportunity for training or building job skills that could produce a higher income. Meanwhile, the other spouse was able to increase earning capacity, in part, because his or her partner was managing the home. In such circumstances, some courts will grant permanent alimony to help make up for the difference in earning potentials.

(4) Children at Home. The presence of young children at home is a factor in favor of granting alimony, at least until the children are in school full-time. Even after the children are in school, the court may grant alimony so that the parent who is taking care of the children need only work part-time. This factor is more likely to apply if, during the marriage, one of the parents had been serving as a full-time homemaker. If both parents had been working outside the home during the marriage, the court is more likely to expect the status quo to continue. As with all types of alimony, a key factor is the ability of the more prosperous spouse to pay. If the better-off spouse has only moderate income, alimony probably will not be ordered or the amount will be moderate.

(5) Standard of Living During the Marriage. This is a phrase that we hear less of these days, “The wife is entitled to be supported in the style to which she has become accustomed.” However, the standard of living of the husband and wife during the marriage is still a factor to be considered. If the parties have sufficient money to continue the same lifestyle when they are separate as when they were married, the court may grant sufficient alimony (and property) to accomplish that. The reality in most cases is that the money won’t go as far as it did during the marriage since it costs more to support two households than one. If the couple’s relatively high style during the marriage was supported, in part, by incurring debt, the court will not expect that one party must continue to incur debt to support the other. Nonetheless, the standard of living of the husband and wife is a factor in setting alimony.

(6) Duration of Marriage. The longer the marriage, the greater likelihood of alimony, particularly if there is a significant difference in the earning power of the parties. In short-term marriages, alimony is less likely (unless there are young children at home).

(7) Contributions of the Spouse Seeking Support to the Education or Career of the Other Spouse. A spouse who helps put the other spouse through school or a training program can use that as a factor to gain alimony, even if
alimony isn’t necessary for day-to-day support. Spouses who actively support their partners’ careers, such as through frequent entertaining or through working at no wages in the family business, also can use that as a factor in seeking alimony.

(8) Tax Consequences of Property Division and Alimony. If the payor of alimony receives a tax benefit as the result of the property distribution, that can be a factor in favor of alimony. Otherwise, if the payor of alimony must pay additional taxes because of the property division, that could be a factor for paying less alimony or no alimony. Under the current tax code, alimony is no longer deductible to the spouse who is paying it. If the husband and wife are in different income brackets, the tax treatment of alimony results in a net savings of tax payments when considering the combined tax payments of the husband and wife. The amount of money the payor will save in taxes by being able to deduct alimony from taxable income will be greater than the amount of additional taxes the recipient pays on the alimony, which is treated as taxable income.

(9) Fault. Fault is a factor that can be considered in setting alimony, although the presence of fault by the spouse seeking alimony doesn’t necessarily preclude alimony (unless it is adultery).

(10) Physical and Emotional Conditions. This factor is used to evaluate the parties' needs and their income earning potential.

(11) Educational Background. This factor is used to evaluate a spouse's income earning potential. The court also may consider the need for additional training or education to achieve that spouse's income potential.

(12) Support Obligation from a Prior Marriage. Whether the spouse is paying or receiving such support.

(13) Other Relevant Factors. This factor is a "catch-all" that allows the court to consider other factors which the court deems relevant.

2. TYPES OF ALIMONY

There are several types of alimony, each of which is designed to meet particular needs.

(1) Permanent (Periodic) Alimony - Permanent alimony is the normal preference in family court. Permanent alimony continues indefinitely. The main bases for ceasing payments of permanent alimony are the death of the payor, the death of the recipient, or the remarriage of the recipient. Cohabitation of the recipient with a member of the opposite sex also is a common basis for cessation of permanent alimony. Generally, the cohabitation needs to be of a permanent or near-permanent nature, with the parties who are living together sharing living expenses. A few overnight visits usually do not constitute cohabitation for the purpose of stopping alimony payments.
(2) Rehabilitative Alimony - Rehabilitative alimony refers to alimony that is given to a spouse so that the spouse may “rehabilitate” herself or himself in the sense of acquiring greater earning power or training in order to become self-supporting. Rehabilitative alimony also might be given to a parent who is staying home with young children until such time as it is considered appropriate for the parent to work outside the home. There is no uniform time at which parents automatically are expected to work outside the home, but when the youngest child is in school full-time is a common time for the parent to resume work. (Of course, in many families--intact and divorced--the parents work outside the home when the children are pre-schoolers. In some families, one parent stays home as long as the children live at home.) Rehabilitative alimony is usually for a fixed period of time. The court (or the parties by agreement) may include a provision that the alimony is subject to review at the end of that period.

(3) Reimbursement Alimony - Reimbursement alimony, as the name implies, is designed to reimburse one spouse for expenses occurred by the other. If, for example, one spouse helped put the other spouse through college or a training program and the couple divorces soon after the training program is complete, the spouse who supported the family during that period might be able to obtain reimbursement alimony as a payback for the resources spent. A classic example is the nurse who marries a medical student and supports the family while the medical student finishes medical school (and perhaps a residency program). If the couple divorces soon after the medical student completed training, the nurse probably would be entitled to reimbursement alimony to compensate for the resources used during the training program. In this case, reimbursement alimony is not necessarily being given because the nurse needs funds for day-to-day support (since the nurse would seem to be self-supporting). Instead, the alimony is given as an equitable payback for supporting the spouse through medical school. Alternatively, a court could choose to give the supporting spouse a substantial majority of marital property in compensation. In many cases which one spouse has just completed a training program, the couple has not accumulated a large amount of marital assets. So, reimbursement alimony is given as an alternative. Reimbursement alimony can be paid over a period of time.

(4) Lump-Sum Alimony - Lump-sum alimony or alimony in gross refers to alimony that is a fixed payment that generally will be made regardless of circumstances that would be a basis for termination of other types of alimony. For example, lump-sum alimony or alimony in gross normally would be paid even if the recipient remarries. Depending on the wording of the agreement or order, payments also could be made to the estate of the recipient in the event the recipient dies. This type of alimony usually is in lieu of a property settlement.

3. MODIFYING ALIMONY
Unless an agreement between the parties says otherwise, payments of permanent alimony can be adjusted upwards or downwards based on a change of circumstances. If the recipient gains employment at a well-paying job or receives a significant amount of money from another source, that might be a basis for reducing alimony payments. If the recipient incurs unexpected medical expenses (that are not covered by insurance), that might be a basis for increasing alimony payments, if the spouse paying alimony can pay more. A drop in income by the payor, including at retirement, can be a basis for reducing alimony. Courts may examine the reason for a drop in income. If the drop in income of the payor is in good faith or not through the fault of the payor, the court is more likely to approve a reduction in alimony. If the drop in income seems to have been engineered by the payor to create a basis for reducing alimony, the court is more likely to disapprove a reduction in alimony.

4. TERMINATING ALIMONY FOR COHABITING

Normally, an ex-spouse’s alimony, if permanent, ends if that spouse dies or remarries. However, under South Carolina family law, an ex-spouse’s alimony may be terminated when that person “resides with another person in a romantic relationship for a period of ninety or more consecutive days.” This circumstance is known as "continued cohabitation." Continued cohabitation also exists “if there is evidence that the supported spouse resides with another person in a romantic relationship for periods of less than ninety days and the two periodically separate in order to circumvent the ninety-day requirement.” Proving cohabitation isn’t easy. Often the supported spouse and their lover will maintain separate homes. Even if they spend almost every night together, keeping separate homes seems to be proof that the parties aren’t living together.

So far, there seems to be little support by South Carolina’s appellate courts for terminating alimony based on cohabitation. However, the South Carolina Court of Appeals upheld the family court’s decision to terminate an ex-husband’s alimony because he was engaged in “continued cohabitation” with his girlfriend. Specifically, for seven months, the ex-husband’s girlfriend was spending every Wednesday afternoon through Monday morning at his house but spending every Monday morning through Wednesday afternoon at her son’s house taking care of her grandchildren.

5. IMPACT OF RETIREMENT ON ALIMONY

Supporting spouses who want to retire from employment run the risk of still paying alimony that they can no longer afford after retirement. Charleston family court lawyers and judges often differ on whether retirement by a supporting spouse is a sufficient basis to change or reduce the payment of alimony. In other words, take the same case and place it before a dozen different judges, and the spouse will not get the same legal outcome twelve times. However, South Carolina’s statute has been amended to help address this legal dilemma. Specifically, S.C. Code § 20-3-170 provides that retirement by
a supporting spouse is sufficient grounds to warrant a hearing to evaluate whether there has been a change of circumstances for alimony. The amended statute provides that the family court must consider the following factors:

1. Whether retirement was contemplated when alimony was awarded;
2. The supporting spouse's age;
3. The supporting spouse's health;
4. Whether the retirement is mandatory or voluntary;
5. Whether retirement would result in a decrease in the supporting spouse’s income; and
6. Any other factors the court sees fit.

Despite these changes to the law, the family court still has a great deal of discretion on this issue. Essentially, such discretion means different judges will still take different positions on a request to reduce or eliminate a retiree's alimony payments and the outcomes will still lack uniformity.
1. IDENTIFYING MARITAL PROPERTY

In South Carolina, the family court views marriages, in part, as an “economic partnership” that must be divided when you divorce. To divide marital property, the family court first decides what property is, in fact, marital. Then, the family court places a value (fixed at the date either party filed in family court) on both marital and non-marital property. Lastly, the family court divides the marital property between the spouses based on several factors.

Marital property is “all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of the marital litigation . . . regardless of how legal title is held.” Essentially, if it was bought during the marriage, it is probably marital property, and it is on the table in a divorce case such as:

1. Cash on hand
2. Money in checking, savings, and other financial accounts
3. Retirement or pension funds
4. Life insurance cash value
5. Stocks and bonds
6. Real estate
7. Motor vehicles and boats
8. Jewelry (excluding the engagement ring which is a non-marital gift)
9. Household contents; and
10. Any other property of value

For purposes of whether property is marital, it doesn’t matter whose name the property is titled in, such as a home. Anything acquired after a party files in family court is typically not considered marital property.

Some property acquired during the marriage may be non-marital. For example, if a spouse acquires property through an inheritance or gift from someone other than their spouse, that property isn’t marital. Premarital property swapped for other property isn’t marital. A pre-nuptual agreement may specify that certain property is non-marital. Lastly, increases in the value of non-marital property is non-marital unless the property increased in value because of the efforts of the other spouse during the marriage such as helping to repair a run-down, non-marital home.

**Can Property Acquired During the Marriage Still be Non-Marital Property?**

**Yes.** There are exceptions to the general rule that property bought during the marriage is marital. Generally, if the property was received by inheritance to one spouse, it is non-marital. Also, if the property was a gift from someone to one spouse, it is non-marital. However, a gift from one spouse to the other, even if made indirectly by way of a third party, is marital property which is subject to division by the judge.

**What If I Receive Property After the Divorce Case is Filed?**

Property received after either spouse files a case for divorce or separate support and maintenance might not be marital, even though it was acquired during the marriage. Specifically, after the court issues a temporary order, or after the parties sign a settlement agreement, or after the court issues a final order dividing the property, any acquired property is likely non-marital. Also, if the parties enter into a written contract, subject to strict rules, that property acquired by one spouse will be non-marital, then it can be non-marital, although there are ways for the other spouse to get around this. Always run it by your divorce lawyer before you buy or receive any property during the case.

**If Non-Marital Property Increases in Value, is the Increase Considered Marital Property?**

**No.** However, if the increase resulted directly or indirectly from the efforts of the other spouse during the marriage, then the increase might be marital. For example, if the Husband inherits a house during the marriage, it is non-marital, at least initially. If the Wife uses her money and labor to help build a deck in the backyard, the increased value from the deck could be marital.
Can Non-Marital Property Become Marital Property?

Absolutely. When this happens, it is called “transmutation.” Transmutation happens in a number of ways. First, if non-marital property is mixed with marital property so that it is no longer traceable, it becomes marital property. An easy example is where non-marital money is placed into a bank account with marital money, and then after a series of debits and credits, there is no way to know which of the monies are actually left. Second, if property is jointly titled, it can become marital property. So, if Husband owns a house prior to the marriage, and then during the marriage he puts his Wife on the deed, then the house may become marital. Finally, if the property is used by the couple in support of the marriage or in some other way that establishes that the parties intended to make it marital property, then the non-marital property can be transmuted into marital property. This last form of transmutation is a little trickier to identify and will be decided by the family court judge on a case-by-case basis. Your family court lawyer will help you build your argument as to whether the property was transmuted or not.

2. IDENTIFYING NON-MARITAL PROPERTY

Along with inherited property and gifts from third persons, property that was acquired before the marriage is typically non-marital. Also, property acquired after filing in family court isn’t marital property unless it was acquired by exchanging marital property.

Depending on the circumstances, sometimes non-marital property may become marital or otherwise be subject to valuation by the family court when there is commingling, transmutation, or the creation of a special equity.

Commingling of Non-Marital Property

When marital and non-marital property are commingled (mixed together) in a way that makes it impossible to decide what is marital or non-marital, all the property becomes marital. A classic example of commingling is when the couple deposits their marital funds from paychecks, etc., into a financial account that belonged to a party before the marriage.

Transmutation of Non-Marital Property

If the parties show a clear intent to treat non-marital property as marital, then this property “transmutes” into marital property. A classic example of transmutation is when one party owns a home before the marriage, but both parties live there during the marriage and both pay the mortgage.

Special Equity in Non-Marital Property

The family court can award a spouse a “special equity interest” in non-marital property even if the property hasn’t been transmuted. A special equity interest is created when one spouse’s direct or indirect contributions increased the value of the other spouse’s non-marital property. A classic example of a special equity interest is when one spouse repairs or maintains the other spouse’s inherited property.
3. VALUING MARITAL & NON-MARITAL PROPERTY

After the family court identifies both marital and non-marital property, it must then place a value on both types of property. The reason the family court values non-marital property is because the value is one of many factors the court considers in dividing marital property and in awarding alimony. The court values of both types of property as of the date of filing in family court. However, the court has the discretion to consider both parties’ contributions to any post-filing increase or decrease in value. As for proof of value, the court can consider the parties’ own opinions, witness testimony, and experts’ opinions.

4. DIVIDING MARITAL PROPERTY

After the family court has identified marital and non-martial and the values for each, the court must equitably divide the marital property. There is no mathematical formula by which the family court decides how to divide marital property. Instead, the family court makes its decision on a case-by-case basis considering the following factors:

1. The duration of the marriage together with the ages of the parties at the time of the marriage and at the time of the family court action
2. Marital misconduct or fault of either or both parties, whether used as a basis for a divorce as such, if the misconduct affects or has affected the economic circumstances of the parties, or contributed to the breakup of the marriage;
3. The value of the marital property, whether the property be within or without the State.
4. The contribution (and the quality of the contribution) of each spouse to the acquisition, preservation, depreciation, or appreciation in value of the marital property, including the contribution of the spouse as homemaker;
5. The income of each spouse, the earning potential of each spouse, and the opportunity for future acquisition of capital assets;
6. The health, both physical and emotional, of each spouse;
7. The need of each spouse or either spouse for additional training or education to achieve their income potential;
8. The non-marital property of each spouse;
9. The existence or nonexistence of vested retirement benefits for each or either spouse;
10. Whether separate maintenance or alimony has been awarded;
11. The desirability of awarding the family home as part of equitable distribution or the right to live there for reasonable periods to the spouse having custody of any children;
12. The tax consequences to each or either party as a result of any particular form of equitable apportionment;

13. The existence and extent of any support obligations, from a prior marriage or for any other reason or reasons, of either party;

14. Liens and any other encumbrances upon the marital property, which themselves must be equitably divided, or upon the separate property of either of the parties, and any other existing debts incurred by the parties or either of them during the marriage;

15. Child custody arrangements and obligations at the time of the entry of the order; and

16. Such other relevant factors as the trial court shall expressly enumerate in its order.

Typically, the longer the marriage, the more likely the court will divide assets 50/50. Essentially, the longer the marriage, the more likely that both parties divided their responsibilities in a way that they believed was fair and so both spouses should enjoy the economic benefits of their marital “partnership” equally. In a shorter marriage, the family court is more likely to look closer at the parties’ contributions to the marriage before dividing property.

If there are third persons or entities that have an ownership interest in property (such as partners in a business that is partially owned by a spouse), then the family court has the power to add these third parties to the lawsuit to accomplish equitable division of that property.

In the end, if the property can’t be divided by giving each spouse “like kind” assets then the family court may order that assets be liquidated (sold) and the proceeds divided between the parties.

5. DIVIDING MARITAL DEBTS

In addition to dividing marital property, the family court also divides marital debts considering the same factors as listed earlier in this section. However, just because the family court divides assets in a particular percentage, such as 50/50, doesn’t mean the family court will divide debts in the same percentage. Typically, the spouse who has greater income will be responsible for a larger portion of the marital debts than the other spouse.

6. PENSIONS AND DIVORCE

What is a Pension vs. a 401(k) or IRA?

A pension is a retirement account through your employer that gives you a fixed payout when you retire. For the most part, your payout depends on how long you’ve worked for your employer and your salary. When you retire, you can choose between a lump-sum payout or a monthly “annuity” payment. Unlike 401(k)s, you can’t take a pension with you when you leave your employment. In other words, you can’t transfer a traditional pension account to your new employer or into an
IRA rollover when you leave one job for another. You may be entitled to a payout of the value of your pension at the time you leave your job such as when it is a cash-balance plan (which can be rolled into an IRA). However, your right to any pay out depends on your employer’s vesting schedule.

**When are Pensions Vested?**

Your pension isn’t vested until you meet all the requirements to begin receiving payments. There are basically two types of vesting:

- **Cliff Vesting** - This typically means that if you quit in 5 years or less, you lose your benefits all pension benefits but after 5 years, you get 100%.

- **Graded Vesting** - You’re entitled to 20% of your benefit if you leave after 3 years. In each subsequent year, another 20% of your benefit vests until you reach 100% after 7 years.

Typically, you don’t receive your benefits until you reach the age of retirement (usually 65). Some pension plans allow you to start collecting early retirement benefits as early as age 55, but the amount of your monthly payment may be less than if you had waited. Even if the pension is unvested, it is still marital property. There are essentially two ways of dividing this property: (1) future payments pursuant to a Qualified Domestic Relations Order (QDRO) or (2) payment by one spouse to the other for a share of the pension’s present value:

**Future Payments – Qualified Domestic Relations Order**

A qualified domestic relation order (QDRO) is a family court order that specifies a spouse’s right to receive a designated percentage of the benefits payable to the other spouse under the retirement plan. A QDRO also allows the ex spouse to withdraw their share and roll it into their own IRA to the extent withdrawals are permitted by pension plan’s terms. As for the percentage a spouse should receive from the future payments, the court determines how much of the value was earned during the marriage. For example, if your spouse had the pension for 3 years before you were married, and you were married for another 6 years, then only 2/3rd’s of the pension is a marital asset that must be divided in the divorce between the spouses.

**Dividing the Present Value of the Pension**

Another way to divide a pension is to calculate the pension’s present value so that one spouse can pay the other spouse their share of this value. Here are the basics of how the present value of a pension is calculated:

**Step One** – From the employer, you need to find out how much your annual pension benefit would be at the earliest age of retirement as of the date the parties filed for separation (which is the date the family court typically uses to value all marital assets and debts). For purposes of this example, let’s say that the annual payment would be $10,000.00.
Step Two – You calculate the present value of the annuity from Step One. To do so, you subtract the earliest age of retirement from your life expectancy as determined by South Carolina Statute 19-1-150. For purposes of this example, let’s assume that the earliest age of retirement is 50 years old, and the life expectancy is 70 years. That leaves a difference of 20 years (which is how long the person will receive payments under the plan). You must also apply a discount rate which is typically 4.5 to 6.5%. The discount rate refers to the interest rate used in discounted cash flow analysis to determine the present value of future cash flows. In this example, we will use a discount rate of 5%. Using a financial calculator, you would input $10,000 as the payment (PMT), the period of 20 years (N), and a discount rate of 5 (i). With this information, you can calculate that the present value (PV) is $124,622.10.

Step Three – Now that we have a present value of (PV), we must decide how much of that value was earned during the marriage. Using the same example as above, if your spouse had the pension for 3 years before you were married, and you were married for another 6 years, then only 2/3rd’s of the pension, or $82,250.59 ($124,622.10 x .66) is a marital asset that must be divided in the divorce between the spouses.

Please note that the calculation above is an APPROXIMATE VALUE of the marital asset. In most cases, we recommend hiring a professional actuary to value the pension plan.

7. BUSINESS INTERESTS

I often deal with cases where one of the spouses owns a business or is otherwise self-employed. Generally, businesses or ownership interests are subject to division in the family court, just as any other piece of real or personal property, or financial accounts.

Determining the Value of a Business

If the business is martial property, the family court must then determine the fair market value of the company. The family court will consider the net asset value, the fair market value for its stock, and its earnings or investment value. In some cases, the parties can agree on the value. In other cases, at least one party will have to prove the value. If the case justifies it, a spouse can order a complete forensic appraisal of the business, but these valuations can be very expensive. In other cases, an opinion from a certified public accountant might be enough. There are numerous methods than can be used by these professionals, but they generally fall under one of three categories: the asset approach, the income approach, or the market approach:

1. Asset Approach - The asset approach views the business as a set of assets and liabilities. In this approach, the value of the assets and liabilities are calculated, and the difference between the two is the value of the business. The challenge in this approach is determining what assets and
liabilities to include, choosing a standard of measuring their value, and then what each asset and liability is worth.

2. Market Approach - Simply stated, valuing a business according to the market approach is determining what buyers would be willing to pay and the sellers would be willing to accept for the sale of a similar business. This approach requires market data and analysis to compare the purchase and sale of other businesses similar to the one in issue.

3. Income Approach - In this approach, a calculation is made as to what economic benefits the business will provide in the future. This calculation assumes that because the money has not yet been earned, there is some risk of not receiving all or part of what is expected. To establish the present value of the future income, and to factor in risk, the income approach requires different methods of analysis such as capitalization of expected earnings by a capitalization rate or discounting the cash flow of the business. Although a discussion of capitalization and discounting are beyond the scope of this book, the point is that regardless of the approach used, valuing the worth of a business is complicated and usually requires the assistance of a business valuation expert or certified public accountant.

Goodwill of the Business

Goodwill is generally included in the fair market value, as long as it attaches to the business itself, separate and apart from the individual owners. So, professional goodwill is usually not included. For example, if one spouse is a doctor, the patients generally follow the doctor, not the business, and the doctor’s practice might not be subject to equitable division in family court. Instead, the court may consider the value of the business when determining alimony.

Transmutation of a Non-Marital Business Asset

A business that was started before the marriage can become marital property under what is called the doctrine of “transmutation.” The family court decides whether property is transmuted on a case-by-case basis. By way of example, in one case, the South Carolina Court of Appeals agreed with the family court judge that a non-marital business became marital when the husband business owner listed the wife as secretary for the corporation. The wife had also reduced the hours she worked at her normal job so that she could work full-time in the business, reducing her contributions to her 401(k) accounts. Finally, the spouses agreed that the business would pay wife a higher salary for her services than would normally be expected in her position to benefit both parties and build their retirement together.

Equitable Division of the Business

If the company is marital property, the court must then decide whether to divide it 50-50 or in some other proportion. Working for a business or contributing financially to a business can strengthen a spouse’s claim in the business, but this is not necessary. For example, it is possible that a spouse
who did not work at all but instead cared for the children and served as a homemaker could receive a 50% share in the value of a business. There is no bright-line rule, and every case is determined on a case by case basis. In many cases, it is not practical for the court to “split” the business between the parties. In these cases, the court will allow the title owner of the business to keep it but require that he or she buy the other person out. The buy-out could be in a lump sum, or the owner spouse could be required to make payments over time.

**Hurdles in a Business Asset Divorce Case**

Generally, divorce cases that involve a self-employed spouse can be tougher to resolve than other cases. First, there is the gray area whether the business is even a marital asset. Second, in most cases, the husband and wife could each hire their own CPA or appraiser to value the business, and the two values will likely not be the same. In fact, the two professionals may not even agree on the proper method for valuing a particular business. Ultimately, if the spouses can’t agree, the judge will have to decide what the value is. Finally, it is often more difficult to determine the income of a self-employed spouse because they can hide income in various ways.
Section 8

Legal Fees

In This Section

1. Who Gets Fees
2. Amount of Fees
3. Ability to Pay Fees

1. WHO GETS FEES

In South Carolina, the family court can award attorney’s fees to either party in the divorce. In deciding whether to award any fees, the family court looks at factors such as:

(a) each party’s ability to pay their own fees;
(b) the beneficial results obtained by the party’s attorney;
(c) each parties’ financial condition;
(d) the effect of the award of attorney’s fees on each party’s standard of living
(e) other factors such as whether a party was uncooperative in the litigation process and caused an increased in the other party’s fees.

Interestingly, a party’s fault (such as adultery), isn’t a factor in awarding attorney’s fees.

2. AMOUNT OF FEES

In deciding how much to award in legal fees, the family court looks at the following factors:

(a) the nature, extent, and difficulty of the case;
(b) the time necessarily devoted to the case;
(c) the professional standing of counsel;
(d) the beneficial results obtained; and
3. ABILITY TO PAY FEES

Unfortunately, it isn’t uncommon for the court to overlook the financial ability of a party to pay court-ordered attorneys fees.

In South Carolina, a party’s ability to pay is an "essential" factor in determining an award of attorney’s fees. In 2001, the South Carolina Supreme Court overturned an award of fees to a husband that represented 16% of the wife’s annual gross income. In 2009, the South Carolina Court of Appeals wrote that it would be “very concerned” by an award of attorney’s fees representing approximately 40% of a party’s annual income. Nevertheless, some family court judges still award fees without considering a party’s ability to pay.

In a 2014 case, a Beaufort family court judge ordered a wife to pay $50,000.00 in attorney’s fees to the husband. This $50,000.00 represented 90% of the wife’s gross annual income of $55,260.00. Fortunately, the South Carolina Court of Appeals reversed this award and sent the case back to family court to make a determination that is more consistent with South Carolina law.
1. SERVICE MEMBERS CIVIL RELIEF ACT

The Service Members Civil Relief Act (SCRA), formerly known as the Soldiers and Sailors Relief Act, delays family court proceedings that might harm a service member's rights if the case went forward while they are on duty. Because the SCRA may postpone family court hearings until the service member can appear in court, military divorces can take a more time than civilian divorces. One consideration under the SCRA is whether the service member has accrued leave that he or she could use to appear in court. The service member's current Leave and Earning Statement (LES) shows whether the service member has accrued leave. However, there may be issues regarding children that need to be resolved quickly. For example, if a service member successfully requests a delay in family court proceedings under the SCRA, the family court judge still may issue a temporary order of custody.

Regardless of whether a family court case is delayed under the SCRA, there are military regulations that require service members to support their spouse and their children. If the armed forces member fails to support their family, these regulations provide for disciplinary action against the service member. Although these regulations set forth support calculations which are often different than the amount of child support calculated under South Carolina's Child Support Guidelines, there is typically enough support until the parties can appear in family court.
2. RESIDENCY AND FAMILY COURT JURISDICTION

Issues may arise whether South Carolina's family courts have jurisdiction over the parties based upon the couple's residency. Typically, military personnel are not stationed in their hometown, they do not take up permanent residency at their duty station, or they are likely to be transferred or deployed to other duty stations. Under South Carolina law, if one spouse lives in another state, the other spouse must have lived in South Carolina for a year to file for a divorce here. To make matters more complicated, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) provides that the family court has jurisdiction over custody and support issues when a child has lived in South Carolina for at least six months. If the child is less than 6 months old, other factors come into play including which state the parties conceived the child. In one military divorce handled by Mr. Futeral, the client lived in South Carolina for less than a year, but the child had been in South Carolina for 6 months. Under those circumstances, the family court in Charleston had jurisdiction to issue orders regarding the mother's custody of the child and for child support, but the court did not have jurisdiction to order the sailor to pay alimony or to grant the parties a divorce. The service member tried to use the issue of jurisdiction to his advantage by refusing to consent to allow a South Carolina family court judge to decide issues of alimony and the divorce. However, using military regulations, the military commanded the service member to pay spousal support, and ultimately the service member later consented to jurisdiction in South Carolina.

3. SERVICE MEMBER'S INCOME

Calculations of child support and of alimony awards are based on each parties' income. Determining a service member's income is not as straightforward as it may be for civilian employees. A service member's income includes base pay, a housing allowance, pay for hazard duty and for other assignments, and “in-kind” compensation as housing, meals, and other non-monetary compensation. Much of that information can be found on the service member's LES.

4. MILITARY PENSIONS

Under the Uniform Services Former Spouse Protection Act (USFSPA), South Carolina's family courts can divide a military pension just like any other martial asset. Although civilian employees typically can cash out early or borrow from their retirement plans, service members cannot receive military pension benefits until at least 20 years of service (Reservists or National Guard must acquire a certain amount of “points” to be eligible). When dividing a military pension, it is necessary to calculate the service member's disposable retired pay which is the amount remaining after deducting the following items from the pension:

- advanced pay;
- forfeited amounts or fines from disciplinary actions;
• waivers in exchange for enhanced civil service retirement benefits;
• waivers in exchange for disability pay; and
• deductions for a survivor benefit plan.

There are typically three ways to divide a military pension. First, the court may award a percentage of the pension. Second, the court may award an exact dollar amount from the pension. Third, the court may award money or other assets in lieu of a share of the military pension.

If a civilian spouse receives a percentage of future retirement pay, the value of the pension may be reduced after a divorce if an eligible service member decides to receive disability payments by waiving a similar (sometimes equal) amount of retirement pay. Unlike a military pension, disability pay is not subject to equitable division in family court. So, it is important to address this contingency during the divorce so that the civilian spouse is not "shortchanged" in the future.

If a civilian spouse receives the pension's value "now" instead of waiting until the service member is eligible, the pension's "present value" must be calculated. Often, this calculation requires the services of a Certified Public Account or an appraiser who has experience in valuing military pensions.

A family court order dividing a military pension must be sent to the Defense Finance and Accounting Service (DFAS). If the following requirements are met, then the former civilian spouse may receive direct payments from DFAS instead of payments from their ex-spouse:
• there is a "final" (no longer appealable) order of divorce and an order dividing the military pension;
• the service member is retired/retiring;
• the service member has served at least 10 years; and
• the parties were married for 10 years during the member’s military service.

The address and fax number for DFAS is:

Defense Finance and Accounting Service
U. S. Military Retirement Pay
PO Box 7130
London, KY 40742-7130
FAX: 1-800-469-6559

Under a single court order of support regarding a service member, DFAS will not pay out more than 50% of the member’s disposable retired pay. If there is a second order (such as an order of child support from another divorce), then DFAS will not distribute more than 65% of the member’s disposable retired pay on the combined family court orders, and DFAS pays them in the order it received them.
5. 20-20-20 BENEFITS

The basic criteria is that the marriage must have lasted at least 20 years, the military member served for at least 20 years, and the marriage overlapped with the member's military service for at least 20 years. If those criteria are met, a former spouse remains eligible for Tricare coverage for the rest of their lives unless they remarry. If the marriage lasted at least 20 years, and at least 15 of those years overlapped with the member's military service, then the former spouse remains eligible for Tricare for one year after the date of the divorce.

6. SURVIVOR BENEFIT PLAN (SBP)

A Survivor Benefit Plan (SBP) is essentially an insurance benefit that pays a portion of a deceased military retiree's pay to a beneficiary, such as a spouse. Otherwise, if there is no SBP, then the deceased retiree’s pay stops at death. A SBP is funded in part by the government and by monthly deductions from the service member’s retirement pay. There are different levels of coverage depending on the premium paid by the retiree, but the maximum coverage is 55% of gross retirement pay.

When a military couple divorces, the former spouse automatically loses eligibility as an SBP beneficiary. However, SBP coverage after a divorce can be either ordered by the family court, agreed upon by the parties, or done voluntarily by the retiree. Regardless of whether coverage for a former spouse is by an agreement or by a court order, that coverage will not take effect unless and until a formal application for a change in status is made to the Defense Finance and Accounting Service (DFAS) within one year of the divorce. If there is an agreement or a family court order requiring continued coverage, but the military retiree refuses to or fails to contact DFAS, then the former spouse may make the election by making a written request to DFAS. This written request is known as a “deemed election” request. The "deemed election" must also be made within one year from the date of the court order or agreement, and a certified copy of the order or the agreement must be included with the written request.

Coverage is suspended (not terminated) if the former spouse remarries before the age of 55. If the former spouse’s new marriage ends by divorce or death of the new spouse, then coverage resumes. If coverage was voluntary (not by court order or agreement), then the retiree can stop it at any time. If coverage was by an agreement or a court order, then as long as the former spouse is alive, the retired service member cannot name his or her current spouse as a beneficiary unless the ex-spouse formally waives the benefit in writing.

7. THE SOUTH CAROLINA MILITARY PARENT EQUAL PROTECTION ACT

The South Carolina Military Parent Equal Protection Act (MPEPA) lessens the impact that military service has on a parent’s custody and visitation rights when they’re deployed.
The MPEPA doesn’t apply to all types of orders or mobilization. Instead, it applies to military personnel who meet a specific definition of “military service.” If the military parent is a member of the Army, Navy, Air Force, Marines, Coast Guard, or Reserves, the parent is in “military service” for purposes of the Act if he or she is deployed for combat, a contingency operation, or a natural disaster when the military order would not allow a family member to accompany the serviceman on deployment. If the parent is a member of the National Guard, the parent is in “military service” for purposes of the Act if called to active service by the President or Secretary of Defense for a period of more than 30 consecutive days responding to a “national emergency.”

In the past, some civilian parents have attempted to gain an advantage when the other parent was deployed by seeking to modify an existing order for custody, visitation, or child support. Civilian parents have also attempted to argue that the deployment means that the military parent isn’t in a good position to have custody or regular visitation due to the uncertainty of the military parent’s schedule. The MPEPA attempts to remove any advantage the non-military parent would have in a custody modification action and to assist in making prompt adjustments to accommodate any time of deployment.

If a service member is given orders that count as “military service” under the Act’s definition, the court can issue a temporary order making reasonable accommodations for the parties because of the military parent’s absence, and that order will terminate upon the military parent’s return. Even if a temporary order isn’t issued to accommodate the absence, the non-military parent is required to give reasonable visitation to the military parent during any time of leave. If there is no existing order establishing custody or visitation, and deployment is imminent, then the court must hold an expedited temporary hearing to address issues of short-term custody, visitation, and support.

If the military parent is required to be separated from a child due to military service, the family court can’t issue a final order modifying the terms of custody or visitation in an existing order until 90 days after the parent is released from military service. Also, a military parent’s absence or relocation due to military service can’t be the only factor supporting a modification of an existing order. In other words, the deployment shouldn’t be held against the military parent.

If a military parent is called to service, then under the MPEPA either parent can request that the family court issue an order temporarily adjusting child support based upon any temporary increase or decrease in pay during the deployment. After the deployment ends, the child support automatically reverts to the original amount. Any “hazard pay” or the like can’t be used to permanently set child support.

In a civilian divorce in South Carolina, a family court judge considers 4 factors in determining whether to award fees to one party: (1) each party’s ability to pay his or her own fees, (2) the respective financial condition of each party, and (3)
the effect of the fee on each party’s standard of living, and (4) the beneficial results obtained by the attorney. Under the MPEPA, the court also considers whether either party didn’t reasonably accommodate the other based upon the deployment, whether either party caused any delay in the process, and whether either party did not timely exchange complete financial information.

The MPEPA specifically encourages parents to act reasonably to negotiate arrangements prior to mobilization. The MPEPA also requires the parents to cooperate in exchanging information to facilitate an agreement. Immediately gather your LES statements and other relevant information. Be prepared to show your pay both before and during your deployment. Remember that the MPEPA requires a prompt exchange of financial information between parents to determine child support.
What is Common Law Marriage?

A marriage is usually involves both spouses obtaining a marriage license from the probate court and having a ceremony where the spouses exchange vows. In a common law marriage, the couple may be considered married, even without a ceremony and a marriage license, if:

- **No Impediment to Marriage** – Both parties are legally free to marry (such as not already married to someone else, not brother and sister, not under age).

- **Cohabitation** – The parties must cohabit (live together).

- **Present Intent to Be Married** – There must be an agreement (formal or informal) and an intent to be married.

- **Reputation** – Both parties must hold themselves out to the public as husband and wife.

Does Living Together Create a Common Law Marriage?

No. Many couples live together in South Carolina without ever creating a common law marriage. Also, the length of time you live together doesn’t by itself determine whether a common law marriage exists. In fact, no South Carolina law says that a certain number of years of cohabitation creates a common law marriage. A couple could live together for decades without creating a common law marriage, or they could create a
common law marriage based on one evening of living together.

**HOW IS A COMMON LAW MARRIAGE DIFFERENT FROM A TRADITIONAL MARRIAGE?**

Besides the way in which the couple married, there is no difference. Parties to a common law marriage have the same duties, responsibilities, and rights as if they were formally married. In other words, a couple married under common law is just as married as a couple who had a formal marriage ceremony. For example, children born out of a common law marriage are legally presumed to be the husband’s children. Also, to end their relationship, a couple married under common law must get a divorce.

**HOW DO I PROVE I’M IN A COMMON LAW MARRIAGE?**

First, you have to show that you’re both legally free to marry as mentioned above. Second, you must show that you and your partner lived together for some period of time. The third and fourth items, intent to be married and a reputation as a married couple, can be challenging to prove:

**Intent to be Married** – Intent to be married can either be formal (such as a written agreement signed by both parties stating they’re married) or informal (such as calling each other husband and wife). Whether the intent is formal or informal, you must also show that you and your partner both held yourselves out to the public as being husband and wife.

**Holding Yourself Out to the Public as Married** – This is also called “reputation.” Essentially, you must show evidence that both you and your partner acted in ways so that the public accepted you as a married couple. Examples include:

- **Both parties in the relationship told others that they were husband and wife** – That would be not only be proof of an intent to be married, but also proof that you held yourself out to the public as a married couple. If one party was making that claim, and the other party didn’t know it, then that wouldn’t be proof of reputation. However, if one party was making that claim in front of the other party, and the other party remained silent and let others think there was a marriage, then that would be proof that you were married under common law.

- **The couple fills out paperwork using the same last name** – Again, this would be proof of an intent to be married and proof of reputation. A few examples of this include:
  - Joint checking accounts
  - Lease agreements
  - Hotel or motel registries
  - Joint tax returns
WHY DOES IT MATTER WHETHER I’M IN A COMMON LAW MARRIAGE?

If a couple breaks up, the rights between them can be drastically different depending on whether they’re considered to be in a common law marriage. Here are some examples:

**Bigamy** – If the couple is married under the common law, then they must get a divorce. Otherwise, it’s illegal (bigamy) for either one of them to get remarried.

**Alimony** – Let’s assume that an unmarried couple lives together, and one of them provides most or all of the financial support by paying the bills. If the couple splits apart, each party is on their own financially. However, if the couple is married under the common law, then the breadwinner may have an obligation to pay alimony to the other party.

**Assets and Debts** – When unmarried couple lives together, it’s common for both of them to contribute financially to their relationship such as helping to make mortgage payments or buying furniture and appliances together. When the unmarried couple splits, major problems can arise over property and debts if the parties can’t agree how to divide their assets and debts. For example, I dealt with a case where an unmarried couple lived in a home that was titled in the boyfriend’s name, but both parties signed the mortgage. When the couple broke up, the boyfriend was legally entitled to keep the property and any equity in the property even though the girlfriend made mortgage payments for several years. To make matters worse, the boyfriend wasn’t able to make the mortgage payment on his own, and the house went into foreclosure. Because the girlfriend signed the mortgage, her credit was ruined, and the bank tried to collect directly from her. If the couple had been married, then the family court could have ordered that the property be sold and that the woman receive her fair share of the equity in the home. Also, the family court could have ordered that she remain in the home instead of the boyfriend.

**Children** – If an unmarried couple has a child, then the law states that the mother has full custody of the child. Absent a family court order stating otherwise, the father has no rights other than to support the child. However, if the couple is married under common law, then the father’s rights are equal to the mother’s rights.

**Death and Probate** – If an unmarried couple lives together, and one partner dies without a will, then the other partner has no rights to inherit any money or property from the deceased. If the couple is married under the common law, then even if the deceased didn’t have a will, the survivor would receive half of the deceased’s estate if they had kids and all of the estate if they didn’t have kids. Also, if the deceased partner had a will but purposely left the other out of the will, the common law spouse would still be entitled to 1/3rd of the deceased’s estate.
HOW DO I AVOID CREATING A COMMON LAW MARRIAGE?

You could enter into a written agreement that you both sign that makes it clear that while your relationship is romantic, you have no intention of getting married and that you can only be considered married by formally obtaining a marriage license. Otherwise, make sure you don’t hold yourself out to the public as husband and wife as follows:

• Don’t tell anyone you’re married.

• If your significant other introduces you as their spouse, correct them.

• File separate tax returns.

• If you buy a house together, make sure the mortgage you sign doesn’t list you as “married.”

• Keep bank accounts and credit cards separate.

• Don’t put utilities and other bills in both of your names.

Overall, use your common sense and don’t confuse the public about your relationship.
1. RESUMING A MAIDEN NAME

At the final divorce hearing (or sometimes in the hearing approving the separation agreement if it occurs before the divorce), a wife may request to resume her maiden name. During the hearing, the wife must testify and show the court that the name change isn’t for an improper purpose such as avoiding existing bench warrants or creditors and that the wife doesn’t appear on any sex offender registries. This is a routine process in almost every case. The family court judge then issues an order allowing the wife to resume her maiden name, and then she takes the order to the Social Security Office to make it official. The spouse then needs to contact the DMV and all other relevant entities to notify them of the name change.

2. CHANGING A CHILD’S NAME

A parent may petition (file a lawsuit) to change his or her child’s name which requires the appointment of a guardian ad litem (“GAL”). The GAL must be appointed even if both parents agree to the name change. Also, a hearing is always required in a child name change case, and the GAL will report the findings of his or her investigation at this hearing.

Before granting a child’s name change, the family court judge must determine whether the name change is in the “best interest of the child.” When determining what is in the child’s best interest, the judge will consider the following factors:
1. The length of time that the child has used the present surname;

2. The effect of the change on the preservation and development of the child’s relationship with each parent;

3. The identification of the child as part of a family unit;

4. The wishes of the parents;

5. The stated reason for the proposed change;

6. The motive of the parents and the possibility that the use of a different name will cause insecurity or a lack of identity;

7. The difficulty, harassment, or embarrassment that the child may experience when the child bears a surname different from the custodial parent;

8. The preference of the child if the child is of an age and maturity to express a meaningful preference; and

9. The degree of community respect associated with the present and proposed surname.
Divorce isn’t an “event.” It is a process. There are procedures to follow in all cases from the moment you file a complaint for divorce until the day you are no longer married. In this chapter, we’ll cover the basics of the process from beginning to end.

“Divorce is a game played by lawyers.”
~ Cary Grant
1. THE PROCEDURE FOR FILING FOR A DIVORCE

First things first, there is time spent filing for the divorce and time for the other spouse to respond. In South Carolina, a divorce begins with the filing of a summons and complaint for divorce as described in Section 2 of this Chapter. After that paperwork is submitted to the clerk of family court, it has to be served on the other spouse such as by personal delivery through a process server. Afterward, the spouse who is served with divorce papers has 30 days to answer and to counterclaim. If the other spouse asserts a counterclaim, then the spouse who started the divorce has 30 days to respond to the counterclaim. So, not accounting for the time it takes to draft the summons and complaint, deliver it to the clerk of court for filing, and to serve the other spouse, it can take approximately sixty days to allow for the answer to the complaint and an answer to any counterclaims.

2. THE GROUNDS FOR DIVORCE

**Fault Grounds** - 90 Days - If you are seeking a divorce on fault based grounds, then you can request a final hearing (a trial) 90 days after you file for divorce. In South Carolina, the fault based grounds for divorce are adultery, habitual drug or alcohol use, or physical abuse.

**No Fault** - 365 Days - The only “no fault’ divorce ground in South Carolina is one year’s continuous separation. In other
words, you can’t file for your divorce until you have lived separate and apart from your spouse for one year.

3. UNCONTESTED VS. CONTESTED DIVORCE

Whether your divorce happens quickly or drags on mostly depends on whether your divorce is contested or uncontested.

**Uncontested Divorce** - If the divorcing couple can agree on everything such as custody, child support, and splitting their property and finances, then the divorce is “uncontested.” Typically, uncontested divorces are based on the ground of one year’s separation. So, the faster they get their paperwork filed and get a final hearing date, the sooner they can get divorced (two to three months is a safe estimate). Click here to learn more about uncontested divorces in South Carolina.

**Contested Divorce** - In South Carolina, a contested divorce usually involves disputes about custody or visitation, alimony, child support, and property. These divorces can easily last a year and sometimes more. For example, if custody is disputed, then the family court appoints a guardian ad litem (GAL) to investigate and report back to the court. Unless the court orders the GAL to complete the investigation within a certain time, then it may take several months for the GAL to finish.

Also, in contested divorce cases, the family court allows the parties to engage in “discovery.” Discovery allows each side to obtain evidence from the other by requesting answers to interrogatories (written questions), requests for production of documents, and depositions (out-of-court oral testimony of a witness that is reduced to writing for later use in court). Generally speaking, a party has 30 days to respond to discovery. If the party doesn’t respond, then the requesting party must file a motion to compel discover which takes time to schedule with the court. Also, discovery can be obtained from nonparties by using subpoenas. Overall, discovery can takes months to complete.

4. THE FAMILY COURT’S DOCKET

Whether the family court docket moves slowly depends on where you file for divorce. Some counties in South Carolina have more resident family court judges to hear cases than other counties do. Some counties do a better job than others at keeping the docket moving along. Generally, it takes more time to schedule a day or more of trial in a contested case than it takes to schedule an uncontested divorce that takes 15 to 30 minutes in court.

5. HOW THE DIVORCE IS HANDLED

How the parties and their lawyers handle the divorce can have a big impact on how long it takes. The more the spouses are disagreeable to each other, the more contested and longer the divorce becomes. In some cases, it becomes clear that one or both spouses are trying to “punish” the other in family court. When spouses use the divorce process for “payback,” then the divorce is likely to drag on for a year or more.

Likewise, some lawyers are very aggressive and encourage their clients to fight over all the details of the divorce. The
unfortunate truth is the more the spouses fight and the longer the divorce takes, the more the lawyers get paid.

6. DON’T RUSH YOUR DIVORCE

Over the years, I’ve helped clients who rushed their divorce, didn’t cover all the details, and didn’t think ahead as to future consequences of their decisions regarding their children, their finances, and more. Don’t make the mistake of rushing your divorce especially if there are children and financial issues involved. There are very few “second chances” in family court, so make sure you take the time necessary to handle it “right” no matter how badly you want out “right now.”
1. SUMMONS & COMPLAINT

In family court, the case is started by the Plaintiff (the person who files first) filing a Summons and Complaint. The summons is a document that tells the Defendant (the person against whom the complaint is made) how long they have to answer the complaint and where to send the answer. The complaint describes all the facts and circumstances showing why the Plaintiff believes he or she is entitled to relief (such as custody, child support, alimony, a divorce, etc.) through the family court.

Before the summons and complaint is served (delivered) to the defendant, it must be filed with the family court. There is a fee for filing which is currently $150.00. After the summons and the complaint have been filed, then the Plaintiff must serve these documents on the Defendant. There are several rules regarding how to serve these documents. For example, if you are a party, you can’t serve the documents yourself. Also, you can’t serve someone in a family court case by leaving the documents with your spouse’s coworker in their office. Overall, it is best to have the paperwork served by a sheriff or a process server.

After the summons and complaint are served, the Plaintiff must file an Affidavit of Service with the family clerk of court’s office so they have a record of whether the Defendant was properly served.
2. ANSWER & COUNTERCLAIM

In South Carolina, the Defendant has thirty (30) days to answer the complaint, otherwise the Defendant may be held in “default.” Typical answers, depending on the allegations, are to “admit” the allegation, “deny” the allegation, or to assert that you are “without sufficient knowledge” to admit or deny the allegation.

Besides answering the complaint, the Defendant may include a counterclaim against the Plaintiff. Like the Defendant, the Plaintiff has thirty (30) days after the service of the counterclaim to respond to the Defendant and, if the Plaintiff fails to respond, the Plaintiff may be in “default.” Likewise, after serving the counterclaim, the Defendant must file an Affidavit of Service with the clerk of family court.

3. DEFAULT

Default in family court is different than in civil court. In civil court, a default typically means that the party who didn’t answer a complaint or counterclaim loses. In family court, it isn’t as simple as whether there is a loser that should pay money because the family court case may involve issues concerning the wellbeing of children and custody. Therefore, in family court, even if a party doesn’t answer, the defaulting party may still ask the family court to decide issues concerning custody, visitation, alimony, equitable distribution, and attorney’s fees.
SECTION 3
Temporary Relief

1. What is a Temporary Hearing & Temporary Relief?

2. What Happens at a Temporary Hearing?

There are many difficult and important decisions clients need to make before a marriage ends in a divorce. For example, there may be property to divide, debts to split, concerns about alimony, and questions about child custody and visitation. Unfortunately, most divorcing couples don’t see eye-to-eye on these decisions especially when they first separate. For these reasons, either spouse make seek “temporary relief” from South Carolina's family courts while the divorce lawsuit is ongoing.

1. WHAT IS A TEMPORARY HEARING & TEMPORARY RELIEF?

Before granting "temporary relief" to either spouse, the family court conducts a hearing that is referred to as a "temporary hearing" after which the court issues a "temporary order." At a temporary hearing, the family court is not trying to decide who is right or wrong or who wins or loses. Instead, the family court's primary goal is to maintain the status quo between the parties during the divorce case. For example, the court will decide who lives in the home and who pays for the home. The court will decide who is financially responsible for utilities, health insurance, monthly credit card bills, car insurance, and many other financial issues. Also, the court may grant a spouse temporary support so they can maintain his or her standard of living during the divorce. If there are minor children involved, then the court will determine where the children will live (physical custody), who will make major decisions for the children (legal custody), who will pay child support in what amount, and the visitation schedule for the
noncustodial parent. The court will restrain the parties from behaving poorly around the children by talking about the divorce, exposing the children to girlfriends/boyfriends, drinking around the children, and so on. Also, the court will restrain the parties from behaving poorly toward each other such as harassing each other at work or at home, hiding or disposing of assets, incurring new debts in each other's names, and other matters.

2. WHAT HAPPENS AT A TEMPORARY HEARING?

Temporary hearings are usually scheduled quickly, and the spouse who requests a hearing only has to give the other spouse 5 days notice of the hearing date. Temporary hearings are very brief, and the parties are limited in what they can present to the family court. Temporary hearings usually last less than thirty minutes and there is no live testimony by the parties or any of their witnesses. Instead, the parties submit affidavits to the court (notarized written statements) along with their financial declarations (a family court form that details each parties' monthly income, monthly expenses, and other finances). In some South Carolina counties, the family court limits the parties' affidavits to 8 pages or less. Additionally, the parties are only given a very brief opportunity (often 5 minutes) to explain to the court what relief they seek. Sometimes the family court judge makes his or her ruling during the hearing itself, but more often the court makes its ruling within a few days afterward. This ruling becomes a "temporary order" that governs the parties' legal rights and responsibilities while the parties litigate and until the family court issues a "final order" after a trial. Unfortunately, the litigation process can take a long time. So, a "temporary order" granting "temporary relief" can have a long-term impact on the parties' lives until their final day in court.
Discovery is a formal process of sharing and exchanging information between the parties before any trial takes place. In discovery, the parties (or their lawyers) are trying to get answers to questions about each parties’ version of events during the marriage, about the parties’ assets and liabilities, and other questions. Also, through discovery, the parties are trying to gather evidence and proof of their claims such as adultery or habitual drunkenness.

In family court, unlike civil court, discovery isn’t automatically permitted once the lawsuit is filed. Instead, you have to ask the family court for an order permitting discovery. In all my years of being a family court lawyer, I’ve never seen a family court judge deny a request for an order of discovery. In other words, the family court routinely grants these requests.

These rules are so complicated that law students spend a good portion of their first year in law school learning about the subject. Indeed, to truly examine discovery in family court, we would need a whole book to cover the subject. Instead, this section on discovery is intended to familiarize you with the basics of discovery and some of the terms involved.

1. INTERROGATORIES

Interrogatories are written questions that are sent by one party to another. Generally speaking, the party who receives these questions has 30 days to answer them if they were personally delivered or 35 if the interrogatories are sent by
mail. There are several other rules that apply to how long you have to answer these questions such as if the last day to answer falls on a weekend or holiday, then the response isn’t due until the next day.

Interrogatories must be answered “under oath.” In other words, your answers, even if prepared by your attorney, must include a notary public’s signature and seal.

The rules for discovery list several “standard” interrogatories such as describing witnesses and documents. Besides these standard interrogatories, you are limited to fifty (50) more questions unless you have a court order permitting more.

Interrogatories are only between the parties. In other words, you can’t send interrogatories to your spouse’s witnesses, only to your spouse.

2. REQUESTS FOR PRODUCTION

Like interrogatories, requests for production are made in writing, they must be answered within 30 days, and they are only between the parties. Requests for production are the means by which you can ask the other party to make copies of documents, photographs, records, etc. and to request the inspection of property.

3. REQUESTS FOR ADMISSION

Requests for admission are written questions by one party to another asking that party to either admit or deny specific facts or whether an attached document, such as a bank statement, cell phone records, or tax returns, are genuine. If the other party fails to respond on time, within 30 days, then the questions are deemed admitted.

4. DEPOSITIONS

A deposition is testimony that is given under oath. Under oath means that the person who is testifying is sworn, under penalty of perjury, to tell the truth. During the deposition, lawyers will ask questions of the witness, and the answers are recorded by an official court reporter. Later, the court reporter prepares a written transcript of everything that is said during the deposition. Depositions can also be video-recorded.

There is little difference between testimony at a deposition and testimony in a courtroom except there is no judge there to rule on objections to the questions such as objections to hearsay testimony. During a deposition, lawyers do not make these objections until later when a lawyer tries to introduce the deposition transcript (or portions of it) at trial. Otherwise, it is not uncommon to hear a lawyer object, during a deposition, to the “form of the question.” However, despite this objection, the witness still has to answer the question.

Depositions can be taken by any party of any other party or any witness in the case.
5. SUBPOENAS

Although you can’t send interrogatories or requests for production to witnesses, your lawyer can send subpoenas to these witnesses that compel them to produce documents and/or appear to have their deposition testimony taken. Like the rules that govern discovery, there are many rules that govern subpoenas, who can send them, how long a witness has to respond to a subpoena, who pays for the costs of copying documents, and the list goes on.

6. MOTIONS TO COMPEL

If a party doesn’t respond to interrogatories or requests for production, then the party seeking those answers must file a motion to compel with the family court. If the family court grants the motion to compel, then the party who objected or failed to answer must then do so. If that party again fails to respond after the family court issues an order compelling discovery, then that party can face various sanctions by the family court.

7. MOTIONS TO QUASH

If a witness or a party objects to a deposition notice or a subpoena, they must file a “motion to quash” the deposition or subpoena. Afterwards, the family court will hear from everyone on the issue and decide whether the subpoena should be complied with or whether the deposition should take place.
## Responding to a Deposition Notice

### In This Section

1. What do I do if I receive a Notice of Deposition in South Carolina?
2. What if the deposition conflicts with my schedule?
3. Do I need to bring anything?
4. Do I get paid for my time?
5. What if I don’t know anything about the case?
6. What if I don’t want to answer the questions or if I don't show up?
7. How can I be served with a Notice of Deposition?
8. Should I bring my own lawyer with me to the deposition?

A deposition is a pretrial examination, under oath, of a witness or a party to a case. People who are parties to a case receive Notices of Deposition through their attorneys, and the attorneys to the case will sort out the logistics of taking the deposition. However, sometimes the parties need to depose people who are simply independent witnesses and not parties to the case. In these instances, the Notices of Deposition should be accompanied by a Subpoena, possibly a Subpoena Duces Tecum. These witnesses are often left wondering what their responsibilities are in such an instance.

### 1. WHAT DO I DO IF I RECEIVE A NOTICE OF DEPOSITION IN SOUTH CAROLINA?

If you receive a Notice of Deposition in South Carolina for a case that you are not a party to, you still have to respond to it and attend the deposition. Specifically, if you are a South Carolina resident, then you may be compelled to give a deposition in any county in which you live or in which you transact business in person.

### 2. WHAT IF THE DEPOSITION CONFLICTS WITH MY SCHEDULE?

Most lawyers will be cooperative with witnesses who aren't parties. There is nothing wrong with calling the lawyer who signed the deposition notice, explaining your situation, and asking that the deposition be rescheduled to a time convenient for all. If the lawyer doesn't want to work with you,
you may have to hire your own lawyer to file a motion to "quash" the deposition and to ask that it be rescheduled.

3. DO I NEED TO BRING ANYTHING?

If a Subpoena Duces Tecum was served with the deposition notice, read it carefully. This type of subpoena directs you to bring certain documents to the deposition. If you are opposed to providing any of these documents, you should contact your own attorney and determine if you have grounds to object to producing them and decide whether you need to take action, such as filing a motion to quash with the court. Also, be aware that a Subpoena Duces Tecum may require that documents be produced either on the date of the divorce or sometime before the deposition date.

4. DO I GET PAID FOR MY TIME?

A witness is entitled to $25.00 per day, plus mileage to and from the witness’ residence, for attending a deposition. There is no difference in compensation if the deposition lasts 1 hour or 7 hours. The check should be served with the deposition notice. If you plan to resist attendance by filing a motion or otherwise, then you are not entitled to cash the check unless the deposition ultimately goes forward.

5. WHAT IF I DON’T KNOW ANYTHING ABOUT THE CASE?

Sometimes, lawyers receive bad information about the identities of witnesses. If you truly know nothing about the case, there is nothing prohibiting you from contacting the lawyer who signed the notice and informing him or her of this fact. The lawyer may decide to withdraw the notice, but if he or she does not, then you are still required to attend, even if most of your answers will be “I don’t know.”

6. WHAT IF I DON’T WANT TO ANSWER THE QUESTIONS OR IF I DON'T SHOW UP?

If you refuse to answer questions or if you just don’t show up, you potentially subject yourself to contempt of court or other sanctions. Generally, you are required to answer all questions. However, sometimes a privilege applies that would protect you. For example, spouses are not required to testify against each other over certain matters. There may be other instances where you are justified in not answering. For example, if you witnessed a car accident, the deposing lawyer should not ask you about your sex life. If you do choose not to answer a question, you may be required to file a motion to quash with the court within 5 days after the deposition.

7. HOW CAN I BE SERVED WITH A NOTICE OF DEPOSITION?

Notices are generally served in one of two manners. First, they may be served by having a process server deliver the papers in person to the witness or leaving the papers at the witness’ residence with someone of suitable age and discretion. “Suitable age and discretion” could be someone under 18 years of age in certain instances. Another manner is by
certified mail. If you have any questions regarding the service of your particular Notice of Deposition, then you should have your own attorney review it.

8. SHOULD I BRING MY OWN LAWYER WITH ME TO THE DEPOSITION?

Every case is different, and you never know when your testimony could show that you are liable for something. Further, you may wish to assert some type of privilege and not answer a question, as described above. You should weigh the costs of hiring an attorney, which could be relatively low for something like a simple deposition, against the potential for liability you may have in a particular case.
If you’re ever involved in a divorce claim that is heading to the courtroom instead of settlement, you too may be required to participate in a deposition.

1. THE PURPOSE OF A DEPOSITION

A lawyer takes a witness’s deposition for three (3) primary reasons: The first reason is to find out what the witness’s “story is,” and what it will be at trial.

The second reason is to “pin down” the witness’s specific story so that the witness will have to tell the same story at the trial. Third, the lawyer may hope to catch the witness in a lie so that later the lawyer can convince a judge or jury that the witness isn’t truthful.

2. PREPARING FOR A DEPOSITION

If the case involves documents that you may be asked about, review the documents (such as contracts, emails, etc.) before you testify. Also, don’t try to memorize what you are going to say. There is no point in trying to “script” your testimony.

3. PITFALLS TO AVOID IN A DEPOSITION

Tell the truth. You have sworn to tell the truth. Tell it. Don’t worry about whether the truth helps one side or the other.

Don't try to answer a question unless you know the answer. Take your time and think about the question. If you don’t know the answer, simply say so.
Answer the question and only the question. Keep your answers honest and to the point. Listen carefully to the question and answer only what the question asks.

Wait for the question. In a normal conversation, you may start to answer a question before its done. Don’t do this in a deposition. Not only is it hard for the court reporter to type questions and answers when people interrupt each other, you may give an answer without knowing exactly what the question is.

Finish your answer. You should finish your answer even if the lawyer asking questions tries to interrupt you before you have had a chance to finish your answer. Experience shows that the best way to handle an interruption is for a witness to stick out the palm of his or her hand toward the questioner like a cop stopping traffic. This works almost every time.

Don’t try to answer a question unless you are sure you understand the question. A deposition isn’t an intelligence exam. Also, no one expects you to understand a lawyer's legal mumbo-jumbo. If you don’t understand, simply say so.

Don’t be defensive when answering questions. For example, if the question is “Do you drink alcohol?” and the truth is you do, then simply answer “Yes” and then stop. A defensive answer would be “Yes, but only on social occasions.” Here is another example to show the right and wrong way to answer questions (a witness, who is a woman suspected of having an affair with a married man, is asked):

Q. Did you ever have lunch with Mr. X?
A. [Wrong:] Yes, but it was always in public places.
   [Right:] Yes.

Q. Did you ever go out of town with Mr. X?
A. [Wrong] Only to Charleston.
   [Right] Yes. (then, if asked “Where?” should the witness truthfully answer Charleston.

Q. Did he ever buy you gifts?
A. [Wrong] Well, nothing expensive. Nothing but a loaf of bread that he got me once on an out-of-town trip.
   [Right] Yes. (then if the questioner asks “What?” the witness may say “A loaf of bread.”)

Remember, everything you say is being taken down word by word by the court reporter. Don’t be chatty, don’t be sarcastic, and don’t be funny. Simply answer the questions put to you.

If your answer was wrong, correct it immediately.
If your answer wasn’t clear, clarify it immediately.
Don’t make a promise during the deposition to give further information in the future. Sometimes in the deposition the attorney will ask about paperwork or records that you don’t have with you. The lawyer may also ask if you will make the paperwork or records available for them to look at and copy. Although in everyday life, you may do small favors for people without giving much thought. Don’t do this in the deposition.

Don’t let the attorney get you angry or excited. This destroys the effect of your testimony, and you say things which may be used to your disadvantage later.

After the deposition, don’t chat with the opponents or their attorneys.

Avoid saying "To the best of my recollection," "I think," "I believe," "In my opinion." Give positive, definite answers if possible. If you don’t know, say so, don’t make up an answer. You can be positive about the important things which you naturally remember. If asked about little details which a person naturally would not remember, it is best to just say you don’t remember.

Avoid starting your sentences with “To be frank with you . . .” or “To be honest with you . . .” These are nervous phrases people use which make the witness sound like they aren’t telling the truth. Of course you are going to be honest with the questioner; you swore an oath to do so.

Don’t nod your head for a "yes" or "no" answer. Speak out clearly. The court reporter must hear the answer so that it can be written down.

4. TRICK DEPOSITION QUESTIONS

There are several questions that are “trick questions.” That is, if you answer them the way the other attorney hopes you will, he or she can make your answer sound bad. Here are a few of them:

"Have you talked to anybody about this case?" If you say "no," that is not right because good lawyers always talk to the witness before they testify. If you say "yes," the lawyer may try to imply that you were told what to say. The best thing to do is to say very frankly that you have talked to whomever you have -- lawyer, party to suit, police, etc. -- and that you were just asked what the facts were.

"Have you told me everything you know?" You may remember things after the deposition that you may want to tell a judge or jury at trial. When you answer this question, it
is fair for you to say that you think you have told everything, but you can’t be sure.
For most persons, court can be an intimidating experience with or without a lawyer by your side. Here are some general pointers if you find yourself appearing in any family court in South Carolina.

1. **BEFORE YOU GO TO COURT**

Try to get a good night’s rest before you go to court. Furthermore, most courts do not allow food or drink, but they do have water fountains. Don’t go on an empty stomach! When you are tired, hungry, or thirsty, you aren’t at your best!

2. **DRESSING FOR COURT**

Dress properly and conservatively for every court hearing. Dress “business casual” or to “dress like you are going to church.” Failure to dress appropriately could result in your case being continued or you being excluded from the courtroom during the case. The judge hearing your case will associate your attire with the level of respect you are giving to the court.

Women should wear dresses which are knee length or longer or tailored slacks and a blouse. Men should wear tailored slacks and a shirt with a collar. Clothing should be clean.

Some examples of clothing that are *not* allowed include baseball caps, sleeveless tops, halter tops, backless dresses, low cuts dresses, miniskirts, shorts, blue jeans, t-shirts, flip-flops, and sandals. Tuck in your shirt.
Remove any piercings other than one pair of ear rings for women, cover any tattoos if possible, and have a conservative hair style and color. Even if you feel these things represent a particular belief or who you are, remember that you are presenting in front of a judge who may be deciding your fate, so a “middle-of-the-road” appearance will minimize the chance of offending the court or jeopardizing your credibility. While most people don’t like being “judged,” that is exactly what going to family court is all about.

3. WHAT TO BRING & NOT TO BRING TO COURT

Bring your entire file, which includes every document, CD-ROM, or thumb drive that relates to your case. You never know what could happen, and it is best to be prepared. Even if you have a lawyer, some portion of your lawyer’s file may have accidentally stayed on his or her desk at the office, and you can actually save the day by having a copy of some document handy.

In some counties, such as Dorchester County Family Court, you aren’t allowed to bring your cell phone, so it is best to just leave it in your car if you’re unsure. If you’re allowed to have your phone, such as in Charleston County, turn it off or put it on silent! If your cell phone goes off in the courtroom, the judge can take your phone and can possibly hold you in contempt (put you in jail). In fact, one Charleston County judge made the local headlines by putting a participant in a holding cell because her phone rang during court. At a minimum, the judge may take a ringing cell phone as a sign of disrespect.

For security reasons, you can’t bring any knives, scissors, nail files, tweezers or other sharp objects into court. Also, you can’t bring in any mace.

You can bring a friend or family for moral support if it would make you more comfortable. Although this person will not be able to sit at the table with you, he or she will at least be there in the courtroom to talk to you before and after.

4. ARRIVE EARLY TO COURT

The court won’t wait on you if you’re late. Talk to court staff upon arrival to make sure you are in the right place and waiting outside of the right courtroom.

Another advantage of arriving early is that you are able to sit down, relax, and gather your thoughts as you wait on your hearing. You are more likely to present well in court if you walk inside in a relaxed state than if you are running down the hallway trying to make your hearing on time.

5. HOW TO BEHAVE IN AND AROUND THE COURTHOUSE

You may find yourself waiting in a hallway outside of the courtroom. Be aware that people around you could be lawyers, witnesses, or others involved in your case. Don’t talk about your case because you never know who might overhear
you. Also, don’t “cut up” or joke around (as many nervous people will do) as it could give someone a bad impression of you.

Even when parking your car, be polite and let other cars in front of you. Don’t cut people off or exhibit frustration towards other drivers. You never know when your judge is in the other car.

If you find yourself waiting inside of the courtroom, just sit there, watch, and be silent. Judges may take whispering to your neighbor, sleeping, or certain other acts as a sign of disrespect. Your sincerity, or lack thereof, will be noticed. If the judge isn’t telling a joke or laughing at a joke from one of the lawyers, you shouldn’t be laughing either. Also, don’t chew gum in the courtroom.

When your case is up, meaning you and your lawyer are addressing the court, continue to maintain a sincere demeanor at the table even if you do not like what others are saying. I’ve seen people scolded by judges on numerous occasions for making facial expressions, talking, or shaking their head, in protest of what a lawyer or witness is saying about their case. If you must speak, do it through your lawyer. Showing respect is of utmost importance. If you don’t have a lawyer, be very careful of how you make any objections and be sure to not be disruptive to the proceedings.

6. HOW TO SPEAK TO THE JUDGE

Be humble, respectful, and polite. Address the judge as “Your Honor,” “Sir,” or “Ma’am.” Address parties, witnesses, and lawyers as “Mr.” or “Ms.” I can’t emphasize enough – show absolute respect, and it will likely be returned. Don’t speak unless the judge asks you to. Stand up when you speak to the judge unless he or she tells you that you can keep your seat. If the judge cuts you off, let it happen. I’ve seen numerous instances of people attempting to “talk over” judges, and it doesn’t usually go well for that person. I’ve also seen people penalized by the judge for being too argumentative.

IMPORTANT

One BIG pet peeve of many judges is when a witness doesn’t directly answer the question asked. If the question calls for a “yes” or “no” answer, don’t beat around the bush. Answer yes or no. If you feel that your answer needs some explanation, first answer the question and then explain it.
1. NON-JURY TRIAL

There is no jury in South Carolina for a divorce. The only people present are the lawyers for the parties involved, the parties themselves, the judge, a court reporter (stenographer), the bailiffs, and sometimes the witnesses. A party can ask that witnesses be “sequestered” and required to remain outside the room where the testimony is taken until their testimony is involved. This is usually done in the case of children.

2. PROVING YOUR CASE

To prove your case in court, you need testimony and evidence. Testimony comes from witnesses such as you, your spouse, your friends and family, your children’s doctors and teachers, and so on. Witnesses can also be “expert” witnesses like a forensic accountant, a child psychologist or psychiatrist, and other persons with specialized knowledge. Evidence consists of physical items such as documents, photographs, emails, bank statements, tax returns, medical records, and the list goes on.

Just because you have witnesses or evidence doesn’t mean the family court judge will allow your proof. There are complicated rules of evidence that govern what comes in or stays out of the courtroom. For example, there is the rule against hearsay evidence. Hearsay is an out-of-court statement made by someone other than the person who is testifying in court and is offered as proof of the matter asserted in the statement. However, there are numerous
exceptions to hearsay such as a declaration made against interest (an admission made by a party). Law students spend a whole semester learning about the Rules of Evidence and lawyers deal with these issues on an ongoing basis before the court. Unfortunately, a detailed discussion of the Rules of Evidence is beyond the scope of this book. The point is that if you are going into a trial without a lawyer, you’ve got much work to do to understand trial procedures and the rules of evidence before you go into court to prove your case. Failing to understand these rules can mean all the difference between winning and losing your case at trial.

3. CHILDREN’S TESTIMONY

Children can sometimes be witnesses in cases against one parent, however, we do not usually require this unless it is ABSOLUTELY ESSENTIAL and then only if the child is of sufficient age or awareness where his or her testimony will be believed. This, of course, isn’t good for the child even when the child qualifies under the latter, and can lead to serious psychological damage later on, as well as permanently injuring the relationship between the child and the spouse against whom the child is testifying. Most of the time, the family court judge will consent to talking to the child in the judge’s chambers (outside the presence of the parties) to minimize the impact on the testifying child, but judges differ in how well they accomplish this.

5. TRIAL DATE

As a practical matter, it may take months or years before a final divorce is ordered by the family court. In cases involving such issues as adultery, physical cruelty, etc., the parties may engage in "discovery" of each other's cases by taking depositions of each other or witnesses, or obtaining documents or other prepared materials such as photographs, financial records, etc. This process of discovery can take many months before the case is ready to go to trial. Further, even when the parties and their lawyers are ready to go to trial, the court docket is often full of many other cases filed before your case and waiting to be heard by the court. The bottom line is, even in a simple, uncontested case for divorce, it may take many months before you get a final order.
1. WHAT IS A RULE TO SHOW CAUSE?

An action for contempt of court in South Carolina’s family courts is called a “Rule to Show Cause.” If a spouse violates the terms of any family court order, then they run the risk of being found “in contempt of court.” Before the court finds someone in contempt, the court issues another order - a Rule to Show Cause - that commands the person to appear in court and explain why they violated the terms of the court’s prior order.

Essentially, anything that has been court-ordered can be subject to a Rule to Show Cause (an action for contempt of court) if a party ignores that order. For example, if someone is ordered to pay child support, alimony, or some lump sum payment in the division of assets, and that person does not make one or more payments on time, that person might have contempt charges brought against them. If someone is given court-ordered visitation, and the custodial parent withholds the child, the custodial parent might be held in contempt. If someone is ordered to list the marital home but refuses to do so, that person could be in contempt. “The list of reasons is numerous. The bottom line is that if you are ordered to do something, you better do everything in your power to do it.

2. WILLFUL VS. NON-WILLFUL CONTEMPT

The party seeking a determination of contempt has the burden of showing that the other party violated a family court
order. Then, the responding party may provide evidence to the court to show that the violation wasn’t willful.

Willful contempt means that the party intentionally violated a court order. For example, let’s say that a father is ordered to pay child support each month, that the father has the financial means to pay support, but the father ignored the court order to pay support. In this situation, the father has engaged in willful contempt of court. For another example, let’s say that the father hasn’t paid support because he was involuntarily laid off from work, he was actively looking for another job, but he wasn’t having any luck in finding one. In this scenario, the father violated the family court order, but his violation wasn’t willful.

Ultimately, the family court will penalize a party more for willful contempt than for non-willful contempt. Whether the contempt is willful or non-willful, the maximum sanctions are up to 300 hours of community service, a $1,500 fine, and/or imprisonment for up to 1 year.

3. DIRECT VS. CONSTRUCTIVE CONTEMPT

As our courts have stated, "[t]he power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice." In South Carolina, contempt can take place in two ways - direct contempt or constructive contempt. Direct contempt are acts that takes place in the presence of the court. That does not mean that a judge must actually see or hear the person’s conduct or words. Instead, this conduct can take place in the courtroom, near jurors (in cases other than family court, anywhere in the courthouse, and "wherever any of the court's constituent parts is engaged in the prosecution of the business of the court according to the law." Unlike direct contempt, construction contempt are acts that take place outside the court’s presence.

The difference between direct and constructive contempt is important because it determines how the contempt proceedings must be brought. If the contempt is direct, then there is no requirement that a rule to show cause be based upon a supporting affidavit or verified petition (sworn under penalty of perjury). For example, if the court views a person engaging in misconduct in the courtroom such as verbally abusing a spouse during a divorce, the court may hold a contempt hearing without any supporting paperwork. However, constructive contempt must be brought by a rule to show cause based on an affidavit or verified petition. For example, if a parent fails to pay court-ordered child support, then the other parent must file a verified petition or paperwork with a supporting affidavit explaining why the other parent should be held in contempt.

4. CIVIL VS. CRIMINAL CONTEMPT

If the family court finds that someone is in contempt of a family court order, the family judge must decide whether the
accused's contempt is civil or criminal. Whether the contempt is civil or criminal depends on the family court's purpose behind its contempt ruling. The difference between civil and criminal contempt is very important because there are constitutional safeguards for criminal contempt.

Civil Contempt - The purpose is to coerce a person to do the thing that is required by the family court's order such as compelling a parent to pay his or her child support. In other words, the punishment is remedial and for the other party's benefit. A fine that is payable to the court is remedial when the person can avoid payment by performing an affirmative act under the family court order. In other words, in civil contempt cases the sanctions (such as jail and/or a fine) are conditioned on compliance with the court's order. The person can end their jail sentence by doing what he or she had been previously court-ordered to do. For example, the court may hold someone in contempt for failing to deliver marital property under the divorce decree. The court may order that person to remain in jail for a period of time, but they can get out of jail if they deliver the property. Civil contempt must be proved by clear and convincing evidence.

Criminal Contempt - The primary purpose is to preserve the family court's authority and to punish any disobedience of its orders. In other words, the sentence is designed to punish the guilty person and to uphold the power of the court. In the case of criminal contempt, the penalty (such as jail time) can't be undone by promising not to repeat the offense. If the sanction is a fine that is paid to the court (not to the other party) and it can't be avoided by performing some other act, then the sanction is for criminal contempt because the sanction is punitive and not remedial. Criminal contempt requires proof beyond a reasonable doubt. Also, because a person can be sentenced to imprisonment for more than six months under South Carolina law, the accused is entitled to a jury trial under the Sixth Amendment.

5. WHO CAN BRING AN ACTION FOR CONTEMPT?

The court, the clerk of court, or a party can ask for a Rule to Show Cause:

1. A judge can issue a Rule to Show Cause sua sponte which means that the judge does so without a prior motion or request from the parties.

2. When child support or alimony is paid through the family clerk of court's office, then the clerk of court may seek a Rule to Show Cause when payments are past due.

3. A party may seek a Rule to Show Cause against the other party for violation of a family court order.

If the contempt is constructive, then you must file a Rule to Show Cause ("RTSC") and serve it on the other party. At the RTSC hearing, the filing party presents their evidence as to the other person's alleged violation of the order. The responding party is also allowed to present evidence to show why they should not be held in contempt. The responding
party may try to show that they did not do the things they are accused of, that the filing party’s interpretation of the order is incorrect, that the responding party was unable to do “the things required, or some other reason to avoid contempt.”

Rules to Show Cause are serious matters. They have many requirements with the initial papers to be filed. There might be timelines that are applicable. At the hearing, the judge will hold the parties to following the procedural rules and the rules of evidence. Ultimately, someone could end up in jail, and anyone could potentially be ordered to pay attorney’s fees.
I N T H I S S E C T I O N

1. When is a Divorce Uncontested?
2. What About Do-It-Yourself Separation Agreements?
3. Do I Need to Hire a Lawyer for an Uncontested Divorce?
4. Can One Attorney Represent Both Parties in an Uncontested Divorce?

Uncontested Divorce

With some divorces, the husband and wife are looking to go their separate ways without the expense and heartache of fighting with each other in family court. These couples usually wonder whether they need to hire a lawyer or each hire their own lawyers to get divorced. They know they need to bring their case to family court, but they do not know the process from there.

1. WHEN IS A DIVORCE UNCONTESTED?

There are many issues for couples to consider if one or both want a divorce. If there are children, they need to address custody, visitation, support, and other details regarding the children. Marital property needs to be divided. Marital debts need to be apportioned. They need to decide whether one party will pay alimony to the other or whether they will both waive alimony. These are just some of the issues depending on the particular situation. If the parties are in full agreement on all the issues, the divorce is often called “uncontested.”

2. WHAT ABOUT DO-IT-YOURSELF SEPARATION AGREEMENTS?

There are plenty of free, and paid, online separation agreements. To be fair, some of these forms aren’t bad. However, when it comes to a divorce, one size doesn’t fit all. Your needs, your spouse’s needs, and your children’s needs are unique. In the end, you will be better served to speak with a lawyer about your situation before trying to cram the future of your family into a template separation agreement. Here’s...
just one of many examples why template divorce agreements don’t always work. In South Carolina, there are inheritance rights for a spouse when their husband or wife dies without a will. Just because you have a separation agreement doesn’t mean that these inheritance rights go away if the other spouse should die before the divorce is completed. In the template forms I’ve seen, none of them address this issue. Again, this is just one of many examples of the shortcomings of separation template forms.

3. DO I NEED TO HIRE A LAWYER FOR AN UNCONTESTED DIVORCE?

It’s possible to obtain a divorce without a lawyer. However, I’ve had clients come to me because they attempted the process and found themselves unsuccessful in court. There are several procedural requirements that must be met. The paperwork must be correct. For example, both parties must have financial declarations on file. Also, even if you think the agreement you’ve come up with is a good one, the family court still has to decide whether its fair and equitable to both parties and in the best interests of any children involved.

Additionally, often when I review an agreement that spouses have written, I spot details that neither spouse thought of. Here are some examples:

**Marital Home** - In some cases, both the husband and wife are on the deed, note, and mortgage of the marital home. Although they decided that the one of them will keep the home and be responsible for the mortgage payments, they forgot that they are both remain obligated to the bank, so the other spouse can’t get a loan to buy a new home. The solution may require that the spouse keeping the home refinance the loan within a reasonable time, otherwise the house would need to be sold.

**Parenting Schedule** – As another example, the couple may have come up with a great parenting schedule that works for a preschooler, but they haven’t given thought to what schedule works best for everyone when the child enters school. In this instance, the family court may send you back to the drawing board to figure out a new parenting schedule.

**Tax Consequences** – In other cases, there are tax consequences to how property is transferred, support is paid, and other taxation issues that neither spouse considers when coming up with their agreement.

These are just three of many examples of where an uncontested divorce should remain uncontested, but the separation agreement needs a little fine tuning.

4. CAN ONE ATTORNEY REPRESENT BOTH PARTIES IN AN UNCONTESTED DIVORCE?

One attorney can’t represent both the husband and the wife. In 1981, the South Carolina Bar’s Ethics Advisory Committee issued an opinion stating: “The position of the [husband and wife] in a divorce action are inherently adversary. We conclude that an attorney could and should not represent both.”
10 Common Mistakes

“Ah, yes, divorce . . . from the Latin word meaning to rip out a man’s genitals through his wallet.”
~ Robin Williams

“He taught me housekeeping; when I divorce, I keep the house.”
~ Zsa Zsa Gabor

If you must go through a divorce, then this Chapter may help you avoid the ten most common divorce mistakes.
Mistake # 10: Failing to Consult with an Attorney

Some people consider it a waste of time or money to retain a lawyer for their divorce and so they try to work matters out for themselves. Divorces can be very complicated and often have long-term consequences for both parties that are not always obvious. You should consider consulting with an attorney before deciding whether it is wise to handle matters for yourself.

Mistake # 9: Dating During Your Divorce

Just because you are separated doesn’t mean you have the right to start dating someone else. If you start dating, even after separation, that is still considered adultery and can have a negative impact on the grounds for your divorce, requests for alimony, custody and visitation with children, and awards of attorney’s fees and costs. Until you are divorced - don’t date.

Mistake # 8: Using Your Attorney as a Therapist

Many times, clients use their divorce lawyer as a therapist. Although your lawyer may try his or her best to lend a sympathetic ear, your lawyer will typically charge fees for such time, and often doesn’t have advice to offer on the matter. Instead of having such discussions with your lawyer, talk things over with your spiritual advisor, a licensed therapist, or someone else qualified to render personal advice.

Mistake # 7: Failing to Consider Tax Consequences

Parties to a divorce often fail to consider the tax impact of a settlement or an award by the court. Issues such as capital gains tax, dependency exemptions, taxable basis of properties, and the tax consequences of alimony versus child support are often overlooked. You should hire a tax consultant to work with you and your attorney regarding potential tax consequences related to the divorce.

Mistake # 6: Failing to Make a Complete Inventory

Many clients do not have a complete grasp of what they own and what they owe. During a divorce, the failure to have or make a complete inventory of assets and liabilities may have devastating consequences. For example, if a client mistakenly fails to disclose an asset to the court, the court may believe that the client is purposefully trying to hide assets. So, to assist you and your lawyer, you should make a complete inventory of all assets and liabilities, whether in your name, in the name of your spouse, or jointly in the parties’ names.

Mistake # 5: Getting Advice from Your Family and Friends

As one might expect, friends and family want to help when someone is going through a divorce. These persons will often have anecdotal advice based on their own experiences or based upon secondhand information. Regardless of the source of their information, friends and family are typically not objective in their views. Additionally, they may not have the
professional background necessary to render such advice. Take the advice of friends and family with a “grain of salt” and do not rely on their observations and advice without seeking the counsel of a licensed attorney.

**Mistake # 4: Trying to Win Your Spouse Back by Being Too Generous**

Sometimes, a person who is “left behind” is not ready for the marriage to end and believes that he or she can win the other party back by giving generously to the other party more than what the court would award or what is fair. If the party gives away everything by agreement, then it may be too late to reverse it later in court. Similarly, if the person is too generous during the divorce, then that person may be setting a precedent that the court may follow later in making its award. You should separate your emotions from your finances and resist the temptation to “buy” your spouse back. This approach seldom works. Stick with the advice of legal counsel and take an approach of fairness. If you desire to save the marriage, you should do so by suggesting you and your spouse attend couples therapy of some sort.

**Mistake # 3 Being Too Anxious to “Get It Over With”**

Some people believe that the sooner they get the divorce over with, the sooner they can heal emotionally and financially and get on with their lives. Thus, these people are willing to make too many concessions to avoid the cost and time associated with their divorce. Instead of taking a proactive, planned approach to the matter, they have a “knee-jerk” reaction to get the divorce over with. Such shortsightedness can lead to dire future consequences. You should have patience during the divorce process. You should set goals and determine which issues matter most and define your objectives regarding such issues as division of debts and equities, child custody and visitation, and alimony. There may only be one opportunity to properly handle the financial and familial issues that are important to you. Your decisions should be carefully made and should give consideration to their long-term consequences.

**Mistake # 2 Trying to Punish Your Spouse through the Legal System**

Too often, parties allow their emotions to get the best of them, including feelings of anger. These parties may attempt to use their lawyer and the legal system to “punish” their spouse. Ultimately, they may find themselves spending more money fighting about the case than the case is truly worth. When all is said and done, and the divorce has long since been finished, too often parties realize that the thousands of dollars they spent on their attorney to punish their spouse did not buy them satisfaction. Although it may be difficult in the heat of the moment, you should try to be realistic about your goals and needs and consider the cost when you choose to fight over certain issues.

**Mistake # 1: Putting the Children in the Middle**

It is all too easy for children to become caught in the middle of their parents’ divorce. Often, children are made to feel that
they are, in part, to blame for the divorce or made to feel that they must chose sides between their parents. Children are also used as messengers between parents or are pumped for information about the other party. The divorce, alone, puts a significant emotional strain on most children. Placing children in the middle only causes further emotional damage and, ultimately, may permanently hurt your relationship with your children. You should do everything to assure your children that the divorce is not their fault. You should not make any disparaging remarks about the other parent, and you should not act in such a manner as to put your children in the middle of the divorce.
No matter what financial situation you’re in, the results are the same - you take one household, you split it in two, and you double living expenses. What that means is that your lifestyle is altered, and you need to change your spending habits during and after your divorce.
Here are 7 steps you need to take to plan financially for your divorce such as identifying your assets and income, creating a budget, and more.

**Step One - Identify All Assets and Income**

In Chapter 5, I’ll explain what you need to do if you believe your spouse is hiding income or assets during your divorce. I encourage you to read the tips I give for protecting yourself from a dishonest spouse and how to avoid being falsely accused of hiding money and property.

Although your assets, such as cars, furniture, your home, and so on, may have value, some assets are easier to convert to cash than others. Assets that are in the form of financial accounts (checking, savings, brokerage accounts, etc.) are very liquid. Furniture, land and homes, antiques, and other items have value too, but they aren’t easily sold and converted to cash. So, on paper it make look great to keep a home and it’s value while your spouse takes the brokerage account, you need to consider your cash flow and your ability to pay living expenses such as maintaining the home. In the end, you don’t want an unbalanced divorce settlement where you end up with the non-liquid assets and no means of paying for your lifestyle.

**Step Two - Create a Budget**

Because your post-divorce income (and your lifestyle) are likely to change (in some cases dramatically), you need to create a budget. Budgeting requires that you know your monthly spending needs and your current spending habits to track your cash flow. Your budget should account for your projected disposable (after tax) income, consider liquid assets, and take into account non-liquid assets that will incur ongoing costs such as maintenance on a home.

Not everyone can afford the services of a Certified Divorce Financial Analyst (CFDA) to calculate your needs into the future. If you are going to consider your finances yourself, then you need to collect all your bills, financial statements, credit card statements, checkbook registers, and receipts for things that you buy with cash to create a good record of your income and expenses. Next, you’ll need to categorize your two categories:

**Expenses:** Rent or Mortgage; Property Insurance; Property Taxes; Gas; Electric; Phone and Cell Phone; Cable; Water and Sewer; Trash; Internet; Groceries; Eating Out; Daycare; Camps; Kids’ Lunches; Extracurricular Fees; School Photos; Allowances; Office Supplies; Bank Fees; Credit Cards; Bank Loans; Auto Loans; Auto Insurance; Car Care; Road Tolls; Doctor Bills; Dental Bills; Eye Care; Repairs; Gifts & Cards; Cleaning and Household Supplies; Clothing; Personal Grooming; Pet Care; Magazines and Newspapers; Health Insurance; and Life Insurance.

Divide your spending into fixed or variable costs. Fixed costs include mortgage payments loan payments, rental payments, and so on. These aren’t expenses that you can easily reduce or
change in your budget. Variable costs such as clothing, food and entertainment, cell phone usage, and so on can be reduced or, in some cases, eliminated from your budget.

**Income:** Wages and Salary; Business Income; Rental Income; Pension; Alimony; Investments and Interest; and Child Support (although this isn’t considered income for tax purposes, it should be part of your budget).

Don’t count on bonuses, tax refunds, etc., because these sources of income are highly variable and often unpredictable.

After you have created your monthly budget, it’s time to set your budget goals considering your income and liquidity of assets that can be used to pay for your lifestyle now or in the future. If you need to trim your expenses, look over the categories of variable expenses for things such as the cost of premium cable channels, caller ID and call waiting on your home phone, how often you eat out, using ATM machines that charge fees for cash withdrawals, and so on. You may be surprised at how much you’re spending at Starbucks, eating out for lunches, and other personal expenses that add up to thousands each year. Also, try to pay your bills when they are due. Late fees and penalties will derail your budget.

**Step Three - Consider Tax Consequences and Liabilities**

You need to consider capital gains (and alimony, which is taxable). Simply stated, capital gains are calculated by the asset’s fair market value minus its cost. For example, if you bought an asset for $20 and it is now worth $200, then your capital gain is $180.00 and a tax liability on that amount when you liquidate the asset. Why is this important? Suppose you and your spouse have two pieces of land, both of which are equal in value, but one of which was bought at a very low cost which may result in large capital gains. If you receive the one that is facing more capital gains, then the net benefit to you is much lower than if you received the other piece of land.

Also, you need to consider any tax liabilities. For three years after the divorce, the IRS can perform a random audit of a divorced couple’s joint tax return. For good cause, the IRS can question a joint return for up to seven years. Your divorce agreement should have provisions that decide which spouse is responsible for any additional penalties, interest, or taxes.

**Step Four - Consider How to Transfer or Liquidate Retirement Accounts**

Before age 59 1/2, retirement plan distributions are subject to a penalty tax plus ordinary income tax. An exception to the tax penalty are transfers of all or a portion of a retirement plan to a spouse as part of a divorce settlement. Income taxes still apply, so any assets you receive from a "qualified plan," such as a 401(k), are subject to a mandatory tax withholding. To avoid this mandatory withholding, the transfer must be made directly to another retirement account, such as your own IRA. If you need to cash out on some of the plan, take them out before your spouse transfers them to your IRA to avoid the penalty tax for an early distribution.
Step Five - Consider Your Credit

To avoid starting out with bad credit after your divorce, there are several steps you need to take. Get a copy of your credit report to identify all joint accounts and items that show up on your report that may impact your credit rating. Even if the family court makes your spouse responsible for paying a joint debt, such as a credit card, you are still liable to the creditor (that wasn’t part of your divorce) for the full amount until the debt is paid off. So, to avoid liability and the possibility of a bad credit rating if your spouse fails to pay the debt, you should pay off and close all joint accounts before the divorce settlement and open new accounts in your name.

Step Six - Obtain Life Insurance

If your spouse is paying alimony, child support, or some other form of support, then it’s a good idea to insist that your spouse obtain life insurance to cover these ongoing payments if there is a tragedy. If you’re the beneficiary of this insurance, then it is very important that you be deemed the owner or irrevocable beneficiary of the insurance policy. That way, if your ex stops making payments for some reason, you’ll be notified so that you can take legal action to prevent the policy from lapsing or being cancelled.
How Bankruptcy Impacts a Divorce

Bankruptcy law doesn’t require a married couple to file jointly. In other words, your spouse can file without you and may leave you “holding the bag” when it comes to your marital debts and other liabilities.
What Happens to a South Carolina Divorce When a Spouse Files for Bankruptcy?

When someone files for bankruptcy, an “automatic stay” becomes effective and a bankruptcy estate is also created. The estate includes all property of the person filing for bankruptcy (the debtor). The automatic stay means that all non-criminal legal claims or lawsuits are automatically stayed from moving forward. The family court must wait until the bankruptcy proceedings have concluded or the automatic stay has been properly lifted before it can divide marital property. However, this automatic stay doesn’t include legal proceedings for:

1. Establishing paternity;
2. Establishing or modifying an order for a domestic support obligation (alimony & child support);
3. Establishing child custody or visitation;
4. Actions for divorce (except if there is a claim to divide property & debts);
5. Actions regarding domestic violence; and
6. Actions to collect a domestic support obligation (alimony & child support) from property that isn’t part of the bankruptcy estate.

What Happens to Child Support or Alimony in Bankruptcy?

In a word – nothing. Unlike other debts, domestic support obligations such as alimony or child support aren’t discharged in bankruptcy court. Stated another way, a spouse or parent can’t avoid alimony or child support payments by filing for bankruptcy.

What Happens to Marital Debt in Bankruptcy?

Unlike child support or alimony, the bankruptcy court can discharge or restructure the payment of marital debts depending on whether your spouse seeks a Chapter 7 bankruptcy or a Chapter 13 bankruptcy. Under Chapter 7, the bankruptcy court relieves a person of all of their debts. Under Chapter 13, the bankruptcy court creates a repayment plan to allow the debtor to make payments over time so that the debtor may keep certain assets and then have the remaining debts discharged.

Under Chapter 7, property settlements between spouses aren’t dischargeable but MAY BE dischargeable under Chapter 13. In other words, a spouse or ex-spouse who files for Chapter 13 bankruptcy could be released from their obligation to pay debt distributed to them by the family court. Also, the spouse or ex-spouse can potentially avoid making payments to the other spouse if those payments were ordered as part of a property settlement in family court. Finally, the spouse who didn’t file bankruptcy may become liable for debts that were distributed to the other spouse in the divorce.
because the lender wasn’t a party to the divorce and so it isn’t bound by any family court order distributing debts.

**How Do I Protect Myself if My Spouse Files or May File for Bankruptcy?**

The answer to this questions depends on your true financial situation and whether your spouse files before or after the divorce:

**Legitimate Claims for Bankruptcy During Divorce** - If you and your spouse are truly in financial hot-water, then it may be best to put your marital differences aside and consider filing jointly for bankruptcy. Although filing jointly may be a bitter pill to swallow, discharging debts before the divorce is final can simplify the division and distribution of the marital property and debts. It can also avoid possible future liability of having debts assigned to you if your ex-spouse declares bankruptcy after your divorce is final.

**Questionable Claims for Bankruptcy During or After Divorce** – Sometimes, either before or after a divorce, a spouse files bankruptcy just to “poor mouth” or to avoid financial obligations that he or she can otherwise afford. In that situation, it may be best to let bankruptcy court do its job to uncover whether your spouse is entitled to bankruptcy. Convincing a bankruptcy court that you are entitled to declare bankruptcy isn’t an easy task, and the bankruptcy court routinely dismisses cases that don’t qualify under federal law.

**Settlement Agreements & Possible Bankruptcy** – If you suspect that your spouse may file for bankruptcy after your divorce, then there are some important things to consider if you’re trying to reach an agreement. For example, a spouse may negotiate to receive ongoing payments as part of a property settlement (which isn’t taxable as income) in lieu of receiving alimony (which is taxable as income). If your ex-spouse files for Chapter 13, they may avoid these property settlement payments. Thus, it would be best to have those payments made as spousal support (alimony) instead which can’t be discharged in bankruptcy.
Hidden Income & Assets

“Divorce is the one human tragedy that reduces everything to cash.”

~ Rita Mae Brown

When couples divorce, the first thing that usually disappears is TRUST. Due to wounding feelings and disillusionment over the failed marriage, it’s only natural that one or more of the parties begins to question everything in the marriage including the parties’ finances.
In divorces where the spouses are salaried or earn a wage, calculating income and identifying assets is typically a straightforward process. In those cases, there is usually a decent paper trail of the money coming in and the money flowing out. But when a spouse is self-employed, that’s when a divorce can get very complicated. In those cases, we’ve seen a lot of money thrown at legal fees and forensic accountants to try to uncover whether there is money or assets that have been syphoned away. Sometimes the time and money spent examining the couple’s finances is worth the payoff; sometimes it’s a “snipe hunt” that is a tremendous waste of the parties’ financial resources.

What can be done to: (a) protect yourself from a spouse who is hiding assets or money or (b) if you are the self-employed spouse, to avoid a costly witch-hunt in family court? Here are some practical tips for both spouses:

**Protecting Yourself from the Dishonest Spouse**

As former President Ronald Reagan used to say, “Trust, but verify.” From the beginning of your marriage, become actively involved in your family’s financial affairs. Know your assets, debts, income, and expenses. Insist that all of your family’s financial documents such as tax returns, bank and credit card statements, retirement income statements, and so on are stored in a location where both spouses have full access. Review your individual tax returns and your spouse’s business returns. If you don’t understand what is declared on these returns, take time to meet with your accountant to have the accountant explain it to you.

If you haven’t kept up with your family’s finances but you are heading toward a divorce, here are some signs to look for if you suspect your spouse is hiding income or assets.

**1) No More Mail.** If you notice that the post office is no longer delivering your bank statements, credit card statements, and other financial documents to your home, then the change in delivery might indicate that your spouse is diverting these documents for the purpose of hiding assets and income. Contact your bank, your credit card companies, and so on and to get copies of the statements for your own records and review these documents carefully for any suspicious activities.

**2) Defensive behavior.** Beware of the spouse who suddenly becomes secretive, controlling or defensive about family finances and income. This behavior usually signals that the spouse is hiding something.

**3) Overpayments.** If your spouse overpays the IRS, he or she will get a refund later, and “later” may mean after the divorce is final.

**4) “Loans” from family members or friends.** Your spouse may claim that they “borrowed” money from family or friends. In this situation, your spouse may pay them on these so-called loans knowing that after the divorce, friends and family will return the money.
5) **Unexplained decrease in income.** Any sudden decrease in income may indicate that your spouse may be deferring his or her income for future distribution after the divorce is final.

6) **Bogus Business Expenses.** When your spouse is self-employed, they can reduce their “bottom line” by creating/adding bogus business expenses such as paying employees who don’t exist or paying expenses to “vendors” who turn out to be friends and family who return the funds after the divorce is final.

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**IMPORTANT**

Before you sign off on joint tax returns, do your homework to make sure the returns are accurate. If you head into family court claiming your spouse makes more money than they declare or, for example, that they get paid cash “under the table,” you will be hard-pressed to argue against the tax returns that YOU cosigned under penalty of perjury as being accurate.

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**Protecting Yourself Against a Financial Snipe Hunt**

Use “GAP.” If you are the self-employed spouse and you wish to avoid any suspicion that you are hiding income and assets, the best thing you can do is run your business according to general accounting principles (GAP). Don’t commingle business and personal funds. Don’t use business credit cards for personal purchases. Give yourself a pay check and avoid taking “draws” from the business.

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1) **Be Transparent.** Give your spouse access to all of your family’s financial records including tax returns, credit card statements, statements from retirement accounts, and so on. If you are concerned that your spouse may remove these records, then make a copy of them for both of you.

2) **Voluntary Disclosure.** If you are going through a divorce, be prepared to turn over all of your business’s books and records in a neat and organized fashion. In fact, don’t wait until your spouse’s lawyer asks for this information; give it to your spouse voluntarily. In the end, your spouse is entitled to see the financial information anyway.

3) **Anticipate Questions.** Don’t be surprised when your spouse, their attorney, or their accounting expert has questions for you about your business’s financial affairs. Try to anticipate what their questions might be such as unusual bookkeeping entries you may have made to correct mistakes in accounting.

4) **Don’t Be Defensive.** There is no point in being defensive about disclosing your business income. At the end of the day, your spouse is legally entitled to all of this information in the divorce. When you become defensive, or you lag in responding to requests for information or documents, you give the appearance of being uncooperative. In a divorce lawyer’s mind, being uncooperative usually signals that a party has something to hide.
Children & Divorce

“For a couple with young children, divorce seldom comes as a ‘solution’ to stress, only as a way to end one form of pain and accept another.”

~ Fred Rogers

Divorces can be an intensely stressful experience for any child, regardless of the child’s age or developmental level. Whether a child will be traumatized by a divorce depends not only on the child's resiliency, but also on the environment created by the divorcing parents.
Dealing with Your Children, the Other Parent & Yourself

Children in divorced families typically experience several losses. For example, children often feel as if they have lost the parent who left the home thereby causing the children to feel lonely, rejected, and unloved. If you ask a custody attorney, they will tell you that when the parents divorce, the parents double their living expenses between two homes which causes financial instability and sometimes poverty. Just like the adults, the children feel the financial loss. Many children lose their sense of security due to the many changes that come with divorce such as moving into another home, perhaps attending a new school, new routines and schedules to accommodate visitation, and a new family structure which may include third parties when divorced parents begin dating or get remarried. These changes leave many children feeling vulnerable and insecure. In hostile divorces, especially those involving custody issues, the psychological effects of divorce on children tend to be more extreme, and these children may suffer from a variety of psychological problems like increased moodiness, panic, denial, guilt, low self-esteem, physical problems, depression, anger, sleeping or eating problems, drug or alcohol use, or even criminal behavior.

Divorcing parents can decrease the impact on their children by following guidelines with their children, by avoiding conflict with the other parent, and by maintaining their own well-being:
1. DEALING WITH YOUR CHILDREN

• **Don’t treat your children as adults** - Some parents believe that their children must "grow up" quicker because of the divorce. Unfortunately, just because some parents treat their children like adults does not mean that their children are emotionally or intellectually equipped to deal with adult issues. Let children be children.

• **Don’t rely on your children for your emotional support** - Although it may seem natural to turn to your children for comfort during an emotional time, you are likely to cause greater instability and more pressure on the children. Some children begin to feel responsible for their parent’s emotional well-being, whereas some children suffer other emotional side-effects such as increased anger or depression. If you need emotional support, turn to another family member, a friend, or a counselor.

• **Don’t bad-mouth the other parent, the other parent’s relatives, or the other parent’s friends** - Whether you dislike these people or even have good reason to feel resentment, often your children have other feelings towards them, especially the other parent. When you talk poorly about others that are loved by your children, you create conflict within your child that may result in your child feeling protective about these other persons and resenting you for making negative comments about them. Let your children feel free to love the other parent, their grandparents, and others.

• **Don’t blame the other parent for the divorce or for bad things that happen in your life** - Doing so goes hand-in-hand with not bad-mouthing the other parent.

• **Don’t talk about money or child support** - Financial issues are "grown up" issues. Plus, talking about child support, etc. has a tendency to make children feel less like people and more like possessions with costs attached to them.

• **Don’t talk about the “divorce” or other grown up stuff** - This issue ties in with not treating your children as adults.

• **Don’t send your children on a “guilt trip” for enjoying time with the other parent** - Similar to not bad-mouthing the other parent, guilt-tripping your child creates much of the same conflict.

• **Don’t block visitation or prevent your children from speaking to the other parent** - There are many psychological studies illustrating the benefits children reap from spending time with both parents. No matter how you feel about your former spouse, don’t deprive your children of having a healthy relationship with the other parent.

• **Don’t interrupt your children’s time with the other parent by calling too much or planning activities during their time together** - At some point, if these interruptions are combined with other actions such as poor-mouthing the other parent and blocking visitation and
communications, then the children may be abused (brainwashed) into thinking the other parent is the enemy. Taken together, such actions are known as Parental Alienation Syndrome (PAS). PAS can cause significant and long-lasting psychological and emotional harm to the children.

• **Don’t argue with the other parent in your children’s presence** - As simple this advice may sound, so many parents tend to argue in their children's presence. These arguments cause a tremendous amount of emotional stress for the children and teach the children to resolve their conflicts by arguing too.

• **Don’t ask your children to spy on the other parent or report back to you** - Children in divorce already may be experiencing conflict in their loyalties and feelings toward both parents. Asking children to spy or to report back to you places the children in an extremely awkward and emotionally stressful position of pleasing one parent while betraying another.

• **Don’t ask your children to keep secrets from the other parent** - Dividing a child's loyalty between parents' places them under extreme stress. Further, the child is learning to become manipulative and may later play one parent against the other using lies and secrets.

• **Don’t ask questions about your children’s time with the other parent or the other parent’s life** - This is similar to spying and reporting on the other parent.

• **Don’t use your children to deliver messages to the other parent** - This puts the children in the middle.

• **Realize that your children have two homes and not one** - Try to understand, and accommodate, the fact that your children will be living in both parents' homes from time to time, and that your children's lives are not identical in both homes.

• **Allow your children to take items such as their toys back and forth between homes as long as they can carry them** - Often parents are reluctant to allow toys, books, and other items to go to the other parent’s home because these items may not be returned. Think of these items as the children's things, not yours, and let your children have a sense of continuity by taking familiar and comforting items such as toys back and forth between homes.

• **At the moment of transition, be organized and make goodbye brief, warm, and loving, not long, sad, and languishing** - During visitation exchanges, do not make the moment of transition highly dramatic and, consequently, traumatic for your children.

• **Reassure your children that the divorce was not their fault and that they will be safe** - Some children believe that they are the cause of the divorce, and the many losses children experience leave them feeling unsafe. They need reassurance from you.
• **Create a stable routine and give appropriate discipline** - Especially at the first stages, the changes and losses that come with divorce may cause some chaos. Also, many parents feel sorry for their children and begin relaxing their discipline. Your children are going through enough changes already, and they will benefit more by being consistent.

• **Give your children ample advance notice of changes whenever possible** - Some parents would rather tell their children about these changes at the last minute because these parents believe the children are better off not worrying ahead of time. However, your children are likely to be "shell-shocked" from all the major life changes that stem from a divorce. If further changes are on the way, such as moving or changes in visitation, giving them a "head's up" gives them a chance to prepare mentally and emotionally for what is to come.

2. **DEALING WITH THE OTHER PARENT**

• **Don’t ignore the other parent or sit on the opposite side of the room during special events involving your children such as athletic matches, school plays, etc.** - As emotionally difficult as it may be for you to be that close to the other parent, it is more difficult for your children to see parents distance themselves at these times. Overall, it is a small sacrifice to make for your children’s emotional wellbeing.

• **Support your children's relationship with their other parent** - By supporting the other relationship, you are creating security and stability for your children.

• **Ignore (rather than arguing back) when the other parent tries to tell you how to parent** - This argument is one that no one can win.

• **Accept that there is more than one "right way" to parent and support different parenting styles** - Even if you weren’t divorcing, chances are that you and your former spouse may have or would have parented in your own unique styles. If you can accept and deal with the difference in parenting styles during marriage, then you can accept these differences in divorce too.

• **Find ways to communicate with the other parent that eliminate (or reduce) hostility** - The more you communicate, the more chances for conflict. There is no need to communicate about minor things, so don’t communicate unless you have to do so. When you do communicate, be factual, concise, and businesslike. Avoid sarcasm. Don’t tell the other parent how to parent and avoid criticizing their parenting. Also, consider communicating by email or letter which will give you an opportunity to be careful with your words.
3. DEALING WITH YOURSELF

• Take good care of yourself by eating well, exercising, and nourishing your spirit - You can't make your children feel safe and secure if you let yourself fall apart. There is nothing selfish or self-centered in spending the time and effort to take care of yourself during a divorce. In the short and long run, your emotional and physical well-being will help you cope with your children's needs.

• Maintain and/or build a support system from extended family and friends, and consider professional/therapeutic support - Don't be ashamed to ask for help during difficult times.

• Inform yourself of the challenges faced in divorce and co-parenting - There is a wealth of knowledge and literature on the subject of children and divorce. The more you know, the better you will be equipped to help yourself and your children cope with and adjust to the divorce.

• Stay busy and make your own plans when your children are away, especially on weekends and on holidays - Often, we focus on the impact visitation has on the children and forget that it has an impact on the parents too. Many parents have never been away from their children for any extended period of time. By making plans and being active, you may avoid experiencing problems such as anxiety or depression when your children are gone.

• Don't be too hard on yourself; be forgiving and accepting of yourself - Chances are you will make some mistakes. Forgive yourself, don't dwell in the past, and try to keep moving forward positively.

• Trust your children to tell you or another trusted person if things don't seem comfortable or safe - Even if you do not have confidence in the other parent, have faith in your children to adapt to the circumstances and to communicate their needs and concerns to you.

• Let go of your need to control every aspect of your children's lives - As parents, we want to protect our children from every possible harm and to grow strong physically and emotionally. Keeping them in a stranglehold, no matter how good your intentions, may cause your children to become, among other things, timid and emotionally codependent or perhaps resentful and rebellious. Don't let your instinct to protect them overshadow their need for individual growth.
1. WHAT IS PARENTAL ALIENATION SYNDROME?

In 1985, psychiatrist Richard Gardner came up with the concept of PAS to describe the behaviors of children whose parents deliberately turn them against the other parent particularly when there is a custody dispute between the parents. Essentially, one parent undermines the child’s relationship with the other parent on an ongoing basis through various means such as belittling and insulting the targeted parent and manipulating the child’s feelings toward that parent. In theory, the manipulative parent brainwashes the child to the extent that the child no longer wants to have a relationship with the alienated parent. Some of the characteristics of PAS include:

- Letting the child choose whether to visit with the other parent despite court-ordered visitation
- Sharing with the child details about the marriage or divorce
- Not allowing the child to take toys and possessions back and forth between homes
- Denying the other parent access to school or medical records and schedules of activities
- Blaming the other parent for money problems, splitting up the family, or having a girlfriend or boyfriend
- Refusing to be flexible with the visitation schedule
2. IS PARENTAL ALIENATION SYNDROME AN ACTUAL “SYNDROME”? 

PAS isn’t embraced universally by psychologists or psychiatrists. There are no statistics regarding PAS, and it isn’t formally recognized by mental health professionals. The bible of psychiatric diagnoses, the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), doesn’t list the term parental alienation syndrome. In fact, some experts have referred to PAS as “junk science.” 

In South Carolina, we aren’t aware of any family court that has formally recognized PAS. Having said that, as divorce lawyers in Charleston, South Carolina, we see the behaviors listed above in many of our cases involving custody. In the least, these cases involve a child who is conflicted and emotionally in crisis as a result of the manipulative parent’s tactics. In extreme cases, the manipulative parent can be successful in creating a false belief that the alienated parent is a dangerous and unworthy parent. So, if PAS isn’t formally recognized in South Carolina’s family courts, what can be done about the harm the manipulative parent is causing?

3. HANDLING PARENTAL ALIENATION IN FAMILY COURT

As mentioned, South Carolina’s family courts haven’t recognized parental alienation as an actual “syndrome” or mental illness. Although a family court lawyer could try to prove PAS in South Carolina, chances are that lawyer would spend most (if not all) of the client’s money trying to prove the validity of PAS as a valid psychiatric concept before ever getting to the heart of the issue which is the harm the child is suffering. In other words, trying to prove PAS in family court may be a waste of time and money. Instead, the lawyer should focus on three key areas:

1) Proving specific negative conduct by the parent that causes harm to the child. Trying to prove both harmful conduct and resulting injury to a child is perhaps one of the most challenging things to do in family court for several reasons. First, often the parent’s conduct, such as badmouthing the other parent, happens in private and without any witnesses except the child. In South Carolina, family court judges are very reluctant to hear the testimony of
any children. As for what your child tells you, you can’t in turn testify to your child’s statements because the statements are hearsay and inadmissible as evidence in court. However, by using the testimony of trained mental health professional who has interviewed the child or through the investigation of a guardian ad litem, sometimes it is possible to prove to the court that alienation is taking place and that it is harming the child. In other words, if alienation is occurring, then the lawyer should get a GAL and a trained child psychiatrist or psychologist involved to help expose the parent’s conduct. Additionally, the targeted parent can help his or her lawyer by creating a detailed chronology of ongoing events such as interfering with the visitation schedule or denying telephone access to the child.

2) Seeking a court order prohibiting certain conduct. Many of the behaviors listed here can be dealt with, and sometimes eliminated, through a family court order. For example, the court order can prohibit a parent from scheduling activities during the other parent’s time or by setting a specific schedule for telephone visitation.

Of course, having a court order doesn’t mean the manipulative parent won’t try to interfere with the other parent’s relationship with the child. However, having a court order does give a client the ability to ask the court to punish the other parent if they violate the court’s order.

Even where the evidence of alienation is overwhelming, the court may still be hesitant to do anything about it. In several cases we’ve had, we’ve seen judges get frustrated and essentially force the parties to go out into the hallway and try to work things out themselves. Also, judges can be slow to place serious sanctions on the alienating parent. When the court is hesitant to take any action through fines, jail time, or granting custody to the targeted parent, then the chances are remote that the out-of-control parent can be stopped. Unfortunately, it usually takes a very dramatic situation, such as repeated violations of court orders, before the orders that the targeted parent gets custody.

3) Seeking a court order that gives the targeted parent liberal time with the child. Liberal time for the targeted parent is CRUCIAL! Spending time with the child won’t stop the other parent from behaving poorly. However, the more time the alienated parent has to demonstrate their love and to care for the child, the less sway the manipulative parent may have over the child. In other words, perhaps some of the best medicine to treat the poison a manipulative parent injected into a child’s mind is liberal quality time spent together by the targeted parent and the child.

4. HANDLING PARENTAL ALIENATION OUTSIDE OF THE COURTROOM

What happens outside of the courthouse is equally, if not more, important than what happens in court. Whether you are seeking primary custody of your child as a result of alienation or simply trying to maintain your relationship with your child,
the following points are very important to your success as a parent:

- **Consider professional counseling.** Although you may not feel like you need family counseling, counseling accomplishes two things. First, counseling can help you build the knowledge and the skills to offset the other parent’s efforts to alienate your child. Second, your willingness to voluntarily attend counseling looks good in family court.

- **Keep your emotions under control.** When another parent is alienating your child from you, it is both natural and understandable that you would be upset, angry, sad, and frustrated by these events. However, it is absolutely crucial that you keep yourself even-tempered, logical, and in check. Don’t retaliate and don’t react in anger. If you do, you are helping to prove the alienator’s claim that you are an unstable parent. Also, if you act in anger or emotionally, then your child is going to be impacted by your reaction.

- **Don’t play the “victim.”** Although you may be a victim, don’t act like one. Don’t get caught up in analyzing how bad the situation may be and condemning the other parent. Instead, focus on what you can do on your end to maintain and improve the relationship with your child. Importantly, focus on enjoying your child’s company. Always take the high road and never talk badly about the other parent to your child.

- **Don’t give up.** Children have a fundamental right and a need for a loving relationship with both parents unless there is a justification for limiting that relationship such as abuse or neglect by a parent. When a parent interferes with a child’s relationship with the other parent without justification, then that parent is causing the child emotional harm. Studies show that children who’ve undergone forced separation from one of their parents in the absence of abuse are highly subject to post-traumatic stress, depression, anxiety, and other harm. In other words, no matter how awful the other parent may be, remember that your child needs you.
Dealing with a Passive Aggressive Parent

I've listened to the frustrations of many divorced parents who are dealing with a passive-aggressive parent. In my experience as a divorce lawyer, passive-aggressive behavior is one of the most common problems divorcing parents experience. Unfortunately, a passive-aggressive parent turns mundane, routine events (such as pick-up and delivery of the children or coordinating the children's healthcare) into an opportunity for conflict.

GOING TO FAMILY COURT ISN’T ALWAYS THE BEST SOLUTION

Some family court lawyers’ “go-to” advice for dealing with a difficult parent is to haul the problem parent into court. Family court intervention may be the solution in extreme cases where the parent’s behavior is harming the children. However, in other cases, South Carolina’s family courts have repeatedly expressed their unwillingness to change or modify custodial arrangements simply because parents don’t get along with each other. Also, dragging the other parent into court may have the effect of making their behaviors worse and, in turn, making matters harder for your children.

I believe that the best family law attorneys not only understand the laws and the courts, but also understand the emotional and the psychological behaviors that cause conflict between divorcing couples and parents. By educating divorcing couples as to why someone is behaving poorly, divorce lawyers can educate their clients on how to deal with a problem parent such as a passive-aggressive parent.

WHAT IS PASSIVE-AGGRESSIVE BEHAVIOR?

The Diagnostic and Statistical Manual of Mental Disorders (DSM) IV describes passive-aggressive personality disorder as a "pervasive pattern of negativistic attitudes and passive resistance to demands for adequate performance in social and occupational situations." In other words, passive-aggressive behavior is hostility that is expressed indirectly. Some of the common characteristics of passive-aggressive behavior include:

- Sarcasm
- Procrastination
- Stubbornness
- Repeated criticism
• Sulking and/or pouting
• Ignoring communication
• Repeatedly running late
• Repeatedly failing to accomplish requested tasks for which that person is responsible

WHY ARE SOME PARENTS PASSIVE-AGGRESSIVE?

In some situations, the parent intentionally wants the other parent to engage in conflict first. By acting passively-aggressively, they succeed in frustrating the other parent to the point where the other parent lashes out and becomes hostile. When the targeted parent behaves poorly out of sheer frustration, the hostile parent can then play the "victim" and justify their passive-aggressive behaviors, e.g., “I refuse to talk to my children’s father because he is always angry and he yells at me.”

For some passive-aggressive parents, their behaviors may be unintentional, learned behaviors from their own family and parents. For example, the problem parent may have grown up in a family environment where it wasn’t safe to assert themselves and where the honest expression of feelings was discouraged or punished. Another example is where the parent grew up in a family where one of their parents was dominant and the other was subservient. To avoid conflict with the dominant parent, the subservient parent may lie or keep secrets to get what they want out of the relationship. The result is that some children don’t develop healthy means of self-expressing and coping mechanisms to deal with everyday frustrations. Instead, they grow into adults who have learned to channel hostility and vindictiveness through passive-aggressive behaviors.

WHAT ARE THE BEST WAYS TO DEAL WITH A PASSIVE-AGGRESSIVE PARENT?

Before I explain the best ways to deal with a passive aggressive parent, let me give you a scenario for the type of passive-aggressive behavior many divorced parents deal with on a regular basis. Let’s say that two parents share custody and that the family court has ordered them to communicate with each other concerning their child. Their child must regularly take medication that goes back and forth with the child between homes. One morning, the father drives the child to school and later discovers later that the child left the medication at the father’s house. The father then texts the mother that he can meet the mother half-way between homes after work to deliver the medication. The mother, however, doesn’t reply. A few hours later, the father sends a repeat text that he can meet to deliver the medication. Again, the mother doesn’t reply that day or even that night. By the next morning, the mother continues to ignore the father’s texts from the day before. At this point, the father is concerned that the child is now off the medication schedule and he becomes frustrated with the mother for ignoring his texts. Sound familiar? What
should the father (or any parent for that matter) do in this scenario?

1. **Understand that this is hostile behavior** - As the saying goes, the beginning of wisdom is to call a thing by its proper name. Simply stated, this is hostility. By ignoring the father’s texts, the mother is intentionally baiting the father to engage in conflict. In this scenario, conflict is exactly what the mother wants and the father needs to avoid. If the father responds with hostility, the mother feels vindicated and may later use the father’s response against him in family court to demonstrate that the father is a hostile person and a bad co-parent. Don’t reward the passive-aggressive parent by acting out.

2. **Don't try to fix the other parent** - As a divorced parent, it isn’t your role to somehow cure the other parent of their passive-aggressive behaviors. The reasons for passive aggressiveness can be complicated and deeply ingrained in the other parent’s personality. More than likely, the problem parent will perceive any attempt you make to “help” them as an attack on them which will lead to more conflict and your frustration. Whether they change on their own or seek professional help is entirely up to them and out of your hands. Don’t focus on changing them; focus on how to respond to their behaviors.

3. **Set and keep limits** - Unfortunately, tolerating passive aggression usually encourages the negative behavior to continue and to intensify. Therefore, you must set and keep limits in response to the passive-aggressive’s behaviors. Oftentimes, the “limits” I’m referring to are set out in family court orders such as parenting schedules, informing each parent of medical treatment, or required communication between parents. In the scenario I described above, the father should remind the mother of her court-ordered obligation of both parents to timely respond to each other’s communications about the child. Additionally, if the problem continues, the father should inform that mother that although he wishes to avoid conflict, he will turn the situation over to his lawyer if the mother continues to ignore him. If the problem persists, the father should follow through to keep those limits in place by contacting his lawyer. Sometimes, a letter from your lawyer to the problem parent may be enough to avoid returning to court.

4. **Be Assertive but not combative** - Being assertive doesn’t mean being disrespectful or hostile. Remember that this is a power-struggle that you will lose if you lose your cool. After all, the end-game for the passive-aggressive parent is for you to blow your stack first. Don’t go on a personal attack against the problem parent and don’t pour over the history of the problems you’ve had with them. Be clear and business-like in your communications and stick to the issue at hand.

5. **Avoid Tit-for-Tat** - It is only natural that you may feel the urge to "strike back." Not only will your behavior look bad if you ever find yourself back in family court, but striking back only escalates the other parent’s passive-aggressive behaviors but also fuels their frequent claims that they are a “victim” of
your aggressiveness. Even when you follow the tips I’ve laid out here, be prepared for the passive-aggressive parent to continue to try to suck you into more conflict. Take for example the scenario I described above. Let’s say that after being ignored, the father reminds the mother of her obligation to communicate and proposes one final time to meet the mother to deliver the child’s medicine. The mother finally texts back to the father “I knew it would be a problem and you would not bring the medicine so I made other arrangements.” By her response, the mother is trying to portray herself (and the child) as a “victim” of the father, to insinuate that the father is “bad,” and to bait the father into an argument. Understandably, the father may be frustrated and angered by the mother’s poor behavior and feel the need to attack. Here, the father could respond by indicating that if the mother will communicate in the future, then he will work with her to solve the problem. Otherwise, the father could choose to let the conversation, and the potential for conflict, end there without a response. Either way, the father should let the issue go at that point because the true issue concern (does the child have medicine) has been resolved.

**FINAL THOUGHTS ON DEALING WITH A PASSIVE-AGGRESSIVE PARENT**

Even if you follow the four ways I’ve suggested to deal with a passive-aggressive behavior, the bottom line is that it is never easy. For many parents, it is a constant, ongoing, and exhausting process. Oftentimes, once you’ve learned to deal with a set of passive-aggressive behaviors, some problem parents will find newer, more vindictive ways to behave. No matter what happens, it is important that you don’t let the passive-aggressive parent control you by turning you into a person or parent that you don’t want to be. In the end, the only way to avoid losing is not to play the game.
This excerpt is from a custody battle in which I was the guardian ad litem (GAL) for the children. In this case, the presiding family court judge, the Honorable Paul W. Garfinkel, eloquently expressed the court’s outlook regarding why parents should do all that they can to resolve their issues before asking the court to decide their family’s future. I thank the Honorable Paul W. Garfinkel for his permission to reprint his words for the benefit of all parents, in South Carolina and elsewhere, who may be facing difficult choices as to what is best for their children.

I want to make a few comments to you about how important it is to your family to resolve this case. . . . I know that both of you sit here today each of you are convinced of the merit of your own case and the rightness of your own position. However, asking your attorney to convert your convictions and beliefs into evidence that will result in a verdict in your favor is asking for what I believe the most difficult task that a trial attorney can be required to do.

A custody case is much different than any accident case or a criminal trial. In those cases, an attorney is only asked to prove what happened at a specific date and place. All of the events have been fixed and are unchanging. A custody case is much different. You are asking your attorneys not to paint a picture in time but to present a movie. The movie must show over a broad range of time how each of you parent. Then I must decide which of you is the better parent.

Can you imagine if you had to prove that DaVinci’s “Last Supper” was a better painting than Michelangelo’s “Creation,” and say that you had to prove this to someone who had never seen either painting and you weren’t allowed to show the paintings to them? I suppose you could hire the curator of the Metropolitan Museum of Art who would come to court and testify about composition, color, depth, character, and proportion. Or I suppose you could bring in some ordinary people to say which one they think is better. Maybe you could take a poll. This is what you are asking your attorneys to do in this case. They have to prove to me which is the better parent, but they have no way of showing me exactly how you parent. They can’t take me to the study sessions so I can see you how a good tutor Dad is. They can’t bring me into your child’s bedroom at 5 a.m. to see how Mom comforts the child who is awakened with a fever. I want you and I want your attorneys to bring up those incidents which show you to be caring and loving parents, and I am sure
they will try. However, it is more likely that they will be forced to show the other parent at his or her worse. Neither of these efforts will work very well. In trying to prove the positives you will discover that with the passage of time, the inability of witnesses to describe the situation with the same force with which it occurred, just the difficulty of putting into words other peoples’ thoughts, feelings and actions, all of these combine to make grey what you felt was vivid or blunt . . . what you thought was poignant. On the other hand, the negatives will seem to make you look like the worse parent that ever lived. Did you ever send one of your children to school without [their] lunch? Did you ever forget to give one of your children [their] medicine? Did you ever say about your child “I could have strangled her?” We probably have all done those things, and it will be presented as if you are the most neglectful or abusive parent. At the end of the trial any goodwill each of you had for the other, if there is any, will have been totally destroyed.

It is both of you who must be parents of these children until either you or they die. Neither I nor any of these lawyers . . . will be there for you for the remainder of this long journey. We could try to do our best to get you pointed in the right direction and maybe even help you along, but it is only in the first few steps. In the end it is both of you who must raise these children.

If your children could reach into their hearts and tell you exactly what they think and feel about what is going on here, if they could get beyond the hurt we know they must feel, we all know what they would say. First they would say, “I wish Mom and Dad were back together.” Knowing this will not happen, they would say, “I wish they would just stop fighting.” No doubt they love you so much they are probably blaming themselves for your original breakup. It is time you get past the anger and put aside the hurt. You may even have to forgive. The pain that has been caused here arises from the conflict between each of you and has nothing to do with the children.

Your children want this conflict to end. You have the chance to leave here today with an agreement that is in the best interest of your children. But it is an agreement that you must reach together. You must be willing to put aside your differences and be willing to accommodate each other's needs. But most importantly you must be ready now to put the needs of your children first.

I know that your children want you to settle this case. You can do the right thing and you can start now. Put aside what has happened in the past. This is the judgment day for your children. It's not about you. And think about the additional damage you are going to cause to these children. I can tell you right now it has happened and it happens every time. Put aside your own egos and swallow them. Leave it in this courtroom . . . we've had a lot of egos left in this courtroom. You don't see them but I do because I see parents who are willing to put their children's welfare above their own ego. And they leave it right here and they know and understand what is really best for the children.
1. WHAT IS PARENTAL ALIENATION SYNDROME?

In 1985, psychiatrist Richard Gardner came up with the concept of PAS to describe the behaviors of children whose parents deliberately turn them against the other parent particularly when there is a custody dispute between the parents. Essentially, one parent undermines the child’s relationship with the other parent on an ongoing basis through various means such as belittling and insulting the targeted parent and manipulating the child’s feelings toward that parent. In theory, the manipulative parent brainwashes the child to the extent that the child no longer wants to have a relationship with the alienated parent. Some of the characteristics of PAS include:

- Letting the child choose whether to visit with the other parent despite court-ordered visitation
- Sharing with the child details about the marriage or divorce
- Not allowing the child to take toys and possessions back and forth between homes
- Denying the other parent access to school or medical records and schedules of activities
- Blaming the other parent for money problems, splitting up the family, or having a girlfriend or boyfriend
- Refusing to be flexible with the visitation schedule
• Over-scheduling the child with activities so the other parent doesn’t have time with the child
• Falsely accusing the other parent of abusing the child
• Asking the child to choose one parent over the other
• Encouraging the child’s anger toward the other parent
• Using a child to spy on the other parent
• Reacting with hurt or sadness when the child has a good time with the other parent
• Monitoring the child’s communications with the other parent

2. IS PARENTAL ALIENATION SYNDROME AN ACTUAL “SYNDROME”?

PAS isn’t embraced universally by psychologists or psychiatrists. There are no statistics regarding PAS, and it isn’t formally recognized by mental health professionals. The bible of psychiatric diagnoses, the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), doesn’t list the term parental alienation syndrome. In fact, some experts have referred to PAS as “junk science.”

In South Carolina, we aren’t aware of any family court that has formally recognized PAS. Having said that, as divorce lawyers in Charleston, South Carolina, we see the behaviors listed above in many of our cases involving custody. In the least, these cases involve a child who is conflicted and emotionally in crisis as a result of the manipulative parent’s tactics. In extreme cases, the manipulative parent can be successful in creating a false belief that the alienated parent is a dangerous and unworthy parent. So, if PAS isn’t formally recognized in South Carolina’s family courts, what can be done about the harm the manipulative parent is causing?

3. HANDLING PARENTAL ALIENATION IN FAMILY COURT

As mentioned, South Carolina’s family courts haven’t recognized parental alienation as an actual “syndrome” or mental illness. Although a family court lawyer could try to prove PAS in South Carolina, chances are that lawyer would spend most (if not all) of the client’s money trying to prove the validity of PAS as a valid psychiatric concept before ever getting to the heart of the issue which is the harm the child is suffering. In other words, trying to prove PAS in family court may be a waste of time and money. Instead, the lawyer should focus on three key areas:

1) Proving specific negative conduct by the parent that causes harm to the child. Trying to prove both harmful conduct and resulting injury to a child is perhaps one of the most challenging things to do in family court for several reasons. First, often the parent’s conduct, such as badmouthing the other parent, happens in private and without any witnesses except the child. In South Carolina, family court judges are very reluctant to hear the testimony of
any children. As for what your child tells you, you can’t in turn testify to your child’s statements because the statements are hearsay and inadmissible as evidence in court. However, by using the testimony of trained mental health professional who has interviewed the child or through the investigation of a guardian ad litem, sometimes it is possible to prove to the court that alienation is taking place and that it is harming the child. In other words, if alienation is occurring, then the lawyer should get a GAL and a trained child psychiatrist or psychologist involved to help expose the parent’s conduct. Additionally, the targeted parent can help his or her lawyer by creating a detailed chronology of ongoing events such as interfering with the visitation schedule or denying telephone access to the child.

2) Seeking a court order prohibiting certain conduct. Many of the behaviors listed here can be dealt with, and sometimes eliminated, through a family court order. For example, the court order can prohibit a parent from scheduling activities during the other parent’s time or by setting a specific schedule for telephone visitation.

Of course, having a court order doesn’t mean the manipulative parent won’t try to interfere with the other parent’s relationship with the child. However, having a court order does give a client the ability to ask the court to punish the other parent if they violate the court’s order.

Even where the evidence of alienation is overwhelming, the court may still be hesitant to do anything about it. In several cases we’ve had, we’ve seen judges get frustrated and essentially force the parties to go out into the hallway and try to work things out themselves. Also, judges can be slow to place serious sanctions on the alienating parent. When the court is hesitant to take any action through fines, jail time, or granting custody to the targeted parent, then the chances are remote that the out-of-control parent can be stopped. Unfortunately, it usually takes a very dramatic situation, such as repeated violations of court orders, before the orders that the targeted parent gets custody.

3) Seeking a court order that gives the targeted parent liberal time with the child. Liberal time for the targeted parent is CRUCIAL! Spending time with the child won’t stop the other parent from behaving poorly. However, the more time the alienated parent has to demonstrate their love and to care for the child, the less sway the manipulative parent may have over the child. In other words, perhaps some of the best medicine to treat the poison a manipulative parent injected into a child’s mind is liberal quality time spent together by the targeted parent and the child.

4. HANDLING PARENTAL ALIENATION OUTSIDE OF THE COURTROOM

What happens outside of the courthouse is equally, if not more, important than what happens in court. Whether you are seeking primary custody of your child as a result of alienation or simply trying to maintain your relationship with your child,
the following points are very important to your success as a parent:

- **Consider professional counseling.** Although you may not feel like you need family counseling, counseling accomplishes two things. First, counseling can help you build the knowledge and the skills to offset the other parent’s efforts to alienate your child. Second, your willingness to voluntarily attend counseling looks good in family court.

- **Keep your emotions under control.** When another parent is alienating your child from you, it is both natural and understandable that you would be upset, angry, sad, and frustrated by these events. However, it is absolutely crucial that you keep yourself even-tempered, logical, and in check. Don’t retaliate and don’t react in anger. If you do, you are helping to prove the alienator’s claim that you are an unstable parent. Also, if you act in anger or emotionally, then your child is going to be impacted by your reaction.

- **Don’t play the “victim.”** Although you may be a victim, don’t act like one. Don’t get caught up in analyzing how bad the situation may be and condemning the other parent. Instead, focus on what you can do on your end to maintain and improve the relationship with your child. Importantly, focus on enjoying your child’s company. Always take the high road and never talk badly about the other parent to your child.

- **Don’t give up.** Children have a fundamental right and a need for a loving relationship with both parents unless there is a justification for limiting that relationship such as abuse or neglect by a parent. When a parent interferes with a child’s relationship with the other parent without justification, then that parent is causing the child emotional harm. Studies show that children who’ve undergone forced separation from one of their parents in the absence of abuse are highly subject to post-traumatic stress, depression, anxiety, and other harm. In other words, no matter how awful the other parent may be, remember that your child needs you.
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Some family court lawyers’ “go-to” advice for dealing with a difficult parent is to haul the problem parent into court. Family court intervention may be the solution in extreme cases where the parent’s behavior is harming the children.
However, in other cases, South Carolina’s family courts have repeatedly expressed their unwillingness to change or modify custodial arrangements simply because parents don’t get along with each other. Also, dragging the other parent into court may have the effect of making their behaviors worse and, in turn, making matters harder for your children.

I believe that the best family law attorneys not only understand the laws and the courts, but also understand the emotional and the psychological behaviors that cause conflict between divorcing couples and parents. By educating divorcing couples as to why someone is behaving poorly, divorce lawyers can educate their clients on how to deal with a problem parent such as a passive-aggressive parent.

**What is Passive-Aggressive Behavior?**

The Diagnostic and Statistical Manual of Mental Disorders (DSM) IV describes passive-aggressive personality disorder as a “pervasive pattern of negativistic attitudes and passive resistance to demands for adequate performance in social and occupational situations.” In other words, passive-aggressive behavior is hostility that is expressed indirectly. Some of the common characteristics of passive-aggressive behavior include:

- Sarcasm
- Procrastination
- Stubbornness
- Repeated criticism
- Sulking and/or pouting
- Ignoring communication
- Repeatedly running late
- Repeatedly failing to accomplish requested tasks for which that person is responsible

**Why Are Some Parents Passive-Aggressive?**

In some situations, the parent intentionally wants the other parent to engage in conflict first. By acting passively-aggressively, they succeed in frustrating the other parent to the point where the other parent lashes out and becomes hostile. When the targeted parent behaves poorly out of sheer frustration, the hostile parent can then play the “victim” and justify their passive-aggressive behaviors, e.g., “I refuse to talk to my children’s father because he is always angry and he yells at me.”

For some passive-aggressive parents, their behaviors may be unintentional, learned behaviors from their own family and parents. For example, the problem parent may have grown up in a family environment where it wasn’t safe to assert themselves and where the honest expression of feelings was discouraged or punished. Another example is where the parent grew up in a family where one of their parents was dominant and the other was subservient. To avoid conflict with the dominant parent, the subservient parent may lie or
keep secrets to get what they want out of the relationship. The result is that some children don’t develop healthy means of self-expressing and coping mechanisms to deal with everyday frustrations. Instead, they grow into adults who have learned to channel hostility and vindictiveness through passive-aggressive behaviors.

**Don’t Try to Fix the Other Parent!**

As a divorced parent, it isn’t your role to somehow cure the other parent of their passive-aggressive behaviors. The reasons for passive aggressiveness can be complicated and deeply ingrained in the other parent’s personality. More than likely, the problem parent will perceive any attempt you make to “help” them as an attack on them which will lead to more conflict and your frustration. Whether they change on their own or seek professional help is entirely up to them and out of your hands. Don’t focus on changing them; focus on how to respond to their behaviors.

**What Are the Best Ways to Deal with a Passive-Aggressive Parent?**

Before I explain the best ways to deal with a passive aggressive parent, let me give you a scenario for the type of passive-aggressive behavior many divorced parents deal with on a regular basis. Let’s say that two parents share custody and that the family court has ordered them to communicate with each other concerning their child. Their child must regularly take medication that goes back and forth with the child between homes. One morning, the father drives the child to school and later discovers later that the child left the medication at the father’s house. The father then texts the mother that he can meet the mother half-way between homes after work to deliver the medication. The mother, however, doesn’t reply. A few hours later, the father sends a repeat text that he can meet to deliver the medication. Again, the mother doesn’t reply that day or even that night. By the next morning, the mother continues to ignore the father’s texts from the day before. At this point, the father is concerned that the child is now off the medication schedule and he becomes frustrated with the mother for ignoring his texts. Sound familiar? What should the father (or any parent for that matter) do in this scenario?

1. **Understand that this is hostile behavior** – As the saying goes, the beginning of wisdom is to call a thing by its proper name. Simply stated, this is hostility. By ignoring the father’s texts, the mother is intentionally baiting the father to engage in conflict. In this scenario, conflict is exactly what the mother wants and the father needs to avoid. If the father responds with hostility, the mother feels vindicated and may later use the father’s response against him in family court to demonstrate that the father is a hostile person and a bad co-parent. Don’t reward the passive-aggressive parent by acting out.

2. **Set and keep limits** – Unfortunately, tolerating passive aggression usually encourages the negative behavior to continue and to intensify. Therefore, you must set and keep limits in response to the passive-aggressive’s behaviors.
Oftentimes, the “limits” I’m referring to are set out in family court orders such as parenting schedules, informing each parent of medical treatment, or required communication between parents. In the scenario I described above, the father should remind the mother of her court-ordered obligation of both parents to timely respond to each other’s communications about the child. Additionally, if the problem continues, the father should inform the mother that although he wishes to avoid conflict, he will turn the situation over to his lawyer if the mother continues to ignore him. If the problem persists, the father should follow through to keep those limits in place by contacting his lawyer. Sometimes, a letter from your lawyer to the problem parent may be enough to avoid returning to court.

3. Be Assertive but not combative – Being assertive doesn’t mean being disrespectful or hostile. Remember that this is a power-struggle that you will lose if you lose your cool. After all, the end-game for the passive-aggressive parent is for you to blow your stack first. Don’t go on a personal attack against the problem parent and don’t pour over the history of the problems you’ve had with them. Be clear and business-like in your communications and stick to the issue at hand.

4. Avoid Tit-for-Tat – It is only natural that you may feel the urge to “strike back.” However, striking back only escalates the other parent’s passive-aggressive behaviors and fuels their frequent claims that they are a “victim” of your aggression. Be prepared for the passive-aggressive parent to try to suck you into more conflict. Take for example the scenario I described above. Let’s say that after being ignored, the father reminds the mother of her obligation to communicate and proposes one final time to meet the mother to deliver the child’s medicine. The mother finally texts back to the father “I knew it would be a problem and you would not bring the medicine so I made other arrangements.” By her response, the mother is trying to portray herself (and the child) as a “victim” of the father, to insinuate that the father is “bad,” and to bait the father into an argument.

Understandably, the father may be frustrated and angered by the mother’s poor behavior and feel the need to attack. Here, the father could respond by indicating that if the mother will communicate in the future, then he will work with her to solve the problem. Otherwise, the father could choose to let the conversation, and the potential for conflict, end there without a response. Either way, the father should let the issue go at that point because the true concern (does the child have medicine) has been resolved.

Final Thoughts on Dealing with a Passive-Aggressive Parent

Even if you follow the four ways I’ve suggested to deal with a passive-aggressive behavior, the bottom line is that it is never easy. For many parents, it is a constant, ongoing, and exhausting process. Oftentimes, once you’ve learned to deal with a set of passive-aggressive behaviors, some problem parents will find newer, more vindictive ways to behave. No matter what happens, it is important that you don’t let the passive-aggressive parent control you by turning you into a
person or parent that you don’t want to be. In the end, the only way to avoid losing is not to play the game.
“What should I do when my child doesn’t want to go visit the other parent?” That is one of the toughest (and most heartbreaking) questions I get asked by some clients.
When a child refuses to visit with a parent, this scenario (1) prompts distrust and suspicion between the parents, (2) creates an awkward situation between the parents and the child, and (3) puts both parents in legal jeopardy if they don’t handle the situation appropriately. In this article, I will explain in detail South Carolina’s family laws and exactly how to handle your children if they refuse to visit with a parent.

What Happens if When a Child Refuses to Visit Their Father or Mother?

No parent wants to force a tearful child into the back seat of the other parent’s car. Likewise, no parent wants to sit in a driveway watching their child cling to the other parent while refusing to get in the car. Not only are these moments emotionally devastating to the parents and the child, these moments create three major challenges: (1) distrust and suspicion between the parents, (2) awkwardness between the parents and the child, and (3) potential legal jeopardy if the parents don’t handle the situation properly.

1. **Raising Distrust and Suspicion** – The parent who has custody of the child may question whether the other parent has done something harmful to make the child fearful or unwilling to visit. Likewise, the parent who wants to visit with the child may blame the custodial parent for withholding visitation or manipulating the child against the visiting parent.

2. **Awkward Parenting Choices** – Both parents are faced with the challenge of how to deal with the child. The custodial parent may feel that they are letting their child down if they force their child to go on visitation. Meanwhile, the visiting parent may feel like they are doing more harm than good to insist that the child visit.

3. **Legal Jeopardy** – Both parents may place themselves in legal jeopardy with the family court depending upon how they handle the situation. For the custodial parent, they may be accused of interfering with the other parent’s visitation if the child does not go. For the visiting parent, they may be accused of inappropriate conduct in the child’s presence if they argue with the other parent over visitation.

Figuring Out Why Your Child Doesn’t Want to Visit

Understanding “why” your child refuses to visit is the first step to resolving the issue. However, you can easily cause emotional harm to your child and create legal problems for yourself if you go about getting answers the wrong way such as questioning the child yourself.

Based on my experience, the reason why a child refuses visitation typically falls into one of four categories each of which requires a different approach by the parents. Here’s what you should and should not do in each situation:

1. **Reciprocal Anxiety Over Visitation** – Parents and children can feed on each other’s anxieties. These anxieties, both the parent’s and the child’s, can reach their peak during visitation exchanges and create a sort of “emotional feedback loop.” The child or the parent exhibits
anxious behaviors before visitation which in turn causes the child or parent to become more distressed which in turn feeds back into both child’s and parent’s anxieties. Here’s what parents can do to break this cycle:

• Listen to and respect your child’s feelings. The experience of being listened to can have a powerful calming effect.

• Don’t reinforce your child’s feelings. Parents sometimes make the mistake of reinforcing the child’s anxiety by saying things along the lines of “I don’t want you to go too” or “I’m going to miss you so much.” Instead, let your child know that although you understand his or her feelings, you “WANT” your child to go visit.

• Don’t ask your child to report back about their experiences. I read another article that recommended that after the visitation, you should ask your child about what they did with the other parent and give positive feedback such as “So you went to the zoo with your day? That sounds like it was fun!” This is exactly what you should NOT do. Never ask your child to report back about the other parent.

2. Manipulation by the Child – Some children don’t want to visit the other parent because the child has other things they’d rather do (such as go visit a friend in the neighborhood) or things they wish to avoid (chores at the other parent’s home). You should handle this scenario the same way as you should handle a child that is anxious about visiting.

3. Manipulation by the Parent – When a parent manipulates a child against visitation, this is one of the most challenging circumstances to address legally and psychologically. In this situation, the manipulating parent typically does thing such as:

• Tell the child how “sad” the parent is when the child is gone;

• Tell the child about fun activities (such as a pool party) that the child will miss out on while the child is away;

• Lay blame on the other parent as to why the family is separated; or

• Make negative comments about the child’s experiences at the other parent’s home such as, “That’s terrible that you had to help your father clean his yard.”

4. Genuine Fearfulness of the Parent – In this situation, the visiting parent is doing something that is truly harmful to the child such as physical abuse, emotional abuse, or sexual abuse. To learn what you should do in this situation, read the section below on “What Do I Do If Visitation is Truly Harming My Child?”

Do I Have to Force My Child to Visit with the Other Parent?

Some parents have asked me whether they have to “force” their child to visit. I am not a fan of the word “force” because it suggests that the parent doesn’t want the child to go in the first place or the parent supports the child’s unwillingness to
visit. Having said that, if you have a family court order that provides for a visitation schedule, then the safest answer is “yes” you must make the child go. If you fail to abide by the court order, there can be several legal consequences. First, you could be held in contempt of the court order and face significant penalties including jail. Second, you may face a legal claim for a change in custody or supervised visitation based on allegations that you are interfering with the child’s parental relationship.

Can I Force My Child to Visit with Me?

You can take legal action to enforce visitation with your child. Before you do so, I urge you to consider the non-legal ramifications of turning to the family court for assistance especially involving teenage children. For example, let’s say your child is 16-years-old and wants to hang out with his or her friends instead of visiting with you. If you force your 16-year-old to visit, I can assure you that the visitation will not go well. Your child will be angry and upset with you and the child’s negative feelings about visitation will increase. I recommend a non-legal approach such as modifying the visitation schedule to accommodate the child’s activities. I also recommend a discussion with your child to listen to his or her feelings about visitation. In a nutshell, try to compromise with a teenage child to come up with a schedule that everyone can live with.

How Old Does a Child Have to be to Refuse Visitation in South Carolina

Many clients ask me whether there is an age can a child have to refuse visitation. Under South Carolina’s family laws, there is no set age at which a child can refuse to go visit with the other parent.

What Do I Do If the Other Parent is Withholding or Interfering with Visitation?

If a parent is purposefully withholding or interfering with your visitation, you should consult with a family court attorney. There are essentially two legal avenues to take in this situation. First, if there is a court order that establishes your visitation schedule, then you can ask the family court to hold the other parent in contempt of court. Second, you can ask the family court to give you custody if you can prove that the other parent is purposefully interfering with visitation. Additionally, the court may also limit or supervise the offending parent’s visitation with the child.

I want to emphasize that taking the other parent to court should be your last option before trying non-legal means to improve relations with the other parent. The reason why I make this suggestion is that when you take the other parent to court, you can expect that their attempts to interfere make actually get worse, not better, as a reaction to being sued. Before going to court, trying speaking with the other parent to find out what their concerns might be regarding visitation. In some instances, you may quickly discover that you have no
alternative but to go to court. However, in some instances, you may find that the other parent may have concerns that you can easily address through compromise or just be talking with one another.

**What Do I Do If Visitation is Truly Harming My Child?**

If the visiting parent is doing something that is truly harmful to the child such as physical abuse, emotional abuse, or sexual abuse, then you must take immediate legal action to protect your child.

1. **Physical or Sexual Abuse** – First, you should contact law enforcement for suspected abuse. Law enforcement will need to collect and preserve evidence of such abuse. If you take your child to a pediatrician or emergency room first, they may inadvertently destroy (or fail to collect) evidence in cases of sexual abuse that is needed for any prosecution. Additionally, you may contact the Department of Social Services to report the abuse for investigation and intervention by the family court. Lastly, speak with a family court lawyer about whether you can deny the other parent visitation in an emergency or whether the attorney can get an emergency order from the family court stopping visitation.

2. **Emotional Abuse** – Emotional abuse of a child by a parent is perhaps even more tragic than physical abuse because these cases are hard to prove to a family court judge. For example, most family court judge’s are reluctant to hear any testimony from a child. Even if the court listens to what a child has to say, they may not give much weight to the child’s claims if the child is young or immature. Nevertheless, there are things you can do to try and protect your child. First, like physical abuse, you can contact DSS to investigate. In my professional opinion, DSS is not well-equipped to handle these cases. Your best approach is to contact a seasoned family court attorney who can formulate a legal plan of action to protect your child such as:

   Sending the child to a therapist or otherwise forensic child interviewer to document the emotional abuse;

   - Gathering school (and sometimes medical) records to show that the child is suffering from the other parent’s treatment of the child;
   - Gathering statements from teachers, after-school care providers, and other adult witnesses to the parent’s abusive conduct; and
   - Using the collected evidence to request that the family court suspend or supervise visitation pending an investigation into the situation.

**Final Thoughts**

Although I’ve tried to give you as much guidance as I can on variations of children who don’t want to visit with a parent, I must point out that there is no “one-size-fits-all” approach to dealing with this sensitive situation. Obviously, every child and every parent are unique. Because of the complexity of
these situations and the risk of doing more harm than good by sorting it out yourself, I encourage you to involve child counselors, the other parent (to the extent possible), and even a family court attorney to find the best solution for your child.
I’m often asked about the rights of grandparents in divorce, visitation, and custody cases in South Carolina. Sometimes, one of the parents dies, and the other parent withholds the child from his or her in-laws. Other times, the grandparents have a falling out with their own child and aren’t allowed to see their grandchildren.
If a grandparent wishes to seek custody or visitation with their grandchild, they should be aware of what they are up against. The Due Process Clause of the Constitution grants people a fundamental right in the care, custody, and control of their children, and South Carolina’s family courts are often reluctant to go against a fit parent’s choice.

**Grandparents' Right to Custody - De Facto Custodian**

If a grandparent seeks custody of their grandchild from a biological or adoptive parent, the grandparent will have to show that he or she (or possibly both) is a “de facto custodian” of the child. To prove they are a de facto custodian, the grandparent must prove to a high standard of proof (called “clear and convincing evidence”) that he or she has been the primary caregiver and financial supporter of a child who has lived with him or her for at least six months (if the child is under three years old) or for at least one year (if the child is older than three). Any days that occur after the day the case is filed don’t count, so a grandparent may wish to wait to file their case to ensure that they meet the required time period.

If the judge finds someone is a de facto custodian, the court may award custody or visitation to the grandparent if it finds, clearly and convincingly, that (1) the parents are unfit or (2) that other compelling circumstances exist. Proving that parents are unfit can be done a number of ways. Sometimes a grandparent can show that the parents abuse or neglect the children, are addicted to drugs or alcohol, make very bad decisions on a regular basis, or put the children’s safety in jeopardy. If the parents are that bad, sometimes the Department of Social Services has already been involved, and if so, a grandparent can’t bring a case to ask to be the de facto custodian. The “other compelling circumstances” requirement is fairly vague, but the word “compelling” means grandparent’s request won’t be granted easily.

**Visitation by the Grandparent - Five Factors**

“If a grandparent cannot establish him or herself as a de facto custodian, the grandparent may still be able to obtain visitation. The family court may order visitation for the grandparents of a minor child where either or both of the child’s parents are deceased, divorced, or separated and if:

(1) the child’s parents or guardians are unreasonably depriving the grandparent of the opportunity to visit with the child, including denying visitation of the minor child to the grandparent for a period exceeding ninety days; and

(2) awarding grandparent visitation would not interfere with the parent-child relationship; and:

(a) the court finds by clear and convincing evidence that the child’s parents or guardians are unfit; or

(b) the court finds by clear and convincing evidence that there are compelling circumstances to overcome the presumption that the parental decision is in the child’s best interest.

If all of these factors are met, then the family court may award visitation to the grandparent. The court must decide on the
visitation schedule carefully as it may not interfere with the parent-child relationship. The court will also likely look at other things relevant to the child’s life to ensure that the grandparent’s visitation does not interfere with the child’s normal activities.

“Compelling circumstances” will be determined on a case-by-case basis, but the family court will consider the children's best interests in deciding custody. It is not enough to show that a child may benefit from contact with a grandparent. Instead, the family judge will consider several factors including:

1. The children's relationship with each other and with their parents;
2. The children's adjustment to home, school, and community;
3. The mental and physical health of all children and their parents; and,
4. In certain circumstances, the wishes of the child or children.

A grandparent seeking court-ordered visitation should also be aware that the judge can order the grandparent to pay the parent or guardian’s attorney’s fees if the grandparent gets less than everything the grandparent asked for. Likewise, if the grandparent prevails, the judge could order the parent or guardian to pay the grandparent’s attorney’s fees.

### The Psychological-Parent Doctrine

South Carolina has recognized the Psychological-Parent Doctrine, which allows for a third party to request custody or visitation with a child. To prove that a psychological-parent relationship exists with the child is one of the most challenging things to do in the family court.

For a court to find this situation exists, it must first look to four factors established by the courts. The factors are:

1. Whether the biological or adoptive parent(s) consented to, and fostered, the third party’s formation and establishment of a parent-like relationship with the child;
2. Whether the third party and the child lived together in the same household;
3. Whether the third party assumed obligations of parenthood by taking significant responsibility for the child’s care, education, and development, including contributing towards the child’s support, without expectation of financial compensation; and
4. Whether the third party has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.
Building the Case for Grandparents’ Rights to Custody or Visitation

Judges will hear all sorts of stories regarding the kids’ relationships with the grandparents. Often, the stories don’t match, and the court will try to figure out the truth. A fundamental way of doing this is for a grandparent to build up their bank of tangible evidence. Pictures of grandparents with the children are excellent. Receipts, credit card and bank statements, airline itineraries, or other evidence of event attended by both the grandparent and child may be useful as well. Receipts or credit card or bank statements of items bought for the kids should be gathered. These items can be useful, such as clothes, or strictly fun, such as toys. Grandparents should look for emails, letters, or text messages with the parents to show evidence of them communicating about the kids. They should look for birthday or holiday cards to the grandparents and signed by the kids. They should look for emails, letters, and text messages with the kids. They should check the phone logs for evidence of repeated phone calls with the kids.
Chapter 12

Mental Health Issues

“The thing about people who are truly and malignantly crazy: their real genius is for making the people around them think they themselves are crazy.”

~ David Foster

In “high conflict” cases, the parties can’t agree to anything, they fight over everything, and their case drags on through the family court system at a high financial and emotional cost to the parties and their children. Unfortunately, the conflict seems to be driven by mental health issues.
In 2011, a multinational study was conducted regarding 18 types of mental disorders (such as phobias, major depression, and alcoholism) and their impact on marriage and divorce. The study found that the disorders all increased the likelihood of divorce ranging from 20 to 80 percent depending upon the type of mental illness. Other research has shown a strong link between personality disorders (such as antisocial and histrionic personality disorders) and higher divorce rates.

Divorce lawyers see the same patterns repeating in cases involving mental health issues. For example, there is the “demonizing” parent. In these cases, the parent who suffers from mental health issues, such as personality disorders, will accuse the other parent of being unfit although the accused party’s parenting skills were fine before the couple separated. In other words, the afflicted parent will “demonize” the other parent by making unsupported claims of parental unfitness. For these parents, they see people as either allies or enemies, they think in all-or-nothing terms, they reason emotionally, and they personalize even the most benign events. Family court becomes a perfect theater for these parents to play out their fantasies by giving them a forum to assign blame to the other parent and to ask the court to punish the other parent by limiting visitation and custody.

As another example, there is the excessively “enmeshed” parent who, due to mental health issues, is too dependent on their children. These parents’ feelings of self-worth are bound so tightly to their children that they feel threatened by the other party’s parental role. In these cases, the enmeshed

parent expects the children to take their side and to be loyal only to that parent. The enmeshed parent actively interferes with visitation, withholds the children’s medical and educational information, makes negative statements about the other parent to the children, often ignores family court orders, and overall engages in a process to sabotage the children’s relationship with the other parent.

**Personality Disorders = High Conflict Divorces**

Ask anyone who has been married to someone suffering from a personality disorder, and they will tell you that their marriage is marked by periods of high conflict. When you add the additional struggles that come from a divorce, then you have a recipe for EXPLOSIVE conflict between spouses and significant damage to children caught in the middle.

Chances are likely that in many high conflict cases, especially those involving custody, there is at least one party suffering from a personality disorder or other mental illness. Initially, the person suffering from mental health issues may appear and act “normal.” However, over time, their difficulty or inability to function during a crisis (e.g. divorce) will surface.

It is crucial that attorneys and judges are able to identify how to deal with parties who suffer from these disorders. Otherwise, if the lawyers and the court do not recognize the personality disorder or mental illness, then they may inadvertently contribute to the conflict.
Cognitive Distortions & False Statements

People with personality disorders view their world as a much more threatening place than most people do. Their world view is generally adversarial, so they often see all people as either allies or enemies. Their thinking is often dominated by cognitive distortions, such as: all or nothing thinking, emotional reasoning, personalization of benign events, minimization of the positive and maximization of the negative, and black and white thinking. They may form very inaccurate beliefs about the other person, but cling rigidly to those beliefs when they are challenged because being challenged is usually perceived as a threat.

People with personality disorders also are more likely to make false statements. In a divorce, the person experiences rejection or confrontation much more deeply than most people. They have great difficulty healing and may remain stuck in the denial stage, the depression stage, or the anger stage of grief. As a result, they avoid acceptance of the divorce by trying to change or control the other person through lies used to keep the other person in the relationship or to punish the other person.

The Family Court is Their Stage

For a person suffering from a personality disorder, family court becomes their stage. They focus intensely on their spouse’s behavior while avoiding any scrutiny of their own behavior. More often than not, these persons are enthusiastic about their claims, and their enthusiasm may be mistaken for sincerity. Their goals are to assign blame and to control or punish the other spouse. They see the family court judge as an all-powerful figure who will help them accomplish these goals. They are also more likely to justify making false statements and accusations to achieve their goals. If the family court is not cautious about the claims made by a mentally ill spouse, then the court may unwittingly punish the parties’ children and the “innocent” parent by, for example, ordering supervised visitation or imposing financial sanctions.

The Beginning of Wisdom is to Call a Thing by Its Proper Name

Of course, family court judges and lawyers should not engage in “arm chair” diagnoses of the parties to a divorce. However, they should educate themselves enough about various mental illness traits to recognize whether mental illness is fueling the parties’ litigation, whether a party’s claims against the other party should be viewed with skepticism, and whether a spouse or a parent may need professional diagnosis and recommendations for treatment.

Personality disorders are mental health conditions that impact how people handle their feelings and how they relate to others. Personality disorders are present in approximately 10 to 15% of the adult population. Some disorders, such as acute distress disorder, have a short duration ranging from a few days to a few weeks. Some disorders are not constant but are recurring such as major depression. Lastly, some
Personality disorders are defined by the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition (DSM-IV) as "enduring pattern[s] of inner experience and behavior" that are sufficiently rigid and deep-seated cause repeated conflicts with the person’s social and occupational environment. According to the DSM-IV, to be classified as a personality disorder, these dysfunctional patterns must be considered as nonconforming or deviant by the person's culture and cause significant emotional pain and/or difficulties in relationships and occupational performance. Also, the person typically views their disorder as being consistent with his or her self-image (ego-syntonic) and may blame others for their societal and occupational problems.

**Cluster B Personality Disorders – Relationship Destroyers**

The DSM-IV divides personality disorders into 3 groups, or “clusters”:

**Cluster A** - Individuals who have odd, eccentric behaviors. Paranoid, Schizoid, and Schizotypal Personalities.

**Cluster B** - Personalities that are highly dramatic, both emotionally and behaviorally. Antisocial, Borderline, Narcissistic, and Histrionic Personality are in this group.

**Cluster C** - Personalities characterized by being anxious and fearful. Avoidant, Dependent, and Obsessive-Compulsive Personality fall into this cluster.

Overall, the largest number of personality disorders falls into Cluster B. Cluster B is present in approximately 9% of the adult population. Further, Cluster B contains those individuals who cause the most damage to social and personal relationships.

In Cluster B, these are the persons who display abusive, controlling, and manipulative behaviors:

1) **Antisocial Personality Disorder (ASP)** – This is a lifelong disorder than begins before age 15. This disorder is prevalent in approximately 7.6 million people in the US (3.6 %) and more common in men than women. These individuals display a pervasive pattern of disregarding the rights of others and the rules of society. These persons are characterized by a lack of regard for others’ feelings and rights and a lack of remorse for their behaviors and the harm they cause others. They may lie, behave violently or impulsively, disregard the safety of others and themselves, and have problems with drug and alcohol use. These persons are intelligent, articulate, charming, and manipulative. They often are deceitful and adept at conning others.

The ASP spouse is not concerned with anyone else’s feelings except their own. They will use the divorce proceedings to abuse their family and are likely to threaten to quit their jobs to avoid support or to flee. Usually, a parent suffering from...
ASP does not make the best parent and has very little emotional attachment with their children. However, they are typically skilled at “mimicking” behaviors that portray them as caring, attentive, and loving spouses and parents.

2) Borderline Personality Disorder (BPD) – This disorder affects approximately 18 million people in the US (5.9%). There are approximately three times more females diagnosed with BDP than males. These individuals display a pervasive pattern of intense yet unstable relationships, mood, and self-perception. Their impulse control is severely impaired. Common characteristics include panic fears of abandonment, black-and-white thinking and views, unstable social relationships, unstable self-image, impulsive and self-damaging acts such as risky driving, unsafe sex and promiscuity, gambling or shopping sprees, substance abuse, recurrent suicide thoughts and attempts, self-injury and self-mutilation, chronic feelings of emptiness, inappropriate yet intense anger, and fleeting paranoia. They lack emotional maturity. It is not uncommon for them to be highly deceptive regarding their behaviors. In the beginning of their relationship, they will essentially idolize their spouse. However, in time they will experience what is know as “splitting” at which point they will devalue their spouse and assign blame to them for all of life’s difficulties.

In dealing with someone who has BPD, it is not uncommon to experience an “emotional roller coaster” ride with them. For example, one moment they will idolize their lawyer and shower them with praise and then, for no apparent reason, become disappointed and threaten their lawyer with professional misconduct claims when they perceive that their lawyer is not meeting their (often unrealistic) goals. The afflicted party will ignore appropriate boundaries by calling their lawyer at home during non-working hours or writing directly to the family court judge about their own lawyer or the other spouse. Their behaviors will appear to be highly inconsistent from one moment to the next, and they will perceive any attempt to set limits as a rejection of them. At one moment, they will place considerable demands on another person and, within the next moment, ignore the other person.

3) Histrionic Personality Disorder (HPD) – A pervasive pattern of excessive emotional display and attention-seeking. Individuals with this personality are excessively dramatic and are often viewed by the public as the “Queen of drama” type of individual. They are often sexually seductive and highly manipulative in relationships.

Narcissistic Personality Disorder – A pervasive preoccupation with admiration, entitlement, and egotism. Individuals with this personality exaggerate their accomplishments/talents, have a sense of entitlement, lack empathy or concern for others, are preoccupied with envy and jealousy, and have an arrogant attitude. Their sense of entitlement and inflated self-esteem are unrelated to real talent or accomplishments. They feel entitled to special attention, privileges, and consideration in social settings. This sense of entitlement also produces a
feeling that they are entitled to punish those who do not provide their required respect, admiration, or attention.

**What Can Be Done?**

Judges, lawyers, and family court counselors need to be trained in identifying personality disorders and how to treat them. As for the family court, it can help the situation by ordering the party into treatment. Considering that persons with personality disorders have a lifetime of denial and avoidance of self reflection, the court should order an extended period of treatment, say at least twelve months, to deal with these deep-seated issues.

Therapists need to help clients challenge and clarify the person's thinking about their own role in the dispute, about the accuracy of their view of the other party, and about their high expectations of the family court.

Finally, attorneys need to also challenge their clients' thinking. Attorneys should not take their clients' statements at face value. Also, lawyers should spend time encouraging their clients to focus on negotiating solutions instead of escalating blame.

There is one important point to emphasize. Whether your role is that of a mediator, a lawyer, or a judge, do not mistakenly believe that you can somehow fundamentally change the beliefs and behaviors of someone suffering from a personality disorder. Remember, these individuals experience “enduring patterns of inner experience and behavior” and, even if they are in treatment, are likely to deal with their condition for a lifetime. They experience cognitive distortions that impact their view of the world in negative ways. So when a person, such as a lawyer or judge, believes they are talking ABOUT the problem with the afflicted spouse, they are actually talking TO THE PROBLEM. At best, the most anyone can do is steer the person into long-term treatment and focus on ways to reduce the conflict between the parties and to negotiate resolutions without fueling the afflicted person's desire to fight in family court.
Can I Date While I’m Separated?

Before you start setting up your profile on eHarmony or swiping through Bumble or Tinder looking for a match, it is important to know how dating during separation may impact your divorce in South Carolina.
What is Legal Separation in South Carolina?

Legal separation is a family court order that spells out the rights and the duties of a couple while they are still married but living apart. These rights and duties may include financial obligations, child support, custody, and other marital issues.

Unlike some other states, South Carolina’s family courts do not recognize “legal separation.” In South Carolina, a couple is either married or they are not regardless of whether the couple is physically living together.

Is a “Temporary Order” Considered a Legal Separation in South Carolina?

No. In many cases, a couple may not see eye-to-eye on these decisions especially when they first separate. For these reasons, either spouse may seek “temporary relief” from South Carolina’s family courts while the divorce lawsuit is ongoing. If a spouse seeks temporary relief, he family court conducts a hearing that is referred to as a “temporary hearing” after which the court issues a “temporary order.” At a temporary hearing, the family court is not trying to decide who is right or wrong or who wins or losses. Instead, the family court’s primary goal is to maintain the status quo between the parties during the divorce case concerning financial issues, issues regarding children, and other issues surrounding the couple’s separation.

Can I Date While I Am Separated in South Carolina?

There is no law that specifically states that you may not date another person while you are separated. However, if you date before you are divorced, then you run the risk of being accused of adultery (having sex with someone other than your spouse) even if you aren’t sleeping with anyone. In South Carolina, adultery is considered to be “marital misconduct” and can negatively affect your divorce in many ways including:

1. **Dating’s Impact on Alimony** – If a spouse commits adultery before (1) the formal signing of a written property or marital settlement agreement or (2) the entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties, then that spouse is permanently prevented from receiving alimony from the other spouse. Conversely, the spouse committing adultery may pay an increased amount of alimony because of their “marital misconduct or fault.”

2. **Dating’s Impact on Property Division** – When dividing a divorcing couples’ property, the family court may consider the “marital misconduct or fault of either or both parties, whether or not used as a basis for a divorce as such, if the misconduct affects or has affected the economic circumstances of the parties, or contributed to the breakup of the marriage.” So, a party guilty of adultery may have his or
her share of the marital estate reduced because of the adultery.

3. **Dating’s Impact on Child Custody & Visitation** – Just because a spouse commits adultery, it doesn’t necessarily mean that parent is a bad parent. However, many family court judges consider issues such as whether a parent has acted “immorally” by dating before they are divorced or, worse still, whether the parent has exposed their children to the person they are dating.

**Should You Date Before You Get Divorced?**

In my experience, the answer is “no – definitely not.” Even in the simplest of divorce cases where there are no assets to divide, no children involved, and no issues concerning alimony, I still advise my clients to hold off on dating until their divorce is final. Although you may have “moved on” emotionally from your spouse, he or she may still feel attached. Even in situations where it may seem to you as if your spouse is accepting the divorce, he or she may turn jealous and angry because you are dating. When hostile emotions start to surface, you can count on negotiations becoming very difficult, your divorce taking longer, and paying more in legal fees as your divorce drags on. In some extreme cases, I’ve observed jilted spouses who went so far as to stalk my clients and the clients’ love interests, to vandalize my clients’ property, to contact employers to get my clients fired, and to become physically violent with clients.

In cases involving children, even when the divorce is amicable, children can still internalize hurt feelings and worry about being abandoned by their parents. If you date during your divorce, you risk more harm to your children’s emotional health. For example, your children may blame the divorce on the person you are dating. Similarly, your children may be angry at you for leaving the other parent for a new partner. Overall, your children are likely to feel confused, distrustful, and alienated if you begin to date too soon. In short, dating before your divorce is final is TOO SOON!
We frequently deal with issues that stem from a couple’s use of social media during their divorce. Social media provides an open forum for anyone going through the pain of a divorce to vent their feelings to all their friends and followers.
Unfortunately, a tweet, a Facebook post, or a share on Google Plus can have significant financial and legal effects on your divorce depending upon how a South Carolina family court judge interprets that share on social media. This article explores how to avoid making costly mistakes on social media while you are going through a divorce.

**There's Nothing “Private” About Social Media**

Social media platforms such as Facebook, Instagram, Twitter, and Google Plus are either a divorce lawyer's nightmare or a dream come true depending on how their clients engage online. These sites provide useful, and often damaging, information regarding a spouse such as where they have been, who they were with, what they did when they were there, how they behaved, and oftentimes photos that illustrate the spouse's activities. Also, activities on dating sites such as eHarmony, Match, and Ashley Madison typically result in devastating consequence for the spouse who choose to 'move on' from the marriage before their divorce.

Some spouses foolishly believe that they can keep their social media activity private by blocking their ex and their ex’s friends. In many cases, my clients have obtained information about their spouse’s online activities by logging into a friend’s account, making a fake account to engage with their spouse, or asking their friends to print or take screenshots of the estranged spouse’s social media feeds and posts. For example, in one of my family law cases, my client’s husband sought custody and visitation of the parties’ children. The husband posted to Facebook messages and pictures regarding his latest big purchase of marijuana, private messages about how he hid a financial account, and pictures of his new girlfriend’s pregnancy. Needless to say, he wasn't successful in his claim for custody.

**Social Media and Children of Divorce**

It isn’t just the spouses’ social media posts that can be used as evidence against a spouse, but children’s post too. Just like some grown-ups, children vent on social media to their friends and followers. In a recent custody case I was involved in, a teenage child was venting on Instagram about how they felt about their parent and how poorly the parent was treating them. Upon further investigation, the child was venting because the child had been disciplined for failing to abide by some of the house rules involving curfew and doing chores. Until the matter was cleared up, the opposing lawyer and the lawyer’s client were making a big “to-do” that the other parent was a bad custodian.

**Using Social Media During Your Divorce**

**Past Posts** - Regarding older posts that may be damaging to you in family court, think twice before you start deleting all of your information! Under South Carolina law, there is a legal doctrine known as “spoliation.” Essentially, it means that if evidence within your control “disappears” in relation to a legal dispute, such as a divorce, the court can infer that whatever went missing was incriminating. In other words, without even seeing this “evidence,” the court can decide against you by
determining that the information, whatever it was, was damaging to you.

**Future Posts** - Think before you post! Ask yourself before you post, share, tweet, check-in, or otherwise engage on social media - “What would a family court judge think of my social share?” If you post hateful things about your ex, then don’t be surprised when the family court views you as a hateful, vengeful person. In real life, you may be a wonderful person and parent. However, in a court of law, your post can easily be taken completely out of context, and you may be judged “in a vacuum” by that single post. Suppose that in your divorce you are claiming that you do not have enough money to either live without support or enough to pay support. How sympathetic do you think a family court judge will be to your plight if your posts consist of you dining out, boating, drinking, going on trips and getaways, or posing with a new shiny toy bought to help yourself “get over” your divorce. You don’t have to be a lawyer to figure out that your posts will weigh heavily against you in family court. **“When in doubt about whether you should share on social media - DON’T DO IT!”**

**Children’s Posts** - What about your children’s posts? If you allow your children to use social media, then stifling their use may seem like a “punishment” to them. After all, the divorce isn’t their fault, so why should they suffer the consequences? Also, warning them to keep their home life, including yours, private from your spouse is, in essence, putting them in the middle by making them take “sides” to protect your privacy. Instead, consider two options. First, if you haven’t already done so, talk to your children about the pitfalls of social media, concerns for privacy, “over-sharing” on social media, and how social media impacts their young lives. Second, if they’re struggling with the divorce or their relationship with either parent, arrange for your children to visit with a counselor. Also, ask the counselor to reinforce general concerns (not just about the divorce) about what they share on social media. In other words, instead of letting your children vent their feelings online, give them a constructive outlet, through therapy, to express and work through their feelings about your divorce.
Divorces involving financial disputes, complicated property division, and claims for support or child custody can be very expensive and take years to get through the family court. Fortunately, many divorces can be settled by agreement with the help of a family court mediator.

“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser — in fees, and expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.”

~ Abraham Lincoln
IN THIS SECTION

1. What is Mediation?
2. Why Mediate?
3. Does Mediation Really Work?
4. Why Does Mediation Work?

1. WHAT IS MEDIATION?

Mediation is an alternative to going to family court. A mediator is not a judge and doesn’t make any decisions for the spouses. Instead, the mediator is a neutral third party who is formally trained to identify and understand issues in family court and to facilitate and to structure negotiations between the parties. A skilled mediator can help divorcing couples move past their conflict and determine for themselves what is important and, ultimately, the outcome of their situation.

2. WHY MEDIATE?

One of the main reasons why many married couples find themselves in a divorce is because during the marriage they fail to communicate, to cooperate, and to negotiate with each other over matters such as children, money, and emotional and physical needs. These failures do not go away after the parties separate, and the parties continue to find it very difficult to resolve their differences in the divorce just as they did in marriage. Moreover, the emotional impact a divorce has on most couples makes it even more challenging for them to cooperate and to solve problems together. So, it is no wonder why so many couples turn to lawyers and the family court to sort out their futures. However, going to family court is rarely satisfying for either party because of the emotional toll, the financial costs, and the lack of control either spouse has over the ultimate outcome.
Mediation offers many significant advantages over battling it out in court. The following are a few examples:

- In litigation, a judge decides what is important for them and their family. In mediation, the parties can focus on their true needs and interests.

- In litigation, a family court judge’s decision is rarely creative and is confined to the law, and even those parties who “win” at trial often find that the cost of winning (time, energy, emotions, money) was too high. In mediation, both parties have control over the voluntary negotiation process.

- In litigation, court records may be open to public examination. In mediation, the parties can maintain privacy because the sessions are confidential, and if no settlement is reached any statements during the mediation are inadmissible as evidence in any subsequent litigation.

- In litigation, court hearings and trials typically foster resentment and ongoing hostility between parties. Through mediation and settlement, the parties may improve their relationship or end their marriage civilly.

- Typically it takes one year to trial, and several more years may be spent after trial if either party appeals the judge’s decision. The cost of trial (and appeals) is significantly expensive. In resolving disputes through mediation, the parties save an enormous amount of time, energy, and expense.

- In litigation, it’s not uncommon for the parties continue to fight in court in the future to seek modification or enforcement of the court’s orders. Studies indicate that parties who enter into voluntary agreements through mediation are much more likely to honor the terms of their agreement than they are with judicially imposed resolutions.

3. DOES MEDIATION REALLY WORK?

Reports compiled by our court systems, the American Arbitration Association, and other organizations show that the majority of all mediations result in a settlement. There are many reasons why mediation works even where all prior attempts at settlement have failed or where the parties are pessimistic about settlement.

4. WHY DOES MEDIATION WORK?

Sometimes the parties’ own lawyers may unintentionally get in the way of settlement. For example, some attorneys may never negotiate without the help of a mediator because they are worried that making a reasonable settlement offer will be taken as a sign of weakness or will be used by the other side as the starting point for the next round of negotiations. Also, although many attorneys are trained to do battle in the courtroom, these attorneys often do not possess essential negotiation skills. Many lawyers spend more effort in posturing and hard bargaining tactics than in settling disputes by seeking common ground.
Mediation provides a safe setting for negotiation because the mediator can control and direct the parties’ (and their lawyers’) communications to avoid arguments, posturing, or other unproductive discussions and to keep the parties focused on exploring helpful ways toward settlement. The parties may meet privately (caucus) with the mediator and discuss and explore settlement options which the mediator keeps confidential unless authorized to convey these options to the other side.

Often, the parties (and their lawyers) have schedules and other commitments which distract them from finding the time to negotiate. Mediation provides the opportunity for the parties to meet together for a designated time at a designated location (such as the mediator’s office) for the specific purpose of discussing settlement. At mediation, the parties are able to focus their entire attention on reaching a settlement without distraction.

During mediation, both parties have the opportunity to directly educate each other about the issues and concerns that are important to them. The mediator can help the parties communicate these issues and concerns to each other in ways that do not antagonize or offend either party.

Mediation offers each party a realistic look at what results they are likely to achieve in family court which tends to make the parties’ negotiations more reasonable and flexible. In addition, mediation assists the parties, and their attorneys, in developing options for settlement. The more options, the greater the chances of success.
Getting Your Spouse to Mediate

During a divorce, it’s typical for one spouse to distrust everything the other spouse says and does. Often, spouses are bitter, angry, emotionally wounded, and blame the other spouse for the problems in the marriage. In many cases, one side doesn’t want the divorce at all. With all of these issues in mind, it can be very challenging to encourage divorcing couples to attend mediation to resolve their differences. So, how does one go about getting their husband or wife to agree to mediation without “lawyering up?” In some counties in South Carolina, family court mediation is mandatory. When mediation isn’t mandatory or you are trying to encourage mediation before the court orders it, then here are some practical suggestions to get your spouse to mediate:

1) **Provide information on mediation.** The first place to start is by sharing information about the mediation process with the other party. For example, you can share with them articles on the internet about family court mediation.

2) **Don’t be a know-it-all.** If you “preach” to your spouse about mediation, then your spouse may feel intimidated because you have all the knowledge and the "upper hand" in the process. If you feel that your spouse is likely to ignore your attempt to share information about mediation, then call upon a third person such as a close family friend or pastor to see if they are willing to encourage your spouse to consider family court mediation.

3) **Let your spouse research.** If your spouse believes mediation is a good option, then they will do their own research on the subject. Be patient and give them time to explore and understand their options.

4) **Don’t force mediation.** Mediation doesn’t work unless both spouses are invested in the process. You can’t control your spouse in the divorce any more than you could when the two of you were together. If you ramrod the idea of mediation down your spouse’s throat, then don’t be surprised when they refuse to mediate.

5) **Be flexible.** Choosing the right family court mediator isn’t a one-sided process. Acknowledge that he or she also has a right to choose. Ask your spouse for his or her opinion, and then patiently wait for their answer. Don’t push it. If your spouse is unsure, then suggest that each of you write down the names of one or two mediators and compare your choices. If you both have the same name on each list, then you have your mediator. If not, then suggest that each of you meet, separately, with the other’s choice of mediators, and then try...
to decide which one to choose. Remember, mediators are NEUTRAL, so trying to decide which mediator might give you an “edge” is pointless. In other words, be flexible about your choice in mediators. At the end of the day, it is better to mediate than to argue over who to mediate with!

6) Be patient. Even if your spouse ignores your suggestion to mediate or wrangles over who to use as a mediator, have patience. Although it would be best to mediate earlier to save time, money, and aggravation, mediation is better late than never. So, if your spouse doesn’t engage in mediation early on in your divorce, keep at them, but be polite and non-threatening about your suggestion to mediate.

7) Be transparent. If your spouse indicates that he or she is willing to mediate, then share ALL of your family’s financial information with them including income, assets, debts, retirement accounts, etc. You can’t expect your spouse to mediate “in-the-blind” or to agree to terms and figures when they have no knowledge of your family’s financial affairs. If you don’t share this information, then you won’t get far in mediation. Besides, eventually, the family court will order you to hand it over anyway.
If you’re getting a divorce, then at some point you’ll have to appear in family court. For most persons, family court can be an intimidating experience. So, here are some pointers for anyone who has to go to family court in South Carolina.
BEFORE YOU GO TO COURT

Try to get a good night’s rest before you go to court. Furthermore, most courts don’t allow food or drink, but they do have water fountains. Don’t go on an empty stomach. When you are tired, hungry, or thirsty, you aren’t at your best!

DRESSING FOR COURT

Dress properly and conservatively for each court hearing. Dress “business casual” or “dress like you are going to church.” Failure to dress appropriately could result in your case being continued or you being excluded from the courtroom during the case. The judge hearing your case will associate your attire with the level of respect you are giving to the court.

Women should wear dresses which are knee length or longer or tailored slacks and a blouse. Men should wear tailored slacks and a shirt with a collar. Clothing should be clean.

Some examples of clothing that are not allowed include baseball caps, sleeveless tops, halter tops, backless dresses, low cuts dresses, miniskirts, shorts, blue jeans, t-shirts, flip-flops, and sandals. Tuck in your shirt.

Remove any piercings other than one pair of ear rings for women, covering any tattoos if possible, and having a conservative hair style and color. Even if you feel these things represent a particular belief or who you are, remember that you are presenting in front of a judge who may be deciding your future. A “middle-of-the-road” appearance will minimize the chance of offending the court or jeopardizing your credibility. While most people don’t like being “judged,” that is exactly what going to court is all about.

WHAT TO BRING & NOT TO BRING TO COURT

Bring your entire file, which includes every document, CD-ROM, or thumb drive that relates to your case. You never know what could happen, and it’s best to be prepared. Even if you have a lawyer, some portion of your lawyer’s file may have accidentally stayed on his or her desk at the office, and you can actually save the day by having a copy of some document handy.

In some counties, you aren’t allowed to bring your cell phone, so it’s best to just leave it in your car if you’re unsure. If you’re allowed to have your phone, turn it off or put it on silent! If your cell phone goes off in the courtroom, the judge can take your phone and can possibly hold you in contempt (put you in jail). In fact, one Charleston County judge made the local headlines by putting a participant in a holding cell because her phone rang during court. At a minimum, the judge may take a ringing cell phone as a sign of disrespect.

For security reasons, you can’t bring any knives, scissors, nail files, tweezers, or other sharp objects into court. Also, you can’t bring in any mace.

You can bring a friend or a family member for moral support if it would make you more comfortable. Although this person
won’t be able to sit at the table with you, he or she will at least be there in the courtroom to talk to you before and after.

ARRIVE EARLY TO COURT

The court won’t wait on you if you’re late. Talk to court staff upon arrival to make sure you’re in the right place and waiting outside of the right courtroom.

Another advantage of arriving early is that you’re able to sit down, to relax, and to gather your thoughts as you wait on your hearing. You’re more likely to present well in court if you walk inside in a relaxed state than if you’re running down the hallway trying to make your hearing on time.

HOW TO BEHAVE IN AND AROUND THE COURTHOUSE

You may find yourself waiting in a hallway outside of the courtroom. Be aware that people around you could be lawyers, witnesses, or others involved in your case. Don’t talk about your case because you never know who might overhear you. Also, don’t “cut up” or joke around (as many nervous people will do) as it could give someone a bad impression of you.

Even when parking your car, be polite and let other cars in front of you. Don’t cut people off or exhibit frustration towards other drivers. You never know when your judge is in the other car.

If you find yourself waiting inside of the courtroom, just sit there, watch, and be silent. Judges may take whispering to your neighbor, sleeping, or certain other acts as a sign of disrespect. Your sincerity, or lack thereof, will be noticed. If the judge isn’t telling a joke or laughing at a joke from one of the lawyers, you shouldn’t be laughing either. Also, don’t chew gum in the courtroom.

When your case is up, meaning you and your lawyer are addressing the court, continue to maintain a sincere demeanor at the table even if you don’t like what others are saying. We’ve seen people scolded by judges on numerous occasions for making facial expressions, talking, or shaking their head in protest of what a lawyer or a witness is saying about their case. If you must speak, do it through your lawyer. Showing respect is of utmost importance. If you don’t have a lawyer, be very careful of how you make any objections and be sure not to be disruptive to the proceedings.

HOW TO SPEAK TO THE JUDGE

Be humble, respectful, and polite. Address the judge as “Your Honor,” “Sir,” or “Ma’am.” Address parties, witnesses, and lawyers as “Mr.” or “Ms.” I can’t emphasize enough – show absolute respect, and it will likely be returned. Don’t speak unless the judge asks you to. Stand up when you speak to the judge unless he or she tells you that you can keep your seat. If the judge cuts you off, let it happen. We’ve seen numerous instances of people attempting to “talk over” judges, and it
doesn’t usually go well for that person. We’ve also seen people penalized by the judge for being too argumentative.

**IMPORTANT**

One BIG pet peeve of many judges is when a witness doesn’t directly answer the question asked. If the question calls for a "yes" or "no" answer, don’t beat around the bush. Answer yes or no. If you feel that your answer needs some explanation, first answer the question and then explain it.
If you’re getting a divorce, then it’s time to give some thought to reviewing and to comparing divorce lawyers. Divorce can be a legally confusing process on top of an already emotional situation. Choosing from the many available divorce attorneys also can be confusing. Here are some suggestions for how to choose the best divorce attorney for you.
Choosing Your Lawyer

1. Ask Yourself . . .
2. Your Legal Budget vs. Your Legal Needs
3. Do Your Homework
4. Interview Your Lawyer
5. How You Feel

In This Section

1. Asking Yourself . . .
2. Your Legal Budget vs. Your Legal Needs
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4. Interview Your Lawyer
5. How You Feel

If you’ve never hired a lawyer, you may not know where to start. If you know someone who recently hired a divorce attorney, then they may have a personal recommendation for you. However, you may feel uncomfortable asking for recommendations or discussing your divorce with people close to you. That’s why the Internet can also be a valuable resource to research and to compare divorce lawyers and their professional backgrounds. Sites such as Avvo, LinkedIn, and others can help you compare the experience and the reputation of various divorce lawyers.

1. **ASK YOURSELF** . . .

When you are meeting with potential lawyers, you must remember that not all divorce attorneys are created equal. Here are some questions you should ask yourself before making your decision as to which lawyer to hire:

1) **Does the lawyer pay attention to you while you’re talking?** You need an attorney who’ll be compassionate and dedicated to your needs. If the lawyer is distracted, taking other calls, checking emails, and so on, perhaps that lawyer isn’t the best for you.

2) **Does the lawyer try to educate you and to answer your questions?** A skilled divorce lawyer knows that educating the client is important so that the client can make sound and informed decisions about their family’s future.

3) **Is the lawyer assertive without being arrogant?** Some clients believe that having a “pit-bull” for a lawyer is
their best move. Obnoxious and egotistical doesn’t mean better or skilled. You need an attorney that will calmly assert your rights and who will always act professionally.

4) **Is the lawyer guaranteeing you results?** If so, be cautious! Litigation in any court, including family court, is risky and the outcome can’t be predicted with any certainty. The outcome of your divorce depends on many things such as the present circumstances, future developments, and the decisions and the attitudes of family court judges. You need a divorce lawyer who shoots straight with you and who tells you like it is and not what you want to hear.

5) **If there are children involved, does the lawyer emphasize that your children’s best interests are the most important aspects of your divorce?** When parents use children as pawns in their divorce, the children suffer. A good divorce attorney will understand that your children’s welfare should be your major priority in the divorce.

2. **YOUR LEGAL BUDGET VS. YOUR LEGAL NEEDS**

As a general rule, well-seasoned attorneys charge higher fees, and newer lawyers are cheaper. You pay higher fees for experience. If you have a simple divorce and you’re on a budget, then a recent law school graduate may fit the bill. However, if you are facing complex legal challenges, then your needs may justify the costs of a more knowledgeable attorney. Additionally, although younger lawyers may charge a lower hourly rate, it may actually take them longer to do the work (meaning more fees) than a veteran attorney who has been performing the same service for years.

3. **DO YOUR HOMEWORK**

When you’re searching for lawyers on the Internet, you should read beyond the marketing rhetoric if you really want to know who you’re hiring. Here are some examples:

- If you visit a website that has plenty of descriptions of the lawyer's services but little information about the lawyer, then you may be missing the most important part of the picture – **the lawyer's experience**.

- If the lawyer's biography doesn’t include the year that the lawyer graduated from law school, then chances are likely that the lawyer hasn’t been practicing for very long and he or she has left this information out of their website for “marketing” purposes. This doesn’t necessarily mean that the lawyer isn’t able to handle your case, but it may mean that the lawyer is still “learning the ropes.”

Here are some resources to learn more about a lawyer's background and experience:

- Look for the lawyer's Martindale Hubbell Rating. The Martindale Hubbell® Directory has been rating lawyers for the past 140 years. According to Martindale, "Peer Review Ratings™ help buyers of legal services identify, evaluate and select the most appropriate lawyer for a specific task at
hand.” Using information supplied by other lawyers and judges, Martindale rates lawyers based on performance in the areas of: (1) legal knowledge, (2) analytical capabilities, (3) judgment, (4) communication ability, and (5) legal experience. The highest rating a lawyer or law firm may have is AV Preeminent. For more information about how the rating system works and to search for a lawyer's rating, visit www.martindale.com.

- A newcomer to the business of rating lawyers is Avvo. Avvo rates lawyers by “using a mathematical model that considers elements such as years of experience, board certification, education, disciplinary history, professional achievement, and industry recognition—all factors that are relevant to assessing a lawyer's qualifications.” Their ratings rank from the highest of 9 – 10 (Superb) to the lowest of 1.0 – 1.9 (Extreme Caution). Also, Avvo posts reviews and comments by both other lawyers and by clients. Avvo's website can be found at www.avvo.com.

4. INTERVIEW YOUR LAWYER

Often when people meet with a lawyer for the first time, they’re under significant stress because of their legal problems, and the conversation tends to focus solely on those problems. While you’re discussing your case and seeking answers to your questions, take the time to ask the lawyer about his or her background and experience such as:

- How long they have practiced;
- Whether the lawyer has handled any cases similar to yours;
- How many similar cases has the lawyer handled;
- Who’ll handle the case (sometimes other lawyers within a firm besides the one you meet with will handle some of your work, and you should know more about the legal team working on your case); and
- Whether the attorney has malpractice insurance (malpractice insurance isn’t required for many lawyers).

Here are two common questions that clients ask that will NOT help you to choose the right lawyer for you:

- "How many cases have you won?" - As any seasoned lawyer will tell you, "You can't win them all." Even if the lawyer has won every case up to that point, your case may be the first that they lose. So, if the lawyer boasts about their track record or gives you the impression that you can’t lose, then perhaps you aren’t dealing with the most straightforward attorney.

- "What are the odds of winning my case?" - Although a lawyer may comfort you by telling you what you want to hear, you’re better off getting a straight answer from the very beginning. The honest answer is - "It depends." Every case is unique, and your case’s outcome depends on many variables which, realistically, cannot be predicted from "day one."
5. HOW YOU FEEL

The final, and perhaps the most important, thing you should consider when you hire your attorney is how you feel about your first meeting. The bottom line is that if, for any reason, you don’t feel comfortable with the lawyer you met with, then go interview others (and there are many) until you are satisfied that you are choosing the best lawyer to represent you.
Working with Your Lawyer

One of the major problems in South Carolina’s family court is that many people try to oversimplify their situation. There are many aspects to a divorce, child custody, or child support case, and the more your attorney knows about your case, the better it is for you.

1) **Explain without venting.** There are many ways you can make your lawyer’s job easier and keep your legal fees and costs down. First, you should tell your lawyer as much as you can about your current situation, including any agreements previously made between you and your spouse prior to seeking the advice of an attorney. You should, however, avoid wasting your time and money by telling your lawyer every detail about every disagreement or verbal exchange you have had with your spouse. Lawyers understand that their clients are going through an emotionally difficult time in their lives. Often, however, you would do better to talk to your friends, family, or a counselor to address these issues (and the cost is usually much less than paying your lawyer to listen).

2) **Read everything your lawyer sends you.** Another way to work better with your attorney is to read carefully everything that is sent to you. Some paperwork requires that you respond to the other party or the court within a certain time period, otherwise you may jeopardize your case. For example, if a complaint for divorce is filed by your spouse in court and the paperwork is served on you (physically delivered), you then have thirty (30) days to file and serve your answer on the other party. In all, there is no substitute for early, thorough preparation. Do all that is required of you within the time frames that your lawyer gives you, and your case may run smoother.

3) **Don’t let your emotions get the best of you.** Regarding your attorney fees and costs, too often parties allow their emotions to get the best of them and they spend more money on fighting than the case is worth. When all is said and done, and the divorce has long since been finalized, too many parties wonder why they spent thousands of dollars on their attorney to fight over some insignificant piece of property that would receive $20 at a garage sale. In other words, although it may be difficult in the heat of the moment, try to be pragmatic about your goals and needs and consider the cost to you when you chose to fight over certain issues.

4) **Don’t make agreements on the side.** While your attorney is negotiating or litigating your case, or after you
have a court order of divorce, be careful not to enter into written or verbal agreements with your spouse that change your formal agreement or divorce order. These agreements are oftentimes not binding and later not enforced by the courts when troubles arise. More often than not, you will increase the cost and time of your case by making unwise agreements with your spouse while your lawyer is attempting to negotiate or litigate your case. If you have reached such an agreement, contact your lawyer to present it to the court to make it formal and binding on the other party.

5) Don’t contact a judge about your case. If you are represented by a lawyer, let all official communications come through and from your lawyer. Additionally, there are rules that prohibit one side or another from communicating directly with a judge.

6) Be patient. As a final note, you should understand that domestic cases take time. There is no such thing as a "quickie" divorce in South Carolina. First, it will take some time for your lawyer to gather all the information he or she needs to proceed with your case. Part of this time depends on how quickly you provide the information your attorney requests. Then, your attorney may need to request information from your spouse through discovery. Afterward, unless your spouse has committed, among other things, adultery or spousal abuse, you may have to wait a year before your divorce action can be filed in the family court. Even after it is filed, it may be some time, depending on the court’s schedule, before your divorce is final. Matters such as custody battles can take years. So, try to have patience with your attorney and with the courts. Impatience will not speed up the process but it will cause you more concern and cost you more money.
Reducing Your Legal Fees

Let’s face it - hiring divorce lawyers can be expensive. The last thing anyone truly wants or needs is to shell out large sums in legal fees during their divorce. Unfortunately, sometimes it is the clients themselves who contribute to the high cost of their legal fees. Here are a few simple pointers on how you can help to keep your legal bill down during your divorce:

1) Don’t Vent - This is perhaps the single contributor to a client’s costs in a divorce. Too often clients want to vent to their divorce lawyer about what is going on in their family court case. They vent about their spouse, the court’s rulings, how “unfair” the circumstances are, and so on. If you are working with a divorce lawyer who is experienced and diligent, then your lawyer knows exactly how stressful things are for you, what is going on in your case, how matters are impacting your family’s life, and what your goals may be. If you need counseling to deal with the stress of your divorce, your lawyer isn’t your best option. Use your lawyer to solve your legal problems. Use therapists, psychologists, and other mental health professionals (who often charge less per hour than your attorney) to help you deal with your emotional problems. Otherwise, venting to your lawyer will result in nothing but a higher legal bill.

2) Don’t Delay - During a divorce action, there is information your lawyer needs to get the job done. For example, your lawyer will need income information such as tax returns, pay stubs, 1099s, and other documents. Also, your lawyer will need information about debts such as credit card statements, bank account records, and more. When your lawyer asks for any information, don’t delay in providing it. If you do, then you will be paying for the cost of your lawyer’s office to write you, call you, or email you to remind you. Also, if this information is being formally requested by the other side through interrogatories and requests to produce (discovery) and you are late in providing this information, then the other side will make a formal motion in court to “compel” your responses. This motion will result in more fees paid to your lawyer to respond and possibly payment of attorney’s fees to the other side.

3) Get to the Point - Too often clients respond to their attorney’s questions with much more information than what is asked of them. For example, if your lawyer wants to know the cost of your month cable bill, here is a “costly” response: “Well, we used to have Time Warner, but to add Showtime and HBO was an extra $65.00 a month. Last June, we switched to Comcast because we could add a land line plus..."
Showtime and HBO and it only costs an extra $55.00 per month . . . so right now the bill is $150.00.” Here is the “cost-effective” response: “$150.00.” You are being charged for each minute whether you are making good use of the time or not. Don’t waste time “chit chatting” or telling long-winded stories of every problem in your marriage. If your lawyer wants more detail, then rest assured your lawyer will ask you. Otherwise, unnecessary, meandering narratives and unproductive communications will add nothing but extra expense to your case.

4) Don’t Piecemeal - Many clients communicate through email because it is quick and easy. Plus, it is a good way to keep track of the “conversation” with your lawyer. Also, emails are oftentimes more cost effective than telephone or face-to-face consultations. However, some clients hit their lawyer with a barrage of emails that address a single topic here, two or three items there, or repeat what was previously emailed, discussed, or decided. Of course, things will always come up as circumstances change, or you may forget an important question or fact. However, avoid long-winded emails or calls. Instead, take the time to organize your thoughts into a concise list of items you want to cover with your lawyer. If you summarize your concerns, you are likely to get a more meaningful, and less expensive, response from your lawyer. Also, only communicate with your lawyer if it is absolutely necessary. For example, if you have email exchanges with your spouse about swapping visitation weekends, don’t copy your lawyer on each email exchange unless, and until, it becomes an issue. Otherwise, you are paying your lawyer to read emails that may not matter if ultimately you are able to work things out with the other parent.

5) Gather Records - Gather up important documents and records yourself and make copies for your lawyer. Asking your lawyer to hunt down information that you can easily obtain yourself is both time-consuming and expensive. Of course, briefly talk with your attorney first to make sure that your moneysaving efforts won’t hurt your case.

6) Be Reasonable – As difficult as it may seem, it is very important that you treat your divorce as a “business negotiation.” If you behave with hostility or provoke the other side, don’t be surprised when they don’t want to agree with you or make matters more difficult and more expensive. If you are provocative and antagonize your spouse, then the only person who will profit from your behavior will be your lawyer. Also, it rarely makes sense to pay your lawyer fees to fight over a household item that can be replaced for a fraction of the cost of your legal bill. Consider things this way – what if you went to a furniture store where every item is “scratch and dent” yet each item costs full retail? Also, what if you had to pay the salesperson by the hour regardless of whether you bought anything? Does that sound like a store where you would shop? Don’t let your emotions or your sense of what is “fair” get the best of you. Fighting in court over meaningless personal effects such as cookware, tables, and chairs never makes good economic sense.
Family law is perhaps the one area of legal practice where the clients are the most susceptible to get overcharged by their lawyer. The reasons why clients are so vulnerable to getting over-billed by a divorce attorney is because divorce cases can be highly emotional for the client. Clients are typically angry, scared, or depressed and oftentimes not thinking at their rational best. Therefore, to a divorce lawyer, clients can be low-hanging fruit who are ripe for the picking. When divorce lawyers play on their clients’ emotions by urging them to fight unnecessarily, then client pays a high price for that game.

**How to Tell if Your Divorce Attorney is Over-Billing You**

Charging Unreasonable Hourly Rates – In South Carolina, every divorce attorney I know charges their clients by the hour. Hourly rates for divorce lawyers aren’t regulated by the state. However, Rule 1.5 of the South Carolina Rules of Professional Conduct covers a lawyer’s ethics concerning the reasonableness of their fees. Rule 1.5 states:

*A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:*

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
3. the fee customarily charged in the locality for similar legal services;
4. the amount involved and the results obtained;
5. the time limitations imposed by the client or by the circumstances;
6. the nature and length of the professional relationship with the client;
7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
8. whether the fee is fixed or contingent.
Charging Lawyer’s Rates for Clerical Work – Abraham Lincoln said, “A lawyer’s time and advice are his stock in trade.” In other words, your divorce attorney’s time is valuable (and billable). Having said that, even a child can make photocopies or put postage on an envelope. Although there may be nothing inherently unethical about a divorce lawyer charging his or her normal hourly rate to perform menial tasks, this type of billing may mean one of two things:

Lack of Efficiency – Your divorce lawyer isn’t efficient and isn’t making proper use of his or her staff such as secretaries or paralegals who cost much less per hour than the lawyer.

No Staff Support – Some lawyers, especially recent law school graduates, practice law without staff support or a paralegal. Although there’s nothing unethical or wrong about an attorney who does everything on their own, this type of billing can significantly increase the costs of your divorce.

Guesstimating Time - When lawyers bill, they’re required to keep contemporaneous records of their time. In other words, lawyers must record their time immediately, if not soon after, the time is spent. When lawyers don’t stay on top of their time keeping and, instead, rely on their memory to later record time, they may record too little or too much time. Some indications that your divorce lawyer may be guesstimating his or her time include:

- Erratic Billing Practices – If your lawyer doesn’t send you bills on a regular schedule (such as the 1st of the month) but instead sends you bills at odd intervals, then your lawyer may not be keeping accurate records of his or her time.

- Untimely Billing Entries – If your lawyer sends a bill each month, then you should expect to see all of your charges for that billing time period. However, if your lawyer is billing you for the month of March yet you see time for January too, then your lawyer may not be keeping accurate records.

Rounding Up Time - Divorce attorneys bill by tenths (six minutes) of an hour. For example, suppose your lawyer charges you $300 per hour and charges in increments of one tenth of an hour. If the lawyer writes a one sentence email that takes just a minute or two, the lawyer will bill you $30 (.1 x $300) for that email. Many lawyers bill no less than two tenths of an hour. Using the same example, the same email would cost you $60 (.2 x $300). Recently, I learned of a lawyer who is rounding up to three tenths of an hour! Again, using the same example, the same email would cost you $90 (.3 x $300) for less than six minutes of the lawyer’s time.

Over-Billing For Forms – Many lawyers edit versions of old templates for lawsuits, settlement agreements, and other forms. However, instead of charging for the time spent making edits, some lawyers charge for a completely new document as if they spent the time drafting it from scratch.

Overstaffing the Case – Some divorce cases can be very complex and include many witnesses, various legal claims, and thousands of pages of documents and exhibits. In such
complex cases, divorce lawyers may bring others with them to help them during depositions, mediation (structured negotiations), court hearings, or trial. However, many divorce cases can be handled by a single, prepared lawyer. Nevertheless, some lawyers will bring an entourage wherever they go for reasons such as:

- The lawyer is trying to impress others by having a following of staff or other lawyers;
- The lawyer is disorganized and doesn’t feel comfortable without support at hearings, during depositions, etc.; or
- The lawyer is trying to maximize billing by overstaffing your case.

In one of my family law cases, the couple never married, they had one child, and their issues were regarding custody, the parenting schedule, and a minor dispute over how to calculate child support. Because the couple never married, there were no issues concerning alimony and how to divide marital property and debts. In the grand scheme of things, this was a “simple” yet contested family court case. When I went to depositions, to mediation, or to court hearings, I went with my client and no one else. There was no need for me to take my paralegal or another lawyer from my office to court, depositions, etc. However, the other family lawyer always had an entourage of staff. This lawyer would bring along at least one paralegal or a paralegal and another lawyer. In other words, this lawyer’s client was paying several people to do the job of one lawyer.

**Encouraging Fights** – My professional view is that divorce attorneys should do everything within their power to keep their client’s fees low and reasonable while helping their clients end their marriage and move on with their lives. Unfortunately, because many divorce clients are emotionally charged, divorce lawyers can abuse their position of trust. A divorce lawyer can encourage clients to fight with their spouse over trivial matters or over issues that have no consequence concerning the ultimate outcome of the divorce. The end result is that the client pays higher fees without any real justification.

In the divorce case I mentioned above, I was negotiating with the other family court attorney to try to resolve our clients’ dispute. During negotiations, the other lawyer mentioned several times that this lawyer’s client was the lawyer’s “only paying client.” I took these comments to mean that the other lawyer was reluctant to settle the case because the lawyer needed money. Instead of focusing on a resolution, the other lawyer put up roadblocks to any settlement and continued to encourage the client to fight on.

**Getting Personal With the Other Divorce Lawyer** – Some divorce lawyers can’t separate their duties to the client from their own negative feelings about the case or the attorney on the other side. These attorneys spend their clients’ money writing pointless, nasty emails, faxes, and letters to the other lawyer. They also spend time in court focusing their hostilities on the other lawyer instead of focusing on how to finalize their client’s divorce. In the end, the lawyer’s
distraction and animosity towards opposing counsel causes higher, unnecessary fees for the client.

How to Avoid Getting Over-Billed By Your Divorce Lawyer

Check Online Reviews – Before you hire a divorce lawyer, check for online reviews. If the attorney has a habit of over-billing clients, then there’s a good chance that former clients have left that lawyer negative reviews. Online places to check include Google Reviews (just search for the lawyer’s or law firm’s name in google), Avvo.com, Yelp, Facebook (if your lawyer has a business page), CitySearch, and Insider Pages to name a few.

Know the Reasonable Rates – In my experience, here’s what I believe to be an estimate of reasonable hourly rates for a divorce lawyer in South Carolina based on their years of experience:

- Less than 5 Years - $100 to $175
- 5 to 10 years - $175 to $250
- 10 to 20 years - $250 to $350
- Over 20 years - $350 to $500

Also, here’s what I believe to be an estimate of reasonable hourly rates for paralegals in South Carolina based on their experience:

- Less than 5 Years - $50 to $75
- 5 to 10 years - $75 to $100
- 10 to 20 years - $100 to $175

Of course, divorce lawyers’ rates may vary from the numbers I’ve indicated above. However, those numbers should give you a rough idea of whether you are being charged a fair amount based on the lawyer’s experience.

Paying for Clerical Work – If you hire a lawyer who doesn’t have staff support, it’s only fair to ask that lawyer how much they intend to bill you for clerical work. If you don’t mind paying several hundred dollars an hour for your attorney to make photocopies, that’s your choice, but you should know whether you’ll be charged this way.

Spotting Guesstimating - First, always look at the charges on your bill. Second, if you have any questions about your legal fees, don’t wait until you are in too deep. Talk to your lawyer immediately. Do the math on your bill to make sure everything is accurate. Also, insist upon a regular billing cycle including all time spent in the billing period.

Preventing Rounding Up – Before you hire a divorce lawyer, ask him or her about their policy regarding billing by tenths of the hour. If the lawyer says that he or she bills in minimum increments of three tenths of an hour (.3), find another lawyer. Otherwise, ask that you be billed accurately in minimum increments of one tenth of an hour (.1). Even if the
lawyer agrees, you should pay close attention to your bill to see if you are being overcharged. Here’s an easy way to do it. When you are talking to your lawyer’s office, use your cell phone. Most smartphones will show you precisely how much time you spent on the call. Otherwise, if you have a cell, your phone bill will show the times of the calls. Then, compare the time you have with time entries on your lawyer’s bills. If the times don’t match, ask your lawyer to adjust the bill. If it happens again on your next bill, then consider hiring another divorce attorney. Also, compare the time a lawyer billed you for a short email or letter against the substance of the email or letter. Use your common sense and make a judgment call as to whether the lawyer is billing too much for simple tasks.

**Fair Fees for Forms & Templates** – It’s difficult for any client to know which paperwork is a form and which is crafted from scratch. However, many types of paperwork only require edits. Examples include a summons and a complaint for a simple divorce and separation agreements (which have many boiler plate sections). Before you hire a lawyer, ask him or her about their billing policies concerning these types of documents.

**Question Overstaffing** – There’s nothing inherently wrong with a lawyer bring their staff to court if the case is complex. Also, the lawyer may bring an assistant without billing you for the assistant’s time. Sometimes an experienced lawyer may bring an inexperienced lawyer with them to train them. In that case, check to make sure that you’re not being billed for the inexperienced lawyer’s time. Otherwise, if you don’t feel that your case is complex, ask your lawyer whether it’s necessary for others to be present during depositions and court hearings.

**Avoid Unnecessary Fighting** – Always remember this is YOUR divorce. Although your lawyer is largely in charge of how to handle your divorce, you make the decisions whether to continue to fight with your spouse. Ask your lawyer what the goal may be to fight, what your chances may be in court, how much the fight will cost, and whether fighting is in your best interests based on your finances.

**IMPORTANT**

The more you fight, the more your lawyer gets paid by the hour. So, if you’re lawyer is encouraging you to fight by suggesting that you can’t lose, then be careful. Few things are 100% certain in any court of law, especially family court. If the lawyer is promising you success, then your lawyer is making a guarantee that he or she can’t keep!

**Say “No” to Personal Conflicts** - You may not know that your lawyer is having a personal problem with the other side unless the lawyer sends you a copy of all of the faxes, the letters, and the emails in your case. So, you should insist on receiving a copy of all communications. If you’re being charged for nasty letters, whiny emails, or otherwise unproductive communication, ask your lawyer to stop fighting with the other lawyer and to move on with your divorce.
Hire Another Lawyer – If you feel uncomfortable with the way your divorce lawyer is handling your case or your billing, then you should consider hiring another lawyer. Trust your instincts before you trust your lawyer or else you may get over-billed for your divorce.
Are “Aggressive” Lawyers “Effective” Lawyers?

Practicing law in South Carolina is remarkably genteel. In fact, the practice of law in Charleston, where I practice, is so well-mannered that in 2001 the ABA Journal ran, as its cover story, an article regarding southern collegiality and practicing law here in the Lowcountry. Of course, there are always exceptions, but overall our Bar prides itself on supporting one another and acting as professional colleagues and not as professional antagonists. To echo that sentiment, members of the South Carolina Bar must take an “Oath of Civility” toward one another and to members of the public. Unfortunately, lawyers throughout the country are not exactly revered for their congenial nature or their civility toward each other. To make matters worse, TV, movies, and dramatic fiction play to an audience that expects lawyers to shout at the witness during cross-examination - “YOU CAN’T HANDLE THE TRUTH!” The unfortunate “truth” is that even in the real world, many lawyers market themselves as being “aggressive” or are endorsed by other lawyers as such.

If you look up the word “aggressive,” you will find definitions that include “ready or likely to attack or confront,” “pursuing one’s aims and interests forcefully, sometimes unduly so,” or “characterized by or tending toward unprovoked offensives or attacks.” Being “aggressive” is not the same thing as being “zealous.” “Zeal” is defined as “great energy or enthusiasm in the pursuit of a cause or an objective.” Zealousness is an admirable attribute; aggressiveness is not. Here is why:

1) Aggressive Lawyers Are On The “Short-List” - Judges don’t care for “aggressive” lawyers. Ask any judge, and they will tell you that they are worn out from baby-sitting lawyers who cannot get along with one another, who quibble over the most mundane aspects of their case, who accuse other lawyers of misdeeds, who complain about imagined slights, who hold hard-and-fast to deadlines without accommodation or courtesy, and the list goes on. Lawyers who place themselves on a judge’s “short list” of intolerable lawyers are doing a great disservice to their clients. Regrettably, many of the lawyers who place themselves on the “short-list” are either oblivious to (or “willfully dense” to) how their attitude negatively impacts upon the court’s scheduling of matters, the court’s receptiveness to the lawyer’s concerns (“Cry Wolf Syndrome”) or even, at times, the court’s rulings.

2) Aggressive Lawyers Get As Good As They Give - During my career, I’ve let other lawyers out of default or extended firm deadlines as a professional courtesy. I can unequivocally state that in those cases, the outcome was positive for the clients and, in some cases, made more positive
by acting professionally. Of course, there will always be those parties, or their lawyers, who foster a hard-line approach to the case. However, perhaps a better practice is to set a positive tone from the beginning before you come out swinging the day the client walks into your door. If you are a lawyer who sets negative, aggressive tone from the outset, then don’t be shocked when opposing counsel does not return your phone calls, does not grant you any extensions you request, does not work with you to complete discovery, etc. In all, what goes around does, indeed, come around. In the end, it would be best to have a reputation as being respected and a “lawyer’s lawyer” than to be the attorney to whom everyone else is looking to dish out a little “payback.”

3) Good Lawyers Don’t Just “Try” Cases; Good Lawyers Try to “Resolve” Cases - Before I hop down off of my soapbox, there is one last point to be made. “Scorched earth” policies and aggressive behaviors do not benefit clients (except in the movies). Aggressive behaviors run up legal fees, destroy any real chance of cooperation between parents, and leave children as the victims of litigation. Sparring with opposing counsel or writing threatening “paper tiger” letters or emails is, in a word, useless. As we say here in the South, “you catch more flies with honey than with vinegar.”
I’ve handled divorces in South Carolina for many years, and we’ve been asked THOUSANDS of legal questions. Of course, there’s also the most important question asked most often by any client – “What are my chances of winning or losing?”
No matter what the legal question might be, here is the BEST ANSWER TO EVERY LEGAL QUESTION. Ready? Here it is:

“IT DEPENDS.”

Disappointed? Please don’t be; this is NOT a trick answer or a joke. It truly is the BEST answer that any lawyer can ever give to any client. It’s also the most important thing about any case a client needs to understand. Please read on, and I’ll explain why:

When I was a law professor, I’d ask my students questions about different legal problems. Their answers (much like young lawyers’ answers to their clients) were always the same—“statute blah blah blah says X, Y, and Z” or “in the case of so and so, the court said A, B, and C.” Technically, their answers may have been correct, but they missed the point. The best answer to any legal question depends on many more things besides statutes or case law. The answer to any legal question, and more importantly the question of whether you win or lose in family court, always depends on a combination of the following 4 things: The judge, the facts, the client, and the lawyer.

There is Nothing “Absolute” About Family Law

Very rarely is the law black or white; it works in shades of gray. In family court, many things depend on “factors.” Alimony depends on “factors” such as the spouses’ ages, their health, their assets and debts, whether they caused the breakup of the marriage, and many more factors. Custody depends on “factors” such as has who’s been the primary caretaker for the children, the financial resources of each one of the parties, and whatever the court considers to be in the children’s best interests. On top of factors, family court judges are given much “discretion” in their decision-making. Between “factors” and “discretion,” if we took the same case and put it in front of 10 different family court judges, we’d get 10 different outcomes. Many of the outcomes may meet “in the middle,” but some of the outcomes will be at one extreme or another. This example brings us back to the best answer to any legal question, including the outcome of any case. It depends on the judge, the facts, the client, and the lawyer:

1) The Judge – Despite what statutes or higher courts may have to say about the law, judges interpret the law as they see fit. Because judges are human, sometimes they’re mistaken about the law. That’s why we have higher courts (appellate courts), to correct any mistakes (hopefully) made by the lower courts. On top of that, judges have their own personal views about the cases they hear, the parties and the witnesses involved, and so on. Some judges do very little to hide the fact that they don’t like certain types of cases. So, as you can see, the answers to any legal question, and in particular the outcome of a case, depends on who the judge might be.

2) The Facts – To prove your case, you must establish the facts. Facts can be documents, witnesses, physical evidence, and all sorts of things. Some of the facts are established by “direct evidence” and some by “circumstantial evidence.” Let’s say at trial you are trying to prove that it was raining outside.
If you took the judge outside and into the rain, that’s “direct evidence” of the fact that it’s raining. If, instead, you pointed out to the judge that everyone walking into the courtroom was carrying an umbrella and was dripping wet, that’s “circumstantial evidence” that it’s raining. Unfortunately, many cases are based on circumstantial evidence which makes it more difficult to “connect the dots” before a judge. Furthermore, if you’re proving your facts by other witnesses’ testimony, not everyone says the same thing, some don’t have a good recollection of events, and some will contradict the testimony of other witnesses. So, when it comes to the important question of whether you win or lose, the answer depends on the facts of the case.

3) The Client – Every client is unique. Some clients are capable of doing a great job of testifying before a judge. Some clients are nervous when they speak in public and need a lot of work to be able to share their story. Some clients are more sympathetic than others. Some clients are well-prepared and well-organized and very helpful to their lawyer. Some clients aren’t so helpful. The list of differences goes on and on, but the point is that the answers to your questions and the outcome of your case depend on you the client.

4) The Lawyer – The answers you get to your legal questions and the outcome of your case also depend on who you choose as your lawyer. Just like judges do, lawyers differ in their views and their interpretations of the law. So, it’s not surprising that when some clients speak to more than one lawyer about their situation, they get different answers. Some lawyers tell their clients what they want to hear to make the client feel better. These lawyers aren’t necessarily trying to be sneaky or dishonest; they do it out of compassion for the client. But at the end of the day, clients need to hear real, truthful answers from their lawyer and not just the things that are going to make them feel better about their case. As a client, you need to know the positives and negatives about your case so you can make the best informed decision about how to move forward such as whether to settle your claim or to take your case to trial.

Some lawyers have an excellent understanding of the law, but they’re not familiar with judges. Some lawyers are very prepared for court and some lawyers fly by the seat of their pants (there’s no substitute for preparation). Some lawyers, despite all their efforts, just can’t seem to connect with judges. Good trial lawyers must be good storytellers. They must present your case to a judge, including the facts and the law, in a way that is understandable, compelling, sincere, and convincing. Just like a great, best-selling novel can be ruined by the movie director who brings the book’s adaption to the big screen, the wrong lawyer can take the best set of facts and favorable law, and turn it into a jumbled mess before a judge. So, the answers to your legal questions, including whether you win or lose, depends on who you choose as your lawyer.
Final Thoughts

As much as lawyers would love to give their clients a definite answer to all of their questions, the truthful and BEST answer is – “it depends.” When a lawyer tells you this, that means that the lawyer is considering ALL of the circumstances and not just what is written in a statute or a text book on case law. That’s a good thing because, in the end, whatever the answers to your questions might be, it’s the results that count.
Chapter 19

After Your Divorce

“Some people think that it’s holding on that makes one strong; sometimes it’s letting go.”

~ Unknown

In the end, after the judge and the lawyers have done their work, you face a new life, a new “family” dynamic, or no family at all. For some, divorce means closure. For others, after the divorce ends, the battle between you and your ex rages on. Your future well-being depends on your perspective and how you treat your former spouse, especially if there are children involved.
Dealing with a Difficult Former Spouse (Your “Ex”)

In this Section

1. Learn to Disengage
2. Set Boundaries
3. Examine Your Own Role

In a perfect world, married couples would never divorce, and in a near-perfect world, divorcing and divorced couples would get along amicably. Some divorcing or divorced couples are able to work together to resolve their differences or to cooperate for their children’s sake. However, there are many couples who can’t find a balance and never seem to get along with one another. In family court, spouses that don’t get along with each other always reach the same ending – increased legal fees, unnecessary emotional strain, and a rocky future for any children who are caught in the middle. Oftentimes, the only persons who clearly “win” in such situations are the lawyers who get paid more to “duke it out” in family court.

Just because your ex or soon to be ex-spouse acts with hostility or is making your life difficult doesn’t mean you should respond the same way. Here are some non-legal suggestions (that will also benefit you in family court) for getting along with your ex:

1. LEARN TO DISENGAGE

Often, divorcing/divorced parties play unhealthy games with each other. For example, a spouse may take every opportunity to make the other spouse feel guilty for the divorce or to blame the other person for everything that is going wrong in life. Another example is the passive/aggressive game where the other spouse refuses to cooperate by ignoring attempts to communicate. There are many other examples, but regardless of whatever game is being played, every game needs two players. You can stop the game by learning to disengage. For
example, if your spouse ignores your email asking for a time that you can pick up your children from school, don’t keep sending emails that go unanswered. Instead, disengage by sending an email that states what time you will pick them up and stating that if you don’t hear back, you will assume that the time you set is good.

2. SET BOUNDARIES

Although some circumstances, like scheduling time with your children, may require flexibility, other circumstances, such as mature and productive communication, childcare responsibilities, etc., require clear boundaries. Try to come up with an agreement in writing so that everyone understands their roles and the other party’s expectations. If reaching an agreement isn’t possible, then the family court will set those boundaries for you. Either way, once those boundaries are set in place, honor them.

3. EXAMINE YOUR OWN ROLE

It’s often difficult for persons to take ownership for their own shortcomings. A good start to taking responsibility for your role is to stop judging and blaming your ex and to look at yourself from a critical viewpoint to see whether you are contributing to the challenges in your relationship. Are you being too critical of your ex? Are your attempts to communicate coming across as threatening or demeaning? Are you playing the part of the “victim” and empowering your ex to bully you? If you’re having trouble figuring out your role, then a therapist can help you work towards these answers. When you understand your role in the relationship, you are better able to understand the reason behind the other person’s unhealthy coping mechanisms and how to avoid confrontation by walking away from fights, by resisting the urge to criticize, by not acting defensively, and so on.

Unfortunately, learning to get along with your ex doesn’t necessarily mean that your ex will ever appreciate your efforts or that your ex will develop healthier coping mechanisms. However, it does mean that you will be emotionally healthier, that you will set the right example for your children, and, in the worst case scenario, that you will be recognized by the family court for choosing the right path in dealing with your ex.
I’m not a licensed therapist; I’m just a lawyer who has witnessed much suffering in family court. In all the years that I have been a family law attorney, I’ve witnessed a complete spectrum of human emotion in my clients - anger, disappointment, regret, denial, excitement, relief, and the list goes on.

1. LETTING GO AFTER YOUR DIVORCE

Perhaps the most tragic circumstance is when a client won’t let go of their marriage and can’t move on with their life. For them, divorce is the worst thing they can imagine happening to them and the future is a black hole of despair. Blinded by pain, they have difficulty recognizing four truisms:

(1) What we plan for our lives, and what life has in store for us, are oftentimes times two different paths;

(2) Change is inevitable;

(3) We can’t control or stop our lives from changing; and

(4) Changes, even those that seem “bad” such as divorce, lead to new possibilities, many of which are “good.”

Perhaps you are reading this book because you want a divorce and you feel that it is the best option for you. Perhaps you are reading this book because you discovered your spouse is unfaithful and you believe a divorce is inevitable. Perhaps you are reading this book because despite all outward appearances and your own contentment in your marriage, your spouse is leaving you and there is nothing you can do to stop it.
Regardless of why you are facing a divorce or whether it is your choice, divorce is about accepting change.

2. A PARABLE ABOUT CHANGE - THE FARMER

The following parable is perhaps one of the best expressions I've ever read about accepting and understanding the changes that life has in store for us. I hope that as you start a new chapter in your life after your divorce, that this story will help you to begin to accept the changes that may come with your divorce brings:

There was once was a farmer who lived on a mountainside with his only son. Together, they carved out a meager living by planting in the hard, rocky soil of the mountain side. To work their land, they owned a single horse, their most important possession, that they hitched to their plow every day.

One evening, the farmer’s only horse slipped out of the corral and ran away. The next morning, the farmer’s neighbors stopped by the farmer’s house to express their concerns for him and his son. The neighbors said, “Oh! What bad luck you have farmer!” The farmer calmly replied “Maybe.”

Several days later, the farmer’s horse trotted back into the empty corral trailed by a whole herd of wild horses. Where the farmer once had a single horse, he now had a dozen! After the farmer and his son corralled all the horses, their neighbors came by to see the herd and said, “Oh! What good luck you have farmer!” Unexcited, the farmer replied, “Maybe.”

Now that the farmer and his son had a dozen horses, it was time to break in the newcomers. While riding the back of one of the wild horses, the farmer’s son was thrown to the ground and broke is leg. The farmer’s neighbors came to the farmer’s house to express their condolences and said, “Oh! What bad luck you have farmer!” Without sorrow, the farmer replied, “Maybe.”

At that same time, there was a war raging in the farmer’s lands between two rival warlords. The warlord of the farmer’s village was in need of more soldiers, so he sent one of his captains to the farmer’s village to conscript young men to fight in the war in which they would be poorly trained, ill-equipped, and to be on the front lines facing a certain death. When the captain came to take the farmer’s son he found a young man with a broken leg who was delirious with fever. Knowing there was no way the son could fight, the captain left him there. Again, the neighbors, hearing of the fact that the son wasn’t taken to fight in the war and of his return to good health, all came to see him. As before, the farmer’s neighbors said, “Oh! What good luck you have farmer!” As before, the farmer replied, “Maybe.”

In the end, by accepting the changes your divorce will bring and by understanding that, over time, those changes may turn out to be neither wholly “good” nor “bad,” you can find “closure” and the strength to move forward with your new life.