

# Marriage and Divorce

- **Marriage**
- **Divorce**
- **Annulment**
- **Legal Separation**

This section gives an overview of the law of marriage and divorce in Illinois. In Illinois, a comprehensive law called the “Illinois Marriage and Dissolution of Marriage Act” controls marriage and divorce. Another state’s laws may be very different from those in Illinois. This section highlights issues which are particularly important to seniors.

## Marriage

### Getting Married in Illinois

Illinois encourages people to marry so the procedures to get married are not complicated. First, you must apply for and obtain a marriage license from a county clerk. Then, you must go through a marriage ceremony attended by a state court judge or in accord with religious standards. The county clerk then registers your marriage.

### Out of State Marriages

If you were married in another state before moving to Illinois, your marriage will be valid here, unless your marriage violates the public policy of Illinois.

*Example: A marriage between two people of the same sex violates public policy.*

### Prohibited Marriages

Certain marriages are prohibited in Illinois. You cannot marry:

- If you were married before, until the previous marriage ends by death or divorce;
- Your brother or sister, or an ancestor or descendent, whether the relationship is by the half or the whole blood or by adoption;
- An uncle/aunt or a niece/nephew, whether the relationship is by the whole or half blood;
- Your cousins of the first degree; however, a marriage between first cousins is not prohibited if:
  - (i) both parties are 50 years old or older; or
  - (ii) either party, at the time of application for a marriage license, presents a certificate signed by a licensed physician stating that he or she is permanently and irreversibly sterile.
- Any person of your same sex.

## Common Law Marriages

In Illinois, the law does not recognize a **common law marriage**.

A “common law marriage” refers to a relationship where two people live together as husband and wife, perhaps for many years, but who have never obtained a marriage license or gone through a marriage ceremony.

If, however, you lived in a state which recognizes common law marriages and then move to Illinois, your marriage will be recognized here. This exception might not apply if you previously left Illinois for the purpose of entering into a common law marriage in another State.

## Pre-Marital Agreements

Illinois law recognizes the validity of premarital agreements.

A “premarital agreement” is an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage, which sets forth the understanding of the spouses as to the division of property should the marriage ever be dissolved.

A premarital agreement must be in writing and signed by both parties. Parties to a pre-marital agreement may contract with respect to various financial interests. If you are anticipating the need for a premarital agreement, you should consult an attorney.

## **Divorce/Dissolution of Marriage**

In Illinois, the procedures you must go through to get a divorce, or **dissolution of marriage** as it is technically known, are considerably more complicated than those required to get married. If you want to end your marriage, you will have to file a special kind of lawsuit called a **petition for dissolution of marriage**. You would need to obtain a court order called a **judgment for dissolution of marriage**. Your marriage will not be legally over until a judge approves and signs a judgment for dissolution of marriage.

Many complicated issues often arise in divorce.

*Examples: Division of the marital property and debts, determining whether one spouse must provide maintenance or other forms of support to the other after the marriage is over, and determining the custody of children under the age of eighteen.*

If two spouses are unable to agree on how to resolve these issues, a family court judge will decide how to resolve them, according to the standards in the Marriage and Dissolution of Marriage Act.

## Residency in Illinois

In order to file for divorce in Illinois, either you or your spouse must be a resident of Illinois at the time of filing. In addition, to obtain a divorce, either you or your spouse must have been a resident of Illinois for at least ninety (90) days prior to the date the petition for divorce was

filed or 90 days prior to the date the Court makes a finding that the parties are entitled to a dissolution of marriage.

### **Grounds for Divorce**

There must be proper grounds to qualify for a divorce. In Illinois, grounds for divorce can be divided into two categories:

- Those involving various kinds of conduct or misconduct (**fault**) by one spouse;
- Those which do not require any misconduct by either spouse. This second category is what is commonly known as **no-fault** grounds for divorce.

There are many grounds for divorce based on the conduct or misconduct of one spouse. They are, in simplified terms:

- impotence at the time of the marriage and continuing;
- bigamy;
- adultery;
- desertion for at least one year;
- habitual drunkenness for 2 years;
- gross habits caused by the excessive use of addictive drugs for 2 years;
- attempted murder of a spouse;
- extreme and repeated physical or mental cruelty;
- conviction of a felony or other infamous crime;
- infection of the other spouse with a sexually transmitted disease.

Most divorces based on fault in Illinois are granted on the grounds of mental or physical cruelty. The other grounds are potentially more embarrassing or difficult to prove.

In contrast, there is only one way to obtain a divorce based on **no-fault** grounds in Illinois. You must prove to the judge that you and your spouse:

- have continuously lived separate and apart for over 2 years (this period can be reduced to 6 months if both spouses agree);
- have irreconcilable differences which have caused the irretrievable breakdown of the marriage; and
- have tried but failed to reconcile, or attempts at reconciliation are not practical or not in the best interests of the family.

Occasionally, a husband or wife will dispute that there are grounds for divorce.

*Examples: The spouse may want to reconcile, or may have religious reasons for wanting to stay married.*

When a party disputes the grounds, it may delay the divorce, but rarely prevents it.

### **Division of Property**

Seniors facing an uncertain financial future and divorce are often concerned with how to divide the property acquired during their marriage.

As a general rule, most property acquired by a husband and wife during the marriage is considered to be **marital property**.

*Examples: Homes and other real estate, savings, investments, pension benefits, health insurance benefits and businesses.*

All other property, including property that you brought into the marriage, is considered to be **non-marital property**. Also, inheritances and gifts made to one of the parties, even during the marriage, are considered to be non-marital property. When you divorce, you are usually entitled to keep your non-marital property.

The law encourages divorcing spouses to divide their property through negotiation and agreement. When the spouses cannot agree, a family court judge must divide the property. It is very important to note that unlike the issue of grounds for divorce, marital misconduct by one spouse cannot be taken into account by the judge when dividing marital property.



#### **ADVOCACY TIP**

*Many people incorrectly believe that by keeping property in their name only, they can keep it away from their spouse if they get a divorce. This is simply not true.*

The factors that the family court judge must consider in dividing the marital property are as follows:

- the contribution that each party made to getting or preserving the property, or to increasing or decreasing its value. The court can consider the contribution of a spouse as a homemaker or to the family unit;
- the way any party may have wasted marital or non-marital property;
- the value of the property assigned to each spouse;
- the duration of the marriage;
- the economic circumstances of each spouse;
- any obligations and rights arising from an earlier marriage of either party;
- any antenuptial agreement of the parties;
- the age, health, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;
- the provisions that have been made for the custody of any children;
- whether one of the parties will be receiving maintenance (alimony);
- the opportunity of each spouse to acquire assets and income;
- what the tax consequences of the property division will be on the parties.

As you can see from this long list, a family court judge has considerable leeway in dividing property between you and your spouse. That is why the law encourages the parties to settle property issues by

agreement. Neither spouse is likely to be completely satisfied with the outcome if it is left up to the judge to decide.

### **Division of Debts**

In the same way that divorcing spouses must divide marital property, they must also divide the debts they jointly incurred during the marriage. Again, the law encourages spouses to settle this issue through negotiation and agreement. If they cannot, a family court judge will use the same set of factors in dividing marital debt that are used in dividing marital property.

In many cases during a marriage, one spouse will take on a debt without the other spouse's knowledge or permission. During a divorce, spouses often wonder if they can be held liable for the debts incurred by the other. The answer to this question depends on the type of debt. If the debt is for a family expense or for the education of the spouses' children, the answer may be yes. The definition of what is a **family expense** is not precise or clear. Each situation is judged based on its particular circumstances.

#### Examples:

- *If your spouse takes out a credit card without your knowledge and pays for clothing for your dependant children, you may be liable to the credit card company even though you never signed the credit card application or agreement, because it is a family expense.*
- *If your spouse takes out a credit card without your knowledge and uses it to pay gambling debts, it is not likely that you will be held liable to the credit card company if your spouse does not pay, because it is not a family expense.*

It is important to note that the division of joint debts between you and your spouse does not alter the rights of your creditors. In other words, even though the family court judge may order your spouse to pay certain of your joint debts, your creditor can still seek payment from you if your spouse does not pay the debt.

*Example: Together, you and your spouse take out a mortgage and buy a home. In the divorce, your spouse is ordered to pay the mortgage. If your spouse does not pay, the mortgage company can still sue you for payment of the debt. You would then have to seek reimbursement from your former spouse before the family court judge.*

It is desirable, if not always possible, to refinance joint debts so the spouse not responsible for paying the debt does not have to worry about being sued by a joint creditor after the divorce is over.

### **Maintenance/Alimony**

When two people marry, they take on a legal obligation to support each other financially. This obligation may continue long after the divorce is over. This is the obligation of **maintenance**, what used to be known as "alimony."

Maintenance awards can be in the form of a series of payments or in the form of an up-front, lump sum.

The law lists the factors a judge will consider in making an award of “maintenance”. They include:

- the parties’ income and property;
- the needs of each party;
- the present and future earning capacity of each party;
- any reduction in the ability of a party to earn money due to family responsibilities or because he or she has given up or delayed education or career chances;
- the time that the party seeking maintenance needs to get a job or needed education or training;
- whether that party is the custodian of a child making it appropriate that the custodian not seek employment;
- the standard of living established during the marriage;
- the duration of the marriage.
- the age and the physical and emotional condition of both parties;
- the tax consequences of the property division on the parties;
- what contributions the party seeking maintenance has made to the education and career of the other spouse;
- any valid agreement of the parties.

The issue of maintenance is particularly important to people over 60 who have chronic illnesses which prevent or impair their ability to work to support themselves. Where one spouse cannot work due to a disability, the other spouse is likely to owe an obligation of permanent maintenance. This is true even if it is a very short marriage.

Because the legal standards for awarding maintenance are very broad, it is difficult to predict with much certainty if a court will award maintenance and in what amounts. Generally, a long marriage, a disabling illness, or a great difference in the spouses’ respective earning capacities are the factors which most likely indicate that a court will award maintenance in a divorce.

### Health Insurance After Divorce

Under a federal law known as COBRA, you are entitled to remain on your spouse’s employer’s health insurance plan for three years after you are divorced. This may be an advantage because you pay only the group rate as a monthly premium. You should consider requiring your former spouse to pay these premiums as a way of providing maintenance to you.

### Child Custody, Visitation, and Support

If a couple going through a divorce have children under age 18, the law requires that the court make arrangements to provide for the children’s welfare. These arrangements include the issues of with whom the children will live, how they will be supported financially, and how major decisions affecting the children’s health, education and religious upbringing will be made.

There are two types of custody awards in Illinois, i.e., **sole custody** and **joint custody**.

When one parent is awarded “sole custody” of a child, that parent is given the legal authority to make major decisions about the child’s health, education, and religious upbringing.

If the parents cannot agree on who will have custody, the family court judge will decide the issue based on what is in the **best interest of the child**.

The law sets out the factors that the family court judge must consider in determining the “best interest” of a child:

- the wishes of the child’s parent or parents as to his custody;
- the wishes of the child as to his custodian;
- the interaction and relationship of the child with his parent or parents, his siblings, and any other significant person;
- the child’s adjustment to his home, school, and community;
- the mental and physical health of all individuals involved;
- any physical violence or threat of physical violence or abuse by the child’s potential custodian, whether directed against the child or directed against another person;
- the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child.

The other type of custody in Illinois is **joint custody**. When two parents have joint custody of a child, it does not mean that the child spends half her time with each parent.

“Joint custody” means that when a major decision must be made about the child’s health, education, or religious upbringing, both parents must discuss the issue and try to reach an agreement about what to do.

If joint custodians cannot reach an agreement on issues affecting the child, they may be required to go to a family mediator before asking a family court judge to decide the issue. Generally, joint custody will be successful only if divorcing parents are able to put aside their differences and cooperate effectively when it comes to their children.

Once the issue of custody is resolved, the other parent will be entitled to **reasonable visitation** with the children. Visitation can only be restricted if it is shown that visitation will seriously endanger the child’s physical, mental, moral, or emotional health.

In general, the non-custodial parent must pay **child support** to the custodial parent. Child support is determined as a percentage of the non-custodial parent's net income, depending on number of children. As of the date of the revision of this handbook, these percentages were as follows:

- One child – 20%
- Two children – 28%
- Three children – 32%
- Four children – 40%
- Five children – 45%
- Six or more – 50%

A court may set the child support amount above or below these guidelines, but only upon a showing of unusual circumstances.

In addition to basic child support, a court may require a parent to provide other kinds of support.

*Examples: Health insurance and assistance with child care payments; after the child turns eighteen, assistance with college tuition and expenses.*

### **Joint Simplified Dissolution of Marriage**

Not all divorces involve complicated issues or lengthy court proceedings. To make the process of getting a divorce simpler, the state has developed a simplified divorce procedure for use in certain cases.

**All of the following must be true in order to use the simplified procedure:**

- Neither party is dependent on the other party for support;
- One of the parties has met the residency requirements of the Marriage and Dissolution Act;
- Irreconcilable differences have caused the irretrievable breakdown of the marriage; the parties have been separated 6 months or more; and efforts at reconciliation have failed, or future attempts at reconciliation would be impracticable and not in the best interests of the family;
- The parties have no children born or adopted during the marriage, and the wife is not pregnant by the husband;
- The parties have been married for no longer than 8 years;
- Neither party has any interest in real property;
- The parties waive any rights to maintenance;
- The total fair market value of all marital property, after deducting all encumbrances, is less than \$10,000;
- The combined gross annualized income from all sources is less than \$35,000, and neither party has a gross annualized income from all sources in excess of \$20,000;
- The parties have disclosed to each other all assets and their tax returns for all years of the marriage;
- The parties have signed a written agreement dividing all assets over \$100 in value and allocating responsibility for debts and liabilities between the parties.

The local court clerk will have forms available to fill out to use this procedure, and will assist you and your spouse in presenting it to a judge.

## Attorney's Fees

When facing a divorce from a spouse with a much higher income, many people do not know where to turn to find the money to hire an attorney to represent them. The Marriage and Dissolution of Marriage Act allows you to go to court at the beginning of a divorce to ask the family court judge to order your spouse to assist you in paying your attorney's fees.

## **Declaration of Invalidity of Marriage/Annulment**

In certain circumstances, it is possible in Illinois to obtain a court judgment declaring a marriage to be invalid. This is what used to be known as an **annulment**.

The grounds for declaring a marriage to be invalid are as follows:

- A party lacked capacity to consent to the marriage at the time the marriage was solemnized, due to either mental incapacity or the influence of alcohol, drugs or other incapacitating substances;
- A party was induced to enter into a marriage by force, duress, or fraud;
- A party lacks the ability to consummate the marriage by sexual intercourse, and at the time the marriage was solemnized, the other party did not know of the incapacity;
- A party was aged 16 or 17 years and did not have the consent of his or her parents, guardian, or judicial approval;
- The marriage is prohibited by law.

You can get a court judgment declaring a marriage to be invalid by using the same procedure used to obtain a divorce. However, you must file a petition to declare a marriage invalid within specific times.

### Examples

- 1) *For the grounds of lack of capacity, force, duress or fraud, you must file the petition within 90 days of the day you find out that such a circumstance exists.*
- 2) *For the ground of inability to physically consummate the marriage, you must file within one year after you learn of the inability.*

## **Legal Separation**

If you are living separate and apart from your spouse through no fault of your own and you do not wish to file for divorce, you may file a lawsuit asking a family court judge to order your spouse to support you financially. Filing this kind of lawsuit does not prevent you or your spouse from seeking a divorce at a later time. The family court judge will decide whether to award you support using the same legal standards as in a divorce case.

Legal separation may be of particular interest for senior citizens, in order to preserve some retirement, inheritance, insurance or benefit rights that may be lost through divorce.

*Note: You cannot use a legal separation to divide property.*

## Where to go for More Information

### Statutes

- The Illinois Marriage and Dissolution of Marriage Act is found at 750 ILCS 5. There are no regulations implementing this Act.

### Other Resources

#### **IllinoisLegalAid**

Legal self help and referrals

Website: [www.illinoislegalaid.org](http://www.illinoislegalaid.org)