

A black and white photograph of a hand holding a broken heart. The heart is split into two halves, with a jagged crack running through the center. The background is a bright, hazy light, suggesting a sunrise or sunset. The overall mood is one of emotional pain and heartbreak.

# **C**hoosing **a process** **for divorce**

**Mediation, Collaboration,  
Lawyer Negotiation/Litigation,  
or Pro Se**

A public service of the Family Law Section



STATE BAR of  
WISCONSIN

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## What is divorce?

Divorce is a process to legally end a marriage. A final judgment of divorce decides the issues of property division, maintenance (financial support for a spouse), custody and placement of children, child support, and other important issues. Wisconsin's divorce law is set out in Chapter 767 of the Wisconsin Statutes, available at [www.legis.state.wi.us/rsb/stats.html](http://www.legis.state.wi.us/rsb/stats.html).

Divorce is an emotional and legal process that affects all aspects of a couple's life and family, with children too often caught in the middle. More than 98 percent of all divorces end with agreements instead of court trials, but many couples experience months of emotional upset and conflict before the agreement is signed. If you are involved in a divorce, you should know that there are several ways to approach the issues and reach reasonable resolutions for your family before conflict takes a toll on your financial and emotional well-being.

## How do divorce issues get decided?

There is more than one process for deciding divorce issues. The processes differ in the amount of lawyer and court involvement, time, cost, and conflict between the spouses. Each temporary and final issue in a divorce case can be resolved either by: 1) the husband and wife reaching an agreement the court approves; or 2) having a contested hearing before a judge or court commissioner who makes a decision. Legal documents must be drafted, including the Initial Petition, Confidential Petition Addendum, Financial Disclosure Statement, Marital Settlement Agreement, Findings of Fact, Conclusions of Law, and Judgment of Divorce and Vital Statistics Certificate. Some counties have local rules requiring additional forms.

The first decision for divorcing spouses is what process they will use to resolve issues for themselves and their family. Factors that each spouse must consider in weighing the pros and cons of each choice include whether there are any safety concerns, the level of conflict, complexity of the issues, and each spouse's ability to make informed decisions. The divorce process options include: 1) **mediation**; 2) **collaborative divorce, also called collaborative practice**; 3) **lawyer negotiation/litigation**; and 4) **pro se divorce**.

## **What is mediation?**

Mediation is a cooperative process involving the spouses and a mediator, in which the spouses define and resolve their issues with the help of a trained mediator who uses communication and dispute resolution skills. In the mediation process, the spouses hire a neutral facilitator – the mediator – to help them reach agreements. A mediator can be, but does not have to be, a lawyer. A mediator can give information about the law and the legal process and guide a discussion to help the spouses resolve issues; *however, the mediator does not represent either spouse and cannot provide legal advice.*

Generally, in mediation, the husband and wife exchange information, identify issues, negotiate with one another and prepare documents directly with the help of the mediator. Divorcing spouses can use mediation whether they have hired lawyers or not. The goal of mediation is to help the spouses reach agreements that meet each person's needs without the financial and emotional cost of contested or lengthy legal proceedings. The spouses must prepare the required court forms, sometimes with the mediator's help, unless one or both spouses hire a lawyer to provide legal advice and to draft the court forms and final agreement.

The mediator is a guide and facilitator, but does not represent the parties and does not have the power to impose a decision if the spouses do not reach agreement on all issues. Mediation is usually a voluntary process that can conclude with an agreement or be ended by either spouse or the mediator.

Mediation may be used by spouses who do not have lawyers to represent them in the divorce process. Each spouse may choose to involve a lawyer for the limited purpose of consultation or to have a lawyer review the terms of their agreement. Mediation may also be used by spouses who have lawyers, either in collaborative practice or in the lawyer negotiation/litigation process, to assist the spouses and their lawyers in attempting to reach a settlement. State law requires mediation for any parents who have a custody or placement dispute regarding their children. In pro se or lawyer negotiation/litigation, courts may order spouses to participate in mediation for financial issues and child-related issues.

## **What is collaborative divorce?**

Collaborative divorce is a dispute resolution process in which each spouse hires a lawyer trained in

collaborative practice. The spouses and their lawyers commit to work together in a cooperative, nonadversarial manner with the mutual purpose of reaching an out-of-court settlement of all issues. The shared goal is to create an agreement that meets the needs of all family members. The spouses work together to avoid the potential emotional and financial expense of traditional litigation.

At the beginning of a collaborative divorce, both spouses and their lawyers sign a Stipulation and Order, in which they agree to communicate and negotiate directly with one another. This document also requires the voluntary disclosure of all financial and other relevant information and obligates the spouses and lawyers to proceed respectfully and in good faith and not to threaten or use litigation. Negotiations occur in four-way settlement meetings, and a structured process for gathering information and communicating during and between four-way meetings is established. The spouses and lawyers make a binding commitment to resolve issues without turning to the court to make decisions for them.

Key to the process is that each lawyer's role is limited by their clients to representing them in settlement negotiations, not court disputes. The spouses still have the right to choose to have a judge decide their issues. However, if either spouse makes that choice, the collaborative process is terminated, both collaborative lawyers are disqualified, and each spouse must hire a litigation lawyer to represent them in any contested court hearing. Lawyers in the collaborative process focus on assisting clients in creating their own settlement by providing legal education and advice while retaining their roles as advocates for their clients in this out-of-court settlement approach.

Collaborative professionals in the interdisciplinary team may include financial advisors as well as mental health professionals as coaches and child specialists. The goal of all professionals is to educate and support the spouses in exploring settlement options that meet the needs of both spouses and their children. The collaborative process can be narrowly defined as two spouses and two lawyers who have made a formal written agreement to adopt a collaborative approach and to resolve all issues outside of court. At its best, collaborative practice is a flexible process in which professionals from other disciplines are included as team

members to help the spouses understand their choices, avoid conflict, learn to communicate, and create a final agreement that meets the needs of all family members. This multidisciplinary collaborative process provides financial and legal education, helps give the children a voice and assists parents in developing co-parenting communication and decision-making skills in addition to focusing on the needs and interests of their children. More information is available at [www.collabdivorce.com](http://www.collabdivorce.com) and [www.collaborativepractice.com](http://www.collaborativepractice.com).

Mediation and collaborative practice share some characteristics. Both processes approach negotiation in a way that seeks to identify outcomes that meet each spouse's needs and objectives and the interests of their children. The goal is to guide the spouses to a personalized, respectful resolution that encourages communication and reduces conflict. Both processes stress education, listening skills, creative problem solving, and improving communication so both spouses can effectively participate. Both processes also allow the spouses to retain privacy and control throughout the process. Both processes may involve financial experts, coaches, and child specialists to provide education and expertise about the central issues to be resolved. The key difference is that in the collaborative process each spouse has an individual lawyer who provides legal advice, direct support, and advocacy in the negotiation process.

### **What is lawyer negotiation/litigation?**

Litigation is the traditional legal process. Both spouses hire lawyers who provide legal advice and advocate the positions of their clients in negotiations and court hearings. The spouses generally communicate through their lawyers regarding their positions, proposals, and counter-proposals. Negotiation occurs in the context of the court process. In the traditional court system, the spouses are seen as adversaries and rules of evidence and formal procedures must be followed. The spouses and lawyers may turn to the court to make decisions if resolution is not reached on all issues. Most negotiations occur against the backdrop of potential court intervention and judicial decision-making and within the limitations of what a court could order.

The lawyer negotiation/litigation process may use formal legal procedures, known as *discovery*, to obtain financial and other relevant information.

Discovery may include the use of depositions (a formal taking of testimony before a court reporter), interrogatories (answering lists of questions in writing under oath), and the subpoenaing of items believed to be relevant to the issues. Each spouse may hire experts to support their positions. In cases with child custody or placement issues, the spouses must attend at least one session of mediation and if no agreement is reached, the court will appoint a *guardian ad litem*, a lawyer who advocates for the interests of the children in the legal disputes between their parents.

If agreements are not reached, spouses and other witnesses testify before a judge, who then rules on each disputed issue. If either spouse is dissatisfied with the final court decision, the spouse has the right to ask the court to reconsider its decision and to take an appeal of the final ruling to a higher court. Further, a spouse who is dissatisfied with the court outcome is likely to return to court in the future to argue for modifications of placement or support orders.

Agreements are reached in most litigation cases, but settlement often occurs after a lot of time, money, and emotion have been spent in legal conflict. Different lawyers take different approaches, and many attempt to go through the negotiation or litigation process in a cooperative manner.

### **What is *pro se* divorce?**

*Pro se* means “for oneself.” *Pro se* divorce is a process in which the spouses do not hire lawyers but instead represent themselves in all aspects of the divorce. The spouses draft and file all necessary court documents to process their case, including the initial pleadings, motions, and affidavits; required court forms; financial disclosure; written stipulations and settlement agreements; and any final judgment. A final court hearing is required, and the spouses attend that and any other hearings without legal representation. The potential advantage to proceeding *pro se* is reduced cost since no professionals are involved. However, this also may be a disadvantage if professional advice is needed to assure quality decision-making and an understanding of the future ramifications of decisions on individuals’ finances and their children.

If the spouses are not able to resolve issues, they must appear at any necessary hearings and be able to present their own evidence and legal argu-

ments to the court. A primary concern of judges is whether both spouses in pro se cases have made all decisions and agreements knowingly and voluntarily. These are particularly important concerns in divorce cases when the issues involve children, retirement benefits, substantial assets, or significant disparities in income. Imbalances in knowledge and mental health issues may raise additional concerns. Safety concerns and additional legal and family issues arise when a spouse has been a victim of domestic violence. **Victims of domestic violence should seek legal advice to discuss safety concerns and to understand their legal options.**

Pro se form kits are available in some county courthouses and most frequently-used forms are available online at [www.wicourts.gov](http://www.wicourts.gov). There also are books, Internet resources, and many services that provide information for a fee, to get through the legal process without the assistance of a lawyer. Although resources are available to assist with pro se divorce, the process can be difficult and the issues complicated. *None of the pro se resources can provide legal advice.*

## **How can lawyers help?**

A lawyer can discuss your options and the potential legal consequences of different decisions and process choices. This is particularly important in cases involving children, disparity of income, real estate, retirement assets, tax issues, or business interests. A lawyer can explain the legal ramifications of parents' custody and placement decisions and provide referrals for experts to help parents consider and meet the needs of their children during separation and divorce. A lawyer can help you make informed financial decisions about maintenance (monthly spousal support), child support (including monthly payments and allocation of child expenses), and property division (including allocating assets such as real estate and retirement accounts or pensions). A lawyer can help you understand tax effects and future impact of such decisions. A lawyer will also make sure that all documents necessary to carry out the agreement are drafted and filed. A lawyer can help you with some or all parts of a divorce.

Divorce involves decisions that affect all aspects of your family and financial situation, and such decisions may affect you and your family for a

lifetime. A lawyer's legal and financial knowledge can help you understand your legal options and the long-term ramifications of decisions, and the lawyer's experience with the court system can help you avoid unnecessary delays, missed deadlines, and incorrect or improperly filed paperwork. It is difficult to change decisions after a court has approved an agreement. Therefore, you should at least have a consultation with a lawyer *before* you choose a divorce process. A lawyer can help you understand the process choices so you can decide which process is best for you and your family.

*Only a lawyer can review the facts of your situation and give you legal advice.*

**Other State Bar of Wisconsin pamphlets you may find of interest include:**

- “Answering Your Legal Questions about Divorce”
- “Answering Your Legal Questions about Guardians ad Litem in Family Court”
- “Answering Your Legal Questions about Custody and Placement”
- “Answering Your Legal Questions about Marital Property”
- “Answering Your Questions about Hiring and Working with a Lawyer”

This pamphlet, which is based on Wisconsin law, is issued to inform and not to advise. No person should ever apply or interpret any law without the aid of a trained expert who knows the facts, because the facts may change the application of the law. 3/09



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