



CHOOSE YOUR FATE:


Seven Courtless Divorce Options

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WHAT IS COURTLESS?

In every U.S. jurisdiction, divorce must be recognized by a court by virtue of a “final judgment” of some kind in order to be effective. So, when I say “courtless,” I mean exactly that; these processes require less court. Rarely is there a “no-court” option.

Divorce proceedings are often wrought with emotion and angst. But couples who decide to end their marriages have choices as to which divorce process they utilize, and some are less stressful than others. Too often, couples are simply unaware of their many alternatives. If divorce is in your future, you should understand your options so that you can employ the process that will work best for you and your family.

Most importantly, you should understand that, while legal action is required, litigation is not. And sometimes the road less taken is the better one. Just ask Robert Frost.



OPTION ONE: DEFAULT

1) Default.

This is the easiest divorce possible, but it is rarely likely.

It involves no negotiation between the spouses. In this situation, the spouses are usually already separated. One person wants the divorce; the spouse either does also or doesn't care and has often disappeared.

The first person files a divorce petition or complaint (depending on the jurisdiction) with the local judiciary and the spouse doesn't respond.

The first person then asks the court to enter a default judgment (recognizing that the spouse "defaulted" by failing to answer the petition) and to grant the divorce requested.



OPTION TWO: DO-IT-YOURSELF

2) Do-It-Yourself.

We lawyers refer to this option as the Kitchen Table Divorce.

You may choose to handle the divorce yourself, without attorneys. If you haven't been married long, have no children, and possess few marital assets and liabilities, negotiating an agreement (at your kitchen table) and filing it in court on your own is not terribly difficult, will be the least expensive way to dissolve your marriage, and is the option most folks often choose.

Many jurisdictions provide the necessary forms on their websites. The forms contain instructions that are intended to be user-friendly. If you and your soon-to-be-ex are able to complete the forms, your only expense will be the filing fee. And then, in most jurisdictions, one of you must attend a court hearing to obtain the judge's execution of the final judgment of dissolution of marriage approving your marital settlement agreement.

Keep in mind, however, that even in the simplest divorce it is a good idea to ask an attorney to review your agreement before you file it.

A photograph of three people in business attire. A man in the center is smiling and gesturing with his hand. To his left, another man is looking at him with his hands clasped. To his right, a woman is looking at him and gesturing with her hand. They appear to be in a meeting or negotiation.

OPTION THREE: KITCHEN-TABLE PLUS

3) Kitchen-Table Plus.

Sometimes the spouses are able to reach an agreement together without the help of any professionals, but it's too complicated for them to complete a simple form.

Sometimes, you've reached an agreement, but you want an attorney's advice before signing anything. Whatever the reason, after the kitchen table negotiation, one of you retains a lawyer who drafts what you understand to be your agreement. It is often beneficial to hire an attorney even if you and your spouse have reached an agreement in order to have legal eyes review it to let you know if you have left out any important issues.

However, you must understand that only one of you hired the attorney, and that the lawyer represents only that spouse's interests. Of course, the other spouse may also retain counsel to review the agreement prepared by the first and to advise him or her of its potential impact on their lives. If that lawyer advises his client that there are provisions that should be added or changed, then Courtless Option #4 may result.



OPTION FOUR: ONE-LAWYER/ONE-SPOUSE NEGOTIATIONS

4) One-Lawyer/One-Spouse Negotiations.

Sometimes one spouse hires an attorney before reaching an agreement, but the other does not. Or the lawyer retained by one to review the agreement they reached advises his client that he recommends certain changes. The attorney then negotiates an agreement between the two spouses.

Again, the couple must be mindful that the attorneys in this scenario only represent the interests of whoever retained him or her. Assuming that the lawyer and the spouse who is unrepresented (called “pro se”) ultimately reach an agreement, again, the other spouse may then retain counsel to review the agreement prepared by the first and to advise him or her of its potential effects.

This may result in Courtless Option #5.



OPTION FIVE: TWO-LAWYER/TWO-SPOUSE NEGOTIATIONS

5) Two-Lawyer/Two-Spouse Negotiations.

This choice is frequently called Cooperative Divorce. Sometimes both spouses retain lawyers to represent you in negotiating the terms of your divorce; sometimes you've already completed your kitchen table negotiations but, having both obtained legal advice, have reopened them. Cooperative divorce is a principles-based dispute resolution process in which both spouses are represented. It is settlement-focused, but leaves open the possibility of litigation if, and only if, it is absolutely necessary.

This process utilizes a framework for settlement which, if there are children of the marriage, promotes cooperative co-parenting later. If not, it simply supports the spouses' efforts to keep your divorce respectful and friendly, for the sake of your families, your mutual friends, and your own self-worth. It's reassuring that your attorneys will try to settle the case. Assuming that both lawyers respect each other and work well together, it minimizes inefficiency and unnecessary costs while fostering civility and respect between you.

If you hit a wall in your negotiations in any of the foregoing scenarios, Courtless Option #6 is the next logical alternative.



OPTION SIX: MEDIATION

6) Mediation.

Mediation is a dispute resolution process in which an impartial person (the “mediator”) facilitates settlement negotiations. The mediator may be a lawyer, a licensed mental health counselor, a certified public accountant, or some other specially-trained professional. The critical elements are that she is trained to mediate and to remain neutral; she does not represent either spouse.

When considering which type of mediator to retain, consider the critical issues of your divorce. If you have children or a mentally ill spouse, for example, a counselor may be best because she is better trained to understand the developmental stages of children and how to most effectively negotiate with an ill person. If your issues are primarily financial, you may wish to hire a financial professional of some kind.



OPTION SIX: MEDIATION

Mediation can be used in any of the alternative situations discussed above, except for Default Divorce. In mediation, both of you, either together or separately, either with counsel or without, work your agreement out with the aid of the mediator. If the relationship has become oppositional, then the mediator will often work with both of you at the same time, albeit shuttling back and forth between you in your separate rooms.

Mediation is intended to be interest-based, rather than positional. However, if you were not able to achieve your marital settlement agreement through any of the first four negotiation processes described above, it is likely because you are not able to back down from “positions,” and to identify “interests” without the help of a talented mediator.

An attorney will best understand the legal ramifications of your agreement, and even if you retain a counselor or financial professional to mediate the details of your divorce, you may still want to engage a lawyer to review your agreement before it becomes official.

A photograph of four people in a meeting. A man with glasses and a suit is speaking, while a woman with long dark hair listens. Another man is partially visible on the left, and a woman is on the right. They are sitting around a wooden table with papers and a laptop. A teal banner with yellow text is overlaid on the image.

OPTION SEVEN: COLLABORATIVE PROCESS

7) Collaborative Process.

Collaborative practice (“CP”) is a negotiation process that also occurs outside of court but is specifically structured to ensure respectful and efficient meetings between the two spouses. The focus and objective of collaborative practice is to produce solutions that meet both participants’ needs, and those of your children, if any, within a safe and confidential setting.

Most divorce processes address only the legal and financial separation between the parties. And many times, you, the spouses, have already taken care of the emotional element of dissolving your marriage. If not, however, the collaborative process enables you to end your marriage legally, financially, and emotionally—without sacrificing those relationships that you value most, as so often happens in court.



OPTION SEVEN: COLLABORATIVE PROCESS

CP is based on three primary principles: the spouses' pledge not to go to court (i.e. to war); their pledge to an open and transparent, but private and confidential exchange of information; and solutions customized by the clients to account for the highest priorities of the adults, their children, and any other interested persons.

In CP, the clients each retain a lawyer, as well as a team of other professionals who are neutral — at least one mental health professional, usually a financial professional, and sometimes a child specialist. All team members, including the participants' lawyers, should be specially-trained in the collaborative paradigm, although a team may agree to the participants' choice of a professional who has not yet been trained collaboratively, if its members believe that they can collaborate with the clients' nominee and that he will contribute to a successful outcome.



OPTION SEVEN: COLLABORATIVE PROCESS

CP consists of a series of meetings: between each spouse and each neutral professional, between each spouse and his or her attorney, sometimes between both spouses and each neutral professional, and almost always of the full team (all of the professionals, the neutrals and the lawyers, and both spouses).

These meetings are intended to be non-confrontational, and to focus on the shared primary goal of finding an acceptable resolution between the spouses. Like the neutral team members, collaborative lawyers are trained to work with one another and the clients to manage communications, to ensure that each client is heard, and to explore each issue and every possible solution fully.

CP does not rely on court-imposed resolutions but instead permits the participants to negotiate in a safe and structured atmosphere of honesty, cooperation, integrity, and professionalism geared toward the future well-being of their restructured family.



OPTION SEVEN: COLLABORATIVE PROCESS

The critical element of CP that distinguishes it from any other is that the collaborative attorneys will withdraw, and the spouses must retain separate trial attorneys if any adversarial proceedings ensue. This assures that everyone involved in the process is committed solely to the collaboration and its goals; no one splits his or her attention between collaborating and preparing for possible litigation in the event that the CP is terminated.

While participants may be more comfortable with the idea that they will not lose their attorneys if they cannot reach a settlement, the fact that the parties in Divorce Options #2-5 can easily choose litigation over settlement means that reaching a settlement is less likely than in the collaborative model.

Furthermore, many lawyers simply do not understand that we all have a conflict with our clients; we want to make money and our clients want to save money. CP eradicates most of this conflict by eliminating the lawyer's ability to "stir the pot," whether by design or by accident. The lawyer's sole job in the collaborative model is to help the clients satisfy their interests and settle their divorce. If he fails and the collaboration terminates, then he loses his job. The parties then proceed to Divorce Option #8.



BONUS OPTION: TRADITIONAL COURTROOM DIVORCE

8) Traditional Courtroom Divorce.

In spite of the plethora of courtless divorce choices, today's traditional divorce method is litigation, primarily because most couples are unaware of the choice that they could make if they wished to exercise that prerogative.

It is true that, with the advent of the internet, folks are becoming more educated about their options. Regardless, while the vast majority of litigating parties end up settling, many issues are still tried in the courtroom; settlements only come after interminable courtroom battles on which countless dollars are spent and endless time wasted. Rather than trying to settle matters amicably, attorneys file motions for even the simplest of issues.

Parties play “discovery” games, refusing to provide financial documents so that the other side has to chase them down. The process tends to be expensive and hostile. It can destroy families who are already emotionally taxed and at odds with one another. And it fails to account for the fact that, once the divorce is finalized, the parties still have to deal with one another if children are involved.



BONUS OPTION: TRADITIONAL COURTROOM DIVORCE

And yet studies that compare the collaborative divorce model with the conventional courtroom divorce demonstrate that CP: 1) costs less; 2) takes less time; 3) is private and confidential; 4) causes less stress; 5) preserves relationships; and 6) produces customized results by which the former spouses are more likely to abide going forward.

Couples who negotiate their own dissolution of marriage agreements, rather than asking a judge to decide the details of their post-divorce lives, are more likely to abide by their settlement agreements. They suffer less post-divorce litigation because they “own” their agreements, decisions they have made for themselves and their families.

Further, judges are limited as to what they can rule, and couples who agree with each other have more leeway to formulate creative contracts that are more likely to fit their families’ specific and sometimes unique needs.

Divorce discussions usually first focus on agreeing how those negotiations should occur. Understanding the different process options is an important first step in resolving your divorce as quickly, as inexpensively, and as free of stress as possible.



IN CONCLUSION

Key Takeaways



There are seven courtless divorce process options: default; do-it-yourself; kitchen table plus; one lawyer/one spouse negotiations; two lawyer/two spouse negotiations; mediation; and the collaborative process.



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