



# Family Law

Myths and Misconceptions

Dana M. Eberle-Peay

McNeely Stephenson



# Topics



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# Custody and Co-Parenting






“He said he’s going to get full custody!”

- ▶ They all say that. It’s a common scare tactic. They think you’ll be willing to give up or make concessions on other things to keep the kids. Unless you do something horrible like walk into the courtroom with a heroin needle sticking out of your arm, you’re not going to lose your kids.




“If he doesn’t make his child support payments, I just won’t let him have the kids.”

- ▶ You can’t do that. The court issues orders as to parenting time and child support. These are court orders that you are bound by. They are independent of each other. When you don’t follow a court order, you’re breaking the law. You’re in contempt. When one party doesn’t pay child support, he or she is in contempt. The proper way to handle that is through the legal system -- not by putting yourself in contempt as well.



# “Courts favor the mother in these things.”

- ▶ Not anymore. This is not 1954 and you are not June Cleaver. The courts now recognize that fathers play just as important a role in child-rearing as mothers. Not to mention that fathers want to be parents every bit as much as mothers do. And kids want to be with their fathers as much as they want to be with their mothers. Mothers and fathers start out on an equal playing field. If you feel there's a good reason why the other parent shouldn't get as much time with the kids as you, you have to prove that in court.



“I can keep her from having the new boyfriend around the kids.”


- No, you can't. Not without good reason. Is the new boyfriend a convicted sexual offender? Then you have a good argument. Has there been domestic violence? Okay. Do you just not like him? Tough. It's perfectly understandable that you might want to keep your kids away from someone you find to be unsavory just for emotional reasons. But sooner or later, there's going to be a significant other in the picture, maybe even a stepparent! The most you can do is negotiate a clause in the settlement agreement that prevents “grown-up sleepovers” when the kids are there. Or perhaps that your ex-spouse will notify you before introducing the kids to a new person. They don't have to get your approval, just let you know that it's coming.



# “He’s only going to get every other weekend.”


- ▶ If that’s what he agrees to. But that’s not the standard anymore. The courts have come up with something called the Indiana Parenting Time Guidelines. They’re a fallback position when Mom and Dad can’t come to an agreement. The judge will use them as a jumping off point to decide who gets the kids when. In the past, the Guidelines were very mom-centric. They provided a *minimum* of every other weekend and one weeknight visit each week. But the Guidelines have been updated. Recently. They now follow the same trends that favor an equal playing field for negotiations. The Guidelines also detail how holidays and vacations are handled, as well as newborns versus teenagers. Once your divorce is final, the Guidelines will be your reference when you and your ex-spouse disagree on a particular parenting time issue. Most settlement agreements include language holding that if you can’t agree, the Guidelines control. Having a fight over who gets the kids for Spring Break this year? The guidelines will dictate which parent gets which part of Spring Break in which year. Problem solved.






“If the kids tell the judge they want to live with me, he’ll award me full custody.”

- ▶ Nope. In fact, chances are the judge will never see or speak to the kids. They’re kids. You and your spouse are the adults. You’re supposed to work together to figure this out. The judge will usually talk to the kids only if there is a major issue requiring their testimony. Allegations of abuse, or “Daddy’s girlfriend walked naked through the house”... There’s far too great an opportunity for parents to start talking to their kids about what they “should” say to the judge. Not to mention the bribery: “If you live with me, life will be a constant amusement park!”




“If he has to get a babysitter for any reason, he has to let me have the kids.”

- Only if it's an outside babysitter. If a parent leaves the kids at home with a stepparent, older siblings, or other responsible household family members, the other parent does not have to be given the first opportunity to have the kids.



“The school has to send information to both parents.”

- No, they don't. It's the responsibility of each parent to make sure they're getting all information. It's a common problem with two households for flyers and newsletters and report cards to get lost in the shuffle. The noncustodial parent should make arrangements with the school to pick up copies once a week. Better yet, most schools are becoming more technologically advanced, and provide information electronically.



“She has to give me a copy of everything she gets from the school.”

➤ Nope. See previous slide.





“If she wants to move, she’s not taking the kids with her!”

- ▶ That will be up to the court. Any time you move, even locally, you have to notify the other parent, including filing a notice with the court. If the move is far enough away to cause a custody issue, the other parent can – and probably will – challenge it in court. The court won’t prevent the relocating parent from moving, but depending on the circumstances and what’s best for the kids, may prevent that parent from taking the kids. It’s a very fact-intensive determination.




“If I’m the ‘custodial’ parent, I get to make all the decisions.”

- Only if you have sole custody. The vast majority of custody orders are for joint custody. This means that regardless of how much time the kids are spending with each parent, both parents have legal custody of the kids. Both parents have decision-making power – in regard to education, religion, healthcare, etc. You are co-parents. You communicate with each other and compromise where necessary. Even when custody is essentially 50/50, for purposes of the legal documents, one party has to be labeled the “custodial” parent and one the “noncustodial” parent. That makes referring to the Guidelines easier, but it does not confer more power onto one parent than the other. So unless you have true sole custody – which is rare – you are not in charge. You’re part of a team.



“I don’t want him getting the kids if I die, so I’ll put in my will that my parents/sibling/best friend will be their guardian.”


- ▶ This has no effect whatsoever. If you get hit by a bus, the other parent becomes the sole custodian. In fact, most of the time, that parent can keep your parents from seeing the kids! A Supreme Court case called *Troxel v. Granville* held that a parent’s fundamental right to direct the upbringing of their children means they have the final say in who gets to spend time with them. If the other parent is deceased, the remaining parent has all the power. In a heartbreaking local case, a woman remarried, her ex-husband had very little to do with the child, and her new husband essentially acted as his father. But the mother died, and a custody battle ensued between the father and the stepfather. The father won. Now, you can name someone as the executor of your kids’ interest in your life insurance or other benefit. You can prevent your ex-spouse from controlling money that you leave to your kid. But you have to have a will. A new one.



“If my son doesn’t want to go to his dad’s, I don’t have to send him.”


- ▶ Yes, you do. Kids aren’t allowed to dictate their situation. If you don’t send them, you’re in contempt. If they are truly upset about going, and you think there might be a legitimate reason, keep notes and build your case for a custody modification.



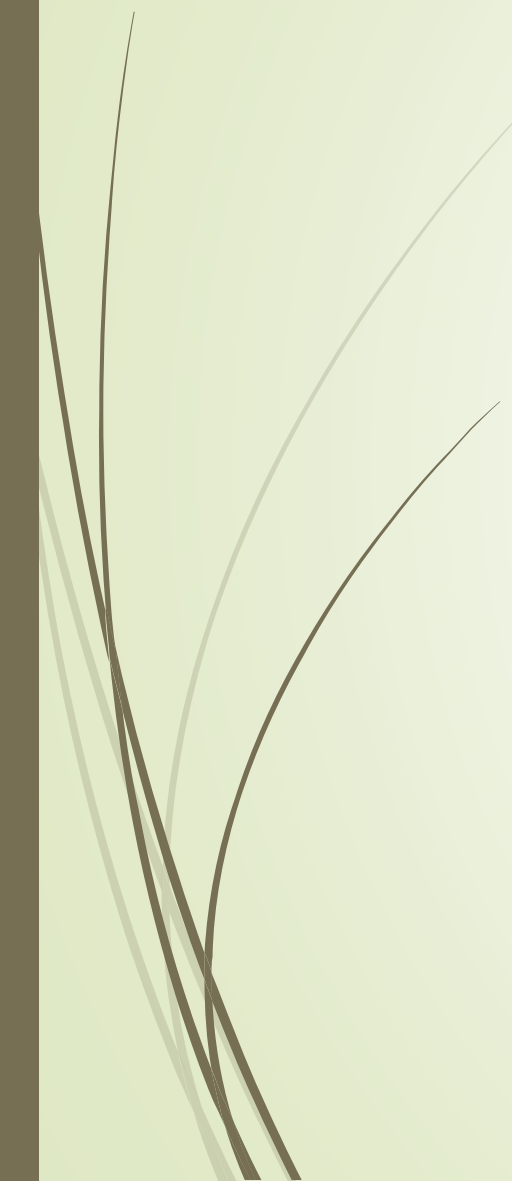



“He doesn’t know this, but our daughter is not his. If I prove someone else is the father, he can’t get custody of her.”

- ▶ Yes, he can. Even if it’s proven the child is not his. Under the law, a child born during a marriage is presumed to be the child of the husband. You would have to prove otherwise in court, and even then, if he has spent any amount of time acting as a father to this child, he may have rights.



“The kids will come through this just fine. We’re keeping it civil.”

- ▶ Even if your divorce is completely amicable – and bless you if you can manage that – divorce is hard on the kids. It’s a huge life change, and even the easy ones create a lot of confusion in kids. Most kids aren’t emotionally equipped to process it without some kind of issues arising. Counseling is always a good idea. For everyone.
- 




“As far as I’m concerned, this marriage is over, but I’m going to stay for the kids.”

- ▶ This could be a big mistake. Especially if your relationship with your spouse is contentious. If you argue a lot, or if there’s a lot of passive aggressive behavior between you, it *will* affect your kids. Divorce is hard on the kids. No doubt about that. Their lives will be turned upside down and there will be many challenges for them. But sometimes – sometimes – it’s the lesser of two evils. If the only reason you’re staying married is to keep the family intact, take a long, hard look at what that family is like for the kids. Will they be better off with some space between their parents? Again, counseling is always a good idea.


# Child Support





“If she doesn’t give me the kids when she’s supposed to, I’ll just withhold child support.”

- ▶ You can’t do that. The court issues orders as to parenting time and child support. These are court orders that you are bound by. They are independent of each other. When you don’t follow a court order, you’re breaking the law. You’re in contempt. When one party doesn’t deliver the kids, he or she is in contempt. The proper way to handle that is through the legal system. Not by putting yourself in contempt as well.




“She wants all this extra money for sports and dance and field trips and stuff. That’s what I pay child support for!”

- ▶ Child support is for basic needs. A roof over their heads, clothes on their backs, food in their stomachs. Beyond that, parents need to work together to provide for extra-curricular costs. That being said, if one parent thinks Elliott needs to play baseball, and the other parent thinks baseball is stupid, the first parent may be stuck with the bill. If you call your ex-spouse and say, “I’m thinking of signing Elliott up for baseball this year. It’s \$150. What do you think?” and your ex-spouse says, “That sounds great. I bet he’ll love it,” then you should split the cost. No matter who is paying child support to whom. Also, because child support is for basic needs, the parent paying it should absolutely refrain from nitpicking every dollar that the other parent spends. If there’s a roof over their heads, clothes on their backs, and food in their stomachs, then it’s none of the paying parent’s business how child support funds are specifically spent. They do not have to be maintained separately from other funds.



“If he stops paying child support, I can’t afford to pay my attorney to enforce it.”

- ▶ You don’t need an attorney to enforce child support. In most, if not all, counties, the Prosecutor’s Office has a separate Child Support Division. You go directly to them and they handle it. They may charge you a one-time nominal fee, but it’s far more cost-effective than an attorney.



“I got a huge raise and bonus this year. I’m not telling him. It’s none of his business!”


- ▶ Child support is based on many factors, and figured with a state-created formula. One of those factors is the gross income of each parent. If that changes substantially for one or both parents, child support needs to be refigured. A substantial enough change could even result in a change of who is paying whom. Bonuses may or may not affect it. It depends on whether they are regularly received and predictable. If your ex-spouse finds out about it, and you haven’t told him, you’re going to end up in court anyway. Tell your attorney and get it handled.





“I can file for bankruptcy and then I won't have to pay child support.”

- Wrong. Very little will affect your obligation to pay child support. Even unemployed parents have minimum wage imputed to them. If you were still married and filed for bankruptcy, you would still be required to provide for your children. That doesn't change because you're divorced.



“Having child support payments taken out of my wages feels like a punishment.”

- ▶ The term “wage garnishment” does seem to have a negative connotation. However, think of it as a convenience. If child support is not automatically withdrawn from your paycheck, you have to physically go to the courthouse every week and pay cash, which is then sent to Indianapolis, and then processed and forwarded to your ex-spouse. If you miss payments, your ex-spouse can go after you for it. And what's the remedy? It's automatically withdrawn from your paycheck. So you might as well do that from the beginning, and save everyone the trouble. Nobody has to think about it. It just happens.



“As long as my kids go to college, I’ll get child support until they graduate.”

- ▶ The law just changed on this in Indiana. Previously, it was until age 21, *if* they were in college. Now, it’s until age 19, unless they are emancipated, incapacitated, or not in college. By the time your kids get to that point, the law may have changed again.
- ▶ In Kentucky, the cutoff is age 18, regardless of whether they go to college.


# Property Division and Finances





# “If her name’s not on the deed, she’s not getting the house!”

- ▶ It doesn't matter whose name is on the deed, or on the mortgage for that matter. If it's marital property it gets divided. Marital property is anything obtained during the marriage through the efforts of the marriage. That doesn't mean that both parties pay for it. If one spouse is working and the other is a homemaker or stay-at-home parent or disabled, both spouses are contributing to the marriage in some way. So a house bought during the marriage is marital property. Who gets the house and who gets a share in the money equivalent is something to be negotiated. Even if one spouse bought the house prior to the marriage, but it was maintained during the marriage, a portion of its value is marital property, and must be calculated and negotiated.



“I’ve been stashing money in a separate account that he doesn’t know about. He can’t touch that, right?”

- ▶ Wrong. Money earned during the marriage is marital property. Keeping it a secret and stashing it away doesn’t change its status. After filing for divorce, each party has to divulge all their financial information. The other spouse will find out about it, and can claim part of it. There are two major exceptions to this. When you inherit money in your name only – say Aunt Thelma leaves you \$50,000 in her will – you can argue that’s *your* money. And because filing for divorce effectuates a legal separation, any money you earn *after* filing for divorce is not marital property. This includes bonuses. So you can stash money away while going through the divorce *after* filing.



“I want to go ahead and move out, but if I do, I’m giving up my rights to the house.”

- No, you’re not. As explained before, the house is marital property that will have to be divided. Moving out – even taking all your stuff with you – has no legal effect on your status or claim in that regard.




“She left, so I changed the locks.”


- Change them back. See previous slide. If she wants to move back in tomorrow, she can. That's her property as much as it is yours, and you can't prevent her access to it.
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# “Everything will be split 50/50.”

- ▶ Maybe. Maybe not. It depends. If you both work, and there's not a substantial need by one party that overrides the needs of the other, then division will be fairly even. But many factors play into it, and negotiation is a huge part of it. Did the wife work to put the husband through school? Does the husband have a fantastic, high-paying job now because of that? Then the wife might get a bigger share of the assets.
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“He cheated on me! He shouldn’t get anything!”

- ▶ As nice as it would be to punish your spouse for his or her transgressions, the court couldn’t care less. The breakdown of the marriage doesn’t have to be anyone’s fault. The court will never ask. In the petition for dissolution, we state that the marriage is irretrievably broken. The end. The only way you can retain more of the assets because of your spouse’s wrongdoing is when that wrongdoing involved the assets themselves. When he or she committed waste. Gambled it all away, for example.




“She’s a beneficiary on my life insurance, but now that we’re divorced she won’t get it, right?”

- ▶ Yes, she will, unless you change it. Beneficiary designation forms are legal contracts that are not affected by divorce. So if you never take your ex-spouse off the policy, and you die, he or she will get the money.




“He’s named as the executor in my will, but now that we’re divorced it will skip him, right?”

- ▶ Maybe. Courts have ruled that if you die during the divorce proceedings, before it’s final, your spouse gets everything. Once your divorce is final, technically your ex-spouse should be skipped over. Whether your ex-spouse actually inherits depends on many factors, but it’s possible he or she could argue that because you have kids, you would have wanted him or her to be the executor and handle the kids’ money. Don’t risk it. Change your will, and specify who is to handle your kids’ inheritance until they are of age.



# “There’s no such thing as alimony anymore.”

- ▶ Technically, this is true. It’s now called spousal maintenance, and it’s only available in two situations: if you have a rock-solid prenup that provides for it, or if you can show the court extreme circumstances. For example, you were a stay-at-home mom, have no marketable skills, and have to go back to school. This type of maintenance in Indiana is temporary. Or perhaps you have a disabled child and you have to stay with and care for that child full-time and therefore can’t work. This type of maintenance would typically last a lifetime – the child’s or the paying spouse’s. Of course, the parties can always agree to maintenance under the terms acceptable to both of them.



“I’ve been a stay-at-home mom for several years and have no other source of income. I can’t get divorced.”

- ▶ Sometimes you can’t stay married, either. How bad is this marriage? We’ve already talked about your options for getting spousal maintenance. Not to mention that if your spouse had a nice 401k, you’re getting half of that. Maybe he’s keeping the house, and it has a lot of equity. You get half of that. You’d be surprised what you can scrape together to live off of. In these situations it’s not uncommon to negotiate him paying your attorney’s fees. And don’t rule out moving back in with your parents. It’s temporary, and it’s nice to have that support system during a divorce.

# The Process





“I don’t need a lawyer. I can do this myself.”

- ▶ True. To a point. If you don’t have kids, and it’s amicable, you absolutely can obtain a divorce decree without attorneys. Technically, even a contentious divorce with complicated issues can be done without attorneys. But getting a divorce without attorneys requires complete cooperation between the spouses. So ask yourself: Do I trust this person that I no longer want to be married to enough to divorce without attorneys? Even the simplest divorces have issues arise that nonprofessionals are not prepared to deal with. You don’t have the resources on your own, and the courts will not be helpful. They don’t have time to hold your hand through the process. The unfortunate truth is that our legal system is so complicated, the average citizen has no idea where to begin, let alone how to close the deal. And if certain details aren’t dealt with in the beginning, you’re going to be back in court later with new problems. Family law attorneys can head those problems off at the pass.





“She’s the one that filed for divorce. She has to pay my attorney’s fees, right?”

- Wrong. The American legal system provides for everyone to pay their own way. Only in certain circumstances can you get your fees paid by the other side. And that’s very rare in divorce. If there’s a huge disparity in income between the parties, you *might* be able to negotiate payment of fees.




“If I don’t want the divorce, I can fight it.”

- ▶ You can, but it won’t do you any good. Remember, there’s no fault in divorce. You can’t argue to a judge that you think the marriage can be saved, so he shouldn’t grant the divorce. If the other spouse wants out, he’ll get out.




# “I really don’t want to fight this out in court.”

- ▶ You probably won’t have to. It’s actually pretty rare for a divorce to land in front of a judge. Most divorces are negotiated between the attorneys. If they can’t reach an agreement, the next step is usually mediation. If mediation is unsuccessful, *then* a hearing will be set, and you’ll have to argue your side to the judge. In fact, most attorneys will tell their client, “You really don’t want to fight this out in court.” It’s better to decide these things yourself, rather than let the judge decide for you. If you do, the judge’s only role is to sign the documents granting the divorce.



“This will be an amicable divorce, so we can share an attorney and save costs.”

- ▶ First, I hope you're right. But even if the divorce *is* amicable, professional ethics prevent an attorney from representing both parties. In fact, we can't even talk to your spouse if he is represented, and if he isn't, we *won't* talk to him until he signs a waiver showing that he understands we are not looking out for anyone but you.




“I’m really upset, so I want Mom with me when I go see my attorney.”

- ▶ That’s fine. In fact, that’s common. Sometimes Mom or Dad is footing the bill, too. But know that your confidential communications between you and your attorney are privileged. Your *confidential* communications. So if someone else is with you in that office when you’re airing all your dirty laundry to the attorney, all of it is admissible in court.




# “We’re going to mediation, but I’m not budging on anything!”

- ▶ You are not going to get on the judge’s good side that way. The courts are backlogged with cases of all kinds. Anything that lawyers and clients can do to relieve that pressure makes judges and their staff happier. If you end up in court, taking up the judge’s time, because you sat in mediation with your arms crossed and shaking your head, the judge is not going to feel inclined to find in your favor. The whole purpose of mediation is to reach an agreement that both sides can live with, without the need for the judge’s intervention. It keeps the power in your hands. That’s not to say that you can’t ever walk out of mediation without an agreement. If you’re honestly trying to compromise and it’s just not getting anywhere, that’s okay. Walk out. But you’ve got to at least try. And the mediator files a report with the court, so, yes, the judge will know if you refused to budge.



“We’ve been together for years. That’s a common law marriage, and I’m taking him for everything he’s got!”

- ▶ Common law marriage doesn’t exist anymore. At least not in Indiana and Kentucky. You can live together for 50 years and you still don’t have a marriage. What you might have is an implied contract. Rather than dividing up “marital” property, you can sue in a contract action, and that’s a whole different ball of wax. But it is an option.



“I want her served with the divorce papers by sheriff, at work, and I wish I could see her face!”


- ▶ No, you don't. If your divorce isn't already an ugly mess, it will be after your spouse is served in a public display of animosity and embarrassment. Serving by certified mail is included in the filing fee. Your spouse will get a postcard notifying her that she's got to sign for something at the post office. It's up to you whether you let her know it's coming. You know her and how she'll react better than your attorney does. Service by sheriff is usually done only if she refuses to sign for it, or if you don't know where she is. Don't do it out of spite. Things may be ugly enough as it is.






“I don’t want her having my last name anymore. She needs to change it.”

- ▶ You can’t make her. If you have kids, she might want to keep the same last name as her kids. If she has professional degrees with that name, she might not want to change it. It’s entirely up to her.




“How long is this going to take? I need child support now, and he’s not paying the bills!”

- ▶ At the very least, it will take 60 days – the waiting period. More than likely, it will be a lot longer than that. But, you don’t have to wait the entire time before you get child support. If you’re living apart, you can get a provisional order, where the court orders a temporary amount of child support to be paid until the final details are settled and the decree is issued. This applies to custody and visitation as well.




“I’ve moved out, but we’re still working on the marriage, so I don’t want to file for divorce yet. I should probably file for a legal separation.”

- ▶ If you file for a legal separation, that can’t be magically turned into a divorce proceeding. You’ll still have to file for divorce from scratch. But when you file for divorce, that automatically creates a legal separation. And you don’t *have* to get divorced just because you’ve filed a petition for dissolution. You can call it off if you decide to reconcile. The only reason to have a legal separation is to create a cut-off for the purposes of dividing marital assets. You get that cut-off when you file for divorce, so a separate legal separation is usually an unnecessary step.




“I’m pregnant, but I can’t wait. I want to get this ball rolling.”

- ▶ You’ll have to wait. The petition for dissolution has to contain a statement that you are *not* pregnant. You can’t file for divorce while pregnant. This is because of the law that presumes a child born of the marriage is the husband’s. If the court dissolves the marriage before the child is born, there is no presumptive father.




“We were never married, so he can’t get custody, because there’s no divorce proceeding.”

- ▶ Yes, he can. As you well know, a marriage certificate is not a requirement for becoming a father. Custody of children born outside of marriage is resolved just like custody for children of divorce. He can file a paternity action, then the process is essentially the same: negotiate, mediate, or let the judge decide.




“We have a prenup, so this should go smoothly.”

- ▶ A prenup is a contract. Just like any contract, it can be attacked as being unconscionable (not fair). Depending on how much time has elapsed since it was executed, and the changes that have occurred since then, chances are one side – or both – is going to argue that it shouldn't apply. A rock solid prenup will shut down these arguments...but you have to have a rock solid prenup.



“If I get an attorney, she has to get one, too.”


- ▶ Neither side has to get an attorney. Just because one did, that doesn't mean the other one has to. If there's only one attorney involved, that attorney has to be extra cautious in dealing with the unrepresented party, but the case can still proceed.



“We weren’t married very long. Let’s just get it annulled.”

- ▶ Getting a marriage annulled is just as detailed a process as getting a divorce. Annulment is usually reserved for voidable marriages: where the marriage may have been invalid to begin with.
- ▶ “Oops, I didn’t know he was my first cousin.”
- ▶ “So, technically, I was still married to a woman in North Dakota.”
- ▶ “I learned she had escaped from a mental health facility and was legally incapacitated when we got married.”





“My attorney isn’t angry enough. He should be as fired up about this stuff as I am!”

- Despite what you’ve seen in movies and on TV, a hot-headed lawyer who is making a spectacle in court is not the best advocate. We have an ethical obligation to remain civil – to each other and to clients. That being said, it’s nice when your lawyer understands what you’re going through. A divorce lawyer who has never been divorced himself may not understand what is most important to you. Tell him. But if your divorce lawyer has gone through a divorce, and has had her own custody battles, she’s going to get it. She knows what it feels like to have your marriage and family dragged through the legal system. She may not make a scene in court, but she will fight for your kids as if they were her own. Because she’s been there.



“I can’t believe a judge gets to decide how we’ll manage our family!”

- ▶ There's a 98% chance (based on an unscientific study) that the judge won't decide your family matters. The vast majority of divorces and custody battles are settled out of court. Remember: negotiation, mediation, *then* court. Even when a dispute arises that seems to be non-negotiable, and a hearing is set, you'd be surprised how many times that looming hearing date prompts one or both sides to settle. More often than not, those hearings get canceled.



“I can’t wait for the divorce to be final, so I don’t ever have to deal with her again!”

- ▶ If you have kids together, you will always be dealing with each other. The court has continuing jurisdiction over your divorce or custody matters. Once the divorce is final, it’s not “case closed.” The case remains open on the docket, and your attorney continues to represent you unless he or she formally withdraws. Unless you’re lucky, there *will* be disputes in the future, and you will find yourself negotiating again. Custody can be modified. Child support can be modified. Someone isn’t paying. Someone is in contempt. Kids get older and want to change things. When kids are involved, it’s never over.

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