

## **DIVORCE IN TRIBAL COURT PRO SE GUIDE**

This page will explain how to go about starting a divorce in tribal court, how to defend against a divorce and what each party's burden of proof is when they go to court on a divorce. Please review Title 2 Chapter 1 of the Rosebud Sioux Tribe Law and Order Code.

### **WHAT IS A DIVORCE**

In order to get a divorce you must be legally married. A marriage can only be dissolved in three ways. The first is the death of one of the parties to the marriage. The other is by annulment but annulments are very rare. The other is by judgment of a court decreeing a divorce of the parties. Therefore, a divorce must be ordered by a court with jurisdiction. A divorce restores the parties of a marriage to the state of unmarried persons. If there is property acquired and debts accumulated during the marriage and children were born during the course of the marriage, the court can divide the property and debt between the parties, give custody of the children to one party, order visitation and order child support be paid to the custodial parent.

### **WHAT ARE THE GROUNDS FOR A DIVORCE**

In Rosebud Sioux Tribal Court a divorce can only be granted if there are grounds or causes for divorce. These include adultery, extreme cruelty, willful desertion, willful neglect, habitual intemperance (being drunk all the time), conviction for a felony and irreconcilable differences (differences between you and your spouse that cannot be worked out). In order to get a divorce one of these grounds or causes must exist.

### **WHAT ARE THE GROUNDS FOR DENIAL OF A DIVORCE**

A court can deny your request for a divorce. One reason might be that person failed to show grounds or cause of divorce explained above. Another reason might be that the other party can prove to the court a defense to the other parties grounds for divorce. A divorce must be denied upon a showing of connivance, collusion, condonation, or for limitation and lapse of time.

- a. Connivance is the corrupt consent of the other party to the commission of the acts to the other party, constituting the cause of the divorce.
- b. Collusion is an agreement between husband and wife that one of them will commit or appear to commit or represent to the court as having committed acts constituting a cause of divorce.
- c. Condonation is the conditional forgiveness of a matrimonial offense constituting a cause of divorce.
- d. Limitation and lapse of time is when there is an unreasonable lapse of time before commencement of the divorce action.

### **HOW DOES A COURT DETERMINE CUSTODY, CHILD SUPPORT AND VISITATION**

If there are minor children born during the marriage the court will give the custody, care and education of the children to one party or both. Custody means whether the children will live with the plaintiff or defendant. The court normally order one of the parties to the primary custodian of the children while the other party is the non-custodial parent who may have visitation rights with

the children. The court will look at what is in the best interest of the children to determine custody and visitation. This means the court will look at the child(ren)'s temporal, mental and moral welfare. It does not mean what is in the parent's best interest. And it does not mean which parent has more money or can provide a better life for the child(ren). The courts primary concern when awarding custody is the best interest of the child(ren) and not the shortcomings of the parents. What this means is that the court will consider who cares for the child(ren) such as bathing, cleaning for, sheltering, feeding and generally caring for the children. Evidence or testimony of alleged immoral conduct of the opposing party is not relevant unless it has a direct bearing or effects the best interest of the child(ren). For example, if the opposing party abuses alcohol this would not be relevant unless you can show that the opposing party neglected or abused the child(ren) while abusing alcohol.

The court will enter a child support order where the non-custodial parent must pay the custodial parent money for the support and care of their children. This is normally done by a support obligation schedule where the court looks at each parties income and the number of children to determine a support amount.

The court may or may not award the non-custodial parent visitation depending on the circumstances. This can range to liberal visitation to supervised visitation, again depending on the circumstances.

The court will not take fault for the divorce into consideration in awarding custody or awarding property unless it is relevant to the those issues.

The court can modify child custody, support and visitation at any time after the decree of divorce. There is a separate page on Modification of Custody, Visitation and Child Support.

### **HOW DOES A COURT DISTRIBUTE MARITAL PROPERTY AND ALLOCATE MARITAL DEBT**

A court will make an equitable (fair) division of property belonging to either party or both. This can be done whether title to the property is in the name of the husband or the wife. In dividing the property the court will look at the equity and circumstances of the parties.

### **HOW TO START A DIVORCE ACTION IN COURT.**

An action for divorce is started in court by filing a Summons and Complaint with the clerk of court. You will also need to file a Civil Court Sheet-Contact Information when you file your summons and complaint.

**What is a Civil Court Cover Sheet-Contact Information?** This will allow the Clerk of Courts the ability to contact the parties when needed for scheduling and service of papers by mail. It will also allow the Court Process Server to locate and personally serve the defendant with the Summons and Complaint for divorce.

**What is a Summons?** A summons is a document that is served with the complaint on the opposing party. A summons notifies the defendant (the opposing party) that an action for divorce

in the form of a complaint has been filed against them and that the opposing party must answer in writing to both you and the court that they deny your claims in the complaint. If the opposing party (the defendant) fails to answer your summons and complaint within 30 days after service on them or if they fail to appear you may seek a default judgment.

**What is a Complaint?** A complaint sets out the plaintiff's cause of action or claim against the defendant (the opposing party). A complaint puts the court and the opposing party on notice of what a plaintiff's claims are. If you file a summons and complaint you are called the plaintiff. The person you are seeking to divorce is called the defendant. In this case it is letting the defendant know that the plaintiff has filed for divorce and any other claims the plaintiff has against the defendant such as child custody, child support or division of property and debts.

**Jurisdiction.** In order for Rosebud Sioux Tribal Court to hear your claim the court must have jurisdiction. First, the court must have jurisdiction over the people involved, that means the court must have jurisdiction over you and the opposing party. Second, the court must have jurisdiction over the subject matter of the plaintiff's claim. This means the court has jurisdiction to hear type of claim you filed such as divorce.

In order for Rosebud Sioux Tribal court to have jurisdiction over a divorce the following must exist:

1. The party filing for divorce(plaintiff) must be a resident of the Rosebud Sioux Indian Reservation and;
2. One of the parties to the marriage (either the plaintiff or defendant) must be a member of the Rosebud Sioux Tribe.

**Interim Custody.** You can file for interim custody when you or the opposing party has filed for divorce and you feel it would be in the best interest of the children that you have interim custody of them or if you feel they are in danger by the custody of the other party and you want custody of the children until the court decides which party gets permanent custody. Do not use this form unless you or the opposing party has filed for Divorce. Please use the **Motion for Interim Custody** form to file for interim custody. The court will normally hold a hearing on the motion within 10 days.

**How to file a summons and complaint.** A summons and complaint is filed when you take them to the courthouse and file them along with the filing fee and Civil Cover Sheet-Contact Information with the clerk of courts. When you file your complaint or petition with the clerk, please date and sign the form in front of the clerk so they can notarize your signature.

**Filing and service fees.** The court will require payment of a filing fee unless waived to file your summons and complaint with the court. There is also a fee to have your summons and complaint served on the defendant. It is required by law that your summons and complaint be personally served on the defendant. This can be by the Court Process Server which will incur a service fee to have them serve your papers. You can file a motion to waive the filing and service fees if you can show you are indigent or don't have the resources to pay the fees. Use the **Motion to Waive**

**Filing and Service Fees** form to ask the court to waive those costs or for a partial waiver. You can also have a tribal member over the age of 18 and not a party to the action serve the defendant with the summons and complaint and they may do it free. If you go this route, have the person who serves the court papers on the defendant complete the **Affidavit of Service** form and you must file the affidavit with the court as proof the defendant was served.

**What happens if the opposing party fails to Answer.** If the opposing party fails to answer your summons and complaint within 30 days after being served with the summons and complaint, you can ask the court for a default judgment.

**PLAINTIFF'S BURDEN OF PROOF.** If you file for Divorce, you have the burden of proving that claim in court at a trial. In a typical civil case you have the burden of proving your claim by a preponderance of the evidence. This means that by representing yourself in a legal matter it is your responsibility to prove your case. Don't expect the judge to prove your case for you. Proving something by a preponderance of the evidence means evidence with greater weight or that the evidence proves something is more likely than not. The plaintiff has the burden of proving by a preponderance of the evidence the following to the court:

1. That there are grounds for the divorce. The grounds for divorce include adultery, extreme cruelty, willful desertion, willful neglect, habitual intemperance, conviction of a felony, chronic mental illness or irreconcilable differences (differences between you and your spouse that cannot be worked out).
2. That it would be in the child(ren)'s (who were born during the course of the marriage) best interest that you be awarded custody of them. The court's primary concern when awarding custody is the best interest of the child(ren) and not the shortcomings of the parents unless those shortcomings reflect on a party's ability to care for the child(ren). What this means is that the plaintiff and their witnesses need to testify who cares for the child(ren) such as taking them to medical appointments, dealing with their education needs, bathing them, sheltering them, feeding them and generally caring for the children.

If you feel that the child(ren) would be in danger by being in the other party's care you need witnesses and evidence to prove those allegations. Evidence or testimony of alleged immoral conduct of the opposing party is not relevant unless it has a direct bearing or effects the best interest of the child(ren). For example, if the opposing party abuses alcohol this would not be relevant unless you can show that the opposing party neglected or abused the child(ren) while abusing alcohol.

3. That the defendant should pay child support. This can be proven by testifying that the defendant is gainfully employed or that defendant has no mental or physical disabilities that keep him from becoming gainfully employment. In awarding child support, the court will look at the circumstances of both parties and the children. Be prepared to testify and introduce testimony about your circumstances and any special needs of the child(ren).
4. That the marital property and debt should be divided fairly. The factors the court will

consider in dividing marital property are the duration of the marriage, value of the property owned by the parties, ages of the parties, health of the parties, ability of the parties to earn a living, contribution of each party to the accumulation of property, and the income-producing capacity of the parties' assets. Fault for the divorce can only be considered when it is relevant to the acquisition of property.

## **WHAT HAPPENS IF YOU ARE SERVED WITH SUMMONS AND COMPLAINT FOR DIVORCE.**

This section explains what to do if you are served with a summons and complaint. If you are served with a summons and complaint you are being sued for divorce. As a result you must file an **ANSWER or ANSWER AND COUNTERCLAIM** with the court and a copy on the plaintiff within 30 days if you are served with a summons from the Rosebud Sioux Tribal Courts or you are in default. Read the summons and complaint carefully. The summons will tell you how long you have to file an answer from the date you are served with the summons and complaint. The complaint will tell you what the plaintiff(s) claims are against you.

**What is an Answer.** An Answer is a pleading (a legal paper you file with the court) where the defendant responds to the plaintiff's complaint. You can answer the plaintiff complaint by denying and/or admitting to any parts or all of plaintiff allegations in the complaint. If you have any affirmative defenses to plaintiff complaint you must specifically plead these affirmative defenses in your answer. If you fail to raise any affirmative defenses you may have you will be barred from using such a defense. This means that if you fail to raise an affirmative defense you waive the right to use such a defense. Affirmative defenses include accord and satisfaction (meaning you already settled this matter with the opposing party), arbitration and award (meaning an independent arbitrator already decided the case before the court did) assumption of the risk, contributory negligence, discharge in bankruptcy, duress (you were forced or threatened to do something you did not want to do), estoppel (meaning the other party can complain against their own actions), failure of consideration, fraud, injury by fellow servant, illegality, laches (meaning the other party waited too long to bring the action), license, payment, release (meaning the other party released you from any obligation), res judicata (meaning the court has already heard and decided the matter in an earlier case involving the same thing as this case), statute of frauds, statute of limitations (meaning the other party did not bring the action in the time set out in the code) and waiver (meaning the other party waived any claim they had). You must prove any affirmative defenses you raise in your Reply by a preponderance of the evidence at trial.

If you don't have a counterclaim against the plaintiff use the **Answer form**.

**What happens if you fail to Answer plaintiff's summons and complaint within time period prescribed by law.** If you fail to Answer plaintiff's complaint within 30 days of the date of service you are in default and the plaintiff may seek a default judgment against you. This means that if you fail to answer, the plaintiff may be awarded what they ask for in their complaint and you cannot object or present your side of the issue. **Warning.** You must answer plaintiff's complaint within 30 days. If you fail to do so a default judgment could be entered against you.

**You may also need to file a counterclaim with your answer.** A counterclaim is like the plaintiff(s) complaint in that it sets out your causes of action against the plaintiff. You must file a counterclaim on any claim you have against the plaintiff if it arises out of the same transaction or occurrence raised in the plaintiff complaint. Failure to do so could result in the court barring your claim. If there are children involved in the divorce and you want custody of the children you must counterclaim for custody and child support. Use the **Answer and Counterclaim form** if you have a counterclaim against the plaintiff.

**How to file an Answer or Answer and Counterclaim.** You must file an Answer or Answer and Counterclaim to the plaintiff's summons and complaint by filing the original with the court and by mailing a copy to the plaintiff if they are not represented by legal counsel or to their attorney if the plaintiff is represented. Look at the summons you received with the complaint, it will tell you where to mail your answer and counterclaim.

**OPPOSING PARTY'S OR PLAINTIFF'S BURDEN OF PROOF.** The plaintiff or opposing party that filed for Divorce has the burden of proving their claims in court. Proving something by a preponderance of the evidence means evidence with greater weight or that the evidence proves something is more likely than not. The defendant can rebut these claims through cross examination of the plaintiff's witnesses and through their witnesses and documents.

**DEFENDANT'S BURDEN OF PROOF.** If the defendant files a counterclaim the defendant has the burden of proving that claim in court at a trial. In a typical civil case you have the burden of proving your claim by a preponderance of the evidence. This means that by representing your self in a legal matter it is your responsibility to prove your case. Don't expect the judge to prove your case for you. Proving something by a preponderance of the evidence means evidence with greater weight or that the evidence proves something is more likely than not. The defendant has the burden of proving by a preponderance of the evidence the following to the court if the defendant counterclaims:

1. The defendant must prove any affirmative defenses it alleges in its answer. Be sure to raise any of affirmative defenses at trial.
2. The defendant must prove any allegations in their counterclaim.
3. That there are grounds for the divorce. The grounds for divorce include adultery, extreme cruelty, willful desertion, willful neglect, habitual intemperance (being drunk all the time), conviction of a felony, chronic mental illness or irreconcilable differences (differences between you and your spouse that cannot be worked out).
4. That it would be in the child(ren)'s (who were born during the course of the marriage) best interest that the defendant be awarded custody of them. The courts primary concern when awarding custody is the best interest of the child(ren) and not the shortcomings of the parents. What this means is that the defendant and their witnesses need to testify who cares for the child(ren) such as taking them to medical appointments, dealing with their education, bathing, sheltering, feeding and generally caring for the children. Evidence or testimony of alleged

immoral conduct of the opposing party is not relevant unless it has a direct bearing or effects the best interest of the child(ren). For example, if the opposing party abuses alcohol this would not be relevant unless you can show that the opposing party neglected or abused the child(ren) while abusing alcohol.

5. That the plaintiff (the opposing party) should pay child support. This can be proven by testifying that the plaintiff is gainfully employed or that plaintiff has no mental or physical disabilities that keep him/her from becoming gainfully employment. In awarding child support, the court will look at the circumstances of both parties and the children. Be prepared to testify and introduce testimony about your circumstances and any special needs of the child(ren).

5. That the marital property and debt should be divided fairly. The factors the court will consider in dividing marital property are the duration of the marriage, value of the property owned by the parties, ages of the parties, health of the parties, ability of the parties to earn a living, contribution of each party to the accumulation of property, and the income-producing capacity of the parties' assets. Fault for the divorce can only be considered when it is relevant to the acquisition of property.

#### **WHAT HAPPENS IF DEFENDANT FILES A COUNTERCLAIM WITH THEIR ANSWER.**

This section explains what to do if you receive a counterclaim in the defendant's answer. You should read defendant's answer carefully. It will tell you what parts of your complaint the defendant admits and what parts defendant denies. The answer will tell you if the defendant is filing a counterclaim against you. If the answer contains a counterclaim you must reply to the counterclaim. As a result you must file a Reply with the court and a copy to the plaintiff within the time period prescribed by law or you are in default to defendant's counterclaim. If you receive an Answer from the defendant and it contains a counterclaim you must reply to defendant's counterclaim within 20 days of service of the counterclaim upon you or you are in default.

**What is a Reply.** A Reply is your answer to the defendant's counterclaim. This means you must admit or deny each of the defendant's allegations in the counterclaim. If you have any affirmative defenses to plaintiff(s) complaint you must specifically plead these affirmative defenses in your answer. If you fail to raise any affirmative defenses you may have you will be barred from using such a defense. This means that if you fail to raise an affirmative defense you waive the right to use such a defense. Affirmative defenses include accord and satisfaction (meaning you already settled this matter with the opposing party), arbitration and award (meaning an independent arbitrator already decided the case before the court did) assumption of the risk, contributory negligence, discharge in bankruptcy, duress (you were forced or threatened to do something you did not want to do), estoppel (meaning the other party can complain against their own actions), failure of consideration, fraud, injury by fellow servant, illegality, laches (meaning the other party waited too long to bring the action), license, payment, release (meaning the other party released you from any obligation), res judicata (meaning the court has already heard and decided the matter in an earlier case involving the same thing as this case), statute of frauds, statute of limitations (meaning the other party did not bring the action in

the time set out in the code) and waiver (meaning the other party waived any claim they had). You must prove any affirmative defenses you raise in your Reply by a preponderance of the evidence at trial.

**What happens if you fail to Reply to defendant's counterclaim within time period prescribed by law?** If you fail to Reply to defendant's counterclaim within 20 days of service of the counterclaim upon you, you are in default and the defendant may seek a default judgment against you on their counterclaim. This means that if you fail to reply to the defendant's counterclaim the defendant may be awarded what they ask for in their counterclaim and you cannot object or present your side of the issue. **Warning.** You must reply to defendant's counterclaim within a specified period of time. If you fail to do so a default judgment could be entered against you.

**How to file a reply.** You must file a Reply to the defendant's Answer and Counterclaim by filing the original with the court and by mailing a copy to the plaintiff if they are not represented by legal counsel or to their attorney if the plaintiff is represented.

## **WHAT DO I DO WHEN I GO TO COURT FOR A TRIAL**

The party bringing any claim or counterclaim has the burden of proving their claim or counterclaim by a preponderance of the evidence. The plaintiff or petitioner (the party who brings the first claim to court) presents their evidence first and then defendant or respondent presents their evidence to the court.

**How to present your Evidence to the Court.** There are several ways of presenting your evidence and case in court. The best way is through live testimony of witnesses. This would include you (you need to testify to your claim) and any other person who has personal and relevant knowledge of the facts of your claim. It is your responsibility to get your witnesses to court and to ask them questions about their knowledge of the facts. In order to compel or force your witnesses to testify at your trial or hearing you may need to subpoena each of your witnesses well before the trial or hearing or hearing date (Use the **Motion to Subpoena Witnesses** form to request the court to issue a subpoena to compel a witness to appear at your trial or hearing if they won't voluntarily appear). You can also subpoena a person or witnesses to bring evidence such as documents to your hearing or trial (Use the **Motion to Subpoena a Person to Bring Evidence to Court** form to request the court to issue a subpoena to compel a person to appear at your trial or hearing and bring specified evidence with them if they won't voluntarily appear). Once you and your witnesses testify the opposing party can cross examine you and your witness. This means that they can ask you and your witnesses questions.

It will be your responsibility to directly ask questions (direct examination) of your witnesses and to get your evidence introduced into the record. You can only ask questions during direct examination. Do not attempt to make statements or comments when you ask questioning witnesses. Your witnesses should be asked who they are, what they know and how they know it or anything they might have observed. Like cross examination you should prepare your questions for each of your witnesses well before the trial and take notes of any strong points



testified to that you can use in your closing arguments to the Court.

It will also be your responsibility to get objects and other physical evidence, such as documents, introduced into the record. You do this by laying the foundation for the admissibility of the evidence by questioning the person you subpoenaed to bring the objects or pieces of evidence you want introduced into evidence. Ask the Court to mark the evidence as an Exhibit. Then you must ask this person who they are, what objects or pieces of evidence they brought to the Court, a description of the objects or pieces of evidence, how the evidence came into that persons possession and if the evidence are documents then you must ask if the documents are kept in the ordinary course of business. Then you must ask the Court to have the evidence introduced and accepted as evidence. Only evidence accepted by the Court after it is ruled admissible will be seen or considered by the Court.

You must cross examine the opposing party's witnesses to cast doubt on the opposing party's claims, counterclaims or defenses. Cross examination is your chance to ask questions of the opposing party's witnesses. You can only ask questions of the opposing party's witnesses during cross examination. Do not attempt to make statements or to testify during cross examination of another witness, the Court will shut you off from doing so.

**Be courteous in Court.** When you go to court the judge will control the proceedings. The plaintiff presents their case first. Then the defendant presents their side of the case. Do not interrupt the other side when they are testifying unless you have an objection. Both sides will have an opportunity to cross examine the other party and their witnesses. Be courteous to the other side. If you disrupt the proceedings the judge could hold you in contempt and throw you in jail.