

Affidavit

Written testimony under oath - usually sworn to in front of a notary. A common misunderstanding by parties is that an affidavit by another person can be used instead of their in court testimony as to a contested issue of fact.

Alternative Dispute Resolution

Ways for parties to a divorce case to resolve their disagreements without a trial. In Oregon the most common form of alternative dispute resolution is mediation or arbitration — especially mediation in custody cases.

Answer

See Response.

Appeal

A procedure to ask a higher court (the appellate court) to review the ruling of a lower court (the trial court). In divorce cases, generally only final Judgments can be appealed.

Appearance

Coming into court as a party to a case or voluntarily submitting to the power of a court. Usually this is not a physical act, but a lawyer filing a document.

Attorney (at Law)

An advocate or counsel employed to prepare, manage and try cases in court. The term lawyer and attorney are synonymous.

Attorney for the Child

An attorney appointed to represent a child. This role differs substantially from that of a guardian ad litem.

Child Support

Money paid by one parent to the other for the support of their children. Child support is generally not taxable to the recipient.

Collaborative Law

Ideally, collaborative law in family law practices allows the attorneys for both of the parties to assist the parties to resolve conflict using cooperative strategies rather than adversarial techniques and litigation. Proponents of collaborative law, as a model, believe that it can create a different paradigm in which the lawyers have a financial interest in resolving disputes without litigation rather than earning fees in part based upon the degree to which a case is litigated. In collaborative law cases, the parties and the lawyers sign an agreement which provides that if there is to be a contested motion or issue, both parties' attorneys must withdraw from the representation. Unfortunately, there are few Oregon lawyers who specialize in collaborative law and most good lawyers will strive to settle cases without litigation.

Common Law Marriage

A marriage without license or ceremony recognized by the law in the state it was created. Oregon does not recognize common law marriages.

Consulting Expert (Consultant)

A consultant is an individual who “has been retained or specially employed in anticipation of litigation or preparation for trial but who is not to be called at trial.” Normally the identity, opinions, and work product of a consultant are discoverable only upon a showing of

exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject matter by other means.

Attorney Fee Award (Petition for Attorney Fees)

A judgment requiring one party to pay the other party's attorney's fees which is entered after the conclusion of the case. A complicating factor in Oregon law regarding fee awards is the timing of such petitions. The petition must be filed no later than 14 days after entry of the Judgment of Divorce. An award by the court does not mean the other person will pay without collection efforts. To over-simplify matters, an award of temporary fees or suit money is sought while the case is pending and the attorney fee award is sought at the conclusion of a case.

Contempt of Court

Failure to comply with a court order by a person who is able to comply. It also includes conduct in court which obstructs a court in the administration of justice. Oregon law divides contempt into civil contempt and criminal contempt. In civil contempt, an individual is said to have the keys to his own cell. This means that the goal in civil contempt is to coerce an individual to comply with a court order (and he or she must have the means to do so.) In criminal contempt, the goal is to punish an individual for his or her past-misconduct and a private party cannot bring a criminal contempt, only the D.A. can do that.

Counter-Claim

A pleading filed by the Respondent also asking for a divorce (dissolution of marriage) or other relief filed in response to a Petition. A reason for filing a counter-petition is that the person who brings the divorce case has the right to voluntarily dismiss the proceedings at virtually any time prior to trial. However, a party cannot cause the entire case to be dismissed if the other side has filed a counter-claim on any issue.

Cross-Examination

Asking questions of a witness who was put on the stand by the other lawyer. Cross-examination is usually intended to discredit the witness or weaken the effect of the testimony.

Custody

Usually refers to the parent's right to (1) have a child live with that parent and (2) make decisions concerning the child.

Custody Evaluation

Before litigating custody issues, there is often a court ordered custody evaluation.

Default

Failure to do something or to do it on time. Typically, if the other person fails to file a response to your pleading within the time required by law, a default order can be entered granting you the relief you seek and barring them from filing new or late pleadings or claims.

Defined Benefit Plan

A type of qualified annuity: It is often called a pension plan and the employee will receive an annuity at retirement, that is, as a general rule he will receive monthly payments for the duration of his life although there may be several other payment options. Such payment options may include a 10 year certain option. Generally, there are no account balances for defined benefit plans. There may be, however, a lump-sum often with a number of defined benefit plans.

Defined Contribution Plan

A WYSWYG (What You See is What You Get) type plan. In a defined contribution plan there is an individual account for each employee. The value of the retirement benefit is the account balance.

Deposition

Testimony under oath taken before a court reporter but not in court. Generally, this is a discovery method. However, in certain cases Oregon law allows the use of what is called an "evidence deposition." Generally, depositions in Oregon can be no more than three hours in length.

Direct Examination

Asking questions of a witness by the lawyer who called the witness.

Discovery

Procedures used to learn facts necessary to settle a case or prepare it for trial. The usual discovery vehicles are: 1) notices to produce (directed to a party); 2) subpoenas for deposition or production of records (directed to a non-party); 3) party depositions; and 4) interrogatories (usually directed to a party). See: Interrogatories; Request for Production; Deposition, Subpoena.

Dissipation

The use of marital property or funds for the benefit of one spouse for a purpose unrelated to the marriage at a time that the marriage is undergoing an irreconcilable breakdown. If there is a claim of dissipation, generally the spouse who is charged with dissipation has to show how he or she spent such funds, that is, demonstrate that the funds were spent for a marital purpose. A key limitation is that dissipation can only be reimbursed to the marital estate if it is at a time frame when the marriage is undergoing an irreconcilable breakdown. This time frame is not necessarily the time when one party files for a divorce.

Dissolution of Marriage

Divorce. The legal process of ending a marriage. Most states, including Oregon, no longer use the word divorce. However, lawyers and clients still use the term divorce because it is simpler than the longer term "dissolution of marriage."

Domestic Violence

Conduct against another member of a family which can include beatings, threats, stalking or other forms of intimidation, harassment, neglect, and physical, emotional, and sexual abuse. May include any act by one member of a family that causes one of its members physical or emotional harm.

Eavesdropping

The Federal discussion is based upon the wiretapping provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. Sections 2510-22. The Federal law prohibits "any person" from making recordings of private conversations in which no party consents and authorizes any person whose conversations are recorded to recover damages. Case law including *Simpson v. Simpson*, 490 F. 2d 803 (5th Cir. 1974) had held that the statute did not apply if the "any persons" were spouses of each other, the conversations that are covertly recorded occur over the telephone in the marital residence and the recording was accomplished without the assistance of an outside party. However, a majority of the cases which have addressed this issue have disagreed with *Simpson*. For a recent case discussing Federal law see, *Glazner v. Glazner*, (December 31, 2002), No. 02-11799 (11th Cir. Court of Appeals). Oregon law allows you to record a telephone conversation in which you are a participant but not non-telephone conversations.

Equitable Distribution (Division)

A system of dividing property owned by parties to a divorce. Oregon is an equitable distribution state. Under Oregon law an equal division of property is not required. Equitable may be equal but sometimes the assets are weighed in favor of the party who has given up career opportunities for the sake of the marriage, who has raised the children, or who has a lesser career potential as compared to her (or his) spouse.

Evidence

Proof presented at a hearing, including testimony, documents or objects.

Exclusive Possession of the Marital Residence

Oregon law provides that a party can seek exclusive possession of the marital residence while the divorce is pending.

Exhibits

Tangible things presented at trial as evidence.

Ex-Parte

Any application to a court for relief made when only one side is present and in certain instances without formal notice.

Fees

A lawyer's charges paid by a client for legal services rendered to the client. Although many different fee arrangements are possible, the following represent the most common types of fees:

1. Hourly fee: A fee based on the time expended and an hourly rate.
2. Retainer: Money paid by the client to the lawyer to obtain a commitment from the lawyer to handle the client's case. In divorce cases, a retainer is generally a deposit against which the lawyer charges fees as they are earned.
3. Engagement fee: This is a fee that is sometimes charged by a lawyer for the agreement to take your case and to commit to being available for your case. Normally, an engagement fee is in addition to charges on an hourly rate basis.
4. Contingency Fee: A percentage of the recovery. Contingent fees are forbidden in divorce cases but, in Oregon a lawyer is permitted to enter into a contingent fee to enforce a judgment, that is, for collection purposes.
5. Bonus Fee: A fee based upon factors in addition to the hourly fee. Also called a premium or final fee.
6. Flat Fee: A fee in a fixed amount for handling an entire case or a certain part of it. In divorce cases, there can be flat-fees for a pre-agreed divorce, that is, simple non-contested divorce. Otherwise, flat fees are rare.

File

In Oregon, generally the act of filing a petition, motion, etc., with the clerk of the court. Term also used as the act of starting a case.

Garnish

To take money from wages or from an account to satisfy an unpaid court order for the payment of money.

Goodwill

Oregon courts sometimes divide the goodwill of a business into two types: enterprise goodwill and personal goodwill. If we over-simplify matters, personal goodwill cannot be valued in Oregon divorces. Personal goodwill is the portion of goodwill which is based upon

the personal efforts of the spouse who owns the business. Enterprise goodwill can be valued. It is the value of business itself, assuming that you could replace the business owner with another person and pay him or her a reasonable salary.

Grounds

The conduct or circumstances which must be proved to entitle a person to a divorce.

Guardian-ad-Litem

A person appointed by a judge to prosecute or defend a case for a person legally unable to do so, such as a minor child.

Hearing

Any proceeding before a judicial officer.

Hearsay

The standard definition lawyers use for hearsay is an out of court statement asked to be introduced into evidence for the truth of the thing that is asserted. A non-legal definition of hearsay is testimony based upon rumor — what someone else says who is not in court — when you are asking the court to consider the rumor testimony based upon its truth. The most common exception to the hearsay rule is an admission of a party opponent. Generally, what the other party says is admissible as an exception to the hearsay rule. The second most common exception to the hearsay rule is the business record exception but even this exception requires certain background (foundation). Not all business records are admissible. Only those records where you can show that they were made in the regular course of the business and where the person who is testifying at least has knowledge of the record keeping system. See evidentiary outline regarding Oregon law.

Income Withholding Notice / Order

An income withholding notice differs from an income withholding order in that a notice provides for withholding of income to secure payment of child support/maintenance or certain other expenses such as payment of health care premiums. An order for income withholding is entered by the court.

In Chambers (In Camera) Interview with the Child

If there is testimony by a minor child, Oregon custody law provides that a judge may take the testimony not in open court but in the judge's office (chambers). Counsel is present at the interview unless otherwise agreed upon by the parties. The parties are not. The court must have a court reporter present who shall make a complete record of the interview instantaneously to be part of the record in the case.

Injunction or Restraining Order

A court order which requires a party to do some act or prohibits a party from doing some act. Injunctions and Restraining orders can be entered on an emergency basis (sometimes without notice). Injunctions can be mutual but mutual injunctions are usually entered by agreement of the parties. Oregon law now requires that a mandatory Restraining Order is issued at the beginning of every case that binds both parties. Ask your lawyer for more information in this regard.

Interrogatories

Written questions served on the other party who is required to serve sworn written answers within a specified time.

Joint Custody

Oregon law will not award joint custody without an agreement of the parties. Joint Custody is merely an agreement which specifies each parent's powers, rights and responsibilities for the personal care of the child and for major decisions such as education, health care, and religious training. It should specify a procedure by which proposed changes, disputes and alleged breaches may be mediated or otherwise resolved and shall provide for a periodic review of its terms by the parents.

Judgment

The decision of a court that is appealable.

Jurisdiction

The power of a court to decide a particular matter.

Legal Separation

A court judgment the terms under which the parties will live apart after separating. While signifying the separation of the parties, it does not formally dissolve the marriage or permit the parties legally to marry other persons. It does do all other things a divorce decree does such as divide property, provide for support and award custody of children.

Litigation

All of the proceedings that take place in the course of a lawsuit.

Maintenance Spousal Support

Payments made to support a current or former spouse for the purpose of supporting that spouse.

Marital Property

Interests in property acquired by the spouses during the marriage

Marital Settlement Agreement

The written agreement made between the parties settling the issues in a divorce. Divorce lawyers in Oregon often refer to the Marital Settlement Agreement as the "MSA."

Mediation

A dispute resolution process in which a disinterested third party, the mediator, assists the parties in reaching an agreement. Usually, the mediation process is confidential. Many counties in Oregon have mandatory mediation of child custody, parenting and visitation issues (but not of financial matters ancillary to the parenting issues).

Motion

An application to the court for an order. Generally, motions are written but occasionally there are oral motions.

Modification

A change in the judgment or order, generally based on a substantial change of circumstances. The standard motions for modification are those brought to modify custody and to modify either child support or maintenance.

No-Fault Divorce

Also called "irreconcilable differences." A divorce granted without proving that one party is guilty of misconduct. Oregon is a "pure" no fault state.

Non-Marital Property

Property which is not marital in character. To clarify this circular definition, Oregon divorce law defines marital property as all property acquired during the marriage. All other property is non-marital or pre-marital. See FAQ for further discussion on this topic.

Order

A ruling by the court that is not appealable.

Orders of Protection (FAPA Orders)

An order entered under the Oregon Family Protection Act. These are issued ex parte and are subject to review if the other party requests one.

Parenting Time

The term used to describe where, when and under what conditions the children will be with one parent or the other. Many joint parenting agreements used to refer to the “visitation” rights of the non-custodial parent. Many people do not look on the term “visitation” favorably. The thought is that parents do not “visit” with their children. The non-residential parent may spend less time with his or her children but that time should not be thought of as “visiting” time. For this reason, Oregon law now uses the term “parenting time.”

Perjury

The crime of lying under oath. It includes lying during a trial, at a deposition, or in a written affidavit. It can be punishable by imprisonment, although divorce lawyers know that perjury is generally difficult to prove in many issues involving divorce proceedings. Divorce lawyers refer to this as the “he said -she said” problem.

Petition for Dissolution of Marriage

Also referred to as a petition for divorce. This is the initial filing in divorce proceedings. A summons for dissolution of marriage will generally accompany the petition for dissolution when the petition is being formally served. In many cases, the petition for divorce is not formally served but a copy will be mailed to the Respondent’s retained counsel who will then voluntarily file an appearance — thereby eliminating the necessity of formal service of petition for dissolution of marriage.

Petitioner

The party who filed the Petition for Dissolution of Marriage.

Pleading

A document filed with the court which asks for something or responds to a pleading filed by the other party.

Premarital or Prenuptial Agreements

An agreement signed in contemplation of marriage, which will address rights as to either dissolution of marriage and/or rights to the estate of the other person. With regard to the enforceability of premarital agreements, Oregon has adopted the Uniform Premarital Agreement Act. It provides for broad enforceability of such agreements so long as there is fair and reasonable disclosure of the property or financial obligations of each party, the agreement is executed voluntarily and the agreement was not unconscionable when executed. Such agreements addressing divorce often limit a party's ability to seek maintenance (spousal support) from her or his spouse. Such agreements addressing estate issues often prevent a party from being able to renounce a will and take a statutory third of the other party's estate.

Present Valuation

A financial concept. It refers to the time value of money and goes along with the saying that a bird in the hand is worth more than two in the bush. In determining the present value, in a future stream of payments, the future payment stream is discounted back to a present value using a discount rate. This concept is important in divorce cases both in valuing businesses and in determining the value in a defined benefit plan (if there is to be other marital assets awarded in lieu of an interest in the plan) — a swap which lawyers call an offsetting property settlement award.

Privileges

A client's right to refuse to disclose confidential communications between the client and certain persons in a professional relationship with the client. In Oregon the usual privileges are professionals such as lawyers, doctors and mental health care professionals.

Pro Se

A party who is representing him or herself in a lawsuit. A party has the right to represent himself or herself in divorce proceedings. On the other hand, it is said that the lawyer who represents himself has a fool for a client. I tell clients that I even hire my own lawyer to handle my real estate transactions.

Qualified Domestic Relations Order (QDRO)

This acronym is pronounced "QUADRO" or "Q-DRO." An order of the divorce case (that is, a domestic relations order) that is determined to be qualified. The "qualified" part of this term generally refers to the approval (qualification) of the DRO by the plan administrator.

Request for Production

(Also known as a Notice to Produce). A written request by one party to the other asking the other party to turn over tangible objects, usually documents.

Respondent

The husband or wife who is sued for divorce.

Response

A document used to answer or respond to the petition for dissolution of marriage or other pleading. Answers or responses usually admit or deny specific allegations or claims in the document being answered. In Oregon those allegations not specifically denied are therefore admitted. It is therefore only necessary to state the allegations which are denied.

Restraining Order

See Injunction

Retainer

See Fees.

Separate Property

See non-marital property.

Service (of Process)

The delivery of official papers by a means prescribed by law. Usually this is accomplished either through a private process server or a sheriff's officer.

Settlement

The resolution of disputed issues by agreement between the parties. Most lawyers use the statistics that 90% of cases are settled rather than tried.

Stipulation

An agreement between the parties or their lawyers about issues in the lawsuit. Common stipulations in Oregon divorce cases are: 1) stipulation regarding irreconcilable differences; 2) stipulation for non-contested divorce (usually based upon a signed marital settlement agreement where one party does not appear for the last court appearance; and 3) stipulations as to certain facts such as income levels, values of assets or divisions of assets.

Subpoena

A document served on a party or a witness commanding appearance at a certain time and place. A Records only Subpoena is sometimes referred to as a Subpoena Duces Tecum. It is a requirement to produce documents, papers, or other things listed in the subpoena in lieu of a personal deposition.

Suit Money or Motion for Temporary Attorney Fees

A petition in which one spouse seeks a court order for the other spouse to pay attorney's fees on a temporary basis (while the case is pending).

Summons

The written notification of the lawsuit that is served upon the Respondent. See Petition for Dissolution of Marriage.

Temporary Orders

Orders granting relief between the filing of the lawsuit and the judgment.

Trial

The final hearing in court to decide the issues in the case.

Uncontested Divorce

A divorce in which there is no dispute as to how any of the issues will be resolved.

Venue

The place where a case will be heard. For example, if the place a case is heard is Marion County, a lawyer might say that the venue is in Marion County. There are cases where venue is transferred from one county to another, often due to a motion to change venue. Oregon law requires that a case be filed where at least one of the parties "resides." However, the court can order that the trial take place where it is most convenient. For example, if a spouse moves 200 miles from where the family has lived for 20 years and the evidence (witnesses) about the children are where the non-moving spouse lives, a court may change venue back to the former location due to the convenience of the parties.

Visitation

The right of a parent who does not have primary custody of the child to spend time with the child now called parenting time.