

## When Is the Best Time To File For Divorce?

**Jake:** So this episode, we wanted to talk about a common question and one that I actually wrote on last week and at the same time, got the same question from a client. That is when is the right time or the best time to file for divorce. Brian and I were just talking before we started recording, I think ultimately it's an emotional question.

We're not going to sit here and tell you, either that your relationship isn't working and you need to file for divorce. Brian and I aren't mental health professionals and everybody's situation is different than we want it to work, for the family unit and for everybody individually that they were emotionally taken care of and things happen at the right time if they are going to happen.

But there are some legal considerations that people need to take into consideration whenever they're deciding whether or not to file for divorce. But I guess before we get into that let's talk about, as much as we can, the emotional aspect of it. When we have clients that come in we are the first ones to tell everybody "this is a hard time."

If it's divorce or even if it's just a child custody case or any type of lawsuit, it's an emotional and difficult time. And a lot of times our clients or our prospective clients are looking to us and saying "Is this the right time, should I file for divorce?"

What do you think? Brian, I'd be curious about your thoughts. What I always tell people about that is nobody hopes for, I think more than even us that things work out. I know that sounds a little silly coming from a divorce lawyer, some of the reviews online that I'm proudest of say I've had clients come to me and we do the consult.

You get down with it and you look at them and say "are you sure you really, you know what, we're here for you and what we're absolutely going to be supportive of you, you decide, this sounds like y'all may want to work it out." Or we have clients that come to us and say, Hey, maybe they filed for divorce already with us, or they're thinking about doing it.

They've already hired say, actually we're thinking about going to marriage counseling. I think. Yeah, I'll get your thoughts in a second, Brian, but I'm the first one to go. Great. great. If you can work it out. Great. If you're physically safe, if you're financially safe, if you can work it out, that's wonderful.

I do every once in a while hear horror stories of divorce lawyers that I think probably too much are pushing people. To, maybe they do it cause for business reasons or what have you, but push people when they don't need to be pushed. people need to be supported, not pushed, on, what's a life changing decision.

And before we start talking about the legal aspects, I do want to talk about the emotional difficulty of it all. What about you, Brian? How's that? How do you deal with that when that time, it often comes up in an initial phone call or the first few weeks of representation.

What do you tell people?

**Brian:** Yeah, exactly. You and I each have personal experience in this and it's a difficult decision to make. Even when it seems pretty obvious, it's difficult. It's one of those situations where the grass is not necessarily going to be greener on the other side, or maybe a better way to put it as maybe some things might be better and some things will definitely be worse.

Part of these situations are zero-sum games. Time with your children for example. You are going to have less time with your children. If you get divorced you may have more time or less time than the other parent, but you will have less time than you're getting right now. I would tell people to always be really sure about it and also tell them to go talk to other attorneys if they want to.

I think it's a decision that they should make with a full understanding of the seriousness of it. And, those clients, I think you're exactly right. Those are the clients that I think are the most appreciative of us, those who've really thought about this carefully and chosen to go down that road with us.

**Jake:** Yeah. We certainly don't push anybody, but then once there is that time where that's why clients are calling us usually. And a lot of times they've made the decision. It's not every client that comes in and wants to talk through the emotional aspect and with it, with their divorce lawyer, a potential divorce lawyer, we totally get it.

When you are struggling emotionally and sometimes, people are, I would say even a lot of times when people come to us, they've thought about it. They've spoken to their counselor. They've spoken to their pastor, friends, family, whoever their support network is they've talked to.

And we always encourage people to talk to those, that support network. Most of the time when people contact us, they've, then they've made the decision. This is what's best for themselves personally or for their family unit. Ultimately people make these decisions to file for divorce because the individual feels is best for the family unit or the other spouse has filed for divorce and the decision has been made already.

So then, once you get past that part of it and I guess before we leave that topic, I'll echo just what Brian and I always say, there's really no judgment anyway.

Sometimes people feel embarrassed I think. They'll come they'll hire us. I'll file for divorce. And then maybe they'll decide not to, or don't want to put the divorce on hold or try counseling or something. They almost seem a little embarrassed to tell their lawyer about it.

If it works, great to never hear from you again. I like you, but I hope to never hear from you again. And if it doesn't work out, here we are. There really is no judgment. And then there's people that come to us and the decision has just been made.

And there's no argument, it's just going to happen. And a lot of times that's the right decision, frankly, and there's no judgment that way either. We're just there for the clients

either way. But then that's talking about the legal question about, it's just, once we made that decision, I think they want to know about, okay.

So timing, is there a particular timing that I need to file for divorce? yeah, that's a, I think it's case by case, obviously there's different strategy points for every single individual case, but I guess overall, Brian, what would you say as far as. Yeah, I think the most common question we have on this is does it matter who files first?

I get that question all the time. does it matter if my husband files for divorce first and my wife files for divorce? Or am I going to be a strategic disadvantage? What's the answer to that, and I know it's case by case, but generally, how do you approach that question, Brian?

**Brian:** I think there are some reasons why it's strategically important in certain types of cases. There are certain situations where it is relevant, most times it is not, but the ones that do exist can be really important. Then I think there is a tactical question of filing first.

Does that give you some type of advantage in the actual litigation? I used to say no. And our system is set up to say, no, it didn't matter. You're the first, the person who files versus called the petitioner and the person who responds is the respondent or the counter petitioner. I used to think the answer was "it doesn't matter."

I've now come to the conclusion that after many years of litigating, it can make a difference and be an advantage to file first. In some cases, it's good, and sometimes that's a little hard to predict whether that's going to be true or not at the time of filing. But, so the answer to both of those is yes, I think there are some cases, maybe 5% of them where it's a strategic advantage to file first.

That's my take on it, but that's again, changed over time and you may view it a little bit differently than me. I'm not sure. I might disagree with myself a year from now.

**Jake:** I think everybody would agree that if you've got an emergency, then you need to file first. If it's health and safety of the kids, drugs and alcohol, family violence, stuff like that, you need to file for divorce first and for no other reason, but to be able to seek out immediate protection from the court, either there a restraining order, ex parte protective order, or both. You need a file.

Frankly, a lot of times we have these cases there's allegations of family violence or drugs or alcohol, a lot of time all the time falsely. But a lot of times the accusations go both ways. Somebody comes in and says, my spouse hit me and inevitably the other side, true or false, a lot of times false, the other side goes "Actually, no, the other spouse, the one that's violent, she had me or, she's the crazy one or he's the crazy one."

If you don't file first, and so let's say both sides are basically kicking off the divorce with a request for emergency relief from the court.

What's called ex parte related if you go in there with an affidavit without letting the other side know. It's asking for an emergency order from the court. If you're the one that pulls the trigger first on that, actually let's say both sides are going to ask for a protective order. If

you're the one that pulls the trigger on that first, then you know you're going to be in a substantial advantage cause you're going to get your order size.

It's difficult I think for a judge to sign an ex parte protective order, for example, for a husband. And then, the wife comes in two, three days later, asked for an ex parte protective order. They're going to go, you aren't granted the one for the husband. I can't really believe that both sides are doing this.

So let's just have a hearing and we'll just figure it out then. And then, if the judge has placed the kids under an order with the husband because he filed first then the wives had a disadvantage, cause it may be a couple of weeks before she can get into court. I had that situation.

I had a case about a year ago exactly where both sides had pretty wild accusations. It's about both sides. Frankly, a lot of them were true both ways. Husband went in, got an ex parte protective order when the wife totally could have been justified going to get an ex parte protective order.

I didn't represent her at the start event. Husband gets an ex parte protective order. It's in place for 20 days. The kids are with him. She's cut off completely. Eventually, I get the case almost 20 days later, we're set for court. We're going to clean up at court. Oh wait, we didn't get in.

The court was too busy. So the ex parte protective order gets extended. And then there's another 20 days where the husband has the kids and the wife doesn't and all, without there even being a hearing, And that was detrimental to our kids and it was a strategic disadvantage.

Now the end of the story is we eventually had a three-day hearing, all the evidence came out and the judge ended up giving our client custody and denied the protective order. The husband had asked against her and so when the evidence all came out, it was fine, but that wasn't easy. It was a really good judge, too.

It took a lot of guts, I think for the judge to simply say "I was wrong for putting the kids with the dad for essentially a month on an ex parte basis. And now that I've heard the evidence, I'm going to switch it up." It was a good judge and she was willing to do that, but I think it's a disadvantage.

The technical answer is whoever files first gets to present evidence for our set of final trial in most likely temporary orders hearing as well. When a case goes to file trial, the judge is gonna look at the petitioner first and have them make the first opening statement.

Then the respondent makes the opening statement. Then they go into the petitioner and say, okay, call your first witness. Does that make a difference at trial with just a judge? Probably not. Although we're all human. I'm curious about your thoughts, but I think it makes a difference with a jury.

**Brian:** It depends. And the answer is sometimes yes. I think it's a question of setting the narrative. If you can set it really, a trial is one side attempting to set their narrative and the

other side attempting to set theirs. There's rarely a case where all the evidence is just in one direction only.

And if you can set that narrative the other side may either have to be defensive in their half of the case, or several of the jurors may have already made up their mind. Then that story, that narrative, it makes sense to them and whatever else comes in after that, even though they may maybe thinking they're going to be open-minded right, they aren't. They've already got that right in place.

So that's where I think really precisely where I think it is if you can set that narrative by being first, and it worked with judges sometimes. I think that it's probably more effective with juries, but it can also work with a judge I believe.

That is a really powerful tool and may be decisive in some cases.

**Jake:** Yeah. I'll still tell clients it's not the end of the world though, if you're not the first, because it is just about, like you said, saying that narrative. And I think, this goes into a much longer discussion about trial strategy and everything right.

But I think a lot of that advantage is accentuated a lot of times by people not knowing how to litigate a case. So they, if you're on the respondent side, a lot of people go into trial as "the respondent is always despondent" because you're always, you're just listening to the other side, go first.

And if you're not experienced in trial work, which you'll do as a lawyer being the respondent, is you'll freak out when you hear the other side put their evidence on, and then you'll change your theme to To address their theme, rather than just sticking to your guns and doing your theme as that's a much longer discussion, but that is that it goes back to who files first, if you don't know how to litigate them, play these cases properly.

It makes a difference. I guess the only thing I'll say too on trial work is this is I never understand this, but in a regular civil case, the petitioner, just like in a criminal case, the prosecution, on closing arguments, the prosecution gets too close and rebut, meaning the prosecution gets to stand up, make their closing argument.

That defense makes a closing argument. And then the prosecution gets to rebut what the defense just said. So prosecuting defense gets to go once. It's the same deal, like a car wreck lawsuit, the plaintiff open or close the defense then. Yeah, it does. They're closing. And then the planet gets to rebut. and that makes sense.

And in criminal cases and the current cases, because the plaintiff has the burden of proof, the plaintiff has to prove that the defendant was negligent or the prosecution has to prove that the defendant is guilty in a divorce. That doesn't make sense. Cause everybody's got the same burden of proof, are we going to get divorced?

Why is it little bit different? Cause you have to prove it, what suggests aren't division character a what's the value. Everyone has the same burden approved. So why does the petitioner get to go twice?

Just because, they filed 30 seconds before me. They get to do two closing arguments. So that is bizarre. And that doesn't make sense. But nobody's changed the rule. Nobody asked my opinion when they wrote that rule and yeah, I think that's a more nuanced advantage you have filing for divorce.

And like you were saying, Brian, I think this is. 1%, 2% of the cases, but we do like to have that discussion with clients just so they know everything that's out there whenever they file. And then I guess to wrap up, I guess I would say, it's really up to the individual.

Brian, can we finish up with, what do you do if somebody is in your office and say, I'm thinking about filing for divorce or I'm ready to file for divorce. Logistically. What is that process, from your end, as far as getting from that consultation to gain the divorce filed?

**Brian:** That's really simple. I think surprising sometimes for clients, it's actually really simple to retain our firm. It simply requires signing a contract, which we have people do electronically on their phones or iPads or whatever, I'll email it to them. Even if they're sitting across the table from me, they can open it on their phone and sign it.

And then there's probably whatever the retainer fee is. There's a link to do that and then it's also remarkably easy to file these initial documents. Then in most cases, there are a few where you need to really put some thought into them in affidavits or their pleadings. But generally, it's a very simple process that we can do either same day or the next business day at the latest. So if it is a race to the courthouse and it is important that we file first, we'll drop what we're doing and make sure that we have a divorce on file.

Assuming it's not one of these really rare, really difficult or long ones I could probably have one on file within an hour from the moment, that may be less. Sometimes does make a difference. I have a case once where there was a tornado warning and it was in the old days when you had to go file something in person and we literally had a race to the courthouse in two different States and we beat the other side in another state by about 30 minutes and that was actually decisive in the case. And those things matter. And I knew it was important. I knew it was a race to the courthouse.

I talked to a potential client yesterday, who's hired a lawyer in February who still has not managed to file the original petition six months later. That's the other extreme, but usually, we can do it really quickly.

**Jake:** You and I have this conversation all the time, Brian. We get the potential clients calling and it's been two or three days and they haven't done anything yet. I think that's the norm and that's crazy to me.

It's not fun filing for divorce. It's really not fun. Making that emotional decision. I need to file for divorce, hiring a lawyer, which is an emotional decision in difficult. And then sitting there waiting for two or three days or something gets filed. That's mind-blowing to me. Brian, you and I get hired all the time over the weekend and it's filed, over the weekend.

I love our associates. They're such hard workers and we've had one, I think three weeks ago, talk to us on Saturday. Good. I told him, I don't expect my associates to work over the weekend. So there'll be filed first thing Monday morning, so that is, it was on the case,

responded to her message on Saturday, had a file Saturday evening, and I think that's should be expected of us.

It's not the norm by any stretch of the imagination. I think everybody just has this mentality of this will take a few days and we'll just get to it when we get to it. And I just don't understand it. I've had to hire lawyers in my life and the slowness, particularly on that first initial difficult decision, which is filing for the divorce or the custody case, I don't understand the delay.

So yeah, Brian is just it's if you're in my office and you were saying, I want to file right now, I really. Just rip the bandaid off. I want to file it or it makes a legal difference. we will drop everything, we'll get it done. and I see that makes us different. but that's what we strive to be is different.

Yeah, that's an interesting topic. I probably could tie to a bunch of other stuff, but that's probably enough, for this episode. Don't you think? I agree.

**Brian:** Hopefully that's helpful and I'm sure we'll be back on here very soon with another one.

**Jake:** Alright. Talk to you soon. Bye.