

DIVORCE IN ALABAMA

This information is provided to answer some of your questions about divorce and applicable Alabama law. This material does not attempt to get into the specifics of your case; rather, it provides general information that will be useful in consulting with us and as a reference.

Grounds

Alabama has many grounds for divorce. Some of these grounds are: voluntary abandonment for one year, physical cruelty, adultery, addiction to alcohol or drugs, incompatibility of temperament, and irretrievable breakdown of the marriage. These last two grounds are the basis for what is commonly called "no-fault" divorce. This simply means that the parties' want a divorce, because they are unable to get along, to such an extent, that the marriage has suffered irreparable damage. No proof of fault is necessary, although it may be considered by the judge on trial. Most divorces can be obtained on "no-fault" grounds.

Residency

There is a residency requirement, which must be satisfied in order for an Alabama court to have jurisdiction to grant a divorce. This requirement is satisfied if both parties or the defendant permanently reside in Alabama. If the defendant does not reside in Alabama, the plaintiff must have been domiciled in Alabama for six (6) months immediately preceding the filing of the divorce complaint. There are limited exceptions which may apply if. You do not qualify under these rules.

Divorce must be filed in the county of the defendants' residence or county of residence when separation occurred; if the defendant is a nonresident, then in the county in which the other party to the marriage resides. However, if either party is an Alabama resident, divorce may, be filed in any county if the defendant fails to object. Petitions to modify, divorce decrees may be brought at the custodial parent's option in the county where the custodial parent has resided for the last three (3) years or in the county where the divorce was granted. If the non-custodial parent files the petition to modify, the custodial parent may choose the, venue. Persons in military service and spouses living in Alabama are deemed residents of Alabama for the purpose of maintaining suits at law and equity in this state. When the defendant is a nonresident, the plaintiff must have been a bona fide resident of this state for six (6) months next before filing divorce, which must be alleged and proved.

Common Law Marriage

"A valid common law marriage exists in Alabama when there is capacity to enter into a marriage, present agreement or consent to be husband and wife, public recognition of the existence of the marriage, and consummation." ***Waller v. Waller***, 567 So.2d 869 (Ala.Civ.App. 1990). See also, ***Hudson v. Hudson***, 404 So.2d 82 (Ala.Civ.App. 1981). The intent of the parties can be proven by the parties holding themselves out to others as husband

and wife. Once a common law marriage is established, it is no different from a ceremonial marriage. It can only be dissolved by divorce.

Divorce v. Legal Separation

In some instances a couple with marriage problems may wish relief short of divorce. They may object to divorce because of religious convictions or in order to retain health insurance military benefits. In a divorce from bed and board, commonly called a "legal separation," or in a suit for separate maintenance, the parties remain married after the legal proceedings. As in a divorce, legal separation and separate maintenance consider custody of the children, child support, alimony, and property use or division. During the legal separation or separate maintenance, either party can sue for a divorce on one or more grounds cited above.

Divorce Proceeding

Divorce proceedings may consist of several events and phases; fact-gathering from you; attempts to achieve an uncontested divorce; filing the complaint, information-gathering from your spouse, records, and witnesses; settlement negotiations and the trial.

Uncontested Divorce

An uncontested divorce can often be obtained quickly and is less expensive than a contested divorce. It can only occur when both parties agree to all of the terms of the divorce. It is often therapeutic for parties to work out a divorce agreement. Disputes over child custody, child support, visitation rights, alimony, or property division, will prohibit an uncontested divorce.

Starting the Proceedings

A divorce case begins with the filing of a complaint in the Circuit Court. Costs vary among the counties but, generally, the filing fee is in approximately \$300. The party filing the complaint is the plaintiff and the opposing party, the defendant. The complaint is normally filed in the county where the defendant resides or where the parties resided at the time they separated.

Service of the Complaint

The law of Alabama requires that the defendant must be made aware of the suit for divorce. This procedure is known as service of process. When a divorce complaint is filed, a request is made for the sheriff to deliver a copy, of the complaint to the defendant or for the court clerk to mail a copy by registered mail to the defendant's last known address. To avoid the embarrassment often associated with being served by the sheriffs, the defendant may sign a waiver acknowledging receipt of a copy of the complaint. If your spouse has a lawyer, your spouse may authorize the lawyer to accept service. In some cases, service may be achieved by publishing notice in a newspaper.

Separation

The law does not require the parties to be physically separated and living apart on the filing the divorce complaint. However, some judges may require it.

Child Custody

In the past, custody was generally granted to the mother. However, this **is** not a rule of law. Alabama courts look to the "best interests of the children" and seek to determine which parent is most fit. The desires of older children are often considered by the judge. Regardless of which parent is granted custody, the other parent will be granted reasonable visitation rights, except in extreme circumstances. Joint custody may be an alternative, but many judges do not favor it.

Child Support

The Supreme Court of Alabama has adopted guidelines for use in determining the amount of child support to be paid by, the non-custodial parent. Once we have all of the relevant facts, we can estimate the amount of child support. The amount of child support depends on the income of the parties and the needs of the children. The law only requires support of a child until the child's nineteenth (19th) birthday or until the child becomes self-supporting, whichever occurs first. If special needs are present, such as for a retarded child, child support can be extended past the age of 19. By agreement, the parties can set the amount of child support and extend the age limit.

Support Guidelines

Alabama has adopted an "Income share method to calculate child support. The gross income of the mother and father is used to arrive at "family income." Adjustments are made for pre-existing support payments for other dependent persons and for health insurance costs. The total support based on "family income" and number of children is then located on the guideline chart. An additional adjustment is made for net childcare costs. Then, the total support figure is multiplied by the percentage of the total income of both the mother and father. The non-custodial parent pays his or her percentage of the total support of the other spouse.

Visitation

The judge will generally approve the visitation periods agreed to by the parties. Judges usually prefer that visitation rights be specific ("every first and third weekend from Friday at 6:00 p.m. until Sunday at 6:00 p.m., one month during the summer vacation, one week each Christmas to include Christmas Day on alternate years, alternate spring vacations, Thanksgivings and Easters, Mother's Day and Father's Day, and on the spouse birthday"). The Madison County Courts have established Standard Visitation Schedules for parents that

live within 150 miles of each other and for those that live further than 150 miles from each other. Special visitation rights may be awarded, if the parents do not live close to one another.

Alimony

Alimony is the money paid by one spouse to the other, in recognition of the duty to support and maintain the other spouse. It is available in Alabama. The amount and duration of alimony awarded is different in every case. Some of the facts considered by the judge in awarding alimony are as follows: length of the marriage, ages of the parties, assets and liabilities, income, earning capabilities, the degree of fault of the parties in causing the divorce, stations in life, and health. Alimony shall be terminated upon petition and proof that the receiving spouse has married or is living or cohabiting with a member of the opposite sex.

Property Division

There is no formula for determining how the property (land, money, automobiles, household, goods, etc.) will be divided.

If the parties can reach a reasonable agreement, the judge will generally approve it. Otherwise, the judge will make a decision considering such factors as the following: the length of the marriage, relative earning capacities, assets and liabilities, custody of the children, and the fault of the parties in causing the divorce.

Temporary Relief

In Madison County, the Courts have established standard rules that govern the behavior of the parties' after a divorce action is filed and prior to its conclusion. These rules govern the behavior of the parties, child custody, child support, and other matter. Under certain conditions, an emergency hearing can be heard before a judge for temporary relief before the divorce is finalized on a showing of the potential for irreparable harm; the judge may prohibit any party from harming or harassing his or her spouse, and from selling property belonging to the parties. It is important to tell your attorney if you are afraid your spouse will harm you or your children in any way. The judge may direct a spouse, usually the husband, to move out of the house pending the trial. The judge may also grant temporary relief by awarding custody of the children, requiring the payment of child support and alimony, setting visitation rights, and requiring payment of attorney fees, all pending trial.

Changing the Wife's Name

The wife may legally change her name through the divorce proceedings to resume the use of her maiden name or name by a previous marriage. The children will retain the name of their father.

Reconciliation

We have an obligation to explore the possibility of reconciliation between you and your spouse. After the divorce is filed, both of you may change your mind and try to work out your marital problems. Our policy is to encourage such efforts. The divorce proceedings can be dropped at the time of your choosing.

Settlement v. Trial

Usually the final proceeding in a divorce action is the trial. Although it will vary among the counties, you can expect a trial approximately six (6) months to one (1) year after the complaint is filed. Divorce actions are tried before a judge and not a jury. We are obligated to explore the possibility of a settlement throughout the divorce proceedings. If we think it to your advantage, we will so advise you. However, the choice is always yours to make. You must not be afraid to try your case. A settlement made merely to avoid a trial may not be wise.

Dating

Since you are still married until the judge divorces you, do not date during the divorce proceedings. Doing so can badly affect your case.

Right of Parties to Remarry After Divorce

Neither party shall again marry, except to each other, until sixty (60) days after the decree is rendered; and, if an appeal is taken, neither party shall again marry except to each other during the pendency of said appeal.

Name After Divorce

The divorced wife may be enjoined from the use of the given name or initials of the divorced husband. The wife will be granted the right to resume her maiden name if she so requests.

Attorney's Fees Where Contempt Citation Made

In all suits for the recovery of alimony, maintenance, or support in which a decree of divorce has been issued or is pending, and a contempt of court citation has been made by the court against either party, the court may award a reasonable attorney fee.

Income Withholding Offers

Every order, which includes a provision for child support, including divorce decrees, granted after May 18, 1984, must include a provision for enforcement of the support order by income withholding. The employer of the person ordered to pay support (the obligor) will

withhold the amount ordered and pays it either to the court or to a designated public agency. A person who should be receiving support (the obligee) may file a petition for income withholding if the obligor is one (1) month or more in arrears. Income withholding may be effective immediately upon entry of the support order or when the obligor is one month or more in arrears in the court decision. In the latter case, the income withholding is activated by the obligee filing an affidavit with the court. The amount to be withheld cannot exceed the Federal fifty/sixty (50/60) percent limitations.

Protection from Abuse

The Alabama Protection from Abuse Act provides authority for the court to make any orders necessary to bring about cessation of abuse, including possession of residence, and temporary custody and support.

Divisibility of Military Retirement Pay

Military retirement benefits are considered marital property and are often divisible in a divorce. They are also a source of income for alimony.

Former Spouses Protection Act

Military Retired Pay

State court may consider military retiree pay as marital property which may be expressed either in dollars or as a percentage which cannot exceed fifty (50) percent. The court cannot consider the soldier's disposable retired pay as property, unless the court has jurisdiction over the soldier's residence (other than because of military assignment), the soldier's domicile in the state, or the soldier's consent to the court's jurisdiction.

Court orders, which were issued before June 26, 1981, which direct a division of the retired pay are still valid. If orders are issued prior to June 26, 1981, the law is not retroactive. If the order is after June 26, 1981, and does not carry this provision, there may be grounds for modification under state law.

The test to even qualify for state law treatment includes: Ten (10) years' marriage and ten (10) years toward retirement in service. Payments are made only if there is compliance with the Soldier's and Sailor's Civil Relief Act. Payments begin no later than ninety (90) days after the soldier is entitled to receive retired pay. Payments terminate on death of the former spouse or upon the death of the soldier, whichever is earlier, or under provisions of the court.

Spousal Medical/Commissary and PX Privileges

The spouse will maintain medical, commissary and PX privileges if: Twenty (20) years of marriage – twenty (20) years of active duty service – twenty (20) years overlap test. Spouse cannot be covered by any other medical insurance. The spouse must not be remarried.

If over sixty-five (65) with medical care, spouse must have a letter of disallowance for Medicare, Part A, from the Social Security Administration.

Medical Care Only

Twenty (20) years of marriage – twenty (20) years of active-duty service – fifteen (15) year overlap test. Expiration occurs two (2) years from the date of divorce or April, 1988, whichever is later. Not covered by employer-sponsored medical insurance. Spouse must not be remarried. Divorce on or after April 1, 1985. No exceptions allowed to these criteria.

Survivor Benefit Plan

Under some state laws, soldiers can be required to have former spouses as beneficiaries to survivor benefits plan.

Soldier's Obligation of Support during Marriage

Under AR 608-99, a soldier must meet the minimum support requirements for dependents. The spouse is entitled to receive BAQ at the "with dependents" rate if they are not living in government quarters and there is no other outstanding court order. If the spouse is living in government quarters, the soldiers must provide the difference between BAQ at the "with dependents" rate and the "without dependents" rate. Prior marriages are governed by the outstanding court orders.

Confidentiality

What you tell us about your case is confidential. For this reason, you should not withhold any information from us and, above all, we must have the truth. We must have ALL the facts to represent you properly. During the course of the proceeding, it may be in your best interest not to discuss your case with other parties and we advise you not to do so.

General Suggestions

Your well-meaning friends may offer you advice about your case. You may hear tales about awards in other divorce cases. The facts surrounding your marriage, divorce, children, and property are unique and they differ from every other case. Divorce proceedings are very emotional and, at times, parties use them to seek revenge. Children are often used by a parent to punish the other parent. Prepare your children properly without poisoning their minds about your spouse. Attempt to cooperate with your spouse when the children are involved.

New Wills

Under Alabama law, divorce invalidates provisions for your spouse in your will made before the divorce. Following the divorce, you will need a new will. If you wish to pursue this, please tell us.

Income Tax Consequences of Divorce

Generally, most people do not consider the tax consequences of a divorce until the time comes to file an income tax return. Nevertheless, many issues can arise in regards to taxes as a result of a divorce. Although not all-inclusive, the sections below summarize some of the pertinent considerations and consequences of divorce on taxation.

Which parent can claim a child as a dependent for the exemption?

Normally the parent that has custody of the child gets to claim the exemption deduction. However, some divorce decrees state that Form 8332 will be filed giving the non-custodial parent the right to claim the child as an exemption. Therefore, first look at the decree, if it is silent, then a safe assumption is that the custodial parent will be entitled to the exemption as long as the custodial parent provides more than one half of the child's total support for the year.

What type of return should be filed for the year the divorce took place?

Separate returns are required if spouses are divorced under a decree or an order of separate maintenance has been issued. If a divorce or separation is not final, the spouses should consult with their attorneys to discuss the advantages and disadvantages of filing separate or joint returns. Taxpayers with children should consult your military tax specialist to see if qualified for Head of Household.

Does alimony have to be included as income if it is received, and does the party paying alimony get deduction for alimony paid?

An amount paid during an individual's taxable year for alimony or separate maintenance is deductible. IRC 215(a). Amounts received as alimony or separate maintenance payments are included in gross income. IRC 72(a).

What type of payments will be considered alimony by the IRS?

- a. To constitute alimony, payment must be pursuant to a divorce or separation agreement IRC 72(b)(1)(A).
- b. A divorce or separation instrument is:
 1. A decree of divorce or separate maintenance or written instrument incident to such a decree. IRC 71(b)(2)(C).
 2. A written separation agreement. IRC 71(b)(2)(B); or
 3. A decree or any court order requiring a spouse to make payments for the support or maintenance of the other spouse, including a temporary decree, an interlocutory decree and a decree of alimony pendente lite IRC 71(b)(2)(C).
- c. Alimony payment pursuant to an oral separation agreement will not qualify.

Can a payment still be treated as alimony if the divorced or separated spouse lives in the same household?

- a. Payment made under a divorce decree will not be treated as alimony if the divorced or separated parties live together in the same household. Temp. Treas. Reg. 1.71-1T(b), Q&A-5.
- b. Transfers of services or property, including a debt instrument of a third party, an annuity contract, execution of debt instrument or the use of property, do not qualify as alimony or separation maintenance payments.

If a person is paying home expenses on behalf of his or her spouse, can that be deducted as alimony for tax purpose?

- a. Generally, cash payment of rent, mortgage, tax or tuition to a third party on behalf of the payee spouse may qualify as alimony. Temp. Treas. Reg. 1.71-1T(b), Q&A, 6.
- b. Payments made by a non-occupying spouse of mortgage, taxes and insurance may be deductible to the extent of the occupying spouse's legal interest in the property. PLR 8710089.
- c. If a house is jointly owned, only half of the payments for the home expenses are deductible and other half are includible.
- d. If the occupying spouse owns the house being used as the residence, payments made to third parties are payments on behalf of the payee spouse and potentially deductible as alimony.
- e. Home expenses paid by a non-occupying spouse who is also the owner of the residence are not deductible. Temp. Treas. Reg. 1.71-1T(b), Q&A-6

If a person is making a payment to a third party at the request of a spouse, does that payment qualify as alimony for tax purpose?

Cash payments made to a third party at the written request of a divorced or separated spouse may qualify as alimony. The written request must state that both parties intend the payment to be treated as alimony. The written request must be received before the "payer" spouse files a return for the year the payments were made. Temp. Treas. Reg. 1.71-1T(b), Q&A-7.

If a divorce or separation agreement call for premiums to be paid for life insurance on the payer spouse's life, does that payment qualify as alimony for tax purposes?

Premiums paid for life insurance on the payers spouse's under a divorce or separation agreement are potentially deductible to extent the payee spouse is the owner of the policy. Temp. Treas. Reg. 1.71.

What are the excess Front Loading Rules?

If alimony payments in the first years exceed the average payment in the second and third year by more than \$15,000, the excess amounts are recaptured in the third year by requiring the payer spouse to include the excess in income and allowing the payee spouse to deduct the excess amount. A similar rule applies if payments in the second year exceed payments in the third year by more than \$15,000. IRC 71(f). Temporary support payments are not subject to recapture. IRC 71(f)(5)(B).

Can child support payments be deducted, and does the receipt of child support require inclusion in income?

Payments made for the support of children under a divorce or separation decree are neither deductible by the payer spouse nor includable in the gross income of the payee spouse. IRC 71(c). Payments that are partially alimony and child support are considered to first satisfy the child support obligation and secondly alimony.

If a joint tax return is filed, are both spouses liable for the tax?

Husband and wife are jointly and severally liable for the tax on a joint tax return. IRC 6013(d)(3).

What happens if one spouse innocently signs a return and the other spouses entered fraudulent information?

- a. A spouse who innocently signs a return that understates income can be relieved of liability if such spouse qualifies as an “innocent spouse”. IRC 6013(e).
- b. In order to be granted innocent spouse relief:
 1. The spouses must have filed a valid joint tax return. IRC 6013(e)(1)(A);
 2. There must be a substantial understatement of tax (\$500 or more). IRC 6013(e)(1)(B).
 3. The understatement must be caused by a grossly erroneous item.
 4. The spouse must establish that he or she did not know, or did not have a reason to know that there was substantial understatement on the joint return. IRC 6013(e)(1)(C).
 5. It must be inequitable to hold the spouse liable for the tax. IRC 6013(e)(1)(D).

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