

Legal Aspects of Divorce

Divorce is an increasingly common occurrence in our society. Yet its effect on the parties, their property and children can often be devastating. Once entered, a Divorce Decree can establish the parties' rights permanently. If you have decided to obtain a divorce, you should consult your personal attorney to assist you. Few lawyers consider themselves marriage counselors, but they are concerned for your well-being and how a divorce action affects you. This brochure is an attempt to present you with some issues involved in a divorce.

Grounds for Divorce

The basis or cause for which a court may grant a divorce is commonly referred to as a "ground" for divorce. There are many different grounds for divorce in Alabama all of which are created by statutes. The most commonly used ground is incompatibility. In practice, it is ordinarily not difficult to convince the court that incompatibility exists sufficient to dissolve the marriage relationship. A divorce based on this ground is commonly referred to as a "no fault" divorce. However, even though a finding of fault is not necessary to the court's decision to grant a divorce, it is often an important factor in such matters as child custody, alimony, and division of property.

Other grounds for which divorce in Alabama may be granted include: adultery, desertion, penitentiary imprisonment for certain prolonged periods, addiction to alcohol or drugs, mental incapacity, cruelty, or conditions which existed at the time of the marriage without the knowledge of the other party such as pregnancy and incurable physical problems.

Divorce by Default or Trial

Two common methods of obtaining a divorce are by default or trial. A default divorce occurs when the party against whom the divorce suit is brought fails to respond within the time limit set by law.

If the defendant files a response to the complaint, the case will be set for a trial. In this set of circumstances, unless the case is settled prior to its going to trial, there will be an actual trial before the judge with each party having the right to call witnesses.

In either case the judge must decide all of the pertinent issues, such as whether or not a divorce will be granted, custody of the children, amount of child support, alimony, and division of property. The difference is that if there is a default, the judge

will base the ruling on the oral or written testimony of only the party who filed the suit.

Non-Contested Divorces

The most common type divorce today is non-contested divorce. This means that both husband and wife agree to a divorce. In such a divorce, the parties usually enter into a written marital agreement defining their rights and duties and other issues of the divorce.

Marital Agreement and Mediation

This agreement should include all of the terms of the divorce, specifically matters relating to the children and to the property owned by the parties. A mediator working with the parties and their attorneys is one of the best ways to develop an agreement that is acceptable to both parties. The agreement is then presented to the judge, and if the judge approves it, a divorce is granted, and the marital agreement is made a part of the divorce decree. By mediating the issues and making their own agreement, parties avoid the necessity of a trial. For more information on mediation, review the brochure "Parents are Forever: Mediating Divorce and Post Divorce Issues" available at www.alabar.org or by calling (334) 269-0409, and talk with your lawyer.

Child Custody and Visitation Rights

In a divorce action, the court determines custody and visitation of the minor children of the parties. The determination is based on the discretion of the court guided by consideration of the following factors: best interest and welfare of the children, fault of the parties, character and conduct of each parent, age and sex of the children, past care and custody of the children, economic conditions of the parents, preference of the children, and agreement of the parents.

Future parenting of the children is very important, and you should give your attorney all relevant information that might affect with which party the children will live. The courts favor a natural parent having physical custody of the children, but it can award custody to other parties such as grandparents or even unrelated persons if it is in the best interest of the children.

The parent who does not have the children living with him or her (non-custodial parent) has the right to visit the children or have them visit him or her. Visitation rights are usually set by the judge

and are generally expressed in terms of reasonable times and places upon reasonable notice; but a divorce decree can also set out specific visitation privileges at certain times and places, i.e.: every other weekend, certain holidays, birthdays, etc. A mediated agreement can help you set a schedule. The court may also, on request, award visitation rights to the grandparents of the children.

Child Support

Once the determination is made that a divorce should be granted, the primary concern of the court becomes the well-being of the minor children of the parties. It is the responsibility of the court to determine the amount that the non-custodial parent is responsible to contribute for support of the minor children.

The court must use the Child Support Guidelines adopted by the Alabama Supreme Court in setting the amount of child support, unless the court specifically finds that following the Guidelines would be unjust and inappropriate. The court combines the income of the divorcing parents, determines from the Guidelines the applicable amount of child support for the number of children of the marriage based upon that income, adjusts this amount for work-related child care expenses and health insurance premiums, and then assigns a portion of that support amount to the non-custodial parent based on his/her percentage share of the combined income.

The most important factors to be considered by the court in making an award of child support are the needs of the children and the parent's ability to earn and pay his/her portion of the support. A parent's obligation to pay child support may be based on his or her demonstrated ability to earn a certain amount of money, not what that parent is choosing to earn.

Child support is paid until the child reaches the age of majority, but can be extended beyond that time under certain circumstances, such as during post majority education (college), or where the child is mentally or physically disabled.

Real And Personal Property Settlement

One of the functions of the court in a divorce proceeding is to make a division of the property owned by the parties. It is within the discretion of the court to order a transfer of property owned individually by either spouse or jointly-held property in order to "do equity" between the parties.

Legal Aspects of Divorce

The court has the power to order either party to give or convey his or her interests in stock, vehicles or real estate to the other spouse in exchange for the release of marital obligations.

Because the divorcing husband and wife are most familiar with their own property, the divorcing couple should work out a division of assets that is acceptable to both and incorporate the agreement into the divorce decree. While a court is not necessarily bound by an agreement for division, such property settlements are looked upon with favor. If no agreement is provided, the court will make the division based on the needs and interests of the parties as shown through testimony at trial. The division of property between the husband and wife and awarding of alimony and child support payments often result in adverse and unexpected tax consequences that may be avoided with proper planning.

Legal Separation and Separate Maintenance

Married couples in Alabama have two divorce related remedies that fall short of an absolute divorce:

1. Legal separation may be appropriate where one party wishes to live apart from his or her mate but does not desire to obtain an absolute divorce. Neither party can remarry while the decree is in effect. A court approving a petition for a legal separation may award temporary support, alimony, child support, custody of children, and make all other orders like those made when a final divorce is entered.

2. Separate maintenance differs from the concept of a legal separation in several respects. A party requesting separate maintenance need not prove that he or she has the grounds to obtain a final divorce and is purely within the discretion of the court. A petition for separate maintenance may be sought by the wife when a husband and wife are living apart and, through no fault of the wife, the husband refuses to support either the wife or his dependents. The amount of the award is based on the husband's income and the wife's needs for herself and her minor children. The fact that a wife earns a separate living will not bar her from asking a court to enter an order of separate maintenance. Mediation may also be useful for either of the above.

Attorney Fees

You should discuss the amount of the attorney's fees and who will pay them in your first discussion

with your attorney. Attorney's fees differ greatly within the state. Noncontested divorces generally cost less and the attorney's fees increase with the complexity of any contested divorce. Factors which affect the attorney's fee in a divorce include child custody, the size and complexity of any property settlement, tax advice, alimony settlement, fault of the parties, etc.

It should be noted that an attorney cannot ethically represent both the husband and wife in a divorce proceeding. Further, an attorney cannot ethically handle a domestic relations matter for a fee that is contingent upon securing a divorce or upon the amount of alimony, support or property settlement awarded.

Alimony

Alimony is based historically on the commonlaw right of a wife to be supported by her husband even after a divorce unless she forfeits it by her misconduct. But today, either a husband or wife may be entitled to alimony if the court determines he or she needs support and the other party is able to pay. There are two types of alimony: temporary and permanent. Temporary alimony is awarded to the needy party during the time after a divorce suit is filed while awaiting trial or final court decision. Permanent alimony is that which is awarded by the court in its final decree. Permanent alimony can either be "in gross" which is a fixed total amount and cannot be changed, or "periodic" which is an amount payable on a regular basis without a fixed total and which can be modified under some circumstances.

The award of alimony and its amount are completely discretionary with the court which considers such factors as the length of the marriage and the age, earning capacity, health, conduct, education, and income of each of the parties. Alimony is separate and apart from any property division between the parties. However, as a practical matter, there is often a relationship between the two issues, since some of the same factors are used as guides to property settlements.

NOTE: This brochure, based upon Alabama law, is issued to inform, not to advise. It is distributed to help you obtain your rights under the law and is published by:

The Alabama State Bar
415 Dexter Avenue
Montgomery, Alabama 36104
(334) 269-1515
August 2006



Published by

**ALABAMA
STATE BAR**