

FREQUENTLY ASKED QUESTIONS **ABOUT DIVORCE**

Sullivan Law & Associates

19800 MacArthur Boulevard, Suite 300, | Irvine, CA 92612 | (949) 590-8100

sullivan-law.com

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Q: I WANT TO FILE FOR DIVORCE; DOES IT MATTER WHO FILES FIRST?

A. There are a few advantages to filing first in a divorce action. The party filing first is able to set the tone of the divorce by starting it out as uncontested or contested. The party is also able to obtain immediate relief in the form of temporary restraining orders and protective orders should the facts warrant this type of relief.

Another advantage is that the party filing first is able to present their case first to the court at a hearing or trial as they are the petitioner and are entitled to go first in the presentation of evidence. This can get a party's story out to the court on the front end such that the other party is practicing defense against the petitioner's case.

Q: I WANT TO FILE FOR DIVORCE, BUT MY SPOUSE WILL NOT AGREE TO THE DIVORCE. DOES THIS PREVENT ME FROM GETTING A DIVORCE?

A. No. Just because your spouse does not agree to the divorce does not prevent you from getting a divorce. Only one party has to want to get divorced for the court to consider and grant a divorce. What this means is that you will likely have to file for divorce and then serve your spouse with the divorce petition through formal service of process. This forces your spouse to answer the lawsuit or face a default judgment for not answering.

Q: HOW LONG WILL IT TAKE ME TO GET DIVORCED?

A. Every state has waiting periods for divorce actions such that from the time the petition is filed the spouses have to wait a certain period of time until they can go into court and get a divorce. Just because the waiting period has expired does not mean that the spouses are divorced upon its expiration. The spouses have to have either agreed to the divorce and have submitted a final decree of divorce to the court for signature or conducted a final trial before the court where rulings were made by the judge on the terms of divorce.

During the waiting period, spouses are free to negotiate the terms of their divorce if it is in fact agreed to. If it is not agreed, the divorce will likely take longer than the waiting period to become finalized as the parties will have to conduct hearings and a final trial to obtain a divorce.

Q: I AM AFRAID MY SPOUSE WILL REACT HARSHLY TO THE DIVORCE, WHAT SHOULD I DO TO PREVENT THIS?

A. It is recommended that you not be present when the divorce papers are served on your spouse so as to prevent an altercation between you and your spouse. Coordinating with the process server who will serve the divorce papers is a good idea.

In addition, if you and your spouse are still living together, sleeping in separate rooms is recommended if your spouse refuses to move out. If things turn hostile or violent, your attorney will likely be able to ask the court for a restraining order or protective order ordering your spouse to move out of the marital residence. It is not recommended that you move out of the marital residence unless absolutely necessary as the one remaining in the house will likely obtain temporary exclusive use of it.

Q: CAN I HANDLE MY OWN DIVORCE BY FILING AND GOING TO COURT MYSELF?

A. It is not recommended that you do this as there are legal requirements that must be alleged in the divorce paperwork to entitle you to a divorce. In addition, when drafting a final decree of divorce, it is vital that the divorce terms are done correctly so that the court orders are enforceable later if someone is not following the orders of the court.

In addition, if you file for divorce, and your spouse hires an attorney, this will put you at a serious disadvantage when it comes to going to court and effectively presenting your case. You will need an attorney who knows the procedural and evidentiary requirements of the court to properly present your case to the judge.

Q: WILL I GET TO KEEP MY PROPERTY ONCE THE DIVORCE IS OVER?

A. The property that the spouses accumulate during the marriage is marital property and is subject to division by the court. Depending on what state you are in, the court can divide this in a variety of ways, with a 50/50 division usually being the starting point for the division. Certain factors can affect an unequal division of assets such as the spouses earning power, age, health, and the spouse obtaining custody of the children.

Certain property is a spouse's separate property that is not subject to division by the court. This includes property acquired by a spouse before the marriage, property acquired by gift, and property acquired by inheritance. However, property such as interest or dividends acquired from this type of separate property is subject to division by the court.

Q: WHO WILL GET CUSTODY OF THE CHILDREN UPON FINALIZATION OF THE DIVORCE CASE?

A. This will initially depend on whether your divorce is agreed or contested. Usually, the parties have agreed to who will obtain the right to determine the children's residence once they are divorced. The party without custody will then obtain visitation rights to the children which can occur in a variety of ways determined by the parties.

If the case is contested, many factors can affect how the court will determine custody, including history of involvement with the children, background of the spouses, work history, place of residence, desires and needs of the children, and the children's wishes if they are old enough to express them. Custody battles can tax the parties' time, energy, and resources, so litigating custody should only be done after careful consideration of the risks and advantages.

Q: AM I ENTITLED TO ALIMONY?

This can vary depending on your state, but a spouse who was dependent upon the other spouse's income during the marriage and was married to that spouse for a significant length of time may be entitled to alimony. The extent of the disparity in income of the spouses, the expenses of both spouses upon dissolution of the marriage, and the particular length of the marriage can affect the amount and duration of the alimony award.

Alimony is designed to help a spouse to either pay for necessary expenses post-divorce or help maintain their lifestyle during the marriage depending on which state you are in. There are limits on the amount of money a court can award to a former spouse for alimony purposes depending on the available income of the other spouse. Also, there is usually a termination date for the alimony award as the receiving spouse is expected to eventually become self-supporting after the divorce.

Q: HOW DOES THE COURT DETERMINE IF I AM ENTITLED TO CHILD SUPPORT?

A. In most cases, a parent who obtains custody of the children will be given an award of child support to help pay for expenses incurred in raising and providing for the children between the parties. The amount of this award of child support can vary depending on the income of the paying parent and the amount of children between the parties. Some states have guideline amounts and percentages to pay based on these income amounts.

Child support usually last until the children turn eighteen years of age or graduates from high school. It can last longer in the case of a disabled child or if the parties agree to post-graduation expenses like college expenses for example.

Q: I AM AFRAID MY SPOUSE WILL MOVE OUT AND TAKE THE CHILDREN. IS THERE ANYTHING I CAN DO TO PREVENT THIS?

A. Before a divorce is filed, each spouse is entitled to the same amount of rights to the children. This means that either of them can have possession of the children at any time. Once a divorce is filed, the spouses are typically under standing orders of the court to not hide the children from the other spouse. This is to prevent a spouse from denying the other spouse possession of the children.

If your spouse has taken the children, an attorney can file for divorce on your behalf and attempt to obtain an order from the court commanding their return to you. If this is not successful, your attorney can set a hearing on the custody issues and have your spouse served requiring him or her to show up to the hearing for the court to decide who obtains temporary custody of the children.

Q: CAN MY SPOUSE DRAIN BANK ACCOUNTS OR CANCEL MY INSURANCE IF WE ARE GETTING DIVORCED?

A. Usually, the court will have orders preventing this once a divorce is filed, including the standing orders of the court that specifically prohibit a party from depleting funds in a bank account, retirement account, or health savings account for example. In addition, these standing orders will prevent a spouse from canceling insurance coverage such as health and life insurance while the divorce is pending.

A spouse may attempt to drain these types of accounts or cancel these types of coverage before a divorce is filed to get around the standing orders of the court that apply once a divorce is filed, but the court is not going to be pleased with a spouse who does this in an attempt to circumvent the clear intentions of the court's orders.

Q: MY EX-SPOUSE IS NOT PAYING COURT-ORDERED CHILD SUPPORT, IS THERE ANYTHING I CAN DO?

A. If your ex-spouse is not following a court order to pay child support, he or she can be held in contempt of court by filing a motion for enforcement or motion for contempt against them in the same court where your divorce decree was granted. The remedies for contempt of court include jail time, fines, and attorney's fees.

Your attorney will want to list each month that child support was not paid in the motion and request the remedies listed above. Having a payment record from the local child support registry can aid your case because this is an official government-generated record of payments made to you in the past.

Q: MY EX-SPOUSE IS DENYING ME COURT-ORDERED POSSESSION OF THE CHILDREN. CAN I STOP PAYING CHILD SUPPORT?

A. No, the matters of child support and visitation are separate issues and not tied to one another in family law proceedings. Thus, if you are paying child support but not receiving visitation, your remedy is to file a motion for contempt in the appropriate court and seek to have your ex-spouse held in contempt for not following the court orders regarding visitation.

If you were to stop paying child support because you were not receiving visitation, then you would also be in contempt of court for not following a court order. By continuing to follow your duties and obligations under the prior order of the court, you can come to court with clean hands when seeking to hold the other party in contempt for not following the court orders.

Q: MY ALIMONY PAYMENTS ARE GOING TO END SOON. IS THERE A WAY I CAN EXTEND THEM OR INCREASE THEM?

A. Typically no, you cannot increase or extend alimony payments once they have been court ordered in a divorce proceeding. However, an ex-spouse who has been paying alimony can seek to decrease or terminate the payments due to a change in circumstance such as job loss or disability.

This is not to say that alimony payments will end in the future as the court might have ordered them payable for an indefinite period, as in cases of lengthy marriages or a spouse having a disability. But, the court will outline the terms of the alimony at the time of the divorce being finalized.

Q: MY SPOUSE AND I AGREE TO MOST TERMS OF THE DIVORCE. CAN WE USE THE SAME ATTORNEY FOR THE DIVORCE?

A. No, only one spouse can hire an attorney to handle their divorce as an attorney cannot ethically represent two adverse parties in a case. With this said, the spouses can work together in coming up with an agreement that one of the spouse's attorney will put into an agreed final decree of divorce.

In addition, the other spouse can hire their own attorney to review the final decree and render advice to them before they sign the final paperwork to become divorce. This is advisable so that the other spouse not only understands the terms of the divorce as written in the decree, but cannot come back later and say they did not understand what they signed and ask for a new trial.

Q: I JUST MOVED TO THIS STATE. CAN I GET A DIVORCE?

A. Usually you have to satisfy residency requirements in your particular state to be entitled to a divorce. This means you have to have resided in your state for a certain period of time and in your county for a specified period. If your spouse has resided in their state for the requisite period of time, then they can file for divorce there and you and your spouse can attempt to reach an agreement on the terms such that you will not be required to show up in their state to prosecute the divorce.

Q: DO I HAVE TO REPORT ON MY TAX RETURN THE CHILD SUPPORT AND ALIMONY PAYMENTS THAT I RECEIVE FROM MY EX-SPOUSE?

A. Child support payments are not taxable income to the parent receiving them, nor are they deductible by the parent who pays. Similarly, alimony payments pursuant to a settlement agreement or divorce judgment executed after 2018 are not taxable to the recipient or deductible by the payor. In contrast, alimony payments made pursuant to a settlement agreement or divorce judgment executed before 2019 are taxable income to the recipient and deductible by the payor.

Q: MY SPOUSE HAS A HISTORY OF ALCOHOL AND DRUG ABUSE. WHAT CAN I DO TO PROTECT MY CHILDREN FROM THIS?

A. In a family law proceeding, substance abuse is relevant to the best interests of the children in determining custody and visitation. If you know your spouse has a history of substance abuse, you will want to bring it to the attention of the court so that appropriate orders can be made, including orders that your spouse (1) abstain from using these substances while in possession of the children and (2) receive limited visitation with the children.

The court can order alcohol assessments and drug testing to determine the extent of the substance abuse by your spouse. These tests can include urine, blood, hair, and nail tests. The type of test ordered can reveal the extent of the substance use including which substances have been used, how long ago, and how much. Frequent testing can also be ordered in the future to ensure your spouse is not using while in possession of the children.

Q: I FEEL THAT MY SPOUSE OR SIGNIFICANT OTHER IS MENTALLY UNSTABLE. IS THERE ANYTHING I CAN DO ABOUT IT?

A. The court in a family law case can order psychological and psychiatric assessments if you feel that your spouse or significant other is mentally unstable. Proper grounds will have to be established to be entitled to seek an order for these examinations of that other party. This can include testimony from you, friends, and family, medical records showing prior diagnosis or treatment, and police reports showing incidents involving the other party.

The examinations the court orders can act to show possible reasons for the other party's unstable conduct including possible diagnoses and suggested treatment. The court can recommend these treatments to the other party and follow up to see if the other party is following the recommendations of the psychologist or psychiatrist. The results of the mental examinations can affect the court-ordered visitation a party receives with their children and the types of conduct prohibited by the unstable party against their spouse or significant other.

Q: CAN THE COURT EVALUATE THE TWO HOMES THAT MY SPOUSE AND I HAVE AND DECIDE WHICH ONE IS BETTER?

A. Yes, court-ordered evaluations of the parties and their homes are called social studies or custody evaluations. These can be lengthy evaluations of each party, their home, friends, family, and the children. The court can choose a specific evaluator to conduct the study and they will be heavily involved with the parties and the children for the duration of the study.

The court can also order the payment of fees by the parties for the study, and the cost can be significant. The study can provide much-needed information and guidance to the court on who should be given primary custody of the children in the evaluator's opinion. This can help sway the court in your direction at a final hearing in your case.

Q: CAN MY SPOUSE REFUSE TO SIGN THE FINAL DECREE OF DIVORCE?

A. This depends on whether the divorce is agreed or contested. For an agreed divorce, your spouse does not have to sign the final decree if they don't agree to it. This would result in you and your spouse going to court to conduct a final trial to decide the issues between you. The divorce essentially goes from being agreed to being contested.

If your divorce is contested and you already conducted a final trial, entering a final decree of divorce with the court is merely a ministerial act that represents the order of the court from trial. If your spouse refuses to sign the decree memorializing this order, then your attorney would have to file a motion to enter the final decree of divorce with the court and present the decree to the judge for signature. At this hearing, your spouse would be able to contest the written form of the order and why it doesn't represent the ruling of the court from trial. If your spouse is deemed to have been unreasonable in contesting the final decree entry, then the judge can order attorneys' fees against them.

Q: MY SPOUSE FILED FOR DIVORCE AND ASKED FOR A TEMPORARY ORDERS HEARING. WHAT SHOULD I EXPECT AT THIS HEARING?

A. A temporary orders hearing is done for the purpose of making temporary orders between the parties on custody, visitation, child support, health insurance, use of property, payment of expenses, and attorney's fees during the pendency of the divorce. It is designed to get the parties through the divorce while it is pending and before they can conduct a final trial.

Usually the temporary orders hearing is short in nature with each party having a limited amount of time to present their case. In this mini-trial, each party shows why they should have temporary custody based on factors like responsibility in raising the children and fitness of the parents. Also, financial decisions are made during this hearing including who will pay what expenses of the parties and whether one party will have to pay the other party child support or temporary spousal support. Use of property can also be decided such as who can live in the marital residence and use certain vehicles.

Q: SHOULD I CHANGE MY NAME WHEN I BECOME DIVORCED FROM MY SPOUSE, OR SHOULD I WAIT TO HAVE IT DONE?

A. It is usually easier to ask for a name change during the divorce as it can simply be included in the divorce decree. If you wait, then you will have to file a separate petition with the court asking for a name change and show why you are entitled to it. This is not to say that you won't have to show the court that you are entitled to the name change during the divorce, but having your name changed in the divorce prevents you from having to come back later and file a separate lawsuit for it.

Q: WHAT HAPPENS WITH THE HOUSE IN A DIVORCE?

A. This will depend on if you and your spouse agree to what ultimately happens to the house upon divorce. The simple way to deal with this is to award one spouse the house in the divorce while giving the other spouse their fair share of the equity from the house, whether through a cash payment or an additional share of another asset in the marital estate. Equity amounts can be determined by an appraiser calculating the fair market value of the house and then deducting any outstanding mortgages.

If spouses cannot agree on who keeps the house, or neither of them can afford it on their own, the usual alternative is to sell the house and split the proceeds. This method will dispense with the necessity of assigning a fair market value to the house through an appraiser as a buyer will determine this value. A spouse can also be awarded the house post-divorce but given a certain amount of time to refinance the house. Otherwise, it will be sold.

Q: HOW DO I GET A FAIR SHARE OF MY SPOUSE'S RETIREMENT UPON DIVORCE?

A. Retirement accounts can be divided in a divorce decree such that a payee spouse will receive either a certain dollar figure from the account or a percentage share of the account. A spouse will be entitled to a fair share of the amounts accrued in the account since the parties were married until they became divorced.

Depending on the type of retirement account your spouse has, a Qualified Domestic Relations Order (QDRO) might be necessary to divide it. These are separate orders from the divorce decree that direct the retirement account plan administrator to divide the account and pay the payee spouse their share as directed in the divorce decree. QDROs are helpful in that they help avoid paying income taxes for the payee spouse as long as the amount taken is put into a new retirement account by the payee spouse.

Q: CAN MY SPOUSE BE ORDERED TO PROVIDE FOR COLLEGE EXPENSES FOR MY CHILDREN?

A. This depends on whether your spouse agreed in the divorce decree to the payment of college expenses like tuition for the children. If so, then the court can enforce this order against your spouse in the future should they not pay. However, if your spouse did not agree to the payment of college expenses in the divorce decree, such as when a final trial was held, then the court likely cannot order your spouse to pay college expenses. This is because the court usually does not have the power or jurisdiction to order child support past the age of eighteen.

Q: ARE THERE ANY EXCEPTIONS TO THE PROHIBITION AGAINST POST-MAJORITY SUPPORT?

A. An exception to this post-majority support rule is for an adult disabled child who requires support past the age of eighteen. If you can show that your child had a disability before the age of eighteen that will require personal care and supervision past the age of eighteen, then the court has the power to order your ex-spouse to pay support after the disabled child reaches the age of majority.

Showing whether your child is in fact an adult disabled child requires testimony from doctors, teachers, and counselors along with medical and school records supporting the disability's existence. The amount of support that has to be paid can include not only a monthly figure but also medical expenses and health insurance.

Q: WHAT IF MY SPOUSE SPENT OR WASTED A LOT OF OUR PROPERTY DURING THE MARRIAGE?

A. If your spouse unnecessarily spent funds from the marriage such that a significant portion to the marital estate is gone, then they may be liable for fraud or waste of marital assets in the eyes of the court. This could be shown by your spouse transferring sizable funds to family members or friends, incurring debts for unneeded expenses, or gambling funds until they were gone.

Upon showing this to the court, the judge might decide to reconstitute the marital estate such that the amount of money wasted by the spouse is assigned to them during property division. This makes it so that more of the estate has to go to the non-offending spouse to make up for the fraudulent or wasteful amount assigned to the offending spouse. Depending on the amount of fraud or waste, a significant additional portion of the estate can go to the non-offending spouse upon divorce.