

CHAPTER EIGHT

Separation, Annulment, and Divorce

A LITTLE LESS THAN HALF OF ALL MARRIAGES in the United States end in divorce. The current divorce rate is down a few percentage points from a peak in 1981, but the current divorce rate is almost double what it was in the 1950s.

As discussed in chapter 3, the state sets the requirements for creating a marriage. The state also sets the requirements for ending a marriage, but the regulations are more complicated since there are more issues to sort out when a marriage ends than when it begins. (Perhaps if before marriage, prospective husbands and wives spent more time exploring issues they will have to deal with during marriage, the divorce rate would be lower.)

Separation and Separate Maintenance

Separation, as the term implies, means the wife and husband are living apart. The wife and husband generally are not required to separate in order to obtain a divorce, although for psychological reasons, it usually works out that way. In some states, certain grounds for divorce may require that the parties live apart for a specified period of time, but in most states there are grounds for divorce that do not require a period of separation.

A **legal separation** also means the husband and wife are living apart, but a legal separation has the added element that the arrangement is ordered by the

court or agreed to by the parties in a written agreement. The fact that the separation is part of a court order or written agreement makes it a "legal separation"

The main reason for obtaining a legal separation instead of an informal separation is to make more certain the rights and responsibilities of the parties during the period of separation. If one party--usually the wife--will be receiving financial support during the period of separation, the court order or written agreement will make support an enforceable right.

Payments of support during a period of separation sometimes are called **temporary maintenance** or **alimony pendente lite**. If the person obliged to make such payments fails to do so, a court could order the payments and take steps to enforce payments.

Written agreements regarding support are necessary if the person making the payments wishes to claim a tax deduction for paying support to the spouse. If the person paying support obtains a deduction for the amount paid, then the same amount will be treated as taxable income to the recipient. Without a written agreement or court order, the payments of support will not be deductible to the payer, nor would they be treated as income to the recipient. (For more discussion of the tax aspects of one spouse making support payments to the other, [see chapter 10 on "Alimony/Maintenance"](#)).

If the husband and wife have children, the separation agreement or court order can specify arrangements regarding custody or visitation with the children, and those arrangements also can be enforced by the court.

A separation (or legal separation) is not the same as a divorce. Persons who are separated may not remarry. They must wait until a divorce is final before being able to remarry. The terms of a separation agreement usually can be modified by the court or by the parties themselves during the period of separation.

Courts, or the husband and wife by agreement, also can modify the provisions of support, custody and visitation when the divorce is finalized.

If the final terms of a divorce are likely to be contested, the parties should be cautious about what they accept as a voluntary, temporary arrangement during separation. Although courts usually have the power to depart from the terms of a separation agreement when entering a final order of divorce, judges may look at the *status quo* and think, "If this arrangement was workable during separation, it should work after divorce too." If someone is agreeing to terms during a period of separation that they would not want to live with after the divorce, they should make abundantly clear in the separation agreement that they are not binding themselves to the same conditions after the divorce is final.

An informal or legal separation does not mean the husband and wife must divorce. They are free to reconcile at any time and resume living together. For some couples, a separation serves as a cooling off period--a method of relieving immediate pressure while they sort out what they want to do with their lives.

If husband and wife decide to live together again and there is a court action pending, the action should be **dismissed** (at least after the couple is reasonably sure they will stay together). "Dismissed" means the case is taken off the list of active cases before the court. If the couple does not dismiss their pending case, the court usually will dismiss the case automatically if nothing has been done on the case after a certain period of time (such as six months to one year). If the husband or wife later decides to divorce, the case can be refiled.

Annulment

An **annulment** is a court ruling that a supposed marriage was never valid. One of the most common grounds for annulment is fraud. For example, one person may have not disclosed to the other a prior divorce, a criminal record, or an unwillingness to have sexual intercourse. An annulment also may be granted may if one of the parties to the "marriage" was still married to someone else at the time of the marriage that is at issue. Other bases for annulments include marriage of an underage person, marriage to too close a blood relative, and marriage by a person under duress as the time of marriage.

Annulments are uncommon compared to divorces because divorces are easy to obtain and the bases for an annulment are narrower than the bases for a divorce. One party may prefer an annulment, however, in order to avoid some of the financial obligations that a court might impose in a divorce. For more discussion of legal annulments, [see chapter 3](#).

Aside from annulments granted by a court, some parties to a marriage also may seek a religious annulment of a marriage. A few religions will not permit a member of the faith to enter into a marriage if the member already had one valid marriage. In that circumstance, a person who was divorced would not be permitted to remarry since the divorce implies that a valid marriage existed. However, if the member was able to obtain a declaration by religious court or religious official that the first marriage was not valid, then the member may be free to remarry.

If a person seeking a divorce (or legal annulment) is concerned about the ability to remarry within his or her faith, that person should seek an agreement or court order that the former spouse will cooperate in obtaining a religious annulment or divorce.

Divorce

A **divorce**--referred to in some states as a **dissolution of marriage**--is a decree by a court that a valid marriage no longer exists. A divorce leaves both parties free to remarry. It usually provides for division of property and makes arrangements for child custody and support.

Although divorces may be emotionally contentious, most divorces (probably more than 95 percent) do not end up in a contested trial. Usually the parties negotiate and settle such things as division of property, spousal support, and child custody between themselves, often with an attorney's help. Sometimes parties reach an agreement by mediation, with a trained mediator who tries to

help husband and wife identify and accommodate common interests. The parties then present their negotiated or mediated agreement to a judge. Approval is virtually automatic if the agreement appears to meet a minimal standard of fairness.

If parties are unable to agree about property, support, and child custody, they may ask the court to decide one or more of those issues. Chapters 9-12 will discuss how courts decide those issues.

A threshold requirement for obtaining a divorce in most states is **residency** or **domicile** of one or both parties who are to be divorced. "Residency" refers to the state in which a person lives; "domicile" refers to the state that the person regards as "home." Usually the state of a person's residency and domicile are the same, but sometimes they can be different. For example, a couple may reside four months each year in the state of their "summer home", but regard another state where they spend the rest of the year as their true home (and that state would be the state of their domicile).

Residency (or domicile) requirements vary. A few states have no residency requirement. That means a person can arrive in a state and seek a divorce on the same day. Residency requirements of other states range from six weeks to one year; six months is the most common time period. In states with a residency requirement, a party must have lived in the state for the specified period before a divorce can be granted.

The party seeking a divorce must state a ground for divorce in the papers filed with the court. The grounds may be based on **no-fault** or **fault**, depending

on the state. All states now offer no-fault divorces; approximately thirty-two states also offer fault-based grounds as an additional option. (See chart on pages 9-10.)

A no-fault divorce is a divorce in which neither the wife nor husband blames the other for breakdown of the marriage. There are no accusations necessary to obtain a divorce--no need to prove "guilt" or "fault". Common bases for a no-fault divorce are "irreconcilable differences," "irretrievable breakdown," or "incompatibility." As those terms imply, the marriage is considered to be over, but the court and the legal documents do not try to assign blame.

Another common basis for a no-fault divorce is that the parties have lived separately for a certain period of time, such as for six months or a year, with the intent that the separation be permanent. Over the last thirty-five years, "no-fault" has replaced "fault" as the dominant basis for obtaining a divorce. No-fault divorces are considered a more humane and realistic way to end a marriage. Husbands and wives who are divorcing usually are suffering enough without adding more fuel to the emotional fires by trying to prove who-did-what-to-whom. The laws of no-fault divorce recognize that human relationships are complex and that it is difficult to prove that a marriage broke down solely because of what one person did.

Some critics of no-fault divorces are concerned that an economically dependent spouse may not be adequately protected when it is so easy for the other spouse to obtain a divorce. The critics argue that no-fault divorces result in

lower awards of property and support to economically dependent spouses than fault-based divorces. Proof of cause-and-effect on this issue is far from certain.

In the approximately thirty-two states that allow divorces based on fault (in addition to no-fault divorces), the grounds for fault-based divorces vary.

Here is the laundry list (one might say dirty laundry list) of grounds: (1) adultery, (2) physical cruelty, (3) mental cruelty, (4) attempted murder, (5) desertion, (6) habitual drunkenness, (7) use of addictive drugs, (8) insanity, (9) impotency (usually unknown to the partner at the time of marriage), and (10) infection of one's spouse with venereal disease.

Husbands or wives in the mood for revenge probably could come up with a multi-count complaint. Some spouses want the emotional release of proving fault by their mates. But courts are not a very good forum for such personal issues, and the accuser is usually less satisfied than he or she expected to be. The degree to which “fault” affects division of property, support, and custody will be discussed in the chapters on those subjects.

GROUNDS FOR DIVORCE

Chart 3C *Grounds for Divorce and Residency Requirements*

STATE	No Fault Sole Ground	No Fault Added to Traditional	Incompatibility	Living Separate and Apart	Judicial Separation	Durational Requirements
Alabama		X	x	2 years	x	6 months
Alaska	x		x	2 years	x	6 months
Arizona	x	x ¹			x	90 days
Arkansas		X		18 mos.	x	60 days
California	x				x	6 months
Colorado	x				x	90 days
Connecticut		X		18 mos.	x	1 year
Delaware		X	x	6 mos.		6 months
District of Columbia	x			1 year	x	6 months
Florida	x					6 months
Georgia		X				6 months
Hawaii	x			2 years	x	6 months
Idaho		X			x	6 weeks
Illinois		X		2 years	x	90 days
Indiana			x		x	60 days
Iowa	x				x	1 year
Kansas			x		x	60 days
Kentucky	x			60 days	x	180 days
Louisiana		x ¹		6 months ²	x	6 months
Maine		X			x	6 months
Maryland		X		2 years		1 year
Massachusetts		X			x	None
Michigan	x				x	6 months
Minnesota	x				x	180 days
Mississippi		X				6 months
Missouri		X		1-2 years	x	90 days
Montana	x		x	180 days	x	90 days

¹ Covenant marriage statutes establish specific grounds for divorce for covenant marriages.

² Two years for covenant marriages.

STATE	No Fault Sole Ground	No Fault Added to Traditional	Incompatibility	Living Separate and Apart	Judicial Separation	Durational Requirements
Nebraska	x				x	1 year
Nevada			x	1 year	x	6 weeks
New Hampshire		X		2 years		1 year
New Jersey		X		18 mos.		1 year
New Mexico		X	x		x	6 months
New York		X		1 year	x	1 year
North Carolina		X		1 year	x	6 months
North Dakota		X			x	6 months
Ohio		X	x	1 year		6 months
Oklahoma			x		x	10/90 days
Oregon	X				x	6 months
Pennsylvania		X		2 years		6 months
Rhode Island		X		3 years	x	1 year
South Carolina		X		1 year	x	3 months (both residents)
South Dakota		X			x	None
Tennessee		X		2 years	x	6 months
Texas		X		3 years		6 months
Utah		X		3 years	x	90 days
Vermont		X		6 months		6 months
Virginia		X		1 year	x	6 months
Washington	X					1 year
West Virginia		X		1 year	x	1 year
Wisconsin	X				x	6 months
Wyoming		X	x		x	60 days

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Resumption of Unmarried Name

A woman who divorces may resume her unmarried name or keep her married name as she wishes. She can even change her name to something completely new, as long as she is not doing so for fraudulent purposes. Court proceedings generally are not necessary in order to change a name.

If a woman is changing her name, she should notify government agencies and private companies that have records of her name. Examples of places to notify: Internal Revenue Service, Social Security Administration, Passport Agency (within U.S. State Department), Post Office, state tax agencies, driver's license bureau, voter registration bureau, professional licensing agencies, professional societies, unions, mortgage companies, landlord, banks, charge card companies, telephone companies, other utilities, magazines and newspapers to which she subscribes, doctors and dentists, and schools and colleges that she attended or that her children attend.

It can be useful to have the divorce decree state that the wife will resume her unmarried name, but generally it is not necessary to do so in order for a woman to make a valid name change.

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