

# 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:*

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# Divorce

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Divorce can be **very** difficult. But learning about the legal process and talking to a lawyer can make it easier.

## How to Start a Divorce

To get a divorce, one of the spouses has to file papers at court. The papers must say the reason (or *grounds*) for the divorce.

## Reasons for a divorce

Most people say the reason for the divorce is *incompatibility*. That means the couple cannot find a way to get along. And they don't think they will get along in the future. A divorce because of incompatibility is also called a "no fault" divorce.

There are other reasons for a divorce. If you give one of the following reasons, the court may make different orders for custody, alimony and property division:

- Adultery,
- Desertion,
- Being in prison for a long period of time,
- Addiction to alcohol or drugs,
- Mental incapacity,
- Cruelty, or
- Things you did not know about when you got married, such as incurable illness.

## Separation instead of divorce

Some spouses may not want to divorce, but they do not want to stay together any more. A legal separation can be a good option.

Legally separated spouses can ask the court for alimony, child support, custody, and other orders. But they **cannot** remarry other people.

*Note:* If a husband decides to live away from the wife, but does not support her or the children, the wife can ask for a separate maintenance order (even if the wife earns her own living).

## Do you need a lawyer?

It's a good idea to talk to a lawyer. A divorce lawyer can explain your options and protect your interests.

When you find a lawyer you feel comfortable with, talk about the lawyer's fees and what the payment schedule will be. Keep in mind that the more things you and your spouse can agree on, the less expensive your divorce will be.

Some of the things that you may need legal help with include:

- Grounds (fault)
- Child custody
- Property division
- Tax advice
- Alimony

**TIP:** Some lawyers let you handle some things on your own, and they will handle the more difficult parts of the divorce. This is called "limited scope representation," and it can save you money.

**Warning!** Do not use a lawyer who will:

- Represent you *and* your spouse, or
- Get paid based on the amount of alimony, support or other orders.

## Going to Court

To get divorced, you *have to* go to court. But how often you have to go and how long your divorce takes depends on your situation.

Here are some examples:

- Default Divorce:** If you ask the court for a divorce, and your spouse does not respond by the deadline, you will get a default divorce. This means the court will probably make divorce orders based on the information you provided in your court papers.
- Court Trial:** If you and your spouse do not agree and you want to present your side to the court, you can have a trial. Each of you will be able to present evidence and witnesses. And the court will decide.
- Non-contested** This is the most common kind of divorce. It is when the spouses are able to make a *Marital Agreement*. They put their agreement in writing, and a judge has to approve it. Many spouses use an independent mediator to help make an agreement.

## Mediation can be easier, faster, and less expensive than a trial

If you and the other spouse want to make an agreement, but you need help, you can try mediation. This is when an independent person guides you and your spouse to make an agreement that is fair for both of you.

A mediator can help you write your own *Marital Agreement*. Your agreement can say what you and your spouse agree to for:

- Child custody
- Alimony
- Support

If the agreement is fair, the court will probably make the divorce orders based on your marital agreement.

To learn more about mediation:

- Read [Parents are Forever: Mediating Divorce and Post Divorce Issues](http://www.alabar.org) at [www.alabar.org](http://www.alabar.org),
- Call the Alabama Dispute Resolution Center: **(334) 269-0409**, or
- Tell your lawyer you want to try mediation.

## Child Custody, Visitation & Child Support

### Child Custody

If you and your spouse have children (under 19), the court will make custody and visitation orders. The court's custody order says where the children will live most of the time. The other parent usually gets visitation rights.

The court's custody order will be based on what is best for *the children*. The court will consider many things, including:

- The children's age and gender,
- Where the children have lived and who has cared for them in the past,
- The parents' situation after the divorce,
- The parents' financial and work situation,
- What the children want,
- The reason (grounds) for the divorce,
- Each parent's behavior, and
- If the parents have made an agreement about custody and visitation.

*Note:* In some cases, the court may decide it's best for the children to give custody to a grandparent or other person.

### Visitation

Most court orders ask the parents to work out a reasonable visitation schedule. But if there is a high level of conflict, the court may order a specific visitation schedule.

The court may also give visitation to the children's grandparents, if they ask for it.

### Child Support

If the spouses have children who are under 19, the court will make a child support order. The child support order will be based on what the children need.

The court will also consider:

- The parents' income and ability to earn income,
- The ages and number of children,
- Which parent the children will live with most of the time,
- Child care expenses related to work, and
- The cost of health insurance.

In most cases, the court uses a formula, called *Guidelines*, to calculate which parent should pay support and how much.

Child support usually ends when a child turns 19. But sometimes it can last longer, for example if the child needs support to go to college or if the child has a mental or physical disability.

## Alimony (Spousal Support)

If you earn more money than your spouse, you may have to pay alimony. If you earn less, you may be able to get alimony.

Until the court decides a divorce, alimony is *temporary*. After a divorce, it's *permanent*. Permanent alimony can be:

- **In gross** – a certain amount that *cannot* be changed, or
- **Periodic** – an amount that is paid regularly (usually monthly) that *can* be changed in certain situations.

To decide how much alimony should be paid, the court will look at many things, including:

- How long you were married
- Spouses' ages, health, and conduct
- Spouses' incomes, education, and ability to earn money

## Property

The court must also make property orders. A property order divides the spouses' property, such as cars, house, furniture, etc.

Sometimes the court orders one spouse to transfer property to the other to make it fair for both spouses. The court may do this, even if one spouse owns the property separately.

**Important!** Property and support orders may have tax consequences. Talk to your lawyer or an accountant to understand how the orders will affect you.

**TIP:** It's best if the spouses can make their own agreement. If the court believes the agreement is fair, the court will likely base the property order on the agreement. If the spouses cannot make an agreement, the court will decide for them.

*Legal Information – Not Legal Advice  
To learn about your rights and get advice, talk to a lawyer.*

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## **Alabama Access to Justice Commission**

### **RESOLUTION**

WHEREAS, last year one in every four of the 821,268 Alabamians living in poverty experienced legal problems, with the majority of these civil problems being consumer issues (creditor harassment, utility non-payment, bankruptcy issues), health issues (Medicaid, government insurance, nursing home), family law issues (divorce, child support/custody, abuse), employment issues (unemployment benefits, pension, lost job), and housing issues (unsatisfactory repairs, foreclosure, eviction, poor living conditions); and

WHEREAS each year the low-income citizens of Alabama lack access to legal assistance for their legal problems that are often critical to their safety and independence, forcing them to resolve complex legal problems on their own; and

WHEREAS, the need for legal aid in Alabama is dire, since unlike in the criminal defense system, funding for low-income Alabamians who need civil legal assistance has not yet been met, with the consequences being a lack of access to justice which is devastating for the poor and which weakens our democratic society as a whole; and

WHEREAS, there are fewer than 60 paid legal aid lawyers to serve the more than 422,119 low-income households in the State of Alabama; and

WHEREAS, although 3,630 members of Alabama's legal community are enrolled in a pro bono program and donated over 11,000 hours in free legal services last year and made generous financial contributions to legal aid organizations in our state, a huge unmet need for legal assistance remains for disadvantaged Alabamians; and

WHEREAS, sponsored by the Alabama State Bar and its Pro Bono Celebration Task Force, with support from local bar associations statewide, Pro Bono Week 2013, from October 20th to 26th, 2013, will educate the public about the extensive work Alabama lawyers are doing donating their time to improve the lives of vulnerable members of our community, and will encourage more individuals in the legal community to get involved in pro bono work and financially support the legal aid system; and

WHEREAS, Pro Bono Week 2013 will feature legal aid clinics throughout the State, assisting Alabamians who greatly need legal assistance but cannot afford to pay for that help, and will also feature service projects throughout the State of Alabama helping lawyers and law students make volunteer connections with legal aid organizations serving Alabamians:

NOW, THEREFORE, BE IT RESOLVED THAT the undersigned, in their representative capacities, do hereby commend the State Bar for the work of its members in providing legal services to the most vulnerable in our society and does hereby

recognize October 20-26, 2013 as PRO BONO WEEK, and further urges all Alabamians to recognize the contributions of our legal community helping those most in need.

DATED this the \_\_\_\_\_ day of \_\_\_\_\_, 2013.

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Henry Callaway, Chair  
Alabama Access to Justice Commission

**Proposed Change to Alabama Rule of Civil Procedure 55(e)  
(change marked)**

**Default.**

(a) *Entry.* When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default. The clerk's entry of default may be made electronically.

(b) *Judgment.* Judgment by default may be entered as follows:

(1) BY THE CLERK. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and if the defendant is not a minor or incompetent person.

(2) BY THE COURT. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered (A) against a minor, or (B) against an incompetent person, unless the minor or the incompetent person is represented in the action by a general guardian or other representative as provided in Rule 17(c) who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least three (3) days prior to the hearing on such application, provided, however, that judgment by default may be entered by the court on the day the case is set for trial without such three (3) days notice. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury pursuant to the provisions of Rule 38.

(c) *Setting aside default.* In its discretion, the court may set aside an entry of default at any time before judgment. The court may on its own motion set aside a judgment by default within thirty (30) days after the entry of the judgment.

The court may also set aside a judgment by default on the motion of a party filed not later than thirty (30) days after the entry of the judgment.

(d) *Plaintiffs, counterclaimants, cross-claimants.* The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) *Proof required despite default* ~~*in certain cases.*~~ No judgment by default shall be entered ~~against minors, incompetents, or parties to an action for divorce or annulment of marriage~~ unless the claimant establishes the party's claim or right to relief by evidence.

(dc) *District Court Rule.* Rule 55 applies in the district courts, except that (1) the reference to a jury in Rule 55(b)(2) is deleted; (2) the time period of thirty (30) days in Rule 55(c) is reduced to fourteen (14) days in all cases except for unlawful-detainer actions subject to appeal under §6-6-350, Ala. Code 1975, and actions for eviction as defined in §35-9A-141(5), Ala. Code 1975, in which actions the thirty-(30-)day time period is reduced to seven (7) calendar days; ~~(3) the provisions dealing with an action for divorce or annulment of marriage at Rule 55(e) are deleted; and (4 and (3)~~ a party shall not be deemed in default if the party has served an appearance in the form of a motion to dismiss.



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George M. Dent, III  
J. Brian Duncan, Jr.  
Lucy E. Tufts  
Margaret Y. Williams\*\*  
Allison E. White\*\*\*  
Ashley H. Robinson

August 27, 2013

**Of Counsel**

Richard Bounds  
John T. Crowder, Jr.\*  
Joseph R. Sullivan

Robert T. Cunningham, Sr.  
(1918-2001)

*(Certified as a Civil Trial Specialist by the ★  
National Board of Trial Advocacy)*

*(Certified as an Appellate Specialist by the \*\*  
American Institute of Appellate Practice)*

*(also admitted in Florida) ♦♦  
(also admitted in Louisiana) ♦♦♦*

Henry A. Callaway, Esquire  
Chair of the Alabama Access to Justice Commission  
P. O. Box 671  
Montgomery, Alabama 36101

Re: Proposal by the Alabama Access to Justice Commission for changes to the  
Alabama Rules of Civil Procedure

Dear Henry:

As I discussed on the telephone with you last week, the Supreme Court of Alabama Standing Committee on the Alabama Rules of Civil Procedure met on August 9, 2013, to discuss the proposal of the Alabama Access to Justice Commission. The members present quickly reached a consensus that the Commission's proposed Rule 88, Ala. R. Civ. P., affected the substantive rights of parties to such an extent that it was not appropriate for that change to be initiated as an amendment to the Rules of Procedure.

We considered the amendment from as many perspectives as we could, but the conviction persisted that this was too much of a substantive change to be adopted as a procedural amendment. The committee members were certainly in agreement that the issues that your proposal attempts to address are serious ones. One member, who is a District Judge, noted that judicial seminars and conferences present programs to educate the judges on the problems surrounding default judgments in consumer debt actions, and he expressed the opinion that these education efforts are important and are having a beneficial effect.

Henry A. Callaway, Esquire  
August 27, 2013  
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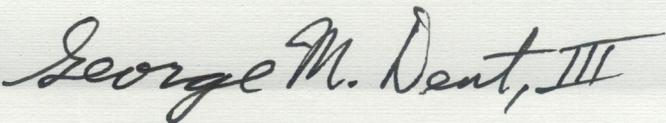
Because this was a specially called meeting to discuss these rules, and because a significant number of members could not fit this meeting into their schedule, I did not plan to take a formal vote on whether to recommend this proposal to the Supreme Court. I thus plan to submit your proposal to the Committee again on September 20, 2013. Unless there is a significant difference of opinion from members who were not present at the August meeting, however, I do not anticipate a different result.

As you and I discussed, a different approach to the problem might be to propose an amendment to Rule 55, Ala. R. Civ. P., the default judgment rule. I will be happy to work with you on such a proposal. Please stay in touch.

On the subject of the Commission's proposed amendment to Rule 4 regarding service of process, there was agreement from the Committee that the procedures for service of process may need attention. Several members expressed interest in examining Rule 4 and proposing amendments, whether along the lines the Commission has suggested or otherwise. The Committee appointed a sub-committee to address this. I will keep you posted on these efforts.

It has been a pleasure working with you, Henry. I know it is discouraging for the Committee not to approve your proposed amendment for forwarding to the Supreme Court. I admire the work you are doing, and I hope you will not take that discouragement to heart, but will continue fighting the good fight to address this problem.

Sincerely,



George M. Dent, III

GMD/dmt