



Divorce Law in Alabama
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I. JURISDICTION

For a divorce to be granted in Alabama, Alabama must have personal jurisdiction over the parties and subject matter jurisdiction over the issue, and both must be pleaded in the Complaint.

The requirement for subject matter jurisdiction is met when a complaint is filed for divorce that alleges a statutory ground for divorce and the residency requirement is met. Statutory grounds for divorce are found at ALABAMA CODE 1975, § 30-2-1, with the most common ground alleged being incompatibility, irreconcilable differences and irretrievable breakdown of the marriage. These are considered no fault grounds. Adultery, addiction and abuse are statutory fault grounds for divorce. Whether or not a party is found guilty of one of the statutory fault grounds may affect that party's share of the marital estate, and/or the amount of alimony awarded.

The residency requirement must also be met. Residency means evidence of domicile, which requires residence at a particular place with the intent to remain there permanently or indefinitely.¹ In order for an Alabama Court to grant a divorce, at least one party must be a resident of Alabama.² If both parties are Alabama residents, there is no statutory time requirement for residency. However, if only the Plaintiff is a resident of Alabama, he or she must have been a resident for at least six months preceding the filing of the divorce.³

In addition to subject matter jurisdiction, the Court must also have personal jurisdiction over the parties. If only the Plaintiff is a resident of Alabama, there must be *in personam* jurisdiction over the non-resident defendant. This is established by the minimum contacts rule.⁴

II. VENUE

ALABAMA CODE 1975, § 30-2-4 dictates venue. Complaints may be filed in (1) the circuit court of the county where the defendant resides, or (2) in the circuit court of the county in which the parties resided when the separation occurred, or (3) if the Defendant is a non-resident, in the circuit court of the county where the Plaintiff resides. The parties may waive this venue requirement, and file in any county in the state if they so desire.

ALABAMA CODE 1975, § 30-3-5 addresses venue in the case of post divorce matters involving children. Venue will lie in (1) the original circuit court rendering the final decree, or (2) the circuit court of the county where both the current custodial parent and the child have resided for at least three consecutive years immediately

preceding the filing of the action. The custodial parent shall be able to choose the particular venue as provided herein. Once the custodial parent has moved the Court for a change of venue pursuant to the statute, the Court has no discretion, and must grant the motion.

III. ANNULMENT

An annulment, simply stated, voids a purported marriage that was otherwise invalid. Once granted, the status of the parties is as if they were never married. Grounds for annulment have been found to include (1) fraud, (2) one party was previously married and not divorced, and (3) one party was younger than the minimum age required to be married⁵. Often parties will consent to an annulment because of religious reasons; however, discretion remains with the Court to grant it.

IV. NON-CHILD ISSUES IN DIVORCE

There are many issues to consider in a divorce, some of which include division of all real, personal, and business assets; alimony and spousal support; health insurance benefits; military benefits; division of retirement accounts; tax consequences; division of debts and bankruptcy; and the cooling off period.

The parties may agree on all aspects of a divorce, or the Court will equitably divide the parties' assets and debts, based on the circumstances of the case and the fault of the parties as to the breakdown of the marriage. While issues involving child support, custody and alimony are modifiable after a final order, it should be noted that

once a property division is ordered by the Court, it cannot be modified, except by the express agreement of the parties.

The parties in a divorce or the Court must effectively divide all real estate, personal property and business assets. When real estate is divided, one party's equity must be bought out or the property sold. If one party keeps the real property and buys out the other, care must be taken to have the property refinanced to remove the other party's name from the mortgage. A quitclaim should not be done without a refinance. In the case of a death, one party may find they must continue to make payments on a mortgage for a house in which they have no legal interest.

Another factor to consider in dividing the equity in real estate is that the same should always be based on actual figures. It may be necessary to have the property appraised, and the mortgage(s) balances should be verified.

Personal property without title is easiest to transfer, but sometimes difficult for the parties to agree upon. One avenue to accomplish settlement is to allow one party to draw up lists dividing the property in two groups. The other party can select which list he or she wants. The other option is to allow the parties to each select one item at a time, as if striking a jury. It should be noted that the Courts do not like to be involved in having to divide personal property such as kitchen and housewares, and generally when left to the Court, no one comes out happy.

Care should also be taken to insure that the titles to automobiles, boats, motorcycles and the like are properly transferred, either by agreement or after a Court enters a final decree. Stock and bank accounts, likewise, should be transferred, and all joint accounts closed.

If a party is self-employed, a Court will often consider the business that one party owns as a marital asset. The general rule is that if the business (or any other asset, for that matter) has been used **regularly** for the **common benefit** of the marriage, it is subject to division.⁶ This can be the case in medical, dental and legal practices, as well as other types of businesses. Generally, the party's equity is purchased by the party that actually operates the business, although Courts have ordered the entire business sold and the equity divided.

The day a divorce is final, a party may no longer carry the other spouse on his or her health insurance. This is particularly noteworthy in the event one party has an upcoming surgery or some other need for treatment, or if he or she has a pre-existing condition. In these cases, the party losing the insurance benefits should attempt to get COBRA benefits or some other type of benefits ordered by the Court, so that they may maintain coverage. COBRA is a federal law that allows a divorced spouse to purchase continued health insurance under the same plan as the party had prior to the divorce for either 18 or 36 months. However, do not assume that COBRA is always an option there are limitations to its application; for example, small businesses with few employees may not be eligible at all.

Depending on how long the parties have been married and whether the benefits are vested, a spouse of a military service man or woman may be entitled to health insurance and/or retirement benefits. These benefits can be confirmed through the military. Generally, there is a requirement that the parties have been married ten years for either of these benefits to vest.

Likewise, if the parties have been married ten years during which time one or both parties accumulated some other type of retirement benefits (401K, pension, IRA, etc.), the account is subject to marital division by the Court.⁷ This division is done through a Qualified Domestic Relations Order (QDRO) so that there is no tax consequence to the division (unless one party makes a withdrawal). The percentage of the account that is given to the other spouse is discretionary with the Court, but cannot exceed fifty percent.

Generally, there is no tax consequence to divisions and transfers of property pursuant to a divorce. However, while there may be no taxable event on the transfer of a certain piece of property, consideration should be given to the tax consequence that ownership of that property may bring to that party. For example, two assets may appear to have equal value at the time of the divorce; however, the basis in the assets may subject one party to higher capital gains tax than the other when the assets is eventually sold. Another example would be offsetting a 401(k) account with the equity in the residence. While the party receiving the 401(k) account would be subject to taxes and possibly penalties for liquidating his or her asset, the other party would not likely be subject to any taxes on the liquidation of the residence. Therefore, the property division, while on its face looked equitable, may not be so later down the road.

One other tax issue to consider is that if the parties are legally married at the end of the tax year, they may file jointly or separately. However, if they are legally divorced on December 31, they must file single and separately. Sometimes timing the order can greatly benefit your client. You also must consider that there is a 30-day

holding or cooling off period between the time a divorce is filed and when the order can be signed.⁸ Even in an uncontested divorce, a decree cannot be signed less than 30 days from the date it is filed. This should be considered when attempting to finalize a divorce at a certain time for tax purposes. If it is beneficial to your client to file jointly with their spouse during the divorce, make sure the parties have an agreement in writing as to how the tax liability or refund will be divided.

One aspect of property division worthy of particular attention is the division of debts, especially joint debts. The parties' creditors are not parties to the divorce. If a divorce decree orders a particular party to pay a joint debt, the other party remains contractually liable unless the debt is refinanced or the creditor agrees to remove one party from liability, which rarely happens. As such, the creditor is free to proceed against the other party in the event of a default. Particular care should be taken in reviewing credit card accounts. Often credit cards will allow one spouse to apply for and receive a card for themselves and for the other spouse, even without the other spouse's knowledge. This account may then be reflected on both parties' credit bureau reports. Make sure all joint accounts are closed, or in this particular case, the party that did not sign the application, if they did not make any charges, can be removed from the account before future problems arise.

Even if joint accounts are closed to future charging, if a balance remains on a joint account, both parties are contractually responsible for that, even when the Court orders one party to pay the balance. A provision for indemnification should always be included for this reason. However, if the defaulting party files bankruptcy, there is really no remedy for the other spouse to get out of paying off that debt, unless they

want to file bankruptcy also. A good idea is to reserve the issue of alimony in the agreement or in the Order so that if a party gets out of paying a debt as ordered by the Court because they filed bankruptcy, the Court still retains a mechanism through which to assist the party who has been left to pay the debt. It should be noted that if alimony is not specifically reserved in the Order or the agreement, it is forever waived.

IV. ALIMONY & SPOUSAL SUPPORT

Often a property settlement in a divorce is called alimony in gross. This is a distribution from the estate of one spouse to the other spouse. It can be made in lump sum or in installment payments, and the payment of the same terminates any property interest one party has in the property of the other. This type of alimony has no tax consequence, nor is it modifiable. Additionally, it is dischargeable in bankruptcy.

The most common form of alimony is called periodic or permanent alimony. This type of alimony represents continuing support from one spouse to the other.⁹ It is a tax deduction to the paying spouse and taxable income to the receiving spouse, so long as certain requirements are met: payments must be in cash; payments must be made under a written divorce or separation order or agreement; payments are made to or in behalf of a payee spouse; payor and payee spouse are not members of the same household; the payment obligation of payor spouse terminates on death of the payee spouse; and the order or instrument does not eliminate the tax consequences of the payments.. It is modifiable, based on a showing of material change, and terminates

when the receiving spouse marries, cohabitates with a member of the opposite sex, or dies.¹⁰ It is not dischargeable in bankruptcy. It is also noteworthy that even if a petition to modify and reduce alimony is filed and ultimately granted, the Court has no jurisdiction to order the reimbursement of alimony that has been paid in the interim since the time of filing or since the change of circumstance.¹¹ Alimony, like child support, becomes a judgment automatically and immediately upon nonpayment.

Generally, periodic alimony is awarded to a spouse so that the status quo as it existed during the marriage is preserved as much as possible. There are numerous factors that the Courts have considered when awarding alimony: the standard of living of the parties during the marriage; the parties' current earning ability and their future prospects; the parties' potential for maintaining their standard of living after their divorce; the parties' ages, health and station in life; the length of the marriage; the source of their common property; and the conduct of the parties with reference to the cause of the divorce. The amount of alimony awarded is entirely discretionary with the Court, and is generally based on the need of one spouse and the ability of the other spouse to pay, taking in to account the aforementioned factors.¹²

Often the Court will award rehabilitative alimony. While there is no statutory concept in the law, this award is used to provide support for one spouse for a specific period of time to allow that spouse the opportunity to become self-supporting. It may be appropriate when one spouse is in school at the time of the divorce, and needs the means to complete his or her education to obtain a good paying job, or when a spouse does not return to work because he or she is staying home with a small child until the child enters school. The tax treatment of this form of support varies based on the

circumstances, and it is wise to consult an accountant or tax attorney in order to better advise your client.

Alimony can and often should be reserved in the agreement or Order, even if it is not awarded at the time of the divorce. In many cases, the appellate courts have found it reversible error not to reserve alimony, even if the circumstances don't warrant an award at the time of the divorce. If alimony is not reserved in the final decree, it is forever waived. As stated previously, reserving alimony may allow a mechanism for the Court to right a wrong, in the event one spouse agrees, for example, to an alimony-in-gross type property settlement or agrees to pay certain debts of the marriage, then files bankruptcy.

¹ Basiouny v. Basiouny, 445 So. 2d 916 (Ala. Civ. App. 1984).

² In Re Sullivan, 283 Ala. 514, 219 So. 2d 346 (1969).

³ ALABAMA CODE 1975, § 30-2-5.

⁴ See Rule 4.2, Alabama Rules of Civil Procedure

⁵ The minimum age for marriage in Alabama was raised from 14 to 16 in 2003.

⁶ ALABAMA CODE 1975, § 30-2-51.

⁷ ALABAMA CODE 1975, § 30-2-51.

⁸ ALABAMA CODE 1975, § 30-2-8.1(a).

⁹ See ALABAMA CODE 1975, § 30-2-51 and annotations

¹⁰ ALABAMA CODE 1975, § 30-2-55

¹¹ ALABAMA CODE 1975, § 30-2-55

¹² See generally, Family Law in Alabama, Practice & Procedure, 3rd Edition, 2002, Gary Pate & Rick Fernambucq, for a thorough discussion of alimony and all family law issues.