

SEPARATION OR DIVORCE DOESN'T HAVE TO BE FRIGHTENING

COMMON QUESTIONS

Going through a separation or divorce can be frightening and stressful. When you are contemplating a divorce, or when you find yourself separated from your spouse, you may have many questions. *What will happen to our children? How will I have enough money to live? Will I lose my home? How can I keep it together with all of the financial and emotional stress? How will I find an attorney I can trust?*

IMPORTANT ANSWERS

The key things you can do to relieve the stress and help you cope with the emotional and financial strain are to: 1) Find an attorney you can trust, and 2) Understand your rights and obligations, the divorce process, and the potential outcomes of the proceedings. The following chapters will help you find an attorney and obtain information allowing you to negotiate the separation and divorce process.

CHAPTER ONE

FINDING AN ATTORNEY YOU CAN TRUST

Horror stories of the divorce process abound, but this difficult time can be manageable if you find an attorney you can trust and with whom you feel comfortable. While facing the end of a relationship can be gut-wrenching, prolonging the matter solves nothing.

You probably know people who have gone through a divorce. Ask them the following questions, but remember that every case is different.

- *Did your attorney explain the divorce process to you?*
- *Did you feel that you were kept informed about what was going on with your case?*
- *Were you told of the potential outcomes of your divorce proceeding?*
- *Did you feel you could trust your attorney to act in your best interest?*
- *What was your attorney's experience in family law?*

Once you gather information on potential attorneys, schedule an initial consultation. You may want to consult with several attorneys to determine which one you feel most comfortable with or which one appears to be the most knowledgeable. Some attorneys have a free consultation while others charge a fee. The fact that the consultation is free shouldn't be the determining factor in your decision. You should choose someone you feel will act in your best interest. As long as the attorney has good experience in family law and has time for your case, the most important thing to remember is whether you feel comfortable working with that person and their staff. You don't want to be the attorney's first divorce case, nor do you want your case to be a low priority item. You want to feel you are being listened to and you are properly updated on each step of the process.

CHAPTER TWO

THE FIRST MEETING WITH YOUR LAWYER

The consultation should allow you to:

- Meet and become familiar with the lawyer.
- Get an overview of your rights and obligations as well as the divorce process.
- Understand the costs and benefits of using an attorney.

You will need to provide the attorney with the following information:

- Your children's names and ages.
- Your employment status and wages.
- Your education and work experience.
- Your spouse's employment status and wages.
- Your spouse's education and work experience.
- Your taxable income over a three-year period.
- Your assets, including retirement plans, savings and checking accounts, real estate, personal property, and debts.
- Any details of inheritances or other money acquired prior to your marriage.

Once given sufficient information, the attorney should be able to explain your rights and obligations during and after divorce and also advise you concerning potential outcomes. Avoid being swayed by someone who makes promises of easy or quick outcomes. Unless you enter into a formal, signed agreement with your former spouse, the judge will be the decision-maker in a divorce proceeding. The attorney can tell you what he or she believes the outcome might be, but he or she cannot guarantee a particular result.

Make sure the attorney explains any fees he or she charges. These should include the required retainer, the hourly rate, and whether any unallocated portion of the retainer is refundable. Once you hire the attorney, these requirements should be given to you in writing in what is called a Retainer Agreement. The retainer should be placed in a special trust account which is overseen by the State Bar of California. If the attorney demands a non-refundable retainer, this money is earned by the attorney as soon as it is paid, regardless of whether any work is actually done on the case. Generally speaking, the more time spent on your case means it will be more expensive, and while you can ask the court to have your spouse reimburse you for your legal fees, there are no guarantees of this. You remain responsible.

CHAPTER THREE

PAPERS YOUR LAWYER WILL NEED

Once you've decided on an attorney and paid the required retainer fee, you will need to provide your lawyer with documentation on your assets, debts, and any claims you might have for separate contributions to community assets. You will also need copies of tax returns going back three years, along with pension/401(k), bank account, credit card, and mortgage statements.

The key date is that of your separation. Community property rights and obligations begin with your marriage and end with your separation. Any property or debts acquired before marriage or after separation will generally be deemed separate property, and any property or debts acquired during the marriage will be presumed to be community property, unless otherwise determined. Therefore, your documentation should be specific to your date of separation, or, if acquired prior to marriage, it should be specific to the date of marriage.

CHAPTER FOUR

CUSTODY AND VISITATION RIGHTS

If you and your spouse have children, you can agree to a parenting plan for the period of the divorce proceedings or for a longer or indefinite period of time. It is generally in the child's best interest to have frequent and consistent contact with both parents. When practical, the parenting of children should be shared, even in the face of divorce.

There are some circumstances in which a shared parenting plan is not practical or is not in the children's best interest. In that case, the issue of custody and visitation will, in all likelihood, be determined by the court.

There are several important terms you should be familiar with related to custody matters:

Legal custody is the right to make decisions for your child. These decisions involve health, education, and general welfare and afford the parent the right to obtain information concerning their child from public agencies, health care providers, or schools.

Physical custody goes to the parent with whom the child primarily lives. Joint physical custody does not necessarily mean the child lives with each parent half the time. Rather, it is a loose description of fairly equal parenting. The parent with physical custody will take the child as a deduction on his or her federal and state income tax returns. With joint physical custody, the parents can agree to alternately taking the children as deductions or to allowing one parent to have the deduction each year.

Visitation schedule is the amount of time the child spends with each parent and will depend on the best interests of the child and the availability of the parents. In the event the parents cannot agree on these issues, the court will refer the matter to Family Court Services (FCS). A trained mediator at FCS will interview the parties, and, sometimes, the child and others (like teachers, doctors or counselors) will be called upon to provide additional relevant information. The FCS representative will then make a recommendation to the court as to the custody and parenting plan arrangement that he/she deems to be in the best interest of the child. The court will then consider that recommendation when deciding custody and visitation orders. The court can make rulings that neither party wants.

CHAPTER FIVE

CHILD SUPPORT

The child has a right to receive monetary support. The parent who is not the primary caregiver will generally be ordered to pay child support based upon a complex formula established by the state Legislature and based upon the incomes of both parents, the amount of time spent with each parent, certain expenses, and many other factors. Child support can be agreed upon by the parents and can be less than or greater than the support formula, but the parties must attest that the child's needs will be adequately met and that neither party has been subject to duress in determining the agreed upon amount.

The parents are also responsible for any healthcare expenses incurred by the child, and, absent an agreement of the parties, will be ordered by the court to share those expenses as the court deems appropriate.

The sharing of other expenses (i.e., day care, music lessons, and special tutoring, etc.) which are incurred for the best interest of the child will be decided upon by the court or by the parties.

CHAPTER SIX

SPOUSAL SUPPORT

Spousal support is the money given by one spouse to the other, often referred to as alimony. There are two types of spousal support -- temporary and permanent.

Temporary spousal support is generally determined early in the dissolution proceedings and is intended to allow the supported spouse to continue to live as the parties lived at the time of separation. It is not always possible for the parties to maintain their lifestyle during the separation and divorce proceeding because they are frequently living on a single, divided income. The court has a formula guideline for temporary support, taking into consideration the income or earning capacity of the parties. Formulas can differ from one county to another.

Permanent spousal support is money that is either agreed to or ordered by the court at the time of the divorce judgment and can be indefinite in duration or for a specific period of time. The party seeking support can also agree to forego spousal support in exchange for other considerations. The court can determine an individual is not entitled to spousal support and decline to issue such an order. Permanent spousal support is dependent upon the age of the parties, their educational and work backgrounds, their health status, the length of their marriage, and a variety of other factors. An experienced attorney can provide additional information and can advise you on the potential outcomes of a request for spousal support, depending on your particular circumstances.

CHAPTER SEVEN

VALUING AND DIVIDING PROPERTY

Unless an agreement is reached by the parties to the contrary, the community assets and debts will be divided by the court. This does not mean that if there are six towels, each person gets three. What it means is that if the total value of the community estate, after adding up the assets and subtracting the debts, is \$60,000, then each person gets \$30,000. Issues can arise as to the value of the property which will sometimes make it difficult to determine an equal division.

The role of the lawyer in this process is to meet with the opposing attorney or party and seek an agreement as to the division of assets and debts, as well as sort out any issues regarding reimbursements or separate property rights. In the event that no agreement can be reached, the attorney must then determine the value of assets through independent valuation by expert witnesses and present that information to the court at the time of the trial. Because expert testimony and legal preparation can be expensive, it is to benefit of both parties to attempt to reach an agreement prior to trial.

There are a number of issues that can arise concerning the awarding of property and the assignment of debts which you should be aware of. Generally, if one asset has a debt attached to it, such as a car and its loan, the party receiving that asset is responsible for that debt. Therefore, it is important to meet with your attorney to discuss these matters.

One frequent issue that arises involves the family residence and mortgage held in the names of both parties. If the property is awarded to one spouse and the title transferred without a requirement that the loan be refinanced, the debt remains a debt of both spouses, and, in the event of nonpayment, it will affect the credit reports of both parties. Ideally, the home would be refinanced, but with only one income and the changing value in the current market, that can often be difficult.

Although it may sometimes be difficult to pay a retainer to hire a competent and experienced attorney, it is important that you be fully apprised of issues that may arise and the relevant facts that you must consider in making decisions during this process. People have lost their share of a family home worth hundreds of thousands of dollars by neglecting this detail.

CHAPTER EIGHT

ATTORNEY PAYMENT

Obtaining sufficient funds to pay a retainer fee to an attorney can often be the most difficult part in beginning a dissolution proceeding. Most attorneys require an advance payment in an amount that will be sufficient to cover the anticipated services. It is not always possible to anticipate all events that transpire in a proceeding, and, therefore, the retainer fee is only an estimate based upon a presumption the matter will be resolved without extensive litigation. Depending on the circumstances, the retainer may be what is needed for the first few months of the case, or it could be for the entire action.

The retainer, once paid, should be held in a trust account overseen by the State Bar of California, and the fees paid as the services are rendered. The client should receive monthly billing statements informing him/her of the status of his/her retainer account. The attorney fee agreement generally requires you maintain funds in your retainer account as a condition to continued representation.

During the divorce proceeding, a party may request the court order the other party to pay a specific sum of attorney fees. The court will generally determine what resources the parties have and may make an award in order that the parties can both be represented. Most attorneys will require, however, the retainer be paid in advance. An award of attorney fees can be helpful later in the proceeding to allow you to recoup some of the funds you have borrowed or utilized from limited resources. However, remember that you are responsible for your attorney and the legal fees.

CHAPTER NINE

RETAINING COUNSEL WHEN FUNDS ARE LIMITED

Even if you are unable to retain an attorney, it is important to consult one concerning your rights and obligations and to have an attorney review any settlement agreements you enter into on your own before they are filed with the court. This should not be expensive.

Some people with very simple cases have used a paralegal to type the forms. A paralegal is forbidden by law to give any legal opinions. While this may seem like a sensible way to save money, if the case is at all complex or there is little cooperation between parties, a paralegal may not be able to complete the case. Remember, paralegals are not regulated by the state and may not have any experience in these matters.

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REDDING

Law Offices of Eric Alan Berg & Associates
5000 Bechelli Lane, Suite 201
Redding, CA 96002
(530) 223-5100

CHICO

Law Offices of Eric Alan Berg & Associates
1050 Esplanade
Chico, CA 95926
(530) 223-5100