

**Fort Rucker Preventive Law Program**  
**LEGAL ASSISTANCE SERIES**

# **Divorce**

## **THIS PAMPHLET**

Contains basic information on divorce in the state of Alabama. If you have specific questions, call 255-3482 to make an appointment.



**OFFICE OF THE STAFF JUDGE ADVOCATE**  
**FORT RUCKER, ALABAMA 36362**

# **SEPARATION, ANNULMENT AND DIVORCE IN ALABAMA**

1. Introduction
2. The role of the legal assistance attorney
3. Counseling services
  - a. Post Chaplain
  - b. Family Support Center
  - c. Licensed Marriage Counselor
4. A member's obligation to support dependents during marriage and separation
  - a. What the Army requires
  - b. What Alabama requires
  - c. Illegitimate children
5. A spouse's liability to a third party for the bad debts of the other spouse during marriage and separation
  - a. Military
  - b. Alabama
  - c. Other States
6. A spouse's liability to a third party for the torts of the other spouse during marriage
7. Options available to married people with marital problems
  - a. Counseling
  - b. Trial separation
  - c. Annulment
  - d. Divorce
8. Legal requirements to get a divorce in Alabama
  - a. Grounds
  - b. Residency
  - c. Jurisdiction
9. Jurisdictional issues we see at the legal office
  - a. Defendant in Alabama is being sued by an out-of-state plaintiff
  - b. Plaintiff in Alabama is suing out-of-state defendant

10. Defending an action for divorce or paternity
  - a. Compromise in a divorce action
  - b. Request a delay
  - c. Lack of jurisdiction
  - d. Not a resident
  - e. Request blood test
  
11. Regular dissolution of marriage
  - a. General steps
  - b. Other orders you can request from the court
  
12. How different states divide marital property and debts
  - a. Community property
  - b. Equitable distribution
  
13. Alabama's equitable distribution of property and debts
  - a. Factors the courts look at to determine how to divide property equitably
  - b. Definition of marital assets and liabilities
  - c. Definition of nonmarital assets and liabilities
  - d. The date for determining marital assets and liabilities and the value of such assets and liabilities
  - e. Presumption on how to divide property and debts
  - f. Special equity
  - g. Division of retirement benefits
  - h. Bankruptcy
  - i. Modification
  - j. Notifying creditors of divorce and getting release of liability
  - k. When spouse disposes of property before divorce
  
14. Alimony
  - a. Types
  - b. Factors a court considers
  - c. Tax consequences
  - d. When it is modifiable
  - e. When it terminates
  - f. Cohabitation with opposite sex
  - g. The remarriage of the parties
  - h. Bankruptcy
  - i. Enforcement

15. Social Security benefits to former spouse
16. Survivor Benefits Plan
17. Military benefits available to former spouse
18. Other health-care coverage to former spouse
19. Child Custody
  - a. Types
  - b. Parental preference
  - c. Adultery of parent
  - d. Removal of child from the state
  - e. Separation of children
  - f. Jurisdiction of court to hear the case
  - g. Effect of custody proceeding in another state
  - h. Modification
20. Child Visitation
  - a. Local rules
  - b. Grandparent visitation
  - c. Who will pay for travel expenses/arranging for transportation
  - d. Child support
  - e. Taking the child out of state or country
  - f. Advance notification
21. HIV Virus
22. Child Support
  - a. Military obligation/illegitimate children
  - b. Alabama amount
  - c. Imputed amount
  - d. Modification
  - e. Relationship to denial of visitation rights
  - f. Tied to periods you actually have the children with you
  - g. When it terminates in Alabama
  - h. Education
  - I. Tax consequences
  - j. Enforcement
  - k. Bankruptcy
  - l. Withholding

23. Whose obligation it is to transport dependent spouse's household goods to ex-spouse's new address
24. How to find an attorney
25. When a court can order your spouse to pay your attorney's fee
26. Wife can request change of name
27. Reconciliation
28. Tax Questions and Answers
29. General Suggestions
30. Post-divorce checklist
  - a. Divorce decree
  - b. Transfer of title
  - c. Personal property
  - d. Legal documents

**1. Introduction:** This handbook is designed to give you a basic understanding of your rights and responsibilities towards your family during marriage, separation, divorce, and annulment. Although it contains the answers to most of your questions, if after reading this handbook you still have questions left unanswered, you should then consider seeing an attorney during Legal Assistance hours. An appointment is necessary and can be obtained by calling (334) 255-3482.

We realize certain parts of this guide may be too complicated or extensive for lay readers. This is a complex, constantly changing area of the law, however, that does not lend itself to simple solutions or guidance. By reviewing the material in this handbook you can become familiar with the legal and practical issues that may affect the outcome of your particular case. As indicated, you should consult an attorney for any needed explanations or answers that are not clearly resolved by your use of this handbook.

**2. THE ROLE OF THE LEGAL ASSISTANCE ATTORNEY:** To adequately serve our primary clients, the commanders and other support agencies on post, and also serve the needs of our Legal Assistance clients, AR 27-3 limits our role to advising you about your rights and responsibilities under Federal and Alabama law. Additionally, we advise commanders and first sergeants on Army requirements for the support of dependents. However, we are prohibited from representing you in any civilian court or drafting documents on your behalf which will be submitted to a civilian court. If you need to be represented by an attorney, you will be referred to the attorney referral service in the state in which you are being sued.

**3. COUNSELING SERVICES:** Marriage represents a significant financial and emotional investment. Before making any drastic decisions, you should consider counseling. Counseling can not only help you save your marriage, if both parties want to work at the relationship, but counseling can also help you avoid the same problems should you enter into another marriage in the future. Most important, counseling may enable you to work with your spouse to minimize the trauma to your children. You can obtain such help from the following sources:

a. Post Chaplain: Post chaplains are usually trained in marriage and family counseling and their professional services are available without charge. For more information please call the Chaplain's Office at (334) 255-2989.

b. Family Support Center: For many spouses, the starting point for obtaining information on counseling services provided by the military or civilian community is the Family Support Center. If the military does not have the services the military or dependent spouse may need, the individual may be referred to a local civilian counselor. For more information please call (334) 255-1846.

c. Licensed Marriage Counselors: In addition to obtaining a referral from the Family Support Center, you can also find information on licensed marriage counselors in the Yellow Pages under "Marriage and Family Counseling."

#### **4. A Member's Obligation To Support Dependents During Marriage and Separation:**

a. What the Army Requires: Under AR 608-99, Army members have a duty to provide regular and adequate support to their dependents. The amount of support is a minimum amount of the BAH RC/T at the "with dependents" rate. This amount is not necessarily equal to what the Servicemember is actually receiving for BAH at their duty station. See a legal assistance attorney for clarification about this rate. This amount is required if there is not a court order or other written agreement specifying an amount of support. When a court order or other written agreement specifies an amount of support, AR 608-99 states that a soldier will comply with the court order or written agreement. The soldier's commander does not

have the authority to excuse the soldier from the minimum support or from complying with the court order or written agreement. However, the commander can order the soldier to exceed the minimum support under the AR if there are extraordinary circumstances and the soldier's financial situation is such that he/she can pay more support. There are a few exceptions to the minimum support requirements for a spouse, such as if the spouse's income is equal to or greater than the soldier's income. In order to take advantage to this exception, the soldier must show the greater income before he/she is allowed to suspend the support. It should be noted though that this exception does not relieve the soldier from the obligation to support his/her children.

If a dependent believes the sponsor is not providing adequate support, the dependent should contact the sponsor's commander or first sergeant. The member will be counseled on the Army obligation to support dependents. If the commander believes the member has failed to provide support, the commander may, among other things, reprimand the member, seek to terminate BAH, or initiate discharge action. The Commander cannot order the sponsor to give any money directly to the dependent. If it appears the sponsor is providing minimum support, then the Army does not arbitrate the dispute. The dependent's only recourse is to go to the civilian courts. It is imperative, therefore, for sponsors to have proof they are providing support. A good way to provide this proof is by establishing an allotment to the dependent.

Under AR 608-99, a soldier must meet the minimum support requirements for dependents. The spouse is entitled to receive BAH at the "with dependents" rate if they are not living in government quarters and there is no other outstanding court order. If the spouse is living in government quarters, the soldiers must provide the difference between BAH at the "with dependents" rate and the "without dependents" rate. Prior marriages are governed by the outstanding court orders.

b. What Alabama Requires: In Alabama, spouses have an obligation to provide support to each other and the children born to the marriage if they have the ability to do so and there is an actual need. Alabama law says alimony is intended to "preserve the financial status quo of the parties as it existed during the marriage." Dependent spouses still have an obligation to support themselves, if they are able.

c. Illegitimate Children: AR 608-99, paragraph 3-3(2) states that no action can be taken on a claim of paternity in the absence of court order or admission of paternity by the member. If the member admits to paternity or paternity is established through a court order, the member has an obligation to support the child. If the mother wants to pursue a paternity action, she can contact the DHR Child Support Enforcement Division or contact a civilian attorney.

## **5. A SPOUSE'S LIABILITY TO A THIRD PARTY FOR THE BAD DEBTS OF THE OTHER SPOUSE DURING MARRIAGE AND SEPARATION:**

a. Military: A military spouse is generally not held liable for the bad checks of the other spouse. However, the military spouse could lose his/her check cashing privileges on post. Liability could be found if the member had advance knowledge but took no action to notify the Army, or if the checks were used to purchase necessities.

b. Alabama: Under Alabama law, a husband is not liable for the debts of his wife, which she contracted before marriage. The opposite is also true. However, Alabama law says the husband is not relieved of his common-law duty and obligation to furnish necessary maintenance to his wife and minor children.

c. Other States: In community property states, spouses may be held liable for debts contracted by the other during the marriage. However, some exceptions exist. One must look to the laws of each particular state.

**6. A SPOUSE'S LIABILITY TO A THIRD PARTY FOR THE TORTS OF THE OTHER SPOUSE DURING MARRIAGE:** Under Alabama law, the husband is not liable for the debts of the wife contracted or entered into before marriage or for torts committed by her before the marriage. Also, the husband is not liable for the debts of the wife, contracted or entered into after the marriage, or for her torts if he does not participate.

## **7. OPTIONS AVAILABLE TO MARRIED PEOPLE WITH MARITAL PROBLEMS:**

a. Counseling: As previously discussed, this may be the best option, depending on your particular situation.

b. Trial Separation: Before deciding whether a divorce is what you need, you may opt for a trial separation. Some states require a period of separation before granting a divorce. Alabama does not; however some judges may require a period of separation anyway. It is not a "legal separation" and you continue to be legally married. It allows you to settle as many of your marital matters as you can both agree upon and doesn't require any court action. If you separate, you should agree as to all major issues (such as child and spousal support, custody, visitation, medical bills of dependents, tax questions, life insurance, transportation expenses, household goods, the distribution of property and debts). Neither party can be forced to sign the agreement, but once both do, it is enforceable in court. Preferably, you should put this agreement in writing and have it notarized (the Legal Assistance Office can notarize the agreement for you). If during the separation, your spouse fails to abide by this agreement, then you can take your spouse to court and enforce the agreement as with any other contract. Another benefit of a separation agreement is that you can use the date the agreement was signed as the last day for determining marital property and liability. Thus, all subsequently acquired property will be considered separate property, and you generally won't be liable for your spouse's debts if you subsequently divorce. During separation, all dependents are still entitled to full military benefits. Under Alabama law, a divorce from bed and board is recognized. This is the same as a legal separation as opposed to a divorce from the bonds of matrimony. When you decide to pursue a divorce, the separation agreement can serve as the basis of a property settlement in your divorce decree.

When you begin the divorce proceedings you will, in most jurisdictions, attach the Marital Separation Agreement to the complaint and ask the court to merge, but not incorporate, the Agreement into the final judicial decree. If the Marital Separation Agreement is incorporated into the decree, it becomes a court order and is enforceable by the court's contempt powers. If you don't incorporate it into the decree, it remains a contract between you and your spouse, which you later have to sue in a separate action to enforce. If the separation agreement is not incorporated into the divorce decree, and your spouse violates the agreement you can still seek money damages for the violation of the agreement, but it is easier and faster if the agreement is incorporated into the divorce decree.

A separation agreement is a legal document that will bind you through many years and determine your rights, obligations, and responsibilities from your marriage. You and your spouse can amend the agreement if you both consent to the changes; or it can be modified by a court order, provided the agreement does not specifically state that the agreement is not subject to any court modification. Nevertheless, the court can always modify provisions in an agreement regarding the care and custody of any minor children.

c. Annulment: An annulment is a court decree saying that the marriage never took place because of a disability or defect that existed at the time of the marriage ceremony. Because it is so difficult to prove, it is not used often. The following are the most common grounds used to get an annulment: (1) one of the parties was too young to get married; (2) one of the parties is guilty of fraud; (3) one of the parties was under duress when they got married; (4) one party didn't have the mental capacity to get married; (5) one party was already married to someone else; or (6) the marriage is incestuous.

d. Alabama Divorce: In Alabama, divorce is called divorce from the bonds of matrimony. In order to file for divorce, you must meet the legal requirements. **YOU SHOULD NOTE THAT, USUALLY, AFTER A DIVORCE, THE STANDARD OF LIVING OF BOTH SPOUSES WILL BE REDUCED!**

e. Common Law Marriage: The intent of the parties is an essential element. The intent can be proven by the parties holding themselves out to others as husband and wife. Once a common law marriage is established, it is no different from a ceremonial marriage. It can only be dissolved by divorce.

## **8. LEGAL REQUIREMENTS TO GET A DIVORCE IN ALABAMA:**

### a. Grounds:

(1) Adultery: When using Adultery for the ground, it may be proven by circumstantial evidence, but more than a mere suspicion must be created; the circumstance created must be such as would lead the guarded discretion of a reasonable and just man to conclude that the act of adultery has been committed.

(2) Voluntary Abandonment: These Ground Covers when there has been a voluntary abandonment from bed and board for one year next preceding the filing of the complaint.

(3) Incompatibility: For this ground, one must show a complete incompatibility of temperament that shows the parties can no longer live together.

(4) Pregnant at time of marriage: This ground is used in favor of the husband, when the wife was pregnant at the time of the marriage, without his knowledge.

(5) Incompatibility: The ground of incompatibility is the most common ground used. Alabama has simple divorce laws. Neither you nor your spouse has to be at fault; in other words, you don't have to prove such things as adultery, desertion, or mental cruelty. Almost all divorces are obtained on the ground of an irretrievable breakdown of the marriage. Some states call it "irreconcilable differences." It just means that your marriage doesn't work anymore, and no matter how hard you try, it can't be fixed.

b. Residency: When the defendant is a nonresident, the other party to the marriage must have been a bona fide resident of this state for six months preceding the filing of the complaint, which must be alleged in the complaint and proved. If the residency requirement is not met, the court does not have jurisdiction. If a military member maintains his/her Alabama domicile when stationed out of the state, the member can still file for divorce in Alabama. 21 ALR 2d 1163.

c. Jurisdiction: For an Alabama court to be able to hear the divorce case and also have the power to make any type of award, such as property distribution and custody rights, Alabama must have personal jurisdiction over both spouses. Generally, jurisdiction is found where a court determines that a person has "minimum contacts" with a state. This means the person has sufficient connection with a state so that he/she could reasonably expect to be sued in that state. This is not a problem if both spouses consent to the divorce. The person filing for divorce automatically consents to jurisdiction. The real question is whether the person being sued has "minimum contacts" with Alabama to subject him/her to our jurisdiction. If Alabama doesn't have jurisdiction over the defendant, then an Alabama court cannot make an award.

Also, the divorce must be filed in the county of the defendant's residence or the county of residence when separation occurred; if the defendant is a nonresident, then the divorce is filed in the county in which the

other party to the marriage resides. However, if either party is an Alabama resident, divorce may be filed in any county if the defendant fails to object. Petitions to modify divorce decrees may be brought at the custodial parent's option in the county where the custodial parent has resided for the last three (3) years or in the county where the divorce was granted. If the non-custodial parent files the petition to modify, the custodial parent may choose the venue. Persons in military service and spouses living in Alabama are deemed residents of Alabama for the purpose of maintaining suits at law and equity in this state. When the defendant is a nonresident, the plaintiff must have been a bona fide resident of this state for six (6) months next before filing divorce, which must be alleged and proved.

## **9. JURISDICTIONAL ISSUES WE SEE AT THE LEGAL OFFICE:**

a. Defendant in Alabama is being sued by an out-of-state plaintiff: In this case, one has to research the jurisdictional laws of the state from which the plaintiff is suing to see how their statutes and courts define "minimum contacts." This requires extensive research into that particular state's laws. If you are thus being sued, you should normally retain an attorney in that state to represent you.

b. Plaintiff in Alabama is suing out-of-state defendant: As stated in paragraph 8, for an Alabama court to hear this case, the out-of-state defendant must have "minimum contacts" with this state.

## **10. DEFENDING AN ACTION FOR DIVORCE OR PATERNITY:**

a. Compromise in a divorce action: Generally, depending on each individual's particular circumstance, individuals are better off compromising and coming to a mutual agreement. While fighting over a particular issue may be attractive, you should consider the expense of litigation and the effect on your children, if any, and your health.

b. Request a delay: If you are active duty military, you can request a court to temporarily delay any legal action pending against you, under the Soldiers' and Sailors' Civil Relief Act of 1940, as subsequently amended (50 U.S.C. Sec 520). For example, if you receive a summons to appear in court but you presently cannot travel to that location to defend yourself, you can request a delay under this Act. However, you must be able to show that being in the military **MATERIALLY** affects your ability to appear in the court proceeding and thus prevents you from defending yourself.

If you want to avail yourself of the protection of this Act, you should request your commander sign a sworn affidavit stating you cannot be granted leave until a specific date because of military necessity. You should also write a letter to the court detailing all the actions you have taken to appear in court (i.e. requested leave, tried to obtain a loan to pay for a plane fare out of state, etc.). A judge is more likely to grant you an extension of time to respond if you request the continuance for a definite and reasonable period of time. However, if the judge does not grant you a delay, the judge can find you in fact made appearance before the court by the simple fact you wrote a letter to him/her and enter a default judgment against you.

c. Lack of jurisdiction: As previously discussed, you can argue you have no minimum contacts with the state which is suing you so that state has no jurisdiction over you. To make this argument, you need to retain an attorney in that state to make a special appearance on your behalf to argue that state has no jurisdiction. If you win, the case will be dismissed. However, you should consider whether to incur the expense of litigation if you have nothing to gain but a delay.

d. Not a resident: If you are not a legal resident of a particular state but reside there only pursuant to military orders, then the case against you may be dismissed if you raise the defense.

e. Request a blood test: Unless you are 100% positive the child is yours, you may wish to have a blood test accomplished. If you acknowledge paternity, you will be liable to support that child at least until he/she is 19 years of age in Alabama. Under some conditions, you can even be liable past the age of 19 if the child has a handicap. However, if you absolutely know the child is yours you should support your child; you have a legal and moral obligation to do so, and, if you don't, you may be liable in the future for back child support.

**11. DIVORCE FROM THE BONDS OF MATRIMONY:** Under this procedure, each spouse has the right to ask questions and obtain documents concerning the other spouse's income, expenses, assets, liabilities and other matters before having a trial or settlement of the case. If you cannot agree on matters with your spouse, a judge conducts a trial or hearing. After listening to all evidence, the judge will make a decision concerning the division of property, alimony, child support, custody of children, visitation, and other matters. Either spouse can ask for a new trial or appeal the judge's decision, when appropriate.

a. General steps: In this type of divorce, you generally have to retain an attorney to represent you. The following is included for an overview of the process. Some terminology you should know is that the spouse filing for divorce is called the plaintiff and the spouse being sued is called the defendant.

(1) Step 1: The plaintiff files the petition for divorce with the clerk of the Circuit court, either in the county in which the defendant lives or where the parties resided at the time of the separation. Costs vary among the counties, but generally, the filing fee is approximately \$120.00. The plaintiff can include in the petition a request for child and spousal support, property and debt distribution, child custody and visitation, as well as any other request. Aside from this petition, the plaintiff must also file the following documents: a financial affidavit; Uniform Child Custody Jurisdiction Act Affidavit (if you have minor children); Certificate of Corroborating Witness (to state either you or your spouse resided in Alabama for the preceding 6 months); Memorandum for Certificate of Military Service (if spouse is in the service), otherwise, you'd fill out the Non-Military Affidavit.

(2) Step 2: After filing the petition, the plaintiff must also make an attempt to notify the spouse of the divorce action. If you know where your spouse is, you would fill out a Summons and file it with the court. After the court stamps the summons, you can request the sheriff of the county in which the defendant is found or a special process server (appointed by the sheriff) to give a copy of the summons and petition to your spouse. You must give the sheriff a good address where the defendant can be found. A small fee is charged for serving the defendant with the papers, usually \$25.00. If the defendant resides out of the state, the defendant can be notified in any manner as can be done in Alabama by an officer authorized to serve the process in that state. Also, the defendant may be served by mailing a copy of the summons and complaint by registered mail, restricted delivery. Once the defendant is served with the divorce papers, the sheriff or process server completes an affidavit informing the court the defendant has received the divorce papers and returns it to the plaintiff or the court. This entire process is called the service of process. In some cases, service may be achieved by publishing notice in a newspaper for the divorce alone or by mailing a copy of the summons to the defendant's last known address where it can be proven that the defendant is avoiding process. To avoid the embarrassment often associated with being served by the sheriffs, the defendant may sign a waiver acknowledging receipt of a copy of the complaint. If your spouse has a lawyer, your spouse may authorize the lawyer to accept service.

If you don't know where your spouse lives or your spouse lives outside the state of Alabama and has never resided in Alabama, then you can notify your spouse by posting or publishing the required notice, according to Alabama law.

(3) Step 3: The defendant has 30 days from the day he/she receive the summons to respond to the court. Service by mail adds no additional days. If the defendant doesn't respond within this time, then the

plaintiff can request the court to enter a default judgement. If the defendant is in the military, then the plaintiff must comply with the Soldiers' and Sailors' Civil Relief Act of 1940.

(4) Step 4: After you have obtained proper service over your spouse, you can obtain a temporary hearing to ask the court to give you one or all of the followings: (1) temporary child support; (2) temporary alimony; (3) temporary determination of primary residence of children; (4) temporary injunctions; or (5) other matters requested.

(5) Step 5: If the defendant responds within the 30 days, then the Clerk of Court will notify both parties when the court hearing will be held. If both parties consent, you can request mediation. This means you and your spouse will meet with a court representative to see if you can settle your differences and avoid further litigation. If your case goes to trial, it normally takes about six (6) months after the complaint is filed. After the hearing, the judge must wait 30 days before he/she can sign the Divorce Decree or the signature will be effective for the proper date 30 days from trial. Since you are still married until the judge divorces you, it is best not to date until after the divorce is final. Neither party can remarry, except to each other, until sixty (60) days after the decree is rendered, and, if an appeal is taken, neither party shall again marry except to each other during the pendency of said appeal.

b. Other orders you can request from the court: You can also request the court enter the following orders: (1) restraining order against other spouse if there is the threat of violence; (2) order for spouse not to remove, sell, or transfer any marital property; (3) order against spouse taking the children out of the state or country; etc. It is important to tell your attorney if you are afraid your spouse will harm you or your children in any way. The judge may direct a spouse, usually the husband, to move out of the house pending the trial. The judge may also grant temporary relief by awarding custody of the children, requiring the payment of child support and alimony, setting visitation rights, and requiring payment of attorney fees, all pending trial.

## **12. HOW DIFFERENT STATES DIVIDE MARITAL PROPERTY AND DEBTS:**

If you and your spouse can't agree on the disposition of the marital property and debts, then the courts will make that determination for you. Although some states appear to decide whoever holds title to property keeps it, most states divide property either under community property or equitable distribution principles. Generally, courts recognize the essential role played by the spouse who, as a homemaker, has contributed to the financial well-being of the family and should be considered a partner whose contribution to the marriage has an economic value.

a. Community Property: All property an individual acquired during marriage, except property acquired by gift or inheritance, is divided equally upon divorce unless both parties agree otherwise. If the parties commingle separate property and can't trace their portion, then it becomes community property. There are 9 community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. In such states, the spouse holds a community interest during marriage which means the other spouse is not free to dispose of the property without the other spouse's consent even if the property is titled in only one spouse's name.

b. Equitable Distribution: A court will award property acquired during marriage, except property acquired by gift or inheritance, fairly and equitably between the parties regardless of who holds title to the property but Only At The Time of Divorce. Thus, a court is free to award one spouse 75% of the property and the other 25%, if the court feels it is fair to do so. Alabama is one of the states that divide property in this manner.

### **13. ALABAMA'S EQUITABLE DISTRIBUTION OF PROPERTY AND DEBTS:**

The court first determines how to divide the marital property and debts. Then it figures whether any need for alimony exists. The court will order an approximately equal division of the assets and liabilities when it was a long marriage, the spouses have nearly equal wealth before the marriage, both spouses have approximately equal earning ability, there are no minor children. The court will award more property (and fewer debts) to the spouse who has less earning ability, less financial contribution to the marriage if the marriage is a short-term marriage, poor health or other adverse circumstances, custody of minor children, marital and Non-Marital Property.

#### **a. Factors the courts look at to determine how to divide property equitably:**

(1) The contribution to the marriage by each spouse, including care and education of the children and services as a homemaker.

(2) Economic circumstances of both parties.

(3) Duration of the marriage.

(4) Any interruption of personal careers or educational opportunities, by either spouse.

(5) Desirability of keeping any asset, including an interest in a business, corporation, or professional business, intact and free from claim or interference from the other spouse.

(6) Contribution of each spouse to the acquisition, enhancement, and production of income, or improvement of or the incurring of liabilities, to both the marital and marital assets.

(7) Desirability of maintaining the marital home as a residence for a minor child or a party, if it is in the best interest of the child or party and financially feasible.

(8) Any other factor necessary to do justice between the parties.

#### **b. Definition of marital assets and liabilities:**

(1) Money that you now have which either of you earned during the time you were living together as husband and wife;

(2) Anything either of you bought with money earned during that period.

(3) Vested and nonvested benefits, rights, and funds earned during the marriage in a retirement pension, profit sharing, annuity, deferred compensation, and/or insurance plan and program.

(4) Enhancement in value and appreciation of nonmarital assets resulting either from the efforts of either spouse or from the contribution of marital monies or other forms of marital assets.

(5) Gifts from one spouse to the other during the marriage.

(6) All real property (house, land) held as tenancy by entireties (held as husband and wife), whether obtained before or during the marriage.

(7) Marital Obligation: The debts that a husband and wife owe together, or that either one incurred during the marriage. This usually includes anything you still owe on any debts either of you took on during the time you were living together as husband and wife.

c. Definition of nonmarital assets and liabilities:

(1) Anything that you owned or were responsible for before the marriage.

(2) Anything that either of you received, as a gift or by inheritance, at any time; however, if the property has been used for the common benefit of the marriage, it could be available for division.

(3) All income derived from nonmarital assets during the marriage unless the income was treated, used, or relied upon by the parties as a marital asset; and

(4) Assets and liabilities excluded from marital assets and liabilities by valid written agreement of the parties and anything you received after your separation.

d. The date for determining marital assets and liabilities and the value of such assets and liabilities:

This is determined by the earlier of the following dates: (1) when you and your spouse entered into a valid separation agreement; (2) the date both of you expressly established in the separation agreement; (3) the time of the filing of the divorce petition; or (4) any other date the judge determines is just and equitable under the circumstances.

e. Presumption on how to divide property and debts: Although equitable distribution does not mean equal distribution, as a rule of thumb, courts tend to divide marital assets and liabilities equally. Generally, any unequal division must be justified such as by showing one spouse has a special equity in property.

f. Special Equity: This type of property division was created by the courts to recognize the extra contribution made by one spouse in acquiring property, either by contributing funds, property, or services, over and above the performance of normal marital duties. Thus, a spouse may request the court give them more than 50% of their share because of their special contribution.

g. Division of Retirement Benefits: See the separate handout on this area (military retirement benefits are considered marital property and are often divisible in a divorce).

h. Bankruptcy: Individuals should be wary that after a court enters a property distribution award to include debts, one spouse could file for bankruptcy. The divorce decree should clearly state the spouses will not include the debts each assumes responsibility for in the divorce decree in any proceeding for bankruptcy. This is important because if you co-signed a loan with your ex-spouse and your ex-spouse is discharged from paying that loan in bankruptcy, then you will be liable, even though the divorce decree said your spouse would be responsible for payment.

i. Modification: The terms of a property settlement agreement ordinarily cannot be modified by the courts absent proving fraud, duress, deceit, or coercion.

j. Notifying creditors of divorce and getting release of liability: Either during or after your divorce, notify your creditors (we recommend you send the letter certified mail, return receipt requested) you will

no longer assume responsibility for any future charges your spouse makes after they receive your letter. Keep a copy of this letter for your records! Also, even if a court awards a particular debt in which you contracted with a creditor to be liable, to your spouse, you should contact that creditor to see if you can obtain a release of liability. Otherwise, if your spouse defaults making a payment, you will still be liable. Your only recourse will be to take your ex-spouse to court to enforce the divorce decree.

k. When spouse disposes of property before divorce: Any property your spouse fraudulently disposes of before divorce, a court can consider it making a property distribution. Thus, it's important you keep accurate records of property jointly owned. If you are concerned your spouse will deplete the joint bank account, you might consider taking a reasonable share and depositing it in another account and notify your spouse. **YOU HAVE A LEGAL AND MORAL OBLIGATION NOT TO HIDE PROPERTY!**

**14. ALIMONY:** After making an equitable distribution of assets and liabilities, the court may grant alimony to either spouse if there is a bona fide need. Spouses have an obligation to support themselves by working. If a court determines both spouses have about equal income, or one spouse refuses to work, then the court would probably not award any alimony. Both the husband and wife can request alimony. Retirement (including military retirement) may be a source of income for alimony.

a. Types: The alimony may be rehabilitative (temporary payments to allow for education, restraining, etc.) or permanent in nature. The court may order periodic payments, payments in lump sum, or both. The "poorer" spouse may request temporary alimony during the pendency of the divorce until the final decree is issued.

b. Factors a court considers: All relevant factors are considered, to include:

- (1) The Adultery of either spouse and the surrounding circumstances;
- (2) Standard of living established during the marriage;
- (3) Duration of the marriage; (a very significant factor!)
- (4) Age and physical and emotional condition of each party.
- (5) Financial resources of each party and the nonmarital and marital assets and liabilities distributed to each;
- (6) When applicable, the time necessary for either party to get sufficient education or training to find an appropriate job;
- (7) The contribution of either spouse to the marriage, including but not limited to, services rendered in homemaking, child care, education, or career building;
- (8) All sources of income available to either party;
- (9) Any other factor needed to be considered to do justice between the spouses.

c. Tax Consequences: Alimony is deductible by the payor (as an adjustment to gross income for federal taxes) and treated as income by the person who receives it. Not all payments under a divorce or separation agreement will be considered alimony by the IRS even if it is labeled as such. The reason for this is that the IRS wants to avoid people disguising property distribution as alimony. While the payor can deduct alimony payments, the payor cannot deduct payments under a property settlement agreement. Also, you

and your spouse can agree that a payment which would otherwise qualify as alimony will not be treated as such and will thus not be deductible by the payor or included in the income of the payee. See IRA Publication 504, Tax Information for Divorced or Separated Individuals, for further information.

d. When it is Modifiable: Periodic alimony is always modifiable for "changed circumstances." Examples include the payor losing his/her job or incurring substantial medical expenses. Under certain circumstances, the recipient spouse may request the court to extend rehabilitative alimony. However, lump sum alimony is generally not modifiable (although parties can provide otherwise). Remember to ask the attorney representing you in the present divorce how you can request modification at a later time by yourself, in case you can't later afford to hire an attorney.

e. When it terminates: Periodic alimony, whether temporary or permanent, generally terminates when the divorce decree states, or when the recipient spouse dies or remarries, or when the payor spouse dies.

f. Cohabitation with opposite sex: Under Alabama law, any decree of divorce providing for periodic alimony may be modified by the court to provide for the termination of alimony upon the petition of a party to the decree and proof that the spouse is receiving alimony has remarried or that such spouse is living openly or cohabiting with a member of the opposite sex. This provision shall be applicable to any person granted a divorce decree either prior to April 28, 1978, or thereafter; provided however, that no payments of alimony already received shall have to be reimbursed. Alabama Code 30-2-55.

g. The remarriage of the parties: The remarriage of one of the parties to a divorce, even though it is a factor to be considered by the trial court, is not, standing alone, a sufficient change in circumstances to warrant a modification of a divorce decree.

h. Bankruptcy: Under federal law, alimony cannot be discharged in bankruptcy unless the award was really a property settlement. (11 U.S.C. 523(a) (5)). This issue usually comes up when the divorce judge assigns a marital debt to one of the parties and that party subsequently files for bankruptcy. If discharged, the ex-spouse would then be liable for the debt. Make sure you know what constitutes alimony and what constitutes property settlement.

i. Enforcement: In addition to other state remedies, if your ex-spouse fails to make your alimony payments you can garnish your ex-spouse's wages, if the state you are in, such as Alabama, authorizes garnishment. The Army will honor garnishment orders for alimony as long as the divorce decree clearly states the payments are meant for alimony and not property settlement. Service of process on the Army for active duty and retired must be made to: Defense Finance & Accounting Services, Indianapolis Center, ATTN: Garnishment Division, Indianapolis, Indiana 46249.

**15. SOCIAL SECURITY BENEFITS TO FORMER SPOUSE:** In some cases, an individual may be eligible to receive social security benefits on the former spouse's eligibility if the marriage lasted 10 or more years. If the former spouse is 62 years of age or older, and eligible to receive social security benefits, you may apply for a portion of the amount your former spouse would receive if you are 62 years of age, were married for at least 10 years, have been divorced for at least 2 years and have not remarried before the age of 60. This is true regardless of whether your former spouse has a second spouse who is also eligible for social security. If your former spouse has died, then you are eligible for benefits when you reach the age of 60. For further information, contact your local social security administration office.

**16. SURVIVOR BENEFITS PLAN (SBP):** This is a voluntary program that provides a monthly income for the survivors of military retirees beginning when the retiree dies and retired pay stops. The member's retired pay is reduced by an amount which buys a monthly annuity for a member's surviving beneficiary under the plan. Thus, if a former spouse was a beneficiary of the SBP before the divorce, that spouse may

be reinstated as a former spouse if (1) both parties agree in a statement, signed by both and the statement is incorporated into the property settlement or divorce decree; or (2) the court orders that the former spouse be reinstated with the same coverage as before (P.L. 99-661). The application for reinstatement of an ex-spouse as beneficiary must be made within one year of the divorce or one year from the date of retirement. For further information on the SBP program, contact the personal affairs office of the Adjutant General's Office.

**17. MILITARY BENEFITS AVAILABLE TO FORMER SPOUSES:** See separate handout.

In summary, State court may consider military retiree pay as marital property which may be expressed either in dollars or as a percentage which cannot exceed fifty (50) percent. The court cannot consider the soldier's disposable retired pay as property unless the court has jurisdiction over the soldier's residence (other than because of military assignment), the soldier's domicile in the state, or the soldier's consent to the court's jurisdiction.

Court orders, which were issued before June 26, 1981, which direct a division of the retired pay are still valid. If orders are issued prior to June 26, 1981, the law is not retroactive. If the order is after June 26, 1981, and does not carry this provision, there may be grounds for modification under state law.

The test to even qualify for state law treatment is:

Ten (10) years of marriage and ten (10) years toward retirement in service.

Payments are made only if there is compliance with the Soldier's and Sailor's Civil Relief Act:

If the soldier was on active duty at the time the court order was issued.

Payments begin no later than ninety (90) days after the soldier is entitled to receive retired pay. Payments terminate on death of the former spouse or upon the death of the soldier, whichever is earlier, or under provisions of the court.

For spousal medical/commissary and PX Privileges, twenty (20) years of marriage – twenty (20) years of active duty service – twenty (20) years overlap test. Spouse cannot be covered by any other medical insurance and must not be remarried.

The spouse will maintain medical, commissary and PX privileges. If over sixty-five (65) with medical care, the spouse must have a letter of disallowance for Medicare, Part A, from the Social Security Administration.

For medical only, twenty (20) years of marriage – twenty (20) years of active-duty service – fifteen (15) year overlap test. Expiration occurs two (2) years from the date of divorce or April, 1988, whichever is later. Not covered by employer-sponsored medical insurance. Must not be remarried. Divorce on or after April 1, 1985. No exceptions allowed to these criteria. Under some state laws, soldiers can be required to have former spouses as benefits to survivor benefits plan.

**18. OTHER HEALTH-CARE COVERAGE TO FORMER SPOUSES:** Voluntary Private Health Insurance Conversion Program: Under the Uniformed Services Voluntary Insurance Plan, all spouses of members whose marriages end in divorce, dissolution, or annulment after at least 1 year of marriage, are automatically entitled to a comprehensive, private-pay insurance policy that provides benefits similar to CHAMPUS, when they lose their eligibility for CHAMPUS. This is purely a voluntary program. The

insurance is good for up to one year after the divorce. For further information, contact the personal affairs section of the Adjutant General's Office.

## 19. Child Custody:

### a. Types:

(1) Shared Parental Responsibility: Both parents have full parental rights and responsibilities for their children, and parents normally jointly make major decisions affecting the welfare of the children - **VERY IMPORTANT**. You should ensure your divorce decree states the custodial parent will provide you access to all medical, school, religious records of your child. You can even stipulate you will get copies of all report cards. Remember, if you want something, put it in the divorce decree. You should also request to have the most current telephone number where you can contact your child at all times.

(2) Sole Parental Responsibility: The responsibility for the minor children is given to one parent by the court, with or without rights of visitation to the other parent. Generally, the court won't award sole parental responsibility unless it finds that shared parental responsibility would be detrimental to the children. A court can also award sole parental responsibility to a person who was physically abused by his/her former spouse.

(3) Primary Residence: Where the children will live most of the time must be decided. This parent is usually called the custodial parent. If the parents cannot agree, the court will make the decision by determining the best interests of the children, and considering and evaluating all of the following factors:

- (a) Which parent is more likely to allow the children frequent and continuing contact with the other parent.
- (b) The love, affection, and emotional ties existing between the parents and the children.
- (c) The capacity and disposition of the parties to provide the children with food, clothing, and medical care.
- (d) The length of time the children have lived in a stable, satisfactory environment and the desirability of maintaining this environment.
- (e) The permanence as a family unit of existing or proposed parent's home.
- (f) The moral fitness of the parents.
- (g) The mental and physical health of the parents.
- (h) The home, school, and community records of the children.
- (i) The reasonable preference of an older child, if the court feels the child has sufficient intelligence, understanding, and experience to express a preference.
- (j) Any other factors considered to be relevant to your case.

b. Parental preference: After considering all relevant factors, an Alabama court shall give the father of a child the same consideration as the mother in determining the primary residence of a child, irrespective of the age or sex of the child. Still, custody is generally granted to the mother.

c. Adultery of parent: Generally, the Adultery of one parent does not render him or her an unfit parent unless the act was committed in the presence of the child or it has affected the child in some manner.

d. Removal of child from the state: Generally, a court may expressly permit or expressly prohibit or limit the right of a custodial parent to remove the child from the state. If the divorce decree is silent on this point, the custodian is free to take the child out of the state. If a parent takes a child out of the state to get another state to issue a decree, the other state court generally will not hear the case. See the discussion below on jurisdiction.

e. Separation of children: Generally, a court would not separate from each other brothers and sisters unless compelling reason exist, such as the preferences of the children.

f. Jurisdiction of a court to hear the case: As most states, Alabama had adopted the Uniform Child Custody Jurisdiction Act. This means an Alabama court will only hear a custody case if:

(1) Alabama is the home state of the child as the time of the suit or had been the child's home state within 6 months before this suit and the child is absent from Alabama because another person claims custody and one parent still continues to live in Alabama. This designed to prevent parents from kidnapping their children to another state to avoid Alabama making a custody determination;

(2) It is in the best interest of the child that Alabama assumes jurisdiction because the child and at least one parent have significant connections with Alabama and substantial evidence concerning and the child's present and future care, protection, training, and personal relationships;

(3) The child is physically present in this state and:

(a) The child has been abandoned; or

(b) It is necessary in an emergency to protect the child because he/she has be subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

(4) a. It appears that no other state would have jurisdiction under pre-requisites substantially in accordance with subdivision (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of that child; and

b. Except under subdivisions (3) and (4) of subsection (a), physical presence in this state assume jurisdiction.

(5) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his/her custody.

g. Effect of custody proceeding pending in another state: An Alabama court shall not exercise its jurisdiction, if at the time of the filing of the petition, a proceeding in a court of another state exercising jurisdiction, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons (Alabama Code 30-3-26).

h. Modification:

(1) Jurisdiction: For an Alabama court to determine the custody rights of a minor child, the parent bringing suit must satisfy the requirements of the UCCJA mentioned above. This generally means if you don't have custody of your child, then to modify the award you may have to go to the state that has the contacts mentioned in the UCCJA (i.e. where the child lives).

(2) Grounds: Custody can be changed upon a proving of a substantial change in circumstances. Generally, remarriage of one or both of the parties is not, in itself, such a substantial change of conditions as will authorize a modification of a custody order. Also, the fact the noncustodial parent will have a higher standard of living is generally not enough to change custody.

**20. CHILD VISITATION**: This is an extremely important area which constantly causes a great deal of problems. Many individuals agree on "reasonable" visitation rights but later many problems come up which require the parties to go to court to resolve. We recommend you be as precise as possible and to consider all possible issues.

a. Local rules: Unless both parties agree to the visitation schedule, a judge will decide the issue. Most courts have a standard visitation schedule. For example, visitation rights may be every first and third weekend from Friday at 6:00 p.m. until Sunday at 6:00 p.m., one month during the summer vacation, one week each Christmas to include Christmas Day on alternate years, alternate spring vacations. Thanksgivings and Easters, Mother's Day and Father's Day, and on the spouse birthday. Special visitation rights may be awarded if the parents do not live close to one another.

b. Grandparent visitation: The court can grant the grandparent's visitation rights if it is in the children's best interest.

c. Who will pay for travel expenses/arranging for transportation: You should agree on how travel expenses will be arranged if one of you will move away. For example, will the parent visiting the child bear all the costs of transporting the children or will it be split. Also, you should agree that, if applicable, the custodial parent will place the children in an airplane or other means of transportation to avoid the other parent having to incur the additional costs of picking up the children.

d. Child support: You should consider the divorce decree providing that if you have the kids for a certain period of time, you should not be required to pay child support to the other parent. In fact, you can ask a court that the other parent pay you child support during that period.

e. Taking the child out of state or country: To avoid any future legal problems, you should request the right to take the children out of state or country when they are to visit with you. You should also state you agree to return the children back to the custodial parent.

f. Advance notification: You should consider adding a provision that states you will give at least 24 hours advance notice before visiting, which permission the custodial parent will not unreasonably withhold. Also, if you are visiting and staying in the local area, the decree should also state you can have the children stay with you overnight.

**21. HIV VIRUS**: A court may not deny shared parental responsibility, custody, or visitation rights to a parent or grandparent solely because that parent or grandparent is or is believed to be infected with the human immunodeficiency virus. However, the court may condition such rights upon the parent's or

grandparent's agreement to observe measures approved by the Center of Disease Control or DHR for preventing the spread of HIV to the child.

## **22. CHILD SUPPORT:**

a. Military Obligation/Illegitimate Children: See the discussion in paragraph 4.

b. Alabama law establishes a minimum amount of child support for parents whose combined monthly gross income is at least \$550.00 and no more than \$10,000.00. If the parents' combined income is more, the court determines the amount case by case, based on the parents' financial ability and the children's needs. In addition to this, a court can also take into consideration child care expenses and any extraordinary medical expenses. Alabama uses the income share method to calculate child support. The gross income of the mother and father is used to arrive at "family income." Adjustments are made for pre-existing support payments for other dependent persons and for health insurance costs. The total support based on "family income" and number of children is then located on the guideline chart. An additional adjustment is made for net childcare costs. Then, the total support figure is multiplied by the percentage of the total income of both the mother and father. The non-custodial parent pays his or her percentage of the total support of the other spouse.

For example: Terry and Becky Smith have two children. His net monthly income is \$1200.00 and her net monthly income is \$1800.00, for a combined net monthly income of \$3,000.00. Looking at the Guidelines at the column showing the number of children next to the combined monthly income, will give you the needs of your children. In this case, the amount is \$686.00. If there were any child care costs, you would add the monthly amount to this figure.

Then you need to figure each parent's percentage share of their combined income. To get Terry's share, Terry would divide his net income by the combined income (ex: 1200 divided by 3000). The answer is .4 (40%). To get Becky's share, Becky would divide her net income by the combined net income (ex: 1800 divided by 3000). The answer is .6 (60%).

To figure the amount Terry owes, multiply  $\$686 \times .4 = \$274.40$ , similarly, to figure the amount Becky owes, multiply  $\$686 \times .6 = \$411.60$ . Whichever parent does not get custody of the children, gets to pay child support to the other parent.

c. Imputed Income: If a judge determines one parent voluntarily reduced his or her income, or simply quit a job for no good reason, the judge can refuse to recognize the loss of income of that parent and impute income to that parent. The amount imputed will depend on what that spouse was making before or could have made.

d. Modification: Child support can always be modified up or down for changed circumstances, such as a change in one or both parents' ability to provide, or a change in the needs of the children, or both. Also, although an increase in the ages of the children or a general increase in the cost of living or a decrease in the purchasing power of a dollar are factors a court can consider, an increase in child support should not be based only on inflation or the fact the children are getting older. Also, either the remarriage of the custodial parent or the payor parent does not, by itself, warrant a change in circumstances.

e. Relationship to denial of visitation rights: The custodial parent cannot deny the other parent visitation rights because that parent has failed to pay child support. Conversely, the noncustodial parent cannot stop paying child support because the custodial parent is denying him or her visitation rights. The only remedy available is for the parties to go to court. However, if a party has denied the other party the right of visitation or part-time custody, the court, in its discretion, may refuse to require the other party to

pay child support, and it may refuse to find the obligated party guilty of contempt for nonpayment of child support, providing that the children will not suffer thereby.

f. Tied to periods you actually have the children with you: The divorce decree should state you will pay child support only as long as the children are living with the custodial parent. If you get them for a period of time, you would then not owe any support. You should request a judge then have the other parent award you child support during that time.

g. When it terminates in Alabama: In Alabama, as in many states, the obligation to support your dependents ends when each child reaches the age of majority, unless you agree to extend the support. In Alabama, the age of majority is presently 19. But, when you divorced you agreed to support your child until the age of majority and at that time in Alabama the age of majority was 21, then you are liable to pay child support until that time. However, you may not have to support your child if he or she is self-supporting, such as by getting married or by joining the armed forces. Before stopping payment, check with an attorney. Also, a court can still order you to pay child support to a dependent who is beyond the age of 19 when such dependency is because of a mental or physical incapacity which began prior to such person reaching majority or if the person is dependent in fact, is still in high school, performing in good faith with a reasonable expectation of graduation.

h. Education: A parent has no obligation to pay for a child's education past the age of majority, as in the case of a college or vocational education, unless otherwise agreed upon. The judge may order the parties to provide college education for the children within certain limits.

i. Tax consequences: For federal income tax purposes, child support is not deductible by the payor spouse and it is not includable as income of the recipient spouse. Also, by federal law, the custodial parent is presumed to be the parent entitled to the child's federal exemption. Generally, if neither a court decree nor agreement establishes custody, the parent who had physical custody of the child for the greater part of the year is considered the custodial parent. If the custodial parent wishes to give it to the noncustodial parent, then that should be included in a marital settlement agreement where the custodial parent agrees to sign every year IRS Form 8332, Release of Claim to Exemption for Child of Divorced or Separated Parents. The custodial parent should seriously consider doing an automatic waiver because, at a later time, the supporting spouse may decide to withhold support payments.

j. Enforcement:

(1) Military: In addition to requesting support through the commander or first sergeant, if the member still refuses to pay or does not pay the amount you feel is due, then you can take your spouse or ex-spouse to court and obtain a support judgement. Once you get a judgement from the state court, you can garnish the member's wages, if state law provides for it. Alabama does. Additionally, you can also receive what is called an involuntary allotment from your spouse or ex-spouse if he or she has failed to pay child support for at least 2 months and you can furnish DFAS, at Indianapolis, Indiana, written notice from a court or state agency (such as DHR) stating the spouse is in arrears from child support order.

(2) Alabama: For information on obtaining child support from a nonpaying parent, whether in Alabama or out of state, you should consider contacting the DHR Child Support Enforcement Division. They can help you obtain child support at no cost to you. In the area of child support, the fact your spouse is out-of-state and may have not contacts with Alabama does not prevent Alabama from obtaining support for you. However, the process may take longer.

k. Bankruptcy: Child support is not dischargeable in bankruptcy.

1. **Withholding:** Every order, which includes a provision for child support, including divorce decrees, granted after May 18, 1984, must include a provision for enforcement of the support order by income withholding. The employer of the person ordered to pay support (the obligor) will withhold the amount ordered and pays it either to the court or to a designated public agency. A person who should be receiving support (the obligee) may file a petition for income withholding if the obligor is one (1) month or more in arrears. Income withholding may be effective immediately upon entry of the support order or when the obligor is one month or more in arrears in the court decision. In the latter case, the income withholding is activated by the obligee filing an affidavit with the court. The amount to be withheld cannot exceed the Federal fifty six (50-55/60-65) percent limitations.

**23. WHOSE OBLIGATION IT IS TO TRANSPORT DEPENDENT SPOUSE'S HOUSEHOLD GOODS TO EX-SPOUSE'S NEW ADDRESS:** Generally, the Army will pay for the shipment of property for divorcing individuals, with some restrictions, under 2 circumstances: (1) the individuals are living in family housing and they will be moving to the local area; and (2) the member has orders to PCS or separate in conjunction with the orders the member is getting divorce. For more detailed information, contact Transportation.

**24. HOW TO FIND AN ATTORNEY:** The best method is to obtain a recommendation from a person whose opinion you trust who has dealt with a particular attorney. Absent that, you have 2 options. You can contact the attorney referral service and request they provide you with a name of an attorney who has experience in a particular area of the law. You simply call information in that state, since most states provide such a service. You can also contact the nearest military legal office and request they provide the number to you. You can also check the yellow pages under "attorney/lawyers."

**25. WHEN A COURT CAN ORDER YOUR SPOUSE TO PAY YOUR ATTORNEY'S FEES:** If the court finds that one spouse is financially better off than the other party, the court, in its discretion, may order the well-to-do spouse to bear the reasonable attorney's fees and court costs of the other party. In all suits for the recovery of alimony, maintenance, or support in which a decree of divorce has been issued or is pending, and a contempt of court citation has been made by the court against either party, the court may award a reasonable attorney fee.

**26. WIFE CAN REQUEST CHANGE OF NAME:** When filing the petition for divorce, you can request your maiden surname be restored. The children will ordinarily retain the name of their father. The divorced wife may be enjoined from the use of the given name or initials of the divorced husband.

**27. RECONCILIATION:** We have an ethical obligation to explore the possibility of reconciliation between you and your spouse. After the divorce is filed, both of you may change your mind and try to work out your marital problems. Our policy is to encourage such efforts. The divorce proceedings can be dropped at any time of your choosing. We will recommend marriage counselors at your request.

## **28. TAX QUESTIONS AND ANSWERS:**

Generally, most people do not consider the tax consequences of a divorce until the time come to file an income tax return. Nevertheless, many issues can arise in regards to taxes as a result of a divorce. Although not all-inclusive, the sections below summarize some of the pertinent considerations and consequences of divorce on taxation.

Which parent can claim a child as a dependent for the exemption?

Normally the parent that has custody of the child gets to claim the exemption deduction however, some divorce decrees state that Form 8332 will be filed giving the non custodial parent the right to claim the child as an exemption. Therefore, first look at the decree, if it is silent, then a safe assumption is that the custodial parent will be entitled to the exemption as long as the custodial parent provides more than one half of the child's total support for the year.

What type of return should be filed for the year the divorce took place?

Separate returns are required if spouses are divorced under a decree or an order of separate maintenance has been issued. If a divorce or separation is not final, the spouses should consult with their attorneys to discuss the advantages and disadvantages of filing separate or joint returns. Taxpayers with children should consult your military tax specialist to see if they qualify for Head of Household.

Does alimony have to be included as income if it is received, and does the party paying alimony get deduction for alimony paid?

Amount paid during an individual's taxable year for alimony or separate maintenance are Deductible. IRC 215(a). Amounts received as alimony or separate maintenance payments are included in gross income. IRC 72(a).

What type of payments will be considered alimony by the IRS?

- a. To constitute alimony, payment must be pursuant to a divorce or separation agreement IRC72(b)(1)(A).
- b. A divorce or separation instrument is:
  1. A decree of divorce or separate maintenance or written instrument incident to such a decree. IRC 71(b)(2)(C)
  2. A written separation agreement. IRC 71(b)(2)(B); or
  3. A decree or any @ of court order requiring a spouse to make payments for the Support or maintenance or the other spouse, including a temporary decree, and Interlocutory decree and a decree of alimony pendente lite IRC 71(b)(2)(C)
- c. Alimony payment pursuant to an oral separation agreement will not qualify.

Can payment still be treated as alimony if the divorce or separated spouse live in the same household?

- a. Payment made under a divorce decree will not be treated as alimony if the divorced or separated maintenance payment. Temp. Treas. Reg. 1.71-1 T(b), Q&A-5.
- b. Transfers of services or property, including a debt instrument of a third party, an annuity contract, execution of debt instrument or the use of property, do not qualify as alimony or separation maintenance payments.

If a person is paying home expenses on behalf of his or her spouse, can that be deducted as alimony for tax purpose?

- a. Generally, cash payment of rent, mortgage, tax or tuition to a third party on behalf of the payee spouse qualifies as alimony. Temp. Treas. Reg. 1.71-1T(b), Q&A,B
- b. Payments made by a non-occupying spouse of mortgage, taxes and insurance are deductible to the extent of the occupying spouse's legal interest in the property. PLR 8710089.

- c. If a house is jointly owned, only half of the payments for the home expenses are deductible and other half are includable.
- d. If the occupying spouse owns the house being used as the residence, payments made to third parties are payments on behalf of the payee spouse and deductible as alimony.
- e. Home expenses paid by a non-occupying spouse who is also the owner of the residence are not deductible. Temp. Treas. Reg. 1.71-1T(b), Q&A-6

If a person is making a payment to a third party at the request of a spouse, does that payment qualify as alimony for tax purpose?

Cash payments made to a third party at the written request of a divorced or separated spouse qualify as alimony. The written request must state that both parties intend the payment to be treated as alimony. The written request must be received before the “payer” spouse files a return for the year the payments were made. Temp. Treas. Reg. 1.71 –1T(b), Q&A-7.

If a divorce or separation agreement call for premiums to be paid for life insurance on the payer spouse’s life, does that payment qualify as alimony for tax purposes?

Premiums paid for life insurance on the payers spouse’s under a divorce or separation agreement are deductible to extent the payee spouse is the owner of the policy. Temp. Treas. Reg. 1.71

What are the excess Front Loading Rules?

If alimony payments in the first years exceed the average payment in the second and third year by more than \$15,000, the excess amounts are recaptured in the third year by requiring the payer spouse to included the excess in income and allowing the payee spouse to deduct the excess amount. A similar rule applies if payment in the second year exceed payments in the third year by more that \$15,000. IRC 71(f). Temporary support payments are not subject to recapture. IRC 71(f)(5)(B).

Can child support payments be deducted, and does the receipt of child support require inclusion in income?

Payments made for the support of children under a divorce or separation decree are not deductible by the payer spouse or includable in the gross income of the payee spouse. IRC 71(c). Payments that are partially alimony and child support are considered to first satisfy the child support obligation and secondly alimony.

If a Joint tax return is filed, are both spouses liable for the tax?

Husband and wife are jointly and severally liable for the tax on a Joint tax return. IRC 6013(d)(3).

What happens if one spouse innocently signs a return and the other spouses entered fraudulent information?

- a. A spouse who innocently signs a return that understates income can be relieved of liability is such spouse qualifies as an “innocent spouse”. IRC 6013(e).
- b. In order to be granted innocent spouse relief:
  1. The spouses must have filed a valid Joint return. IRC 6013(e)(1)(A);
  2. There must be a substantial understatement of tax (\$500 or more). IRC 6013(e)(1)(B).
  3. The understatement must be caused by a grossly erroneous item;

4. The spouse must establish that he or she did not know, or did not have a reason to know that there was substantial understand on the joint return. IRC 6013(e)(1)(C).
5. It must be inequitable to hold the spouse liable for the tax. IRC 6013(e)(1)(D).

**29. GENERAL SUGGESTIONS:** Anything you tell anyone in this office is strictly confidential and will not be disclosed without your permission. For this reason, you should not withhold any information from us and, above all, we must have the truth. We must have ALL the facts to represent you properly. During the course of the proceeding, it may be in your best interest not to discuss your case with other parties and we advise you not to do so.

Your well-meaning friends may offer you advice about your case. You may hear tales about awards in other divorce cases. The facts surrounding your marriage, divorce, children, and property are unique and they differ from every other case. Divorce proceedings are very emotional and, at times, parties use them to seek revenge. Children are often used by a parent to punish the other parent. Prepare you children properly without poisoning their minds about your spouse. Attempt to cooperate with your spouse when the children are involved.

Under Alabama law, divorce invalidates provisions for your spouse in your will made before the divorce. Following the divorce, you will need a new will. If you wish to pursue this, please tell us.

**30. POST-DIVORCE CHECKLIST: (VERY IMPORTANT):** After you divorce, remember you still have certain rights and obligations. You have the responsibility to understand what they are and how to enforce them.

a. Divorce Decree:

- \_\_\_\_\_ Do you have certified copies?
- \_\_\_\_\_ Do you thoroughly understand what it says? Give it to a friend (or your attorney) and ask questions and see what they say.
- \_\_\_\_\_ Do you know how and where you can modify child and spousal support and child custody?
- \_\_\_\_\_ Do you know when and where you are to send payments?

b. Transfer of Title:

- \_\_\_\_\_ Transfer of car title? Title to land or home?
- \_\_\_\_\_ Have you notified insurance company? Mortgage company? Tenants?

c. Personal Property:

- \_\_\_\_\_ Do you know what property you are getting, how it will be delivered, who will bear the costs and liability for damage, and when it will be delivered to you?
- \_\_\_\_\_ Have you transferred bank accounts, credit cards, securities, IRAs?

d. Legal Documents:

- \_\_\_\_\_ Updated the Will?
- \_\_\_\_\_ Revoked, destroyed outstanding Powers of Attorney or Health Care Surrogates?
- \_\_\_\_\_ Updated the beneficiaries on insurance policies? Eliminate former spouse or include former spouse and/or children per divorce decree?
- \_\_\_\_\_ Notified proper authorities of change of name and status? e.g. driver's license, Social Security number, credit cards, bank accounts, etc.

\_\_\_\_\_ Have IRS Form 8332 signed by spouse? Revised W-4? Collected the necessary documents for tax preparation? Seen an accountant before filing income tax? Have copies of joint returns to preceding year(s)?

\_\_\_\_\_ Notified creditors of change in obligation and tried to obtain releases of liability?

\_\_\_\_\_ Updated records; e.g. emergency notification cards, dependent I.D. cards and DEERS enrollment, and personal records?

e. Custody and Support:

\_\_\_\_\_ Notified schools of custody arrangements?

\_\_\_\_\_ Request school to provide noncustodial parent with school information concerning children?

\_\_\_\_\_ Maintain proof of child support payments made?