

# Untying the Knot

A LAYMAN'S GUIDE TO  
DIVORCE LAW IN MARYLAND



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**Disclaimer:** The information contained in this book is for general information purposes only. It does not form an attorney-client relationship, and it does not constitute legal advice. Every legal case involves unique facts and circumstances, and different people often want different outcomes based on their unique needs and desires. You should talk to an attorney for advice concerning your particular legal situation.



## INTRODUCTION

Marriage is a misunderstood institution, often perceived solely as a relationship. That's understandable. After all, people frequently enter it -- they "tie the knot" -- for reasons that are largely based on emotions, including love, lust, anxiety and insecurities, a desire for companionship, a personal connection to the other or a combination of these and other feelings. Even the simplest courthouse wedding is a joyful occasion, the joy resulting from the happiness surrounding the relationship and the couple's anticipated good fortune in the future.



***But marriage more accurately is a legal institution, an entity distinct from the underlying relationship , which usually existed prior to the marriage and which may survive in some form after any divorce.***

But marriage more accurately is a legal institution, an entity distinct from the underlying relationship, which usually existed prior to the marriage and which may survive in some form after any divorce. Marriage is a creation of the law, and the law is a rational and dispassionate set of rules, created and administered by government.

Not many things on earth are as different as the law and romantic love. In order to understand marriage, one must not confuse it with the underlying relationship and must recognize its essential legal character.<sup>1</sup>

Similarly, divorce also is misunderstood. Having endured an unhappy marriage, individuals often begin the process of divorce with the emotions of bitterness and anger in their hearts. They may feel betrayed by or disconnected from their spouses as a result of treatment experienced in the relationship. As a result, they want out, they may want revenge or they just want their fair share of the marital wealth.

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1. To many, marriage also is a religious institution, however the religious concept of marriage plays little or no role in divorce law. My remarks here will be restricted to the legal concept.



Just as a marriage is not a relationship, divorce is not a breakdown of the relationship. It is also a legal concept — the dissolution of the marriage. It is a rational and practical provision in law and does not exist to satisfy either spouse's desire for revenge or to give anyone an opportunity to express wrath, hurt or jealousy, all common emotions among people going through a divorce.

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***As much as it may be emotionally satisfying to one party or the other, the law may not allow a spouse to simply “cut the knot” that he or she earlier tied...***

As much as it may be emotionally satisfying to one party or the other, the law may not allow a spouse to simply “cut the knot” that he or she earlier tied by walking away from a marriage and the rights and obligations that accompany it. Nor does it allow a party to obligate the other to a lifetime of servitude. Instead, the law requires that the parties “untie the knot” — that is, dissolve the marriage in a way that is consistent with the law and with the legal purpose of marriage. Unfortunately, this untying is often a painfully slow process.

One may view the relationship and the marriage as proceeding through time on separate but parallel tracks. The relationship occurs with its accompanying emotional highs and lows, moments of joy and times of frustration, and the marriage occurs roughly simultaneously with its characteristic licenses, ceremonies, contracts and court hearings. The relationship and the marriage rarely coincide exactly. The relationship usually starts prior to the marriage and may end prior to any divorce. Sometimes the relationship evolves into a friendship and survives after the divorce. Although they are related, the relationship and the accompanying marriage are distinct.

Every couple's relationship is unique and so will be any breakdown of that relationship. Some couples going through a divorce would be happy to see the other dead, and others remain amicable if not good friends. Some have children who will bind the parties to each other for the rest of their lives. Others have no children and are free to forget that the other exists. Despite these differences between couples, the principles that I outline here can assist anyone going through a divorce to understand the basic law and procedures that will govern his or her case.



Maryland divorce and child custody law is contained entirely within Maryland case law and the Family Law article of the Maryland Code, however, my purpose in writing this book is not to give detailed instructions on Maryland family law.

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***Rather, my purpose is to assist individuals who are going through a Maryland divorce to focus on the legal concepts of marriage and divorce...***

Rather, my purpose is to assist individuals who are going through a Maryland divorce to focus on the legal concepts of marriage and divorce, to understand the basic concepts governing how a divorce takes place, to answer as many basic questions about divorce law and procedure as possible, and to assist individuals to organize their thoughts, and, therefore, their emotions, that surround their marriage and their potential divorce.

I hope that, by understanding these principles, individuals going through a divorce will be better able to direct their emotions in a constructive way and simultaneously to develop a legal strategy for moving forward.



## WHAT IS MARRIAGE?

In order to understand divorce, one must first understand marriage.

I'm not instructing here on what makes a marriage relationship successful or what the marriage relationship might mean to either spouse. Such a relationship is a deeply personal arrangement and its meaning may vary greatly with the individual.

Instead, I am instructing on the legal concept of marriage.



***In Maryland, marriage is a contract. In general, a contract is an agreement — a meeting of the minds — between two individuals whereby each promises to abide by a set of terms.***

In Maryland, marriage is a contract. In general, a contract is an agreement — a meeting of the minds — between two individuals whereby each promises to abide by a set of terms. One person promises to do A, B and C. The other person promises to do X, Y and Z.

So it is with marriage, but marriage is not just any contract and does not include just any terms.

Marriage is a special kind of contract, treated with an unusual degree of respect and care by the courts. Most standard contracts involve the exchange of goods or services for money. And most are made at arms-length, that is, they are made between individuals who may not trust each other, who are unrelated and uninterested in the well-being of the other, and who are entering into the contract for their own self-interest. In fact, under normal circumstances, individuals enter into contracts, not despite their lack of trust, but because of it.

Marriage is very different. First, it does not involve an exchange of money but, rather, centers on the health and welfare of a family and the children and spouses who comprise it. Second, it is not a contract made at arms-length but between individuals who are very close. Their relationship is based on trust, and their trust in the other is one of the



primary reasons for wanting to enter into the marriage contract. Although individuals contemplating marriage are unrelated by blood, they are related by an emotional bond that is as strong as any blood-relation. Finally, far from acting out of pure self-interest as in the case of a standard contract, individuals entering into a marriage contract normally have a high degree of compassion for, and interest in the good of, the other. While they anticipate drawing great happiness for themselves during the course of the marriage, they also have deep concern for the other and intend to act on behalf of the other in accordance with such concern.



***The courts' deference to marriage contracts especially applies when a marriage involves children or a dependent spouse.***

The courts' deference to marriage contracts especially applies when a marriage involves children or a dependent spouse. Courts will tend to bend-over backward to allow for a full airing of all viewpoints and they may establish certain unique presumptions to protect children or a financially dependent spouse. Finally, courts likely will try harder than otherwise to seek an outcome that is fair and that is in the best interests of any children.

Finally, marriage is different than other contracts in that its terms are set by statute. The marriage contract comes with a predefined set of rights and obligations for each spouse. In general, such rights and obligations pertain to the property that each spouse accumulates during the marriage, how such property is distributed upon any divorce and whether one spouse is entitled to support from the other after the divorce.

Contrary to popular understanding, when one party seeks a divorce, he or she is not breaking the contract. This is so because the very terms of the marriage contract provide for the possibility of divorce. Under a marriage contract, two spouses are always free to seek a divorce. The only conditions for such divorce are that it occur as provided by statute.

The parties may avoid some of these statutory terms by executing a written contract that specifies alternate terms. In general, such agreements are valid as long as they adhere to basic laws of contracts and a few other requirements unique to marital agreements.





Parties commonly execute such agreements prior to the marriage, in which case they are called pre-nuptial agreements, or in anticipation of divorce, in which case they are called separation agreements or property settlement agreements.

The terms of the marriage contract, whether by statute or agreement, accomplish one purpose — transforming the two people into a partnership and giving that partnership certain rights that are independent of each individual. In effect, the marriage partnership is an entity that is separate from each individual.

One of the rights of the partnership is an interest in property acquired by spouses during the marriage. It may seem unfair to some that the marital partnership acquires an interest in property that otherwise would be solely owned by one spouse or the other. Why does the law consider this joint ownership to be fair? The answer lies in the fact that the law and, therefore, any court, views the partnership as an association of two individuals engaged in the task of building a single married life.

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***Their efforts will commonly result in visible fruits — property, income, children, cooked meals, a clean home and so on. Each spouse has an equal claim to those fruits because of the partnership and their joint commitment to it.***

Their efforts will commonly result in visible fruits — property, income, children, cooked meals, a clean home and so on. Each spouse has an equal claim to those fruits because of the partnership and their joint commitment to it.

A spouse is not denied an interest in a particular marital asset simply because he or she is not the one who earned it or purchased it, just as a spouse is not denied the right to eat home-cooked meals simply because he or she isn't the one who cooked it. Absent evidence to the contrary, the law presumes that each spouse assumes his or her fair share of the burden of making a successful marriage. The law does not dictate the roles that each spouse should take or how responsibilities in a marriage must be allocated. It allows the parties to work out such things for themselves and it states that, however the parties allocate them, the fruits of any labor belong to the partnership.





As an example, a spouse who stays home to raise children, clean, cook and otherwise make a home may earn no income. Nevertheless, those efforts assist the spouse who works outside of the home to earn a living for the household. As a result, both he and she will have an equal claim under the terms of the marriage for the accumulation of property by either one during the marriage, however great or small that may be.

The point to remember is that, under Maryland law, marriage is an equal partnership. Under such a partnership, both individuals have an equal claim to its fruits, which include the total property accumulated during the marriage.



## WHAT IS DIVORCE?

So if marriage is a partnership, what is divorce?

Divorce is the dissolution of the partnership and the division of its fruits—the untying of the knot. The divorce process usually is slow and painstaking and always consumes more time than divorcing spouses wish.

Aside from the loss of the relationship, much of the hurt and anxiety in getting a divorce stems from not recognizing the partnership aspect of marriage. Having forgotten or never learned that a marriage is a partnership, spouses may be dismayed during their divorce proceeding to learn that their spouse is entitled to a large share, often half, of the marital assets. Spouses often think, “I earned that money and all he did was stay at home, so he shouldn’t get any of it” or “that property isn’t marital property because it is titled in my name only.” On the contrary, even in the bad times, property accumulated during a marriage is property of the partnership, and divorce is the process of dissolving the partnership and dividing the property.

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***As anyone who has been involved in dissolving a business partnership knows, ending it entails a lot more than just cutting one’s losses and walking away.***

As anyone who has been involved in dissolving a business partnership knows, ending it entails a lot more than just cutting one’s losses and walking away. Rather, it requires stepping back, taking stock of the partnership’s assets and liabilities, and dividing them according to the terms of the original partnership agreement. In the case of a marriage, the terms are included in either Maryland law or a valid prenuptial or separation agreement.

“Stepping back and taking stock” of the partnership is exactly what occurs during a divorce proceeding. The court provides ample opportunity for each side to learn of the properties, assets, liabilities and sources of income of the other. The court will require that each spouse disclose his or her income and expenses in detailed financial statements. The court will require that each spouse provide a complete property listing for the marriage, and that the lists include not only everything that they own but also information on how it is titled, its approximate value and the amount of any loan or lien associated with it.



Then, if the spouses can't reach a written settlement splitting up all the property, their lists and financial statements may form the court's starting point for deciding what constitutes the property of the partnership and how to fairly divide it.

The subject of alimony may also be raised in a divorce proceeding, however, it is based not on property but on income. In a marriage, the parties commonly allocate responsibilities for employment, maintaining the home, bill paying and so on. These understandings usually lead one party to depend on the other for certain things, especially for income. When the marriage ends, a spouse who formerly was dependent on the other for income may be unable to immediately earn a living. For this reason, the law allows a dependent spouse to seek income from the other while he or she obtains training or education to become self-sufficient. Alimony awarded in this situation is called rehabilitative alimony and is usually temporary. Indefinite alimony is possible in rare circumstances.



***Alimony is not intended to provide an undeserving former spouse with source of unearned income.***

Alimony is not intended to provide an undeserving former spouse with source of unearned income. Rather, where justified, it provides a former spouse with a source of income, usually temporary, to maintain that spouse and compensate for that person's smaller income during the course of the marriage. In other cases, when awarded indefinitely – that is, with no scheduled expiration -- it may serve a broader purpose. The requesting spouse in those cases has a high burden to prove that such open-ended income should be granted, and the court must consider numerous factors when considering its response. Such factors prevent the court from awarding indefinite alimony except in rare cases.

The main point of this chapter is that a divorce is not merely a process of allowing the parties to split up and go their own ways. Nor is it a matter of providing unjust windfalls to one spouse or the other. It is the unwinding of a partnership. Such unwinding, as with any partnership, is a slow process of assessing the properties and resources of the partnership and distributing them according to a set of terms.



None of this is to say that courts always adhere to principles of marriage and divorce as they should. Courts make mistakes and injustices occur. Nevertheless, the law governing divorces does strive to accomplish a fair outcome, and parties going through a divorce should not believe that the procedure, as unpleasant as it may be, is inherently one-sided.

Let's now turn to a more detailed explanation of various issues that arise in divorce and child custody proceedings.



## SEPARATION

Separation is a natural, and often necessary, step in a divorce process. Although separation may seem like common sense, there are some legally significant things to consider when contemplating separation.

### A “LEGAL” SEPARATION

Contrary to popular belief, in Maryland, there is no such thing as a “legal separation.” Couples do separate and that separation often has legal significance, but the act of separating does not require filing paperwork with the court to make it official. In order to constitute a separation in Maryland, the parties’ time away from each other need only meet the following criteria: (1) the parties must refrain from sleeping under the same roof — that is, in the same building, and (2) the parties must refrain from engaging in sexual intercourse with each other. As long as these two conditions exist simultaneously, the parties are separated. As soon as one of those things occurs even once, the separation period stops. At that point, couples wanting to establish separation must start over. There is no requirement to officially register the separation or file any documents with the court. One need only abide by these two requirements of separation and remember the approximate start date.



***Separation in Maryland is useful for three things.***

### THE “WHY” AND “HOW” OF SEPARATION

Separation in Maryland is useful for three things. First, separation is necessary for establishing grounds for no-fault divorce based on voluntary separation and twelve-month separation. Of all the divorce grounds, grounds based on separation are the easiest to prove and result in the least tension between the parties. Without separation, parties attempting to obtain a divorce will be required to rely on fault grounds — those alleging that one party or the other is at fault in the breakup of the marriage. Such grounds are more difficult to prove and generate more animosity.



Second, separation provides an opportunity to begin taking certain steps that will assist each party in the divorce proceeding. A divorce is often adversarial and involves a struggle by each person for information — financial and otherwise — about the other. Such information may be useful to the parties in deciding whether and how to settle or, ultimately, for proving one's case in court. Married households are invariably full of documented information concerning income, property, debt, and the family life of the spouses and their children.

**Such information commonly includes:**

- Bank account statements
- Canceled checks
- Check registers
- Tax returns
- W-2s and other tax forms
- Mortgage statements
- Car loan statements
- Investment statements
- 401k statements
- Pension statements
- Credit card bills
- Utility bills
- Apartment leases
- Paystubs
- Employment contracts
- Diaries
- Calendars
- E-mails
- Letters
- Greeting cards
- Family photos
- Family videos
- Children's school records
- Medical records
- Medical bills
- Medical insurance documentation



Other documents that show part of either spouse's financial picture or that give information about the parties' family life.

If you are contemplating separating from your spouse in anticipation of a divorce, you should try to take all such documentation with you as you begin the separation if you can accomplish it without violence or a heated confrontation. If you cannot secure such documentation, or a copy, you may have to rely on the legal process called "discovery" should you later want such information. Discovery is the process by which, in a divorce proceeding, both parties may compel the other side to provide requested information, including access to documents. Despite the availability of this process, one can rarely be certain that a spouse isn't withholding important documents. You are better off retaining control of the documents from the start and, therefore, control of much of the information upon which both you and your spouse will rely during the course of the case.



***Finally, in addition to gaining control of important documents, separation provides an opportunity to begin separating one's life for the eventual reality of being single.***

Finally, in addition to gaining control of important documents, separation provides an opportunity to begin separating one's life for the eventual reality of being single. As soon as possible, upon deciding to proceed with a divorce, you should consider taking the following steps:

1. Move out, unless your spouse moves out first. Two issues often arise in the course of deciding whether to move out – ownership of the house, and custody of the children.
  - a. First, the house. In general, if you own the residence or are named on the apartment lease, it is preferable that your spouse move out so that you don't find yourself having to make two monthly payments — one for the residence you're leaving and one for the residence into which you're moving. However, if your spouse refuses or is unable to leave, you should make the move. You will not be barred from moving back in at a later time should you so choose.





- b. Next, the children. If you have children with your spouse and custody may be contested, it is preferable that you keep the children with you when you separate. If you are the one moving out, this means that you should take the children with you. Having the children live with you will give you greater control over their lives during the course of the case, will give you an opportunity to demonstrate, or continue to demonstrate, your fitness as a parent and will create a useful history of the children living with you. It isn't wise to take the children or keep the children if one cannot do so without violence or a heated confrontation in front of the children. However, all else being equal, having the children live with you from the start is generally in your best interest if you intend to fight for custody.
2. Close any joint credit cards. If any credit card accounts remain open on which both parties are named, your spouse could add charges to that account, including for his or her divorce attorney, for which you will be at least partly liable. An important step in separation is ceasing to incur joint debt. Closing all joint credit card accounts, therefore, is imperative. If a joint account has a balance, you and your spouse will have to address the balance together, but by closing the account, you at least foreclose the possibility of being liable for additional charges.



***A checking or savings account is an asset. If both spouses are named on such an account, from the bank's point of view both parties are equally entitled to all of its contents.***

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  3. Close any joint bank accounts. A checking or savings account is an asset. If both spouses are named on such an account, from the bank's point of view both parties are equally entitled to all of its contents. To prevent your spouse from emptying the account, you should take all funds in the account to which you reasonably believe that you are entitled and place them in a separate account in your sole name. If the joint account is then empty, it should be closed. Closing such accounts may require both spouses' written consent. If the other spouse refuses to provide such consent, at least your funds are safe.
4. Cease any direct deposits into, or automatic debit from, the joint accounts. If you have arranged with an employer to have your paycheck direct-deposited into a joint account, or if you have arranged with your bank to have certain bills automatically



paid from that account, you should make immediate arrangements to cease these automatic deposits and withdrawals. Resume any such arrangements in an account titled solely in your name.

5. Consider ceasing to pay the bills of your spouse. If you have historically paid any expenses of your spouse, you may wonder whether you should continue. Common bills of this kind are a spouse's auto-insurance and cell phone bills. Answering this question in general terms may not be possible. Obviously, it is preferable that each separating spouse assume full responsibility for his or her own living expenses. But there may be good reasons for continuing to pay certain bills of the other. Among them are that the other's inability to pay such bills will make his or her moving out impossible, that both spouses' names are on the account associated with such bills and your desire to protect your credit, and that the product or service associated with the bill benefits the children. While complete financial separation is preferable, whether to cease paying all bills of the other is a decision that one must make on a case-by-case basis.



***Secure any personal property and household items that you wish to keep. Things left in the possession of a separating spouse are vulnerable to being lost, sold or damaged.***

6. Secure any personal property and household items that you wish to keep. Things left in the possession of a separating spouse are vulnerable to being lost, sold or damaged. Although one may have recourse against a spouse who engages in such conduct, avoidance of the situation is preferable. This being said, if you cannot take certain items upon separation, recovery of those items at a later time may be possible.



## GROUNDS FOR DIVORCE

Now that we have a decent understanding of the rationale behind the divorce process and the practical considerations behind separation, how does one get a divorce?

### JURISDICTION

First, the court must have jurisdiction to hear the divorce case. In Maryland, only the circuit courts have jurisdiction to hear what are called “family law cases” — those involving divorce, child custody and child support. Furthermore, in divorce cases, jurisdiction also requires that one of the spouses have resided in the state of Maryland for at least one year immediately prior to the filing of the complaint for divorce.



***... the spouse seeking a divorce must decide whether to seek an absolute or a limited divorce. What are the differences between the two types?***

### LIMITED V. ABSOLUTE DIVORCE

Second, the spouse seeking a divorce must decide whether to seek an absolute or a limited divorce. What are the differences between the two types?

An absolute divorce is a real divorce. When two people are granted an absolute divorce, they are no longer married, all property issues and alimony issues have been addressed and the parties are free to marry other people. The deal is done.

A limited divorce is not a real divorce. Parties who receive a limited divorce are still married and cannot marry other people.

So why would anyone who wants a divorce ask for a limited divorce? There is a very good reason. The grounds for an absolute divorce are harder to prove than the grounds for a limited divorce. Often the grounds for an absolute divorce are not met when the parties are ready to start the divorce process and time must pass before such grounds exist. A very common example is in the case of an absolute divorce based on twelve-month separation, which will be described in more depth later. In order to start the divorce process based on twelve-month separation, the parties would have to wait for an



entire year after separating before even opening the case. Having made the decision to get divorced, the parties naturally want to have the case finished sooner rather than later. Waiting for such a long time may leave the parties feeling like they are wasting valuable time when they should be busy “unwinding” the partnership by addressing issues like property, alimony, child custody and child support.

A limited divorce proceeding can solve such a problem. The grounds for filing for a limited divorce are easier to prove than for an absolute divorce, and it is often possible to file for a limited divorce immediately after separating. For example, parties may file for a limited divorce based on voluntary separation after being separated for only one day. By choosing to file for a limited divorce, the parties can start the divorce process immediately upon separation and make progress in their case while they wait for the absolute divorce grounds to be established.

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***When the absolute divorce grounds later are in place, the parties will likely have addressed many or all of such divorce-related issues like property, alimony and child custody either in a limited divorce trial or by way of agreement.***

When the absolute divorce grounds later are in place, the parties will likely have addressed many or all of such divorce-related issues like property, alimony and child custody either in a limited divorce trial or by way of agreement. At the very least, the parties will have already endured the long period allowed for discovery and mediation. They may then promptly change the case from a limited divorce case to an absolute divorce case and finish the case much more quickly. In short, a limited divorce proceeding allows the parties to start the divorce case before the grounds for an absolute divorce arise.



## GROUNDS

Third, the spouse seeking the divorce must show one or more “grounds” for divorce. Limited divorces and absolute divorces have different grounds.

### **For a limited divorce, one must prove one of the following:**

- **Voluntary separation:** Separation requires that the parties refrain from both sleeping under the same roof and engaging in sexual intercourse. Voluntary separation also requires that the separation be voluntary on the part of both parties and that both parties want to end the marriage. Finally, there must be no reasonable expectation of reconciliation.
- **Desertion:** Desertion requires that one spouse deliberately take an action to abandon the other, either by leaving the home or by creating an intolerable condition that forces the other to leave the home.
- **Cruelty of treatment and excessively vicious conduct:** Cruelty of treatment and excessively vicious conduct are two distinct grounds for divorce, but they mean essentially the same thing – which is why they often are listed together. Cases in which cruelty of treatment and excessively vicious conduct can be proven are rare. The typical poor treatment of which spouses commonly accuse each other rarely rises to this level. The cruelty and vicious conduct standards ordinarily require substantially more than disagreement, emotional isolation, arguments, shouting or even an occasional instance of physical violence. These grounds generally require a condition amounting to deliberate and routine mental or physical torture by one spouse against the other or against a minor child of the complaining party.

### **In order to obtain an absolute divorce, one must prove one of the following:**

- **Twelve-month separation:** If the parties have been separated for twelve months without interruption prior to filing the complaint for absolute divorce, and if there is no reasonable expectation of reconciliation, such separation provides grounds for an absolute divorce. Unlike the separation grounds for a limited divorce, an absolute-divorce based on twelve-month separation does not require voluntariness by either spouse.



- **Desertion:** In addition to serving as grounds for a limited divorce, desertion also provides grounds for an absolute divorce. In order to obtain an absolute divorce on this ground, the condition of desertion must exist without interruption for at least one year prior to filing the complaint for absolute divorce. Finally, there must be no reasonable expectation that the parties will reconcile.
- **Cruelty of treatment, and excessively vicious conduct:** In addition to serving as grounds for a limited divorce, cruelty of treatment and excessively vicious conduct also provide grounds for an absolute divorce. In order to obtain an absolute divorce on this ground, a party must also show that there is no reasonable expectation that the parties will reconcile.
- **Adultery:** One party can obtain an absolute divorce from the other if he or she can prove that the other party committed adultery. The law recognizes that acts of adultery usually occur secretly, therefore it does not require first-hand proof of the actual act of intercourse in order to establish the ground of adultery. Unless there is such first-hand evidence, the law requires that only two elements be shown: (1) disposition and (2) opportunity. That is, the party need only show that the other party has the disposition, or personal character, that allows him or her to commit such an act, and that the party had the opportunity to commit the act.

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*The question then arises whether both are thereby prohibited from obtaining a divorce on the ground of adultery.*

- Recrimination is a common issue on the topic of adultery. Recrimination occurs when both parties commit adultery. The question then arises whether both are thereby prohibited from obtaining a divorce on the ground of adultery. The law states that recrimination is not a bar to a claim for divorce based on adultery, but it will be a factor that the court will consider.
- Condonation is another common issue on the topic of adultery. Condonation occurs when one party learns that the other spouse has committed adultery but forgives the other spouse or continues to reside with the other spouse as husband or wife. As with recrimination, condonation is not a bar to a claim for divorce based on adultery, but it will be a factor that the court will consider. The court may conclude



that if the parties continued their marital relationship for a substantial period of time after disclosure of the adultery, then the adultery could not have been the real cause of the subsequent breakup of the relationship.

- **Insanity:** A party may obtain an absolute divorce against the other if the other is declared insane. A divorce based on the ground of insanity is possible if: (1) the court finds that the spouse has been confined in a mental hospital or similar institution for at least three years before the filing of the complaint for divorce, (2) the court determines from the testimony of at least two physicians who are competent in psychiatry that the insanity is incurable and that there is no hope of recovery, and (3) one of the parties has resided in Maryland for at least two years before the filing of the complaint for divorce.
- **Imprisonment:** A party may obtain an absolute divorce against a spouse if the spouse has been sentenced to serve at least three years or an indeterminate sentence in a penal institution and has served at least one year of that sentence.

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*In any divorce case, regardless of the alleged grounds, the evidence of the ground must include corroboration, usually by a third-party witness.*

## CORROBORATION

In any divorce case, regardless of the alleged grounds, the evidence of the ground must include corroboration, usually by a third-party witness. In other words, one of the parties must present independent evidence, usually a witness who is neither the husband nor the wife, that can corroborate the elements of the ground for divorce. Such corroboration need not rise to the level of proof — it need only consist of competent testimony that sufficiently supports the ground for divorce. Without such testimony, regardless of the strength of the other evidence, the court will be unable to grant the divorce. This requirement exists to prevent divorcing parties from colluding or conspiring to present false evidence of grounds for divorce.





## FAULT V. NO-FAULT GROUNDS

Of the above grounds, those based on some period of separation are considered “no fault” grounds because they do not allege or otherwise involve fault by either party. The remaining grounds are considered “fault” grounds because they obviously allege that the other party was at fault and guilty of some kind of misconduct that caused the breakdown of the marriage. In general, no-fault grounds are easier to prove and generate less animosity between the parties than fault grounds. Whether a divorce proceeding is based on fault or no-fault grounds is important in the division of property, the determination of child custody, any decision to award alimony and any decision to award attorney fees because fault by one spouse may give the court reason to award the other spouse a larger share of the property and the other forms of relief being sought.



***Divorce and annulment are similar but are different in a fundamental way.***

## ANNULMENT

Spouses who have been married for only a short period of time often ask about the possibility of an annulment. Divorce and annulment are similar but are different in a fundamental way. A divorce is the termination of a presumably valid marriage, whereas an annulment generally is a formal recognition that a marriage is invalid.

Annulments are not favored in Maryland. Requests for annulment are rarely filed in court and even more rarely granted.



**Unlike with divorce, no set list of grounds exists for an annulment, however, several possible grounds for annulment include:**

1. The marriage was induced by fraud.
2. The parties are related by blood.
3. One of the parties was already married.
4. One of the parties was not competent to marry as a result of mental deficiency, intoxication or minority.
5. The marriage was induced by duress.
6. The marriage ceremony was defective.

Despite the essential difference between a divorce and an annulment, in an annulment proceeding, the court will still address the issues of marital property and, if requested, alimony. The court may always address the issue of child custody between any two parents, regardless of the validity, or the entire lack, of any marriage.



## PROPERTY DIVISION

In every divorce case, the court has to divide marital property.

The parties may have mountains of property or they may have very little. In either case, the court will address the issue of the division of property. The parties may resolve the property issue by written agreement. If they don't do so, the court will address the issue at trial.



***The court will not necessarily divide all of the parties' property. Rather, it will divide only "marital property."***

### IDENTIFYING MARITAL PROPERTY

The court will not necessarily divide all of the parties' property. Rather, it will divide only "marital property."

What is "marital property"? The short and simple definition of marital property is: All property that either spouse acquired during their marriage. The slightly longer but more complete definition is: All property that is titled to one of the parties and that was earned or paid-for by either spouse during the marriage.

Itemizing the things that either spouse earned or paid for during the marriage might sound simple, but it can become surprisingly complex. Some things are easy to list, like televisions, shoes, appliances and other things that are tangible and relatively inexpensive. Such items are almost always paid for at the time the item is acquired. For example, say Husband goes to an art dealer, buys a painting for \$500, gives the cashier \$500, takes the painting home and hangs it over the mantle. That painting is marital property because Husband paid for it during the marriage.

Other things that spouses may earn or pay for during a marriage are much more difficult to list because they are not earned or paid-for all at one time but rather over time. Pension plans, 401(k) accounts and federal employees' Thrift Savings Plans are examples of assets that are earned over time. Vehicles, real estate, and jewelry are examples of assets that are paid-for over time. Are these things marital property? Yes and no.



Yes, they are marital property to the extent that they were earned or paid for during the marriage. No, they are not marital property to the extent that they were earned or paid for before the marriage or after the divorce. Calculating which portions of assets like these are marital usually requires doing some math. (Get out your calculators.) The portion of an asset's value that is marital normally will be a fraction. The numerator or top number of the fraction will be the total amount of the payments made while the parties were married; the denominator or bottom number will be the total amount of the payments made over the life of the loan for the item. This fraction will represent the portion of the item or its value that is marital and that the court will consider when dividing marital property.

A common example is a car. Wife buys a car on January 1, 2001, and takes out a 5-year loan to pay for it. For each month during the life of the loan, Wife makes a payment in the same amount. On January 1, 2003, Wife marries Husband. On January 1, 2010, Wife and Husband get divorced, and Wife still owns the car.



***The car is marital property, but only in part because she started paying for it before the marriage started.***

The car is marital property, but only in part because she started paying for it before the marriage started. Wife made monthly payments on the car while she was married from January 1, 2003, until January 1, 2006, which equals 36 payments. Wife made a total of 60 payments over the life of the car. As a result, 36/60 or 60 percent of the car or its value is marital property.

Another common example is a pension. Husband works for Widget Corp. starting on January 1, 2000, until he retires on January 1, 2012. Husband and Wife married on January 1, 2005, and divorced on January 1, 2010. What portion of the pension is marital? A pension does not require payments, therefore we cannot generate our marital fraction using payment. Pensions are normally earned according to units of time, usually months, so we will use months to generate our fraction. The top number of the fraction will be the number of months that Husband worked for Widget Corp. while married; the bottom number will be the total number of months that Husband worked for Widget Corp. In this case, Husband was both married and working for Widget Corp. for 60 months, and Husband worked for Widget Corp. for a total of 144 months. The fraction of 60/144, or



42 percent, represents the marital portion of the pension. The court should consider only this portion when dividing the pension or any payments on such pension that Husband receives.

Marital property may be tangible, as in the case of cars, houses, art, appliances and jewelry, or it may be intangible, as in the case of cash, checking accounts and savings accounts, debts owed by someone else to one of the parties, stocks and so on. In general, marital property can be any asset.

Although marital property must be titled to one of the parties in order to be marital, to whom it is titled has no bearing on whether property is marital or non-marital. A piece of property may be marital even if it is titled solely in the name of one of the two spouses.



***Finally, property that one earns or pays for during the marriage is marital property even if the parties are separated.***

Finally, property that one earns or pays for during the marriage is marital property even if the parties are separated. The court usually considers a marriage to be in existence until the day of divorce — regardless of whether the parties are living together.

The law provides two very clear exclusions from the category of marital property: (1) property that one inherits and (2) property that one acquires by gift, even a gift from the other spouse. If your mother leaves you her diamond earrings in her will, or if your father gives you an antique gun for your birthday, you need not worry that your spouse has an interest in it and may acquire it upon any divorce. Property may be partly a gift or partly inheritance, in which case it is non-marital at least to that extent.

## **DIVIDING MARITAL PROPERTY**

After identifying the marital property, the court's next task will be to divide it between the parties. In Maryland, marital property is divided "equitably." What constitutes an equitable division of marital property differs with each case and is an ambiguity that is the cause of much of the litigation in Maryland divorce cases. If the law simply stated



that the property would be divided in half, much of the room for argument on the issue of property division – and therefore, a great portion of divorce litigation in Maryland – would evaporate.

On the other hand, the benefit of having a law that grants to the courts discretion to divide marital property equitably, and not simply to cut it down the middle, is increased fairness in the division of property. Circumstances often exist that dictate against an equal division of marital property. The court may find that one party was at fault in the breakup of the marriage, either as a result of desertion, adultery, cruelty of treatment or another fault ground. If the court finds that one spouse's conduct toward the other was bad enough and that such conduct caused the breakup of the marriage, the court may decide that such spouse is not entitled to a full half of the marital property.



***The process of dividing marital property can force the court to make difficult decisions. Most property is not subject to easy division.***

The process of dividing marital property can force the court to make difficult decisions. Most property is not subject to easy division. A bank account or a retirement account is an asset that is easily divisible because the funds in such accounts can be divided and each party can receive his or her equitable share. But how does the court divide a house? It obviously can't saw it down the middle. What it can do is take such properties that it cannot divide and distribute them in a fair way. One way the court may do that is by transferring title to some property from one spouse to the other. Another way is by allowing one spouse to keep one item and allowing the other spouse to keep another item of comparable value. For example, the court may give one car to Husband and another car to Wife or give all the cars to Husband and the entire house to Wife, and so on. Another way the court may divide property is by ordering that certain properties be sold and that the sale proceeds be divided between the parties. There is more than one way to skin a cat and there is more than one way to equitably divide marital property.

During a divorce proceeding, the court will divide only the marital property that exists at the time of the divorce. Property that was earned or paid-for during the marriage but was disposed of prior to the divorce — by gift to a third party, sale, destruction or otherwise



— is not included in the division. If a spouse is found to have improperly disposed of property, such spouse may be held accountable by the court when the court decides on the amount of any “monetary award.”

## MONETARY AWARD

A monetary award is a judgment for money that the court enters against one spouse and in favor of the other. This judgment is not intended to punish one spouse or reward the other. Rather, a monetary award serves to equalize the piles, so to speak, and is used where otherwise one party would be left with less than what the court regards as a fair division of the marital property. A monetary award may also be used to compensate one spouse for inequities in the marital finances that are not attributable to property. Examples include compensating one spouse for the improper disposition of marital property by the other, or compensating a spouse who incurred non-marital debts for family purposes.



***Marital debt is a concept that is often discussed in divorce cases but is usually misunderstood.***

## MARITAL AND NON-MARITAL DEBT

Marital debt is a concept that is often discussed in divorce cases but is usually misunderstood. Marital debt is debt that one acquires in order to obtain or purchase marital property. Marital debt is a concept that is inseparable from marital property because the value of marital property is dependent on the amount of any marital debt associated with it. For example, Husband owns a car that he purchased during the marriage and on which he still owes \$8,000 to the finance company. At the time of the divorce, the car is worth \$10,000, therefore, Husband’s asset is valued at only \$2,000. Husband’s debt of \$8,000 is marital debt because it was used to purchase marital property — the car. But the marital debt is already taken into consideration when valuing the marital asset. At the time that the parties or the court determine the value of the marital portion of the asset, consideration of the marital debt associated with that property is already complete.

Non-marital debt is another question. Non-marital debt is debt that is incurred not to buy marital property but for other purposes. This is so even if the debt was incurred on marital property, such as with a home equity loan. Most credit card debt falls into





this category. Food, vacations and college tuition are examples of things that are not property, and any debt associated with them is non-marital debt. Non-marital debt is not relevant to the valuation of marital property, but the court may consider non-marital debt and the purpose for which it was incurred when deciding on the amount of any monetary award.

## USE AND POSSESSION OF FAMILY-USE PROPERTY

When the court awards child custody in a divorce case, it may also award possession and use of family use property to one spouse. Property that the court commonly labels “family use” includes houses in which the parties lived with their children or cars that the parties commonly used to transport their children. In general, granting such possession and use is possible if the property was purchased by one of the spouses during the marriage, the property was used during the marriage for family purposes, and continued possession and use is in the best interests of the children. Commonly, the court will require the other spouse to make the mortgage and car payments and other payments necessary to maintain the ownership interest in the property for the duration of the period for which it awards possession and use, which may extend up to three years. The purpose of such law is to prevent children from being suddenly uprooted from an otherwise stable environment and to provide the spouse receiving custody of the children with a longer period of transition.



***Divorcing parties should be aware that tax consequences flow from certain decisions that the court or the parties make in a divorce proceeding, however property division usually is not one of them.***

## TAX CONSEQUENCES OF MARITAL PROPERTY DIVISION

Divorcing parties should be aware that tax consequences flow from certain decisions that the court or the parties make in a divorce proceeding, however property division usually is not one of them. While exceptions exist in certain circumstances, typically no tax consequence follows from the division of property in a divorce or from the transfer of property from one spouse to another pursuant to a divorce decree or a separation agreement.



## ALIMONY

In addition to marital property, another issue that the court must address during every divorce proceeding is alimony. Alimony, otherwise known as spousal support, is money that the court orders one spouse, normally the spouse with the higher income, to pay to the other as support either for a defined period or indefinitely. Alimony typically involves payments that are made monthly. If one party seeks alimony, the parties may resolve the issue by written agreement. If the parties don't agree, the court will address the issue at trial. Alimony is not child support. When awarded, it is in recognition of the needs of one spouse and is for that spouse, not for the children



***There are two types of alimony: rehabilitative and indefinite.***

### REHABILITATIVE V. INDEFINITE ALIMONY

There are two types of alimony: rehabilitative and indefinite.

Rehabilitative alimony exists in order to assist a dependent spouse by providing time for that spouse to become self-supporting. Rehabilitative alimony is temporary, commonly lasting for five to ten years and is sometimes structured in such a way that it decreases over time.

Indefinite alimony – that is, alimony that is awarded without a time limit – is rare. Indefinite alimony may be awarded in two situations. First, it may be given when, even after becoming fully self-supporting, a formerly dependent spouse's lifestyle would still be unconscionably lower than the lifestyle of the other spouse. For example, the court may deem it unjust if a former spouse, even if he or she is getting along without assistance, is still merely making ends meet while the other is entertaining guests on his or her yacht. In such a case, the court may award permanent alimony in order to partially address the inequity.

Second, indefinite alimony may be awarded when one spouse, even after taking every available measure to become self-supporting, remains unable to earn sufficient income to support himself or herself as a result of age, illness, infirmity or disability. Before



awarding alimony in such a case, the court may require that the dependent individual have tried all other means of obtaining support. In particular, it may stipulate that he or she have exhausted any relief available under the federal Social Security programs.

## CALCULATING ALIMONY

Even though certain guidelines exist to assist courts to arrive at appropriate alimony amounts, no formula exists for alimony and the court is allowed to use its discretion in establishing whatever levels it believes are just. When deciding on whether to award alimony and on the amount, the court has twelve options to consider.

### **These are:**

1. The ability of the party seeking alimony to be wholly or partly self-supporting.
2. The time necessary for the party seeking alimony to gain sufficient education or training to enable that party to find suitable employment.
3. The standard of living that the parties established during their marriage.
4. The duration of the marriage.
5. The contributions, monetary and non-monetary, of each party to the well-being of the family.
6. The circumstances that contributed to the estrangement of the parties.
7. The age of the parties.
8. The physical and mental condition of each party.
9. The ability of the party from whom alimony is sought to meet that party's needs while meeting the needs of the party seeking alimony.
10. Any agreement between the parties.
11. The financial needs and financial resources of each party.
12. Whether the award would affect the eligibility for financial assistance of a spouse from whom alimony is sought and who resides in a nursing home.

The court is free to consider any other factor that is not listed but that it believes is important in any particular case. Also, the party seeking alimony has the difficult burden of introducing evidence that will support the claim.



As with division of marital property, whether the divorce claims constitute fault or no-fault grounds will likely have a strong impact on the court's inclination to award alimony. There is no absolute rule, however a spouse who is at fault in the breakdown of the marriage will receive much less sympathy from the court than a spouse who is not at fault when the court is considering alimony.

### PENDENTE LITE ALIMONY

Finally, a dependent spouse may not be able to wait until the end of the divorce proceeding before starting to receive any alimony. The period between the filing of the complaint and the final divorce is often close to a year. Such spouse may need support immediately, including in the interim period between the time of the filing of the complaint and the time that the parties receive the final divorce, in order to support himself or herself and in order to pay for his or her divorce attorney. Relief in this interim period is available in the form of pendente lite alimony and pendente lite attorney fees. The term "pendente lite" is Latin and means "pending litigation." Pendente lite relief must be specifically requested and is available either by agreement of the parties or by court order after a hearing. A pendente lite hearing will not occur immediately but will usually occur a few months after the filing of the complaint, nevertheless, it will occur much more quickly than the ultimate trial. An order regarding alimony that the court issues at the end of the case will supersede any award for pendente lite alimony.



***The party seeking the pendente lite alimony, as with regular alimony, still has the burden of proving the required elements, but the elements are fewer.***

The party seeking the pendente lite alimony, as with regular alimony, still has the burden of proving the required elements, but the elements are fewer. The spouse seeking the pendente lite alimony need only establish that he or she needs it and that the other spouse can afford to pay it. Any fault by either party in the breakdown of the marriage is not a factor, nor could it be, because any fault by either side would not be determined until the end of the case at trial. It is not sufficient that fault may be alleged in the initial pleadings.



## TAX CONSEQUENCES OF ALIMONY

Unlike division of marital property, tax consequences always flow from an award of alimony. Typically, alimony payments are tax deductible by the paying spouse and taxable as income to the receiving spouse. In addition, payments that one spouse makes toward property that is titled to the other spouse, such as a house, may be considered alimony for tax purposes and may be taxable as income to the spouse to whom the property is titled.

## MODIFICATION OF ALIMONY

Alimony, once established, may be modified upon a request by either party. The court may extend the time during which alimony must be paid if circumstances arise that the court believes would lead to a harsh and inequitable result without an extension. The court may also modify the amount of the payments if it finds that the circumstances and justice require the change.



***Alimony may also terminate. Obviously temporary alimony will automatically terminate on a predetermined date.***

Alimony may also terminate. Obviously temporary alimony will automatically terminate on a predetermined date. But in addition, alimony, whether temporary or indefinite, will normally terminate upon the death of either party or upon the remarriage of the recipient. It may also be terminated upon request by either party if the court finds that termination is necessary to avoid hardship and inequity.

## ATTORNEY FEES

Similar to alimony is the issue of attorney fees. In any family law case, including one for divorce, one party may request that the court order that the other contribute to some or all of his or her attorney fees. When deciding on attorney fees, the court will generally consider the ability of the requesting party to afford his or her own attorney, the ability of the other party to afford to contribute to such attorney fees, the reasonableness of the actual attorney fees charged and whether the requesting party's case was made with a good-faith basis.



## CHILD CUSTODY

In most divorce cases in which the parties have children, they will want the court to simultaneously address the issue of child custody. In addition, many people who have children without being married may decide to ask the court to address the issue of child custody. In all such cases, the parties may resolve the issue of custody by written agreement. If they don't do so, the court will address the issue at a trial. Child custody is an issue that is separate and distinct from a divorce and the divorce-related issues of property and alimony, however, if the parents are married and going through a simultaneous divorce, the court will treat the two issues in the same case.

Unlike in the case of divorce in which the court decides all issues based on fairness to one spouse or the other, child custody rulings have comparatively little to do with the interests of the parents. The court may recognize that both parents love their children and want to spend time with them, have a role in raising them and share important moments with them. Still, the court cannot consider the parents' wishes as primary in deciding child custody.



***The laws regarding such jurisdiction are somewhat complicated and it isn't necessary to outline them in detail here.***

## JURISDICTION

The first question the court must answer is whether it has jurisdiction. The laws regarding such jurisdiction are somewhat complicated and it isn't necessary to outline them in detail here. It suffices to say that, in most cases, a Maryland court has jurisdiction to award custody only of a child whose home state is Maryland. A child's home state is that state in which the child most recently lived for at least six months. If no state qualifies, then the question becomes more complicated and other rules apply. In addition to establishing jurisdiction, these laws exist for the purpose of preventing one parent from absconding with a child, taking the child from the child's home state and immediately seeking custody of that child in Maryland.



## PHYSICAL V. LEGAL CUSTODY

Upon establishing that it has jurisdiction to award custody of a particular child, the court may then proceed to award custody. Two kinds of child custody exist in every case — physical custody and legal custody.

Physical custody is what people usually envision when they think of custody. It is the form of custody associated with having the child live with one parent or the other. Often one parent has primary physical custody, sometimes called sole physical custody, and the other parent has visitation, sometimes called child-access. Alternatively, the parents may share joint physical custody. In this situation, the child alternates living with each parent, and each parent considers that the child lives with him or her part of the time.



***Legal custody is less well known than physical custody but is equally important.***

The second kind of custody is legal custody. Legal custody is less well known than physical custody but is equally important. Legal custody is the authority to make important decisions affecting the child. Legal custody may be required for a parent to make decisions regarding things like the child's religion, which school the child attends, whether the child travels abroad, whether the child gets braces, whether the child plays football and so on. As with physical custody, legal custody may be held solely by one parent or jointly by both parents.

If one parent has sole legal custody, he or she is free to make decisions affecting the child without consulting the other parent and regardless of whether the other parent agrees. In the case of joint legal custody, the parties are required to consult with one another and reach mutual decisions on all important issues affecting the child. In order to award joint legal custody, the court will have to find that the parents are able to communicate amicably with one another on issues affecting the child and to reach mutual decisions. If they are unable to do so, then joint legal custody will be impossible.





## BEST INTERESTS OF THE CHILD

When deciding either physical or legal custody, one factor is overriding — what is in the best interests of the child. The court's determination of custody must be consistent with the child's best interests. Although the court's decision may take into consideration the desires of the parents, satisfying those parental wishes cannot be the court's primary objective.

The court considers numerous factors when determining the best interests of the child.

### **These factors include:**

1. The sincerity of each of the parents in making their requests.
2. The capacity and willingness of the parents to communicate and to reach shared decisions affecting the child's best interests.
3. The flexibility of each parent.
4. Any prior voluntary abandonment or surrender of custody of the child.
5. The length of separation of the parents.
6. The relationship between the child and the parents.
7. The desires of the parent and any agreements between them.
8. The fitness of the parents.
9. The character and reputation of the parents.
10. The potential for maintaining natural family relations.
11. The existence of extended family.
12. Any preference of the child, if the child is old enough to form rational judgments.
13. Material opportunities affecting the future life of the child.
14. The age, health, gender and number of children.
15. The residences of the parents and the opportunities for visitation.
16. The willingness of each parent to share custody.
17. The potential disruption of the child's social and school life.
18. The geographic proximity of the parents' homes.
19. The demands of the parents' employments.



20. The financial status of the parents.
21. Any impact of custody on state or federal assistance.
22. The benefits of custody to the parents.

The gender of the parents is not included among the above factors. Maryland law on child custody includes no preference for the mother or the father. Nevertheless, mothers do obtain custody more often than fathers. One could debate the reasons for this, but it is likely a combination of three factors. First, some judges may unconsciously believe that mothers are better parents than fathers. Second, more mothers than fathers insist on obtaining custody and, therefore, are more persistent during the custody proceeding. And third, mothers' lives may tend to be better suited to accommodate having custody of children — often having a stronger network of family and friends who are able to share the burden and often having less demanding work schedules.

Still, the court's discretion in awarding custody is broad and an award of custody is inherently unpredictable. The law does not require that the court consider the above factors in a certain order or that it give any of the factors a particular weight. Further, the lives of parents are complicated and every family situation is unique. Applying the factors to each family situation is a complicated task for which there can be no standard outcome.



***The court is prohibited from looking ahead to determine what will be in the best interests of a child.***

One thing that simplifies the court's job is that it may not award future custody. The court is prohibited from looking ahead to determine what will be in the best interests of a child. Its duty is limited to finding what is presently in the best interests of the child based on the current circumstances. If circumstances change such that the best interests of the child dictate that custody should be altered, either party is free to seek a modification at that time.

The fact that courts are prohibited from awarding future custody does not mean that they do not consider what may happen in the future. Courts are practical and may consider future possibilities when determining what is presently in a child's best interests. For example, if one parent is in the military and is eligible for deployment to a war zone or if



one parent is a foreign national whose U.S. immigration status will soon expire, the court will likely take a strong interest in that circumstance and may award custody to the other parent as a result.

## MODIFICATION OF CUSTODY

Of course, one parent might decide in the future that the custody arrangement in place is no longer working. In such a situation, that parent may decide to request that custody be modified. Custody is never set in stone, but the standard by which the court may modify custody is different and more difficult to meet than the standard by which it first establishes custody. In order to modify custody, the court must determine that there exists a substantial change in circumstances affecting the best interests of the children since the initial order such that it is now in the best interests of the children to modify custody. The important words are “substantial change in circumstances.”

The court will not allow parents to use a modification proceeding to re-litigate an award of custody with which he or she was unhappy, and it will not allow a parent to run back to court to modify custody based on small and inconsequential changes in the family’s situation. Although an award of custody is changeable, the court intends that its initial award of custody be final and remain in place unless a change occurs in the family’s situation that is substantial and that affects the best interests of the child in such a way that modification is appropriate.



***It would be impossible to create a list of all possible changes in circumstances that may qualify as substantial in the eyes of the court, however some examples may be helpful.***

It would be impossible to create a list of all possible changes in circumstances that may qualify as substantial in the eyes of the court, however some examples may be helpful. These examples illustrate mere possibilities and do not guarantee that the court will order modification in any particular case.



**Nevertheless, substantial changes in circumstances that may warrant modification of custody include:**

- A custodial parent's sudden decision to prohibit reasonable visitation by the other.
- A custodial parent's decision to move out of state.
- A custodial parent's imprisonment.
- A custodial parent's newly discovered addiction to alcohol or drugs.
- A custodial parent's prolonged loss of employment.
- A custodial parent's loss of housing that can accommodate the child.
- A custodial parent's abuse of the child.
- A child's failure in school that can reasonably be attributed to the custodial parent.
- Non-custodial parent's recovery from drug or alcohol addiction.
- Non-custodial parent's decision to move back to the child's home state.
- A non-custodial parent's gain of employment.
- A non-custodial parent's acquisition of housing that can accommodate the child.
- A child's change in preference if the child is old enough to form rational judgments.

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***The above list could continue indefinitely.***

The above list could continue indefinitely. It merely serves to illustrate some circumstances that a court might find substantial enough to warrant modification of custody.

## **PENDENTE LITE CUSTODY**

A proceeding for an initial determination of custody may take many months from the date of the filing of the custody complaint, and one parent or the other might not want to wait that long before obtaining a custody determination or an order for visitation. Circumstances might exist that warrant a more prompt custody order. As with alimony discussed above, pendente lite, or interim, child custody and visitation are available. Unless the parties are able to agree on pendente lite custody, such an order will require a hearing and will be effective until the time of the final custody determination.



## EMERGENCY CUSTODY

In some instances, even the shortened time for obtaining pendente lite custody — a few months — may be too long. The parent may believe that the child is in danger or is being neglected. In such a case, the parent may petition the court for an emergency order for custody. A hearing on such a request will usually occur within a day or two from the date of the filing of the request, and any order will take effect immediately. Courts are reluctant to issue such orders without a substantial showing of actual danger or neglect, but if the parent seeking the order follows the proper procedure and shows sufficient cause, the court may issue such an order and may even do so without the other parent's presence or input. This latter situation is called “ex parte.” An emergency order, like a pendente lite order, is temporary and will be superseded by a final determination of child custody.



***Parents, on their own, often reach settlement agreements on the issue of child custody.***

## CUSTODY AGREEMENTS

Parents, on their own, often reach settlement agreements on the issue of child custody. In divorce cases, such agreements normally become part of the overall divorce and, therefore, are included in the divorce declaration along with the language addressing other divorce-related issues such as alimony, property and attorney fees. Like separation agreements in divorce cases, voluntarily-reached child custody agreements are valid, provided that they meet the normal requirements of a contract.

Unlike settlement agreements, however, the court has discretion to change or discard a child custody agreement if it finds that the agreement is not in the child's best interests. This is so even if the agreement is otherwise valid. For this reason, even when the parties have reached an agreement on the issue of custody, the court will still make an independent determination, even if a cursory one, that the agreement is in the child's best interests.



Despite this authority to discard or change custody agreements, courts are reluctant to intervene except in extreme cases. Courts are busy, and, as a matter of policy, courts encourage settlements, including settlements between parents on the issue of custody. Judges normally are not inclined to stir up conflict when parties have settled. In addition, most judges tend to defer to the decisions of parents on raising their children.

### TAX CONSEQUENCE OF CUSTODY

Although child custody does not involve any money or property transaction, it does have a tax consequence. A parent with whom a child lives during the course of a tax year normally claims that child as a dependent on his or her income tax returns, and such claim will have the effect of reducing that parent's income tax. However, parents may change by agreement which of them may claim a child as a dependent, and parents frequently do agree to alternate the years in which they claim a child. This arrangement is most common in situations in which both parents have a child for a substantial number of days in the year. In situations in which parents have multiple children, they often agree to split the children on their income tax returns. For example, Mother may claim son and Father may claim daughter every year. The right to claim a child as a dependent is a right that the parties may freely trade.



***As in any family law case, in a case involving child custody, either party may seek a contribution by the other party for his or her attorney fees.***

### ATTORNEY FEES

As in any family law case, in a case involving child custody, either party may seek a contribution by the other party for his or her attorney fees. When deciding whether awarding attorney fees is appropriate, the court will generally consider the ability of the requesting party to afford his or her own attorney, the ability of the other party to afford to contribute to such attorney fees, the reasonableness of the actual attorney fees charged and whether the requesting party's case was made with a good-faith basis.



## CHILD SUPPORT

After establishing child custody, the court will almost always address child support, which is financial support that one parent pays to the other for the support of their common minor child.

### JURISDICTION

As with other issues, when addressing child support, the court first must address whether it has jurisdiction. Jurisdiction for child support purposes is different than for child custody. In general, jurisdiction for child custody purposes lies in the state in which the child resides. Jurisdiction for child support purposes, on the other hand, lies in the state in which the paying parent resides. If the child custody case occurs in a state that is different than the state in which the paying parent resides, then the court of that state may not have jurisdiction to hear the child support matter. Even if it does hear the child support matter, that state will not have authority to enforce the child support in the payer's home state but will have to enroll the case in the state of the paying parent. As a result, the parties often find it simplest to adjudicate the child support issue separately in the state in which the paying parent lives.



***If a Maryland court determines that it has jurisdiction to hear a child support case, then that court may proceed to determine the child support amount.***

### CALCULATING CHILD SUPPORT

If a Maryland court determines that it has jurisdiction to hear a child support case, then that court may proceed to determine the child support amount. In theory, child support is something that the court charges both parents with paying. In practice, however, the only child support payments that the court tracks and enforces are those that it orders one parent, usually the non-custodial parent, to pay to the other. Child support, which is usually paid monthly, is support for the children, and is not intended as support for the other parent.



Unlike child custody, which is very subjective and unpredictable, child support is very objective and predictable. Child support is calculated according to a strict formula, from which the court may not normally deviate.

**Into the formula, the court will insert several numbers:**

1. Mother's and father's incomes from all sources.
2. Any alimony that either parent is receiving from the other.
3. Any alimony that either parent is paying to the other.
4. Any child support that either parent is paying for other children pursuant to a court order.
5. Any day-care expense for the child.
6. Any health insurance expense for the child.
7. Any extraordinary medical expense for the child.
8. Any travel expense incurred to visit the child.
9. Any private school tuition expense for the child.



***The above numbers are inserted into the formula, and based on them, the formula produces a child support amount that one parent will have to pay to the other.***

The above numbers are inserted into the formula, and based on them, the formula produces a child support amount that one parent will have to pay to the other. In most instances the court will have no choice but to order that this amount be paid.

The formula takes into account only the above-listed factors, and the court is generally not free to consider any others. A parent who faces the prospect of paying child support often wonders how his or her other living expenses fit into the formula. The tough answer is that they don't. The child support formula does not take into account a parent's other expenses, regardless of how high they may be. A parent may have no further room in his or her budget for child support. Nevertheless, child support will be ordered and that parent will have to make painful decisions in order to comply.





## STANDARD V. SHARED CHILD SUPPORT FORMULA

The court uses one of two possible formulas in determining child support. In situations in which one parent has sole physical custody and the other has visitation, the court will use the standard child-support formula. In situations in which the would-be child support payer has overnight custody or access to the children for at least 128 overnights per year, the court will use a different formula, which is called a shared child custody formula. This formula results in a significantly lower child support amount, which the court justifies on the grounds that such parent is supporting the child directly during the longer period of time that the child is in his or her care.



***One situation exists in which the court may determine child support without using any formula at all.***

## ABOVE-THE-GUIDELINES CASES

One situation exists in which the court may determine child support without using any formula at all. Such a situation is called an “above-the-guidelines case” and it exists when the parents’ combined income exceeds \$15,000 per month. In such a situation, the court will not be bound by any formula but will be free to consider the parties’ financial circumstances in determining a proper child support amount. Practically speaking, however, even in these above-the-guidelines cases, the court will usually use one of the two formulas as a guide rather than devise a new method for determining child support.

## IMPUTATION OF INCOME

If one parent has no income, the court may nonetheless impute or assign income to that parent for the purpose of calculating child support. In order to take this measure, the court will have to find that the parent is voluntarily impoverished — that is, find that he or she is willfully making less money than he or she is capable of making. Often this means assigning the minimum wage to an individual, even if that individual is actually unemployed. Or it may mean assigning to an individual the amount that he or she was making at a higher paying job that such parent voluntarily quit in favor of a lower-paying job. However, the court will be unable to impute income to a parent if that parent is caring for a child of the parties and the child is under two years of age.



## RETROACTIVITY OF CHILD SUPPORT

When ordered, child support usually takes effect retroactively to the date of the request. This retroactivity often results in an immediate arrearage amount that the court charges to the payer in addition to the regular child support amount. For example, Mother files against Father a complaint for child custody and child support in January of 2010. The parties litigate the issue, and, in November 2010, the parties have a trial. In the trial, the court awards child custody to Mother and orders that Father pay child support. The court makes such order retroactive to the date of the filing of the complaint, therefore, Father's obligation to pay the particular child support amount actually started in January 2010. Assuming that Father had not been paying child support voluntarily during the months since Mother filed the complaint, Father suddenly finds himself 11 months in arrears on his brand-new child support obligation.

## ARREARAGE

When a payer of child support gets behind, or in arrears, in his or her payments, the court will require that he or she eventually make-up those payments. The court does not require that an arrearage amount be paid in full immediately. Rather, when the court addresses an arrearage, it normally allows the payer to pay the arrearage over time. The court will usually make the arrearage payment 25 percent of the regular child support payment, but the parties are usually free to agree on a different amount as long as it is reasonable.



***Once a child support amount is established, and unless the parties agree otherwise, the total child support amount along with any arrearage will be ordered withheld directly from the payer's paycheck and such payments will be processed through an intermediary...***

## EARNINGS WITHHOLDING

Once a child support amount is established, and unless the parties agree otherwise, the total child support amount along with any arrearage will be ordered withheld directly from the payer's paycheck and such payments will be processed through an intermediary —



the county office of child support enforcement. The withholding order will be served on the payer's employer, who will be required to comply. If the payer is self-employed, no such withholding will be possible, however the payer will be required to make his or her payments through the same county agency. Once the payer starts to make his or her payments through the county agency as required, he or she should be careful not to make any payments directly to the receiving parent. If any payment is made directly to the receiving parent, such payment may be considered a gift and, therefore, may not be counted towards the child support obligation.



***As with alimony in a divorce proceeding, pendente lite child support is available in a child custody proceeding.***

## PENDENTE LITE CHILD SUPPORT

As with alimony in a divorce proceeding, pendente lite child support is available in a child custody proceeding. A parent who is caring for a child likely has numerous expenses relating to supporting that child and may be unable to wait until the end of the custody or child support proceeding before starting to receive child support payments. If requested, and after a hearing, the court may order that the other parent pay pendente lite, or interim child support, to help support the child in the period between the filing of the complaint and the final hearing. A pendente lite hearing will not occur immediately but will usually happen a few months after the filing of the complaint, nevertheless, it will occur much sooner than the ultimate trial. When the court orders final child support at the end of the case, such amount will supersede the pendente lite child support amount.

When child support is the only issue in the case because, for whatever reason, child custody and divorce are not issues or already have been adequately addressed, the court's procedure will likely be expedited. The reason for this is that child support is a relatively straightforward matter and little time is usually necessary for the parties to prepare any case that they wish to make. As a result, in these situations, pendente lite child support may not be necessary or possible.



## TAX CONSEQUENCES OF CHILD SUPPORT

Unlike alimony, which is tax deductible to the payer and taxable to the recipient, child support payments have no tax consequence. For tax purposes, child support payments do not reduce the income of the payer nor increase the income for the recipient.

## MODIFICATION OF CHILD SUPPORT

Once established, child support may be modified. To modify child support, as with modifying child custody, the parent requesting the modification must show that a substantial change in circumstances has occurred since the date of the last order such that a modification of child support is in the child's best interests. When dealing with child support, a substantial change in circumstances usually involves a change in the employment status or income of one of the parents. It could also involve a change to one of the relevant expenses related to the child. The parents should remember, however, that any change must be substantial in order to warrant a change in child support. The court likely will be unsympathetic to a parent who asks for a modification of child support based on an insignificant increase in the other parent's income.



***As with an initial determination of child support, a modification of child support will take effect on the date of the modification request.***

As with an initial determination of child support, a modification of child support will take effect on the date of the modification request. Although it may take the requesting party several months to obtain the order modifying child support, and although that party will be obligated to continue making child support payments in the amount of the prior order, once the child support amount is modified, the modification will take effect retroactively to the date of the filing of the request. The payer will then receive credit for any overpayments or an arrearage assessment for any underpayments during the interim months based on the new child support amount.

As an example, Mother pays child support to Father in the amount of \$500 per month. Mother gets a big raise and Father subsequently files a request for child support modification on January 1, 2011. The trial on the requested modification is scheduled for June 1, 2011. Mother will continue to be obligated to pay child support in the amount of



only \$500 during the interim months between January 1, 2011 and June 1, 2011. At the trial on June 1, 2011, the court orders that child support be increased to \$600 per month retroactive to January 1, 2011. As a result, Mother is now suddenly \$100 in arrears for each month since the modification request, or a total of \$500, and the court will require that she pay this arrearage in addition to the increased child support amount.

In order to avoid an arrearage as a result of retroactive child support orders, a parent who anticipates that his or her child support amount will increase or who anticipates being the subject of a new child support order may want to voluntarily increase the child support payments starting on the date of the request or set aside funds in order that they be available should the court order child support or an increase in it.

In our prior example, if Mother had anticipated that her child support might increase, she might have paid some additional child support or put some money into a separate bank account for safe keeping so that when the modification took place on June 1, 2011, she had already been paying at least some of the increased amount or had at least some of the arrearage amount ready to pay immediately.



***It is the state's position that a parent's obligation to support his or her children is paramount — even more important than paying one's mortgage.***

## ENFORCEMENT OF CHILD SUPPORT

It is the state's position that a parent's obligation to support his or her children is paramount — even more important than paying one's mortgage. Failure to comply will likely result in severe penalties. A parent's refusal or inability to comply with a child support order will likely result in Maryland's Motor Vehicle Administration automatically suspending that parent's driving privileges. In addition, refusal to comply may lead the court to find that parent in contempt of court and even to impose jail time. Regaining one's privilege to drive or purging one's finding of contempt will require resumption of steady payments of child support in the amount ordered by the court.



## SHOULD I GET AN ATTORNEY?

Several especially important occasions arise in one's life — among them, marriage, the birth of one's children, retirement and, I would argue, divorce. It would seem that one should not leave any of these, including divorce, to chance.

As the prior chapters of this book indicate, a divorce rearranges one's financial and family affairs. Usually, there is an accompanying decline of one's standard of living due to obligations to pay alimony or child support, due to being deprived of certain property holdings and due to having to solely pay expenses that were once shared. The degree of loss in living standard will depend greatly on both the circumstances of the individuals' lives and the decisions the parties and the court make during the divorce proceedings.

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***Throughout the process, enumerable issues, factors, and ambiguities arise on which an individual must make decisions — preferably informed and calculated ones.***

Throughout the process, enumerable issues, factors, and ambiguities arise on which an individual must make decisions — preferably informed and calculated ones. An attorney can be of immense value to his or her client, in part by assisting the client in making informed decisions. Such assistance is in addition to the attorney's role in drafting persuasive pleadings and other documents, investigating the relevant facts of the case, presenting courtroom arguments and otherwise taking all reasonable actions that may be in the client's best interests.

One may attempt to represent himself or herself in a divorce and may do just as well as with an attorney. But the chances are not good. Most people don't fare well at specialized tasks for which they lack training, so they leave such needs to experts. Most attorneys can't repair a transmission, fill a tooth, repair a broken arm or write a romance novel, and most people untrained in the law are unable to effectively navigate the complexities of a divorce case, especially one that may involve complicated issues of marital property and child custody. The same as other individuals embarking upon specialized jobs for which they are unprepared, people setting out to handle their own divorces are highly likely to be have disappointing results and to regret not seeking the assistance of a professional.



Even in simple cases, such as in uncontested divorces in which the parties have a prenuptial agreement or have already signed a separation agreement, an attorney may be invaluable. The court still would have to hear testimony on the grounds for divorce, without which the court would be unable to grant it. An attorney can assist with filing the case, filing the necessary documents, presenting the required testimony and other evidence in the divorce hearing and otherwise ensuring that the divorce process goes as smoothly and as quickly as possible. Although an attorney cannot represent both parties in a divorce, this service to one spouse in an uncontested case may also be greatly appreciated by the other, who often wants the divorce just as badly and is grateful for the opportunity to move on with his or her life.



***In the end, no law requires an individual to have an attorney in a divorce or child custody case.***

In the end, no law requires an individual to have an attorney in a divorce or child custody case. An individual in such a situation might be able to get by representing himself or herself without counsel. But a lot would be at stake and a decision to proceed without counsel would greatly increase the chance of failure. In any legal matter, including divorce and other family law cases, one always maximizes the chance of a good outcome by having the assistance of counsel.





## CONCLUSION

Marriage and divorce have important places in our lives, but they are not exactly what people perceive them to be. A marriage is not a relationship but, rather, a legal entity that the parties elect to accompany their relationship. It serves to make the individuals partners and parties to a contract -- a contract that determines their rights to any marital property and says how the court will divide property upon any divorce.



***Likewise, a divorce isn't the termination of a relationship but the unwinding of the partnership.***

Likewise, a divorce isn't the termination of a relationship but the unwinding of the partnership. The process isn't quick, as divorcing parties often want, but rather is slow and deliberate. It requires that the parties inventory all marital resources, including property; that they fairly divide property earned or paid-for during the marriage; that, upon request and under certain circumstances, they provide for the support of the other, usually temporarily, if the court deems it fair and appropriate; and it requires that the parties take responsibility for any children of the marriage, perhaps with continued personal involvement in their lives but almost certainly with financial support.

As I stated near the beginning, it is my hope that this short book sheds some light on the divorce process — its purposes and how it works. Greater understanding probably won't change one's emotions — good or bad — associated with the breakdown of the relationship, but it can put those emotions into a proper context and allow the parties to view the divorce proceeding with more objectivity and calm.