

Family Law: What Are My Rights in a Divorce?

If you are going through a legal separation or divorce, you may have questions about benefits, assets, and property that you shared with your spouse during or before your marriage. This handout provides general information about your rights to your property and health insurance after a separation.

I want to divorce my spouse. Do I have to give a reason?

Typically, there are two types of divorce: fault and no-fault divorce. In a fault divorce you would claim that your spouse did something wrong (adultery or abandonment, for example) to ruin the marriage. In no-fault divorce, you and your spouse would say that there is some sort of “irreconcilable difference,” or that the marriage is beyond repair, but neither spouse is to blame. Most states no longer recognize fault divorces, but all states currently allow no-fault divorces.

Will I need a lawyer to help me file for divorce?

An attorney is not required when filing for divorce, but having one can be helpful. If your spouse has hired an attorney, you might also want to consider also hiring an attorney of your own. Whether you will need an attorney can typically depend on the personalities of the people involved in the divorce and the issues involved, such as child custody or child support. An attorney may be able to help keep the process civil and focused on the legal issues involved. If you cannot afford to hire an attorney, you may be able to get legal assistance at your local legal aid center or courthouse.

How is a legal separation different from a divorce?

The key difference between a legal separation and a divorce is that in a legal separation, you are still legally married to your spouse even though you may be living apart. A legal separation might make sense for tax purposes.

What rights do I have to my property after a divorce?

It depends on whether you live in a state that follows “community property” or “equitable distribution” rules. In community property states, property that is part of the “community” (acquired during the marriage by either spouse) will be divided equally after a divorce, but separate property (usually acquired before the marriage) will remain separate. Non-community property states typically will use equitable distribution, a method where the court determines what would be the fair way to divide property. In an equitable distribution state, the court may choose to divide either spouses’ separate property if it will make the division of property more equal between spouses. For information about exactly which property between spouses counts as community or separate property in states that follow community property laws, it is important to consult with a family law attorney in your state.

What counts as community property?

Community property is a system that assumes that both spouses jointly own property purchased or acquired during the marriage, regardless of who purchased it. This includes all money earned by either spouse from the beginning of the marriage until the official date of separation. Community property also applies to debts. A debt incurred by one spouse is a debt that both spouses may be equally liable to pay. Debts can include anything from credit card debt or medical debt, to a home mortgage. Currently, the states that follow community property rules are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.

What counts as separate property?

Separate property is property that spouses own outside of the marriage. In a community property state, separate property can include: anything owned or inherited by either spouse prior to the marriage, anything received as a gift prior to the marriage, and anything either spouse earned after the date of separation.

It may be helpful to record, in writing, things that each spouse pays for. Doing this will make it much easier to prove what is separate property and what is community property in case of divorce or death. For example: One spouse contributes to the down payment on a home with her separate property, money that she had been saving prior to the marriage. Then, after getting married, both spouses contribute to the mortgage payments using community property. If the couple gets divorced, in order to receive any compensation for the separate funds that were used for the down payment, the spouse who paid it would need to provide proof that it was paid out of separate property.

Why is the date of separation important?

The “date of separation” may have different meanings depending on the state you live in. Some states will define “date of separation” as the date both spouses choose to officially end the marriage. Knowing how your state characterizes the date of separation is important because the official date of separation will determine whether the property is labeled as community property, or instead is labeled separate property.

Am I entitled to spousal support (alimony)?

It depends. Regardless of whether you live in a community property state or a state that follows equitable distribution rules, you might be entitled to spousal support or alimony. Spousal support is typically given to an ex-spouse who is not working, or an ex-spouse who works but earns a low income. The purpose of spousal support is so that an ex-spouse will be able to meet their financial obligations. An ex-spouse may need spousal support because he or she chose to forego a career in favor of taking care of the family; or a spouse may need assistance in continuing the standard of living they had during the marriage.

How is spousal support calculated?

Although child support is typically mandatory in most states, spousal support is not. Unlike child support, there is no standard method for calculating spousal support, as the factors considered by courts vary by state. Some factors may include the age, emotional, or financial state of a spouse, the standard of living the couple held during their marriage, and the length of marriage.

How is a spousal support order enforced?

Spousal support is not enforced the same way child support orders are enforced, such as wage garnishment or other enforcement procedures. Someone looking to enforce a spousal support order may choose to go to court to hold a contempt proceeding¹ to force payment.

How long does spousal support last?

It depends. Spousal support generally continues as long as the ex-spouse is in need of financial support. Unless the court specifies in the divorce decree a date on which the spousal support will end, it is assumed that the spousal support will continue indefinitely or until there is a change in circumstances that requires the order to be changed.

After my divorce or legal separation, can I stay on my ex-spouse’s health insurance?

No. If you have children, they may remain on your ex-spouse’s health insurance after a divorce, but you will have to look for an alternative option for yourself. If your spouse received his or her health insurance through an employer with at least 20 employees, and you wish to remain with the same health plan while you look for new coverage, COBRA may be an option available to you. Alternatively, you could potentially be eligible for a special enrollment period to purchase a health plan through your state’s health insurance marketplace. See www.healthcare.gov for information about marketplace insurance.

What is COBRA?

The Consolidated Omnibus Budget Reconciliation Act (COBRA) is a federal law that lets you temporarily remain on group healthcare coverage that would normally end after a qualifying event, like divorce, as long as you were receiving health insurance under a group plan through an employer with at least 20 employees. COBRA is available to spouses who were receiving health insurance coverage through their ex-spouse but now face termination of coverage due to a divorce or legal separation.

How long does COBRA last?

If you are getting divorced or separated, you may be eligible for up to 36 months of COBRA coverage. However, COBRA health insurance premiums can be extremely expensive. COBRA premiums can be up to 102% of the monthly premium that your ex-spouse’s employer paid. Despite the cost, COBRA may be a good option because it allows you to maintain the exact same coverage you had while you were married, which means that you can continue your treatment with your current doctors and healthcare providers. Depending on your financial situation, you may be able to ask for COBRA premiums to be paid by your ex-spouse as part of the divorce decree. However, because COBRA coverage can be terminated if payments are not made on time, it might be in your best interest to pay the premiums yourself or look for alternative insurance options so that your ex-spouse is not involved in your health care coverage. If you cannot afford COBRA, or once COBRA ends, you can purchase insurance on the health insurance marketplace or potentially qualify for Medicaid depending on your financial status.

¹ Being held in contempt of court generally means that your actions disrespect the court and its ability to properly administer justice.

Resources:

Generally, the procedures relating to divorce and legal separation will vary from state to state. If you would like more information about your state's laws, you may wish to consult an attorney to discuss your legal and financial options:

For more information about COBRA:

<https://www.dol.gov/general/topic/health-plans/cobra>

For more information about health insurance options, such as state marketplace insurance or Medicaid: <https://www.healthcare.gov/>

For possible legal assistance, you can contact your local county or state bar association and ask for a referral to an attorney who practices family law.

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