

Chapter Nine

HOW MUCH LAW DO I NEED TO KNOW?

Okay, I'm accepting the fact that my marriage is over, and I am now involved in the settlement or litigation process. I have made a plan, and am implementing it. I now know what issues need to be resolved. Can I just trust the legal professional to resolve everything to my benefit?

No.

Lawyers and mediators are there to assist **you** in the process. You can't just dump your life in your lawyer's or in your mediator's lap, and ask him or her to "fix it." The attorney advising and guiding you will require you to call the shots and to make decisions, based upon his or her sound recommendations. Similarly, the mediator informing and guiding you will also require you to decide upon the options which you feel are best for your situation.

If you have a lawyer collaborating, negotiating or litigating your case, your lawyer will inform you as to the law and the strength of your positions, and will advise you as to what is in your individual best interests. You then have to decide what you will accept, or how to proceed, based upon your attorney's recommendations, your personal beliefs and needs, the likely response of your spouse, the likely outcome and the financial and emotional costs of protracted litigation.

If you are in mediation, the mediator will inform you and your spouse as to the law, will guide you both in the process, and will offer for your consideration options you hadn't thought of, or of which you were not aware. The mediator will then leave it to you and your spouse to decide upon your options, or may assist you and your spouse in negotiating with each other.

You should be guided somewhat in your decision-making by an understanding of how reasonable or unreasonable your positions are, based upon what would happen if you were to go to court. If you make these decisions based solely on emotion, on your spiritual and religious beliefs, and on your personal feelings of what is right and what is wrong, you may spend a lot of money on litigation, only to be disappointed in the final outcome.

Although those personal feelings may have a role in mediation and in collaboration, and possibly in adversarial negotiation, your personal ideas of fairness may have no relevance in litigation, except as a factor in determining how expensive your case will be if your settlement positions are far afield of how the judge is likely to rule. You could even wind up being ordered to pay some of your spouse's attorney's fees. The judge and the law may not agree with your view of justice.

For example, if your husband of thirty years who is at the height of his earning potential has left you for another woman, or for another man, you may not like hearing that the judge may consider that betrayal to be absolutely irrelevant to your requests for spousal support and for the division of property, under state law. You may spend a whole lot of money on private investigator fees and on attorney's fees, simply to obtain a piece of paper legally stating for the record that your husband found someone he would rather sleep with than you.

You may not want to hear that your involvement in an intimate affair may have a dramatic effect on your ability to obtain spousal support, even

if the extramarital relationship began well after the final separation from your spouse. You may also not want to hear that if your spouse walks out on you, a good and dutiful spouse, for no just cause or excuse, he or she is still likely to get half of everything. If you pursue a desertion divorce, you may simply spend a lot of money trying to buy a piece of paper signed by a judge legally announcing to the public that your spouse got tired of you, before you got tired of him or her.

Maybe in the olden days, if your spouse had committed a fault ground for divorce, perhaps he or she would have had to pay all of your attorney's fees, and might not have been awarded any property or spousal support by the court. Nowadays, that may not be the case. Some judges have come to the conclusion that assessing blame for the breakup of the marriage serves merely to increase the conflict between the parties, and that fault can often be assigned to both parties in varying degrees.

However, other judges may feel differently, especially if the fault has had a financial impact on the value of the marital estate. The result is some degree of variability in how the issue of fault is addressed in awarding spousal support, and in dividing property interests. Be sure you find out from local practicing family litigators how your local judges view fault claims.

Can I cooperate with the adultery divorce suit my spouse will file against me, so we have an uncontested fault divorce? If my paramour testifies simply to the occurrence of one act of intimacy during my marriage, and isn't worried about self-incrimination, is this the fastest way for us to get divorced? Does that mean I may be able to remarry before the new baby is born, so he or she is not born out of wedlock?

If I file a divorce suit based on the no-fault grounds of us living separate and apart, but my spouse and I can not agree as to the division of our assets, or as to custody and support, does that mean we have a contested no-fault divorce suit?

Is it true that my abusive, alcoholic husband is still likely to get half of our marital assets? Am I “deserting” my spouse who is violent, and who is openly committing adultery, if he still wants to stay married to me, but his conduct is so intolerable that it is driving me out of the home? What is “constructive desertion?”

If my spouse went on a spending spree just before our separation, knowing we would be divorcing, will I get stuck with half of the debt? What is “waste?” Can the value of our assets be defined as of prior to when my spouse liquidated them? Is it permissible for me to withdraw marital funds for a marital purpose, or for living expenses and/or attorneys fees, after we are separated? Does the answer to that question depend on how much money I am earning?

If my spouse and I have had separate bedrooms for a year, is that sufficient to prove grounds for a no-fault divorce based on living separate and apart? Why not? What else do I have to prove? What level of third party corroboration is necessary? Can we pick one date of separation for the pension calculations, and use another date of separation for the divorce grounds?

What if my spouse is mentally incompetent, or incarcerated? Do I have to pay for an attorney, or for a guardian *ad litem*, for him or her? Can my spouse suffering from a mental health problem, or struggling with a substance abuse problem, even validly enter into a binding Agreement?

If a child was born to me and my spouse prior to our marriage, does the paternity of that child need to be acknowledged or established? What are the legal presumptions and ramifications if my spouse conceives or fathers a child with someone else during our marriage? Can paternity tests be ordered? Should they be? Could I be liable for over 18 years of child support for a child born to my wife prior to the entry of our divorce

decree, even though the child is clearly not mine, if that decree did not state that the child was fathered by another?

What if I suspect that one of our children born during the marriage was not fathered by me? Should I ask for a paternity test? Is “the truth” paramount? If a test is not done, will I always view that child differently, or would I still view and treat the child as my own? What is “fatherhood?” Is fatherhood a different concept than biological paternity? Does the mere fact that I want to know the child’s true paternity show that I really do not fully view and accept that child as mine? What would “the truth,” or the request for a paternity test, do to that child’s well-being?

Can my spouse really just up and take the children, and resettle out of the country? Should I try to get a temporary custody order? What is the Hague Children’s Convention? To which countries does that treaty apply? Should I notify Immigration and Customs Enforcement, (ICE), if I think my spouse will try to leave the country with our children?

Which state’s laws apply in a custody suit, if my spouse and I reside in two different states? What is the Uniform Child Custody Jurisdiction and Enforcement Act, or “UCCJEA?” Will the custody case be heard in the courts of the child’s home state, or in the state from which the child was removed? Which state’s laws would apply in a support suit? What is the Uniform Interstate Family Support Act, or “UIFSA?”

If I have physical custody of the children, and if I were to die, would custody automatically go to my new spouse, or to my ex-spouse by operation of law? Would a new spouse, who has lived with my children for years, have legal standing to petition for custody as a stepparent after my death? Could he or she argue that it is in my children’s best interests not to be uprooted from their step or half siblings, friends, school and support system, to go and live with my ex? If I had physical custody of the children and die unremarried, could the court disregard the designation in my Will for guardian, and award custody to someone else?

If my spouse or ex-spouse who had physical custody of the children in another state were to die, could *anyone* petition for the custody of my minor children upon my death? Could a court find that it is not in my children's best interests to come and live with me?

Is it really true that my homemaker wife of thirteen years, who has stayed at home and been the primary caretaker for our children, may very well be granted physical custody, even though she stays with the paramour she left me for on the weekends I have the children? And spends time with that person and my children during the day, exposing them to the relationship? Can the court order restraints on cohabitation, and restraints on displays of affection in front of the children? If she asks the court for spousal support, will she at least have to prove by clear and convincing evidence that a denial of support would be manifestly unjust, which may be impossible to prove?

How are the state child support guidelines applied? How many of the numbers used in the calculation can we argue about? What range of numbers applies to my case? Is the range we're arguing over even that big? Would the obligation calculated under the shared custody support guidelines really be that much lower than the obligation calculated under the sole custody guidelines? Can we agree on a different number? Can child support be waived? Is that waiver enforceable? Is it a good idea to prepay my entire future child support obligation with my share of the equity in the house, or would that be a really, really bad idea?

What if my spouse and I only had a religious marriage ceremony, and never got a state civil marriage license? What if we had 500 people at our wedding, had children together, bought a house, paid taxes as a married couple and lived together for over twenty years? The court has no jurisdiction for a divorce suit, and I can't ask for property or for spousal support? Are the children illegitimate? Have we committed tax fraud? I can't get my spouse's Social Security benefits? But what if the religious

marriage was performed in a country where religious-only marriages are valid?

What is a common law marriage? How is a common law marriage created? How many states recognize common law marriages? Which ones? Did we create a common law marriage by vacationing in one of those states? Does the state either one of us lives in recognize a cause of action for a palimony suit? Do any of the concepts contained in this *Guide* apply to same-sex couples with or without children?

Can I get an annulment instead of a divorce? What is the statute of limitations period pertaining to an annulment? What are the grounds for an annulment?

If I obtain, or if my spouse obtains, a religious divorce, does that mean we are legally divorced? Will the divorce court consider the religious marriage contract and the religious traditions my spouse and I are following?

Is there any such thing as a "Legal Separation," or are we simply either married or divorced? Can a suit for Separate Maintenance be filed asking for custody and support only, but not for a divorce?

It is important to hear from a locally practicing family law attorney how the courts view fault and no-fault grounds of divorce, alimony, property and debt distribution, custody, visitation and child support under your state's statutory and case law. And to then hear how the judges would view your unique situation. Then you, with your attorney, can strategize as to the best plan to attain your goals in accordance with the divorce laws of your state, and in accordance with the views of your local courts.

The internet may provide some useful information, may provide outdated information which is not state-specific, or may provide harmfully incorrect information. Do not make major decisions without first talking

with a local practicing family law attorney about likely outcomes if you were to go to court. Then let those legal factors guide you somewhat in your decision-making, and in your settlement efforts, before you wind up spending a fortune pursuing requests the judge hearing your case, and your spouse's attorney, would consider baseless.

On the other hand, even though you know your spouse is entitled to half of your thirty year pension, you don't have to just hand it to him or her on that silver platter if you know he or she isn't likely to spend the money to go to court and get it. But should you anyway? Maybe it's the right thing to do. Maybe it's also the right thing to do to pay for college for your children, even though the judge may not be able to make you.

While it is important to know the law, it may also be important to consider why the marriage broke up, the fact that you may have brought children into the world, and the reasons for the destruction of and/or reorganization of your family. It is also important to consider principles of honor, integrity, dignity, fairness and compassion.

Stop deluding yourself. Actually listen to what your spouse is saying. There may be some real validity to his or her feelings. Even if you don't believe the feelings are justified, you can't deny that your spouse actually does have those feelings. Push aside the anger and desire for revenge, push aside thoughts of vindictiveness and push aside selfishness and pettiness. Consider your spouse's and children's perspectives.

Try saying some of the following out loud:

1. If it really means that much to her, she can have it.
2. I know I don't have to pay that much child support, but I want her to be able to keep the kids involved in their activities.

3. I know my children like his new girlfriend, and she will be their stepmother. I will be happy my daughter has a step-mom at her father's house to do her hair.
4. We were married for over twenty years, and she took care of us all. I want her to be comfortable.
5. I know the baby is innocent in all this, and will be a half-brother to our children. I will welcome him into the family.
6. I know our child is better off with him, so I won't contest custody.
7. I know she and the kids will be better off if they move away, and in with her parents for a few years, while she finishes her degree.
8. I want the kids to spend as much time with their father as possible.
9. I want to give her the house. I know our children are grown, but I don't want them to hate me.
10. She's happier with him, and I wish her well.
11. He worked for it and put his life on the line, so I won't ask for any of the pension.
12. I know I don't have to agree in writing to pay for college, but I still want to.
13. Even though the court can't make me carry life insurance, I will anyway.
14. Our son will probably want to live with him in a few years. I'll let him.

15. We've agreed to name each other as trustee in our estate plans, because we trust each other, and each of us knows the kids better than anyone else.
16. I don't need a detailed visitation schedule, because we work that out just fine.
17. I'll stay on the mortgage until our youngest graduates from high school eight years from now, so you don't have to move, since I know you won't qualify to refinance.
18. We'll put into our Agreement that we will share college costs.
19. I won't ask you for any child support yet, so you'll have time to get back on your feet.
20. We'll both take the kids to the classes, practices, games, birthday parties and other activities in which they're involved. Same as when we lived together.
21. You can hold the passports.
22. How much money do you need each month?
23. How much can you pay?
24. I wouldn't want you to have to go back to work yet, so I'll pay spousal support until our youngest starts first grade.
25. What do you think is fair?
26. I know you wouldn't be able to trace your separate down payment, but I know you made it, so you can have that off the top when we sell the house.

27. We'll work out those issues regarding the kids the same way we did before the separation.
28. If you need to move down there where the cost of living isn't so high, I'll look for a place down there too, so I can stay involved in our children's lives.
29. She'll never be their mom. You are.
30. He'll never be their dad. You are.
31. I've told the children to be nice to her, and to listen to her.
32. Her fiancé can pick the children up from daycare on his way back from work, since he gets off earliest.
33. I'll pay spousal support until you finish your degree, since you left school to take care of our child.
34. I want to do what's right.
35. I want for us to remain friends when this is over.
36. I'm sorry.

The "issues" are real. The pain is real. So is the opportunity to be the best person you can, and to be the best parent you can. Say the above out loud until you no longer choke on the words. Then try saying them to your attorney, or to your spouse.

Perhaps after the Denial, Bargaining, Grief, Anger and Acceptance stages described in Chapter 1 of this *Guide*, may come the final stages of Forgiveness, Closure and Personal and/or Spiritual Growth. The experience can either beat you down, or teach you something. For those

unfortunate souls who still prefer the final stage to be Revenge, at least consider that it has been said that “living well is the best revenge.”

Would you act any differently if you felt your mother were watching you? Or some other person you greatly admire? What if God were actually sitting right next to you in the courtroom, seeing you testify and make your requests to the judge? If you are mediating, pull up an empty chair. If your child were sitting there watching the process, what would you be asking for, or fighting for? Are you badmouthing your spouse to your children? Using your children as messengers, or as spies? Telling them about all the court and legal proceedings? Putting your wishes before their needs? If so, stop it. Just stop.

Then do what you feel is right. Do what you can live with for the rest of your life. Do what you can be happy with when you look at yourself in the mirror every day. Do what you wouldn't mind seeing on your headstone, or in print for the public, about your actions. Do what you feel is the right thing to have done through the eyes of your children.

When you look right into their eyes, and see how you and your actions are reflected, are you pleased with yourself?



[To read more...](#)