

So You're Getting Divorced

What to Expect and How to Proceed



Q Can I stop the divorce?

If you are not the spouse who filed for divorce, you probably cannot stop the proceeding. If your spouse wants to get a divorce, he or she has a right to do so—no state will force a spouse to remain married.

If you are the spouse who filed for divorce, you can usually stop the process by withdrawing your petition for a divorce as long as your spouse has not filed his or her own petition for divorce.

Can one lawyer represent both of us?

No. Under every state's rules of professional conduct, divorce lawyers cannot represent both parties in a divorce. A lawyer is your advocate, and he or she has a duty to represent you and your interests only. The ethics rules for lawyers prohibit them from representing clients with conflicting interests—which are especially common between divorcing spouses. Parties to a divorce have opposite interests (even if both of you want to resolve the case amicably). Divorcing spouses cannot “waive” the conflict of interests and engage the same lawyer. It is also important that your lawyer be your champion, and anything you say must remain confidential. This can only be true when you talk to your attorney alone and not with your spouse present.

How long will a divorce take?

How long a divorce takes depends on many different factors and legal requirements that vary by state. For example, states may have a residency requirement (the length of time one or both parties must be a resident of the state). Some states also have a separation requirement (an amount of time you and your spouse must be separated in order to qualify for a divorce) and/or waiting periods (a fixed amount of time between filing for divorce and scheduling a hearing or entering a final judgment). The amount of time couples must be separated prior to finalization of a divorce ranges from sixty days to five years.

The amount of time your divorce takes will also depend on your location (that is, how crowded the court system is); the complexity of the issues involved; whether or not you have children; and how complicated your assets are. Generally, however, if you and your spouse are able to reach agreements, your divorce will be completed quickly.

If you are in a state where you can contest the grounds, or reasons, for a divorce, your divorce process may take longer. Depending on the state, your spouse can either file for a no-fault divorce or on fault-based grounds. Other issues that delay resolution are marital property division and parenting issues.

Should I move out of the house?

You should move out immediately if your physical, mental, or emotional well-being is seriously endangered and you are unable to have your spouse removed from the house (that is, by obtaining a court order for exclusive possession of the house or an order of protection). However, if you have children and you move out before you have a visitation schedule in place, you will be jeopardizing your ability to see them regularly. Once you move out, moving back in will typically be harder. Prior to leaving, you should consider inventorying all the property and removing your personal property. An inventory can be a video on your cell phone. If you want to move out, it is important to have specific court orders detailing your rights, who pays household expenses, and a visitation schedule.

Can I read my spouse's mail or email or tape our telephone conversations?

This is not recommended, and it is illegal in most situations. No individual is allowed to open anyone else's mail—being married does not provide an exception to this law. Exceptions arise only when the mail is addressed jointly to you and your spouse or one party has a power of attorney or similar legal power. Similarly, hacking into your spouse's email account is a violation of the Federal Wiretap Act. State rules vary regarding the taping of telephone conversations, and you should check to make sure you are not violating your state's rules. However, under federal law, unless you obtain permission, you cannot tape conversations between you and your spouse or your spouse and others.

How do I prove that my spouse is hiding cash?

The best way to start is to ensure that you have complete records from your spouse.

- First, you should obtain complete tax returns. The complete returns will include tax schedules and forms that provide information about income, interest and dividends earned, and deductions.
- Second, obtain complete statements for all financial accounts. A one-page snapshot will not show you the specific transactions (including deposits and withdrawals), which may reveal additional undisclosed accounts.
- Third, request loan documents and applications. A spouse may have been required to submit financial statements to the lender disclosing assets, debts, income, and expenses.
- Finally, if your spouse is self-employed, it is essential you review his or her business records (credit card statements, checking account statements, tax returns, etc.). America is an entrepreneurial country; one can be self-employed by an entity as small as a “mom and pop” store on up to a multi-million-dollar business. It is not unusual for family businesses to have personal expenses run through the business. A review of such expenses can reveal hidden assets and debts.

Can I change the locks on the house?

You may change the locks, but you may not be able to prevent your spouse from entering the house. Even if you change the locks, your spouse will still have the right to enter the house unless you have “exclusive possession” of the house—that is, unless you have a court order excluding your spouse from the house. The other way to prevent your spouse from entering the house is by obtaining an order of protection if your physical, mental, or emotional well-being is seriously endangered.

What about my prenup?

If your prenuptial agreement complies with the laws of your state, it should be validated by the court and the terms of the prenuptial agreement incorporated into your final divorce decree. A valid prenuptial agreement will typically comply with the following rules.

1. It must be a written agreement (not oral).
2. It must be signed by both parties prior to the wedding.
3. It must be signed voluntarily without pressure from one side.
4. Both parties must be given enough time to review and understand the agreement.
5. Each party must make a full and truthful disclosure of income, assets, and liabilities.
6. It must not be unconscionable (grossly unfair such that one side suffers severe financial hardship).
7. Each party should be represented by his or her own attorney, as the parties must each defend their own interests. As discussed in more detail above, one attorney can never represent both parties.

But please exercise caution: the rules on prenups vary greatly state by state.

Can I change the judge?

Every state court system handles requests to change judges differently. Many states will allow a change of judge so long as the request is made early in the proceeding. Once the proceedings have begun and the judge has heard issues relating to your specific case, it becomes much more difficult to change the judge. If the request is not made early in the proceedings, you will need to give a clear reason why the judge would not be able to give you a fair trial. Some of the most common reasons are:

1. the judge has a financial interest in your case;
2. the judge is related to the one of the parties; or
3. the judge represented one of the parties previously when practicing as a lawyer.

If one of these reasons applies, the judge can also voluntarily remove him- or herself from the case in a process known as “recusal.”

What should I wear to court?

You should look professional. It is important you make a good impression and put your best foot forward. You are not *required* to wear a suit, but you should treat a court appearance as you would a job interview. You will be treated more seriously and with more respect if you are dressed appropriately for the environment.

What if I don't show up to court?

If you have a lawyer representing you, the lawyer will tell you when it is necessary for you to personally appear at court. If you are representing yourself, it is essential that you show up for all court dates. Appearing in court will ensure that you are not held in default for failing to appear—which would mean that you could automatically lose your case. You would not be able to participate in the proceedings, and orders could be entered without your consent or knowledge. If you are representing yourself, you will also be the only person advocating on your behalf. It is essential that the judge hear your side of the issues and arguments. Please note that if you choose to represent yourself, the court will usually hold you to the same standards as an attorney for the practice of law.

Will my spouse be required to return to work?

Whether spouses are required to work will depend on:

1. how long they have been unemployed;
2. their educational background;
3. their work history; and
4. their job training.

If your spouse has been unemployed during your marriage and is unemployed when the divorce proceeding is filed, he or she will most likely not be required to work while the divorce case is pending. Generally, state laws preserve the financial status quo during a divorce proceeding. If your spouse is ultimately awarded “rehabilitative alimony” (also referred to as “limited” or “short-term” support), there is an expectation he or she will eventually work. The purpose of this type of alimony is to provide your spouse with enough support to enable a return to school or development of job skills or training that will result in a job and self-sufficiency. If your spouse is older and if you have a long-term marriage, your spouse may be past a point where return to work will be expected.

What happens to credit card debt in a divorce?

Responsibility for credit card debt will depend on which state you reside in, whether it is joint credit card debt, and if the debt was incurred before or after the divorce proceeding was filed. In some states, credit card debt incurred during the marriage is the joint responsibility of both parties so long as both parties are co-signers on the credit card. In other states, both spouses are responsible for all credit cards even if only one spouse is a signer. However,

even if your spouse is responsible for your credit card debt in your divorce decree, credit card companies are not bound by your agreement. It is important that you take additional steps to protect yourself, as the credit card companies can still pursue you if your spouse fails to pay. Additional protections can include putting indemnification language into your decree or ensuring there will be sources of funds to pay off the credit card debt completely.

What about wedding gifts?

Wedding gifts are unique in that they are gifts (which normally are considered separate property belonging to the individual who received them), but, by their very name, wedding gifts are intended for both spouses. Most judges will take a commonsense approach to wedding gifts and divide them in what they consider to be a fair way. In determining how to award wedding gifts between spouses, the judge may consider who gave the gift (which spouse's family or friend), whether the gift has sentimental value for one party (for example, a family heirloom), and the gift's original value.

Can I make a spouse sign a joint tax return?

A court will not order an unwilling spouse to sign and file a joint tax return. If failing to file a joint tax return results in additional taxes or liabilities, the judge may require the spouse who refused to sign the joint return to be solely responsible for the additional taxes. This is more likely if the judge believes the refusal was unreasonable. However, if a spouse has doubts about the accuracy of the information contained on a joint tax return, that spouse has every right not to sign and to prepare his or her own tax return.

Should I hire a private detective?

A private detective can be useful in many different circumstances when getting divorced. A private detective may or may not be able to confirm your suspicions about your spouse's behavior with a significant other. A private detective can provide you with actual evidence that can be used in court. A private detective, however, will not be able to prove how much money your spouse is spending. You will need to do this by looking through your spouse's financial records and potentially hiring a financial expert to assist you. A private detective, however, may also help you find hidden assets or income. The detective will know what records to look for and how to access the information, including information related to off-shore bank accounts, and how to look for hidden income or employment.

Finally, a private detective can help provide crucial evidence in custody proceedings. For example, a private detective can help determine how attentive your spouse is to your children's needs and safety while the children are in his or her care. Private detectives are usually very expensive, and you should speak with your attorney about whether hiring one is necessary or worth the time and effort. **FA**