



ANATOMY OF A DIVORCE AGREEMENT

A divorce agreement is a legal contract between you and your spouse which outlines what happens with your property, your finances and your children after the divorce. You and your spouse will present this agreement to the court at the time of your divorce hearing; after finding the agreement to be fair and reasonable and not the product of fraud or duress, the Probate and Family Court judge will incorporate your Divorce Agreement into the Judgment of Divorce, making it enforceable as a court order.

The following roadmap is designed to provide you with some considerations to make as you negotiate the terms of this agreement.

- ❑ **Child Custody.** Your separation agreement will specify your agreement with your spouse with respect to two kinds of custody – legal custody and physical custody.
 - Legal Custody: Legal custody is the ability of a parent to make major life decisions for a child, such as the child’s religion, education, elective medical procedures, travel, etc. If parents agree to share legal custody, they are committing to using good faith efforts to agree on of these major life decisions for the child(ren). Both parent’s signatures may be required on school forms, applications, health care decisions. Both parents must consent to any visa applications and international travel. With shared legal custody, both parents may review all dental, medical and school reports, and other reports or written communications concerning the welfare of the child(ren) without obtaining the permission of one another, each may consult with individuals providing medical, psychological, dental or educational services for the child(ren) and each may attend or participate in any activity or event involving the child(ren) (including recitals, performances, sporting events, games and practices, school events and such) whenever we wish without permission from one another.
 - Physical Custody relates to where child(ren) primarily lives. If the child(ren) primarily lives with one parent, that parent is said to have physical custody of the child. Parents can agree to shared physical custody of the child(ren). The parenting plan in the separation agreement details the specific schedule or agreement between the parents with respect to the time the child(ren) will spend with each parent.
 - Considerations to make when negotiating custody:
 - Who has been primarily taking care of your child(ren) up until the separation?
 - Are you in agreement with your spouse (or able to reasonably come to agreement) in important aspects of your child(ren)’s life, including religion, education, travel and medical care?
 - Is one of you in a better position, because of work, location, skills or schedule, better able to care for the child(ren) during particular times of the week?

- Considerations to make when negotiating a parenting schedule:
 - Your time with your children on weekdays and weekends
 - Your spouse's time with your children on weekdays and weekends
 - Schedule for long weekends
 - Schedule for school vacations
 - Arrangements for holidays and other special events
 - Arrangements for summers
 - Arrangements for telephone access

- Other issues to discuss:
 - How will you make decisions about your child(ren)'s academic, health, and social needs?
 - Exchange of information between you and your spouse – how will you exchange this information?
 - How will you resolve disputes should they arise later - such as therapy or mediation?
 - How will you each provide notification and/or arrangements for out-of-state travel with your child(ren)
 - Will you tolerate permanent removal of your children from Massachusetts (if either of you wants to move out of state).

☐ Child Support -The Massachusetts Child Support Guidelines provide a formula for determining the amount of child support to be paid from a non-custodial parent to the custodial parent. These guidelines can be found here: <http://www.mass.gov/courts/childsupport/guidelines.pdf>. You should read through these guidelines and familiarize yourself with the various issues to be determined relative to deciding the appropriate amount of child support to be paid, including:

- Applicability of Massachusetts Child Support Guidelines
- Determination of “income” including base salary, overtime, bonuses
- Attribution of income
- Confirmation of cost of child care expenses
- Confirmation of cost of health insurance
- Adjustments to child support
 - When? Under what circumstances?
 - How will these be made?
- Termination of child support
 - When? Under what circumstances?
 - How will this occur?
- Definition of “emancipation”
- Payment of child-related expenses (i.e. extracurricular activities, clothing, etc.)

☐ Education of Children – In your agreement you may make decisions relative to post-secondary education (and secondary education) for your children. When children are young, these decisions are open-ended in language. If the children are in their final years of high school, the agreements should be more specific. Issues to consider when negotiating the terms of your education provisions include:

- Decision-making on choice of public or private school/college and/or secondary school
- Exchange of information
- Cooperation with financial aid forms
- Contribution from you and your spouse
- Contribution from your child's assets / income
- Contribution from third parties
- Impact, if any, on child support

- **Spousal Support/Alimony** Alimony/spousal support is often a difficult area to address and negotiate, due to the emotional tenor of a divorce and the lack of clear guidance from the legislature or the courts about how to determine an appropriate amount of alimony. Generally, the standard for whether alimony may be paid in Massachusetts is one spouse's need for support from the other spouse, and the other spouse's ability to pay that support. To determine this, parties (or a judge) must take into consideration all of the factors listed in M.G.L. c. 208 §34. These can be found here:

<http://www.malegislature.gov/Laws/GeneralLaws/PartII/TitleIII/Chapter208/Section34>

- If, after some discussion, you determine that alimony is appropriate under the circumstances, then the following are components to consider and on which you and your spouse must agree:
 - What is the amount to be paid? What is the frequency of payment? How (what method) shall payment be made?
 - Termination of alimony
 - When? Under what circumstances?
 - Employment
 - Remarriage
 - Retirement
 - Death
 - Specific date
 - What are the intended tax consequences for payor / recipient?
 - Will alimony be modifiable at a later date, or will it be fixed indefinitely? If modifiable, then when? Under what circumstances? How will this occur?

- **Health Expenses and Insurance** – Parties must determine how children's health expenses will be covered following divorce, including who will provide health insurance coverage for them, how will uninsured medical expenses be shared and until what point in the child(ren)'s lives will health insurance coverage continue? Parties must also consider whether any insurance coverage will be provided by one spouse for the benefit of the other. Things to consider when negotiating the health insurance provision of the divorce agreement include:

- Health insurance for your children
 - Available coverage
 - Cost of coverage
 - Responsibility for this cost
 - Responsibility for co-payments
 - Responsibility for prescriptions
 - Responsibility for other uninsured health-related expenses
 - Method of reimbursement

- Length of coverage
- Health insurance for you and your spouse
 - Available coverage
 - Cost of coverage
 - Change in cost after Judgment of Divorce
 - Responsibility for this cost
 - Responsibility for co-payments
 - Responsibility for prescriptions
 - Responsibility for other uninsured health-related expenses
 - Extent of continued coverage
 - Termination of this continued coverage
 - ⇒ Remarriage
 - ⇒ Eligibility
 - ⇒ Emancipation of children
 - ⇒ Death
 - ⇒ Retirement
 - ⇒ Alternate insurance available
 - ⇒ Specific date

□ **Life Insurance.** Your divorce agreement may contain a provision requiring one or both parents to maintain a life insurance policy for the benefit of the other parent or for the benefit of the children. Things to consider when negotiating this provision include:

- The availability of life insurance -
 - Through employer
 - Through private provider
- The responsibility for payment of premiums
- The amount of death benefit
- Who will be named as beneficiary -
 - Your spouse
 - Your children
 - Third party
 - Trust
- Termination events – when will the obligation to provide life insurance terminate (if ever)?
 - Emancipation of the child(ren)
 - End of child support
 - End of alimony
 - Specific date
 - Change of employment

□ **Division of Real Estate** – The division of real estate, including the marital home, is often one of the most difficult issues to decide in a divorce agreement. There are numerous reasons why one spouse may wish to keep the marital home or to sell the marital home, depending on the financial circumstances of that parent, the needs of the child(ren) and the history of the parties' ownership of the property. The tax consequences of retaining or selling the marital home cannot be overlooked when negotiating this provision, as must the

liquidity (or illiquidity) of real estate compared with cash or retirement assets. Issues to be determined with respect to the marital home or other real estate include:

- Use/occupancy of marital home
- Responsibility for:
 - Mortgage
 - Utilities
 - Insurance
 - Taxes
 - Minor upkeep/repairs
 - Major upkeep/repairs
- If one spouse will buy out the other, then:
 - When?
 - Triggering events
 - ⇒ Specific date
 - ⇒ Completion of high school
 - ⇒ Completion of college
 - ⇒ Remarriage
 - ⇒ Discretion of one party
 - ⇒ Mutual discretion
 - Terms / Conditions
 - ⇒ Determination of fair market value
 - Certified real estate appraiser
 - Bank appraiser
 - Realtor opinion of value
 - Mutual decision
 - Determination of buyout % or amount
 - ⇒ Timeframe
 - ⇒ Interest
 - ⇒ Responsibility for refinancing % cost of buy-out
 - ⇒ First option to buy

- If property is to be sold, then:
 - When?
 - Selection of realtor
 - Triggering events
 - ⇒ Specific date
 - ⇒ Completion of high school
 - ⇒ Completion of college
 - ⇒ Remarriage
 - ⇒ Discretion of one party
 - ⇒ Mutual discretion
 - Terms / Conditions
 - ⇒ Determination of fair market selling price
 - Certified real estate appraiser
 - Bank appraiser
 - Realtor opinion of value
 - Mutual decision

- ⇒ Allocation of net proceeds from sale
- ⇒ Definition of net proceeds
- ⇒ Timeframe
- ⇒ Interest
- ⇒ Responsibility for refinancing / cost of buy-out
- ⇒ First option to buy

□ **Division of Other Property** – Massachusetts is an equitable division state, meaning that all assets owned by the parties at the time of the divorce may be considered as part of the total pot of assets to be divided at divorce. The concept of equitable division (and the relevant factors) is a tricky legal standard – one to discuss with your attorney before you begin negotiations.

Property to be divided, and the relevant issues to be determined, may include:

- Automobiles/Other vehicles
 - Use and ownership
 - Equity versus loan
 - Payment of expenses
- Bank Accounts
 - Joint accounts
 - Sole accounts
- Pensions/IRAs/Retirement/Social Security
 - Valuation
 - ⇒ Actuary
 - ⇒ LawData
 - ⇒ Statement for cash value
 - Division
 - ⇒ Liquidation
 - ⇒ Rollover
 - ⇒ Qualified Domestic Relations Order
 - ⇒ Tax consequences
- Investments
 - Valuation and division
- Shares of Stock/Stock Options
 - Valuation and division
 - If not assignable, method of exercising them
- Businesses
 - Valuation
 - Division
 - ⇒ Buy-out
 - ⇒ Co-ownership
 - ⇒ Sale
- Art/Antiques/Collections
 - Valuation and division

□ **Division of Liabilities** – liabilities, just like assets, must be divided at the time of the divorce. You and your spouse will need to determine who will be responsible for joint and individual liabilities, including:

- Mortgage
- Line of equity
- Home equity loans
- Credit cards
- Reserve credit
- Loans against 401Ks/other investments
- Personal loans
- Uninsured medical/dental expenses

☐ Taxes – You and your spouse will need to make decisions with respect to the payment of taxes, including whether all taxes that need to be filed have been filed, whether you will file jointly or separately for any upcoming calendar year during which you are considered married, how you will allocate a dependency exemption, and other tax-related issues, including:

- Prior tax filings
 - Status (married, filing separately; married, filing jointly; individual)
 - Liability
 - Indemnification
 - Exchange of information
- Current tax filings
 - Status (married, filing separately; married, filing jointly)
 - Liability
 - Indemnification
 - Exchange of information
- Use of dependency exemptions
- Method of review
 - Exchange of W-2s/1099s/tax returns
 - Meeting with accountant
 - Mediation
- Use of other available tax benefits
 - Earned income credit
 - Head of household
 - Child care credit
 - Hope credit
- Use of other available tax deductions
 - Mortgage
 - Real estate taxes
 - Excise taxes
 - Medical expenses
- Consideration of capital gains taxes
 - Real estate
 - Investments