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## **MISCONCEPTIONS ABOUT DIVORCE**

*We can save money by both of us using the same lawyer.*

You and your spouse are potential adversaries in a divorce. This is true even in a divorce that is settled amicably by agreement. The ethical rules that lawyers must follow do not allow a lawyer to represent two people with conflicting interests except in very unusual cases. Such dual representation is *never* appropriate in divorce cases. You and your spouse each need your own lawyer to look out for your individual rights and interests.

*If we agree on everything we will not have to have a trial.*

Even if everything is agreed to and all the right papers have been filled out, signed and filed, you and your spouse will have to go to court for a brief hearing before a Judge. The purpose of that hearing is so that the Judge can make sure that you and your spouse understand the meaning of your agreement, that the agreement was entered into voluntarily by both sides, that all relevant financial information has been fully disclosed by both sides and the agreement is fair and reasonable. Also, if you and your spouse have children you will each separately have to attend a program, sponsored by the court, about the effect of divorce on children.

*The court has to go along with what we want to do so long as we agree and we have both been honest.*

Not true. The court can, within reason, do whatever it wants even if you and your spouse have agreed to something else. In fact, anything to do with child custody, visitation and child support is *always* up to the court. The court can, at any time and for almost any reason, reopen a case and change its decision regarding child custody, visitation and child support. The only decision the court can't reopen is how property is divided between you and your spouse. However, even that issue can be reopened if it is later discovered that one or both parties lied about or concealed property.

*The only property the court can divide up is property accumulated while we were married.*

The court can divide up property that one spouse or the other had before the marriage if the court feels this is appropriate. The fact that a piece of property belonged to one spouse or the other before the marriage is only one factor of many that the court considers in dividing up property.

*My pension belongs to me. The court can't give part of it to my spouse.*

In recent years the courts have overcome any reluctance they might have had regarding dividing up pensions. It is a mistake to think that a pension is "immune" from division by the

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court. Whether or not a pension is likely to be divided by the court depends on a number of factors. Some of those factors are: the length of the marriage; the relative incomes of the parties; the ages of the parties; the values and types of assets accumulated by the parties so far; whether one party has made sacrifices for or substantially contributed to the other party's career advancement; whether one party has foregone career or employment opportunities in order to keep house or care for the children; et cetera.

Lastly, while it may seem impossible to divide something that nobody is going to receive, if at all, until far into the future, the courts have found ways. The most common methods are dividing the present value of the pension and dividing the ultimate payments once they begin. Present value is a dollar amount that an accountant or an actuary calculates. The idea is vaguely similar to figuring out how much money would have to be invested right now to create a fund that could pay all of the pension payments that the pension beneficiary would receive over his or her expected life span. Once a present value figure is determined, that figure is added to the list of assets that is presented to the court. The other method simply gives the spouse without the pension a set percentage of each payment received by the pension beneficiary spouse as each payment is made. These examples are only two of the many possible ways a court might decide to deal with pensions.

*Whomever ends up with the children will end up with the house.*

It depends. While it is true that the courts protect the interests of children above all else in a divorce, that does not mean that the spouse that has the children most of the time gets the marital home. The court may decide that the home should be sold and the proceeds divided; however, the court can order that the sale be delayed until the children reach a certain age. Also, other assets of the marriage may be "traded" for one spouse's interest in the house or one spouse may simply buy out the other.

*We will have to list everything we own and the court will divide it all up.*

Very unlikely. There is no need to list every single item of personal property. The court is only interested in dealing with items of significant value such as cars, stocks, bonds, valuable art, et cetera. Judges hate getting involved in deciding who gets the throw rug in the bathroom or the end tables in the den. Often the only mention of ordinary personal property in a divorce judgment is the simple statement that all personal property not specifically listed has been divided to the satisfaction of the parties.

*Child support is determined by the unique circumstances of each case.*

Not any more. For a number of years Massachusetts, and all the other states as well, has used guidelines to calculate the amount of child support in almost all cases. In Massachusetts specifically, the amount of the weekly payment is determined by a formula that assigns percentages to a number a factors, such as number and ages of the children,

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and applies the formula to the incomes of the parties (see the yellow form included with this package). The result provided by the formula is then ordered by the court unless there are specific and unusual facts that would make the formula result unfair.

*The court will require a specific visitation schedule.*

Usually the court does not want to get involved in setting visitation schedules. The court expects that in most cases the parties can set their own schedule. Also, the courts prefer not to have to order a schedule; because, that removes any flexibility. In fact, most separation agreements and divorce judgments deal with visitation by simply stating that the parties shall have reasonable rights of visitation and leave it at that.

*The spouse the children live with the most will control how the children are raised.*

Most judges in Massachusetts prefer to see joint legal custody. This means that the parties are equal in the important decisions regarding the children, such as religion, schooling, elective medical treatment and the like. As a practical matter, true equal time between the parents is very rare. School and work schedules usually make an even division of time impossible. Consequently, the spouse that the children reside with most of the time will be the one making ordinary day to day decisions regarding the children, such as meals, clothing, bedtime, et cetera, without any need to inform and consult with the other spouse. However, the courts strongly encourage both parents to be very involved with all aspects of the children's lives.