

Crafting a Separation Agreement

This written contract spells out the terms of your divorce.

By Diana Shepherd

The Divorce Act stipulates the sole grounds for divorce as breakdown of marriage, and provides for three basic ways for proving it:

1. You and your spouse have been separated for one year.
2. Your spouse has committed adultery.
3. Your spouse has treated you with intolerable mental or physical cruelty.

The first is certainly the easiest to prove, and is by far the most commonly used ground for divorce. There's no such thing as a "legal separation"; you're legally separated by the simple act of living apart. While living apart, however, you should be protected by a Separation Agreement.

You can work out the details of your Separation Agreement through negotiation (with lawyers and/or mediators), or you can argue about the details in court. Of these options, the first is greatly preferable to the second. There are many reasons to negotiate your Agreement rather than slugging it out in court; the most persuasive of these include:

The costs. A court battle is expensive -- financially and emotionally. The time. One spouse could use the court to vent his or her anger at the other, arguing over every single item; you could still be fighting with your ex about who gets the tea towels five years from now. There's no closure, and you can't get on with your life when yet another court date is hanging over your head. The control. If you can't reach an agreement, the court -- which may neither know nor care what your desires and priorities are -- will decide everything about your future rights and obligations as well as who gets which assets. Do you really want to let a stranger determine what your life will look like in the future?

Why create a separation agreement?

After your divorce, the financial relationship with your soon-to-be-ex-spouse will be governed by your Separation Agreement. This written contract spells out the terms of your separation, including: property division; child support, custody, and visitation; spousal support or maintenance (formerly called "alimony"); division of assets and debts; and any other issues that apply to you. If you negotiate your own agreement, it can reflect what each of you wants and needs.

Even if you're not sure you want a divorce, creating a Separation Agreement may be in everyone's best interests. You may need financial help from your spouse while you're living apart, or you may have small children and need to work out the details for custody and/or visitation, or you may want to specify who will be responsible for debts incurred during your separation (this is vital if your spouse is vengeful, a "shopaholic," or a compulsive gambler. You don't want to get saddled with a whopping big debt from expenses your spouse racked up while you two were separated).

A legal Separation Agreement answers all the questions about the mechanics of your separation so that each of you clearly recognizes your rights and obligations. If you eventually decide to divorce, some or all of what you included in your initial Separation Agreement can be included in your Petition for Divorce; all that will be needed in your Petition is a statement to the effect that "we have a Separation Agreement and want to keep it in force after the divorce."

This can be both good and bad: if you have agreed to a provision only because you thought it was temporary, and then your separation agreement becomes your divorce agreement, you may find you can't change that "temporary" provision. Unless your spouse agrees to void or modify that provision, or it causes obvious problems (obvious to a judge, not to you), you may be stuck with it. So don't agree to

anything you can't live with forever -- or make sure your Separation Agreement indicates in writing that you will in no way be bound to the same terms when you eventually file your Petition for Divorce.

Questions, questions

Before you start negotiations with your spouse, you need to ask yourself some questions. Start with the worksheet entitled "My Priorities" to give you the big picture, then narrow your focus to items such as:

- Who gets to stay in the home?
- Who will pay the mortgage (and other regular expenses such as gas, electricity, and home repairs) while you're apart?
- How will you share the money in your joint bank accounts?
Note: never clean out a joint account if you hope to avoid a bitter court battle with your ex. A civilized compromise would be to take out half, tell your ex what you've done immediately, and invite him or her to do the same.
- How will you share assets such as stocks and bonds? How about the pension(s)?
Who keeps the family home/car/boat/ washing machine etc.? How will you split big-ticket items?
Note: if a marital asset, such as a home or a car, can't be divided, one spouse can keep it and compensate the other with cash (this will probably be part of the "Equalization Payment" you'll make to your spouse so that your Net Family Properties end up being equal). Or you could find two items of approximately the same value, and each of you keeps one depending on your wants and needs. If you both want the same item, take a page from your childhood: write down the names of each item on two pieces of paper, put both of them in hat, and draw to see who gets what. This method won't stand up in court, of course, but if you can work out your differences amicably and fairly, you can avoid having to let a judge decide. Keep your lawyer up-to-date on how you're dividing your property and assets so he or she can make you aware of potential inequities.
- What about the joint credit-cards? Will you cancel them? When? If not, who will be responsible for paying the debts and fees? Note: if you've never had credit in your own name, you should apply for your own credit card before the joint cards are cancelled.
- How will you handle your current debts?
- Who will be responsible for the debts either of you incur while you're separated?
- Will you continue to file joint income-tax returns? Are there tax arrears due, or other problems pertaining to joint tax returns that will surface after the divorce that will have to be addressed in the division of property and liabilities?
- Will one of you be paying maintenance to the other? How much will it be? Will it be in the form of a lump-sum or periodic payments? When will the payments end? **Note:** how you choose to pay maintenance can affect your tax status. Check with a lawyer before deciding.
- Will one of you be paying child support to the other? How much? When will the payments be made? When will they end (e.g., when the child turns 18, or leaves home, or completes college, etc.)?
- Will one or both of you be contributing to a college fund (RESP) for your kids? How will the payments be made?
- How will you share responsibility for the care and raising of your children? Joint, sole, or shared custody? When will the children be staying with each of you?
- Who will pay for legal fees? Will each of you be responsible for retaining and paying your own lawyer?

There will be other issues that apply to your unique case. For example, you and your spouse might have a small business that you run together: can both of you continue to work together during and after the divorce? If not, who will continue to work the business? Can you afford to hire a replacement for the other spouse? Will one of you buy the other out? How will you determine a fair buy-out price?

Compromise

Some people think "compromise" is a bad word: for them, it means giving something up. They don't see the other side, that you also get things when you compromise fairly. Compromising also affords you the

opportunity to be generous with your ex -- and generosity can sometimes alter the whole tone of the case, shifting a recalcitrant spouse into a cooperative one.

You shouldn't expect to get everything you ask for in a Separation Agreement. Of course, you can refuse to compromise on anything, but this approach will usually backfire -- you'll end up in court where the judge is extremely unlikely to grant you your heart's desire. Instead, you may end up losing everything that's important to you for the sake of a few items you could have lived without.

If you've been trying and failing to reach a preliminary agreement to give your lawyers to work with, a neutral third party can help you through the sticky areas. A trained mediator can help to defuse anger, and get negotiations back on track when emotions have sent your discussion off the rails.

If you and your spouse are no longer on speaking terms, you may want to give responsibility for working out the details of the Agreement to your lawyers. This can be done in one of two ways: either one lawyer drafts the agreement, which is then read and amended by the other lawyer and his or her client, or both lawyers draft agreements and present them to each other for review. These initial presentations can be trial balloons floated by the lawyers to see how you and your spouse react to certain provisions, or they can be very close to the final agreement. You must review all drafts in order to provide your lawyer with useful feedback. Do not give sole responsibility for reading them to your lawyer, and do not agree to any proposal that makes you uncomfortable without thinking about it for a while. Maybe you're uncomfortable because you never thought of this provision before, but maybe you're uncomfortable because it's unfair given your unique circumstances. You can accept or reject draft agreements, or you can use them as a jumping-off point for additional negotiations.

Evaluating an agreement

Although you will certainly solicit your lawyer's advice, you are ultimately responsible for evaluating the draft Agreements. Here are a few questions to ask yourself when considering an Agreement:

- Is this Agreement fair? Apply this question to yourself only -- you don't want to start second-guessing your spouse here.
- Is it in my best interests? Is it in my children's best interests?
- Can I afford this Agreement -- now and in the foreseeable future?
- Is there a clearly-stated method to collect or enforce commitments (usually financial)?
- What did I want (see "My Priorities" worksheet) that I didn't get? Can I live without it? Is it worth additional time and money to re-negotiate?
- What am I willing to give up in order to get the missing items?
- Am I rejecting this Agreement because important provisions are missing or very unfavorable to me, or because I'm mad at my spouse and want to make him or her suffer?
- Will I be better or worse off if I go to court? Ask your lawyer how a judge is likely to rule given your province's laws and guidelines.
- Is the financial and emotional toll of *not* settling too high for me and my children to pay?

My Priorities Worksheet

If you don't really know what your priorities are, you won't know what to ask for -- and what to fight for, if necessary -- and what you can live without. Saying "I want it all!" is useful neither to you nor your attorney. Use this worksheet to help you identify your priorities before entering into serious negotiations, and share this information with your attorney. Add or delete items to suit your individual case.

Property division

My priorities are:

- a) _____
- b) _____
- c) _____
- d) _____

My spouse's priorities are:

- a) _____
- b) _____
- c) _____
- d) _____

Finances (spousal support, division of assets and debts)

My priorities are:

- a) _____
- b) _____
- c) _____
- d) _____

My spouse's priorities are:

- a) _____
- b) _____
- c) _____
- d) _____

Children (support, custody, visitation)

My priorities are:

- a) _____
- b) _____
- c) _____
- d) _____

My spouse's priorities are:

- a) _____
- b) _____
- c) _____
- d) _____

Note: if you and your spouse don't agree on custody, write down why you feel your custody arrangements are reasonable and in the children's best interests, and why your spouse's aren't.