

Separation – an alternative to divorce

In the event of a marriage breakdown, not everybody wishes to commence divorce proceedings. There can be many reasons for this and you should discuss with your solicitor whether it is more appropriate in your case to separate from your spouse (formally or informally) rather than to divorce, and whether the separation should be permanent or for a fixed period until divorce proceedings can be commenced.

Please see our information sheets titled 'Divorce Procedure – a brief guide' and 'Divorce – the grounds and facts' for full details about the divorce procedure.

If you choose not to divorce immediately – or at all – you should consider how to deal with your separation.

Separation

There are various ways in which a separation can be regulated:

1 Judicial separation

A decree of judicial separation is almost as final in its effect as a decree of divorce. The principal differences are that the parties remain married and thus cannot re-marry, and that they remain each other's next of kin for some purposes. In addition, no pension sharing order can be made so in the event of the death of one party, the surviving party will probably qualify to receive widow/widower's benefits from his/her deceased spouse's pension (depending upon the precise terms of the pension arrangements). The surviving party will also be a widow/widower upon the death of the other, from the point of view of state benefits.

Unlike an application for divorce, at present it is not possible to apply for judicial

separation online and an application must be lodged with the court on paper. However, in most other respects the proceedings are conducted in the family court in a similar way to divorce proceedings; that is, by way of a petition founded upon one of the following five facts:

- 1 Adultery: the respondent's adultery and the petitioner finding it intolerable to live with the respondent, although not necessarily as a result of the adultery.
- 2 Unreasonable behaviour: the respondent behaving in such a way that it is unreasonable to expect the petitioner to continue to live with the respondent.

These are the only facts that do not rely on a period of living apart. If the parties live together as man and wife under the same roof for a period of six months or more, either after the adultery is known about or after the last incident of unreasonable behaviour, the court will treat the petitioner as having forgiven the respondent, and it is extremely unlikely that a divorce will be granted.

- 3 Desertion: the respondent deserting the petitioner, i.e. leaving without this being by agreement, and throughout the period of living apart, the petitioner being willing for the respondent to return. This desertion has to be for a period of at least two years, prior to the presentation to the court of the judicial separation petition.
- 4 Two years' separation with consent: the parties must have been living separately for a period of at least two years, prior to the presentation to the court of the judicial separation petition. It is possible in some circumstances to demonstrate that parties have been living separately, even if they are still living in the same

Head Office
Heathervale House
2-4 Vale Avenue
Tunbridge Wells
Kent TN1 1DJ
T 01892 510000
F 01892 540170

Thames Gateway
Corinthian House
Galleon Boulevard
Crossways Business Park
Dartford
Kent DA2 6QE
T 01322 623700
F 01322 623701

Separation – an alternative to divorce

(continued)

household. The consent of both parties is vital to this fact and it may be withdrawn at any time prior to the grant of decree nisi.

- 5 Five years' separation: in this case either of the parties may petition the other as long as they have been living separately for a period of at least five years, prior to the presentation to the court of the judicial separation petition. Again, it is possible in some circumstances to demonstrate that parties have been living separately, even if they are still living in the same household. No consent is required when petitioning on this fact. However, there is a specific defence to this if a decree of judicial separation would cause grave financial hardship or other grave hardship.

The court has the power within these proceedings to deal with an application by either or both parties for capital and income provision, but does not have the power to order a financial clean break between the parties against the wishes of either or both of them, as it may in divorce proceedings.

The court cannot compensate a party in judicial separation proceedings for the loss of widow/widower's pension unless the parties specifically agree that the provision that has been made takes this into account in anticipation of a party becoming a widow/widower following divorce proceedings.

2 Separation regulated by court order for maintenance

These orders are quite rare. Often if one party seeks maintenance from the court this is as part of divorce proceedings. However, in theory a spouse may ask the court to order

maintenance in the face of his or her spouse's wilful neglect to maintain him or her, or to vary the terms of a Separation Agreement or Deed that provides for maintenance.

3 Separation regulated by a maintenance order

It is possible for the parties to obtain an order for maintenance in which the decisions will be made by employed or trained volunteer magistrates. These proceedings usually take place before there are any divorce or judicial separation proceedings.

However, if there are divorce or judicial separation proceedings in progress, the parties may only ask the court which is dealing with their petition to deal with the question of maintenance.

These orders for maintenance are less important now that the Child Support Acts provide for the calculation of child support through the Child Maintenance Service. The Family court may provide for spousal maintenance and variation of existing child maintenance orders (unless the Child Maintenance Service has sole jurisdiction for issues about the children's maintenance) and may also provide certain additional orders for children who do not come within the Child Maintenance Service system. The advantage of having a family court order for maintenance is that it is then beyond doubt that one spouse should be supporting the other to the limit of that order and various methods of enforcement are available.

4 Separation regulated by formal deed

The parties may agree to live apart and have the terms of their separation recorded in a

Separation – an alternative to divorce

(continued)

formal deed. A solicitor would normally draft the deed for the sake of clarity and certainty.

The parties may come to an agreement either about the financial repercussions of their separation, which is intended to last for a specific period (for example, a period of two years after which time divorce proceedings can be commenced by consent), or to last throughout the period of their separation, or throughout the rest of their lives, as they choose.

Before entering into a deed of separation the parties should make disclosure of their respective financial positions and should both have the opportunity to seek independent legal advice. Neither party should be placed under pressure to sign the deed.

An agreement of this nature does not prevent the divorce court having the power to review the financial issues in later divorce proceedings if either spouse makes an application to the divorce court within those proceedings for this to take place. However, the deed of separation, assuming that it has been properly drafted and the parties have met certain requirements in respect of it before signing it, will be given significant weight by a later divorce court.

As the law stands at present, an adjustment in previously agreed capital provision will only take place if there has been a significant change in the parties' circumstances when compared with those that prevailed at the time of the agreement.

If the deed of separation shows that what was intended by the parties was to be a full and final settlement of their respective claims against each other for capital provision and there has been no significant reason for a

judge to go behind such agreement to ensure fairness, then it should stand.

Upon application of either party the court may review spousal maintenance payments if there has been a material change in circumstances.

Parties should take legal advice in respect of a deed of separation before entering into it, to ensure that it is properly drafted and that certain requirements have been met to give the greatest chance of the deed being upheld in any later divorce proceedings.

5 Oral agreement

The major problem with the parties reaching an oral agreement about the arrangements arising from their separation is that either party could say at a later stage that the other was wrong, or that there was a misunderstanding or that the terms were somewhat different than had been thought to be the case. It is difficult to prove an oral agreement. Whilst courts have indicated that intrinsically an agreement should be binding regardless of what the parties may say subsequently, in practice, lack of legal advice usually means that any deal made orally cannot be enforced.

Accordingly if there is any expectation of an agreement lasting for some time and having an intention to be binding, written evidence of it is a necessity.

This information sheet has been prepared to highlight some key issues relating to separation. It is intended to be for general guidance only and is not a substitute for specific advice. It is based upon our understanding of the legal position as at

Separation – an alternative to divorce

(continued)

November 2021 and may be affected by subsequent changes in the law.

If you require any further information, please contact a member of our Family Team on 01892 510000 or by email:

Joanna Pratt
joanna.pratt@ts-p.co.uk

Sarah Judd
sarah.judd@ts-p.co.uk

Kirstie Law
kirstie.law@ts-p.co.uk

Desmond O'Donnell
desmond.odonnell@ts-p.co.uk

Sarah Keily
sarah.keily@ts-p.co.uk

Helen Waite
helen.waite@ts-p.co.uk

Anna Woodhoo
anna.woodhoo@ts-p.co.uk

Harry Golding
harry.golding@ts-p.co.uk

© Thomson Snell & Passmore LLP All Rights Reserved