

## Separation Agreements from A to Z

1. Purpose. To provide legal assistance clients with answers to routine questions regarding separation agreements.

2. FAQs:

Q1. What is a separation agreement?

A1. A separation agreement is a contract voluntarily entered into between two spouses in which they agree to resolve such matters as property division, debts, custody, and support when they separate from each other. It must be signed by both parties in the presence of a notary public before it is valid. A separation agreement from the Legal Assistance Office is a “written legal separation” agreement – it is not a court-ordered legal separation. The separation agreement you sign at the Legal Assistance Office is an agreement or contract between the spouses which establishes legally enforceable duties and rights.

Q2. Who prepares a separation agreement?

A2. You will jointly draft a separation agreement with your spouse. Once it is prepared, it is best to call your Legal Assistance Office for an appointment and have an attorney review the document for you. Beware that office policies and ethical considerations prohibit both parties from being seen by the same attorney. Both parties are entitled and encouraged to speak with and be counseled by separate and independent attorneys before they actually enter into any formal, binding agreement.

Q3. Can we divide our property in a separation agreement?

A3. Yes. A couple that is separating can agree upon a division of property in their separation agreement and that agreement will be binding between them. The property to be divided consists of real property (such as land and the buildings on it), tangible personal property (such as cars, jewelry, and furniture), and intangible personal property (such as bank accounts, stocks and bonds, pension or retirement interests, and life insurance).

Q4. Does my spouse have to sign a separation agreement?

A4. An “agreement” means that both parties sign voluntarily, without duress or coercion. You cannot force your spouse to sign a separation agreement or compel an agreement to the terms that you wish to impose upon him or her in the agreement.

Q5. Do I really need a separation agreement?

A5. The law does not require the parties to execute a separation agreement. However, it is a wise idea, if there are debts, children, support claims, or property involved, and the parties want to settle these matters in writing. A written separation agreement is beneficial because the legal rights and responsibilities of each spouse are specifically detailed.

Q6. Does a separation agreement help me get a divorce?

A6. A separation agreement will usually facilitate court action by reducing the friction, costs, and time required. The various states have different provisions in their laws which might make a divorce faster or easier, if there is a separation agreement in which the parties have divided their property and arranged for payment of any debts of the marriage. Generally, if the parties have executed a separation agreement, only one party needs to have an attorney and appear in court for the divorce hearing.

Q7. If I have a separation agreement, may I live with another individual?

A7. Under the law, you are still considered "married." Only a court of competent jurisdiction has the ability to dissolve the marital status. Servicemembers (SM) are subject to military law (UCMJ), and may be prosecuted for adultery, a crime punishable by Article 134, UCMJ, even if there is a separation agreement between the husband and wife. Civilian laws in CONUS do not make adultery a crime.

Q8. Can we decide in our separation agreement how we will file taxes after we separate?

A8. Yes. As long as you are married, you may file federal and state taxes either jointly or separately. If you file separately, the "payer" spouse will normally be permitted to deduct from gross income any sum paid to the "recipient" spouse as alimony or separate maintenance, but not amounts paid as child support. The recipient spouse will have to report these sums as taxable income. The party who has custody of the child is entitled to claim the tax exemption for that child, in the absence of a contrary agreement. However, the parties can determine whom will get the tax exemption in the separation agreement.

Q9. Can my spouse be charged with contempt of court if s/he violates the terms of the separation agreement?

A9. No. It is not contempt of court to violate a separation agreement, unless the agreement has been made a part of a court order or a divorce decree. Contempt of court is failure to obey a court order without legal justification. You may, however, sue your spouse for breach of

contract, if s/he violates the separation agreement. Failure of a military member to honor family support provisions of a separation agreement may result in judicial or non-judicial punishment for a violation of a lawful general regulation (Article 92, UCMJ).

Q10. How can I enforce the support provisions of my separation agreement without going to court?

A10. SMs must comply with the terms of written separation agreements in accordance with their appropriate service regulation (i.e. AR 608-99). If you are not receiving support payments from a SM in violation of an agreement, contact the SM's immediate commander and request enforcement. The commander cannot take the money directly from the SM, but the commander can explain what the alternatives are, including: elimination from military service; filing of unfavorable information in official records; non-judicial punishment under Article 15, UCMJ; adverse administrative actions under service appropriate regulations (i.e. AR 635-200 or AR 635-100); or court martial. In the absence of a court decree or written separation agreement, the SM spouse could provide up to the full amount of BAH at the "with-dependents" rate. If there are multiple families to be supported, the amount of support will be divided. Also, there is the possibility of obtaining an involuntary support allotment under certain circumstances.

Q11. Will a separation agreement free me from paying debts for which I have signed along with my spouse?

A11. No. A separation agreement is only a contract between spouses. It cannot bind third parties, such as banks or finance companies, which have not signed it. However, if your spouse promises to pay a bill, then breaks that promise, and you have to pay it, you can then sue your spouse for breach of contract for the amount of money you had to pay. Furthermore, you and your spouses may agree that any debts you individually incur after the signing of the separation agreement are the obligation of the party who incurred it.

Q12. Will a separation agreement stop my spouse from hassling me?

A12. While separation agreements usually have a non-harassment clause in them, you should understand that no pieces of paper – be it an agreement or a court order – is going to stop a person from doing something s/he is determined to do. If the problem is one of physical violence, a court order would be better than a separation agreement. If violated, it could serve to punish or jail the wrongdoer. If there is only an agreement, a lawsuit for breach of contract is one possible remedy for breaking the promise of not hassling each other.

Q13. Is a court of law bound by what we put in the separation agreement about our children?

A13. Not necessarily. The terms you include for child support, custody, and visitation can always be altered by the court in the best interests of the children. Courts will generally adopt all the terms, including the provisions for child support, custody, and visitation so long as the terms are reasonable. Finally, all states now have child support guidelines and will most likely apply these guidelines when determining child support.

Q14. Can the court modify other terms we include in a separation agreement?

A14. The terms in a separation agreement that pertain to division of property or adults will not be modified by the court except in very limited circumstances. For example, if the separation agreement has been incorporated in a court decree, the court normally has the power to modify the support terms (alimony or child support) based upon a "substantial change in circumstances." The party desiring the modification has to show the court that there has been such a change of circumstances. If the terms involve property division, the court can only modify terms which are executory in nature (i.e. those terms that have not yet been completed, such as transfer of car titles), not the executed or completed terms such as reallocation of property already divided.

Q15. Can a single attorney advise, both, me and my spouse regarding the separation agreement?

A15. No. Two attorneys should be involved, one to advise each party. In this way, both spouses know that they have received independent legal advice from a lawyer who does not have a conflict of interest by representing two clients with different needs or goals. Even if both parties are agreeable on all terms, one legal assistance attorney will not, and cannot, represent both parties.

Q16. Will the government transport me, my children, and our household items; and if so, how long will I have to use this privilege?

A16. Under normal circumstances, government transport and household goods shipment are a privilege available to the SM.

Q17. What happens if my spouse objects to my taking the children?

A17. This is a difficult and highly emotional problem. You must recognize that only a court of law can resolve child custody disputes. A military commander or the Legal Assistance Office cannot determine which spouse will have custody of minor children. If you and your spouse

cannot resolve the problem, seek a court-ordered resolution. You must hire civilian counsel to represent your interests.

Q18. Am I entitled to medical, exchange, and commissary privileges following my separation?

A18. As long as you remain married to a SM, you are entitled to a family member identification card. Children of military members are entitled to identification cards until age 18. If the children attend college, they are entitled until age 23. Your privileges are normally limited to emergency medical care, theater, and recreational services. You will retain all privileges until the date of divorce. Emergency medical care will still be available after the date of divorce.

Q19. Am I entitled to medical care after separation?

A19. Family members are authorized to use all DOD medical treatment facilities, including dental clinics. However, once your SM spouse PCS's or a divorce is granted, the former spouse loses medical care coverage and will qualify only for emergency medical care.

This fact sheet has been prepared by the Presidio of Monterey Legal Assistance Office. It is intended only for general information regarding separation agreements. Since this field of law is complex and state laws differ, you should consult a legal assistance attorney by calling our office at (831) 242-5083/5084.

Updated July 2019