



D.I.Y. Separation Agreement

2009 EDITION

DIY LAWYER Limited

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DIY SEPARATION AGREEMENT can help you make your own Separation Agreement for a mere fraction of what you can expect to pay with the legal profession. With the cost of a judicial separation in Ireland over **€10,000 per spouse** and the average separation agreement costing approx **€3,000 -€6,000**, we believe couples should, at the very least, explore what is involved in obtaining their own low cost legal separation agreement before they embark on a costly separation and time consuming exercise with the legal profession. So why not give us a call and check out your options.

ARE YOU TRANSFERRING A PROPERTY AS PART OF YOUR SEPARATION SETTLEMENT?

DO YOU WANT YOUR MAINTENANCE AGREEMENT STATED IN WRITING?

ARE THE SOCIAL WELFARE INSPECTORS OR REVENUE COMMISSIONERS INSISTING ON YOU PRODUCING A LEGAL SEPARATION?

ARE FINANCIAL INSTITUTIONS RELUCTANT TO DEAL WITH YOU WITHOUT A LEGAL SEPARATION?

If you have consent and agreed terms why not let our experts draw up your documents. We have successfully drawn up documents for Separation Agreements (www.diyseparationagreement.ie), Judicial Separation (www.diyjudicialseparation.ie) and Divorce (www.diydivorceireland.ie) applications for consenting couples. You can have your own settlement in regard to maintenance, family home, property, finance, pensions, Succession Act rights etc. This will enable you to have any property transferred without it becoming the subject of our slow, costly and overly adversarial legal family law system where you pay a percentage of the value of your assets, regardless of consent, to two sets of legal representatives.

MARRIAGE COUNSELLING

When a marriage breaks down the parties concerned have a number of choices including, to continue to live together, to separate and agree terms on how they intend to function in regard to children, family home, maintenance etc. or to separate and seek provision and enforcement of their rights through the use of the courts. There is no substitute for professional guidance and marriage counselling is highly recommended even if it merely demonstrates the differences between the parties and the gap that needs to be bridged if the marriage is to be saved. And if the marriage is to end, it should end with dignity and proper provision for any dependent children and the spouses concerned. There is no shortage of organisations and counselling agencies available. For example, Accord has 57 centres throughout Ireland and over 800 trained members who provide a professional service in a safe and non judgemental environment. They can be contacted at their central office at Accord Central Office, Columba Centre, Maynooth, Co Kildare on 01/5053112 or visit their website www.accord.ie

MEDIATION

Mediation is a process whereby use is made of a mediator or referee to help spouses negotiate on the issues of custody, child-care, living arrangements, parenting, maintenance, the distribution of assets including the family home and settlement of debts etc. This process can ensure that the interests of both parties and the children are addressed. A mediation agreement therefore can be a first step in coming to terms with the difficulties encountered in a marriage break down and can lead to a separation by agreement. The Department of Social Community and Family Affairs operate a **free** Family Mediation Service at various centres throughout the country. The mediators do not provide legal advice. They can be contacted at 01/6344320.

SEPARATION AGREEMENTS EXPLAINED

A Separation Agreement is a written document drawn up by parties to a marriage that have decided to separate and live apart and who do not wish to use the Courts in ruling on their terms of settlement.

If any party decides to engage a solicitor and apply for Judicial Separation or Divorce that solicitor must first discuss with them the possibility of engaging in mediation to help effect a separation on an agreed basis with the estranged spouse and give to him/her the names and addresses of persons and organisations qualified to provide a mediation service. The solicitor must also discuss with the intended applicant or respondent the possibility of effecting a separation by the negotiation and conclusion of a separation deed or written separation agreement.

Therefore, by statute law, contained in the Judicial Separation and Family Law Reform Act, 1989 and in the Family Law (Divorce) Act, 1996 solicitors are duty bound to discuss the possibility of concluding a written separation agreement.

Parties are entitled to draw up their own written agreement. Whether they do so with the aid of the legal profession or the aid of our experts is a matter of choice. As stated elsewhere the Judiciary while bound to consider written agreements are not bound to accept the terms negotiated and any subsequent application for divorce will be determined by the provisions existing at the date for divorce.

For more information on separation and divorce visit our websites
www.diylawyer.ie
www.diydivorceireland.ie
www.diyjudicialseparation.ie

SEPARATION AGREEMENTS AND THE LAW

Separation Agreement or Judicial Separation?

Following the decision of the **Supreme Court** in **P.O'D v A.O'D. (1998)** it is not possible to obtain a Judicial Separation if the parties have already agreed to live apart and have a Separation Agreement in place. A couple who therefore enter into a separation agreement as mentioned above are prevented from seeking a judicial separation at a later date.

‘As will be clear from the earlier part of this judgement, the reasons for treating a separation agreement which takes the form of a binding contract as a bar to subsequent proceedings for a decree of judicial separation are twofold. First, where the agreement provides, as it invariably does, that the parties are to live separate and apart, the granting of such a decree would be superfluous. Secondly, where parties have entered into a binding contract to dispose of differences that have arisen between them as husband and wife, it would be unjust to allow one party unilaterally to repudiate that agreement’

Whether a consenting couple have a Separation Agreement drawn up and made legally binding by the ordinary principals of contract law, or, apply for a Judicial Separation and have their terms of agreement made a “Consent Order” of the Circuit Court through the application of Court Orders will depend on the nature of their agreement and the level of trust and co-operation between them. It may also depend on the length of time it may take to complete the process and the costs associated with and charged by the legal profession.

Separation Agreements and Divorce

In the High Court in the case of **R.G. v C.G. 2005** the Court considered Section 20(3) of the Family Law (Divorce) Act, 1996

which obliges a Court in deciding whether to make ancillary orders or in determining their provisions to have regard to the terms of any separation agreement which is still in force. The Judge stated

“Proper provision for the parties and the dependent children must exist at the date of the hearing of the application for the decree of divorce. Further, it must be based upon the value of the assets of the parties at that date and the circumstances as they then exist”.

The Court dismissed clauses that were agreed upon to constitute a “full and final settlement” of all matters, that what was agreed constituted “proper provision” and that neither party should issue proceedings against each other save for a decree of divorce. The Court said any agreement not to apply for ancillary orders in any divorce proceedings is unenforceable.

The judiciary are obliged to consider the terms of any agreement and the full range of circumstances that are prevalent at the time of trial or which may ensue in the lifetime of the parties before granting a Decree of Divorce.

Separation Agreements and Future Provision

Couples who decide to live separate and apart may elect to have a written agreement as a legal binding contract. They may wish to have their agreement drawn up by way of a Separation Agreement and avoid costly litigation and the involvement of the Courts. The judiciary have stated that they will be reluctant to interfere with an agreement which takes the form of a binding contract and was entered into fairly and which made proper provision for the spouses and dependents. However, the judiciary have also indicated that they will not be bound by the terms of any separation agreement. Therefore, whether the terms of an agreement will be accepted by a Court at some future date will depend on a number of factors. In the first instance it will depend on whether any of the parties wish to go behind the agreement and seek alternative or additional

provision. Other factors that may influence the continued acceptance by the judiciary of the terms agreed may include the circumstances in which the agreement was negotiated and executed, the length of time since it was made, the legal advice sought and obtained by either party and whether circumstances have substantially changed since entering into the agreement.

For instance, despite clauses in agreements stating that each spouse shall be responsible for their own maintenance provision, a spouse is not prevented from seeking provision through the courts at some future date for a maintenance order or for an increase in maintenance for themselves or any dependent children. And the payment of a lump sum in lieu of future maintenance provision may not prevent the receiving spouse subsequently seeking a maintenance order under the law despite the lump sum payment.

Clauses in separation agreements on 'full and final settlements' may not be accepted by the judiciary at some future date. An application for divorce is recognised as a fresh application before the courts and the circumstances prevailing at the time will influence the courts willingness to grant a decree of divorce.

Also, clauses regarding pensions inserted in separation agreements of themselves do not give the authority for a share of, or a bar to seeking a share, of any spouse's pension. A Pension Adjustment Order is required from the courts to compel or enable the trustees of any pension scheme to act in a certain manner.

SEPARATION AGREEMENTS – WHY BOTHER?

In view of the decision of the Court in **R.G. v C.G 2005** (see page No. 5) one might ask what is the point in entering into a separation agreement if in three or four years time the courts may not accept it. In looking at recent case law mixed messages are coming from

the Courts. On the one hand the Courts are saying that the judiciary will be loath to interfere with a legal binding contract that takes the form of a separation agreement and on the other hand the same Courts are saying that they will not be bound by them and that the circumstances that exist at the date of court (divorce) will determine the needs of the parties.

Therefore one has to ask why any couple would hire solicitors at a huge cost to each party for a service the outcome of which may not be certain at some future date.

Ultimately the success of any separation agreement will be dependant on the willingness of the parties to agree terms and abide by them.

Clauses can be inserted for review to cater for changing circumstances and thereby provide the flexibility needed to help make the agreement a lasting one.

Therefore, we say that if the success of a Separation Agreement hinges entirely on the willingness of the parties themselves to separate on agreed terms and abide by those terms then why not use our services, draw up your own agreement and save yourself €1,000's. If you are satisfied it will hold and be honoured why pay thousands for solicitors to draw it up.

BREACH OF CONTRACT & STATUTORY REMEDIES

The law of contract applies to any such agreement. If one of the parties were not to comply with any part of the agreement then the other party would be entitled to sue for breach of contract.

However, in the case of non-compliance a better and less costly approach might be to apply for a corresponding **statutory** remedy.

For instance, if there is a breach on the payment of maintenance under the separation agreement then the aggrieved party may apply for a Maintenance Order under Section 5 (1) (a) of the Family Law (Maintenance of Spouses and Children) Act, 1976 and have a breach of the Order enforced through the District Court. Such a remedy can be heard in the District Court although the court is not bound to accept that the figure of maintenance agreed in the separation agreement will be the figure granted by court order.

If there were a breach of the clause that the spouses have agreed to live apart and free from the control and interference of each other again, it would be easier, quicker and less costly to seek a statutory remedy than to apply for a restrictive injunction to restrain a party. A spouse could apply to the District Court for a Safety, Protection or Barring order under the Domestic Violence Act, 1996.

Breaches of custody and access arrangements in a separation agreement can be addressed by an application under Section 11 of the Guardianship of Infants Act, 1964 through the District Court.

A failure to transfer property as part of a separation agreement can be enforced by an action for specific performance. This is a form of equitable relief whereby a court orders one party to a contract to act as they promised to do. Because it entails a new court action some legal writers believe it is a disadvantage compared to enforcement under a property adjustment order granted in a judicial separation.

SEPARATION CONTRACT – HISTORICAL BACKGROUND

In 1848 in the case of *Wilson v Wilson* it was established that a contract which provided for the immediate separation of spouses was a valid contract and enforceable if followed by immediate separation. The term contract can mean every description of agreement or obligation where one party is bound to the other or it can simply mean an agreement between two or more persons concerning something to be done.

In common law systems, like our own, the main requirements for the creation of a contract are:

There is an exchange of promises or an offer and acceptance of terms best described as an agreement.

There must be consideration. Each party must be 'giving' something in return for the others promise. However, this requirement for 'consideration' has been challenged on the grounds that the creation of legal relations by the parties fulfils this requirement under contract.

The intention of the parties is to be legally bound.

The contract is formed and obligations under it arise which may be in writing.

DISCLAIMER

The content of this brochure is not intended to be the opinion of the judiciary or of the legal profession. It is an information brochure only. It does not purport to be, nor should it be relied upon as, advice, legal advice or legal opinion. If you are affected or could be affected by any issue in relation to separation and/or divorce then you should contact a professional adviser.

TERMS OF A SEPARATION AGREEMENT

The essential provision of every separation agreement is that the parties agree to separate and live apart and that the agreement is to be legally binding upon each of them. Other clauses in separation agreements are summarised.

General Provisions

To live apart free from marital control and not to annoy, disturb, molest or otherwise interfere with the other.

Guardianship, Custody and Access

Married spouses remain joint guardians of their dependent children. The parties may have joint custody or agree that either party have sole custody. Full details of the access arrangements can be inserted in the agreement.

Maintenance, Financial Payments and Support Provisions

A maintenance clause can be for the payment of maintenance for the spouse and/or the dependent children of the family by the other spouse. It may detail when and how the money is to be paid and whether it is to be indexed linked to the consumer price index and whether it is to be reviewed annually or on the happening of certain events like, unemployment, co-habiting of the receiving spouse etc. The conclusion of an agreement on maintenance will not prevent a spouse access to a court for a maintenance order for his/herself or for any of the dependent children. Other provisions could be in the nature of lump sum provision, health insurance, life insurance, education costs, orthodontic or optical treatment, school costs etc.

Property

The separation agreement may include the terms of settlement of any property including the family home. The property may be transferred to one spouse with or without consideration, sold and the proceeds divided or one party may reside there, to the exclusion of the other party, for a set period. A clause should also be inserted to contain a general consent to satisfy the requirements of the Family Home Protection Act, 1976 in regard to the future sale or disposal of the family home.

Contents of the Family Home

Normally these remain with the family home. Other items may be divided.

Income Tax

Normally each party wish to be singly assessed for income tax but they can remain or opt for joint assessment in certain circumstances. Maintenance for a spouse can be deducted from the gross income of the giver and added to the gross income of the receiver for income tax purposes. Maintenance for children is not taxable in the hands of the receiving spouse.

Responsibility for Debts

Indemnity clauses are normally inserted regarding mortgages and future debt liability to protect both spouses.

Succession Act Rights

Spouses may renounce their rights or retain their rights under the Succession Acts to a share in the estate of the other.

Pension Provision

Until recently clauses in separation agreements on pensions were accepted by the judiciary at the time of divorce. However, that is no longer the case and the courts now insist that anyone applying for a divorce must have pension adjustment orders made up. So, while parties can still have clauses on pensions inserted in separation agreements to waive their interest in the others pension or to award the other a share of the pension court orders will be needed to give effect to those decisions.

Miscellaneous Provisions

Parties can add their own provisions to their agreement.

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FREQUENTLY ASKED QUESTIONS

Q: How does your service work?

A. On receipt of payment we will send, by return post, a questionnaire designed to obtain the necessary information. The questionnaire is easy to follow with notes on its completion and is continually updated so that the information can be exchanged hassle free and from the comfort of your own home. We are available by telephone, mail or email to answer any queries you may have in relation to the information

required. When we receive the returned questionnaire we will examine it closely to ensure we have the required information and we will make contact if necessary. When we are satisfied with the information given us we will complete the necessary paperwork and have it with you within five working days.

Q. What do the solicitors charge?

A. The solicitor's fees for a Separation Agreement can be very high, for instance we have seen solicitor's bills for a charge of €250 per hour for attendance alone. Any couple who intend employing solicitors and barristers should give consideration to the level of their consent on issues and the value of their properties before deciding what route they wish to take and certainly they should look for a reasonable estimate from more than one solicitor rather than proceeding to grant a blank cheque.

Solicitor's fees vary depending on the level of agreement at the outset and the value of assets but generally they are charging approx. €3,000 to €4,000 each per spouse for a Separation Agreement (although one of our divorce clients was recently asked for €8,000 for a Separation Agreement). Their charges for a Judicial Separation can vary between €5,000 and €50,000 + , each per spouse, depending on the level of acrimony that exists or is made to exist by the time the process arrives in court and of course the value of a couples assets.

Q. What matters should we consider before making a Separation Agreement?

A. Your decision should give consideration to the level of conflict that could arise, especially in relation to contentious issues , like the family home, maintenance, custody, property, assets, pensions etc. If the above matters have all been settled or terms agreed for inclusion in your Separation Agreement then you should have little difficulty in the future. However, the success of your agreement will depend on both parties keeping to their agreement, having proper clauses inserted to

cover changes in circumstances and adapting a reasonable approach to matters that may surface for decision in the future.

Q. What is a Section 5 Certificate?

A. Under Section 5 of the Judicial Separation and Family Law Reform Act, 1989 any applicant, who is represented by a solicitor, must receive from the solicitor a certificate stating that the solicitor has complied with the section and discussed the possibility of reconciliation between the spouses, has given the names of qualified persons who could help effect a reconciliation between the spouses who have become estranged, including the names and addresses of mediators, and discussed the possibility of engaging in mediation to help effect a Separation Agreement. The certificate must also state that the solicitor has discussed with the Applicant the possibility of effecting a Separation by the negotiation and conclusion of a Separation Deed or written Separation Agreement with the Respondent spouse.

Q. Can I remarry after the granting of a Separation Agreement?

A. A marriage is not dissolved by making a Separation Agreement. To remarry you must first obtain a decree of divorce.

Q: Do I need to have a Separation Agreement or Judicial Separation before applying for divorce?

A. No, you are not required to have a mediation or Separation Agreement or a Judicial Separation before applying for a divorce.

Q. Can I continue to use my married name after the making of a Separation Agreement?

A. Wives may take their husband's names on marriage or retain their former names. A wife can retain her former husband's name after a

Separation Agreement provided she is not using it for the purpose of fraud or to defraud him or to invade other rights or to embarrass him.

Q. What can we do if we are unable to agree terms?

A . If spouses are unable to resolve their marriage difficulties then they may engage in mediation to effect a Separation Agreement.

Q. What is mediation?

A. Mediation is a process whereby use is made of a mediator or referee to help negotiate between spouses in dispute. Mediation and the conclusion of a Separation Agreement should then be considered as an alternative to Judicial Separation where the issues of custody and parenting, maintenance, child-care, the family home, pensions, assets, debts etc. can then be sorted in an amiable way. A Mediation Agreement can therefore be a first step in addressing the difficulties encountered in a marriage.

Q. Where can I obtain mediation?

A. The Department of Social Community and Family Affairs operate a free Family Mediation Service with Full Time Offices at various centres throughout the country.

Q. What are the benefits of a mediation Agreement?

A. A Mediation Agreement can be a prelude to a Separation Agreement. We would recommend that you consider this route especially if both parties are finding it difficult to agree a settlement. A free information booklet on Separation and Mediation is available from the court offices, and the Citizens Information Centres throughout the country also provide information on this subject.

Q: Do I need a Judicial Separation to solve issues in regard to access, custody of children, maintenance, the family home etc?

No. Custody and Access to children can be addressed through an application under the Guardianship of Infants Act, 1964.

Barring Orders, Safety Orders and Protection Orders can be availed of under the Domestic Violence Act, 1996.

Maintenance can be addressed under the Family Law (Maintenance of Spouses and Children) Act, 1976.

Issues in relation to the Family Home can be addressed under the Family Home Protection Act 1976, the Married Women's Status Act, 1957 and the Family Law Act, 1995. Ownership of property can be determined under Section 36 of the later Act.

Q: What if we have not sorted the Family Home?

If there is Agreement on who is to obtain the family home and it is to be transferred to one spouse then you should consider consulting a solicitor and have the property transferred and waiver documents signed. Unless you are in disagreement the Courts are not the place to transact your business. However it is possible to include your terms of Agreement in relation to the Family Home, Maintenance, Custody, Access etc in your Judicial Separation application.

Q. What if I have reservations that my spouse will not honour the Separation Agreement at a later stage?

A. Whether your spouse dishonours an agreement to pay maintenance based on, consent as outlined in your Judicial Separation application, a Separation Agreement, court orders granted under the Judicial Separation and Family Law Reform Act, 1989 or any previously attained Maintenance Order the situation is more or less the same. If your spouse fails to make provision you will have to apply to the Court to enforce the orders granted or the terms of the agreement.

Q. If I enter into a Separation Agreement will I lose my Deserted Wife's Allowance?

A. Deserted Wife's Allowance, Deserted Wife's Benefit and Lone Parent Allowance continue to be paid to those in receipt of them.(prior to 1997) Upon the granting of a Judicial Separation that is recognised in the State or on entering into a Separation Agreement a deserted wife and a lone parent shall continue to be eligible to receive the allowance's or benefit.

Q. What about the One-Parent Family Payment after a Separation Agreement?

A. One-Parent Family Payment is payable to a 'qualified parent' with whom a 'qualified child' normally resides. A qualified parent whether they are a widow, widower or a separated spouse will continue to be a 'qualified parent' and entitled to the above payment after obtaining a Separation Agreement. Similarly obtaining a Judicial Separation does not deprive a separated spouse of his or her public law entitlement to a Widow or Widowers Pension.

TERMS AND CONDITIONS

On receipt of payment we will forward a detailed questionnaire for the necessary information to complete the documentation. Our questionnaire has been specifically designed by us to ensure that the information we supply allows each party sufficient scope to cater for their needs and enough flexibility for the Separation Agreement to be long lasting.

Once we have received payment and sent our questionnaire we will not grant you a refund under any circumstances.

We reserve the right to vary our prices at any time. The price of our products and services will be the price prevailing at the date of purchase.

On receipt of the returned questionnaire we agree to provide all documentation made to the highest standard and representing the parties particular circumstances. We agree to have all documentation delivered to the address given, within 5 working days of the returned and properly completed questionnaire.

If the questionnaire is incomplete and requires us to contact you we reserve the right to do so by telephone, mail or email, depending on the amount of information missing or requiring amendment.

You will receive 3 copies of your Separation Agreement by registered post. The copies of the Agreement must be signed and dated by both parties and all signatures witnessed. The witnesses should be identifiable and a Commissioner for Oaths is recommended. We will supply more copies on request.

DISCLAIMER

The content of this brochure is not intended to be the opinion of the judiciary or of the legal profession. It is an information brochure only. It does not purport to be, nor should it be relied upon as, advice, legal advice or legal opinion. If you are affected or could be affected by any issue in relation to separation and/or divorce then you should contact a professional adviser. If it is **your** intention to make a separation agreement with your spouse then such decisions are entirely of your own making and we will not be held responsible for **your** actions. The services provided by DIY SEPARATION AGREEMENT and DIY LAWYER are information services only and the supply of documentation and are not to be regarded as legal advice or opinion.

HOW TO OBTAIN OUR SERVICE

Simply return the enclosed **Order Request Form** with your payment or payment details, and we will send the separation questionnaire to you within 5 working days together with a receipt.

Once we have sent you the completed documentation we will not entertain any requests for a refund.

Note: We at DIY Separation Agreement are anxious that your judicial separation procedure runs smoothly and that the service we provide is of the highest standard. Consequently we would very much appreciate your comments on any aspect of our service, however critical.

Can you please indicate how you heard of our service?

Newspaper: Please specify?

Internet:

Citizen's Information Centre:

Radio:

Word of Mouth:

Other: Please specify:

ORDER REQUEST FORM

I have read and understand the Terms and Conditions (box must be checked)

I enclose €400 payment for your separation agreement services

Through Cheque Postal Money Order Credit Card

Made payable to: DIY Lawyer Ltd, 38 Beechlawns, Dublin Road, Mullingar, Co. Westmeath

Signature: _____ Name: _____

Direct Line Telephone No: _____

Card Type: VISA MasterCard Laser

Card No:

Expiry Date: m y Security Code:

Name on Card:

Card Billing Address

Mailing Address

Note: We request full payment up front because of our guaranteed quick return of all documents within 5 working days of the return of the completed questionnaire.