DIVORCE AND SEPARATION AGREEMENTS HANDOUT

Please note that this Information Paper only provides basic information and is not intended to serve as a substitute for personal consultations with a Legal Assistance Attorney.

Divorce is a common occurrence. This handout gives you information to help you through the process.

1. Q. Can I get a divorce at the Legal Assistance Office?

A. No. You have to go to court to get a divorce, and you will probably need a private attorney to do that. Although you are not legally required to have an attorney, it is sometimes difficult to get a divorce without one.

Even though a legal assistance attorney (LAA) can't go to court for you, a LAA can still help you by advising you about the issues and procedures involved in your case and by preparing a separation agreement for you and your spouse to sign, if appropriate.

2. Q. What is a separation agreement?

A. A separation agreement is a contract between the spouses that resolves issues such as property division, division of debts, spousal support, child custody, and child support. A separation agreement is legally binding and can help make getting a divorce faster and cheaper by resolving these issues, before you see a private attorney.

No law requires a separating couple to execute a separation agreement, but it may be a wise idea if there are debts, children, support claims, or property involved, and you want to settle these matters in writing with binding and enforceable promises.

Remember, unless a separation agreement is entered as a court order or part of your divorce decree, then a separation agreement is binding only between the two parties who sign it and other parties (such as credit card companies, etc.) are not bound by it. The only way to enforce it is to sue for breach of contract

3. Q. How should we divide our property in the separation agreement?

A. The separation agreement can cover all types of property, including real estate, homes and other buildings; tangible personal property, such as cars, jewelry and furniture; and intangible property, such as bank accounts, mutual funds, IRA accounts, pensions and insurance. Generally you and your spouse are free to divide your property any way you want, and the judge may accept it without question. However, as a rough guide in drafting your separation agreement, you may want to consider how a judge might divide your property if you and your spouse can't agree.

Different states may have different rules for dividing specific items; however, in most cases, the differences are slight, and the end result is likely to be very similar, regardless of which state's rules are followed. In today's modern society, marriage is often considered to be a partnership between two parties, the husband and the wife, and when the partnership breaks up, then the partnership assets are divided between the two partners on a 50-50 basis, regardless of whose name is on the title or who actually paid for a particular item.

The judge does not always use a 50-50 split, if the judge decides that 50-50 is not fair. For example, if one spouse has custody of the children of the marriage, that spouse may need additional property to be able to raise the children. The judge may also consider each party's financial and other contributions to the marriage, tax consequences, and whether a spouse has other support obligations. Some states may also factor in any marital fault by one spouse or the other, such as adultery, abuse, etc.

Finally, the judge will usually divide only marital property, that is, property acquired during the marriage. Separate property generally cannot be divided. Separate property includes items acquired and paid off before the marriage; property acquired as a gift or inheritance, even if acquired during the marriage; and professional licenses, if they cannot be transferred to another individual (except in New York). Some states also consider pension rights to be separate property, if those rights are not vested at the time of the divorce.

4. Q. Are military pensions divisible?

A. Yes. For more information about military pensions, please see the handout on the Uniformed Services Former Spouses Protection Act (USFSPA).

5. Q. Can we also divide our debts in the agreement?

A. Yes. The same general principles discussed above in the sections on division of property apply when dividing debts. The parties are pretty much free to divide their debts in any way they see fit, so there is no single "right" answer to this question. In addition to those general principles, you may also want to consider who received the benefit from the debt, before deciding who should be responsible for paying it off. For example, a student loan probably benefits only the spouse who actually went to class, so it might be fair for that spouse to pay off that debt. By the same token, it might be fair for the spouse keeping the car to also pay off the car loan.

When identifying who pays which debts, include enough information to identify the specific debt involved, including the creditor's name, and the amount owed.

Remember, as mentioned above, that third parties (such as credit card companies) are not bound by separation agreements. So if a debt is in your name, then creditors can still collect the whole debt from you, even if you divided the debt or assigned it completely to your spouse in a separation agreement.

6. Q. What if my spouse fails to pay a debt as required under our separation agreement?

A. The separation agreement is binding only between you and your spouse; it has little or no effect on third parties. So if the spouse responsible under the agreement to pay a joint debt fails to make any payments, it is completely legal for the creditor to demand payment from or file an adverse credit report about the other spouse, regardless of the agreement. However, if your spouse violates the agreement that way, you can sue your spouse and ask the court to order your spouse to reimburse you for the amount of money you had to pay. However, if your spouse is broke or files for bankruptcy, then you won't be able to collect anything.

It is possible to protect yourself somewhat from such a situation. For example, if your spouse is supposed to pay a debt secured by property that you are keeping, it might be a good idea to have your spouse pay you instead of the creditor. That way, if your spouse fails to make any payments, you'll know right away and will be able to take appropriate corrective action. Also, if the agreement requires you to pay spousal support, the agreement might provide that the support payment will be made to the spouse's creditors, not to the spouse; or that the amount of support may be reduced by any amount you are required to pay due to the spouse's failure to make a required debt payment.

7. Q. Can the court modify the terms we include in a separation agreement concerning our property or our debts?

A. Unlike provisions for child custody and support, which are always modifiable, the provisions for division of property and debts are seldom modified by the court, except in limited circumstances, such as fraud, coercion, or lack of capacity.

8. Q. I don't have a court order yet, but my spouse is in the Army. Am I entitled to any spousal support right now?

A. Unless you are in the military yourself, your Army spouse is almost always required to pay you some amount of support based on the soldier's BAH entitlement. (Please see AR 608-99, ¶¶ 2-3 through 2-6, and Appendix B, for the exact requirements). However, if you make more money than your Army spouse, this spousal support will not be provided for you under certain circumstances. *See* AR 608-99, ¶ 2-14 – where the income of the spouse exceeds the military pay of the soldier.

Some states also allow a spouse to request alimony until the divorce becomes final; however, it is not likely that spousal support will be required after the divorce becomes final, unless your marriage lasted for several years and you cannot support yourself. Alimony may also be awarded sometimes as compensation for marital misconduct, such as adultery, abuse, etc.

9. Q. How much alimony should I get in my separation agreement?

A. Alimony is spousal support to provide the lower-income spouse with money for living expenses (food, shelter, transportation, clothing, etc.) over and above the money provided by child support. Generally, as with property and debts, you and your spouse may determine the amount you think is appropriate, and the judge is not likely to disagree with whatever you come up with. However, as a rough guide in drafting the separation agreement, you may want to consider how a judge might rule if you and your spouse can't agree.

It's impossible to determine for sure how a judge would rule, because not all states have official alimony guidelines. Nevertheless, there are some general factors that a judge would probably consider, such as the length of the marriage, the work and education history of the spouses, the financial needs and resources of the two spouses (Military couples should consider the possibility of the soldier losing the BAH entitlement when the divorce becomes final), and any marital fault. For spouses returning to the U.S. from overseas, it would probably be appropriate to consider the cost of getting back to and setting up a new household in the U.S. Travel and transportation expenses, deposits for an apartment and utilities, job hunting expenses, and training and education expenses should also be considered.

Of course, if you agree that no alimony will be paid, then you should put that in your separation agreement too, so there is no misunderstanding later.

Here is some very general guidance regarding alimony pursuant to state laws:

- Alimony, maintenance or spousal support (in many jurisdictions) must be requested in court before the divorce is granted in most states in order to "keep it alive" for the judge to decide. Alimony does not need to be requested if you make more than your spouse or you do not wish to receive these payments. But if you're a dependent spouse and you intend to ask the court for alimony, discuss this with your divorce lawyer at the outset. This means before the divorce is granted!

- You will probably have to prove that you are the **dependent spouse** -- you are financially dependent on the other party or in need of support from him or her;

- Likewise you'll probably have to prove that your spouse is the **supporting spouse**; and

- In some states, you may have to prove some sort of fault on the part of your spouse (abandonment, adultery, domestic violence, etc.) although this is becoming less and less important as a part of alimony in many states.

- An absolute defense to alimony may exist when the parties have waived alimony in a separation agreement or premarital agreement, when a divorce has been granted before an alimony claim is filed, or when only the dependent spouse has committed adultery or some other form of marital fault. Please be sure to see your legal assistance attorney for more information on alimony in your particular case.

10. Q. How long should alimony last?

A. If you decide that alimony is required, its duration also depends on you and your spouse, or the judge, if you can't agree. There are several types of alimony, (1) permanent, (2) lump sum, (3) temporary and (4) rehabilitative.

(1) Permanent is usually paid until either the death of the payer or the remarriage of the recipient. Some agreements even include a "cohabitation" clause that states that alimony ends when the recipient cohabits with another person simply to avoid the loss of the alimony due to a remarriage.

(2) Lump sum alimony is one lump payment to the recipient instead of periodic (weekly, monthly, etc.) payments.

(3) Temporary alimony lasts for a specified period of time, usually one to two years. This type is used when the spouses are on almost equal footing, but due to certain circumstances one person may need financial assistance in order to get them "back on their feet."

(4) Rehabilitative alimony is the most commonly awarded type. This type is awarded in situations in which the recipient is younger and is eventually able to return to the workforce and become financially self-supportive. This type of payment may include tuition for education to enable the recipient to attend school in order to acquire a better job.

11. Q. Is alimony tax-deductible?

A. Usually yes, but it is really up to you and your spouse. If the payer-spouse is in a higher tax bracket than the payee- spouse, then it makes good sense for alimony to be deductible by the payer.

12. Q. Who gets custody of the children?

A. All child custody, visitation, and child support issues are discussed in the "Custody" handout. Please ask for it.

However, a separation agreement is a good forum in which to settle these issues. Please remember, however, that the courts are not necessarily bound by what you say in your agreement. The terms you include for child support, custody, and visitation can always be modified by the court in the best interest of the children. In the absence of proof to the contrary, there is a presumption that the agreement's terms concerning the children are fair, reasonable and necessary for the best interest and welfare of the children.

13. Q. Will a separation agreement stop my spouse from harassing me?

A. Although military separation agreements usually contain that provision, it is very difficult to enforce. For harassment by a military spouse, the military spouse's commander can order him or her not to contact the non-military spouse. For harassment by a non-military spouse, barring him or her from the installation or getting a restraining order are probably your best options.

While separation agreements usually have a non-harassment clause in them, you should understand that no piece of paper – be it agreement or court order – is going to stop a person from doing something he or she wants to do. If the problem is one of physical violence, a court order would be better than a separation agreement and could be used to punish the wrongdoer if he or she violated the order. If there is only an agreement, a lawsuit for breach of contract is one possible remedy for breaking the promise of not bothering each other, but it may not be a very effective remedy.

14. Q. If I get a separation agreement, does my spouse have to sign it?

A. No. You cannot force your spouse to sign. If your spouse refuses to sign, then the separation agreement is worthless.

15. Q. Do I need a separation agreement for an Early Return of Dependents?

A. No. Early Return of Dependents is an administrative process and does not require a separation agreement. For information on Early Return of Dependents, see your legal assistance attorney or your command.

16. Q. I have a separation agreement and an approved request for Early Return. Does my spouse have to leave?

A. No. Your spouse may lose command sponsorship and be barred from all the facilities here, but your spouse is not obligated to go back to the States, if he or she doesn't want to.

17. Q. After the separation agreement is signed, can I "date" other people?

A. No. You are still legally married, even after the separation agreement is signed, until your divorce is finalized by judicial decree. Soldiers may be prosecuted under the UCMJ for adultery, if they have sex with anyone else before the divorce has been finalized by a judge. Adultery can also have adverse consequences on the financial settlement in your divorce decree.

18. Q. Can the separation agreement set out how we file our income taxes?

A. Yes. You and your spouse can save a lot of money sometimes by choosing the best filing status; and filing separately is not always best, especially before the divorce.

Your income tax filing status may change before or after the divorce, so both spouses should review their tax withholding and make any adjustments required in their filing status or number of dependents.

Additionally, the 1984 Tax Reform Act allows the parties to agree as to who can claim the children as exemptions for income tax purposes. Without a written agreement, the parent who has physical custody of a child for more than half the year will get the dependency exemption. You can also provide for the person who receives the dependency exemption to receive the "child tax credit" allowed by the federal tax laws.

Consider these issues:

- Should the exemption be "traded", instead of <u>given</u>, to the other parent--in exchange for an increase in child support? Even a small increase in support would help offset the tax increase that will be paid by the custodial parent, and the other parent can better afford such an increase due to the taxes he or she saves by claiming the exemption on federal and state tax returns.

- Should you alternate the exemption between parents? For example, the father could claim the exemption in even-numbered years (2006, 2008, 2010, and so on) and the mother could do so in odd-numbered years. Or the father could claim one child and the mother could claim the other. Such alternation would reduce the taxes on the custodial parent.

- Should you condition the transfer on the other parent's regular and full payment of support? Instead of transferring the exemption <u>permanently</u> without regard to the timely payment of child support, some custodial parents agree to transfer of the dependency exemption only if the other parent is current (not in arrears) on child support payments by December 31 of each year. This would be very useful to the custodial parent in getting prompt payment of child support each year (at least by year's end) without hiring an attorney when the other parent "gets a little behind."

19. Q. Can we provide for college education of our children in a separation agreement?

A. In most states, judges cannot order you to pay child support for your child in college. But you may make provisions for college in a separation agreement and these will be binding and enforceable; the court can require each of you to perform your promises you set out in the agreement. Since college is less of a luxury and more of a necessity these days, it would be a good idea to consider whether you want to provide in writing for college expenses in your separation agreement.

20. Q. What points should we remember when deciding about college or other schooling expenses?

A. Here are some of that items that a good separation agreement will address:

- How long should the obligation last? 4 years? 8 semesters? Until the child attains age 23? Some ending date should be set.

- What costs will be covered? The usual ones are room and board, books, tuition, and fees. Some parents also agree on a modest monthly allowance for spending money for the child, or for travel to and from home, or for summer expenses.

- What are the expenditure limits? Few parents want to agree to finance a college education for a child at <u>any</u> college or university. The cost of some private colleges and universities would bankrupt the average parent. Consider putting a ceiling or "cap" on the college expenses, such as by specifying that the maximum shall be "the then-prevailing rate for in-state tuition at XYZ State University" or some other nearby public institution. Such a provision is fair to everyone and does not force either parent to go broke financing a college education.

- What other limits should be set? For example, some agreements state that the child must attend an accredited institution, in pursuit of a generally recognized undergraduate degree, on a full-time basis, while maintaining at least a "C" average.

- What part of the college costs will each parent pay? Be sure to set some specific percent or amount so that it will be enforceable in court if you need help in the future. Clauses that provide for the other side to pay "a reasonable share of the child's college expenses" are worthless since they don't say exactly what the other parent has to pay and a judge is not going to guess what the parents meant by this language. When in doubt, **spell it out**! Even if you just divide the college costs 50-50 between both parents, it's still better than a vague and unenforceable clause.

21. Q. If I need a lawyer, who pays for that?

A. Generally you have to pay for your own attorney in a divorce case, unless you have agreed otherwise in a separation agreement or other agreement, or unless the judge requires your spouse to pay your lawyer's fees.

If both spouses agree with the provisions of the proposed divorce, it is common to split the attorney fees and court costs evenly between the spouses. You should also shop around for a lawyer who won't charge too much. An uncontested divorce is a simple procedure, so there's no reason to pay a very large fee just to have someone file a few simple forms.

22. Q. Can a single attorney do the separation agreement for me and my spouse?

A. No single attorney can represent both husband and wife in a separation agreement. It is best to have two attorneys involved, one to advise each partner. In this way, the husband and the wife both know that they have received independent legal advice for their individual situation from a lawyer who does not have a conflict of interest in trying to represent two clients with different goals and needs.

23. Q. Does it matter who actually files the divorce?

A. Yes. For example, certain states may grant you a divorce but not handle any property separation or child custody if both the husband and wife are not legal residents of that state (the court would not have jurisdiction).

You may also want to see if you qualify to get a divorce in multiple states; sometimes certain jurisdictions are more favorable than others when determining alimony, property division and child custody issues. If you discover that you qualify in several states you may want to be the first to file, in order to make it your decision where the divorce will be handled.

24. Q. What if my spouse won't give me a divorce?

A. The judge is the person who grants a divorce, not your spouse. If your spouse won't cooperate with you, it will take longer and probably cost more to get your divorce, but you can still get one.

25. Q. How does the court procedure actually work?

A. In most states, you may file for divorce only if you have been living there or a bona fide resident for a set period of time, often six months, prior to the date of filing. You may also file for divorce in the state where you or your spouse is a legal resident. If there is any dispute about child custody, then you may have to file in the state where the child has been living for the six months immediately preceding the filing of the lawsuit. You may also file for divorce in Germany, but you must have lived apart for at least one full year to get an uncontested divorce, and at least three full years to get a contested divorce. Also attorney fees in Germany are usually much higher than in the United States, particularly for an uncontested divorce.

After filing your divorce paperwork at the courthouse, your lawyer will serve a copy of the summons and complaint on your spouse. If your spouse consents or does not file an answer within a few weeks after that, the judge will probably grant your divorce without any further discussion.

If your spouse files an answer contesting the divorce, then the judge will set a trial date. At trial, both of you will be allowed to testify, and then the judge will decide whether to grant the divorce, how to split up your property and debts, and all the other issues involved in your case. It would be very unusual for the judge not to grant a divorce, but the property and custody arrangements may not be what you asked for.

26. Q. That seems pretty long. Is there a quicker way?

A. No. You may see ads for quickie foreign divorces, but don't be fooled. Those divorces are not recognized by the US, unless you have your spouse's consent. And if you have your spouse's consent, it's usually cheaper to file in the US.

27. Q. Is my divorce final when the judge signs the decree?

A. Not always. In some states there is a waiting period after entry of judgment before the divorce becomes final. The decree itself should state its effective date.

28. Q. Can I get my maiden name back in the divorce?

A. Yes. You may want to put this in the separation agreement too.

29. Q. Is there anything else I should do before the divorce?

A. Yes. Among other things:

(i) Both spouses should consider canceling joint financial arrangements, such as credit cards, bank accounts, and phone calling cards. The military spouse should file a disclaimer with AAFES and other check-cashing facilities to avoid being held liable for the non-military spouse's bad checks, and should put a block on DPP or similar plans at AAFES for the same reason. AAFES disclaimers must be renewed every year, until the divorce becomes final.

(ii) Both spouses should consider canceling powers of attorney, making new wills, and changing the beneficiaries of life insurance policies, including SGLI.

(iii) If you and your spouse get back together and live with each other after the separation agreement is signed, the validity and legal effectiveness of the agreement may be damaged or destroyed.

(iv) If you both agree not to follow one or more of the provisions of the separation agreement, for example, if you decide that one of the children should live with someone other than the custodial parent named in the agreement, then you should sign a new agreement. To change court- ordered child support, you must go back to court.

(v) The military spouse must notify DEH after the agreement is signed or you stop living together, whichever occurs first. DEH will ask you to move out of the government quarters, usually within 30 to 60 days.

(vi) You should also notify your commander to update the military spouse's personnel records and the non-military spouse's ID card, passport stamps, no-fee passport, ration cards, driver's license, POV registration, and residence permit.

For further information, contact the Legal Assistance Office, Stuttgart Law Center, DSN 421-4152, Civ 0711-729-4152

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References:

Military divorce and separation issues:

http://usmilitary.about.com/cs/divorce

General Family Law:

Tables Summarizing Family Law in the Fifty States (http://www.abanet.org/family/familylaw/tables.html) - it covers alimony/spousal support factors; custody criteria; child support guidelines; grounds for divorce and residency requirements; property division; and third-party visitation.

http://www.divorce-online.com

http://www.divorcenet.com

http://www.divorcesource.com

http://www.divorceinfo.com/

Separation Agreements:

http://www.divorcelawinfo.com/intro/separationagreements.htm

http://www.divorcesupport.com/divorce/Separation-Agreements-1345.html