

What You Should Know About Separation Agreements

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A Separation Agreement, also known as a property settlement agreement, is a contract between married persons in which rights, duties and responsibilities arising out of the marital relationship are settled and compromised between the parties. Matters addressed in such agreements may include property division, debt division, spousal support, health insurance and expenses, litigation costs, divorce costs, attorney's fees, child custody, visitation and support and payment of educational expenses.

Formerly these types of agreements were not favored; in fact, many times such agreements which were found to be in facilitation of divorce were deemed to be unenforceable as against public policy. More recently there has been a paradigm shift and such agreements are now favored, provided there is no overreaching or undue influence. State laws vary as to what may be included in these agreements, as well as the requirements of such agreements. You should research the law of your state regarding the requirements for these types of agreements or consult an experienced divorce lawyer. Virginia law generally requires that such agreements be in writing signed by the parties. It is not necessary for the agreement to be reduced to writing if the agreement is contained in a court order endorsed by counsel or the parties. Nor is it necessary for the agreement to be reduced to a signed writing if the agreement be recorded and transcribed by a court reporter and affirmed by the parties on the record personally. Under Virginia law, a reconciliation of the parties after the signing of a separation or property settlement agreement abrogates the agreement, unless the agreement expressly says otherwise.

Why consider a separation agreement? These contracts allow the parties to negotiate a compromise on the issues that they can live with. Absent agreement of the parties, disputes must be litigated. This makes the divorce proceedings more complex, more lengthy and more expensive. Litigation also takes an emotional toll on the parties. This is especially true, if there are children. Finally, parties have more flexibility in designing agreements to suit themselves than the courts have in fashioning a remedy for the couple.

Does a separation agreement make it easier to get a divorce? Yes. Generally such agreements leave nothing to be decided by a court, except the matter of the divorce itself. In Virginia, if there are no minor children, having a written agreement shortens the separation period from one year to six months. If you do not want a divorce, you should think long and hard before you sign a separation agreement because it is usually the first step down the road to divorce. Even if you do not want a divorce, there may be cogent reasons to sign an agreement.

What if we reconcile? If you decide to stay together after you sign a separation agreement, you may want legal advice as to how to rescind the separation agreement. Some separation agreements survive reconciliation and some do not. It may also be prudent to consider counseling to deal with the problems that caused the separation, because unless the problems are resolved, they will surface again. Finally, it may also be wise to consider a written "reconciliation agreement." It is prudent to talk to your lawyer before resuming cohabitation, if you have gone to the trouble and expense of separating and having a separation agreement drawn up.

How do we go about getting an agreement? First you need to determine the issues. You should seek legal advice early; your attorney can assist you in determining the issues to be included in the agreement. Once the issues are determined, set a meeting with your spouse. Try to reach an agreement with your spouse on the issues, as you agree, write down the terms of your agreement. If possible, sign it and have your spouse sign it. Your signed notes may be taken to an experienced divorce attorney who can draft a formal separation agreement for you and your spouse to sign and notarize. Although Virginia law does not require that these agreements be notarized, it is a good idea to have them notarized to avoid an allegation of forgery.

Do you have to have an attorney draw up the separation agreement? No. You can draw up your own contract, provided you know what to say and how to say it. In fact, it is possible that your signed notes may be sufficient under Virginia law to constitute a binding contract, even if the parties had contemplated having them formalized by an attorney. Remember under Virginia law all that is required is a writing signed by the parties. Of course you can perform surgery on yourself, too, but wisdom lies in knowing the difference between removing a splinter from your finger and removing cataracts from your eyes. The safest thing to do is to at least talk to a lawyer before you do something that will bind you for the rest of your life.

The important thing to remember is that you should consult an experienced divorce attorney early to find out what your rights and obligations are and to receive guidance as to the issues to be resolved with your spouse. It is also important to remember that you should carefully review and think about any document before you sign it. It is also prudent to have a lawyer review the document and opine as to what it means before you sign it. It may not mean what you think it means. Never sign documents when you are emotional. You need a clear head together with sound legal advice before you sign anything.