

# **PREVENTIVE LAW**

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*TOPIC:*

#### ***SEPARATION AGREEMENT SURVIVAL GUIDE***

*August 2014*

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## **SEPARATION AGREEMENT SURVIVAL GUIDE**

### **FOR AIRMEN AND SPOUSES**

*INTRODUCTION: As a service to our legal assistance clients, we prepared this handout with frequently asked questions on separation agreements. It is, of course, very general in nature since no handout can anticipate and answer all your specific questions. We ask, however, that you read over these questions and answers carefully in connection with your visit to our legal assistance attorneys so that you may have the fullest information available to help you with your family law problem.*

1. **Q. WHAT IS A SEPARATION AGREEMENT?**

**A.** A separation agreement is a contract between a HUSBAND and WIFE when they separate from each other in which they resolve such matters as property division, debts, custody and support.

2. **Q. I'M SEPARATING FROM MY SPOUSE. MUST I HAVE A SEPARATION AGREEMENT?**

**A.** 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. Be forewarned though, that to enforce this agreement just like any other contract, you are going to need to work through a court in the US which is not easy from Misawa.

3. **Q. MY SPOUSE IS IN THE MILITARY. I'VE HEARD THAT I NEED A SEPARATION AGREEMENT IF I WANT TO LEAVE MY OVERSEAS LOCATION AND RETURN TO THE UNITED STATES (ALSO KNOWN AS "EARLY RETURN OF DEPENDENTS" or "ERD" PACKAGE). IS THAT TRUE?**

**A.** No. All you need for an Early Return of Dependents is a letter from a professional, such as a lawyer, chaplain, or marriage counselor, to verify your marital difficulties. No one can compel a spouse to sign a separation agreement. An "agreement" by its very nature must be voluntary. If signed, it becomes a legal, binding contract between and a HUSBAND and a WIFE, and in some cases, may be final promises that will later be adopted by a court. It may be the most important contract you and your spouse sign, so do not sign the document unless you are comfortable with each and every term in the agreement.

4. **Q. MY SPOUSE IS A CIVILIAN. IF I SIGNED A SEPARATION AGREEMENT AND AN APPROVED REQUEST FOR AN ERD PACKAGE, DOES S/HE HAVE TO LEAVE?**

**A.** No, a civilian spouse is not required to leave if s/he doesn't want to. On the other hand, they do become subject to the limitations of Japanese immigration law.

5. **Q. CAN WE DIVIDE OUR PROPERTY IN A SEPARATION AGREEMENT?**

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

6. **Q. DOES MY SPOUSE HAVE TO SIGN A SEPARATION AGREEMENT?**

A. No. An "agreement" means that both parties sign voluntarily. You cannot compel your spouse to sign a separation agreement or to agree to the terms that you wish to impose on him or her in the agreement.

7. **Q. DOES A SEPARATION AGREEMENT HELP ME TO GET A DIVORCE?**

A. Maybe, depending on many factors. While a separation agreement is not a divorce and doesn't make you "single again," it can make your divorce faster or easier in some states. That being said, it may have no effect at all on the divorce process in other places. You should consult an attorney licensed in your state for more information.

8. **Q. CAN OUR SEPARATION AGREEMENT SETTLE WHO WILL GET TO CLAIM THE TAX EXEMPTION FOR OUR CHILDREN?**

A. Yes. 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.

9. **Q. WHAT ARE THE FACTORS I SHOULD CONSIDER IN TRANSFERRING THE DEPENDENCY EXEMPTION?**

A. Consider these issues:

- Should the exemption be "traded", instead of given, 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 (2004, 2006, 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. Alternating the exemptions 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 permanently 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."

**10. Q. CAN I GET MY SPOUSE FOR CONTEMPT OF COURT IF THEY BREAK THE PROMISES IN THE SEPARATION AGREEMENT?**

**A.** No. Contempt of court is the failure to obey a court order without legal justification. It is not contempt of court to violate a separation agreement unless the agreement has been made a part of court order. You may, however, sue your spouse for breach of contract if they violate the separation agreement. However, this is a private lawsuit that you will have to pursue on your own. If you and your spouse do get a divorce decree, and the judge has adopted the separation agreement as part of the divorce, then your ex-spouse could be held in contempt of court for not complying with a provision of the separation agreement.

**11. Q. WILL A SEPARATION AGREEMENT FREE ME FROM PAYING DEBTS FOR WHICH I HAVE SIGNED ALONG WITH MY SPOUSE?**

**A.** No. A separation agreement is a contract between spouses. It cannot bind third parties (such as banks or finance companies) that have not signed it. If, however, your spouse promises to pay a bill and then breaks that promise, resulting in your having to pay, you can then sue your spouse for breach of contract for the amount of money you had to pay. To insure there are no future charges, you may want to consider closing the account, and opening separate accounts.

**12. Q. WILL A SEPARATION AGREEMENT STOP MY SPOUSE FROM HASSLING ME?**

**A.** While separation agreements usually have a nonharassment clause in them, you should understand that no piece of paper is going to stop a person from doing something he or she wants to do. If you are being harassed by your spouse, it is possible to get a no-contact order through the military spouse's chain of command. If a military member violated a no-contact order, military disciplinary actions may be taken against them. If a civilian violates a no-contact order, s/he may be barred from base. It is also possible to get a court order, but these take quite a while both to be issued and to enforce at a location as remote as Misawa. Moreover, if your situation involves either violence or the threat of violence, please consult the military spouse's chain of command, law enforcement, Family Advocacy, or a legal assistance attorney immediately!

**13. Q. CAN WE DECIDE ABOUT CUSTODY AND CHILD SUPPORT IN A SEPARATION AGREEMENT?**

**A.** Yes, and it would be a good idea to settle these issues yourselves *but only if you are in agreement.* If you cannot agree on the terms, DO NOT sign anything just to save time or money. Furthermore, you should remember that the terms you include for child support, custody, and visitation can always be modified by a court if it is in the best interest of the child/ren. Therefore, before setting terms you might want to consult your state's child support guidelines to determine the basic minimum level of child support deemed sufficient by that state. If you and your spouse agree to an amount that is significantly lower than what the child support guidelines suggest, the court may not accept your figures. In the absence of proof to the contrary, however, 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.

**14. Q. ONE OF OUR CHILDREN HAS SPECIAL NEEDS. HOW SHOULD WE DEAL WITH THAT?**

**A.** The child's needs should be specifically addressed in the separation agreement. Since this can be a complex issue, we recommend hiring a private attorney who is familiar with the laws of the jurisdiction where you will file for divorce. To find an attorney in the area where you plan on filing for divorce, check [www.lawyers.com](http://www.lawyers.com) or call the bar association for that state.

**15. Q. OUR CHILDREN ARE VERY YOUNG. CAN'T I JUST AGREE TO MINIMAL CUSTODY NOW, AND TRY TO INCREASE IT LATER?**

**A:** You will always be able to petition a court to modify child custody until the child turns 18. The court is going to consider what is in the best interests of the child. Once custody has been established, however, and assuming the child is doing well in their environment, the court may not want to make major disruptions to the child's life. In short, do not count on being able to change custody at a later date. Some states do have laws that permit a child to express a parental preference. The age changes from state to state, and keep in mind that the child's preference is not binding on the court.

**16. Q. CAN THE COURT MODIFY THE TERMS WE INCLUDE IN A SEPARATION AGREEMENT CONCERNING OURSELVES?**

**A.** Unlike the terms concerning children, which are always modifiable by the court, the terms that pertain to adults are harder to change. This depends entirely on the law of the place where the agreement is to be enforced or modified – overseas or stateside. Here is some very general guidance:

- If the separation agreement has already been incorporated or made a part of a court decree, then it's binding and cannot be changed regarding your "adult promises," except with the consent of your spouse. Examples of things that cannot normally be changed are division of property, personal belongings and retirement pay.
- The court can overturn a separation agreement if it was signed due to fraud, coercion or lack of mental capacity. In most cases, however, this is a hard case to prove.

**17. Q. CAN WE PROVIDE FOR COLLEGE EDUCATION OF OUR CHILDREN IN A SEPARATION AGREEMENT?**

**A.** Yes. While in most states, judges cannot order you to pay child support for your child in college, you may make provisions for college in a separation agreement if you so choose. These will be binding and enforceable. 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.

**18. Q. WHAT POINTS SHOULD WE REMEMBER DECIDING ABOUT COLLEGE 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 any 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.

19. **Q. SHOULD WE PROVIDE FOR ALIMONY IN OUR SEPARATION AGREEMENT?**

**A.** Alimony is spousal support. It is money paid by one spouse to the other to help with food, shelter, transportation, clothing and other living expenses. It is not the same thing as child support. If the two of you have agreed on some measure of temporary or permanent alimony, you should definitely put that in the separation agreement. Such a provision might state, for example, that the HUSBAND shall pay the WIFE alimony of \$500.00 per month for X number of months (or years). Your attorney can advise you about the specifics in your particular case. Some factors to consider is the age and education experience of each party. A parent who has stayed at home for several years to care for children is more likely to get alimony than a young spouse with no children who has been working consistently.

20. **Q. WHAT SHOULD WE DO IF WE HAVE AGREED THAT NO ALIMONY WILL BE PAID?**

**A.** It is always best to set out such a term clearly in the agreement. Don't just leave it out or let the agreement be silent on this issue. A waiver of alimony is such an important term that it should be clearly spelled out in the agreement so that there is no misunderstanding.

21. **Q. HOW DO I KNOW IF I AM ENTITLED TO ALIMONY?**

**A.** The attorney assisting you with your Separation Agreement should explain alimony (also called spousal support or maintenance) to you. Here is some very general guidance regarding alimony pursuant to state laws:

- You cannot demand alimony from the court unless you file a lawsuit requesting it, and this should be done before you get divorced!
- 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.

**22. Q. HOW SHOULD WE DIVIDE OUR PROPERTY IN THE SEPARATION AGREEMENT?**

**A.** In many states there is a presumption that all property acquired during the marriage is equally divisible. This is presumed to be fair. Other divisions, such as 60-40 or 75-25 are certainly legal if the parties agree that the division is fair and reasonable (or if you go to court and the judge finds that an unequal division is justified).

**23. Q. HOW DO I ENFORCE AN AGREEMENT THAT MY SPOUSE AND I HAVE, BUT THAT WE DIDN'T PUT IN THE SEPARATION AGREEMENT?**

**A.** You cannot enforce a "handshake" agreement. Make sure you put everything in the agreement.

**24. Q. WHAT ABOUT PENSIONS AND RETIREMENT BENEFITS - ARE THEY DIVISIBLE?**

**A.** Pensions and retirement rights can also be considered marital property. This type of property is often very valuable. It is an important aspect of equitable distribution, or equally dividing your assets. Often a spouse's retirement is the most valuable asset of the entire marriage, and this should certainly be considered in doing a separation agreement. If there is to be no division, the agreement should say so. If the decision on retirement division is to be put off or deferred because there is no present agreement, that also should be stated clearly. Make sure your agreement is very specific and plain in this area as to your intent on dividing the pension; a poorly worded agreement may be challenged in court as vague and unenforceable.

**25. Q. MY SPOUSE AND I HAVE BEEN MARRIED FOR LESS THAN 10 YEARS. DOESN'T THAT MEAN S/HE HAS NO RIGHT TO ASK FOR PART OF MY RETIREMENT?**

**A.** No. This is a common misconception among many in the military. A court has the ability to divide retirement pay no matter how long the couple has been married. However, the percent awarded is normally based on the amount of time the parties were married and how much time during the marriage the sponsor spent on active duty. So, a dependent spouse who has been married for 3 years, overlapping with 3 years of active service will receive a significantly smaller percentage than a spouse who has been married for 15 years, with 14 years overlapping with active duty service. Military retirement pay is not automatically divided by the court. In most jurisdictions, if the dependent spouse does not request division of military retirement pay, the right to ask for it is waived. The significance of the 10 year mark pertains only to how the former spouse will receive their share of the retirement, if awarded. If the parties were married for 10 years, which overlapped with 10 years of active duty service, then the dependent spouse can have her (or his) portion of the retirement pay sent directly to them by the Defense Finance and Accounting Service (DFAS), the organization responsible for issuing retirement checks.

**26. Q. HOW CAN A RETIREMENT BE DIVIDED?**

**A.** The division of retirement rights in a separation agreement can be done in two ways: a present-value offset, or a future percentage of payments. The former of these involves calculating the present value of the pension right now and setting it off (or trading it) against the value of another asset, such as the other spouse's pension or the marital residence. The second, and more common, approach postpones the division until whenever the active duty spouse starts receiving retirement pay. A legal assistance attorney can assist you with language to insert in

your separation agreement. Remember, though, that a dependent spouse will not receive any military retirement pay, even if contained in a court order, if the member who was on active duty at the time of the divorce leaves the military prior to serving 20 years of active duty service and does not collect any retirement.

**27. Q. DO WE ALSO DIVIDE OUR DEBTS IN THE AGREEMENT?**

**A.** You should set out a schedule for who pays what debt in your separation agreement, including the creditor's name, account number, purpose of the debt, approximate balance and monthly payment amount. This will not stop the creditor from suing both of you if your spouse doesn't make the required payments and both of your names are on the obligation. But it allows you to ask the court to hold your spouse (and not you) accountable for the debt as set out in the agreement. Just because you and your spouse made an agreement of who will pay credit card Y does not mean that credit card Y company has agreed to your division, and in their eyes, you can both remain liable.

**28. Q. HOW SHOULD WE DIVIDE OUR DEBTS?**

**A.** There is no "right" answer to this question. In one case, the HUSBAND may take on payment for all the debts because his is the sole source of income in the family or because he created the debts in the first place. In another case, the WIFE may take over certain debt payments for things she charged or purchased or for things that she is being given in the property division. For example, if the WIFE is getting the mini-van and the HUSBAND is getting the washer and clothes dryer, it might seem fair that each should assume the debt payment for the items she or he is receiving.

**29. Q. I WANT TO MAKE SURE I CAN DATE AFTER WE SIGN OUR AGREEMENT. CAN I HAVE MY ATTORNEY PUT IN A DATING CLAUSE?**

**A.** There is no such thing as a "dating clause" in separation agreements. Any sexual relations with a person who is not your spouse is adultery if it occurs before you are legally divorced by a court of competent jurisdiction. Adultery is punishable under the UCMJ.

**30. Q. SHOULD WE ALSO PROVIDE FOR HOW WE FILE FOR TAXES IN THE AGREEMENT?**

**A.** Yes -- this is a very important provision which can save you and your spouse a lot of money in taxes if prepared properly. A good example would be a clause that required the parties to file jointly so long as they are eligible to do so (usually until the year they are divorced) and to divide the refund or liability for taxes in a specified way, such as 50-50, or 75-25, depending on the incomes of the parties.

**31. 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 spouse. 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.

32. **Q. WHAT CAN'T A SEPARATION AGREEMENT DO?**

A. Since it is a contract between spouses, it cannot bind third parties (such as banks or finance companies) that have not signed it. Thus if the Separation Agreement requires that the husband pay for the car loan that is in both names, the wife remains liable for that loan unless the lending company releases her from that obligation. If the husband does not make the payments, the wife will still be responsible for the payments. Her remedy would be to go after the husband for breach of contract.

A Separation Agreement cannot legitimize adultery. Sexual relations with a person who is not one's spouse is adultery, and no "dating clause" will serve to make legal something that is illegal. Most separation agreements do, however, contain a clause that allows each spouse to be left alone as if single and unmarried and that forbids each spouse from harassing, molesting or interfering with the other. Again, this is not a license for adultery, and service members must continue to remember that they are subject to the UCMJ.

A Separation Agreement cannot bind the court in areas relating to child custody and child support. The court will always look out for the best interest of the child and will be able to adjust the terms of the Separation Agreement to insure that the child's best interests are protected. If the Separation Agreement says that the non-custodial parent will not pay any child support, the court will probably refuse to accept such a provision and instead calculate the appropriate level of child support using the state guidelines and substitute that amount into any resulting court order.

32. **Q. IF I HAVE OTHER QUESTIONS ABOUT SEPARATION AGREEMENTS, WHAT SHOULD I DO?**

A. Please consult a legal assistance attorney or private attorney of your choice as soon as possible. Your lawyer can answer the many questions about separation agreements and help you to make a fair and intelligent decision about your choices, options, and alternatives. Our legal assistance office stands ready to help you in these matters. Bring with you to the interview a copy of any documents or court papers that might be helpful to your attorney.

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