

SEPARATION AGREEMENTS

Often when a new client comes into my office, it is their first time in a lawyer's office, ever. Such virgins look terrified, glancing over their shoulders to see if they have been followed. Although their anxiety makes me feel like a dentist, I don't believe I have ever inflicted actual pain. But there's always a first time.

A common second step is hearing themselves say the words out loud, rendering the concept concrete. "I am thinking about getting a divorce and I want to know my rights."

I ask "What is it that you want to know?" I am not there to provide counseling. It is my job to tell my client he or she can expect from their legal experience.

More often than not these days, my new client is still sharing a house or even a bed with their possible-soon-to-be-ex. Anyone serious about seeking a divorce should contemplate moving out of the marital home or be working hard to convince their spouse to relocate. Living together for the duration can be tense, in the best of situations. Even with two evolved individuals, it is extremely difficult to have a divorce in the pipeline while under the same roof.

Many misinformed new clients claim the reason they have not left their unhappy home is because they fear being accused of abandonment. The way the word is whispered makes it sound like the plague. Let me dispel that misconception. Abandonment in Pennsylvania is when a spouse leaves the marital residence and virtually disappears, leaving no forwarding address. Abandonment is not when you move to an apartment in

the next town and tell the post office to forward your mail.

But the main reason so many couples continue to reside in the same house when they can no longer stand each other is economic. Most families can barely afford to support one household, let alone two. It is simply cheaper to stay put until the divorce is final. As a result, the divorce waiting period, whether it is 90 days or two years, often takes place while both spouses occupy the same residence.

When the decree is finally entered, the house can be sold and the proceeds divided or the spouse leaving the house will receive a payout from the refinance. Either way, the departing spouse now has funds for a down payment on a new, smaller house. The alternative, paying rent on and furnishing a new apartment or condo for 24 months, quickly drains bank accounts and reduces the size of the marital estate. Few people can afford to pay rent and save money for a down payment, especially if the spouse out of the house is paying support.

While the PA Divorce Code has preserved the traditional fault grounds for divorce, such as indignities, adultery, bigamy and insanity, over 90 percent of PA divorces are of the no-fault variety.

PA has two no-fault grounds. First, if both parties agree to the divorce, after waiting the requisite 90-day cooling-off period from the date of service of the complaint, husband and wife can sign consent affidavits. By filing the affidavits with the court, they concede their marriage is irretrievably broken. The court then enters a “grounds order,” which opens the door for

the division of property and the award of alimony by the court, if the parties have been unsuccessful in creating their own Marital Settlement Agreement to dispose of economic issues.

However, if one side refuses to sign a Consent Affidavit, the other party can insist upon a hearing on traditional Grounds. Adultery and indignities are the most common. Holding such a hearing is an outdated option. Most local courts, in an effort to eliminate the practice, have made this alternative time-consuming and expensive. In the majority of cases, in the absence of consent, the filing spouse must wait the two full years of separation.

The Pennsylvania Divorce Code permits this separation to occur while the spouses share a residence if they live Separate & Apart - defined as the complete cessation of any and all cohabitation, whether living in the same residence or not. Cohabitation is not merely sexual relations but the mutual assumption of rights and duties consistent with the marriage relationship. Bona fide attempts to reconcile and sexual relations may toll the two years.

Any self-respecting divorce attorney prefers that clients live separately during this waiting period. Living separately performs many functions. Like a reverse engagement, it forces the couple experience the reality of living on their own. To be meaningful, that experience cannot be imagined. It must be real. Otherwise, the couples' lives do not change. They are unable to try on their new single status for size, from an emotional, financial and social standpoint. Conversely, separation can also lead to reconciliation.

Living apart also allows the parties to more clearly assess their options. The stress of chronic arguing or terse silence takes a toll on body and soul. While under the same roof, couples are on edge, waiting for the other shoe to drop. They rarely sleep well or take care of themselves. They are quick to anger and can be irrational. Decisions made in these circumstances are often wrong simply because they are made for the wrong reasons.

Divorcing couples need guidelines in this uncharted territory. Otherwise, minute issues escalate into unnecessary conflict. Most importantly, there is no support or custody order in place while the parties live as roommates so neither side has a clear understanding of what the new rules are or how they work.

For this reason, I encourage clients in these straits to fashion a Separation Agreement, a four or five page contract setting forth the basics of their living arrangements during the pendency of the divorce. A good Separation Agreement is simple and clear, detailing who pays what bills. It divides the joint checking accounts, separates the debt payments, addresses who pays for childcare and can serve as a useful blueprint for future dealings. Who pays the vet bill? Who pays if the roof needs a repair? What about school tuition? The Separation Agreement outlines the parameters of mutual, soon to be separate, obligations. The scope and content of each individual Separation Agreement fits the unique circumstances of the couple.

Importantly, the Separation Agreement also acts as a freeze order, prohibiting both parties from raiding the marital estate, transferring assets, cashing in IRAs,

running up credit cards, borrowing from the Home Equity Loan or engaging in any other form of dissipation. Basically, if you don't have the other person's permission, you can't do it.

In a perverse way, the Separation Agreement creates trust between the parties, by forcing them to be realistic about the family budget and to start a productive dialogue about how they will function in their new roles. If one party refuses to participate or rejects the idea of a Separation Agreement completely, then you have an insight into future dealings.

So, if you find yourself in the situation I describe, considering divorce and thinking about living together for the duration, or even if you are already living separately, consider the benefits of working through the issues in writing before they surface.