

## Separation Agreements – Client Guide

***This document provides general guidance regarding separation agreements. Your family lawyer will be able to provide specific advice based on your circumstances.***

### **What is a separation agreement?**

People who are already married or in a civil partnership can enter into a written agreement setting out what they intend to happen to their money, property and other practical issues as a consequence of their current or planned separation. This written agreement is called a separation agreement. Separation agreements are usually entered into by parties who are separating but who do not want to divorce or dissolve their civil partnership at that time, perhaps for religious or practical reasons. The legal rules about these agreements come from the usual laws that apply to divorce, and also a decision of the Supreme Court in 2010 (Radmacher v Granatino) where the court said: *‘The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.’*

A separation agreement is a contractual agreement between the parties to a marriage or civil partnership dealing with:

- your agreement to live apart
- your obligations to maintain one another and any children of the family
- the distribution of your assets, and
- arrangements for any children of the family

### **Why enter into a separation agreement?**

Everyone has their own reasons for entering into a separation agreement. It may be that you and your spouse simply like to be as organised as possible with your finances, and want to have the certainty of an agreement as to how you will deal with financial arrangements on separation and divorce. You may be able to save time and costs by annexing to the separation agreement a draft of the financial order you would like the court to make in due course in relation to any divorce proceedings. A separation agreement might be particularly beneficial where:

- one of you has substantially greater capital or income than the other
- one or both of you wishes to protect assets you owed prior to the marriage, including inheritances or family trusts
- it would be beneficial to define what is considered to be ‘matrimonial property’ or ‘non-matrimonial property’, for example in relation to business assets owned by one of you
- one or both of you has children from a previous marriage or relationship and wishes to protect assets for the purposes of inheritance planning
- one or both of you has a connection with, or property in, another jurisdiction

#### **Harrisons Solicitors LLP**

11 Berriew Street Welshpool Powys SY21 7SL

tel | ffôn 01938 552545 fax | ffacs 01938 552970 email | ebost enquiries@harrisonsllp.com DX 29215 Welshpool

Newtown tel | ffôn 01686 625134

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## Are separation agreements binding on the court?

In England and Wales separation agreements are not strictly binding in the event of a later divorce, but the terms of a separation agreement may be decisive in the event of a dispute dealt with by the court unless the effect of the agreement would be unfair. It is not possible in this country to have a fully binding marital or civil partnership agreement about what will happen on divorce or dissolution. In other countries, post-nuptial agreements may be binding provided certain requirements are met.

To improve the prospect that the court will not consider the agreement to be unfair if it is necessary to rely on it, both of you will need to set out your financial circumstances in full (called financial disclosure), and take independent legal advice on the agreement and its effects. You can negotiate an agreement using mediation or collaborative law, or by using solicitors to negotiate and draft the terms of the agreement on your instructions. Your family lawyer will help you find the process most suitable for you.

Agreements are generally less likely to be considered to be unfair if they are recent or if circumstances have not changed since and if both people knew exactly what they were agreeing when the agreement was made, both legally and financially, without undue pressure being applied. For this reason, properly negotiated separation agreements are most likely to be upheld by the court on divorce. It is common to build in provision for the agreement to be reviewed, either after a period of time has elapsed (say three years, or five years) or when a specified 'trigger' event occurs, for example if either you or your spouse were to have health issues that impact on your earning capacity.

It is possible that the court might uphold part of an agreement while considering a different part to have an unfair effect.

Even though separation agreements are not always binding, you should not enter into a separation agreement unless you intend to be bound by the terms of that agreement.

## What will make a separation agreement more likely to be binding?

The courts have indicated that in order for an agreement to be considered fair, the following will be taken into account:

- whether both parties to the agreement had independent legal advice before entering into it
- whether there was full financial disclosure: this has generally been interpreted as both parties having sufficient information to make an informed decision on whether to enter into the agreement with a full understanding of its implications
- whether the terms of the agreement are substantially fair, ie does the agreement provide for each of your basic needs to be met in the event of a divorce?
- that neither party felt pressurised by the other party to enter into the agreement, ie that there was no undue influence or duress
- whether there was any fraud or misrepresentation by a party in relation to the agreement
- whether legal contractual requirements were followed when the agreement was entered into, including a statement in the agreement that you and your spouse intend to 'create legal relations' by entering into the agreement, and that the agreement is executed as 'a deed',

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Newtown tel | ffôn 01686 625134

which includes that it must be witnessed by an independent witness

### **What can a separation agreement include?**

A separation agreement is a bespoke document drawn up for the two of you for your particular circumstances, so it can cover almost anything you want it to, although your solicitor will be able to advise you as to what types of provision are likely to be enforceable, and the focus of the agreement will be on finances. There are certain things that couples usually think about when deciding to separate:

- recording the date on which you separated, whether you are going to get divorced and, if so, when, on what grounds and who is to be the petitioner
- what is to happen to property either of you brought into the marriage, including your home
- what is to happen to any property given to you or inherited during the marriage or any income or assets derived from trusts
- what is to happen to money held in joint accounts and property purchased jointly
- what would happen to any personal belongings or possessions
- what is to happen to any saved money earned during the marriage and your pensions
- how you are going to deal with any debts
- whether either of you will pay or receive any maintenance and, if so, for how long
- what events will require the separation agreement to be reviewed
- whether you wish the agreement to be confidential, ie that neither of you may disclose all or part of the agreement (save for the purpose of taking legal advice) to a third party or to the press
- what the arrangements are for any children of the family, in both financial and practical terms, such as where the children will live (residence) and when they will see their parents (contact)
- what arrangements you wish to make if either of you should die, and whether you intend to enter into a Will to make provision for each other in the event of death
- who will pay the costs regarding preparation of the agreement

A separation agreement *cannot* provide that the court will not be able to consider financial issues ('have jurisdiction') in relation to the marriage, as that would be contrary to 'public policy'. Neither party can, therefore, agree that they will not to make an application for financial provision from the court. In particular, it is not possible to make an agreement restricting any financial provision for children.

The agreement will include a declaration that you have each provided financial disclosure, and attach a schedule summarising that disclosure. It will include a statement that you have each taken legal advice on the terms of the agreement (or if you have chosen not to, that you had the opportunity to do

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Newtown tel | ffôn 01686 625134

so). It will also state that you intend the agreement to be legally binding.

A separation agreement can have a draft consent order attached. This enables it to be turned into a final court order if you decide to proceed with a divorce or dissolution, as long as circumstances have not significantly changed from those envisaged when the separation agreement was made.

### **What happens if we have children?**

An agreement between adults does not remove the court's responsibility to consider the interests of any children in your family. In the event of a divorce or dissolution, if the court is asked to intervene in financial arrangements its first consideration is always the children involved. If the court considers that any agreement between the adults may adversely affect their children it is likely to consider that it is not fair to uphold the separation agreement, or part of it, in the circumstances. It is not possible to contract out of providing financial support for a child in a separation agreement.

### **How do international elements affect a separation agreement?**

Where either you or your spouse, or both of you, have a connection with another country, either as to assets, domicile, habitual residence, or future plans, and you are considering entering into a separation agreement, a specialist family lawyer should be instructed in each relevant country to advise you on the need for and effect of such an agreement in that country. Significantly more time and costs are likely to be incurred where there are international aspects. The approach to the enforcement and validity of separation agreements varies between countries, and in some countries outside England and Wales a separation agreement will be fully binding with no regard to fairness. A separation agreement will usually include a 'jurisdiction clause', confirming your domicile and habitual residence, together with your intentions as to the jurisdiction in which the divorce or dissolution will proceed, and where you intend the agreement to be enforceable. Where there are international elements, consistent separation agreements may be drafted in each relevant jurisdiction, translated and notarised as necessary. Alternatively this can be dealt with by the preparation of one comprehensive agreement which can be translated, if required.

### **What are the advantages and disadvantages of a separation agreement?**

A separation agreement can give more certainty as to financial arrangements in the event that you divorce, provided the agreement is entered into in accordance with the suggested steps as to legal advice and disclosure, and represents a fair arrangement for both parties. It can be an effective way to protect assets.

However, because the court will always have jurisdiction in the event of a divorce, entering into a separation agreement can sometimes provide a false sense of security. If there is a divorce, and you cannot reach agreement as to how finances can be dealt with, and one of you no longer wishes to proceed in accordance with the terms of the separation agreement, the issues may then be determined by the court.

There is little advantage in agreeing terms that will be unfair to one party, particularly if that party has been placed under pressure to agree those unfair terms, hasn't had independent legal advice or doesn't have sufficient information (financial disclosure) to make an informed decision on whether to enter into the agreement. In those circumstances the court would be unlikely to consider the agreement to be 'fair', although there have been cases where all of the recommended steps haven't been followed but a separation agreement has still been upheld by the court. Often this will turn on the extent to which the party who no longer agrees with the terms understood what they were

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Newtown tel | ffôn 01686 625134

agreeing to.

Circumstances can change, and in the event of a dispute the court will look at your circumstances as they are at the time the agreement is being considered by the court. What may have been fair at the time of the agreement might not be considered fair if your or your spouse's circumstances have changed significantly, for example you have had children and one of you has a reduced earning capacity, or one of you has suffered ill health, and the agreement hasn't provided for those changes either in its original form or by an amended agreement. For this reason it is sensible to include provision in the agreement for there to be either regular reviews, or reviews in the event of certain events occurring.

### **What will happen if one party no longer wishes to be bound by the terms of a separation agreement?**

If, in the event of a divorce, one of you no longer wishes to be bound by the separation agreement, but the other person does, that person may make an application to the court for the other party to explain why an order should not be made in the terms of the agreement. Whether the court will uphold the agreement will depend on the factors detailed above, but it is for this reason also that you should not enter into a separation agreement unless you intend to be bound by the terms of that agreement.

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