

SEPARATION

Leaflet No. 3



LEGAL AID BOARD

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This leaflet is not an interpretation of the law.

Note: This leaflet primarily deals with married couples who wish to separate. If you're cohabiting, see **Leaflet No. 16 – Rights of Cohabitants**.

Who can help me if my marriage is in trouble?

A number of organisations provide counselling for marriages in trouble with a view to helping couples to try and sort out their differences. Details are provided in this leaflet.

If we have decided to separate who can help?

You have a couple of options. A trained mediator can help a couple who have decided to separate and who wish to try and negotiate the terms of the separation without involving lawyers. There is a State funded Family Mediation Service, which is free of charge. There are also many trained mediators who will mediate privately, for a fee. Details of local mediation services are available from law centres. While a mediator can help you draw up an agreement, that agreement will not be legally binding. You can consult a solicitor for the purpose of having it made legally binding.

What is a Separation Agreement?

A separation agreement is a legally binding written contract between a husband and wife setting out their future rights and duties. Such an agreement is also known as a Deed of Separation. The agreement will include a number of terms, including:-

- an agreement to live apart and not to disturb or interfere with each other;
- arrangements about responsibility for, and care of, the dependent children, including,
- if necessary, the level of contact that each spouse will have with the children;
- the amount of maintenance to be paid for the support of the dependent spouse and children and how and when the maintenance is to be paid;
- arrangements as to who will own and who will live in the family home;
- arrangements as to who will own any other property;
- arrangements as to who will pay any mortgage(s); and
- arrangements as to succession and inheritance. **This may include an agreement to renounce each others rights to a “legal right share” of the other spouse’s estate upon their death.**

As trustees of a pension scheme are not obliged to honour a term in a separation agreement that varies pension rights, it is necessary to get a court order in order to secure any pension entitlements when separating.

Social welfare pensions are not affected by the terms of a separation agreement.

What can I do if my spouse will not agree to separate and if we cannot reach a separation agreement?

You can consult a solicitor who can seek to negotiate an agreement on your behalf. He or she can do this by negotiating on your behalf directly with your spouse's solicitor or by trying to engage your spouse and his or her solicitor in a collaborative manner. If it is not possible to negotiate a settlement your solicitor can apply to court on your behalf for a judicial separation.

Separation agreements and judicial separations can deal with the matters that need to be resolved when parties are separating including arrangements in relation to children, financial provision and the division of property.

What is a judicial separation?

If spouses cannot reach an agreement about the conditions on which they will separate, or if only one spouse wants to separate, an application can be made to the court for an order for judicial separation.

Does a judicial separation give me the right to remarry?

Separation does not give the spouses a right to remarry. A decree of divorce gives parties a right to remarry. For further information see **Legal Aid Board Leaflet No. 4 - Divorce**.

Do I need to be legally separated to get a divorce?

No. You do not need to be legally separated but you will need to be living apart for at least four years before you can proceed with a divorce application. For further information see **Legal Aid Board Leaflet No. 4 - Divorce**.

Advice on counselling and mediation

A solicitor advising a person about judicial separation is required to give advice about:-

- counselling services, to help bring about a reconciliation;
- mediation services, to help negotiate the terms of a separation agreement; and
- the possibility of negotiating terms for a separation agreement.

Grounds for judicial separation

A court can grant an order for judicial separation on one or more of the following grounds:-

- adultery;
- unreasonable behaviour;
- desertion for a continuous period of one year before the time of the application;
- where the parties have been living apart for one continuous year before the time of the application and both spouses consent to a decree being made;
- where the parties have been living apart for three years, whether or not the other spouse consents; or
- where no normal marital relationship has existed between the spouses for at least one year.

Additional orders

In making an order for judicial separation, the court may also make additional orders in relation to matters such as:-

- **custody and access** arrangements in relation to dependent children; (For further information see **Legal Aid Board Leaflet No. 8 - Children and Family law**).
- **financial provision** for the dependent spouse and children by means of maintenance to be paid at fixed intervals and/or lump sums;
- **exclusion** of a spouse from the family home by giving the other spouse the right to live in the family home, for life or for a fixed period;
- **barring** of a spouse from the family home by prohibiting that spouse from entering it and from using or threatening violence against the other spouse and/or their children;
- without prohibiting a spouse from entering the home, the court may make a safety order prohibiting a spouse from using or threatening violence against the other spouse or their children.
- **financial compensation** by making provision for the future financial security of a spouse through insurance policies. For example, requiring either spouse to take out a life insurance policy, assign the benefit of an existing insurance policy, and/or pay the premiums on a policy;
- **inheritance/succession matters** whereby the rights of either spouse to inherit from the other spouse may be extinguished. This means that the court may decide to end one spouse's right to share in the other's estate. (Estate means the assets held by a person at the time of death, for example, property, possessions and money);
- the court must be satisfied that proper provision has been made for a spouse before it will make this type of order. However, unless the court orders otherwise, a spouse can apply to court for a share of the estate of the other spouse;
- **pension arrangements** adjusting the pension entitlements of either spouse. However, the court will only make a pension adjustment order if proper provision has not been, or cannot be, made for the spouse and children through the making of other financial or property orders. A spouse can seek such an order either for his/her own benefit or for the benefit of dependent children;
- **emergency/temporary** matters can be dealt with before the hearing of an application for a judicial separation, for example where one spouse is:
 - running up debts which could cause a risk to the family home or other property;
 - threatening to remove money from bank accounts or to spend or hide a redundancy/gratuity/compensation/damages payment that s/he is about to receive or has recently received; or
 - threatening to remove or sell household contents or other family assets.

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