

Looking at the Options - Separation or Divorce?

Not all people who separate or divorce need a solicitor. Some negotiate their own agreements, and take advice only about how to make that agreement binding. Others want advice at every step.

By the time people take legal advice, some will already have firm ideas as to what they would like to achieve. Divorce is not the only option when problems arise in a marriage; there may be alternatives.

Reconciliation

Many people take advice when their plans are uncertain or they are unsure as to their options, seeking advice about the implications if they did decide to separate. It may still be possible to have a reconciliation, which for some is the most successful solution.

Separation

Separation may be an alternative to divorce if, for example, neither party wants to remarry. There may be good reasons for being separated rather than divorced, or at least for postponing divorce proceedings.

If there is to be a period of separation before divorce proceedings, it is, however, important to take advice, particularly about the tax consequences. Many people need to recognise their finances within the tax year in which they separate.

There is no such thing as a "legal separation" - just various ways in which a couple can regulate their arrangements whilst they are separated, either for the short or long term.

(a) Separation Agreements

Separation agreements (or deeds of separation) may be entered into by a husband and a wife when they are no longer living together but do not intend to start divorce proceedings immediately. Its purpose is to set out the terms they have agreed about their financial arrangements, about any future divorce or about their children.

Until there is a divorce, the agreement is binding between the husband and the wife in so far as it relates to money and property. If there are divorce proceedings later, the court will often be asked to make an order confirming the terms of the agreement. The court will rarely overturn a separation agreement if it has been properly prepared and all the legal formalities have been complied with.

However, it does not achieve a completely binding settlement. That can only be obtained by a court order made within divorce proceedings.

(b) Judicial Separation

It is rare but still possible to apply to a court for a decree of judicial separation. It does not end the marriage. It might be used where either party has religious objections to divorce. Unlike a separation agreement, grounds need to be proved: these are the same as the facts which have to be established to obtain a divorce but it is not necessary to prove that the marriage has broken down irretrievably.

A decree of judicial separation enables the court to make orders about property, money and children. The advantage, in contrast to separation agreements, is that where the couple cannot agree a particular point it can be decided by the court. However, pension sharing orders cannot be made either by a Separation Agreement, or in judicial separation. They can only be made in divorce proceedings.

Financial Provision During Marriage or on Separation, without Divorce

If a husband or wife fails to provide reasonable maintenance for his or her spouse during the marriage an application can be made to the court for maintenance, even if there are no divorce proceedings. It may also be possible to seek an order for sale of a jointly owned property without divorce proceedings.

Divorce Proceedings

Immediate divorce proceedings will be the preferred choice for many where it is clear that there is no prospect of reconciliation. Divorce will also be necessary for most people where a final comprehensive financial settlement is required. Filing for divorce opens the door to pursuing a wide range of financial claims against the other spouse, including provision for income, capital and pension sharing.

The Process - Legal Advice and Mediation

Many couples who separate or divorce are able to agree arrangements between themselves, and need only limited advice from a solicitor at the outset, or at the end to achieve a binding settlement. For others, mediation may be a useful supplement to legal advice.

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Mediation is a process by which separating couples engage the help of a neutral third party to help them resolve issues between them, whether relating to finances, children or other matters. The mediator is trained to act as a facilitator in negotiations between the couple and not to act for either party. Mediators cannot advise, nor can they create a binding settlement. Mediation can however be valuable as a way of narrowing differences, particularly in making arrangements for children.

For the majority, however, both financial settlements and arrangements for children can be worked out by negotiations with as much or as little help from a solicitor as is needed to keep the negotiations on the right track. Where there is no alternative an application to the court can be made. There is more information about this in the background notes about Financial Settlements and Arrangements for children.

For further information please contact:

Catherine Hallam



Partner

Tel: 0117 939 2000

Email: catherine.hallam@burges-salmon.com

Ashley Palminteri



Senior Associate

Tel: 0117 902 7761

Email: ashley.palminteri@burges-salmon.com

Sarah Woodsford



Senior Associate

Tel: 0117 902 7743

Email: sarah.woodsford@burges-salmon.com

Thomas Boyce



Associate

Tel: 0117 902 7710

Email: thomas.boyce@burges-salmon.com

Sharon Mahmood



Solicitor

Tel: 0117 307 6905

Email: sharon.mahmood@burges-salmon.com

Mary Gaskins



Solicitor

Tel: 0117 307 6870

Email: mary.gaskins@burges-salmon.com