SEPARATION AGREEMENTS

FREQUENTLY ASKED QUESTIONS

Q. What is a separation agreement?

A. A separation agreement is a contract voluntarily entered into between a husband and a wife where they agree to resolve such matters as property division, debts, custody, and support when they separate from each other. It must be signed by both parties in the presence of a notary public before it is valid. A separation agreement from the Legal Assistance Office is not a court ordered legal separation. The separation agreement you sign at the Legal Assistance Office is an agreement or contract between the parties that establishes legally enforceable duties and rights.

Q. Who prepares a separation agreement?

A. It is best to call the Legal Assistance Office for an appointment and have an attorney prepare one for you. Be aware that office policies and ethical considerations prohibit both parties from being seen by the same attorney. Both parties are entitled and encouraged to speak with and be counseled by separate and independent attorneys before they actually enter into any formal, binding agreement.

Q. Can a single attorney advise both me and my spouse regarding the separation agreement?

A. No. Two attorneys should be involved, one to advise each party. In this way, both the husband and the wife know that they have received independent legal advice from a lawyer who does not have a conflict of interest by representing two clients with different needs or goals. Even if both parties are agreeable on all terms, one legal assistance attorney will not, and cannot represent both parties.

Q. Can we divide our property in a separation agreement?

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

Q. Does my spouse have to sign a separation agreement?

A. An "agreement" means that both parties sign voluntarily, without duress or coercion. You cannot force your spouse to sign a separation agreement.

Q. Do I really need a separation agreement?

A. The law does not require the parties to execute a separation agreement, but it is a wise idea if there are debts, children, support claims, or property involved, the parties are in agreement and want to settle these matters in writing. The legal rights and responsibilities of each spouse are specifically detailed.

Q. Does a separation agreement help me to get a divorce?

A. A separation agreement will usually facilitate court action by reducing the friction, costs, and time. The various states have different provisions in their laws which might make a divorce faster or easier if there is a separation agreement in which the parties have divided their property and arranged for payment of any debts of the marriage. Generally, if the parties have executed a separation agreement, only one needs to have an attorney and appear in court for the divorce hearing.

Q. If I have a separation agreement may I live with another individual?

A. Under law you are still considered "married." Only a court of competent jurisdiction has the ability to dissolve the marital status. Soldiers are subject to military law (UCMJ), and may be prosecuted for adultery, a crime punishable by Article 134, UCMJ, even if there is a separation agreement between the husband and wife. Civilian laws do not make adultery a crime.

Q. Can we decide in our separation agreement how we will file taxes after we separate?

A. Yes. As long as you are married, you may file federal and state taxes either jointly or separately. The person who has custody of the child is entitled to claim the tax exemption for that child in the absence of an agreement to the contrary. However, the parties can determine who will get the tax exemption in the separation agreement.

Q. Can my spouse be charged with contempt of court if s/he violates the terms of the separation agreement?

A. No. It is not contempt of court to violate a separation agreement unless the agreement has been made a part of a court order or divorce decree. Contempt of court is failure to obey a court order without legal justification. You may, however, sue your spouse for breach of contract if s/he violates the separation agreement. Failure of a military member to honor family support provisions of a separation agreement may result in judicial or non-judicial punishment for a violation of a lawful general regulation (Article 92, UCMJ).

Q. How can I enforce the support provisions of my separation agreement without going to court?

A. Soldiers must comply with the terms of written separation agreements by AR 608-99. If you are not receiving support payments from a soldier in violation of an agreement, contact the military member's immediate commander and request enforcement. The commander cannot take the money directly from the soldier, but the commander can explain what the alternatives are, i.e. elimination from the service, filing of unfavorable information in official records, Article 15, adverse administrative actions under AR 635-200 or AR 635-100, or even court-martial.

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 only a contract between spouses. It cannot bind third parties (such as banks or finance companies) that have not signed it. However, if your spouse promises to pay a bill and then breaks that promise, and you have to pay it, you can then sue your spouse for breach of contract for the amount of money you had to pay. Furthermore, you and your spouse may agree that any debts you individually incur after the signing of the separation agreement are the obligation of the party who incurred it.

Q. Will a separation agreement stop my spouse from hassling me?

A. While separation agreements usually have a non-harassment clause in them, you should understand that no piece of paper - be it an agreement or a court order, is going to stop a person from doing something he or she is determined to do. If the problem is one of physical violence, a court order would be better than a separation agreement, and if violated, it could serve to punish or jail the wrongdoer. If there is only an agreement, a lawsuit for breach of contract is one possible remedy for breaking the promise of not hassling each other.

Q. Is a court of law bound by what we put in the separation agreement about our children?

A. Not necessarily. The terms you include for child support, custody and visitation can always be altered by the court in the best interests of the children. Courts will generally adopt all the terms including the provisions for child support, custody, and visitation so long as the terms are reasonable.

Q. Can the court modify other terms we include in a separation agreement?

A. The terms in a separation agreement that pertain to division of property will not be modified by the court except in very limited circumstances. For example, if the separation agreement has been incorporated in a court decree, the court normally has the power to modify the support terms (alimony or child support) based on a substantial change in circumstances. The party desiring the change has to show the court there has been a "substantial" change in circumstances. If the terms involve property division, the court can only modify terms that have not yet been completed, such as transfer of car titles, not the completed terms such as re-allocation of property already divided.

Q. Am I entitled to medical, exchange, and commissary privileges following my separation?

A. As long as you remain married to a Soldier you are entitled to a family member ID card. You will retain all privileges (PX, Commissary) until the date of divorce. Children of military members are entitled to ID cards until age 18, or later if attending college.

If you have any questions concerning separation agreements, please call the Fort Polk Legal Assistance Office at (337) 531-2580 for an appointment. Hours of operation are Monday through Friday, 0800 – 1130 and 1230 – 1630. We are located in Building 1454 on Alabama Avenue, next to the Showboat Theater.