

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. Separation agreements are contractual agreements between 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
- arrangements for the children of the family

What sort of things can a separation agreement cover?

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. 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 is to happen to any saved money earned during the marriage and your pensions
- how are you going to deal with any debts
- whether either of you are to pay or receive any maintenance and, if so, for how long
- what events will require the separation agreement to be reviewed
- what the arrangements are for any children of the family, in both financial and practical terms, such as where the children will live and when they will see their parents (child arrangement orders)

In order to make the separation agreement as persuasive as possible in any future divorce or dissolution proceedings, you both need to disclose and set out your financial circumstances in full and take independent legal advice on the agreement and its effects. A separation agreement can be negotiated using mediation or collaborative law, or more traditionally by using solicitors to talk to each other on your instructions. Your family lawyer will help you find the process most suitable for you.

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.

How do the courts approach prior agreements between parties?

When deciding what weight should be placed on agreements the court will usually consider the following factors:

- whether there was pressure by one party on the other party to enter into the agreement
- whether one party exploited a dominant position to secure an advantage
- whether either party's knowledge of the situation was inadequate, including in relation to finances
- whether either party did not take legal advice or received bad legal advice
- whether the circumstances changed and whether such changes were overlooked or unforeseen at the time of the agreement

Are separation agreements binding on the court?

Separation agreements are not binding on the court in the event of a later divorce or dissolution. Parties to a marriage or civil partnership cannot contract out of the court's jurisdiction to make orders for financial provision upon divorce or dissolution. However, the existence of a separation agreement will be one of the factors that the court considers. A separation agreement may have a persuasive or even decisive influence on the outcome of either party's application for ancillary relief (financial remedy), depending on the precise circumstances surrounding the completion of the agreement.

The Supreme Court has said the court is entitled to overrule an agreement between parties in certain circumstances (see *How do the courts approach prior agreements between parties?*). The agreement may be taken into consideration as either part of all the circumstances of the case or as conduct it would be unfair for the court to disregard.

The court must consider whether the agreement is 'fair'. Agreements are more likely to be considered to be fair if they are recent, if circumstances have not changed and if you both knew exactly what you were getting into when the separation agreement was made, both legally and financially, without undue pressure being applied.

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.