

# Introduction to Separation Agreements

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## § 1.01 Marital Agreements in General

This is a treatise about marital agreements. We should begin, therefore, by stating our definition of a marital agreement.

In all fifty states, a court must complete certain basic tasks when it divorces two married persons. It must determine whether grounds for divorce exist;<sup>1</sup> divide the parties' property;<sup>2</sup> and award spousal support and attorneys' fees, if required.<sup>3</sup> If the parties have children, the court must also determine custody and visitation,<sup>4</sup> and award child support.<sup>5</sup>

There are, in general, two methods by which these tasks can be accomplished. First, the court can complete the tasks itself, using the rules and procedures established by statute and case law. Second, the parties themselves can agree upon the proper completion of any or all

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1. *See generally* 2 HOMER CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, ch. 14 (2d ed. 1987).

2. *See generally* BRETT R. TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY* (3d ed. 2005 & Supp. 2007).

3. *See generally* MARIAN C. DOBBS, *DETERMINING CHILD AND SPOUSAL SUPPORT* (rev. ed. 1995); Brett R. Turner, *Rehabilitative Alimony Reconsidered: The "Second Wave" of Spousal Support Reform*, 10 *DIVORCE LITIG.* 185 (1998); CLARK, *supra* note 1, ch. 17.

4. *See generally* Jeff ATKINSON, *MODERN CHILD CUSTODY PRACTICE* (1986); LINDA D. ELROD, *CHILD CUSTODY PRACTICE AND PROCEDURE* (1993 & Supp. 1999).

5. *See generally* LAURA W. MORGAN, *CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION* (1996 & Supp. 1999).

of these tasks.<sup>6</sup> Our definition of a marital agreement is *a contract that resolves some or all of the issues that the court must consider in a divorce action.*

Marital agreements fall into three distinct classes. In this book, agreements signed before the marriage are referred to as *antenuptial agreements*. Agreements signed during the marriage that are in contemplation of imminent separation and eventual termination of the marriage are referred to as *separation agreements*. Agreements signed during the marriage that are not in contemplation of imminent separation are referred to as *midnuptial agreements*.<sup>7</sup>

Apart from time, the major difference among these three types of agreements is the nature of the parties' relationship when they are signed. Antenuptial and midnuptial agreements are signed when the parties are either engaged or married. Their relationship is confidential, and each is charged with a duty to watch out for the other's interests. Separation agreements, in the great majority of cases, are signed after the marital breakdown, at a time when the parties have retained counsel to negotiate at arm's length the terms of their divorce settlement. Because the parties' relationship is adversarial, parties to separation agreements do not generally have a duty to watch out for the other party's interests.

## § 1.02 Separation Agreements in General

### ***Definition of "Separation Agreement"***

A *separation agreement*, for purposes of this work, is a marital agreement signed at a time when the parties anticipate the termination of their marriage.<sup>8</sup> It may or may not be signed after the parties actually separate, but it must be signed at a time when the parties anticipate that their marriage will actually end, either by divorce or by annulment.<sup>9</sup>

Since an antenuptial agreement is signed before the marriage starts, it is easy to distinguish antenuptial agreements and separation agreements. The difference between a midnuptial agreement signed late in the marriage and a separation agreement signed before actual separation can be difficult to discern. For purposes of this book, if the parties anticipate that their marriage might or might not continue—in other words, if they do not believe that their marriage is finally and irrevocably broken—then the agreement is a midnuptial agreement. If the parties believe their marriage is broken

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6. See §§ 3.03–3.04 (court is generally bound by parties' agreement on division of property and spousal support). The parties' agreement is less binding on questions of child custody and child support, but even in those areas the agreement is controlling unless the court finds that it is not in the best interests of the children. See § 3.07.

7. See generally *Combs v. Sherry-Combs*, 865 P.2d 50 (Wyo. 1993).

8. See *In re Marriage of Bisque*, 31 P.3d 175 (Colo. Ct. App. 2001).

9. An agreement signed to settle a pending annulment action is not technically a separation agreement, but it is generally governed by the same rules of law as an agreement signed to settle a divorce action. See *In re Estate of Lundahl*, 332 Ill. App. 3d 646, 773 N.E.2d 756 (2002); *Pittman v. Pittman*, 909 So. 2d 148 (Miss. Ct. App. 2005).

when they sign the agreement, it is a separation agreement, even if the parties do not physically separate immediately upon signing.<sup>10</sup>

### **Types of Separation Agreements**

Some states use different terms to refer to different types of separation agreements. For example, some states limit the term *separation agreement* to an agreement for future support, and use the term *property settlement agreement* or *marital settlement agreement* to refer to an agreement to divide property. The authors agree with Professor Clark that this variation in terms creates needless confusion:

Some cases and authorities produce unnecessary confusion by attempting to draw distinctions between separation agreements, property settlements, stipulations, consent judgments or other forms of agreement in divorce actions. None of these is a technical term. They all refer to method of compromising divorce litigation. In this chapter only one term will be used: separation agreement.<sup>11</sup>

This treatise will generally use the term *separation agreement* to refer to any and all agreements that are signed at a time when the marriage has already broken down and for the purpose of resolving issues expected to arise in divorce or annulment proceedings.

### **General Policies**

Negotiation and drafting of separation agreements are core functions in any modern family law practice. Periodic surveys of *Divorce Litigation* subscribers reveal that over 75 percent of all divorce actions are settled out of court.<sup>12</sup> Because so many divorce cases settle out of court, the law of separation agreements is essential to the final outcome in a large majority of divorce cases.

Separation agreements are merely one specific category in the general field of contracts, and they are therefore subject to the same rules of law that apply to contracts generally. *See* § 5.02. The specific application of these general rules, however, is strongly influenced by two competing public policies. First, as a general rule, courts

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10. *See In re Marriage of Bisque*, 31 P.3d 175, 179 (Colo. Ct. App. 2001) (“when an agreement between present spouses is entered into ‘attendant upon’ separation or dissolution, the agreement must be considered a separation agreement, even if it was signed prior to filing for dissolution or legal separation”); *In re Pond*, 700 N.E.2d 1130 (Ind. 1998) (agreement signed during the marriage, on assumption that marriage was over, and at a time when a legal separation action had been filed, was a separation agreement and not a midnuptial agreement).

11. CLARK, *supra* note 1, at 409.

12. For example, a 1992 survey of *Divorce Litigation* subscribers showed that 75.31 percent of subscribers’ cases were settled by agreement, and that another 6.16 percent were settled by mediation. Survey Results, 4 *Divorce Litig.* 151 (1992). The data are generally consistent over time; a 1998 survey showed that 76 percent of all cases settled by agreement or mediation. These figures are probably conservative, as the *Divorce Litigation* subscriber base includes a disproportionate number of advanced specialists whose practices are more litigation-oriented than the norm. *See also* CLARK, *supra* note 1, at 408–09 (“probably about ninety percent” of all divorces are uncontested, and “certainly greater than fifty percent” are disposed of by separation agreements).

favor negotiated settlements of private disputes. This rule applies with special force to divorce cases. The issues in a divorce case are heavily fact-specific, and they are often intertwined with personal emotional disputes, which are not susceptible to judicial resolution. As a result, the parties themselves can create a much better divorce settlement than any court could decree for them. When the parties agree to such a settlement, the courts are highly reluctant to set it aside. A Mississippi court has noted:

The law favors the settlement of disputes by agreement of the parties and, ordinarily, will enforce the Agreement which the parties have made, absent any fraud, mistake or overreaching. . . . This is as true of agreements made in the process of termination of the marriage by divorce as of any other kind of negotiated settlement. . . . They are contracts, made by the parties, upon consideration acceptable to each of them, and the law will enforce them. . . . With regard to the property of the parties, this is a strong and enforceable rule with few, if any, exceptions.<sup>13</sup>

At the same time, courts also recognize that divorce is an emotionally difficult time in the lives of almost all litigants. Many rational persons have difficulty exercising reasoned judgment while their marriage is breaking down, and dishonest spouses are all too aware of this unfortunate fact. Almost every divorce practitioner has seen at least one case in which an emotionally troubled client insists upon signing an obviously unfavorable agreement. The possibility of overreaching is especially troubling because the disadvantaged spouse is frequently the one who is willing to give the most in order to preserve the marriage. If the rule of caveat emptor were strictly applied to these spouses, the law would violate its own policy of encouraging marriage. A Virginia court has noted:

[M]arriage and divorce create a relationship which is particularly susceptible to overreaching and oppression. . . . [T]he relationship between husband and wife is not the usual relationship that exists between parties to ordinary commercial contracts. Particularly when the negotiation is between the parties rather than between their lawyers, the relationship creates a situation ripe for subtle overreaching and misrepresentation. Behavior that might not constitute fraud or duress in an arm's-length context may suffice to invalidate a grossly inequitable agreement where the relationship is utilized to overreach or take advantage of a situation in order to achieve an oppressive result.<sup>14</sup>

The tension between these two competing public policies underlies the entire law of divorce settlements. On the one hand, courts recognize the many advantages of private settlement of divorce cases; but on the other hand, courts are also aware that divorce cases present a dishonest spouse with a unique opportunity for unjust enrichment.

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13. *McManus v. Howard*, 569 So. 2d 1213, 1215 (Miss. 1990).

14. *Derby v. Derby*, 8 Va. App. 19, 378 S.E.2d 74, 79 (1989).