

SEPARATION AND DIVORCE – WHAT’S THE DIFFERENCE?

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“I’m going through a divorce”- what does that really mean?

Not surprisingly a lot of people use the term “divorce” when they are talking about a whole range of different aspects of their marriage breakdown.

In legal terms there are a number of different issues that may arise following a marriage breakdown.

- Separation;
- Property settlement;
- Parenting arrangements;
- Child support;
- Spousal maintenance; and
- Divorce

What is a Divorce?

So, a divorce is just one aspect – it is the legal severance of the marriage. It involves a specific application and when granted by the court a certificate is issued to confirm that you are no longer legally married, meaning you can remarry in the future.

You can only apply for a divorce once you have been separated for a period of 12 months. The law states that this indicates that the marriage has broken down irretrievably. The Family Law Act in Australia is based on a ‘no fault’ system, which means that the reasons for the breakdown of the marriage are not relevant to whether a divorce will be granted.

A divorce does not deal with any other issues that may exist or be in dispute between a couple, such as parenting arrangements or property division. These issues are separate to a divorce and should be addressed following separation, whether or not a divorce has been granted.

It is important to understand that there is no waiting time required following separation before any other issue (eg parenting or property) can be considered and resolved. The 12 months only applies to the divorce application.

Once a certificate of divorce has issue, if no property settlement agreement has been reached, you only have 12 months from the date of the final divorce order to apply to the court for a property settlement. If this time lapses, you will need to obtain special leave from the court before you can make a property settlement application.

As you must wait 12 months to file for a divorce, and you only have 12 months after a divorce to finalise property matters, most people use this time to resolve these other issues, such as property settlement and parenting arrangements. As noted, these issues can be resolved at any time following separation.

So, what is separation?

There is no paperwork or certificate to confirm when separation occurs. Sometimes a dispute will arise between spouses around when separation occurred, particularly if parties remain living together.

In legal terms, separation is when one spouse has communicated to the other spouse an intention to separate and their actions reflect that intention. Usually this will be by way of a physical separation, where one spouse leaves the joint residence. However, the law also recognises 'separation under one roof' (and this occurs quite often).

To establish 'separation under one roof' it is important that a genuine separation has occurred. For example, there needs to be a real severing of the relationship in all aspects so that there are effectively two households running under the one roof.

If a 'separation under the one roof' is being relied upon to meet the 12 months separation requirement for a divorce, the divorce application must be filed with an affidavit from a third party confirming that the relationship has truly broken down.

It is important to understand the difference between a divorce and separation and to be aware of the time limitation ticking once a divorce order is made. You should obtain specialist family law advice following separation to inform yourself of the legal matters that may arise. For a fixed cost appointment call us today on (07) 3221 4300.