

Separation Agreements in Manitoba

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A Separation Agreement can be used whether you are married or in a common-law relationship. It is a contract between you and your ex that details how you are going to disentangle your lives and be independent of each other.



Separation Agreements are flexible and allow the parties to determine (not a piece of legislation or a judge) how and when different steps in the separation process are going to occur.

Separation Agreements are often used to evidence the necessary requirements for the legal side of the separation, and allow parties to obtain an unopposed Divorce Judgment and/or a Final Order by consent.

Is a Separation Agreement the Right Tool for you?

Separation Agreements can be a great tool to resolve the issues of a relationship breakdown if both parties can agree and act fairly with each other. However, if there is a significant disparity in bargaining positions and one party attempts to “bully” the other party rather than the parties “bullying the issue” to find a solution that works for both of them, coming to a fair agreement probably won’t be possible.

Can a Separation Agreement save us money?

Generally, the more you and your ex can agree and be clear about the terms of your agreement, the less money needs to be spent on lawyers to clear up any confusion or argue back and forth.

The best way to save money is for you and your ex to sit down together and make a basic (or detailed) outline of the points you agree to, and start gathering the documents your lawyer will need (discussed further below). Make a list of the points you don’t agree to yet, or need further information about, or need to discuss with a lawyer. The more organized you are, the quicker and cheaper the process will be for both parties.

A Separation Agreement has to be signed by each party with their own lawyer. However, only

one lawyer needs to draft a Separation Agreement and that lawyer can sign with one party. The other party can go to another lawyer for Independent Legal Advice (ILA) and usually will only pay for an hour of that lawyer's time.

Both you and your spouse or common-law partner should review a draft of the agreement to make sure that it accurately reflects the agreement before it is sent to the ILA lawyer. It can be expensive if there is something that needs to be changed and there are now two lawyers on the clock.

Once the Separation Agreement has been signed, the parties need to "implement" the agreement. That is, they must follow the agreement and do any steps required of them in the agreement (e.g. close bank accounts, apply for RRSP rollover/transfers, list property for sale, pay support, etc.).

Do you still need to go to Court?

If you are in a common-law relationship (not married), a Separation Agreement can comprehensively deal with your separation. So long as the terms are followed by each party, there is no reason to go to court. If one party doesn't follow the terms, then the other party can take the matter to court to have the agreement enforced for breach of contract. So long as the Separation Agreement states that the agreement can be enforced by the Maintenance Enforcement Program (MEP), you don't need a court order to register it and MEP will provide collection services on the support portions of the agreement.

If one common law partner is concerned that the Separation Agreement may not be followed by the other spouse, having your lawyers draw up a consent Final Order that reflects the terms of the agreement and filing that order with the Court will provide extra protection. If one of the parties breaches the agreement, he/she also breaches the court order and can be found "in contempt" of an order of court and face stiff penalties such as jail time.

Some agreements can specify that the parties are not to go to court in the event of a material change in circumstances or dispute. Instead, the parties are to attempt mediation to resolve the issue and, in the event that mediation fails, then the parties will enter arbitration. This out-of-court process to resolve disputes is especially beneficial if there are young children of the relationship as any disputes can be resolved more quickly.

If you are married, you will still have to file a Petition for Divorce in court if you want to obtain a Divorce Judgment. A Separation Agreement can make it easier to obtain a Divorce and a Final Order as it typically demonstrates that all the issues that need to be considered before a Final Order or Divorce are granted have been addressed. Generally, parties can obtain a Divorce and Final Order on a "desk top" basis without any of the parties or their lawyers having to speak to the matter in court.

What does the Lawyer need?

The lawyer needs to know what the **agreement** is between you and your spouse/partner as to how you are handling your separation. Depending on the family structure, the following are the main points that must be covered:

- Custody and Care and Control of Children
 - Custody – Joint or Sole decision making about the children
 - Care and Control
 - Primary– children are primarily with one parent most of the time
 - Shared – mostly equal with both parents
 - Split – one child with one parent, one child with the other parent.
 - Child Support – Application of the mandatory Child Support Tables or some other form of support (explanation of support arrangement).
- Spousal Support / Common-law partner support
 - Requires a complex analysis to determine if there is entitlement to support, the amount of support to be paid, and for how long support should be paid.
- Property Division
 - Assets of both parties, on the date of separation, individually or jointly owned.
 - Debts of both parties, on the date of separation, individually or jointly owned.
 - Possible exemptions (property owned prior to relationship, gifts/inheritance/ insurance payouts and property acquired post-separation).

Children

If there is a child (or children) of the relationship, you need to determine Custody and Care and Control.

A good starting point in Manitoba is the Parenting Plan Tool through the Justice Website:
<https://www.justice.gc.ca/eng/fl-df/parent/plan.html>

Each parent should, together or by themselves, make a parenting plan. Not only is it a court requirement, but it helps parents think about how things are going to be different co-parenting post-separation.

For the most part, custody has to deal with decision-making for the child. Typically, separating parents have “joint custody” of the decisions affecting their children’s health, education and religious upbringing. Parents should discuss, cooperatively, issues with the other parent. Even if one parent has been making those decisions all along in the relationship, and both parents agree that should continue, the other parent should be informed and has the right to know what is going on with their children.

“Sole Custody” is only granted in very narrow and extreme circumstances. Generally, unless agreed to, it will only be granted if one parent has done nothing to exert parental rights or the communication between the parties is so deplorable (which is evidenced by expert reports over the years) that it necessitates an order of sole custody in the best interests of the children. Even if one parent has “sole custody” it isn’t automatic that the “sole custody”

parent can move with the children without the other parent's approval of the move.

Care and Control (or Parenting Time) has to do with the day-to-day care of the children. If a child spends 60% or more nights with one parent during the year, that parent is the "Primary Care" parent. If children spend more than 40% but less than 60% of their nights with both parents, the parents have "Shared Care and Control". If each parent has one or more children in their primary care, it is referred to as "Split Custody".

Child Support

Which Parent Pays Child Support

If one parent has primary care of the children, child support is paid by the non-primary care parent.

If the parents share care and control, child support may be off-set. The higher income spouse will pay the difference to the lower income spouse. If parents have equal incomes, neither will pay support to the other. Set-off child support is not automatic, and is subject to a detailed analysis under section 9 of the Child Support Guidelines.

Amount of Child Support to be Paid

The amount of child support to be paid is determined by what the payor parent's gross (non-taxed) income is, (subject to adjustments in Schedule III of the Child Support Guidelines and common law adjustments), the number of children, and which province the payor parent lives.

A good starting place for parents is the Justice - Child Support Table Look-up which includes instructions and worksheets which help explain how to calculate child support amounts:

<https://www.justice.gc.ca/eng/fl-df/child-enfant/2017/look-rech.asp>

Even if parents agree to reduce or not pay child support from one parent to the other, there must be a valid (statutory) reason for a non-payment/reduction of the child support or the agreement on this point could be invalid. The child support table amount is almost certainly the mandatory minimum to be paid.

The lawyer needs the last three income tax returns (or proof of income from all sources) for each parent for the last three years, and evidence of current income, which usually can be shown by the three most recent paystubs.

It is important to determine if there are "special expenses" for the children, such as medical/dental expenses, daycare/child care for the purposes of work or health, extraordinary school expenses like a school trip, or other extraordinary expense such as an extracurricular activity that is more expensive than a regular activity. Gather your receipts and proof of

these expenses and determine how you and your spouse/partner are going to share these expenses. If you are deviating from the legislation (which provides for sharing in proportion to the income of the parents), explain why you are doing so.

Spousal Support / Common-law partner support

A complex analysis is required to determine if there is entitlement to spousal support / common-law partner support, the amount of support to be paid, and for how long support should be paid.

Spousal support can be a touchy subject for most couples to discuss. The law is clear that the conduct of the spouses/partners (cheating or abuse) does not matter in determining whether or not spousal support or common-law partner support should be awarded or denied.

A good place to start is to list on a year-by-year basis what each spouse/partner did during the relationship, the reason behind it, and what their “roles” were.

- Education, what was achieved, did anyone stop their schooling, etc.?
- Employment – changes in jobs, promotions, terminations, types of employment and places worked?
- Relocations – where to, when, and why?
- Who took care of the children, who paid the bills, household chores, grocery purchases, who handled finances, etc.?

Generally, both men and women may be entitled to support. The payment of spousal support/common-law partner support must be evidenced in an agreement between the spouses/partners or court order for the payor to be able to deduct the payments on his/her taxes. Spousal support/common-law partner support is taxable in the hands of the spouse/partner receiving support.

The payment of child support has priority over spousal/common-law partner support. Child support will always be paid first. There can be some circumstances that even though a spouse/partner is entitled to support, there is not enough money for the support to be paid.

The spouse/partner receiving support has a statutory obligation to try to become self-sufficient – this may require retraining or education. At some point, support may/will come to an end or be reduced.

Property Division

Generally, each spouse/partner should receive an equal portion of the accumulated family wealth.

Spouses/partners should find time to sit down together and start listing the assets and debts they each individually have in their own names, as well as the assets they have in joint names.

The date to determine the value of the assets is the date of separation. It is typically the date the relationship was over or a date that the spouses/partners agree that their relationship is over.

Each party should obtain bank statements, loan documents, pension payout statements, and other documents to show where they are getting the valuation numbers for those assets.

If the parties cannot agree to the value of an asset, it may require that they hire an appraiser to determine the value.

Pensions are a shareable family property asset. If either party has a pension during the relationship, the plan administrator should be contacted and pension payout/division statements should be requested. These can sometimes take several weeks. If spouses/partners agree to equally share in the pensions, then they can be divided at source.

The parties should make a list of assets they feel may be exempt from sharing and take the details of these with them to discuss with their lawyer.

The parties should divide the household contents and other small value items amongst themselves. Generally, these items have the value of what they would sell for at a garage sale on the date of separation.

Conclusion

If both parties can focus on the issues that must be addressed in their separation (without attacking each other), and provide the lawyer with clear instructions and supporting documents as to the agreement reached, then a Separation Agreement can be one of the fastest and least expensive tools available to evidence a separation.

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