

July 2014



separation



When a marriage breaks down, the couple can arrange for a formal separation. The couple may eventually decide to divorce (see separate information leaflet on Divorce). There are two different ways for married couples to separate:

1. Separation agreement;
2. Judicial separation.

You can also do a lot of work towards agreeing on the eventual settlement before you ever go to court, which may save money and time in the long run.

Options for negotiated agreements before going to court

1. Mediation

Family Mediation is a process in which an impartial third person (the mediator) assists those involved in family breakdown to reach agreement regarding their children, finances and property. Mediation is particularly useful where the parties have agreed to separate or divorce or where they have any issues relating to maintenance, custody, access or guardianship.

The courts favour mediation and judges will adjourn cases in some instances and suggest

mediation before proceeding with the case in court.

The mediator should be accredited and professionally trained – his/ her job is to manage negotiations in an impartial way. Generally speaking mediation takes place over 3 to 6 sessions. The parties should obtain their own separate legal advice throughout the mediation process.

When agreement is reached, the mediator will draw up a written document usually referred to as a memorandum of understanding that sets out what the parties have agreed. The parties will each be advised by the mediator to get independent legal advice and the mediated agreement can then form the basis of the Deed of Separation or Decree of Judicial Separation/Divorce on consent terms.

Note: A mediated “agreement” of understanding is not a legal agreement until it is formalised by a Deed of Separation or Court Order.

The **Family Mediation Service** is a state-run, non-means tested and free service forming part of the Legal Aid Board. There can be a waiting time of a number of weeks/months. Each party must contact the mediation service separately to book themselves in. There are currently 16 offices located around Ireland, some part-time and some full-time. For more

information, check the website at www.legalaidboard.ie

Apart from the Family Mediation Service, you can avail of mediation on a private basis where you pay by the hour. Some solicitors and barristers have qualified as mediators and there links on the Law Society and Law Library websites. However, mediators do not have to be lawyers and there are a number of mediation bodies.

Northside Community Law Centre (NCLC)

Tel: 01 848 2988 Web: www.nclc.ie and

Ballymun Community Law Centre (BCLC) –

Tel: 01 862 5805 Web: www.bclc.ie

both provide a free family mediation service.

2. Collaborative Law

This is an alternative method of resolution of family law disputes including separation and divorce. The process takes place outside a court setting.

You and your partner work with your own specially trained collaborative lawyers and try to resolve the various issues through face-to-face meetings. Once issues are agreed the lawyers can draft a binding agreement. If the process breaks down neither of the lawyers

can act for you in any contested court proceedings.

The Legal Aid Board has published an information leaflet on Collaborative Practice which can be downloaded from their website.

What is the difference between Mediation and Collaborative Law?

There are a number of differences but the main one is that in Collaborative Law your lawyer is at your side at all times during the process and if the process has been successful you have a legally binding agreement.

In mediation the agreement reached between the parties is not legally binding. When the mediation has concluded the parties are advised by the mediator to go to their solicitors with the mediated agreement for legal advice. Mediation can be the first step to attaining a Legal Separation or Divorce.

Options for formal separation

1. Separation agreement

A separation agreement is a legally binding written contract between spouses, known as a **Deed of Separation**, setting out their future rights and duties. The agreement should set out the living and management arrangements for the children.

The effect of the agreement is that it is legally enforceable. The courts have the power to make the agreement a 'rule of court' if requested. This means that all of the agreed terms (where covered by appropriate legislation) can afterwards be legally enforced by applying to the court.

Unlike mediation, each party should have their own solicitor to ensure they receive independent legal advice when the agreement is being set out.

Following a separation agreement, neither spouse is legally free to marry another person. If it operates successfully, however, it can later form the basis of a divorce application.

The agreement will include a number of terms, depending on the circumstances of the individual couple, and include all details involving what duties each party will have now they are no longer a married couple:

These include:

- Provision for the family home (if owned) or any property – whether it will be sold or which spouse will remain there and under what conditions.
- Provision for any bills – household or medical – and mortgages.
- Provision for children in terms of money, education and access. All children must be provided for until they reach the age of 18 or, if in full-time education, 23. In making any agreement, parents must consider the best interests of the child despite the fact that their own relationship is now changed.
- Provisions for maintenance.
- Adjustment around succession rights.
- Indemnities from the other spouse's debts.
- Arrangements for family pets and access to shared animals, if any.

A separation agreement cannot deal with pension rights and generally it is necessary to get a court order for this. This is because trustees of pension schemes are not obliged to honour a separation agreement term that alters pension rights.

Completion of the separation deed depends on both spouses agreeing to all of its terms. The parties and/or their solicitors can continue to negotiate until agreement is reached.

In general, it is easier and less costly for all parties if they can reach an agreement on separation. However, if they cannot agree and all negotiations fail, or where the matter is very complex and involves pension adjustment orders, a judicial separation may be necessary.

Judicial Separation

A judicial separation case is heard in the Circuit or High Court by a judge. It is sought generally where a couple fail to reach an agreement, where there are more complex financial matters or where a Pension Adjustment Order is needed.

Judicial
Separation
and Family
Law Reform
Act 1989

Family Law
Act 1995

When the Court is satisfied to grant a Decree of Judicial Separation, it can make various ancillary orders in relation to various financial and property matters, including Orders relating to the family home, maintenance and pensions. When deciding to make any such Orders, the Court is obliged to endeavour to ensure that proper provision is made for each

spouse and for any dependent member of the family. In deciding whether to make any such Orders, the Court will take into consideration the various factors set out in Section 16 of the Family Law Act 1995, which include the following:

- a) The income and capacity, property and other financial resources of the spouses;
- b) The financial needs, obligations and responsibilities of each of the spouses;
- c) The standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses separated;
- d) The age of each of the spouses and the length of time during which the spouses lived together;
- e) Any physical or mental disability of either of the spouses;
- f) The contribution which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family (including financial and non-financial contributions);
- g) Any income or benefits to which either of the spouses is entitled;

- h) The conduct of each of the spouses, if that conduct is such that in the opinion of the Court, it would in all circumstances of the case be unjust to disregard it (misconduct is only taken into consideration by the Court if the misconduct is considered to be gross and obvious; (in other words, the misconduct has to be of an extremely serious nature));
- i) The accommodation needs of either of the spouses;
- j) The value to each of the spouses of any benefit which by reason of the Decree of Judicial Separation that spouse will forfeit (such as a benefit under a pension scheme);
- k) The rights of any person other than the spouses.

A couple may not seek a judicial separation when they already have a separation agreement in force.

To apply for a judicial separation, one of the following six grounds must be present:

1. The respondent spouse has committed adultery.

2. The respondent spouse has behaved in such a way that it would be unreasonable to expect the other spouse to continue to live with him/her.
3. The respondent spouse has deserted the other for at least one year at the time of separation application.
4. The spouses have lived apart from one another for one year up to the time of the separation application and both spouses agree to the separation decree being granted.
5. The spouses have lived apart for at least three years up to the time of the application for a separation (this applies whether or not one or both spouses agree to the separation).
6. The court has decided that a normal marital relationship has not existed between the spouses for at least one year before the date of application for separation.

The most frequent reason given to the Court is **ground 6**. This has the benefit of not placing the blame on one party more than on the other. **An application is made to the Circuit Court, normally through a solicitor, and the same solicitor cannot act for both parties.**

You are allowed to represent yourself in court – no one is legally required to have a solicitor – but you are advised to be represented by a lawyer as there are many complex matters. If you cannot afford a solicitor, you can apply for civil legal aid (see below) and, if granted, a solicitor will be appointed to represent you.

The solicitor will discuss whether any of the grounds for separation exist and will then advise you with regard to counselling or mediation services available to couples. The solicitor will also discuss the possibility of a separation agreement.

What do I need to apply for Judicial Separation?

To apply for a Judicial Separation, the following documents must be prepared by the **applicant** and submitted to the office of the Circuit Family Court:

1. A **Family Law Civil Bill**. This document sets out details relating to you and your spouse, when and where you were married, what each of you do for a living, where each of you live, how long you have lived apart and the names and birthdates of your children (if any).
2. A sworn **Affidavit of Means** which is a document that lists your assets, income, debts and/ or liabilities, all monthly outgoings and pension entitlements.
3. A sworn **Affidavit of Welfare** if there are any dependent children. This document sets out details of the children such as dates of birth, where and with whom they live, details regarding their education, health, childcare arrangements and any maintenance and access arrangements already in place.
4. A document that certifies you have been advised of the **alternatives to judicial separation**. This is signed by a

solicitor, and certifies that you have discussed the possibilities of reconciliation, mediation and separation agreements.

Copies of the relevant forms are available from your nearest Circuit Court Office. Some of these forms are also available on the Courts Service website: www.courts.ie under Rules and Fees > Circuit Court > Schedules > Schedule B - Forms. The court rules that govern family law proceedings can also be viewed on the Courts Service website under: Court Rules > Circuit Court Rules > Index of Rules > Order 59.

What should the Respondent do?

When the respondent is served with a Family Law Civil Bill, he/she should lodge an **Appearance**. This is a document that indicates to the Applicant and the Court that the respondent has been served with the proceedings. The respondent is then allowed some time to file (register papers with the court) his or her **Defence and Counter-Claim, Affidavit of Means and Affidavit of Welfare**.

What happens after the documents are all filed?

Once all documents are filed by the applicant and respondent, or earlier if both parties agree, the County Registrar (a Court official with powers similar but much more limited to those of a Judge) will convene a meeting or (meetings) with the people involved and their lawyers, if they choose to be represented. These meetings are called **case progression hearings**, and they happen in a court room though with much less formality than a court hearing. At these hearings, the County Registrar will make sure that both sides identify the issues in dispute and are prepared for hearing.

What happens at the case hearing?

When the case is ready, it will be listed before a judge who will hear both sides and ensure that the legal requirements are met. If both parties agree at any time during this process to settle the case, then it can be very quickly brought before a judge who must be satisfied with the settlement agreed.

When a Decree of Judicial Separation is granted, Ancillary Orders are usually made by the judge on issues such as:

- Maintenance
- Access to and custody of children
- Property adjustments
- Sale of property
- Extinguishing of succession rights
- Pensions
- Life cover.

Interim Orders are available to parties seeking a judicial separation. These are orders that will be in place up until the hearing of the application. As there can be long delays in getting the full case heard in the Circuit Court, these orders are important. They can include:

- A Protection Order
- An Interim Barring Order
- A Custody Order
- A Maintenance Order
- An Order freezing an asset, such as a lump sum termination payment from an employer.

If it becomes clear at a later stage that significant information was deliberately withheld by either party, then any order can be adjusted so long as the court is satisfied it would be fair to do so in the circumstances. (See Domestic Violence, Family Law & Children and Maintenance leaflets for more information).

The cost for these procedures can be high, depending on a number of issues, including the attitude taken by both parties, any expert evidence needed and whether the case goes to court. You are entitled to get as accurate an estimate as possible of the costs involved from your solicitor.

The family home

A family home refers to a dwelling in which a married couple normally lives. Protection is provided for the family home of a married couple in Irish law, in that one spouse cannot sell, mortgage, lease or transfer the family home without the consent of the other spouse.

Family Home Protection Act 1976 as amended by Family Law Act 1995

This legal protection applies even where the family home is registered in the name of one spouse only. It must be noted that the court can dispense with the need for consent where it considers that consent is being unreasonably withheld. A spouse may also apply to the

court to stop the other spouse/civil partner from doing anything that might damage his or her interest in the family home.

The *in camera* rule

All cases in the Family Law Courts in Ireland are heard *in camera* (in private). Therefore, members of the general public are not permitted to enter the court. The *in-camera* rule has changed recently to allow the media to have limited access to family law hearings and to have limited rights to report on the proceedings.

Legal Aid

You may be eligible for legal aid if you are a person of moderate means. To qualify for legal aid in civil cases your disposable income and assets must be below a certain limit, there must be merit to the case and there must be no other satisfactory way of resolving the problem. After approval, the Legal Aid Board provides you with the services of a solicitor and, if necessary, a barrister. You can apply for legal aid for more than one matter at a time. The Board's offices are called Law Centres and are located around the country. For the location of your nearest Law Centre, call 1890 615 200.

All those who are granted legal advice and/or legal aid must pay a fee called a contribution to the Board. The minimum contribution is €30 for legal advice and €130 for legal aid. Law centre staff will advise what a person's actual contribution will be as each person is assessed on an individual basis.

Before you qualify for legal aid, you must first satisfy a means test. Your disposable income must be less than €18,000 and your disposable capital cannot be more than €100,000.

If you are in receipt of allowances, they will be taken into account and they are deductible when calculating disposable income. The **maximum allowance** on childcare facilities if you are working is €6,000 per child per year and the maximum allowance on accommodation costs (e.g. rent) is €8,000 per year. The

Public Service Pension Related Levy and the Universal Social Charge are now also considered and are deductible for the purposes of assessment.

The value of an applicant's home and its normal contents are excluded when assessing the value of his/her capital resources (property). If your capital resources exceed €4,000, you must complete a Statement of Capital.

For further details on financial eligibility requirements or for details of other allowances, **contact your local Law Centre**. A full list is available at www.legalaidboard.ie. FLAC has prepared a guide to the state legal aid system which you can download at bit.ly/CLAflacsheet.

Need more information?

Legal information leaflets are also available from FLAC on a variety of other areas of law. They are free to download as PDFs from the FLAC website or in print from your local FLAC centre or Citizens Information Centre.

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FLAC Mission Statement

FLAC (Free Legal Advice Centres) is a human rights organisation which exists to promote equal access to justice for all.

While every effort has been made to ensure the accuracy of this leaflet, it is provided for general legal information only and is not intended as a substitute for legal advice. The information it contains is correct as of date of publication. FLAC does not accept any legal liability for the contents of this leaflet. People with specific legal problems should consult a solicitor.

FLAC is very grateful to Eugene Davy, solicitor, who finalised this leaflet and Susan Webster, solicitor, who assisted with earlier drafts.

FLAC offers free, confidential basic legal information via its lo-call telephone information line at 1890 350 250 and one-to-one legal advice through its network of voluntary advice centres countrywide – www.flac.ie/help



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