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# Legal Matters®

## Legal separation vs. divorce: pros and cons

If you and your spouse are having difficulties but you're not 100-percent certain about divorce, it may be worth discussing the option of "legal separation" as an alternative. This is a formal arrangement, backed up by a court order or written agreement, that allows a couple to stay legally married but with enforceable provisions in place to address spousal and child support, custody and visitation.

It's not an ideal arrangement for everyone, but there are reasons to consider it, as well as several drawbacks.

Some couples consider legal separation because of their religion. Certain faiths prohibit or discourage divorce and a legal separation allows a couple to live separate lives without losing the financial security

**A legally separated couple has a chance to assess life apart while having important conversations about custody and support issues.**

of marriage. For example, if a couple is legally separated and one spouse passes away, the surviving spouse retains the right to receive Social Security and pension payments.

Other couples might consider legal separation as a way to determine whether their marriage is irretrievably broken. When a couple divorces, it's permanent. But a legally separated couple has a chance to assess life apart while having important conversations about custody and support issues. They can reverse the separation if they are able



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to resolve their differences. If they can't, their separation agreement might form a useful framework for a quicker, more efficient divorce. In addition, couples may feel more secure about their decision to divorce if they have attempted a legal separation period.

Another potential benefit to legal separation is that, at least in some states, once a couple is legally separated any new property either spouse acquires and ongoing income that each spouse is receiving does not become marital property and thus is not divided as part of a marital estate. This may work to your advantage or disadvantage, depending on your circumstances, but it's something you would want to discuss further with an attorney.

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## Biological granddaughter can't inherit despite 'equitable adoption'

Many states have a legal doctrine known as “equitable adoption” under which a parent-child relationship can be recognized even if the child never goes through a formal adoption procedure.

This usually happens in cases where a parent has acted as a child’s parent for a significant period of time without ever formally adopting the child. This may include cases involving a stepchild or foster child. In many states, courts will deem a child adopted and thus entitled to inherit from a parent who dies without a will if the relationship began while the child was a minor and continued throughout the parties’ lifetimes, and it can be shown that the purported adoptive parent would have formally adopted the child if not for some legal obstacle (for example, a biological parent not giving consent).

However, a recent North Carolina case shows that equitable adoption has its limits. In that case, a young woman named Harley Shearin sought to have herself declared the sole heir when her biological grandfather, George Shearin, died intestate (without a will) with no other living descendants.

Shearin’s father, Timothy, was legally adopted by his stepfather as a child. But as an adult, he reconnected with George, his biological father, and developed a close relationship with him. Timothy died at age 32, but Harley maintained a close relationship



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with George until he passed away.

In seeking to have herself declared George’s sole heir, Harley argued that when Timothy reconnected with George he became his legal son once again via equitable adoption. Accordingly, she contended, she became his legal granddaughter.

But the North Carolina Supreme Court saw it differently, deciding that because Timothy was already an adult by the time he reconnected with his biological father the doctrine of equitable adoption was inapplicable. Because Timothy was not equitably adopted, Harley was not George’s granddaughter for the purpose of intestate inheritance.

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## Alimony reduction delayed based on business sale

While alimony laws vary from state to state, many states have laws in place stating that income from an asset that has been assigned to a party in a divorce cannot be factored into a party’s income for the purpose of calculating their alimony obligation. But a recent decision from Massachusetts shows that this is not always the case.

In that case, divorcing husband Shaun Dolan was assigned his 50-percent ownership in a business as an asset. Following the divorce, he and his business partner sold the company. Dolan then sought to lower his alimony obligations based on the reduced income that resulted from the sale. (He took a position with the company’s new owners at a lower salary).

A family court judge granted the modification, but said it wouldn’t take effect for another five months, at which point Dolan would no longer be receiving

installment payments from the sale of the business. According to the judge, those payments represented a significant temporary increase in his income over what he was making at the time of the divorce.

Dolan appealed the ruling, arguing that it contradicted a provision in the state alimony law that requires courts to exclude “capital gains income and dividend income” deriving from assets divided during the divorce.

But the Massachusetts Appeals Court found that the provision did not apply to this situation, where the judge was only considering Dolan’s temporary extra income to determine whether he had a “material change in circumstances” warranting modification, not to calculate how much he would pay going forward. In this case, the change in circumstances justifying modification wouldn’t kick in until Dolan stopped receiving the installment payments.

# Enforcement issues regarding cross-border prenups

Prenuptial agreements are a useful way for soon-to-be married people to provide themselves with security in the event of a divorce. Enforcement of these agreements is quite simple when both members of a divorcing couple live in the state where the agreement was entered into and where their assets are. But in an increasingly mobile society, it's likely that post-divorce both spouses might not reside in the same state and assets may be spread across varying states.

This can lead to challenges, since each state has its own laws that govern how courts may interpret and enforce prenups. It can get even more complicated when prenups involve couples from different countries with assets all over the world.

If you are marrying someone with strong ties to another state or country and are considering a prenuptial agreement, it is important to consult with a domestic relations attorney familiar with the complexities that cross-border prenups may pose.

A particularly critical issue is the choice of jurisdiction to govern the prenup. A prenup is commonly drafted under the law of the state where the couple intends have their primary residence. But it may not be that simple. Where the couple lives at the time of the marriage may not be where they plan to have their primary residence in the

future. They may not even know where that will be. So it's important to consider where their close personal connections are, any business connections they may have and where the bulk of their assets are located in order to determine which state's laws they want to have apply.

When a couple is drafting a prenup with cross-border implications, they need to ensure the agreement complies with the law in every possible jurisdiction, meaning where a party lives, where a party does business, where a party holds citizenship and where a party has family contacts and assets. This may even mean the attorney needs to consult with attorneys in other countries to ensure the agreement complies with laws there. Otherwise the prenup could potentially be unenforceable in a place where the couple has significant assets that were supposed to be subject to the agreement.

What if you have a prenuptial agreement drafted in another country but you are getting divorced in the U.S.? Courts here will generally recognize and enforce such an agreement unless it's written in a way that would render it completely unreasonable. However, there are no guarantees. That's why it's so important to meet with a skilled attorney who can counsel you through these issues.

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## *Legal separation vs. divorce: pros and cons*

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Health insurance coverage is yet another reason some couples might consider legally separating. That's because if they are still married, they can both remain on one spouse's insurance plan. If they get divorced, the loss of health care coverage for the uninsured spouse could then become part of the post-divorce cost calculus. It's worth noting, however, that some employer-sponsored health plans don't permit a legally separated spouse to stay covered, so check the fine print of your plan.

The biggest consideration in favor of divorce, on the other hand, is that a legally separated couple can't move on with their lives the same way a divorced couple can. A legally separated person is still married and thus cannot get married to someone else. If one spouse wants to remarry, then he or she has to



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go through the process of a divorce.

The bottom line is that legal separation isn't appropriate for everybody. But in states where it's permitted, it is a good idea to discuss this option with your attorney.



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## Life insurance in a divorce: Why is it necessary?

The typical divorce involves a laundry list of issues to address, ranging from who gets the house, how the cars are divvied up and who ends up with the

dog to issues of custody, child support and alimony.

You can add life insurance to the list. This issue typically comes into play in cases where one spouse will be paying child and/or spousal support. If the paying spouse already has a life insurance policy in place, the court will likely order that spouse to keep the policy and keep their ex-spouse

as its beneficiary. This is to ensure that if the payor spouse passes away, there is sufficient support for the recipient spouse and/or the kids.

If there is no life insurance policy in place, the court may order the paying spouse to purchase a policy for the benefit of the recipient spouse or the children.

The amount of insurance required, however, can be tricky. One way to calculate it is to determine how much child support the paying spouse will be paying until the children become adults and use that amount for coverage. But this does not take into account other potential expenses, such as unexpected medical expenses, costly activities the kids may be involved in and college expenses.

It's an even trickier problem for alimony. If the divorce agreement calls for \$1 million in alimony over 10 years, \$1 million in life insurance might seem reasonable. But what if the payor spouse dies the next year? Then the recipient spouse is getting the benefit of the full \$1 million nine years early. That doesn't seem fair to the payor.

If the payor spouse is older or not in good health, life insurance may be unreasonably expensive if it's available at all, in which case the parties may need to look to other financial vehicles.

These are only a few of the issues that can arise. Talk to an attorney to learn more.



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