

Chapter Thirteen

WHAT IS A SETTLEMENT AGREEMENT?

So, you've both decided to settle, instead of going to court. Good for you. Now you "just need to put it in writing." Maybe you have some of the questions set forth below.

If we settle everything without going to court, is a document drawn up and sent to a judge?

Yes.

An attorney or an attorney mediator will draw up an Agreement, either before, during or after litigation has commenced. An Agreement may be prepared by an attorney mediator, by a collaborative attorney or by an attorney hired for negotiation or for litigation. The Agreement becomes a binding contract when signed. If either you or your spouse violates the Agreement, you could be sued for breach of contract. The document will be submitted into evidence during the court case, and will be incorporated into your final divorce decree. It will then also become a binding court order. If either one of you violates the terms of the Agreement later on, you could be held in contempt of a court order.

The Agreement is actually a settlement of a case either of you could bring for property division, debt division, alimony, custody, visitation and/or child support. Viewed in that light, it is important to understand that you can't make your spouse sign an Agreement. You can't make your spouse settle his or her case. If you do not reach an agreement, if you do not want to give in to your spouse on everything, and if you do not want to maintain the in-limbo *status quo*, you will have to go to court, put on your case and ask the judge to enter an order granting your requests.

Reaching an agreement outside of court is very often the preferable way to go.

If we do an Agreement, do we have to agree to what the law would require of us if we went to court?

No.

If you work out an agreement, there are no rules. Anything goes as long as it is legal. You do not have to do what the judge would do if he or she heard your case. You are free to craft solutions a judge wouldn't think of, wouldn't order or wouldn't take the time to put together.

You should, however, enter into your Agreement with a full understanding of what would likely happen if you went to court, in order to evaluate the reasonableness of your positions. If you agree to provisions such as a waiver of child support, you need to understand that some provisions, and you need to understand which ones, if any, may not be enforceable, or may have no teeth as drafted.

Do we need to sign and put an Agreement in place before we separate?

No.

You can reach agreement, and sign a document embodying those agreements, either before you separate, or after. You may settle before a case is filed, or after. You may settle on the eve of trial, or on the day of trial. Sooner is usually preferable to later, if the goal is to avoid unnecessary turmoil and attorney's fees. Exactly when an Agreement is prepared and presented to you, or to your spouse, is a matter of mutual planning or of separate strategy.

What is the Agreement called?

The document may have any of a number of titles such as: Separation Agreement; Separation and Property Settlement Agreement; Custody, Support and Property Agreement; Mediated Separation Agreement; Collaborative Settlement Agreement; or very commonly, Property Settlement Agreement or "PSA." Attorneys often talk of "PSAs." What you call the document doesn't matter.

Do I need a lawyer to prepare the Agreement?

Yes.

Yes.

Yes.

You need a lawyer to prepare your Agreement.

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You need a lawyer to prepare your Agreement.

And if your spouse's attorney has prepared the Agreement, you need your own lawyer to review that Agreement for you, and to inform you of

all the important little omissions and phrases which will certainly need to be added, deleted or corrected in order to protect you. Phrases such as “exclusive possession,” “timely indemnify and hold harmless” and “relinquish and waive all future claims.” These little words actually do have very important meaning. You are not a lawyer. You will not even realize there were problems, or know what words should have been included to protect your interests but weren’t, no matter how smart you are. The smart thing to do is to pay someone in the beginning, to make sure you don’t pay even more in the end.

If I don’t like the Agreement my spouse has given me, what should I do?

Don’t sign it. It’s just a proposal – a starting point in the negotiation.

If a letter accompanying the Agreement “only gives you” some amount of time “to respond,” you still don’t have to do anything. You can throw the proposal right in the trash if you want to. No one can make you settle until you are ready.

But there is such a thing as waiting too long.

If you won’t negotiate or sign anything, because you want to keep milking your spouse’s generosity for as long as possible, you will find that that generosity will lessen as your spouse’s frustration with you grows, and may ultimately end completely. Animosity will increase between you, harming the children, because of your unwillingness to move forward. If you refuse to address the situation in a timely manner, you will wind up years behind the curve in your efforts to get your life back, and in your efforts to reestablish yourself in the job market, with only yourself to blame.

Don’t wait so long to resolve matters that you hurt yourself in the long run, and are forced to settle for a less desirable result, and at greater cost.

If you are going to have to support yourself in the future, start getting yourself ready to get back into the workforce Right Now, especially if you are a female in your late forties. Don’t put all your eggs in one basket, unless you are holding the basket.

Get an attorney to review the Agreement. See how far apart you are. File a lawsuit if your views are so far apart they can’t be settled, before your spouse does and you lose all control over your life. Or you may wish to discuss mediating the differences you each have with the proposal. Or you may discuss whether you could resolve your disagreements collaboratively. Or if you hire an attorney, you and your attorney could negotiate the Agreement adversarially with your spouse’s attorney.

If I like the Agreement my spouse has given me, should I just sign?

Absolutely not. If you are ready to move forward with a settlement, if your spouse’s attorney has prepared the first draft, it is vital that you not sign the Agreement unless you at least have the Agreement reviewed by an attorney who has only your interests in mind. No matter how much pressure is put on you to sign. No matter how much you want to “keep it simple” without “getting all the lawyers involved.” No matter how conflict averse you are. To request revisions so the Agreement clearly and appropriately reflects what you and your spouse may have verbally agreed upon, or to request revisions that are fair to you, should not create conflict.

You have to involve a lawyer to review the Agreement for you. Your spouse’s attorney does not care what you want, does not represent you and may even mislead you. You should not trust that attorney no matter how nice, how sympathetic or how agreeable he or she might seem. That attorney will have properly done his or her job to draft an Agreement that protects only his or her client, and not you. Sure you may want to “get it all over with” real bad. But if you don’t do it right, you may find that

the problems are not really over just by your signing off on your spouse's proposal, and will blow up with a vengeance in the future, right in your face.

If we can agree on everything, can my spouse and I just write up an Agreement on our own, maybe using a copy of a friend's Agreement, or one we get off the internet, to save money?

Only if your divorce does not involve spousal support, retirement, significant assets or a house, and even then for you to write up an Agreement yourselves would probably still be a bad idea. Most likely, the document will not be specific as to your state's laws, and will not be tailored to your situation and life. Later on, when you and your spouse may not be on such friendly terms, especially if you have no minor children keeping you involved with each other, you will realize that the document did not protect you. You will then spend more money on attorneys, trying to fix, trying to clarify and unsuccessfully trying to undo what should have been done properly in the first place, and then you will pay a higher price.

If my spouse and I have agreed on everything, why don't we just decide which of us will hire an attorney to draw up an Agreement, and the other of us will just sign that Agreement?

You could. But if you just sign off on the Agreement your spouse tosses at you, you will have taken small part in creating your future. The Agreement will be drafted from your spouse's perspective, and will contain subtle biases and omissions which are not in your favor. If instead you hire the attorney to draw up the Agreement, and the Agreement is mailed to your spouse, or left on the kitchen table, your spouse may feel left out of the process, and as if he or she is simply signing off on your requests without any involvement or input in the decision-making.

The Agreement will contain lots of language like "whereas," "hereby" and "aforementioned," and will refer to your family as "the parties" and "said children." The home you may remain in with the children will be termed "the former marital residence."

You could instead participate jointly and equally in the process redefining your family and your life, and could create your futures together. By using collaboration or mediation, you can have an Agreement prepared which is written more simply, which refers to all of the members of your family by name, and which does not contain a lot of stuffy, old-fashioned and unnecessary legal jargon.

Should the Agreement cover every detail and possibility that could occur?

It can't. You have to draw the line somewhere. If you each want a high level of control and predictability, you may try to define what the plan will be in each and every contingency, but you won't be able to cover every possible event that could occur.

If you and your spouse have a high level of trust in each other, certain provisions within your Agreement may be very general, rather vague or even aspirational. You may state that visitation with the children, extracurricular activities and the costs for college shall be "as mutually agreed upon." On the other hand, if you lack trust in each other, you may set forth a detailed visitation plan that defines who gets the kids on which holidays in even and odd years, starting with which one of you in which year, from what time to what time, and where the visitation exchange will take place. You may merely state that you will divide your household goods by agreement, or you may feel the need to attach two comprehensive lists of possessions as an Attachment to your document. It may be very important to you to clarify for the record just who gets the shower curtains. Or not.

You, your spouse and your attorney should know and define just how much protection is necessary or desirable based upon the assets involved, your unique relationship, your family history, your children's needs and the current situation.

What is the actual purpose of the Agreement?

Most lawyers will tell you that the purpose of writing agreements down in a contract, and then having the contract signed, is so you can sue the other party in court if he or she violates any of the contract's provisions. Viewed in this way, the purpose of the Agreement is to create a binding, enforceable document which the other party must obey, and if he or she doesn't, the court will make him or her do what was promised.

You may decide, however, to include aspirational provisions in your Agreement. These provisions merely indicate that you've considered a particular matter, such as college costs for a child or extracurricular activity costs, but can only promise to contribute financially "to the extent you are able" or "only if the choice of activities is mutually agreed upon." You may agree to waive child support. Provisions drafted in a certain way may not protect either one of you, and may not be enforceable. Aspirational provisions may, however, indicate that you jointly considered certain matters, and that you have a certain intent, which intent may or may not ever be realized. Or you may each in good faith do your best to attain your aspirational goals, and will succeed in making them a reality.

What if we jointly decide not to follow the Agreement we signed?

You can.

The world won't stop spinning, and you won't be arrested. The terms of your Agreement, in some sense, such as those provisions pertaining to a visitation schedule, can be viewed as a sort of fallback if you don't agree

otherwise. You're not breaking the law if you begin to follow a different visitation schedule by mutual agreement.

But be very clear. If you decide to do *anything* other than what you agreed in writing to do, and then have a falling out with your ex-spouse, perhaps when one of you starts dating another, you each have the right to enforce the terms of the original written Agreement. This is true regardless of the fact that you have both been doing otherwise, regardless of for how long you have been doing otherwise, and regardless of your verbal agreement to do otherwise. Possibly even regardless of the contract you both signed modifying your original Agreement, but which contract you didn't incorporate into a new court order to modify the order which incorporated your original Agreement. And even if you don't mind the lower amount paid for the buyout of your equity in the home, if you die perhaps your executor or heirs will, and they may have standing to file a lawsuit, using assets from your estate to pay the legal fees to sue your ex-spouse.

If you verbally agree to a higher or lower support amount, or home equity buyout, than what your Agreement states, rock beats scissors, and paper beats air.

Can we modify our Agreement in the future, or are we stuck with it forever?

Yes and yes.

Provisions regarding property, debt and almost all other matters are usually considered to be carved in stone. That means that if one of you changes your mind, and the other doesn't, the Agreement will not be changed. But if you both agree, you can always do an Addendum, or a Modification Agreement, to be incorporated into a new court order, changing anything from the first Agreement.

However, understand that if you don't incorporate a Modification Agreement into a new court order, the Modification Agreement may not be enforceable. Rock beats scissors, and orders beat agreements.

Some provisions, such as those involving child support, custody and visitation, will always be modifiable if a significant change in circumstances occurs after entry of a previous court order, such as the original order incorporating your Agreement. That means you can always go to court later on and try to change those provisions.

Spousal support provisions may or may not be modifiable, depending upon the wording of the document. That wording is therefore critical. Make sure you are very clear as to whether any spousal support payments will either be modifiable, or nonmodifiable, in your Agreement.

But don't bank on making future revisions when you sign your original document, regardless of what your spouse may be telling you about "just separating to work on the marriage," and even if you're still in denial and think you'll eventually get back together. Before you sign your name to any Agreement, be sure you can live with what that document states, forever.

Will the Agreement be a public record?

Usually, yes. Our court system is supposed to be open, so your document will be placed in a court file folder with your name on it, and the folder will be kept somewhere in the courthouse before it may be moved to Archives, or scanned and destroyed. Your file may even be recorded in public computer records.

Will anyone care to read your divorce papers over at the courthouse? Probably not. Maybe. Is there anything you can do to prevent your life from being available for anyone to peruse? Probably not. Maybe.

Some courts will at least have a separate filing system not available to the public, and not put into the public computer records, for private matters such as social security numbers, and asset and debt account numbers. But the details of the boozing, infidelity, cruelty or visitation arrangements involving your family are not considered private. You may ask your attorney to seek a protective order sealing your case from the public eyes, but in the absence of good cause, the court will assume that inquiring minds have a right to know.



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