

Marital Separation and Property Settlement Agreement

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GETTING STARTED

Generally, a Marital Separation and Property Settlement Agreement is drafted according to the laws of the state in which at least one party lives. When executed and witnessed properly, it is a valid, binding, and enforceable contract between the parties, but it is not in and of itself an instrument of divorce or a divorce decree. You must still file for divorce in court (typically in the county where at least one of the parties meets local residency requirements).

Most parties ultimately do file for divorce, at which time an Agreement can be "merged" or "incorporated" into the eventual divorce judgment. "Merged" means that the Agreement becomes a part of the judgment and, therefore, is no longer an individual contract, the terms of which can be separately enforced. The court can, however, use its powers of contempt to enforce any provision of the judgment. When the Agreement is "incorporated" (or sometimes called "approved") into a judgment without a merger, the terms of Agreement can be enforced as a judgment or as an independent contract. SmartLegalForms, Inc., assumes that you and your spouse will proceed to divorce and will request that the Agreement be incorporated into the divorce judgment.

MARITAL SEPARATION AND PROPERTY SETTLEMENT AGREEMENTS IN GENERAL

A Marital Separation and Property Settlement Agreement is simply a written contract dividing your assets and property; outlining your rights, obligations, responsibilities; and settling such issues as alimony, child support, and child custody and visitation. An Agreement may be drawn up before or after you file for divorce – even while you and your spouse are still living together. If you have prepared an Agreement and do ultimately move toward divorce, you should ask the court to "incorporate, but not merge" the Agreement into the final judgment (also called a decree). As a contract, the Marital Separation and Property Settlement Agreement will bind you over many years and determine your rights, obligations, and responsibilities from your marriage. You and your spouse can mutually amend the agreement, or it can be modified by an order of the court, provided the agreement does not specifically state that the agreement is not subject to any court modification, or there is an express waiver of a right in the agreement. In addition, the court can always modify provisions in an agreement regarding the care and custody of any minor children.

DIVIDING PROPERTY BY AGREEMENT

In constructing this Agreement, you have been asked questions regarding your marriage, children, plans for child support, custody, and visitation, alimony, division of property, retirement benefits, debts, continuing insurance coverage, tax returns, and so forth. SmartLegalForms, Inc., assumes that you and your spouse will be able to reach agreement on these issues and that there will be no need for the court to divide the marital property. The Agreement will also cover custody, visitation rights and schedules, and other issues that you may want to deal with after the divorce. If you cannot agree on these issues, then you have a contested divorce, and you should consult an attorney.

In an uncontested divorce, the court nearly always approves the Agreement of the parties if it is generally fair and the court is convinced that the Agreement was entered into by both spouses with no fraud, mistake, or coercion. Often the court may want to review financial affidavits attached to the Agreement in order to determine the accuracy of child support figures and the fairness of the property distribution.

HOW THE COURTS DIVIDE ASSETS AND OBLIGATIONS:

I. COMMUNITY AND SEPARATE PROPERTY STATES

There are several "community property" states, including Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Community property is property that is owned by husband and wife together. Each spouse is viewed as owning an undivided one-half interest in community property. Separate property is property that is owned by one or the other spouse by himself or herself.

Determining whether a piece of property is community or separate is very important when dividing property during a divorce. The general rules are:

- Regardless of whose name appears on the title or debt, all property acquired by either spouse after the date of marriage is assumed to be community property – unless an established exception exists;
- All property acquired by a spouse prior to the marriage is that spouse's separate property;
- All property acquired by either spouse during marriage (with the exceptions of gifts and inheritances to a specific spouse) is community property;
- All property acquired after the couple permanently separates with the ultimate intention of divorcing is separate property; and
- All property acquired during a "trial separation" with the hope of getting back together (regardless of whether the couple does in fact reunite) is community property.

Without a settlement agreement, the court would order an approximately equal division of the assets and liabilities of anything that constitutes community property. All separate property will be awarded to the person that owns that property.

II. EQUITABLE DISTRIBUTION STATES

With the exception of Mississippi, all other states follow the tradition of "equitable distribution". This means that the court, if you cannot reach agreement on your own, "equitably divides" the marital property based on the income, expenses, and responsibility of the parties. The court normally considers the length of the marriage; the age, health, and conduct of the parties; and their occupations, skills, and employment potential. Equitable division does not mean equal division and seldom is property equally divided. As such, if a debt is created or a piece of property is purchased and controlled primarily by only one party, it may be considered to only be under the rights or obligations of that party. In these situations, these assets and debts are sometimes handled like personal property - not marital.

The court will order an approximately equal division of the assets and liabilities when:

- It was a long marriage;
- The spouses had nearly equal wealth before the marriage;
- Both spouses have approximately equal earning ability; and
- There are no minor children.

The court will award more property (and fewer debts) to the spouse who has:

- Less earning ability;
- Less financial contribution to the marriage if the marriage was short in duration;
- Poor health or other adverse circumstances; or
- Custody of minor children.

Without a settlement agreement, the court determines what qualifies as marital property, sets a value to it, and then makes a monetary award to adjust for any imbalance in terms of one party having title to less than an equitable portion of the property.

In an "equitable distribution" state, all property (no matter how it is titled), acquired during the marriage by either party is "marital property." Marital property also includes any interest in real property held by the parties as tenants by the entirety, unless the real property is excluded by a valid agreement. Marital property does not include property acquired before the marriage or through gifts or inheritances to either spouse, property that is excluded by valid agreement, or that is directly traceable to any of these sources. Be aware, however, that there are situations where "non-marital" property can become marital or partially-marital property. You should consult an attorney if you have any questions about the status of your property.

III. MISSISSIPPI

Mississippi does not follow either the "equitable distribution" or the "community property" tradition for the division of property in divorce, which means that the division of property is up to the judge. Without a settlement agreement, jointly-titled property will be divided equally by the court. Separately-titled property will be awarded to the person in whose name the property is titled.

REVIEW THE AGREEMENT CAREFULLY

Please read the document carefully and remember that minor revisions or revisions caused by our error are made without charge. However, if major changes are required as a result of a change of mind or circumstances on your part, an additional charge may be assessed on a case by case basis with your prior approval.

SIGNING AND FILING THE AGREEMENT

Once you and your spouse agree on the terms of the Agreement, it must be properly signed (executed).

Note: Signatures must be certified by a Notary Public, but the parties do not have to sign the document at the same time, or in the presence of the same Notary. Once the document has been signed by both parties, it is considered binding and "properly executed".

Some people prefer to print at least two copies of the Agreement, with each party signing each copy in the presence of a Notary. Each party may then have an original copy with original signatures for their records, and one original copy with original signatures is then available for the court.

Other people prefer to print only one copy of the Agreement, have each party sign it in the presence of a Notary, and then make two copies – allowing for each party to have a copy for their records, and the original document with original signatures is available for the court.

An executed settlement agreement, with original Notarized signatures of both parties, is usually filed with prepared divorce documents at a local court clerk's office. Be sure to follow the filing procedures outlined in either a related divorce product, or at the specific direction of your local court clerk.

Note: Whenever possible, only those forms with original signatures should be filed in court.

Note: In New York State, you cannot file the New York divorce papers until one year after your Marital Separation Agreement (MSA) is signed by both parties and Notarized (properly executed).

Some New York counties also require that you file the executed MSA at least one year before you file divorce papers. The included Memorandum of Agreement form is used in these situations. At the time of filing, an Index Number (case number) will be purchased. Check with your local court to determine whether a one-year MSA filing requirement exists.