

Legally Separated: Are We There Yet?

By Amy A. Edwards

This is a common question from my clients, especially in the beginning of the divorce process. After all, whether you are separated or not has an impact on the division of property and debt, support for a spouse and/or any children, and ultimately, whether you can remarry.

What is a *Legal Separation*?

In North Carolina, the term "legally separated" is a term of art used by attorneys, and misused by many non-attorneys. This legal separation is a decree made by a judge after a special trial based on marital fault. The court enters an official decree, stating that only the husband or the wife shall have the right to live in the marital home. In that event, the other spouse must leave the home. Why do all of this to separate? Because people are correctly reluctant to move out of the family home for fear of committing abandonment. If a judge rules there is marital fault, it can easily cause a great deal of harm to a spouse during divorce litigation. This process of a judge declaring a person to be legally separated is a rare event indeed, but it is still alive and well in our state. In legal terms, this process of declaring people to be separated, but still married to each other, is called a *divorce from bed and board*.

What is a *Traditional Separation*?

What people usually mean when they talk about a legal separation is a traditional separation of husband and wife. Two main things are required to be separated for purposes of a divorce at some later date. First, the husband and wife must not live together in the same residence for at least one year. Living in the same residence in different parts of the house is not adequate. Second, either the husband or the wife must intend for the separation to be permanent. Note there is no requirement that *both* intend the separation to be permanent; only one person must. If they are living separately but neither intends to be separated, such as those separated by military service or extensive travel, they are not separated for the purpose of getting divorced.

Occasionally, there is a question about whether spouses actually live apart. I have had clients who had several buildings on one parcel of land, such as a farm where there was a farmhouse or homestead house and various out buildings. Another time, I had a question about one person living in the recreational vehicle in the back yard. People with unconventional marriage relationships can also be confused about whether they have actually separated. There is no easy "one size fits all" answer for these types of legal questions, which must be addressed on a case-by-case basis. There is no legal requirement for any documents to be drafted or signed for people to be separated. The fact that people live apart, and one of them intends the separation to be permanent, is sufficient to be separated for the purpose of filing for a divorce after one year has passed.

What About the Divorce?

After spouses are separated for one year, either of them may file a complaint for divorce based upon the year of separation in this state. The only exception to this rule is in the case of incurable insanity, which requires the separation to be for three

years. There is no way under the law to shorten the time required to be separated before one person can file a lawsuit for the divorce. The Legislature intentionally created the twelve-month waiting period in order to allow husbands and wives enough time to be sure a divorce is what they truly need. The parties do not have to "agree" to the divorce. As long as the statutory requirements listed above are met, either spouse is eligible to file for a divorce, regardless of whether the other party consents.

Clients sometimes ask me if they can agree to say they have been separated for a whole year, when they have only been separated a few months. The answer is always NO. Alleging untruthful things in a divorce complaint (the document that generates the lawsuit) constitutes the crime of perjury, whether one person commits perjury or both do, regardless of whether you agree to do so. The process of a judge entering a divorce based on one year of separation is called an *absolute divorce*. Once this type of divorce is entered, each person is legally free to remarry if he or she chooses to do so.

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