

## THE CONFUSING ISSUE OF THE DATE OF SEPARATION

One of the most difficult and confusing issues in any divorce or legal separation case concerns the issue of the Parties' date of separation. In essence, the starting point in all marital dissolution proceedings begins with the question "When did the Parties separate?" Until this date is determined, property cannot be valued and the case cannot really proceed forward because the date of separation will determine not only the length of the marriage (thus impacting on spousal support and other issues) but also determining as of what date to value assets.

By way of example, is the marriage a long term marriage (ten years or more)? The length of the marriage cannot be determined until one knows the date that the Parties separated.

Another example concerns determining community assets. The starting point always is, how much was in the community bank account at the date of separation. Again, until the date of separation has been determined, one cannot determine the value of the assets.

Determining the date of separation can often times be confusing. Naturally, in a case where a spouse says to the other spouse words to the effect "the marriage is over ...." an immediately files for divorce the next day it is easy to imagine that there is no confusion regarding the date of separation.

However, what if a Party makes that statement but does not file for separation until five years later. Where the Parties actually separated on that date or are those words given little meaning given the conduct of the Parties?

When clients comes to see me, if they are serious about getting divorce I tell them that it is extremely important to immediately establish their date of separation. The ways of establishing separation are obvious. Moving out, hiring an attorney, filing for divorce and dividing up assets are all easy ways to establish a date of separation.

Problems arise, however, when there is a delay in the action following the development of the intent to separate. When *that* occurs, the door is open for the argument that the parties were not actually separated until clear conduct occurred evidencing the separation.

People often confuse the term "date of separation" with being "separated." Let me give an illustration.

When a Husband and Wife start to develop problems and decide that it would be best for them to temporarily separate (i.e. live separate and apart) and, following that actually live in separate abodes, does that mean that the date that they moved into separate abodes was the actual date of separation? The answer to that would be a resounding No.

In order for Parties to be separated pursuant to case law, the state of the marriage must have reached an “irremediable breakdown such that the marriage has a “final rupture” and it is evidenced that the Parties will not be getting back together again. A temporary cessation of the marriage with the possibility of the Parties resuming their relationship does not satisfy this criteria. Thus, when Parties live in separate abodes while they are considering the possibility of ending their marriage, they have not attained the ultimate “date of separation.” Likewise, when Parties are separated and go to marriage counseling to help save their marriage, they have similarly not reached the “final rupture” and thus are also not “separated” within the meaning of the law.

While they are in fact “separated” in common parlance, this does not equate to the same standard as the “date of separation” as defined above. When determining the date of separation, each case is extremely fact based. Such minor nuances as continuing to file joint tax returns, having intermittent sexual relations, having dinner together, going on family vacations together, bringing the laundry for your spouse to do for you, sending each other cards, all can be evidence of an intent to continue the relationship albeit while the Parties are living separate and apart.

As indicated above, the best way to establish a date of separation is to inform the other spouse of your intent and then take clear and unambiguous actions to establish a date of separation. Such conduct would include (as mentioned above) retaining counsel, filing for divorce, moving out, etc., within a relatively close time frame.

The Party who states that their marriage is over and fails to act on it can subject themselves to significant detriment. Assets will be valued at a future date not the date that the Party intended to be separated. The marriage could be considered to be a “long term” marriage thus subjecting one spouse or the other having to pay spousal support for a longer period of time and possibly affect the receipt of Social Security benefits or certain retirement benefits.

As the reader can see, the issue of the date of separation is a complicated one which requires significant analysis.