

AMICABLE SEPARATION OR DIVORCE

Amicable SEPARATION or divorce

Contemplating the breakdown of a marriage or a civil union is never easy. Often, the decision is made only after a long period of heartbreak, soul-searching and agonizing uncertainty, especially where children are involved. More and more couples wish to minimize the conflict and amicably dissolve the union in a climate that fosters agreement. If you are among them, your notary can advise you on the legal effects of separation, divorce or dissolution of a civil union. Trusted family advisers over the years, notaries specialize in civil law, including matrimonial law. Their university training and experience in drawing up contracts make them outstanding legal advisors. Your notary can inform you and guide you through the legal process leading to separation, divorce or dissolution of a civil union. But, first, are you aware of the differences between separation, divorce and dissolution of a civil union?

***DE FACTO* SEPARATION: NO LEGAL EFFECT**

A *de facto* separation is where the spouses simply no longer live together; no matter how long it lasts, it does not sever the marriage or the civil union bond.

Even if they no longer live together, the spouses retain towards each other the obligations and responsibilities arising from their marriage or civil union: respect, fidelity, succour and assistance.

In reality, this means that, even after being separated for some time, a spouse may apply to the court for financial support if unable to support him- or herself, or may even be held liable for debts related to the current needs of the family.

De facto separation does not open the door to the partition of the family patrimony, but if the parties eventually obtain a **judgment** of separation from bed and board or divorce, or a **judgment** of dissolution of civil union, the exact date of separation may be taken into account by the court for the partition of the family patrimony. When the spouses agree on the consequences of the dissolution of their civil union, the date when they ceased living together to co-habit can be retained to establish the net value of the family patrimony in the terms of the transaction contract executed before the notary.

YOUR CHOICES IN CASE OF A SEPARATION

There are various options open to you. If you are married, you can choose separation from bed and board or divorce, or start with separation from bed and board and divorce later. In both cases, it is possible to reach a judgment of amicable separation or divorce. If you are in a civil union (since June 24, 2002) and the interests of your common children are not at stake, you can opt for an amicable separation by making a joint declaration consenting to the dissolution of your union and concluding an agreement on the consequences of the dissolution. Both the declaration and the agreement must be made before a notary.

SEPARATION FROM BED AND BOARD

Separation from bed and board, commonly called a “legal separation”, is the result of a judgment. Either spouse, or both, may apply to the court to obtain judgment if the will to live together has been seriously undermined.

It releases the spouses from their obligation to live together, but the other duties and obligations resulting from marriage continue. Since the spouses remain husband and wife, they are unable to remarry. Their matrimonial regime becomes separation as to property. Separation from bed and board results in the partition of the family patrimony.

DIVORCE

A judgment of divorce results from a breakdown of the marriage; it ends the relationship and breaks the bond of marriage. It causes the partition of the family patrimony and the dissolution of the matrimonial regime.

The law now recognizes “no fault” divorce. Since 1986, it is no longer necessary to admit to a conjugal offence such as adultery or physical or mental cruelty in order to obtain a divorce. One or the other or preferably both spouses together may request a divorce if they have lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding and were living separate and apart at the beginning of proceedings. However, in such a case and before judgment is rendered by the court, the spouses should protect their respective interests. Speak to your notary. He will advise you properly.

AMICABLE SEPARATION OR DIVORCE

To obtain an amicable judgment of separation or divorce, the spouses must have reached agreement on all the legal consequences of their separation.

Your notary can draw up for you such an agreement, called a draft agreement. This is the fundamental document which is submitted to court with your application for separation from bed and board or divorce. In the judgment of separation from bed and board or divorce, the court confirms the draft agreement.

WHAT SHOULD THE DRAFT AGREEMENT CONTAIN?

The agreement settles all questions arising from the marriage breakdown. For example:

- What will be the children’s residence? How will custody and access be shared?
- Who will pay the cost of the children’s schooling?
- Who will remain in the family residence? Must it be sold instead?
- Who will keep the furniture?
- Who will pay off the spouses’ joint debts?
- Will there be spousal or child support? For how long?
- How will the family patrimony be divided?
- How will the matrimonial regime be liquidated?
- Will a compensatory allowance be paid?
- Etc.

DISSOLUTION OF A CIVIL UNION

A civil union can be dissolved either through a court judgment or through a joint declaration and a transaction contract made before a notary. When the interests of common children of the spouses are at stake, dissolution through a court judgment is obligatory. Dissolution before a notary allows the spouses to settle all the consequences of the dissolution in a notarized contract without having to go to court at any moment in the process.

Dissolution of a civil union, either through a court or before a notary, entails the partition of the family patrimony and the dissolution of the regime. For more information, consult your notary. He or she will advise you properly

ADVANTAGES

Statistics tend to support the view that an amicable separation or divorce has positive effects, compared to a judgment obtained in a climate of confrontation and contestation.

An amicable agreement between the parties shortens the process and reduces legal costs and fees. Moreover, it appears that children are much less traumatized by the experience when their parents can communicate and agree.

There are no winners or losers under the judgment which follows the draft agreement (or, in the case of a civil union, the notarized transaction contract settling the consequences of the split), since it ratifies the result of negotiations and agreements freely entered into by responsible individuals wishing to decide their future for themselves.

FAMILY MEDIATION

If questions are raised on a particular subject or relations between the spouses deteriorate to the point that it becomes difficult to finalize an agreement on the effects of the marriage or civil union breakdown, the couple may resort to family mediation. Family mediation may even be resorted to at the beginning of the breakdown if difficulties are foreseeable.

Many notaries have developed an expertise as a result of special training and have been certified by their professional order to act as family mediators. This enables them, as impartial third parties, to help spouses resolve their differences themselves and draw up a workable, mutually satisfactory agreement that determines the effects of family reorganization.

Family mediation is another method of dispute resolution. It is an alternative to the traditional judicial process. Unlike the judicial process, mediation allows room for emotions and direct exchange.

THE ROLE OF THE MEDIATOR NOTARY

Family mediation is not therapy for the reconciliation of parties. Before beginning mediation, the mediator notary must be sure that the couple's decision to separate is irrevocable. The aim of the mediator notary is to ensure that the solutions found are just and fair for everyone and respect the laws in force. He or she does not give an opinion but furnishes all the information necessary for the parties to make proper decisions.

THE STEPS IN MEDIATION

Mediation is characterized mainly by its flexibility and, depending on the degree of difficulty or the points to be covered, consists of two to eight sessions lasting one or two hours each. The steps followed by the mediator notary are basically the same in any mediation.

1. The first or introductory meeting is where the mediator notary explains to the parties the process of mediation and the basic rules that apply. If, at the end of the first meeting, the parties decide to continue mediation, the mediator notary has them sign a consent to mediation as evidence of their good faith; it also ensures full cooperation and establishes costs.
2. The mediator notary, together with the spouses, analyzes the problems and determines their needs and interests and those of their children.
3. The spouses and the mediator notary then explore different options and verify whether they meet the needs that have been identified.
4. After the parties have reached agreement and made the necessary decisions, the mediator notary prepares a **draft agreement** that fully reflects their wishes. He or she verifies that the solutions contained in the draft agreement comply with the law and that the agreement respects the interests and meets the needs of all parties involved.
5. Once the draft agreement is signed, a joint application for separation from bed and board or divorce based on the agreement must then be prepared. Because of the precautions taken, the draft agreement is very likely to be approved by the court and confirmed by the judgment of separation from bed and board or divorce.

THE NOTARY, AN AGREEMENT LAWYER

By their training and the obligations imposed on them by law, notaries are specialists in the drafting of contracts and are impartial lawyers with the responsibility to enlighten and advise parties who engage their services. Because they encourage a climate of agreement favourable to negotiation, notaries are clearly the best-qualified professionals to help you reach a satisfactory conclusion to your separation, divorce or dissolution of your civil union.

Consult your notary: he leaves nothing to chance.



**Chambre
des notaires
du Québec**

December 2002