

Separation & Divorce

Separation Agreement. A separation agreement is a contract made by a married couple considering a divorce or legal separation. It contains written arrangements concerning custody, child support, spousal support, property division and other matters, and sets forth the terms by which you agree to separate.

A separation agreement is voluntary. Your spouse does not have to sign a separation agreement if he or she does not agree to the terms. A court can set aside an agreement that was signed due to fraud or coercion. Once signed by both parties, a separation agreement remains in place until the divorce is final, or until it is **revoked** by you and your spouse.

A separation agreement may be revoked, or canceled, in a written document signed by both parties, or automatically upon reconciliation if provided for by the terms of the separation agreement.

Legal separation. A legal separation can mean different things in different states, but is generally a court order that directs spouses to live apart and arranges the terms under which they will live separately until the divorce is finalized. A legal separation may be as complicated and expensive as a divorce and is not available or necessary in many states.

A separation agreement from the Legal Assistance Office is not a legal separation.

Enforcing a separation agreement. If your spouse does not abide by the terms of the separation agreement, your remedy is to sue him or her in a civilian court for breach of contract. This is of very little benefit when either or both of you live overseas.

A commander cannot enforce the terms of a separation agreement. The only exception relates to support provisions, which can be enforced by a commander under Army Regulation 608-99. A commander cannot order a soldier to pay support, but will counsel a soldier on the possible consequences for not paying support (e.g., elimination from the service, reduction in rank, filing of unfavorable information in official records, Article 15, or other adverse actions under AR 635-200).

Child custody disputes. Only a court of law can resolve child custody disputes. If you and your spouse cannot resolve the problem, you have two options: (1) travel to the U.S. and seek a court resolution; or (2) apply to the local German civil court for a court resolution. In both cases you should hire a civilian attorney to represent your interests.

If you and your spouse cannot agree on custody matters the situation will become very complicated. As a general rule, only a court where the children reside can resolve issues of child custody. Therefore, the children must return to the states before either of you can petition a court for custody. The best solution is for you and your spouse to resolve the problem between yourselves.

A military commander or the Legal Assistance office *cannot* determine if the husband or wife shall have custody of the minor children.

Separation & Divorce in Germany

Separation Agreements: Separation agreements are not very common in Germany. These agreements must be drafted and signed by a German Notary Public, and these services are very expensive. A separation agreement is generally only worthwhile when there is a lot of money and assets involved.

Divorce: To file for divorce in Germany, at least one spouse must be a legal German resident. Also, the couple *must have lived apart for at least one full year*. If the divorce is uncontested, the judge will likely grant the divorce at the initial hearing. The divorce then becomes final after the passage of one month, during which time either party can appeal the divorce (this period can be waived by both parties if both are represented by lawyers). If the divorce is contested, the judge will be looking for evidence of an irretrievable breakdown of the marriage. This breakdown is presumed if the couple have lived apart for three years, but otherwise it must be proved. The one month appeals period applies to contested divorces as well.

Retirement benefits:
A German court *cannot* divide American retirement benefits. A soldier's military retirement benefits typically remain with the soldier, therefore. Sometimes the judge will decide to leave the issue open for subsequent agreement between the parties, but this is problematic because:

- A German contract, made when only one of the parties is German, will typically not be recognized in the United States.
- If the American courts, which can divide military retirement benefits *before* a divorce is finalized, are petitioned to do so *after* the divorce is final, they will be unable to act, since the divorced former spouse will then have no right to the ex's benefits.

The German "Package Divorce": In Germany, the judge may not just dissolve a marriage – he must also address the issues of custody, child support, spousal support, and retirement benefits (which are not considered marital property). Other issues, like division of marital property (money, bank accounts, debts, real and personal property, etc.) are only addressed if the court is petitioned to do so.

Attorney's Fees: Attorney's fees in Germany are usually much higher than in the United States, particularly for an uncontested divorce. German attorneys do not charge their clients on an hourly rate basis. Instead, their fee is based on the so-called "value of the case." This value is determined by the amount of money in dispute, or else it is fixed by the judge, who attributes a certain value to a given legal question. A strictly binding ordinance will inform the clients how much "one share of the total fee" is. Depending on the work performed, the attorney may earn one, two, or three shares (one each for counseling and paperwork, for filing the petition, and for court representation). This system permits a fairly accurate estimation of the future costs based on the initial consultation. Also, in this system the fee will be the same regardless of the attorney. It is the attorney's ethical obligation to inform his clients on the total costs of legal services to be rendered. In most instances, an attorney will require a retainer for contested cases. In smaller towns, the first counseling session is frequently free of charge, however.