



## A NEW LOOK AT “LEGAL SEPARATION”

BY SUSAN M. FALL

If you’ve practiced family law for any length of time you’ve probably had this conversation with a potential client:

Client: I’m not sure I want a divorce. What about a legal separation?

You shift in your seat and begin your spiel, which goes something like this:

Well, there really isn’t any such thing as a “legal separation” in Michigan. We have what’s known as a separate maintenance action, but if your spouse files a counterclaim for divorce, your case will become a divorce. If you do end up with a judgment of separate maintenance it will be just like a divorce but you can’t remarry. And if you decide to get divorced later you have to file an entirely new case. Generally, separate maintenance is done only when someone has a religious opposition to divorce.

You’ve successfully ruled out a separate maintenance action and move on to talking about a divorce. But, not so fast. Recently, one of the excellent attorneys I work with unearthed this gem:

When a decree of divorce from bed and board forever, or for a limited time, shall have been pronounced, it may be revoked at any time thereafter, under such regulations and restrictions as the court may impose, upon the joint application of the parties, and their producing satisfactory evidence of their reconciliation. MCL 552.43

So, separate maintenance really isn’t “just like divorce, but you can’t remarry.” The drafters of MCL 552.43 expected that people who were divorced from bed and board might change their minds later and want to resume a traditional marriage. The statute contemplates a status that protects the parties’ rights while leaving the door open to a change of heart – which is exactly what some people are looking for.

I receive calls from people who want to know if mediation can help them accomplish a “legal separation.” Usually, they are in a long-term marriage that has become unlivable for them. They don’t want a divorce but they don’t feel they can continue in their relationship as it is. They are looking for a unique solution to a unique problem and they hope mediation can get them there. They want to do it differently.

In the past, I gave my 30-year-old speech about how legal separation isn’t really done much anymore. But, I’ve received enough calls of this nature that I’ve begun to rethink the idea of separate maintenance—particularly since my colleague enlightened me to MCL 552.43. Maybe we’re too quick to rule out an in-between status for those people who don’t want a divorce but are unhappy with the status quo of their marriage. What about the couple that has been together for years and are approaching retirement age? They’ve spent a lifetime accumulating a nest egg that will see them comfortably through their golden years; a nest egg that, once divided in half, won’t be enough for either of them to live the way they planned. Or, the couple who has already retired? They want to live separately, but want a plan to share their money, make sure the survivor is provided for after the first one dies and that whatever is left ultimately goes to their children. What about the young couple who has hit a rough patch? They’re not really getting along but they don’t necessarily want a divorce either. Then someone cancels a credit card or empties an account and the snowball starts to roll. The other party files a divorce to protect his or her interests, they both become



entrenched in their positions and the focus shifts from resolving the original conflict to prosecuting or defending a divorce.

People seek an in-between status for all sorts of reasons: They just aren't ready to accept the finality of a divorce or maybe they want to signal to their spouse that they would like to stay married and haven't given up on resolving their differences. Maybe they don't want a divorce but can't stand the financial uncertainty of remaining with someone whose spending habits are very different from their own. Or, they want to live separately, continue to share resources and neither has an interest in remarrying.

Apparently, Limbo no longer exists, but marital limbo may be precisely where a couple needs to go at a given point in time. Divorce is life-altering. It can change a person's standard of living and long-term security. It can force a person to leave the home they've lived in most of their life. A divorce not only ends a marriage, it can disrupt family relationships and friendships. It can create financial insecurity and force people to work long after they had hoped to retire. Divorce can be embarrassing and lonely. It's no wonder people come to us looking for a way to change the immediate situation while leaving a glimmer of hope alive.

I think we become uncomfortable when faced with the possibility of any sort of in-between status for people who don't want a divorce but don't want to stay married either. We view a separate maintenance action as some archaic device that people used when divorce carried a greater stigma, but has no place in today's world. We are uncomfortable with post-nuptial agreements because we can never assure our clients that they will be enforced in the event of a divorce. We don't have a lot of experience handling cases that conclude in neither a divorce nor a reconciliation. And, we probably bring a bit of personal bias to the conversation because we, ourselves, can't imagine wanting to be in a neither fish nor fowl relationship.

Perhaps it's time to give separate maintenance a second look. The more options for resolution a mediator has, the better. So, instead of dismissing it as something that really isn't done anymore, maybe we should treat it as one more tool for people to use to fashion a resolution that is right for them. After all, isn't that the point of mediation?

### **About the Author**

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