

Divorce – Petitioner

The legal basis for a divorce

As the law stands at present, there is only one basis for a divorce - the irretrievable breakdown of the marriage. This has to be established by the person bringing the proceedings (“the Petitioner”) in one of five ways:-

1. an allegation, which has to be proved, that the other spouse (“the Respondent”) has committed adultery. An admission in writing by the Respondent that adultery (i.e. sexual intercourse with a person of the opposite sex) has taken place will normally be accepted by the court as adequate proof. More often than not, the third party will not now be named in the divorce proceedings: OR,
2. an allegation that the Respondent has behaved unreasonably. Physical violence is the most obvious example of this, but other kinds of behaviour often form the basis of a divorce petition. The Petitioner has to satisfy the court, by giving examples, that the conduct of the Respondent has been so unreasonable that the Petitioner cannot be expected to live with him or her: OR,
3. an allegation that the Respondent has deserted the Petitioner for at least two years. A separation which has been by mutual consent cannot constitute desertion. OR,
4. an agreement between the spouses, following a two year separation, that there shall be a divorce. The Respondent will have to sign a court form confirming consent at the time of the divorce proceedings: OR,
5. a separation for a period in excess of five years. There is very limited scope for a Respondent to oppose a petition on this ground.

Under grounds 3, 4, & 5, there can be attempts at reconciliation during the separation without having to restart the 2 or 5 year period, as long as those attempts do not total more than six months in all. However, the time spent together would have to be added on to the end of the 2 or 5 year period before divorce proceedings could be commenced. It is possible for a couple to be accepted by the courts as living apart even if they are occupying the same house, although there would normally be some inquiry to establish that there had been a genuine separation and to ensure that some elements of a matrimonial relationship had not continued.

The law is designed to encourage the possibility of reconciliation and so at any time up to the grant of the initial decree (“decree nisi”), you can bring divorce proceedings to a halt.

Even after decree nisi, you can delay the grant of the final decree. If you want to seek assistance with exploring the possibility of reconciliation, please let us know and we can refer you to one of a number of counselling services for assistance.

Please note that divorce proceedings cannot be commenced under any circumstances before the marriage is at least one year old. A divorce petition under grounds 3, 4 or 5 can only be filed with the court once the required period of separation has fully elapsed.

Procedure

Initially

We will discuss with you whether you feel that there is any prospect of reconciliation and, if there is, follow that up with you. If there is not, we will take from you the details needed to prepare your divorce petition, which, if you are legally aided, you will be asked to sign when it has been typed.

To avoid the risk of contested proceedings, there are times when it can be helpful to try to agree the contents of a divorce petition with your husband/wife before it is finalised.

If you have children aged under 18 who are receiving full-time education or training, we will need to ask you to complete a form setting out the practical arrangements for them.

Commencement of proceedings

Your divorce petition, the statement about the children's arrangements (if appropriate), your marriage certificate and (unless you are eligible for exemption) the court fee are sent to the court. Within a few days, the court will send the divorce papers to the Respondent with a questionnaire to be completed, called the "Acknowledgement of Service". That form, when signed by the Respondent, acts as a receipt of the papers and also as an indication of whether the divorce is to be contested or not and should be sent back to the court completed within 8 days of receipt.

In the event of the Respondent failing to return the Acknowledgement of Service to the court, we will need to consider with you other ways in which service of the divorce petition can be established to the court's satisfaction. One of the most common ways in which this is done is by asking the court bailiff or a private enquiry agent to effect personal service of documents on the Respondent.

What happens then depends on whether the Respondent says in his Acknowledgement that the divorce is to be defended or not.

If defended - the Respondent has to file a statement ("an Answer") in response to the petition. In the event of an Answer being filed, we will give you further advice as to the procedure; the details fall outside the scope of this factsheet. Very few divorces turn out to be defended.

If undefended - you will be asked to meet with us to prepare a statement confirming the contents of your divorce petition, and you will be asked to swear that the statement is true.

This statement then counts as your sworn evidence for the court and avoids the need for you to attend the court hearing when the initial decree of divorce (“decree nisi”) is formally granted.

Decrees

We will advise you as soon as we know the date upon which your decree nisi is to be granted. Provided your spouse has co-operated over the return of the Acknowledgement you should normally expect to be granted a decree nisi within 3 months of having filed the divorce petition. The decree nisi is not the final decree. For example, it does not permit you to remarry. It does however open up the court’s powers to make orders dealing with capital and property if those financial matters are to be dealt with by an order of the court.

You may apply for the final decree (“decree absolute”) 6 weeks after the date of the decree nisi. If you do not do so, the Respondent may seek the decree absolute after a further 3 months from that time has elapsed. There are times when it may be advisable for you to delay applying for the decree absolute, for example where there might be a loss of pension rights before financial issues have been dealt with, and we will consider with you whether those circumstances might apply in your case.

If financial matters remain unresolved, the Respondent may (but only if the divorce proceeds on either ground 4 or 5) seek to delay the grant of the decree absolute until the finances have been dealt with.

The decree absolute dissolves the marriage finally, enabling remarriage to take place. It can have a dramatic adverse effect on your ability to make financial claims and if those have not been resolved, you should always seek our advice before taking the step of remarrying. The decree absolute also affects any will you may have made previously by removing automatically any provision it contains for your former spouse and you should always therefore seek our advice about whether it is appropriate to make or revise a will.

This brief note is designed only to give a general outline of the law and procedure relating to divorce proceedings. It is not comprehensive and we will be glad to supplement it with further advice relevant to your particular