

A GUIDE TO DIVORCE PROCEDURE IN ENGLAND AND WALES

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1. INTRODUCTION

Getting a divorce nowadays is usually quite straight forward - particularly if a couple agree that the marriage is over. Any difficulties tend to occur more often in sorting out the practical issues such as where to live, arrangements for the children and financial matters.

As you will be concentrating on those related issues, the procedure of actually getting the divorce may seem unnecessarily complicated. The purpose of this brief Guide is to outline the divorce process, to highlight key areas and to set out the sort of time table you might expect.

2. WHO CAN START DIVORCE PROCEEDINGS?

Anyone who has been married for over a year.

One or other of the couple must satisfy the jurisdiction criteria for the English courts to accept a divorce petition:

1. Both spouses habitually resident in England (which always includes Wales!)
2. Both spouses last jointly habitually resident in England and one still resides here
3. The Respondent habitually resident in England
4. The Petitioner is habitually resident here if has been residing here for the past 12 months
5. The Petitioner is domiciled here and has been habitually residing here for at least 6 months.
6. Both spouses domiciled here

If none of the above apply and no other EU state has jurisdiction, then the additional ground of sole domicile of either spouse is available

It does not matter where the couple were married. Admissions of residence and domicile have important tax consequences which we will take into account when considering this aspect with you, and we would liaise with your accountant or other financial adviser.

3. ON WHAT GROUNDS CAN A DIVORCE PETITION BE STARTED?

The only ground for divorce is that the marriage has irretrievably broken down, but there is a complication. A divorce will be granted only if one of five facts, laid down by law as evidencing irretrievable breakdown, is established.

4. WHAT ARE THE FACTS?

- 4.1 Your spouse has committed adultery and you find it intolerable to continue living together.
- 4.2 Your spouse has behaved in such a way that it would be unreasonable to expect you to continue living together.
- 4.3 Your spouse has deserted you for a continuous period of two years or more.
- 4.4 You and your spouse have been living separately for two years or more and your spouse agrees to a divorce.
- 4.5 You and your spouse have been living separately for five years or more, whether or not your spouse consents to a divorce.

5 IF THE MARRIAGE HAS "IRRETRIEVABLY BROKEN DOWN" AND ONE OF THE FIVE FACTS APPLIES, WHAT HAPPENS NEXT?

This will depend on your particular circumstances. It is often a good idea and good practice to try and obtain your spouse's agreement to a divorce at the outset. We may be able to reach agreement with his or her solicitor over the form a petition should take and its contents. For example, if your spouse

accepts that you will file a petition based on unreasonable behaviour (4.2 above), only a brief and uncontentious outline of the particular behaviour need be given. In an undefended divorce, not saying all that might be said will not generally prejudice you.

6. WHAT DOES THE PETITION ACTUALLY LOOK LIKE?

Every petition follows the same form. It contains basic information such as names, addresses, date and place of marriage, ages of children and a statement that the marriage has irretrievably broken down. It will also state the “fact” on which it is intended to rely.

The petition will include a section (known as a “prayer”) which includes a request to the Court for the divorce to be granted. It may also include a claim regarding the costs of the divorce itself. Often it will list a request for all available types of claims for financial provision. This is quite usual and certainly does not necessarily mean, for example, that you or your spouse are seeking all the financial provision that is claimed.

The original marriage certificate or a certified copy, together with the translation if appropriate, has to be filed at the same time. In exceptional circumstances, it is possible to obtain leave at the court to file it later.

The court fee on issuing a petition is £300.

7. WHAT ABOUT THE CHILDREN?

A form is filed at Court with the divorce petition outlining the arrangements proposed for the children. The law encourages couples to try and agree those arrangements. The form (known as “a statement of arrangements”) is usually completed by the person filing the petition. Preferably, it should be sent to the other spouse to be agreed before the divorce petition is filed. If agreement is not reached, this does not prevent the divorce from proceeding.

8. ARE FINANCIAL MATTERS DEALT WITH BEFORE THE DIVORCE IS FINALISED?

Sometimes. However, in practice final financial resolution has often not been reached by the time the final divorce can be granted. Nevertheless, it should be possible to sort out any urgent problems and make temporary maintenance (i.e. financial support) arrangements. In certain circumstances, it may be advantageous if the making of the final decree absolute of divorce is postponed until all the financial matters have been resolved. This is because the final decree can affect National Insurance contributions, pension and life insurance entitlement, rights under your spouse’s Will and protection of your rights of occupation in the family home if it is not in joint names. Account should be taken of the impact of the death the one spouse if a decree absolute were pronounced before the final financial settlement. There can also be tax benefits in delaying the final decree until after settlement and implementation of financial matters. We will advise you about this at the appropriate time.

9. WHAT HAPPENS IF A RECONCILIATION IS ATTEMPTED WHICH LATER DOES NOT WORK OUT?

The law specifically encourages couples to attempt a reconciliation even where one of the five “facts” exist. If the reconciliation does not work out, you may still be able to petition for divorce in reliance on that “fact”. A maximum six months’ reconciliation period is permitted. This can be made up of one six month period or more than one period totalling up to six months in all. A couple may therefore live together for up to six months after the last act of unreasonable behaviour or after discovery of the last act of adultery and still petition for divorce on these “facts”.

After separation they can live together for up to six months and still petition, although there must be a total of two or five years apart. For instance, if a couple have a reconciliation for four months and then agree to a divorce they must have separated at least two years and four months before the presentation of the petition.

We work closely with relationship counsellors and can make recommendations to assist with an attempted reconciliation or simply to talk through issues concerning the relationship breakdown. Even where it is accepted that the relationship has broken down, it can often be immensely helpful for a couple to seek joint counselling.

10. CAN I WITHDRAW AFTER I HAVE FILED MY PETITION?

You can withdraw or dismiss your petition at any time up to the pronouncement of the decree nisi (the initial decree) with the leave of the Court and/or consent of your spouse if the petition has been served. Alternatively, you may decide merely to take no further action in respect of the petition for a short while, particularly if you are attempting a reconciliation. Once the decree nisi has been pronounced the Court will only stop an application for the decree absolute (the final decree) in exceptional circumstances. We will discuss this with you in detail should this arise.

11. WHEN CAN I RE-MARRY?

A divorce decree is granted in two parts, the decree nisi and, at least six weeks later, the decree absolute. It is only when the decree absolute has been pronounced that the marriage is completely at an end and you are each free to marry again.

12. RELIGIOUS DIVORCES.

In conjunction with a civil divorce, some seek a pronouncement by their religious authorities on their marriage. This may be in the form of a get, an annulment, a talaq or similar. In our experience, the timetable for obtaining them vis a vis the date of the civil divorce decree is often very important. If this is relevant, let us know so that we may co-ordinate the civil divorce with other steps you may be taking. The final civil divorce order can now be delayed if one spouse has to take a step to enable the other spouse to obtain a religious divorce.

13. MUST THE DIVORCE TAKE PLACE IN ENGLAND & WALES?

Not necessarily. Although a divorce could take place in England and Wales, in an increasing number of marriages it is possible also for a divorce to go ahead in another country. It is very important to consider this carefully at the beginning of any separation or divorce. This may apply when the marriage took place abroad, or if you or your spouse were born abroad, are domiciled or resident abroad or are nationals abroad, have a non-British passport, have property or business interests abroad, or where the children were born abroad or are being educated abroad. See our checklist on issues to take into account in deciding in which country the proceedings should take place. A divorce in another country may be more beneficial or detrimental to you, e.g. due to the likely financial provision on divorce.

This issue is of fundamental importance to consider at the very outset of a relationship breakdown. Within Europe, the spouse who issues a divorce petition in a country first secures that country as the place where the divorce will take place even though it may not be the country with the closest connections with the family. Outside Europe, most countries operate a discretion to decide which is the most appropriate country to decide a divorce but again being first to issue is increasingly important in the forum outcome. Quick advice and quick decisions are often needed.

We can advise you on this aspect. However please consult us very quickly and at a very early stage so

that we can take the most appropriate safeguarding action for you.

14. I HAVE PROVIDED FOR MY SPOUSE IN MY WILL. SHOULD I CHANGE MY WILL?

Yes. A result of the decree absolute is that unless you otherwise direct in the Will, any provision for a former spouse in a Will or any appointment of that spouse as an executor or trustee takes effect as though the spouse had died at the date of the divorce. This can result in an intestacy or partial intestacy which may not reflect your wishes. For this reason a review of your Will on decree absolute is essential. However, you should not wait until then before changing your Will but should change it at the earliest opportunity.

Some prefer a short term Will, to change the provisions of an existing Will but with a view to preparing a more permanent Will after the divorce and when all financial matters have been dealt with. It is also important to review any nominations under insurance policies and similar arrangements you have made for your spouse on your death. This may also include the manner in which the title deeds show the ownership of the family home.

We can arrange through solicitors with whom we work closely for the preparation of a Will for you, at any stage, in accordance with your instructions as well as advising on any estate or other tax planning which could be usefully undertaken at the same time. We will also advise you regarding the interests in the family home.

15. ARE THE PROCEEDINGS PUBLIC?

Court proceedings relating to family law are almost entirely dealt with “in chambers” to which the public and press are not allowed. This is right and proper as such matters should remain entirely confidential and private. However, the decree nisi is an exception and the press are able to publish its pronouncement. Despite this, the information that they may disclose is limited. While they are able to publish the “facts” of the divorce, e.g. adultery, unreasonable behaviour, separation by consent, they should not publish specific allegations. In our experience, most newspapers limit themselves to the very bare facts of the divorce but this is not always the case with some media. If you think the media are likely to take an interest, we can arrange for a short press statement to be issued on your behalf. However, in my experience this can sometimes increase press interest and so have the opposite effect from that intended. We are used to dealing with clients’ PR departments and media representatives to coordinate action on these crucially important issues. We will gladly discuss this with you.

16. TIME TABLE.

16.1 After at least one year of marriage, either spouse may file a divorce petition. He or she is referred to as the “petitioner”. The petition and statement of arrangements about the children are completed and then lodged at Court, together with the marriage certificate. If you have lost your marriage certificate or wish to keep the original for sentimental or other reasons we can obtain a certified copy for you. The Court fee for issuing a divorce is £ 300.

16.2 Within a few days of filing the petition at Court either we or the Court sends a copy of the petition and statement of arrangements to the other spouse, who is referred to as the “respondent”. A copy of the petition is also sent to anyone named in an adultery petition. That person is referred to as a “co-respondent” although it is no longer necessary nor good practice to name a co-respondent in the petition. If the respondent has instructed solicitors to accept service on his or her behalf the document will be sent to them instead. In certain circumstances, service on the respondent in person (personal service) may be necessary. From the date the documents are received, strict time limits have to be observed by the respondent.

16.3 Within 8 days (including day of receipt) of service of the petition, the respondent should file at Court a form called an “Acknowledgement of Service”. The form asks whether the respondent intends to defend the petition, whether any claim for costs is disputed and whether the proposed arrangements regarding the children are agreed. Although it may have to be signed by the respondent, it is completed by his or her solicitors.

16.4 Within 29 days (including the day of receipt) of service of the petition (longer if served abroad), the Respondent must file a defence (known as an “Answer”) if he or she intends to defend the divorce. The Petition then becomes defended and the procedure set out below does not apply. Defended divorces actually resulting in a final contested hearing are very rare, with a “compromise” usually being reached. However a delay in the final divorce is inevitable. Defended divorces are also very costly and the final hearing is public and sometimes reported in the newspapers. Much thought must therefore be given before embarking on this course of action.

16.5 Within a few days of receiving the acknowledgement of service from the Respondent, and if the petition is not being defended, the Petitioner can apply for the Decree Nisi (the first stage of the divorce order). The Petitioner’s solicitor prepares a statement for the Petitioner to swear (an Affidavit), confirming that the contents of the petition are true. Certain other information must also be given, for example whether the couple have lived together since knowledge of the last act of adultery or unreasonable behaviour. Where a period of separation is relied on, the court has to be satisfied that the couple have truly lived separate lives. The Affidavit will also state if the arrangements for the children are agreed and whether there are any changes to the details filed at the time of the original petition. The Petitioner swears the Affidavit before a solicitor (in another firm) and it is then filed at the court with an application for the decree nisi under the “special procedure”, the so called “quickie-divorce”.

16.6 If the Acknowledgement of service is not returned, proof that the Respondent has been served is necessary. This may be by personal service or, exceptionally, obtaining a court order dispensing with further service altogether.

16.7 When the Court receives the application for the Decree Nisi, a Judge looks through the papers and if they are in order, gives a certificate for the Decree Nisi to be granted. A date is fixed for its pronouncement. This is usually about 6-8 weeks after filing the application at the court. The couple do not have to attend court when the Decree Nisi is pronounced.

16.8 What normally happens about arrangements for the children? If agreement has been reached, the court is unlikely to interfere. The Court will not make an order regarding children unless it is clear that the making of an order will be better for the child. If agreement has not been reached, the Judge may ask the couple to attend a hearing to see what satisfactory arrangements can be made. This may delay the final divorce order.

16.9 6 weeks and 1 day after the date of the Decree Nisi, the Petitioner may apply for the final decree, the Decree Absolute. The fee is £30. The Petitioner’s solicitor files a simple document at court and the Decree may be processed as quickly as the next day. But as we have explained above, there are sometimes advantages in delaying the final decree until all financial issues have been sorted out.

16.10 3 months after the Petitioner could have first applied for the Decree Absolute i.e. about 4 months after the Decree Nisi, the Respondent can apply for the Decree Absolute if the Petitioner has not already done so. The fee is £40. The Petitioner can prevent this if it would result in material hardship before a final financial order has been made.

17 BUT I THOUGHT THE LAW WAS CHANGING

The Family Law Act 1996 was to make a fundamental change to this law and procedure by introducing

no fault divorce. However the government decided to drop it even after it had passed through Parliament. We regard this as a great pity. No change in the law of divorce itself is now likely in the next few years.

18 CONCLUSION

We hope that this brief guide will be helpful. Inevitably it is only a summary. If you would like to discuss any point in more detail either now or at the relevant stage in a case, do not hesitate to contact us.

We will keep you informed of developments throughout, prepare all necessary documents and make any court applications on your behalf.

We would like to express our gratitude to Resolution/Solicitors Family Law Association, which produced a leaflet many years ago on which part of this guide is based. They are an association of family law solicitors which encourages a conciliatory and constructive approach to resolving disputes involving families. We actively support its approach and do our best to follow its code of practice, a copy of which we can send to you.

If you do not have a solicitor but would like to discuss with me any aspect of this Guide or your general personal affairs, please contact us on 07973 890648 or dh@davidhodson.com or via www.davidhodson.com

ABOUT DAVID HODSON AND THE INTERNATIONAL FAMILY LAW GROUP

David Hodson is a specialist family law solicitor, mediator, family arbitrator and founding partner in The Family Law Consortium, Covent Garden, London. He is a sole and joint family mediator, assessed by the Legal Services Commission as s29 competent. He is a past governor and former vice chair of the UK College of Family Mediators. He is a family arbitrator, and a member of the Chartered Institute of Arbitrators. He is a member of the Law Society's Ancillary Relief Reform Committee and Protocol Committee and the SFLA International Committee. He is co-author of "Divorce Reform: a Guide for Lawyers and Mediators" (Sweet and Maxwell), "The Business of Family Law" (Jordans) and consulting editor of the forthcoming "International Family Law" (Jordans). He is a member of the LCD's Family Proceedings Rule Committee. He is a SFLA Accredited Specialist (with portfolios in Substantial Assets and International Cases), a Fellow of the International Academy of Matrimonial Lawyers, a trustee of Marriage Resource and sits as a Deputy District Judge at the Principal Registry, London. He can be contacted on dh@davidhodson.com.

The International Family Law Group is a legal services practice looking after the interests of national and international families and children. It is in the heart of Covent Garden, near the Law Courts. It has specialist accredited English lawyers, family and civil mediators, collaborative lawyers, arbitrators and Australian lawyers and mediators. It resolves the financial aspects of relationship breakdown for all families. This includes expertise in high net worth individuals with global and complex assets. The work includes international child abduction as well as all other national and international disputes involving children. It is regularly instructed by the Central Authority of the UK Government. It has a specialist contract with the Legal Services Commission. It looks after the distinctive aspects of international families and expatriates. It works closely with many lawyers abroad. It resolves cases through a sensitive, pro active, settlement-focused and conciliatory approach. It has much experience in handling the media when it affects our clients, their children and their personal lives. Its interactive website is mobile telephone accessible. It includes valuable information, pod casts, a government approved child abduction questionnaire, formulae as a starting point for calculating fair financial settlements. It is in six languages. The International Family Law Group can be contacted on www.iflg.uk.com

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