

AWDRY BAILEY & DOUGLAS - DIVORCE PROCEDURE FACTSHEET

Divorce

A divorce is usually a straightforward Court process in which it is unusual for either of the parties to attend Court. However, the Family Procedure Rules 2010 will apply as from 6 April 2011 which sets out a new procedural code. These notes adopt this new procedural code and terminology.

The Petitioner (the party to the marriage who commences the divorce process) has to satisfy the Court that the marriage has “irretrievably broken down”. The Respondent is the party who has to respond to the Application for a Matrimonial Order (Divorce) formerly called a Divorce Petition.

The Irretrievable Breakdown of a Marriage

The words “irretrievably broken down” are given their normal and natural dictionary meaning. The Court cannot find that a marriage has irretrievably broken down unless the Petitioner satisfies the Court that at least one of the following five facts has been satisfied:-

1. One party has committed adultery and the other party finds it intolerable to live with that person.
2. One party has behaved in such a way that the other cannot reasonably be expected to live with that person (more commonly known as unreasonable behaviour).
3. One party has deserted the other party for a continuous period of at least two years immediately before the presentation of the divorce proceedings (this ground is very rarely used now).
4. The parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the divorce proceedings and the party who is the Respondent consents to a Decree being granted.
5. The parties to the marriage have lived apart for a continuous period for at least five years immediately preceding the presentation of the divorce proceedings and in such circumstances the consent of the Respondent is not required.

In order for divorce proceedings to be started the parties need to have been married for over one year provided one or other of the couple is either domiciled here or has been resident in England

and Wales during the preceding year. It does not matter whether the couple were married in this country or abroad.

Procedure

This will often depend on the individual's particular circumstances. It makes sense to try to obtain the other spouse's consent to the contents of the Application for a Matrimonial Order (Divorce) and to try to reach agreement over the contents. This is particularly true if the fact relied upon to show that the marriage has broken down irretrievably is that the other spouse has behaved in a way which the Petitioner finds unreasonable. Only a reasonable outline of the facts of the particular behaviour need to be given and you will not be prejudiced by not going into the finer detail. The whole point is to demonstrate to a Court that the behaviour complained about appears to be unreasonable. It is also looked at from the point of view of the Petitioner only as to what is and is not considered by them to be unreasonable. The test is therefore a subjective one and not objective.

All divorce Applications for a Matrimonial Order (Divorce) contain the same basic information about both spouses and any children of the marriage/family. Obviously, the "fact" on which it is intended to rely will differ from case to case.

The Application for a Matrimonial Order (Divorce) will also include a section towards the end which will include a request for the divorce to be granted, a request for an Order relating to children (where relevant), a claim regarding the costs of the divorce and (if being claimed) an order for financial provision.

If there are children then the outline arrangements relating to them will need to be given to the Court. This is done in a form known as a "Statement of Arrangements for Children". This is normally completed by the Petitioner and preferably it is good practice to send it to the other spouse before it is filed for agreement. However, if there is no agreement then the divorce is not prevented from proceeding.

Defended/Undefended Divorces

It is highly unusual for a divorce to be defended simply because, as the ground for the divorce is the irretrievable breakdown of the marriage, the only defence would be that the marriage has not broken down irretrievably. People often forget this when they talk about "defending a divorce". What people often mean is that they do not accept that the marriage broke down irretrievably for the reasons put forward by their spouse and believe that the marriage broke down for other

reasons. Caution needs to be taken about challenging an Application for a Matrimonial Order (Divorce) in this way as often it actually makes no difference whatsoever as to who divorces who. The divorce process is simply a mechanism for ending an unhappy marriage which is broken down irretrievably. Therefore, virtually all divorces proceed as an undefended matter and divorce today no longer carries the stigma which it once did.

A Decree Absolute of divorce terminates the marriage and ends the divorce process. This radically changes the status of the parties. In particular, he or she is no longer the other spouse's potential widow or widower. Therefore, they are ineligible for certain State Benefits and Occupational Pensions.

Often the financial issues surrounding the breakdown of the marriage are still outstanding and can prevent a Decree Absolute being obtained until they have been settled. A financial settlement in a divorce is a highly specialist legal topic and we can help and assist via the extensive experience of our Family Law Team.

If there are no financial issues remaining outstanding then a Decree Absolute may be applied for by the Petitioner six weeks and one day after the date of the Decree Nisi. This is done by sending the appropriate form properly completed to the Court together with a Court fee of £45 currently. The Respondent may apply to the Court for permission to apply for a Decree Absolute three month's after the Petitioner could first have applied if the Petitioner has not already done so.

Further Procedural Matters

Upon receipt of the Application for a Matrimonial Order (Divorce) and Statement of Arrangements for Children, the Court will send a copy to the other spouse and they are known as the Respondent. It is for the Respondent to obtain their own legal advice upon receipt of such documents from a Court.

From the date the documents are received the Respondent has strict time limits to observe. Within eight days he or she should send to the Court a form called an "Acknowledgement of Service" which is also sent out by the Court. This form asks a number of questions of the Respondent and, in particular, whether it is intended to defend the Application for a Matrimonial Order (Divorce), whether any claim for costs is disputed and whether there is a need for any Orders in respect of the children to be sought.

Within 29 days of receipt (longer if the documents have to be sent to an address abroad), whether or not an Acknowledgement has been filed, the Respondent must, if he or she intends to defend the Application for a Matrimonial Order (Divorce), file a defence which is actually called "an Answer".

At this point the Application for a Matrimonial Order (Divorce) will become defended which would result in a fully contested Court Hearing and become very expensive for both parties. This would inevitably cause a delay in finalising the divorce.

If the matter proceeds undefended then the procedure outlined below would apply.

Within a few days of receiving the Acknowledgment of Service from the Respondent the Court will send a copy to the Petitioner Solicitor and this will enable the Petitioner to apply for the Decree Nisi by preparing the appropriate Affidavit for swearing and then sending to the Court.

It is a fact that the Court will require evidence that the Respondent has received the Application for a Matrimonial Order (Divorce) before the Petitioner will be allowed to take the next step. If the Acknowledgement of Service is not filed then this may involve arranging for someone to deliver another copy of the Application papers to the Respondent in person or, exceptionally, obtaining a Court Order that such proof does not need to be given and that personal service can be dispensed with. Either of these only become necessary if the Respondent fails to cooperate by completing and returning the Acknowledgement of Service form to the Court. Once the Court receives the Application for the Decree Nisi a District Judge will look through the papers and if they are in order give a Certificate that the Decree Nisi will be pronounced. The Court office will then fix a date for the Decree Nisi to be pronounced but neither party needs to attend Court on that date.

For further information or actual assistance concerning a divorce, please contact us on any of the following telephone numbers to arrange an initial free consultation at one of our offices:-

Calne - 01249 815110

Devizes - 01380 722311

Marlborough - 01672 518620

Wootton Bassett - 01793 853200