

Divorce, Separation and the Children

An Overview

There are few problems more worrying for an individual than a breakdown in family relationships. The following guide is intended as a very brief overview of the reliefs available from the Courts in the event of divorce or separation. Every situation is different, and every person needs individual advice tailored to their needs, particularly when the future of income and capital assets is to be considered. But it is extremely difficult to remember all of the advice given, particularly in a first interview with one's solicitor, and it is hoped that this brief summary may be a source of reassurance for anyone in such a difficult stage of their lives.

Divorce

To start divorce proceedings, a petition for divorce must be filed with a County Court. The jurisdiction of the Court is based on either your domicile in England and/or Wales or the fact that you have been living in England and Wales for a period of more than one year. Divorce is based on the irretrievable breakdown of marriage but this may be established only by proof of one of five separate facts, which may be described simply as follows:

- Adultery by the spouse who is not the petitioner;
- unreasonable behaviour by the spouse who is not the petitioner;
- desertion for two years by the spouse who is not the petitioner;
- divorce by consent after separation for two years;
- five-years' separation, when no consent is required.

Where there are children it is helpful, before divorce proceedings are begun, if the parents can agree what arrangements shall be made for the children, and to set these out in a signed document called a Statement of Arrangements for the children.

On filing the Petition for divorce with the Court, the original Marriage Certificate or a copy supplied by the place of the marriage or the Central Records Office, must be lodged. This is accompanied by the Statement of Arrangements for children and the appropriate court fee from which it may be possible to claim exemption or remission. If a solicitor is acting, a certificate to state whether or not the possibility of reconciliation with addresses of relevant agencies has been discussed also has to be supplied.

The Petition itself is then served on your husband/ wife, who becomes known as the Respondent. In cases of adultery, if the third person involved is named in the Petition (it is not necessary to name the third party), that person, known as the Co-Respondent, will also be served with the Petition. With the Petition is sent a form called an Acknowledgement of Service, which has to be completed by the Respondent and Co-Respondent and returned to the Court within a specified time limit. Provided that document confirms that the divorce will not be contested, you would then lodge with the Court a sworn affidavit verifying the contents of the Petition and

confirming that the signature on the Acknowledgement of Service is that of the Respondent. The affidavit is in a specific form which may be obtained from the court office. The Court will then fix a date for the pronouncement of Decree Nisi and six weeks thereafter, if there are no difficulties, the Petitioner can apply for the Decree Nisi to be made Absolute. This is not obligatory save that without it you are not divorced nor are you available to re-marry. But if the Petitioner waits for more than a year before taking this step s/he will have to provide the Court with certain additional information in writing and may have to swear a further affidavit. The Respondent cannot apply for the Decree Nisi to be made Absolute for a further three months.

In the five and two-year separation based divorce proceedings there is provision under the Matrimonial Causes Act 1973 for the Respondent, though not the Petitioner, to make an application to the Court for his or her financial position to be considered after the Decree Nisi. The Decree Absolute cannot be granted if such an application is lodged with the Court until after it has been resolved.

What is important however is that if one party re-marries before they have lodged with the Court an application for financial provision from their prior marriage, either by including this in their own petition for divorce or by a separate formal application, they lose the right to make an application for financial provision from the previous marriage.

In divorce proceedings the Court also has powers relating to the future of the children, if this is in dispute. The Court will consider the Statement of Arrangements for children at the time of setting a date for pronouncement of the Decree Nisi and, if there is an agreement about the children's future, the Court will certify that there is no need for the Court to be involved. Under the provisions of the Children Act 1989 it is now only (a) if there is a dispute, and (b) if it is in the best interests of the children, that the Court will consider the dispute and make an order. If there is a dispute about any of the children the Decree Absolute may be delayed until the dispute has been resolved.

Children

If you and your spouse/partner cannot agree the arrangements for your children, it may ultimately be necessary to seek the intervention of the Courts. This may be the case even if there are no divorce proceedings between you.

There are four types of Court order, namely:

- a Residence Order,
- a Contact Order,
- a Prohibited Steps Order, and
- a Specific Issue Order.

The Residence and Contact Orders are hopefully self-explanatory; they provide for the arrangements for with whom and where the children are to live, and for the degree of contact with the parent no longer living with them, respectively. Prohibited Steps Orders are orders made by the Court preventing acts from taking place, and a Specific Issue Order may be directed to something such as education or religious upbringing, or some other particular point concerning the child's welfare.

Finances

In divorce proceedings the Court also has jurisdiction to consider the financial arrangements to be made between the parties. As between husband and wife these include maintenance pending suit (*i.e.* maintenance up to the date of the Decree Absolute), periodical payments (*i.e.* maintenance thereafter), a lump sum order and any transfer of property and/or property adjustment orders that may be necessary once the entire financial situation of "the family" has been considered. Orders which deal with capital can only be made after Decree Nisi, and even then only take effect after Decree Absolute (unless already put into effect by agreement).

Since the Child Support Act 1991 the Courts no longer have jurisdiction to deal with disputed maintenance for children; this does not prevent the parents reaching an agreement between themselves, and asking a court to make an order following on from the agreement. But this will not prevent the Child Support Agency becoming involved if the parent with whom the children have their main home makes a claim for means tested state benefit. The Child Support Agency does not have jurisdiction if one or other of the parents lives outside England and Wales or if there is any additional financial provision needed, for example school fees, or a lump sum for the children, in which case the Court may be involved.

Injunctions

The Courts are also able to intervene in cases of domestic disturbance to prevent the use or threat of violence, whether this is directed at the other spouse/cohabitee or a child. The Courts' emergency powers to grant restraining orders can be sought whether or not divorce proceedings have commenced and, in extreme cases, may result in a party being obliged to leave the family home as a result of his or her conduct. The Courts' emergency powers can also be used in the case of child abduction.

Separation

Judicial separation is an alternative to divorce. This is commonly sought by individuals with a strong moral or religious objection to divorce. Following a Decree of Judicial Separation the parties remain legally married. The main advantage is that the Court has jurisdiction to consider the financial arrangements and make the full range of financial orders available in divorce proceedings, with the exception only that a "clean break" order cannot be imposed and that there can be no pension sharing order.

Judicial separation proceedings used to particularly suit those individuals whose spouse has retired, or who are approaching retirement age, and who would otherwise lose their widow/er's status and pension rights as a result of a Decree of Divorce. Since 1 December 2000, for cases where the petition was issued after that date, it is possible for a court to order that a pension fund be shared. After judicial separation proceedings the

Petitioner remains the Respondent's legal widow/widower and may retain this status under some pension schemes of which the spouse is a beneficiary. A Decree of Judicial Separation can be obtained on proof of one of the five grounds detailed above in relation to divorce. It is not necessary, however, to show that the marriage has broken down irretrievably.

Many couples who are experiencing difficulties in their relationship prefer informal separation to divorce or judicial separation. We are able to provide advice and assistance to such individuals, particularly where financial matters need to be resolved or there are difficulties in relation to children. It is possible for a separating couple to enter into a separation agreement or deed which may, though need not necessarily, record the parties' intentions about the future dissolution of their marriage. Separation agreements are primarily drawn up to reflect the arrangements agreed over financial issues. It is hoped that separating couples will reach agreement at an early stage about the division of their assets. They may, however, have no pressing wish to be divorced and a separation agreement, therefore, is one way of recording any agreement reached between them without the need for divorce proceedings.

This information sheet has been prepared to highlight some key issues relating to divorce, separation and the children. It is intended to be for general guidance only and is not a substitute for specific advice. It is based upon our understanding of the legal position as at May 2004 and may be affected by subsequent changes in the law.

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