

Separation and Divorce The Available Alternatives

Divorce

Since the Matrimonial Causes Acts of 1969 and 1973, divorce has been based upon the irretrievable breakdown of the marriage. However, the person petitioning the Court for a divorce may only use one of five facts to show to the Court that the marriage has broken down irretrievably. Throughout the person who issues the Petition will be described as "*the Petitioner*" and the person who receives the Petition, as "*the Respondent*".

The five facts are as follows: -

1. The Respondent's adultery and the Petitioner finding it intolerable to live with the Respondent, although not necessarily as a result of the adultery.
2. The Respondent behaving in such a way that it is unreasonable to expect the Petitioner to continue to live with the Respondent.

These are the only two so-called "quickie" divorces that do not rely on a period of living apart. However, if the couple live together as man and wife under the same roof for a period of six months or more after either the adultery is known or the last incident of unreasonable behaviour, the Court will treat the Petitioner as having forgiven the Respondent and it is extremely unlikely that a divorce will be granted.

3. The Respondent deserting the Petitioner, i.e. leaving and living apart, without this being by agreement, and throughout the period of living apart, the Petitioner being willing for the Respondent to return. This desertion has to be for a period of two years at least, prior to the presentation to the Court of the Divorce Petition.
4. Two years separation with the Respondent's consent, to which the consent is absolutely vital and may be withdrawn at any time prior to the grant of Decree Nisi.
5. Five years separation. In this case either of the parties may petition and no consent is required. However, there is a specific defence to this ground if a Decree of divorce would cause grave financial hardship or other grave hardship. The classic example of this type of defence is loss of pension rights for which adequate financial compensation cannot be given or the likelihood of being ostracised in one's ethnic community.

In cases 3 - 5, a period or a total of periods of up to six months is allowed for attempts at reconciliation, i.e. the couple may live together again for a period or periods of time totalling no more than six months. Even a day over six months will bring the period of separation or desertion to an end and the wait for the two years has to start again. If there has been a period of living together, then the same period has to be added to the period of separation so that a full two years or five years, as the case may be, of living apart is involved. So if the couple spend a total of say three weeks trying to reconcile then the period over which the separation will be calculated will be two years and three weeks or five years and three weeks.

In both cases 4 and 5 there is a further provision that the Respondent may ask to have his or her financial position considered by the Court, which has the effect of delaying the pronouncement of the Decree Absolute.

There is a separate handout dealing with the procedure from the lodging of a Petition for Divorce with the Court up to the granting of the Decrees Nisi and Absolute. There are two stages of Decree in this fashion, and it is only upon Decree Absolute that the parties are fully divorced and are free to re-marry. A period of at least six weeks has to elapse between the pronouncement of Decree Nisi and the Decree Absolute. However, if there is a delay of more than one year, the person seeking to make the Decree Nisi Absolute has to provide the Court with additional information. An application by a Respondent for Decree Absolute on the Petitioner's Decree Nisi may be made only after a period of three more months has elapsed after the initial six weeks and one day and the application has to be determined by a District Judge in a court hearing.

At any time following the issue of the Divorce Petition, either party may initiate the procedure, which ultimately in the absence of an agreement being reached will result in a hearing to resolve the financial repercussions of the breakdown of the marriage. Thus either party once this procedure has been commenced may apply to the Court for a decision whether or not they should receive an income from the other party (usually known as "*maintenance pending suit*" when for the spouse, and as "*interim maintenance*" when for children). The question of child maintenance has been altered dramatically by the Child Support Act 1991 and there are separate information sheets about this.

Separation

There are various ways in which a separation can be regulated:-

(i) Judicial Separation. A Decree of Judicial Separation is almost as final in its effect as divorce. The principal differences are that the parties remain married and thus cannot re-marry, that they remain each other's next of kin for some purposes, that no pension sharing order can be made and that the wife will probably be a widow for her husband's pension (depending upon the precise terms of the pension arrangements) and will be a widow upon his death from the point of view of State Benefits. The proceedings are conducted in the Divorce Registry or a Divorce County Court in a similar way to divorce proceedings, that is by way of a Petition founded upon one of the five facts already quoted under the section about divorce proceedings. The County Court (or Divorce Registry in London) has the power within these proceedings to deal with an application by either or both parties for capital and income provision but does not have the power to order a financial clean break between the parties against the wishes of either or both of them, as it may in divorce proceedings. The Court cannot compensate a wife in Judicial Separation proceedings for the loss of widow's pension unless the parties specifically agree that the provision that has been made takes this into account in anticipation of the wife becoming a widow following divorce proceedings.

(ii) Separation Regulated by County Court Order for Maintenance. These Orders are quite rare. It is often the case that if one party is going to ask the County Court for maintenance, there are usually divorce proceedings. However, in theory a spouse may ask the County Court to order maintenance in the face of his or her spouse's wilful neglect to maintain him or her or to vary the terms of a Separation Agreement or Deed that provides for maintenance. By the very nature of the application, one would not see a joint application for a Consent Order although in theory it might be possible to achieve a Consent Order following a compromise of Court proceedings.

(iii) Separation Regulated by a Family Proceedings Court Order. It is possible for the parties to obtain a Consent Order for maintenance through the Family Proceedings Court in which the decisions will be made by employed or trained volunteer magistrates which proceedings usually take place before there are any Divorce or Judicial Separation proceedings. However, if there are Divorce or Judicial Separation proceedings in progress, the parties may only ask the Court which is dealing with their Petition to deal with the question of maintenance. Family Proceedings Court Orders for maintenance are less important now that there is no tax relief available for maintenance payments. The Child Support Act 1991 has also reduced the significance of these types of

Order. The Family Proceedings Court may provide for spousal maintenance and variation of existing child Maintenance Orders (unless the Child Support Agency has sole jurisdiction for the children's keep) and may also provide certain additional Orders for children who do not come within the Child Support Agency system. The Family Proceedings Court may also provide a Protection Order for a spouse and/or children if there is violence. A new regime governing such orders commenced on 1st October 1997. The advantage of having a Family Proceedings Court Order for maintenance is that it is then beyond doubt that one spouse should be supporting the other to the limit of that Order and various methods of enforcement are available.

(iv) Separation Regulated by Formal Deed or Formal Agreement in Writing. The parties may agree to live apart and have the terms of their separation recorded in a formal deed, formal agreement or an exchange of Solicitors' letters. A Solicitor would normally prefer there to be a Deed setting out the precise terms because of its clarity and lack of ambiguity. A Solicitor would normally draft the document in question, again for the sake of clarity and certainty. The parties may come to an agreement either about the financial repercussions of their separation, which is intended to last for a specific period or throughout the period of their separation or throughout the rest of their lives, as they choose. They may decide to have a Separation Agreement, which does not mention finance at all, but this is extremely rare and unlikely. However, an agreement of this nature does not prevent the Divorce Court having the power to review the financial issues in later divorce proceedings if either spouse makes an application to the Divorce Court within those proceedings for this to take place. The Court would not review it automatically. As the law stands at present, an adjustment in previously agreed capital provision will only take place if there has been a major change in the parties' circumstances when compared with those that prevailed at the time of the agreement. If the Deed or Agreement shows that what was intended by the parties was to be a full and final settlement of their respective claims against each other for capital provision and there has been no major change or other significant reason for a Judge to go behind such agreement, then it should stand. The Court upon application of either party may review maintenance payments if there has been a material change in circumstances. Although a formal Deed has more binding weight than letters and can be sued upon should one person break its terms, in practice it is extremely unlikely that this would take place because the parties usually prefer the flexibility of taking financial proceedings within Divorce or Judicial Separation.

- (v) Oral Agreement. The major problem with this is that either party could say at a later stage that the other was wrong, or that there was a misunderstanding or that the terms were somewhat different than had been thought to be the case. Accordingly if there is any expectation of an agreement lasting for some time and having an intention to be binding, written evidence of it is a practical necessity.

Costs

When considering the costs of Court proceedings, one has to be careful to see to which part of the proceedings the costs relate. In Divorce or Judicial Separation proceedings, the costs of breaking the formal legal tie between the parties are dealt with separately to the costs of the financial issues. If arrangements about children of the marriage are agreed, there will be no Orders made and no formal proceedings about them. The costs of financial issues, even maintenance pending suit, will be dealt with separately and will be either the subject of agreement or a separate order of the Court made within that part of the proceedings. In matrimonial cases the usual rule of the costs following the success of the event applies subject the Judge's decision in the light of the offers which have been made and the parties conduct in dealing with the case. A costs order tends to be quite usual in that part of the case which deals with the disposal of the legal tie of marriage itself ("*the main suit*"). The Rules with regard to Costs Orders in proceedings relating to the financial issues are likely to be changed shortly, so that only where one party has acted unreasonably in so far as the conduct of the Court proceedings is concerned (as opposed to conduct during the marriage) will the Court make an Order for Costs. Each party is therefore likely to have to pay its own legal costs. The overriding principles of Civil Litigation apply to family proceedings with an emphasis upon seeking to achieve justice and proportionality to the conduct of such proceedings.

This information sheet has been prepared to highlight some key issues relating to separation and divorce. 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 December 2005 and may be affected by subsequent changes in the law.

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