

# **DIVORCE HANDOUT**

You can only commence Divorce Proceedings after you have been married for a period of one year.

There is one ground for Divorce, this being the irretrievable breakdown of the marriage. To prove to the Court that the marriage has broken down in this way, you must prove one of five facts, these are as follows:-

## **1. Adultery**

You must show your spouse has committed adultery with either a named or an unnamed person and as a result of this you find it intolerable to continue living with them. To pursue such a Petition, it is essential to obtain some evidence of adultery and therefore it is imperative that we obtain the co-operation of your spouse in ensuring that they will either sign a Confession Statement and the Acknowledgement of Service of the divorce Petition returning this to the Court indicating that they have committed adultery. If such cooperation is not forthcoming do not rely on this fact as your Petition will fail.

## **2. Unreasonable Behaviour**

You must show your spouse has behaved in such a way that you cannot reasonably be expected to continue living with him. The legal test for this is a cross between a subjective and an objective test. In other words, would a right thinking person come to the conclusion that this spouse has behaved in such a way that his spouse cannot reasonably be expected to live with him taking into account the whole of the circumstances and the characters and personalities of the parties.

## **3. Desertion**

You must show not only that your spouse has deserted you, but also that this state of affairs has gone on for a continuous period of at least two years immediately preceding the presentation of the Petition. You should note however that it is rare for this fact to be relied upon as there are evidential problems of proof of intent to deal with. Usually the circumstances allow for a Petition to be issued on adultery, unreasonable behaviour or two years separation with consent.

## **4. Two Years Separation with Consent**

You must show that you and your spouse have lived apart for a continuous period of at least two years immediately preceding the presentation of the Petition and that your spouse consents to a Decree being granted. As to what is meant by living apart, you can live in separate houses, or you can live in the same house, but you must live as separate households and you must have decided that the marriage had broken down irretrievably before you separated.

## **5. Five Years Separation**

You must show that you and your spouse have been living apart for a continuous period of at least five years immediately preceding the presentation of the Petition. Your Spouse does not need to consent to the divorce, although you should have regarded the marriage as over before your separation began. Living apart is determined in the same way, in this case as it is in a divorce based upon two years separation with consent.

Even though you have decided the marriage has broken down irretrievably and you are relying upon a period of time or an act of adultery, or behaviour, the Court does allow you to attempt a reconciliation and still rely upon the original incidents or separation provided that the period of attempted reconciliation and cohabitation does not last for more than six months.

## **DIVORCE PROCEDURE**

Once you are certain you have grounds to Divorce, the Petitioner files at Court a Divorce Petition, the original Marriage Certificate or a duplicate, and the Court fee of £410.00 plus a Solicitors Statement of Reconciliation confirming that he/she has advised you of the availability of counseling services and/or discussed whether a reconciliation would be possible.

Once in receipt of these the documents are then forwarded to the Court who will issue the proceedings and then serve directly on your spouse, the Respondent. He or she will have 8 days inclusive of the date of service to return the Acknowledgement of Service to the Court indicating whether he or she intends defending the proceedings.

In the event of he or she returning the Acknowledgement of Service and indicating that they do not intend to defend the Proceedings, the case will then be dealt with under "Special Procedure" and essentially this will mean that the divorce will proceed as a "paper exercise".

### What if my spouse defends the Divorce?

In the event of the Acknowledgement of Service being returned marked "Defended" your spouse will have to file an answer as to why he/she wishes to defend the Proceedings within a period of 21 days. Thereafter the Court will list the matter for a Hearing where both you and your spouse will have to attend and give reason to the Judge as to why the divorce should be allowed to proceed or not. The Judge will then make the final decision.

If your spouse fails to file an answer within 21 days then you can proceed to the next stage (Application for Decree Nisi) as normal.

### Can I claim the costs of the divorce against my spouse?

When the Acknowledgement of Service is returned to the Court there is a section which refers to the costs of the Divorce. Normally where a Petitioner is petitioning on the basis of adultery or unreasonable behaviour and desertion a claim for Divorce Costs is made against the Respondent, your spouse. In the case of "Two year separation with Consent Petition" however, normally the parties agree the sharing of costs or decide what should happen about the Divorce Costs. In the case of a "Five years separation Petition", you could either claim the costs against the Respondent or decide to pay them yourself.

### What if my spouse fails to return the Acknowledgement of Service to the Court?

The Impact of this depends upon the fact used in your Petition for unreasonable behaviour and 5 year separation. In the event of the Respondent not returning the Acknowledgement of Service to the Court, you must then arrange for this to be personally served upon them to prove service to the Court. This is normally done through the Court Bailiff or alternatively by a private Process Server. For adultery, 2 year separation with consent and desertion failure to return the Acknowledgement of Service could be fatal to your Petition.

### Applying for the Decree Nisi (first decree)

Once service has been effected and the case is to proceed undefended basis, you can then apply for your Decree Nisi by filing your statement in support of the Divorce. This is your evidence confirming to the Court that everything in your Petition is true and you wish to rely upon the contents as confirming that the marriage has broken down irretrievably based upon either adultery, unreasonable behaviour, desertion, two year separation with consent or five years separation.

The Court will then consider the evidence filed and if satisfied will certify your entitlement to a Decree and make a declaration as to who should pay the legal costs of the Divorce.

Provided that you have proven the marriage has broken down irretrievably and the Court has certified that you are entitled to a Decree, the Judge will list a hearing date for when the Decree Nisi will be pronounced. There is no need to attend this hearing date or when the Decree Nisi will be pronounced. There is no need to attend this hearing unless there is an issue in relation to costs being claimed or if you object to the Decree Nisi being pronounced.

### When can I apply for Decree Absolute (final decree)?

Following the pronouncement of the Decree Nisi, you will have wait for a period of six weeks and once day before you are entitled to apply for your Decree Nisi to be made Absolute. Once you have your Decree Absolute you will be officially divorced on that day.

### How long will my Divorce take?

Most people want to know how long a Divorce will take, it is very difficult to work out the time scale of a Divorce, but normally from the commencement of the Proceedings until the granting of the Decree Absolute takes between four and eight months, provided there are no particular complications.

Resolution of financial issues or disputes over children generally takes longer.

### Alternatives to Divorce

- a. Separation Agreement - a contract between parties involving no Court Proceedings.
- b. Judicial Separation - involves Court Proceedings taken on the same grounds as Divorce but on Declaration of your Decree you merely formalise your separation but you remain married. Finances can be sorted within such Proceedings.

### The Importance of Making a Will

Divorce affects inheritance under a Will. Where a Will has already been made by either party to the marriage then, by virtue of section 18A of the Wills Act 1837:-

- a. Any provisions of the Will appointing the former spouse executor or trustee or conferring a power of appointment on the former spouse shall take effect as if the former spouse had died on the date on which the marriage is dissolved unless a contrary intention appears in the Will.
- b. Any property which, or an interest in which, is devised or bequeathed to the former spouse shall pass as if the former spouse had died on the date on which the marriage is dissolved unless a contrary intention appears in the Will.

Divorce affects the appointment of a guardian. Unless a contrary intention is shown in the instrument of appointment, any appointment under section 5(3) or 5(4) of the Children Act 1989 by one spouse or his or her former spouse as guardian is, by virtue of section 6 of that Act, deemed to have been revoked at the date of the dissolution of the marriage.

For more advice on making a will telephone our offices for more information. The costs of making a Will is £115 plus VAT.

**Susan Howarth & Co Solicitors Ltd**

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