

Divorce: Survival Guide

Process

How long do I have to be married to get divorced?

You must have been married for at least one year before you can get divorced, unless there are wholly exceptional circumstances.

If your marriage breaks down before you have been married for a year, you may want to separate in the meantime, and to agree issues such as financial arrangements and who will look after any children.

What about whose fault it is?

In general, it makes no difference to the outcome either in terms of the financial agreement or the arrangements for looking after the children. However, where one spouse has been guilty of seriously unreasonable behaviour – e.g. violence towards the other spouse – this may have consequences both in relation to finance and arrangements for any children.

Does it matter who initiates the divorce?

It should make no difference to the final outcome which one of you starts the proceedings. However, the costs of the person starting the divorce are normally recovered from the other party.

In practice, there may be circumstances that make one or the other spouse want to be the "petitioner" rather than the "respondent":

- if only one spouse wants the divorce, he or she will be the one who files for divorce. More broadly, the petitioner's solicitor tends to drive the divorce process – for example, chasing up the respondent's solicitors if documents have not been returned on time;
- if the divorce is on the basis of adultery, unreasonable behaviour or desertion, the aggrieved party must petition for the divorce; and
- a spouse who has religious objections to divorce may prefer to be the respondent.

What are the various grounds for divorce?

You need to show that the marriage has irretrievably broken down. You do this by establishing any one of the following:

- adultery;
- unreasonable behaviour;
- desertion (for at least two years);
- two years' separation and agreement from both spouses to the divorce; or
- five years' separation.

Incompatibility or "irreconcilable differences" are not acceptable grounds for divorce. However, in these circumstances it may be possible to establish unreasonable behaviour, e.g. by failing to adequately respond to a spouse's emotional needs.

Do we have to go to court in person?

If you and your spouse both agree to get divorced, and can reach a reasonable agreement between yourselves on finances and looking after any dependent children, you should be able to get divorced without going to court in person.

What if my partner is refusing to get divorced?

Your spouse can defend a divorce by claiming that the facts relied on in the petition are not true, for example, that he or she did not commit adultery, or that you have not in fact been separated for five years. This could mean that you have to delay your divorce, unless you can petition for divorce on a different basis for example, demonstrating that the marriage has irretrievably broken down, and that your spouse's behaviour has been unreasonable. At the worst, this might mean that you have to separate from your spouse for five years before you can get divorced.

In practice, defending a divorce in this way is most uncommon. What is more common is for an aggrieved spouse to make the process of getting divorced more difficult, expensive and drawn out. For example:

- your spouse may fail to respond to court documents, delaying the process and increasing your costs;
- your spouse may state that he or she intends to defend the divorce, which delays proceedings even if ultimately the divorce is not defended;
- negotiations on childcare and financial arrangements can be drawn out, particularly if every point has to be argued out through your solicitors; and
- your spouse may ask the court to intervene in deciding financial and childcare arrangements. In some cases, it may not be possible to finalise the divorce until these have been agreed.

How long does it take?

A relatively straightforward divorce typically takes around six to eight months, provided that you both deal with court papers promptly. It may be possible to speed this process up – for example, if you want to get remarried as soon as possible – though the costs will increase.

In practice, negotiations over financial arrangements can take longer than this. However, it is usually possible to get divorced before a financial agreement has been finalised – although your solicitor will advise you when this is not advisable. For more information, see our Fast FAQs on divorce and separation – financial matters.

What if my partner is being unreasonable?

If you are still on speaking terms, it's important to try to remain calm and sympathetic. If you can, you should try to make sure that your spouse realises that the longer negotiations continue, the higher the costs – for both of you. If you have children, bitter negotiations will also impact on them.

Although your spouse may be being unreasonable, you should try to reach agreement without involving the court (and added court costs). An experienced solicitor can advise you if the negotiations are going so badly that going to court would be a more cost-effective route.

If you do have to apply to the court, it will set a court-driven timetable – this may help your spouse to focus on the issues.



Children

How can we get the matter resolved quickly so as to avoid upsetting the children?

Ideally, you and your spouse will be able to reach agreement between yourselves. This should be done as quickly as possible. The court will review what you are proposing for the children as part of the divorce proceedings, but is unlikely to object provided what you are suggesting is reasonable. If one parent is stalling, it may be worth pointing out that resolving matters quickly is in the children's best interests, and that financial issues – which may underlie any dispute – can be dealt with separately.

Even if the parents cannot resolve matters among themselves, it may be possible for them to reach agreement with the assistance of mediation. This can be both faster and more cost-effective than going to court.

Otherwise, it will be necessary to apply for the appropriate court orders covering who a child will live with, what contact rights the other parent will have and any specific issues or prohibitions. The process involves various stages. Again, the process will be quicker if the parents are able to reach agreement during the initial conciliation appointment.

The more you can agree among yourselves, the better. Ideally, you should agree all the arrangements for the children without the need for any court order. This avoids the children having to become involved in court proceedings. Children who are asked to tell the court what they want can feel that they are being asked to choose between their parents.

Try as best as you can to avoid involving the children in your own arguments. No matter how badly you may feel your spouse has behaved towards you, it may well be in the child's best interests to continue to have a strong relationship with both of you.

You may find it helpful to get in touch with a suitable support group, both for your own sake and for advice on how to protect your children's emotional wellbeing. You can find a range of helpful information on the Internet, aimed both at parents and at children, for example, at www.cafcass.gov.uk, the website of the Child and Family Court Advisory and Support Service.

What if the children are adopted/not biologically either of the parents/fostered?

If you have both been treating a child as if he or she is your own, then the child is treated as a 'child of the family'. This means that if you separate, the child might continue to live with either parent, and the other parent could be ordered to pay child maintenance. The key issue is what would be in the child's best interests.

Adopted children are treated in the same way as natural children.

Foster children are not 'your' children. Normally any foster children would be removed from your care if you are going through a separation or divorce, but this would be a matter for the local authority who placed the child with you rather than the courts.

How is custody worked out?

The concept of 'custody' has now been replaced by considering the question of 'residence' (i.e. with whom the child/children should live) and 'contact' (i.e. what access to the child/children the other spouse should enjoy).

The key consideration is what is in the child's best interests. The court will take into account various factors, including the child's own wishes and the ability of each parent to look after the child.

What about rights to see the children on certain important occasions?

It is normal to agree that the non-resident parent should have the right to see the child on special occasions. Your spouse might also agree that you should be able to see the child for occasional longer periods, such as during an annual holiday. Specific contact rights for special occasions can be included in a contact order.

What if my partner or I are moving abroad and wish to take the children?

As you retain parental responsibility for your children your spouse is legally required to obtain your permission or a court order to take the children to live abroad. Your spouse is, however, generally allowed to take the children abroad for holidays of up to 28 days.

If you are concerned that your spouse plans to take your children to live abroad regardless, you can apply for a prohibited steps order to stop your spouse taking your children abroad at all. You should note, however, that your spouse can apply for a court order allowing the children to be relocated abroad if it is in their best interests.

If the children are with my spouse, will I be forced to pay more child support that I can afford?

The welfare of the children – including providing them with a home – is a priority. Normally, this applies only to children aged 16 and under, or aged 18 or under and still in full-time education. The courts can however, require you to provide maintenance to older children who are still in full-time education or who have special needs.

The Child Support Agency (CSA) has a formula for calculating the amount of maintenance that the 'non-resident parent' must pay to support children. Normally, this would be 15% of net income for one child, 20% for two children, and 25% for three or more.

The amount can be reduced if the non-resident parent has other children to support or extra costs. There are also a number of other circumstances in which the CSA will vary the level of maintenance, for example, if a child spends more than one night a week with the non-resident parent.



In most cases, either parent can apply to the CSA (www.csa.gov.uk) to assess the level of maintenance to be paid. This will override any agreement between the parents.

In certain circumstances, either parent can apply to the courts for a 'top-up' of the level of maintenance, for example, to contribute to the cost of private education.

Can arrangements for the children be changed?

Yes. You can either agree the change with the other party if no court order is in place. Alternatively, either of you can apply to the court. If the court considers that a change is in the child's best interests, it can grant an appropriate order.

In practice, it would be unusual for the court to order that a child who has been living with one parent for some time should now live with the other. More commonly, you might go to court to get an order covering a particular issue, such as where the child should be educated or to enforce your rights to see the child.

The financial arrangements for the child's maintenance can be changed to reflect changes in the parents' circumstances.

How does a judge decide upon the consequences?

The key consideration is what is in the child's best interests. The court will take into account various factors, including the child's own wishes and the ability of each parent to look after the child. The judge will often be guided by a detailed report from an appointed CAFCASS officer.

Finance

When do we need to agree on the issue of financial settlement?

You can agree a settlement at any time before or after your divorce, although it is advisable to do so as quickly as possible and before either partner remarries. Each party will need to fully disclose his/her financial position to the other before any binding settlement can be concluded.

It is usually best if you can negotiate a settlement prior to the divorce. The court can then be asked to make any relevant financial orders at the same time as the grant of the decree nisi. (This decree nisi is granted when the court agreed that grounds for divorce have been proved. However, there is a further delay until the 'decree absolute' finalises the divorce.)

Are my rights affected if I leave the house before the divorce process is complete?

You will still have the same rights to occupy the home as you had before, and can move back in if you choose.

There may be practical problems if, for example, your spouse changes the locks. While you will be entitled to get back in, it makes sense to ensure that you take anything you may need – such as important documents – with you in the first place.

There may also be other considerations and it is advisable to take advice before moving out.

You need to take urgent advice if your name is not on the title deeds or you are not a registered owner of the property.

Will I be forced to pay maintenance?

It depends on the circumstances. Factors to be taken into account include:

- each partner's needs, assets and ability to earn income;
- the standard of living before the break up of the marriage;
- how long you have been married and how old you are;
- any special needs such as a disability;
- the contributions each spouse made to the marriage; and (for example, by looking after the home and bringing up children).

If, for example, two young people divorce after a brief, childless marriage, it might be fair for them to each walk away with the assets they brought into the marriage, and with neither paying the other maintenance.

On the other hand, suppose a couple have been married for 30 years, with the wife sacrificing her career to bring up the children, looking after the home while the husband worked. A fair financial settlement might award the wife half the joint assets, including half her husband's pension entitlement, and maintenance of half her husband's income until he retires. This would reflect the value of the wife's contribution to the marriage as a homemaker, and the fact that she would not now be in a position to earn a large income.

If there are children, their interests and needs – including maintenance – are regarded as paramount.

Can a man ever claim maintenance from his wife?

There is no reason why a man should not be able to claim maintenance, for example, if the woman is a high-earner. A fair settlement should take into account the factors in the previous paragraph, regardless of gender.

Who pays the solicitors fees?

During the process of negotiating a financial settlement, you will each use – and be responsible for paying – your own lawyer. As part of the settlement, however, one of you might negotiate that the other should pay part or all of their legal fees.

You can keep your legal fees down by agreeing as much as possible amongst yourselves. Fees will escalate where hostile spouses insist on conducting all the negotiations through the lawyers and arguing over trivial details.

What if we have complex business assets?

There is no presumption that the individual who has built up a business has any greater claim to the business assets. The other partner's contribution to the marriage, for example, by looking after the home and children might be considered to be equally valuable. Depending on the circumstances, this might mean that each partner could claim entitlement to half the value of the business.

In all cases, the parties are encouraged to agree a settlement which allows the business to continue. For example:

- one partner could retain ownership of the business and pay maintenance out of the business income;
- the individual who will retain ownership of the business could borrow against the value of the business to provide a lump sum for the other partner; and
- in exceptional circumstances, the business could be split into two separate businesses.

Where possible, courts try to avoid ordering a settlement which results in the break-up or sale of a business, but this may be ordered by the court if there is no practical alternative.

How will my pension be affected?

Your pension is a marital asset, like your home and other assets. The value of your pension can be taken into account in deciding a fair settlement.

Practical solutions can include:

- offsetting the value of one partner's pension fund by transferring a lump sum, or other assets, to the other partner; and
- splitting the pension fund into two separate pension funds, each controlled by, and for, the benefit of one partner.

What if I feel my partner is not disclosing their assets?

A court will order both parties to make full financial disclosure in Form E. A party who fails to do so would be in contempt of court and liable to imprisonment.

What if I cannot afford to pay maintenance?

You can go to court to ask them to change the maintenance order to reflect your circumstances. For example, you might do this if you lose your job and cannot find another one.

Should I execute a new will?

Yes. When you get divorced, your ex-spouse is automatically excluded from your will as either a beneficiary or an executor. (Note that this is not the case if you have merely separated.) Unless you draw up a new will, there can be undesired consequences.

For example, your original will might have been drawn up on the assumption that your ex-spouse would take care of the children using the money left to him or her. With the ex-spouse excluded from the will, you might now want to arrange an appropriate trust to hold the inheritance for the children. More broadly, you may want to alter the way assets are shared among the various beneficiaries.

If you do want your ex-spouse to continue to be a beneficiary, you must draw up a new will. In some cases, the financial settlement you agree when you divorce may require one or both of you to make provision in your will for your ex-spouse and any children. This might be appropriate, for example, if you are paying continuing maintenance.

Note also that if your ex-spouse remains dependent on you, in some circumstances he or she may be able to challenge your will if it does not make

adequate provision for him or her. Your own wishes are more likely to be followed if you draw up a new will that takes this into account.

What if we have life policies?

Life insurance and endowment policies are taken into account when agreeing a fair settlement. You should agree how each policy will be handled, whether premiums will continue to be paid for regular contribution policies, and whether the beneficiaries of any life insurance cover will be changed.

You may choose to retain individual policies or to sell (or surrender) them. Any policies in joint names will normally be sold or transferred into one individual's name. Early surrender of a policy may result in a sharp fall in the expected value of the policy, and surrender, sale or transfer may also have tax consequences. Take advice on the best option in your circumstances.

How are rights to the property worked through?

If there are no children, the aim is to reach a fair financial settlement. Whether you can retain the home will depend primarily on how many other assets you have between you and what your individual preferences are. For example, if you have sufficient money, you might agree that one of you will keep the home but the other will receive a correspondingly large share of other assets. If your resources are more limited, you may need to agree to sell the home so that you can each buy a smaller property.

Where there are children the situation becomes more complex. The welfare of the children requires them to have a home where they can live with whichever parent will continue to look after them. If you have sufficient assets, it is normally best for the children to stay in the family home while the other parent buys another home to move into. If assets are less abundant, it might make sense to sell the family home so that two cheaper homes can be bought.

The problem becomes more difficult when assets are more limited. The children and the parent with whom they reside may require significantly more than half the assets to ensure the children have an adequate home, and sufficient to make ends meet. This may leave the other parent with very little. However, a court would be unlikely to approve a very one-sided agreement, unless the interests of the children left no alternative.



For more information on divorce please contact:

Jonathan Dunkley
Partner

Direct Line: 0191 211 7918
email: jdunkley@muckle-llp.com

Specialisms: Over 30 years' experience of all aspects of marital breakdown, with particular emphasis on financial disputes in high value and complex cases, and those involving business assets.