Divorce (same–sex marriage)—client guide

This document provides general guidance regarding divorce procedure. Your family lawyer will be able to provide specific advice based on your circumstances.

How do I apply for a divorce?

To apply for a divorce, you must have been married for at least a year. It doesn't matter where in the world you were married, but you can only apply for a divorce in England and Wales if either you or your spouse meet certain residence conditions or are domiciled here. You should speak to your family lawyer about this if you are in any doubt.

The divorce process is generally administrative. This means that usually neither of you will need to see a judge to get a divorce as it is almost always agreed by a judge on the paperwork. The process is simple as long as your spouse does not ask the court not to grant your divorce. When this happens, it is called a defended divorce and is a different process, but defended divorces are costly and thankfully very rare.

If you and your spouse are not in agreement regarding arrangements for children and finances these will be dealt with separately (but at the same time) from the divorce process.

Starting divorce proceedings

The document that starts the divorce is called a petition. The law in this country still requires one spouse to petition against the other, even if both of you agree that there should be a divorce. Your family lawyer will need to have your original (or an official copy)

marriage certificate to file the petition and also an approved translation of what it says if it is in a language other than English. There is a court fee payable of £550 to start the process.

To start a divorce, you (or your family lawyer, on your behalf) must file a petition at court. The petition is a form that gives the court information about you and your spouse, and tells the court that you feel your marriage has irretrievably broken down. You must briefly set out evidence that your marriage has broken down by supplying certain details in one of the following five categories:

1. that your spouse has behaved unreasonably
2. that your spouse has deserted you for two years
3. that you have lived apart for two years and your spouse consents to the divorce, or
4. that you have lived apart for five years

In a same-sex marriage, that your spouse has committed adultery is a category on which a petition may be based where applicable, but adultery is defined in legislation as only relating to conduct between the respondent and a person of the opposite sex. A relationship between the respondent and a person of the same-sex may fall within the category of unreasonable behaviour and your family lawyer will be able to provide advice depending on the circumstances.

The person starting the divorce is called the petitioner and the other spouse is called the respondent.

No fault divorce

You may be aware that there is going to be a change in the way that divorces proceed in England and Wales. The Divorce, Dissolution and Separation Act 2020 (DDSA 2020) has been described as a landmark reform of divorce law. It aims to make divorce an easier process for all parties and less acrimonious by relying on what is commonly known as 'no fault divorce'. This new legislation will, for the first time, completely remove the need to assign blame when commencing divorce proceedings. The objective is to reduce the unnecessary distress and acrimony caused by the allegations of behaviour that currently feature in the majority of divorces in England and Wales.

The new divorce procedure is expected to take effect from 6 April 2022. This will be dependent on the government issuing supporting legislation to bring DDSA 2020 into effect and various administrative changes taking place in the court system before then.

Under current divorce law in this country, to establish that a civil partnership has broken down irretrievably, one or more of four facts must be proved. Two facts are based on fault unreasonable behaviour (ie that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent) and desertion, and two facts are based on a period of separation (two years' separation with consent or five years' separation without consent).

DDSA 2020 retains irretrievable breakdown as the sole ground for divorce but removes the need for the party applying for divorce to satisfy the court as to either the 'conduct' or 'separation' facts in order to establish irretrievable breakdown of the marriage, ie in effect it removes the need to assign blame. It replaces the four facts with a single notification process. One (or for the first time, both) of the parties will state at the outset that the marriage has irretrievably broken down. The applicant(s) must confirm to the court that they want to proceed with the application before the conditional order is made. The first stage in the process will be a conditional order (previously known as decree nisi).

Under the new procedure, that confirmation cannot be given to the court unless 20 weeks have elapsed from the start of proceedings. There will then be a further six weeks until the final divorce order can be applied for (previously known as decree absolute). Although the ability to contest a divorce is rarely used under the current law, under the new system there will be no option to defend the divorce.

The current dissolution procedure will continue to apply until the reforms under DDSA 2020 take effect. This means that any divorce petitions issued before 6 April 2022 will rely on the sole ground for divorce that the marriage has broken down irretrievably, which must be established by proving one or more of the five separation or fault-based facts. Your family lawyer will be able to provide specific advice based on your circumstances. In some instances, couples may prefer to delay starting divorce proceedings until the new law takes effect.

Children and finances

For the purposes of any financial or children arrangements that need to be made, it doesn't matter in most cases who starts the divorce proceedings and why. You can ask the court to make orders about money and about children if necessary during (or after) the divorce, but these legal processes are completely separate from the divorce itself. This guide only deals with the divorce procedure; see our guides to arrangements for children and financial arrangements for more information on these areas. You should note however that if you are considering getting remarried or entering into a civil partnership you should speak to your family lawyer before doing so as that may affect your ability to make an application for financial provision.

Procedure

Agreeing the contents of the petition

The Law Society says that a family lawyer acting for someone who wants a divorce should usually send a draft copy of the divorce petition to the other spouse at least seven days before it is filed at court. This gives the other spouse the opportunity to obtain legal advice and to raise an objection if there is anything in the petition that they find particularly offensive. It tends to be better to agree what is in the divorce petition if possible, as disputes about what goes in can have implications for the smooth progress of the rest of the divorce proceedings.

Co-respondent

Note that for the purposes of divorce, legislation provides that only as conduct between the respondent and a person of the opposite sex may constitute adultery. If your spouse has committed adultery with a person of the opposite sex, it is technically possible to name the person with whom they committed adultery as a co-respondent in the divorce. However, we do not recommend that you do so unless you believe that your spouse is likely to defend the proceedings. In our experience, naming a third party in divorce papers raises the emotional temperature between you and may make it more difficult to agree arrangements in other areas, increasing your stress levels and legal costs as a result.

Filing the petition

The petition is filed at court with the court fee and your original (or an official copy) marriage certificate.

Serving the divorce papers

The court, or your family lawyer, sends the petition out to ('serves') the respondent together with a form for them to fill in called the acknowledgment of service. In this form the respondent has to say whether or not they intend to defend the divorce. The form has to be returned to the court. If the respondent has no intention to defend the divorce that may be the end of their part in the process and all further steps are taken by the petitioner. In some cases however the respondent may want the decree absolute to be made earlier than the petitioner would prefer (see below)

Applying for the decree nisi

The next step is for the petitioner to complete a statement in support of the petition. This is another form that states that the contents of the divorce petition are true and asks for certain technical legal details such as whether you have lived in the same household since a certain relevant date. Your family lawyer will then file it at court with your application for a decree nisi. The decree nisi is the second-to-last phase of the divorce. It means the court has agreed that you are entitled to a divorce, but has not yet made it final. After the court has received your application for decree nisi, a judge will look at your papers to make sure they fulfil the legal criteria and if they do the court will issue a certificate telling you when the decree nisi will be pronounced.

Decree nisi is pronounced in open court. This means the judge reads out a list of names of people whose divorces have got to this stage, this week. Although anyone can go along if they want to, you do not have to attend court when this happens. At any time after decree nisi, the court is able to make a binding financial order setting out your arrangements for finances and property on divorce, either by consent or as a result of separate court

proceedings. It will not do so unless you or the respondent ask it to or your separate financial court proceedings have come to a conclusion.

Finalising the divorce suit

Six weeks and one day after the grant of decree nisi, the petitioner can apply for the decree absolute, which formally ends the marriage. Not everyone should apply for decree absolute as soon as it is available and you should make sure you have discussed whether you should do so with your family lawyer. It may not be sensible to apply immediately if, for example, financial arrangements are not yet settled. You should discuss your specific circumstances with your family lawyer as in some cases the grant of decree absolute will prevent certain types of financial claims being made. However, if the respondent is keen to end the marriage and the petitioner has not applied for the decree absolute, the respondent can ask the court for permission to do so after a certain period of time (about four-and-a-half months from decree nisi). The court will usually grant such an application unless there are particularly pressing reasons not to do so. In certain special or exceptional circumstances the court may delay the grant of a decree absolute. You should discuss whether an application to delay the court making the decree absolute is necessary or appropriate.

How long will my divorce take?

Your family lawyer will be able to advise you on how long your divorce is likely to take. This can vary depending on the current timescales for the court dealing with your divorce, and whether each step in the divorce is taken promptly and financial arrangements do not hold things up.

Implications in relation to your Will

It’s important to note that divorce may mean that certain provisions in your Will do not work as you might have intended them to. You will need to make a new Will quickly after decree absolute (or in contemplation of divorce) to ensure your wishes are carried out in the event of your death.