

A photograph of St Paul's Cathedral in London, viewed from a high vantage point, likely the Sky Garden. The cathedral's dome is prominent in the center, surrounded by other buildings of the London skyline. People are visible walking on the glass walkway in the foreground.

BRIEFING

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# Marital Breakdown: A Brief Guide to Obtaining a Divorce

## Introduction

Obtaining a divorce does not have to be a complex process. This briefing, which has been written by our Family Law experts, provides an overview of the procedure involved.

## First Things First

### When can proceedings begin?

Divorce proceedings cannot be commenced until you have been married for at least a year.

### How is the divorce process commenced?

The person wishing to begin the divorce proceedings must file an application at Court known as a 'petition'. The person who files the petition is referred to as the Petitioner, and the person who receives the petition is referred to as the Respondent.

### In which jurisdiction should divorce proceedings be commenced?

Careful consideration should be given to the jurisdiction in which proceedings are issued as financial proceedings are linked to these. There can be significant differences in the level of the financial award depending on the jurisdiction where proceedings take place. London is known as the divorce capital of the world, due to the Courts' reputation for awarding generous settlements to non-working spouses. Our Family Law experts are able to provide guidance on which jurisdiction might be most appropriate for you and your family.

A person wishing to issue divorce proceedings in England and Wales should be aware that the Courts can only deal with divorce proceedings where one of the following is applicable:

- both parties are habitually resident in England and Wales;
- both parties were last habitually resident in England and Wales and one party still lives there;
- the Petitioner is habitually resident in England and Wales and has lived there for at least one year before the petition is filed;
- the Respondent is habitually resident in England or Wales;
- the Petitioner is domiciled and habitually resident in England and Wales and has been living in England and Wales for at least six months before the petition is filed; or
- both parties are domiciled in England and Wales.

## Grounds for divorce

There is only one ground for divorce and that is the irretrievable breakdown of the marriage.

The fact that the marriage has irretrievably broken down is evidenced in the petition by citing one of five possible facts:

- **Adultery:** an adultery petition requires an admission by the Respondent that he or she has committed adultery within the last six months and that the Petitioner finds it intolerable to live with him or her. In this context, adultery continues to be defined as conduct with a person the opposite sex, meaning that an adultery petition may not be open to gay or lesbian couples (though this may factor into unreasonable behaviour, below). A couple cannot live together for more than six months after the last act of adultery, otherwise the Court will consider that it was not intolerable to live together. To minimise any acrimony, it is generally considered better not to name any third party (referred to as the co-respondent) in the petition.
- **Unreasonable behaviour:** an unreasonable behaviour petition requires five or six examples of behaviour on the part of the Respondent which the Petitioner has found unacceptable, with dates where possible, one of which must have taken place within the last six months. What constitutes unreasonable behaviour is a subjective test and so there is no need for the behaviour to be objectively unreasonable. If you have already separated it is sufficient for the last incident of unreasonable behaviour to have taken place within the last six months prior to separation.

In cases where the parties remain reasonably amicable, it is often possible to agree the contents of a “behaviour” petition to minimise conflict.

- **Two year separation with mutual consent:** a petition on this basis requires the parties to have lived apart for a period of two years prior to the petition being lodged at Court. This does not mean that you have to have lived in separate houses, but does require you to have led separate lives, for example, having separate bedrooms and not attending social activities together. The Respondent also has to consent to a divorce on this basis.
- **Desertion by your spouse:** the Respondent must have deserted the Petitioner for a continuous period of at least two years immediately before the petition is sent to the Court.

- **Five years’ separation whether or not your spouse consents:** this type of petition can be delayed by an assertion by the Respondent that divorce will cause grave financial hardship.

### Should you be the Petitioner or the Respondent?

A divorce petition is often seen as a means to an end and in some circumstances it can be politic to agree to be the Respondent, rather than to commence the proceedings (i.e. be the Petitioner).

However, generally, it is preferable to be the Petitioner for several reasons. Firstly, it gives you more control over the timetable of the divorce itself. Also the Petitioner may obtain an order for costs against the Respondent on the two fault-based petitions namely adultery or unreasonable behaviour.

It is possible for the parties to determine who is to issue the petition in advance by providing for this in either a Pre-nuptial or Post-nuptial Agreement. For further information please see our Briefing Note on Pre-nuptial Agreements.

### Timescale

It can take between three to six months to obtain a divorce though delays are possible if the financial arrangements are not finalised within this timeframe.

### Defended divorce proceedings

It is exceptionally rare for divorce proceedings to be defended. The Respondent has to argue either that the marriage has not irretrievably broken down and/or refute the particulars on which the Petition is based.

A Respondent who accepts that the marriage has broken down may still choose to defend the petition and file their own petition (technically referred to as a cross petition) setting out his or her grounds for the breakdown of the marriage. This will increase the costs of the divorce considerably for both parties but can, on occasion, be appropriate. It is also sometimes possible to agree that the Decree should be pronounced on both petitions, called cross Decrees.

### **The Procedure**

#### Lodging the Petition

Once the divorce petition is drafted, it must be lodged at Court and issued.

#### Service of the Petition

A copy of the petition will then be served on the Respondent, together with a form called an 'Acknowledgement of Service'.

In order for the divorce to progress without delay, the Respondent must sign and return the Acknowledgment of Service to the Court within seven working days, confirming that he or she does not intend to defend the divorce. This is frequently dealt with by solicitors. The Court will then send a copy of the Acknowledgement of Service to the Petitioner's solicitors.

#### Applying for Decree Nisi

The Petitioner's solicitors then prepare an application for Decree Nisi and a statement in support in which the Petitioner confirms that the contents of the petition are true. These will then be sent to Court together with what is called a Request for Directions for Trial.

#### Filing Documents at Court

The documents are placed before a District Judge who will decide whether or not the petition is proved. Sometimes the District Judge will require more information and this can cause a delay.

#### Decree Nisi

If satisfied that the Petitioner is entitled to a divorce, the District Judge will sign a certificate which will state the date of the hearing at which the Decree Nisi will be pronounced. You do not have to attend this hearing. At this point, however, you remain married regardless of whether you are the Petitioner or the Respondent.

#### Application for Decree Absolute

Six weeks and one day after the Decree Nisi is pronounced, the Petitioner can apply for the

Decree Absolute. It is only when we receive this Decree, that you are finally divorced.

The Decree Absolute in effect replaces the marriage certificate and you will need to produce it in the event that you wish to re-marry.

We usually advise the Petitioner not to apply for a date for pronouncement of Decree Absolute until the financial arrangements following the divorce are finalised.

The Respondent may apply for Decree Absolute three months after the date when the Petitioner could first apply but his or her application - in contrast to that of the Petitioner's - is not automatically granted in order to give the Petitioner the opportunity to oppose it, as appropriate.

You should also be aware that on divorce, if you have any bequests you have made to your spouse in a will, they will be treated as if your spouse has predeceased you. Depending on how your will has been drafted, it may mean that their share falls into the residuary estate or may even have to be divided in accordance with the intestacy rules.

#### Judicial Separation

It is possible to start judicial separation proceedings, or nullity proceedings, if you have been married for less than a year (or later if appropriate).

Judicial separation proceedings will not terminate the marriage and you would not be free to re-marry at the conclusion of the proceedings. This is usually most appropriate for people who have religious objections to a divorce.

**For further information, please contact:**



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