



Guide to the financial consequences of divorce.

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Introduction


This guide examines the financial consequences of divorce.

Divorce may not be the most pleasant subject to contemplate, but sometimes it can be the only practical solution if a relationship between a husband and wife has broken down.

Statistically, one out of three first marriages and two out of five second marriages end in divorce, with around 300,000 people going through the divorce courts every year. For them, the logistical and emotional aspects of separation can be made worse by the complexities of the law and the financial considerations involved.

It is important to remember that each divorce is different and the services of an efficient and sympathetic solicitor are likely to prove invaluable at what may be a very distressing time.

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The divorce process

The divorce process itself is outlined in the seven steps listed below. Please note that there is a glossary at the end of the guide that will help to explain the legal terms used.



The petitioner files, with the court, the divorce petition and a statement of arrangements about any children. It is necessary to lodge either the marriage certificate or a certified copy of the marriage certificate and this will be retained by the court.



The court posts the divorce papers to the respondent. This is known as service.



The respondent returns the acknowledgement of service form within 7 days. On this form the respondent will either agree to or defend the divorce and state the position on costs.



The petitioner files the application for Decree Nisi.



The District Judge considers the papers and, if satisfied, will provide a certificate fixing the date for Decree Nisi. He will also rule on any divorce costs. Once Decree Nisi has been pronounced any financial consent order can be approved by the court.



The petitioner can apply for a Decree Absolute six weeks and one day after the Decree Nisi. If the petitioner fails to apply, the respondent can apply for a Decree Absolute three months after the date on which the petitioner could have first applied for a Decree Absolute.



The Decree Absolute will be pronounced a few days later. This brings the marriage to an end and brings into force any financial order that has been approved. Any agreement may have already been implemented by this stage though sometimes financial negotiations continue long after Decree Absolute.

Starting divorce proceedings

It is not possible to start divorce proceedings within the first year of marriage. Judicial separation is the only remedy i.e. the marriage cannot be annulled. After one year, either the husband or wife can apply to the court in England or Wales for their marriage to be dissolved. This is provided that at least one of them is domiciled or is resident in England or Wales. In assessing this issue, the court may apply either a 6 or 12 month requirement dependant upon the circumstances of the case.

There is only one ground for divorce and that is that the marriage has irretrievably broken down. This will have to be proven before the court will dissolve the marriage.

The evidence to prove that the marriage has irretrievably broken down will be set out in the petition. The court cannot find that the marriage has broken down unless it is satisfied that one of the following five 'facts' applies:



Adultery

The respondent has committed adultery (the act of sexual intercourse), and the petitioner finds it intolerable to live with them afterwards.

Unreasonable behaviour

The respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with them.

Desertion

The respondent has deserted the petitioner for a period of two years.

Two years' separation

The husband and wife have lived apart for two years and both agree to a divorce.

Five years' separation

The husband and wife have lived apart for five years.

If the husband and wife have lived together for more than six months following discovery of the last act of adultery the petitioner cannot rely on this adultery in the petition. Any cohabitation for a period of over six months will also 'reset the clock' for any period of separation or desertion.

Whilst you do not have to use a solicitor to get divorced it is prudent to seek legal advice as to the terms of any financial settlement.

Financial settlement

Most divorcing couples negotiate and agree a financial settlement without the need for contested court proceedings. This is often done through their solicitors, who will prepare an order recording the terms of the agreement that is then approved by the court. This is known as a consent order.

Once made, this order is binding upon both parties. By making an agreement without the need for contested proceedings the husband and wife are likely to save both distress and legal costs.

If agreement cannot be reached, either party may issue an application in the court.

There follows a number of set steps dealing with

disclosure of assets and valuations. Sometimes expert evidence is needed, especially if businesses or pensions are involved. The length and expense of the final hearing will depend on how complicated the financial position is and how many aspects are in dispute. The husband and wife must both give evidence and be cross-examined, and other witnesses may also be called.

Having examined the evidence the judge will then make an order. However, the majority of cases reach settlement before this point – frequently being negotiated even ‘at the door of the court’ – and final hearings are, in practice, rare.

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The splitting of assets

There are no hard and fast rules about how assets are split. The court has wide discretion in this matter, although first consideration must always be given to the welfare of any children.

The court will seek to achieve ‘fairness’. In many cases this will involve beginning from a position of equality of distribution, but an unequal distribution may be warranted depending upon the circumstances of the particular case.

There are a number of factors that the court must consider before making a financial order. These include present and future needs of the husband and wife, their respective earnings capacities both currently and in the foreseeable future, their ages, any physical or mental disabilities, the length of the marriage, their standard of living during the marriage, the contributions of each to the welfare of the family, whether financial or otherwise.

Sometimes the conduct of the parties is relevant but in practice this is rare and the court seldom uses a financial order to penalise a party or apportion blame. Neither does the court seek to favour a party on the basis of gender. Every divorce is different and will require a solution to suit the individual needs and resources involved.

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Disclosure of assets

The first step towards settlement is for both the husband and wife to disclose, to their solicitors and to the other side, the full details of their financial circumstances. This will involve all assets, liabilities, income and any likely changes in circumstances. It must also be disclosed whether the husband or wife intends to remarry or live with a new partner.

The husband and wife do have a duty to fully and frankly disclose their financial position. If either refuses to answer reasonable questions, an application can be made to the court to compel them to do so.

If either party deliberately misleads the other as to their financial position or does not disclose assets, then it may be possible to overturn any agreement reached based on this non-disclosure.

New partners

The financial position of a new partner may be taken into account if it relieves either the husband or wife of some expense. For example, if the husband plans to live with a new partner that already owns a house, less emphasis will be placed on his need to own a house for himself.

Any maintenance order for a spouse comes to an end when they remarry. If they cohabit instead and are supported to some degree by their new partner, the spouse paying the maintenance can apply to have these payments reduced or stopped.

However, living with a new partner will not itself mean that maintenance payments come to an end, unless the original order provided for this. It is important to note that the court has no power to make orders against the assets of new partners.

Transferring assets

Any order requiring the transfer of assets or cash between the husband and wife can only be made after the Decree Nisi has been issued. However, in practice, it may be necessary for some transfers to take place beforehand.

Where assets are sold or transferred between husband and wife it is essential that careful consideration is given to taxation consequences. Professional tax planning advice should be sought as soon as possible, rather than waiting for the divorce to be finalised.



Welfare of children

Provided that the children were born during the marriage, or if not that the father is named on the children's birth certificates and they were born after 1st December 2003, the husband and wife share joint parental responsibility for their children before, during and after divorce. When making an order, the court will take account of this and also recognise that the welfare of the children is the most important priority.

Maintenance

The level of maintenance that should be paid by the non-resident parent is decided using a simple calculation of liability based on a percentage of their net weekly income. Net weekly income is income after income tax, National Insurance and any contributions to a pension scheme have been deducted. The percentage of the net weekly income used is:

- > 15% if there is one qualifying child
- > 20% for two qualifying children
- > 25% for three or more qualifying children

Where a non-resident parent has natural or step-children in their current family the net income will be reduced by 15% for one child, 20% for two children and 25% for three children or more before the percentage is applied.

Example:

Mr Smith has one child with Mrs Smith. He is now in a relationship with Mrs Brown who has two children. 20% of Mr Smith's net income will be taken off the maintenance calculation (because of Mrs Brown's children). He will have to pay 15% of his net income as maintenance to his child with Mrs Smith.

It is also worth noting that as the Government is keen to encourage contact between parents and children, if the non-resident parent has overnight care for the children then an adjustment is made to the amount of child maintenance due. It will be reduced as follows, depending on the number of overnight stays with the non-resident parent:

- > 52-103 nights per year 1/7th reduction
- > 104-155 nights per year 2/7th reduction
- > 156-174 nights per year 3/7th reduction
- > 175 nights or more 1/2 reduction

The legislation places a limit of £2,000 on the amount of net weekly income that can be taken into account when working out maintenance. There is also a flat rate so that if the non-resident parent has a net weekly income of £100 or less or is on a wide range of benefits or pensions, the rate of maintenance will be £5 each week. It is possible to apply to the courts for 'top up' maintenance and the Child Support Agency can collect this with the Child Support. A court can also be used to apply for payments to cover specific areas such as school fees, disability costs or maintenance for step-children.

Any order for child maintenance made by the court will now only be binding for a period of up to 12 months. After this period, either party may apply to the Child Support Agency. In this way it is open for the court to order more than the Child Support Agency amount, but this would only be binding for a period of 12 months. If the parent with care of the children is on Income Support or Income Based Jobseeker's Allowance they have to apply for an assessment by the Child Support Agency. If they refuse, unless they have good grounds to do so, they will be penalised by having their benefit payments reduced.

Welfare of children (continued)

Those who are on other specified State Benefits may be able to use the Child Support Agency for an assessment, if maintenance cannot be agreed between the parties. The Child Support Agency cannot normally accept applications for child maintenance if any of the people involved live outside the United Kingdom. However, in some cases if the non-resident parent is a Civil Servant, a member of the Armed Forces or working for an employer that is based in the United Kingdom, they may be able to arrange maintenance.

The Child Support Agency has new powers for enforcing the payment of monies, including powers to impose penalties for late payment, criminal sanctions for people who refuse to provide information or deliberately provide false information and other such powers.

Other court orders

Other than maintenance, there are four other areas relating to children in which a court order may be necessary. These are:

- › 1 Residence – an order stating with whom a child is to live.
- › 2 Contact – an order requiring the parent that the child lives with to allow the child to visit, stay with or have contact with the other parent.
- › 3 Prohibited steps – an order prohibiting specific steps in relation to a child, for example, a change of surname or moving abroad.
- › 4 Specific issue – an order relating to a specific issue, such as education.

When looking at these, the court will consider the welfare of children as its paramount concern.

Matrimonial home

This is often the largest asset, and as a result the sale of the property may be necessary so that its value can be divided between the husband and wife.

The ideal situation is that following divorce both the husband and wife will have funds available to buy a new house. In reality this is often not possible, especially after the significant house price rises witnessed in recent years.

The main priority for the court will be to provide a home for any children, though this might be mortgaged or rented as opposed to bought outright. It all depends on the circumstances of each particular case and what is fair and reasonable to both parties.



Division of assets

Business assets

While a court will be keen to ensure a fair division of assets, they will be reluctant to make an order that will severely affect the running of a business. Therefore the court will very carefully consider the division of business assets where one of the spouses runs the business or has shares in a private company. Valuations will almost always be considered.

Pensions

Pension funds should be taken into account when determining the division of assets. In the majority of cases the husband has a bigger pension and so an award may be made to the wife. However, if the wife has the bigger pension the award may be made to the husband.

There are three ways in which pension assets can be shared and these are (assuming it is the husband that has the bigger pension):

- 1. Giving the wife a bigger share of other assets because she loses the right to share her husband's pension in retirement. This approach is known as offsetting.
- 2. Earmarking some or all of any lump sum or pension so that when it is paid out a proportion is handed over to the wife. In practice, this is now rare.
- 3. Transferring some of the husband's accumulated pension savings to the wife to provide her with her own pension savings. This option is called pension sharing and only became available for divorces from 1st December 2000.

Other assets

All other assets owned by the husband and wife are relevant to the financial settlement and should be taken into consideration.

How long will the divorce process take?

The length of time that the divorce process takes can vary considerably from case to case, largely depending upon the complexities and any disagreements involved, the likely minimum being between four and six months.

Mediation

Mediation is voluntary and offers separating and divorcing couples the opportunity to resolve issues arising from the breakdown of their relationship. Mediators frequently work with solicitors to help parties arrive at a settlement.

Collaborative practice

Collaborative practice is a new way of resolving family law matters including divorce, separation and parenting disputes. It is a good option for people who want to avoid the uncertainties of the court based system and it allows clients to benefit from expert legal advice without risking the threat of court action during negotiations. Both partners and their lawyers work together to find the best solutions through discussion and face-to-face meetings. Provided everyone enters the process in good faith the process is faster and less acrimonious than court proceedings and almost always cheaper.

Financial planning during the divorce process

It is estimated that around 80% of all divorces involve pension rights (source: GE Life). The use of a specialist financial planning service from the outset of divorce proceedings can ensure that pensions are arranged in the most effective manner for all parties. The division of pension assets is fraught with danger and not surprisingly many divorce solicitors prefer to pass advice on this matter over to specialist financial planners.

There have always been potential problems with earmarking pensions, such as the husband (assuming it is the husband that has the pension) deciding not to retire at the expected time, making poor investment decisions to the detriment of the wife or deliberately building funds in another non-specified pensions contract. There can also be concerns with the splitting on pensions. In some cases it may be more sensible to allocate whole pension policies rather than splitting them and indeed, some final salary pension schemes will not even allow splitting.

There are many examples of potential pitfalls. The example on the following page refers to one actual case.

When the divorce has been finalised it is possible that your financial position will then be radically different. Your main priorities will include getting on with your life and also the welfare of any children involved, two factors that could be negatively affected if you do not ensure that your revised financial planning requirements are in order.

Example:

Mr Smith, who is a higher rate income taxpayer, is currently receiving an income of £24,000 per annum from a final salary pension scheme. During his divorce from Mrs Smith a 50% pension split is agreed.

The logical option will be for Mrs Smith to simply receive income of £12,000 per annum generated through earmarking.

The problems with this are:

- As Mr Smith is a higher rate taxpayer, all income is taxed at 40% and so Mrs Smith will only receive her income after 40% income tax has been deducted even though she is not a higher rate taxpayer.
- There is no clean break to the relationship.
- The arrangement would lapse if Mrs Smith re-married and her income would therefore stop.

The Cash Equivalent Transfer Value of the pension arrangement was £356,662.12.

By transferring 50% of this amount to a drawdown scheme for Mrs Smith, she is able to take an income between the Government Actuarial Department (GAD) minimum of £8,238.96 per annum and the GAD maximum of £23,539.69 per annum.

The advantages of this arrangement are:

- Mrs Smith has control over her pension funds.
- There is a clean break.
- There are improved death benefits.
- In this case, the reduction in Mr Smith's income leads to him no longer being a higher rate taxpayer. He would have remained a higher rate taxpayer if 50% of the income was simply earmarked to Mrs Smith.

Glossary

Affidavit a formal statement sworn on oath to be true by the person making it, usually in support of an application to the court, for example in relation to financial matters.

Ancillary commonly refers to the financial aspects of the case. An application for ancillary relief is an application made to obtain financial remedies on divorce.

Clean break a financial arrangement where it is agreed or ordered that the husband and wife will make no further financial claims against each other.

Collaborative practice a process whereby you, your partner and your lawyers agree to work together in a respectful, honest and open way to try to reach settlement without threatening to go to court. Issues are discussed and hopefully resolved in full way face-to-face meetings with the clients deciding the pace and remaining in control of the process. Available for finance and children issues.

Contact the arrangement by which a child sees the parent, or other individual, with whom he or she does not live.

Co-respondent a person with whom the respondent is alleged to have committed adultery. The law no longer requires that person to be named in the divorce proceedings.

CAFCASS officer a person who prepares an independent report to assist the court in deciding what arrangements would be in the best interests of the children, where there is a disputed issue relating to them.

Decree Nisi the provisional order indicating that the court is satisfied that the ground for divorce has been established.

Decree Absolute the final order of the court that brings the marriage to an end.

District Judge a county court judge who deals with most of the court proceedings and financial matters.

Matrimonial home any property in which a married couple live together, whether or not they own it.

Mediation a voluntary process which seeks to facilitate settlement through discussion. Available for finance and childcare issues.

Petition the document by which a divorce or judicial separation is applied for.

Petitioner the person who applies for a divorce or judicial separation.

Respondent the other spouse upon whom the divorce or judicial separation proceedings are served.

Statement of Arrangements form setting out the proposed arrangements for the children which is filed with the divorce petition.

Note:

This guide is intended to be a summary of matters in relation to divorce and should not be taken to be a definitive statement of the law. The information contained is correct at the time of press. However, the law does change regularly and you should obtain specialist professional advice before making any decisions.

About Stephenson's

Stephenson's provides legal advice for all aspects of your personal or business life. By understanding your circumstances and keeping the red-tape to ourselves, we focus on efficiently delivering what you need, when you need it.

Operating from a number of regional locations, we rank among the top 100 UK law firms and are one of the fastest growing practices in the north west. With over 300 staff, you can trust our specialists to take care of things on your behalf, always putting your best interests first. Our family department can help with all relationship matters. Our lawyers understand the emotional, financial and childcare issues that arise from a relationship breakdown. We handle all cases sympathetically, but focus on achieving the most cost-effective and practical solutions to disputes, including mediation wherever possible.

To ensure our clients of the best all-round support, we can provide access to specialists within our firm to help with matters relating to the family home or business, and issues such as wills and trusts. We also enjoy close relationships with professionals in other fields such as financial services, accountancy and counselling.

At all times, we work around your personal circumstances, budget and timeframe. So, for legal advice and action the way you want it, just turn to Stephenson's.

Further information

To find out more about how Stephenson's can help you with all aspects of your divorce please call Elizabeth Tait on

0161 832 8844