Divorce – the grounds and facts

Since the Matrimonial Causes Acts of 1969 and 1973, divorce has been based upon one ground - the irretrievable breakdown of the marriage. The person who petitions for a divorce must then use one of five facts to evidence the ground that the marriage has broken down irretrievably.

The person who issues the petition is described as the petitioner and the person who receives the petition is described as the respondent.

The five facts referred to above are as follows:

1. Adultery: the respondent’s adultery and the petitioner finding it intolerable to live with the respondent, although not necessarily as a result of the adultery.

2. Unreasonable behaviour: the respondent behaving in such a way that it is unreasonable to expect the petitioner to continue to live with the respondent.

These are the only facts that do not rely on a period of living apart. If the parties live together under the same roof for a period of six months or more, either after the adultery is known about or after the last incident of unreasonable behaviour, the court will treat the petitioner as having forgiven the respondent, and it is possible that the court will refuse to grant the divorce.

3. Desertion: the respondent deserting the petitioner, i.e. leaving without this being by agreement, and throughout the period of living apart, the petitioner being willing for the respondent to return. This desertion has to be for a period of at least two years, prior to the presentation to the court of the divorce petition.

4. Two years’ separation with consent: The parties must have been living separately for a period of at least two years, prior to the presentation to the court of the divorce petition. It is possible in some circumstances to demonstrate that parties have been living separately, even if they are still living in the same household. The consent of both parties is vital to this fact and it may be withdrawn at any time prior to the grant of decree nisi. However, where it is available it is sometimes by parties preferred to the other facts as it does not involve the need for either party to make accusations against the other.

5. Five years’ separation: in this case either of the parties may petition the other as long as they have been living separately for a period of at least five years, prior to the presentation to the court of the divorce petition. Again, it is possible in some circumstances to demonstrate that parties have been living separately, even if they are still living in the same household. No consent is required when petitioning on this fact. However, there is a specific defence to this if a decree of divorce would cause grave financial hardship or other grave hardship.

In cases 3 – 5 above, a period of up to six months is allowed for attempts at reconciliation, that is the parties may live together again for periods of time totalling altogether no more than six months. Even a day over six months will bring the period of separation or desertion to an end. If there has been a period of living together, then the same period has to be added to the period of separation, so that a full two years, or five years, as the case may be, of living apart is involved.
Divorce – the grounds and facts
(continued)

In cases 4 and 5 there is a further provision that the respondent may apply to have his or her financial position considered by the court, which has the effect of delaying the pronouncement of the decree nisi, which cannot take place until this application has been resolved.

Once the court has been satisfied that the petitioner is entitled to a decree of divorce, there are two stages to the pronouncement of the decree. The first of these stages is called the decree nisi, the second the decree absolute. It is only upon the decree absolute that the parties are fully divorced and are free to remarry. Please see our information sheet entitled 'Divorce procedure – a brief guide' for further details of the divorce procedure.

“No-fault divorce” - Plans to update the grounds for divorce:

There are currently advanced plans in place to update the law in relation to the basis for divorce. Specifically, in June 2020 Parliament passed an Act to make it possible to apply for divorce without needing to establish one of the five facts above. This is a concept known as “no-fault” divorce. The legislation has been passed but has not yet been implemented and no date has yet been set for this. Once this has been implemented the guidance set out above will need to be updated.

This information sheet has been prepared to highlight some key issues relating to divorce procedures. It is intended to be for general guidance only and is not a substitute for specific advice. It is based upon our understanding of the legal position as at November 2021 and may be affected by subsequent changes in the law.

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