

*Expert, professional, friendly*

## Divorce & Finances



## **JUDGE & PRIESTLEY LLP**

### **Divorce and Finances**

#### **1. Divorce Proceedings**

There is only one ground for divorce and that is that the marriage has broken down irretrievably. The person who commences the divorce proceedings is known as the Petitioner and the spouse is called the Respondent. In order to satisfy the Court that there has been an irretrievable breakdown, the Petitioner must prove one of the following five facts:-

- (a) That the Respondent has committed adultery and the Petitioner finds it intolerable to live with the Respondent. Please note however that one party will not be able to rely upon the other's adultery if, after it became known that the other party had committed adultery, the parties continued to reside with each other for a period exceeding six months or periods together exceeding six months.
- (b) The Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent.
- (c) That the Respondent has deserted the Petitioner for a continuous period of at least 2 years immediately preceding the presentation of the Petition.
- (d) The parties to the marriage have lived apart for a continuous period of at least 2 years immediately preceding the presentation of the Petition and the Respondent consents to a Decree being granted.
- (e) The parties to the marriage have lived apart for a continuous period of at least 5 years immediately preceding the presentation of the Petition.

Our costs to act for a Petitioner in straightforward divorce proceedings are usually in the region of £850 - £1,000 plus VAT. In addition the Court fees relating to the divorce proceedings will total £550.

When a Petition is based upon alleged unreasonable behaviour or adultery then it is usual to seek a Costs Order against the Respondent. Please note that if a Costs Order is made, then the Order will only relate to costs incurred dealing with the divorce application and will not include any costs incurred dealing with the financial settlement or any other matter.

Under the Family Law Protocol (to which this firm subscribes) when a Petition is based on unreasonable behaviour then it is usual to submit a draft form of the Petition to the Respondent prior to issue so as to ensure that the particulars of unreasonable behaviour can be agreed and the Petition can proceed on an uncontested basis.

If there is a possibility that either you or your spouse could issue divorce proceedings in another jurisdiction, then please let me know immediately.

The marriage will be formally brought to an end upon pronouncement of Decree Absolute. Our usual advice is that the application for Decree Absolute should be delayed until there is a Court Order in place recording terms of financial settlement in case a party were to die before a financial settlement is reached. Upon pronouncement of Decree Absolute, a party will lose their entitlement to benefits that they would otherwise be entitled to upon the other party's death, for example as a widow / widower under a pension scheme or through death in service benefits.

## 2. **Financial Settlement**

There can be no full and effective clean break between the parties until a Court Order recording the terms of a financial settlement is obtained within divorce proceedings. The Court cannot deal with financial issues on a freestanding basis and can only make Orders in relation to financial settlement once divorce proceedings have been issued and are in progress.

The costs which will be incurred in connection with the resolution of financial issues are in addition to the costs that will be incurred in relation to the divorce proceedings and will depend on whether you are able to reach a satisfactory resolution of financial issues with your spouse without the necessity of proceeding with the issue of a separate application to the Court. Each party will be liable to pay their own costs incurred in relation to the financial settlement and even if an application is made to the Court for a financial Order, the general rule is that the court will not make an order for costs.

Where matters can be agreed then the terms of the agreement will be incorporated into a document known as a Consent Order. The Consent Order will then be submitted to the District Judge and if the District Judge is happy with the terms of the agreement reached between the parties then the Court Order will be sealed and there will be no need for either yourself or your spouse to attend any Court hearing. The District Judge would have to see figures detailing each party's capital, income and pension situation before they approve the terms of any settlement. These figures will be set out in a Statement of Information Form and the completed forms must be exchanged with each other prior to sending the Consent Order to the Court for approval and sealing. If matters can be agreed by consent then our firm's costs to resolve financial issues and obtain a Consent Order are likely to be in the region of £2,000 - £4,000 plus VAT. In addition there is a Court fee payable for lodging the Consent Order of £50.

If you are unable to resolve financial issues with your spouse then it may be necessary for either one of you to proceed with the issue of a formal application to the Court. Attendance at a family mediation information and assessment meeting (a MIAM) is compulsory before an application may be issued at Court, unless an exemption applies. If it is necessary to proceed with a formal

application, then there will usually be a maximum of three hearings before a District Judge:-

i. First Directions Appointment (FDA)

At the FDA the District Judge will review the case and the financial information which both parties have produced. The District Judge will then consider whether any further directions are required to enable the case to be progressed to the next hearing (FDR). The District Judge might for instance give a direction that pension valuations are to be obtained or that a formal valuation should be obtained in respect of the matrimonial home if the value of that property is in dispute. The costs from the issuing of financial proceedings (or the issuing of a Form A) are likely to be between £3,000 - £6,000 plus VAT. The costs of the barrister to represent you at the hearing and any disbursements will be in addition to this. There is also a court fee payable of £255.

ii. Financial Dispute Resolution Hearing (FDR)

Once the parties have complied with all of the directions given by the District Judge at the FDA Hearing, then the case will be listed for an FDR.

At the FDR the District Judge can hear representations from both parties or their respective legal representative with regard to appropriate terms of financial settlement. After the District Judge has heard from both parties, then he or she will give a view as to what they consider would be appropriate terms of financial settlement and will attempt to guide the parties towards the sort of settlement which a court would be likely to approve. After the parties have heard from the District Judge, they will be encouraged to remain at court to negotiate and try and reach an agreed settlement following the guidance given by the District Judge.

If the parties can reach an agreement at this stage, then the terms of the agreement can be incorporated in a Consent Order drawn up by the parties' representatives and then handed to the District Judge for approval. If the District Judge is able to approve the terms which the parties have agreed, then the Financial Remedy Order will be approved and this will then bring the proceedings to an end.

If the parties are unable to reach an agreement following the FDR Hearing, then the matter will need to be listed for a third and Final Hearing at which both parties will then be required to give oral evidence. At the Final Hearing, both parties will also be subject to cross examination concerning their financial disclosure.

The costs from the FDA to the FDR are likely to be a further £7,000 - £10,000 plus VAT. Again, the costs of the barrister to represent you at the hearing and any disbursements will be in addition to this. Our experience is that the majority of cases settle by way of negotiation or at the FDR stage and very few cases actually proceed to a Final Hearing.

iii. Final Hearing

If the parties have been unable to reach an agreement by consent or following the FDR Hearing, then the District Judge will list the case for a Final Hearing and an Order will then be made by the District Judge for the resolution of financial issues after the District Judge has heard evidence from both parties and submissions from their legal representatives. The terms of any Financial Remedy Order will then be imposed upon the parties rather than the terms having been agreed by consent.

It is difficult to provide an estimate for the costs of attending a final hearing as it depends upon the financial circumstances of each case. However, it is likely to be a further £10,000 - £15,000 plus VAT. Again, the costs of the barrister to represent you at the hearing and any disbursements will be in addition to this.

In a long marriage the starting point in any financial settlement is that there should be equality of division of the matrimonial assets however different factors will be taken into account when it is a short marriage. In all cases the factors set out in Section 25 of the Matrimonial Causes Act 1973 would be considered by the Court.

I am unable to advise you with regard to appropriate terms of financial settlement unless there has been an exchange of full and frank financial information between yourself and your spouse. If you and your spouse are able to agree terms of financial settlement in the absence of an exchange of financial disclosure then it is my firm's policy to ask clients to sign a form of disclaimer as we will not be in a position to assess whether the proposed terms of settlement are appropriate.

You should not access or copy any documents belonging to your spouse. Please be aware that a party runs the risk of civil and criminal proceedings where information has been improperly obtained.

3. Deed of Separation

When parties decide to separate rather than divorce at this stage, it is possible to enter into a document known as a Deed of Separation. The Deed of Separation will set out the date upon which you and your spouse have formally agreed to separate and may also include provision that after 2 years have elapsed from the date of separation either one of you may proceed to present a Petition for divorce based upon 2 years separation with the consent of the other party. The Deed of Separation could also set out the terms of any financial settlement which has been agreed between yourself and your spouse and could confirm that in any subsequent proceedings for divorce the terms that are set out in the Deed of Separation will form the basis of a full and final settlement of financial issues arising from the breakdown of the marriage.

It is important however that you remember a Deed of Separation is technically not a binding Court Order. It is evidence of your intention and because it is drafted as a Deed, it has some contractual force in law.

Provided both parties sign the document after taking independent legal advice, the Deed is intended to be binding and usually is. Generally speaking, as long as the Court in any future divorce proceedings is satisfied that you entered into the Deed of Separation having had the opportunity to take independent legal advice and with the benefit of full and frank disclosure of all of your financial circumstances, then a Deed of Separation will be upheld as a concluded agreement. The Deed of Separation must be converted into a legally binding document (called a Consent Order) within any future divorce proceedings so that it can be formally approved by the Court.

Our costs to prepare a Deed of Separation would usually be between £2,000 - £3,000 plus VAT. If your matter proves to be more complicated this may increase the costs involved.

#### 4. **Matrimonial Home**

If the matrimonial home is registered in the joint names of yourself and your spouse and held by you as joint tenants then in the event of the death of one party, the survivor will automatically inherit the deceased's partner's interest in the property. When parties are separating or have decided to divorce, it is normal practice for the parties to consider proceeding to sever the joint tenancy so that each party thereafter has a defined 50% interest in the property. This means that in the event of the death of one party the survivor will not automatically inherit the deceased's partner's share which will instead pass in accordance with the terms of the deceased's wishes as set out in a Will.

The procedure for severing the joint tenancy is straightforward. Once we have obtained up to date copies of the Land Registry Entries we will thereafter prepare a Notice of Severance and this will need to be signed by yourself and a copy of the signed Notice would then be sent to your spouse. Once the Notice has been served an application is then made to the Land Registry to enter a restriction on the Proprietorship Register. This will therefore protect your legal and beneficial interest in the property.

The severance of the joint tenancy will then mean that you and your spouse will thereafter continue to own the property jointly but will hold it as beneficial tenants in common in equal shares. You will then be able to make a Will to specify how you would like your share in the property to be dealt with in the event of your death. Please consider your position and confirm whether you would like to proceed with a Notice of Severance. If you are unsure as to whether you own the former matrimonial home with your spouse as joint tenants, please let me know and I would be happy to obtain up to date copies of the Land Register Entries to ascertain the position.

The costs to sever the joint tenancy are usually in the region of £300 plus VAT.

## 5. **Injunctions to protect from domestic abuse**

If you are suffering from violence, threats or intimidation, it is possible to apply in the family courts for an injunction to help protect you. There are two types of injunction; a Non-Molestation Order and an Occupation Order.

A Non-Molestation Order prohibits your partner or spouse from using or threatening violence against you or your children, or intimidating, harassing or pestering you. It can contain very specific provisions depending on the particular type of harassment happening to you.

Making an application to the Court for a Non-Molestation Order involves completing a Court application form and drafting a Witness Statement setting out in detail what has taken place. Although usually the other person is told if a Court application is made against them, this will not be necessary if your safety or the safety of any children is at risk and you can therefore make an ex parte (without notice) application to the Court.

When the Court receives your application it will fix a hearing to decide whether a Non-Molestation Order should be made. In deciding whether to make an Order, the Court considers the health (mental and physical), safety and well-being of the applicant or any relevant child. It must be satisfied that there is evidence of molestation and that the applicant or children need protection from the Court. Molestation is not only defined as violent behaviour, it may be other forms of behaviour. The order can last either for a specified period of time or indefinitely. Breach of a Non-Molestation Order is a criminal offence and the police can arrest someone who is disobeying an Order. If an Order is made without notice then the Order must be served personally on the Respondent together with a copy of the application and statement in support and the Court will set a date for the full hearing when the Respondent will have to attend.

An Occupation Order sets out who can live in the family home, or certain parts of it, and can also restrict someone from entering the area surrounding a home. An occupation order does not affect each person's financial interest in the home, simply who can live in it. The length of time for which the order will last depends on your particular circumstances and is usually 6 or 12 months, but may be renewable. Breach of an occupation order is not a criminal offence, but a power of arrest can be attached to the order allowing the police to arrest the person in breach.

There is no Court fee payable when making the application. Court proceedings are a costly exercise and there could be a number of hearings and we would anticipate that our fees would be between £3,000 and £5,000 plus VAT.

## 6. **Will**

Whilst you remain married to your spouse and if you do not currently have a Will in place, the bulk of your estate will pass to your spouse under the rules of intestacy. You should therefore review the terms of your existing

Will or consider making a new Will. If you would like any assistance in this regard, please let us know and my colleagues in this firm's Wills & Probate Department would be happy to assist you. The cost of preparing a standard form of Will is generally in the region of £200 plus VAT.

You should also consider whether you wish for your spouse to be named as the beneficiary on any life insurance cover and nominated to receive death in service benefits in respect of any pension you may have. If you do not want your spouse to receive any such widow/widowers benefits you should take steps to contact the administrators and provide an express declaration of your wishes.

7. **Mediation**

If you are unable to reach an agreement with your spouse as to terms of financial settlement or with regard to arrangements for your children then you should consider attending mediation. We would be happy to provide you with details of various mediation bureaus.