

Obtaining a Decree of Divorce or Judicial Separation

Family

This factsheet briefly outlines the process for obtaining a divorce or decree of judicial separation. The grounds for attaining a judicial separation are identical to divorce, but in the case of the judicial separation both parties remain married after the decree has been issued. This is most commonly used by those individuals who object, in principle, to the concept of a divorce or who have not been married for long enough to obtain a divorce

Although the procedure is relatively straightforward, your change of status will have permanent consequences. For example, you will no longer be your husband or wife's next of kin and this may deprive you of a number of benefits which you would otherwise have been entitled to. There may also be tax issues that can arise. It is important to obtain legal advice at the start of the process so that you can make an informed decision on whether or not to proceed.

Who can start proceedings?

Either party can proceed with a divorce provided you have been married for at least 12 months, however the 12 month rule does not apply for judicial separation.

What are the grounds for a divorce or judicial separation?

The only ground for a divorce is that your marriage has broken down irretrievably, but you have to establish this ground by relying on one of the following "facts":

- That your husband or wife has committed adultery and you find it intolerable to live with him or her
- That your husband or wife has behaved in such a way that you cannot reasonably be expected to continue living with him or her
- That your husband or wife left you without your consent for a minimum continuous period of two years up to the start of proceedings
- That you and your husband or wife have lived apart for at least two years prior to the start of proceedings and he or she agrees that there should be a divorce
- That the two of you have lived apart for a period of at least five years prior to the start of the proceedings.

The process

Proceedings begin by sending a Petition to the Court in which you set out all the relevant details of your marriage. If you don't have your original marriage certificate you can obtain a copy from the Registrar of Births, Deaths and Marriages.

Once the Divorce Petition has been processed by the Court a copy will be sent to your husband or wife who is obliged to return an Acknowledgement of Service form within seven days of receiving the papers. That document will indicate whether or not the proceedings are to be defended. Most divorces are not defended.

The application for a divorce

For divorce, this is a two-staged process as the Court will first issue a decree nisi and then a separate application has to be made for that decree to be made absolute. For judicial separation there is only one decree of judicial separation.

The decree nisi

The Certificate of Decree Nisi will be authorised by the judge after you have returned a signed statement and a request for such a decree. You will need to satisfy the Court that your husband or wife has received the divorce papers. On that basis the judge will then consider the application and provided that he is satisfied that you

have established the relevant fact he will sign a Certificate authorising a decree to be pronounced. Generally it is not necessary for anyone to personally attend Court.

The decree absolute

Six weeks and one day after decree nisi has been pronounced the person bringing the divorce can apply for decree absolute which involves completing a short form. Once that application has been processed by the Court and a Certificate has been issued the marriage is formally dissolved. Again it is not generally necessary for anyone to attend Court.

If there is a delay of more than four and a half months in making the application for the decree absolute then the other party can apply for decree absolute, but the Court will only consider that application at a Court hearing after the judge has heard representations from both parties about it.

A delay of more than 12 months in applying for the decree absolute will require an explanation to the Court.

Protect your valuable benefits

It is important to understand the implications of dissolving the marriage particularly relating to its effect on pension benefits. Once the final Decree has been issued you are no longer regarded as the surviving widow/widower of the other party in the event of him or her pre-deceasing you. In such circumstances you may lose pension benefits that you might otherwise have been entitled to – unless the Court has made an Order in relation to pension assets. You may also lose any entitlement that you might formerly have had in respect of any life policies taken out by the deceased. It is therefore essential that you obtain appropriate legal advice about the timing of the application to protect your position.

In addition, the granting of the decree absolute does not, in itself, prevent financial claims being made by either party. This can only be prevented by other means

Deciding who pays the costs

The person who initiates the proceedings may want to apply for an Order that the other party pays his or her costs. If the application is disputed the Court will usually allocate a date for a hearing of the application when the judge will decide whether or not to make such an Order.

A practice has evolved where some parties suggest that the costs should be shared equally between the two participants and sometimes this is a sensible compromise to adopt to avoid unnecessary delays in the process.

Remember also that in some circumstances you may find that the costs of arguing about obtaining a Cost Order are equivalent to the amount in issue – without any guarantee of a successful outcome.