

LEGAL GUIDE

YOUR FAMILY MATTERS AT SHOOSMITHS

Your guide to applying for divorce, dissolution and judicial separation

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Overview

This guide will provide you with an overview of the legal requirements and process to apply for a divorce, dissolution or judicial separation. Reference throughout this guide to divorce or marriage will equally apply to dissolution and judicial separation unless referenced otherwise.

Terminology

A party applying for a divorce is known as the '*applicant*' or '*petitioner*'. A party who receives the application/petition is referred to as the '*respondent*'.

Legal requirements

You must meet the following legal requirements to issue an application:

- you must have been married for at least one year (this is not required for a judicial separation application);
- the court must have jurisdiction to hear the divorce (based on habitual residence or domicile); and
- the marriage must have irretrievably broken down (the ground for the divorce).

Facts

To support the irretrievable breakdown of your marriage you must prove one of five facts:

- **That the respondent has committed adultery and that you find it intolerable to live with them.**
You cannot use this fact if you have continued to live together as a couple for a period, or a combination of periods, exceeding six months after discovering the adultery.

The fact of adultery cannot be used by same sex couples.
- **That the respondent has behaved in such a way that you cannot reasonably be expected to continue living with them.**
Behaviour cannot be used if you have lived together as a couple for a period or periods, totalling more than six months after the date of the last incident you want to rely on. Examples of behaviour can include, verbal abuse, physical violence, lack of affection, drinking to excess and failure to provide financial support.
- **That the respondent has deserted you.**
The respondent must have deserted you for a continuous period of two years immediately preceding the presentation of the application.
- **That you and the respondent have lived separately and apart for two years and he or she consents to a divorce.**
You must have lived apart for a continuous period of two years immediately preceding the presentation of the application. You cannot use this fact if the respondent does not give their consent.

- **That you and the respondent have lived apart for a continuous period of at least five years.** *You must have lived apart for a continuous period of at least five years immediately preceding the presentation of the application. The respondent does not need to provide their consent for you to use this fact.*

Living together after separation

You can still live in the same property while separated, as long as you are not continuing to live together as a couple. For example, this means that you are not eating, sleeping or cooking together.

If you have continued to live together as a couple after separating, you will be unable to use the fact of two years separation, five years separation or desertion, if it was for more than six months during or after the separation period.

Jurisdiction

The court must have jurisdiction to deal with your application. Jurisdiction is established under one of the following regulations:

- Divorce – Opposite Sex Couple – Article 3(1) of Council Regulation (EC) No 2201/2003 of 23 November 2003;
- Divorce – Same Sex Couple – Marriage (Same Sex Couples) (Jurisdiction and Recognition of Judgments) Regulations 2014 for matrimonial proceedings involving same sex couples; or
- Civil Partnerships – the Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005.

You will need to state in your application why the court has jurisdiction and set out which of the following reasons apply to you:

- the petitioner and the respondent are habitually resident in England and Wales;
- the petitioner and the respondent were last habitually resident in England and Wales and either the petitioner or respondent still resides there;
- the respondent is habitually resident in England and Wales;
- the petitioner is habitually resident in England and Wales and has resided there for at least a year immediately preceding the presentation of the application/petition;
- the petitioner is domiciled and habitually resident in England and Wales and has resided there for at least six months immediately prior to the application/petition; or
- in the case of a marriage, the petitioner and the respondent are both domiciled in England and Wales.

If none of the above apply to you then you will need to confirm whether one of the following provisions apply instead:

- the court has jurisdiction other than under the Council Regulation on the basis that no court of an EU member state has jurisdiction under the Council Regulation and either the petitioner or the respondent is domiciled in England and Wales on the date when the application is issued; **or**
- the court has jurisdiction other than the Marriage (Same Sex Couples) (Jurisdiction and Recognition of Judgments) Regulations 2014 or under the Civil Partnership (Jurisdiction and Recognition of Judgments) Regulation 2005 on the basis that no court has, or is recognised as having jurisdiction as set out in these regulations, **and**
- either the petitioner or the respondent is domiciled in England and Wales; **or**
- the petitioner and Respondent are registered as civil partners of each other in England and Wales or, in the case of a same sex couple, married each other under the law of England and Wales and it would be in the interests of justice for the court to assume jurisdiction.

'Habitual Residence' is the place in which your life is primarily based. This may be the place where you work, own property or have children who go to school there. It is the place in which you are settled and intend to stay settled.

'Domicile' is your main and permanent home in which you live, or to which you intend to return. On birth you will have acquired your parent's domicile. If you have moved to another country and you have made that your permanent home then your domicile may have moved there.

Stage 1: Making the application communication with the other party

An application will proceed more quickly, cost effectively and amicably if you agree in advance with the other party the fact you will use, who will be the petitioner and respondent and how you will fund the costs. You should attempt to agree the content of the application before it is issued by the court unless the application is urgent and/or giving notice of issue would prejudice your case. For example, you may need to issue urgently to be able to apply for an urgent financial order or to secure jurisdiction.

Marriage certificate

Your original or a certified copy of your marriage certificate will need to be filed with the application. This will not be returned by the court and therefore you will need to take a copy if you need to retain a copy for any reason.

If you cannot find your original marriage certificate you can obtain a certified copy by applying online to the General Register Office.

If your marriage took place abroad and the marriage certificate is not in English, you will need to have it translated. The translation will need to be certified by a notary public or authenticated by a statement of truth by the person who did the translation.

Drafting the application form (Form D8)

The application form will include:

- the full names, dates of birth, addresses and contact details for both parties and if applicable legal advisers;
It is possible to apply for your address to be kept confidential and not disclosed to the respondent. Speak to your legal advisor if you would like your details to remain confidential.
- details of the marriage/civil partnership;
- why the court has jurisdiction;
- the reason for your divorce or dissolution (the facts as outlined above);
- supporting information (statement of case in support of the fact used)
 - *if using adultery you will need to give the date when you first became aware of the adultery and, if known, dates and places where the adultery happened. It is not normally necessary to name the person your spouse committed adultery with;*
 - *if using unreasonable behaviour you should include examples of your spouse's/civil partner's behaviour which affected you the most, and the most recent incident. You can describe how they have behaved over a period of time or use particular incidents. Include dates if relevant. Provide enough detail to satisfy the court that you cannot reasonably be expected to live with them;*
 - *if you are using two years' separation and consent or five years' separation the date you reached the conclusion that your marriage or civil partnership was at an end, the date you stopped living together as a couple and whether there has been any period of periods during this time that you have lived together as a couple again;*
 - *if using desertion you should include the date when your spouse/civil partner left (deserted you) without your consent and describe why and how this came about. You should also confirm that you have lived separately since the date of the desertion;*
- details of any existing court cases; and

- details of the financial orders you would like to apply for.
For an overview of the types of financial orders you can apply for and the procedure please refer to 'Your guide to applying for financial orders';
- a statement of truth and whether you are asking the court to order the respondent to pay your costs. See below for more information.

Costs

You can ask the court to consider making an order that some or all of the costs of the application are paid for by your spouse/civil partner and/or, if applicable, the co-respondent. The court will not normally order costs where the application is based on five years' separation.

Stage 2: Issuing the application and acknowledgement of service

A court fee is payable at the time of filing your application. Your legal advisor will confirm the fee and whether you will qualify for a fee exemption.

Your application will either be filed at your local divorce centre or may be issued in another court if it involves complex issues or is urgent. Your legal adviser will discuss with you the most suitable court

Once the application has been issued you will receive notice of issue from the court confirming your case number and the time and date of issue. Your legal advisor will advise you whether you should request the court serve the application directly on the respondent by post or email or whether you should arrange personal service on the respondent. Personal service can be arranged by your legal advisor, the court bailiff or a process server. An applicant cannot however personally serve their own application.

Your legal advisor is likely to advise personal service on the respondent if they are unlikely to respond to or co-operate with the application or if you spouse/civil partner live in another country.

Whatever method of service is used the respondent will receive a copy of your application together with 'notice of proceedings' advising them on how to respond to the application. The respondent has seven business days to respond to the court to confirm whether they are going to defend the application and if you have applied for costs whether they agree or object to paying your costs.

Stage 3: Applying for your decree nisi/conditional order and issue of the certificate of entitlement

The decree nisi or conditional order on a dissolution application is the first of two decrees you will apply for.

This is the stage at which your application will be considered by a judge and they will confirm whether or not you are entitled to a divorce. In dissolution applications this is known as applying for your conditional order.

Once the acknowledgment of service has been received a statement in support of your application for decree nisi or conditional order can be prepared. You will need to confirm in this statement receipt of the acknowledgment of service form from the respondent and whether you want to make any changes to your application. Your application and statement in support will then be lodged with the court and passed to a judge to consider whether you are entitled to a divorce/dissolution. If the judge is satisfied they will issue a certificate of entitlement to a decree/conditional order. This certificate will confirm the date and time when your decree nisi will be pronounced.

In the event that your spouse/civil partner has not responded to the application your legal advisor will advise you on applying for deemed service or what other steps are appropriate to take in your case.

In the event that your spouse/civil partner intends to defend the application your case will follow a different route from here. Your legal advisor will let you know if this happens and what the procedure is.

Stage 4: Decree nisi/conditional order and orders for costs

If costs are in dispute the court will usually send out directions at the time of issuing your certificate of entitlement to direct you file a written statement setting out your position on costs or to require your attendance at the decree nisi hearing to make representations on costs. Your legal advisor will guide you through this stage. If costs are not in dispute there will be no need to attend court. The judge will authorise the decree nisi and this will be sent out with any agreed cost orders.

Stage 5: Applying for your decree absolute/final order

This guide is for general guidance only and should not be treated as a definitive guide or be regarded as legal advice. If you need more information about the issues referred to in this guide, please seek formal advice.

Your decree absolute/final order will legally end your marriage/civil partnership. You can apply for it six weeks and one day after the pronouncement of your decree nisi/conditional order. This is a simple application asking you to confirm the date your decree nisi/conditional order was made and to confirm you want the decree absolute/final order to be made.

If you are making the application more than 12 months after the making of your decree nisi/conditional order your application will need to be accompanied by a short statement setting out the reasons for the delay in making the application.

It can be quite common to delay applying to your decree absolute/final order until the terms of any financial settlement have been finalised and recorded in an order. This is because certain rights are lost on the pronouncement of the decree absolute/final order; for example, loss of spousal pension benefits and the application of different tax and inheritance rules. Your legal advisor will discuss with you at this stage whether you want to apply straight away or delay your application.

In the event that the applicant has not applied for the decree absolute/final order within a period of three months from the earliest date it can be applied for a respondent can apply for it. The respondent will need to give you notice if they apply so you will have the opportunity to object or try and reach an agreement before the court considers any application.

International considerations

This guide only explains the procedure in England and Wales. If you or your spouse have a connection with another country, you should seek advice before taking any action.

Religious marriages

If you entered into a religious marriage as well as a civil marriage you may need to follow a different process to dissolve the religious element of your marriage. It is important that you contact the relevant religious authority and seek further guidance if you are unsure.