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L.E LAW INFORMATION SHEET NO. 9

GUIDE TO DIVORCE, FINANCIAL REMEDY AND CHILDREN

Getting a Divorce

Getting a divorce starts with a form called a "Divorce Petition".

You cannot start divorce proceedings unless you have been married for one year.

Reasons for a Divorce

The court will only grant you a divorce if a Judge agrees that your marriage is at an end. The legal term for this is "irretrievably broken down".

You must satisfy the court that one or more of the following is true to prove that your marriage is over:-

- Adultery by your husband or wife
- Unreasonable behaviour by your husband or wife
- Desertion for a period of at least two years
- Two year separation, if you both agree to the divorce
- Five year separation, if there is no agreement to the divorce

The main stages of Divorce

Once the Divorce Petition is issued at court, the divorce process has begun. From now on you are legally known as "the Petitioner". The husband or wife you are divorcing is legally known as "the Respondent".

To issue the Divorce Petition, the court will also need:

- The marriage certificate
- Details of any children involved
- Payment of the court fee (currently £550.00) unless you are exempt on the grounds of low income

The court will then post a copy of the Divorce Petition to your husband or wife and any Co-Respondent named in your Petition.

Your husband or wife then has eight days to acknowledge receipt of the Petition. If they do not do this, it may be possible to arrange for a court official – known as a bailiff – to serve the Petition.

Once the Petition has been served, what happens next depends on whether or not your husband or wife contests the divorce or agrees to it. You may be asked to provide more information by the court.

The next part of the divorce process is known as “the Decree Nisi”. This is the first stage of the actual divorce. It is granted only when a Judge has reviewed all of the papers and is satisfied that there are proper grounds for a divorce. The Judge will also check that all financial issues and arrangements for the children have been agreed or are in the process of being resolved. You may be required to attend court, but many divorces happen entirely by post.

Decree Absolute

The final stage of divorce is called “the Decree Absolute”. You can apply for the Decree Absolute six weeks and one day after the Decree Nisi has been pronounced. If you do not apply for the Decree Absolute, then your husband or wife as the Respondent can apply for it but only after a further three months has passed.

When you receive the Decree Absolute you are no longer married and are free to re-marry. A Judge can make a financial Order before the Decree Absolute is granted.

Getting help with the process

You do not have to use a solicitor; many couples get divorced without consulting a solicitor but you may need legal advice if you are not sure whether you have grounds for a divorce or if your husband or wife does not agree to a divorce or if you have children.

The Financial Side of Divorce

You may also need legal advice about financial issues even if you agree on how to divide up your property and finances. The process of sorting out the financial aspect of the divorce is known as “financial remedy”. It is not the case that property is automatically divided into a 50/50 split. If you do go to court the Judge will consider a number of factors when deciding who should get what, but the needs of any children will always be the main consideration.

Reaching Agreement and Consent Orders

All property - typically a house, car, savings and shares are matrimonial assets. A pension fund is an asset, even if the pension is already being paid. If the parties cannot agree on a fair division of these, the Court can order any of the property to be

transferred from one party to the other or sold. It does not matter whether the property is in joint names or in the name of just one party to start with.

Hopefully, even though a relationship may be over, and even though relations may have broken down between the parties, a couple can still often cooperate sufficiently to reach a workable agreement in respect of their assets and liabilities so that each party and any children of the family can be properly provided for, not only at the time of the divorce, but in the future. Of course, this depends on how much money is available.

Solicitors can assist the parties in reaching agreement because they can apply the legal principles to the particular circumstances of the case. Each case is different, so even though well-meaning friends and relatives may want to give advice, it is essential to get professional help since you may be bound by an agreement which could affect your whole financial future.

The starting point, before any negotiations begin in respect of financial settlement should always be a full and frank disclosure by both parties to each other of their finances so that each party and their advisor are aware of the true extent of the assets and liabilities. Only then can negotiations start with a view to reaching a workable agreement.

If an agreement is reached, and the Decree Nisi has been pronounced, the parties can apply to the Court for a Consent Order to confirm their agreement and to give it the legal status of a binding order. This is the only way to ensure that all existing and future claims between the parties are disposed of and is essential if a 'clean break' is desired.

What happens if no agreement is reached?

If agreement cannot be reached, then a party may ask the court to decide by making an order reflecting their view of what the settlement should be. These proceedings are usually called a "Financial Remedy Application".

Even if court proceedings for a Financial Remedy Application have started, they can be stopped if the parties reach an agreement. Most cases end in this way avoiding a final court hearing which would increase both tension between the parties and emotional and financial costs.

It is possible for the parties to agree terms of settlement that a Court would not be able to impose upon them. This means that an agreed settlement can be very flexible and is more likely to fit the circumstances of the case with both parties feeling that they have had a say.

It is important to note that since 22 June 2014 applicants wishing to issue a Financial Remedy Application are required to provide a completed form with their application confirming they have attended a mediation assessment meeting (MIAM) or that they are exempt from doing so.

Basic Principles

The criteria which the Solicitor uses for the purpose of negotiations and which the Judge will use if there is a contested hearing are to be found in Section 25 of the Matrimonial Causes Act 1973.

Factors which will be taken into account include:

- (a) the needs of any children of the family,
- (b) the length of the relationship,
- (c) the earning capacity of each party, now and in the future,
- (d) the state of health of each party,
- (e) the contributions made to the marriage by each party,
- (f) the needs of both for income and capital.

In the widely reported House of Lords case of *White v White* in 2001, it was emphasised that the court's objective is fairness to both parties. This can often mean something different to each party.

It is clear, however, that there is no place for discrimination on the basis that the parties have taken different roles in the marriage, e.g. with the wife staying at home to look after the children and the husband being the main earner.

Further guidance has been given by the House of Lords in the linked cases of *Miller v Miller* and *McFarlane v McFarlane* in 2006. Three important principles may justify the redistribution of resources from one party to the other:

- (1) the needs generated by the relationship between the parties;
- (2) compensation for relationship-generated disadvantage (e.g. where one party foregoes a career in order to focus on the upbringing of the children);
- (3) the sharing of the fruits of the matrimonial partnership.

These factors will differ in importance from case to case and the ultimate objective is to give each party an equal start on the road to independent living.

Conduct

The conduct of the parties or the blame for the breakdown of the relationship would be taken into account in only the most exceptional circumstances (e.g. severe financial mismanagement or heavy gambling leading to bankruptcy). 'Ordinary' behaviour such as adultery or domestic violence is not usually taken into account when finances are being considered. In the vast majority of cases, the court will not seek to weigh the parties' respective conduct or attitudes in an attempt to assess responsibility for the breakdown of the marriage, or to attribute legitimacy or reasonableness to the wish of one party to continue the marriage against the wishes of the other.

Contribution

The question of contribution is now approached in much the same way as conduct. Only if there is such a disparity in the parties' respective contributions to the welfare of the family that it would be unfair to disregard it, should this be taken into account in determining the shares.

Periodical Payments (Maintenance)

A periodical payments order can be made to wife/husband (and children which is usually now dealt with by the Child Maintenance Service) afford compensation to a party as well as to meet their financial needs. A clean break is not to be achieved at the expense of a fair result. Similarly, there is no reason to limit a periodical payments order to a fixed term in the interests solely of achieving a clean break.

Assets

The views of the court differ as to which assets if any should be excluded from the "pot" available for division. Some senior judges accept the notion of family assets, i.e. those generated by the joint efforts of the parties and so could exclude not merely property owned by the individual prior to the relationship or acquired by inheritance during the marriage, but also business or investment assets generated solely or mainly by the efforts of one party during the marriage.

The duration of a marriage may justify a departure from equality of division in relation to non-family assets. The nature and source of the property and the way in which the couple had run their lives might also be taken into account. However, in the vast majority of cases, which are driven by need, such arguments will be irrelevant.

Separation Agreements

Sometimes separating couples agree not to divorce (perhaps for religious reasons) or to divorce after 2 or 5 years separation. In these circumstances, if they are able to agree on financial matters at the time of their separation, a formal separation agreement can be drawn up clearly stating the terms of the settlement.

On a later divorce, the separation agreement can be redrafted into the form of a court order and an application made to the court by the parties for an order by consent as detailed above.

It is important to remain aware that you cannot in a separation agreement remove the power that the Court has to come to a different settlement if it considers this just. If the agreement is properly prepared and has been entered into freely with proper legal advice the Court is less likely to set it aside.

Any agreement or Court order obtained by fraud or where there has not been full and frank disclosure is open to later challenge. The Court will not hesitate to set aside any order obtained in such circumstances. The dishonest party may have to bear all the legal costs involved and may also be prosecuted for perjury. Honesty really is the best policy.

Dealing with relationship problems

If you are thinking about divorce there are alternatives such as counselling or mediation that you could look at first. These services can help you to avoid splitting up, if that is what you want. Or they can make the split, if it does come, less painful and damaging for you and your family.

Counselling

A counsellor can help you discuss emotive issues and will help couples that want to save their marriage. Counsellors are professionally trained, though some offer their services voluntarily. They are trained to listen and help you to work out your own solutions to relationship problems. They do not negotiate for you or tell you what to do.

Family support is counselling that can help the whole family to deal with problems and prevent relationships breaking down and families splitting up.

Tackling problems early is important in order to save a relationship. The longer a problem is left unresolved, the harder it usually is to deal with it.

Counselling can also help a family to accept what is happening to them and deal with the emotional stress that separation or divorce can cause within a family. Attempting to work things out through counselling or mediation could lead to better family decisions and long term relationships after the divorce.

Mediation

Mediation is different from counselling and it is more concerned with dealing with the practicalities of day to day life following relationship breakdown. It is more like negotiating an agreement and resolving a dispute without involving lawyers or the courts. You can ask a trained family mediator to act as an impartial third party; they will help couples come to an agreement without bias or being on anyone's 'side'.

Counselling and mediation during a divorce or separation

You can negotiate directly with your partner and reach agreement without any outside help about issues such as your children's care and splitting property and finance. That is usually the best way. You may not be able to reach agreement on everything, but it can still help to make issues easier to resolve even if you got to court. Mediation can be used when you have decided to go ahead with a divorce or separation, by helping you to work out solutions between you in ways that reduce confrontation.

Relationship breakdown and your children

Divorce or separation is a difficult time for all concerned and children can become very involved emotionally in what's happening. However, there are a number of ways you can help make the process as painless as possible for your children.

Keeping your children informed

Most childcare experts agree that it is important to keep your children informed at every stage of your separation or divorce. You are not protecting your children by keeping things from them.

Tell your children what is happening to their family, it's better for them to know. They don't need every detail, but they do need enough information to know what is going on, depending upon their age. They may not wish to be involved in making decisions, but most children will still want to feel they are being listened to. Encourage them to ask questions and try to give them honest and reassuring answers, but don't promise what you cannot deliver. If something is not yet decided, then say so and reassure them that you will tell them as soon as you can.

What will happen to your children?

If there is no question about the child's safety and you can agree financial support, property and arrangements (such as where the child/children will live) you will not need to involve a Judge hence Court.

If you cannot agree these terms then a judge could become involved or you could be referred to mediators.

It is far better if you can come to an agreement between yourselves.

Disclaimer

This information sheet is for guidance only and does not avoid the need to take professional legal advice relevant to the specific facts of any individual case. No responsibility will be accepted for any losses occasioned as a result of any action taken in reliance on the contents of this document.

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