

## PART 2

# Proceedings for dissolution of marriage: divorce, judicial separation or nullity

*Solicitors should keep under review at all times the availability of public funding and the need to provide clients with costs information at the outset and on a regular basis.*

## 2.1 SCOPE

**2.1.1** This section covers all applications for divorce, judicial separation or nullity unless otherwise specified.

## 2.2 IN ALL MATTERS

**2.2.1** Solicitors should always bear in mind the following:

- (1) Family issues often go to the heart of people's religious, cultural or personal beliefs.
- (2) Any procedure taken, for example the contents of a divorce petition or correspondence, may impact on other issues such as children and ancillary relief.
- (3) The cultural and/or religious implications of divorce should be considered, for example the question of obtaining a 'get' (a divorce under Jewish religious law) or a 'talaq' (a divorce under Islamic religious law). To some clients of particular faiths, obtaining a divorce according to their religion may be as important as or more important than a civil divorce. Certain faiths have stringent rules, set a timetable vis-à-vis a civil divorce or only allow a husband to apply. Solicitors must consider these issues when they are given instructions and take such steps as they reasonably can in the civil divorce to help clients to

obtain a religious divorce. In this context solicitors must be aware of the effect of the Divorce (Religious Marriages) Act 2003. (In cases relating to the obtaining of a ‘get’, solicitors may find it useful to refer to the website [www.gettingyourget.co.uk](http://www.gettingyourget.co.uk) which offers guidance on this issue.)

- (4) A forced marriage (that is, a marriage to which the consent of each party is not freely given, but is obtained by duress) may raise issues beyond those normally found in dissolution. Solicitors should be aware of the problem, and if necessary refer to experts in the field or seek assistance from agencies with experience of dealing with victims of this form of abuse. A copy of the Society’s leaflet on forced marriage with addresses of organisations appended is reproduced at **Appendix 5**. If a solicitor is approached in connection with an individual who has been removed from England and Wales, they should contact the Forced Marriage Unit, a joint Home Office and Foreign and Commonwealth department. The address of the unit can be found in **Appendix 17**.
- (5) Issues that arose during the marriage, which are irrelevant to the evidence of irretrievable breakdown but which may impact on children or ancillary relief issues, should be dealt with in separate correspondence.

## **2.3 JUDICIAL SEPARATION OR NULLITY**

- 2.3.1** Although applications for judicial separation or nullity are rare, there will be circumstances in which it will be impossible to obtain a divorce or where it is appropriate to obtain a decree of nullity or judicial separation. These may, in particular, be appropriate where clients have strong religious and/or cultural reasons for not wishing to divorce or in cases when a divorce decree would cause a loss of pension rights.
- 2.3.2** Where an application for judicial separation is appropriate, solicitors should discuss with clients the possible extra expense of obtaining a divorce after a decree of judicial separation. The ramifications of obtaining a judicial separation also need to be discussed, most particularly the ramifications in relation to pension benefits and the death of one of the parties to the

marriage after judicial separation. Solicitors should also explain that the respondent in a suit for judicial separation could issue an application for divorce in any event.

- 2.3.3** In cases where an application for nullity is appropriate, solicitors should discuss with clients the additional expense of obtaining a decree of nullity, rather than one of divorce, due to the need for a court hearing.

## **2.4 PRIOR TO ISSUING PROCEEDINGS**

**2.4.1** Prior to the commencement of proceedings solicitors should:

- (a) check that the marriage of the parties is recognised in this country; and/or
- (b) advise clients to confirm that a decree granted here will be recognised in the country in which they will live, so far as is practicable; and
- (c) in appropriate circumstances, consider which country or countries are the appropriate jurisdictions to issue proceedings for dissolution, and if appropriate (see in particular European Council Regulation (EC) 2201/2003), which is the most advantageous. In deciding the appropriate jurisdiction, solicitors should consider all factors including the remedies available and the nature and location of assets;
- (d) notify respondents' solicitors (or respondents where unrepresented) of the intention to commence proceedings at least seven days in advance, unless there are good reasons for not doing so (see **para. 1.4.1** above especially in regard to it being bad practice for respondents to use this notification to pre-empt the petitioners by issuing first);
- (e) provide respondents' solicitors (or respondents where unrepresented) with the fact or facts on which the petition is to be based and the particulars, with a view to coming to an agreement or minimising misunderstanding unless there is good reason not to do so.

**2.4.2** Solicitors should ensure that a list of approved translators is kept in the office so that a speedy and accurate translation of a marriage certificate can be obtained if necessary.

## **2.5 THE PETITION**

**2.5.1** In drafting the petition the following guidelines should be followed:

- (1) Where the divorce proceedings are issued on the basis of adultery:
  - (a) petitioners should be encouraged not to name co-respondents and should be told that there is no need to do so in law;
  - (b) solicitors should advise respondents who do not intend to defend the proceedings that an admission of adultery on the acknowledgement of service is likely to be sufficient evidence (the need for separate confession statements should be avoided wherever possible).
- (2) Where the divorce proceedings are issued on the basis of unreasonable behaviour, petitioners should be encouraged only to include brief particulars sufficient to satisfy the court.
- (3) In all cases, solicitors should consider carefully with clients the possible aggravating effect of claiming costs from respondents and such claims should only be made when it is considered appropriate.

**2.5.2** Solicitors advising a petitioner should check that the petition is completed accurately. Common errors include the names of the parties or the place of marriage not being shown exactly as they appear in the marriage certificate; paragraph 3 not according with the ground(s) of the court's jurisdiction under EU Council Regulation (EC) 2201/2003, art. 2(1); and incorrect calculation of the periods of separation or desertion.

**2.5.3** The filing of answers and cross-petitions should be discouraged unless there are good reasons for doing so. Solicitors acting for respondents who are unhappy with the allegations made can record their client's concerns in correspondence so that the petitioner is aware of them. Where clients wish to defend allegations made in divorce petitions because they may be relevant on determination of ancillary relief or on children issues, the parties should be encouraged to enter into agree-

ments whereby respondents do not accept the particulars but will not defend the main suit, and whereby petitioners will agree that respondents are free to raise their concerns afresh in the ancillary relief or children proceedings. This agreement should be made within correspondence.

- 2.5.4** Respondents to petitions must be discouraged from filing another petition in the same or another court unless for very good reason, for example inordinate delay in proceeding with the petition.

## **2.6 THE STATEMENT OF ARRANGEMENTS FOR CHILDREN**

- 2.6.1** The ‘statement of arrangements’ form is an important document and must be completed carefully. The court cannot fulfil its statutory obligations unless this form is completed fully.

- 2.6.2** Before filing the statement of arrangements for children:

- (a) a copy should normally be sent to respondents’ solicitors (or respondents where unrepresented) for approval and a reasonable time should be allowed for reply;
- (b) the other party’s signature should be obtained where possible;
- (c) only information necessary to state the arrangements being made for the children should be included;
- (d) solicitors should discuss with clients the arrangements being proposed for the children to ensure that the interests of the children are not overlooked. Clients should be encouraged to discuss and agree arrangements for parenting with their spouses where appropriate and when it is safe to do so;
- (e) if at the time the petition is issued a parenting plan has been agreed by both parties, it should be attached to the statement of arrangements for children.

## **2.7 ACTING FOR THE RESPONDENT**

- 2.7.1** If solicitors are acting for a client who has a divorce petition in which there is a claim for costs, it is quite appropriate to write

to the petitioner's solicitors to ask whether they are prepared not to pursue the claim for costs, or alternatively, to specify a limited figure for costs that can be agreed. However, if such a letter is to be written it is important to consider whether the petitioner or their solicitor might use the letter in evidence in an affidavit for deemed service. Marking the letter 'without prejudice' may not be sufficient to prevent this as it can still be used. The fact that a petition has been received does not attract privilege.

- 2.7.2 If the respondent to a petition based on Matrimonial Causes Act 1973, s.1(2)(b) is unhappy with the allegations of unreasonable behaviour, it is appropriate to write on the acknowledgement that the allegations are not admitted. However, if it is indicated that the allegations are denied, a court might take that as an indication of a defence and not allow the matter to proceed under the special procedure.
- 2.7.3 Solicitors must ensure that all particulars in the affidavit in support of the petition are completed accurately and that clients are aware of the special procedure system.
- 2.7.4 Solicitors should be aware that in divorce cases where immigration complications also arise, cross-petitions by clients who have suffered abuse or violence may be necessary so that they have an opportunity to give their explanation of why their marriage failed. Solicitors should consider cross-petitions in such cases because a client's immigration application to stay in the country may be prejudiced by allegations made against him or her by the applicant in the divorce petition.

## **2.8 APPLYING FOR DECREE ABSOLUTE**

- 2.8.1 Before applying for decree absolute solicitors should consider whether circumstances exist which make it advisable to delay finalising a decree of divorce until these issues are resolved (for example, outstanding issues relating to pension entitlement or life insurance). Solicitors acting for respondents should consider asking petitioners' solicitors to agree in advance that they will not apply on behalf of the petitioner for decree nisi to be made absolute if this course of action would prejudice respondents.

Solicitors should also be aware of the procedures available under the Matrimonial Causes Act 1973, s.10(2) to delay the making of a decree absolute in cases brought under s.1(2)(d) and (e) of that Act pending the consideration of the respondent's position.

- 2.8.2** Solicitors acting for respondents on divorce must discourage their clients from making inappropriate applications for decree absolute and make it clear that an inappropriate application may be penalised in costs.
- 2.8.3** Clients should be advised that they may be prejudiced, both in terms of law and procedure, if they remarry after decree absolute but before an application for ancillary relief is made on their behalf.
- 2.8.4** Respondent clients should be advised in writing not to remarry before an application for financial relief has been made.