Facing the Future

Where do I go from here?

A brief guide to the legal steps to be taken to end a marriage

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IS YOUR MARRIAGE REALLY OVER?

Most marriages, like other close relationships, go through bad patches from time to time but whether this particular episode is so bad that you and/or your partner feel that your relationship has reached the end of the line and that separation is inevitable is a decision that only you and your partner can make.

It may be that there could still be a possibility of reconciliation if you have some professional help, in which case you may benefit from seeking the assistance of Relate or Guernsey Counselling Service who will be impartial and try to help you both. This ought to be the first step to consider, especially if you have young children to think about as well as yourself, but it may not be effective if either you or your partner find it difficult to talk about your problems and are reluctant to attend. Friends and relatives may try to help you with all sorts of advice, but sometimes it is better to speak to someone totally unconnected with you and your partner, so do not dismiss the possibility of counselling without giving it proper consideration. It is important to remember that no two marriages (or break-ups) will be the same, and what may have been appropriate and exactly right for your friend may not be appropriate for you.

THE PRACTICAL ASPECTS

Having reached the stage where a separation from your partner is inevitable the legal aspects are often the least urgent, but there are some practical problems which both you and your partner will need to consider:

1. Where will you live, and how will you pay for it?
2. Where will your partner live, and how will he/she pay for it?
3. If there are young children, with whom will they live and what arrangements can be made for the children to see the absent parent?
4. How will you support yourself financially?
5. How will you support the children financially?
6. How will you and your partner share out those possessions that you acquired during your marriage and which at the time were intended to be for both of you.

These questions are involved in every marriage break-up whether upon separation or divorce and whether the Courts are involved or if you and your partner just agree to a settlement between yourselves.

These practical issues are important and every effort should be made by you and your partner to consider these questions on the understanding that no matter how hurt either of you feel, you will both have to address these issues and in settling them it is highly improbable that either of you will be able to have everything that you want, and inevitable that some degree of compromise will be necessary by both of you.

It is perfectly possible to agree these matters between you, without the involvement of an advocate. Negotiation and agreement will give you more control over the outcome, and minimise the money spent on legal fees. If you cannot agree and the matter is taken to the court for a decision, certain elements may end up out of your control, so reaching an agreement with your partner is always preferable (although, as discussed below, formalising that agreement in a consent court order would be advisable). One option is to have an initial consultation with an advocate so that they can advise you on your legal position, and then use that advice as a basis to negotiate a satisfactory way forward.

ADVOCATES OR MEDIATION

Unfortunately, it is not always possible to reach an agreement between yourselves and you may need assistance from a third party. Some of the decisions will involve the termination or variation of other legal commitments between you and your partner and also other people. It is at this point that you will need to consider going to see an advocate who can advise you and guide you through the paperwork and necessary Court applications, and who will be able to advise you with regard to your own particular circumstances.

Alternatively, or additionally, you may choose to seek mediation. Whilst this also has a cost, it is less expensive than spending time in court, and can also help keep the process more amicable which is particularly important where children are involved. Details of qualified mediators can be found online.

LEGAL STEPS TO END A MARRIAGE

There are several legal steps that can be taken. A marriage can only be ended by a divorce, but there are various forms of separation available as an alternative, or as an interim measure.

The Matrimonial Causes Division of the Royal Court has jurisdiction to grant a divorce or judicial separation only if either or both of the parties has been habitually resident in the Bailiwick for at least a year or if either or both is domiciled in the Bailiwick (broadly, they

have a substantial connection with the Bailiwick and intend to live there indefinitely). There is an additional basis for jurisdiction in the case of a same-sex marriage where the marriage took place in the Bailiwick and e.g. the parties have residence or domicile in another country which does not recognise same-sex marriage and therefore cannot grant them a divorce – in such a case the Matrimonial Causes Division may assume jurisdiction. Further information regarding jurisdiction is available on the application forms.

All applications in relation to divorce and judicial separation will be heard in private unless the Court directs otherwise.

DIVORCE

There is one ground of divorce in Guernsey law, namely that "the marriage has broken down irretrievably".

Under the Matrimonial Causes (Bailiwick of Guernsey) Law, 2022, there is no longer any need to prove any facts (e.g. adultery or behaviour) to establish that the marriage has broken down irretrievably. Instead, the application will include a statement of irretrievable breakdown which will be taken as sufficient evidence for the Court.

The previous requirement for an advocate to draft a petition for divorce is replaced by a simple application, which may be made by one party to the marriage or by both jointly. A joint application might proceed more quickly than an application by one party because it will remove the need for certain procedural steps such as proving service of documentation on the other party.

It is now possible for an application for divorce to be made without the assistance of an advocate. However, it may still be desirable for the parties to seek legal advice when seeking to finalise ancillary matters such as arrangements for children and division of property and other possessions.

Under the new Law, it is not possible for the other party (respondent) to defend an application for divorce, the rationale being that if one party believes that the marriage has irretrievably broken down there is no point in the other defending the application. However, in order to safeguard certain vulnerable parties –

(1) there is a requirement that the Court approve the arrangements for any children of the marriage before a final order of divorce is granted; and

(2) if the granting of a divorce order would lead to serious financial consequences for the respondent, the Court may be asked not to grant a final order before the applicant has made or has undertaken to make financial provision for the respondent.

Divorce Procedure

The divorce procedure still consists of two stages – the provisional order, which will not be made earlier than 60 days after the initial application; and the final order (when the divorce takes effect), which cannot be made until at least 28 days have elapsed after the provisional order is made i.e. a minimum of about 3 months in total. In each case it is possible for the specified period to be shortened by the Court e.g. in the case of terminal illness; and the granting of a final order may be delayed by the matters mentioned in paragraphs (1) and (2) above. It may also be delayed by prolonged negotiations relating to division of assets and other ancillary matters.

An application for divorce can be made using a form obtainable on the Royal Court website or at the Greffe. It may be made by one spouse (Form 1) or by both spouses jointly (Form 2). Before submitting the completed form to the Greffe it will be necessary to take it to an advocate, notary public, Jurat or the Seneschal of Sark or, if you are not in the Bailiwick, to another person empowered to administer oaths/declarations, and swear or affirm that the statements in the application are true.

The application must be accompanied by specified documents including a certified copy of the marriage certificate (and a certified translation if applicable), copies of any previous orders made in relation to the marriage or children, evidence of any name changes and a document setting out the statement of arrangements for any children of the marriage (Form 9). These are all set out in the application form.

Where the application for divorce is made by one only of the spouses, the applicant must then (within 7 days) serve a Notice (Form 7) on the respondent together with certain specified documents including an Acknowledgment of Service which the respondent should sign, swear or affirm and return to the Court and serve on the applicant within 14 days. The form invites the respondent to indicate if he/she wishes to dispute the application but only the validity of the marriage or the jurisdiction of the Court may be the basis of the dispute; the divorce itself may not be defended. The respondent is also

able to file and serve a written statement of the respondent's views on the arrangements for the children.

Once an application has been filed at the Greffe, it is possible to make an application for interim financial provision (periodical payments or lump sum payments) for the benefit of one of the parties or a child; or for an order granting rights of occupation of any property to one of the parties (and if necessary, excluding the other party) where appropriate in the interests of a child.

When the application for a provisional order (Form 10) is heard (not less than 60 days after the initial application is filed) neither the applicant nor his/her advocate will need to attend unless required to do so by the Court.

An application for a final order may be made by either party at least 28 days after the grant of the provisional order. Where a party has made an application asking the Court to consider his/her financial position the final order will not be granted until that application has been resolved. Likewise, a final order will not be made unless the Court is satisfied as to the arrangements for the children. The parties and their representatives need not be present for the final order hearing.

Finances and children

Aside from the legal dissolution of the marriage, the Court also has jurisdiction to make orders in relation to finances, property and arrangements for any children you may have after divorce. These issues are commonly referred to as "ancillary relief".

Where an application for divorce has been made, the Court now has power to make (on application by either party) an order for interim financial provision payable by one party to the other, and/or an interim occupation order allowing one party to occupy a specified property with a child of the marriage, pending further order. An application for a definitive order as to ancillary matters can be made at any time after the divorce application but will not take effect until the final order is granted.

The Court can make orders for a lump sum and regular maintenance payments, as well as an order for property to be transferred or to be sold, as well as other powers giving the Court flexibility in ensuring fairness between the parties. These orders can be made in relation to the former spouse or for the benefit of the child.

There is provision for financial dispute resolution hearings (FDR hearings) to encourage the parties to reach an agreement on financial matters. An FDR hearing can be requested by either party and will take place before a Judge of the Royal Court – the parties and their advocates will be present at a relatively informal hearing. The hearing is "without prejudice" and cannot be referred to at any trial; and it is not recorded. The Judge will give a summary of his/her opinion of the likely outcome of any trial and notes will be put in a sealed envelope. An FDR hearing often leads to settlement between the parties before any trial takes place.

Matters relating to the welfare of any children of the marriage including residence, contact etc will be dealt with by the Matrimonial Causes Division under the Children (Guernsey and Alderney) Law, 2008 or the Children (Sark) Law 2016.

SEPARATION

There are other ways of bringing your relationship to an end which stop short of actual divorce. This is generally referred to as "separation" and can be accomplished in one of three ways (see below for further details):

1. By the parties reaching an informal agreement between themselves concerning the practical issues (such as division of jointly owned assets and matters relating to any children) without involving lawyers. However, it will be advisable for the terms of the agreement to be embodied in a court order in order to ensure that they are legally binding and cannot be challenged at a later date e.g. in subsequent divorce proceedings. Although this will incur legal costs for drawing up a consent order such costs would be lower than if an advocate had been involved throughout the negotiations.
2. The parties applying to the Royal Court for a "Judicial Separation by consent" once they have reached agreement on the practical issues. This will usually include, in addition to the division of assets, provision for the children etc, a provision that (although the marriage has not been legally terminated) any automatic rights of a spouse, such as inheritance rights, will no longer apply. This procedure will often be used if the parties do not wish to divorce for some reason, e.g. for religious reasons, but wish to separate their property and live independently from each other.
3. The parties applying to the Magistrate's Court for a separation order and maintenance. This is infrequently used because the Magistrate's Court's powers to

make financial orders are limited and matters such as residence, contact and maintenance orders for children can now be dealt with under the Children Law which applies whether the parents are married or not.

A legal separation will leave you and your partner still legally married but will remove the "duty" to live together and at the same time settle some of the other practical matters concerning children and finance.

1. Informal separation

This is the most informal and cheapest method of separation which involves you and your partner reaching an agreement on the practical matters referred to earlier which suits you both and which you both stick to. This may be regarded as a preferable solution as it can save significant expenditure on legal fees when that money could be used in maintaining your separate lives.

If neither of you are concerned about getting married again, or your informal separation will not cause any problems with property and business, then there is no reason why this should not work indefinitely. However, it is not legally binding and could be revised e.g. if divorce proceedings subsequently take place. A problem may also arise if one or other of you does not stick to the agreement, perhaps by not paying child maintenance regularly as agreed. Furthermore, this sort of voluntary arrangement is often not acceptable to banks where they have loaned money to buy property on the strength of joint income, and in such cases, it may be necessary to go one step further and obtain an order from the Court to ratify the terms of your agreement.

2. Judicial Separation by Consent

The essential ingredient of this type of Judicial Separation granted by the Royal Court is the **agreement**. Couples making such an application may be quite amicable but no longer wish to be married to each other. In such a situation, if the couple can reach an agreement concerning a division of the matrimonial assets (including the home, money and other jointly owned possessions) and matters relating to the children, then the Royal Court will, provided it is satisfied that the agreement is reasonable, grant an order of Judicial Separation on the terms and conditions set out in the application before the Court.

Judicial separation by consent has previously frequently been used where couples did not meet the criteria for divorce on the basis of one of the 5 facts such as adultery, behaviour or length of separation. Now that "no fault" divorce is possible, many couples may

conclude that a joint application for divorce, followed by a consent order for ancillary matters, is a quicker and more efficient way of bringing an end to their marriage, separating their assets and settling the arrangements for the children.

Judicial separations by consent are dealt with in private at a hearing of the Court on certain Tuesdays. Applications (Form 5) must be filed by noon on the preceding Friday and, like an application for divorce, a statement of truth must be sworn or affirmed before one of the named officials. It is not necessary to engage the services of an Advocate in order to make the application although in cases other than the most straightforward it may be advisable for legal advice to be sought on the terms of the agreement.

An application for a judicial separation by consent will need to be accompanied by a certified copy of the marriage certificate and –

(i) a statement signed by or on behalf of both the parties that they seek to be judicially separated from each other,
(ii) a statement of arrangements for the children (Form 9),
(iii) the terms of the agreement including a draft vesting order relating to transfer of any real property, and
(iv) a financial statement in the prescribed form (Form 12).

It is not necessary for a party who is represented by an advocate to appear before the Court in person to consent to a Judicial Separation but an unrepresented party will need to be present.

3. Legal Separation in the Magistrate's Court

The Magistrate's Court has power to grant a legal separation with terms concerning maintenance of the children (if any) and maintenance for the spouse (if applicable) pending a divorce. It is not necessary to prove any grounds to make an application.

As the Magistrate's Court has no jurisdiction to transfer rights in real property and limited powers in respect of lump sum orders (maximum £1,000) it is inappropriate for couples who own their own homes or require more substantial financial orders.

Furthermore, the Family Court is now able to make orders re residence, contact etc for any children, and associated maintenance orders, so the jurisdiction of the Magistrate's Court described here is now rarely used.

This is dealt with in the Magistrate's Court every Wednesday afternoon, after Petty Debts Court and will require applications which can be drafted by an advocate. These proceedings require the Applicant to "summon" the Respondent to Court. If the Respondent fails to attend Court at the appropriate time, then the Court can make any order requested by the Applicant "by default".

FEES

Legal cost assistance may be available for a divorce under the Legal Aid Scheme, and you would need to consult an advocate to find out if you might be eligible. However, it is now unnecessary to instruct an advocate to draft a divorce petition and the necessary forms are obtainable at the Greffe for unrepresented applicants to use. Any additional negotiations that are necessary in respect of ancillary matters (for example, arrangements for children, or property matters) are charged at an hourly rate.

Advocates, if they are used, may accept payment by instalments but you should enquire during your first interview about the costs and level of fees charged by your chosen advocate, whether payment by instalments is acceptable.

You must remember that every time you speak to an advocate on the telephone or at his or her office you will incur a charge, in addition to time spent by your advocate writing letters, speaking to your partner's advocate or researching your case. Photocopying documents will also incur fees. If you and your partner can work out a settlement which is acceptable to you, your advocate's advice can be limited to reviewing the settlement terms and advising you if the proposals are fair to you (and incidentally to your partner), thus reducing the costs. Remember that your advocate has a duty to advise you, but you are under no obligation to follow the advice given.

Whether or not you involve your advocate in negotiations with your spouse or his/her advocate, or accept their advice, is your decision, but obviously the more you and your spouse argue, the more you pay in fees and the less will be left over for you and your spouse to share. These legal costs must be taken into consideration by you as part of the final settlement, especially if the argument goes all the way to Court, in which event legal fees will rise sharply.

It is normal for each party to pay their own legal costs in matrimonial disputes and it is only in exceptional cases that an order that one party pay the other's costs will be made by the Court. The more that you can agree between yourselves on the financial matters therefore, the lower the cost in legal fees.

CONCLUSION

These are the main options available to you and your spouse in the event that your marriage breaks down; but of course, this is only a very brief outline and, as stated earlier, each case will be different.

It is important to remember that when a home and marriage breaks up, it is inevitable that there must be some element of compromise by both of you when settling the financial and practical matters, because the costs of living alone are not much less than living with a partner and therefore neither of you are likely to be able to retain the same standard of living when apart as you enjoyed when you were together.

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