

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 similar 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 if they are to live with you?
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 problems are far more important than the legal aspects 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 problems and in settling these practical problems it is highly improbable that either of you will be able to have everything that you want, and 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. Once the matter proceeds to the court, certain elements may end up out of your control, so reaching an agreement with your partner is always preferable. 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 on these matters, and having decided that you really want to end your marriage this will lead on to the need to make many more decisions, some of which may be easy, others which may not. Some of these 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 inevitable mass of paperwork and Court applications, and who will be able to advise you with regard to your own particular circumstances.

Alternatively, or additionally, you may choose initially 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.

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, which is due to come into force on 19th July, 2024, there is no longer any need to prove any facts 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 present 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 will be possible for an application for divorce to be made without the assistance of an advocate. However, it will still be desirable for the parties to seek legal advice when seeking to finalise ancillary matters such as arrangements for children and division of assets.

Under the new Law, it will not be 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 is granted; and
- (2) it will be possible for the respondent to apply for special consideration to be given to their financial position should a divorce be granted e.g. where the granting of divorce will cause serious financial hardship. In such a case the Court will not grant a Final Order if it is satisfied that to do so before the applicant has made or has undertaken to make financial provision for the respondent would be unreasonable.

The divorce procedure will still comprise two stages – the Provisional Order, which cannot be made earlier than 60 days after the initial application; and the Final Order, which cannot be made until at least one month has elapsed after the Provisional Order. 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 conversely the granting of a Final Order may be delayed by the matters mentioned in paragraphs (1) and (2) of the previous paragraph.

There is no longer any need for the Court to be satisfied that there has been an attempt to reconcile the parties.

Divorce Procedure

(The procedural details of how to make an application for divorce and for other matters under the new Law will be contained in Rules of Court which are not yet available.)

Finances and Children

Aside from the legal dissolution of the marriage, the Court also has jurisdiction to make orders in relation to your finances, property, and any children you may have for arrangements after your separation or 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, as well as an order for property to vest in a certain party or to be sold. These orders can be made in relation to the spouse or for the benefit of the child.

These practical matters can be difficult to resolve, even if you and your partner agree on the divorce itself. It is always possible that you and your partner may not be able to reach an agreement on finances or child custody, by the time that the Court grants the Provisional or Final Order. If this is the case, again the matter to be contested will be

heard by the Court in exactly the same way as other Court hearings and can also incur significant legal fees. If possible, you should seek to reach agreement on these matters.

SEPARATION

There are other ways of bringing your relationship to an end which stops short of actual divorce and leaves you both still legally married. This is generally referred to as "separation" and can be accomplished in one of three ways:

1. Merely by you and your partner reaching an agreement between yourselves concerning the practical problems and not involving lawyers at all. However, it may be advisable for the terms of the agreement to be embodied in a court order in order to ensure that they are binding.
2. You and your spouse applying to the Royal Court for a "Judicial Separation by consent" once you have reached agreement on the practical problems.
3. You or your spouse applying to the Magistrate's Court for a separation order and interim maintenance.

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. LIVING APART WITHOUT INVOLVING LAWYERS AND COURTS

This is the most informal and cheapest method of separation which involves you and your partner reaching an agreement on the practical problems referred to earlier that suits you both and which you both stick to. This may be a preferable solution as it gives you more control than asking the Court to make its own order and 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 arise if one or other of you does not stick to the agreement, perhaps by not paying child maintenance regularly as agreed. 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 AGREEMENT

The essence and 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 also reach an agreement concerning a division of the matrimonial assets, (including the home, money, all other matrimonial possessions) and the children, (in fact all of the questions relating to the Practical Problems posed earlier, and which are referred to legally as "Ancillary Matters"), then the Royal Court will accept the situation and grant an order of Judicial Separation on the terms and conditions set out in an Application which will have been placed before the Court.

If you and your partner are unable to agree on the settlement of the ancillary matters, then there can be no Judicial Separation. This is an all or nothing application upon which the Court will not hear any argument. If no agreement can be reached on all aspects, then it may be necessary to ask the Court to adjudicate on a settlement following an application for divorce.

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 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 and separating their assets.

Judicial Separation procedure

Either two or three documents need to be drafted and submitted for a Judicial Separation, this will require one party to engage the services of an Advocate.

- (i) A Memorandum setting out your basic personal details
- (ii) The terms of your agreement
- (iii) A Vesting Order (if the Agreement is dealing with a variation or transfer of you and/or your partner's interest in real property).

A Judicial Separation is always an agreed Order. The papers can be submitted to the Court signed by both parties, or their advocates, by 12 noon on a Tuesday. It is always necessary for both parties to appear before the Court in person for Judicial Separations as the Court

is anxious to ensure that both are aware of the terms of the agreement and understand the implications.

3. LEGAL SEPARATION IN THE MAGISTRATE'S COURT

The Magistrate's Court also 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. If that is so then it may be necessary to make an application to the Magistrate's Court which can make orders concerning separation and maintenance. The Court will deal with them either by agreement or after having heard argument by both sides.

As the Magistrate's Court has no jurisdiction to transfer rights in real property it is inappropriate for couples who own their own homes (as opposed to those who are renting) to apply for a separation in the Magistrate's Court, or if they do, then only to the extent of an interim measure concerning immediate maintenance of either the wife, or the children or both. Separations in the Magistrate's Court therefore tend to be used primarily by those couples for whom the main concern is the financial maintenance and support of the wife and children of the marriage, rather than the separation of the husband and wife.

If you and your partner have in fact separated amicably and he/she has been paying you "maintenance" voluntarily, the Court can make an order concerning the maintenance for you and/or the children "by agreement", if needed.

Since 2009 the Family Court has been 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.

Separation procedure

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".

It is possible for an advocate to appear on behalf of both Applicant and Respondent, but it is equally possible for you to appear on your own and represent yourself in simple

straightforward matters. If you do receive a summons, do not ignore it and if necessary, take it to an advocate immediately.

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. Any additional negotiations that are necessary in respect of ancillary matters (for example, arrangements for children, or property matters) are charged at an additional 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.

The cost of a Legal separation or a Judicial Separation and fees for settling the ancillary matters both for Separation and Divorce are charged on an hourly rate, depending on which advocate you instruct and at your first interview you should ask how much your chosen advocate will charge.

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 partner or his/her advocate, or accept their advice, is your decision, but obviously the more you and your partner argue, the more you pay in fees and the less will be left over for you and your partner 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 and can run into several thousand pounds for you and the same for your partner.

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 more likely you are to get what you both want, without it costing a fortune in legal fees.

CONCLUSION

These are the main options available to you and your partner 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.

An advocate can be consulted to advise you on the rights, duties and liabilities between you, your partner and your children. Remember that you are not obliged to follow his or her advice to the letter and the best agreement is the one which suits both you and your partner, no matter what it is.

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.

General disclaimer

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July 2024