

1ST EDITION

MATRIMONIAL PROCEEDINGS

Richard Davies and
Marilyn Mornington

LONGMAN PRACTICE NOTES

Longman 

L O N G M A N P R A C T I C E N O T E S

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1ST EDITION

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PUBLISHER'S NOTE

For the sake of simplicity of style, 'he', 'his', etc has been used throughout the text. 'She', 'her' etc should be read as an alternative, where appropriate.

UNDEFENDED PETITIONS: BASIC INFORMATION

This practice note is intended to be a practical guide to matrimonial proceedings in which the practitioner is likely to be involved. The subject is immense and the authors are mindful that much useful information has had to be omitted as a matter of necessity in view of the restrictions of length imposed. Nevertheless, it is hoped the busy practitioner will find it useful in itself or in giving some indication of where to look next for further information or detail.

1.1 Sources

Matrimonial law is embodied in statute, case law, statutory instruments and rules.

1.1.1 Statutes The main consolidating statute laying down the current code of divorce law is the Matrimonial Causes Act 1973 (MCA 1973) which is amended from time to time (see Matrimonial and Family Proceedings Act 1984 and Family Law Act 1986).

1.1.2 Matrimonial Causes Rules 1977 (MCR 1977) These are rules governing matrimonial proceedings which incorporate the provisions of the rules of the Supreme Court and County Court Rules. Where the MCR 1977 fail, recourse is had to the rules of the Supreme Court or the County Court Rules.

1.2 A system of working

A solicitor who is well organised is likely to be in a better position to advise a client. This is achieved by:

- Clarity of the instructions. Time is money, both for you and your client. Pro-forma can reduce time spent and achieve an increased efficiency. The authors suggest, when instructions are taken, a client completes or supplies the information requested in the:
 - (a) General client questionnaire which can then be a front sheet (see 2.1);

- (b) Maintenance calculation checklist (see 3.1);
- (c) Matrimonial home questionnaire (see 3.2)—in this way you can prepare for later ancillary relief applications in advance even if an application for legal aid is pending. This will also ensure the relevant documents are to hand such as details of pensions/surrender values of policies.
- Keep all pleadings on a separate clip. Maintain a front sheet as follows:

Step no	Pleading	date	Filed at court	Served on other side
---------	----------	------	-------------------	-------------------------

From the front sheet, anyone foreign to the file can, at a glance, be aware of the progress made.

- Keep meticulous file notes. These should contain full details of the attendances, including time spent. Often overlooked is the time spent on perusals, preparation, travelling time, waiting time etc. If necessary, calculate the value of the file as you proceed. This is especially important in green form cases so the appropriate extension can be applied for. For further tips on file management see Rigby, *Contentious Costs* (Longman Practice Note, 1988).

1.3 Jurisdiction in matrimonial proceedings

The major provision dealing with jurisdiction is contained in the Domicile and Matrimonial Proceedings Act 1973.

Jurisdiction will be founded in divorce, judicial separation and nullity cases where either party to the marriage:

- (a) is domiciled in England and Wales on the date when the proceedings are begun; or
- (b) is habitually resident in England and Wales throughout the period of one year ending with that date or additionally in nullity cases where either party to the marriage has died before the date when proceedings were begun and was either:
 - (i) domiciled at death in England and Wales; or
 - (ii) had been habitually resident in England and Wales throughout the period of one year ending with the date of death.

For further clarification of the jurisdiction of the court see *Rayden and Jackson on Divorce*, Vol 1, 15th edn (Butterworths, 1988); *Butterworths Family Law Service*, Section C.

1.4 Grounds for granting a decree

1.4.1 Divorce The MCA 1973, s 1(1) provides that the only ground for divorce is that the marriage has broken down irretrievably.

Irretrievable breakdown is established by proving one of the five facts set out in MCA 1973, s 1(2) (see 'Irretrievable breakdown—the five facts', p 4). Proof of any of the facts raises a presumption of breakdown and, in the absence of evidence to the contrary the court *must* grant a decree nisi of divorce unless a petition for divorce has been presented before the expiration of a period of one year from the date of the marriage (MCA 1973, s 3). Where decrees are sought under s 1(2)(d) or (e), MCA 1973, s 10(2) contains provisions intended to secure the financial position of the respondent spouse and a decree nisi will not be made absolute unless and until the court has satisfied itself the financial arrangements are 'reasonable and fair' or 'the best that can be made in the circumstances'.

1.4.2 Judicial separation (JS) The principal effect of such a decree is to remove the duty of one spouse to live with the other (MCA 1973, s 18(1)). A petition for JS can be presented by either party to the marriage on the ground of any of the five facts for divorce as set out in MCA 1973, s 1(2) (see 'Irretrievable breakdown—the five facts', p 4), and once one of the five facts is shown to exist the court is bound to grant a decree. In JS petitions the court is not concerned with the question of whether or not the marriage has broken down irretrievably.

The effects of a decree of JS are:

- (a) the court's ancillary financial and custody powers including power to grant injunctions, may be invoked;
- (b) for the purposes of intestacy a decree of JS operates as divorce and neither spouse has any right to succeed to property from the other on intestacy (MCA 1973, s 18(2)).

Orders of JS are often obtained:

- For religious reasons, eg for Roman Catholics who do not believe in divorce.
- Where one year has not elapsed since marriage.
- Where the petitioner does not wish to obtain a divorce or does not yet have the necessary evidence to establish irretrievable breakdown or, alternatively, tactically chooses to keep an avenue of reconciliation demonstrably open to the other spouse.

IRRETRIEVABLE BREAKDOWN—THE FIVE FACTS

MCA 1973, s 1(2)(a) 'that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent.'

'Adultery' is sexual intercourse between a married person and a member of the opposite sex who is not the other spouse. 'Intolerable' is given its ordinary meaning and a subjective test is applied. It need not be the adultery which makes it intolerable it may be other factors.

Note Standard of proof is considered to be on the balance of probabilities.

MCA 1973, s 1(2)(b) 'that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent'.

'Reasonably' qualifies 'expected' not the respondent's behaviour. 'Expected' means required: *Pheasant v Pheasant* [1972] Fam 202. The question as to whether the petitioner can reasonably be expected to live with the respondent is to be decided: 'Can this petitioner with his or her character and personality, with his or her faults and other attributes, good or bad, having regard to his or her behaviour during the marriage reasonably be expected to live with this respondent?' *Ash v Ash* [1972] Fam 135.

Note Standard of proof is an interaction of subjective and objective tests; right thinking person test (*Ash v Ash* [1972] Fam 135).

MCA 1973, s 1(2)(c) 'that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition.'

'Desertion' consists of the unjustifiable withdrawal from cohabitation without the consent of the other spouse and with the intention of remaining separated permanently.

In considering whether the period the parties have lived apart to have been continuous 'no account shall be taken of any one period (not exceeding six months) or of any two or more periods (not exceeding six months in all) during which the parties resumed living with each other, but no period during which the parties lived with each other shall count as part of the period of desertion or of the period for which the parties to the marriage lived apart, as the case may be' MCA 1973, s 2(5).

MCA 1973, s 1(2)(d) 'that the parties of the marriage have lived apart for a continuous period of at least two years immediately

preceding the presentation of the petition . . . and the respondent consents to a decree being granted.’

‘Consent’ must be positive, it will not be implied.

MCA 1973, s 1(2)(e) ‘that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition’.

For the purposes of s 1(2)(c) and (d) above and this section, a husband and wife shall be treated as living apart unless they are living with each other in the same household, and references in this section to the parties to the marriage living with each other shall be considered as references to their living with each other in the same household.

Note The period of separation must be ‘immediately’ prior to the presentation of the petition. Note *Spawforth v Spawforth* [1946] 1 All ER 379 stressed the two year period must precede immediately the date of the original petition and not a supplemental petition.

COMMON PITFALLS—THE FIVE FACTS

MCA 1973, s 1(2)(a)

- The petition must show why the petitioner finds it intolerable to live with the respondent.
- Adultery requires sexual intercourse to involve some but not necessarily full penetration. If in doubt proceed under MCA 1973, s 1(2)(b), as an extra-marital sexual relationship falling short of adultery.
- Ensure the adultery which is being relied on as the fact the petitioner finds intolerable, is not more than six months after the petitioner learnt of it and the petitioner and respondent have lived together since.
- If, after the discovery of the adultery the petitioner and respondent live together after the decree nisi but before decree absolute, this will prevent a decree absolute being made and the decree nisi will be rescinded.
- If the identity of the co-respondent is known, although there is no statutory requirement, the petitioner should name that party unless the court gives leave otherwise. The alternative may be this anyway causing delay and additional expense.
- Confessions are evidence against only the maker unless made on oath and satisfy the Civil Evidence Act 1968 (CEA 1968, s 2) and, if so, an admission against another person is admissible.
- Previous convictions by the respondent in a UK court or courts

marital is admissible subject to proof to the contrary to CEA 1968, s 11.

- Findings of adultery and paternity in previous civil proceedings are admissible; CEA 1968, s 12(1).

MCA 1973, s 1(2)(b)

- Although the petitioner may wish to spare the blushes of the respondent by only mentioning the minor indiscretions, this could be counterproductive and an unwise decision if 'conduct' may be relevant in ancillary matters. The petition must have 'teeth' if the registrar is to grant a certificate under the special procedure. Once it is explained to a petitioner that the consequences of the refusal of the registrar's certificate is usually the petitioner giving evidence in open court, this will usually lower the resistance and permit the proper pleading of the behaviour.
- It is wise, if possible, to obtain a proof of evidence written by the client where relevant as a précis can be taken.
- The behaviour can be viewed throughout the marriage as a whole which may be important in determining whether the court considers this petitioner should have to live with this respondent when applying the right thinking person test. Consider making clear the type of disposition of the petitioner in the petition so the court can properly put the complaint about behaviour into context. In *Ash v Ash* [1972] Fam 135 a petitioner who was violent, alcoholic and flirtatious was reasonably expected to live with the respondent who was of a similar disposition.
- Ensure the MCA 1973, s 2(3) provides that where 'the parties to the marriage have lived with each other for a period or periods after the date of the occurrence of the final incident relied on by the petitioner and held by the court to support his allegation, that fact shall be disregarded in determining for the purposes of s 1(2)(b) above whether the petitioner cannot reasonably be expected to live with the respondent if the length of that period or of those periods together was six months or less.'

MCA 1973, s 1(2)(c)

- Ensure desertion is for the 'continuous' period and 'immediately' preceding presentation of the petition. There cannot be separation if the parties are living together.

MCA 1973, s 1(2)(d)

- Ensure the acknowledgment of service is duly signed by the respondent or his written consent is lodged with the affidavit of evidence as consent must be positive and not implied.
- If parties live in different places but both regard the marriage relationship still subsisting, this will not amount to living apart; *Santos v Santos* [1972] Fam 247. Close judicial scrutiny is given to divorces by consent. Care is needed when replying to the question, when and in what circumstances did the petitioner come to the conclusion the marriage was in fact at an end.
- As withdrawal of the respondent's consent at any time before the decree would defeat the petition and cause obvious delays consider, if you suspect this tactic may be adopted by the respondent, that the prayer for costs be claimed in the petition in the event that the decree proceeds defended. The normal attitude on costs is that they should be shared; *Hymns v Hymns* [1971] 1 WLR 1474.

MCA 1973, s 1(2)(e)

- When acting for middle aged to elderly parties, it may well be the respondent's position after decree (MCA 1973, s 10(2)) will have to be considered. This risk should be explained in writing to the petitioner prior to proceedings.
- Costs should not be claimed in the petition; *Chapman v Chapman* [1972] 3 All ER 1089, CA.
- As in the first two points of s 1(2)(d) above.

1.4.3 Nullity

- What is the effect of nullity?

Parties to a void marriage are treated as if they have never been married so there is no necessity for an annulment. The decree is therefore declaratory.

See MCA 1973, s 11 for the criteria for void marriages.

Parties to a voidable marriage are treated as validly married unless or until the marriage is annulled by a decree of nullity.

See MCA 1973, s 12 for the criteria for voidable marriages.

- Why apply for a decree?

In a void marriage there is strictly no need to apply. A party could validly contract to marry another person but this is not so with a voidable marriage as a decree is necessary before re-marriage. On the grant of a decree, if marriage is void, the court has the same powers to order one party to make financial provision for the other as if they were married. If the marriage is voidable the parties'

financial rights are the same before or after decree as parties in 'divorce' proceedings.

Children of a void marriage are treated as legitimate provided that at the time of intercourse resulting in the birth (or at the time of the celebration of the marriage if later) both or either parties reasonably believed that the marriage was valid (Legitimacy Act 1976, s 1). Children of voidable marriages are 'legitimate'.

- Who may apply for a decree?

Only spouses can apply and challenge the validity of a voidable marriage and then only during their joint lives.

Other 'interested' parties can apply to challenge the validity of a void marriage even after the death of the parties.

1.4.4 Decree of presumption of death and dissolution of marriage See MCA 1973, s 19.

1.4.5 Declarations affecting matrimonial status Part III of the Family Law Act 1986 gives effect to the recommendations contained in the Law Report '*Declarations in family matters*'. This concerned proposals relating to declaratory relief relating to matrimonial status, legitimacy, legitimation and adoption. The proposals are now embodied in Pt III of the Act which has been amended by the provisions of the Family Law Reform Act 1987 which extends the power of the court to make declarations as to parentage.

PROCEDURE TO OBTAIN DIVORCE

2.1 General client questionnaire

Client	File No
Forenames	
Surname	Maiden name
Alias	
<i>Address</i>	
Address of last cohabitation	
(Leave to omit yes/no	
Permanent/temporary	
Confidential yes/no)	
Telephone (home)	(neighbour)
(work)	(Extn no/Dept)
Date of birth	Age
<i>Occupation</i>	
Worked there for years	
Approximate salary	
gross £	per year/month/week
net £	per year/month/week
If unemployed, ref no	Local U/B office
Signs on days at	am/pm
In receipt of £	family credit/income support
Agreement for maintenance	Details
yes/no	
<i>Client's cohabitee/girlfriend</i>	
Name	Age
Address	Telephone
Confidential yes/no	
Permanent cohabitation likely	Remarriage yes/no
yes/no	
Gross income £	Capital £
Net income £	Rough contribution to
	outgoings £ per

MATRIMONIAL PROCEEDINGS

Spouse

Forenames

Surname

Maiden name

Alias

Address

Other haunts, eg pubs

Telephone (home)

(neighbour)

(work)

(Extn no/Dept)

Date of birth

Age

Occupation

Worked there for years

formerly at

as

Approximate salary gross £

per year/month/week

net £

per year/month/week

capital £

If unemployed, ref no

Local U/B office

How long?

Signs on days at am/pm

In receipt of £ family credit/income support

Likely application re MCA 1973, s 10(2) by respondent to have financial position considered yes/no

Photograph obtained/description

Spouse's cohabitee/girlfriend

Name

Age

Address

Telephone

Confidential yes/no

Permanent cohabitation likely yes/no

Remarriage yes/no

Gross income £

Capital £

Net income £

Rough contribution to outgoings
£ per

Previous proceedings?

Jurisdiction

Petitioner's domicile if not England/Wales

Respondent's domicile if not England/Wales

Have they resided in England/Wales for one year yes/no

Give details of addresses and duration parties cohabited

Solicitors acting

Petitioner/Respondent	co-respondent
Address	
Telephone no	
DX no	Fax no
Person dealing	

Instructions for Divorce/Judicial separation/Nullity

Children	yes/no	Names
Questionnaire completed	yes/no	

2.2 Undefended divorces

2.2.1 The petition Although no set form is prescribed it must contain the information contained in MCR 1977, Appendix 2. Forms may be obtained from the court office without charge. For a useful precedent see *Atkins Court Forms*, Volume 16 and *Butterworths Family Law Service*, Section K. A form of petition is set out in chap 12.

2.2.2 Who are parties to a petition? The party presenting the petition is the 'petitioner' and the other party is the 'respondent'. The titles remain the same even if the other spouse files an answer containing a cross-prayer.

If a third party is brought into proceedings this is usually a person who is alleged in a petition or answer to have committed adultery. If so, that person must be made a party unless the petition contains a statement that his or her identity is not known to the petitioner or unless the court directs otherwise. Where it is alleged in a petition that the respondent is guilty of an improper association falling short of adultery with a person whose identity is known, directions should be sought of the court on notice or ex-parte if no notice of intention to defend has been given by the respondent. The court may direct the person named to be made a co-respondent or that a copy of the petition and notice of proceedings be sent to the party to the improper association leaving that person to intervene and become a party to the proceedings if he or she wishes.

In adultery cases with a girl under 16 directions should be sought as to whether she is to be served, see *Practice Note* [1961] 1 All ER 129.

A petition by a party under disability may be presented by that person's next friend. Unless the Official Solicitor is the next friend a consent in writing by the next friend must be filed before he can act. In the case of a patient, a sealed copy of the court of protection order or authorisation for the conduct of proceedings should be filed. If not, if the person under disability is a minor, a certificate must be filed