COLLAS CRILL

Grounds for divorce

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There is only one ground for divorce, that is that the marriage has irretrievably broken down. The Court cannot hold that a marriage has irretrievably broken down unless the petitioner proves to the Court one or more of five facts, which are as follows:

1. **Adultery** - The respondent has committed adultery and the petitioner finds it intolerable to live with the respondent.
2. **Unreasonable Behaviour** - The respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.
3. **Desertion** - The respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition.
4. **Two Years' Separation with Consent** - The parties to 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.
5. **Five Years' Separation** - The parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.

One important point to note is that it is not necessary for the petitioner to show that the breakdown of the marriage was caused by the fact on which the petitioner relies. As an example, the marriage may have broken down many years before on the grounds of irreconcilable differences. If however one party later commits adultery, then a petition can be issued on that ground even though the adultery was not the cause of the marital breakdown.

In practice, this usually causes the Court few difficulties. The petitioner will state in his petition that a marriage has broken down irretrievably. If the petitioner is then able to prove the fact upon which he relies in his petition, then the Court will accept the petitioner's statement without further enquiry and will grant a divorce.

In the event that the petition is defended, then the Court will hear evidence and determine on the facts of the case whether or not the marriage has irretrievably broken down. See Defended divorce.

The five facts in more detail

Generally, there is no benefit in issuing a divorce petition on one particular fact rather than another.

As will be clear from the five facts set out above, the first two grounds, namely adultery and unreasonable behaviour, are fault based. The remaining three grounds rely upon the passage of time and consent, with the

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minimum time period being two years. In other words if the petitioner wishes to issue a petition within two years of the separation, then the only possible grounds available would be adultery or unreasonable behaviour.

1. Adultery

A person cannot petition for divorce on the grounds of his own adultery; it has to be the adultery on the part of the other person.

To prove adultery, the petitioner will need to state briefly when and where the adultery took place and will need to cite the name of the third party. The third party will then be named in the divorce as co-respondent and will receive a copy of the petition.

In any adultery petition there are two matters that the petitioner must prove, namely that the respondent has committed adultery and that he finds it intolerable to live with the respondent.

Adultery is defined as voluntary sexual intercourse between a married person and a person of the opposite sex who is not the person's spouse. Sexual behaviour short of intercourse is not sufficient, but may be grounds upon which an unreasonable behaviour petition can be issued.

As with all divorce petitions, the onus is upon the petitioner to prove to the Court that the reason for the divorce is made out. One frequently asked question is how can a petitioner prove adultery. By its very nature, adultery is rarely witnessed by a third party! In reality, respondents are often willing to admit adultery because it provides a straightforward ground for divorce and avoids any unpleasant allegations of unreasonable behaviour.

In Guernsey, the adultery is usually proved by way of a sworn statement (affidavit) from the respondent. This affidavit is sent to the Court in support of the Provisional Order application and will invariably be accepted by the Court as evidence of the adultery.

Unlike England, in Guernsey the co-respondent must be named in a petition based on adultery. The co-respondent also receives a copy of the divorce petition and is required to return the Acknowledgement of Service form to prove receipt of the petition. In the absence of co-operation from the co-respondent, HM Sergeant will be asked to serve the papers and produce a certificate to confirm good service. Strangely, having being named in the divorce and served with the papers, the co-respondent is usually dismissed from the divorce proceedings at the Provisional Order stage.

If the respondent denies adultery and files an Answer, the case will be defended. The onus is upon the petitioner to prove the adultery. Ultimately the Court will have to consider whether the adultery is proved on the basis of the evidence brought before the Court. In practice, this is rare. The Court will usually assume that a cohabiting couple are in a sexual relationship for the purpose of proving adultery.

2. Unreasonable behaviour

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In the absence of adultery, the only possible ground to issue a petition within two years of the separation is on the grounds of unreasonable behaviour.

It is important that divorce petitions are drafted very carefully. This is particularly so with petitions based on unreasonable behaviour. It is unfortunate that on occasions a badly drafted divorce petition, including malicious, exaggerated and incorrect allegations, can cause further damage at a time when the situation may already be very difficult between the parties. This can be particularly damaging in cases where there are young children and the parties need to maintain some semblance of a relationship post separation.

In law, the test of unreasonableness is whether the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him. The Court will consider whether a right thinking person would come to the conclusion that a spouse has behaved in such a way that one cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the characters and the personalities of the parties.

In practice, the range of allegations that can be taken into account is very wide. Domestic violence is an obvious example, but there are many lesser allegations that will suffice.

Examples of unreasonable behaviour include excessive drinking, unreasonably refusing to have sexual intercourse or making excessive sexual demands, having an intimate relationship with another person falling short of adultery, committing serious criminal offences or keeping the other party unreasonably short of money. These are just some of the many examples of behaviour that can be cited. The Court usually requires only brief details of such allegations, but the allegations must be strong enough to convince the Court that the marriage has broken down irretrievably.

In practice, it is usually necessary for the petitioner to include only a brief account of the unreasonable behaviour, showing where possible the effect that the other party's behaviour has had on the petitioner.

Clearly, allegations of behaviour can give rise to additional and unnecessary conflict in circumstances which are already difficult. With this in mind, the Law Society of England & Wales has produced a Protocol which provides best practice in drafting unreasonable behaviour petitions. The Protocol provides that any petition citing allegations of unreasonable behaviour should be kept to a minimum, and if at all possible the allegations should be agreed with the respondent prior to the issue of the petition. The Law Society Protocol is not binding in law but it is good practice.

3. Desertion

For the purposes of divorce, desertion requires the respondent to have left the petitioner without the petitioner's consent for a minimum period of two years.

The true legal definition of desertion is rather technical and it is perhaps for this reason that in practice, petitions on the grounds of desertion are very rare. In such cases, it is usually easier to proceed on the basis of two years' living apart and consent.

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4. Two years' separation with consent

If there is such a thing, the best way to get divorced is a petition based on two years' living apart and consent.

This ground allows the petitioner to petition for divorce simply on the basis that the parties have lived apart for a continuous period of two years and that the other party consents. This avoids the necessity of making allegations of unreasonable behaviour or adultery and, together with five years' separation, is seen to be the least contentious of the grounds for divorce.

One point to be noted is the definition of 'living apart'. It is possible for parties to live apart under the same roof. The law provides that a husband and wife shall be treated as living apart unless they are living together in the same household. To satisfy this test, the husband and the wife must live entirely separate lives, albeit under the same roof, ie they must have no communal life together. This usually means that they do not share the same bed, that they do not socialise together, that they do not eat meals together, that they do not wash each other’s clothes. In short, the parties live entirely separately.

In such cases, it can sometimes be difficult to pinpoint a particular date of separation.

The divorce petition itself will simply state that the parties have lived apart for a period of two years from a specified date. The petitioner must swear on oath that the contents of his divorce petition are true, so of course the date of separation must be accurate.

The second element required for a divorce on this ground is the consent of the respondent. The respondent is at liberty to consent or refuse to consent to a petition on this ground, at will. The respondent is not required to give a reason for refusing to consent, nor can he be put under any pressure to provide such consent.

The respondent usually signifies his consent to the Court on a standard consent form provided to him by the petitioner’s advocate, which is included with the divorce papers. The respondent is at liberty to withdraw his consent at any time up to the granting of a Provisional Order, although a withdrawal of consent is rare in practice.

5. Five years' separation

If the petitioner can show that he and or his spouse have been living apart for a continuous period of at least five years immediately preceding the presentation of the petition, then he is entitled to a decree whether or not the respondent consents to a divorce.

As with the two years' separation and consent, there are distinct advantages in pursuing a divorce on this ground rather than adultery or unreasonable behaviour, assuming of course that the five year separation period can be proved.

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