

# Chapter 2: Procedure and Drafting in Divorce

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## Aims of this Chapter

This chapter will enable you to achieve the following learning outcome from the ILEX syllabus:

- 1 Understand how to terminate a marriage and civil partnership

## 2.1 Introduction

Today, nearly all divorces are undefended. This chapter explains the procedure in undefended matrimonial proceedings. It examines how the documents are to be completed and the steps to be taken to obtain the decree *nisi* and decree absolute of divorce.

Practitioners should now be aware of the good practice principles of the Law Society Family Law Protocol, which to a great extent mirrors the long-established Code of Resolution. Broadly, in pursuit of the aim of reducing conflict in divorces and related child matters, the Protocol encourages an open collaborative approach to resolving issues in divorce.

## 2.2 The first interview

The procedure described here applies equally to a civil partnership dissolution.

When meeting the client for the first time, it is important to be fully prepared. The client may be nervous, apprehensive, angry or fearful. It is important that the client is reassured and offered an appointment promptly and also that the solicitor is fully prepared for the first interview. All of the client's basic details must be taken including name, date of birth, address and details of their family including children. Many firms have a pro-forma checklist for initial interviews.

### (1) Professional conduct duties

As well as advising the client on the law, all of the professional conduct issues must be covered including money laundering regulations.

You have professional conduct rules that govern that relationship between you and your client. There are some core duties to the client found in the **Solicitors Regulation Authority's (SRA) Solicitors' Code of Conduct 2007 (SCC)** and are:

- to uphold the law;

- to act with integrity;
- to act in the best interests of your client.

In ***Re Z (Restraining Solicitors from Acting) [2009]*** an application was made by a husband seeking an order preventing the wife's solicitors from acting for her on the ground that the senior partner of that firm had previously acted, while at another firm, for the husband in financial proceedings with the wife.

The husband had retained the solicitor to act in connection with a freezing order to prevent the wife from disposing of assets and had regarded the solicitor as a friend. After several separations and reconciliations, the marriage broke down in 2009 and the wife approached a firm of solicitors where the husband's solicitor was now the senior partner, although the wife was being advised by another partner.

The solicitor had left her previous firm to start the new firm in concert with several colleagues although the old firm still operated and retained the relevant files. When the husband found out, he requested through his solicitors that the firm cease to act for the wife, who at first refused to do so. After a five-week wait, the husband renewed his request for the firm to cease to act. The wife's solicitors said they were prepared to put in place undertakings that the senior partner would not discuss the case with her colleagues, attend any related meetings and the wife would not attempt to discuss the case with the solicitor. The husband applied to the court.

Bodey J identified three principal questions for the court:

- Was there a real risk of disclosure?
- If so, have the wife's solicitors refuted the burden to show that there is no risk?
- If the order is granted, what effect should the five weeks' hiatus between raising the issue and seeking this order have?

Bodey J concluded that the wife's current solicitor possessed information which is "confidential to the husband" and that the risk is neither "merely fanciful nor theoretical". The judge took account of the solicitor's "hands on" approach as senior partner and the fact that systems to prevent disclosure did not always deal with accidental or inadvertent disclosures. Bodey J granted the husband an order but ordered that the husband contribute to the wife's costs incurred during the five-week wait between requests.

According to **r2.01 SCC**, you are free to decide whether to take on a client but you must have the resources and competence to act in a case. This is extremely important in the early stages of a solicitor's career as it is tempting to take cases which require a very high level of expertise.

During the interview, according to **r2.02**, you must agree an appropriate level of service; explain your responsibilities in the case as well as the client's responsibilities, for example, the duty of full disclosure in financial relief. You must also inform the client, in writing, of the name and status of the person dealing with the matter as well as the person who has overall responsibility for supervision of the case.

**r2.03 SCC** gives the information which the client should be given following the first interview, including:

- basis and terms of the firm's charges and whether they are to be increased;
- any likely payments which the client or the firm may need to make to others;
- whether the client is eligible, and should apply for, public funding;
- any potential liability for the other party's costs;
- the effect of the statutory charge (if the client is a publicly funded client).

Many solicitors keep a selection of leaflets and information on local services and agencies which can help families as well as national organisations which offers advice and information.

## (2) Money laundering

Money laundering is the process by which criminals attempt to hide or obscure the origins of criminal proceeds in order to make it easier to spend the money. The proceeds may arise from activities as diverse as drug trafficking and selling, prostitution, people trafficking, robbery and all other forms of illegal activity including tax avoidance, benefit fraud or fraud.

Solicitors' firms present money launderers with a target as a firm keeps money within client accounts and moves money between bank accounts in property transactions. The risks to the firm include criminal and disciplinary action against the firm and individual members of staff with the attendant damage to reputation and bad publicity.

The principal statute governing money laundering is the **Proceeds of Crime Act 2002 (POCA 2002)** and the **Money Laundering Regulations 2007**.

A firm will assess the risks to it from money laundering and must have systems in place to ensure compliance with the regulations. Customer Due Diligence describes the systems and processes by which the firm can verify the client's identity using documentation (e.g. a passport) and this must be done at the time of the first interview, that is, at the time that the business relationship is established.

There are certain warning signs that may indicate money laundering activity, for example, disputes that settle too easily as this may indicate "sham" litigation or clients wishing to pay large sums in cash.

When the client is new to a firm, his identity needs to be verified. Clients should be asked to bring some form of identification with them, for example, a passport and verification of their address, for example, a recent utilities bill.

Following ***Bowman v Fels [2005]***, the Law Society issued guidance on money laundering issues. The case concerned an financial relief case where a report to the **National Criminal Intelligence Service (NCIS)** had been made and an adjournment sought until the "appropriate consent" had been obtained from NCIS to continue the case. The Court of Appeal's judgment excluded certain activities from the scope of offences under **POCA 2002**. These activities include litigation from issue of proceedings to its disposal by final judgment and the Law Society guidance indicates that this also includes settlements, negotiations and alternative dispute resolution.

As a matter of professional conduct, you must also give your client the best overall information about the possible cost both at the outset of the case but also as the case progresses. **r2.03 SCC** states that a firm should give the following information on costs:

- advise the client of the basis and terms of your charges;
- advise the client if charging rates are to be increased;
- advise the client of likely payments which you or your client may need to make to others;
- the circumstances in which they may be liable for your costs;
- the effect of the statutory charge if publicly funded;
- that even if your client is successful, the other party may not be ordered to pay costs or may not be in a position to pay them;
- any information about the cost must be clear and confirmed in writing. You must discuss with your client whether the potential outcomes of any legal case will justify the expense or risk involved including, if relevant, the risk of having to pay an opponent's costs.

The cost of a divorce if a client is privately funded varies according to the levels of fees charged by an individual firm but a privately paying client can expect to pay between £200–£1,000 depending upon complexity and unexpected problems. The court fees payable in divorces are high, as the court fee to issue a divorce application is £340.

### (3) **Best practice**

The Family Law Protocol gives guidance for good practice in divorce and civil partnership dissolution cases. Guides to good practice in family law are also published by Resolution. Resolution's Code of Practice gives general guidelines for the conduct of family law cases:

- conduct matters in a constructive and non-confrontational way;
- avoid use of inflammatory language both written and spoken;
- retain professional objectivity and respect for everyone involved;
- take into account the long-term consequences of actions and communications as well as the short-term implications;
- encourage clients to put the best interests of the children first;
- emphasise to clients the importance of being open and honest in all dealings;
- make clients aware of the benefits of behaving in a civilised way;
- keep financial and children issues separate;
- ensure that consideration is given to balancing the benefits of any steps against the likely costs – financial or emotional;

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