

## Divorce - Gibraltar

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### 1 What are the conditions for obtaining a divorce?

A written application (called a petition) must be made to the court by either the husband or the wife. Applications for divorce are dealt with by the Supreme Court and spouses have to apply to that court for their divorce. The applicant has to prove that the marriage has broken down irretrievably and has to provide evidence of one of the five facts listed below.

No petition for divorce can be presented within **two years** from the date of the marriage. The only exceptions to this rule are where the petitioner has suffered exceptional hardship, or the respondent has exhibited exceptional depravity, or where the petitioner was under the age of 16 at the date of the marriage.

## **2 What are the grounds for divorce?**

The sole ground for divorce is the irretrievable breakdown of the marriage. In order to show that the marriage has broken down irretrievably it is necessary to produce evidence of one or more marital 'facts'.

- that the other spouse has committed adultery and that the applicant finds it intolerable to live with him or her;
- unreasonable behaviour, which means that the other spouse has behaved in such a way that the applicant cannot reasonably be expected to continue to live with him or her;
- desertion, which means that the other spouse has left the applicant for a period of two years before the time of the application for divorce;
- separation of the parties for a period of two years before the application for divorce (with the consent of the other spouse);
- separation for a period of five years before the application for divorce (without the consent of the other spouse).

The court is required to inquire as far as is possible into the facts alleged by the applicant (petitioner) and into any facts alleged by the other spouse (respondent). If the court is satisfied on the evidence that the marriage has broken down irretrievably, a decree of divorce will be granted by a Supreme Court judge, provided that the judge is satisfied with the arrangements regarding any children of the divorcing parties.

If the court is satisfied that the marriage has broken down irretrievably, it will first issue a 'decree nisi' (interim divorce order). After a period of six weeks an application can be made by the party that applied to the court for the divorce, to obtain the 'decree absolute' (final divorce order). Other than in exceptional circumstances, there is no time limit on an application for a decree to be made absolute (final).

However, if the application for the decree absolute is lodged more than 12 months after the decree nisi, the applicant will be required to lodge with it a written explanation:

- giving reasons for the delay;
- stating whether they and their spouse have lived with each other since the decree nisi and, if so, between what dates; and
- stating whether, being the wife, she has given birth to any child since the decree nisi and, if so, stating the relevant facts and whether or not it is alleged that the child is or may be a child of the husband.

The judge can require the applicant to file a sworn statement verifying the explanation she has given and can make such order on the application as the judge thinks appropriate.

## **3 What are the legal consequences of a divorce as regards:**

### **3.1 the personal relations between the spouses (e.g. the surname)**

The marriage is dissolved so there is no further duty to cohabit or continue any further personal relationship unless the parties wish. The parties are free to remarry should they wish to do so. They may choose to keep their married surname or revert to a pre-marriage name as they wish.

### **3.2 the division of property of the spouses**

This is determined by the court on hearing the facts of each case. Even where there is agreement between the parties, the Court retains an overall power to approve or amend the same.

### **3.3 the minor children of the spouses**

Either before or after the Supreme Court makes the final decree, it has the power to make provision for the custody, maintenance and education of the children of the marriage or even direct that proceedings be taken to place the children under the protection of the Court. The Supreme Court cannot make absolute a decree of divorce unless it is satisfied that satisfactory arrangements have been made for any children.

### **3.4 the obligation to pay maintenance to the other spouse?**

On pronouncing a decree nisi for divorce or any time thereafter, the Supreme Court has power to order that the husband shall pay his wife, during their joint lives, such monthly or weekly sum for the maintenance and support of the wife as the Court may think reasonable. A wife's entitlement to maintenance ceases once she remarries but any maintenance for the child of a marriage remains unaffected by the remarriage of the mother.

#### **4 What does the legal term “legal separation” mean in practical terms?**

Under Gibraltar law, legal separation is referred to as “judicial separation”. Upon such an order being made there will no longer be any expectation on the spouse who asked for the order to continue to live with their husband or wife. However, he or she will not be able to remarry. Effectively judicial separation is an option for spouses whose marriage has broken down but who do not wish to remarry. An applicant for judicial separation is not required to prove that their marriage has irretrievably broken down. It is possible to apply for an order for divorce after an order for judicial separation has been given.

#### **5 What are the conditions for legal separation?**

The applicant has to provide evidence of one or more of the facts required to prove the breakdown of the marriage, and, unlike those who seek a divorce, does not need to wait for three years from the date of the marriage to commence proceedings.

#### **6 What are the legal consequences of legal separation?**

If a party to a judicial separation dies without having made a will his or her property will be distributed under the intestacy rules and a decree for judicial separation has the same effect as a divorce. Therefore neither spouse has thereafter any right to the property of the intestate party. However, if a party to a judicial separation dies having made a will, judicial separation has no effect on entitlement under that will where, for instance, the surviving judicially separated party is nominated as a beneficiary under that will.

The same provisions for the division of property as are available on divorce are also available to the court with a judicial separation.

#### **7 What does the term “marriage annulment” mean in practice?**

There are two forms of marriage annulment. The marriage can either be declared “void”, which means that the marriage was never valid and never existed. Under different circumstances the marriage can be “voidable”, which means that one of the spouses can apply for the marriage to be declared invalid. It is possible for the marriage to continue if both spouses are content.

#### **8 What are the conditions for marriage annulment?**

A marriage is void and invalid if:

- It does not fulfil the terms of the Marriage Act.
- At the time of the marriage one of the parties was already legally married.
- The parties are not of different sexes. One married partner must be male and the other female for a marriage to be valid.
- In the case of a polygamous marriage completed outside Gibraltar, where one of the spouses was domiciled in Gibraltar at the time of the marriage.

A marriage is voidable in the following circumstances:

- That the marriage has not been consummated because of the incapacity of one of the spouses to be able to consummate it.
- That the marriage has not been consummated because of the wilful refusal of the respondent to consummate it.
- That one of the spouses did not consent to the marriage properly, because they were under pressure and were forced to agree, were mistaken as to the legal effects of the marriage, or were mentally incapable of appreciating the effects of the decision to marry.
- That at the time of the marriage one of the spouses was suffering from a mental illness of such a type as to make them unfit for marriage or from venereal disease in a communicable form and the petitioner was unaware of this fact at the time.
- That at the time of the marriage the respondent was pregnant by someone other than the petitioner and the petitioner was unaware of this fact at the time.

#### **9 What are the legal consequences of marriage annulment?**

Once a marriage is declared a nullity, it is null and void. However, where there are children of the marriage, the Supreme Court must be satisfied that suitable arrangements have been made. Provision can also be made for the payment of maintenance and custody/maintenance of any children.

#### **10 Are there alternative non-judicial means for solving issues relating to the divorce without going to court?**

Divorce falls solely within the jurisdiction of the Supreme Court of Gibraltar. However, some social assistance may be obtained through marriage counselling.

**11 Where should I lodge my application (petition) for divorce/legal separation/marriage annulment? Which formalities must be respected and which documents should I attach to my application?**

Applications should be filed at the Supreme Court Registry, 277 Main Street, Gibraltar.

The application is made by way of a petition and should be supported by affidavit evidence exhibiting a copy of the marriage certificate, copies of the birth certificates of any children and setting out the grounds for divorce/judicial separation/nullity. Reference should also be made to the children of the marriage and the petitioner's financial circumstances. Further details can be obtained from the Supreme Court Registry, 277 Main Street, Gibraltar, telephone (+350) 200 75608.

**12 Can I obtain legal aid to cover the costs of the procedure?**

Legal assistance may be available to cover the proceeding on satisfaction of relevant criteria as to income. Forms and further details are available from the Supreme Court Registry, 277 Main Street, Gibraltar.

**13 Is it possible to appeal against a decision relating to divorce/legal separation/marriage annulment?**

Rescission of a decree of divorce or nullity may be made at any time before the decree is made absolute. In the case of judicial separation, in certain circumstances, the decree may be reversed at any time after its making. Orders regarding maintenance and the custody and maintenance of children may be varied after a decree is made absolute.

**14 What should I do to have a decision on divorce/legal separation/marriage annulment issued by a court in another Member State recognized in this Member State?**

European Union Regulation EC No 2201/2003 states that a decision leading to divorce, legal separation (judicial separation) or marriage annulment given in one Member State can be recognised in other Member States. The documents required can be obtained from the court which made the order and should be submitted to the Supreme Court.

This Regulation does not affect issues of fault, property consequences of the marriage, maintenance or any other ancillary matters. There must be a real link between the party concerned and the Member State exercising jurisdiction.

Recognition may be refused if the decision is contrary to public policy, if given in default of appearance, if the respondent was not served with relevant documents in sufficient time, or if it is irreconcilable with a judgment in proceedings between the same parties in Gibraltar, or if it is irreconcilable with an earlier judgment in another country, provided the earlier judgment can be recognised in Gibraltar.

Any interested party may apply for a decision that the judgment be or not be recognised. The Supreme Court may stay the proceedings if an appeal has been lodged against the judgment for which recognition is sought.

If the decision cannot be recognised under this Regulation the arrangements for the recognition of divorces obtained overseas are in the Matrimonial Causes Act. This provides that:

The validity of an overseas divorce or legal separation obtained by means of proceedings shall be recognised if:

- the divorce or legal separation is effective under the law of the country in which it was obtained; and
- at the relevant date (that is at the date when the proceedings to obtain the divorce began) either party to the marriage
  - was habitually resident in the country in which the divorce or legal separation was obtained; or
  - was domiciled in that country; or
  - was a national of that country.

**15 To which court should I turn to oppose the recognition of a decision on divorce/legal separation/marriage annulment issued by a court in another Member State? Which procedure applies in these cases?**

Divorces and legal separations in other countries are recognised by Gibraltar law if certain conditions are satisfied. If an objection is made to the recognition of such a divorce/legal separation, it may be on the grounds that one of the conditions set out in the Matrimonial Causes Act has not been made out. In such a case, it may be appropriate to make an application to the Supreme Court of Gibraltar seeking a declaration that a particular divorce/legal separation obtained in another country is not valid.

**16 Which divorce law does the court apply in a divorce proceeding between spouses who do not live in this Member State or who are of different nationalities?**

The courts in Gibraltar will always apply the law in Gibraltar to cases brought before them. The courts have jurisdiction to deal with a divorce, even if the marriage took place abroad, if either of the parties to the marriage:

- is domiciled in Gibraltar on the date when the proceedings are begun; or
  - was habitually resident in Gibraltar throughout the period of one year ending with that date.
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