Unit 2:

Nullity and Divorce
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### Unit 2: Nullity and Divorce

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1. Nullity

There can be occasions when legally, a marriage or a civil partnership is considered to be invalid. This could be for a number of reasons, each of which we shall examine in this section. If the marriage is invalid, it can be said to be either ‘void’ or ‘voidable’. The grounds for void or voidable marriage are contained within sections 11 and 12 of the Matrimonial Causes Act 1973. These grounds apply to marriage ceremonies that took place after 31st July 1973, when the Matrimonial Causes Act 1973 came into force. The grounds in respect of civil partnerships are contained within sections 3 and 49 of the Civil Partnership Act 2004, and apply to all civil partnerships.

1.1 The Relevance of Nullity

It is highly likely that the majority of clients who you will represent wanting to end their marriage or civil partnership will do so either by divorce or dissolution respectively. This does not mean, however, that nullity is not relevant to marriage or civil partnership, as is reflected by the decision to include the nullity procedure in the recent civil partnership legislation.

Nullity is important as it recognises that a contract of marriage or civil partnership requires the same certainty as any other contract, and remains particularly important for those who, for religious or cultural reasons, are unable to divorce.

2. Void Relationships

A void marriage can be treated as a marriage that never came into existence. In the case of a void relationship the parties do not necessarily have to go to court and a decree of nullity is not essential, but there are reasons why you may advise a client whose relationship appears void to seek the court’s assistance:

- A decree of nullity removes any doubt as to the nature of the parties’ relationship.
- A decree of nullity allows the parties to seek ancillary relief under the Matrimonial Causes Act 1973.

A decree of nullity in a void relationship operates retrospectively.

2.1 Void Marriages

The grounds for what comprises a void marriage are set out in section 11 of the Matrimonial Causes Act 1973:

'A marriage celebrated after 31st July 1971 shall be void on the following grounds only, that is to say-'
(a) that it is not a valid marriage under the provisions of the **Marriages Acts 1949 to 1970** (that is to say where- 

(i) the parties are within the prohibited degrees of relationship;  

(ii) either party is under the age of sixteen; or  

(iii) the parties have intermarried in disregard of certain requirements as to the formation of marriage);  

(b) that at the time of the marriage either party was already lawfully married;  

(c) that the parties are not respectively male and female;  

(d) in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales.’  

(i) **the parties are within the prohibited degrees of relationship**  

We considered the prohibited degrees of relationship/kindred in the previous module.  

(ii) **either party is under the age of sixteen**  

The social and moral rationale behind this may well seem obvious. What is worthy of note, however, is the fact that such a marriage in countries were it is permitted will not be valid on return to England or Wales.  

(iii) **the parties have intermarried in disregard of certain requirements as to the formation of marriage**  

As there are many formalities in relation to marriage, some of them complex, a failure to comply will, in the majority of cases, only make the marriage void if the parties are aware of the particular formality and chose to deliberately ignore it.  

There are many kinds of ceremonies by which people choose to get married. Some of these ceremonies are so unusual that the courts can consider them to not give rise to a marriage and therefore not require a decree of nullity.  

If this is the court’s decision then it results in there being no legal marriage, and therefore no legal consequences, and will prevent the parties from seeking ancillary relief.
(b) that at the time of the marriage either party was already lawfully married

We have considered the issue of bigamy in Unit 1. A marriage where either party was already lawfully married will automatically be void.

(c) that the parties are not respectively male and female

We have considered this issue in Unit 1. Under the current law, transgender persons may marry those of the opposite sex to that of their current gender.

(d) in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales

There are countries in which polygamy is legal, but if either party to such a marriage is domiciled in England or Wales then that marriage will automatically be void.

2.2 Void Civil Partnerships

The similarities between the grounds for a void civil partnership and a void marriage are clear, and give further weight to those who argue that a civil partnership is in effect ‘same sex marriage’.

Task 1:

Using the website for the Office of Public Sector Information, find the Civil Partnership Act 2004. Consider sections 3 and 49. Do all the factors outlined in section 11 of the Matrimonial Causes Act 1973 feature, in one form or another, in providing grounds for a civil partnership to be void?

3. Voidable Relationships

A decree of nullity in a voidable relationship does not operate retrospectively, and a voidable relationship remains valid until a party seeks a decree of nullity from the court.
3.1 Voidable Marriages

The grounds for what comprises a voidable marriage are set out in section 12 of the Matrimonial Causes Act 1973:

'A marriage celebrated after 31st July 1971 shall be voidable on the following grounds only, that is to say-

(a) that the marriage has not been consummated owing to the incapacity of either party to consummate it;

(b) that the marriage has not been consummated owing to the wilful refusal of the Respondent to consummate it;

(c) that either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise;

(d) that at the time of the marriage either party, though capable of giving a valid consent, was suffering (whether continuously or intermittently) from mental disorder within the meaning of the Mental Health Act 1983 of such a kind or to such an extent as to be unfitted for marriage;

(e) that at the time of the marriage the Respondent was suffering from venereal disease in a communicable form;

(f) that at the time of the marriage the Respondent was pregnant by some person other than the Petitioner;

(g) that an interim gender recognition certificate under the Gender Recognition Act 2004 has, after the time of the marriage, been issued to either party to the marriage;

(h) that the Respondent is a person whose gender at the time of the marriage had become the acquired gender under the Gender Recognition Act 2004'.

(a) that the marriage has not been consummated owing to the incapacity of either party to consummate it

This is a reason commonly known by the public as to why a marriage is invalid. A marriage will be voidable if either party is not able to have sexual intercourse with the other. This does not relate only to an impotent male; a common example may be a party unable to consummate as a result of injury. Consumption only has to occur once.
(b) that the marriage has not been consummated owing to the wilful refusal of the Respondent to consummate it

Wilful refusal means a party's settled and definite decision, where there is not sufficient reason, not to have a sexual relationship with their husband or wife. It is not possible for a party to rely on their own refusal; the refusal must be their husband or wife's.

(c) that either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise

i. ‘duress’

The consent of a party to a marriage, where that consent is given under duress, is not validly given and therefore the marriage is voidable.

The test in such cases was set out in the case of Hirani v Hirani [1983] 4 FLR 232. In this case, a 19-year-old female Indian Hindu formed a relationship with an Indian Muslim male. Her parents arranged a marriage with a male whom she had not met in order to end her current relationship and threatened to turn her out of her home if she did not consent to the marriage. She went through with the marriage but left after six weeks, and petitioned for nullity.

Ormrod LJ set out the relevant test as:

“The crucial question in these cases, particularly where a marriage is involved, is whether the threats, pressure, or whatever it is, is such as to destroy the reality of consent and overbears the will of the individual.”

ii. ‘mistake’

This is a particularly rare ground for a voidable marriage; a relevant mistake will include the identity of the spouse.

iii. ‘unsoundness of mind’

A marriage contract is similar to any contract in that both parties must have sufficient mental capacity to understand the contract which they are entering into.

(d) that at the time of the marriage either party, though capable of giving a valid consent, was suffering (whether continuously or intermittently) from mental disorder within the meaning of the Mental Health Act 1983 of such a kind or to such an extent as to be unfitted for marriage
A party seeking a decree of nullity on this ground does not have to do so only in respect of their husband or wife; they may rely on their own mental health.

(e) **that at the tune of the marriage the Respondent was suffering from venereal disease in a communicable form**

Venereal disease is the only disease given in the Act, and reflects the problems at the time the Act was passed. It may be possible for this ground to apply to more modern epidemics.

(f) **that at the time of the marriage the Respondent was pregnant by some person other than the Petitioner**

This ground relates to where a man marries a woman in the belief that he is the father of the child with which she is pregnant. If the contrary is proved, the husband may seek a decree of nullity. It is not possible for a wife to seek a decree of nullity under this ground if she discovers that another woman was carrying her husband’s child at the time she married him.

(g) **that an interim gender recognition certificate under the Gender Recognition Act 2004 has, after the time of the marriage, been issued to either party to the marriage**

The final two grounds were inserted into the Matrimonial Causes Act 1973 by the Gender Recognition Act 2004. Under this ground, either spouse may petition the court for nullity within six months of an interim gender recognition certificate being granted.

(h) **that the Respondent is a person whose gender at the time of the marriage had become the acquired gender under the Gender Recognition Act 2004**

This ground allows a party to a marriage who, at the time of the marriage, was unaware that their husband or wife had acquired a gender recognition certificate, to petition the court for nullity.
3.2 Absolute Bars to Voidable Marriage

Section 13 (1) of the Matrimonial Causes Act 1973 provides where the court shall not grant a decree of nullity:

‘(1) The court shall not, in proceedings instituted after 31st July 1971, grant a decree of nullity on the ground that a marriage is voidable if the Respondent satisfies the court-

(a) that the Petitioner, with knowledge that it was open to him to have the marriage avoided, so conducted himself in relation to the Respondent as to lead the Respondent reasonably to believe that he would not seek to do so; and

(b) that it would be unjust to the Respondent to grant the decree.’

The ‘and’ between (a) and (b) indicates that both parts of the test must be satisfied.

Under section 13(3) of the Matrimonial Causes Act 1973 if the Petitioner seeks a decree of nullity under the grounds in section 12 (e) and (f) set out above, the court will not grant the decree unless satisfied that the Petitioner was not aware of either the venereal disease or the pregnancy.

3.3 Bars to Voidable Marriages in certain circumstances

Under section 13(2) of the Matrimonial Causes Act 1973, if nullity proceedings are instigated on the grounds in section 12, subsections (c), (d), (e), and (f) set out above, then the decree can only be granted if the proceedings are instituted within three years of the date of the marriage.

It is possible, however, to begin proceedings brought under these grounds after three years if a judge grants permission. Such permission will be granted if:

(a) he is satisfied that the Petitioner has at some time during the three year period suffered from a mental disorder within the meaning of the Mental Health Act 1983; and

(b) he considers that in all the circumstances of the case it would be just to grant permission for the institution of proceedings.

If a decree of nullity is sought under section 12 (g), then the time for instituting proceedings is shorter, at six months.
3.4 Voidable Civil Partnerships

**Task 2:**

Using www.legislation.gov.uk consider section 50 of the Civil Partnership Act 2004. What are the grounds for a voidable marriage that are not present, in one form or another, as grounds for a voidable civil partnership?

3.4.1 Bars to Voidable Civil Partnerships

**Section 51** of the **Civil Partnership Act 2004** provides that:

‘(1) The court must not make a nullity order on the ground that a civil partnership is voidable if the Respondent satisfies the court

(a) that the Applicant, with knowledge that it was open to him to obtain a nullity order, conducted himself in relation to the Respondent in such a way as to lead the Respondent reasonably to believe that he would not seek to do so, and

(b) that it would be unjust to the Respondent to make the order.’

As in marriage, an application for a decree of nullity in relation to a gender recognition certificate must be made within six months. In all other cases, the application must be made within three years.

Under **section 51 (4)** of the **Civil Partnership Act 2004**, leave may be sought to apply for a decree of nullity after three years. Under **section 51(3)** a judge may grant such leave if he or she:

(a) is satisfied that the Applicant has at some time during the 3 year period suffered from mental disorder, and

(b) considers that in all the circumstances of the case it would be just to grant leave for the institution of proceedings.

4. The First Year of Marriage

As we will consider later in the module, the **Matrimonial Causes Act 1973** prevents divorce within the first year of marriage. There is no ban on nullity proceedings within the first year of marriage.
4.1 Procedure for decree of Nullity

The application is heard in open court before a judge. As in divorce, there are two decrees available, decree nisi and decree absolute.

Public Funding is available for nullity proceedings. Funding is an important issue to remember when you advise clients whether or not to make an application for a decree of nullity, as if they are not eligible for public funding, there will be the expense of a court hearing that will not usually be necessary in divorce proceedings.

For those working in solicitors' offices, you will be bound by the SRA Code of Conduct 2011. Chapter 1 of this Code deals with client care and provides, amongst other things, that you have to give the client the best information possible about costs and advise the client about the risks of taking a case in terms of costs. The detail of the Code requirements can be found at: www.sra.org.uk.

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<td>Visit the Solicitors Regulation Authority website and download a copy of the SRA Code of Conduct. Familiarise yourself with the requirements of chapter 1 and keep it with your notes, as the issues relate to all clients.</td>
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5. Divorce

A divorce in England and Wales can be made under only one ground: that the marriage has **irretrievably broken down** see s1(1) Matrimonial Causes Act 1973.

5.1 The Five Facts

A court cannot find that a marriage has irretrievably broken down unless one or more of the ‘Five Facts’ are satisfied by the Petitioner for divorce. These facts are set out in **section 1 (2)** of the **Matrimonial Causes Act 1973**:

“(a) that the Respondent has committed adultery and the Petitioner finds it intolerable to live with the Respondent;

(b) that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent;

(c) that the Respondent has deserted the Petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition (hereafter in this Act referred to as ‘two years’ separation”) and the Respondent consents to a decree being granted;

(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 (hereafter in this Act referred to as ‘five years’ separation’.”

5.1.1 (a) Adultery

There are two parts to prove in relation to adultery. First, the Petitioner must prove that the Respondent has committed adultery, and second that this results in the Petitioner finding it intolerable to live with his or her husband or wife.

To prove adultery, which is voluntary sexual intercourse between a man and woman who are not married to each other but at least one of them is married to somebody else, a Petitioner may be able to produce the following types of evidence:

Cohabitation of more than six months after learning of adultery

A Petitioner cannot rely on adultery committed by the Respondent if the Petitioner and Respondent have lived with each other for a period exceeding, or periods that in total exceed, six months after the Petitioner learned that the Respondent had committed adultery (section 2(1) of the Matrimonial Causes Act 1973).

If the Respondent has committed adultery on more than one occasion, time begins to run when the Petitioner learns of the last act of adultery.

Cohabitation of less than six months after learning of adultery

If the Petitioner and Respondent have lived together for a period or periods of less than six months in total after the Petitioner became aware of the Respondent’s adultery, section 2(2) of the Matrimonial Causes Act 1973 provides that the cohabitation can be disregarded in determining whether the Petitioner finds it intolerable to live with the Respondent.
1. Admission

In the Acknowledgement of Service Form, completed by the Respondent to a petition for divorce where adultery is alleged, the question ‘Do you admit the adultery alleged in the petition?’ will be asked. If the Respondent answers: “yes” to this question and signs the Form then that will be treated by the court as sufficient evidence of adultery.

It is also possible for the Petitioner to obtain the Respondent’s signed admission in statement Form. Should the Respondent deny the adultery in the Acknowledgement of Service Form, refuse to make a statement admitting the adultery, or indeed file a statement denying it, then the divorce petition will be defended and the court will consider the evidence and then decide whether the adultery took place, as alleged or otherwise.

2. Circumstantial Evidence

This can include evidence that the wife has given birth to a child and that the husband is not the father. Another, more common example is that the Respondent and another partner are living together as man and wife. Evidence of this may be given by the Petitioner themselves or by someone independent, such as a ‘friend’ of the Respondent or new partner, or a private investigator.

A private investigator may also be able to provide evidence of the Respondent and another partner behaving in such a manner suggestive of the inclination to commit adultery, such as holding hands in public or staying the night together in the same property.

3. Findings

Findings in other proceedings can be used in relation to proving adultery. Such findings can include:

- that the husband is the father of a child in proceedings brought by the Child Support Agency;
- the husband has been convicted of rape; or
- a finding of adultery made in previous family proceedings.
4. **Co-Respondent**

This is the person(s) with whom the Respondent has allegedly committed adultery.

**Rule 2.7** of the *Family Proceedings rules 1991*, which can be found at:


sets out the rules in relation to whether the co-Respondent should be made a party to the cause:

‘(1) Subject to paragraph (2), where a petition alleges that the Respondent has committed adultery, the person with whom the adultery is alleged to have been committed shall be made a co-Respondent in the cause unless -

(a) that person is not named in the petition, or
(b) the court otherwise directs.’

The second part of the adultery test is that the Petitioner must find it intolerable to live with his or her husband or wife. The vast majority of divorce cases are undefended and in those cases, the Petitioner’s claims of intolerability will normally be accepted by the court.

If whether the Petitioner finds it intolerable is challenged by the Respondent then the matter will be considered by the judge. In those circumstances, the test applied by the court is a subjective one: does this Petitioner find it intolerable to live with this Respondent.

5.1.2 (b) Behaviour

The case of *Livingstone-Stallard v Livingstone-Stallard* [1974] Fam 47 set out the test the court must consider in cases where the Respondent’s behaviour is the ground for divorce in the petition:

‘Coming back to my analogy of a direction to a jury, I ask myself the question: would any right-thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the characters and personalities of the parties.’

It follows that when considering behaviour, the court must consider the:

- Petitioner’s behaviour;
- Respondent’s behaviour;
- background of the marriage; and
- sort of people the parties are.
One of the most common types of behaviour relied on in divorce petitions is violence. This can take the Form of repeated domestic violence or one single, serious, incident.

Other types of behaviour that may be relied on in a petition vary along with human nature. It is important to remember that the test is worded: “behaved in such a way that this wife cannot be expected to live with him” and therefore must apply to the individual characteristics of the parties.

**Cohabitation of more than six months**

Unlike in adultery cases, cohabitation for more than six months is not an absolute bar in relation to behaviour. However, if the Petitioner continues to live with the Respondent for a period or periods exceeding six months in total, the cohabitation will be taken into account when deciding whether the Petitioner cannot reasonably be expected to live with the Respondent. The longer the period of cohabitation following the last incident of behaviour, the less likely the court is to find that it is not reasonable to expect the Petitioner to live with the Respondent – unless a convincing reason can be given for the continued cohabitation.

**Cohabitation of less than six months**

In determining whether the Petitioner cannot be reasonably expected to live with the Respondent, section 2(3) of the *Matrimonial Causes Act 1973* provides that cohabitation of a total of six months or less following the last incident of behaviour proved can be disregarded.

5.1.3 (c) Desertion

Desertion is not a common feature on a divorce petition. This area of law is quite complex, but there are four essential elements that comprise desertion:

- the Respondent, when he or she left, intended to bring cohabitation to an end;
- cohabitation ended at least two years ago;
- the Petitioner did not consent to the end of cohabitation; and
- there was no reasonable cause to end cohabitation.
5.1.4  (d) Two years’ separation and consent

There are two elements to this test, both of which must be satisfied:

• the Petitioner and Respondent have lived apart for a continuous period of two years prior to the petition; and

• the Respondent consents to the decree.

i. ‘lived apart’

It is possible to imagine many scenarios where, for valid reasons such as employment in other areas of the country or overseas, a married couple may well not have lived together for long periods of time. This will not, however, satisfy the test for having lived apart as is meant under the Matrimonial Causes Act 1973.

It is necessary, under the Act, for at least one of the parties to have decided that the marriage has ended. After a party has made that decision, which does not necessarily have to have been communicated to the other party, any time spent living apart will count towards the two years’ separation.

There may also be a problem where a couple is married, consider themselves separated, but continue to live together under the same roof. This may well be for convenience or financial reasons.

In such cases, the test that the court will apply is whether the normal relationship of husband and wife has ended and the parties have been leading separate existences.

ii. ‘consent’

The most common way for a Respondent to give his consent is to do so in the Acknowledgement of Service Form, referred to above. It is possible for the Respondent to withdraw the consent that he has given before the decree is pronounced by the court.

If the decree nisi is granted and the Respondent subsequently discovers that the Petitioner has misled him about any matter considered when consent was given, the Respondent can apply to have the decree rescinded. Such a process can be undertaken at any point prior to the granting of the decree absolute.
5.1.5 (e) Five years’ separation

Where the Petitioner and Respondent have lived apart for five years’ there is no requirement for the Respondent to consent to the decree.

5.1.6 Cohabitation and section 1(2)(c)-(e)

In determining whether a period of living apart or desertion has been continuous, section 2(5) of the Matrimonial Causes Act 1973 provides that a period or periods not exceeding a total of six months will be disregarded. However, the period or periods in which the parties lived together cannot be counted as part of the period of separation or desertion.

Although not expressly stated in the statute, a period or periods of cohabitation exceeding six months will break the continuity of desertion or separation.

5.1.7 The First Year of Marriage

Under section 3 (1) of the Matrimonial Causes Act 1973, there are no circumstances, no matter how intolerable the circumstances of the marriage are for a particular party, in which it is possible to begin divorce proceedings during the first year of marriage.

6. Undefended Divorces

We shall now consider the procedure for obtaining the most common Form of divorce: the undefended divorce.

1. Filing Documents with the court

The following documents must be filed with the court on application:

(a) Petition;

(b) Marriage Certificate;

(c) any court orders relating to the parties or children of the marriage; and

(d) Statement of Arrangements for Children.
Rule 2.2 of the Family Proceedings rules 1991 states that:

‘(2) Where a petition for divorce, nullity of marriage or judicial separation, or for dissolution, nullity of civil partnership or separation, discloses that there is a minor child of the family who is under 16 or who is over that age and is receiving instruction at an educational establishment or undergoing training for a trade or profession, the petition shall be accompanied by a statement, signed by the Petitioner personally and if practicable agreed with the Respondent, containing the information required by Form M4, to which shall be attached a copy of any medical report therein.’

This rule therefore requires the Statement of Arrangements for Children (Form M4) to be completed where a child of the family is under 16 or older, but in full-time education. The Form, as will be apparent from its title, will set out what it is proposed happens to the children of the family.

Task 4:

Using the Courts Service website (www.hmcourts-service.gov.uk) search for, and find, a Statement of Arrangements for Children. Print a copy off, consider and keep with your folder.

2. Beginning the Proceedings

The petition must be presented to either a divorce county court or the Divorce Registry in London – (This is Form D8). Not every county court is designated as a divorce county court. It is important, for obvious reasons, to discover where the nearest divorce county court is to the Petitioner before filing the petition and documents listed above. You can find your nearest divorce court using the following link:

http://www.hmcourts-service.gov.uk/HMCSCourtFinder/CourtFinder.do?court_work_type_desc=Divorce

A useful site that you may want to refer clients to for more information is:

www.direct.gov.uk

Task 5:

Using the Courts Service website find Form D8 – download it and keep a copy with your notes.

An example of a completed petition is at Appendix 1
3. **Service**

Save for only very unusual circumstances, the Respondent(s) must be served with the petition.

It is usual practice for the service of the documents to be effected by the court. The petition is usually posted by the court to the Respondent(s) address given on the petition.

Together with the petition, the court will send a Notice of Proceedings, explaining to the Respondent the nature of the proceedings and their responsibilities at this point. An Acknowledgement of Service Form is also sent, together with the Statement of Arrangements for Children, if applicable.

There are other methods by which service can be affected. The Petitioner is not permitted by the rules to effect service of the documents themselves. It is possible, however, for the Petitioner to arrange service through their solicitor who may in turn instruct an agent to carry out the service. When an agent carries out service it is usual practice for them to file a statement, detailing how and when service was carried out.

A similar statement is also filed when service is carried out by the court bailiff, should the court direct service in such a manner following the Petitioner’s request.

In circumstances where the Acknowledgement of Service has not been returned but the District Judge is satisfied that the Respondent has received the petition, under rule 2.9(6) of the Family Proceedings rules 1991, the judge can direct that service is “deemed to have been duly served on him.”

4. **Directions for Trial**

On application by the Petitioner’s solicitor, directions for trial can be given – Form D84 – see the Court Service website. There are requirements as to what is required in this application, and the following must be filed:

a. Form for directions that the Petitioner must sign;

b. Affidavit (sworn statement) in support of the petition. There is no requirement for a full written statement, and you will find that there is a standard Form to complete in relation to each of the Five Facts; and

c. any further evidence that the Petitioner relies upon. This may be evidence in support of assertions in the petition or affidavit.

**Task 6:**

Consider the section on the Five Facts. Give three examples of the types of cases in which you think it would help the Petitioner to file further, supporting evidence on application for directions for trial.
Directions for trial can be given by the District Judge when the judge is satisfied that:

(a) the Respondent(s) has been served with the petition; and  
(b) the case will not be defended by any Respondent; and  
(c) if the petition is on the grounds of section 1 (2) (d) of the Matrimonial Causes Act 1973 (see paragraph 5.1.4 above) that the Respondent has indeed given the appropriate consent.

5. Consideration of the Case

The first direction given in relation to the case will be to place the matter in the list. The District Judge will next move to consider the evidence in the case.

The District Judge must be satisfied that the petition is proved, and if he or she is so satisfied, the following events will occur:

a. a certificate that the judge is satisfied is filed;  
b. the date for pronouncing the decree nisi is fixed and the parties are notified;  
c. costs are awarded (if applicable).

If the judge is not satisfied that the case is made out, he or she may allow for further evidence to be filed or fix a date for a hearing on the basis of the information as is currently available. This is not that common, but it is important to remember when considering the evidence you intend to present to the court.

6. Decree nisi

Decree nisi will be pronounced on the date fixed by the judge after consideration of the case. The pronouncement will be in open court and is usually simply a matter of the judge or court official reading a list of names.

Decree nisi is the interim position, and its pronouncement does not mean that the marriage is dissolved.

7. Decree absolute

As is indicated by the name, decree absolute is the final stage in the divorce process.

In the vast majority of cases the earliest decree absolute is applied for by the Petitioner is six weeks after the pronouncement of decree nisi. There is power under rule 2.49 (1) of the Family Proceedings Rules 1991 to apply earlier than six weeks, but this is seldom used.
If the Petitioner does not make application for decree absolute, the Respondent may do so after three months after the date at which the Petitioner could apply. This is therefore three months + six weeks after the pronouncement of decree nisi.

7.1 The Defence of Grave Hardship

If divorce is sought after five years' separation under section 1(2)(e) of the Matrimonial Causes Act 1973, it could be possible for a spouse to be divorced against his or her will. The defence of Grave Hardship, provided for in section 5 of the Matrimonial Causes Act 1973, allows such a spouse the opportunity to prevent the divorce from occurring by demonstrating that to allow it would cause him or her grave financial or other hardship.

Section 5 of the Matrimonial Causes Act 1973 provides as follows:

'(1) The Respondent to a petition for divorce in which the Petitioner alleges five years’ separation may oppose the grant of a decree on the ground that the dissolution of the marriage will result in grave financial or other hardship to him and that it would in all the circumstances be wrong to dissolve the marriage.

(2) Where the grant of a decree is opposed by virtue of this section, then –

(a) the court finds that the Petitioner is entitled to rely in support of his petition on the fact of five years’ separation and makes no such finding as to any other fact mentioned in section 1 (2) above, and

(b) if apart from this section the court would grant a decree on the petition.

The court shall consider all the circumstances, including the conduct of the parties to the marriage and the interests of those parties and of any children or other persons concerned, and if of the opinion that the dissolution of the marriage will result in grave financial or other hardship to the Respondent and that it would be wrong to dissolve the marriage it shall dismiss the petition.

(3) For the purposes of this section hardship shall include the loss of the chance of acquiring any benefit which the Respondent might acquire if the marriage were not dissolved.'

This allows a Respondent to reply to a petition that to allow the divorce would cause the Respondent grave financial and other hardship, and to dissolve the marriage would be wrong in the circumstances.
The court will take into account all the circumstances of the case:

a. the conduct of the parties during the marriage;
b. the parties’ interests;
c. the interests of any children of the family;
d. the interests of any other relevant persons.

The court must carry out a balancing exercise in relation to the Respondent’s hardship and the injustice to the Petitioner if the decree is not granted.

The financial hardship must follow from the divorce and not simply from the breakdown of the marriage.

It is a possibility, but rarely used, under section 10 of the Matrimonial Causes Act 1973 for the court to decline to make decree absolute on the basis of an application under section 1(2)(e) on the ground that the financial arrangements for the Respondent are not satisfactory.

Section 10 provides that:

‘(1) Where in any case the court has granted a decree of divorce on the basis of a finding that the Petitioner was entitled to rely in support of his petition on the fact of two years’ separation coupled with the Respondent’s consent to a decree being granted and has made no such finding as to any other fact mentioned in section 1(2) above, the court may, on an application made by the Respondent at any time before the decree is made absolute, rescind the decree if it is satisfied that the Petitioner misled the Respondent (whether intentionally or unintentionally) about any matter which the Respondent took into account in deciding to give his consent.

(2) The following provisions of this section apply where-

(a) the Respondent to a petition for divorce in which the Petitioner alleged two years’ or five years’ separation coupled, in the former case, with the Respondent’s consent to a decree being granted, has applied to the court for consideration under subsection (3) below of his financial position after the divorce; and

(b) the court has granted a decree on the petition on the basis of a finding that the Petitioner was entitled to rely in support of his petition on the fact of two years’ or five years’ separation (as the case may be) and has made no such finding as to any other fact mentioned in section 1(2) above.
(3) The court hearing an application by the Respondent under subsection (2) above shall consider all the circumstances, including the age, health, conduct, earning capacity, financial resources and financial obligations of each of the parties, and the financial position of the Respondent as, having regard to the divorce, it is likely to be after the death of the Petitioner should the Petitioner die first; and, subject to subsection (4) below, the court shall not make the decree absolute unless it is satisfied-

(a) that the Petitioner should not be required to make any financial provision for the Respondent, or
(b) that the financial provision made by the Petitioner for the Respondent is reasonable and fair or the best that can be made in the circumstances.

(4) The court may if it thinks fit makes the decree absolute notwithstanding the requirements of subsection (3) above if-

(a) it appears that there are circumstances making it desirable that the decree should be made absolute without delay, and
(b) the court has obtained a satisfactory undertaking from the Petitioner that he will make such financial provision for the Respondent as the court may approve.'

7. Defended Divorces

It is rare to see a defended divorce case. There are two main reasons for this:

1. Cost.

It will cost a party a great deal of money to defend a divorce case. It is possible to obtain public funding to defend a petition of divorce, but financial eligibility is not the only requirement. The Legal Services Commission must first be satisfied that there are both substantial prospects of success and substantial benefits to be gained by the decree not being made.

If public funding is granted at this stage, it will be limited and will only include disclosure and seeking counsel’s opinion on whether it is worth defending the divorce.

If, at this stage, the Respondent still wishes to defend the divorce, then a further application will be made to the Legal Services Commission which will consider counsel’s opinion and decide whether funding should be made available.
This is not the end of the matter, however, and any client wanting to obtain public funding to defend a divorce must be advised that the Legal Services Commission will seek to recover most, if not all, of the Respondent’s costs from his share in the family property.

The same charge will apply to the Petitioner, who will have to pass the financial eligibility test and satisfy the Legal Services Commission, once the petition is answered, that it is reasonable to continue with the proceedings.

2. The nature of modern Family Law proceedings.

Until relatively recently, divorce proceedings were regularly used to apportion blame. Petitioners sought proceedings to ‘have their say’ with regard to the Respondent’s behaviour during the marriage, and the courts did often not actively discourage this.

The situation now is different. Divorce proceedings are not about blame, but about removing the parties from a relationship in which they no longer wish to be a party. The courts and judges will now seek to prevent parties embarking on such an acrimonious route.

Defended Divorces

3. The defended divorce procedure.

Fewer than one per cent of divorces are defended. Given that such a small number are defended, this section is intended to give you a brief overview only of the defended divorce procedure and defended judicial separation procedure.

It is important to bear in mind that the Petitioner will not officially know that the divorce is defended until the Respondent states that this is the case in the Acknowledgement of Service. Accordingly, the first two stages in the defended divorce procedure are the same as for undefended divorce.

1. The Petitioner files the relevant documents at court, namely:

   (a) Petition;
   (b) Marriage Certificate;
   (c) any court orders relating to the parties or children of the marriage; and
   (d) Statement of Arrangements for Children
   (e) Court fee (currently £300).

2. The petition is presented to either a divorce county court of the Divorce Registry in London.
3. The Respondent is served with the petition, a Notice of Proceedings, the Statement of Arrangements for Children (if applicable) and the Acknowledgement of Service.

4. If the Respondent intends to defend the divorce, then the Respondent must indicate this intention on the Acknowledgement of Service by answering the relevant question accordingly.

5. If the Respondent intends to defend the divorce, the Respondent must file an “Answer” with the court within 29 days from receiving the Petition. (An Answer is a document that sets out the Respondent’s position and the reasons why the Petitioner is not entitled to a divorce or judicial separation.)

6. If the Respondent does not file an Answer within 29 days, the Petitioner may apply to the court to prove the petition.

7. The process of proving the petition is a formal one whereby the Petitioner establishes the facts in the petition and entitlement to a decree of divorce. If the Respondent has not sent an Answer by the time the Petitioner proves the petition then the Respondent will not be entitled to defend the divorce.

8. If the Respondent does file an Answer within the time limit then a directions hearing will take place and the court will give directions detailing the steps required to be carried out for the issues to be determined.

9. The matter will be listed for trial in open court.

8. Judicial Separation

8.1 What is it and why advise a client to use it?

This is a remedy available from the court. It is not a legal separation which has no defined legal meaning. It usually means that the parties want to live apart from their spouse and sometimes that people want to live apart but not divorce. The decree of judicial separation is not a divorce and the parties remain married but, in effect, the normal marital obligations come to an end.

A decree of judicial separation can be granted for any of the grounds which would justify a divorce which we discussed above in the five facts. However, it is not necessary to prove that the marriage has irretrievably broken down. There is only one decree pronouncing the judicial separation once the court is satisfied that the requirements are met.

A decree of judicial separation has three main effects:

- the parties are no longer obliged to live together;
- the court can exercise all the powers which it has to divide the matrimonial property etc. just as it can in the case of a divorce; and
• the decree operates just like a divorce in terms of its effect on any will - the spouse no longer takes any benefit unless a new will is made specifically stating that is to be the case.

In practice, the numbers granted of this type of decree are tiny compared to the amount of divorces. It is usually the power of the court to deal with the division of property that is most important to the parties.

There seem to be three main reasons why the parties to a marriage may seek a decree of judicial separation rather than a divorce:

• At least one of the parties to the marriage is opposed to divorce for some reason - often religious reasons.
• Given the absolute bar to divorce within the first year of a marriage judicial separation may be all that is available if the parties are determined to formalise the break by court proceedings within the first year.
• For some reason it may be difficult to prove the irretrievable breakdown of the marriage necessary for a divorce.

Is it relevant in most cases? Generally, unless both parties to the marriage are opposed to a divorce for religious or conscientious reasons it is difficult to see how it is in the interests of either of the parties to agree to a decree of judicial separation rather than a divorce.

One of the major drawbacks to agreeing a separation because one or other party does not agree to a divorce is that the party is never likely to agree to a divorce. This means that having a separation might prevent the party who wants a divorce from remarrying for a very long time indeed, as the other party may be untraceable when a divorce is required and may still object to it. Judicial separation does not allow the parties to move on in the same way as divorce and unless there is a good and compelling reason to advise using this path, it would be better for the parties to seek a divorce.

8.2 Legal issues

Judicial Separation is provided for in **section 17** of the *Matrimonial Causes Act 1973*:

‘(1) A petition for judicial separation may be presented to the court by either party to a marriage on the ground that any such fact as is mentioned in section 1(2) above exists, and the provisions of section 2 above shall apply accordingly for the purposes of a petition for judicial separation alleging any such fact, as they apply in relation to a petition for divorce alleging that fact.'
(2) On a petition for judicial separation it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged by the Petitioner and into any facts alleged by the Respondent, but the court shall not be concerned to consider whether the marriage has broken down irretrievably, and if it is satisfied on the evidence of any such fact as is mentioned in section 1(2) above it shall, subject to section 41 below, grant a decree of judicial separation.

(3) Sections 6 and 7 above shall apply for the purpose of encouraging the reconciliation of parties to proceedings for judicial separation and of enabling the parties to a marriage to refer to the court for its opinion an agreement or arrangement relevant to actual or contemplated proceedings for judicial separation, as they apply in relation to proceedings for divorce.'
Before completing this form, read carefully the attached Notes for Guidance.

In the  Birmingham County Court  County Court*  *(Delete as appropriate)*

**No.**

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**Introduction**

This petition is issued by  Elizabeth Spratt  (*the Petitioner*)

The other party to the marriage is  Ian Spratt  (*the Respondent*).

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(1)  On the  13th  day of  March  [19 91 ]

Elizabeth Spratt  was lawfully married to

Ian Spratt  at Riverside Church, Moseley, Birmingham, West Midlands

(1a) Since the date of the marriage the name of the petitioner has not changed

(1b) The petitioner believes that since the date of the marriage the name of the respondent has not changed

(2)  The petitioner and respondent last lived together as husband and wife at

18 Elsemere Crescent, Moseley, Birmingham B12 8SU

(3)  The court has jurisdiction under Article 3(1) of the Council Regulation on the following ground(s):

The Petitioner and Respondent are both habitually resident in England and Wales

(4)  The petitioner is by occupation a   housewife   and resides at

18 Elsemere Crescent, Moseley, Birmingham B12 8SU

The respondent is by occupation a   graphic designer   and resides at

101 Sherbourne Village, Birmingham B1 8KL

(5)  There are no children of the family now living except

Edward Spratt, born 19th September 1995
Michelle Spratt, born 28th July 1999

(6)  No other child, now living, has been born to the petitioner/respondent during the marriage (so far as is known to

the petitioner)  except --

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D8 (04.05)  HMCS
(7) There are or have been no other proceedings in any court in England and Wales or elsewhere with reference to the marriage (or to any child of the family) or between the petitioner and respondent with reference to any property of either or both of them except.

(8) There are or have been no proceedings in the Child Support Agency with reference to the maintenance of a child of the family except.

(9) There are no proceedings continuing in any country outside England or Wales which are in respect of the marriage or are capable of affecting its validity or subsistence except.

(10) (This paragraph should be completed only if the petition is based on five years' separation.)

No agreement or arrangement has been made or is proposed to be made between the parties for the support of the petitioner/respondent (and any child of the family) except.

(10) The said marriage has broken down irretrievably.

(11)
(12) Particulars

(i) In February 2004 the Respondent began unjustifiably criticising the Petitioner for not having secured employment.

(ii) In June of 2004 the Respondent began to restrict the Petitioner’s access to the joint account held by the parties.

(iii) Since September of 2004 the Respondent has not allowed the Petitioner’s friends to visit the matrimonial home.

(iv) Since March 2005 the Respondent has refused to be seen in public with the Petitioner, claiming she is an embarrassment to him.

(v) Since June 2005 the Respondent has refused to assist with the child care arrangements for either of the two children of the marriage.

(vi) The Respondent frequently drinks to excess on his return home from work.

(vii) The Respondent’s alcohol consumption causes him to become verbally aggressive towards the Petitioner, often referring to her as “stupid”, “inadequate” and an “unfit mother”.
Prayer

The petitioner therefore prays

(1) The suit
That the said marriage be dissolved

(2) Costs
That the Petitioner may be ordered to pay the costs of this suit

(3) Ancillary relief
That the petitioner may be granted the following ancillary relief:
(a) an order for maintenance pending suit
   a periodical payments order
   a secured provision order
   a lump sum order
   a property adjustment order
   an order under section 24B, 25B or 25C of the Act of 1973 (Pension Sharing/Attachment Order)

(b) For the children
   a periodical payments order
   a secured provision order
   a lump sum order
   a property adjustment order

Signed

The names and addresses of the persons to be served with the petition are:

Respondent: Ian Spratt
101 Sherborne Village, Birmingham B1 8KL

Co-Respondent (adultery case only):

The Petitioner's address for service is:
c/o Haines and Haines solicitors, Birmingham B2 4HE

Dated this 17th day of April 20 10

Address all communications for the court to: The Court Manager, County Court,
The Court office at
is open from 10 a.m. to 4 p.m. (4:30 p.m. at the Principal Registry of the Family Division) on Mondays to Fridays.
In the
Birmingham County Court
*Delete as appropriate

County Court*

No.

Between

Elizabeth Spratt Petitioner

and

Ian Spratt Respondent

Divorce Petition

Full name and address of the petitioner or of solicitors if they are acting for the petitioner.