



CompleteClarity[®]
SOLICITORS



simplicitylegal

Family law and Your Family's Needs

We can advise individuals who are experiencing the trauma and complexity of separation and divorce including matters involving issues regarding children and finances. It is important in Family Law matters that you instruct a solicitor who is familiar with the under-noted areas of law and someone whom you have confidence in at what is likely to be a very difficult time.

Matrimonial Separation

If you have decided that your marriage or civil partnership has come to an end, there are some practical issues that have to be resolved. You cannot get divorced or seek a dissolution of a civil partnership in Scotland without either first resolving these issues or, as part of the court proceedings, asking the court to make Orders alongside the divorce itself.

You have to consider matters such as where you are going to live, how you are going to manage your finances and managing arrangements so that you and your spouse can have a positive relationship with your children. While we appreciate that you may not be considering the formalities of divorce at this time, it can be sensible to consider the arrangements and finances for children following a separation. At times this can seem overwhelming. This is where we can help.

Cohabitation Separation

Insofar as the arrangements for the financial aspects of a separation, the law for unmarried partners is slightly different to those in a marriage or civil partnership. For further advice and information please see our information leaflet on 'Cohabitation'.

Children

When you and your partner separate, and there are children of the relationship, you will have to decide what the care arrangements are going to be in place for your children. Parents have parental responsibilities and rights. Your rights include being able to make choices about how your children are brought up, and where your children should live. You have a responsibility to care for and look after your children. For more detailed information on how PARRR work, and who holds them, see our more detailed information leaflet on Children.

Following on a separation, where parents have different points of view, they can ask lawyers or a Sheriff (Judge) to assist with this. The different options as to how to deal with the issues arising about the care of children are outlined below. If Court is decided as being the best way of dealing with matters then the Sheriff can make a residence order, deciding where the children ought to be live, or a contact order, deciding how often the children should spend time with the non-resident parent. The Sheriff can also make specific orders such as, what school children should go to or what religion they should be brought up in. When the Court is considering these types of Orders, the welfare of the children is there primary concern.

The Court will try and promote a relationship between a child and both parents so far as is possible. They will have regard to what the current circumstances are at the point of a decision being made and how the children are coping with those circumstances. For that reason, if there is an

arrangement in place which you feel is not in the children's best interests it is important that we discuss and raise this urgently.

The Court is required to take the views of the children into consideration however it is important to know that this does not mean that the child(ren) are required to attend at court or speak directly or that they are the decision makers. There are a variety of ways that the views of the child(ren) can be obtained and consideration will always be given to the best way to achieve this, taking in to account their age and maturity, without the child feeling under any pressure. Where the parents are married and seek to Divorce, the court must be satisfied at the point of the Divorce being granted that there are no outstanding issues relation to any children of the marriage under sixteen. For this reason, we must either seek to reach an agreement in advance of raising those Divorce proceedings or, where agreement cannot be reached, ask the Court to make a decision as part of that process.

Finances on Divorce

When divorcing from your spouse, or seeking a dissolution of your civil partnership, decisions have to be made about how the finances, property and possessions are going to be dealt with. You and your spouse can come to an arrangement about this. The law does provide its outline of who should receive what in such circumstances with the starting point being a fair sharing of net matrimonial property. What is included in the net matrimonial property, and what is fair sharing, is dependent on a number of factors and we always recommend you seek specialist advice.

Where you and your spouse/partner cannot agree, you can ask the Court to grant financial orders. For example, they can order the transfer or sale of property, one-off payments or regular payments and pension sharing. You can also ask the court to grant maintenance payments if you are financially dependent on your spouse/partner though in most circumstances, the court will seek to adopt a "clean break" approach. It should also be noted that the law provides for 'no fault' financial provision meaning that in almost all cases the circumstances leading to the breakdown of the marriage will not affect the division of the finances.

Again, a Court will not grant a Divorce or Dissolution in Scotland until it is satisfied that there are no outstanding financial issues between the parties. For that reason, we recommend exploring whether agreement can be reached or, if not, we must ask the Court to make orders ensuring matters are dealt with.

Methods - Alternative Dispute Resolution – Negotiation, Mediation and Collaboration

If you and your ex-partner are agreed on arrangements for how the finances are to be dealt with and/or the care arrangements for your children, then you can regulate those in a document known as a Separation Agreement (sometimes also known as a 'Minute of Agreement'. This is essentially a contract between you and your ex-partner and, where executed properly, has the same effect as a court order in relation to certain matters but at lesser expense and time than a court action may take. For that reason, it is important that it is dealt with very carefully. We would always recommend the involvement of a lawyer who can assist you with negotiating the terms or, where the terms are already agreed, formalising them by drafting the document for you. If you and your ex-partner are having difficulty in reaching an agreement, but would prefer to avoid the stress and expense of court, then you can try to reach resolution through other means. These are:

1. Mediation
2. Collaboration
3. Negotiation

Mediation is a process that both you and your ex-partner attend. Typically, no other parties (including solicitors) are typically involved in the mediation other than the Mediator themselves. Depending on the mediation chosen the Mediator may be a Family Solicitor but will not be acting on behalf of either party and is instead neutral. The role of the Mediator is to facilitate discussion but not to make decisions. This leaves the decision-making power in the hands of you and your ex.

Collaboration is a process where you and your ex-partner agree at the outset that you are not going to go to court. Each party has their own Solicitor (who has been specially trained) and collectively, all four participants (you, your solicitor, your ex and your ex's solicitor) agree to a certain set of 'rules' at the outset which are focused around amicable resolution. Typically, in a collaborative process, there is a series of joint meetings which move matters towards an overall resolution.

Negotiation can take different forms. Often where we are most able to assist here is to act as a 'buffer' between you and the other person. Where we are acting on your behalf we would take your instruction and then put that to your ex-partner either directly or via their solicitor. This process allows us to talk to you directly and privately in order to take your instruction. Most negotiations are done via writing- either email or letter- but in some circumstances may be by way of direct meetings.

If an agreement is not going to be possible then you can ask the court to make orders.

Divorce

How do I get divorced or civil partnership dissolved?

In order to get divorced or your civil partnership dissolved in Scotland, you have to be able to confirm to the court that your marriage or civil partnership has broken down irretrievably. You have to prove the irretrievable breakdown is established in one of four ways for divorce or three ways for dissolution of a civil partnership. These are:

(1) you have separated from your spouse of a period in excess of one year and they consent to the divorce,

(2) you have separated from your spouse for a period in excess of two years,

(3) your spouse has engaged in unreasonable behaviour. Unreasonable behaviour can be demonstrated in different ways but common behaviours are mental, physical or financial abuse or engaging in controlling behaviour such as not letting you see friends or family.

or

(4) your spouse has committed adultery (divorce only)

Procedurally, there are two ways to get divorced in Scotland (1) Simplified Divorce or (2) Ordinary Divorce.

Simplified Divorce/Dissolution

Where grounds 1 or 2 above apply- that is where you have been separated from your spouse for a period of one year, and they have provided your consent or where you have separated for more than two years, you can apply for a divorce or dissolution under the Simplified process.

It is important to note however you **cannot** apply for this type of divorce if there are any outstanding financial issues at all or there are any children of the marriage under the age of sixteen (even where the care arrangements for the children are agreed).

We can assist in completing, and notarising (formally witnessing) the forms for you. Applying for this type of divorce takes around two-three months and is typically the most straight forward way of progressing a divorce application.

Ordinary Divorce/Dissolution

Where you wish to divorce your spouse because of adultery, or unreasonable behaviour, or you wish to ask the court to make orders regulating the financial arrangements or where there are children of the marriage under the age of sixteen then the correct process is via the Ordinary Procedure.

This type of process is more technically complex and we would recommend you seek the advice of a solicitor. Where we are raising the court action we will prepare a document known as an Initial Writ. It will set out what orders you are asking the court to grant, why you are asking the court to grant them and what the legal basis for this is. The Initial Writ will be served upon your spouse or civil partner. They can either decide to defend the action, or not. If they do not defend the action then you will have to provide an Affidavit (sworn statement) to the court, together with a supporting Affidavit from a witness. If the Sheriff is satisfied with what is in the statements then they will usually grant the orders you have asked for. (see flow chart below)

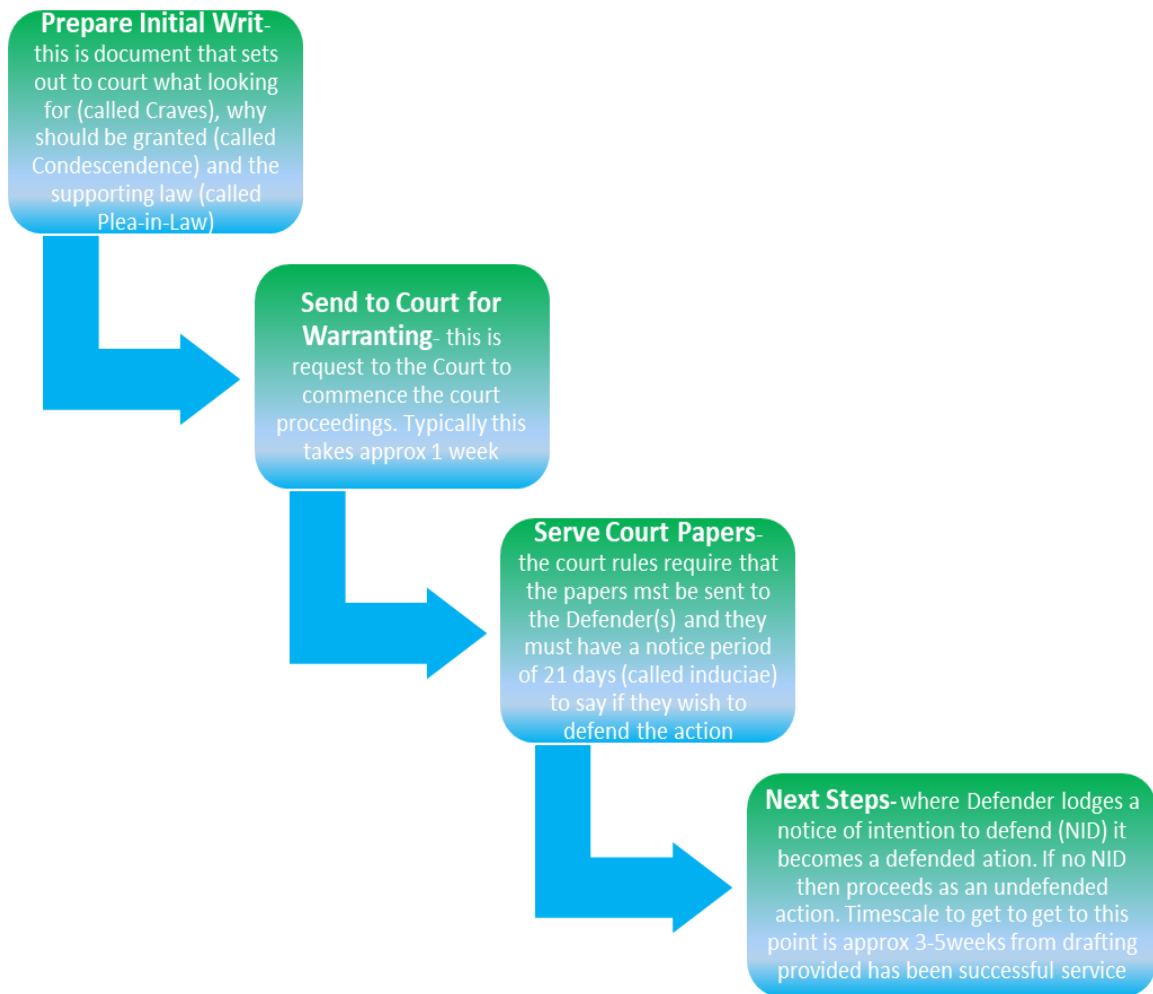
If your spouse or civil partner disagrees with the orders that you have asked for then they will defend the action. If this happens, they will have to lodge Defences (which is their detailed written response to the Initial Writ) and may ask the Court for alternatives orders to be granted. A court process will then follow and ultimately, the Court will have to make a decision about what orders to grant.

The ordinary action can take two-three months where the action isn't defended and no less than nine-twelve months if defended.

Raising or defending an Ordinary action can be a very involved process. For that reason, we always recommend seeking specialist advice which we're happy to provide.

The information and opinions contained in this blog are for information only. They are not intended to constitute advice and should not be relied upon or considered as a replacement for advice. Before acting on any of the information contained in this blog, please seek specific advice from Clarity Simplicity Ltd.

Flow Chart Showing Process for Initial Steps in Raising an Ordinary Court Action





CompleteClarity[®]
SOLICITORS

Clarity Simplicity Ltd.
34 Woodlands Road
Glasgow
G3 6UR

0141 433 2626

legalteam@claritysimplicity.co.uk



simplicitylegal