

DIVORCE AND MATRIMONIAL LAW

Top 10 Frequently Asked Questions

1. I think that my spouse is cheating on me. Can I sue?

- S.498 of the Penal Code prohibits the enticement of a married woman for illicit intercourse. There is the possibility of action being taken against a wife's lover but not against the wife herself, as there is no provision either in the Penal Code or the Criminal Procedure Code that stipulates punishment for adultery.
- There is however, no similar prohibition against enticement of a married man.
- Distinction between adultery and enticement: In adultery, a woman may be a consenting party but under section 498, she may be a subject of enticement against her own will.
- In practice though, the A-G's chambers often decline to prosecute under s.498 as seen in a recent case involving a local celebrity, viewing it as a private matter between a husband and wife. Instead, legal counsel was engaged to lead a private prosecution team on behalf of the husband.
- If you believe that adultery has led to the breakdown of your marriage, and that you find it intolerable to live with your spouse, you may wish to petition for a divorce (see below). You will need to seek advice as to the options available to you.

2. What is the difference between divorce and judicial separation and which would be a better option for me?

Judicial separation is often sought as an alternative to divorce where one spouse has a religious or strong moral objection to divorce. The process and costs are similar to a divorce and the Court has power to make the necessary orders as to the division of assets, living arrangements for the children of the marriage as well as spousal and child support. If you are uncertain as to whether your marriage has completely broken down, a judicial separation may be a better option. Where a court grants a decree of judicial separation, the Petitioner would no longer be obliged to live with the Respondent, even if they are not officially divorced. You would not be prohibited from petitioning for divorce proper, after a decree of judicial separation. If you wish to remarry however, you will need to get a divorce.

3. What is the procedure for obtaining a divorce? Is there a minimum waiting period? When can I remarry?

- A petition for divorce may NOT be filed within the first **2 years** of marriage, unless leave of Court is obtained in cases of exceptional circumstances or hardship to the petitioner.
- Types of petition: (1) Joint petition, where the parties, as joint petitioners, consent to the grounds of divorce and terms of separation; or (2) Petition

for Divorce, where the divorce is contested, with one spouse as the petitioner and the other, the respondent.

- A divorce petition may only be presented after the matrimonial difficulty has been referred to a conciliatory body such as a marriage tribunal, and the conciliatory body has certified, **after 6 months**, that it has failed to reconcile the parties. This requirement does not apply to cases of divorce on the grounds of conversion to Islam or to joint petitions for divorce and further exceptions are made where the respondent is in prison, suffers from an incurable mental disease, or whose whereabouts are unknown.
- At the hearing of your divorce petition, a Decree Nisi will be granted by a judge if (s)he is satisfied that you have the legal right to a divorce. The Decree Nisi will be made absolute after a period of 3 months, after which the parties may remarry if they so wish.
- You need to seek advice as to your options at this stage. You may wish to consider alternative dispute resolution such as Divorce Mediation, which is a quicker and more economical way forward, and may be more appropriate for you and your spouse. (Please see the article “Divorce Mediation” by our Family Dispute Resolution unit)

4. What are the grounds for Divorce?

There is really only one ground for divorce – the irretrievable breakdown of a marriage. This is proved by establishing one or more of the following facts:

- Intolerable Behaviour
You must show that your spouse has behaved in such a way that you cannot reasonably be expected to live with him or her.
- Adultery
You must prove beyond reasonable doubt, either through actual admission or by way of sufficient circumstantial evidence that sexual intercourse has taken place between your spouse and another person of the opposite sex and that you find it intolerable to live with your spouse. Proving this may be complex and you should seek advice. Adultery can be used as the basis for a divorce petition whether you and your spouse are still living together or have separated.
- Two Year Separation
You and your spouse have been living apart, for a continuous period of at least two years before the filing of the petition. There may be circumstances where a Court may be of the view that spouses have been living separately even when they are living under the same roof. You should seek advice as to whether this applies to you.
- Desertion
Where your spouse has deserted you for a continuous period of at least two years before the filing of the petition.

You will NOT need to prove the above facts, if your divorce is mediated and a separation agreement is reached. Your divorce may then be reached via a Joint Petition. Please see our article on “DIVORCE MEDIATION” by our Family Dispute Resolution unit, for more information.

5. What is the difference between legal custody and physical custody (or care & control)? My spouse and I both want custody of our children. What will happen if we cannot agree?

- Legal custody: authority to make decisions over the health, safety and welfare of the child. Where parents have joint custody of a child, they both have an equal say as to decisions affecting their child.
- Physical custody (sometimes referred to as “care and control”): Deals with matters like where the child resides and how much time each parent spends with the child.
- Access/ visitation rights: The right of a parent to visit a child who is in the care and control of the other parent.

If you and your spouse cannot agree on issues relating to the children, a Court will decide in the best interests of your children, which parent is to have custody and the extent of access for non-custodial parents. You may wish to consider Mediation which would give you greater control over the outcome and put into place a shared parenting plan that’s workable for all parties concerned.

6. Can I apply for my spouse to pay spousal maintenance to me?

A court may order a man to pay maintenance to his wife or former wife. In deciding the sum for spousal maintenance, the Court will have regard to:

- future and present income, property resources and earning capacity of both parties;
- financial needs of both parties;
- degree of responsibility which the Court apportions to each party for the breakdown of marriage.

A woman may be ordered to pay maintenance to her husband or former husband where he is incapacitated from earning a livelihood by reason of mental or physical injury or ill health and the Court is satisfied that it is reasonable to do so, having considered her means.

7. Can I apply for my spouse to pay maintenance for the children? Can the children expect payments that would support a standard of living that they had enjoyed during the existence of the marriage?

It is the duty of a parent to maintain or contribute to the maintenance of his or her children, as may be reasonable, having regard to his/her means. In determining the amounts to be paid the Court will take into account the standard of living that the children were accustomed to in the past.

8. How are assets acquired during the marriage divided? What if one party contributed more money than the other in acquiring the assets?

The court will strive to make a fair and equitable division of the assets or the proceeds of sale of such assets, taking into account:

- The extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

- Any debts owing by either party which were contracted for their joint benefit; and
- The needs of the minor children, if any, of the marriage

Subject to the considerations above, the Court would be inclined towards the equality of division.

However where the assets are acquired by the sole effort of one party to the marriage, the Court will have regard to the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family, as well as the needs of the children, but in any event, the party by whose efforts the assets were acquired shall receive a greater proportion.

9. Do the Malaysian Courts have jurisdiction to grant a divorce where one spouse is a foreigner?

The Malaysian Courts has jurisdiction to grant a decree of divorce where the domicile of **both** parties to the marriage is in Malaysia, at the time when the petition is presented.

10. I have heard that a litigated divorce can take years, is very expensive and all our “dirty laundry” may be aired in Court. My kids are traumatised from all the fighting. I just want a solution that’s fair to both sides and not have to leave it to a judge, who may not decide in my interests. What are the alternatives to fighting in out in Court?

Divorce Mediation is an alternative to Litigation that has been used extensively and successfully in Australia, Canada, the US and parts of Europe. It is a quicker, cheaper non-adversarial way of reaching a fair and workable solution to all issues that arise from their separation, including their children, property and maintenance. For more information, please see “DIVORCE MEDIATION” by our Family Dispute Resolution Unit.