

**BVA**

**BANA VAID & ASSOCIATES**  
— S O L I C I T O R S —

# Family Law



**Everybody Matters**

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# GUIDE TO CLIENTS ON FAMILY MATTERS

## DIVORCE/ NULLITY & SEPARATION

A breakdown of a relationship can be a traumatic and distressing time for all involved whether you are married or just living with one another.

When considering whether or not you want to legally end your marriage it is important to seek legal advice at an early stage so that you can work out what your options are. Divorce is not the only option, you may want to consider Nullity, Judicial Separation or an Informal Separation.

### Divorce

You must be married for at least one year before you can issue divorce proceedings. There is only one ground in this country for obtaining a divorce and that is that your marriage has irretrievably broken down. In order to prove that your marriage has irretrievably broken down you will need to establish one or more of the five facts listed below:-

1. Your spouse has committed adultery and you find it intolerable to live with your spouse
2. Your spouse has behaved in such a way that you cannot reasonably be expected to live with your spouse
3. Your spouse has deserted you for a continuous period of at least two years immediately preceding your petition for divorce
4. You and your spouse have lived apart for a continuous period of at least two years immediately preceding the petition for divorce
5. You and your spouse have lived apart for a continuous period of at least five years immediately preceding the petition for divorce

We will be able to assist you in relation to the most suitable basis in your circumstances, and will also advise you in relation to any financial aspects and matters involving children of the family.

If your spouse has issued divorce proceedings and you require legal assistance to know where you stand, then we are also able to help you.

### Nullity

You may be able to have your marriage annulled in certain specific circumstances. You will need to satisfy certain criteria for your marriage to be declared either 'void' or voidable'. There are different grounds for 'void' and 'voidable' marriages and there is a crucial distinction between the two; a void marriage is where the marriage will be regarded as not having taken place at all whereas a voidable marriage means that the marriage will have subsisted until the decree of nullity.

Grounds for Void Marriages:

- The marriage is within the prohibited degrees of relationship because either party is under the age of 16 or because the parties have intermarried
- At the time of the marriage either party was already married
- The parties are not respectively male or female
- In the case of polygamous marriages (where more than one marriage at a time is allowed) outside England & Wales, if one of the parties was at the time of the marriage domiciled in England and Wales

This is an exhaustive list which means that the above are the only grounds for a marriage being declared void.

Grounds for Void Marriages:

- The marriage has not been consummated due to the incapacity or wilful refusal of your spouse to consummate it
- Either you or your spouse did not validly consent to the marriage, either due to duress, mistake, unsoundness of mind or otherwise
- At the time of the marriage either party, though capable of giving a valid consent, was suffering from mental disorder
- At the time of the marriage your spouse was suffering from venereal disease in a communicable form
- At the time of the marriage your spouse was pregnant by some person other than you
- 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
- Your spouse is a person whose gender at the time of the marriage had become the acquired gender under the Gender Recognition Act 2004

This is also an exhaustive list which means that the above are the only grounds for a marriage being declared voidable. There are certain bars to declaring a marriage voidable and if this situation applies to you then please contact us to obtain advice based on your specific circumstances.

### **Judicial Separation**

You can apply for a Judicial Separation on the same grounds as a divorce petition, however, you do not have to wait one year before petitioning for Judicial Separation as you do for divorce.

A Judicial Separation will not bring your marriage to an end and if you wish to end your marriage then you will still need to petition for a divorce. This option is suitable for those who do not want to divorce due to strong personal views or religious views about ending a marriage.

The effect of a Judicial Separation is that you will no longer be bound to cohabit and because of the Court's involvement you can also resolve matters concerning finances and any children of the family. In addition, if either of you dies without having made a will, the deceased's estate will pass as if the marriage had come to an end. However, Judicial Separation differs from marriage in that if the other party has made a Will, the Judicial Separation will not affect the provisions under the Will. This means that if property is left to a spouse, that spouse will still benefit despite the Judicial Separation. Further, as the marriage is not brought to an end, if one party has a pension with death benefits, as a spouse the other party may still benefit. They may also be entitled to the widow/widower's pension.

### **Separation**

As a married couple, you can decide to separate formally or informally. If you wish to separate informally, you will need to inform the relevant authorities such as HM Revenue and Customs, your local council or the benefits agency. You can also decide to make your own arrangements with respect to maintenance, property and children. However, without formal arrangements in place there is nothing binding either of you to the agreement reached between yourselves.

You may therefore wish to consider entering into a separation agreement with your spouse. There will be no involvement of the Court and you can both decide what arrangements you wish to make with respect to financial assets and in relation to any children of the family. The only draw back is that this would not be legally binding and can be set aside in subsequent divorce proceedings. However, if you do not wish to initiate Court proceedings and are happy to remain legally married, then this may be the option for you.

If you feel that this is something you would like to consider, please contact us to arrange an appointment to discuss the matter further based on your particular circumstances.

### **Financial Matters**

One of the biggest concerns of parties following a separation is often what is going to happen to them financially and how are the assets to be divided. We take an amicable and practical approach to resolving such issues and we encourage parties where possible to participate in mediation. Sometimes however it is not possible to reach an agreement and the only way forward is to commence Court proceedings.

If the matter proceeds to Court then the Court's first consideration will be the welfare of any children of the family under the age of 18. In addition, the Court will also have regard to the following matters:

- (a) The income, earning capacity, property and other financial resources which each spouse has or is likely to have in the foreseeable future including, in the case of earning capacity, any increase in that capacity which it would be, in the opinion of the Court, reasonable to expect a person to take steps to acquire
- (b) The financial needs, obligations and responsibilities which each spouse has or is likely to have in the foreseeable future
- (c) The standard of living enjoyed by the family before the breakdown of the marriage
- (d) The ages of each spouse and the duration of the marriage
- (e) Any physical or mental disability of each spouse
- (f) The contributions which each spouse has made or is likely to make in the foreseeable future to the welfare of the family, including any contribution by looking after the home or caring for the family
- (g) The conduct of each spouse, if that conduct is such that it would in the opinion of the Court be inequitable to disregard

- (h) The value to each spouse of any benefit which one spouse because of the divorce will lose the chance of acquiring (most usually pension provision)

The Court has a wide range of powers to make Orders and these Orders fall into two main categories of Income Orders and Capital Orders.

Income Orders include the following:

- Maintenance pending suit (this is a request for maintenance payments whilst proceedings in relation to financial matters are ongoing)
- Periodical payments
- Secured periodical payments

Capital Orders include the following:

- Lump sum orders
- Property adjustment orders
- Orders for sale
- Pension sharing orders

We will strive to achieve the best possible outcome for each client.

## **Children Matters**

After the breakdown of a relationship parties will often forget the impact that this has on a child who is often caught in the middle.

It can often be very difficult for the parties to reach an agreement on issues such as contact and where a child should live as well as other important decisions about the upbringing of the child. We understand that it is important for a child to have a relationship with both parents and as such we adopt a constructive and positive approach to try reaching an agreement which is best for the child.

We understand that sometimes it is not possible for an agreement to be reached and matters will sometimes have to be referred to the Court. When considering any application in relation to a child the Court will give the following three principles the highest priority:

1. The child's welfare is of the paramount importance
2. The Court shall have regard to the general principle that any delay is likely to prejudice the welfare of the child, and
3. The Court shall not make an Order unless it considers that doing so would be better for the child than making no Order at all

In deciding whether an Order should be made, the Court will have regard to:

- (a) the ascertainable wishes and feeling of the child concerned (considered in the light of the child's age and understanding)
- (b) the child's physical, emotional and educational needs
- (c) the likely effect on the child of any change in his/her circumstances
- (d) the child's age, sex, background, and any other characteristic which the Court considers relevant
- (e) any harm which the child has suffered or is at risk of suffering
- (f) how capable each of the child's parents, and any other person in relation to whom the Court considers the question to be relevant, is of meeting the child's needs
- (g) the range of powers available to the Court under the Children Act in the proceedings in question

The Court has the power to make the following Orders under the Children Act:

- Residence Order : where the child shall live
- Contact Order : what contact arrangements should be in place with the non resident parent
- Specific Issue Order : where parties are unable to reach an agreement in relation to a particular issue
- Prohibited Steps Order : where restrictions need to be placed on certain parental rights and duties

We have the knowledge and compassion to help you determine issues such as who the child should live with and who the child should have contact with and the nature and frequency of such contact. If the matter proceeds to Court then we are experienced in presenting your case effectively to reach the best outcome for you and your child.

### **Cohabitation & Trusts of Land Act Claims**

Couples who live together do not share the same rights as married couples. Many people believe that they have certain implied rights by being a 'common law' husband or wife. However, there is no legal recognition of a common law partner in England & Wales.

Therefore when a relationship breaks down following a period of cohabitation, there is no automatic right to property or assets not jointly owned by both parties. However, this does not mean to say that there will be no entitlement whatsoever. The law relating to the division of financial assets belonging to cohabiting couples is complex and the Court will take several factors into consideration before making a decision.

The main financial dispute usually concerns the family home or other investment properties. Your rights will differ depending on whether property is owned by you and your partner jointly or if it is held in either of your sole name. If property is held in the joint names of you and your partner then the extent of your ownership will depend on any agreements you made at the time the property was purchased. If the property is held by you as 'tenants in common' then the land registry documents will reflect what shares you hold the property in. If the property is held as joint tenants then there is a presumption that the share will be divided equally. However, if one of you would like to claim a larger share then this can be done by making an application to the Court. In the absence of a clear agreement as to what each party's interest is, the Courts can infer the intention of the parties based on their conduct.

The law which governs issues involving property disputes between cohabiting couples is the Trusts of Land and Appointment of Trustees Act 1996. This Act also applies to other relationships, for instance, between parents and children or between siblings. The Courts can make an order for the sale of the property or a declaration of a person's interest in the property. The Courts will take into consideration several factors when making a decision, including the following:

- The intention of the parties
- The purpose for which the property i.e. the family home
- The welfare of any child who occupies the property or might reasonably be expected to occupy the property
- Interests of any secured creditors i.e. mortgage company
- The needs and resources of the parties and any child of the family

A recent Supreme Court decision highlighted the Court's approach that if the parties' intentions cannot be inferred from their conduct then the Courts have the power to impute an intention.

If the property is held in the sole name of you or your partner then the other person would need to establish that they have an interest in the property based on the principles of trust law and/ or proprietary estoppel.

1. Constructive trust: where a common intention as to what shares each party holds can be established because of a specific agreement between the parties or because of a promise made by one party to another and this was relied upon by the other party
2. Resulting trust: where one party contributes towards the purchase of a property and therefore a presumption may arise that the person who contributed has a beneficial interest in the property because of this contribution
3. Proprietary estoppel: where one party represents that he or she is transferring an interest in land to another, but what is done has no legal effect, or, where one party promises to another that at some point in the future they will transfer land to them and the party making the promise knows that the other party will spend money or otherwise act in their detriment in reliance on that promise. Proprietary estoppel is similar to a Constructive trust described above. When deciding whether Proprietary estoppel can apply the following will need to be established:
  - The party making a claim must have made a mistake as to their legal rights
  - There must be an act of reliance on the promise by the party making the claim
  - The party who made the promise must be aware that their legal right is inconsistent with the right claimed by the party
  - The party who made the promise must be aware of the other party's mistaken belief, and
  - The party who made the promise must have encouraged the other party in their act of reliance

The outcome will depend on the particular circumstances of the case. We have extensive experience in this field and can advise you as to what your entitlement should be if you find yourself in this situation and how best to achieve this.

## **Harassment & Injunction Orders**

Where a person has suffered violence, threats of violence, or harassment, it is possible to apply for an Order to protect themselves. The relationship (if any) between the victim and the perpetrator of the violence, threats or harassment, will determine the type of Order which can be obtained.

### **Family Law Act 1996**

You may be able to obtain an Injunction Order under the Family Law Act 1996 provided that the person against whom you wish to obtain an injunction (the "Respondent") is classed as an 'associated person'. An 'associated person' includes include husbands or wives, divorced couples, co habitants, former co habitants and a wide range of related persons who live or have in the past lived in the same household and those who have agreed to marry or have a child together.

There are two types of injunctions under this Act:

- Non Molestation Order: where someone is prohibited from using or threatening violence against another person, or harassing, pestering or molesting them.
- Occupation Order: where a person is prohibited from occupying a home or coming within a certain radius of it.

The Courts attach a Power of Arrest to all Injunction Orders under the Family Law Act 1996 which means that if the Order is breached then the police can arrest the other party immediately.

If a case is sufficiently urgent due to an immediate threat of violence then an application can be made on the same day, without the other party having been given notice of the application. This is known as an 'ex parte application'. If an Order is granted then it will become effective only once it has been personally served on the Respondent. If an Order was obtained on an ex parte basis then the Courts will set a date shortly thereafter for the matter to be reviewed. At this second hearing the Court may order that the Injunction Order continues or the matter may be resolved if the Respondent undertakes i.e. makes a solemn promise to the Court, to not commit the acts complained of.

### **Protection from Harassment Act 1997**

If a person is unable to obtain an injunction under the Family Law Act 1996 because the person is not an 'associated person' then it may be possible to obtain an Order under the Protection from Harassment Act 1997. A person can bring a civil action for an injunction if they are being harassed by a person who is not an associated person. The Act provides that :

A person must not pursue a course of conduct :-

- (a) which amounts to harassment of another, and
- (b) which he knows or ought to know amounts to harassment of another.

Harassment by its definition means that the conduct must be on more than one occasion. On hearing an application, the Court can grant not only an injunction but also award damages for any anxiety caused by the harassment and any financial loss resulting from the harassment.

However, a major difference from the Family Law Act 1996 is that there is no automatic Power of Arrest attached to an Order under the Protection from Harassment Act 1997. Therefore, if you meet the criteria under the Family Law Act 1996, this would offer more protection.

If either of the above mentioned scenarios applies to you then contact us immediately in order to seek the protection of the Court. We will assist you and advise you in complete confidence.

*Please note that the information provided above is an overview only and is not intended to be a comprehensive study of family law matters. If you require assistance on any of the above mentioned matters, you should seek specific advice in relation to your particular circumstances.*