4

THE GROUND FOR DIVORCE AND THE FIVE FACTS

The present law of divorce is contained in the Matrimonial Causes Act 1973 ('MCA 1973')

A A NOTE ON TERMINOLOGY

4.01 The party seeking a divorce is described as 'the petitioner' in the Matrimonial Causes Act 1973 ('MCA 1973') and 'the applicant' in the Family Procedure Rules 2010 ('FPR 2010', SI 2010/2955) which govern the procedure to obtain the decree of divorce.

4.02 In this and subsequent chapters dealing with aspects of divorce, the term 'applicant' will be used unless specific reference is made to the wording in the MCA 1973.

B THE GROUND FOR DIVORCE

4.03 There is only one ground for divorce, that is that the marriage has irretrievably broken down: s 1(1), MCA 1973.

4.04 A decree absolute of divorce terminates the marriage and radically changes the status of the parties, especially in relation to eligibility for certain state benefits and pensions.

C THE FIVE FACTS

4.05 The court cannot hold that the marriage has irretrievably broken down unless the petitioner satisfies the court of one or more of the five facts set out in s 1(2), MCA 1973. These are:

(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 and the respondent consents to a decree being granted (two years' separation and consent);
(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 (five years' separation).

4.06 Because of the requirement that one of the five facts should be proved, it is possible for a situation to arise where the marriage has undoubtedly broken down irretrievably but no divorce can yet be granted because neither party can establish any of the five facts.

Example A couple separate by mutual consent simply because they have found that they are incompatible. Neither has committed adultery or behaved in such a way that the other cannot reasonably be expected to live with them. Although the marriage has irretrievably broken down, they are not able to obtain a divorce during the first two years of their separation as none of the five facts can be established. When two years are up, assuming they both wish to be divorced, it will be possible to establish two years' separation and consent (s 1(2)(d)) and one or other party will be able to seek a decree.

D IRRETRIEVABLE BREAKDOWN

No link necessary between s 1(2) fact and irretrievable breakdown

4.07 It is not necessary for the applicant to show that the irretrievable breakdown of the marriage has been caused by the s 1(2) fact on which she relies (*Stevens* v *Stevens* [1979] 1 WLR 885; *Buffery* v *Buffery* [1988] 2 FLR 365 (CA)).

Example (The facts of *Stevens* v *Stevens*.) The applicant established that the respondent's behaviour was such that she could not reasonably be expected to live with him: s 1(2)(b). The marriage had irretrievably broken down but in fact it was established that it was the applicant's own behaviour that had caused the breakdown.

The applicant was nevertheless entitled to a decree.

Proving irretrievable breakdown

4.08 Section 1(4), MCA 1973 provides that if the court is satisfied that one of the s 1(2) facts is proved, unless it is satisfied on all the evidence that the marriage has not broken down irretrievably it shall grant a decree of divorce (subject to the provisions of s 5, MCA 1973, see Chapter 12). In other words, once one of the facts is established, a presumption of irretrievable breakdown is raised. In an undefended case, there is not normally any evidence to displace the presumption and the court therefore accepts the applicant's statement in her petition that the marriage has irretrievably broken down without further enquiry.

4.09 However, it is open to the respondent to challenge the applicant's assertion of irretrievable breakdown by filing an answer denying that the marriage has irretrievably broken down. In this event, the suit will become defended and it will be up to the court to determine on the basis of all the evidence at the hearing whether or not the marriage has irretrievably broken down by that date (see *Ash* v *Ash* [1972] 1 All ER 582; *Pheasant* v *Pheasant* [1972] 1 All ER 587).

Adjournment with a view to reconciliation

4.10 If at any stage in the divorce proceedings the court feels that there is a reasonable possibility of a reconciliation between the parties, the court may adjourn the proceedings for whatever period it thinks fit to enable attempts at reconciliation to take place: s 6(2), MCA 1973.

E ADULTERY: S 1(2)(a)

Two separate elements to prove

4.11 There are two matters that the applicant must prove:

(a) that the respondent has committed adultery; *and*
(b) that she finds it intolerable to live with him.

The adultery may be the reason why the applicant finds it intolerable to live with the respondent but it is not necessary for there to be any link between the two matters (*Cleary* v *Cleary* [1974] 1 All ER 498, followed in *Carr* v *Carr* [1974] 1 All ER 1193).

Example (The facts of *Cleary* v *Cleary*.) The respondent wife committed adultery. The applicant husband took her back afterwards but things did not work out because the wife corresponded with the other man, went out at night, and then went to live at her mother's and did not return. The applicant said that he could no longer live with the respondent because there was no future for the marriage. Although it was the respondent's conduct after the adultery and not the adultery itself that had made it intolerable for the applicant to live with her, he had satisfied both limbs of s 1(2)(a) and was entitled to a decree.

Meaning of adultery

4.12 Adultery is voluntary sexual intercourse between a man and woman who are not married to each other but one of whom at least is a married person (*Clarkson* v *Clarkson* (1930) 143 LT 775).

Proof of adultery

4.13 It would be quite extraordinary if the applicant were able to produce a witness who had actually *seen* the respondent committing adultery. Proof is therefore normally indirect.

4.14 Examples of the type of evidence commonly used are set out in the following paragraphs.

Confessions and admissions

4.15 It used to be routine practice for a confession statement to be obtained from the respondent (and if possible the co-respondent as well) admitting adultery and setting out briefly the circumstances in which it took place.

4.16 Nowadays, the acknowledgment of service forms used by respondents and co-respondents in adultery cases ask the question 'Do you admit the adultery alleged in the petition?' If the respondent answers this question in the affirmative and signs the form, the court can accept this as sufficient evidence of adultery. Depending on the nature of the case and the practice of the particular court in which proceedings are pending, it may or may not still be necessary for the old style of confession statement or other evidence of adultery (see paras 4.20 and 4.21 below) to be obtained as well.

4.17 In circumstances where there is some doubt as to whether the respondent will admit the adultery in his acknowledgment of service form, it is sensible to obtain a signed confession in any event before commencing divorce proceedings. To do otherwise may result in costs being incurred without any prospect of a divorce being obtained because the applicant cannot prove the fact of adultery in any other way.

4.18 If the respondent denies adultery and proceeds to file an answer, the case will be defended and the court will have to consider whether, on all the evidence available at the hearing, adultery is proved.

4.19 If the respondent does not admit (or even denies) adultery in the acknowledgment of service but does not go so far as to file an answer, his lack of cooperation will not necessarily be fatal to the applicant's case. She will simply have to attempt to prove adultery by other evidence.

Circumstantial evidence

4.20 The following are examples of the type of evidence from which the court can be asked to infer adultery:

(a) Evidence that the respondent and another woman are living together as man and wife. The applicant may be able to state this from her own observations. Alternatively she may be able to produce an independent witness of her own to the fact (eg the next-door neighbour of the respondent and his cohabitant). If necessary an enquiry agent can be instructed to watch the respondent and collect evidence of cohabitation.

(b) Evidence that the respondent and another woman had the inclination and the opportunity to commit adultery, for example that they had formed an intimate relationship (eg they may have been seen kissing or holding hands in public or the applicant may have obtained copies of 'love letters' passing between them) and had spent the night together in the same bedroom or alone together in the same house. Again, the applicant may be able to supply this evidence herself but, if not, an enquiry agent may be able to help.

Indeed, in the case of evidence of the type set out in both points (a) and (b), the court may *require* independent evidence before it is satisfied of adultery.

(c) Evidence that the wife has given birth to a child of which the husband is not the father. Normally it is presumed that a child born during the marriage is legitimate. However, this presumption can be displaced, for example, by evidence that the parties did not have any contact with each other during the time in which conception must have taken place (eg where the husband has been working overseas continuously for a prolonged period). A birth certificate can be admitted as prima facie evidence of the facts required to be entered on it. This can be useful where the wife has registered the birth and named someone other than the husband as the father of the child.

Findings in other proceedings

4.21 Findings made by a court in other proceedings may be admissible as evidence of adultery by the party against whom the finding had been made, for example:

(a) where the husband has been found to be the father of a child in proceedings brought by the mother of the child under sch 1, Children Act 1989, for a lump sum order or transfer of property order;
(b) where the husband has been found to be the father of a child in proceedings brought by the Child Support Agency for maintenance for the child;
(c) where a finding of adultery has been made against either party in family proceedings;
(d) where the husband had been convicted of rape;
(e) where the applicant has already been granted a decree of judicial separation on the basis of the adultery on which she relies in the divorce proceedings, the court may treat the decree of judicial separation as sufficient proof of the adultery (s 4(2), MCA 1973): see Chapter 12.

4.22 The solicitor has to consider whether the co-respondent should be named where the petition is based on the respondent's adultery and the identity of the co-respondent is known to the applicant.

4.23 As a general rule, the co-respondent should not be named unless the applicant seeks an order for costs against the co-respondent. This approach is reinforced by para 2.1, PD7A, FPR 2010 which states that the co-respondent should not be named unless the applicant believes that the proceedings are likely to be defended.

Intolerability

4.24 Normally, at least in an undefended case, the applicant's statement in her petition that she finds it intolerable to live with the respondent will be accepted at face value.

4.25 However, further evidence may be required in support of her contention if either:

(a) the information supplied by the applicant in the petition itself and in support of the petition raises doubts in the mind of the court as to whether the applicant finds it intolerable to live with the respondent; *or*
(b) the respondent files an answer challenging the applicant's assertion, in which case the divorce will become defended and the court will hear evidence from both parties on the issue.

The test to be applied when an issue arises over whether the applicant finds it intolerable to live with the respondent is a subjective one (*Goodrich* v *Goodrich* [1971] 2 All ER 1340), that is, 'does *this applicant* find it intolerable to live with the respondent' and not 'would *a reasonable applicant* find it intolerable to live with the respondent?'

Living together

4.26 In some cases the applicant can be prevented from relying on adultery because she has lived with the respondent after she discovered his adultery. This matter is dealt with at para 4.61 below.

F BEHAVIOUR: S 1(2)(b)

The test for behaviour

4.27 The test as to whether the respondent has behaved in such a way that the applicant cannot reasonably be expected to live with him is a cross between a subjective and an objective test. The formula used in the case of *Livingstone-Stallard* v *Livingstone-Stallard* [1974] Fam 47 seems to have been accepted (see *Birch* v *Birch* [1992] 1 FLR 564), that is:

> 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?

4.28 Thus, not only must the court look at the respondent's behaviour but also at the applicant's behaviour (eg asking whether she provoked the respondent deliberately or simply by her own anti-social conduct). Consideration must also be given to what type of people the applicant and respondent are (eg asking whether the applicant is particularly sensitive and vulnerable) and to the whole history of the marriage. The court must then evaluate all this evidence and decide objectively whether, in these particular circumstances, it is reasonable to expect the applicant to go on living with the respondent.

Examples of behaviour

Violent behaviour

4.29 It is quite common for applicants to rely on violent behaviour on the part of the respondent. One serious violent incident may entitle the applicant to a decree (eg an unprovoked attack upon the applicant causing her an unpleasant injury for which she required medical treatment). If the violence used is relatively minor (eg the occasional push and shove), more than one incident will be required or it will be necessary for the applicant to show that there was other behaviour as well as the violence.

Other behaviour

4.30 The respondent's behaviour need not be violent to entitle the applicant to a decree. All sorts of other anti-social behaviour can be sufficient as the following examples show. Incidents which

are relatively trivial in isolation can amount to sufficient behaviour when looked at as a whole, particularly if the applicant is especially sensitive to the respondent's behaviour for some reason.

Example 1 (The facts of *Livingstone-Stallard* v *Livingstone-Stallard*, para 4.27 above.) The husband was 56, the wife 24. The marriage was unsatisfactory from the start. The wife's complaints about her husband's behaviour included the following matters. The husband criticized the wife over petty things—her behaviour, her friends, her way of life, her cooking, her dancing—and was abusive to her, called her names, and, on one occasion, spat at her. Once he tried to kick her out of bed. On one occasion he criticized her for leaving her underclothes soaking in the sink overnight (although he did the same himself) and said that it was indicative of the way she had been brought up. He made a fuss when she drank sherry with a photographer who had brought round their wedding photographs, forbidding her to give refreshment to 'trades-people' again (on the basis that if she drank sherry with a tradesman it might impair her faculties so that the tradesman might make an indecent approach to her). The wife left after the husband had bundled her out of the house on a cold evening and locked her out, throwing water over her when she tried to get back in. She suffered bruising and was in a very nervous state for six weeks, needing sedation.

Although many of these complaints were trivial themselves, the wife was entitled to a decree.

Example 2 (The facts of *Birch* v *Birch*, para 4.27 above.) The parties had lived together for more than 27 years. The wife's main complaint against the husband was that he was dogmatic and dictatorial with nationalistic, male chauvinistic characteristics, which she had resented for many years. The judge found that, in contrast, the wife was sensitive, taking a passive role and putting her own interests aside until the children had grown up and left home.

The wife was entitled to a decree.

Note that although Examples 1 and 2 are taken from the facts of decided cases they are not intended to be looked on as *precedents* of what is and is not sufficient behaviour; every case is different and must be decided on its own facts. The examples are only intended to show the type of conduct which is relevant in establishing behaviour.

4.31 Other matters which can constitute behaviour include excessive drinking leading to unpleasant behaviour, unreasonably refusing to have sexual intercourse or making excessive sexual demands, having an intimate relationship (falling short of adultery) with another person, committing serious criminal offences, and keeping the other party unreasonably short of money.

Where the respondent is mentally ill

4.32 The fact that the respondent's behaviour is the result of his mental illness does not necessarily prevent it from being sufficient to entitle the applicant to a decree. However, the fact that he is mentally ill will be a factor for the court to take into account in determining whether s 1(2)(b) is satisfied (*Katz* v *Katz* [1972] 3 All ER 219 and see also *Richards* v *Richards* [1972] 3 All ER 695 and *Thurlow* v *Thurlow* [1975] 2 All ER 979).

Behaviour which is not sufficient

4.33 Section 1(2)(b) will not be satisfied if all that is proved is that the applicant became disenchanted with the respondent or bored with marriage.

4.34 Simple desertion cannot amount to behaviour; the applicant must wait for two years to elapse from the date of desertion and apply on the basis of s 1(2)(c) (*Stringfellow* v *Stringfellow* [1976] 2 All ER 539).

The relevance of living together despite the behaviour

4.35 In some cases the petitioner may not be able to prove sufficient behaviour because she and the respondent have continued to live together; see paras 4.63 ff.

G ESTABLISHING AS A MATTER OF FACT THAT THE PARTIES ARE LIVING APART

4.36 The facts set out in s 1(2)(c) to (e) all require cohabitation to have ceased and the parties to have lived apart for a period of time.

Living apart for the purposes of s 1(2)(d) and (e)

4.37 'Living apart' is defined for the purposes of s 1(2)(d) and (e) (the two-year and five-year separation facts) in s 2(6), MCA 1973. This provides that a husband and wife shall be treated as living apart unless they are living with each other in the same household.

4.38 It is usually possible to pinpoint a time at which the spouses began to live apart in the sense required by the Act. This is normally the time when one or the other moves out of the family home to live in his own accommodation elsewhere and the parties start to lead separate lives. However, difficulties can arise:

(a) When the parties have been living separately in any event, not because the marriage has broken down but for some reason, for example because one spouse has gone to look after his or her invalid parents or because they are working in different cities or because one is working abroad. Although as a matter of fact they are living separately, this physical separation is not sufficient; they will not be counted as living apart within the meaning of the MCA 1973 until at least one of them has decided that the marriage is at an end (*Santos* v *Santos* [1972] 2 All ER 246). It is not necessary for that spouse to communicate this decision to the other spouse. Of course, it is easier to prove that the requisite state of mind did exist if something was said to the other spouse but in other cases, a decision that the marriage is at an end can be inferred from conduct, for example where the party living away ceases to contact the other party or to return home for holidays or sets up home with someone else.

Example 1 The husband is posted abroad. To begin with, he and his wife email each other frequently and he spends his periods of leave at home with her and the children.

After he has been abroad for a year, contact between him and his wife ceases and he does not answer her emails. In April 2011 he writes to his mother saying that he does not see any future in the marriage and does not intend to come home when his posting is over. Two years later the wife wishes to apply for a divorce; the husband consents to a decree. She can rely on s 1(2)(d). It can be seen from the husband's conduct and his letter to his mother that he had decided in 2011 that the marriage was over. The two-year separation period therefore began to run from that date.

Example 2 The husband is sentenced to a period of six years' imprisonment. To begin with the wife intends to stand by him. However, after six months she meets another man whom she wishes, ultimately, to marry and with whom she starts to live. The parties will be treated as having separated at this point because it is then that the wife recognizes that the marriage has no future.

(b) When the parties continue to live under the same roof but contend that they are actually living there separately. Whether or not the court will accept in these circumstances that there has been a sufficient degree of separation will depend on the living arrangements. To establish that the parties have been living apart it must be shown that the normal relationship of husband and wife has ceased and that they have been leading separate existences. The position is best illustrated by an example.

Example (The facts of *Mouncer* v *Mouncer* [1972] 1 All ER 289.) The husband and wife slept in separate bedrooms in the matrimonial home. They shared the rest of the house. They continued to take meals (cooked by the wife) together and shared the cleaning of the house making no distinction between one part of the house or the other. The wife no longer did any washing for the husband. The only reason the husband went on living in the house was his wish to live with and help to look after the children.

The parties had not been living apart.

If the parties in *Mouncer* had lived in separate parts of the house, had not shared cleaning and had taken meals separately, no doubt the court would have found that they were not living in the same household, albeit that they were living under the same roof, and would have accepted therefore that they were living apart.

Living apart in desertion cases

4.39 Section 2(6) applies only to s 1(2)(d) and (e). However, if a question were to arise in a desertion case as to whether cohabitation had ceased, there is no doubt that similar principles would be applied (see *Smith* v *Smith* [1940] P 49). In addition, recognition that the marriage is at an end must be communicated to the other party: *Beeken* v *Beeken* [1948] P 302 (CA).

H DESERTION: S 1(2)(c)

4.40 Under s 1(2)(c), the applicant must show not only that the respondent has deserted her but also that this state of affairs has gone on for a continuous period of at least two years immediately preceding the presentation of the petition.

Desertion rarely relied on

4.41 It is rare these days for an applicant to rely on desertion. No doubt the reason for this is that if the respondent has seen fit to desert the applicant, he is usually sufficiently disenchanted with the marriage to consent to a decree of divorce being granted. Thus, the applicant need not struggle with the technicalities of desertion but can base her petition much more conveniently on two years' separation and consent (s 1(2)(d)). Furthermore, if the respondent has committed adultery, the applicant need not even wait for two years' separation; she can apply for a divorce immediately on the basis of the adultery.

4.42 It should never be necessary to rely on *constructive* desertion (ie, behaviour by the respondent causing the applicant to withdraw from cohabitation). In such cases, the petition should be based on behaviour under s 1(2)(b). Apart from being more straightforward than desertion, the behaviour fact has the marked advantage that the applicant need not wait for two years' separation to have elapsed before applying as she must with desertion.

4.43 Desertion is thus only likely to be used where adultery and behaviour cannot be made out and where, despite having walked out in the first place, the respondent is not prepared to consent to a decree being granted or where he has simply disappeared and cannot therefore be asked to consent to a decree.

What is desertion?

4.44 The law relating to desertion is detailed and rather technical. This book outlines the main provisions; it does not deal with the intricacies. A fuller picture of the law can be found in standard practitioners' works on divorce.

4.45 The essentials of desertion are as follows:

(a) The respondent must have withdrawn from cohabitation with the intention of bringing cohabitation permanently to an end.
   (i) *Cessation of cohabitation*: it is vital that cohabitation should have ceased. The applicant cannot say that the respondent has deserted her if he is, in fact, still living with her, even if he contributes virtually nothing to family life. See paras 4.36 ff as to when the parties will be taken to be living apart.
   (ii) *Intention*: the respondent must intend to bring cohabitation permanently to an end.

Example 1 As far as the wife is concerned, she and her husband have been living together in the matrimonial home perfectly happily. One day, the husband packs his suitcase and departs to live in his own flat, saying that the wife has done nothing wrong but that he needs his freedom and does not intend to live with her ever again. The husband has thus withdrawn from cohabitation with the intention of bringing it permanently to an end. He has, in fact, deserted the wife.

This example deals with a couple who are living in the same house at the time that the desertion occurs. While this is the normal situation, it is not always the case. It is quite possible for one party to desert the other at a time when they are living in different places anyway (*Pardy* v *Pardy* [1939] 3 All ER 779). It is not the actual packing up and leaving that is important. What is important is the change in the respondent's state of mind so that he no longer

regards himself as a married man with all the normal obligations of married life (including, ultimately, returning to live with the applicant), but decides that he will never resume cohabitation with the applicant and therefore regards himself as a free agent.

Example 2 The husband and wife live together. The husband gets a job in Saudi Arabia and, with the wife's consent, he goes off for a year's contract. Just before he is due to come home, he decides that he is not going to return to live with his wife and he telephones to tell her so. The physical separation of the parties would, up to now, have had no consequence as far as divorce proceedings were concerned. At this point, however, the husband starts to be in desertion. If this state of affairs continues for two years, the wife will be able to apply for a divorce on the basis of this desertion.

It does seem, however, that where the original separation was consensual, a party cannot be in desertion simply because he subsequently makes up his mind privately not to resume cohabitation at the end of the agreed period as originally planned. He will not be in desertion until he communicates this to the other party or until the agreed period of separation expires and he does not return (*Nutley* v *Nutley* [1970] 1 All ER 410).

In other cases, there is no need for an express statement by the respondent of his intentions. It can be inferred from his conduct that he intends to bring cohabitation permanently to an end. In Example 1, therefore, the husband would have been just as much in desertion if he had said nothing to his wife but had merely departed with all his belongings to live in his own flat, with no intention of resuming cohabitation.

Because the respondent's state of mind is the essence of desertion, he will not be in desertion if he is forced to live separately from his wife against his will, for example if he is imprisoned. However, if he is already in desertion when the involuntary separation supervenes (eg he is sentenced to a period of imprisonment after he has deserted his wife), the desertion will be presumed to continue throughout the period of involuntary separation (*Williams* v *Williams* [1938] 4 All ER 445). The court may treat the respondent as having been in desertion during a period in which he was excluded from the matrimonial home by a court order (ie, an occupation order made under Part IV, Family Law Act 1996).

(b) The applicant does not consent to the respondent's withdrawal from cohabitation. If the applicant consented to the respondent's withdrawal from cohabitation, she cannot allege that he has deserted her. Consent can be expressed (eg where a separation agreement is drawn up providing for immediate separation) or can be implied from what the applicant says or does.

Example (The facts of *Spence* v *Spence* [1939] 1 All ER 52.) For a fortnight before she left home, the wife engaged in open preparations for her departure. Her husband was perfectly aware of her intentions and they discussed the division of their household goods. The husband did not make any attempt to deter his wife from going or to delay her departure.

The husband was held tacitly to have consented to his wife's departure.

However, the mere fact that the applicant breathes a sigh of relief when the respondent has gone does not mean that she has consented to his departure.

The following situations may arise:

(i) Consent can pre-date the respondent's departure, in which case desertion never begins.

(ii) On the other hand, the applicant may decide to consent to the separation after the event, in which case her consent can bring the respondent's desertion to an end (*Pizey* v *Pizey* [1961] 2 All ER 658).

(iii) Consent may be to a limited period of separation (eg while the respondent works abroad). Such consent comes to an end when that period ends; thereafter, the respondent can be in desertion (*Shaw* v *Shaw* [1939] 2 All ER 381).

(iv) If consent is given to an unlimited period of separation, it can be withdrawn and either party can seek a resumption of cohabitation. If the other party, without just cause, refuses to resume cohabitation, he will be in desertion (*Fraser* v *Fraser* [1969] 3 All ER 654). Furthermore, if the parties originally separate contemplating that they will get back together eventually (even though no time may be fixed) and one of them then decides never go back to live with the other and communicates this to the other, he will be in desertion from that point unless, of course, the other spouse is agreeable to the permanent separation (*Nutley* v *Nutley*, above).

(c) The respondent must not have any reasonable cause to withdraw from cohabitation.

4.46 Normally, if the respondent has reasonable cause to leave, this will arise from the behaviour of the applicant although there would seem to be no reason, in principle, why some cause unconnected with the applicant should not be sufficient justification for the respondent going (eg where it is shown that it is imperative for his health that he should leave the applicant permanently). Where the applicant's conduct is relied on, it must be shown to be 'grave and weighty' and not merely part of the ordinary wear and tear of married life (*Dyson* v *Dyson* [1953] 2 All ER 1511).

4.47 There are no recent authorities on the point but it would seem logical to suggest that the type of behaviour that would form the basis of a petition under s 1(2)(b) would also constitute reasonable cause in a desertion case. Furthermore, a reasonable belief that the applicant has committed adultery will give the respondent reasonable cause to leave even though the adultery cannot be proved (*Glenister* v *Glenister* [1945] 1 All ER 513).

Termination of desertion

4.48 The ways in which desertion can be brought to an end include the following:

(a) By the parties subsequently agreeing to live apart (*Pizey* v *Pizey*, para 4.45 above).

(b) By the granting of a decree of judicial separation. Once a decree of judicial separation has been granted, neither party has any further obligation to live with the other and cannot therefore be in desertion by failing to do so. However, if the decree of judicial separation was based on two years' desertion, the applicant can subsequently issue a divorce petition based on the same desertion (s 4(1), MCA 1973). The desertion will be deemed to have taken place immediately prior to the issue of the divorce petition if the parties have not resumed cohabitation since the judicial separation decree was granted and the decree of judicial separation has continued in force since it was granted (s 4(3)). Furthermore, the

court may treat the decree as sufficient proof of desertion in the divorce proceedings: s 4(2) (see further Chapter 12, paras 12.12 ff).

(c) By the resumption of cohabitation for a prolonged period (certain periods of cohabitation are disregarded, however, in determining whether there has been a continuous period of desertion; see paras 4.65 ff).

(d) By the deserting spouse making a genuine offer to resume cohabitation which the deserted spouse unreasonably refuses (*Ware* v *Ware* [1942] 1 All ER 50).

(e) By the deserted spouse subsequently providing the deserter with reasonable cause to stay away, for example where she commits adultery which comes to the notice of the deserter.

Living together during a period of desertion

4.49 In determining whether the period of desertion is continuous, certain periods of cohabitation can be ignored, see paras 4.65 ff.

I TWO YEARS' SEPARATION AND CONSENT: S 1(2)(d)

Two separate matters to prove

4.50 There are two matters which the applicant must prove:

(a) that she and the respondent have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition; *and*

(b) that the respondent consents to a decree being granted.

Living apart

4.51 As to what is meant by living apart, see paras 4.36 ff. Certain periods of cohabitation can be disregarded in considering whether the parties have lived apart *continuously*, see para 4.65 below.

Respondent's consent

4.52 The respondent normally signifies his consent to the court on the acknowledgment of service form (which must be signed by him personally and, if he is represented by a solicitor, his solicitor as well; see r 7.12(4) and (6), FPR 2010), and see Chapter 8.

4.53 The respondent can make his consent conditional, for example giving his consent provided that the applicant does not seek an order for costs of the divorce (*Beales* v *Beales* [1972] 2 All ER 667).

4.54 Whether his consent is unqualified or conditional, the respondent can withdraw it at any stage before the decree is pronounced (*Beales* v *Beales*, para 4.53 above). If s 1(2)(d) is the only basis for the petition, the petition will then have to be stayed (r 7.12 (13) and (14), FPR 2010).

If decree nisi is granted solely on the basis of two years' separation and consent, the respondent can apply at any time before the decree is made absolute to have the decree rescinded if he has been misled by the applicant (intentionally or unintentionally) about any matter which he took into account in deciding to give his consent (s 10(1), MCA 1973). **4.55**

Section 10(2), Matrimonial Causes Act 1973

Under s 10(2), the respondent may seek to hold up decree absolute until his financial position after the divorce has been considered by the court, see Chapter 11. **4.56**

J FIVE YEARS' SEPARATION: S 1(2)(e)

Establishing the five years' separation

If the applicant can establish that she and the respondent have been living apart for a continuous period of at least five years immediately preceding the filing of the petition, she is entitled to a decree whether or not the respondent consents to a divorce (subject only to the respondent's right to raise a defence under s 5, MCA 1973 of grave financial or other hardship, see Chapter 11). **4.57**

Cohabitation during the five-year period

Certain periods of cohabitation can be disregarded in determining whether the five-year period is continuous, see para 4.65 below. **4.58**

Section 10(2), Matrimonial Causes Act 1973

As with s 1(2)(d), the respondent can seek to hold up decree absolute by an application under s 10(2) to have his financial position considered, see Chapter 11. **4.59**

K THE EFFECT OF LIVING TOGETHER IN RELATION TO THE FIVE FACTS: S 2

Section 2 deals with the relevance of the parties having lived with each other when considering whether any of the five facts have been made out. Section 2(6) provides that the parties are to be treated as living apart unless they are living together in the same household. **4.60**

Cohabitation after adultery

Cohabitation exceeding six months is a total bar

Section 2(1) provides that the applicant cannot rely for the purpose of s 1(2)(a) on adultery committed by the respondent if the parties have lived with each other for a period exceeding **4.61**

or periods together exceeding six months after the applicant learned that the respondent had committed adultery.

Example 1 Mr Brown commits adultery on one occasion only in June 2011. On 1 July 2011 Mrs Brown learns of this. She and her husband continue to live together as man and wife as before although they bicker constantly. In March 2012 Mrs Brown decides that the marriage is doomed and consults a solicitor with a view to applying for a divorce on the basis of her husband's adultery. She cannot do so. She has cohabited for a period exceeding six months since she learned of the adultery on 1 July 2011 and he has not committed further acts of adultery since then.

If the respondent commits adultery on more than one occasion, time will not begin to run until after the applicant learns of the last act of adultery.

Example 2 Mr Green begins an affair with his secretary at the office party at Christmas 2010. He first commits adultery with her on 23 December 2010. The affair continues until April 2011. Mrs Green learns almost straight away of the adultery on 23 December 2010 but thinks that that is the only occasion on which adultery took place. She discovers the true facts about the continuing adultery on 1 August 2011. She continues to live with her husband until 1 September 2011 when she leaves him because relations have become so strained. Mrs Green will be able to petition for divorce on the basis of her husband's adultery. The last act of adultery was in April 2011, she learned of it on 1 August 2011 and she only cohabited with her husband for one month thereafter.

Cohabitation of six months or under to be disregarded

4.62 Section 2(2) provides that where parties have lived together for a period or periods not exceeding six months in total after it became known to the applicant that the respondent had committed adultery, the cohabitation is to be disregarded in determining whether the applicant finds it intolerable to live with the respondent. Thus, in Example 2 above, it could not be said against Mrs Green that she did not find it intolerable to live with her husband because she had in fact lived with him for a month after finding out about his last act of adultery. This period of cohabitation would be disregarded in determining the question of intolerability.

Cohabitation and behaviour

Cohabitation of six months and under to be disregarded

4.63 Section 2(3) provides that the fact that the applicant and the respondent have lived with each other for a period or periods not exceeding six months in total after the last incident of behaviour proved, is to be disregarded in determining whether the applicant cannot reasonably be expected to live with the respondent.

Example 1 The last incident of behaviour proved by the applicant was on 3 January 2011 when the respondent beat her over the head with a snow shovel. She did not leave the respondent until the middle of February 2011. The period of cohabitation from 3 January 2011 until mid-February 2011 will be disregarded.

The behaviour on which the applicant relies may be continuous in which case time will only start to run against the applicant if she cohabits with the respondent after the particular behaviour ceases.

Example 2 The applicant makes several allegations of violence on the part of the respondent during 2011. She continues to live with the respondent until shortly before decree nisi is granted. No specific incidents are detailed in relation to the period after 2011. However, the applicant alleges generally that the respondent continually criticizes and belittles her, keeps her short of money, and prevents her from having any contact with her friends and family. Her cohabitation for more than six months since the last specific incidents in 2011 will not prejudice her entitlement to a divorce because the other behaviour of which she complains continued up to the day when she left and time therefore never started to run against her.

Cohabitation of more than six months

4.64 If the applicant continues to live with the respondent for a period or periods exceeding six months in total, the cohabitation will be taken into account in determining whether the applicant can reasonably be expected to live with the respondent. The longer the applicant goes on living with the respondent after the last incident of behaviour, the less likely the court is to find that it is not reasonable to expect her to live with the respondent unless she can give a convincing reason for her continued cohabitation. However, cohabitation for more than six months is not an absolute bar in a behaviour case as it is in a case of adultery (*Bradley* v *Bradley* [1973] 3 All ER 750).

Example (The facts of *Bradley* v *Bradley* above.) The wife applied for a divorce on the basis of the husband's behaviour, alleging many incidents of violence. She was still living with the husband. The parties lived in a council house with four bedrooms with seven of their children. The wife said she had no alternative but to continue to sleep with the husband, cook his meals, etc because she was too frightened of him to do anything else. She could not be rehoused by the council whilst she was still married. The wife was not prevented from relying on s 1(2)(b) by reason of her continued cohabitation. She was entitled to have her case investigated on its merits and to call evidence to show that, although she was still living with her husband, she could not reasonably be expected to continue to do so.

Cohabitation and s 1(2)(c) to (e)

4.65 Section 2(5) provides that in considering whether a period of desertion or living apart has been continuous, no account is to be taken of a period or periods not exceeding six months in total during which the parties resumed living with each other. However, no period or periods during which the parties lived with each other can be counted as part of the period of desertion or separation.

Example Husband and wife started living apart exactly two years ago. However, they have lived with each other for two periods of a month during this time. Neither can apply for a divorce therefore until two years and two months have elapsed since the initial separation.

It should be noted that s 2(5) is dealing with the question of *continuity* of the period of separation. It does not say that the periods of cohabitation should be disregarded for other purposes. A short period of cohabitation (six months or less) may therefore be relevant in determining, for example, whether desertion has been terminated or whether, in the case of either separation fact, there has been the sort of decision required by *Santos* v *Santos*, para 4.38 above, that the marriage is at an end.

4.66 Although the statute does not say so expressly, it must be the case that a period or periods of cohabitation in excess of six months *will* automatically break the continuity of the separation.

4.67 In drafting the petition, details of the date of separation must be specified in the statement of case. Where there has been a period of resumed cohabitation, no matter how short, details of this should also be included.

The rationale behind the cohabitation rule

4.68 The provisions of s 2 are designed to facilitate a reconciliation between the parties and to give them an opportunity to reflect on the state of their marriage without prejudicing proceedings for divorce if such proceedings become necessary at a later stage. It is vital that the solicitor understands the practical effect of the s 2 provisions and warns the client from the outset about the rules which are relevant to the client's particular circumstances.

L CHAPTER SUMMARY

4.69

1. The only ground for divorce is that the marriage has broken down irretrievably.
2. The applicant must prove one or more of the following 'facts' on the balance of probabilities:
   - Fact A: respondent's adultery and the applicant finding it intolerable to live with the respondent.
   - Fact B: respondent's behaviour.
   - Fact C: respondent's desertion for a continuous period of at least two years.
   - Fact D: applicant and respondent have lived apart for a continuous period of at least two years and the respondent consents to the decree being granted.
   - Fact E: the applicant and the respondent have lived apart for a continuous period of at least five years.
3. Care is needed where the parties have resumed cohabitation as laid down in s 2, MCA 1973.

M KEY DOCUMENTS

4.70 Matrimonial Causes Act 1973