

Legal Requirements for Divorce

Background

The law of divorce involves both federal and provincial legislation. This is because the Canadian Constitution divides powers between the federal and provincial governments. The federal government has control over marriage and divorce laws, but there is overlap. The provinces have control over laws concerning solemnization of marriage, property and civil rights in the province, and the provincial courts. There are two main laws that will affect your divorce in Manitoba: the *Divorce Act (R.S., 1985, c. 3 (2nd Supp.))*, which is a federal law, and the *Court of King's Bench Rules, Manitoba Regulation 553/88* which is a provincial regulation. Links to these acts can be found in the Appendix of this kit.

Canadian Divorce Law

We will deal with the requirements of the *Divorce Act* first.

In Canada, you cannot immediately get a divorce simply because you decide you want one, or have agreed with your spouse to get one. To get a divorce in a Canadian court, you must have grounds before you can ask the court to dissolve your marriage.

In Canadian law, there is only one ground for divorce. It is the breakdown of the marriage. The person who asks the court for a divorce must prove to the court that there has been a breakdown of the marriage. According to the *Divorce Act*, breakdown can be proven in one of three ways:

1. By showing you and your spouse have been living separate and apart for at least one year before the divorce is granted;
or
2. By showing your spouse committed adultery;
or
3. By showing your spouse treated you with serious physical or mental cruelty, which would make continuing to live together intolerable.



Living Separate and Apart

Users of this guide will rely on the first form of proof, living separate and apart for at least a year, (although you can file your Petition for Divorce before the year is up). It is the easiest and most common way of proving breakdown of the marriage.

Living separate and apart is based on two things: being physically separated, not just because one spouse is in jail or the hospital, or one or both spouses having communicated the intention to separate to the other spouse although they may continue living together in the same home for some time. You may be able to count time that you were living in the same residence as part or all the year if, for example, both parties have been living their lives separately and have stopped representing themselves as a couple, living more like roommates.

The law also says that you can try to reconcile and live together for up to 90 days, and if you separate again, the 90 days of living together will not interfere with the calculation of the one-year period of you having lived “separate and apart”

Adultery and Cruelty

Claiming adultery or cruelty means that the parties do not have to wait for a year to get the divorce. Using these forms of proof can be complicated and difficult. If you want to rely on these forms of proof, you should consult a lawyer. Accordingly, we will not discuss the requirements in detail here.

Claiming adultery or cruelty as proof of the breakdown of the marriage will likely require an oral hearing at court, in front of a judge.

If you use adultery as proof, you must also prove that you did not condone the adultery (this means you did not forgive the adultery and that you separated immediately afterwards). The law also says that there must not have been connivance (this means you cannot have encouraged the adultery).

If you file for a divorce using cruelty as your proof of breakdown of the marriage, you must prove the cruelty took place and made it impossible to remain with your spouse. Medical evidence may be needed. Your spouse may want to dispute the evidence.

Courts do not consider whose fault the divorce was when they decide on parenting arrangements support payments, or property division, so using these forms of proof is not helpful in that regard. Courts do not tend to view evidence of adultery as proof that it is in the best interests of the child to spend less time with a parent that committed adultery or who may have been seriously mentally or physically cruel to you, if it has no impact on the best interests of the children.



Other Requirements Under the Divorce Act

Under the *Divorce Act*, the court must be satisfied that there is no possibility of a reconciliation before granting a divorce. The Petition for Divorce contains a statement that says there is no possibility of reconciliation or living together again. The court must also be satisfied that there has not been collusion, or the application will be dismissed. Collusion is when both parties have acted together to deceive the court.

If there are children of the marriage, the court must consider the issue of child support in a divorce. Determining appropriate child support can be complex. **If there are children of the marriage and you have not determined support for them, you should see a lawyer. This guide therefore does not cover those situations.**

Section 11 of the *Divorce Act* says that the court must be satisfied that reasonable support arrangements have been made for any children of the marriage, having regard to the applicable child support guidelines. The *Divorce Act* also says if reasonable arrangements have not been made, the court must wait until they have been made before granting the divorce.

Note: If both spouses live in Manitoba and there are children of the marriage, the *Child Support Guidelines Manitoba Regulation 58/98* applies. These are the provincial guidelines. If one of the spouses lives outside Manitoba, then the *Federal Child Support Guidelines* apply.

Some users of this guide may have children of the marriage and may have made child support arrangements already. If you are seeking a divorce and have children of the marriage, the financial information of each spouse who has an obligation to pay child support and the details of the arrangement should be provided to the court. If you have shared or split custody, then you both must attach your financial information. The court needs to know the income of each of the spouses, so the court can confirm the child support is in accordance with the child support guidelines or is otherwise reasonable.

Sometimes spouses choose to agree with each other on a child support amount that is different from the amount in the child support guidelines. If the parents have chosen to do this, the court must decide whether it is a reasonable alternative to the guidelines.

If the child support arrangement is not acceptable to the court, or if there is not enough evidence to prove it is appropriate, the divorce may not be granted. The financial information in a case where there is child support that has been previously agreed to should include a Financial Statement (Form 70D) and the accompanying documents specified by Form 70D, such as income tax returns and notices of assessment and reassessment from the past three years, and other documentation proving the amounts of income in the current year such as pay stubs or a letter from an employer.

If you are filing after March 1 but before you and/or your spouse have completed your Income Tax Return (s) for the previous year you should attach your and/or your spouse's T4(s) from all sources of employment to your Affidavit.



You will need updated pay stubs to prove current income if filing on or after May 1 of any year because your Tax Return and/or Notice of Assessment and/or T4 showing your income from the previous year, although still relevant, will not be the best indicator of your current income

If you need your spouse's financial information and he or she will not provide it before you file your Petition for Divorce, then you must complete and serve a Demand for Financial Information (Form 70D.1) if you are claiming spousal or child support and the other spouse's income is necessary to determine the amount of support. You must serve this on your spouse at the same time as the Petition for Divorce is served on your spouse.

Once served within North America, your spouse will have thirty days to provide the required information to you. If he or she does not do so then you must file a Notice of Motion for financial disclosure before the Master, with an Affidavit in support, setting out what you requested, what was provided if anything, and what is still outstanding. You must ask the Master to make an Order that your spouse provide the financial information still outstanding by a certain date.

You must wait to receive that information ordered to be provided or wait for that date to pass before you can proceed with your uncontested divorce. You will then have to explain to the court in your Affidavit that although your spouse was required to provide you this financial information after being served with your Petition for Divorce and the Demand for Financial Information and an Order from the court that he or she provide you this information by a certain date he or she has failed or refused to do so and you will have to provide the best documentation or information that you can get to support the income you think is most accurate for your spouse, for the court to be able to proceed.

If the court is satisfied that you have taken all necessary steps to get this financial information, they may accept the other documentation or information you are able to provide to determine your spouse's income, so that they can set support if necessary, or agree that your Agreement is already for the appropriate amount of support.

Then they will grant you a Divorce Judgment. This Divorce Judgment is subject to a 31-day appeal period which must expire before your divorce is final, just in case anyone decides to appeal the Divorce Judgment.

A divorce takes effect on the 31st day after it was granted. Spouses cannot re-marry until the divorce takes effect. Once the divorce has taken effect, you can get a divorce certificate. You can use this certificate or a certified copy of it as proof of your divorce. Your divorce has legal effect throughout Canada.

Who Can Get Divorced in Manitoba

The *Divorce Act* says that if either spouse has been ordinarily resident in a province for at least one year, either of the spouses can file for divorce in that province. So, if you or your spouse has been living in Manitoba for at least one year, either (or both) of you can file a Petition for Divorce in The Manitoba Court of King's Bench.



The Court of King's Bench Rules

Rule 70 of *The Court of King's Bench Rules* deals with family law issues before the court. It sets out what forms you must fill out and file with the court and what procedures you will need to follow to get a divorce. For an uncontested divorce, you and your spouse can apply to the court jointly, as co-petitioners, or, one person can file the Petition for Divorce and the other can fail to respond, allowing the petitioner to proceed on an uncontested basis. If the respondent files a form called an Answer, then the divorce becomes contested. **This guide does not deal with contested divorces.**

Procedures to follow to get an Uncontested Divorce

You have a choice in deciding how to file for divorce. If your spouse and you are willing to work together, you can file jointly as co-petitioners. You can also choose to file as petitioner and respondent. This is the most common way it is done in Manitoba.

The advantage to filing jointly is you do not need to serve your spouse. One possible disadvantage is you must work together on the Petition for Divorce. You might think that filing as joint petitioners would save time since you do not have to serve your spouse, however in most cases it takes the same amount of time. This is because a Central Divorce Registry (CDR) certificate (a document that says that a divorce has not been started in another province or territory) is required and will take six to eight weeks to arrive. The hearing cannot be set down or the affidavit determination requested until the certificate is available. The serving of the Petition for Divorce normally takes place during the time you are waiting for the CDR certificate.

If all matters are not completely resolved or if the parties may have difficulties during the process, they might want to file as Petitioner and Respondent in case some contested issue must be decided by the court.

