

Legal Requirements for Divorce

Background

The law of divorce involves both federal and provincial legislation. This is due to the division of powers between the federal and provincial legislatures in the Canadian Constitution. 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 Queen'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 can't immediately get a divorce simply because you decide you want one, or have agreed with your spouse to get one. In order 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, and one or both spouses having the intention to be physically separated. This intention must be communicated to the other spouse. You may be able to count time that you were living in the same residence as part or all of 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 won't interfere with the calculation of the one-year period.

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 didn't condone the adultery (this means you didn't forgive the adultery and that you separated immediately afterwards). The law also says that there must not have been connivance (this means you can't 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. Your spouse may want to dispute the evidence.

Courts do not take into account whose fault the divorce was when they decide on spousal support payments, so using these forms of proof is not helpful in that regard. Courts also do not tend to view evidence of adultery as proof of inferior parenting, so it is not relevant to child custody claims either.

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. If you have an

oral hearing, at court the judge will ask you whether reconciliation is possible. 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 an appropriate child support arrangement can be complex. If there are children of the marriage and you have not determined support for them you should seek assistance from 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 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, each spouse's financial information and the details of the arrangement should be provided to the court. 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 or not 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's 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 other income such as pay stubs or a letter from an employer. You will need updated pay stubs to prove current income if filing after May of any year.

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 there. 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 Queen's Bench.

The Court of Queen's Bench Rules

Rule 70 of *The Court of Queen'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 have to 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 initiated in another province or territory) is required and will take 6-8 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 has to be decided by the court.