

GUIDE TO DIVORCE & MENTAL CAPACITY

Every adult should consider the implications of becoming mentally incapable of managing their own affairs, whether because of accident, ill health or old age. In the event this happens to a loved one, the strain can sometimes be too much and result in the marriage breaking down.

ARE YOU ABLE TO GET DIVORCED IF YOUR SPOUSE LACKS CAPACITY?

The short answer is yes.

HOW DO I START THE PROCESS?

A doctor needs to confirm that your spouse has not got the ability to make decisions themselves. Once confirmed, your spouse will be classed as a 'Protected Party' by the Family Court and as such needs what is called a 'Litigation Friend' to make decisions and act on their behalf.

HOW DO I GET A LITIGATION FRIEND?

If your spouse already has a Deputy appointed by the Court of Protection to make decisions about their welfare and/or finances they need to apply to the Court of Protection for additional authority to act as Litigation Friend in the divorce. When the authority is obtained that person will then be able to conduct the proceedings on behalf of the spouse.

WHAT IF MY SPOUSE DOESN'T HAVE A DEPUTY?

A relative over the age of 18 or if there are no relatives, the local authority or a solicitor can apply and be appointed. The process is then the same as above for the Deputy to also become a Litigation Friend.

CAN MOGERS DREWETT ACT FOR THE DEPUTY/LITIGATION FRIEND?

If you have been contacted to act on behalf of the spouse who lacks capacity we can assist in obtaining authority for you to become a Deputy so that you can represent them in a divorce. The Deputy will need a solicitor, we can act for the Deputy, however we cannot act for both spouses.

HOW IS IT DIFFERENT FROM A 'NORMAL' DIVORCE?

Aside from needing a Litigation Friend to act for your spouse rather than them acting for themselves, there is no difference in terms of the procedure in relation to the divorce.

However, the fact your spouse lacks capacity may mean other considerations need to be looked at in more detail such as:-

- the needs of the party without capacity (this is likely to require medical evidence)
- life expectancy linked to needs
- any impact the settlement would have on benefits/care home fees.

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