

PRACTICE NOTE 9

UNCONTESTED DIVORCE DOCUMENTS

It has come to the attention of the Court that documents filed in support of uncontested divorce petitions are often deficient or incorrect in the following manner:

1.
 - (a) Pursuant to s. 11(1)(b) of the *Divorce Act*, the Court is duty bound to ensure that all “children of the marriage” have been adequately provided for financially. Some counsel appear to be of the mistaken belief that merely because a child has reached their 16th year, the child is no longer a child of the marriage requiring support. That belief is certainly incorrect and in contravention of s. 2(1)(b) of the *Divorce Act*. A child of the marriage may continue beyond age 16 if that child is unable to withdraw from his/her parents’ charge. There may be various reasons for that child being or remaining dependent, but certainly the most common reason is the child attending an educational institution whether academic or vocational in nature. That child may indeed remain “a child of the marriage” into their early twenties (i.e., graduation with first degree).
 - (b) In conjunction with the idea “child of the marriage” merely because the parents collectively agree that no maintenance be paid on behalf of the child(ren), it does not mean the Court will automatically accept such a decision. The Court’s duty is to be satisfied that adequate financial contribution toward the child has been anticipated, and the Court may order the maintenance be payable regardless.
 - (c) The use of the phrase, “there are no children under the age of majority” within the petition or affidavit concerning the children of the marriage, is in all likelihood of no consequence and therefore unacceptable. The Court asks that counsel clearly state if there are no children born of the union; or, if there are children:
 - (i) list the names and birth dates of all children of the union; and
 - (ii) qualify whether each child remains dependent pursuant to the definition of “child of the marriage” as found in s. 2(1)(b) of the *Divorce Act*.
2. Per Rule 70.19(5)(a), please state in the petitioner’s affidavit that there is no possibility of reconciliation.
3. Per Rule 70.19(5)(b), please state in the petitioner’s affidavit that all the information in the petition is correct (not the information in the affidavit), and subsequent to that statement, list any additions, omissions or corrections applicable to the petition since its issue.
4.
 - (a) Please refer to any settlement of division of assets by document name (e.g. Separation Agreement or Memorandum of Settlement) within the petitioner’s affidavit.
 - (b) In drafting Divorce Judgments, please do not lift/transfer long unenforceable excerpts from Separation Agreements pertaining to such things as what the attitudes of the parties should be or to what the parties will “confer” upon. Counsel are aware the Court is limited by the governing statutes in what it can enforce and to represent otherwise is a disservice to one’s client.
5. Per Rule 70.19(5)(g), if the parties have reached a suitable division of property, either by formal or informal agreement, or if there is to be no division of property, the petitioner’s

affidavit must state that they do not wish to claim division at this time and that they understand they may be barred from doing so later.

6. According to Rule 70.19(5)(c), if the Certificate of Marriage filed in support of the motion is not signed by the Director of Vital Statistics for Prince Edward Island, the petitioner's affidavit must refer to the Certificate by title, date and place, name and office of issue, and state that it contains the correct particulars.
7. Please ensure all particulars of draft judgments are cross-checked with the petition for accuracy, as it is obvious that a number of documents are not being proofread before leaving counsel's office.
8. Divorce judgments should not contain clauses which purport to oust or restrict the court's jurisdiction to review or vary spousal or child support provisions in the future.

Approximately 75% of the Divorce Petitions that are filed contain one or more mistakes. Knowing that mistakes are so prevalent results in extra time having to be taken when the documents are reviewed causing further delay in the judicial system.