

Divorce (Syariah Law)

Conditions for Divorce

1. The marriage is registered in Malaysia in accordance to the Penang Islamic Family Law Enactment (IFLE);
2. The marriage is in accordance to *Hukum Syara'*; and
3. The divorce application must be filed in the state where the husband or wife resides.

Procedure for Divorce

1. You will first need to make a complaint with the Religious Department and state in your complaint that your marriage has problems and that you wish to have a divorce.
2. The Religious Officer will advise you to go for counselling and both you and your husband would need to attend a maximum of 3 sessions over a period of 2-3 months. When reconciliation cannot be reached the officer will then state that the counselling process cannot be continued (because the husband was not present during the sessions) and advise you to apply to Court for a divorce.
3. Proceed to the Syariah Court and bring along this letter and register your application for divorce under any one of the four options for divorce, it is also advisable that you simultaneously make an application for maintenance and custody of any child of the marriage.
4. Once the application for divorce is registered in Court, the Court will issue a summons against your husband. He will then need to attend Court on the date stated in the summons. Depending on the type of divorce you have applied, the Court will then investigate the consent to divorce and agreement by both parties to the divorce and proceed to grant divorce to the parties if he is satisfied that the parties cannot be reconciled, but under the divorce option by *talaq*, and where both parties consent, the court will ask the husband to pronounce *talaq* in the court and will make the relevant orders. If the husband does not consent, the court will refer parties to reconciliatory committee for further reconciliatory attempts. If the reconciliatory committee does not work, court will refer party to a *Hakam*, so it is not necessarily the judge's decision alone.

Types of Divorce

There are **FOUR** main types of Divorce and dissolution of marriage under the Penang Islamic Family Law Enactment .

1. Pronounce *Talaq* in Court

The Court will ask the husband to pronounce *talaq* in court. Normally the Court will advice one but the husband may pronounce up to 3 *talaq*. If it is one or two *talaq*, the divorce remains reconcilable within the period of *iddah*. (not necessarily 3 months, i.e the completion of 3 menstruation period of the wife). For 3 *talaq*, the divorce becomes final upon pronouncement and reconciliation within or after *iddah* period is not allowed unless the wife legally remarries and then divorce someone else.

2. **Divorce by Redemption** (*tebus talaq*)
This type of divorce is initiated by the wife. The wife offers to return her mahr or pay her husband an agreed sum in return for her husband agreeing to pronouncing a divorce.

3. **Ta'liq Divorce**
This is where if the wife can prove to Court through witnesses and oath that her husband has broken the conditions of marriages (i.e. has not provided maintenance, desertion or domestic violence). If the judge is satisfied that the conditions of the marriage has been broken that Court will then grant you the divorce.

4. **Fasakh** (Dissolution of marriage by order from the Court)
In order to apply for fasakh you'll need to prove either one of these conditions:-
 - (a) your husband has treated you cruelly (e.g. abused you physically and mentally; forced you into immoral behaviour, obstructed your religious obligations; associated with prostitutes, mistreated your property or according to Syariah law treated you unequally compared to his other wife/wives);
 - (b) he has failed to provide maintenance;
 - (c) he has been sent to prison for more than 3 years;
 - (d) he has left home and not contactable for at least one year;
 - (e) he is impotent or has refused sexual intercourse after at least 4 months of marriage, or at least 1 year;
 - (f) he has been insane for at least 2 years;
 - (g) he is suffering from leprosy, or a sexually transmitted disease; or
 - (h) your consent to the marriage was been given by force, mistake or unsound mind.
 - (i) any other ground allowed by Hukum *Syara*

Important matters related to Divorce application

There are **THREE** main issues to consider in a Divorce. 1. **Maintenance for wife and children**, 2. **Hadanah or Custody of children**, 3. **Matrimonial Assets and Accomodation Rights**

1. **Maintenance (For Wife)**

According to the *Hukum Syara'*, the Court has power to order the husband to pay maintenance to his wife. The Court has the power to also order a collateral to be made with the maintenance.

In deciding the amount of maintenance to be ordered, the Court will consider:

- (a) the earning capacity of the husband; and
- (b) financial needs of the wife.

A wife's right to maintenance may cease when:

- (a) when the wife dies;
- (b) when the wife is disobedient (*nusyuz*); and
- (c) when the wife remarries.

Maintenance for children

In Islam, it is the husband's responsibility to maintain the children whether the children lives with him or with his wife or any other person. He must provide accommodation, food, clothing, medical treatment and education in accordance to his ability and capacity or pay costs instead. The order for maintenance expires when the child attains **eighteen (18) years of age**.

2. Custody (*Hadanah*) and Guardianship of Children

In Islam, a mother is given the primary right to the physical custody or *hadanah* of her child. Under the IFLE, a father has the primary guardianship rights to the child. The guardianship rights mainly refer to decisions about the legal and property rights of the child. In any case, the father will always have the primary responsibility to maintain the child. Rights to guardianship and physical custody may be modified by the Court if the relevant party breach conditions provided by the IFLE.

In deciding the **guardianship rights**, the person must be:-

- (a) a Muslim
- (b) a person of sound mind and age;
- (c) living in a environment suitable for a child; and
- (d) a person of good behaviour in Islam.

3. Matrimonial Assets

Matrimonial assets are assets **both parties acquire** during marriage. In this situation the Court will normally order a sale of the property and divide the proceeds of the sale between the parties. The Court will also take into consideration the following when making the order:-

- (a) How much you and your husband contributed in money terms to obtain assets- your role as a housewife will also be taken into consideration as a financial contribution.
- (b) Any loan borrowed by either of you for the benefit of the family is also considered.
- (c) The needs of the minor children, if any of the marriage

Harta Sepencarian

Where the asset is acquired by the **sole effort of one party** only, the Court shall consider the following facts in dividing assets:-

- (a) The extent of contribution made by the other party who did not acquire the property, to the welfare of the family e.g. keeping the house clean, cooking and generally, looking after and caring for the family; and
- (b) The needs of the minor children, if any of the marriage.

Other Property

Any property that belongs to the wife before or after marriage is solely the wife's property and the husband can have no claim over the property except to the extent that he has contributed to the improvement of assets.

Accommodation Rights

A wife has a right to remain in the matrimonial home or be provided with an alternative accommodation by the husband upon divorce. These rights will cease when:

- (a) period of *iddah* ceases;
- (b) you re-marry;
- (c) if the wife has custody of a child to the marriage, the custody ceases.