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Delaying a Divorce Because of Financial Prejudice: The New No-fault Law and Practice

Executive summary

There can be real loss and prejudice in some divorce cases if the final divorce order, previously the decree absolute, is granted before the final financial settlement and its implementation in circumstances when the paying party then dies. Automatic entitlement to pensions, the primary circumstance, but also insurance policies, beneficial interest in trusts and similar are then not available as the applicant is now divorced, financial remedy claims are no longer available after death and there might have to be a difficult and separate civil claim. The usual answer from the law, and perhaps just as crucially by the practice of lawyers, is to delay the final divorce order until the financial settlement has been implemented. But the new no-fault divorce has ended some opportunities to defend a divorce pending the financial settlement or to go deliberately slowly. The new provisions in the legislation arguably do not go far enough to give adequate protection, if based on previous case law. In any event, what is the procedure being adopted at the digital divorce centres? This article looks at the background to the relevant legislation, and how it might be applied and is operating.[i]

Introduction and the risk and prejudice

The starting point is the circumstances in which this sort of case arises. There are automatic entitlements for a spouse during marriage in respect of the other's pensions. This is lost on the final divorce order being made; the marriage coming to an end. A pension sharing order may be made in respect of marital pensions so that the applicant spouse receives her share, or what she needs. Once this pension sharing order is in place,[ii] the final divorce order can be safely made and the applicant spouse has her own pension and doesn't have any risk or prejudice by the

pension holder dying. But if the pension holder dies between the final divorce order and the final financial settlement including pension sharing order, the applicant spouse will have no further remedy through the family courts. She will lose out significantly on what would otherwise be a pension sharing arrangement.

A similar situation may apply in relation to entitlements under insurance policies. An automatic entitlement as spouse ends on the divorce order and could not be recoverable if the policyholder dies before the Family Court makes an order. Less frequently but certainly relevant may be entitlements as a beneficial owner under trusts and other similar holdings.

So, in this context, and over several decades, where there would be this financial prejudice the family law profession has by and large operated a system of putting over the final divorce order until the final financial settlement has been made. Very often once the possibility of any financial prejudice becomes clear, the request would come from the lawyer of one spouse to the lawyer of the other spouse to agree, in terms, that no one would apply for the final divorce order until the financial settlement was completed. Very often that agreement would be forthcoming. Where there is any prospect of financial prejudice, it’s thoroughly reasonable. Advice was given that making this commitment would save the costs of any application and avoid animosity and contentiousness. This agreement was often recorded on the court file either as an agreement or a formal undertaking not to apply. Moreover, and as set out below, the profession often didn’t trouble itself too much with the technicalities (restrictions) of and in the law, not least because the law didn’t help in all circumstances. Lawyers got on with it for the best progress of cases and reasonable outcomes.

But family law also engages in highly adversarial situations and sometimes one party may not play ball, may refuse and insist on going ahead with the final divorce order. In those circumstances, an application had to be made to the court to delay the final divorce. These applications were rare but certainly occurred. And it was at this point that scrutiny of the technical law found the position was sometimes wanting.

The previous fault-based divorce system had ways to overcome the unreasonable difficulties presented by one party wanting to pursue the granting of the divorce before the financial order where there could be financial prejudice to the other party. If it was the applicant who was at potential risk and if it was known that the other party would not be agreeable to holding off on the final divorce, the simple answer once the acknowledgement of service arrived was not to progress to the conditional order. Either the respondent had to start their own divorce or try to find other

ways of encouraging the divorce to go through. They might not have had their own grounds to petition for divorce themselves or it was in any basis a nuisance to have to start a new petition if either the basis of 2 years' or 5 years' separation. These were additional factors encouraging sensible resolution. By and large it often worked.

However once no-fault divorce arrived, the opportunity to prevent the final order being granted was more limited. What opportunity would there be in the new legislation to hold off the final divorce order? Was it fit for the new purpose?

Original position in the 1973 legislation and before no-fault divorce

The provisions are in ss 9 and 10 Matrimonial Causes Act 1973 (MCA). Although fairly cumbersomely worded, for these purposes they are similar in intent and outcome, i.e. a request to delay the divorce. They are, however, completely different in the party to whom they apply. Section 9 is for the divorce applicant when the respondent to the divorce wants the divorce to be pronounced but the applicant, the financially vulnerable party, seeks to delay it pending the financial settlement. Section 10 is for the respondent where the applicant for the divorce wants the divorce to be pronounced and the respondent is the financially vulnerable party who seeks to delay the final divorce. It is crucial for practitioners to make the distinction.

The original 1973 wording of ss 9 and 10 bears alarming similarity to the present law in circumstances where so much in law and society has changed. Section 9(2)[iii] of the pre-no-fault divorce legislation recorded that if there had been no application for the final divorce order, and 3 months had elapsed since the earliest time the applicant could have applied for the divorce order, the respondent could apply for the final divorce order. On that application, the court would make an enquiry and could make the final divorce order, rescind the conditional order[iv] or make any other order.[v] The applicant for the divorce would oppose the respondent obtaining the final divorce order by reason of financial prejudice.

Section 10(2)[vi] of the pre-no-fault divorce legislation is for the respondent to prevent the divorce being finalised by the applicant pending a financial settlement. However, this statutory protection only applied in circumstances of 2 years or 5 years of separation, and it was only the respondent who could in effect delay the conditional order. In other words, it was not available to the applicant (then known as petitioner), nor was it available in the other three, fault-based, grounds. Section 10(3) was explicit that in considering whether to make the s 10(2) order in effect delaying the pronouncement of the final divorce order, the court had to take into account all of the

circumstances including financial position of the respondent as it was likely to be after the death of the applicant if they should die first. In other words, exactly the circumstances contemplated above. The court *shall* not make the final divorce order unless satisfied the applicant should not require to make any financial provision for the respondent or that the financial provision made[vii] by the applicant for the respondent was reasonable and fair or the best that could be made in the circumstances.[viii] There were two exceptions in s 10(4) in which the court would make a final divorce order notwithstanding the circumstances in s 10(3) if either there were circumstances which made it desirable the divorce order should be made without delay[ix] or the court had obtained a satisfactory undertaking[x] from the applicant that he would make such financial provision[xi] for the respondent as the court may approve.[xii]

This s 10(2) remedy was only available in circumstances of divorce applications based on 2 or 5 years of separation. Parliament anticipated in the 1973 legislation that most people would use the so-called civilised grounds of a period of separation. That might have been the case in the first couple of decades but certainly wasn't so in the past couple of decades when parties were less willing to wait, hence the greater use of fault-based grounds. Technically, this disallowed any access to s 10(2). In reality applications were entertained. These issues needed to be addressed in the reforms of no-fault divorce which introduced a completely new process of who could apply. It is important to understand this in the context of the position in law now.

Who can now apply at each stage of the divorce? [xiii]

For a careful understanding of the circumstances of who can now apply to delay the divorce and when, it's important to understand who can and cannot apply at each stage for the divorce, the conditional order and the final divorce order:

1. A can apply for a divorce.
2. B can apply for a divorce.
3. A and B can apply for a divorce jointly.
4. If A applied for the divorce, A can apply for a CO (conditional order) but B cannot
5. If B applied for the divorce, then as above for A.
6. If A and B applied for divorce jointly, they can apply jointly for a CO or, on notice, one of them, e.g. A can apply alone.

7. If A alone applied for CO, A alone can apply for the final divorce (DA) 6 weeks after a CO. A cannot agree to it being joint so A and B cannot apply together.
8. In (7) above, if A doesn't apply for the DA, B has to wait 3 months to apply for the DA after the earliest date A could apply.
9. If A and B applied jointly for the CO, both can apply jointly for the DA or either, e.g. A, on notice, can apply alone 6 weeks after the CO.
10. In (7) and in (9) above (if it were a sole application for DA and not now joint), B applies under s 10(2) to prevent A applying for the DA after 6 weeks and in effect to delay the DA.
11. In (8) above, B has to apply for the DA and in doing so A opposes under s 9(2), in effect to delay the DA.

It will be seen that the new divorce law creates a different situation for the respondent to a sole divorce compared to a joint divorce application. Lawyers quickly realised that there remained often a significant advantage in a sole divorce application and consequently a sole application for a conditional order. It is certainly not a process of anyone can apply at any time interchangeably[xiv]

As to the extra 3 months before a respondent can apply for the final divorce order, the old law has been retained, perhaps rather cumbersomely. It is difficult to see why. The extra 3 months will rarely mean the difference in finalising a settlement. It might have been far better to have had simultaneous time periods but better protection against financial prejudice.

The position in law now

As the new divorce legislation was going through Parliament, organisations such as the Law Society lobbied for more explicit and clearer protection for the financially vulnerable spouse in the context where the divorce would be concluded within 6 months, perhaps even with one spouse having had much less than 6 months' awareness. It was proposed that it was made far easier to oppose the granting of the final financial order if any or any material financial prejudice or risk was shown. This lobbying was unsuccessful. The position as far as the criteria for delaying the divorce doesn't seem to have changed much.

Section 9(2) has been amended in the new law. Where a conditional order has been made on the application of one party,[xv] then any time after 3 months from the earliest time the applicant could have applied for the divorce order, the so-called respondent can apply to the court for the making of the final divorce order. The other party can then oppose, in effect seek to delay, whereupon the court can refuse or allow the granting of the final divorce order or make other

orders.[xvi]

Therefore, if a party is anxious that there might be financial prejudice by a divorce order before the financial order is made, ideally, they should be the original sole applicant for the divorce. This will give them an additional 3 months to try to finalise the settlement otherwise then applying under s 9(2). These tactics are crucial for lawyers, although perhaps unfortunate in the spirit in which the new legislation was intended.

Section 10(2)[xvii] of the new law is mostly new as necessary given s 10(2)'s previous reference to separation petitions. Unlike s 9(2) where the application is 3 months after the earliest date the final divorce order could have been sought, an application under s 10(2) must be made quickly after the conditional order and before the 6 weeks have elapsed before the divorce order could be applied for. Section 10(2) applies when a conditional order has been made and is either in favour of one party to the marriage or in favour of both, but one party has since withdrawn from the application and then applied to the court under s 10(2) for consideration of their financial circumstances after the divorce, i.e. in effect the prejudice of a final divorce before the financial order. This is in effect the respondent seeking to delay the divorce. If the applicant wants to delay the divorce, they will simply not apply for the final order and let a further 3 months elapse and then apply under s 9(2).

New s 10(3) is a shortened version of s 10(3) of the pre-no-fault divorce legislation and says that the court *must* [xviii] not make a final divorce order unless satisfied that the applicant should not be required to make any financial provision for the respondent or the financial provision made by the applicant for the respondent is reasonable and fair or the best that can be made in the circumstances.[xix] In other words if the court doesn't think there's going to be any more financial provision for the applicant for the delay in the petition, the application won't be successful.

Parts of s 10(3) of the pre-no-fault divorce legislation are now s 10(3A). They reiterate that the court must take into account all the circumstances of the case including what the financial position of the respondent is likely to be after the death of the applicant should that person die first, i.e. the impact of the death of the applicant if they die first. Section 10(4) remains substantially the same.

It will be seen that there has been no change in the criteria to be taken into account by the court. It can certainly be argued that it is pretty clear: the court must not make a final divorce order unless satisfied there shouldn't be, in practice won't be, any other financial provision. This may not necessarily be reflected in case law.

The rules[xx] state that the court will make a conditional order final if satisfied the provisions of s

10(2)–(4) do not apply or have been complied with.

The position in case-law

So, what are the case-law principles and guidance on when a court should and should not delay the divorce, whether s 9(2) or s 10(2)? There had been a concern under the pre-no-fault divorce law that it was narrow and geared towards big-money cases. The risk of prejudice applies just as much in modest cases, and everything is relative. There should be no dispensations or special allowances in bigger money cases.

The leading case was *Thakkar*,[xxi] in which the husband wanted, under s 9(2), the final divorce which the wife sought to prevent in circumstances either of non-disclosure or of uncertain risk through trust interest or both or more uncertainty regarding his finances. The court found the existence of offshore structures might cause *very considerable prejudice* to the wife and therefore the divorce was delayed. The husband was quite probably a billionaire, with offshore interests. There were apparent concerns about whether he had given full and frank disclosure. However, the court made it clear that granting this provision to delay the divorce was exceptional, referring to special circumstances. Nevertheless, it declined to explain the special circumstances in which the court would or should (or now must) delay the divorce. This was unfortunate. The High Court could have said for example any case in which there would be any or any material financial prejudice to one party by one party dying after the final divorce order but before the financial settlement. Simple, clear and across the financial spectrum. But specifically, it did not.

Years earlier in *Dart*,[xxii] another big-money case, the Court of Appeal said that there was a presumption in favour of the granting of the final divorce order, weighing heavily against the finding of any special circumstances to delay a divorce. Hence it was felt at High Court level that such delaying orders would be very much the exception or at least were under the pre-no-fault divorce law. This was very unfortunate. Will this position still be upheld? *Dart* had also held under s 9(2), but presumably also under s 10(2), that the court had an absolute discretion as to whether to grant the application.

Mere outstanding financial provision proceedings are not in themselves a reason to delay the divorce; there might be no financial prejudice. This is another reason for the quick issuing of Form A, i.e. so that at the time of the application to delay the divorce there should at least have been financial disclosure and therefore better knowledge of whether there are any assets which might be lost on a death after divorce and before the financial settlement and what other financial

provision can be put in place instead. If for example there are no questions, for example about a pension sharing order and the only asset is the family home where the joint tenancy could be severed, there should be no reason to delay the divorce.

There is limited case law. In the excellent article referred to in note 1 by David Salter, he refers to the case law as positively *antique*, citing from past decades. Accordingly, *Thakkar* being the most recent has tended to dominate expectations of when, and specifically when not, a delay order may be made. This may be unfortunate and indeed unintended. Nevertheless, in the pre-no-fault divorce days, the general perception in the profession was that the availability of ss 9(2) and 10(2) had become limited, e.g. non-disclosure of significant assets, risk of losing out of entitlement in substantial trusts or other offshore vehicles. Not the wife of a plumber anxious after a long marriage to make sure she can have a pension sharing order! This was why there had been lobbying at the time of the legislation to extend or at least clarify the protective provision.

The position in the digital divorce centres

It will be seen that an application is needed under s 9(2) or s 10(2) to delay the divorce. But is this happening in practice? It seems that where opposition to the granting of the final divorce by either applicant or respondent is given to the online divorce centre, they will set the matter down for a review in the locality of the parties. Too often, even if the parties are represented in the financial matters, for costs reasons the parties may attend in person, unrepresented, and then have to try to argue the complexities of ss 9 and 10! With the encouragement to people to act in person on the divorce even if represented in financial matters, an opposition to the granting of the final divorce order can be given to the divorce centre without any merits, i.e. without any likelihood of any financial loss or prejudice. It might be that the only asset is the family home which can be protected by severance of the joint tenancy. This does not need a formal s 9 or s 10 process. It might be that they are simply waiting for a final financial order and one of them doesn’t want to have the divorce finished until it has come through, but again without any financial prejudice. Moreover, it may well be that the opposition communicated to the divorce centre gives no indication of relevant financial matters or specifically of financial prejudice. Nevertheless, a review hearing locally is likely to be fixed.

It must be remembered that these matters will be referred by the divorce court to a local judge under the divorce portal number alone, so the judge may not even know the number of the financial remedy proceedings to find out what the financial background is and review the merits.

The divorce centre is obviously taking a pragmatic view, particularly with the informality of litigants in person, and an email in clear terms seeking to delay a divorce is sufficient to prompt a court hearing review. Naturally when the court is hearing the review, the judge is likely then to insist on a strict adherence to a formal application and statement, including showing the financial prejudice of the pronouncement of an immediate divorce order. In practice, in many such cases, the issues may be sorted out at the review hearing, and directions sent back to the digital divorce centre to progress the divorce.

Good practice must of course be formally to apply with a statement in support which should set out, strongly particularised, what are the pertinent financial circumstances and what financial prejudice there will be. Only then can the court properly undertake its duties under ss 9(2) and 10(2).

Conclusion

So, the important point for lawyers is what criteria are being used in the consideration of delaying a divorce? Does the inclusion of the word *must* in the new s 10(3) legislation strengthen the expectation that there would be a delay in the divorce? Is it the case that around the country, district judges being given these review hearings are turning up *Thakkar* to look at the distinctive circumstances of offshore holdings? Or is it more likely to be the case that if there would be any or especially any material financial prejudice, e.g. in the context of a likely pension sharing order or similar, a delay order is made? If this latter is right, as I suspect, then is there any difference of practice between the High Court and District Judge level? District Judges faced with an applicant, quite probably at significant risk of prejudice if the divorce order was made before the financial settlement with the risk of a death, may well adjourn or delay the divorce to make sure that there is no such loss. It is difficult to see why this should not be the normal case where the court is presented with good evidence that such financial prejudice would arise by the immediate granting of the divorce order.

Of course, in big-money cases, insurance can be taken against the death of one party, and this does occur. But this is impossible in the wide range of modest asset cases.

The divorce law landscape changed with no-fault divorce. It was well overdue. The entire thinking and psychology, coupled with an encouragement of a collaborative approach, should be informing the new process. Yet it is still fraught with looking back to the pre-no-fault process. The fact a

respondent, as equally not at fault as the applicant and often only a matter of timing of who issues first, is at a disadvantage in the timing of the final CO and divorce[xxiii] seems odd and out of kilter. [xxiv] But crucially with a divorce based only on a 6-month notice given to the divorce court office, with no opportunity to defend, with financial claims invariably taking much longer than 6 months, the potential exists for parties to be in a prejudicial position as described in this article. The simple solution should be that if there is any material risk of financial prejudice, there should be a delay on the divorce.[xxv] Rarely will there be too much prejudice on a divorce delayed a matter of months or a year or so. The financial prejudice may be colossal. It must be hoped that if and when ss 9(2) and 10(2) go back to the High Court, the opportunity will be taken to make sure that financially vulnerable parties on no-fault divorce are suitably protected. In the meantime, solicitors should not be beguiled by the no-fault divorce concepts, and they have positive professional[xxvi] duties to take steps to protect their clients at key stages of the divorce.

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Notes

[i] The writer acknowledges the really helpful article by David Salter entitled ‘MCA 1973, s 10(2)–(4): a New Lease of Life?’ where he looks at a number of the relevant cases, describing them as *antique* and going back several decades. Available at: https://financialremediesjournal.com/content/mca-1973-s-10-2-ndash-4-a-new-lease-of-life.747b9e83536e40d28539249ded712cd5.htm

[ii] Here and throughout in the context of pensions it’s not just the timing of the making of the final financial order itself which is important but the Transfer Day which is in practice 28 days from the financial order, i.e. time for appealing +7 days or the divorce final order itself, which is a prerequisite for implementation of any financial order.

[iii] Section 9(1) relates to material facts not being before the court on granting the original decree so irrelevant here although the s 9(1) court powers are referred to in ss 9(2) and 10(2).

[iv] See the recent case of *Cazalet v Abu-Zalaf* [2023] EWCA Civ 1065 where this featured.

[v] As set out in s 9(1).

[vi] Section 10(1) can be ignored as it is in the context of misleading information leading to the conditional order.

[vii] Not just proposed: *Wilson v Wilson* [1973] 2 All ER 17.

[viii] It will be appreciated immediately both require fairly extensive review of the disclosure and possible s 25 outcomes.

[ix] This might be imminent death.

[x] Although held to be inadequate in *Grigson v Grigson* [1974] 1 All ER 478.

[xi] Not a general undertaking of an offer but specific proposals: *Grigson v Grigson* [1974] 1 All ER 478.

[xii] This in itself will again require the court to have full disclosure and carry out something akin to a s 25 exercise.

[xiii] The author is grateful to Annie Boxer, solicitor, of iFLG for her help on this section.

[xiv] As the new legislation was entering Parliament and the opportunity of a joint petition was highlighted, it had also been said that even if only one party applied for the divorce initially, both could jointly apply for the subsequent decrees to recognise that there was a collaborative approach and joint recognition of the relationship breaking down. This hasn't come through into the new law itself and the respondent remains in a different situation compared to the applicant if time is important.

[xv] Note not both parties, another reason to be the sole applicant for the conditional order and not agreeing to a joint request. If it were a joint CO, and one party was at potential financial prejudice, that party would refuse to apply for the DA and use s 10(2).

[xvi] Set out in s 9(1).

[xvii] Section 10(1) is now abolished.

[xviii] Observe the mandatory requirement. No-fault divorce legislation has *must* not *shall* as in the previous legislation. Can anything be read into this? Is there now a stronger obligation under this new legislation? This might be an important point of argument.

[xix] Each will require disclosure and a quasi-s 25 analysis.

[xx] See for example FPR 7.19(4)(f) and PD 41G, para 15.3(f).

[xxi] *Thakkar v Thakkar* [2016] EWHC 2488 (Fam).

[xxii] *Dart v Dart* [1996] 2 FLR 286.

[xxiii] Indeed, prevented from applying for the conditional order.

[xxiv] With the interchangeability of who can apply and when at each stage of the divorce, it's hard now to understand why respondents were put in such a less good position under the legislation.

[xxv] And if disclosure has not yet been satisfactorily provided, with reasonable reason to believe there might be assets which would be lost on death before the final financial order, then surely the benefit of the doubt should be to delay the divorce pending review when disclosure is available.

[xxvi] See the risk of negligence in *Griffiths v Dawson and Co* [1993] 2 FLR 315.