# England’s new divorce law from April 2022

Prof David Hodson OBE KC(Hons) MCIArb writes about the new no-fault divorce law coming into force in April 2022, drawing attention to its significant benefits but also highlighting some of the problems likely to occur in practice.

## Executive summary

From 6 April 2022 England and Wales has a new divorce law, so-called no-fault. It is the most significant change since 1969. It introduces an entirely new basis of obtaining a divorce and a new timetable. It will have different consequences for the applicant and the respondent. It allows joint petitions and joint applications for the final divorce. Rules will provide for email as default service method. In any event, divorce itself is now an almost entirely online process.

## The existing law until April 2022

The Matrimonial Causes Act 1973, mostly reiterating the Divorce Reform Act 1969, dramatically changed the Divorce law of England and Wales. After much public consultation and involvement of the Law Commission and a special working group under the auspices of the Archbishop of Canterbury, it introduced only one basis of Divorce which crucially could only be proven in one of five ways. These were mixed fault and non-fault. Amazingly, 50 years on, half a century of dramatic change in society, family life and expectations of the law, change is only now occurring. In 1996 Parliament passed a law to bring about no-fault Divorce but it was never introduced. But in these 50 years the Divorce court procedure has dramatically changed. I started practising in the mid-1970s and Divorce procedure and process in 2022 is unrecognisable. But the law itself has remained largely unchanged.

There is only one basis for a divorce which is irretrievable breakdown of the marriage. This is however very largely a legal fiction as far as grounds for a divorce is concerned. Irretrievable breakdown can only be proven in one or more of the following ways, using shorthand rather than

the technical legal wording:

- Adultery
- Unreasonable behaviour
- Desertion
- Separation for two years with consent
- Separation for five years without consent

None of these allow for immediate divorce without allegations of fault. In 1969 Parliament anticipated that the so-called civilised basis namely separation for two years with consent to a divorce would be most used. Adultery and unreasonable behaviour along with the rarely used desertion were a residue from the previous law. For a number of years, the so-called consensual basis of two-year separation was quite often used. This was often as well in the context of agreements reached regarding financial circumstances then contained in a separation agreement and made into a final order at the time of the divorce two years after separation.

However, as the 1980s moved into the 1990s, there was increasing distrust of these separation agreements. There were many instances where a party would seek to go back on the agreement and see different financial outcomes at court. At the time, in law, the court would certainly not necessarily follow and uphold a written agreement even if with legal advice. So increasingly lawyers recommended clients to seek an immediate divorce and with it an immediate financial settlement to avoid any subsequent risk of later claims for greater provision. This was only possible with the immediate grounds of adultery and unreasonable behaviour. So, it became, in lawyer perception, that these grounds were far more likely to be used instead of waiting for two years separation by consent.

In any event, wives as invariable applicants for financial provision could not wait two years if there was no financial agreement and the needed urgent financial help and provision. Accordingly, they would petition immediately in order to seek financial orders immediately. This produced the very skewed statistics showing that women were far more likely to be petitioners on adultery and unreasonable behaviour petitions. It was only ever about the financial need to seek courtassistance.

This trend accelerated in March 2001 when the UK was subject to EU law. There are many families in England and Wales with EU connections. To secure proceedings in England all that was necessary was to issue first. So, there was no waiting for two years separation by consent. Moreover, any marital agreement stating in which country proceedings should take place was irrelevant on where the proceedings for divorce under EU law should occur. These were huge incentives for immediate divorces. So, for many reasons fault based divorces were mostly used.

In the meantime, the divorce procedure had changed dramatically. In the 1970s, the aftermath of the new law, the court had an obligation to consider the arrangements for the children and the petitioner had actually to come to court to give evidence on oath at a very short perfunctory hearing. It was a thorough waste of time in practice. This was eventually scrapped, and a so-called special procedure introduced which was thoroughly non-special because it applied in almost all cases. The media enjoyed calling it the quickie divorce! It wasn't. Through the years, other changes made the divorce process almost administrative. In the last few years, it became an online experience. This is now mandatory for a divorce.

There remained the opportunity for a respondent to defend. These were exceptionally rare, but a very perverse case of Owens went to the Supreme Court in circumstances where the marriage had clearly broken down, but a divorce was not granted. This was the encouragement to reform. Parliament in 1996 had endorsed no-fault divorce but it had not been introduced. Throughout the world many other countries now had no-fault divorce. It was time for England and Wales.

## The new law

The Divorce, Dissolution and Separation Act 2020 introduces no-fault Divorce available from 6 April 2022. It covers marriage, civil partnership and nullity. Although the new no-fault law is very welcome, there are many problems potentially in its implementation and in practice.

Instead of new legislation writing a new law for divorce in the 21st-century, the 2020 Act amends the 1973 Act. It is impossible to see what the new law is without going back to the detail of 1973.

This is a huge pity. The Law Society had argued for a freshly worded law, easily understood and accessible.

Irretrievable breakdown remains the only basis of divorce. But as now it remains a legal fiction.

The new law provides for divorce after a period of time, six months, has elapsed. However, this is not a period of time during which the respondent is fully aware of the intention of the petitioner to seek a divorce. The six months period of time runs from the date that the papers are filed at the court, not from when they are served. A hugely controversial issue is that respondents may have many less months' notice.

20 weeks after the filing of the papers at the court and presuming the respondent has been served at some stage, the applicant can apply for the first decree of divorce, previously known as the decree nisi but now known as the conditional order. Six weeks after the conditional order, the applicant can apply for the final decree of divorce, the decree absolute as presently known and will be known as the final divorce order. It's far from clear why these separate decrees with this separate timetable have been retained in this new law. It has very historic origins.

Fundamentally a respondent cannot oppose a divorce or the pronouncement of the decrees, unless very narrow statutory provisions. It is no-fault. Fault does not have to be shown or argued or pleaded.

One of the best elements of the new law is to recognise that some couples want to apply jointly for a divorce. So, the new law allows for joint petitions; both can apply together to the court for the divorce. Even if only one person applied for the original divorce or if both did, both or either can apply for the conditional order. Equally either or both can apply for the final divorce order. This is highly commendable.

The new rules surrounding the new divorce have not been published, mid-January 2022, although I have seen them in draft. They make provision for service on the respondent in 28 days of filing the papers at the court but if this does not happen there is opportunity for an extended time. However, the rules do not allow the court to stop or extend the timetable if there are delays in service nor give any criteria about when an extension should be granted. It would seem that as long as the respondent is served a couple of weeks before the end of the 20 weeks then this will be sufficientin law. This will be highly regrettable and very unfair on respondents. Not only will they have no longer any opportunity to oppose a divorce, they will also have limited time and opportunity to persuade the other spouse not to proceed.

There will be a number of circumstances in which lawyers may decide deliberately to delay service. This might be in the context of domestic abuse by the respondent, cited in Parliament as the primary reason why respondents should not have the full 20-week notification. It might also be to reduce the likelihood of a foreign forum dispute or foreign proceedings. Serving late in the 20 weeks might reduce the likelihood of a pension sharing order before the final divorce. There may be many other good, and less good, reasons for delaying service and giving notification to the respondent. Many lawyers worry about circumstances in which one spouse has commenced divorce proceedings but not yet served the other spouse and continues marital life as if nothing was amiss and only much later serves the respondent who may then feel deceived and cheated as a consequence. Ironically the purpose of this new law is to find a better way of dealing with marital breakdown! It must be hoped that there is general good practice for immediate service on respondents.

There are very exceptional circumstances in which it is possible to delay the pronouncement of the final divorce order based on the adverse impact. This is invariably in circumstances where the so-called paying party might die after the final divorce order and before the financial settlement. The applicant would then no longer have an entitlement under life provision in pensions and insurance policies and would have to claim against the estate of their former spouse for any financial provision. The Law Society had argued there should be no final divorce until financial arrangements were finalised if there was any risk of financial prejudice to either spouse, but this was denied by Parliament and the promoters of the legislation. It will be important for those seeking pension sharing orders to expedite the financial proceedings. It will be good practice and give confidence to agree to hold off the final divorce until the financial settlement has been concluded.

There is power to make orders about service to make sure it comes to the attention of the

respondent. In exceptional circumstances service can be dispensed with.

A major change is that service will be expected by email. The usual email address of the respondent or indeed one specifically provided by the respondent for service. However wholly incongruously, the rules require the email service to be accompanied by a notice saying that the papers have been sent to a postal address by first class post or other form of delivery. It is hard to understand why this is required in the context of a fully digital divorce process. It raises questions about what happens if the postal communication doesn't arrive. It's unnecessary extra work and costs. Hopefully this element of the rules will be abandoned soon after introduction.

The respondent has 14 days from service to acknowledge the proceedings. Afterwards, when the 20 weeks from the filing of the papers has occurred, the applicant can apply for the conditional decree, the first stage of the divorce orders. Six weeks later an application can be made for the final divorce order, presently known as the decree absolute.

The rules require the respondent to be given 14 days written notice of the intention of the applicant to seek the final divorce order. This is not needed now and seems curious at best. A respondent cannot oppose the final decree, divorce order. Again, this may not survive long with the new process. The rules say that either party can be heard on the question of costs but if it is no-fault, it's difficult to see how either party should be responsible for the other's costs of the divorce. Certainly, if either party has created difficulties in receipt of the papers or service then discrete costs orders might be appropriate but it must be hoped that costs are not sought on a divorce. Otherwise, it will be a rehearsal of the problems in the marriage and why it has broken down. The whole purpose of this new divorce law is to avoid these arguments.

There are huge hopes for this new divorce law. No-fault divorce should have been introduced decades ago. However, outside this new commendable law surrounding elements are very problematical. The lack of respondents having any stipulated period of notification of the existing divorce apart from a minimum of 14 days before the application for the first stage of the divorce order. The lack of clear guidance to the courts on what to do if and when an applicant seeks an extension of time for service. The likelihood in the context of delayed service for the final divorce order to be well in advance of the final financial settlement therefore putting at substantial risk if the paying party were to die before the settlement leaving the other, now former spouse, to make claims against the estate or pension companies rather than through the family court. Curious and potentially unnecessary procedural steps ancillary to email service, application for the final divorce order and other stages.

The family law profession has at times shown remarkable ability to adapt a law for the best interests of those going through family breakdown. It must be hoped that the profession can take the good elements of this law and work with the very adverse elements to make them workable for the best interests of everyone involved in family breakdown including the impact on children.

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