

## **Divorce, Dissolution and Separation Bill**

### **2<sup>nd</sup> Reading – Briefing from Resolution**

#### **About the Bill**

The Divorce, Dissolution and Separation Bill will have its second reading in the House of Commons on Monday 8 June 2020, having passed the Lords stage with support from across the Chamber. The Bill will allow couples to divorce without having to assign blame.

As the leading family law body in England and Wales, representing 6,500 family justice professionals Resolution fully supports this Bill, which will help thousands of divorcing couples to minimise conflict, in turn reducing the negative impact of an acrimonious divorce on any children they may have.

These proposals have the support of the public, politicians from all parties, family law professionals and those who work with separating couples as well as the judiciary.

**We urge you to support and speak in favour of this Bill at second reading.**

#### **Why is this reform needed?**

- For a couple seeking a divorce under the current law (the Matrimonial Causes Act 1973), they cannot proceed simply on the basis that they decide together that their marriage is over and mutually agree to divorce, even though this is a common request. They have to establish one of 5 “facts” in support.
- The current mutual consent divorce requires couples to have been separated for a minimum of two years. Most couples do not wish or cannot afford to put their lives on hold for this length of time. If they want to get their divorce so that they can plan for the future, they have no option other than to allege adultery or ‘behaviour’. They become involved in a ‘blame game’ - this can often serve as a prompt for couples to revisit painful moments in the marriage which ultimately led to its breakdown.
- Furthermore, at present, it is possible for one of the couple to defend the divorce on one of the “blame” grounds, and keep the other spouse locked in the marriage against their wishes for 5 years from separation.

#### **What is the problem with the current law?**

- In the experience of Resolution’s members, the current divorce law doesn’t encourage co-operation. Rather, it introduces and/or escalates conflict from the outset of the divorce process, making it harder for people to make agreements about children and/or finance issues.
- All too often the first discussion is about who is to issue a divorce petition, on which fact, and the detail of the behaviour alleged. This can lead to polarised opinions and extensive correspondence, which sets a negative tone for the more important discussions to follow around children and money.
- It can derail discussions even for those who otherwise have chosen to try to reduce conflict, including those choosing out of court processes such as mediation, collaborative practice or

constructive negotiation. Our mediator members frequently see a mediation process derailing, or coming close to doing so, because of the discussions that have to take place about who blames who on the petition.

- Most divorces have at least one party representing themselves in proceedings rather than a trained legal professional. How can we expect them to know how to draft a behaviour petition or as a respondent, to know they don't have to defend the behaviour? This adds unnecessary confusion into the process.

### **How will this Bill help my constituents?**

- Each year around 100,000 couples get divorced in England and Wales. In the years that have passed since the last significant piece of family legislation, the never implemented 1996 Family Law Act, nearly two million people have assigned blame in the divorce process; many of those will have done so only because they had no choice (given the process available), and a large number of them will have been parents.
- The leading academic study "[Finding Fault](#)" found that **43%** of those identified by their spouse as being at fault for the marriage breakdown **disagreed with the reasons cited in the divorce petition**. This is unfair and unnecessary, and risks introducing or escalating conflict between divorcing couples.

### **Why is Resolution supporting the bill?**

- Resolution's 6,500 members are family lawyers, mediators and other family justice professionals, committed, through our [Code of Practice](#), to a non-adversarial approach to family law and the resolution of family disputes.
- However, our members' work to reduce conflict in divorce is often impeded by the current law, which requires many of their clients to apportion blame, even if neither of them wishes to do so or it isn't actually the reason the marriage broke down.
- In a recent survey of Resolution members, 9 out of 10 agreed that the current law makes it harder for them to reduce conflict and confrontation between divorcing couples. In addition:
  - 67% said that the current law makes it harder for separating parents to reach an amicable agreement over arrangements for children.
  - 80% believe that the introduction of no-fault divorce would make it more likely that separating couples would reach an agreement out of court.
- On a daily basis, our members see the negative impact the current law has on separating families. That is why we have been campaigning for over 30 years for a change in the law, and why we are pleased to see the government introduce a bill, supported by all main parties, that will bring an end to the blame game.

### **Who else supports no-fault divorce?**

#### *The public*

- A [2019 YouGov poll](#) showed 73% of the public supported divorce law reform.
- A separate YouGov poll commissioned by Resolution showed that 71% of the population agrees that no-fault divorce is urgently needed to protect the long-term interests of children.

### Senior judges

- No-fault divorce is supported throughout the family judiciary. Senior judges who have spoken in favour of reform include two former Presidents of the Family Division (the late Sir Nicholas Wall, and Sir James Munby); and Supreme Court judge, Lord Wilson of Culworth.
- Baroness Hale, former President of the Supreme Court of England and Wales, said at Resolution's 2018 conference, "There is no evidence at all that having to give a reason for [marriage] breakdown makes people think twice."

### Polymakers

- No-fault divorce is supported across political divides. In announcing this Bill, the Lord Chancellor said: *"The institution of marriage will always be vitally important, but we must never allow a situation where our laws exacerbate conflict and harm a child's upbringing. Our reforms will stop divorcing couples having to make unnecessary allegations against one another and instead help them focus on separating amicably."*
- The Bill received cross-party support in its passage through the House of Lords, seeing only two minor government amendments.
- Support for no-fault divorce was confirmed by all three major political parties ahead of the 2019 General Election, including commitments in the Labour and Liberal Democrat manifestos.

### Other groups

- During the passage of the Bill in the previous Parliament, Rights of Women, a legal charity, highlighted at committee stage that domestic abuse survivors often have concerns about issuing a divorce petition, particularly if they have to cite domestic abuse on the petition, and this can hinder their ability to escape an abusive marriage.

## Academic Research

In 2017, the Nuffield Foundation published the Finding Fault study, the first empirical piece of research since the 1980s into the operation of divorce law in England and Wales. It was led by Professor Liz Trinder at the University of Essex.

The study included interviews with people going through divorce, focus groups with lawyers, observation of the court scrutiny process and analysis of divorce court files, coupled with a national opinion poll and comparative analysis of divorce law in other countries.

It concluded:

- **Divorce petitions are often not accurate descriptions of why a marriage broke down and the courts make no judgement about whether allegations are true.**

In a national opinion survey, 43% of people who had been identified as being at fault by their spouse disagreed with the reasons cited for the marriage breakdown and 37% of respondents in the court file analysis denied or rebutted the allegations made against them by their spouse.

In practice these rebuttals are ignored except in the rare cases where the respondent is able to defend the case (as in the 2018 case of *Owens v Owens*).

- **Uncertainty about what constitutes unreasonable behaviour undermines the principle for the rule of law to be 'intelligible, clear and predictable'.**

In the 1980s, 64% of behaviour petitions were based on allegations of physical violence, but this has now fallen to 15%, indicating that there has been a large drop in the expectations of the courts as to what is needed to prove 'behaviour' in the last 30 years.

Despite this drop in the threshold, many lawyers and members of the public do not know exactly how low it is. This uncertainty means some lawyers are filing stronger and potentially more damaging petitions than necessary, while people who cannot afford a lawyer may think they have to wait out long separation periods because they do not 'qualify' for the faster fault-based divorce.

- **The use of fault may trigger, or exacerbate, parental conflict, which has a negative impact on children.**

In the national survey, 62% of petitioners and 78% of respondents said that in their experience using fault had made the process more bitter, 21% of fault-respondents said fault had made it harder to sort out arrangements for children, and 31% of fault-respondents thought fault made sorting out finances harder.

When interviewed, both petitioners and respondents gave examples of how the use of fault, mainly behaviour, had a negative impact on contact arrangements, including fuelling litigation over children. Some described threats to show the petition to children.

- **Fault does not protect marriage or deter divorce.**

The study found no empirical support for the argument that is sometimes made that fault may protect marriage because having to give a reason makes people think twice about separating. In fact, the evidence points the other way: analysis of case files shows fault was associated with shorter marriages and shorter gaps between the break-up of the relationship and filing for divorce.

#### **Aren't other reforms needed in family law?**

- Yes, there are many other changes Resolution and others wish to see, including greater provision for early legal advice, basic legal protections for cohabitants who often mistakenly believe they have 'common-law' spousal status, and more out-of-court processes falling within legal aid provision as well as reforms to divorce finance
- However, the Divorce, Dissolution and Separation Bill is not the vehicle to deliver these or other changes.
- **The Bill represents a landmark moment for our divorce laws.** Having been introduced – without any significant opposition – three times in the last 12 months, it must now pass through Parliament without delay. Every day it does not will see thousands of divorcing couples at risk of having to play the blame game.

#### **Would this Bill have helped Mrs Owens?**

Yes, undoubtedly. Mrs Owens was initially refused a divorce, which had been contested by her husband (contested divorces are rare but possible under the current law). The judge found that, even though the marriage had broken down, Mrs Owens had failed to meet the legal test and prove that her husband had behaved in such a way that she could not reasonably be expected to live with him.

Resolution supported Mrs Owens's case as it progressed to the Supreme Court, making interventions on the grounds of a wider public interest. The Supreme Court dismissed her appeal, as it was bound by the current law, and thus Mrs Owens was legally bound to remain in a marriage she no longer wanted to be a part of. **In the 21<sup>st</sup> century this has to be wrong and would not have happened if the proposed Bill was the law at the time she was seeking a divorce.**

Judges in both courts said that it was for Parliament, and not judges, to change the law. In the Court of Appeal, Sir James Munby, then President of the Family Division, spoke of an aspect of the law and procedures being based on "hypocrisy and lack of intellectual honesty".

## Won't this make divorce easier or quicker?

- There's no getting away from the fact that divorce is rarely easy. It's an emotional time and often involves difficult discussions about what happens to the house or arrangements for children. But for many people, it often marks the end of an intensely unhappy period in their lives and gives them the freedom to move forward.
- There is a robust body of research on the detrimental impact of conflict on the parties, wider family relationships and particularly (and most importantly) children. This law is needed in order to make divorce *kinder*, rather than *easier*.
- Another common misconception is that this law would make divorce quicker, whereas many couples experience a much shorter wait under current law than under what is proposed. The measures contained in this Bill include a minimum twenty weeks from the start of proceedings to when the application can be progressed to conditional order (presently known as the Decree Nisi). There is currently no minimum timeframe for this.
- Together with the retention of the minimum six-week period between the granting of a conditional order and the order being made final, this means couples will need to wait at least 6 months before their divorce is confirmed, whereas the quickest divorces at present can take only 4-5 months. This will naturally provide an opportunity for people to decide if divorce is still the right way forward for them.

## Will this lead to an increase in divorce rates?

There is nothing to suggest that a divorce process as proposed by the Bill would encourage divorce or result in any long-term increase in the divorce rate. The experience of other jurisdictions is that any increase after similar new legislation is short-term and temporary, reflecting those who have waited for the new legislation to come in.

That is exactly what happened in Scotland after the implementation of reforms in 2006 – within two years the divorce rate reverted to the pre-reform level and then continued on a downward trend, and with a reduction in the number of divorces based on fault.

## Conclusion

It is hard to find anyone who disagrees with the principle of reducing conflict in divorce. Academic studies, such as [Finding Fault](#), have endorsed the need for change. Having campaigned on this issue for many years, Resolution has secured support for reform from charities, politicians, judges and the public.

Divorcing couples have been forced to play the blame game for far too long – this Bill will bring it to an end. We urge all MPs to support it and help it progress through Parliament as quickly as possible.

## Contact us

Representatives from Resolution's No-Fault Divorce Team would be delighted to meet with you as the Bill progresses to discuss it further or answer any questions you may have.

To get in touch, email [divorcebill@resolution.org.uk](mailto:divorcebill@resolution.org.uk) or call us on 020 3841 0300.