



No-fault divorce is here: legal experts share their views

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IN NEWS

Today is the day that 'no-fault divorce' officially comes into force, marking an important moment for married couples wishing to separate amicably. Until now, couples have had to specify the grounds for their divorce – illustrating an irretrievable breakdown of the marriage.

Here, 8 legal experts share their views:

Charles Hale QC, barrister at 4PB, comments: *"The family justice system, like the criminal justice system, is creaking at the seams. This is despite huge efforts by those working in it including those in charge of Courts – the HMCTS if the MOJ do not look at drastic action – and that means more money. The backlog of cases caused by Covid, with the increased cases now, will combine to produce the perfect storm. Not only are buildings crumbling but cases are taking longer and longer to get to a judge. Whether its money or children cases, the reality is that it will always be the vulnerable and children that suffer the most. The vast majority of hard working judges would agree – they can't cope already, and they have little to no bandwidth for more."*

Alex Davies, Partner and Head of Family Law at Cripps Pemberton Greenish, argues that no fault divorce is a great solution to the wrong problem – and that what is needed more is reform of co-habitation laws. He says:

"The advent of No Fault divorce is a very welcome reform, but what is worrying is the crashing silence on Cohabitation law reform. The real issue that needs to be addressed is the law around Cohabitation. With marriage rates declining, it is clear that more and more couples are choosing not to marry. Many people find themselves financially extremely vulnerable when their cohabiting relationship ends because they are not entitled to make financial claims as married people can on divorce. This year marks the 15th anniversary of the Law Commission's report, 'Cohabitation: The Financial Consequences of Relationship Breakdown', which recommended wholesale reform. So far the government has

chosen not to act. It is high time parliament addresses this injustice that affects women disproportionately.”

Simon Donald, Partner, in the Family team at Cripps Pemberton Greenish, adds: *“The introduction of “no fault” divorces finally allows practitioners, divorcing spouses and the courts to move away from what has become an archaic requirement for the breakdown of the marriage to be proven by the ‘fact’ of a spouse’s adultery or alleged unreasonable behaviour, or requiring a couple to have lived apart for either two years or five years. The term “unreasonable behaviour” alone inherently carries connotations of blame, yet this was the only “fact” that could be relied on if no other applied. Divorcing couples were forced to use this language even when they themselves recognised that they had simply grown apart or their lives were moving in different directions. In reality, introducing “no fault” divorces fixes a problem that family lawyers and the courts had already worked hard to resolve in practice. This remains an important change in the law, and a significant change in the language that will now be used, which will be invaluable in changing the public perception of one party having to be to blame for the breakdown of the relationship. Importantly, it continues to promote the profession’s desire to avoid unnecessary conflict on the breakdown of a relationship.”*

Graham Coy, Head of Family at Wilsons Solicitors, shares his thoughts on whether the new, no-fault divorce law will impact lawyers and their workload:

“The law change won’t reduce lawyer’s work, but there is a risk it could increase it.

Over the last decade or so, most judges have recognised divorce law is out of date and that preventing a divorce when a marriage or civil partnership is over helps no-one. In the absence (until now) of the law changing, the Court has been constructive, and adopted an increasingly lenient approach to approving fault-based particulars. Tini Owens’ case was an unfortunate exception!

In short, divorces have proceeded for very mild reasons for a long time. Because of this, rather than instructing solicitors to apply for their divorce, many people have successfully done this themselves with only a small amount of legal advice in the background. This has helped people focus their legal spend on related children and financial matters, which is where the legal advice is really needed.

The well-publicised law change may well embolden people to apply for their own divorce or dissolution before speaking to a solicitor at all. That could lead to unnecessary risk for them though. Notwithstanding the ease of the application, there are a few bear traps in the process. Prevention is definitely better than cure and early legal advice can cost effectively help people avoid those traps. Corrective legal work at a later date will almost certainly be more costly and this would make work for lawyers.”

Graham Coy also believes that this law change will also mean people seek legal advice later. He says:

“As well as potentially encouraging more people to go it alone, the no-fault divorce process will also signpost mediation more strongly. Mediators are not advisors and they will continue to tell people they should seek legal advice alongside mediation to support the process. Legal advice is vital to, for example, support informed decisions about negotiations and settlement offers. No-fault divorce does not change this. If, though, people arrive at mediation without legal advice, and don’t heed the mediator’s recommendation to consult a lawyer, they may not seek legal advice until their case is at a relatively advanced stage.

A trend in simple cases becoming unnecessarily complicated. The fact that it will no longer be necessary to blame someone for the end of a relationship, does not change the legal complexity of the divorce/dissolution process itself. If the predicted trend in timing is borne out, and people endeavour to navigate the legal landscape without legal advice they will run into problems, often without even knowing it.

A trend in people exposing themselves to unnecessary legal risk. Not knowing when or how to proceed, but doing it anyway is clearly inherently risky.”

He adds: *"The new law removes the need to attribute blame. This makes the divorce/dissolution process sound simple, but it's not.*

Perhaps it is a good thing but the new law provides no real way to defend the divorce, though it could be contested on a few technical grounds.

Specialist family lawyers are worried about the potential for divorces to complete before financial matters have been properly resolved. Being a current (albeit separated) spouse is legally hugely different to being a former spouse. The new law provides (as per the old) for the final order to be delayed if finances are outstanding, but very few people doing it themselves will know about this.

If the spouse applying for divorce doesn't send a copy of the court application to their spouse within 28 days this will significantly reduce the time available for the respondent spouse to deal. They could find themselves only 16 weeks away from a conditional order having only just discovered they are to be divorced.

As it stands, it will take a minimum of 26 weeks to obtain a divorce. That's longer than the current process which will be frustrating for some people. There should be some provision for reducing this timescale in certain cases.

Aside from no-fault divorce, financial family law matters have the greatest need for review and reform. This is currently being debated in Parliament. Promises have been made that review will start within weeks. Nobody working in family law is holding their breath for this!"

Zoe Porter, Partner and Head of Family at Ashfords, believes the move to online applications will trigger more fraud in divorce. She says:

"I think there will be a surge in applications. Many new clients that I have spoken to have opted to wait until the 'no fault' divorce is available, rather than rush to issue a petition on one of the (current) old grounds and risk acrimony – particularly where unreasonable behaviour or adultery is used. The online process has been running for a while now, and hopefully the major wrinkles that many of us experienced when the portal was first introduced are a thing of the dim and distant past. Regrettably though, with so much of the country suffering the effects of COVID, most sectors are experiencing staff shortages and the court system is no different. We are already experiencing long delays in the process of applications (and the listing of hearings depending on where in the country you are based) and I can see this continuing for the foreseeable future."

Fiona Turner, Partner at Weightmans, comments:

"Ultimately, while the relative ease offered by no-fault is a plus point, the ongoing development of the online application process remains potentially problematic. Petitioners can apply for a divorce at any time of day or night, and can even do so via the gov.uk website, which can tempt couples to move through the process too quickly.

"This is compounded by the fact that some individuals choose not to use legal representation to make their initial application. While this does save money, it does mean that couples risk initiating, and concluding, their divorce proceedings without properly considering the ramifications if proper legal advice hasn't been taken in advance.

“Serious financial implications could inadvertently arise if a divorce is initiated without consideration of possible competing legal jurisdictions, which would have a knock-on effect on the scope of a financial settlement. Similarly, if a divorce is concluded by a Final Order, previously known as a Decree Absolute, before a financial order is put in place, this can cause challenges linked to occupation of the family home, pensions and insurance matters.

“Bringing in legal representation from the earliest stages means couples can secure a strategy that will help them to avoid any unintended consequences.”

Marilyn Bell, Partner and Head of the Family Law team at

SA Law, says: *“The advent of No-Fault Divorce will be particularly welcome to spouses who are also business partners and will be running their business together at least in the short term, and possibly the longer term. Getting divorced does not mean necessarily one or other having to leave the business.”*

Jonathan Madge, Director and Solicitor with The Family Law Company, adds: *“If we truly want to take an inclusive and collaborative approach, no-fault divorce could go even further and consider reinstating Legal Aid for those struggling to pay for legal advice, particularly with the cost of living increases and the impact of the pandemic across our communities. Since the Legal Aid cuts in 2013 there has been an increase in people representing themselves. These litigants-in-person have to navigate negotiations or the legal system alone and are often frustrated with the Court system, having usually started the process with (up until now) a contentious divorce. If funded legal advice is coupled with no-fault divorce, we hope that more cases could resolve amicably with less expense and conflict.”*