

## DDSA 2020—the view from the front line

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**Family analysis: As the Divorce, Dissolution and Separation Act 2020 (DDSA 2020) comes into effect on 6 April 2020, practitioners Alex Davies and Simon Donald, partners at Cripps Pemberton Greenish, Graham Coy, partner at Wilsons Solicitors, Zoe Porter, partner at Ashfords and Charles Hale QC, barrister at 4PB, share their views on the impact of the changes and what further issues need to be considered.**

### What are the practical implications of the changes?

**Simon Donald, partner at Cripps Pemberton Greenish:** The introduction of 'no-fault' divorce 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 divorce 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, partner and head of family at Wilsons Solicitors (GC):** 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 Over the last decade or so, most judges have recognised divorce law is out of date and that preventing a divorce when a marriage or civil partnership is over helps no-one.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 courts have been constructive and adopted an increasingly lenient approach to approving fault-based particulars—*Owens v Owens* [2018] UKSC 41, [2018] 2 FLR 1067 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.

### Will no-fault divorce reduce acrimony in family cases?

**Zoe Porter, partner and head of family at Ashfords (ZP):** Few cases end up in court over the actual divorce, and those that do very much grab the headlines. The vast majority of big cases that head to court are usually finance or children related, and the new divorce ground won't change this. The fees incurred for a divorce are de minimis in comparison to the potential legal fees of parties fighting over their assets, or their children, and good lawyers should be advising clients to take a commercial view on any potential dispute over divorce fees.

**GC:** The divorce cases which catch the headlines are very largely about money or arrangements for children. For a long time it has been very unusual for divorces to be defended. Ironically, it was the inability of Mrs Owens in 2018 to obtain a divorce against the wishes of her husband, and the widespread criticism of

the present system both generally and in legal circles, which seems to have been the catalyst for the government to act. Perhaps, the fact that in future divorces will not be fault based may encourage couples to take a less adversarial approach but I somewhat doubt it. There is a trend in simple cases becoming unnecessarily complicated and 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.

## Are there any remaining concerns or issues?

**ZP:** 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-19, 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.

**GC:** Couples may have been waiting to start the process until the new no-fault system was in place but, in practice, I have not seen any real evidence of that. With government IT systems there is simply no way of knowing if a whole new system will be able to cope. The current online service had its teething problems, is a bit 'clunky' but generally works quite well. The new law removes the need to attribute blame and 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. Legal advice is vital to, for example, support informed decisions about negotiations and settlement offers. No-fault divorce does not change this and if people endeavour to navigate the legal landscape without legal advice, they will run into problems, often without even knowing it.

## Is further reform is needed?

**Charles Hale QC, barrister at 4PB:** 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, HM Courts and Tribunals Service. If the Ministry of Justice does not look at drastic action—and that means more money—the backlog of cases caused by COVID-19, 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:** 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 report [Cohabitation: The Financial Consequences of Relationship Breakdown \(Law Com 307\)](#), 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.

**GC:** 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!

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