

The end of the blame game in divorce?

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Changes in divorce law in Guernsey and the UK are finally reflecting modern society, write Charles Hale and Elizabeth Couch

What is the issue?

The *Divorce, Dissolution and Separation Bill 2017-19* has passed through the UK Houses of Parliament to become an Act of Parliament. The reforms in England and Wales are likely to come into place in late-2021, following a period of implementation.

What does it mean for me?

The long-awaited changes to divorce legislation will simplify the divorce process and should accelerate the determination/finalisation of future financial arrangements.

What can I take away?

The grounds on which a party will be able to contest a divorce will be limited to coercion, fraud, legal validity or jurisdiction.

Gwyneth Paltrow and Chris Martin famously coined the phrase 'conscious uncoupling'. For them, it meant separating their family lives without acrimony, mudslinging and blame. Theirs was a divorce reflective of their overriding joint wish to depart their marriage emotionally intact and able to parent their children in harmony.

What we read about divorce in the press and tabloids is often the fights over money, infidelity and families locked in adversarial battles, but that is not the only reality. Many, like the former Mr and Mrs Martin, want to divorce without casting blame.

Unless a couple has been separated for two years and both parties agree that the marriage is over, it remains impossible to divorce in either Guernsey or the rest of the UK, without asserting as a fact that the marriage has irretrievably broken down and, consequently, stating that it was someone's fault. There has to be a petitioner on one side and a respondent on the other; one asserting blame and the other stomaching it, if they want to divorce.

For over 30 years in the UK, a campaign has challenged the need for fault in divorce and championed a different consensual approach to enable those unhappily married to separate without apportioning blame. Societies have changed beyond recognition in those years. Civil partnerships, same-sex marriage, opposite-sex civil partnerships and transsexual rights are now all part of the UK family law lexicon but, still, fault has to be alleged to end a marriage. One can even apply online for a divorce, so long as someone is blamed. The elephant has been in the room long enough and, finally, it is all about to change.

The Guernsey changes

The current law governing divorce and separation in Guernsey dates back to the *Matrimonial Causes Act (Guernsey), 1939* (the 1939 Act). In England and Wales, it is the *Matrimonial Causes Act 1973* (the 1973 Act).

Although family law in Guernsey has been amended on several occasions, it has never been substantially reformed. In 2015, Guernsey's parliament called for recognition that there was a need for the 1939 Act to be reformed and to ensure that it was both inclusive and reflective of modern society. The subsequent review of the 1939 Act was prioritised in the *Policy & Resources Plan*,¹ which led to a public consultation being held during March and April 2019.² Of the 158 responses received, 77 per cent were 'very supportive' of removing fault grounds for divorce and 73 per cent were 'very supportive' of removing the ability to contest a divorce.

In December 2019, a policy letter set out the proposals to amend,³ modernise and simplify the legislation, with the aim of reducing conflict and ensuring that the provisions were inclusive and fair. These were unanimously approved by Guernsey parliament and will apply to the whole bailiwick, including Alderney and Sark.

The significant changes provide for fault- and separation-based facts to be removed, and a form of no-fault divorce introduced. Where parties to the marriage are in mutual agreement that the marriage has irretrievably broken down, the new legislation will enable them jointly to apply to the court for a divorce. The ability to defend a divorce (save where it is challenged on the basis of jurisdiction/validity of marriage) will be removed in circumstances where one party applies to the court for a divorce without needing to prove fault and the requirement for the court to consider reconciliation will be removed.

Alongside these wide-ranging changes, some elements of the existing legislation will be retained: the 60-day 'cooling off' period will stay in place (albeit the court will retain the ability to reduce this period in certain circumstances), as will the current two-stage provisional order/final order process. Guernsey's unique judicial separation by consent procedure will be unaffected by the new law, allowing couples to continue to access the quick and cost-effective procedure that enables them to secure a legally binding agreement in

¹ *Billet d'Etat XII*, June 2017: www.gov.gg/article/160174/Policy-Resource-Plan-Phase-Two

² bit.ly/3klz9fb

³ bit.ly/3lewVtH

respect of children arrangements, property and finances without the need to prove that the marriage has irretrievably broken down.

When will these changes be introduced?

The changes are designed to reduce the time, cost (both emotional and financial) and conflict that is often triggered by a fault-based divorce process. Children of separated parents will undoubtedly experience less parental conflict during separation and court time will be freed up to allow the court to focus its resources on complex rather than procedural issues. The proposals should reduce the likelihood of the legal process being used by perpetrators of domestic violence exercising coercive control on their victim by defending the divorce and extending the abuse. Overall, the aim of the new legislation is to simplify the process and make it easier to navigate.

New primary legislation will be required to implement the approved proposals and repeal the 1939 Act. A draft Bill (*Projet de Loi*), and the subordinate legislation required to support it, will be drafted by the law officers and it is anticipated, subject to prioritisation of drafting legislation, resources and approval by the UK Privy Council, that the new law will be enacted in 2021.

England and Wales, finally there?

The *Divorce, Dissolution and Separation Bill 2017-19* (the Divorce Bill) finally concluded its passage through the House of Commons on 17 June 2020. It returned to the House of Lords to consider an amendment and the text agreed before actually, and at last, receiving Royal Assent (it has been through two parliaments, the Bill having come to a standstill as a result of first the prorogation of parliament by Boris Johnson and then the December 2019 general election). The changes are substantially the same as those proposed in the Guernsey law.

Before considering the changes, it is worth looking a little at the history.

Until the mid-19th century, the only way to divorce your spouse was through a private Act of Parliament, a Petition of Parliament. Divorce through judicial process was first introduced into England and Wales by the *Matrimonial Causes Act 1857*. At the heart of that process has remained fault.

Until 1969, a divorce could only be obtained if the party asking for the divorce could prove their spouse was at fault. Proving fault literally before a judge was required. The *Divorce Reform Act 1969* introduced, for the first time, an option for divorce based upon a period of separation and that was brought into force in the 1973 Act, still the primary legislation in England and Wales.

There was a previous attempt at change to no fault. Part 2 of the *Family Law Act 1996* provided expressly for it, however, it was never implemented and has now been repealed.

England and Wales has been as slow as Guernsey to adjust family law to meet modern society. Australia, Canada, Germany and New Zealand, to name but a few, have all moved to a no-fault basis of divorce.

Although the campaign for change has been constant among members of the family law community, it was not until the case of Mrs Owens and her desire to divorce her husband that renewed calls for change finally gained some proper traction. The case,⁴ getting all the way to the UK Supreme Court (the Court), saw Mrs Owens fail to prove her husband's behaviour was sufficiently serious to constitute the fault necessary to prove irretrievable breakdown. She left court still married and deeply unhappy in the knowledge that she would not be divorced until five years to the date of her separation. For many, including parliamentarians, enough was enough and a change had to come.

The Court gave the necessary impetus. The majority of the Court expressly invited the UK Parliament to urgently 'consider replacing a law which denies Mrs Owens a divorce in the present circumstances'.

In September 2018, the UK government released a consultation paper: *Reducing family conflict: Reform of the Legal Requirements of Divorce*.⁵ The consultation received more than 3,000 responses; they were overwhelming in support of change.

The stated objectives of the reforms are:

'to make divorce law consistent with the non-confrontational approach taken in wider family law and to recognise that a legal process that does not introduce or aggravate conflict will better support adults to take responsibility for their own futures and, most importantly, for their children's futures'.

However, Lord Chancellor Robert Buckland has recently stated that the Bill's reforms will not come into force on Royal Assent 'because time needs to be allowed for careful implementation', and that the government was now working towards implementation in late-2021.

It may well be that the Guernsey snail will beat the English and Welsh tortoise and bring into force the most significant change to divorce law before its English and Welsh counterparts.

For England and Wales, that may depend upon the Brexit negotiations and its impact on UK national family law... but that is another article.

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