Chapter 3 update: September 2021

A note on reading chapter 3 of the book:

There is nothing more irritating for the textbook writer than a legal change that comes along, quite shortly after publication of a new edition, that more or less calls for a total rewrite of one (or more!) chapters. But, family law being as mobile as it is, these things inevitably happen!

Your course lecturers will advise you specifically on what parts of chapter 3 of the main text they want you to read, and how much of the pre-amendment MCA law they want you to know in detail. But the following guide to what impact the Divorce, Dissolution and Separation Act 2020 has on the current chapter may be helpful.

- **3.1-3.4** continue to provide valuable background information.
- **3.5.1** remains relevant – the ground for divorce, if only in the most formal sense, remains 'irretrievable breakdown of marriage' (IBM)
- **3.5.2-3.5.5** – these sections cover the 'facts' on which IBM currently has to be based, but which will be swept away once the 2020 Act comes into force in April 2021. You may therefore only need to skim read these sections, in order to understand in broad terms the law that the 2020 Act will in due course replace.
- **3.5.6** – the time bar will continue in force, and the financial protection provision will continue to apply, but now in all cases; the hardship bar in s 5 will go; the special protection for religious marriage cases remains.
- **3.5.7** – this discusses the procedure whereby divorces are currently granted. The demise of the defended divorce under the 2020 Act will remove the necessity for different procedures for defended and undefended divorces that currently exists. But it is important to understand the criticisms of the current law to appreciate the impact of the procedure for undefended divorces (in particular).
- **3.5.8 –** again, useful data for evaluating the current law
- **3.5.9 –** judicial separation will remain available, but subject to the same sort of reform as divorce law itself – i.e. no facts
- **3.6 to the end of the chapter –** remain relevant for critique of the pre-amended MCA and discussion of various models of divorce, as material for evaluating both the case for the form that has been effected by the 2020 Act and for evaluating the new Act itself.

3.8.2 Divorce, Dissolution and Separation Act 2020

As we noted at page 197 of the main text, early in 2019 the government announced its intention to introduce a Bill to reform divorce law, replacing the existing 'facts' with a notification process that would itself evidence that the ground – irretrievable breakdown – was made out.

The Bill was published in June 2019 and swiftly progressed from its Second Reading stage in the House of Commons into Committee. After a hiatus caused by the December 2019 election, the Bill was reintroduced, and the Divorce, Dissolution and Separation Act 2020 was enacted this summer. It is due to be implemented in full in April 2022. So for now, the familiar MCA 1973 scheme of irretrievable breakdown + facts applies to anyone petitioning for divorce today.[1] But from April 2022, the new scheme will apply, transforming the process

[1] See section 8(4), 2020 Act, on commencement date / transitional provisions.

of terminating marriages and civil partnerships (for ease, we shall refer to both processes as 'divorce' below), as well as judicial separation from both type of formalized relationship.

Sections 1-5 of the 2020 directly amend the MCA 1973 and CPA 2004 – so the law will be found in the familiar location (for amended version of key provisions, see below). In summary, the 2020 Act effects the following fundamental changes:

- Removes all five (four for civil partnership) 'facts' whereby irretrievable breakdown of marriage/CP and the basis for judicial separation must currently be established
- Allows solo *or joint* applications for divorce: new MCA s 1(1) / new CPA s4(1)
- In their place, requires the application for divorce to be 'accompanied by a statement by the applicant or applicants that the marriage has broken down irretrievably' (s 1(2) / s 4(1A)), that statement to be treated by the court as 'conclusive evidence' of the ground, on the basis of which the divorce order must then be made, with no opportunity for the respondent in a solo application case to defend: s 1(3) / s 44(4)[2]
- The timetable for this process (s 1(4)-(8), s 37A(1)-(5)) will ordinarily[3] be as follows:
    - One-year time bar remains in force (so no application for divorce in first year of marriage/CP – see current MCA s 3, CPA s 41)
    - Party or parties apply any time thereafter
    - After 20 weeks from the start of the proceedings (i.e. the application), party or parties[4] may confirm that they wish the application to continue
    - Court must then make conditional order for divorce (equivalent to current decree nisi)
    - Court then makes final order (terminating the marriage/CP – equivalent to current decree absolute) no earlier than six weeks after that.[5] So a divorce will take at least six months from application to final order.

This timetable was one of the more controversial aspects of the Bill as it went through Parliament, in particular, related to the time from which the first 20 weeks start to run. 'The start of the proceedings' is understood to be the date of the application, not (in solo application cases) the date on which the respondent receives formal notice (service) of that application.[6] Concern was expressed that this will unfairly deny some respondents the benefit of having the full 26-week period (six months) that the law otherwise appears to

[2] Assuming that there are no grounds on which the application can be challenged, these being limited to grounds of jurisdiction (i.e. can the parties get divorced in England & Wales at all?), there being no valid marriage/CP to dissolve (i.e. the purported marriage was in fact void, voidable or a non-marriage), or some fraud or other procedural irregularity. Applications for judicial separation would require a simple statement that the party(ies) seek a judicial separation order: new MCA s 17, new CPA s 56.

[3] The court may reduce the period in an individual case, s 1(8) / s 37A(5): e.g. if one party terminally ill and wishes urgently to remarry.

[4] Despite the drafting if s 1(5)(b), it appears that rules to be made under s 1(10) will ensure that one party to an originally joint application will be able to confirm alone, which is clearly the intention: MoJ Response to consultation: MoJ (2019), *Reducing Family Conflict: Government response to the consultation on reform of the legal requirements of divorce*, 27, available at https://consult.justice.gov.uk/digital- communications/reform-of-the-legal-requirements-for-divorce/results/reducing-family-conflict-consult- response.pdf.

[5] Lord Chancellor is free to amend these time periods by statutory instrument, but not so as to make the combined periods exceed 26 weeks: s 1(6)(7) / s 37A(3)-(4).

[6] See MoJ (2019), 32.

require prior to the final order if they do not receive notice until (much) later.[7] Conversely, it is argued that the problem in such cases is frequently that the respondent is deliberately evading service, as a means to frustrate the applicant's attempts to secure a divorce.[8]

The Schedule to the Act makes a series of consequential amendments to other legislation arising from the removal of the facts and (more mundanely) the change in terminology arising from the adoption of conditional/final orders, in place of decrees nisi/absolute. Significant substantive rather than purely terminological amendments include:

- Removal of the 'hardship' bar (MCA s 5, CPA s 47) that currently applies only to 5-year separation-based cases: see Sch 1, para 5 and para 40, 2020 Act
- Retention of the provision that permits the delay of the grant of the final order to ensure that the financial interests of the respondent will be adequately protected post-divorce (MCA s 10, CPA, s 48), but extending it from separation-based cases to all divorces: see Sch 1, para 10 and para 41, 2020 Act

Technical objections related to issues like the timetable aside, the Bill as enacted had widespread support in principle amongst legal and other relevant professionals and the academic community. But – as one would expect given the turbulent history of divorce reform (and attempted reform) – there was notable opposition in principle, particularly from conservative evangelical and some other Christians. The MoJ noted how the numerical weight of opinion amongst respondents to its earlier consultation exercise ended up being strongly *against* the essence of the proposed reform, thanks to 'a surge of late responses' right at the end of the consultation period, apparently prompted by some groups encouraging their supporters to write in with standard-form objections. The MoJ remarked:

Ministry of Justice, *Reducing family conflict: Government response to the consultation on reform of the legal requirements for divorce* (2019), CP 58, 19

The concerns raised involved opposition based on a Christian view of marriage and divorce. The Government acknowledges and respects these views. Some of the objections – often arising from sincere convictions – were based on a misunderstanding of how the current divorce law operates in practice (although misunderstanding was not limited to these groups). The law on formation of marriage provides for marriage either through a civil ceremony or through a religious ceremony, including marriages solemnized by the Church of England. However, the law on divorce is secular and makes no general distinction between divorces of marriages according to how they were entered into. While we acknowledge views on the religious aspect of marriage vows, these are matters of conscience for the individuals in the marriage and are not matters that concern the legal requirements for divorce. Opposition to reform by Christian groups must be seen alongside the views of respondents more generally, who were broadly supportive of our proposals to reduce

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[7] Notably, the Law Society in its evidence to the Public Bill Committee: https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/results/reducing-family-conflict-consult- response.pdf

[8] See e.g. evidence given by other witnesses at the Public Bill Committee hearing: 2 July 2019, cols 23-24 – Mandip Ghai (Rights of Women) and Prof Liz Trinder, available at MoJ Response to consultation: MoJ (2019), *Reducing Family Conflict: Government response to the consultation on reform of the legal requirements of divorce*, 32, available at https://hansard.parliament.uk/commons/2019-07-02/debates/4599b1c5-9b6d-43c8- b8cc-67e1ee3d6c46/DivorceDissolutionAndSeparationBill(FirstSitting)

conflict.

Commentary:

English divorce law has therefore continued its way along the spectrum of possible divorce laws explored in 3.7 of the main text, the journey on which it began – very restrictively – back in 1857. Having gone through various manifestations of (gradually 'liberalised') fault-based divorce, through a mixed-model system of irretrievable breakdown based on fault/conduct or separation, the law has finally reached the end of the road: a system of notification based on unilateral (or bilateral) demand for divorce. Yes, time must pass before the divorce can finally be granted, but that time is very largely administrative – the 2020 Act's scheme, importantly, contains no requirement for the parties to separate or for any allegation of fault or conduct to be made; no opportunity to defend against the wish of one spouse to terminate the legal relationship; and – unlike the abandoned 1996 Act, discussed at 3.7.4 of the main text – no suggestion on the face of the law that the parties should use the intervening period in order to reflect,[9] consider, conciliate or agree on anything (though they would be well-advised to use the time productively to reach settlement on all issues related to their children's arrangements and their finances[10]). The *continuation* of marriage and civil partnership, like the *inception* of those status-based formalized relationships, therefore depends upon the consent of *both* parties. Once the consent of one party has evaporated, barring the admin, the marriage can be dissolved.

The introduction, for the first time, of the possibility of joint applications for divorce by the couple together also enables couples to approach divorce as a mutual project – not a case of one spouse divorcing the other (with the implication, however subtle, of blame and responsibility all on one side), but a decision that can be taken together, more or less amicably, the implementation of which the couple would then like to deal with together.

All this is a radical shift from the old concept of matrimonial offence and the role of divorce as a remedy for the innocent spouse to be released from their otherwise continuing obligations to the offending respondent. And spouses in the position of Mrs Owens will now, entirely straightforwardly, be able to obtain the divorce that they want – without having to make any specific allegations about their spouse's conduct or separating for a protracted period.

Is that a good thing or a bad thing? Has anything been lost as a result of this legal change? Or is this an arena in which, ultimately, the law is supremely unable to influence human behaviour?

[9] Though s 6 remains in force, as amended, its practical impact is widely regarded as being more or less non-existent.

[10] This is particularly true for pension provision – it would be most unwise for final order of divorce to be made before any pension issues have been resolved, as the pension will not remain shareable if the pension-holder dies after the marriage has ended.

Key provisions of the 1973 Act, as amended by the 2020 Act:

Matrimonial Causes Act 1973

1 Divorce on breakdown of marriage

(1) Subject to section 3 below, either or both parties to a marriage may apply to the court for an order (a "divorce order") which dissolves the marriage on the ground that the marriage has broken down irretrievably.
(2) An application under subsection (1) must be accompanied by a statement by the applicant or applicants that the marriage has broken down irretrievably.
(3) The court dealing with an application under subsection (1) must –
  (a) take the statement to be conclusive evidence that the marriage has broken down irretrievably, and
  (b) make a divorce order.
(4) A divorce order –
  (a) is, in the first instance, a conditional order, and
  (b) may not be made final before the end of the period of 6 weeks from the making of the conditional order.
(5) The court may not make a conditional order unless –
  (a) in the case of an application that is to proceed as an application by one party to the marriage only, that party has confirmed to the court that they wish the application to continue, or
  (b) in the case of an application that is to proceed as an application by both parties to the marriage, those parties have confirmed to the court that they wish the application to continue.

  and a party may not give confirmation for the purposes of this subsection before the end of the period of 20 weeks from the start of proceedings.
(6) The Lord Chancellor may by order made by statutory instrument amend this section so as to shorten or lengthen the period for the purposes of subsection (4)(b) or (5).
(7) But the Lord Chancellor may not under subsection (6) provide for a period which would result in the total number of days in the periods for the purposes of subsections (4)(b) and (5) (taken together) exceeding 26 weeks.
(8) In a particular case the court dealing with the case may by order shorten the period that would otherwise be applicable for the purposes of subsection (4)(b) or (5).
(9) A statutory instrument containing an order under section (6) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.
(10) …. Family Procedure Rules may make provision as to the procedure for an application under subsection (1) by both parties to a marriage to become an application by one party to the marriage only (including provision for a statement made under subsection (2) in connection with the application to be treated as made by one party to the marriage only).

2 … [repealed]

3 Bar on applying for a divorce order within one year of marriage

(1) An application for a divorce order may not be made before the expiration of a period of one year from the date of the marriage.

(2) [repealed].

4 … [repealed]

5 … [repealed]

6 Attempts at reconciliation of parties to marriage

(1) Provision shall be made by rules of court for requiring the legal representative for an application for a divorce order to certify whether the representative has discussed with the applicant the possibility of reconciliation and given the applicant names and addresses of persons qualified to help effect a reconciliation between parties to a marriage who have become estranged.
(2) If at any stage of the proceedings for a divorce order it appears to the court that there is a reasonable possibility of a reconciliation between the parties to the marriage, the court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a reconciliation. …

[**Sections 7-9 remain in effect**, subject only to minor consequential amendment of language]

10 Proceedings before divorce order made final: special protection for respondent

(1) …[repealed]
(2) The following provisions of this section apply where –
  (a) on an application for a divorce order a conditional order has been made and –
    (i) the conditional order is in favour of one party to a marriage, or
    (ii) the conditional order is in favour of both parties to a marriage but one of the parties has since withdrawn from the application, and
  (b) the respondent has applied to the court for consideration under subsection (3) of their financial position after the divorce.
(3) Subject to subsection (4), the court hearing an application by the respondent under subsection (2) must not make the divorce order final unless it is satisfied –
  (a) that the applicant should not be required to make any financial provision for the respondent, or
  (b) that the financial provision made by the applicant is reasonable and fair or the best that can be made in the circumstances.

(3A) In making a determination under subsection (3) the court must consider all the circumstances including –
  (a) the age, health, conduct, earning capacity, financial resources and financial obligations of each of the parties to the marriage, and
  (b) the financial position of the respondent as, having regard to the divorce, it is likely to be after the death of the applicant should that person die first.

(4) The court may if it thinks fit make the divorce order final notwithstanding the requirements of subsection (3) above if –
  (a) it appears that there are circumstances making it desirable that the order should be made final without delay, and
  (b) the court has obtained a satisfactory undertaking from the applicant that they will make such financial provision for the respondent as the court may approve.

[Section 10A remains in effect, subject only to minor consequential amendments of language]

Background materials:

The Bill and associated parliamentary materials
The Ministry of Justice's response to the consultation exercise and associated documents