Parliamentary Briefing

Divorce, Dissolution and Separation Bill
House of Lords, second reading

27 January 2020

The Law Society of England and Wales is the independent professional body that works to support and represent over 190,000 members, promoting the highest professional standards and the rule of law.

1. Introduction

This briefing outlines the views of the Law Society in relation to the Divorce, Dissolution and Separation Bill ahead of its Second Reading in the House of Lords on 5 February.

The Bill, which had its First Reading in the House of Lords on 7 January, introduces a system of no-fault divorce.

The Law Society unequivocally welcomes and supports legislation to introduce no-fault divorce.

Executive Summary

The Bill will reform the process in England and Wales for married couples to obtain a divorce or judicial separation and for civil partners to dissolve their civil partnership (a process termed dissolution), by introducing a 'no fault' divorce model.

The Bill will:

- Replace the requirement to provide evidence of conduct or separation with a new requirement to provide a statement of irretrievable breakdown followed by an overall period of notice of 26 weeks.

- Remove the possibility of contesting the divorce as the statement of irretrievable breakdown will be taken as determinative of such.

- Introduce the option for a joint application.

- Update the language used to ensure it is fit for the modern age; e.g. decree nisi to conditional order and decree nisi to final order.

The Law Society welcomes and supports the Bill and has been vocal in our support of no-fault divorce. In relation to the Bill the Law Society has one key area for improvement, that the 26-week period of notice should begin from the date of service e.g. when the respondent has formal receipt of notice or can be taken to have receipt of notice.

2. The Law Society's position

The Law Society welcomes and supports the Government's introduction of 'no fault' divorce in this Bill. We are also supportive of joint petitions and the principle of a divorce based on the statement of irretrievable breakdown of marriage coupled with the 26-week notice period.

There are several clarifications that could be made to strengthen the Bill and ensure that it is clear, fair and accessible. We outline these below.

a) Commencement of notice period

Clause 1(5) proposes that the notice period should commence from 'the start of proceedings.' We would support this in the case of joint petitions as both parties have knowledge and have agreed to begin a formal divorce process. However, we believe that in the case of sole petitions the notice period should begin from the date of service when it can be demonstrated the respondent has had, or can be considered to have, formal receipt of notice. We recommend that that provision should also be made within the Bill for when notice should be served by so as not to disadvantage either party. We believe this will create a level playing field, as much as is possible, for both applicant and respondent, and avoid a situation arising whereby a respondent genuinely faces a divorce with less than 20 weeks' notice.

It is proper that a respondent to a divorce is given the full 26-week period of notice that their spouse considers that the marriage has broken down irretrievably, irrespective of the fact that, absent agreement, they are rightly unable to prevent the divorce from being granted. If the notice period

runs from the start of proceedings rather than the date of service, the respondent may receive the notice long after the start of proceedings, whether due to court delays, interference from the petitioner in delaying receipt by the respondent, the simple length of time of delivery if abroad, or other administrative reasons.

This then puts a differing and discriminatory timescale on the respondent having less, perhaps much less, than 26 weeks while the Bill presumes the 26-week timescale is appropriate. It would be unfair and arbitrary if some recipients are to have less than the entire 26 weeks. It is equally vital that the requirement to give notice should not allow the respondent deliberately to evade service or stall and delay the divorce, and provisions already exist in family court rules to overcome this. It should not be onerous to record both the giving and receipt of notice, particularly given the increasing ability to communicate electronically and near instantaneously. Regulations can ensure that the respondent who seeks to exploit the requirement for notice should not be permitted to do so.

We would recommend the Bill is amended to ensure that the notice period in applications by one party to a marriage only, would start from when the notice was received by the other party to the marriage. We believe it is vital that both parties each have a minimum of 26 weeks for the divorce to proceed under.

b) Litigation free period of reflection

Any period of reflection should take place at the beginning of the process should either party wish to reflect on the fact of the divorce, and/or to allow both parties to consider how best to separate sensibly, including encouraging both to access early advice and explore non-court-based dispute resolution.

We therefore recommend a three-month period at the beginning of the process without any ancillary finance litigation (unless agreed by both parties or in the case of the need for urgent court assistance e.g. interim financial support). Children or domestic violence applications, e.g. occupation orders, non-molestation orders and special guardianship orders, should of course be available during this reflection period.

This period of reflection could then reasonably be used to engage in legal and financial advice and/or to start mediation or reconciliation counselling as appropriate. This would not prevent parties jointly engaging in voluntary disclosure and non-court dispute resolution, or engaging the court to approve any agreed financial order or to start financial proceedings if both agree.

We would recommend the Bill is amended to ensure that there is a three-month litigation free period from the time when the 26 weeks' notice runs for both parties, except for urgent and emergency protection applications and applications relating to any children.

c) Irretrievable breakdown

We support irretrievable breakdown as the sole ground for divorce. The Bill sets out that this will be established from the statement that accompanies the initial giving of notice.

We recommend a form of words is needed by the law to say that irretrievable breakdown is the ground for divorce at the initial giving of notice which is then confirmed at the conditional order (decree nisi) stage.

Anecdotal evidence suggests that particularly with online divorce, many litigants in person will commence proceedings, perhaps impulsively, but not then continue. However, if irretrievable breakdown is asserted from the initial giving of notice, the law will have held that there was already irretrievable breakdown even if they decide not to proceed.

A statement that the applicant asserts that the marriage has broken down can be given at the outset, which the applicant, or indeed the respondent or perhaps both parties, confirm in the application for the conditional order (decree nisi).

We would recommend the Bill is amended to ensure that the irretrievable breakdown of the marriage is only conditionally asserted at the start of the process and only finally declared as a matter of law once the initial notice is confirmed at the end of the process, when applying for the final decree.

d) Financial applications

If there are financial proceedings underway (Form A) no final order (decree absolute) should be granted until a financial order has been made if either party might suffer financial prejudice by a final decree before the final financial settlement.

There can be severe, sometimes irretrievable, financial prejudice to an applicant if final divorce is granted before a financial settlement is reached. This will be in circumstances where one party, the so-called paying party, dies after the decree absolute but before the financial settlement, as a consequence of which a claimant loses automatic entitlement to pensions, policies, insurances, trust

and similar beneficial interests and more. There should be a simple test, unlike the provisions in the Bill, of financial prejudice, whereupon the final divorce decree would be delayed until the financial settlement has been agreed. Good practice by many specialists is to agree delaying final divorce until final financial settlement. However, in the absence of agreement, case law is at best uncertain and therefore encourages litigation and at worst can be significantly prejudicial to a financially vulnerable applicant.

In cases where no financial proceedings have been issued and/or financial settlement has been reached by consent, the above does not apply and a final decree divorce could be pronounced without any delay. This does not prevent applications for final decree where there is no objection. It also does not require the grant of a divorce conditional on there being a final order – but rather simplifies the process of pausing the final divorce if one party is going to suffer financial prejudice by it being granted immediately.

We therefore welcome amendments tabled which would ensure that if a Form A has been issued for financial matters to be determined, the presumption is reversed for the final decree. The final decree can therefore only be successfully applied for prior to a financial order being made, if it can be proven that there will be no meaningful financial prejudice.

We also strongly recommend that there is very clear signposting within the online divorce and dissolution process to the need to properly resolve financial matters before final decree.

e) Other concerns

We note the below concerns as a matter of general principle:

- **Divorce application fees** – We believe the current court fee of £550 for divorce applications is too high and discriminates against those less able to afford it. The new process will require less administrative and possibly less judicial scrutiny and we believe that court fees should be reduced to both support the intent of this legislation and in recognition of the relative ease of online applications. Court fees should be proportionate to service.

- **Language** – We suggest that the wording and language used in the Bill be made more accessible, including the description of the process for obtaining a divorce and the terms used for both applicant and respondent. An alternative might be wording such as ‘an application for divorce between A and B.’ We also suggest consideration is given for wording and language to ensure that people who are disabled, or for whom English is not their first language, will not be disadvantaged.

- **Wider support information** – we support the opportunity for appropriate signposting to marriage and relationship support services and to non-court based dispute resolution processes.

Conclusion

We repeat the Law Society's unequivocal support for no-fault divorce and the ability of one party to exit a marriage on the basis that they consider it to have broken down irretrievably. We consider that it is vital that the responding party is properly informed of this decision.

For further information please contact:

Miki Bhalla (Public Affairs Adviser)
T: 0208 049 3981
E: miki.bhalla@lawsociety.org.uk