PENNINGTONS MANCHES

# REDUCING FAMILY CONFLICT: REFORM OF THE LEGAL REQUIREMENTS FOR DIVORCE

## Response to Ministry of Justice consultation from Penningtons Manches LLP

### QUESTION 1: DO YOU AGREE WITH THE PROPOSAL TO RETAIN IRRETRIEVABLE BREAKDOWN AS THE SOLE GROUND FOR DIVORCE?

**Answer: Yes**

### QUESTION 2: IN PRINCIPLE, DO YOU AGREE WITH THE PROPOSAL TO REPLACE THE FIVE FACTS WITH A NOTIFICATION PROCESS?

**Answer: Yes**

The report prepared on behalf of the Nuffield Foundation entitled *Finding Fault? Divorce Law and Practice in England and Wales* concludes: "In reality we already have divorce by consent or even (given the extreme difficulty and impracticality of defending a case) 'on demand', but masked by an often painful and sometimes destructive legal ritual of fault with no obvious benefits for the parties or the state".

This eloquently sums up our experience of the current law. Section 1(2) of the Matrimonial Causes Act 1973 forces those who wish to obtain a divorce without waiting for two years from the date of separation, not only to place the blame for the irretrievable breakdown of the marriage on their spouse (in the form of the fact of either adultery, behaviour or desertion) but to provide evidence in support of the chosen fact. This process can prove painful not only for the respondent to the application for a matrimonial order, who often feels that they are reading a false account of their behaviour, but also for the applicant, requiring them to relive those parts of the marriage they most wish to forget and / or to point the finger at their spouse when they may have no wish to do so. It promotes acrimony at a time when couples should be encouraged to use their energy to co-parent well and minimise bad feeling. What is more, it is rarely, if ever, a clear cut case of one party being at fault. As Teresa Williams states in her foreword to the abovementioned Nuffield Foundation Report, "Relationship breakdown and separation can be complex and messy. It cannot be readily categorised or date stamped, and the perspectives of those involved can differ legitimately".

Despite the compulsory obligation on the applicant to provide evidence, the court will make no enquiry into the evidence unless the application for divorce is defended. It is deeply unfair, as the Nuffield Foundation Report points out, that "the [applicant's] account in undefended cases will be taken as true even where the respondent rebuts the allegations without taking the procedural steps necessary to mount a formal defence". The effect of the current law is to allow the applicant to say whatever they want about the respondent to an application for a matrimonial order, including making allegations of violence or abuse, but to deny the respondent any real opportunity to challenge these allegations, save to rebut the allegations (which means that the petition remains on the file unaltered) or to adopt the costly, lengthy and, in the majority of cases, ultimately futile path of defending the petition. If the respondent chooses not to defend the petition, because it is too expensive to do so, or they simply want to get on with the divorce without delay, the allegations against them will remain on the court file. Understandably, this can cause the respondent great discomfort. Unfortunately, those applying for a divorce can and do sometimes use the threat of disclosing the fault allegations cited in the divorce petition, and the evidence provided in support, against the respondent in discussions about arrangements for the children.

The current law stands very much at odds with the general tenor of modern day family law, which places significant emphasis on the reduction of conflict. A quick glance at the first tenet of Resolution's Code of Conduct evidences just

how archaic the law is: "[The legal practitioner] will: reduce or manage any conflict and confrontation; for example, by not using inflammatory language".

It is difficult for legal practitioners to abide by the principle to which they subscribe, when conflict is demanded by the law at the very outset of proceedings. As the Government acknowledged in its White Paper, "Looking to the Future" (published in 1995), at a time when every effort should be made by professional advisers to reduce conflict "The need to cite evidence in support of an alleged fact has the effect of forcing couples to take up hostile positions from the very beginning, which may quickly become entrenched".

The situation has been made all the more difficult by the Judgement in *Owens (appellant) v Owens (respondent) [2018] UKSC 41*. Prior to this, practitioners in this firm (and, in our experience, many other firms) would, wherever appropriate, ensure that evidence provided in support of the "fact" cited was as anodyne as possible. This reduced conflict and minimised the possibility of the application being defended. However, there is now a significant danger that if the evidence provided in support of the fact cited is too anodyne, the application could be challenged successfully, costing both parties significant amounts of money, taking up court time, denying the applicant a divorce and ultimately increasing conflict.

The reality of the current situation is that for decades, spouses and those advising them have felt compelled to manipulate the reasons for a breakup to show that one spouse's behaviour has caused the irretrievable breakdown of the marriage, in line with the court's interpretation of the law. As James Munby stated in *Owens* in the Court of Appeal (*Owens v Owens [2017] EWCA Civ 182*): "...the law which the judges have to apply and the procedures which they have to follow are based on hypocrisy and lack of intellectual honesty. The simple fact is that we have, and have for many years had, divorce by consent, not merely [by waiting two years from separation to divorce by agreement], but, for those unwilling or unable to wait for two years, by a consensual, collusive manipulation [of the law]."

It is important to note that, in our experience, people do not take the decision to end a marriage lightly. Our clients have invariably thought long and hard about their decision and have often made many attempts to address the problems in their marriage before they come to see us. The vast majority of, if not all, people choose to proceed with a divorce only once they feel that they can longer go on in the marriage. Our experience is backed up by the findings in the Nuffield Foundation Report, which states: "What did emerge strongly from the qualitative evidence, however, is that the decision to end the marriage is not taken lightly. Marriage is highly valued as an institution and as a relationship, and not one that people give up precipitately".

The need to apportion blame and to provide evidence in support of the fact cited will not, and does not, deter people from divorcing. However, it invariably causesthem, and / or their spouse, additional upset and creates acrimony right from the start of the proceedings.

## QUESTION 3: DO YOU CONSIDER THAT PROVISION SHOULD BE MADE FOR NOTICE TO BE GIVEN JOINTLY BY BOTH PARTIES TO THE MARRIAGE AS WELL AS FOR NOTICE TO BE GIVEN BY ONLY ONE PARTY?

**Answer: Yes, we consider that provision should be made for notice to be given jointly by both parties to the marriage as well as for notice to be given by only one party.**

The ability to give notice jointly will reinforce the notion that neither party is to blame for the breakdown of the marriage. It will also enable parents to inform their children that they have come to the mutual decision to divorce. This is likely to reduce the level of conflict and therefore reduce the distress suffered by children when their parents divorce.

For obvious reasons, the mere fact of who files the petition can cause significant acrimony. Conflict can arise in this regard before proceedings have even begun. If parties are able to give notice jointly, any such conflict will be eliminated, saving money and time. What is more, parties will commence the proceedings on an even footing. This is likely to set a far better tone for any discussions about the arrangements for the care of the children and / or the finances.

We suggest that if only one party has given notice, the ability to join the application should be provided for in the Acknowledgement of Service.

## QUESTION 4: WE HAVE SET OUT REASONS WHY THE GOVERNMENT THINKS IT HELPFUL TO RETAIN THE TWO-STAGE DECREE PROCESS (DECREE NISI AND DECREE ABSOLUTE). DO YOU AGREE?

**Answer: No**

We note that the Government considers that there should remain a two stage process with both a provisional decree and a final decree. However, it appears to us that there is no practical purpose for retaining this two stage process. If there is no requirement to evidence the fact that the marriage has broken down irretrievably and there is no ability to defend the divorce, why is a stage required for the court to find that the marriage has broken down irretrievably? The giving of notice that the marriage has broken down irretrievably will surely be sufficient to achieve this.

If the reason to retain the Decree Nisi / provisional decree stage is to ensure the parties have time to consider the implications of divorce and to agree practical arrangements for the future, this will be dealt with by the imposition of a minimum timeframe for divorce (see our response to question 5 below). If the reason is to provide sufficient time to investigate matters, this will be rendered redundant by the removal of the requirement to provide one of five facts in support. In the event that a referral to the Queen's Proctor is required, the granting of the Decree Absolute can be delayed if necessary.

In our experience, the pronouncement of the Decree Nisi is often delayed; this can create difficulties in the financial remedy proceedings, preventing agreements from being encapsulated in a court order. The courts are vastly under resourced and simple tasks can take weeks, if not months. In addition, we have come across situations where applicants have deliberately (or on occasion accidentally) failed to apply for the Decree Nisi, delaying the entire process. In a system where litigants in person are ever more common, and the courts are increasingly overloaded, we consider the government should use this opportunity to simplify the process and remove the Decree Nisi stage.

We suggest that the process whereby the respondent to an application for a matrimonial Order has to complete an Acknowledgement of Service within a set timeframe should remain in place. On receipt of a completed Acknowledgement of Service (or an application for deemed service), the court will consider whether the divorce can progress or if there is a dispute as to jurisdiction. If there is no dispute as to jurisdiction the court should then serve both parties with a notice that the Decree Absolute can be granted once the minimum timeframe has elapsed. There should be no requirement to complete a Statement in Support of Petition. If there is a dispute as to jurisdiction this will continue to be dealt with in the way that it is dealt with currently.

## QUESTION 5: WHAT MINIMUM PERIOD DO YOU THINK WOULD BE MOST APPROPRIATE TO REDUCE FAMILY CONFLICT, AND HOW SHOULD IT BE MEASURED?

**Answer: Six months from the date when the initial notice is filed with the court by the applicant (or both parties jointly).**

As we have set out in our response to question 2 above, parties do not take the decision to get divorced lightly. By the time they take steps to divorce the marriage has invariably broken down irretrievably. It is extremely rare that parties change their mind and reconcile once they have commenced divorce proceedings. The Nuffield Foundation Report comments: "As previous studies have shown, once at least one of the parties is seeking advice then it is generally too late to intervene".

We do not agree with any suggestion that there should be a minimum period imposed from the date of the pronouncement of Decree Nisi. As we have set out in our reply to question 4 above, we consider that the Decree Nisi stage should be removed. With the delays in the court system it can often take three to four months from the date of filing the Petition for the Decree Nisi to be pronounced. If a minimum period of six months was imposed after the pronouncement of Decree Nisi, parties could be waiting as long as ten months to obtain the Decree Absolute in their divorce. This is an inordinately long period of time for families to be in limbo.

Further, to impose a minimum period of six months following the pronouncement of Decree Nisi would be to take a step backwards. The current minimum period from the date of Decree Nisi is six weeks and one day.

We consider that protection will need to be afforded, as it is presently, to those parties who may be financially prejudiced by the making of Decree Absolute, particularly if they will lose certain pension benefits on divorce which cannot be replaced by a claim against their former spouse's estate.

## QUESTION 6: ARE THERE ANY CIRCUMSTANCES IN WHICH THE MINIMUM TIMEFRAME SHOULD BE REDUCED OR EVEN EXTENDED?

**Answer: Yes**

It should be possible to reduce the minimum timeframe in the event of imminent death or terminal illness. The Section 10A Proceedings (Proceedings after Decree Nisi, religious marriage) should remain in place save that they should apply if Notice of a divorce has been given but the decree has not been made absolute (rather than applying if a decree of divorce has been granted but not made absolute).

## QUESTION 7: DO YOU THINK THAT THE MINIMUM PERIOD ON NULLITY CASES SHOULD REFLECT THE REFORMED MINIMUM PERIOD IN DIVORCE AND DISSOLUTION CASES?

**Answer: No**

Nullity proceedings are separate to divorce proceedings. There is no requirement for parties to have been married a year to obtain a decree of nullity currently. This must be correct. A Decree of Nullity asserts that a marriage is not valid. It cannot be right for parties to have to remain in a "marriage" that is not valid. This is particularly important in cases involving forced marriage.

## QUESTION 8: DO YOU AGREE WITH THE PROPOSAL TO REMOVE THE ABILITY TO CONTEST AS A GENERAL RULE?

**Answer: Yes**

As the Australian Attorney General observed at the second reading of the Australian divorce bill in the 1970s: "...the two criteria... for a good divorce law are that it should buttress rather than undermine, the stability of marriage and, when a marriage has irretrievably broken down, it should enable the empty legal shell to be destroyed with the maximum fairness and the minimum bitterness, distress and humiliation".

If one party has the ability to successfully defend the divorce and keep a party in the marriage against their will, the empty legal shell will not be destroyed and bitterness, distress and humiliation will be enforced on the applicant.

Why should the state (here represented by the law and judiciary) have the absolute power to decide under what circumstances a marriage can end? The state has no ability to evaluate whether a marriage should start. Why should it have any ability to override personal choice as to when it can be terminated?

What is more, the current law enables those who are abusive or exerting coercive control to prolong the marriage if they so wish and in so doing to continue the abuse and control. This cannot be in the interests of the victim of the abuse or any children of the marriage.

## QUESTION 9: ARE THERE ARE ANY EXCEPTIONAL CIRCUMSTANCES IN WHICH A RESPONDENT SHOULD BE ABLE TO CONTEST THE DIVORCE?

**Answer: Yes, on the basis that the courts of England and Wales do not have jurisdiction**

## QUESTION 10: DO YOU AGREE THAT THE BAR ON PETITIONING FOR DIVORCE IN THE FIRST YEAR OF THE MARRIAGE SHOULD REMAIN IN PLACE?

**Answer: No**

As the Nuffield Foundation Report concluded, divorce law in England and Wales is "out of step" with similar jurisdictions in Europe and in North America (and, indeed, countries that are not as advanced democratically). The bar has already been removed in many other jurisdictions including the Netherlands, China, Russia and perhaps most surprisingly Argentina, where the divorce laws were overhauled in 2015.

It may be argued that removing the bar could encourage the perception that the institution of marriage is being undermined. However, as we have set out in our response to question 2 above, the reality is that the decision to divorce is not taken lightly. In our experience it is rare that parties chose to divorce in the first year of marriage. However, in the event that the marriage has broken down irretrievably in the first year of marriage it does not follow that if parties are forced to stay together they will reconcile. Indeed, it is more likely that conflict will be exacerbated. What is more, judicial separation is available within the first year of marriage. Parties can therefore legally separate but not get a divorce. This is illogical.

If there is a bar on petitioning for divorce in the first year of marriage and a minimum time period of six months is imposed on those wishing to divorce, then, in the admittedly rare event that people decide to obtain a divorce immediately following their marriage, they will have to wait 18 months in order to do so. This cannot be right or in either of the parties' best interests.

## QUESTION 11: DO YOU HAVE ANY COMMENT ON THE PROPOSAL TO RETAIN THESE OR ANY OTHER REQUIREMENTS?

**Answer: We do not see that there is any need to retain the requirement that legal professionals certify whether they have discussed with the applicant the possibility of a reconciliation and given them the names and addresses of persons qualified to help effect a reconciliation between parties to a marriage**.

In our experience, the certificate is redundant. The petition will proceed regardless of whether the legal professional confirms that they have or have not advised the client as to the possibility of reconciliation. What is more, a litigant in person is not required to confirm whether they have considered reconciliation or sought out persons qualified to assist with this. There is therefore a disparity between the requirements that those who seek legal advice have to meet and those who do not, which cannot be justified when the certificate serves no practical purpose.



Penningtons Manches LLP is a limited liability partnership registered in England and Wales with registered number OC311575.
San Francisco is an office of Penningtons Manches (California) LLP, a California registered limited liability partnership with number 202016025001.