

# 'NO FAULT' DIVORCE

## THE IMPACT ON DISPUTE RESOLUTION

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On 6th April 2022, we experienced the most major change in the divorce legislation in almost five decades. 'No fault' divorce has been the sought-after route for the process of divorce since the 1990s – in part, to fall in line with the preferred conciliatory out-of-court route for resolution of all other issues between separating couples.

When the only consensual means of bringing a marriage to an end was a two year wait after separation (provided the other spouse would consent), this change has revolutionised the way in which a marriage can be terminated. But what other consequences flow from this?

**A cynical view might be that as the new online regime is so simple (and perhaps rightly so) and therefore designed to be activated without legal input, there must be a risk that separating couples with limited resources may seek no legal advice at all – with concerning consequences.**

If no financial order is made, matters may unconsciously be left open-ended for many years until one party wakes up to the fact that a claim might be made

or remarriage may prohibit a claim for financial resolution, which could otherwise have been validly made.

So, are we at a pivotal point in the way in which family practitioners work? Are we at the outset of far more fundamental and far-reaching change than actually has been envisaged?

The new legislation provides an initially fixed (albeit extendable) time period of twenty weeks between the issue of the divorce application to the conditional order of the divorce – formerly Decree Nisi. It is entirely impossible to resolve disputed issues within the court process in such a time frame, so once again – albeit on a different basis – the divorce process sits out of kilter with the other aspects of the process. Although that may work for those who are able to afford legal fees, such non-alignment of timing plus the potential of excessive cost may drive separating couples away from the legal profession towards a more 'DIY' mechanism.

Broadly, separating couples either want to be helped to reach their own outcome or, if they are really unable to achieve this, want to have someone make a decision for them quickly, fairly and cost-effectively. Out of court dispute resolution methods achieve exactly that. The range of methods available have never been more innovative or diverse.

It is counterproductive to expect your client, who is already confused / scared / hurt / angry to make a choice from the variety of options available when they are undoubtedly in no emotional state to do so. Instead, listen carefully to their 'back story'. Find out what they are like; what they might need; what is important to them.



**Use your skills to tailor a process from that which is available to specifically meet their individual needs. Speak to the other side. Ultimately, you have a common goal – to achieve a fair result for this family, with particular reference to any children who sit at the centre of the process.**

If there is a clear 'knotty' issue which can clearly be argued either way and is undoubtedly likely to cause an impasse, endeavour to deal with this at the earliest stage possible, ideally by reference to neutral evaluation. In cases where resources are tight don't be afraid to use junior counsel to provide such facility. They will be more cost-effective and will actually attend more regularly at the coalface of the court dealing with similar cases before the judiciary than their more senior colleagues.

Mediation is the obvious way to facilitate reaching an agreement. The couple do not need to be conciliatory or close to agreement to do this. The hybrid model, where the mediator can hold confidences to assist the negotiation, will suit even the most high-conflict couple, and in both mediation models (both classic and hybrid) solicitors can be present within the process or in the mediation meetings to provide support and on hand advice. Whilst this may seem initially expensive, the concentration of support (both from the neutral mediator and your individual lawyer) will ensure that the mediation process is more focused and fast-moving, with the opportunity to take advice within the meeting as the discussion unfolds. If proposals are advanced which are mutually acceptable, the privilege of mediation can be removed, allowing the meeting to become open and a binding agreement achieved. It may even be possible for the lawyers there and then to draft the necessary paperwork to enable those proposals to be embodied within an application for order by consent.



If agreement simply cannot be achieved in some or all issues, arbitration (children or finance) is the obvious solution. Far from being an expensive option, arbitration provides a selected tribunal dedicated to the couple who can construct a bespoke option for the particular needs of the family. An arbitrator will be seeking a reputation for diligence and fairness.

In Children Proceedings, unfortunately, the maintenance of the status quo will always suit one parent. An opportunity to resolve issues more swiftly may

therefore be unattractive to one side. This, however, does not take account of the untold damage which ongoing contested court proceedings can do to the children, who undoubtedly have some awareness that their parents are engaged in a court battle which relates to them. Might it be incumbent upon the legal advisor to use whatever methods may be available in order to underline to the 'status quo' parent that other factors should be taken into account and that timely resolution must be in the best interests of their children?

'Uncoupling' provides the fusion of all options, bringing in professionals from all areas who may assist the family. 'The Certainty Project' combines mediation and arbitration with the arbitrator maintaining overall control of the process, providing certainty of personnel, timing and cost. Other methods of resolution offered, including the 'one lawyer two clients' model, are equally innovative and intended to provide separating couples with flexibility and value.

### **In all situations the need to listen is paramount.**

In high conflict cases some form of personality disorder, such as narcissism, is highly likely to be present. As a consequence of low empathy and an inability to maintain relationships, narcissists are much more likely to be involved in relationship breakdown and, as a consequence of the desire to create chaos and drama, would be attracted to the court process. Specialist skills are essential in such

circumstances in order to understand the pattern of behaviour, how best to negotiate and what to look out for and evaluate in a decision-making environment. Allowing such cases to reach the court will play into the hands of the narcissistic spouse and, as a consequence of the time constraints imposed upon the judiciary, may mean that a decision is made in difficult circumstances, which can create an outcome which inadvertently perpetuates coercive abuse. Out of court dispute resolution will provide specialist practitioners the ability to identify and deal appropriately with such behaviours. An arbitrator will have proper time to fully consider the nuances of the case if an imposed outcome is the only option.

So significant change on all fronts must be inevitable. How that change may manifest itself lies in the hand of the gatekeepers to family law. Added value and sensible costs will attract separating couples to seek professional help. Careful listening and selection of the appropriate process outside of the court system will achieve resolution within the twenty-week initial window and promote the desire for separating couples to engage in a service provided by family practitioners now far more attuned to the requirements of individual families and their future.

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