Owens v Owens:
Until Divorce Do Us Part

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When filing for divorce in the United Kingdom, current law requires couples to apportion blame, which encourages bitterness and hostility throughout the proceedings. Where an application is contested, parties must substantiate their claims to a court where it must then be regarded as something more than trivial. Recent cases outline the troubles that may arise from a proceeding where courts feel as though a marriage has irretrievably broken down but through application of the law cannot grant a divorce. Many academics, lawyers, and judges feel there is a need to introduce a 'no-fault' based system of divorce law which would enable parties to unilaterally file for divorce in an amicable and civilised fashion.

Divorce and separation are often times of conflict and heartache. Our contemporary social ethos has grown to accept marital breakdown as being part and parcel of our modern society, and divorce has indeed become less taboo. Nonetheless, it continues to put a tremendous amount of stress on families as there are all sorts of things left to be resolved in the wake of such a breakdown: division of financial assets, property ownership, and living arrangements for children, just to name a few. A breakdown in a family relationship raises extremely sensitive, distressing, and emotional issues, which can be difficult to fix and it is within this context that family law has an important role to play. As opposed to facilitating couples to amicably redress their issues during an already turbulent time, the present law sadly makes the process much worse by forcing them to allocate blame. This creates potential flashpoints, even in situations where both parties have mutually agreed that their marriage is over.

In light of the recent Jackson reforms on civil litigation costs, which have created a positive duty for justice professionals to encourage litigants to resolve their disputes outside of an overburdened court system, it is a wonder why the government has not created a divorce system which would provide a form of extrajudicial recourse to people who want to terminate their marriage.[1] It is time for Parliament to set aside overly-rigid limitations on divorce and seriously consider a 'no-fault' based system in order to improve and manage how divorces are petitioned and carried out. It is in my opinion that the law needs to change to allow people to separate with dignity, without having to assign fault. After all, a civilised society deserves a civilised divorce process.

The law as it stands

A petitioner can obtain a divorce only if the marriage has 'broken down irretrievably'.[2] This can be proven with 'the five facts'. Section 1 provides the relevant criteria required to establish that a marriage has broken down irretrievably:

a. the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
b. the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
c. the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
d. the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted;
e. that the parties to the marriage have lived apart for a continuous period of at least five years

[1] Ministry of Justice, *Review of Civil Litigation Costs: Final Report* (December 2009) 355.

[2] Matrimonial Causes Act 1973, s 1.

immediately preceding the presentation of the petition.

As the law currently stands, short of living apart for at least two years, or 5 years without consent, some form of blame needs to be apportioned, which could potentially make it difficult for couples to reach an amicable agreement. In turn, this makes it more difficult for legal professionals to help them reconcile their issues in a constructive manner. The case of *Owens v Owens* is a recent illustration of the problems that might arise.

Owens v Owens: The law unravels

Petitions are not typically designed to describe one spouse as being despicable and intolerable, but they exist to simply establish that there is extreme unhappiness and misery being experienced within the marriage. In one such case, a woman filed for divorce because her husband's obsession with golf had pushed her over the edge when he left her and the kids at home to play a round at the local course on Christmas day.[3] In most situations, consequent to receiving a petition, the respondent simply acknowledges the malcontent and writes a service form indicating that they are not defending the divorce. If the courts can see no reason why a divorce should not be granted, a 'decree nisi' is produced. Six weeks after this date, the petitioner can apply for a 'decree absolute', upon which the marriage is legally terminated. However, in 1% of cases, the respondent does not agree with the reasons put forth by the petitioner and consequently the divorce is contested in court.[4] In particular, under section 1(b), 'unreasonable behaviour' has proven to be the most inflammatory clause.

Ironically, the divorce case of *Owens v Owens* was heard before the Court of Appeal on Valentine's Day 2017. Mrs Tini Owens filed a petition against her husband, Mr Hugh Owens, on the basis of unreasonable behaviour.[5] The petition was contested by Mr Owens and at trial, His Honour Judge Tolson, refused to grant Mrs Owens the divorce, as he was not of the opinion that there was enough substance to her allegations. The decision was appealed by Mrs Owens, but it was consequently rejected by the Court of the Appeal. Although their Lordships acknowledged that the marriage had broken down and any chance of reconciliation was hopeless, they concluded that the trial judge's judgement was correct and that he had properly carried out his duties as legally required under subsection 3 of the Matrimonial Clauses Act 1973 (MCA).

Subsection 3 imposes a duty upon the court to, 'enquire so far as it reasonably can, into the facts alleged by the petitioner'. As such, the court must enquire as to whether the allegations of unreasonable behaviour actually happened and what effect it had on the applicant. The Court of Appeal stated that the test for what constitutes unreasonable behaviour is correctly set out in *Livingstone-Stallard*:

> Would any right-thinking person come to the conclusion that [a] husband has behaved in such a way that [a] wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the characters and personalities of the parties?[6]

The problem with this test, however, is that the scope of discretion enjoyed by the courts to determine whether or not the respondent's behaviour was in fact unreasonable, is extremely wide. This point was appropriately addressed by Hallet LJ. She says, 'what may be regarded as trivial disagreements in a happy marriage could be salt in the wound in an unhappy marriage'.[7]

The decision in *Owens* indicates that their Lordships are of the opinion that the current law is in need of reform, but that it is not the court's place to usurp the decisions of Parliament on the matter. Hallet LJ states, 'We cannot ignore the clear words of the statute on the basis we dislike the consequence of applying them. It is for Parliament to decide whether to amend section 1 and to introduce 'no fault' divorce on demand'.[8] It is now because of the law that Mrs Owens is bound to a joyless marriage, and unless her husband reconsiders his position or consents to a divorce on the grounds of mutual separation after two years, Mrs Owens must wait five years to move forward from her crestfallen marriage.

A 'no-fault' based system

The sentiment for reform is not only held in the Court of Appeal. The President of the Supreme Court, Baroness Hale, is also of the opinion that it is time to change the current law to a 'no-fault' based system as it would reduce bitterness and hostilities; elements which she considers to be serious drawbacks of the current system.[9] In an interview with the *Evening Standard*, she proposed that one solution could be to 'make a declaration that your marriage had irretrievably broken down and if you were still of that view a year later, then you get the divorce, [and] that's that'. The idea is that the one-year break would serve as a 'cooling off' period that may encourage parties to mend their differences and in some cases, reduce hostility and dismay.

Further, Baroness Hale recognised the utility to:

> ...use the waiting period to attempt to reach agreement on what was to happen to the house, the money, the children, and everything else'. The potential for reforming the law in such a manner 'should reduce cost and it would certainly reduce the need to produce a list of the other person's failings which you have to do now on the most popular ground, which is the other party's behaviour. That's not a constructive way to start.

In short, by creating a 'no-fault' based divorce law, many of the concerns that currently exist regarding hostility and its ancillary effects, could be resolved. Additionally,

[3] 'Is Your Partner's Behaviour Unreasonable?' (Graysons Solicitors, 13 February 2008) <http://www.graysons.co.uk/news/is-your-partners-behaviour-unreasonable/> accessed 21 September 2017
[4] ibid (n 3).
[5] *Owens v Owens* [2017] EWCA Civ 182.
[6] *Livingstone-Stallard v Livingstone Stallard* [1974] Fam 47, 54.
[7] ibid [37].
[8] ibid [99].
[9] Katharine Alexander, 'Baroness Hale Proposes 'No-Fault' Divorce' (UKSC Blog, 19 December 2014). <http://ukscblog.com/baroness-hale-proposes-no-fault-divorce/> accessed 11 September 2017.

Sir James Munby, the most senior family law judge in England and Wales, suggested that uncontested divorces could be processed without judicial supervision in a manner akin to that of the registering of births, deaths, and marriages, effectively making divorce quick and easy.[10]

It is clear from the sentiments of high ranking judges with family law experience, that there is room in the current law for adjustments to make the divorce process less of a bitter experience and more resource friendly for the judicial system. As such, decisions similar to that in *Owens,* which force someone to stay in a marriage can be avoided. All things considered, the future is not all bleak. *Owens* has been granted permission to appeal the decision in the Supreme Court. There, it will presumably be heard and decided by Lady Hale, who is one of the three family lawyers in the Supreme Court, so there is still some hope that the current law's inadequacies will be addressed and the need for reform will be encouraged.

Conclusion

Although divorce has become more commonplace, there are many who still believe that the institution of marriage is just as important as ever. However, there is a clear trend showing that more couples are choosing to cohabit rather than marry. Cohabiting families are the fastest growing family type. In 1996, 2.9 million people were cohabiting whereas in 2013 that figure nearly doubled to 5.6 million.[11] In comparison, in 2014 only 252,222 marriages were registered.[12] Traditionally, a couple would get married because it created a legal status conferring upon them new rights, duties, responsibilities, and defined the legal status of their children. However, incremental changes like the Civil Partnership Act 2004, have made a new form of legal relationship available in the UK, recognising that duties and responsibilities flow not only from husband to wife and vice versa, but also to those who are outside the scope of an 'intact family'.

The fact that divorce law has not been updated for close to fifty years is a clear indication of Parliament's reluctance to make changes that may give the public an impression of the government condoning divorce. But it should be noted that there is an important distinction between the *legal* act of divorce and the *social* fact of marital breakdown.[13] It is obvious that divorce rates will go up once made available as a form of recourse, but that does not necessarily mean that marital breakdown rates will increase as well.[14] This point was accurately addressed in a government consultation paper on divorce in 1993. It states, 'It is true that no statute, however cleverly and carefully drafted can make two people love each other or force them to live together in peace and harmony'.[15] Indeed, there are many reasons for a marriage to break down, but even if thought of as an attractive preventive force, the government's ability to influence family relationships is limited. Restricting divorce cannot save marriages, but it can lead to further unhappiness.

Introducing a no-fault divorce scheme within the UK's legal framework would have three main benefits. First, it would save the courts a lot of time and money, as a spouse could unilaterally file a declaration for divorce, removing the need for lawyers and judges if uncontested. Secondly, blameless divorce would put both parties on equal footing, and as a result, it is more likely for non-court dispute resolution to succeed. This lessens the burden on the family court and assists the government in meeting its goal for more people to resolve their disputes outside of the courts. Finally, it will have the ancillary effect of protecting children from having to witness their parents fight with one another in an arduous court process. The reasons for reform are, in my estimation, highly persuasive because the current law can make a hostile and bitter situation far more problematic. This sentiment is shared by academics, judges, and lawyers alike. In a recent 2015 poll, 4 out of 5 family lawyers were in support of a 'no-fault' based system of divorce.[16] The call is on Parliament to reconsider its antiquated stance on the matter and begin formulating a system that reflects the modern values of our society.

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