

'Finding Fault?' interim research findings



Following the Court of Appeal judgment in *Owens v Owens*, this research highlights the need for reform of divorce law in England and Wales. It presents interim findings from the first major research study on divorce law since the 1980s.

What is the current law on divorce?

The majority of English and Welsh divorces still rely on showing one party is 'at fault', based on their adultery or behaviour. The alternative to fault requires a two years separation, if both parties consent to the divorce, or five years if the other spouse does not. Fewer than 1% of divorces are defended. The law is now nearly 50 years old and there have been many calls for reform, including from senior judges.

About us

Finding Fault? is a major research study of how the current divorce law works in practice. The study is funded by the Nuffield Foundation. It is led by Professor Liz Trinder (Exeter University) with Mark Sefton, Bryson Purdon Social Research, OnePlusOne and Kantar Public UK. The study includes:

- a national opinion survey on divorce law, including a sample of divorcees
- interviews with people going through divorce
- interviews and focus groups with family lawyers
- observations and interviews with legal advisers and judges scrutinising divorce cases
- analysis of court files

A final report will be published in Autumn 2017.

Interim findings – producing a petition and finding a fact to fit

The theory behind retaining fault is that identifying who and what was responsible for the marriage breakdown will discourage and condemn such behaviour, thus protecting marriage. In reality, petitions are drafted to ensure the court grants a divorce. They are not necessarily accurate records of how and why a marriage broke down, even if that can be identified. In our national survey among people who divorced using fault, 43% of respondents to the divorce reported that the fact used was not closely related to their view of the 'real' reason for the separation.

Why is there a potential gap between the reason for the relationship breakdown and the reason given in the petition? Speed is a primary factor. A divorce based on adultery or behaviour can be achieved in three or four months, rather than the couple having to be physically separated for at least two years before petitioning. Some interviewees explained they could not afford to wait so long to sort out finances or did not think it right to keep their children in limbo. As such, it was a question of coming up with enough material for a fault-based petition, usually based on 'behaviour', as this lawyer explains:

"Basically it's a farce, because you're just saying [to your client] 'All we have to do is get a form of words. As long as you're not telling any lies, we'll get it through' ... You cobble up some words which will do the business".

- (Lawyer focus group)

Key interim findings

- The majority of divorces are based on 'fault' i.e. blaming one spouse for the marriage breakdown.
- Using fault (adultery or behaviour) means the divorce can take as little as three months, instead of a wait of at least two years.
- Divorce petitions are not necessarily accurate records of who or what caused the breakdown of the marriage. Petitions can be based on compromise statements (a 'fudge') designed to minimise conflict and upset, or can be just one person's view of what went wrong with the marriage.
- The court cannot test whether allegations are true or not and petitions are taken at face value. 'Rebuttals' written on the form by respondents are ignored unless the respondent files a formal 'Answer' (with £245 fee) to defend the petition.
- The threshold for behaviour petitions appears to be lower than 30 years ago. Very few petitions appear to be rejected on substantive legal grounds, whether 'true' or not.
- Fault can create or exacerbate conflict. This can affect negotiations about children or finances where the law expects parties to work together.
- In reality, there is already divorce by consent or 'on demand', but masked by an often painful and sometimes destructive legal ritual.
- So far, there is no evidence from this study that the current law does protect marriage.
- Reform of the divorce law is long overdue. A single system of notification of intent to divorce would be clearer, more honest and neutral between petitioner and respondent.

In some cases behaviour, such as domestic violence, did appear to have triggered the breakdown. For others, the reality might simply be that nobody was at fault, or both parties were, but allegations had still to be produced to avoid a long wait. Producing a behaviour petition can be a balancing act between providing strong enough allegations to ensure the divorce is granted while not telling the 'whole truth' to avoid damaging relationships further:

"Either the clients go too far and you'll get reams and reams of horrible things that you then have to try and water down. Or they really, really struggle to find something and - you know, a lot of the time [the marriage] just hasn't worked out."
(Lawyer focus group)

Consequently, the makeup of undefended behaviour cases appears different from previous decades. A Law Commission study in the early 1980s found allegations of domestic violence (DV) in 65% of behaviour cases. In our study so far, 'behaviour' petitions focus more on failings such as lack of attention or affection, with fewer than 20% of petitions alleging DV.

The stretching of the truth is not confined to behaviour petitions. Adultery can be falsely claimed and admitted. Dates of separation may also be massaged to shorten wait times in two and five-year separation cases.

In practice, therefore, divorce petitions are best viewed as a story produced to secure a legal divorce, rather than an accurate reflection of why the marriage broke down and who was 'to blame'. This is not a new problem. The existing law was designed to eradicate the fabrication of grounds. The manipulation of facts is now less overt than the staged or bogus adulteries with strangers of the 1950s, but it remains a problem.

The constraints on the Court's inquiries

In our national opinion survey 71% thought that fault should remain part of the law. However, the general public are unlikely to be aware of the very limited scrutiny that the court can undertake in practice.

In our observations at court, scrutiny of each petition took five minutes on average, with much of this time taken with checking technical details. The only 'evidence' about reasons are the few sentences in the particulars supplied by the petitioner. In reality, the court can only take these allegations at face value.

It is common for respondents to state in their 'Acknowledgement of Service' that they do not accept the petitioner's allegations. These 'rebuttals' are routinely ignored except in the rare defended cases where the respondent has the legal literacy to file an Answer and can afford the £245 fee. The court's reliance upon the petitioner's account can seem very unfair to respondents who dispute the allegations but cannot afford to formally defend:

"Whilst I no longer wish to be married to this man I do not see why his fabricated lies and the fact he can afford a solicitor should be allowed to blacken my name."
(File study, Respondent in behaviour case)

Unless the parties make a mistake with the paperwork, the great majority of divorces will be granted, despite the changing composition of behaviour petitions noted above. The constraints on the scrutiny process have been evident since the 1980s when the Law Commission noted that the court could only 'pretend' to inquire into petitions. The most senior family judge in England, Sir James Munby, recently described the process as "intellectually dishonest" and called for law reform.

Creating or exacerbating conflict

A majority in our national opinion survey thought that fault makes divorce more bitter and harder to focus on children's needs. Our interviewees elaborated:

"What my husband decided to write was that I was 'emotionally abusive'. That was a hurtful thing to read and that will have an effect on our relationship which will [not] benefit the children" (Respondent wife).

"Having to come up with reasons [where] someone [is] already hurting - you've got to hurt them more to be able to fill the paperwork in - doesn't make you feel great, it doesn't make them feel great, and is already a very stressful time in your life". (Petitioner husband)

The urgent need for law reform

In reality, we already have divorce by consent or 'on demand', but masked by an often painful, and sometimes destructive, legal ritual with no obvious benefits for the parties or the state. There is no evidence so far from this study that the current law does anything to protect marriage. The divorce process is currently being digitised. This is a timely opportunity for law reform so that divorce is based solely on irretrievable breakdown after notification by one or both spouses.

Further details

See <http://findingfault.org.uk> and contact e.j.trinder@exeter.ac.uk

This briefing was written by Liz Trinder of Exeter University. The Nuffield Foundation has funded this project, but the views expressed are those of the authors and not necessarily those of the Foundation. More information is available at www.nuffieldfoundation.org