Reflections on family breakdown: past & future

David Burrows on the law of family breakdown: where are we now & where are we going?

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IN BRIEF

- Elements of family breakdown law over the past 50 years.
- Divorce: new law but no thought for those caught out by the formalities of the Marriage Act 1949.
- Towards trial of a family breakdown case in a 'reasonable time'.

The term 'family law' is a euphemism. In reality, we are talking about the law of 'family breakdown'—a law for broken families. By that criterion, there is still much work for law reformers to do. This can be judged by what has been achieved over the past 50 years and what—it could be said—remains to be done over, say, the next ten years. The most important matters to be achieved in law reform are to cast financial orders away from reliance on matrimonial and civil partnership dissolution, and to urgently work out how judicial time can be saved and family cases brought on more quickly for trial.

I start with the assumption that courts concerned with family breakdown work on four main areas of controversy:

- children;
- domestic abuse;
- matrimonial and civil partnership breakdown; validity of marriage; and
- money.

Children law underwent massive and much-needed reforms with the Children Act 1989. Two blots in particular remain: delay (see later) and uncertainty still about how children's wishes and feelings should be heard, even 35 years after Lord Scarman said in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 at p186: 'The underlying principle of the law… is that parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision…'. And the United Nations Convention on the Rights of the Child 1989 says much the same thing, to little effect on most children judges.

Domestic Abuse Act 2021: much to be done

Domestic abuse litigation—still—is in limbo after passage of the Domestic Abuse Act 2021 (DAA 2021). In 1976, Erin Pizzey persuaded the then Labour government that unmarried women were in as much danger from violent men as their married sisters. Lord Scarman in *Davis v Johnson* [1979] AC 264 at p348 said: 'I conclude that the mischief against which Parliament has legislated by [Domestic Violence and Matrimonial Proceedings Act 1976 (repealed and replaced by Family Law Act 1996 in 1997)] may be described [as] conduct by a family partner which puts at risk the security, or sense of security, of the other partner in the home. Physical violence, or the threat of it, is clearly within the mischief…. Homelessness can be as great a threat as physical violence…. Eviction—actual, attempted or threatened—is, therefore, within the mischief: likewise, conduct which makes it impossible or intolerable, as in the present case, for the other partner, or the children, to remain at home.' He was not far from a modern definition of coercive control.

Under DAA 2021, it will be impossible for one court to convict, award damages and make an injunction order, all on the same facts. The burden of proof may be different in crime and civil; but if it's an allegation of domestic abuse, surely our law can find a way to cope.

Matrimonial & civil partnership breakdown

The new Divorce, Dissolution and Separation Act 2020 (DDSA 2020), its amendments to the Matrimonial Causes Act 1973 (MCA 1973) and Civil Partnership Act 2004 (CPA 2004) and the rules which back up these came into force on 6 April 2022. Law reformers claim that great strides have been made with this. I disagree. Important areas of real need among those whose relationship has broken down—mostly among women—have been completely overlooked.

In 'Blame-free divorce, but how fair?' Pt 1, *NLJ* 4 March 2022 and Pt 2, *NLJ* 8 April I have looked in some detail at the introduction of the DDSA 2020 amendments to MCA 1973 and CPA 2004. In their haste to simplify divorce procedure (which, from now on I'll couple with civil partnership dissolution: the legislative provisions are in effect the same) rule-makers have cut

too many corners. Space prevents me from saying much of the failings of the rule-makers in writing brand new rules for a new forensic scene. As I read the rule-maker's minutes, they delegated the job to a sub-committee who took six months to do little more than to rehash the old rules in Family Procedure Rules 2010 (FPR 2010) Part 7, and to tack on four new paragraphs to the old practice direction PD 7A.

I confine comment here to the legislation:

1. The rules for service of an application (ie divorce etc petition) in FPR 2010 Part 6 are complex (derived mostly from similar Civil Procedure Rules 1998 Part 7). Part 7 was not designed in the same way for the time-limited period of 20 weeks before time for obtaining a conditional order runs down by statute. What happens if service cannot be effected in this time? How long will the courts allow the applicant to run on past the 20-week watershed?
2. Reconciliation and its denial of the truth of irretrievable breakdown, again a statutory question, was considered in Pt 1 above.
3. Parliament and the rule-makers have not thought through the revised s 10(2), MCA 1973 and s 48(2), CPA 2004. The old s 10(2), MCA 1973 etc was a sort of *in extremis* mopping-up provision for two/five-year separation cases, and was hardly ever used. Parliament has just chopped out references to 'separation' so that now, if an economically weaker partner gets into court in the six weeks between conditional order and final order (no later), that partner can hold up the final order till the court has fully considered that their financial position is fair (eg that their pension position has been fully considered).

All these points and those considered in the last articles, will—I am sure—add to the cost of family breakdown litigation, which could have been saved if the legislators and the rule-makers had done their job more carefully. And it gets worse…

Outside the marriage pale

The major gap in all this is that Parliament has not taken the trouble to amend two massive holes in this area of family breakdown legislation. The first is to unlink financial orders for partners (married, civil partners or not) from matrimonial and civil partnership cases, so that all have the same rights to financial provision; and then to unlink relationship breakdown finance from divorce.

You should no longer have to establish matrimonial etc rights (ie to be divorced) to be able to claim financial support from your former spouse (or 'spouse'). Reform of the UK Marriage Acts would be an enormous step forward. We still work on the Marriage Act 1949, Pt 2 which is based on legislation which predates *New Law Journal* (the Clandestine Marriages Act 1753, relaxed a little by the Marriage Act 1823). And still all those non-qualifying ceremonies place many people who thought they were married outside the marriage pale, so that they cannot claim 'ancillary relief'—properly 'so-called ancillary', since it can be only claimed *ancillary* to divorce—and, in many cases, such applicants have no right to state benefits when their 'spouse' dies.

This should have been addressed by Parliament alongside matrimonial and civil partnership legislation: financial order proceedings must finally be detached from matrimonial and civil partnership dissolution (and even where you are married you should not need to go through divorce to sort out money). The Marriage Act 1949 must be massively reformed so that many more ceremonies are recognised if money remains linked to marriage breakdown.

'Hearing within a reasonable time'

Finally, to look forward: I shall restrict myself to one topic. The European Convention 1950 Art 6.1, as applicable here, says of court process: 'everyone is entitled to a fair and public hearing within a reasonable time'. A 'fair' hearing can be assumed in respect of family breakdown and child law judges. The subject of public hearings is taking up a lot of family lawyers' ink at present. I'll not add to that here. But, what of the elephant in the room: 'a reasonable time'? For me, this is much more important than any other issue.

The 'reasonable time' provision has been on our statute book for over 20 years; yet I know of no judicial review or other challenge to the delays in family courts based on that. Six immediate means of saving judicial time spring to mind:

1. At every case management meeting (not just the first meeting in financial order cases), the parties should agree, or the judge should impose upon them, what they or the court says are the issues for trial. This will be a moving target in some family cases and as trial approaches, but must be finalised four weeks (at least) before any final hearing.
2. This will help the court to define and control evidence (including documents and any other material said to be relevant to a final hearing). Lawyers who try to file excessive bundles could be subject to penal wasted costs orders or committal for contempt.
3. Examination in chief must not happen—FPR 2010, r 22.6(3) says so save with permission of the court.
4. The number of jobs done by judges under the new divorce etc rules must be cut down. Why must a district judge be 'satisfied' (FPR 2010, r 7.10(2)(a)) under the new rules? How much time will this take, where the idea is to take an applicant's word for irretrievable breakdown? Much more work can be done by civil servants if more is set out in guidance (as in many other departments: see eg *R (on the application of A) v Secretary of State for the Home Department* [2021] UKSC 37, [2021] All ER (D) 115 (Jul)).
5. Assessors—ie making decisions *qua* judges (s 70, Senior Courts Act 1981)—could be taken on for appropriate work. Much more in this category can be done on paper: 'death' cases for physicians; reports on tax and accounts by assessor accountants; pension reports. If each of these are defined conducted with judicially defined issues (maybe), could these types of case not be resolved by assessors?
6. Child abduction: surely this does not have to be dealt with always by High Court judges? Could not district judges deal with many on paper and with limited, if any, advocacy or attendance of the parties? At least they could give a decision, with short appeal on law to a circuit judge (as in housing cases in *Runa Begum v Tower Hamlets London Borough Council* [2003] UKHL 5, [2003] All ER (D) 191 (Feb)).

The government shows no enthusiasm for appointing more judges. Ways must therefore be found the better to allocate work among those there are.

Perhaps an anecdote is permitted? Twenty years ago, I had to cross-examine an elderly lady in Norwich from Chancery Lane (where the video equipment for the Family Division was cited). I had prepared a number of points: she had given money to her daughter. She and the daughter said the house the daughter had bought with the money was beneficially that of the mother. My client did not believe her. Bennett J said I could have ten minutes to ask her questions and five for any cross-examination. I suspect my cross-examination was as concentrated and, I hope, as effective as it has ever been.

More guillotining and taming of advocates' efforts would save massive amounts of judicial time, I am sure. If they can do it in the Supreme Court, then why not in all courts? NLJ

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