

Article

Changes to Divorce Rules Highlight Differences Between England and Bermuda

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Bermuda's divorce laws have been in place for close to 50 years. While many other jurisdictions have adapted their laws to reflect changing attitudes to divorce, Bermudian legislation has remained unchanged. Divorce rules in England and Wales (which were initially very similar to Bermudian legislation) have undergone several changes in that time and will have undergone further by the end of next year.

It is therefore timely to consider the key differences between the two jurisdictions.

First, in Bermuda couples are generally prevented from issuing divorce proceedings within the first three years of marriage. In contrast, divorce is available in England and Wales after only one year.

The practical effect of this time bar is significant. Most obviously it prevents either party from entering into a marriage with any new partner whilst the first marriage continues. For a couple separating shortly after their marriage, this could be a significant period to wait.

More importantly, the legal rights which flow from a marriage continue in full force during this time. For example, if one of the parties passed away during this period without a will, the surviving spouse would be responsible for managing the estate and entitled to inherit as a result of the marriage. A new partner would have no such rights.

In addition, the court is generally unable to exercise its powers in relation to the parties' property and finances during this period. This can be very distressing where parties are unable to agree on significant matters such as who should keep their home.

It seems likely that the justification for the rule was to prevent parties divorcing too quickly rather than working on their marriage. However, there is little evidence to suggest that this waiting period is ever a factor in a couples' decision to separate.

Second, England and Wales are now moving towards no-fault divorces.

Currently neither jurisdiction permits a party to divorce simply because they say that the marriage has broken down. Instead couples must prove it has broken down and the way in which this can be proven is limited to the following:

- i. adultery making continuation of the marriage intolerable;
- ii. other unacceptable behavior which is intolerable;
- iii. desertion lasting two years;
- iv. consent following separation of two years; or
- v. five years of separation.

The result is that those unwilling to separate and wait (for two years with consent, and five years without it) must seek to identify ways to blame the other for the breakdown of their marriage.

Although many attorneys will take care to draft petitions in a way which does not unnecessarily increase tensions between the parties, the fact is that the law requires a blame game at what is almost always an emotionally sensitive time.

The rules of course are aimed at ensuring divorces are not pursued without proper consideration and limited to scenarios deemed sufficiently serious. However, there are obvious difficulties in encouraging parties to focus on each other's negative attributes in this way particularly where there is an ongoing need to co-parent.

Petitions are a matter of record, so it is understandable that a spouse might be reluctant to accept blame for the breakdown of the relationship, particularly if they feel the allegations are unfair. Arguments over the contents of the petition are not uncommon and can set a tone which is difficult to overcome when the parties later try to reach agreement about how to separate their lives and assets. It can also encourage the (misplaced) idea that a badly behaved spouse will be punished by less contact with their children or fewer assets after the divorce.

The result in practice can often be a form of agreeable fiction. According to the Bermuda Digest of Statistics 2020, only a tiny percentage of divorces were granted on the basis of adultery from 2016-2019 (1.3%), an allegation which few wish to accept voluntarily. In that same period, over 66% of divorces were based on unreasonable behaviour, which can cover almost anything and is something which is comparatively easy to admit. It is rare in practice for the courts to refuse to accept that behaviour complained of in a divorce petition is intolerable, especially where the other side does not resist. What is endearing to one person can after all be the source of endless irritation to another. The rule often does little to ensure that the reasons for a divorce are truly significant.

The change to English legislation will come into force in spring 2022. It has been welcomed by many in the field as a step towards reducing the stress and cost of divorce. The change has however taken over 20 years to accomplish (the proposal was initially recommended in the 90s). There is no sign of the law in Bermuda changing any time soon.

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