

Article

No-Fault Legislation Will Reduce Stress, Cost of Divorce

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On 2 March 2022, the Senate passed legislation aimed at reducing the stress and cost of obtaining a divorce by introducing “no-fault divorce” to Bermuda. This legislation will be the first of a “raft” of reforms that aim to modernise Bermuda’s current legislation, which is now almost 50 years old.

The current legislation requires divorcing couples to satisfy a judge that their marriage has broken down, by providing evidence of one of the five grounds:

- i. adultery, making continuation of the marriage intolerable;
- ii. other unacceptable behaviour, that is intolerable;
- iii. desertion by the Respondent lasting two years;
- iv. separation for a period of two years with the Respondent’s consent; or
- v. separation for a period of five years (without the need for consent).

An application that fails to provide evidence of one of those facts, and that the marriage has therefore broken down irretrievably will be refused, even in circumstances where both spouses agree that the marriage is at an end. The current rules, therefore, require families to engage in a costly and time-consuming exercise at a time when those funds (and energies) are almost certainly needed elsewhere to resolve their housing, child custody and financial arrangements.

The need to evidence the breakdown of the marriage also comes with an emotional cost. Focusing on why the marriage ended and what each party did wrong, is an unhelpful mind-set at a time when parties will need to navigate how to separate their lives. Family lawyers often spend a lot of time helping their clients separate these emotions from practical considerations. Sadly, the current legislation does not assist as it encourages parties to engage in a blame game in order to justify the grant of a divorce at the outset of this difficult process.

Requiring couples to prove the breakdown of the marriage risks increasing tensions while serving no purpose other than vetting whether their reasons for separating are good enough. This focus on blame is at odds with the court’s encouragement in connected proceedings regarding their children and finances to resolve disputes as amicably as possible.

New Legislation

Once the new legislation receives final assent, a statement that the marriage is over will be the only evidence needed to obtain a divorce. Importantly, that statement will be treated as conclusive evidence of the breakdown and therefore removes any need for detailed reasons for the separation or any investigation by the court of their merit. The entire process will be capable of completion in as little as 20 weeks thereby removing the delay, as well as unnecessary blame, in place under the current legislation.

The new legislation also envisages that the language used in family proceedings will be updated with terms such as “petition” and “decree absolute” being abandoned in favour of “applications” and “final order” — a step which will undoubtedly help make the process less intimidating, especially for those going through the process without a lawyer.

The new legislation comes two months before similar changes are due to come into effect in England and Wales. (The legislation in Bermuda closely mirrors that in the UK.) Despite reform being introduced in both jurisdictions for the same purpose, important differences will remain however. Couples divorcing in England and Wales will be able to issue joint applications creating potential for even greater savings in terms of their legal fees. In addition, regardless of whether the application was made jointly or not, once issued,

it will be possible for either spouse to progress the application by inviting the court to make either the decree nisi or decree absolute. Neither of these provisions appear in the legislation currently before parliament in Bermuda.

There are also differences in the timescales for obtaining a divorce in each jurisdiction. Under the new legislation, once the divorce application is underway, those divorcing in Bermuda will be able to obtain a divorce six weeks quicker than their British-based counterparts.

Unfortunately, however, the rule preventing divorce within the first three years of marriage (save in exceptional circumstances) is not mentioned in the new legislation and therefore looks set to remain for now. For the sad few whose marriage falters in the first year or two, the “quickie” divorce proposed for most will therefore remain unavailable. For those who find themselves in dire situations early in a marriage (which may well include victims of domestic abuse) it has always been, and will remain possible, to obtain a divorce within those first three years by demonstrating “exceptional hardship” or “depravity” on the part of the Respondent. However, the survival of a provision which requires spouses to prove the state of their marriage to a judge seems at odds with the objectives of the legislation, particularly given the risk that this additional hurdle may impact vulnerable victims of abuse who may well be more easily discouraged from applying for a divorce in the first place.

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