UNDERGRADUATE LAWS BLOG

Surely this time? : Divorce reform after Owens

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The recent case of *Owens v Owens* [2018] UKSC 41 has once again focused the mind of the family law world on the issue of divorce reform. It has long been apparent to many that the current law on divorce is in need of reform. Since the attempted reform of the current law was abandoned in 2001 and officially repealed in 2014 any discussion of divorce reform has tended to be in the abstract with few cases capturing the imagination of reforming lawyers. That is until now.

The facts of the case of *Owens v Owens* [2018] UKSC 41 are not unusual in the family law world. A couple, with adult children, in a long marriage who have gradually and regrettably grown apart. Mrs Owens was relying on legislation which is now 50 years old[1] trying to persuade a judge that under s1(2)(b) Matrimonial Causes Act 1973 Mr Owens' behaviour was unreasonable, and it would be unreasonable to expect her to continue to live with him on that basis. Whilst Mrs Owens recognised her husband's behaviour may have appeared minor, she argued it demonstrated 'authoritarian, demeaning and humiliating conduct.' Initially, following legal advice based around the fourth edition of the Family Law Protocol[2] the nature of the behaviour was presented in a particularly anodyne way. The statement was then expanded on and some 27 examples of unreasonable behaviour since 2013 were presented to the court.[3] A summary suggested Mr Owens had prioritised his work over their life at home; he had treated her without love or affection; he had often been argumentative and moody; he had been disparaging of her in front of others and as a result she had felt unhappy and upset. What was then unusual in this case was Mr Owens defending the divorce petition. Especially given data in 2016 in England and Wales suggests that only 17 petitions out of 114,000 petitions were contested and research[4] shows that bar the present case there had been no recent example of a successfully defended suit.

Mr Owens defended the case successfully at first instance. His Honour Judge Toulson QC rejected Mrs Owens' petition for divorce. Although he had found that, as a matter of fact, the marriage had broken down the judge thought that Mrs Owens had failed to prove, within the meaning of s1(2)(b) Matrimonial Causes Act 1973 that Mr Owens had behaved in such a way that she could not reasonably be expected to live with him. The judge said the allegations by Mrs Owens were 'at best flimsy' (paragraph 12) and they 'lacked beef because there was none.' (paragraph 7). At the Court of Appeal Mrs Owens was once again unsuccessful where President Munby dismissed the appeal stating that HH Judge Toulson QC had not failed to make findings of fact as required of him and did not fail to have regard to Mrs Owens' subjective characteristics or regard to the cumulative

[1] The Matrimonial Causes Act 1973 was consolidating legislation which included existing divorce law from the Divorce Reform Act 1969.
[2] As issued by the Law Society (2015) para 9.3.1 of the Fourth Edition of the Protocol states "Where the divorce proceedings are issued on the basis of unreasonable behaviour, petitioners should be encouraged only to include brief details in the statement of case, sufficient to satisfy the court ..."
[3] There was no evidence of unreasonable behaviour presented as taking place before 2013 given this was when Mrs Owens begun to keep a diary of each instance.
[4] Research by Trinder and Sefton (2018). See https://www.nuffieldfoundation.org/sites/default/files/files/No%20contest%20final_Nuffield_Foundation.pdf

impact of the incidents described. Finally, the President confirmed that there is no right to divorce under either Articles 8 or 12 of the European Convention on Human Rights.

By the time the case reached the Supreme Court the case had received nationwide attention with almost universal astonishment at how it was possible for one spouse to prevent another spouse from obtaining a divorce when the marriage had so clearly irretrievably broken down. At the Supreme Court, as at the Court of Appeal, the justices unanimously dismiss Mrs Owens' appeal with the result that Mrs Owens must remain married to Mr Owens until at least 2020.[5] It is perhaps cold comfort to Mrs Owens that both the Court of Appeal and Supreme Court appear reluctant to apply the existing law recognising the result is so unsatisfactory. Although both courts recognise the trial judge followed the correct three stage process in reaching his decision there was some disquiet in the Supreme Court as to how much weight was placed upon the cumulative effect of Mr Owens' behaviour on Mrs Owens. Lord Wilson cited 'uneasy feelings' and Lady Hale reluctantly dismissed the appeal preferring the option for a retrial, that Mrs Owens did not seek.

The commentary since the case has been almost universally critical of what is seen as an outdated law which is unduly interested in notions of fault and appears to reinforce the requirement that couples are expected to preserve the empty shell of a marriage. This was, of course, something the then more liberal Divorce Reform Act 1969 had originally intended to remove. Against this backdrop a series of research reports have been published by the Nuffield Foundation and written by Professor Liz Trinder et al.[6] Focusing on the search for fault in current divorce law and what happens in contested divorce cases such as these, the evidence base is now there for reform. The government also announced in September 2018 that it intends to reform the law of divorce. The response to the consultation exercise ending in December 2018 is due in March 2019. The Nuffield Foundation responded to this consultation exercise with another insightful report[7] and the government announced in February 2019 that divorce law reform will now take place in the next Parliamentary session, which will start in May 2019. Meanwhile a Private Members' Bill (Starting in the House of Lords) and sponsored by Baroness Butler Sloss entitled the Divorce (etc.) Law Review Bill was introduced into the House of Lords in July 2018. If passed, it would require the Lord Chancellor to review the law of divorce and judicial separation. It has not yet obtained a date for a second reading. In addition, Baroness Anelay of St Johns raised the issue in the House of Lords in September 2018 when she asked an oral question which claimed that the case of *Owens v Owens* showed that the law of divorce is 'not working; it is not up to standard.'[8]

So far so good, but students of family law will know that we have been here before. Part 2 of the Family Law Act 1996, if fully implemented, would have introduced a no-fault divorce framework. This was never fully implemented because the academic research evaluating the six models of information meeting being used in the pilots concluded that no one model was workable. It was argued the meetings came too late in the process for divorcing couples and any uncertainty appeared to result in a desire for divorce rather than reconciliation. It is also the case that not

[5] When Mrs Owens will be able to rely on s1(2)(e) Matrimonial Causes Act 1973 where the couple have lived apart for five years and where the respondent does not consent. This will be subject to a defence of Mr Owens under s5 Matrimonial Causes Act 1973 although there is no evidence to suggest this defence would be made out.

[6] See http://findingfault.org.uk/wp-content/uploads/2017/10/Finding-Fault-summary-report.pdf and https://www.nuffieldfoundation.org/sites/default/files/files/No%20contest%20final_Nuffield_Foundation.pdf

[7] http://www.nuffieldfoundation.org/sites/default/files/files/Taking%20Notice-Trinder-Nuffield-Foundation.pdf

[8] Baroness Anelay of St Johns – 6th September 2018 at 11.21am

everyone supports the move to a no-fault system. The Coalition for Marriage[9] have argued that no-fault divorce would undermine and trivialize marriage, punish those who were not adulterous, reduce protection for those who may be vulnerable, and reduce the status of marriage to a tenancy contract.

In spite of this criticism of the 'no fault' proposals the government does plan to reform the law.[10] It plans to devise a process which retains the requirement of 'irretrievable breakdown' whilst removing the necessity to prove one of the five facts. The overarching aim being to:

'… recognise people's autonomy in making decisions about major life events and, by reducing family conflict, support divorcing couples in their responsibility to cooperate with each other on the practical decisions needed so that the family can move on in the most beneficial way possible in the circumstances.'

If you support divorce reform, then this is a positive step forward. What remains to be seen is how the mistakes of the aborted reform of 1996 can be avoided in 2019. In the meantime, Richard Kwan[11] has noted that practitioners will have to maintain a balancing act of keeping the claim as anodyne as possible so as to avoid further confrontation in the divorce process whilst still satisfying the current requirements to prove the behavior fact under s1(2)(b). Going back to Mrs Owens, she will perhaps wish she had been more colorful in her account of her married life (as Professor Trinder et al. have argued others often are)[12] if only to thwart any suggestion of her being 'more sensitive than most wives.'[13] Divorce reform is now probably inevitable, but the more critical question is whether it will be suitably enduring? Surely this time.

[9] See https://www.c4m.org.uk/five-reasons-no-fault-divorce-disaster-marriage/
[10] See https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf

[11] https://www.familylaw.co.uk/news_and_comment/owens-v-owens-supreme-court-dismisses-wife-s-appeal
[12] See http://findingfault.org.uk/wp-content/uploads/2017/10/Finding-Fault-summary-report.pdf
[13] *Owens v Owens* [2018] UKSC 41 at para 20.