The Divorce, Dissolution and Separation Act 2020: our answers to your questions

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This note is designed to assist lawyers with the implementation of the DDSA 2020. It should not be taken as legal advice. Individual lawyers should carry out their own research into the new law and rules.

The document records the questions asked by registrants using the Q&A and Chat functions during our talk on 22nd March.

We have organized the questions and answers by topic below.

'The FP(A)R 2022' means The Financial Procedure Amendment Rules 2022.

Specific Issues on the Application Process

1. **Can you deal with the position where one party is resident in England but the other lives in another jurisdiction?**

   In a sole application, the respondent can dispute the jurisdiction of the court in England and Wales to conduct proceedings. For example, where neither party lives in or has any other connection with England and Wales, or one-party lives in another jurisdiction. The respondent will have to file their 'answer' using a D8B form for divorce, within 21 days from the date of acknowledgement with their reason for disputing (Rule 7.7 (5)). The court will then deal with case management and listing to determine the issue and including consideration of habitual residence/domicile.

2. **Would a barrister with public access and authority to conduct litigation who is representing and conducting the divorce for an applicant be able to lodge the relevant paperwork?**

   There is nothing in the rules setting out that a barrister with the authorisations set out in the

question is prevented from conducting litigation on behalf of an application, but it is recommended that the barrister checks and confirms the position with the regulator (BSB), undertakes due diligence and complies with their core duties to the client and the court.

3. **How do you apply for service to be dispensed with?**

   The existing rules provide for the Court's powers to dispense with service of the application at FPR 6.20. This provision has been unamended by the FP(A)R 2022.

   There are new rules and procedures setting out how the application is 'served' under the new law, once it has been issued by the court. The general rule is that the court will send the application to the respondent, but the applicant can do this on request (new Rule 6.5).

   The applicant can use the D11 form to apply for alternate means of service and/or deemed service.

4. **Is there still a requirement to live in separate households and confirm this on applying for a Conditional Order?**

   No. The new forms have not yet been published. However, under the new s.1 MCA, the parties will be required simply to declare that the marriage has *broken down irretrievably*.

5. **What are your views on circumstances where a statement of irretrievable breakdown is made but then the parties reconcile temporarily? By reconciling, don't the parties show that the marriage had not broken down irretrievably? How can that application continue**?

   Under the new s.1 MCA 1973, the original application for divorce must contain a statement that the marriage has broken down irretrievably (s.1(2)). Curiously, s. 1(5) provides that when applying for a CO, the applicant must confirm to the Court that they want the application to continue (s.1(5)). This appears to permit a short-lived reconciliation (or attempted reconciliation). Provided that the applicant(s) still want the application to continue when the CO is applied for, the Court must grant it.

6. **Do the Act or the FPR address the potential for applicants to divorce for a benefit? eg: transferring assets to reduce claim by creditors when there is financial difficulty for one party**

   No, the Act and Rules do not address divorce for a benefit. Case law considers this issue, see *LS v PS* [2021] EWHC 3508 (Fam).

7. **Do you still require an Acknowledgement before you can apply for a Conditional Order?**

   See Rule 6.16 for deemed service by post or alternative service where no acknowledgement of service has been filed.

8. **Is there any guidance on a situation where the respondent does not acknowledge the application for divorce?**

   Under Rule 7.7 (1) the respondent must file an acknowledgement of service within 14 days beginning with the date on which the application for a matrimonial or civil partnership order was served.
   See Rule 6.16 for deemed service by post or alternative service where no acknowledgement of service has been filed.

9. **Will we be able to apply for the time period to be shortened by including provision in a consent order?**

   We assume that the term 'consent order' here means a financial remedy consent order. On that basis, see question 10 below.

10. **If the parties have already reached an agreement with regards to finances at the outset, such as through mediation, do they still need to wait the 20 weeks or is this a ground to seek a fast track.**

    The divorce proceedings and financial remedies matters/proceedings are two separate proceedings/matters. The timescales may be different for both.

    Applications for divorce and a Form A can be issued at the same time.

    Parties may apply for a financial remedies consent order once there is a conditional order.

    See DDSA 2020, section 1(8). In a particular case the court dealing with the case may by order shorten the period that would otherwise be applicable for the purposes of subsection (4) (b) or (5).

11. **In single application cases, if the applicant does not progress it but the respondent does want it progressed, what is to be done. Can the respondent apply for the Conditional order?**

    A respondent as well as the applicant can apply for a final order after the Conditional Order

has been granted, but they must wait an extra 3 months after the 6-week period has expired and make an application - see section 9 (2) of the Matrimonial Causes Act 1973.

12. **Would you be able to change a sole application to a joint application at the conditional order or final order stages. I understand from an earlier point that you can change the application to a sole one at either one of these stages**.

    There is an ability to change from joint to sole application at conditional and final order stages.

13. **Can a final order be applied for after 3 months of making a condition order? Or is there an extra 6 weeks included?**

    A divorce order may not be made final before the end of the period of 6 weeks from the making of the conditional order (DDSA section 1 (4) (b)).
    An applicant can apply for a final order after the conditional order has been granted, after giving notice (Rule 7.19 (1) (a) to the respondent. The applicant needs to give 14 days notice that they seek a final order (Rule 7.19 (2).
    If the conditional order is in favour of both parties they can jointly give notice to the court that they wish the conditional order to be made final (Rule 7.19 (1) (b)).
    A respondent must wait an extra 3 months after the 6 weeks period has expired and make an application - see section 9 (2) of the Matrimonial Causes Act 1973.
    See DDSA 2020, section 1 (8) In a particular case the court dealing with the case may by order shorten the period that would otherwise be applicable for the purposes of subsection (4) (b) or (5).

14. **Under the current law the respondent can apply for DA (once an appropriate timeframe has passed). Is there a similar provision if a single applicant makes the application but refuses to apply for the FA**?

    A respondent as well as the applicant can apply for a final order after the Conditional Order has been granted, but they must wait an extra 3 months after the 6 week period has expired and make an application - see section 9 (2) of the Matrimonial Causes Act 1973.

15. **Under the current system if a respondent applies for DA the court tend to list a hearing. The new system appears to imply that if the respondent applies then as a matter of course a final order will be made without a hearing is this correct**?

The respondent has to give notice of an intention to apply for a final order before the court makes a final order and has to show that the notice has been served on the applicant.

16. **Is there still a rule around applying for a final order longer than 12 months after conditional order**?

    The old FPR 7.32 ('Making Decree Nisi Absolute by Giving Notice) has been replaced with new FPR 7.19(5). The applicant will still need to apply for permission for FO if it is made more than 12 months after the CO but there is a slightly different wording as to what the applicant has to certify.

17. **Presumably the applicant has the same right of protection to delay final order as respondent can apply to finalise after further 3 months**.

    See above the divorce process must not exceed 26 weeks.

18. **If there is a dispute regarding finances and/or children, are these to be made on the online-system, or are they still to be made in the usual way?**

    It appears that the on-line system being started on 6th April will be for lodging the application for divorce order only.

Court Forms

19. **When will the new court forms be released**?

    Ahead of 6 April 2022 - please check the website at
    https://www.legislation.gov.uk/ukpga/2020/11/contents

20. **Can we access the forms before 6 April**?

    See above answer

21. **Which form is to be used between the 31st of March and the 5th of April**?

    Urgent applications that need to be considered after 31st March and before the 6th April will continue to be accepted, and issued where possible, if received by post or email. We believe that this will mean an application under the old regime but there is no guidance available publically.

If you are submitting your urgent application by email, you are asked to use the following email address, onlineDFRjurisdiction@justice.gov.uk. However, this email address will be unmonitored after 4pm on 5th April 2022.

22. **Is there any guidance as to what should be included in the statement of irretrievable breakdown?**

    The guidance will follow on completing Form D8 application for a divorce or dissolution of the marriage or civil partnership on the basis that it has broken down irretrievably.

23. **Is there any guidance on what the statement contained in the application for divorce should contain?**

    The guidance will follow please check the website at paragraph 19 above in respect of the new forms for 6 April 2022 start date.

24. **If applying as an individual does a part still have to give particulars/examples**?

    No, please see DDSA 2020:

    1 Divorce: removal of requirement to establish facts etc

    For section 1 of the Matrimonial Causes Act 1973 (divorce on breakdown of marriage) substitute—

    "**1 Divorce on breakdown of marriage**

    (1) Subject to section 3, either or both parties to a marriage may apply to the court for an order (a "divorce order") which dissolves the marriage on the ground that the marriage has broken down irretrievably.

    (3) The court dealing with an application under subsection (1) must—

        (a) take the statement to be conclusive evidence that the marriage has broken down irretrievably, and

        (b) make a divorce order.

25. **Will there be an option to indicate an intention to apply for financial provision on the divorce application?**

    Yes.

Issues Surrounding Joint Applications

26. **How can we as solicitors submit joint applications acting for both parties? I see that this will be an option but not on the digital system; only on paper.**

Joint applications for divorce and dissolution can be made online or on papers and made by a solicitor or solicitors instructed on behalf of one or both parties.

Joint applicant's will be known as 'Applicant 1' and 'Applicant 2'. Different permutations are envisaged:

- one solicitor for the joint applicants.
- Each applicant may have their own solicitor; or
- One applicant may have a solicitor and the other applicant is a litigant in person.

Where either one of both joint applicants have instructed a solicitor, the application must be made by the solicitor through the digital service, unless there is one solicitor acting for both applicants - in this instance the paper forms must be used. But watch this space.

27. **A number of questions have been asked in relation to the same topic[1], summarized in this way:**

- **If parties choose to instruct a solicitor for a joint application for divorce, how would this impact instructions regarding finances?**
- **Could the solicitor proceed to act for one party or would both parties need to go elsewhere due to conflict of interest**?

There is no rule on this specific issue and (as yet) no guidance.

A conflict of interest arises in any circumstances where a solicitor's separate duties to act in the best interests of two or more clients in relation to the same or a related matters conflict. (Glossary to the SRA Code of Conduct)**.** The general principle (paragraph 6.2 of the Code)

[1] Those questions are:

1. Parties can make a joint application and yet we can only act for one of them to avoid a conflict of interests. Has consideration been given to this?
2. If you act for both applicants in a joint application for divorce, how does that work for financial proceedings? Can I still only act for one applicant for finances?
3. Can we act for both parties if both parties wish to apply for the divorce?
4. Surely the fact that a joint application is possible does not alter the fundamental conflict rules. The analogy would be a Consent Order at present where it is effectively a joint application where one or both may be represented. It would be dangerous to act for both.
5. Would a joint application not be a conflict of interest if there are matrimonial finances to be considered?

is that you do not act in relation to a matter or aspect of a matter if you have a conflict of interest unless a series of conditions apply. Reference should be made to the Code[2].

Although the decision is an ethical one to be made on each case individually, we would expect practitioners to agree to joint representation in only limited cases: where, for instance, the solicitor is satisfied that the parties have such modest assets that there are no grounds for a financial remedy application.

28. **If it is a joint application presumably the application does not need to be served as both have consented? So the application is submitted and you would wait 20 wee**ks.

When the parties to a marriage have made a joint application for a divorce order, the Court will send a copy of the Notice of Proceedings to both parties (although not the Acknowledgement of Service for obvious reasons (FPR 7.5(3)). An application can then be made to the Court for it to consider making a CO at any time after the end of 20 weeks from the date on which the application was issued (FDR7.9(a)).

29. **Presumably a joint application will be slightly quicker as there will be no need to file an acknowledgement of service**?

No. Provided that the single application is not complicated by a dispute (defence), the timescale from the date issue to the application for a CO is the same whether it is a sole or joint application (per FPR 7.9(1)). Irrespective of whether both or just one of the parties started the proceedings, an application for making a CO can be made any time after 20 weeks from the date on which the original application was issued.

30. **What if one party applies for the divorce and the second does not choose to progress it**?

The withdrawal of one party from a joint application cannot de-rail the process. Where both parties issue the original application and one later drops out, the remaining party:

- Can still apply for a CO (per FPR 7.9(3)(c)):
- Can later apply to make a CO into an FO (per 7.19(1)(c)).

[2] **Either** the clients have a substantially common interest in relation to the matter or the aspect of it; **or** the clients are competing for the same objective and the following conditions below are met: all the clients have given informed consent in writing to you acting; (2) where appropriate, you put in place effective safeguards to protect your clients' confidential information; and (3) you are satisfied it is reasonable for you to act for all the clients.

31. **What is the benefit of making a joint divorce application as this would result in both parties incurring their own legal costs to issue and prepare**?

The purpose lying behind the creation of joint applications is one of principle. It allows both parties jointly to record that their marriage is at an end; which record the Court must respect and adopt. Arguably it is at the heart of the new reform. There is no requirement for both parties to be represented. The system has been made less complex with the intention of encouraging litigants in person (at least on one side).

Applications under the Old and New Rules

32. **What will be the position for existing petitions issued prior to 6th April 2022**?

Existing Petitions will be dealt with under the existing rules.

33. **If there is a pending application under the current provisions which is at a standstill, can a new application be issued under the new provision and will this require an application to withdraw the previous application under the old provision or can this be left in abeyance**?

There are no specific rules dealing with this issue. However, since the Court will not grant both a decree absolute and a final divorce order, it will probably be necessary to dispose of the pending petition if a new application is to be made for a divorce order. The existing petition can be dismissed. If decree nisi has been granted on the existing petition, then there will need to be an associated application to rescind the order.

34. **Can we still use the HMCTS to apply for Decree Absolute for an existing matter after 6th April?**

Yes; but the portal is different. See the HM Government website:

https://www.gov.uk/government/news/new-divorce-laws-will-come-into-force-from-6-april-2022.

35. **Where should old petitions be uploaded? The current portal or the new one under the new act?**

Old petitions must be uploaded to the existing portal by 4pm on 31st March 2022. From 6th April the new portal applies. Although urgent petitions can be uploaded between 31st March

and 6th April, practitioners should note that if the originating application is not deemed urgent, then the divorce application will not be capable of upload (see the HM Government website above).

36. **Will the Act have retrospective effect on divorces that are being contested currently**? and

37. **How do the new rules affect existing proceedings**?

    Existing petitions will be dealt with under the current rules.

38. **What is the first date on which an application may be made under the new regime**?

    6th April 2022.

39. **Will the amendments to the rules on service of documents apply to currently issued petitions also or only to new non fault petitions**?

    The amendments to FPR Part 6 come into force when the new primary legislation does (i.e 6th April) (per FP(A)R 2020 r.1(3)(a)) . However, the FP(A)R 2002 only amends some of Part 6: not all of it. Careful review of the amended sections reveals that they almost exclusively apply to service of applications rather than documents generally.

Divorce and Financial Remedy

40. **Is there going to be a limbo period with us not being able to ask the court to make a financial consent order for 20 weeks after filing the application? If we are likely to reach a financial agreement within the next few weeks are we better to file a petition under the current system so as to be able to obtain an order rather than having to wait until November?**

    There will be a limbo period of 20 weeks between starting the process for a divorce order and applying for a conditional order of divorce (new FPR 7.9):' an application can be made for a conditional order (new style Decree Nisi) at any time after the end of the period of 20 weeks from the date the application for a divorce order was made'. Since this is designed to be a cooling off period in which the parties may collectively decide not to pursue the divorce, we think that it is unlikely that Courts will be prepared to make a financial remedy consent order subject to a conditional order of divorce being made during that time.

If you are about to reach a financial agreement before 31st March 2002, you should file a Petition before the rules change. Note that the HM Government website says this:

> 'If you have an application saved on the current digital service and still want proceed, you'll need to access your account and submit your application by 4pm on 31 March 2022.
>
> Alternatively, you can wait until the new digital service is launched. If you still want to apply for a divorce, you can start your application again from 6 April 2022. If you've started filling out a paper application form, you'll need to make sure it's received by the court by 4pm 31 March 2022. If you're sending it in the post, you'll need to make sure it reaches the court by that date'.
>
> (*https://www.gov.uk/government/news/new-divorce-laws-will-come-into-force-from-6-april-2022*).

41. **Given the rules about applying the FO, how can a FO be delayed until after the financial proceedings are concluded**?

Obviously, an applicant can simply delay their application for a FO until the financial proceedings are resolved. The respondent has protection by virtue of the new s.10(2) MCA which provides that prior to making an FO, they can apply to the Court for consideration of their financial position after divorce. This can be done whether the application for a divorce order was originally made by a single spouse or both spouses and one subsequently withdrew (s.10(2)(a)(ii) MCA 1973). Once an application is made pursuant s.10(2), the Court cannot make the CO into an FO unless it is satisfied that:

- The applicant should not be required to make any financial provision for the respondent;
- Or the financial provision made by the applicant for the respondent is reasonable and fair or is the best that can be made in the circumstances.

This power exists under the current framework but only in relation separation petitions (2 and 5 years). The Financial Remedies Practice 2021/2022 describes its current role as obsolete[3]and the authors muse on whether it will enjoy a renaissance following its broader applications to all sole applicant divorce orders.

[3] p.577

43. **What information will be needed for the Judge to determine whether financial provision is acceptable upon application for the final order? Will it be something akin to the statement of information**?

The Court must look at all the circumstances of the case including (new MCA s.10(3A)):

(a) The age, health, conduct, earning capacity, financial resources and financial obligations of each of the parties to the marriage; and

(b) The financial position of the respondent as, having regard to the divorce, it is likely to be after the death of the applicant should person die.'

It is not clear how this information will be conveyed to the Court as the Court forms have not yet been published..

44. **It seems like the court is envisioning that (ideally) the divorce application will be made, then the finances will be agreed between the parties while they wait for the Conditional Order and then Final Order. In this case, where the finances are agreed, is the idea that the draft Financial Order agreed between the parties should be uploaded on the same system**?

As to the process, we anticipate that the existing ways to apply for financial orders will remain unchanged for solicitors. Solicitors are able to file an application for a financial order (whether by consent or contested) using the digital service. Use of the digital service for consent applications will still be mandatory for solicitors.

The new HMCTS system will not be launched until 6th April. We do not believe that the intention of the Service is to combine the divorce order and financial systems into one portal but the position will be clearer after the launch.

45. **Do section 10(2) and 10(3) suggest that the applicant might not need financial support. It suggests that the Respondent is always the weaker party**?

No. Sections 10(2) and 10(3) do not suggest that the applicant might need not need financial support. However, the applicant has control over the divorce process; in particular, the speed with which the CO and FO can be made. The provisions of section 10(2) and 10(3) provide some control to the respondent.

46. **Should we now always tick the box for s.10(2) if we are acting for the Respondent**?

Not necessarily. Only if there is a concern that the applicant may try and obtain an FO before the FR final order has been agreed.

47. **Re Financial Provision - does this mean that unless you have agreed £ and got a Consent Order that a Final Order cannot be made**?

    No. If the respondent does not make an application under s.10(2), then the Court can make a CO into an FO.

48. **If either party is able to apply for FO, if you are dealing with complex finances, do you have to submit an application to prevent a FO being made to protect pension position**?

    No although the respondent might see the benefit of making an application under s.10(2) where they are concerned that an unscrupulous applicant will apply for an FO before a PSO has been made.

49. **What might be the Court's attitude to delaying grant of the Final Divorce Order e.g. to preserve inheritance rights pending Financial Settlement**?

    The list of reasons for delaying the making of an FO are set out in the new FPR 7.19(4). Issues of inheritance are not included on the list.

Costs Issues

NB: on 28th March 2022, the President published Guidance on Costs in Proceedings for Matrimonial and Civil Partnership Orders. A copy is attached to these answers.

50. **Is there provision for claiming costs under the new procedure if no agreement has been reached on costs?**

    An application for costs of an undisputed (standard) divorce or dissolution will need to be made by a separate application using Form D11 (general standard application form). The application goes before a Judge and is decided by a Judge.

51. **What the court will do on an application for a conditional order, a judicial separation or a separation order?**

    Per Rule 7.10 (3): If the applicant has applied for costs, the court may, on making a direction under paragraph (2)(a), make directions in the costs application.

Further provisions about costs

7.32.—(1) In a disputed case any party to matrimonial or civil partnership proceedings may be heard on any question as to costs at the hearing of the proceedings.

(2) In a standard case, any application for costs should be made using the Part 18 procedure.

There is likely to be further guidance on costs.

52. **Are you able to please recap at which stages costs should be applied for in divorce in a standard case and disputed case?**

Any application for the costs of an undisputed (standard) divorce or dissolution case will need to be made by a separate application using Form D11. Further guidance on costs will be shared separately to this information pack when available.

53. **Is there likely to be a change to the Court fee?**

See https://www.gov.uk/divorce/file-for-divorce website. Current and any changes to the court fee will be available on the government website.
Those on benefits or low income may be eligible for help with fees.

54. **Are court fees split between parties as of routine or does this need to be agreed beforehand?**

Joint applicants can agree between themselves how they pay the fee for the application. However, on the digital service, applicant 1 will have to pay the court fee. On paper applications, either applicant may insert their details on the court fee page. Joint applicants can apply for Help with Fees if both applicants have little or no savings and either get certain benefits or have a low income. Where this is only the case for one applicant, Help with Fees will not be available for joint applicants. More information on Help with Fees can be found at https://www.gov.uk/get-help-with-court-fees.

55. **Is there still an option to apply for costs against the other party?**

There is an option to apply for costs against the other party in certain circumstances. For example, when a respondent does not reply to the application or there is non-engagement then the applicant has to show service of the application and can apply for deemed service.
Any party can be heard on the issue of costs in a disputed case.

56. **Do the presenters now think that costs claims will fall away now a separate D11 application is required?**

This remains to be seen. The process is streamlined and the policy behind the general approach of the group working on the DDSA was that the costs discretion be retained, including the 'clean-sheet' costs rules and a high bench mark being needed for costs orders to be made.

57. **How are costs issues resolved if the divorce is now one based on no fault? As the applicant, on what basis can you claim your costs from the respondent?**

Applicant 1 will have to pay the court fee but can get help with this if s/he is in receipt of benefits or on a low income. On a standard undisputed application for divorce a Form D11 can be completed application for costs can be issued to be placed before a Judge for consideration.

Questions of Broader Principle

58. **Are Solicitors being marginalised in these reforms**?

It is understood that the Ministry of Justice has aimed to establish a system which can be used by citizens (litigants in person) as well as solicitors acting on their behalf. Furthermore, it is expected that the new framework will allow the Ministry to have an improved statistical view on who is using the system. Whether this marginalises the solicitors' profession remains to be seen.

59. **Is there now a need for a corresponding change to s25 (2) (g) MCA 1973?**

I suspect not. There is still a legitimate place for conduct within the s.25 criteria; particularly financial conduct. Certainly, the relevance of financial conduct is not based on a moral principle which arguably the existing s.1(2)(a) and (b) MCA are. The position over non-financial conduct is more nuanced but in the rare cases where it exists, there are often financial consequences for the injured party arising from the index behaviour.

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