

# Family law answers to problem questions



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## Family Law

### Introduction

The law of divorce is governed under the Matrimonial Causes Act 1973 where it provides the sole ground for divorce, namely that the marriage between Jason and Sandra has broken down irretrievably.[1] Nevertheless, in order to establish irretrievable breakdown, Jason will have to show that one of the five facts listed in section 1(2) of the MCA 1973 has been established on proof ( *Richards v Richards* ) [2]. Meanwhile, it is notably that the court in England and Wales is given a wide power in determining the arrangement of children between the Jason and Sandra. Since Jason and Sandra are married, they both have parental responsibility for Joyce and Tom[3]. Their parent responsibilities will not be terminated even if the court grants them a decree of divorce. By virtue of CA 1989, the focus is on the welfares of the children[4] and thus the welfare checklist set out in section 1(3) of CA 1989 will be taken into account by the court in deciding whether to grant share residence to Jason and Sandra and to limit Sandra's contact with Joyce and Tom.

### Divorce between Jason and Sandra

Since the marriage between Jason and Sandra has lasted seven years, Jason is not restricted by the absolute bar on the presenting of petition for divorce within one year of marriage imposed by section 3(1) of the MCA 1973. Jason is allowed to petition for divorce if he is able to establish one of the five facts set out in section 1(2) of the MCA 1973.

## Adultery and Intolerability: section 1(2)(a)

The first possible fact that Jason would rely on is that if adultery and intolerability contained in section 1(2)(a) of MCA 1973. In order to successful in this claim, Jason would have to show that Sandra has committed adultery and he finds it intolerable with her. In *Dennis v Dennis* [5], adultery is defined as a voluntary act of sexual intercourse between Sandra and another person who is of the opposite sex. On the fact, Jason's brother saw Sandra and Craig having dinner at a local restaurant and then leaving the restaurant together late at night, holding hands and getting into the car. According to *Sapsford v Sapsford* [6], It is unlikely that this incident is sufficient to constitute a ground of adultery as there is no evidence of sexual intercourse between Sandra and Craig. However, following the case of *Farnham v Farnham* [7], Jason would want to raise a rebuttable presumption that Sandra has committed sexual intercourse with Craig by using the circumstantial evidence of inclination and opportunity. However, it is unlikely this claim will be successful as the circumstances does not in any sense suggest that Sandra and Craig have indulged in sexual intercourse.

Further, it must be noted that, adultery is a serious accusation to make and thus the courts have always insisted on strong evidence to allow such accusation.[8] Even if adultery can be established, Jason would have to show that he finds it intolerable to live with Sandra while the intolerability need not follow from Sandra's adultery ( *Clearly v Clealy* ) [9]. According to *Goodrich v Goodrich* [10], the intolerability test is to be accessed subjectively and thus Jason could rely on the fact that he cannot cope with Sandra's

increasingly volatile behaviour and claims that it is intolerable to live with Sandra.

#### Unreasonable Behaviour: section 1(2)(b)

A more realistic option for Jason is section 1(2)(b) of MCA 1973, where it provides that Jason can rely on the ground of 'unreasonable behaviour' if he can establish that Sandra's behaviour is such that it is unreasonable for him to continue living with her. According to *Livingstone- Stallard* [11], the focus is not on the gravity of the behaviour per se but on its impact on Jason.

Following *O'Neill v O'Neill* [12], the test under s. 1(2) is to be accessed both objectively and subjectively, the objective aspect concerns whether Jason is reasonably expected to stay with Sandra, while the subjective part takes into account the personalities of Jason and Sandra. Since we are told that Sandra's behaviour becomes increasingly volatile, the chance that Jason will succeed in this claim would increase.

It is likely that Sandra's unreasonable behaviour can be established, it is then necessary to look at the character of Jason and Sandra and decide whether they can be expected to stay together reasonably ( *Ash v Ash* ) [13]. It can be pointed out that Sandra is having an adulterous relationship with Craig and this it might not be reasonable to expect Jason to live with her. At this point, it is arguable that the court will grant a decree of divorce on the ground of s. 1(2)(b) based on Sandra's behaviour that makes Jason cannot be reasonably expected to stay with her.

#### Arrangements in relation with Joyce and Tom

By virtue of section 2(1) of CA 1989, both Jason and Sandra owe parent responsibilities toward Joyce and Tom. Such responsibility is defined in section 3(1) as ‘all rights, duties, powers and responsibilities and authority which by law a parent of a child has in relation to the child and its property’. This right continues even after Jason and Sandra divorce. Nevertheless, under section 1(5) of CA 1989, Jason and Sandra are required to file a statement of arrangements for the children, detailing the measures that have been resolved between them and also the unresolved issues.

On the facts, there are two issues to be considered in regards with Joyce and Tom: who should the children stay with and the extent of Sandra’s contact with the children. In regards with these unresolved issues, the court is able to make the child arrangements order under section 12 of the Children and Families Act 2014 which replaces the orders previously known as residence orders and contact orders contained in section 8 of Children Act 1989. The change of terminology supposed to move away from emphasis of ‘resident’ and ‘non-resident’ parent and shift the focus onto the children’s welfare[14]. In other words, the court will take into account the welfare checklist set out in section 1(3) of the CA 1989.

The Welfare checklist includes the ascertainable wishes feelings of Joyce and Tom; their physical, emotional and educational needs; the likely effect on Joyce and Tom in their circumstances; Joyce and Tom’s ages, sex, backgrounds and other relevant characteristics; any harm which they have suffered or are at risk of suffering; and how capable Jason and Sandra and Craig are meeting Joyce and Tom’s needs.

We are told that Joyce is five years old and Tom is at an age of three. They are still young and might not be able to express their true wishes and feelings with regards to the issue of residence and contact and thus it is unlikely that the court will give weight to their wishes ( *Stewart v Stewart* ) [15]. In regards with their needs, even though there no presumption that a child's emotional and physical needs are best met by the mother, the case law has showed a preference for keeping young children with their mother [ *Re S (a minor) (Custody)* ][16]. However, in *Re H (A Minor)* [17], it was held that the time has changed and that many fathers were as capable as mother of looking after small children and this may lead to a decision that in favour of Jason. Further, the facts that Sandra is under depression and her plan to move in with Craig, who is also has anger management issues will be taken into consideration under section 1(3)(e) by the court. Lastly, the capabilities of Jason and Sandra in meeting Joyce and Tom's needs will be considered as well. Here, it is likely that Jason would have a good chance of obtaining a residence order as the facts that Sandra and Craig is starting a new relationship and there is no evidence that Craig seems to fit the stereotype of the replacement father.

However, even if the court grants a residence order in favour of Jason, the parental responsibility of Sandra towards Joyce and Tom will not be terminated. According to *Re R (A Minor)(Contact)*, Sandra will be granted a generous contact with Joyce and Tom because the court is on the view that ' it is a right of a child to have a relationship with both parents wherever possible'.[18]The fact that both Sandra and Craig are under anger

management course will deny Jason's claim that Sandra has a mental condition that makes her inappropriate to be in contact with Joyce and Tom.

(1500 words)

## Part 2

### Introduction

In 1956, the concept of no-fault divorce was first put forward by the Morton Commission in their report on the basis that the divorce law prior to that date has encouraged acrimony between the parties.[19] Such approach was taken by a series of Law Commission reports and led to the Introduction of Divorce Act 1969, which was later consolidated to the legal provision in use today, namely the Matrimonial Causes Act 1973. Section 1(1) of MCA 1973 provides that irretrievable breakdown of marriage is the only ground for divorce and this can only be established if one of the five facts listed in section 1(2) of the MCA 1973. There are two no fault facts that can be relied to establish divorce, namely the two years' separation with the respondent's consent to the divorce [section 1(2)(d)] and the five years' separation [section 1(2)(e)]. However, the facts that the number of petition under these no-fault facts are much lesser than the fault facts of adultery [section 1(2)(a)] and unreasonable behaviour [section 1(2)(b)] raises a question that whether the law of divorce in England and Wales can really be described as one of 'no-fault'? This essay will argue that identifying who is at 'fault' is still very much a feature of the divorce system in Wales and such element can be proved decisive in determining issues such as division of financial assets, child contact and residence. Such approach was also put forward by

John Eekelaar that the law that the current law of divorce is 'deeply corrupting by the law itself' as the individuals are prevented from accessing to their legal rights conferred on them by law.[20]

### Application of 'no-fault' divorce

In order to obtain a speedy divorce, it is more likely that the parties to a relationship would be more willing to rely on fault-based divorce. The courts have taken a strict approach in allowing a non-fault divorce and the degree of separation does not limit to the normal notion of physical contact but it also involves mental element. For instance, in *Mouncer v Mouncer*, regardless the facts that the parties were slept in separate bedrooms, it was held that they were living apart as they continued to spend time with their children together.[21] At this point, it can be concluded that the law has failed to provide an effective method of no-fault divorce and this forces the party to a relationship to initiate a divorce claim by alleging fault on the part of the other party.

In the other words, the law has failed to fulfil its original objective that to enable the parties of a marriage to end their relationship with minimum bitterness and hostility. Fault remains as an important exists that dominate the law of divorce in England and Wales today. Despite its decisive role in establishing a ground for divorce, the courts have also emphasised 'fault' of the parties in determining the consequences of a relationship breakdown.

### Division of financial assets and Child contact and residence



According to Thorpe J in *Dart v Dart*, the court are given wide discretion to make orders which suits the needs of individual cases, albeit guided by the various factors set out in the statutory framework. With regards to the financial distribution on marriage breakdown, section 25(1) of the MCA 1973 required the court to take into account to all circumstance of the case, whereby section 25(2)(g) provides that the conduct of the parties is one of the factors that should be considered. Even though, it is arguably that the introduction of no-fault divorce by MCA 1973 reduced the significance of fault in determining the distribution of property, but by reviewing the case law, the outcome of the reform is somehow disappointing. In *K v K*, the court held that the husband was not entitled to his wife's assets due to the facts that he had sexually abused his wife's grandchildren.[22] Also, in *H v H (Financial Relief: Attempted Murder as conduct)*, the wife was given a greater priority in the financial distribution because the husband had attacker her with knives and was convicted of attempted murder.[23] It is apparent that the fact that a spouse has behaved very badly will inevitably affect his or her entitlement to a greater priority in the financial distribution, and this encourages further animosity between the parties. As a result, section 25(2)(g) was highly criticised as it undermines the aim of the law to remove incentive to make allegations of fault in order to divorce peacefully.

On the other hand, it must be noted that, by virtue of section 2(1) of Children Act 1989, the parental responsibility of the parties remains even after divorce. In determining the issue in relation to child contact and residence, the welfare checklist set out in section 1(3) of CA 1989 plays a prominent role in the decision making. Within the checklist, there is no reference to the

‘ fault’ element at the part of the parents, but the courts are tend to grant the relevant order in favour of the ‘ innocent’ parent with the conception that it will be the children’s best interest not to stay or even in contact with the ‘ fault’ parent, particularly in the cases of domestic violence.

## Conclusion

In conclusion, it is undeniably that the approach to divorce in England and Wales cannot be described as one of ‘ no-fault’ as the ‘ fault’ element is still playing a prominent role in relation with the issues of divorce and its consequences. Nevertheless, we are not arguing a reform towards a purely no-fault divorce because, as according to Deech , this will give too much freedom to the individual and give them a wrongful thought that divorce something can be obtained easily.[24]Instead, we are saying that the system of divorce should be balanced between a mixed mechanism with both ‘ fault’ and ‘ no-fault’ ground for divorce[25]but not letting the ‘ fault’ feature dominate the whole system alone.

(1041 words)

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