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Divorce Dissent

Dangers in Divorce Reform

Ruth Deech

CENTRE FOR POLICY STUDIES

Biographical note

Ruth Deech is Principal of St Anne's College, Oxford where she initially read law. After post-graduate work at Brandeis University, USA, she was called to the Bar by the Inner Temple in 1967. Her first post was with the Law Commission formulating the Divorce Reform Act, 1969.

As an academic lawyer she returned to Oxford after two years as a law professor in the University of Windsor in Canada, and became fellow and tutor in law at St Anne's College, Oxford. She remained in that post until her election as Principal in 1991. She has taught Constitutional Law, Public International Law, Land Law, Family Law and Jurisprudence. She has published widely both in academic journals and in the newspapers on family law and divorce.

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Introduction

Late in 1993 the Government published its detailed proposals for reforming the divorce law in the Green Paper *Looking to the Future: Mediation and the Ground for Divorce.*[1] Whereas existing law provides for divorce on the ground of irretrievable breakdown of marriage established by one of five grounds, under the new proposals either spouse may initiate divorce proceedings without the need to establish grounds, and only twelve months need elapse between initiation and the decree. The changes are based on the recommendations of the Law Commission, as reshaped by the Lord Chancellor to promote family values and save legal costs. This pamphlet challenges the assumptions on which the Green Paper is based and argues against reforming the existing law.

Today's reformers use many of the same terms and arguments as their predecessors in the 1950s and 1960s. But easier divorce has failed to realise the aims of its original proponents and, in many ways, has gone against them. There is every reason to think that new reforms will be equally counter-productive. The proposed arrangements for financial support and mediation are impractical, and little account is taken of the evidence of the bad, lasting effects of divorce on the children. The message of the reforms is that marriage should be regarded as a short-term commitment – and this perception of the law will increase still further the rate of marital breakdown.

The Government should abandon its plans to reform divorce law. They will save neither money nor marriages, and please no one outside the narrow legal establishment which instigated them.

1

The Green Paper and its Proposals

The proposals in the Green Paper, *Looking to the Future: Mediation and the Ground for Divorce*, are designed to rationalise divorce law further – to make divorce easier, quicker and cheaper than at present, and to remove any notion of fault or guilt. The Green Paper, published by the Lord Chancellor's Department on 6 December 1993, was based on the proposals of the Law Commission, who reported that divorce law needed reforming.[2] The Commission's proposals for a new law were promptly reshaped by the Lord Chancellor, with the twin additional aims of saving legal costs and promoting family values, as called for in the interim by politicians. The Green Paper sets out the basis for future Government action.

The existing law provides for divorce on the ground of irretrievable breakdown of marriage, and is based on the Divorce Reform Act 1969. The breakdown must be established by one of five situations: (a) adultery; (b) unreasonable behaviour; (c) desertion; (d) two years' separation plus consent; and (e) five years' separation. In 1973 a Special Procedure was introduced which now applies to the 99 per cent of divorces that are undefended. This Procedure has eliminated oral proceedings and deals with divorce by documentary evidence, not court appearance. For this reason, and others, the statutory safeguards referring to opportunities for reconciliation and protection of spouses divorced against their will have become ineffective. Legal aid was withdrawn from undefended divorce petitions in 1977. Financial provision and arrangements for children are treated separately and, it is widely agreed, are far more complicated and protracted than the divorce itself.

The divorce reform proposals are as follows: either spouse is to be free to initiate the divorce process, without the need to establish any grounds or reasons at all. Twelve months ('the transition period') will have to elapse between the initiation and decree, or freedom to re-marry. During those twelve months financial arrangements and

arrangements for children have to be made (although the proposals do not make clear what would happen if the settlements were not made in time) and mediation will be on offer, with or without charge or sufficiency of mediating services. A person seeking a divorce would be offered an initial interview for the purposes of receiving information, registering the intention to divorce and ascertaining eligibility for legal aid.

The Green Paper's proposals are based on a set of beliefs that need to be challenged:

1. That mediation commenced after the formal initiation of divorce can save marriages.
2. That mediators can sort out the financial and property issues pertaining to divorce.
3. That children will suffer less harm if mediation is on offer.
4. That legal aid costs will be saved.
5. That both spouses will be rational and co-operative over the procedures preceding the decree.
6. That fewer lawyers will need to be involved in divorce proceedings.
7. That lawyers' assistance to divorcing parties has been inadequate.
8. That offences committed in marriage can be ignored and set aside.

The current debate on changing divorce law needs to be bolstered by some facts of which most participants are unaware. The first is that only *mediation* (formerly called conciliation) is on offer, not *reconciliation*; in other words, *counselling* on reaching decisions, not an attempt to heal the marriage. The second fact is that every reform of the law in the last 130 years, whatever the reason, has led to an irreversible rise in the divorce rate. Further, predictions concerning social change after divorce reform are notoriously unreliable, as will be shown. Finally, it is impossible to reform divorce law in isolation from maintenance law and procedure. We have no social consensus on support of the ex-wife nor have we considered why she should be supported by a well-off former husband. The recent clamour over the Child Support Agency shows how deep the divisions run. From a mediator's point of view, the prospects of

financial settlement have been undermined by a recent decision of Mrs Justice Booth, *Crozier v. Crozier* (*The Times*, 9.12.93). In this case it was decided by the court that liability to support a child assessed by the Child Support Agency was no ground on which to reopen a clean break settlement reached in an earlier divorce package. This means that there is no longer any incentive for a divorcing father to agree to transfer his interest in the former matrimonial home to his ex-wife in exchange for future freedom from child support. Every single matrimonial asset will henceforth be in dispute and worth fighting for, in a way that has ceased to be the norm in recent years.

2

The Mistakes Made Last Time

Plans to reform divorce can be better assessed by setting them in the recent historical context. In 1969 the notion that divorce should only be granted to an innocent party on grounds of fault was swept away on the recommendation of the Law Commission. It is now clear that the work of the reformers in the 1960s was flawed. Their reliance on selected statistics and works of social science led to wholly inaccurate predictions about the effect of the Divorce Reform Act 1969, and there is no reason to suppose that the latest reform proposal is any more reliably based.

The stated aims of the architects of the 'no-fault' law of 1969 were to promote 'stability of marriage, reconciliation, maximum fairness, protection of children and the economically weaker spouse', the regularisation of what were then called 'illicit unions' and 'bastards' and the use of the two-year separation and consent ground of divorce. It was estimated then that some 40 per cent of illegitimate children were born into stable illicit unions of persons unable to marry because one of them could not end a first marriage. The Law Commission estimated that if divorce law were eased, 30 per cent of all illegitimate children then under sixteen would be legitimised and that in future 19,000 more every year could be legitimated (this represented 30 per cent of the then annual illegitimacy rate of 64,000). In fact, far from encouraging parties to regularise their unions and the status of their children, the new freedom to divorce of the late 1960s had the opposite effect. Births out of wedlock now account for 30 per cent of annual births and other figures show a marked rise in cohabitation. This popular disregard for the formalities has led to the virtual abolition of illegitimacy by the Family Law Reform Act 1987, and to legislative attempts to give status to cohabitation. In other words, people are not as interested in formalising relationships as the law reformers had thought.

It was also predicted in the 1960s that the availability of the two-year separation ground would reduce the number of hostile divorces based on the grounds of cruelty, adultery and desertion. No such

thing occurred, and today three-quarters of all decrees are based on allegations of adultery and unreasonable behaviour.

Today's arguments for more divorce reform were rehearsed in the late 1960s. A broad motive then was to make the law understandable and respected; it was feared that if the law were seen to be hypocritical it might bring the whole administration of justice into disrespect. This anxiety arose from the alleged widespread practice of disguised consensual divorces. The same excuse is used today. Once again we are told that the law is hypocritical because of the unexpectedly heavy use made by petitioners of the 'fault grounds' and because of the operation of Special Procedure, avoiding any appearance in court. Once more, we are warned of the dangers of this to parties and to the system. (The same fears were aired in the Royal Commission on Divorce in the 1950s.) This argument has been made so frequently that it should now be concluded that such fears are unfounded, and members of the public do not necessarily start to view divorce law and the administration of justice with disrespect after contact. Probably it is impossible to avoid some deception in a field as emotional as that of divorce. Indeed, it may even be the case that some hypocrisy is not a bad thing after all, and unavoidable in practice.

The most pronounced failure of the reform of the 1960s was the prediction of the level of the divorce rate itself. It was thought that there would not be a large increase and that the rates might even fall back. In fact the rate trebled from approximately 60,000 petitions a year in the late 1960s to 190,000 per annum today. The Law Commission has once again predicted no rise stemming from new laws.

3

Divorce Law and its Defects

Every thirty years or so, when divorce is re-examined, well known social factors are blamed for the high divorce rate. In the 1950s it was blamed on lack of housing, youthful marriages, emancipation of women, and high expectations by them, and both spouses' demand for satisfaction and self-expression in marriage. In the 1960s it was blamed on the housing shortage and shot-gun marriages, and the ability to legitimate children born out of wedlock by subsequent marriage, along with the availability of legal aid. What has always been ignored is examination of the process of changing divorce law and the effects of the change on the public.

The relationship between the law and rates of breakdown of marriage is by no means straightforward, but credulity is strained if one continues to acquit the law itself of any effect. Family lawyers tend to believe that the enactment of reformed and rational law will affect the behaviour of those subject to it. At the same time they tend to deny that new divorce law will actually cause more people to end their marriages. Yet there is proof that it does. The divorce rate went up in the late 1940s when legal aid was extended to divorce; it went up dramatically after the passage of the 1969 Divorce Reform Act and has continued to climb, especially after the reform of procedure in 1977. Over and again in this century reformers have told us that the law has to be amended to bring it into line with reality, because behind the façade of statute, consensual decrees are being obtained without proper investigation. The black letter law is then brought into line with practice; the divorce rate rises and very soon we find that practice is again out of step with the law. Somewhere a stop has to be called.

The effect of divorce on children has continued to be disregarded. The wealth of statistics supporting the new proposals has been chosen in a way that ignores the relationship between the break-

down of marriage and the law, and ignores studies of the relationship between divorce and the welfare of the children. Divorce is bad for children. This is the message of the National Child Development Study of 16,000 children born in March 1953 and the Medical Research Council National Survey of Health and Development, a study of children born in March 1946.[3] These works demonstrate what common sense tells one: that divorce leads to lower educational achievement and worse employment and emotional prospects for children, and that these consequences are not related solely to poverty of parents. The findings could be used to support calls to make divorce and marriage more difficult; however, researchers only use these figures to support calls for improvement of maintenance levels, as if poverty were the sole important factor.

With regard to children, it has been said that the most memorable and scarring episode in the divorce process is the moment of separation. Therefore, any alteration to divorce law is irrelevant to them, as it does not diminish their post-separation suffering. We should not delude ourselves that the nature of the divorce process can make a real improvement to the lot of women and children. If we really believe in the welfare of the children, as we say we do, then any law that might risk an increase in the divorce rate should simply be avoided. There are no proposals in the Green Paper that would benefit children and end the trauma caused by the fact of separation.

The divorce rate has been running at 180,000 to 190,000 petitions a year for at least ten years. At a modest estimate this amounts to 3,600,000 adults experiencing divorce in the last ten years; 1,600,000 children have grown up during their parents' divorce in the last ten years. The figures are very crude because they do not allow for the number of remarriages ending in second divorces and the children twice affected by the same experience. Surprisingly, but sadly, a second marriage is even more likely to end in divorce than a first, and a third marriage even more so. Similarly, couples who cohabit before marriage are more likely to divorce than those who do not. Experience does not seem to make us any wiser.

The cost of divorce to the public has received various estimates, ranging up to several billion pounds per year. They reflect: legal aid,

welfare payments to one-parent families, extra housing where the family unit splits into two households, the cost of courts, judges and lawyers, accountants, conciliators and counsellors, illness, absence from work and children's extra needs. It is undoubtedly an enormous cost. We should not, however, focus on the material costs alone but also on the emotional ones.

The current expressions of bitterness by fathers made to pay extra support to their children by the Child Support Agency is an indication of the resentment, inability and unwillingness of fathers to pay for the families left behind on divorce. Not only that, but it would be charitable to admit that many men simply do not have the resources to support the wife and children of the first marriage and that they must, in many cases, become a charge on the State. We cannot afford serial marriage in our society: poverty is as inevitable as the damage to children from the emotional state of their parents. Yet it seems to be an unspoken political decision that attempts to make divorce more difficult are totally unacceptable. Even while public debate focuses on the plight of single parents and their children, the fact that over half of them are created by divorce and separation is overlooked. It is astonishing that any government should seriously contemplate easing divorce law while simultaneously expressing anxiety about single parents, their children and society's health.

The real problem in divorce law is not the question of grounds for divorce, but rather the financial problems associated with separation and breakdown, consequent upon abandoning the concept of marriage as a lifelong commitment while retaining the notion of the husband as perpetual provider. The law of financial provision is going to appear even more anomalous if the proposed reform of divorce is carried out. In our society, we embrace two totally contradictory beliefs. One is that marriage may be ended without blame in the pursuit of individual fulfilment; the other is that women should stay at home and take care of their children with the financial assistance of the father of the children. It is unrealistic to propose, as the Law Commission has, that the financial arrangements of the divorcing couple can all be concluded in every case in twelve months or a shorter period, as long as financial provision law remains as complicated, inquisitorial and embittering as it is at present.

The Green Paper examines the cost of mediation (£550 per case) and how it should be borne. The guiding principles are stated to be

that the costs of dissolving a marriage should be borne by the couple themselves, but that legal aid should be available in limited circumstances and provided the recipient is behaving reasonably. The interviewer at the initial interview is to be charged with a duty of determining eligibility *and* unreasonableness should that arise. This places considerable influential power in the hands of the mediator. It will also have the effect of creating a two-tier approach to divorce. The poorer population, eligible for at least some legal aid assistance, will have to persist with mediation and accept control of the case by the mediator. Those who would be expected to pay their own divorce costs will be able to choose to go directly to lawyers for advice. It should be noted that financial arrangements, including pension sharing, investments, home, capital sums, mortgage etc., are far too complicated to be dealt with by mediators, certainly in the middle income bracket divorces and up. It can easily be predicted if the new proposals are enacted, that in a few years' time the visit to mediation will become a routine formality, undergone only by those who have to. This will in due course lead to calls for its abolition in turn.

A very recent phenomenon is the solicitor/mediator. The solicitor/mediator offers legal advice alongside the family mediator. Taken at face value, this will add to the cost. It will also mean that the couple will have to revert to their own solicitor or solicitors for completion of the financial agreements. Solicitors pride themselves on their specialised family services under existing law, and are appreciated by most clients.[4] They are unlikely to allow themselves to be moved aside to make room for mediators without legal training.

4

Are There Reasons to Change the Law?

Mediation is now being advocated as the vital factor in the proposals for a twelve-month waiting period between initiation of divorce and freedom to re-marry. Mediation must be clearly defined and distinguished from reconciliation. Mediation is a process undertaken at present by rather few, poorly funded and unregulated organisations and it is designed to help a single person or a couple reach the appropriate decision concerning the breakdown of the marriage. *It is not designed to promote or assist reconciliation*, i.e. the dropping of a claim for divorce. As such, mediation is useful and helpful, but will do nothing to hold down the rate of divorce. Moreover, the Newcastle University Research Project on the costs and effectiveness of conciliation (1989) cast doubt on the efficacy of the process itself. Its conclusion was that conciliation is good for divorcing parties but that it should not be fused with divorce procedure. It was shown to add some hundreds of pounds of costs to divorce while leaving conciliated and non-conciliated couples in exactly the same position some two years after the divorce was finalised. In other words, it helped couples who took advantage of it go through the immediate divorce with less bitterness. It should also be pointed out that the Green Paper proposals assume that even after a party to a marriage has been to an initial interview and made a formal claim to end the marriage, that party may change his or her mind during the twelve months' transition period. There is no basis for such a belief. Although unprovable, it is assumed that in England a spouse goes to a lawyer and initiates the formal process to end the marriage only after long reflection and having reached a decision to go through with it. It cannot reasonably be assumed that both parties will change their minds after visiting lawyers and mediators and arguing over the division of assets and children over the course of twelve months.

There is no specific proposal to save marriage throughout the Green Paper. Mediation may save money, not matrimony. The existing divorce statutes contain provisions to postpone or refuse a

divorce in circumstances of hardship, and the Green Paper proposes to retain them, even though they have had no effect in over 21 years of operation. The notions of innocence, guilt and commitment in marriage are given short shrift. And the protection of women, achieved to a limited extent by the existing law, is to be completely abandoned, that is, the five-year ground will vanish. Women are reported to feel disadvantaged by mediation. This is because mediation seeks a compromise or agreement and favours the articulate and determined over the cowed and quiet and, it is said, female mediators are more persuaded by men's arguments than women's. For over 20 years there has been a statutory provision in the divorce law that solicitors filing petitions should indicate whether they have, or have not, given information to the petitioner concerning reconciliation services. This is known to have no effect, and this fact undermines the mediation approach of the Green Paper proposals.

There is certainly no public or professional clamour for reform. All those people whose marriages have broken down can easily obtain divorces under the existing law, so there is no practical need to liberalise it. The only possible reason for change, then, is rationalisation. This, however, is not a good end in itself; indeed it may be positively harmful in divorce law. Each successive attempt during this century to bring the statute law into line with reality has resulted in an increase in the divorce rate. Both world wars and increased access to the divorce courts led to a rise in the divorce rate, and the rate has never declined even when the proximate cause of the previous rise has been removed. Every increase in the divorce rate results in greater familiarity with divorce as a solution to marital problems, more willingness to use it and to make legislative provision for its aftermath. The pressure on the divorce system leads to a relaxation of practice and procedure in divorce, then to a call for a change in the law in order to bring it into line with reality, and then to yet another increase in divorce. This is the spiralling process which Parliament should not encourage, for the sake of the children if nothing else.

The proposed new law is said to make the divorce process longer. This will certainly not be true of the present two-year and five-year separation grounds. In relation to the adultery and behaviour grounds there is always a waiting period, currently of seven or eight months on average, between service of the petition and decree

absolute. So the new law would be adding a few months to some grounds. The notion of waiting, not a bad one in itself, could be much more efficiently achieved by adding to the present grounds of divorce a provision that no decree shall be granted until at least twelve months have elapsed from the service of the petition. This would ensure that no petitioner would be free to re-marry for at least one year after beginning the process, regardless of the reasons for the divorce.

The message that is conveyed by divorce law reform to the public is an important one. Awareness of the law is probably at its most widespread when it is reformed and the debates are reported in the newspapers, sometimes in a rather sensational fashion. The headlines in the popular press, if the law were to be reformed, would probably be something like 'NEW QUICKIE DIVORCE'. The message in the media would be that marriage is a short-term option with no specific obligations and no impediments to the freedom of the individual within the family, and that no account need be taken in connection with the right to divorce of the presence of children or of long-standing family commitments. Reciprocity and stability would be optional; on divorce there would be no standards of justice, no adjudication and allocation of responsibility, only short negotiations with the help of a mediator or solicitor. It would be clear that the state had abandoned all interest in the control of the dissolution of marriage, retaining a check only over the fairness of financial agreements. This perception of the law would be highly likely to affect breakdown rates.

An alternative route to amelioration of the effects of divorce would be more affordable day-care for children, to enable lone mothers to work, and better career guidance for girls, as well as a fresh look at men's preparation for parenthood. If divorce is, indeed, inevitable in society, then women should be educated to face it, and it is no solution to the material and psychological problems to expect them all to rely on ex-husbands. Historically, the poverty of divorced and separated women is an established feature. It is surprising that feminists have remained silent on this issue, where one might expect a clear and demanding female voice. Presumably it is because

women have diametrically opposed personal interests in ease of divorce. For every woman abandoned by her husband, there is another who is glad to have the opportunity to marry a divorced man. Yet it is clear that if women ought to be protesting as a sex about anything, it is against easy divorce and a high divorce rate.

If we are serious about the need to hold or reverse the rise in divorce, then there are two ways forward. One is by education of young persons still at school. The advantages and disadvantages of educating young people about the dangers of smoking and Aids are debatable. They certainly hear the messages even if they do not heed them, and some may say that it has done some good. There is no reason not to try the same approach in relation to divorce. A marriage education programme could be built around the existing sex education programme. Each half of such a dual programme would in fact enrich the other and help young people understand the part played by both marriage and sex in their adult lives. A marriage education programme could focus on the factors that are known to make for a happy or unhappy marriage, the financial costs of splitting up, the dangers to children of broken marriages, the paternal rôle, and the career prospects and post-divorce situation of women. It is not necessary to antagonise teachers or public opinion by attaching any particular political or religious agenda: one need only let the facts speak for themselves. Sadly, these changes will take a long time to prepare and to take effect. Another remedy is to tighten divorce procedure by insisting on a twelve-month delay before freedom to re-marry in cases based on adultery or behaviour which, allegedly, may take only eight months to process at the moment.

5

The Way Forward

Best of all the Government should abandon these plans to reform divorce altogether. They will not save money but will increase the long-term benefits bill for one-parent families. They will not save marriages but will precipitate a further rise in divorce rates. They will not reconcile couples but create a new and costly mediation service for poorer couples. They will not defuse the maintenance arguments or reduce the need for lawyers. They are based largely on ideas that have been tried and have been found to fail. They will not spare children the trauma and sad consequences of loss of one parent. We need to bolster families and not to cushion their destruction.

The strengthening of marriage and the stable family unit would be additionally reinforced by a fresh look at the provisions in recent statutes that have given the unmarried father a status almost equivalent to that of the married father and treat the two as nearly identical in function. The Children Act 1989, ss.2, 4 and 5 established ways in which an unmarried father may acquire guardianship and parental responsibility (or 'rights') and he may challenge the Local Authority when his child is in care or being adopted (s.34). Legal recognition of this status is not desirable if it is thought preferable to ensure that the privileges of parenthood should attach only to the married.

The status of cohabitation is recognised by statutory provisions giving mistresses inheritance rights (the Inheritance (Provision for Family and Dependants) Act 1975) and protecting the occupation of homes by unmarried non-owning partners (Domestic Violence and Matrimonial Proceedings Act 1976). This, too, should be reconsidered.

To conclude:

1. The Government should abandon plans to reform the ground of divorce.
2. No decree absolute should be granted until at least twelve months have elapsed from the service of the petition.

3. An education for marriage programme should be drawn up for school use.
4. The statutory provisions giving legal status to cohabitation and unmarried fathers should be reviewed.

Statistical Appendix

Every change in the law has increased the divorce rate:*

Divorce Petitions

Year	*No.*
1936	5,915
1937	6,049
1937	*Matrimonial Causes Act*
1938	10,350
1970	70,575
1971	*Divorce Reform Act* 1969 in effect
1971	111,138
1972	109,822
1973	115,048
1976	141,415
1977	*Special Procedure*
1977	170,149
1980	177,415
1990	191,615

*Source: *Judicial Statistics*, HMSO

Notes and References

1. *Looking to the Future: Mediation and the Ground for Divorce*, (HMSO, 1993) Cm 2424.
2. *Facing the Future*, Law Commission No. 170 (London, 1988); *The Ground for Divorce*, Law Commission No. 192 (London, 1990).
3. The National Child Development Survey in B. Elliott and M. Richards, 'Children and Divorce', *International Journal of Law and the Family* 5 (1991), at p. 258; Medical Research Council National Survey of Health and Development in M. Maclean and M. Wadsworth, 'The Interests of Children after Parental Divorce', *International Journal of Law and the Family* 2 (1988), at p. 155; and M. Richards, 'Children and Parents and Divorce', Ch. 21 of *Parenthood in Modern Society*, ed. J. Eekelaar and P. Sarcevic, (Nijhoff, 1993).
4. G. Davies, *Partisans & Mediators*, (Oxford University Press, 1988).

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