VIEW FROM THE PRESIDENT'S CHAMBERS (17)

Divorce and money – where are we and where are we going?

Sir James Munby, President of the Family Division

The advance towards the digital court, heralded by the progress towards on-line divorce (in which expression I include for present purposes the analogous processes in relation to civil partnership, judicial separation and nullity), demands that we now tackle an issue which has been around for some time. Why is it that what is referred to in some places as ancillary relief is still, as the name indicates, part of the divorce process? Has the time not come to bring about a complete de-linking – separation – of divorce and 'money', so that they are started and pursued by completely separate processes, albeit, of course, that the timeline for ancillary relief is determined by the progress of the divorce? My view, which I have been propounding for some time, is an unequivocal and emphatic YES!

A number of realities drive this conclusion: (1) Only a minority of divorce cases give rise to a money claim. (2) Divorce, as a process, is largely administrative and bureaucratic. Whatever the theory, judicial involvement in the process is limited (see *Owens v Owens* [2017] EWCA Civ 182) and, unless the petition is defended, involves no face-to-face contact (whether in a courtroom or by visual electronic link) with the parties. In contrast, judicial involvement in money claims is significant, usually involving face-to-face contact, and, even if the case is eventually settled, requiring considered expert judicial approval of the final order. (3) The concentration of divorce cases in a limited number of regional divorce centres, as the prelude to a completely on-line system, is putting the administration of ancillary relief under unnecessary and avoidable strains. (4) Ancillary relief is only one of the various types of financial remedy that are dealt with in family courts; others (see the definition in FPR 2.3) include claims under Part III of the Matrimonial and Family Proceedings Act 1984, claims under Schedule 1 to the Children Act 1989, claims under the Inheritance (Provision for Family and Dependants) Act 1975 and claims under the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA).

Surely what is called for is a system under which (1) there is, formally, legally and procedurally, a complete de-linking – separation – of divorce and money and (2) all money claims as I have described them above are dealt with in accordance with a single set of rules providing, so far as possible, for a common form of application, a common set of forms, a common process and common procedure.

The first step in this direction has been taken with the very recent implementation of the first phase of what is called "Administrative De-linking of Financial Remedy Applications from Divorce Proceedings". Although these are early days, this seems to be going well.

The next step is to move toward formal (legal) de-linking.

With one exception (see below) none of the proposed 'money' reforms requires primary legislation: it can all be achieved by changes to the FPR, to Practice Directions and to forms.

Reform of the substantive divorce law – for example by the introduction of 'no-fault' divorce – requires primary legislation. The chronology of recent events is instructive. On 13 February 2017 (see *Owens*, para 51) Lord Keen of Elie, Lords Spokesperson (Ministry of Justice), said "we have no current plans to change the existing law on divorce." The appeal in *Owens* was heard on 14 February

2017 and judgment was handed down on 24 March 2017. On 29 March 2017, Baroness Buscombe, speaking for the Government said "the Government are considering what further reform may be needed to the family justice system so that it better meets the needs of separating couples and families and can achieve the best possible outcomes for them. Options for reviewing divorce law are part of that broader consideration. We will publish a Green Paper with our proposals on family justice in due course." We can only wait and see. The lamentable history of procrastination suggests it would be unwise to assume speedy progress. Obviously it would be better, if divorce law reform is now seriously on the agenda, to delay full implementation of on-line divorce until we know what shape the reformed law might take. But we cannot allow the pressing imperatives of procedural and digital reform to be delayed in anticipation of such an uncertain future. Absent clear decisions from Government in the reasonably near future, we have to proceed with reform on the basis of the existing statutory regime.

Reform of divorce procedure, by contrast, including the introduction of on-line divorce, does not require primary legislation, only changes to the FPR, to Practice Directions and to forms (or their electronic equivalents). On-line divorce must be more than a simple electronic version of the existing processes. The on-line divorce project has now reached the stage where, before it can sensibly move forward much further, we need to undertake a questioning and challenging look at the existing processes and procedures to identify what amendments to the FPR, forms, etc, are appropriate.

In addition to the implementation of these wide-ranging reforms in relation to money claims, there is also a need to implement those of the specific, though nonetheless important, reforms proposed by the Financial Remedies Working Group which remain outstanding.

Finally, there is an urgent need to begin implementing, initially by way of pilots followed by more general roll-out, the exciting plans for specialist Financial Remedies Courts first suggested by HHJ Edward Hess and Joanna Miles in their important article in the November 2016 edition of Family Law, [2016] Fam Law 1335, "The recognition of money work as a specialty in the family courts by the creation of a national network of Financial Remedies Units" and now impressively elaborated by HHJ Martin O'Dwyer, HHJ Edward Hess and Joanna Miles in their more detailed blueprint, "Financial Remedies Courts", to be published in the June 2017 edition of Family Law. The case they present is, in my view, unanswerable. Unsurprisingly, and surely appropriately, it builds on the thinking underlying the geographical re-organisation of the Family Court in the run-up to its formal birth in April 2014, to the judicial leadership and management structures put in place for money cases, both in the Central Family Court and the Family Division, and to the judicial leadership and management structures more recently put in place when the Court of Protection was regionalised. Early implementation of pilot Financial Remedies Courts must be a priority.

Pulling the threads together what I envisage is this:

1 The on-line divorce project must proceed as fast as sensibly possible.
2 The roll-out of administrative de-linking must likewise proceed as fast as sensibly possible.
3 By the end of 2017, all necessary amendments to the FPR, forms, etc, should have been agreed, ready for implementation, no later than January 2018, of (a) the remaining recommendations of the Financial Remedies Working Party, (b) all aspects of on-line divorce, (c) formal (legal) de-linking of divorce and ancillary relief, and (d) if amendments are required, specialist Financial Remedies Courts.
4 Work must proceed for the initial roll-out, as soon as sensibly possible in late 2017 or very early 2018, of the first pilot specialist Financial Remedies Courts.

5 Once the first tranche of work under 3 has been completed, work must proceed as rapidly as possible on all necessary amendments to the FPR, forms, etc, to enable all money claims to be dealt with in accordance with a single set of rules providing, so far as possible, for a common form of application, a common set of forms, a common process and common procedure. I see no reason why this work should not have been completed by Spring 2018, particularly if, as may well be desirable, an expert group is tasked to produce the necessary drafts.

The need for continuing reform is clear, not least to create systems and procedures that can be easily navigated by the litigants in person who increasingly dominate the worlds of both divorce and money. The way forward is clear. The programme sketched out above is, no doubt, challenging but, I am sure, eminently 'do-able' given appropriate commitment and energy. We – all of us – must seize the moment.

I leave to last a particular problem which surely demands a solution.

There is, as most family practitioners are all too aware, an obstacle to the bringing of 1975 Act claims or TOLATA claims in the Family Court. Section 25 of the 1975 Act and section 23 of TOLATA confine the two jurisdictions to the High Court (which of course includes the Family Division) and the County Court (which is now, of course, an entity quite distinct from the new Family Court). These claims do not, usually, require to be dealt with in the Family Division; the Family Court is their natural home. Practitioners are driven to the stratagem of issuing in the County Court and then inviting the District or Circuit Judge to sit for this purpose in the County Court whilst at the same time sitting in the Family Court to deal with any related family money claims, eg for ancillary relief. This nonsense is exacerbated in places – the Central Family Court being the most prominent example – where the County Court and the Family Court and their associated court offices are in different buildings. I cannot believe that this was intended; my assumption is that the point was overlooked by the draftsman of Schedule 11 to the Crime and Courts Act 2013.

The remedy could not be simpler. Section 25(1) of the 1975 Act requires that the definition of "the court" be amended by adding after the words "the High Court," the words "or the family court,". Section 23(3) of TOLATA likewise requires that the definition of "the court" be amended by adding after the words "the High Court, or (b)" the words "or the family court, or (c)". This simple solution was identified and recommended by Sir Michael Briggs in his report on civil justice reform. It was rejected, without any adequate explanation by Government for reasons which are unfathomable. Is it really too late for Government to reconsider? Or does the inconvenience of litigants and the administrative burden on HMCTS count for nothing?