



# No Contest: Defended Divorce in England & Wales

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## About this report

This report explores the relatively rare phenomenon of the ‘contested’ or ‘defended’ divorce in England & Wales. It is a companion study to *Finding Fault?*, published in October 2017, which examined undefended divorce cases. Both reports present findings from a Nuffield-funded project to explore how the current law regarding divorce and civil partnership dissolution in England and Wales operates in practice, and to inform debate about whether and how the law might be reformed.

All reports from the project are available to download from

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## Foreword

Defended divorce cases are rare, accounting for fewer than one per cent of divorces each year in England and Wales. Successfully defended cases are rarer still; the case of Owens vs Owens is remarkable because it is the first such case in England and Wales in recent years.

This report presents findings from an empirical study of why defended divorce occurs and how those cases are dealt with by the courts. The research team found that in nine out of ten cases, people did not defend the divorce petition to try to 'save' the marriage, but to dispute the allegations of 'fault' made against them. Defending a divorce is expensive, complicated, and unlikely to succeed, in short it is not a realistic option for most people, and yet it is the only means of legal recourse offered to dispute allegations of 'fault'.

The evidence presented here shows that defended cases are triggered by the law itself, which is out of step with similar jurisdictions in Europe and North America in its heavy reliance on 'fault' as a basis for divorce. The removal of fault would make the concept of defence redundant, and in doing so would align the law with the wider reforms in the family justice system, which have focussed on reducing conflict and promoting resolution.

Although defended cases are rare, evidence from an earlier strand of this research published in last year's *Finding Fault* report, showed that the current divorce law is also problematic for the majority of undefended cases. The research team found that the current law is incentivising people to exaggerate claims of 'behaviour' or adultery to get a quicker divorce. In practice, these claims cannot be investigated by the court or easily rebutted by the responding party, leading to unnecessary conflict and a system that is inherently unfair.

Parliament first tried to introduce no fault divorce in the Family Law Act of 1996, so the drive for reform is not new. The evidence presented here, and in *Finding Fault*, provides further evidence that the current law is not operating in anyone's best interests and is subjecting divorcing couples and their children to unnecessary conflict. The authors note that trying to apportion blame is a fruitless task, and not one over which the justice system can effectively and fairly preside.

The Nuffield Foundation is delighted to have funded and supported Liz Trinder and her research team in undertaking this important study and bringing together the findings in this accessible and engaging report. I would also like to thank everyone whose participation made this study possible.



**Tim Gardam**  
**Chief Executive**

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Resolution has been a brilliant research partner throughout the study, both at national and local level. Particular thanks are due to Nigel Shepherd, Rachel Rodgers and Matt Bryant for their ongoing advice and enthusiasm. For this report we were fortunate to be able to draw on some very thoughtful and reflective Resolution members who participated in focus groups or individual interviews. We are grateful too to the judges who took part in interviews about their approach to defended cases.

We are grateful to the Judicial Office and the President of the Family Division for giving permission for the study. Thanks are due too to the research ethics committee at Exeter University who had to consider multiple applications for this multi-method study.

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Finally, we would like to thank all the staff and trustees at Nuffield Foundation for their ongoing support for the study. We think the project has fantastic help from almost every team within the Foundation over the last two years, from front-of-house, to communications and events, to the grant support team and beyond. We are particularly indebted to our three friends and colleagues who have recently left the Foundation: Tracey Budd, Alison Rees and Teresa Williams. It has been an absolute pleasure and privilege to have worked with them over the last few years.

## Executive summary

### Key messages

**The law of divorce in England and Wales has been subject to criticism for decades, most recently following the rare defended case of *Owens v Owens*.** This report explores why defended divorce occurs and how cases are dealt with by the courts. It finds that most disputes are generated by the law itself; the law then provides an ineffective, unhelpful and potentially unfair solution to the problems it has caused. The report recommends law reform so that divorce is available solely on the basis of the expiry of a notification period.

**The current law.** The sole ground for divorce in England and Wales is the irretrievable breakdown of the marriage. Irretrievable breakdown must be evidenced by one of five 'Facts', three of which require allegations of fault: adultery, behaviour and desertion. Fewer than 1% of divorces are defended each year.

**The problems created by fault and the problems of the defence process.** Most defences are not attempts to save the marriage, but quarrels about who should be blamed, mostly triggered by allegations about behaviour. Claims that the marriage is saveable generally reflect tactical considerations or are wholly unrealistic.

The legal mechanism to address those problems is inadequate. Few of those who might wish to defend allegations are able to do so because of the financial and emotional costs of defending, and discouragement from the family justice system. The inaccessibility of the only remedy available is procedurally unfair.

Most defended cases that do reach the courts are settled, rather than decided by a judge. The outcomes therefore reflect the relative bargaining capacity of the parties, not an inquiry into the truth of allegations. The court's willingness to accept the results of some deals appeared intellectually dishonest, even if it did bring an end to a damaging dispute.

The pressure to settle reflects a realistic appraisal by family lawyers and judges that defence is costly, unhelpful and ultimately futile for the parties and burdensome for the courts. The defence process does increase acrimony, contrary to family justice policy. It can be misused by controlling spouses to make the divorce unnecessarily difficult. There were no cases where a divorce was refused by the court.

**The need for law reform to eliminate fault and defences.** This analysis strengthens the case for law reform. The majority of disputes are generated by the law itself. Defending is then an inaccessible and inadequate mechanism which causes further problems in its own right, without offering any protection to vulnerable parties. We propose a simple notification system instead. Divorce would be granted where one or both parties register that the marriage has broken down irretrievably, and that intention is confirmed by one or both parties, following a minimum period of at least six months. That system would have the advantage of being fair, honest and less harmful to adults and their children. It would also be cheaper for both the parties and the state. There would be no need for defence, removing a further source of unnecessary acrimony, unfairness and expense.

## About the study

This report explores the relatively rare phenomenon of the ‘contested’ or ‘defended’ divorce in England & Wales. Contested divorce refers to cases where the respondent objects to the divorce on the basis that the marriage has not broken down and/or objects to the reasons given for the divorce. In about 600 cases each year - fewer than 1% of all divorces – the respondent will file an Answer to formally defend the divorce.

The report is the first study of defended divorce since the 1980s. It sets out to explore why people do (and do not) defend divorce proceedings, how the court responds to these cases, and who appears to win what, if anything, as a result. The report also addresses two policy questions: whether the substantive law on divorce should be reformed to remove fault and, if reform were to occur, whether defence should still be possible or whether divorce could be safely and appropriately a purely administrative process.

The report is based on court file analysis of 100 intend to defend (ITD) cases, a sample of 71 cases with Answers (including 29 of the ITD cases) and a comparison group of 300 undefended cases. This is supplemented by interviews and focus groups with petitioners and respondents, family lawyers and judges.

*No Contest?* is a companion study to the previously published *Finding Fault?* report that examined undefended divorce cases. The *Finding Fault* report highlighted the gap between how the law works in theory and the pragmatic way it works in practice in undefended divorce cases. In the absence of law reform, the family justice system has developed something tantamount to immediate unilateral divorce ‘on demand’. Divorce is, in effect, already an administrative process that is masked by an often painful, and sometimes destructive, legal ritual with no obvious benefits for the parties or the state. The *Finding Fault?* report recommended reforming the law to remove fault entirely.

## The current law on divorce

The sole ground for divorce in England and Wales is the irretrievable breakdown of the marriage. But a divorce may be granted only if one of five ‘Facts’ is proved. Three Facts are fault-based: adultery, behaviour, and desertion. Two Facts are based on separation: two years if the other spouse consents to divorce, five years even if they do not. In 2015, 60% of English and Welsh divorces were granted on adultery or behaviour. That reliance upon fault is extremely high compared to similar jurisdictions. In Scotland and France, for example, only 6-7% of divorces were granted on fault grounds.

The respondent may seek to defend the divorce on the basis that the marriage has not broken down irretrievably and/or to challenge the contents of the petition. Formal defence is uncommon. About 2% of respondents state that they intend to defend, but fewer than 1% of divorces each year are formally defended. A successful defence of the marriage is even more rare, with *Owens v Owens* (see below) as the only recent reported case.

## **What are the barriers to issuing a formal defence?**

The number of formal defences significantly understates the number of respondents who might wish to defend or to challenge the contents of a petition. About a third of respondents in behaviour cases rebut (or deny) the allegations, but do not formally defend the divorce.

There are a number of barriers to defending that account for the gap between respondents upset by a petition and those filing an Answer. The financial barriers are considerable, with court fees of £245 to file an Answer and £550 to file a cross petition. Legal fees might run into the £1,000s with the risk of liability for the petitioner's costs too. Defending is technically and emotionally demanding, with only a minority of respondents able to manage the process without legal help. Family lawyers have a strong professional orientation against defence and typically advise clients against defending. The courts adopt a reactive approach to assisting respondents, amounting to reactive or constructive discouragement. Respondents are not informed automatically that they must use the D8b form to defend. Nor are they told automatically that an intended defence in letter form is not acceptable until it is too late.

The pragmatic approach adopted by both family lawyers and the courts is based on a perception that defence is unlikely to be in anyone's best interests, given the financial and emotional cost of defence and the inevitable outcome of a divorce where one party seeks it. However realistic that appraisal is, the barriers to defence may well appear to be procedurally unfair to respondents who are subject to allegations that they cannot challenge and that the court will otherwise take at face value.

## **Why are divorces defended?**

Most intended or actual defences were disputes about allegations of behaviour, rather than respondents trying to save their marriage. These were respondents who are angry or indignant about what the petitioner had said about them, in 89% of defended cases in a behaviour petition. The threat of defence was an attempt to correct what was seen as an exaggeration or falsehood. It is important to recognise that the majority of defences were therefore triggered by the law itself. Without a law that permits or invites fault, it is likely that relatively few respondents would seek to defend the divorce.

Only a small proportion of defences were attempts to 'save' the marriage. There were four primary drivers in these cases, sometimes in combination. These were: money (wanting to protect an inheritance or avoid reaching a financial settlement); mental health (in effect being 'in denial' about the reality of the ending of the relationship or dogmatic and obsessive personalities); power and control (including in the form of domestic abuse or coercive control); and religion and culture. In some circumstances the defence could be based on a genuine, if clearly mistaken, belief that the marriage was salvageable; in others it appeared a tactical consideration on the part of the respondent.

## **How are defended cases handled by the courts?**

While respondents are typically focused on defence as a means to establish their 'truth' of why the marriage broke down, the family justice system is predicated on settlement and compromise. That settlement orientation applies even in cases where a formal defence has been issued, with encouragement to settle at each stage of proceedings, up to and including, contested hearings. The very active promotion of settlement at each stage, with



lawyers and judges working in concert, reflects the dominant family justice perspective that agreed outcomes are less costly and damaging, that trying to apportion blame is a fruitless and inherently non-justiciable task and that defence is futile where one party has decided that the marriage is over.

About a third of defended cases were settled by lawyers even *before* a preliminary Case Management Hearing (CMH) had been held and another third of cases were settled at the CMH itself. Only two of the 71 Answer cases reached a fully contested final hearing. Extrapolated nationally, that would suggest that the court is required to exercise its full powers of adjudication in only 0.018% of all divorce cases in England & Wales each year, amounting to fewer than twenty divorces. The number of contested trials has been extremely low since at least the early 1980s.

### **The outcomes of contested cases**

The outcomes of the Answer cases appeared to depend very much on what was being contested. Respondents who were challenging the Fact or particulars had a fairly good chance of achieving all that they wanted, or of winning significant concessions. Those compromises included proceeding on undefended cross decrees (where both parties petition against the other), amending the Fact, or removing more contentious allegations. Those concessions were not achieved as a result of persuading the court of the merits of their case or establishing the 'truth'. It was simply as a result of what deals could be hammered out between the parties on the day, reflecting bargaining power and tenacity, rather than the veracity of any allegations.

In contrast, none of the respondents denying that the marriage had broken down were successful, including three behaviour cases that were adjudicated in some form of trial. The approach of the court in those cases appeared to be an extension of the pragmatic approach to divorce found in non-adjudicated cases, where there was an assumption by the court that divorce was inevitable, and defence was unhelpful, even stupid.

### **The *Owens v Owens* case**

The *Owens* case attracted significant media attention in 2017. It is a rare defended case where the husband denied that the marriage had broken down and disputed the behaviour allegations. The trial judge described the allegations as "scraping the barrel" and refused the decree. The Court of Appeal upheld that decision, finding the judge was not plainly wrong, though noting that the 'flimsy' allegations were typical of many undefended petitions that are granted. The decision is being appealed to the Supreme Court.

In some respects, the *Owens* case is typical of cases where irretrievable breakdown is denied. It concerns, as many do, an older couple able to afford extended litigation. Finances and power and control would also appear to underlie the dispute, as in our sample.

The case is highly distinctive in other respects. First, unlike most respondents in our sample, Mr Owens chose, and was able to, resist all attempts at settlement and has continued to fight the case. Second, the approach of the trial judge was markedly different. Judges elsewhere worked on the pragmatic assumption that defence was futile and unhelpful. Thus, they looked for compromises to make the divorce happen or accepted weak behaviour

petitions. In *Owens*, rather than framing the respondent as obstructive and unrealistic, the trial judge's criticism was directed towards the petitioner and her attempts at 'scraping the barrel' to produce particulars of behaviour. The unlikely combination of an unusually persistent (and well-funded) respondent, and a very unusual judicial approach, resulted in the only known recent case where a divorce has been successfully defended.

To date, the decision appears to have had little, if any, impact on how the courts approach defended and undefended cases. That may be because of the deeply ingrained pragmatic approach that discourages defence and seeks to make divorce as conflict-free as possible where one party has decided that the marriage is over. It may also reflect the clear statement in the Court of Appeal's judgment in *Owens* that family lawyers should continue to be "very moderate" in what should be included in behaviour petitions. That message can be interpreted as a clear signal to lawyers, and the legal advisers and judges beyond them, to carry on (pragmatic) business as usual until the law can be reformed.

### **Evaluating the current law on divorce and defence**

In conducting our research, we evaluated law and practice in relation to five criteria:

**Conflict:** The research found that conflict and acrimony were heightened for two reasons: the role of fault in triggering disputes and defences, and the impact of the process of defending itself. The creation, or exacerbation, of parental conflict, and the direct involvement of children in disputes, is contrary to, and undermines, family justice policy. Defended cases were also far more likely to go on to have initially contested financial remedy applications.

**Truth:** Whilst who divorces whom, and on what basis, might be of critical and enduring importance to some parties, the court took a more pragmatic view that the divorce would happen and that it was generally in the interests of the parties to settle, rather than to continue to fight over details. With the exception of the adjudicated outcomes of the few trials in the study, the handling of defended cases was a search for settlement, rather than the testing of allegations. The focus was therefore on achieving the divorce, with the route to get there of little significance to the court, as long as the minimum legal requirements were satisfied, although in some cases even the minima were ignored. The outcome could lack 'intellectual honesty'. There were, for example, court orders accepting the petitioner's account that a behaviour had occurred, whilst simultaneously accepting the respondent's account that it had not, as well as behaviour petitions amended to two year's separation where the parties had been apart for only a matter of months.

**Justice and fairness:** Although the search for settlement makes objective sense, and is the only realistic option for an over-stretched family justice system, the difficulty with inviting but then not testing allegations to prove the ground for divorce, is that one or both parties may feel aggrieved. The perception that the court is endorsing the petitioner's account, without the opportunity to have one's say, can engender an enormous sense of injustice in respondents, especially where they are unable to defend. However, the ability to defend can also be misused. There were cases where it appeared respondents were defending the divorce as a means to exercise control, to be obstructive or as a bargaining tactic.

**Knowledge, complexity and clarity:** The archaic language and complex procedures caused significant difficulties for the parties and professionals. A fifth of intend to defend cases were the result of errors, where the respondent mistakenly reported that they wished to defend. Other respondents defended unnecessarily due to a misunderstanding of the basis of the law. There is continuing uncertainty amongst lawyers over what is required for a behaviour petition following *Owens*, with the risk that petitions are stronger than necessary.

**Protection of marriage and the vulnerable:** Unlike *Owens*, none of the respondents were successful where they sought, whether genuinely or tactically, to 'save' the marriage. Even where the fight for the marriage appeared to be genuinely motivated, the defence process was very stressful for the petitioner and offered only false hope to the respondent. There were no cases where arguments that the divorce should be prevented on the basis that it would cause grave financial or other hardship under s5 of the Matrimonial Causes Act 1973 were seriously pursued, or indeed, would have been appropriate.

## **Conclusions and implications**

Our conclusions are emphatic. The analysis of defended cases has only strengthened the case for law reform. It is clear that the majority of disputes and defences are caused and/or at least facilitated by the law itself. Without allegations of behaviour, it is likely that most defences would not occur. And having created a problem, it is clear that the deeply imperfect solution offered by defence is inaccessible to most respondents.

Our recommendation is to reform the law to remove fault and establish a straightforward notification process. A divorce (or civil partnership dissolution) would be granted if one, or both, parties registered that the marriage had broken down irretrievably and that that intention was confirmed by one, or both, parties after a minimum period of at least six months. Judicial separation would be retained as an option, available on the same no-fault notification basis. The advantage of such a process, for divorce, dissolution and judicial separation is that it would be clear, fair and transparent. It would also be considerably cheaper for the parties and for HM Courts and Tribunal Service and Ministry of Justice.

The concept of defence would be redundant in a no-fault divorce law. In practice, defence of the marriage itself has in effect been near impossible for many years, leaving aside the unique (and controversial) circumstances of the *Owens* case. Nor is there any valid reason to retain the hardship bar under s5 MCA. With the advent of pension-sharing, any case for retention of the hardship bar appears to disappear. The risk of retaining the bar is that it will be used, not to protect the vulnerable as intended, but as a defence can be used now, simply to be difficult or obstructive, or to attempt to retain control of the other spouse.

The court would retain a residual role in four specific circumstances:

- To address how service is effected in sole registration cases where the second party (or respondent) has not returned an acknowledgement of service.
- In cases of potential fraud.
- Where jurisdiction is disputed, or one party argues that proceedings have been issued elsewhere or there is no valid marriage.
- Where there are allegations that the applicant lacks capacity and/or has been coerced into initiating the divorce.

## Glossary

Terms underlined are also the subject of entries in this glossary

Unless otherwise indicated, the terminology of divorce is equally applicable in the context of dissolution of civil partnerships.

**Acknowledgment of service:** Court form on which the respondent should confirm receipt of the petition, say whether they intend to defend the proceedings, and provide certain other information. The form should be signed by the respondent personally if they are using it to admit adultery or to consent to a decree in two years' separation with consent cases. In other cases, the form may be signed by a solicitor on their behalf.

**Adultery:** One of the Facts which may be relied on to establish that a marriage has broken down irretrievably. Adultery involves consensual sexual intercourse between a man and a woman who are not married to each other, but at least one of whom is married. Adultery is not available as a Fact to be relied on in respect of civil partnership dissolution.

**Answer:** A formal defence to divorce proceedings.

**Bailiff service:** See under service.

**Certificate of entitlement:** If satisfied that the petitioner is entitled to a divorce (or dissolution), the court will send a notice to the petitioner and respondent confirming that and specifying a date on which decree nisi (or a conditional order in the case of a civil partnership) is to be pronounced.

**Child arrangements:** In family law this term covers, in the context of divorce or separation, with whom a child is to live, spend time, or otherwise have contact.

**Co-respondent:** If a divorce petition is based on adultery and the person with whom the respondent is alleged to have committed adultery is named in the petition, that person is made a co-respondent (i.e. a second respondent) to the proceedings.

**Contested case:** For the purposes of this report only, a case where an intention to defend has been registered. The intention to defend may be the result of an error, or may be a genuine dispute with no Answer or a genuine dispute where a formal Answer is lodged.

**Court fees:** HMCTS charges a fee for taking certain steps in proceedings, including applying for a divorce. Means-tested **Help with court fees** may be available to parties with limited means; if so, fees may not have to be paid or may not have to be paid in full.

**Cross petition:** A petition filed by the respondent in defended divorces, setting out the Fact and particulars that the respondent seeks to rely on. A cross-petition may be filed in addition to an Answer.

**Decree nisi** (or conditional order in the case of a civil partnership): A provisional decree indicating that the court has held that the marriage (or civil partnership) has irretrievably broken down based on the Fact(s) relied on by the petitioner and sees no reason why a divorce (or dissolution) cannot take place. The divorce (or dissolution) is not finalised at this point.

**Decree absolute** (or final order in the case of a civil partnership): The final court order in divorce (or civil partnership) proceedings, which legally brings the marriage (or civil partnership) to an end. Usually it will be the petitioner who applies for decree absolute (or final order), but in certain circumstances the respondent may do so.

**Deemed service:** See under service.

**Defended divorce:** A petition may be defended if the respondent files an Answer challenging the allegations made by the petitioner and/or disagreeing that the marriage has broken down irretrievably. The petitioner's petition will also be treated as defended if the respondent files their own petition (commonly referred to as a cross-petition).

**Desertion:** One of the Facts which may be relied on to establish that a marriage has broken down irretrievably. Desertion involves one spouse intentionally leaving the other without good cause and without the other's consent, for a period of at least two years.

**Dissolution:** The term used instead of divorce for the ending of a civil partnership.

**District Judge:** District judges are full-time judges who deal with a wide spectrum of civil and family law cases. **Deputy District Judges** may deal with a similar range of cases, but on a part-time basis. They are commonly also practising barristers or solicitors.

**Error or error case:** For the purposes of this report only, a case where an intention to defend has been registered by the respondent by mistake and there is no intention to contest the divorce.

**Family Procedure Rules (FPR):** Rules of court which govern the conduct of family law cases in the Family Court and High Court. The rules are supported by Practice Directions.

**Fact(s):** Unless otherwise indicated, used in this report (in capitalised form) to refer to one of the five Facts which may be relied on to satisfy the court that a marriage has broken down irretrievably.

**File:** (verb) In court proceedings, delivering or having a document delivered to the court.

**Financial remedy proceedings:** Proceedings involving applications for financial orders that the court may make in respect of the parties' money and property and which may accompany divorce proceedings. A final financial order cannot be made before decree nisi has been pronounced. Such proceedings were previously referred to as 'Ancillary Relief'.

**Genuine dispute with no Answer (GD-NA):** For the purposes of this report only, a case where an intention to defend has been registered but where the respondent does not file a formal Answer.

**HMCTS:** HM Courts and Tribunals Service, an executive agency responsible for the administration of criminal, civil and family courts and tribunals in England and Wales.

**Intention to defend:** A statement by the respondent on the Acknowledgement of Service that they intend to formally contest the petition.

**Issue:** (verb) In the context of court proceedings, means the formal start of proceedings.

**Jurisdiction:** The petition must state why the court has jurisdiction (the legal authority) to deal with the proceedings; this requires one or both of the parties to have one of certain specified connections to England and Wales.

**Justices' Clerk:** A senior lawyer who acts as legal adviser to and provides support to, lay magistrates when they are dealing with criminal and family proceedings. In certain limited circumstances, Justices' Clerks may also undertake certain functions which ordinarily fall within the remit of judges and magistrates in the family court. A Justices' Clerk may authorise **Assistant Justices' Clerks**, commonly known as **Legal Advisers**, to perform similar functions. Justices' Clerks and Assistant Justices' Clerks are employed by HMCTS.

**Law Commission:** An independent body with a remit to keep the law of England and Wales under review and to recommend reform where it is needed.

**Legal Adviser:** See under Justices' Clerk.

**Litigant in person:** A party to proceedings who is not represented by a lawyer.

**Ministry of Justice (MoJ):** Government department responsible for, among other things, courts, and family law policy.

**Petition:** The form on which an application for a divorce is made.

**Petitioner:** The party applying for a divorce.

**RDC:** Regional Divorce Centre.

**Respondent:** The person against whom an application for divorce is made.

**Service:** In court proceedings, to serve a document means to deliver or have it delivered to another party. In divorce proceedings, the standard method for service of the petition and accompanying documents, is for the court to send them by first class post to the respondent at the address supplied by the petitioner. If service cannot be achieved in this way there are a number of options open to the petitioner. These include bailiff service, whereby an application may be made for a court-employed bailiff to attempt to deliver the documents to

the respondent personally, and deemed service, whereby an application may be made for an order that the respondent be deemed to have been served with the petition.

**Statement in support:** An application for decree nisi must be accompanied by a statement in support of the application, signed by the petitioner personally, confirming the contents of the petition are true, and providing further information which the court requires to consider entitlement to a decree. If an acknowledgment of service has been signed by the respondent personally, a copy must be attached and the respondent's signature identified.

**Statement of case:** The section of the petition where the petitioner should set out sufficient details of the alleged adultery, behaviour, desertion or separation to satisfy the legal requirements relevant to the Fact(s) relied on.

### **Court forms referred to in the report<sup>1</sup>**

D8 Petition

D8b Answer

D10 Acknowledgment of service (there are different versions depending on the Fact(s) relied on in the petition)

D80 Statement in support of an application for decree nisi (there are different versions depending on the Fact(s) relied on in the Petition)

D84 Application for decree nisi

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<sup>1</sup> The current version of each form can be found on the HMCTS formfinder at:  
<https://hmctsformfinder.justice.gov.uk/HMCTS/FormFinder.do>

## Introduction

This report explores the relatively rare phenomenon of the ‘contested’ or ‘defended’ divorce in England & Wales. By ‘contested divorce’ we refer to those cases where the respondent is denying that the marriage has broken down, and/or objects to the reasons given for the divorce in the divorce petition. In a small proportion of those, fewer than 1% of divorces each year, the respondent will file an Answer to formally defend the divorce.<sup>2</sup>

They are a group about which we know very little. The only previous research dates back to the 1980s.<sup>3</sup> Since then, there have been only the occasional reported cases,<sup>4</sup> going largely unnoticed until the case of *Owens v Owens* hit the media headlines in 2017.<sup>5</sup> In *Owens*, the Court of Appeal upheld the trial judge’s finding that whilst the Owens’ marriage had broken down irretrievably, Mrs Owens could not be granted a divorce as the behaviour Fact had not been made out. The case attracted widespread public criticism. Whilst there was some recognition that the outcome was highly unusual – there have been no other reported refusals in recent history – what is not clear is how distinctive *Owens* is, both in terms of its case profile and in the approach of the court. One of the goals of this report, therefore, is simply descriptive: to explore why defences occur, as well as how the court typically responds to these cases and with what results.

The report also addresses two evaluative or policy questions: whether the substantive law on divorce should be reformed to remove fault and, if reform were to occur, whether defence should still be possible. The context for considering these two questions lies in this report’s companion piece, *Finding Fault* (2017), which reported on the how the law was working in relation to *undefended* divorce cases.<sup>6</sup> Previous academic research, and Law Commission reviews from the 1970s onwards, had reported serious problems with the divorce law, with the parties exaggerating behaviour allegations to get a quick divorce, while the court could do little more than ‘pretend’ to inquire into allegations.<sup>7</sup> The *Finding Fault* study found that those problems remained and, in some respects, had worsened over the years. It highlighted the gap between the theory of a divorce law based on proving evidence of irretrievable breakdown through fault or separation following a judicial inquiry, and the pragmatic reality of the instrumental drafting and scrutiny of divorce petitions in what has become an almost entirely administrative process. That gap between the law in the books and the law in practice results in a number of undesirable consequences, including unnecessary conflict between the parties, procedural unfairness and undermining the rule of law (see Box 1). Consequently, the *Finding Fault* report proposed replacing the current mixed-fault and no-fault divorce law<sup>8</sup> with a notification system where divorce would be

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<sup>2</sup> See Section 2 below for statistics on intentions to defend and Answers.

<sup>3</sup> Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988), summarised in Section 1.4 below.

<sup>4</sup> *Hadjimilitis (Tsavlis) v Tsavlis* [2002] All ER (D) 32 (Jul); *Rae v Rae* [2012] EWCA Civ 541; *Savva v Savva* [2012] EWCA Civ 579; *Lindner v Rawlins* [2015] EWCA Civ 61; *Price v Price* [2015] 1 FLR 1202; *B v L* [2016] EWFC 67.

<sup>5</sup> *Owens v Owens* [2017] EWCA Civ 182. The case is being appealed to the Supreme Court.

<sup>6</sup> Liz Trinder, Debbie Braybrook, Caroline Bryson, Lester Coleman, Catherine Houlston, and Mark Sefton, *Finding Fault? Divorce Law and Practice in England and Wales* (Nuffield Foundation 2017) Available at [http://www.nuffieldfoundation.org/sites/default/files/files/Finding\\_Fault\\_full\\_report\\_v\\_FINAL\(1\).pdf](http://www.nuffieldfoundation.org/sites/default/files/files/Finding_Fault_full_report_v_FINAL(1).pdf)

<sup>7</sup> Summarised in, Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) para 2.11.

<sup>8</sup> See Section 1.2 below for an overview of the current divorce law.



available if one or both parties registered their intention to divorce on the basis that the marriage has broken down irretrievably, and that intention was confirmed by one or both parties after a minimum period of six months.

**Box 1: The main problems with the existing divorce law in undefended divorces<sup>9</sup>**

- The sole ground for divorce in England and Wales is the irretrievable breakdown of the marriage. But a divorce may be granted only if one of five 'Facts' is proved. Three Facts are fault-based: adultery, behaviour, and desertion. Two Facts are based on separation: two years if the other spouse consents to divorce, five years even if they do not.
- The majority of divorces in England & Wales are granted on fault, mainly behaviour. This is primarily as a result of the parties wanting, or needing, to avoid having to wait at least two years to use a separation Fact. The heavy reliance upon fault is unusual in international terms. In 2015, 60% of English and Welsh divorces were granted on adultery or behaviour, approximately ten times the use of fault in France or Scotland.
- Family lawyers encourage a pragmatic approach to the petition, viewing it as a means to an end, rather than an accurate account of why the marriage has broken down. The reliance on fault, especially behaviour, means that parties often feel under pressure to exaggerate allegations or retro-fit the reasons for their separation into one of the legal Facts, even though the court's expectations of what is required to make out each Fact are now actually very low, particularly for behaviour.
- The court has a statutory duty to inquire into allegations made, but in practice in undefended cases, only has the capacity to take the petitioner's allegations at face value. That lessens the burden on the courts and avoids painful and distressing inquiries into why a marriage failed. However, it risks being procedurally unfair for the great majority of respondents who cannot defend themselves against allegations and who inevitably feel cast as the 'guilty' party.
- Qualitative interviews with legal advisers and judges underlined that, like family lawyers, courts take the pragmatic stance that if one party has decided the marriage was over then that was the reality. It was then the court's task to try to facilitate the divorce - "looking to make the petition work" – not to place hurdles in the way or to engage in what are usually inherently non-justiciable issues about who was to blame.
- The study found no evidence that fault prevents, or slows down, the decision to divorce and some evidence that it may shorten the time from break up to filing a petition. It also found, as did previous studies, that producing evidence of fault can create or exacerbate unnecessary conflict, with damaging consequences for children, and contrary to the thrust of family law policy.
- The study highlighted the gap between how the law works in theory and the pragmatic way that the law works in practice. In the absence of law reform, the family justice system has developed something tantamount to immediate unilateral divorce 'on demand'. What is, in effect, already an administrative process is masked by an often painful, and sometimes destructive, legal ritual with no obvious benefits for the parties or the state. A clearer and more honest approach, that would also be fairer, more child-centred and cost-effective, would be to reform the law to remove fault entirely.

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<sup>9</sup> Liz Trinder, Debbie Braybrook, Caroline Bryson, Lester Coleman, Catherine Houlston, and Mark Sefton, *Finding Fault? Divorce Law and Practice in England and Wales* (Nuffield Foundation 2017).

The results and recommendations of the *Finding Fault* analysis of *undefended* cases raise the two evaluative questions we explore in this analysis of *contested* and *defended* cases. These are first, to what extent are the problems identified in the approach to *undefended* cases – the potential of a (fault-based) law to create unnecessary conflict, the lack of intellectual honesty in the drafting and scrutiny of petitions, fairness between the parties, the complexity of the law and the failure of the law to protect marriage and the parties - also relevant for *defended* cases? Are the arguments for law reform to remove fault given more, or less, weight given the experience of contested and defended cases?

Second, is the right to defend in itself a problem? If the law were to be reformed to remove fault, how necessary, or appropriate, would it be to continue to permit defence? If irretrievable breakdown were to be established purely on the basis of sole, or joint, notification and confirmation, then there would appear to be no scope to deny irretrievable breakdown. Nor would there be a Fact or particulars to which one could object. In that case, should there remain a residual adjudicative role for the court or should the process be purely based on party control, or at least the control of one party? Are there any circumstances where one party can, in effect, veto the divorce where the notification period has expired? Should some element of court oversight continue as a protective mechanism for vulnerable parties, as currently,<sup>10</sup> or could the process be safely administrative?

## Research questions and overview of research methods

For this report on contested and defended cases, the research questions were therefore as follows:

### *Profiling of contested and defended cases*

- How are contested (or 'intend to defend') and Answer cases similar, or different from, undefended cases, and from each other?
- Who defends what (principle, particulars, jurisdiction), and why?
- What is the role of fault in triggering disputes?

### *Case progress and outcomes*

- How do cases progress?
- When do they reach an outcome and how does that compare to undefended cases?

### *Outcomes*

- What type of 'agreement' or outcome is reached and how?
- Who appears to win what? How 'successful' are formal defences?
- What factors appear to increase chances of success?

### *Understanding what shapes progress and outcomes*

- Why are there so few intentions to defend, why do so few ITD cases translate into Answers and why do so few Answer cases proceed to fully contested trials?
- What are the barriers/enablers to respondents wishing to defend? How relevant are the emotional and financial barriers identified by previous research?
- What norms are held by lawyers regarding defence? What tactics do they use to

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<sup>10</sup> Section 5 MCA 1973 (and s 47 CPA 2004) enables the respondent to raise a 'hardship' defence, though only in five year's separation cases. See Section 7.6 below for the ineffectiveness of this provision.

advise/persuade clients? What types of cases/issues would lead to advice to defend?

- How does the court/judiciary view defence? What are the underlying norms and how are these manifest? What assistance is given to respondents? Does the court discourage defence/encourage settlement, as identified by previous research?

#### *Evaluation*

- How fair is the current process between petitioner and respondent, represented and unrepresented parties?
- Is the ability to defend a necessary protective mechanism or a means of allowing control of the petitioner by the respondent?
- Can divorce be safely a purely administrative process?

The *Finding Fault* study as a whole is a large, multi-method research project.<sup>11</sup> For this *No Contest* report, the data drawn upon was derived from analysis of court files and interviews and focus groups with family lawyers and judges, as follows:

#### *Data sources for the No Contest report*

	Sample type	Sample size/source	Purpose
<b>Analysis of court files<sup>12</sup></b>	'Intention to defend' (ITD) sample	100 cases (25 from each of 4 RDCs) where there was an ITD.	Explore the types of ITD cases and their pathways and outcomes
	Answers booster sample	42 files (from 3 receiving courts) where an Answer was filed	(Combined with 29 ITD sample Answers) to explore the profile, paths and outcomes of defended cases
	Undefended cases sample	300 divorce cases issued Q4 2014 to Q4 2015 (75 from 4 RDCs)	Provide comparison group for ITD and Answer cases
<b>Qualitative interviews and focus groups</b>	Lawyer focus groups	4 regional focus groups each with 5-8 participants, recruited via Resolution	Explore general approach of family lawyers to divorce
	Conflicted cases interviews	Interviews with 14 family lawyers recruited via Resolution and twitter, each discussing up to 2-4 cases	Explore approach to and outcomes of high conflict and defended divorce cases
	Interviews with judges	Interviews with 5 Deputy District Judges, District and Circuit Judges	Explore approach to ITD and Answer cases

<sup>11</sup> A comprehensive technical appendix setting out the components of the project in detail is available at <http://nuffieldfoundation.org/finding-fault-divorce-law-practice-england-and-wales>

<sup>12</sup> All samples were identified by the Ministry of Justice Analytical Services/HMCTS. Access required approval by the MoJ Data Access Panel and a Privileged Access Agreement.

## Organisation of the report

This report is in eight sections. In Section 1, we describe the current law and procedure on divorce and defended divorce. We also summarise the limited body of research on defended cases, dating back to the 1980s. In Section 2, we look at the numbers of contested and defended cases. Drawing on our analysis of ITD cases we identify three types of case that we explore throughout the report: *error cases* (where the respondent mistakenly states an intention to defend), *genuine dispute but no Answer cases* (GD-NA) and *Answer cases*. In Section 3, we look at the barriers that prevent disputes being translated into Answers, including respondent intentions and capacity, the settlement orientation of family lawyers and the reactive response of the courts to contested cases.

In Section 4, we look in more detail at the cases where an intention to defend is lodged. The discussion focuses on the nature of disputes in GD-NA and Answer cases and their triggers, including the role of fault. In Sections 5 and 6, we explore in detail what happens to the Answer cases. We first examine the process of filtration whereby cases are generally settled before reaching a fully contested trial. In Section 6 we then explore the outcomes of cases, comparing the relative success of respondents in Answer cases with those who do not file a formal defence.

In Section 7, we evaluate the adequacy of the law and practice against the criteria explored in the *Finding Fault* report: that is conflict, orientation to the truth, fairness and justice, clarity and understanding and protection. Section 8 offers conclusions and implications. A more detailed research methodology can be found in Appendix 1.

# 1. Context: the current law on defended divorce

## 1.1 Introduction

In this section of the report we set out, briefly, the relevant law and procedure for defended divorce cases. We also include in Section 1.4 a summary of the main messages from previous investigations of defended divorce.

## 1.2 The framework for divorce in law and practice

The sole ground for divorce or civil partnership dissolution is the irretrievable breakdown of the marriage or civil partnership, as set out in Section 1 of the Matrimonial Causes Act 1973 (hereafter 'MCA') and its equivalent in Section 44 of the Civil Partnership Act 2004 (hereafter 'CPA').<sup>13</sup> However, irretrievable breakdown has to be evidenced by one of five 'Facts'.<sup>14</sup> Three of those Facts are fault-based: adultery, behaviour (combining what had been previously 'cruelty' and 'incurable insanity') and desertion. Two of the Facts are based on periods of separation: two years with the consent of the respondent to the divorce or civil partnership, otherwise five years.

There is a strong presumption that irretrievable breakdown will be established if a Fact is made out.<sup>15</sup> However, *both* elements – irretrievable breakdown together with a Fact – need to be established.<sup>16</sup> It is *not* a requirement that the Fact relied upon is causally related to the reason for the breakdown of the marriage.<sup>17</sup> Indeed, as we set out in the *Finding Fault* research on undefended cases, the selection of Fact is driven strongly by instrumental or pragmatic reasons, with the heavy use of the behaviour Fact due to a desire to avoid a long wait for a separation-based divorce.<sup>18</sup>

Divorce is framed by the MCA 1973 as a judicial, rather than an administrative, process. Section 1(3) of the Act places a duty on the court "to inquire, so far as it reasonably can, into the Facts alleged by the petitioner and into any Facts alleged by the respondent". In practice, the investigatory activity of the court into the truth of any allegations in undefended cases has been limited for many decades. The Law Commission noted in 1990 that it was "practically impossible to test the Facts" in undefended cases and that the "present law

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<sup>13</sup> The couple must have been married for at least one year before presenting a petition (MCA 1973, s 3(1)). This waiting period was reduced from three years to one by the Matrimonial Proceedings Act 1984.

<sup>14</sup> MCA 1973, s 3(2)(a) to (e)). The same formula of irretrievable breakdown as evidenced by a fault or a separation Fact was transposed for same sex unions, except in relation to the adultery Fact (CPA 2004 s 44). Applicants for a civil partnership dissolution have only four Facts to rely upon, meaning any allegations of sexual infidelity must be framed as behaviour rather than adultery. Petitioners in a same sex marriage may rely on the adultery Fact to divorce, but only if the respondent has voluntary sexual intercourse with a member of the opposite sex.

<sup>15</sup> Section 1(4) MCA 1973 provides that "If the court is satisfied on the evidence of any such Fact mentioned in subsection 2 above then unless it is satisfied on all the evidence that the marriage has not broken down irretrievably, it shall .... grant a decree of divorce".

<sup>16</sup> Affirmed in *Owens v Owens* [2017] EWCA Civ 182.

<sup>17</sup> *Stevens v Stevens* [1979] 1 WLR 885.

<sup>18</sup> Liz Trinder, Debbie Braybrook, Caroline Bryson, Lester Coleman, Catherine Houlston, and Mark Sefton, *Finding Fault? Divorce Law and Practice in England and Wales* (Nuffield Foundation 2017), Section 3.

pretends that the court is conducting an inquiry”, but it can do no such thing.<sup>19</sup> The *Finding Fault* study found that nothing had changed subsequently, with the courts taking a routine processing approach to divorce, starting from the position that what the petitioner had set out in the petition was true (see especially Section 4 of the report).

### 1.3 ‘Defences’ to divorce and dissolution

The respondent can seek to defend the divorce, on the basis that the marriage has not broken down irretrievably and/or to challenge the Fact or particulars. The respondent may also file their own petition, seeking divorce on their terms. As we explore below, formal defence is uncommon, with fewer than 1% of respondents filing an Answer. And a successful defence of the marriage appears to be even rarer, with *Owens* as the only recent reported case.<sup>20</sup>

The MCA 1973<sup>21</sup> does also contain an additional provision to protect vulnerable respondents, although only in five years separation cases. MCA s 5 enables the respondent to raise a ‘hardship’ defence where the divorce can be prevented if the respondent can show that “the dissolution of the marriage will result in grave financial or other hardship to him and that it would in all the circumstances be wrong to dissolve the marriage”. The provision was introduced specifically as a result of concerns about ‘blameless’ wives who could be divorced against their will. However, as we see below, this is an extremely high bar.<sup>22</sup>

### 1.4 Previous research on defended cases

There has been limited previous research on defended divorce, and none since the 1980s. However, the messages from those previous investigations have been clear and consistent, particularly in relation to understanding why there have been so few defended cases.

In 1985, the Booth Committee, appointed by the Lord Chancellor to consider divorce procedure, set out very clear reasons for the limited number of defences.<sup>23</sup> They noted that the cost of litigation was a significant barrier to defence at that time. They also concluded that the court itself discouraged defence. The report did not set out *how* respondents were discouraged, but it did offer two explanations for the court’s stance. The first was the futility of pursuing an argument that the marriage had not broken down, when the petitioner was clearly asserting that it had; the second was the court’s concern about the emotional and financial implications for the family, especially for any children. As we see below, in Sections 4 & 5, these arguments continue to resonate today.

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<sup>19</sup> Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) para 2.11. And see Liz Trinder, Debbie Braybrook, Caroline Bryson, Lester Coleman, Catherine Houlston, and Mark Sefton, *Finding Fault? Divorce Law and Practice in England and Wales* (Nuffield Foundation 2017), Section 4 for a detailed exploration of current practice.

<sup>20</sup> The Respondent’s doggedness and wealth and an unusual approach by the trial judge may account for the outcome (see below, Section 5.1). On the later point see *Hadjimilitis (Tsavlis) v Tsavlis* [2002] All ER (D) 32 (Jul) and *B v L* [2016] EWFC 67 for a more robust approach to the respondent where the marriage had irretrievably broken down.

<sup>21</sup> And the equivalent s 47 of the CPA 2004.

<sup>22</sup> See Section 7.6 below.

<sup>23</sup> Booth Committee, *Report of the Matrimonial Causes Procedure Committee* (HMSO, 1985) para 2.16.

In 1990, the Law Commission reported similar barriers to defence, noting how difficult it was for respondents to challenge behaviour allegations, which require “time, money and emotional energy far beyond the resources of most respondents”.<sup>24</sup> It also repeated the conclusion of the Booth Committee that attempting to defend was futile, in any case.

The most comprehensive analysis, and the only previous empirical research on defended cases, is Davis & Murch’s study published in 1988. Davis & Murch identified similar barriers to defence as set out by the Booth Committee and the Law Commission. They noted that significantly more respondents would have liked to defend than actually managed to do so, largely due to systemic barriers operating at all stages of the process. These included the early advice from lawyers that defence would be contrary to the client’s interests.<sup>25</sup> Davis & Murch also explored how the parties in defended cases were still encouraged to settle during proceedings, rather than to fight it out to a final hearing.<sup>26</sup> The result was that very few cases with Answers were formally adjudicated as the parties were encouraged or persuaded to settle, typically before or during a ‘first appointment’ (now termed a Case Management Hearing).

Davis & Murch were sympathetic to the arguments put forward by lawyers and the court, that defence was counter-productive, upsetting and costly. However, they were highly critical that while the law permits allegations to be made, and does also provide a procedure to defend against those allegations, in practice neither investigation into allegations nor defence are practicable in most cases. Instead, they concluded that the whole system “is geared to the efficient processing of divorce petitions”.<sup>27</sup> We will test the continuing relevance of Davis & Murch’s analysis throughout this report.

## 1.5 The procedure for defended cases

The procedure for defended cases will be unfamiliar to many readers, including some lawyers. We set out the main points here to assist.

- How the parties and the court should deal with petitions for divorce, and responses, is governed by the Family Procedure Rules 2010 (‘the FPR’) and in particular Part 7, which is supplemented by Practice Direction 7A. The rules provide that:
- The petition will be presumed to have been served on the respondent, on the next business day after posting (the standard method of service being the court sending the petition and accompanying forms to the respondent by first class post).
- The respondent has 7 days, starting with the date on which the petition was served, to file an acknowledgment of service (AoS).
- If the petition is based on adultery or two years separation and consent, and the respondent admits the adultery or consents to a divorce accordingly, the respondent must sign the AoS personally. In other cases, either the respondent or their legal representative may sign.
- The AoS includes a question asking whether the respondent intends to defend the divorce.
- If the respondent does indicate an intention to defend, they may file and serve an

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<sup>24</sup> Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) para 2.14.

<sup>25</sup> Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988) 106-7.

<sup>26</sup> Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988) chapter 8.

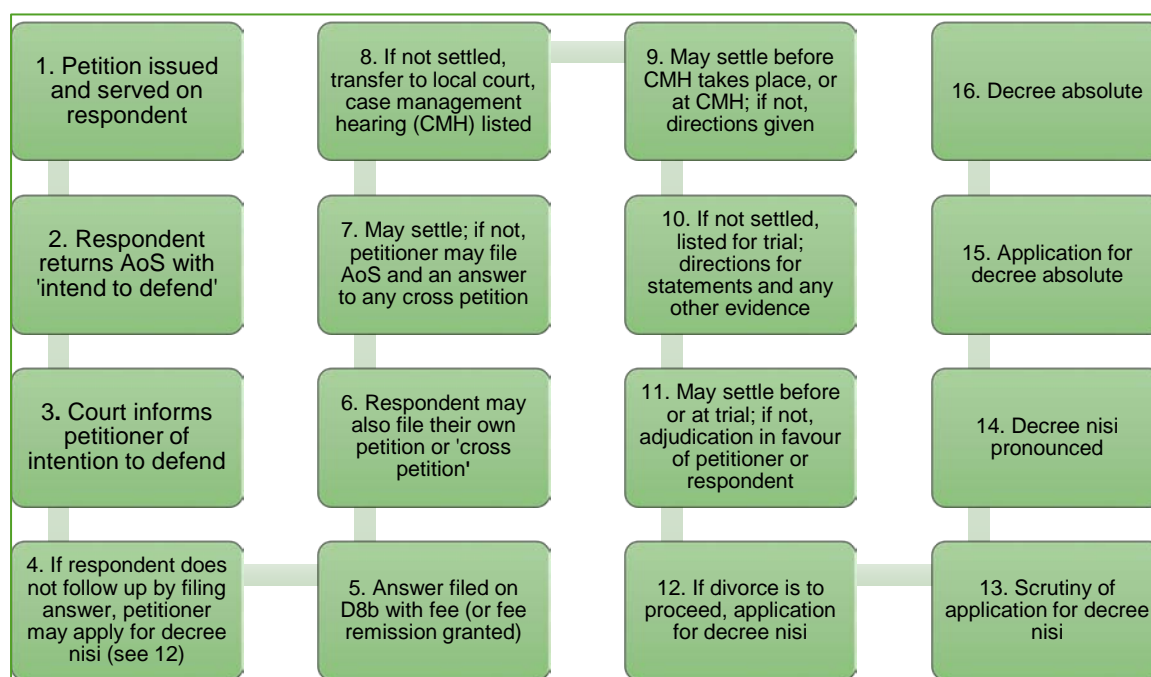
<sup>27</sup> Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988) 106.

Answer within 21 days starting from the date by which the AoS had to be filed. The rules also state that the respondent may file an Answer even if they have not indicated an intention to defend in the AoS. However, in any event, a respondent who wishes to file an Answer must do so within 28 days from the date of service of the petition.

- If the respondent so wishes, they may also file their own petition – almost universally still referred to as a ‘cross-petition’, although the rules no longer use that term. If the respondent does wish to file a cross-petition, the deadline for doing so is the same as that for filing an Answer.
- If the respondent files an Answer and/or a cross-petition then the divorce becomes ‘defended’ under the rules.
- If the respondent does not indicate an intention to defend, or has not filed an AoS within the timescale allowed, the petitioner may apply for decree nisi. However, given that the respondent has the option of filing an Answer without prior indication of intention to defend, the petitioner would be wise to wait for at least 28 days rather than seven days from the date of presumed service of the petition, before applying for decree nisi.
- If the divorce is defended, then on application for decree nisi, the court must direct that the case be listed for a case management hearing (CMH).
- At the CMH, the court must give directions as to how the case is to proceed, including setting a timetable for and giving directions regarding evidence to be filed and served by the parties.

The main stages of the divorce procedure in a case where an intention to defend is lodged by the respondent are set out in Figure 1.1 below. As indicated, cases may settle at any one of several stages; this is explored in detail in Section 5.

*Figure 1.1: The principal stages of the divorce process for contested and defended cases*





Under the Family Proceedings Fees (Amendment) Order 2014, Schedule 1 (as amended) court fees are payable at various stages of the process, unless help with court fees in the form of remission is granted. Those of most relevance here are at the time of writing:

- £550 payable by the petitioner on filing the petition.
- £245 payable by the respondent on filing of an Answer.
- £550 payable by the respondent on filing their own petition, or cross-petition.
- In a defended case, £50 payable by either party on applying for decree nisi and a CMH.
- £155 payable by either party on making any other application within the proceedings on notice (reduced to £50 if made without notice or with the consent of both parties).

Other key aspects of procedure include:

- At the time of the study, the standard practice was that if a hearing was required in a case in which the petition had been issued in one of the regional divorce centres, the case would be transferred out to a local court for the hearing to be listed.
- Failure to comply with the time limits (or other rules) means that all or part of a petition, Answer or other application may be struck out, unless a successful application to the court for relief from sanctions is made (FPR rule 4 and Practice Direction 4A).
- A petition, cross-petition or Answer may be amended, or supplemental or further such applications filed – but generally speaking, if the case has progressed beyond the very early stages, then either the consent of the other party, or the permission of the court, will be required. As described in Section 6, a number of defended cases were settled by way of amended petitions.

In our review of court files, it was apparent that unrepresented parties, lawyers, and indeed the courts, found the procedure in defended cases complex to navigate (and see below, section 7.5). There was also some variation in how courts managed defended cases. Case files were invariably referred to a District Judge or Deputy District Judge on receipt of an Answer or cross petition. However, there were different approaches to listing defended cases for a CMH. In some courts, judges routinely listed a CMH at that stage, whereas in others, judges directed simply that a copy of the Answer or cross petition be sent to the petitioner, and it was left to the petitioner (or respondent) to decide whether to apply for a CMH. This latter approach appeared designed to allow the petitioner time to reconsider their position in light of the respondent's response to the petition, and for the parties to attempt to negotiate a way forward by way of compromise, before enlisting the active assistance of the court in the form of judicial input at a CMH.<sup>28</sup>

Another aspect which featured quite frequently in the defended case files was disputes over whether the respondent had filed their Answer (and/or cross petition) within the relevant time limits. In several cases it was clear that they had failed to do so, and some respondents made applications for relief from sanctions accordingly, by applying for permission to file 'out of time'. In others, whether the time limits had been complied with was less obvious. There was also some variation in how the courts dealt with this issue; in some cases, judges struck out Answers on the basis that they were out of time; in others, judges exercised their discretion differently, and treated a late Answer as an application to file an Answer out of time, and listed cases for directions.

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<sup>28</sup> Although it should also be noted that this latter approach appears to be more in line with the FPR (see Rule 7.20(4)).

## 2. How many disputes and defences are there?

### 2.1 Introduction

In this section we explore the numbers and types of disputes and formal defences, drawing upon national statistics and our analysis of our 100 intend to defend cases. We emphasise that the number of formally defended cases is very low, although the number of respondents who might wish to defend is higher.

### 2.2. The rarity of formal defences

It is rare for a divorce to be formally defended; and it has been so for decades. In 1982, for example, the Law Society reported that Answers were filed in only 0.65% of divorces in England & Wales that year.<sup>29</sup> The current figures are remarkably similar. There were approximately 760 Answers filed in the year to January 2017, representing only about 0.67% of divorces in England & Wales.

There is some indication that even the very low figure of 760 Answers may overstate the number of *unique* defended cases. For this study, HMCTS supplied a list of 636 cases in which Answers were recorded as filed in the 12 months to 30 September 2016. However, some cases appeared on the list more than once, and the number of *unique* cases in the list was only 577. The reasons for this were not entirely clear, but in at least some instances, the duplication appears to have been due to more than one Answer being filed in a single case (e.g. an Answer to a cross petition as well as an Answer to an initial petition). In any event, the degree of duplication encountered suggests that the *number of cases* annually in which an Answer is filed may be around 10% smaller than has been reported.

### 2.3 The numbers of disputes

Although the numbers of formal defences are very low, it is important to recognise that this figure does not reflect the numbers of respondents who are upset or angry about the divorce or the contents of the petition. In the 1980s, Davis and Murch reported that 63% of respondents in behaviour cases had been “shocked” by the particulars, but were unable to defend.<sup>30</sup> More recently, we established in the *Finding Fault* report that significant numbers of respondents were unhappy with the allegations made against them, notably in relation to behaviour petitions. The most that they could do, however, was to rebut the particulars on the Acknowledgement of Service, with 37% of behaviour cases including a rebuttal.<sup>31</sup> We explore why respondents do not defend in the following section.

The number of formal defences, or Answers filed, is also only a minority of those respondents who state that they intend to defend. In the year to January 2017, notice of an *intention* to defend was given in 2,600 (or about 2%) of the 113,996 petitions in England and Wales.<sup>32</sup> Only a third (29%) of those intentions to defend subsequently resulted in an Answer being filed.

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<sup>29</sup> Law Society, *A Better Way Out Reviewed* (Law Society, 1982) para 2.21-2.22.

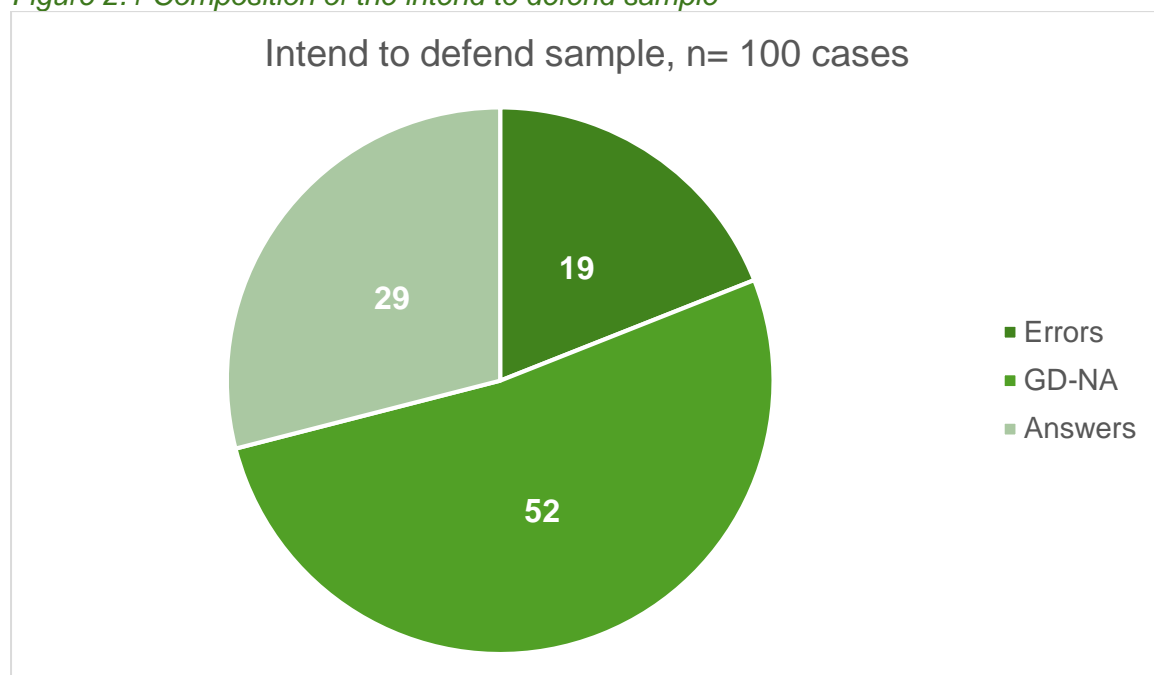
<sup>30</sup> Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988) 90.

<sup>31</sup> Liz Trinder, Debbie Braybrook, Caroline Bryson, Lester Coleman, Catherine Houlston, and Mark Sefton, *Finding Fault? Divorce Law and Practice in England and Wales* (Nuffield Foundation 2017), Section 4.5.

<sup>32</sup> Unpublished data from HMCTS reported in *Owens v Owens* [2017] EWCA Civ 182 para 98.

As part of the current study we sampled 100 cases (25 from each of 4 RDCs) where the respondent registered an intention to defend. A fifth of the 'intend to defend' cases were categorised as 'errors' (Figure 2.1). These were cases where there was no intention to contest the divorce, but the respondent had mistakenly replied with a 'yes' to the question of whether they intended to defend on the Acknowledgement of Service form, instead of a 'no'. In some of these cases the respondent contacted the court to admit their mistake.<sup>33</sup> In others, the mistake could be inferred from the lack of any other evidence of a dispute, and/or the Fact relied upon - the majority of error cases were based on two year's separation where the respondent said that they both consented to, and intended to defend, the divorce.

*Figure 2.1 Composition of the intend to defend sample*



The remaining 81% of intend to defend cases were genuine disputes, but only a minority resulted in a formal Answer being filed. Thus, just over half of cases were 'genuine dispute but no Answer' cases (hereafter 'GD-NA'), where the respondent signalled clear discontent with the claim of irretrievable breakdown or the contents of the petition, or both, but where an Answer was not subsequently filed.

Consistent with the national statistics, just under a third of respondents in the intend to defend sample did file an Answer.<sup>34</sup>

If one can assume, based on our sample, that a fifth of intention to defend cases nationally are going to be errors, then that would suggest that there are likely to be approximately 500 ITD cases each year that are not genuine disputes. That would reduce the number of cases where there is a genuine dispute to about 2,100 annually.

<sup>33</sup> See Section 3.4 below, for the court's response to error cases.

<sup>34</sup> The high level of consistency between the proportion of Answers in our sample and the national figures, suggests that although our sample of 100 is quite small, it can be seen as broadly representative of the national picture.

At the same time, our analysis of the GD-NA cases provides further evidence that the number of Answers is a serious undercount of the number of genuine disputes each year. Based on our analysis of GD-NA cases, we would estimate that at least double the number of respondents would wish to defend, than do actually file an Answer. We explore the reasons why disputes do not translate into Answers in the following section of the report.

## **2.5 Summary**

Estimating the number of defences and disputes is rather difficult. What is clear, is that there are more frustrated and angry respondents who would like to defend, than who register that they intend to defend, let alone who then file an Answer. The numbers of Answers do not, therefore, provide an accurate picture of the extent of respondent frustration with the process. At the same time, our analysis of intend to defend errors and the double-counting of Answers suggest that the number of actual intend to defend and Answers cases may be over-estimates. We explore the reasons why the number of Answers is so low in the following section.

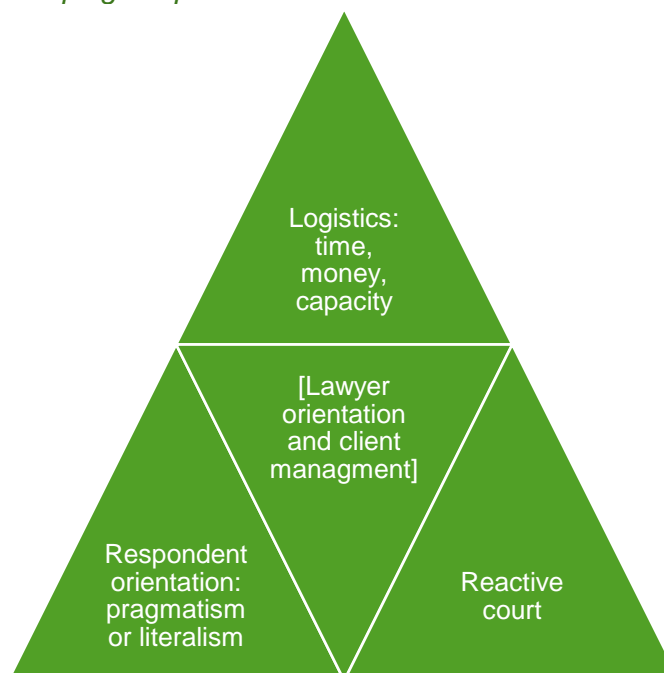
### 3. What are the barriers to issuing a formal defence?

#### 3.1 Introduction

We established in the previous section that significantly more respondents would like to defend the divorce, or at least dispute the contents of the petition, than actually do manage to do so. In this section of the report, we explore why there are so few disputed cases and why only a minority of the intend to defend cases are translated into Answers.

In the 1980s the Booth Committee, the Law Commission and Davis & Murch suggested that there were a range of barriers to defence, including emotional and financial costs and the court's general discouragement (see Section 1.4 above). We consider here the continuing relevance of these and any other factors. We explore, in turn, the respondent's intentions, litigation capacity, the orientation of family lawyers against defence and the court's reactive approach to facilitating to defence which amounts to discouragement (see Figure 3.1). We find that some respondents do not necessarily seriously intend to defend, but those that wish to do so have significant barriers to tackle. These include the financial and emotional costs of defence as well as the reactive non-assistance or active discouragement of defence by family lawyers and the courts.

*Figure 3.1 Factors shaping the pursuit of formal defences*



#### 3.2 Respondent intentions and capacity

##### Genuine intentions

In our sample, 19 of the 52 GD-NA respondents appeared to take no further action to defend the case other than a short annotation on the Acknowledgement of Service. We cannot know for certain, but a proportion may well have been letting off steam in response to the particulars, or issuing empty threats, in the absence of a realistic appraisal of what might be involved in defending. The respondent in case M117 appeared to be one of those letting off

steam, noting on the Acknowledgement that: “To put the record straight, I would like to [defend]”, although later writing to the court to confirm “I am not defending”.

### **The failure to routinely provide accessible information about how to defend**

The ability of respondents, most of whom were unrepresented at the time of filing an Acknowledgement,<sup>35</sup> to decide whether or not to defend, or even to understand what ‘defence’ might mean, will have been hampered by the very limited information about defending made available by the court. The gov.uk website does include accessible information about defending, the fee (and the possibility of fee remission), together with a link to the D8b form.<sup>36</sup> Alternatively, respondents who phoned or emailed the regional divorce centres were given information about the D8b form and fee. However, all that respondents are (or were) sent *automatically* by the court are the accompanying notes to the Acknowledgement of Service form.<sup>37</sup> These stated that:

*“If you answer **Yes to Question 4** [do you intend to defend] you must file in the Court office an answer to the petition together with a copy for every other party to the proceedings. You must file your answer within 21 days after the time limit for giving notice of intention to defend has expired, which is in turn seven working days after the notice has been served on you. You will have to pay a fee.”*

Aside from the inaccessibility of the language for litigants in person, what the notes fail to explain is what ‘defence’ meant in that context, particularly that filing an Answer required the use of the proper D8b form. The notes do not set out the £245 fee or the possibility of fee remission. The court did not send out copies of the D8b form automatically if an intend to defend was recorded on the Acknowledgement. Thus, whilst the possibility of defence, and the necessary procedures and costs, were not actively *concealed* in official communications to respondents, the routine information provided offered little help to unrepresented respondents and could be viewed as reactive discouragement.

### **Affordability (court fees and legal costs)**

Even if respondents were aware of, or were able to find out about, the procedure for defending, for many the costs would be likely to be prohibitive. The current application fee for filing an Answer is £245 plus £550 for any cross-petition. That is clearly out of reach for some respondents. The respondent in case L087,<sup>38</sup> for example, decided not to pursue her defence when she found out that she would have to pay a fee and would not be eligible for legal aid. L098 also wanted to defend, but explained to the court how his low income meant that he could not afford the £245 fee. Fee remission might be available, but only for those on the lowest incomes and assuming that they were aware of the procedure and able to action the application well within the 28-day timeframe.

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<sup>35</sup> Except in the Answers sample, where a majority of respondents were represented and/or had legal advice.

<sup>36</sup> <https://www.gov.uk/divorce/respond-to-a-divorce-petition>. There is also clear and helpful information about fee remission.

<sup>37</sup> The notes consist of a double-side of A4, in a small font, looking much like a set of terms and conditions. The language is inaccessible.

<sup>38</sup> All references to court files are prefixed with L- or M- followed by a three-digit number. These references are identifiers for the research study only. They are not HMCTS court file numbers.

The cost of legal advice and representation, and possible liability for the petitioner's costs, were further significant barriers. The wife in GD-NA case M007, for example, was on the receiving end of allegations of her domestic violence that she strongly disputed. She wrote several times to the court recording, at length, her objections to the petition, but stated that she could not afford legal representation. The wife in GD-NA case M009 said she could not afford to pay the £6,000-8,000 legal fees that she had been quoted to "to contest anything in the divorce at all or even to answer it correctly", which she described as "a crushing blow". Interviewee WK022, who was furious about the allegations against him, had nonetheless decided not to pursue the defence. Cost was a significant factor:

*"I would have had to attend the court in [several hours away] and I would be forced to then either represent myself or get representation which would incur further costs. Whichever party were deemed lost at the end of the proceedings would likely be deemed responsible for the legal costs of the other."*

Where the petitioner was represented, the arguments about costs could be deployed effectively by the petitioner's lawyer to help deter some respondents. In case M090, for example, the petitioner's solicitors wrote to the unrepresented respondent, noting that the petitioner would claim costs if the intention to defend the suit was pursued and that these would be at private client rates. No Answer was filed. Another lawyer recalled one case where, rather than advising their petitioner client to back down in response to a threat to defend, they had relied on the prohibitive nature of the likely legal costs for the respondent, predicting that the respondent would be unable to carry out their threat:

*It was a case of almost chicken, who's going to jump out the way of the moving car first. And I thought, well, I'm going to just stand still and wait and see if you actually do go ahead with this.... I didn't enjoy that experience. But, I think we got the right outcome for our client. (Lawyer interview 5)*

### **Stress of court proceedings and vulnerable respondents**

The highly stressful nature of litigation was a further deterrent, and one that lawyers deployed frequently with clients. In addition, those seeking to defend included unrepresented people with significant vulnerabilities, who were likely to find mounting a defence particularly challenging, if not practically impossible. Those vulnerabilities included mental health issues, language and literacy issues, living outside the jurisdiction and (older) age. GD-NA case L067, for example, concerned a respondent who wrote to the court stating: "I am a [mid 70s] year old lady who never thought would be put in this position". M003 was a retired man with significant language and literacy issues. He did make contact with the Regional Divorce Centre to get help with defence. They explained that he would have to complete a D8b, pointed him to fee remission and suggested he contact the CAB for support. He wrote to the RDC a second time to report that he did not understand the D8b Answer and EX160 fee remission forms, could not use a computer, that the CAB had said they were not qualified to complete the forms and that he could not afford a solicitor. There was no reply on the court file. The respondent did not pursue the defence.

### 3.3 Orientation of family lawyers against defence

#### The pragmatic approach

Aside from the capacity of respondents, a further barrier was the orientation of family lawyers away from defence. We explored in the *Finding Fault* report the pragmatic approach of family lawyers (and indeed, the courts) to divorce.<sup>39</sup> Pragmatism meant viewing the divorce process as a means to an end – achieving the termination of a legal relationship in the easiest way possible, rather than an attempt to establish the ‘truth’ of why the marriage broke down. That often meant an instrumental reliance upon the behaviour of the respondent to avoid a long wait to achieve the divorce. In that case, lawyers would commonly attempt to reduce any collateral damage from having to rely on allegations of fault, by drafting the mildest possible particulars and agreeing on drafts with the respondent. The pragmatic approach was also attractive to some clients who wanted to reduce conflict and the inherent stress of the divorce process and recognised that the divorce was, in effect, a paper exercise.

Other clients took a more literal approach, wanting the divorce to reflect publicly their version of who was responsible for the marriage breakdown. In such cases, pragmatic family lawyers worked hard to persuade their clients to take a wider, and longer-term, view of the family situation, rather than to focus on blame and short-term victories. This pragmatic approach was adopted with both petitioners and respondents. With the former, lawyers could also point to the pragmatic approach of the court – focused on problem-solving rather than blame – to try to focus petitioners on an approach that would contain, rather than potentially exacerbate conflict, as well as reducing the risk of triggering a defence:

*[Where I have clients saying] “I need the court to know what a shit he is”. I’d be quite frank. “I’m not sure the court is that interested in that. I’m sorry. The court is much more interested in are you going to be able to keep your house, is there going to be sufficient money, are the children going to continue to go to their schools? I absolutely get that’s how you feel, I absolutely get that, but the judge is really looking for something else”.  
Lawyer interview 3.*

With respondents, lawyers had a crucial role in trying to talk down clients who were on the receiving end of an upsetting petition. Whilst lawyers were sympathetic to their plight, the focus was typically on actively managing clients towards acceptance that *not defending* was in the client’s best interests. Ironically, this had the effect of framing pragmatic respondents as the ‘good’ clients and more literal respondents as the ‘difficult’ clients:

*To [respondent’s] credit she took a very pragmatic approach, and just said, “You know what? This matters to him [the petitioner]. I just want to get divorced.” So, she wrote in her acknowledgement that she didn’t accept what was in here, and that this had been issued in breach of the protocol, so she objected to paying the costs, but otherwise she wasn’t going to defend it. If she had been of a different personality, this would have been like lighting the touch paper ... Some people just want everything to be their*

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<sup>39</sup> Liz Trinder, Debbie Braybrook, Caroline Bryson, Lester Coleman, Catherine Houlston, and Mark Sefton, *Finding Fault? Divorce Law and Practice in England and Wales* (Nuffield Foundation 2017), especially Sections 2, 3 and 7.



*way, and other people are able to say, "Look, my primary objective here is to get divorced. Actually, the way ultimately doesn't matter to me," and they can rise above it. And those are people that you can have a sensible conversation with; the others are the ones that you end up in a conflict situation, and they are just thinking, "He's not getting away with it. And this is going to set the tone, and he thinks he's won. I can't give in." (Lawyer interview 10)*

Lawyers reported using a wide range of arguments to persuade clients against defending, pointing to:

- Additional, and unnecessary, financial costs (issue and legal fees, typically in the £1,000s).
- Delay to the divorce.
- Emotional impact and stress, particularly of any court hearing.
- The potential to fuel conflict.
- The fact that the reasons for the divorce has no impact on finances or children.
- Parties should focus energy and resources on the important issues – children and money.
- The petition is a means to an end, always with the same outcome, i.e. divorce, whatever the route.
- The specific reasons for the divorce (the particulars) will not be made public.
- Defence is futile – the divorce will happen if one side wants it.

In addition, a powerful tool to use with respondents was the possibility of adding a disclaimer, or rebuttal, on the Acknowledgement, described by Lawyer Interviewee 9 as:

*"an amazing tool where [I say to them] you can either contest it and spend about ten grand arguing about it or we can just add this point in to the Acknowledgement,' And a 'pacifier' is actually how I would use it. Always, always works".*

The case files and interviews with solicitors revealed a number of situations where a pragmatic lawyer had been successful in persuading a (sometimes reluctant) petitioner or respondent client to avoid an approach that could result in defended proceedings. These examples included:

- The respondent withdrawing the threat to defend, or an Answer, following legal advice in cases where previously unrepresented respondents had subsequently consulted a lawyer (e.g. GD-NA cases M175, M178).
- Allowing the other party's petition to proceed where two petitions had been drafted (Lawyer interview 9).
- Toning down allegations of domestic violence in a behaviour petition in response to the respondent's threats to defend (Lawyer interview 1).
- Talking down a respondent client from defence and relying on a rebuttal in cases where a (overly strong) petition had not been shared and the petitioner refused to amend it (Lawyer interview 3).

The very active client management approach, and talking clients down to avoid defence, is not a new strategy. In the 1980s, Davis & Murch described family lawyers as being the “main agents” in ensuring that the problems created by fault were “effectively buried” and threats to defend the divorce, neutralised.<sup>40</sup> The arguments used to deter defence in the 1980s were exactly the same as now: that the divorce would make no practical difference to the financial settlement and that the cost of defending was disproportionate to what could be achieved.

### **The limits to pragmatism and client management**

Not all clients were persuadable. Equally, not all lawyers were as confident about managing their client so firmly. And some lawyers were themselves less conciliatory.<sup>41</sup> As one solicitor noted:

*Sometimes you get a very, very strong client, and sometimes you get a weak solicitor who isn't going to be able to sit on that client heavily enough to say, "You don't have to do it this way." Sometimes you get an unfortunate combination of aggressive client and aggressive solicitor, which doesn't help. (Lawyer interview 10)*

The professional ethic of pragmatism is so strong that none of our lawyer interviewees would consider themselves litigious. However, not all were able, or chose to, ‘sit on’ their clients heavily. Some clients will not be at a stage, or might not ever reach a stage, where they have come to terms with a traumatic marriage or separation and can sit back and be ‘reasonable’. As noted above, people are going to be on different stages of a grief cycle or emotional readiness or acceptance. Solicitor 8, for example, had a client who was ‘so distressed’ that the solicitor felt forced into filing a cross-petition before managing to persuade the client to back down. Such clients could not be steamrolled, but needed to be heard, then gently persuaded, if at all possible. Solicitor interviewees recognised that it was asking a lot of people, especially with very recent or traumatic separations, not to want to tell their side of the story and to vent their anger and hurt. In those circumstances, some lawyers recognised that it was necessary to play a long game with their client:

*[Respondent's] not really even on the grief cycle, I don't think. She's just not on the acceptance bit yet.... I mean, she has mental health difficulties as well. So, from a professional point of view, part of me might have been thinking, "Deal with it; this is going to happen," but you have to be very sensitive because she's not even into the grief bit yet; she's just utterly rabbit in the headlights.... but ultimately, we got her to where we wanted to. But you need to be... People need to know that they had been heard. (Lawyer interview 10)*

With two literalist parties, the conflict could escalate quickly. Solicitor 2 described a case with two literalist parties where neither solicitor was able to rein their clients in: the husband

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<sup>40</sup> Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988) 108.

<sup>41</sup> The lawyer interviews and focus groups pointed out that not all lawyers practising in the area are members of Resolution or, if they are, do not necessarily comply fully with the Resolution Code of Practice or Law Society protocol.

wanted control and the wife wanted to use the petition as a “therapy session”, insisting “the nastier” examples of behaviour went in. The divorce and other matters were fully defended.

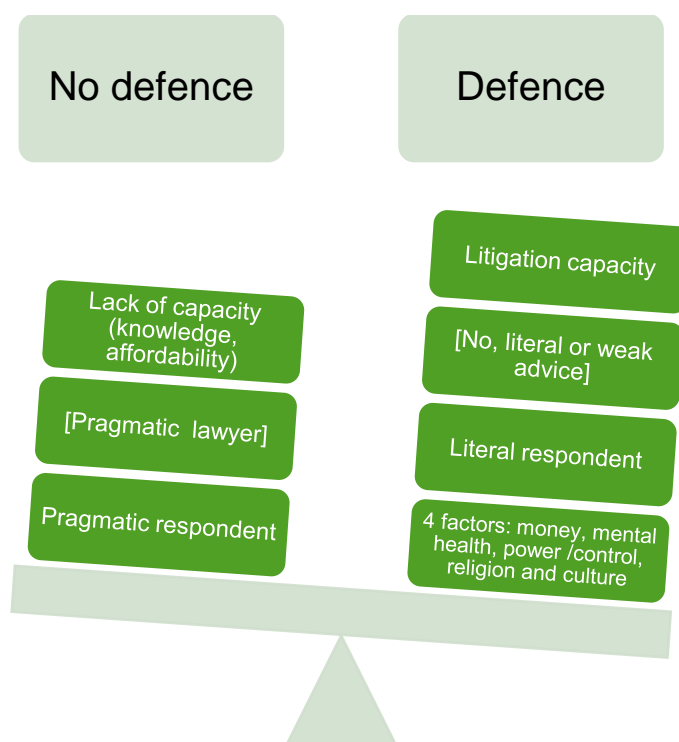
The other balance to be struck was how to gain the trust of clients, whilst steering them away from a course of action that the lawyer thought would be counter-productive and pointless, especially at an early stage in the lawyer-client relationship. Not all solicitors managed this and some lost clients as a result. The respondent in L172, for example, had apparently sacked their first lawyer who appeared to have advised against defence and changed to solicitors who were prepared to issue an Answer.

Of course, the other major limitation with pragmatism is that the great majority of respondents, and about half of petitioners are acting in person. They will not have access to any reassurances that strong particulars are not necessary or had advice that a pragmatic approach is likely to be of greater benefit in the long run. Furthermore, unrepresented respondents may be distrustful of any attempts to engage from the petitioner’s lawyer. Lawyer interviewees described examples of litigants in person refusing, for example, to respond to draft petitions and launching a defence instead.

In sum, there are a range of factors that will shape whether or not the respondent will issue a formal defence. As Figure 3.2 sets out, critical factors relate to the respondent’s capacity for litigation (time, money, emotional stamina and vulnerability, particularly) as well as a literal or pragmatic orientation and the availability, and effectiveness, of pragmatic legal advice.

Defence is most likely where the respondent has a literal orientation, the time and money to pursue the defence, probably enabled by a lawyer, but where that lawyer is unable, or does not seek, to follow a pragmatic approach.

Figure 3.2 Factors enabling and discouraging formal defence



### 3.4 The reactive approach of the court to intentions to defend

The final barrier to translating an intention to defend into a formal defence was the approach of the court to contested cases. As we noted above, the Booth Committee had previously suggested in the 1980s that the court discouraged defences. Davis & Murch also concluded that the court, or family justice system more widely, accounted for the limited number of Answers, pointing specifically to “judicial policy, procedural rationalization, and the denial of [legal aid] funds” for defence.<sup>42</sup> As we set out below, there was no evidence from our study that the court actively, or consciously, deters defence. What was evident though was that the court’s approach to intend to defend cases was reactive: it was the responsibility of the respondent to take all the necessary steps to defend if they chose to do so. The court would not proactively encourage or support that process and would respond only to specific procedural questions, and then only when asked.

#### **Wait, let the clock run down, crack on**

The rules set out that to defend a divorce, respondents have 28 days to file an Answer from receipt of notice of divorce proceedings.<sup>43</sup> If that deadline is missed, the respondent must apply to file an Answer out of time.<sup>44</sup> Otherwise the case will proceed as undefended.

As noted above, unless specifically asked, the court provides very little information to respondents about what is required to defend. In particular, the respondents are *not* told that to “answer the petition” requires the use of the D8b Answer form. In contrast, the court *automatically* sends all petitioners a D9E Notice to notify them that the respondent is intending to defend. The notice also informs the petitioner that they may apply for decree nisi if a copy of the respondent’s Answer is not received within the next month. A leaflet detailing how the petitioner should apply for decree nisi is also supplied.<sup>45</sup>

The comparison between the very sparse (and inadequate) information for respondents, and the fuller guidance for petitioners, is telling. What it suggests is an orientation that supports the routine processing of divorce petitions, but not one where defence is encouraged.

This general orientation against actively enabling defences is reflected in how the court approaches cases where there has been an intention to defend (ITD). The court will be keenly aware that an ITD has been lodged.<sup>46</sup> The court will then wait, as the clock runs down, for an Answer to be filed. If no Answer is forthcoming, the court will keep moving forward, dealing with any applications for decree nisi after the Answer period has expired as if the ITD had never been lodged:

*Yeah, so we just crack on. That’s why the time limit’s there, otherwise the divorce would be suspended indefinitely. They’ve got so long to file their answer. If they haven’t filed it, they can’t defend it. So, it then becomes an undefended divorce. So, on we go. (Legal Adviser 18)*

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<sup>42</sup> Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988) 106.

<sup>43</sup> Strictly, the rules allow seven days to file a notice of an intention to defend and twenty-one days after that. Family Procedure Rules 7.12(8). See Section 1.5 above.

<sup>44</sup> Family Procedure Rules 7.14(1).

<sup>45</sup> D186 “*The respondent has replied to my petition – what must I do*”. Available at <https://formfinder.hmctsformfinder.justice.gov.uk/d186-eng.pdf>

<sup>46</sup> It will be recorded on FamilyMan, the court service’s management information system.

*Well sometimes they say [ITD], but then they're given 28 days and then they just don't bother.<sup>47</sup> So then we can proceed on the basis it's undefended.*  
(Legal Adviser 14)

The 'waiting for the clock to run down and then carrying on as normal' approach, was also adopted by lawyers representing petitioners. Typically, lawyers would send a cover letter with their application for decree nisi, noting that an ITD had been lodged, but that the time period had now expired and asking for the divorce to be treated as undefended. Lawyers usually allowed a couple of weeks after the Answer deadline had passed before filing their application for decree nisi, in case an Answer was stuck in the court's backlog.<sup>48</sup> In some instances, the application was lodged as soon as possible, to ensure that the divorce kept on track. Solicitor 5, for example, described one case with a controlling and litigious respondent where "We pushed it through... we just kept on banging it through".

Similarly, the Regional Divorce Centres had a policy of holding back for a couple of weeks any applications for decree nisi that had been sent within the Answer period. In one case (L189), an application was sent for scrutiny for entitlement for decree nisi within the Answer period. It was initially refused, but the RDC did not notify the parties. Instead entitlement for decree was granted on reconsideration after the Answer period had expired.

### **The court's non-response to error cases**

The reactive approach of the court was evident in the error cases, where an intention to defend appeared to be a mistake by the respondent. In a small number of the error cases the respondent made contact with the RDC to flag the error. The RDC would then respond by issuing a new Acknowledgement or making a note on the file. However, in none of the 19 error cases did the RDC proactively contact the respondent to check whether the ITD was an error or a genuine dispute. It was left to the parties, or the passage of time (i.e. the expiry of the Answer period), to resolve the issue.

Eleven of the 19 errors were petitions based on two year's separation where the respondent had stated that they both intended to defend, and consented to, the divorce on the basis of two year's separation. Clearly, both answers cannot be true. In each case, however, the court appeared to interpret the ITD as the error, rather than the consent to the two-year's separation. Indeed, in M006, the legal adviser noted on the file: "I suspect [respondent] has answered 'yes' [to ITD] by mistake", and advised that consideration of any application for decree nisi be held back until the 28 days had expired. Whilst that addressed the ITD issue, in itself, it did not establish definitively that positive consent to two year's separation had been given by the respondent, as the law requires.<sup>49</sup>

### **The court's reactive approach to GD-NA cases**

The court also adopted a reactive approach to GD-NA cases, where the information supplied by the respondent made it clear that there was a genuine dispute, not just a presumed error.

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<sup>47</sup> We discuss the framing of respondents as a 'nuisance' below in Section 5.2.

<sup>48</sup> On average, applications in Answer cases took six weeks longer than sample cases between the signing of the Acknowledgement and the signing of the D80/84.

<sup>49</sup> MCA 1973 s1(2)(d)

With the GD-NA cases, the court’s approach was more selective, though equally reactive – the court picked out any procedural points and disregarded everything else.

GD-NA cases ranged from those where the respondent merely added a few words to the Acknowledgement,<sup>50</sup> to cases where the respondent included an attachment with the Acknowledgement, and cases where additional material was sent on up to four separate occasions. The median length of total written interactions in the 52 GD-NA cases was 98 words, ranging from two to about 8,000 words.

The response of the court to the different types of GD-NA cases is set out in Table 3.1. The reactive approach is evident – in more than half of cases the court did not appear to acknowledge the respondent’s material at all. In case M100, for example, the respondent submitted a long attachment with the Acknowledgement and a 300-word ‘My defence for the courts’ 4-5 months later. There was no indication that anybody at the court acknowledged the communication or informed the respondent that it could not be treated as a defence.

*Table 3.1 Mode of respondent communication with court and the court’s response (number of cases)*

	Annotation on the AoS <sup>51</sup>	Attachment to the AoS	AoS plus post-AoS	Total
No response	15	6	12	33
Supply information about the process in general	1	0	2	3
Clarified case-specific procedural points pre-DN	1	1	5	7
No initial response, post-DN clarification of procedure	0	0	5	5
Addressed at scrutiny of entitlement to DN (consent, admission)	1	1	0	2
Court sought substantive clarification from Petitioner	1	0	0	1
DN refused + CMH listed	0	1	0	1
<b>Total cases</b>	<b>19</b>	<b>9</b>	<b>24</b>	<b>52</b>

Source: *Finding Fault* contested samples

Where the court did engage with the respondent it was typically (10/52) cases to supply procedural information, e.g. about forms and fees, with no reference to the allegations or counter-allegations made by the respondent. The only exceptions to this non-engagement

<sup>50</sup> E.g. “Yes, as it is not true and if the facts had been correct I would not have to defend them.” (L189).

<sup>51</sup> Beyond a mere “Yes” to ITD.

were two cases where the respondents' lack of admission of adultery and consent to two years separation were picked up on scrutiny of entitlement to decree nisi as the legal fact was not made out, i.e. no admission of adultery or no consent and decree nisi was refused.

There was also one case where a case management hearing was listed erroneously on the basis that the case was defended. The petitioner's lawyer protested and entitlement to decree nisi was reinstated.

A fourth case (M099) was particularly interesting. The respondent had noted on the Acknowledgement that the parties had not been separated for five years and that their last child had been born within that period. The court refused to grant entitlement to decree nisi and sought clarification from the petitioner. The respondent wrote back, with a statement signed by both parties, stating that they had been separated for more than five years, notwithstanding that the child had been conceived during that period. Decree nisi was granted. With the exception of the very small number of adjudicated trials, this case was the sole example in the sample of 300 undefended and 142 contested cases where the court questioned the veracity of the petitioner's account, although the court was willing to accept a fairly basic explanation.

With the sole (and brief) exception of M099, the court ignored the respondent's counter-allegations in GD-NA cases and, at most, provided information on procedural points. The default position in all four sample RDCs was that the court would only consider defences that were on the correct form and, crucially, where the respondent had paid the fee to file their defence (or been granted remission):

*They tick the box saying 'I do intend to defend this' and then they write a bit of a screed with it. Well, unless they have paid the court fee then they're out of time, so one would pragmatically just let it through. (Deputy District Judge)*

The result was that the GD-NA 'protests' were entirely ineffective, with the exception of the two no consent and no admission cases where a legal Fact was therefore not made out. The allegations and denials of the respondents were not explored at all by the court as the cases were deemed to be undefended.

We have little insight into how respondents felt about this non-response from the court, not least when some clearly thought, in the absence of clear directions from the court, that their 'screed' was a defence. Some appeared to be surprised that their divorce had proceeded in any case, and wrote to the court in protest after receiving notice that the petitioner was entitled to decree nisi. A typical response was that of the court's 'too late' letter sent to the respondent in L100: "You said you intended to defend, but failed to file an answer within the proposed time. The Petitioner applied for Decree Nisi upon your default, and the Decree Nisi was granted on [date]".

Court staff are constrained in their interactions with respondents by the need to avoid giving legal advice. The reactive response to GD-NA cases may well be based on a real concern about the danger of getting pulled into giving legal advice. But avoidance of legal advice would not prohibit automatically giving clear information to respondents about what was

required to defend, such as sending a copy of, or link to, the D8b form and current information about the fee and potential availability of fee remission. Nor would it appear to prevent letting respondents know that what had been sent (the 'screed') would not constitute a defence without being filed in time, on the proper form and with the fee (unless remission were granted). The information was available if sought directly from the RDC (or to represented parties), but it was not volunteered *automatically* to *all* respondents.

In the following section we explore further what might underlie the court's response to ITD cases. What was apparent was that the court adopted a routine case processing approach to divorce cases where an ITD was something of an irritant or distraction. In GD-NA case L067, for example, an elderly lady had written to the court to challenge the decision after receiving notice of the petitioner's entitlement to decree nisi. The court did outline her legal options (albeit in highly technical language and noting each option would attract a fee). The letter concluded with a rebuke that "the Court deals with Applications. It cannot enter into prolonged correspondence about cases", even though the respondent had sent only one short letter.

The reaction of the court was not just about resources and workloads. As we will see in the next section, it also reflected a view that if one party stated that the marriage was over then divorce was unavoidable and that defending was both futile and counter-productive and damaging for the parties and any children. In GD-NA case M095, for example, there was a note on the file where the legal advisers had queried how they should handle a case where both petitioner and respondent had made inflammatory allegations against the other. The response from a district judge was to allow the divorce to continue, as "despite reply from respondent and what petitioner has put on statement in support is clear both parties wish a divorce so matter can proceed".

### **3.5 Summary**

As identified previously in the 1980s, there are significant barriers to defence that mean that only a minority of respondents who might wish to do so are able to put into effect their stated intention to defend the divorce. Those barriers include factors relating to the respondent themselves, including their intentions and, in particular, their emotional, financial and intellectual capacity. The barriers are also external to the respondent. First, the pragmatic approach of family lawyers, based on focusing clients on the end goal of achieving the divorce in the easiest way possible and therefore away from possible defence. The second is the reactive approach of the court, whereby respondents are given minimal assistance in how to defend, in what amounts to a process of reactive (or constructive) discouragement. The approach adopted by both family lawyers and the courts is based on a perception that defence is unlikely to be in anyone's best interests, given the financial and emotional cost of defence and the inevitable outcome of a divorce. However realistic that appraisal is, the barriers to defence may well appear to be procedurally unfair to respondents.



## 4. What is in dispute and why?

### 4.1 Introduction

In this section we explore what is, or appears to be, in dispute in contested cases and what appears to have triggered the conflict. We explore any differences between the contested and non-contested (or undefended) cases, as well as between GD-NA and Answer cases.

It should be recognised that our interpretations of causes and triggers cannot be definitive. As will become apparent, disputes and defences may be tactical, as much as ‘genuine’ emotional responses to the situation. The parties may have complex, confusing and changing motivations over time that are not measurable in any meaningful, or empirically feasible, fashion. Our analysis is based on what appears to us, as independent researchers, to be the primary issues and motivations in contested cases, whether drawn from case files<sup>52</sup> or from interviews with lawyers and judges. The parties themselves, may see things differently.

### 4.2 What is in dispute?

One of the most important findings of the study is that the great majority of contested cases, whether resulting in a formal defence or not, were not attempts by the respondent to save the marriage. Fewer than a fifth of respondents were denying that the marriage had broken down (Table 4.1). Instead, most disputes were cases where the respondent was upset or angry about the choice of Fact or the specific allegations that had been made about them in the petition.

*Table 4.1 Primary issue presented by the respondent, (GD-NA and Answer cases)<sup>53</sup>*

Primary issue	GD-NA (n=52)	Answer (n=71)
Denies marriage broken down irretrievably <sup>54</sup>	12%	18%
Fact/specific particulars disputed	83%	72%
Jurisdiction/status of marriage disputed	2%	10%
Other disputes	4%	0%

Source: *Finding Fault* contested sample

In addition, a small number of disputes were based on the respondent claiming that there was no valid marriage, or that divorce proceedings had already been issued and/or should proceed, in another jurisdiction. Two of the GD-NA cases involved attempts by unrepresented respondents to ask the court to investigate issues relating to the children of

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<sup>52</sup> In (almost) all cases including narrative statements from the parties themselves in the form of the petition, the Acknowledgement of Service and/or Answer or cross petition and, in a small number of cases in which they were ordered, the parties’ witness statements. We recognise that, particularly where parties are represented, those narrative statements are commonly drafted to achieve a particular legal purpose, rather than being straightforward accounts of the individual’s views and motivations, if indeed such a thing were possible.

<sup>53</sup> Percentages are rounded to the nearest whole number throughout this report and may not add up to 100%.

<sup>54</sup> Respondents filing an Answer are required to state whether or not they agree that the marriage has broken down irretrievably, or not. The coding for the GD-NA cases on this question was based on comments on the Acknowledgement of Service and any other material supplied by the respondent.

the marriage. The majority of respondents, therefore, were willing for the divorce to go ahead, but disputed the legal basis (and/or process) on which the divorce should proceed.

It was clear that fault, and behaviour allegations in particular, were a significant driver behind disputes. Four-fifths of GD-NA and Answer cases involved a behaviour petition, compared to fewer than half of undefended (or main sample) cases (Table 4.2). Further, of the nineteen Answer cases where irretrievable breakdown was disputed, eighteen were behaviour cases and one was based on five year's separation.

*Table 4.2 Fact relied upon in the petition, by case type*

	Main (n=300)	Error (n=19)	GD-NA (n=52)	Answer (n=71)
<b>Adultery<sup>55</sup></b>	11%	5%	4%	6%
<b>Behaviour</b>	45%	26%	77%	89%
<b>Desertion</b>	1%	0%	2%	0%
<b>Two year's separation with consent</b>	29%	58%	8%	1%
<b>Five year's separation</b>	14%	11%	10%	4%

Source: *Finding Fault* main and contested samples

The majority of contests in our study, therefore, were not attempts to save the marriage, but attempts by angry or indignant<sup>56</sup> respondents to 'put the record straight' as to who was to blame for the divorce. This could be a straight rejection of the Fact relied upon or of the particulars in the petitioner's statement of case. More commonly, the respondent offered an alternative account of why the marriage had broken down: putting their alleged behaviour in a wider context, offering an alternative interpretation of the facts, or making counter-accusations against the petitioner. These could be very brief, e.g. "I have not behaved as alleged in the petition. The petitioner told me that she had instructed her solicitor to withdraw all allegations of violence" (GD-NA case M195). Alternatively, respondents might offer point-by-point rebuttals of the petitioner's statement of case and/or highly detailed alternative accounts of what the petitioner themselves had done (or failed to do), sometimes with supporting 'evidence' (see Section 3.4 above).

Twenty-eight of the Answer cases also included a cross-petition. Again, these appeared to be primarily attempts to reallocate blame away from the respondent and onto the petitioner. Twenty-six of these offered alternative accounts of fault: denying the respondent's behaviour and alleging the petitioner's behaviour instead (17 cases), denying the respondent's behaviour and alleging the petitioner's adultery (7 cases), or denying the respondent's adultery and alleging the petitioner's behaviour (2 cases). Only two cases involved a respondent seeking to replace a fault petition with a cross-petition based on two year's separation with consent.

<sup>55</sup> Only one of the defended adultery petitions included a named co-respondent. They took no part in the proceedings.

<sup>56</sup> Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988) 106.

How does this compare with earlier studies? The finding of a very strong relationship between the behaviour Fact and disputes mirrors research from the nineteen seventies and eighties. In the seventies, Eekelaar & Clive reported that 67% of intentions to defend were behaviour cases.<sup>57</sup> In the eighties, Davis & Murch reported that behaviour petitions accounted for 73-88% of Answers in their two sample courts.<sup>58</sup>

Where there is a clear difference between now and earlier decades, however, is a substantial fall in the proportion of respondents who were arguing that the marriage had not broken down. In the Davis & Murch study from 1988, 43% of defended cases were attempts to save the marriage (whether genuine or tactical).<sup>59</sup> That is more than double the proportion – 18% of Answer cases in the current study – where the respondent was seeking to argue that the marriage had broken down.

It is not clear why this quite marked drop has occurred. It may reflect changing social attitudes towards marriage and divorce and a greater acceptance of divorce; or it may reflect the advice of family lawyers that defending the divorce is futile but that trying to amend the particulars may be effective (see Section 6.2 below).

### **4.3 What factors are associated with contested cases?**

Aside from the very clear influence of the Fact relied upon, there were a range of other factors that distinguished contested from undefended cases. These included legal representation, demographic factors and the perceptions of the parties.

#### **Legal representation<sup>60</sup>**

Legal representation or being legally advised, interacted with case type in different ways. Unsurprisingly, the error cases – where the respondent mistakenly stated that they intended to defend the case - had the lowest levels of legal support, with 18 out of 19 respondents being unrepresented (Table 4.3).

In contrast, Answer cases had the highest levels of legal input, for both petitioner and respondent (Table 4.3). The direction of effect in the Answer cases is not straightforward, however. It may be that in some cases litigious lawyers were encouraging (or not actively discouraging) defences. However, there is also a very strong legal professional ethos against defence (see Section 3.3 above). We think that a more likely explanation, therefore, is that representation provided the technical capacity to file an Answer where respondents were determined to press ahead with a defence. In contrast, the technical and financial demands needed to pursue a formal defence would appear beyond most litigants in person, reflected in the failure to file Answers by GD-NA respondents, three-quarters of whom were unrepresented.<sup>61</sup>

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<sup>57</sup> John Eekelaar and Eric Clive, with Karen Clarke and Susan Raikes, *Custody after Divorce* (SSRC Centre of Socio-Legal Studies, 1977).

<sup>58</sup> Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988) 102.

<sup>59</sup> *Ibid*, 103. The sample was 114 Answers drawn from the Bristol court.

<sup>60</sup> As stated at the time of the petition for petitioners and the Acknowledgement (or Answer, if filed) for the respondent.

<sup>61</sup> There were also some GD-NA cases where it appeared that the ITD had been registered when the respondent was unrepresented. The respondent had subsequently sought legal advice, presumably to defend the case, but the advice appeared to have been not to defend.

Table 4.3 Legal representation (or advice), by case type

Represented or (legally) advised	Main (n=300)	Error (n=19)	GD-NA (n=52)	Answer (n=71)
Both parties	19%	5%	23%	62%
Petitioner only	37%	37%	52%	23%
Respondent only	1%	0%	2%	4%
Neither party	42%	58%	23%	11%

Source: *Finding Fault* main and contested samples

### Demographic factors

In terms of demographics, gender did not influence dispute status, with male respondents in 61.3% of main sample cases, 55.8% of GD-NA and 50.7% of Answer cases. There was no difference in marriage duration between case types either, with a median ten years for main sample and eleven years for contested cases. Nor did any previous marriages of husband or wife appear significant, with about one fifth of spouses in each case type having previously been married.

There were indications, however, that older respondents may be more likely to defend than younger people. Davis & Murch found that Answers were more common in longer marriages, with 33% of defended divorce in marriages of over 15 years duration.<sup>62</sup> In our study, respondents in Answer cases were older on average, at 47.5 years, than main and GD-NA cases, at 43.75 and 44.4 years respectively. This echoed the older age profile of the defended cases that were described in our solicitor interviews and, indeed, in the few reported cases. Whether the association between defence and age reflected a greater reluctance to compromise amongst older people, different attitudes to marriage, or a greater ability to afford legal and court fees, is unclear.

In addition, there were more likely to be minor children in contested cases, with under half of main sample cases having any minor children, compared to 67.3% of GD-NA cases and 59.2% of Answer cases. We would be cautious about relying on this finding. Providing details of children is no longer a mandatory element of the petition and it was clear that the number of cases with children was somewhat undercounted. What was clear, however, was that there were minor children involved in at least half of all cases where parents were in serious disagreement about the divorce.<sup>63</sup>

### The content and strength of behaviour petitions

As noted above, more than three-quarters of contested cases were based on the behaviour Fact. There were some indications that the *specific* content of the particulars may trigger

<sup>62</sup> Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988) 103.

<sup>63</sup> See Section 7.2 below for the impact of conflict on children.

disputes. The GD-NA and Answer cases were more likely to include allegations of violence against the petitioner and to meet the cross-government definition of abuse,<sup>64</sup> than main sample cases (Table 4.4). GD-NA and Answer cases also tended to have longer statements of case (median 220.5 and 230 words), compared to main sample cases (193 words).

*Table 4.4 Content of behaviour petitions, by case type*

Whether issued raised	Main (n=135)	GD-NA (n=40)	Answer (n=62)
Violence to petitioner	15%	30%	36%
Violence to child	2%	0%	3%
Violence to property	4%	8%	8%
Cross-government definition of abuse	42%	60%	66%
Drug and/or substance abuse	10%	18%	9%
Financial problems	20%	28%	26%
Improper associations	27%	23%	16%
Serious breach of trust	7%	20 %	18%
Interpersonal difficulties	75%	68%	76%
Sexual problems	19%	23%	21%
Mental health impacting on petitioner	14%	8%	2%

Source: *Finding Fault* main and contested samples

That said, there does not appear to be a straightforward relationship between behaviour particulars and disputes. On most indicators in Table 4.4, the main, GD-NA and Answer cases had a similar profile in the *types* of allegations made. And our overall assessment was that 85.9% of undefended petitions were ‘full strength’,<sup>65</sup> not dissimilar to the 95% of GD-NA and 93.5% of Answer cases.

<sup>64</sup> See Liz Trinder, Debbie Braybrook, Caroline Bryson, Lester Coleman, Catherine Houlston, and Mark Sefton, *Finding Fault? Divorce Law and Practice in England and Wales* (Nuffield Foundation 2017), Section 5.2. The definition is available at <https://www.gov.uk/guidance/domestic-violence-and-abuse> It includes psychological, physical, sexual, financial and emotional abuse.

<sup>65</sup> That is, attributing full blame to the respondent and with strong interpersonal or behaviour allegations.

Similarly, there were examples of relatively mild petitions that still triggered an Answer. In some cases, *any* attribution of blame was resisted, including cases where the respondent considered that it was the petitioner who was entirely responsible for the separation.

### **Petitioning conduct**

In the *Finding Fault* report we described how petitioners frequently relied upon (or resorted to) the behaviour Fact to avoid having to wait for at least two years for their divorce.<sup>66</sup> In order to reduce the risk of conflict, and especially the possibility of defence, lawyers (and some unrepresented parties) used a range of strategies to try to limit the impact of behaviour allegations on relationships. Those harm minimisation strategies, including a letter before proceedings, exchange of draft petitions and drafting mild particulars, were not always successful in minimising conflict, but they were widely practiced.

A common, though not a universal theme in the GD-NA and Answer cases, was a complaint that harm minimisation strategies had not been followed. This included leapfrogging - or issuing a petition ahead of the intended 'petitioner' - sometimes where a draft petition had already been shared. The respondent in Answer case M231, for example, objected to costs on the basis that "the petitioner had confirmed he would pay the costs and that I could begin the divorce. Despite this agreement he has started the divorce in an underhand way". There were multiple examples of lawyers not following the Law Society protocol<sup>67</sup> and filing a petition without sharing a draft, let alone being willing to take on board amendments. There were also cases where the Fact relied upon was altered to behaviour, despite apparent prior agreement to use a non-fault separation ground.

It appears unlikely that petitioning conduct in itself would trigger an Answer in many or any cases, however, it did appear a common aggravating factor.

### **Costs and financial remedies**

There were also quite distinct differences between the main sample and contested cases in relation to costs and financial applications.

Costs were significantly more likely to be claimed by petitioners in GD-NA and Answer cases, compared to main sample cases, but significantly less likely to be accepted or agreed by respondents (Table 4.5).

There were some indications from the qualitative data that claims for costs, whilst also not the sole trigger for disputes, could be the final straw. This was particularly so where the particulars were seen as unfair or untrue. The respondent in M187, for example, objected to costs on the basis that allegations of domestic violence were untrue. Some lawyers in the interview sample reporting a policy of not claiming costs, especially with Legal Aid clients, to avoid the possibility of defence. In contrast, one solicitor reported that an Answer was filed by another solicitor primarily based on objections to costs.

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<sup>66</sup> See Liz Trinder, Debbie Braybrook, Caroline Bryson, Lester Coleman, Catherine Houlston, and Mark Sefton, *Finding Fault? Divorce Law and Practice in England and Wales* (Nuffield Foundation 2017), Section 7.

<sup>67</sup> See the Law Society *Family Law Protocol 4<sup>th</sup>* (2015) <http://www.lawsociety.org.uk/practice-areas/family-children/> and the Resolution *Code of Practice* <http://www.resolution.org.uk/code/>. The Law Society Protocol endorses explicitly the Resolution *Code of Practice*.

Table 4.5 Claims for costs by petitioner and objections to costs by respondent, by case type

	Main	Error	GD-NA	Answer
Costs/qualified <sup>68</sup> costs claimed by <u>petitioner</u>	41% (n=299)	32% (n=19)	67% (n=52)	77% (n=70)
No objection by <u>respondent</u> (or cites agreement on costs)	75% (n=244)	50% (n=18)	4% (n=49)	2% (n=65)

Source: *Finding Fault* main and contested samples

Petitioners in Answer cases were also significantly more likely than in other case types to state that they intended to apply for financial orders as well as to make applications for such orders (Table 4.6). Again, this may contribute towards a perception of unfairness that triggers an intention to defend.

Table 4.6 Applications for financial orders by case type

	Main	Error	GD-NA	Answer
Intention to apply for financial orders at petition stage (number and % of petitions)	64% (n=190)	58% (n=11)	75% (n=39)	89% (n=63)
Financial remedy application made (number and % of petitions)	34% (n=103)	26% (n=5)	35% (n=18)	56% (n=40)

Source: *Finding Fault* main and contested samples

Any perception of unfairness may have been exacerbated by the wording of the petition that was in place in 2014/15. The form offered petitioners a range of boxes to tick to indicate which financial order they would like, without making clear that this would be subject to a separate financial application.<sup>69</sup> As lawyers noted, this could be an unnecessary source of conflict:

*They get the prayer, and they're like: 'They want all of this, and we've got nothing'. And really it is a menu of orders the court could make. We're not asking the court to make those orders ... but yeah I've had loads [of respondents] explode because of that. (Lawyer focus group E)*

#### Emotional dissonance: The leaver and the left

A key, but unmeasurable factor, in this research was the different emotional stages or states of the petitioner and respondent. While few respondents were seeking to deny the marriage had broken down, there were many more where emotions were clearly still raw and

<sup>68</sup> Qualified costs include riders such as "costs if defended" or "delay in returning the Acknowledgement"

<sup>69</sup> The wording on the new version of the D8 makes clear that a separate application for a financial order is needed and merely describes the range of orders available, rather than inviting petitioners to select them.

unprocessed, particularly in comparison with petitioners who may have psychologically left the marriage some time before. As one solicitor noted:

*You definitely see people at different stages of the grief cycles. The one who's petitioning is miles ahead usually, and the other one's probably about two or three stages behind. And you can see them going through clear stages of upset, shock, and then sort of ambivalence and then, denial, and then anger, and then revenge. (Lawyer interview 1)*

### **Misunderstandings of the law and practice**

Leaving aside the error cases, there were also examples where misunderstandings contributed to disputes and Answers. These included a misunderstanding of the law. Two of the GD-NA respondents, for example, objected to the use of the behaviour Fact, but stated that they would accept divorce on “irreconcilable differences”.

More commonly, lawyers pointed to the fact that unrepresented respondents had not had explained to them how the law worked in practice, that is that behaviour particulars were drafted to achieve the divorce, rather than intended to be accurate portrayals of what had happened in the marriage.<sup>70</sup> Without that understanding, it was more likely that respondents would get upset about behaviour allegations and threaten to defend:

*That's the problem with more and more litigants in person isn't it? That's the thing, if you have a solicitor to say to you, 'This is part of the process, you only need to do XY and Z, because this is what you want to achieve' it's a different thing. But when you have a litigant in person who thinks, 'Oh my god, I can't believe she said this about me'. That's the whole problem isn't it? (Lawyer focus group A)*

In some instances, those misunderstandings were taken further. M203 was a GD-NA case where, unusually, the petitioner produced highly mutualised particulars, attributing the separation to the parties being unable to work out their differences. Rather than accept shared responsibility and a pragmatic approach, the respondent wife threatened to defend. The husband withdrew his petition and the wife issued her own behaviour petition. In this case it was clear that the wife wished her account of the breakdown of the marriage to prevail.

### **Reputational reasons to defend**

One of the arguments by lawyers to discourage defence was that the specific reasons for the divorce, rather than the Fact relied upon, are not made public. The respondent may also choose to deny the allegations on the Acknowledgement. Even so, there were some specific situations where the respondent was advised, or felt justified, in threatening to defend or filing an Answer. The most commonly cited situations were where the petition made allegations involving the children or any type of criminal activity. In those circumstances, lawyers would typically seek to have the petition amended to remove the allegation.<sup>71</sup> If that

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<sup>70</sup> Liz Trinder, Debbie Braybrook, Caroline Bryson, Lester Coleman, Catherine Houlston, and Mark Sefton, *Finding Fault? Divorce Law and Practice in England and Wales* (Nuffield Foundation 2017), Section 3.

<sup>71</sup> But incurring additional costs and delay and, probably, heightening tensions.



were refused, then as described by the respondent in M101, being forced to defend may be considered as the “least worst option”, given allegations of criminal behaviour that could be used in future proceedings.

The irony, of course, is that the allegations have to be sufficiently strong to reach the threshold, but not too strong that they might trigger a defence:

*We encourage them to give us incidents of unreasonable behaviour, but it's that balance, we don't want it to be too serious. Because the worst thing is for you to be advising someone who's received a divorce petition and it's saying things about the children isn't it and other things about finances – it can force you down the route where you might have to advise the client to defend, because you can't let those allegations go through. (Lawyer focus group E)*

The other situation related to circumstances of the individual respondent. Being named as a co-respondent in an adultery case was identified by lawyers as a reputational problem that would require defence for a number of professional groups, including members of the armed forces. Being of good standing in the community was also of significance for those without an automatic right to live in the UK. The respondent in M103, for example, was very concerned that future visa applications might be affected by allegations contained in the petition that were disputed.

#### **4.4 Defending the marriage cases**

Nineteen of the contested cases court sample, and a small number of cases described in solicitor interviews, concerned situations where the respondent denied that the marriage had broken down, as in the *Owens* case.

In these cases, the respondent had a seemingly uphill task in trying to argue that the marriage was viable, when the petitioner had already filed for divorce. Their response was typically that the petitioner was mistaken, was being manipulated, or was temporarily mentally ill, rather than deliberately lying. Whether those arguments were based on genuinely-held beliefs, or more tactical considerations, was difficult to determine. One lawyer contrasted the petitioner wife's perception that the husband was controlling and that the marriage had broken down, with the apparently genuine, if erroneously-held, views of the husband that the marriage was still viable:

*“His absolute position was this marriage hasn't broken down; she doesn't know what she's doing; I'm a fantastic husband; we were very, very happy together”. (Lawyer interview 2)*

In other cases, the argument that the marriage was still intact, or was retrievable, was plainly based on tactical considerations that the respondent would be better off, including financially, if the marriage continued as a legal entity, even if the relationship had ended.

The marriage defence case files were a heterogeneous group, but they were not entirely idiosyncratic. The nineteen GD-NA and Answer cases fell broadly into six different groups,

as set out in Table 4.7. Looked at more broadly, those six different groups, together with the defended cases described by lawyers in interview, really concerned various combinations of four different factors. Those four factors were:

- Money
- Mental health
- Power and control
- Religion and culture

*Table 4.7 Primary factors raised in, or associated with, denial of irrevocable breakdown cases*

Factors raised or associated	GD-NA cases	Answer cases
Capacity, coercion and financial abuse	0	2
Stalling financial settlement	1	2
Immigration/visa issues	1	0
Lovelorn/forlorn	2	2
Denial of serious domestic violence	2	3
Religious objections	0	2
Unclear motivations	0	2
<b>Total cases</b>	<b>6</b>	<b>13</b>

Source: *Finding Fault* contested samples

## **Money**

Money featured in the marriage defence cases in multiple ways.

*Inheritance/capacity cases:* There was a distinct sub-group of court file and lawyer-described contested cases that raised issues around inheritance and capacity. These concerned old, or older, couples where the respondent argued that a vulnerable petitioner, allegedly lacking capacity, had been put under pressure, by the petitioner's children or extended family, to initiate the divorce, against the petitioner's real wishes. In each case, the motivation to force the divorce through was said to be to protect an inheritance. In some of these cases there were applications to the Court of Protection to address the capacity point.

*Settlement avoiders:* There were also cases where respondent husbands appeared to be seeking to defend the marriage in order to delay or avoid having to reach *any* settlement of the family finances, let alone one that the courts might consider to be fair. In each case, the parties had separated but the (again, older) respondent husbands retained complete control of all the family assets, including occupation of the former matrimonial home. In the two court file cases, whilst the respondent denied that the marriage had broken down, it was clear that the respondent was seeking to defend the divorce to avoid or delay having to reach a financial settlement. One unrepresented respondent (L187) was explicit in his Answer that he was fighting the divorce to avoid having to give his wife any share of the home or family business that he considered he had built up alone. The other (L190) savaged

his wife's personal and sexual conduct at great length in the Answer, whilst concluding, rather unconvincingly, that he was open to reconciliation.<sup>72</sup>

A similar case was described by one of the solicitor interviewees, where an older respondent husband sought to retain control of the family assets, on his own terms, rather than those that might be determined by Section 25 of the MCA 1973:

*He wanted to come to some sort of arrangement whereby they would remain married and there would be some sort of financial carve-out for the wife, but very much on his terms, and not in line with what we would consider to be a normal division of assets. They would still remain very linked financially. [All financial assets were] entirely within his control... And it must be incredibly difficult to have structured your financial affairs for 30 or 40 years to be a certain way and then at the 11th hour for your wife to turn around and say actually she wants out and she wants half of everything. So, I can see his perspective as to why he resisted, but as far as the wife was concerned, she wants out and his protest didn't really work. (Lawyer interview 1)*

### **Mental health**

Issues of mental health occurred in multiple cases, some overlapping with power and control issues, discussed below.

*Lovelorn/forlorn:* There were a small number of cases where the parties had long since separated, or had never fully co-resided, but where the respondent clung to the belief that they could win the petitioner back. In each case, the respondent had self-acknowledged mental health problems. In some cases, the respondent acknowledged past failings, but were adamant that they had changed and that their past behaviour would not recur. In each case, there appeared to be no possibility of reconciliation and the petitioner appeared increasingly frustrated with the attempts of the respondent to defend the divorce.

*Obsessive and dogmatic:* Some cases featured obsessive or dogmatic litigants who refused or were unable to take advice and instead appeared to fight on principle. With such individuals, the usual rational, cost-benefits arguments against defence went unheeded. Lawyer interview 6 described such a case that had resulted in an Answer:

*[The Answer] was really just a four-page diatribe about what a mad woman she was, and she shouldn't be allowed to divorce him because she's clearly mental, because she's having an aberration. He wants to wait, let her get her head back to normal, and then she'll come back.... He was charged with domestic harassment which he's fought. And lost. And appealed. So, he likes the court process, he likes, he likes a fight. So, it may be that's just his nature is to disagree with everything.*

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<sup>72</sup> He also placed multiple barriers in the way of starting negotiations about the finances.

## **Power and control**

*Domestic abuse/coercive control cases:* Five of the contested file cases involved detailed allegations of domestic abuse where the respondent husband denied all allegations and that the marriage had broken down irretrievably. In Answer case M217, for example, the husband's case was that the wife's 'reckless' petition was the result of depression, and that the marriage was retrievable because she had stayed in a women's refuge several times previously, but had always returned home. The wife's account was that she had previously been pressured into returning. This, and other cases, appeared to involve attempts by an abusive husband to retain control of the wife by defending the divorce.

There were elements of power and control also running through the obsessive and dogmatic cases and perhaps also with the settlement-avoiding cases.

## **Religious and cultural objections**

*Religion and culture:* Two of the Answer cases involved respondents denying that the marriage had broken down, mainly, or at least partly, driven by a religious objection to divorce.<sup>73</sup> One of the lawyer interviews (Contested case D4) described a case where the male respondent objected to the divorce on the basis that he would lose face within his community.

## **4.5 Summary**

In practice, most intended or actual defences are disputes about allegations of behaviour, rather than respondents trying to save their marriage. They are respondents who are angry or indignant about what the petitioner has said about them, typically in a behaviour petition, and the threat of defence is an attempt to correct what is seen as an exaggeration or falsehood. It is important to recognise that without a law that permits fault, it is likely that very few respondents would seek to defend the divorce.

Only a small proportion of defences were attempts to 'save' the marriage. There were four primary drivers in these, sometimes in combination: money (wanting to protect inheritance or avoid reaching a financial settlement), mental health (in effect being 'in denial' about the reality of the ending of the relationship or a dogmatic and obsessive approach), power and control in the form of domestic violence or coercive control, and religion and culture. In some circumstances the defence could be based on a genuine, if mistaken, belief that the marriage was salvageable; in others it appeared a purely tactical consideration on the part of the respondent.

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<sup>73</sup> The two cases were not exclusively about religious objections to divorce, but also appeared to share some of the emotional characteristics of the 'lovelorn' cases in refusing to accept the reality of the breakdown of the marriage.

## 5. How are defended cases resolved?

### 5.1 Introduction

In this section we explore what happens to the very small number of cases where the respondent does file an Answer, having negotiated all the potential barriers to defence outlined above. Once a formal defence has been issued, the court must engage proactively with the case. It cannot continue with the reactive discouragement approach adopted with error and GD-NA cases. However, while respondents are typically focused on defence as a means to establish their 'truth' of why the marriage broke down, the court's focus is on attempting to settle the dispute by reaching some form of compromise. Lawyers play a key role in assisting the court in finding agreement as a means to avoid a contested trial.

### 5.2 The settlement orientation of the court

The family justice system as a whole – public and private law children, financial provision – is predicated on an assumption that most cases will, and should, be settled by agreement, rather than adjudicated.<sup>74</sup> The settlement orientation is enshrined in the Family Procedure Rules 2010 which place a duty on the court to “further the overriding objective by actively managing cases”, with active case management including “helping the parties to settle the whole or part of the case”.<sup>75</sup> The settlement orientation is, in no small part, for logistical reasons – the system could not cope if more than a small minority of cases were adjudicated. It also reflects a fundamental belief that agreed outcomes are less costly and less damaging to family relationships.

The settlement orientation is as strong in relation to divorce as in other areas of family justice. In the *Finding Fault* report we explored how the courts had established a quasi-administrative approach to handling undefended divorce cases. Providing that the parties could manage the paperwork, and that the respondent engaged with the process, then the divorce would be expected to go through. This positive and pragmatic orientation when dealing with applications for divorce – looking to make it happen, rather than looking for a reason to refuse – was founded on a recognition and acceptance of the reality of relationship breakdown.

Linked to this, is a sense that trying to attribute and apportion blame for relationship breakdown is a fruitless and inherently non-justiciable task.<sup>76</sup> It is not a proportionate use of the court's limited resources and there is a reluctance to get dragged into refereeing arguments, or petty squabbles, between the parties. In another (rare) defended case reaching the Court of Appeal, Black LJ (as she then was) urged the parties in a contested behaviour case to drop their cross-petitions and proceed instead on the two-year separation Fact, to avoid engaging in “hurtful, time consuming and distracting litigation over how they

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<sup>74</sup> See, amongst many examples, John Dewar, 'The Normal Chaos of Family Law' (1998) 61 *Modern Law* 467; Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988); Emma Hitchings, Joanna Miles and Hilary Woodward, *Assembling the Jigsaw Puzzle: understanding financial settlement on divorce* (University of Bristol, 2013); Judith Masson, Jonathan Dickens, Kay Bader and Julie Young, *Partnership by Law?: The pre-proceedings process for families on the edge of care proceedings* (University of Bristol, 2013).

<sup>75</sup> Family Procedure Rules 2010, rules 1.4.1, and 1.4.1 (g).

<sup>76</sup> And is not required in law either. It is not a requirement that the Fact relied upon is causally related to the reason for the breakdown of the marriage (*Stevens v Stevens* [1979] 1 WLR 885).

behaved during the marriage”.<sup>77</sup> That reluctance was reflected in the approach of the legal advisers in the *Finding Fault* study, particularly in relation to behaviour allegations and cross-allegations that were framed as “dirty washing” or “tit-for-tat”.

In relation to defended cases, a particularly powerful judicial assumption is that any attempt to defend the marriage is futile. This belief has deep roots. In 1971, Lord Simon of Glaisdale noted the futility of the court trying to persuade one party that the marriage had a future if one party had decided that it had not:

*If even one of the parties adamantly refuses to consider living with the other again, the court is in no position to gainsay him or her. The court cannot say, 'I have seen your wife in the witness-box. She wants your marriage to continue. She seems a most charming and blameless person. I cannot believe that the marriage has really broken down'. The husband has only to reply, 'I'm very sorry; it's not what you think about her that matters, it's what I think. I am not prepared to live with her any more'.<sup>78</sup>*

This futility argument was particularly relevant in the context of our defended cases and it underpinned the approach of front-line judges. The futility argument had two elements. The first was that marriage is based on consent and if one party has concluded that the marriage is over then that is the reality. This argument was deployed with the parties. Lawyer interviewee 2, for example described how a District Judge had sought to persuade the husband to withdraw his defence at a case management hearing, using the futility argument:

*The judge tried to talk to him about the futility of trying to defend the divorce. So, my note of the hearing says the judge started the hearing by trying to persuade [respondent] to accept that his wife ... if his wife concludes the marriage is over then, you know, it has arguably irretrievably broken down. (Lawyer interview 13)*

A similar argument was deployed by Lady Justice Hallett in *Owens*, where she observed that the marriage was over, despite the husband’s denial, but within the constraints of the current law, could only urge him to reconsider to allow the divorce.<sup>79</sup>

The second element of the futility argument focuses on inevitability: that the divorce can only be delayed, not prevented.<sup>80</sup> As a consequence, the focus of judicial persuasion was on *how* the divorce would occur, not *if* it would happen, with a strong push to settle sooner rather than later:

*[to respondent] 'This is going to happen one way ... You're simply delaying the process by stopping her from getting a divorce. She can get a divorce*

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<sup>77</sup> *Lindner v Rawlins* [2015] EWCA Civ 61, [31].

<sup>78</sup> Lord Simon of Glaisdale, President of the Probate, Divorce and Admiralty Division, Riddell Lecture 1971.

<sup>79</sup> *Owens v Owens* [2017] EWCA Civ 182 [102].

<sup>80</sup> The only possible means of preventing a divorce would be under Section 5 MCA 1973 if the respondent can show in a five-year separation case that “the dissolution of the marriage will result in grave financial or other hardship to him and that it would in all the circumstances be wrong to dissolve the marriage”. As we show in Section 7.6 below, the likelihood of being able to make that case is extremely remote.

*from you, come what may, in X number of years' time. Why not think about that, why not try and resolve it now? Why not try and put this past behind you – you've only got one life – and then move on.'* (Circuit judge)

Given the very strong drive towards settlement, and a long-standing belief that defence is futile, those who seek to defend are viewed with some frustration. There is more than an element of this in Lady Black's appeal to the parties in *Lindner v Rawlins*, noted above. It was also evident amongst frontline judges in our study where the parties, at least the respondent, are framed as obstructive, even stupid, and unable to see sense:

*The standard procedure should be just to set it down for a short directions hearing, usually where you try and bang heads together and tell everyone to not be stupid and let the divorce go through one way or the other, or both ways [i.e. cross decrees].* (Deputy District Judge)

*"I knew very well that [the district judges] would have struggled with this particular couple to try to get them to see sense".* (Circuit Judge)

This orientation towards settlement rather than adjudication, based on arguments about the futility (and cost) of defence, underpinned how the court handled the 71 Answer cases in our sample. It is worth noting that the framing of the parties, particularly the respondent, and the acceptance of the inevitability of divorce, is at odds with the approach of the trial judge in *Owens*. In that case, rather than framing the respondent as obstructive and stupid in trying to prevent the divorce, the judge's criticism was directed towards the petitioner and her attempts at 'scraping the barrel' to produce particulars of behaviour to substantiate the petition.<sup>81</sup>

## **5.2 The filtration process: wearing down defence mechanisms**

We have noted that the family justice system as a whole is predicated on settlement, with attempts to divert cases away from contested proceedings and then to continue efforts to settle cases and avoid adjudication for those cases that do embark on litigation. Therefore, family justice processes and procedures typically offer multiple opportunities to settle at each stage of proceedings, up to and including contested hearings.

Exactly the same is true of defended divorce and indeed, has been so for many years. Davis & Murch, for example, described in detail how 'preliminary appointments', or directions hearings, were used in defended cases in the 1980s as an opportunity to encourage the parties to settle and avoid a trial. Although the Family Procedure Rules at the time framed the appointment as an opportunity to prepare for a trial, in practice, Davis & Murch characterised it as "just one stage in the 'softening up' process designed to secure a greater proportion of undefended divorces". They noted also that the appointment was conducted on the basis that a divorce was inevitable.<sup>82</sup> Not surprisingly, in the two courts they surveyed, between 10 and 27% of cases were settled before the preliminary appointment, 43-57%

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<sup>81</sup> Reported in *Owens v Owens* [2017] EWCA Civ 182 [42].

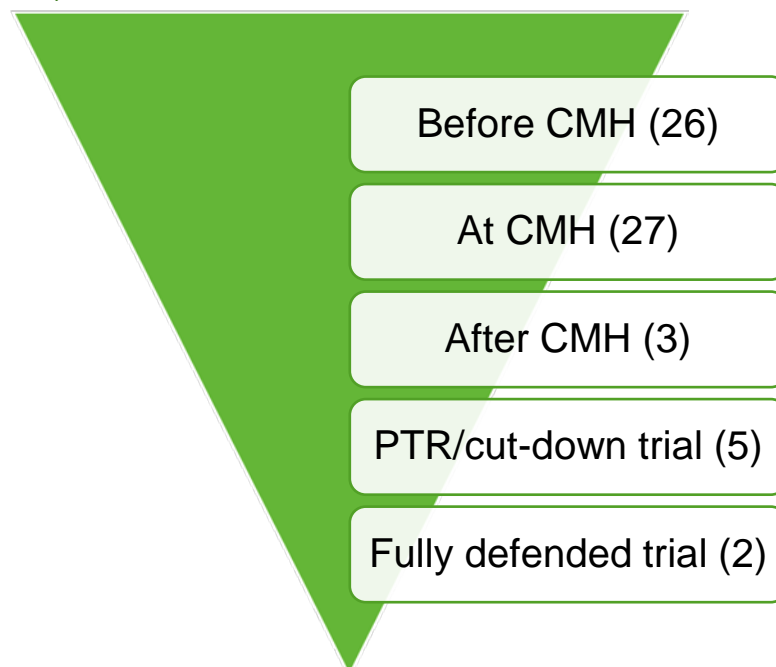
<sup>82</sup> Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988) 114, 116.

settled at the appointment and more settled after the appointment and before the scheduled trial.<sup>83</sup>

Although more than two decades have passed since the Davis & Murch research, and the 'first appointment' has been recast as a Case Management Hearing (CMH), in other respects the process, assumptions and outcomes appear almost entirely unchanged. The process continues to offer multiple opportunities to settle, even after a formal Answer has been filed, with the result that very few cases result in a fully contested trial. The stages, and the number of 'settlements' at each point, are set out in Figure 5.1. As we explore below, only the most-determined (or stubborn) and, generally, the best-resourced parties, will be able to resist having their cases being filtered out before, or even during, a trial. The only exceptions to the general drive for settlement were a small number of cases where the petitioner's capacity had been raised. In those cases, the process of settlement was suspended as the question of capacity was addressed by proceedings within the Court of Protection.<sup>84</sup>

Despite all the cost and effort of preparing an Answer, as in the 1980s, about a third of defended cases in the current court file sample were settled before a CMH had even been held. In most cases this appeared to be the result of furious, and last-ditch, attempts by lawyers to reach a settlement. Typically, agreement was reached at the eleventh hour, with lawyers writing to the court, with one or two day's notice, asking that the CMH be vacated and for the agreed way forward to be approved.

*Figure 5.1 The 'filtration process': how and when Answer cases were resolved (n=63 'concluded' cases)<sup>85</sup>*



<sup>83</sup> Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988) 114, 116.

<sup>84</sup> These were cases described by lawyer interviews, rather than in the court file study. In one case, after capacity had been established, the search for settlement in the divorce proceedings was resumed.

<sup>85</sup> Including cases where it was agreed that a petition would be stayed, and the suit proceed (or more correctly, resume) in another jurisdiction. Six further cases 'petered out' early in the process after the filing of the Answer,



The pre-CMH negotiations were a continuation of attempts by most lawyers to encourage the parties to settle and to avoid a contested hearing. It is not clear why the parties were persuaded to settle at that point, having come so far, although arguments about significant *additional* costs and the stress of court proceedings may be more persuasive as the court hearing draws ever nearer. In a case described by Lawyer interviewee 7, those same arguments were deployed effectively by counsel before the CMH, having gone unheeded from the solicitor:

*I had got as far as the documents were all ready, but then we had counsel involved to deal with the finance. And thankfully when we had our first conference, the barrister absolutely advised [respondent] not to get into it, not to go any further with it ... which is what I had advised [respondent]. Because ... apart from the cost, it's the energy isn't it, just perpetuating the whole thing. And [respondent] was able to hear it from another party ... they could then maybe stand back from it and sort of realise what is the point of arguing over all of that.*

Not all the parties were represented and therefore some were unlikely to negotiate with each other before the hearing in order to try to settle the case. As one District Judge noted, in those cases, it was only when the parties came to court that they would be confronted with the reality that the court would expect them to settle and that defence was futile:

*When they had lawyers representing them, they'll sort it out themselves because they know what's likely to happen [at CMH]. But particularly now that more of them are in person, you need to get them here and explain you're going to get, for example, divorced one way or another. (District Judge)*

Again, as in the 1980s, another third of cases were settled at the CMH.<sup>86</sup> The purpose of the CMH, is set out in FPR Rule 7.22 as to identify a timetable for a hearing and what, if any, evidence is to be produced. Again, as in the 1980s, the primary purpose of the CMH, in practice, was to offer another opportunity to settle the case and avoid a trial. The process typically involved all the various family justice professionals – solicitors, barristers and judges – working together to try to produce a compromise or a dignified retreat. As occurs in most types of family case, lawyers reported in interviews that the parties were encouraged to attend court before the scheduled appointment to effect further waiting-room negotiations.

The precise format of the hearing itself was variable, but focused on persuading the parties to settle, in effect trying to get the respondent to back down or to compromise. Judges used a range of approaches. A Deputy District Judge, in a case described by lawyer Interview 12,

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with no indication of further progress or any outcome (see Section 6.2, below). One other case was listed for a CMH, PTR and a multi-day trial, but on the question of whether the marriage had previously been dissolved abroad. An outcome was recorded, but it is unclear if the trial was ever held.

<sup>86</sup> A CMH was held in 40 of the 71 Answer cases. Case M215 had two CMHs before the case was settled. CMHs were mostly conducted by District Judges, followed by Deputy District Judges. Only four were conducted by Circuit Judges. Two of the hearings were combined with other hearings for finances or children applications.

used a multi-stage approach, starting by trying to ensure that the respondent was aware of the futility, and then the costs,<sup>87</sup> of pursuing the defence:

*We were before a Deputy District Judge (DDJ) and he was very sort of wise I suppose ... First of all [DDJ] saw counsel without the parties and discussed with counsel why we were all there. He wanted to make sure in fact that the (respondent) husband's counsel had received copies of the evidence that we intended to file if we had to file a statement. Because reading between the lines I think [DDJ] thought that ... it seemed pretty clear that in fact the relationship was over and these people no longer wanted to be married. But then we all went into court for probably about 15 minutes ... and [DDJ's] first point was like costs, because I think he was trying to make the parties see ... which unfortunately my client was already painfully aware of, but obviously he just wanted to impress upon the husband how much this was costing both of them, and whether in fact it was actually worth it, I suppose. He did ask him to confirm that he had read the evidence that we proposed to file as part of our statement and he also went through what would happen at the hearing in terms of both parties giving evidence.... So it was information giving, but it was information which from where I was sitting was hopefully going to put the parties off, certainly put the [respondent] off...*

Some judges were also reported to combine their efforts at persuasion with allowing the parties, at least the respondent, to have their say in the hope that getting things off their chest might break the impasse. One judge was commended for his empathy in allowing the respondent to have his say, despite much of the content being described as being “completely irrelevant” to proceedings.

As with pre-CMH negotiations, the presence of counsel could also be persuasive, with respondents being reported to be readier to listen to and “see sense” from what was seen as a more “objective” source, even if the advice was the same as that given previously by the solicitor.<sup>88</sup> We cannot tell from our data, whether that settlement was as a result of gentle persuasion, or, as Davis & Murch reported in some of their cases, great “pressure” to abandon the defence.<sup>89</sup>

From the court's perspective, a trial is not a proportionate use of the limited resources of the family justice system given the inevitability of divorce; nor is it considered to be in the interests of the parties:

*It was listed for directions. And the court were really quite keen not to have a contested divorce. I remember the judge saying to him ‘Do you not accept that the marriage has broken down irretrievably’: ‘No’. And he was like ‘Well how do you want this woman to live with you and be married to you in the light of this?’ And in the end the judge went ‘Yeah, right’. And so the court*

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<sup>87</sup> Other judges were described as giving “the usual lecture on costs”.

<sup>88</sup> Lawyer interview 4.

<sup>89</sup> Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988) 133.

*made the decree nisi there and then.... I think they're reluctant to list stuff if they can avoid it. (Lawyer interview 8)*

It is not surprising, therefore, that the lawyers and judges mounted a sustained and concerted effort to encourage the parties to settle at the CMH and that so many cases were resolved at that point. In that sense, the CMH, like its predecessor the 'first appointment' operated as what Davis & Murch call "a rationing device – a form of sifting mechanism designed to limit the demands on judicial time and on the Legal Aid fund".<sup>90</sup> The only obvious difference now is that there is no longer a need to protect a Legal Aid Fund.

Even after the CMH, efforts at settlement still continued. Thirteen trials were listed after a CMH, but five of these cases were settled before the trial could take place. We have little information from the court files on why cases settled at that stage. However, in one case described by a family lawyer, the CMH had operated to provide something akin to judicial indications of the likely outcome in FDRs in financial proceedings:<sup>91</sup>

*I think the case management hearing obviously brought to light what was involved in defending a divorce. And I don't know if the husband then got some more frank legal advice or whether he just started listening to the legal advice he was being given. (Lawyer interview 13)*

The remaining seven cases proceeded to some form of trial.<sup>92</sup> Three of those appeared to have been listed for a hearing only because there had been no effective CMH after the (unrepresented) respondent had failed to attend.<sup>93</sup>

The nature of the trials varied. Four of the seven fell short of a fully contested hearing and were in effect a pre-trial review conducted with a Deputy District Judge or District Judge. Two of the four cut-down 'trials' were one-sided, where the respondent failed to attend and the judge made rulings based on the petitioner's evidence/submissions. One case listed for 'further consideration' after a CMH resulted in a consent order, the other was settled by a minor concession from the petitioner.<sup>94</sup> Only two trials were held that could be described as fully contested final hearings, with oral evidence by, and submissions for, both parties, and a judgment.

We have little information about how judges approached trials, however it is apparent that settlement remained a judicial goal, even at that late stage. The account of a pre-trial review given below illustrates the extent to which judges continued to proactively seek settlement. What is interesting as well, in contrast to *Owens*, was the judge's willingness to accept a weak behaviour petition if that was all that the petitioner could produce, and then to dilute that further to make it acceptable to the respondent:

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<sup>90</sup> Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988) 121.

<sup>91</sup> Financial dispute resolution hearings. See Emma Hitchings, Joanna Miles and Hilary Woodward, *Assembling the Jigsaw Puzzle: understanding financial settlement on divorce* (University of Bristol, 2013).

<sup>92</sup> One case did reach decree nisi having been listed for trial but it is not known whether the trial occurred.

<sup>93</sup> M214, M218, M184. In M184 the respondent had not received notice of the CMH. The other two respondents stated that they were too ill to attend the CMH. Nor did they attend the subsequent hearing.

<sup>94</sup> The outcomes of cases are discussed in Section 6, below.

*The judge started giving me a hard time about the contents of the petition and my statement wasn't going to support it .... He gave me a bit of a telling off. And then he said, 'But there's just enough there to get the divorce if that's all I had'. And then he spent the rest of the time bashing the husband for 'Why, why do you need this [defence], you're not going to [save the] marriage?' And then, by some miracle, he persuaded the husband. And the judge dictated in front of the husband what he said should be in that petition that was acceptable to the husband. And so, by the end of about an hour's worth of effort, the judge had managed to amend the petition, husband had agreed to the divorce based on that petition as amended, and we didn't have to have a final hearing. I have to say, 'Fair play to Judge X'. (Lawyer interview 6)*

Circuit judge 2 similarly emphasised that the approach to trials was still focused on finding a way forward that could be agreed and avoiding the need for cross-examination of the parties and adjudication. If in person, the judge would therefore undertake an initial exploratory phase, seeking to understand the parties' positions, without the need for formal cross-examination. This problem-solving approach was an attempt to find a compromise solution, but one that was predicated on the widespread assumption that divorce was inevitable by that point and the only issue was how to deliver it:

*And in my mind, I would be thinking is there a way through this impasse? And by 'a way through' ... seeing whether one could cut down or cut out some of the allegations completely and allow there to be amendment of the petition to a few reasonably innocuous ... and then I'd put that to the other side, the respondent, and if they were happy with that then .... that'll be it, decree nisi. There are all sorts of things you can do. It's those sorts of ways of being practical about it that can get people through it. (Circuit judge 2)*

If the parties were not able to compromise, then the judge reported allowing a limited amount of cross examination to avoid inflaming the situation further. Only in the last resort would the judge have the parties sworn in and allow them to have their 'day in court'.

### **5.3 The incidence of fully contested trials**

The various filtration processes, both before and during proceedings, had a significant impact on the number of cases proceeding to a fully contested trial. In *Owens*, the President of the Family Division guesstimated that only about 0.015% of divorces would result in a final contested hearing, translating into only about 17 contested hearings a year.<sup>95</sup> On the figures reported here, that guesstimate would appear in the right ballpark. As our sample of 71 Answers equates to about 9-10% of all 2015 Answers, multiplying the two fully contested trials in our sample by nine or ten would yield about 18-20 such trials per year. In percentage terms, that means that the court was required to exercise its full powers of adjudication in only 0.018% of all divorce cases.

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<sup>95</sup> *Owens v Owens* [2017] EWCA Civ 182 [98]

How does that compare to the 1980s? In 1982, the Law Society reported that the then President of the Family Division estimated that there were only about 50 fully contested hearings annually, compared to more than 170,000 divorces.<sup>96</sup> That was a rate of about 0.029%, nearly double that of today, but in relative terms, similarly miniscule. In Davis & Murch's study, only four of the 114 Bristol cases with an Answer, or 3.5%, required a fully contested trial, a very similar proportion to the current study of 2.8%.<sup>97</sup>

## 5.4 Case progression

Given the sustained pressure to settle, notably on the respondent, it is not surprising that most Answer cases resulted in a divorce decree. As Table 5.1 shows, there was little difference between the proportion of Answer cases that resulted in decree nisi, i.e. the court had determined that the petitioner was entitled to a divorce, compared to undefended cases.

Table 5.1 Decree nisi and decree absolute, by case type

	Main (n=300)	Error (n=19)	GD-NA (n=52)	Answer (n=71)
Decree nisi	91%	84%	85%	85%
Decree absolute	83%	74%	71%	69%

Source: *Finding Fault* main and contested samples

Answer cases did take longer than other case types, however, accounting for the slightly fewer cases that had reached decree absolute by the time of data collection (Table 5.2).

Table 5.2 Weeks taken from issue of petition to decree nisi and absolute, by case type

	Main	Error	GD- NA	Answer
Mean number of weeks to Decree Nisi (sample size)	21.75 (272)	22.00 (16)	27.51 (43)	41.73 (59)
Mean number of weeks to Decree Absolute (sample size)	35.14 (245)	34.57 (14)	43.65 (37)	58.45 (49)

Source: *Finding Fault* main and contested samples

The delay appeared to be caused primarily by waiting for a CMH to be listed and, especially for a trial. Answers were generally filed fairly quickly, but it then took about three months on average before a CMH could be held and then a further four months or so for a trial. Whilst that slowed down the disposal of defended cases and meant prolonged stress for the parties, it did also provide plenty of opportunities for negotiating and for the parties to consider their positions.

## 5.5 Summary

<sup>96</sup> Law Society, *A Better Way Out Reviewed* (Law Society, 1982) para 2.21-2.22.

<sup>97</sup> Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988) 132.

Only a very small number of divorces result in a formal defence in the form of an Answer. Very few of those are then subsequently adjudicated in a formal trial. The majority are settled either before, or at, case management hearings, with the potential for settlement continuing even up to, and including, trials. Although most respondents pursuing a defence appear to be motivated by having their truth established in court, the pragmatic orientation of both judges and lawyers, and the belief that defence is futile and destructive, accounts for the active promotion of settlement at each stage. In the next section of the report we consider what those outcomes were.

## 6. What are the outcomes of contested cases?

### 6.1 Introduction

In the previous section we noted that most defended cases are settled rather than adjudicated. In this section of the report, we explore the outcomes of those cases. We start by looking at the overall outcomes of defended cases and then explore what factors are associated with greater or lesser success.

The backdrop to the discussion is the recent defended divorce case of *Owens*, where the respondent husband was successful in his defence that the marriage had not broken down irretrievably as behaviour was not made out. As might be expected from the fact that the case was appealed to the Court of Appeal and the Supreme Court, it is highly atypical of divorce cases in general, and defended divorce in particular, at least as regards the outcome. In contrast to *Owens*, in this study with a broadly representative sample of 71 defended cases, there was not a single respondent who was successful in arguing that the marriage had not broken down. However, respondents who accepted the marriage had broken down, but disagreed with the contents of the petition, had a reasonable chance of getting something from their defence. This was not because their defence, or counter-allegations, had been made out, but it was as a result of what could be agreed between the parties.

### 6.2 Outcomes of defended cases

There were no cases in our sample where the respondent argued successfully that the marriage had not broken down. However, respondents could be effective in challenging the basis for the divorce. It is noteworthy that only 59% of divorces were expected to be granted solely to the original petitioner. In a third of cases, the defending respondent managed to become, in effect, a substitute or parallel petitioner (Table 6.1).

*Table 6.1 Whether divorce made (or expected to be made) in favour of original petitioner, all Answer cases (n=71)*

	Number	Percentage
Original petitioner	42	59%
Cross decrees (to petitioner and respondent)	8	11%
Original respondent <sup>98</sup>	14	20%
Petered out early/ongoing	7	10%

The specific outcomes of the Answer cases are set out in Table 6.2. As can be seen, a third of Answer cases proceeded on the original petition, with no concessions to the respondent on the ground for divorce. However, a fifth of respondents were able to substitute their own petition, a fifth managed to have the original Fact or particulars amended and a tenth proceeded on undefended cross-decrees.

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<sup>98</sup> Including a case where the respondent to the index petition argued that divorce proceedings were already underway in another jurisdiction.

Table 6.2 Case disposals, all Answer cases (n=71)

	Number	Percentage
Proceeds on original petition	25	35%
Rebuttal added to acknowledgement of service	1	1%
Amended particulars (same Fact) on original petition	4	6%
Amended Fact on original petition	10	14%
Undefended cross decrees	7	10%
Proceeds on (respondent's) cross petition	14	20%
Proceeds on earlier petition in another jurisdiction	2	3%
Other (nullity decree)	1	1%
Proceedings petered out/ongoing	7	10%

In relation to the Fact relied upon, about a third of respondents were able to secure some changes. This was primarily about re-allocating, or sharing out the responsibility, or the blame, for the divorce. As Table 6.3 indicates, seven behaviour petitions were amended from sole to cross decrees, making both parties equally 'blameworthy'. In seven cases the decree shifted responsibility from the respondent's behaviour to the petitioner's adultery and in ten cases the respondent managed to absolve themselves of any blame for the divorce as the basis of the divorce switched from fault to two years with consent.

Table 6.3 Fact relied upon in the original Petition compared to Fact the divorce was granted upon, all Answer cases (n=71)

	Number	Percentage
Behaviour (no change)	34	48%
Behaviour (sole to cross decrees)	7	10%
Two years to behaviour	1	1%
Adultery to behaviour	1	1%
Behaviour to adultery	7	10%
Adultery to two years with consent	2	3%
Behaviour to two years with consent	8	11%
Five years (no change)	1	1%
Jurisdiction cases proceeding elsewhere	3	4%
Case petered out early/ongoing	7	10%

Another area where respondents did fairly well was in relation to costs. Despite the defence probably adding hundreds, if not thousands, of pounds to the costs of the petitioner, there were a number of cases where the price of settlement, and avoiding an expensive trial, appeared to be conceding ground on costs. In 60% of defended cases the petitioner dropped their claim for costs (Table 6.4). Even so, that could be a small price to pay, compared to the emotional and financial costs of continuing to fight the suit. As one lawyer put it:

*As part of the negotiations around the consent order, we asked the husband to meet her costs in full, which we then had to back down on .... We gave him that one ... the wife gave him that one.*



Table 6.4 Outcome on costs, all Answer cases (n=71)

<b>Petitioner dropped claim for costs</b>	43	61%
<b>Costs awarded to petitioner</b>	15	21%
<b>Costs not previously claimed</b>	4	6%
<b>Case unresolved or missing/unclear</b>	9	13%

Looked at as a whole, including any concessions in relation to costs, the results suggest that about half of respondents in Answer cases managed to get all, or most, of what they wanted or to strike some compromise deal. That could be in the form of the divorce proceeding on their own petition, their account having equal status with that of the petitioner or the petitioner's allegations against them being largely neutralised in cases where the Fact or particulars were amended (Table 6.5).

Table 6.5 Who 'wins', all Answer cases (n=71)

	Number	Percentage
<b>R got all/most wanted (proceed on, or revert to, R's petition)</b>	14	20%
<b>P and R compromise (amend fact to two years, undefended cross decrees, stripped particulars)</b>	22	31%
<b>R gets minor concessions (rebuttal added and/or costs dropped)</b>	8	11%
<b>P got all/most wanted (Answer out of time, struck out, withdrawn or adjudication with no concessions)</b>	20	28%
<b>Proceedings petered out/ongoing</b>	7	10%

In seven cases the case ground to a halt at an early stage. We have only limited information on which to make an appraisal of outcomes about these cases. However, in four cases, the stalling of the case appears to have been the result of an unrepresented (or now un-advised) petitioner wife backing down, or backing out, in response to the filing of the Answer in cases where the petition alleged domestic violence. Our information is incomplete, but there is a suggestion that the process of defending could be a vehicle, and an effective one at that, for allegedly abusive respondents to continue patterns of control.

In the other three cases the results were mixed. One case involved a defence that the respondent had not committed adultery. The petitioner conceded that the wrong co-respondent had been named and that appeared to result in the petitioner backing down completely. Assuming our reading of the non-completion cases is correct, it provides some more support to the findings that respondents had a reasonable chance of getting something from challenging the petition, if not defending the divorce itself.

Only two respondents appeared to be in a worse position, at least in legal terms, than they would have been if they had not defended. In both cases the litigation conduct of the respondent was questionable. One was a litigant in person who withheld consent to and defended a two-year separation petition, despite a previous separation agreement to use that Fact. The decree was granted instead on a strong behaviour petition, following warnings to the respondent that the petitioner would have no other choice if consent was withheld. The other case concerned a financially-motivated defence on the basis of the date of

separation but where, for reasons that emerged in proceedings, the marriage was eventually annulled.

Our data on outcomes is drawn entirely from the court files. We do not have access to what petitioners or respondents felt about the outcomes, other than any material that might be on the file. Although our data suggests that respondents had a reasonable chance of achieving something by challenging the contents of the petition, we do not know whether they would consider that the process had been worth it. Nor do we know how the petitioner viewed the outcome. As a note of caution, Davis & Murch reported in their study that only 16 of 33 people interviewed thought that the agreement reached at the first appointment (now the CMH) was fair. In 15 cases, both parties were interviewed, in six of those both were upset or disappointed with the outcome. Davis & Murch noted that their interviewees were more likely to be disappointed about the outcomes of the divorce itself, rather than discussions about children or money. Their explanation for that was that the type of compromise solutions offered, such as cross decrees or amending the petition, were technical and legalistic solutions that did not really address the parties' real concerns about fault and blame.<sup>99</sup>

### **6.3 Which respondents were more likely to be successful?**

Our sample of 71 Answers is quite small but some trends were discernible in terms of which respondents did better than others. The most significant, and clearest, is that respondents disputing the particulars appeared far more likely to achieve something by defending, than those who denied that the marriage had broken down irretrievably. As noted above, no respondent was able to argue successfully that the marriage was retrievable. Furthermore, of the twelve 'deniers', only one was able to secure an amended Fact (from behaviour to two years). Otherwise, the most that deniers managed to secure were concessions on costs in six cases. In contrast, 14 of the 51 'Fact-fighters' got all or most of what they wanted and 20 achieved a major concession.

There was some suggestion that in defended cases male respondents fared a little less well than women respondents or, put another way, petitioner wives appeared more likely to stick to their guns than husbands. Fifteen of the 36 female petitioners were rated as getting all or most of what they wanted, compared to only 5 of 35 male petitioners.

Having representation, in contrast, did not appear to influence the relative success of defending respondents. It is not clear why this might be the case, although it is possible that represented respondents may be under more pressure to compromise than litigants in person.

The other point to add is that the Answer respondents fared better as a whole than the GD-NA respondents, although whether the outcome merited the financial and other costs for Answer respondents is unknown. In contrast to the relative success of the Answer respondents, at least those challenging the petition rather than the divorce, only four of more than 50 GD-NA respondents appeared to extract any significant concessions. In two of those four cases, the mere threat of defence was determinative. In L158, the petitioner had issued a behaviour petition alleging domestic violence. The respondent's threat to defend resulted in the wife withdrawing her petition and later resubmitting a petition based on two year's

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<sup>99</sup> Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988) 119-20.

separation. In M203 the husband submitted a highly mutualised behaviour petition. Again, the threat of defence was sufficient to persuade the petitioner to withdraw and the wife subsequently issued a behaviour petition against the husband. In the other two cases it was not the threat of defence that appeared decisive, but rather that the petitioner would be unable to make out the relevant Fact without the respondent's cooperation – a refusal of consent to a two-year's separation petition and a non-admission of adultery.

#### **6.4 The outcomes of 'trials' and the behaviour threshold**

As noted in section 5, there were very few trials in the sample, and only two fully contested final hearings. Three of the seven cut-down or fully contested trials were behaviour cases where the respondent was denying that the marriage had broken down, two of which had a religious element. In the three trial cases, all three petitioners were granted their divorce. Our sample here is clearly very small, but equally, none of the lawyers or judges interviewed for the study could cite a case, other than *Owens*, where a defence of the marriage had been successful.

The four trial cases where the defence was about the particulars also resulted in poor results for respondents, compared to non-trial cases. The most that was gained was the addition of a rebuttal on the Acknowledgement, otherwise one trial ended with a finding that behaviour was made out in the absence of the respondent, one Answer was struck out due to being filed out of time and there was one decree of nullity.

What does this say about the behaviour threshold? It is hard to draw firm conclusions based on a very small sample. Perhaps the most obvious point is to reiterate that the court mostly avoided making decisions about threshold by encouraging settlement at every opportunity. This continued at trial stage. L195, one of the three trial cases where irretrievable breakdown was denied, ended in a consent order amending the wife's behaviour petition to two year's separation.<sup>100</sup>

Where the court was forced into adjudication, behaviour was adjudged to be made out in all three cases. In comparison with the particulars in the *Owens* case, one of these was clearly stronger – with a criminal conviction being held sufficient.<sup>101</sup> One petition was as weak, possibly weaker than *Owens* – a case where the allegations in the petition centred on the respondent's role in the home. The third case was largely on a par with *Owens* – a fairly standard petition based on emotional distancing and failure to support emotionally, but with a single instance of dishonest behaviour. There was no indication in the files that the trial judges concerned had found the decisions difficult to reach. Nor was there any indication, as there was in *Owens*,<sup>102</sup> of the judges questioning the motives of the petitioner and no

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<sup>100</sup> The wife had stayed in a refuge on more than one occasion. The husband's defence of the marriage was admittedly tactical – he was not prepared to come to a financial settlement with the wife. The amendment to two year's separation in those circumstances does underline the court's enduring commitment to settlement, even at trial stage and where the behaviour threshold would appear to be within reach.

<sup>101</sup> The respondent husband's failure to attend the hearing, or the earlier CMH, would not have helped his case either.

<sup>102</sup> The petition in *Owens* was described as "scraping the barrel" and the trial judge was reported as concluding "In reality I find that the allegations of alleged unreasonable behaviour in this petition – all of them – are at best flimsy. I would not have found unreasonable behaviour on the wife's pleaded case. As it is, having heard both parties give evidence, I am satisfied that the wife has exaggerated the context and seriousness of the allegations

suggestion that the particulars had been exaggerated to achieve the divorce. Although the cases were exceptional in that they had reached a trial and required adjudication, the broad approach of the court in these cases appeared consistent with the pragmatic approach seen with other defended and undefended cases.

## **6.5 Summary**

The outcomes of the Answer cases appeared to depend very much on what was being contested. Respondents who were challenging the Fact or particulars had a fairly good chance of achieving all that they wanted or of winning significant concessions. This was not as a result of persuading the court of the merits of their case or establishing the 'truth'. It was simply as a result of what deals could be hammered out between the parties on the day. In contrast, none of the respondents arguing that the marriage had not broken down were successful, including three behaviour cases that were adjudicated in some form. The approach of the court in those cases appeared to be an extension of the pragmatic approach to divorce found in other cases, where there was an assumption that divorce was inevitable. The results highlight the highly atypical outcome of the *Owens* case.

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to a significant extent. They are all at most minor altercations of a kind to be expected in a marriage. Some are not even that." As reported in para 42 and 46 of the Court of Appeal judgment *Owens v Owens* [2017] EWCA Civ 182.

## 7. No contest? Evaluating the current law on divorce and defence

### 7.1 Introduction

The *Finding Fault* report identified five main problems with how the current divorce law operates in relation to *undefended* cases. Consistent, with previous research,<sup>103</sup> it explored five problems created by a gap between the unreformed law on the statute book and how the law works in practice. These were: the potential of the law to create unnecessary conflict between the parties, the lack of intellectual honesty in the creation and scrutiny of petitions, unfairness between the parties, lack of public understanding of the law and the failure of the law to protect marriage. In this section of the report we explore, in turn, the relevance of each of these five issues to *contested* and *defended* cases.

### 7.2 Creating and exacerbating conflict

#### Impact on relationships

It is self-evident that the current law does create, or exacerbate, conflict between the parties, with potential repercussions for children and sorting out finances and thus contrary to family justice policy. Conflict is heightened for two reasons: the role of fault in triggering disputes and defences and the impact on relationships of the process of defending itself.

As we saw in Section 3.2 above, the majority of disputes and defences were not about whether the marriage has broken down, but the respondent's objections to what has been said about them in a behaviour or adultery petition.<sup>104</sup> If fault, and especially the behaviour Fact, were removed as the means to evidence irretrievable breakdown, it is likely that the number of defences would reduce significantly.

Fault therefore creates disputes and defences that would not otherwise always occur. In turn, defence creates further, and possibly more intense, conflict. It is clear that, despite the emphasis on diverting cases from defending and settling those that do defend, the process of defending and even the intention to defend, is likely to exacerbate conflict between the parties. It is always possible that the process could be cathartic for some parties. However, the dominant impression that we gained from the court files, and from interviews with judges and lawyers, was that the process was not helpful for relationships and could be highly damaging as respondents countered allegations about their own behaviour with lengthy point-by-point rebuttals and counter allegations.<sup>105</sup>

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<sup>103</sup> The body of earlier research and reviews includes, Elizabeth Elston, Jane Fuller and Mervyn Murch, 'Judicial Hearings of Undefended Divorce Petitions' (1975) *Modern Law Review* 609; John Eekelaar and Eric Clive, with Karen Clarke and Susan Raikes, *Custody after Divorce* (SSRC Centre of Socio-Legal Studies, 1977) and Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988). Official reports include the Booth Committee, *Report of the Matrimonial Causes Procedure Committee* (HMSO, 1985); Law Commission, *The Financial Consequences of Divorce* (Law Com No 112, 1981), Law Commission, *Facing the Future* (Law Com No 170, 1988); and Law Commission, *The Ground for Divorce* (Law Com No 192, 1990).

<sup>104</sup> The behaviour Fact was used in 45% of undefended cases, but 77% of GD-NA and 89% of Answer cases.

<sup>105</sup> The average (median) length of the statement of case in an Answer was 292 words and 288.5 in any cross petition. The longest were over 3,000 and 2,000 words respectively.

There were examples from our file study where the defence process had enabled, even encouraged, tit-for-tat allegations that appeared to be deliberately retaliatory and could only damage relationships further. Examples included:

- L172 where a reference to the petitioner husband's recurrent problem with premature ejaculation appeared to have been added gratuitously to the list of allegations about domestic abuse
- L179 where the respondent produced pages of testimonials from other people about the petitioner's sexual behaviour. The testimonials had been circulated more widely and appeared to have damaged the petitioner's professional standing

Not surprisingly, the nineteen behaviour cross-petitions filed in Answer cases were also generally strong, indeed somewhat stronger than undefended petitions in the main sample. Of the 19 cases, 12 included allegations of physical violence to the respondent, a far higher proportion than the 15% of main sample petitions including such an allegation. All nineteen behaviour cross-petitions held the respondent entirely responsible for the breakdown of the marriage.

Even where the respondent's defence was not deliberately retaliatory, the impact on relationships, and on the individuals concerned, could be highly damaging. One lawyer described a case where the petitioner hesitated about continuing with a defended divorce out of concern at the prospect of being cross-examined about the marriage. Another lawyer reported how damaging the public 'washing of dirty laundry' in court had been for the parties concerned:

*We ended up in a hearing, where unfortunately the sordid details of some very unpleasant stuff had to come out. And it was just awful for everybody... it didn't seem to benefit anybody, and it just cost them a lot more emotionally and financially than it needed to. ...It was a very bruising experience for everybody and I don't believe it did any of them any good.  
(Lawyer interview 2)*

### **Impact on finances**

The cost of defence also had a damaging impact on family finances. Indeed, one of the main arguments used by lawyers and judges to deter defence and promote settlement was the financial cost of court and legal fees. Bills could be racked up even before the process started. Lawyer interviewee 2, for example, described how three weeks of legal arguing between the parties over who was going to start the divorce, and on what grounds, had resulted in a "power play" that had already cost thousands of pounds.

Aside from the depletion of family resources, there was an association between defence and disputes over finances. We cannot be sure of the direction of effect, but it is noteworthy that 89% of applications for financial orders in GD-NA cases and 88% in Answer cases were initially contested. That compared to just 26% of financial applications in main sample cases being initially contested. It would appear likely that, in at least some cases, disputes over the divorce resulted in more disputes over sorting out finances, and of course, yet further legal costs, delay and uncertainty for the parties and their children.

## Impact on children

Children Act proceedings are not linked to divorce court files in the same way as financial remedy applications, and so we cannot identify whether defended divorce was associated with more (or fewer) disputes over child arrangements. It is highly likely, however, given the extensive research on the impact of parental conflict on children, that the very intense, and often bitter, disputes over the divorce would impact on the parent's own capacity to parent, as well as their ability to co-parent, and so indirectly influence children's wellbeing.<sup>106</sup>

In some cases, children were *directly* implicated in the disputes between their parents over the divorce. In M085, the (young) adult child of the family was brought in to testify (in writing) about the length of the parties' physical separation. In M235, the respondent submitted with their Answer a letter from the young adult child of the petitioner. Counter-allegations by the petitioner then prompted a further signed letter in support of the respondent from a second minor child of the family. That letter included extensive detail about family problems. The involvement of the children in the dispute was contrary to directions from the court. In case M236, the respondent included, among copious documents appended to the Answer, a copy letter from a school-age child. The letter was addressed to both parents and in it the child expressed great sadness at their parents' break-up and pleaded for them to get back together.

The creation or exacerbation of parental conflict, and the direct involvement of children in disputes, both arising directly from the current divorce law, is contrary to, and undermines, family justice policy.

## 7.3 Truth – literalism and pragmatism

One of the major themes of the *Finding Fault* report on undefended cases was the dominance of pragmatism, that rather than straightforwardly reflecting any single truth about why the marriage had broken down, the process of petitioning was shaped by instrumental factors. In other words, petitioners were selecting a Fact, or finding a Fact to fit, to secure the divorce in the easiest, and quickest, way possible. At the same time, the court's duty to inquire into Facts alleged has, over the decades, in effect been reduced to ensuring that the petitioner has put forward a legal Fact, but the court is unable (and unwilling) to then test the veracity of that Fact.

One might anticipate that a search for the truth, or the testing of allegations, would play a more significant role in *defended* cases. Certainly, it is clear that the motivation of many respondents in GD-NA and Answer cases was to try to correct what was, in their view, the erroneous attribution of responsibility for the breakdown of the marriage provided by the petitioner. For these respondents, the 'truth' really did matter:

*So, [the respondent] went through every single particular of unreasonable behaviour... and then put her response underneath it ... and I guess this is*

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<sup>106</sup> Gordon Harold, Daniel Acquah, Ruth Sellers and Haroon Chowdry, *What works to enhance inter-parental relationships and improve outcomes for children, DWP ad hoc research report no. 32* (University of Sussex, DWP 2016).

*always the case but there's two sides to every story and I think she really wanted her side put across. (Lawyer interview 9)*

However, as we saw in Section 5, the approach of the family justice system to defended cases remains resolutely pragmatic. The statutory duty to inquire into Facts alleged by petitioner and respondent,<sup>107</sup> only really bites in the very small number of cases where all attempts at diversion from contested proceedings, and towards settlement, have failed, and where the parties have the resources and stamina to get to a trial. Whilst who divorces whom, and on what basis, might be of critical and enduring importance to some (literalist) parties, the court takes a more pragmatic view that the divorce will happen and that it is generally in the interests of the parties to settle, rather than conduct an expensive and bitter fight over details. Thus, in one case, the Deputy District Judge recorded on the case file his/her failed attempts to persuade the respondent to settle at CMH:

*Suggested to respondent she allows petition to proceed undefended on basis of no admissions. Explained realistic stance court takes to divorce petitions and distress of proceedings. Absolutely insistent she wants to defend. Told her to write in if changes mind.*

The focus was therefore on achieving the divorce, with the route to get there of little significance to the court, as long as the minimum legal requirements were satisfied. This highly pragmatic stance was reflected in a case recounted by one lawyer where two petitions had been issued:

*And we had this debate with the judge who said 'Well look, which one's going to go first? Does it really matter?' And the attitude of that judge seemed to be 'Well look you both agree the marriage has broken down, it doesn't really matter who goes in'. It's not the first time I've heard a judge simply say 'Look. Who cares?' (Lawyer focus group F)*

The problem for the court in defended cases was how to find some way of navigating between the competing truths or realities of the parties, without having to resort to adjudication. There were a range of techniques or strategies to achieve a compromise. These included:

- *Accepting respondent denials of allegations on the Acknowledgement of Service.* We noted in Section 4.3 above that advising respondents to rebut allegations on the acknowledgement was a staple tool in talking clients down from defending. There were no examples of the courts querying this approach. Indeed, in some Answer cases this became the court-sanctioned means to resolve the dispute. Technically, however, the fact that the respondent was denying the allegations that the court was relying upon to establish irretrievable breakdown, does raise questions about whether the Fact has been made out. As Lawyer interviewee 8 noted "If the court were dealing with their job correctly.... as soon as they're saying: 'Well my behaviour's not unreasonable", technically they should refuse it. But they don't".
- *Including rebuttals within recitals of court orders.* The court's acceptance of respondent rebuttals extended further than Acknowledgements. There were several examples

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<sup>107</sup> Under section 1(3) MCA 1973.



within the Answer sample of recitals *in court orders* that explicitly accepted denials about the Fact that the petitioner (or respondent) was relying upon to establish irretrievable breakdown. In M206, for example, the recitals included: “It is recorded that the respondent wife categorically denies each and every allegation contained within the Petition.... But does not seek to challenge the petition and agrees that the petition can proceed undefended”. In M205, which proceeded on undefended cross-decrees, the decree nisi certificates stated that the court had found the behaviour Fact on both petitions proved, even though the consent order expressly recorded that both parties denied the allegations made by each other.

- *Stripping the statement of case to remove contentious allegations.* There were multiple examples of cases where the respondent challenged the contents of the statement of case and where the petitioner agreed before, or at, the CMH to remove the allegations to which the respondent objected. These included cases where allegations of serious domestic violence were included in the petition and where there was some objective evidence, such as non-molestation and occupation orders, to suggest that the allegations could be made out. In each of these, the petition was, in effect, filleted to secure the respondent’s agreement and the court endorsed that agreement. There was no evidence on file of any cases where the court queried whether undue pressure had been placed on the petitioner to withdraw their allegations.
- *Amending the fact.* The fourth alternative was to amend the petition to a different fact, most commonly from behaviour to two year’s separation with consent. There appeared to be very limited, if any, testing by the court of whether the new Fact was made out. In some cases, there was little evidence that it was. The petition in M056, for example, was amended from behaviour to two year’s separation with consent. However, the petition and Answer gave every indication that the parties had been physically separated for only about six months. Nonetheless, the court endorsed a consent order, agreed at the CMH, recording that the parties “believed that they had been separated for two years”.<sup>108</sup>

What these approaches had in common was the court’s willing acceptance or endorsement of multiple, or changed, ‘truths’ about the Fact that was being put forward as evidence of irretrievable breakdown. In reality, even with these defended cases, the court was looking to find a solution that would enable the divorce to occur, rather than inquiring into allegations of either party under section 1(3). In practice, that meant accepting the petitioner’s account that some behaviour had occurred, whilst simultaneously accepting the respondent’s account that it had not. It might mean endorsing a filleted petition where evidence of domestic violence was readily available, and it might mean turning a blind eye to cases where a Fact clearly had not been made out. While the goal of avoiding further acrimony and expense is laudable and understandable, one is left with the impression that the court’s approach, in the President of the Family Division’s terms, lacks “intellectual honesty”<sup>109</sup> and can be seen to undermine the rule of law. In the absence of law reform, however, the court’s focus is on finding real world solutions, rather than strict adherence to the law in the books:

*I’ve just simply got to try and enable these people to separate in as tidy a way as possible. Applying the law obviously, as I must, but in a sense sort*

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<sup>108</sup> The parties may have been living separately under the same roof prior to that, but all the papers suggested otherwise.

<sup>109</sup> *Owens v Owens* [2017] EWCA Civ 182, paras 94-95.

*of paying lip service to the law really, you know. Finding a way through.  
Finding a handle on which to hang this. (Circuit judge)*

## **7.4 Justice and fairness**

### **Unfairness to the respondent**

Although the search for settlement makes objective sense, and it is the only realistic option for an over-stretched family justice system, the difficulty with inviting, but then not testing, allegations is that one, or both, parties may feel aggrieved.

In the *Finding Fault* report, we explored how the perception that the court is endorsing the petitioner's account, without the opportunity to have one's say, can engender an enormous sense of injustice in respondents. In Section 4.3 above we set out, in more detail, the barriers to respondents having the opportunity to 'correct' what they might see as inaccuracies in petitions. These barriers were the lack of information about the possibility and means of defending, the reactive approach of the court to GD-NA cases, the practical barriers of money, time and capacity and the attempts at diversion from defence, both before and at court.

We have some insights into the respondent's sense of injustice about the process. For those who have had some legal advice, and an explanation as to why non-defending is actually their better option, the petitioner's 'victory' could still be a hard pill to swallow:

*[Respondent] was quite good in terms of following my advice, I think she understood what I was saying, I just don't think she really agreed with it ... I think she felt hard done by about it and I think as much as you can explain to someone that actually the only people who see the petition are the representatives and the court staff, actually they feel like... I think she felt like he had a win instantly and I think that that sort of permeates quite a lot of the case.... (Lawyer interview 9)*

This echoes strongly the findings of Davis & Murch from the 1980s where it was reported that have to accept a contested petition "could prove very distressing, offending the respondent's sense of justice as well as being a blow to his (or her) pride".<sup>110</sup>

For those who had not had the benefit of advice from a lawyer about how the system worked in practice, and that the Fact and particulars would invariably have no bearing on other matters, then the sense of injustice appeared heightened. For GD-NA cases, especially, not only were the respondents being divorced on what they regarded as a falsehood, but the lack of response from the court to their pleas for help, must have seemed deeply unfair. In GD-NA case M007, for example, the respondent alleged that it was her husband, the petitioner, who was a domestic abuser, not her, as he had alleged. She was unable to afford the thousands of pounds quoted to defend the case and instead wrote several times to the court complaining about the unfairness of the process: "Whilst I no longer wish to be married to this man I do not see why his fabricated lies and the fact he can afford a solicitor should be allowed to blacken my name."

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<sup>110</sup> Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988) 107.

The respondent L086 was also unable to afford legal fees to file an Answer. She did think she had a good case against her husband's behaviour petition and had emailed documentary evidence of his prior adultery as an 'informal defence' to the court.<sup>111</sup> She appeared surprised, and protested, when the court certified entitlement to decree nisi "as no Answer was filed". The court's response to further information from the respondent was to reply that "The respondent should consider FPR rule 7.31 and 7.32". As a litigant in person, it is doubtful that the respondent knew what the acronym stood for, knew where to find the FPR or was in a position to interpret and apply rules 7.31 and 7.32. There was no further activity on the file. The respondent was therefore divorced on the basis of allegations that she disputed strongly and with what may well have been a sense of unfair treatment by the court.

However, being able to access the defence process does not necessarily ensure procedural fairness for respondents, or indeed petitioners. We saw above, in Section 6.2 and 6.3, that respondents had a reasonable chance of achieving something by challenging the Fact and/or particulars. Yet the focus on settlement, rather than testing the merits of each case, means that those outcomes are not necessarily 'just' or 'fair' but simply what can be negotiated. The risk is that it will be the more forceful, stubborn or well-resourced parties – whether petitioner or respondent – who are the ones who will be able to insist on having their way in those circumstances.

### **Unfairness to the petitioner**

Whilst petitioners undoubtedly have the upper hand in undefended cases as the court will start from the assumption that any allegations in the petition are true,<sup>112</sup> the balance of power was more unpredictable in defended cases. There were cases where it appeared, on the account of solicitors, or from what could be gleaned from the case files, of respondents defending the divorce as a means to exercise control, or just to be difficult or obstructive. Four of the Answer cases that stalled early on involved unrepresented women alleging domestic abuse (Section 6.2). The defence, in effect, meant that those women either remained married or might have to wait until they could establish five year's separation.

Given the lack of testing of allegations, we cannot know if those defences were meritorious. However, there were other cases in the study where defence was used by men with a history of alleged domestic violence or controlling behaviour. Some of the cases, where strong particulars were filleted or stripped at CMH of reference to domestic violence, raise questions about whether the system may be used to perpetuate control by alleged abusers. There were several cases where there was evidence of findings already made in criminal proceedings or non-molestation or occupation orders, suggesting that there would be no difficulty in meeting the behaviour threshold. Some of the lawyer interviewees also raised concerns about the deliberate use of defence by abusive men. In this first example, the lawyer was representing a woman currently living in a refuge:

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<sup>111</sup> Although in law, the fact that the petitioner husband had *also* committed adultery and that that had *pre-dated* the separation was not relevant. All that the husband had to do in the instant case was to make out the behaviour Fact against his wife.

<sup>112</sup> See Liz Trinder, Debbie Braybrook, Caroline Bryson, Lester Coleman, Catherine Houlston, and Mark Sefton, *Finding Fault? Divorce Law and Practice in England and Wales* (Nuffield Foundation 2017 section 4 and the observations of the President of the Family Division in *Owens v Owens* [2017] EWCA Civ 182, [93].

*The true victim actually has to jump through huge hoops to extricate themselves from a marriage which is actually quite damaging. It's bad enough she's going to have to fight him on the finances. But the control and the coercive behaviour, [the defence] gives him an avenue.... Actually if [they] are that coercive personality there's very little you can do about it. (Lawyer interview 5)*

Another commented how the respondent used the defence to attempt to reassert control where the petitioner was seeking to break free:

*[Defending respondent] was the sort of character who would always have been very difficult. ... And this system allowed him to hold [divorce] up by probably an extra six months. But, you know, he played a system. I think there's also a power dynamic in it, because if you're the petitioner you're in the driving seat and if you've got a husband whose been dominant throughout the marriage and the wife finally rallies herself, and she now is for the first time in the marriage taking control of what happens. (Lawyer focus group A)*

The potential misuse of defence was not just by alleged abusers. Defence could also be used by respondents as a bargaining chip to extract concessions in other negotiations about children or money. Solicitor 8, for example, reported a case where the respondent husband had used the defence as a “sword of Damocles” over the petitioner wife, only withdrawing the Answer when he had secured significant financial concessions.

## **7.5 Knowledge, complexity and clarity**

In the *Finding Fault* report on undefended cases, we explored how the complexity of the law and the gap between the law in the books and the law in practice in relation to the behaviour Fact created access to justice issues for unrepresented parties. It also resulted in behaviour petitions that were stronger than necessary to secure the divorce. Problems of understanding and complexity also featured in the contested and defended cases in four respects: language and forms, literal misinterpretations of the law, uncertainty over the behaviour threshold and procedural misunderstandings.

### **Language**

As with the undefended cases, the archaic language of divorce law and complex procedure caused difficulties for litigants in person, most notably in the error cases. In this context, the term ‘defend’ appeared to have been understood, by at least some respondents, as ‘wanting to continue with the divorce’. The problems were not insurmountable, but this basic error was likely to have caused some delays (as applications for decree nisi were held back by the court while the Answer period ran down). It is possible also that in some cases that the mistake will have caused the petitioner alarm or even be perceived as a hostile and deliberate act.

Some respondents blamed themselves for the error. For example, the respondent in M008 wrote to the court saying:

*I have basically said that I want to defend it when in fact this is not the case at all – it should have been a simple & straightforward form for me to fill out, in agreement with everything, but unfortunately I have messed it up.*

However, the real problem is with the language and layout of the form, not the respondent. The current HMCTS project to digitise the divorce process should lead to significant improvements in the accessibility of materials. The initial trial of the redesigned petition has already led to a very significant fall in the number of petitions returned for technical errors.<sup>113</sup> That said, the redesign of the online Acknowledgement will raise more challenging policy dilemmas about how to frame (and explain) the intend to defend question. A balance will need to be struck between ensuring that respondents are made fully aware of the possibility and process of defending in order to be fair to respondents, whilst not encouraging an explosion of Answers, to be fair to petitioners and other users of the family justice system.

### **Literal misunderstandings of the law and practice**

The law is complex, and the gap, or perceived gap, between the law in the books and the law in action, makes navigating the process more difficult for aggrieved respondents, especially the unrepresented. As we pointed out in the *Finding Fault* report, the law does not require that the Fact relied upon is the *cause* of the marriage breakdown.<sup>114</sup> Instead, the Fact is evidence that the marriage has broken down, not why.

This subtle legal distinction can be difficult to grasp, not least in the highly-charged context of a difficult separation. The result is that there were defences that were launched on a (mistaken) literalist interpretation of the law. The respondent in M209, for example, defended on the basis that it was the husband, and his behaviour, that had caused the breakdown: “I request the Petitioner amends his statement for case, and admits his wrongdoings are the reason we are divorcing and [he] has knowingly omitted important details of the breakdown of the marriage”. Similarly, the respondent wife in Answer case MX01 denied that her adultery had caused the breakdown of the marriage, as asserted in the husband’s petition. She pointed instead to the husband’s own prior adultery as the trigger for the separation. The respondent wife did concede that she was currently in a new relationship and thus was also committing adultery. If she had had access to legal advice, she could have been told that the husband’s allegation of adultery against her was legally valid, even if his adultery had pre-dated hers. The Answer was, therefore, an entirely unnecessary (and expensive) application, sparked by a not uncommon misunderstanding of the legal purpose of citing fault.

### **The uncertainty of the behaviour threshold and *Owens***

One of key findings of the *Finding Fault* report was that uncertainty over the behaviour threshold, amongst unrepresented parties and lawyers alike, was resulting in some over-egging of particulars to ensure that the threshold was reached. The uncertainty was potentially compounded by the Court of Appeal decision in *Owens*.

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<sup>113</sup> HM Courts and Tribunals Service tests fully digital divorce application

<https://www.gov.uk/government/news/hm-courts-and-tribunals-service-tests-fully-digital-divorce-application>

<sup>114</sup> Liz Trinder, Debbie Braybrook, Caroline Bryson, Lester Coleman, Catherine Houlston, and Mark Sefton, *Finding Fault? Divorce Law and Practice in England and Wales* (Nuffield Foundation 2017), Section 1.1 and see *Stevens v Stevens* [1979] 1 WLR 885.

It is not clear that the *Owens* decision has had any impact on how the courts scrutinise petitions. Legal advisers scrutinising *undefended* divorces suggested that the decision would have no impact on their practice as *Owens* was a *defended* case.<sup>115</sup> Equally, the interviews conducted with judges suggested that the *Owens* decision was not having any “major effect in practice” on the ground in defended cases either, at least not yet.<sup>116</sup>

The absence of a significant impact of *Owens* on court practice is unsurprising for two reasons. First, there are so few defended cases where judges are required to make a decision on threshold that *Owens* is not relevant in the great majority of cases. Second, the underlying approach of the trial judge in *Owens* can be seen to be in conflict with the pragmatic approach of the court to defended and undefended divorces, built up over many years. That pragmatism is how the family justice system approaches all areas of work - including private and public law children and money – and not just divorce. Furthermore, family judges will have a practice background as lawyers, often doing divorce work, in which they will most likely have also pursued a pragmatic approach with clients and colleagues. In that context, it would appear unlikely that a single decision, even from the Court of Appeal, could turn around decades of how the law has worked in practice in courts throughout the country. That is particularly so given that, whilst the Court of Appeal refused the wife’s appeal in *Owens*, the judges also lamented the state of the law and endorsed the advice to solicitors from their professional bodies to be “very moderate” in what should be included in behaviour petitions.<sup>117</sup> That message can be interpreted as a clear signal to lawyers, and the legal advisers and judges beyond them, to carry on (pragmatic) business as usual.

However, the apparently mixed messages from the Court of Appeal do not offer clear guidance to lawyers advising clients and drafting particulars and it is here that the *Owens* decision is likely to cause more misunderstandings and fuel conflict. Whilst lawyer interviewees reported no *systematic* strengthening of behaviour particulars as a result of *Owens*, some did note that they were more aware of the possibility of defence. Lawyer interviewee 9, for example, reported that the case had “changed the mood music a bit” with lawyers “slightly covering their backs, ramping up their petitions a little bit or if they are doing so they are trying to explain to the clients why maybe we need to put a little bit more in”. Lawyer interviewee 10 talked about a differentiated approach – with no change where there was a known (and pragmatic) solicitor on the other side, but “with a chunkier petition than you would have done” if the respondent was a non-communicative litigant in person. Of course, the risk is that stronger petitions may in themselves increase the chance of defence, even if they reduce the risk of petitions being refused on threshold.

### **Procedural difficulties**

In addition to understanding the substantive law, there were also difficulties for all parties in getting to grips with procedure. Besides the error cases described above, the rarity of defended divorce and the potential complexities of defence cases resulted in a range of difficulties for litigants, lawyers, court staff and judges alike. These difficulties included:

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<sup>115</sup> Liz Trinder, Debbie Braybrook, Caroline Bryson, Lester Coleman, Catherine Houlston, and Mark Sefton, *Finding Fault? Divorce Law and Practice in England and Wales* (Nuffield Foundation 2017), Section 5.2.

<sup>116</sup> Our court file sample cases were mostly concluded by the Court of Appeal’s decision in March 2017 and so provide no indication of the impact of *Owens* in defended cases.

<sup>117</sup> *Owens v Owens* [2017] EWCA Civ 182, [96]

- Problems relating to the period for filing an Answer. There were numerous instances of litigants and court staff having difficulty in calculating the time period available for filing an Answer. Ten of the Answer cases resulted in applications to file the Answer out of time, four of which were refused. Applying to file out of time was, in itself, a challenging (and fee-incurring) procedure for unrepresented respondents. It also resulted in further work for the court, as well as uncertainty for the petitioner.
- Confusion about what constitutes an Answer. We noted above, in Section 4.4, that a number of respondents had not appreciated that their 'screed' would not constitute an Answer until it was too late and decree nisi had been pronounced. Equally, some lawyers mistook a 'screed' for an Answer. The lawyers in case M175, for example, wrote to the court assuming that the case had become defended, even though no formal Answer had been filed and no fee paid. And there was an example of a District Judge listing a case for CMH solely on the basis of an intention to defend and no fee, even after a legal adviser had (correctly) granted entitlement to decree nisi. The certificate of entitlement was later reinstated.
- Confusion about the correct format and content for an Answer and for a cross petition, and the correct court fees payable for each.
- Confusion about who is petitioner and respondent. Cases with cross decrees or where the divorce proceeded on the respondent's cross petition, regularly caused confusion amongst court staff drawing up decree nisi and decree absolute certificates, with multiple cases of certificates having to be amended or reissued, sometimes more than once.

## **7.6 Protection: Does defence protect the vulnerable (or marriage)?**

### **Introduction**

In relation to undefended cases, the *Finding Fault* report found that the use of fault did not protect marriage and that the reconciliation provisions within the MCA 1973 were ineffective. In this section we explore whether the ability to defend does help to protect marriage, or at least protect those who might be vulnerable as a result of divorce.

What was clear from our sample of Answers is that most defences (and thwarted 'defences' in GD-NA cases) were not attempts to save marriages. They were instead cases where both parties agreed that the marriage had broken down but were arguing over who was responsible, and why. And, unlike *Owens*, none of the respondents were successful in the small numbers of cases where they sought, whether genuinely or tactically, to 'save' the marriage.

Whilst those who might have been fighting to save the marriage would have been disappointed by the outcome, there were no examples of vulnerable respondents where the legal divorce would cause *additional* hardship. We noted above that some attempts to 'save' the marriage were purely tactical and some appeared to be attempts by abusive husbands to retain control of wives. But even where the fight for the marriage appeared to be genuinely motivated, the defence process only offered false hope to the respondent, whilst also being very stressful for the petitioner. The petitioner wife in M085, for example, had waited five years before she initiated the divorce, even though she had long since re-partnered. The respondent hoped for reconciliation and sought to challenge the length of the separation period, an approach that the petitioner felt was done purely to elongate the

process and cause additional stress. The decree was granted and a subsequent application by the respondent to set aside the decree absolute was struck out as an abuse of process. It had taken eighteen months from when the petition was issued to reach that point.

There is a specific provision in the MCA 1973<sup>118</sup> to protect vulnerable respondents, though only in five year's separation cases. Section 5 enables the respondent to raise a 'hardship' defence where the divorce can be prevented if the respondent can show that "the dissolution of the marriage will result in grave financial or other hardship to him and that it would in all the circumstances be wrong to dissolve the marriage". However, this sets an extremely high bar. There have been no reported cases of successful actions based on non-financial grounds, such as a religious objection to divorce. The only area where respondents initially had some limited success with a hardship defence was in relation to the loss of pension rights. However, the introduction of pension-sharing following the Welfare Reform and Pensions Act 1999 has made even that defence extremely unlikely. The restrictions on legal aid following the Legal Aid, Sentencing and Punishment of Offenders Act 2012 offer a further hurdle, both to awareness of the availability of the defence, and to the ability to utilise it if the respondent were aware of the provisions.

There were no cases in our sample where the hardship defence was seriously pursued or would, in any case, have been effective. Only three respondents ticked a box to state that they were opposing the decree on hardship grounds. In all three cases, this was based on a clear misunderstanding of the provision. In one case the unrepresented respondent appeared to be objecting to the costs of the divorce, rather than opposing the decree. The second case concerned an unrepresented wife who apparently wanted to pursue financial orders, but in response to a behaviour petition (and thus the provision did not apply). The third case did involve five-year's separation, but where the (represented) husband indicated that he would be willing to consent to two year's separation. That was due to a belief that if he conceded that the parties had been separated for more than five years, it would weaken his claim to a share in property (which the wife had purchased between two and five years previously). The defence, therefore, was based not on opposing the divorce, but the Fact relied upon. The date of separation and whether the property was a matrimonial asset were questions of fact which could be addressed in any financial proceedings. In any case, there was no indication that the circumstances described by the husband would amount to 'grave hardship'.

In two and five year's separation cases where the respondent has applied to court for financial orders it is also possible for the decree absolute to be delayed if the court is not satisfied that the financial provision made by the petitioner for the respondent is "reasonable and fair or the best that can be made in the circumstances".<sup>119</sup> There were no examples of requests for the divorce to be delayed in our sample.

There were also no applications to delay the decree absolute in religious marriages cases under s10A of the MCA 1973, a provision introduced primarily to facilitate civil divorce for cases where a Get (a requirement for divorce in the Jewish religion) is being withheld.

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<sup>118</sup> And the equivalent s 47 of the CPA 2004.

<sup>119</sup> MCA 1973, s 10(3) and CPA 2004, s 48(4).



## 7.7 Summary

The research found that conflict and acrimony were heightened for two reasons: the role of fault in triggering disputes and defences, and the impact of the process of defending itself. The creation, or exacerbation, of parental conflict, and the direct involvement of children in disputes, is contrary to, and undermines, family justice policy. Defended cases were also far more likely to go on to have initially contested financial remedy applications.

Whilst who divorces whom, and on what basis, might be of critical and enduring importance to some parties, the court took a more pragmatic view that the divorce would happen and that it was generally in the interests of the parties to settle rather than to continue to fight over details. With the exception of the adjudicated outcomes of the few trials in the study, the handling of defended cases was a search for settlement, rather than the testing of allegations. The focus was therefore on achieving the divorce, with the route to get there of little significance to the court, as long as the minimum legal requirements were satisfied, although in some cases even the minima were ignored. The outcome could lack 'intellectual honesty'. There were, for example, court orders accepting the petitioner's account that a behaviour had occurred, whilst simultaneously accepting the respondent's account that it had not, or behaviour petitions amended to two year's separation where the parties had been apart for only a matter of months.

Although the search for settlement makes objective sense, and is the only realistic option for an over-stretched family justice system, the difficulty with inviting, but then not testing, allegations to prove the ground for divorce, is that one or both parties may feel aggrieved. The perception that the court is endorsing the petitioner's account, without the opportunity to have one's say, can engender an enormous sense of injustice in respondents, especially where they are unable to defend. However, the ability to defend can also be misused. There were cases where it appeared respondents were defending the divorce as a means to exercise control, to be obstructive or as a bargaining tactic.

The archaic language and complex procedures caused significant difficulties for the parties and professionals. A fifth of intend to defend cases were the result of errors, where the respondent mistakenly reported that they wished to defend. Other respondents defended due to a misunderstanding of the basis of the law. There is continuing uncertainty amongst lawyers over what is required for a behaviour petition following *Owens*.

Unlike *Owens*, none of the respondents were successful where they sought, whether genuinely or tactically, to 'save' the marriage. Even where the fight for the marriage appeared to be genuinely motivated, the defence process was very stressful for the petitioner and offered only false hope to the respondent. There were no cases where arguments that the divorce should be prevented on the basis that it would cause grave financial or other hardship under s5 of the Matrimonial Causes Act 1973 were seriously pursued, or indeed, would have been appropriate.

## 8. Conclusions and implications

### Conclusions

The report set out to explore why people do (and do not) defend divorce, how the court responds to these cases and who appears to win what, if anything, as a result. The report also sought to address two policy questions: whether the substantive law on divorce should be reformed to remove fault and, if reform were to occur, whether defence should still be possible.

Our conclusions are emphatic. This analysis of defended cases has only strengthened the case for law reform to remove fault. As we have seen above, the majority of disputes and defences are caused and/or at least facilitated by the law itself. Without allegations of behaviour, it is likely that most defences would not occur. And having created a problem, it is clear that the intended solution – defence, or ‘would-be defence’ in the GD-NA cases – may only compound the difficulties. Both defence, as well as a frustration with the inability to defend, could result in additional conflict and perceptions of unfairness between the parties, whilst still doing nothing to establish the truth of any claims or to protect the vulnerable.

Where divorce is based on allegations of fault, natural justice requires that there must be a legal process to test those allegations. That is indeed provided for, in law, in the duty of the court to inquire into Facts alleged by the petitioner and respondent under MCA s1(3) and in the right of the respondent to defend the divorce and to cross-petition. In practice, however, the court’s starting point is to assume that the petitioner’s allegations are true.<sup>120</sup> The only exceptions to this are the tiny number of cases that are formally defended and that reach a fully contested final hearing, that is about 0.018% of English and Welsh divorces, or about twenty cases a year. It is clear, too, that although there is a legal process available to respondents in theory to challenge allegations, in practice there is far from equal access to the court to defend, given financial, psychological and intellectual barriers. For respondents on the receiving end of allegations that they dispute, justice is a chimera.

Equally, if there is a legal process, then it must be meaningful, i.e. capable of establishing the truth. However, the very strong and sustained focus on settlement, means that most defended cases will be resolved by what can be ‘agreed’, rather than on the merits of any case. Our analysis suggested that up to half of respondents could do fairly well if they did challenge the particulars. That gives no indication, however, as to whether that outcome was fair or just in the circumstances. In some cases, it may well have been a ‘fairer’ outcome than that offered by the original petition, but neither we, nor the court, would be in a position to make that assessment. In other cases, it may equally have been a more unfair outcome. We remain particularly concerned about the number of cases where the emphasis on settlement appeared to enable abusive husbands to strip out what appeared to be well-founded allegations from petitions.

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<sup>120</sup> President of the Family Division, Sir James Munby in *Owens v Owens* [2017] EWCA Civ 182, [93]. For a detailed analysis see Liz Trinder, Debbie Braybrook, Caroline Bryson, Lester Coleman, Catherine Houlston, and Mark Sefton, *Finding Fault? Divorce Law and Practice in England and Wales* (Nuffield Foundation 2017) Section 4.

At the same time, it is vital that any process does not cause harm or further harm to the parties. As we saw above, defence does generate further conflict, with potential knock-on effects for dealing with children and money. The financial and emotional costs of defence are significant in themselves. It is not surprising, therefore, that family lawyers and the courts do all that they can to discourage defence and fully contested hearings, even if the result will be procedurally unfair to some parties.

The result, therefore, is a deeply unsatisfactory compromise where there is *technically* a process for defending and testing allegations, but, in practice, the process for dealing with defended and undefended divorce cases is administrative. The lowering of the threshold for behaviour, the non-testing of allegations, and the discouragement of defence, has meant that the divorce is virtually guaranteed so long as the petitioner can navigate the paperwork. This is not a new problem. As far back as 1976, Michael Freeman noted the wide gap between the law in the books and the law in practice, resulting in:

*a text book account of the rules which will gradually lag further and further behind the law in action... what is necessary is divorce law reform which rids us of our existing pretences and a procedure which admits that divorce has become an administrative rather than judicial function.*<sup>121</sup>

In lieu of law reform, the courts have evolved a deeply pragmatic approach to defended and undefended cases that has enabled what amounts to unilateral divorce on demand, but concealed within an expensive and potentially harmful fault-based law. The pragmatic approach is effective in enabling the efficient processing of tens of thousands of divorces each year,<sup>122</sup> but at a cost in terms of conflict, fairness, access to justice and the rule of law. Further, without a statutory underpinning, the pragmatic approach of the law in action is vulnerable to unexpected interpretations of the law in the books. The case of *Owens* is an obvious example of the potential instability of a system where, as Freeman notes, law and practice have drifted so far apart. It is testimony to the depth with which the pragmatic approach is embedded within the family justice system that the *Owens* decision appears to have had such little impact to date. However, that gulf between law and practice does little to uphold the rule of law.

More fundamentally, the analysis has underlined a fundamental disjunction between a divorce law based on fault, inquiry and defence and a family justice system focused on the future rather than the past, relationship-building rather than recrimination, and compromise rather than a win-lose orientation. The current law simply does not fit with how the family justice system works, or seeks to work, either in general, or in relation to divorce.

This raises a wider public policy question that the President of the Family Division advances in *Owens*, about whether divorce is a question for the parties themselves to decide, without

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<sup>121</sup> Michael Freeman, 'Divorce without legal aid' [1976] *Family Law*, 255, 258-9).

<sup>122</sup> Davis & Murch also noted how the system in the 1980s was geared towards "the efficient processing of divorce petitions" and that the courts would "grind to a halt" without the efforts of family lawyers to dissuade respondents from defending. Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon 1988) 106 and 109.

the involvement of the State.<sup>123</sup> It seems clear that the courts have already answered this question in practice, given the hollowing out of the duty to inquire and the reluctance of the courts to accept, and then to adjudicate, defended cases. Closely linked to this point is a particular conception of marriage based on ongoing consent. Where that consent is withdrawn by one of the parties, the courts have long since held the view that divorce is inevitable and defence is futile.

## Implications

This analysis of defended cases has reinforced the case for law reform to remove fault and to replace it with a straightforward notification process. Under a notification system, a divorce or dissolution would be granted if one, or both, parties register that the marriage has broken down irretrievably and that intention is confirmed by one, or both, parties after a minimum period of at least six months. Judicial separation would be retained as an option, available on the same no-fault notification basis. The advantage of such a process is that it would be clear, fair and transparent and would not trigger additional conflict. It would be considerably cheaper for the parties who would be able to navigate the process without the need for legal advice for the divorce itself. It would also result in significant cost savings for HMCTS and the Ministry of Justice as the process would become genuinely administrative and not require expensive – and legally pointless – scrutiny by legal advisers and judges.

If the law were to be reformed to remove fault, then the results of this study clearly suggest that the concept of defence could, and should, be redundant. In practice, defence of the marriage itself has been near impossible for many years, leaving aside the apparently unique circumstances of the *Owens* case. But if irretrievable breakdown were to be established purely on the basis of an objectively verifiable process of notification and confirmation, then irretrievable breakdown becomes undeniable. Nor would there be a Fact or particulars to object to, the current trigger for most disputes and defences.

There would also be no reason to retain the hardship bar under s5 MCA. In 1990, the Law Commission did recommend the retention of the bar, but that appeared to be based solely on concerns about the protection of respondents before the advent of pension-sharing.<sup>124</sup> With the advent of pension-sharing, any case for retention of the hardship bar appears to disappear. The risk of retaining the bar is that it will be used, not to protect the vulnerable as intended, but as defence can be used now, to be difficult or to attempt to retain control of the other spouse. And the advantage of abolishing the hardship bar, is that it reduces the complexity of the law and means that the law can be described in very clear and simple terms, a critical consideration in a diverse community with limited access to legal advice.

The only possible exception to this is that we can see some justification for the retention of MCA s10A relating to the possibilities of a delay in Jewish or other religious divorces where there are difficulties in relation to the Get, or similar requirements.

With a notification-only system, and no possibility of defence, it will be essential that, in sole registration cases, that the second person (or non-registering spouse), is made aware of the

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<sup>123</sup> *Owens v Owens* [2017] EWCA Civ 182, [90], referring to Stephen Cretney, *Family Law in the Twentieth Century: A History* (Oxford University Press 2003) 391.

<sup>124</sup> Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) paras 5.72-77.

process. It would be wholly wrong for a person to be divorced without their knowledge. It is likely, therefore, that the same mechanisms for service will be required as now in sole registration cases, including the possibility of requiring the court's assistance in achieving service.

There are also three situations where the rules will need to be drawn up so that only those who meet eligibility requirements are able to use the notification process. The three situations are:

- *Fraud.* We envisage that the Queen's Proctor would still be required to investigate cases of potential fraud, along the lines of the irregular divorces set aside in *Rapisarda*.<sup>125</sup>
- *Jurisdiction.* As now, any individual or couple seeking to use the notification system, would first have to satisfy the requirements in relation to jurisdiction. If jurisdiction is not satisfied, or if an individual claims that proceedings have already been issued elsewhere, then it will be a matter for the court to determine the way forward.
- *Capacity.* There were a small number of cases in our sample where allegations were made by the respondent that the petitioner had been coerced into, or lacked capacity, to petition for divorce.<sup>126</sup> If that were the case, then neither party would be consenting to the divorce and so they would not meet the requirements of the law in terms of one or both parties initiating and confirming the irretrievable breakdown of the marriage. In those circumstances, an appropriate remedy might be an application to the Court of Protection to test capacity.

## Final word

We end with an extract from one of the petitions in our sample. Section 10 of the version of the petition that was in use at the time of the study contained the 'Prayer', where the petitioner was required to specify what legal remedies were sought. Underneath the heading "Prayer", the form included the phrase "The Petitioner therefore prays" with a range of tick box options below that.<sup>127</sup> The form is not clearly laid out and is open to misinterpretation. In case L159, the petitioner husband had handwritten in the large area of white space next to "The petitioner therefore prays" the words:

*"I pray for God's blessing on us as we live our separate lives."*

This petitioner's 'prayer' is worthy of note for two reasons. First, it highlights the absolute necessity to have a law and procedure that is clear and understandable for all citizens, regardless of the level of their literacy and understanding. In this case the petitioner husband had misinterpreted the archaic legal language of the form. His wife, the respondent, had also struggled with the acknowledgement of service, having mistakenly stated that she intended to defend.

The second, and perhaps more important point, is to recognise the moral code demonstrated here, based on a sense of care and compassion for others, extended even to

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<sup>125</sup> *Rapisarda v Colladon (Irregular Divorces)* [2014] EWFC 35.

<sup>126</sup> Section 3.4 above.

<sup>127</sup> The tick box options were that the marriage or civil partnership be dissolved or that the Petitioner be (judicially) separated from the Respondent.

the spouse one is divorcing. Divorce law and procedure in the twenty first century should be encouraging and enabling exactly that kind of moral sensibility, rather than a morality of punishment and blame.

## Appendix 1 Research Methodology

### Overview

This report draws on data collected for the earlier *Finding Fault* report, together with additional data collection. The key sources were:

1. Analysis of court files in 300 undefended divorce cases, i.e. which followed the standard undefended pathway and in which there was no apparent element of formal contest in respect of the proceedings.
2. Analysis of court files in 100 divorce cases which were contested – i.e. the petition was formally contested to some degree – as a minimum, by the respondent returning an acknowledgment of service indicating an intention to defend the divorce proceedings (whether or not the respondent followed up by filing an Answer).
3. Analysis of a booster sample of 42 court files in cases in which an Answer was filed.
4. Interviews with 14 lawyers and 5 judges.

This report also draws on lawyer focus groups and interviews with petitioners and respondents which were reported on in the main *Finding Fault* report.

Civil partnership dissolution was excluded from this element of the study due primarily to the small numbers of cases involved.

### Undefended and contested samples

The 300 undefended and 100 contested divorce cases were drawn equally (75 undefended and 25 contested) from each of four regional divorce centres (RDCs), using sample lists supplied by the Family Statistics team within Justice Statistics Analytical Services at the Ministry of Justice. File data collection for these samples was largely conducted at the RDCs, but where cases had been transferred out to individual courts, the researchers attended individual court offices to undertake data collection.

The undefended and contested sample cases were ones in which divorce petitions had been issued either in the last quarter of 2014, or during 2015. Fieldwork for this part of the file review was conducted between December 2016 and July 2017.

### Answer booster sample

This sample was drawn from a list supplied by HMCTS Courts & Tribunals Directorate, of cases in which divorce petitions were issued at any RDC, and an Answer was recorded as filed between 1 October 2015 and 30 September 2016. As the filing of an Answer typically generated a transfer out to individual courts, it was agreed that to maximise the efficient use of researcher resources, and keep the burden on HMCTS to a minimum, the booster sample should be based on cases transferred to three receiving courts. Fieldwork for this part of the study was conducted in October and November 2017.

The data collected and analysis conducted for the Answer booster sample mirrored that for the undefended and contested samples, which we have previously reported on in the *Finding Fault* report.<sup>128</sup>

## **Interviews**

The 14 interviews with solicitors comprised 11 in which interviewees were asked to discuss between two and four defended or otherwise high-conflict cases in which they had acted, and three further interviews in which interviewees were asked to discuss one or more cases in which an Answer was filed. These three interviews were focussed on the approach of lawyers and the court in regard to attempts at settlement and conduct of case management hearings. The five interviews with judges drawn upon for this report included four which were conducted during fieldwork for the main study and thus covered undefended, contested and defended cases, supplemented by an additional interview with a judge which was focused on the approach of lawyers and the court in defended cases.

Participants for these interviews were recruited primarily via Resolution and the RDCs and courts in which fieldwork for the court file review was conducted. Additionally, a call for participants was made via twitter, which generated the three additional solicitor interviews.

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<sup>128</sup>A comprehensive technical appendix setting out the components of the project in detail is available at <http://nuffieldfoundation.org/finding-fault-divorce-law-practice-england-and-wales>