



international  
FAMILY LAW GROUP LLP



# England's new divorce law

Prof David Hodson OBE QC(Hons) MCI Arb

# Speaker



Prof David Hodson OBE QC(Hons) MCI Arb

*‘David Hodson is a legend in family law circles. He is calm, reassuring and generally right. There are few partners who deal with international financial work with his level of gravitas and knowledge. He is a stellar individual and there are very few like him in family law. He is a one-man encyclopaedia on Brexit and its potential impact on international clients’.*

The Legal 500 2021/2022



*"The clue is in the name – ‘the’ go to place for international family law."*

*"IFLG has unrivalled strength at all levels and across the whole span of family law. The partners and associates are first-rate."*

*"They always impress with the dedication to detail, client service, and deep knowledge of the relevant legal framework."*

*The Legal 500 2022*

# England's new divorce law

- 🌍 History including 1996
- 🌍 Existing law and procedure
- 🌍 Provisions of the new law
- 🌍 The new rules
- 🌍 The forms and digital journey
- 🌍 Conclusion

More detailed articles found at [www.iflg.uk.com](http://www.iflg.uk.com)

## History including 1996

- 🌍 1969 DRA became 1973 MCA
- 🌍 Mixed fault and non-fault; Parliament expected use of “civilised” grounds of 2 yr separation
- 🌍 Significant use of separation agreements
- 🌍 Mid 80s saw increasing distrust and litigation
- 🌍 Need for immediate financial assistance meant need for immediate divorce; hence increase in use of fault petitions
- 🌍 Worldwide trend to no fault
- 🌍 1996 Family Law Act: divorce over a period of time with specific time set aside for reflection and consideration with encouragement to mediation
- 🌍 Never implemented
- 🌍 And so the profession waited; impetus of Owens in Supreme Court

## Existing law and procedure

- Irretrievable breakdown as only ground, provable in only 5 ways, so-called facts
- 3 fault grounds plus 2 years separation with consent and five year separation
- Law has barely changed
- Procedure has dramatically changed
- Now no involvement of children; the old s41 child satisfaction hearing
- The special procedure became the normal procedure
- Codes of practice encouraged anodyne, uncontentious, mild particulars
- The rarity, cost and publicity of defended divorces
- Irrelevance for children and finance outcomes; divorce admissions without prejudice etc.,
- Became almost administrative process, now mostly digital

## Existing law and procedure

- Nevertheless problem remained that one spouse was petitioner and so respondent was perceived as 100% to blame, the guilty party!
- Yet reality in most, certainly not all, cases that fault was shared, even if not equally
- Attempts at joint petitions via cross petitions floundered and were expensive
- Perception that unhappiness with the divorce process overflowed into finance and children
- Specific unhappiness at needing to blame; the so-called divorce blame game
- Out of step with the rest of the westernized world
- Out of step with general psychology of family resolution processes
- Campaign for reform gained momentum after Owens

## Existing law and procedure

- Bill had difficult time through Parliament
- Some tried to defeat altogether but little prospect and no success
- However for those seeking to examine and challenge key elements, perception that it was unduly rushed. It will be a matter of time in practice to decide if this was the case
- Greatest challenge was the impact on the respondent. Parliament strongly influenced by impact on victims of domestic violence as petitioners even though consequence is for all respondents. In practice most significance in finance cases
- Distinctly, when would the respondent be served? Government made commitment to review when the rules were being prepared. This may be the most unsatisfactory element in the new divorce process. A matter now to be considered once it is in practice

# The new law

- 🌍 Divorce, Dissolution and Separation Act 2020
- 🌍 New law in force from 6 April 2022
- 🌍 Covers marriage, civil partnership, nullity and judicial separation
- 🌍 Amends MCA 73 rather than writes a new law; criticised in Parliament as law unable to be understood or accessible to the public. Constant cross-reference to MCA!
- 🌍 Irretrievable breakdown remains only basis of divorce. But even more now a legal fiction
- 🌍 Final divorce six months, 26 weeks, from issuing the divorce petition
- 🌍 But this is not divorce by notice and expiry of time. The respondent will not have 26 week notice. May be significantly less. It is divorce by unilateral notice
- 🌍 Retains separate decrees; DN after 20 weeks and DA after another six weeks

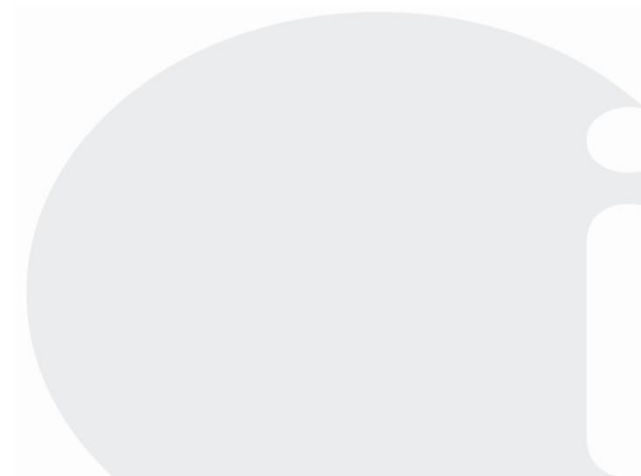


# The new law

- 🌍 No opportunity to defend the divorce on the basis of grounds
- 🌍 Can only be disputed on basis that there was no marriage i.e. dispute about validity of the original ceremony or status, alternatively England and Wales Family Court has no jurisdiction or not appropriate forum, alternatively marriage already ended in law
- 🌍 Opportunity for joint applications, joint petitions, but the rules have not translated the original hope that even if divorce started by one party, both could seek the final divorce order, with the psychological benefits of doing so. This is a great pity
- 🌍 This joint acting opportunity will create distinctive challenges for the profession where solicitors for probably the first time will find they are filing court documents for both parties
- 🌍 No power in the Act to extend the time period. This may work injustice for respondents

## The new rules

- 🌍 Family Procedure (Amendment) Rules 2022 (22/44), amending FPR 2010
- 🌍 Also see excellent Ministry of Justice information pack, with court forms. Also YouTube videos from court service are anticipated



# The new rules: Change of language

- 🌍 Change of language imputing attempt to change the culture
- 🌍 Divorce petition is divorce application
- 🌍 Petitioner is now applicant; and applicant 1 if joint application!
- 🌍 Divorce decrees are divorce orders
- 🌍 DN is conditional order
- 🌍 Decree absolute is divorce order, and probably will be referred to as final divorce order
- 🌍 Decree of nullity is a nullity of marriage order
- 🌍 Decree of judicial separation is a judicial separation order
- 🌍 A defended case is now a disputed case

## The new rules: initial process

- 🌍 Process starts with filing the divorce application at the court
- 🌍 Will almost always be a digital process; but not if nullity or judicial separation
- 🌍 Can be sole or joint
- 🌍 Retention of statement of reconciliation; a fiction for 50 years and now more!
- 🌍 Assertion of irretrievable breakdown at the point of filing the divorce application. This is controversial. Under existing law, the “fact” has already occurred at the point of filing the divorce petition. Under new law, no time has elapsed and the respondent may be wholly unaware. It was unsuccessfully argued it should be at the point of the application for the conditional order when 20 weeks had elapsed i.e. proper divorce by a period of time
- 🌍 Reiterates that this is a divorce law by unilateral notice and not by time

## The new rules: timing of service

- 🌍 Timing of service was and remains the most controversial element
- 🌍 26 weeks run from issuing the petition, not receipt by respondent
- 🌍 Unlike civil law, no provision in English family law timetable for service of originating process such as a divorce petition. Therefore risk that respondent may have minimal notice
- 🌍 Government commitment in Parl to review in drafting the rules
- 🌍 The rules are unclear. They seem to require importing CPR. They seem to allow cases where respondent will have little notice until the application for the DN. This will have very adverse consequences

## The new rules: timing of service

- 🌍 Where applicant serves papers, must occur by midnight 28 days after the issuing.
- 🌍 Respondent then has 16 weeks before first decree application
- 🌍 Provision to seek extension of time if not served in 28 days
- 🌍 Such application to be made within 28 days or, if not, within any extended time by court order. This will be obviously without notice. This therefore directly anticipates an application outside the 28 day period
- 🌍 More crucially, if the applicant has so-called “good reason” for not making application within the 28 days then can still make application for extension of time. Good reasons not specified
- 🌍 Court must consider all circumstances of the case including attempts to serve in 28 days and whether acted promptly
- 🌍 Complete failure in the rules to say what should happen if court not satisfied!

## The new rules: timing of service

- 🌍 Court has no power to extend the 20 weeks i.e., reset the 20 week time period
- 🌍 Overlap with CPR r 7.6.2 where expectation that application for extension of time will be made within the stipulated period. If not, application may be struck out or time extended to run from the date of later service. The problem is that neither can occur in this new divorce process. So CPR crossover, if intended within the FPR, has no similarity or application
- 🌍 Unlikely the family court will say non-28 day service is bad service? Cx CPR
- 🌍 At this stage the court is dealing “without notice” and will have difficulty verifying the truthfulness of the assertions e.g. in difficulty locating or serving the respondent. If later on being served, respondent shows court was misled, what can it do? Seemingly nothing
- 🌍 If the respondent can only be located after 16 weeks and court permission is then given, this respondent will only have a couple of weeks notification before the first decree

## The new rules: timing of service

- 🌍 Parliament and the rules have given lawyers significant opportunities in delayed service, tactically, for their applicant clients which must be used
- 🌍 Circumstances of anxiety regarding domestic violence by recipient
- 🌍 Reducing the likelihood of an international forum claim, albeit with huge protests from foreign lawyers with perceptions of very unfair English process
- 🌍 Reducing likelihood of respondent seeking to delay final divorce because of financial prejudice to respondent via pensions or policies
- 🌍 Sheer antagonism by one spouse to the other



## The new rules: timing of service

- 🌍 Practitioners must be alert to the inevitable impact on the respondent who is served well after the initial 28 days, perhaps after four months, 16 weeks
- 🌍 Marital life continued without any awareness that one spouse had already filed for divorce
- 🌍 Family holidays, family financial decisions, coparenting for the future of the children or just living a marital life together with one unaware of the existence of these divorce proceedings
- 🌍 Then discovering that within a month there will be the first decree of divorce
- 🌍 This will create huge hostility which will overflow into disputes regarding children and finances. It will defeat any intention to avoid the blame game
- 🌍 There must be colossal expectation that service will almost always be quick, in 28 days

## The new rules: timing of service

- 🌍 Upon service, respondent files acknowledgement of service within 14 days. Cannot defend the divorce but can dispute the validity of marriage or jurisdiction
- 🌍 20 weeks after issue of proceedings and presuming service has occurred, application can be made for the conditional order, the first decree. Can be made by both parties if a joint petition or one party even if a joint petition or by applicant, petitioner. Seems no reference to opportunity for respondent to apply. Seems they would have to issue a new divorce application and start time running again. This seems pointless
- 🌍 Six weeks thereafter, either or both can apply for the final divorce order; if sole applicant, petitioner does not, the respondent can
- 🌍 Distinctive rules of notice if there was a joint conditional decree and only one applies for the final divorce order

## The new rules: expectation of email service

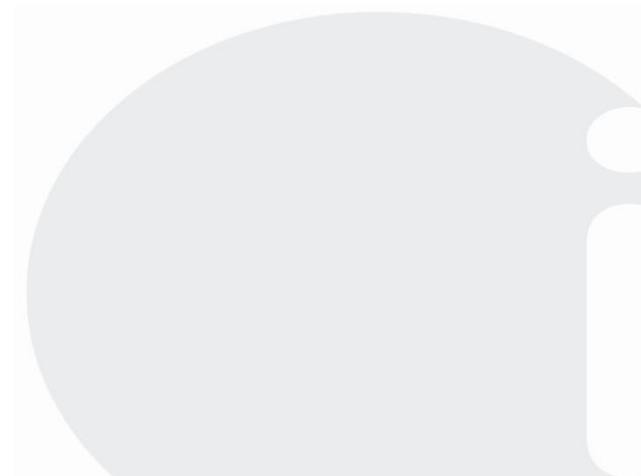
- 🌍 Under English law various methods of service are permitted
- 🌍 New rules anticipate email service as default method
- 🌍 Upon usual email address. But even if the work address?
- 🌍 But must also be accompanied by papers sent to a physical address by first class post. Thoroughly incongruous and historic and may create procedural problems, delays and increase costs
- 🌍 If no acknowledgement of service, proof of service in the usual way e.g. showing other emails received from the particular address used for service
- 🌍 Provisions for court office to serve
- 🌍 Distinctive provisions for international service including not by court

## The new rules: Costs

- 🌍 Under present law, costs often follow the fact of the divorce e.g. against respondent
- 🌍 Can be very high even in undefended cases
- 🌍 With no fault, how can costs orders be justified? Another area where good practice from the outset by practitioners in the courts will be essential. Making costs orders in no-fault divorce law will be totally counter-productive. NB nowhere to claim on new petition form!
- 🌍 Either party can apply for costs in a disputed case i.e., discrete issue
- 🌍 Costs may be appropriate if evidence of evading service
- 🌍 Some practitioners may regard it as scandalous that with the new divorce far simpler and almost always online, the divorce fee of £593 has not been reduced. It is unaffordable to some resulting in limping marriages. Good practice should be to split or apportion the cost on the basis of a joint divorce application

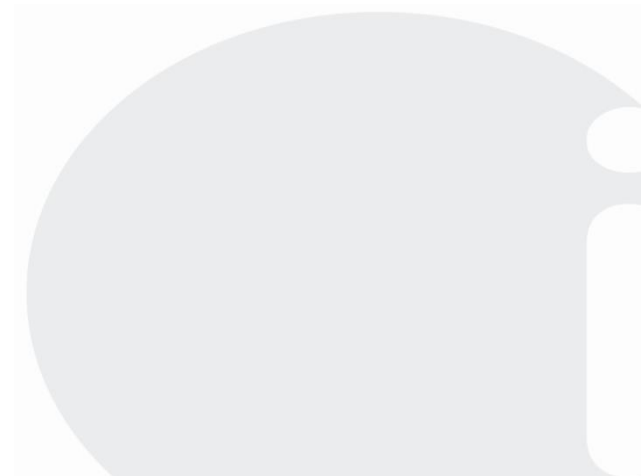
## The new rules: procedure for disputed cases

- 🌍 No basis to defend on grounds
- 🌍 Dispute whether ceremony took place i.e. is there a civil marriage
- 🌍 Dispute whether England has jurisdiction or is appropriate forum
- 🌍 Dispute over whether the parties are already divorced e.g. abroad
- 🌍 Disputed cases and standard cases
- 🌍 Case management procedure for disputed cases



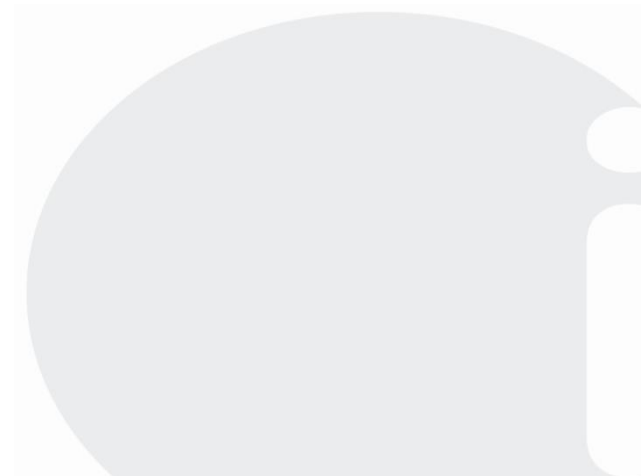
## The new rules: delaying the final divorce

- 🌐 Existing law in the context of a religious divorce, presently only the Jewish faith



## The new rules: delaying the final divorce

- Primarily, context of delaying final divorce until financial settlement
- Significant prejudice if one party dies between decree absolute and financial settlement because other party is no longer automatically entitled to pensions, insurances etc as spouse. Have to make a claim directly against the pension company or under the Inheritance Act
- Presently good practice to agree to delay decree absolute until financial settlement
- Will this survive change in negotiating position between the parties?
- Power in s10.2 MCA to delay final divorce until financial settlement
- Limited by case law to big-money cases with particular complexities



## The new rules: delaying the final divorce

- Argued unsuccessfully in Parliament for a reform so that no decree absolute until financial order if any risk of material prejudice to either party
- The case law must be re-examined and recalibrated in the context of this new divorce law, the significant risk of respondents having minimal opportunity to apply for Form A and obtain disclosure before decree absolute, the inability to delay the divorce through purported defence of a divorce and other reasons
- S10.3 says no final divorce unless provision made is reasonable and fair or the best that can be made in the circumstances. If no financial provision because proceedings recently started or no disclosure yet, the application should succeed. But previous case law over several decades have limited application for financially vulnerable parties in modest asset cases
- Given vulnerability of respondents under this new law, it must change



## The new rules: transitional arrangements

- 🌍 Proceedings commenced on or before Tuesday, 5 April 2022 will continue to use existing law and procedure
- 🌍 However court service have imposed deadline of 4.00pm Thursday 31 March
- 🌍 Thereafter only accepted if urgent reasons given. Better by email and specific address given to use by the court service. See Ministry of Justice information pack
- 🌍 If there are existing proceedings, perhaps heavily defended, amendment of the petition to go under the new law seems not impossible and it would be necessary to stop and start again. Beware of costs risks if giving notice of dismissal of divorce proceedings.

## The forms and digital journey

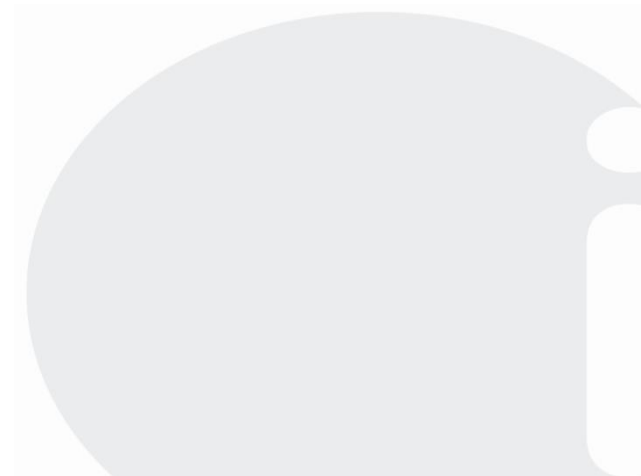
- 🌐 See Ministry of Justice information pack and accompanying forms
- 🌐 Applications where applicant is represented must use digital service
- 🌐 If in person can use digital service or paper D8
- 🌐 Curiously if a joint application with one solicitor acting for both, must use paper form and not digital. Hopefully will be available by 6 April. For fees exemption both must qualify
- 🌐 Also if joint application, even if they share the fee, only one can pay if digital
- 🌐 If urgent application for conditional or final order, use paper
- 🌐 Significantly improved forms, paper and digital, in the new process
- 🌐 Digital process not available if judicial separation or nullity

## Conclusion

- 🌍 Family law has wanted no-fault divorce for decades. Tantalisingly close in 1996
- 🌍 Blaming one spouse 100% for the breakdown of the marriage has been wrong, thoroughly unhelpful in future family relationships, detrimental in sorting out children and financial aspects and wholly out of touch with realities
- 🌍 Accordingly, this law reform is hugely welcome and well overdue
- 🌍 In removing the blame game it should make resolving other elements on relationship breakdown easier, or at least allow concentration on the real matters in dispute
- 🌍 Nevertheless the actual form of the law, unilateral notice rather than a period of time for each party to reflect and consider, negotiate and resolve, is not the best way forward nor adopted in other westernised countries with no-fault divorce
- 🌍 The new law isn't user-friendly and relies on ancillary information guides

## Conclusion

- 🌍 Opportunity for joint initial applications is hugely to be welcomed, although regrettable that it is not possible to have joint request for the final divorce order if a sole petition
- 🌍 Expectation of email service as default method is hugely to be welcomed
- 🌍 Expectation of divorce being a digital process is crucially overdue and to be welcomed

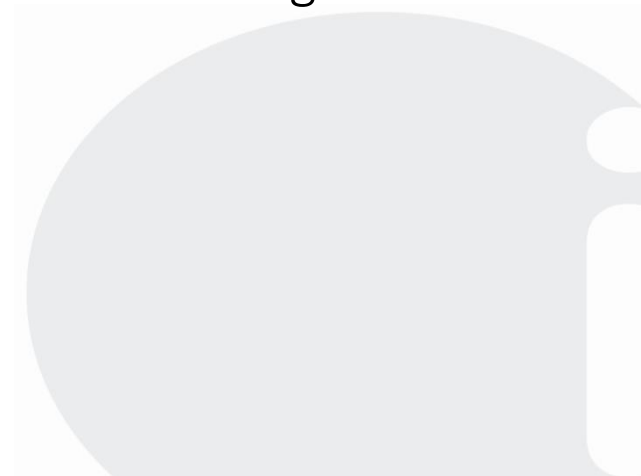


## Conclusion

- 🌍 Nevertheless the law and rules are highly partial against the respondent at key stages
- 🌍 Although service in 28 days, rules allow opportunities to serve later and apply for extension of time to serve later
- 🌍 Wholly unclear what will happen if court is not satisfied with delays in service
- 🌍 What will happen if respondent only served after 18 weeks? Still two weeks for acknowledgement of service and then application for the first decree
- 🌍 Can a respondent set aside an extension of time for service if the court was given misleading information? And what would then happen?
- 🌍 Tactics of serving late will be employed
- 🌍 Primarily greatest worry is women losing opportunities to delay the divorce if pension or related issues unresolved

## Conclusion

- 🌍 With these shortcomings or uncertainties in the rules, and the distinct partiality against respondents within the legislation, there is a significant obligation on the specialist family law profession to work in accordance with the intention of the no-fault legislation
- 🌍 The need to produce a system fair for both spouses on divorce
- 🌍 The need to produce fairness in resolution of financial matters
- 🌍 The benefits of no-fault divorce cannot be allowed to be derailed by the several failings in the law and rules however much that risk presently exists





**Prof David Hodson OBE QC(Hons) MCIArb**  
English solicitor, mediator, arbitrator, DDJ CFC FinRemCourt,  
and Australian solicitor

The International Family Law Group LLP

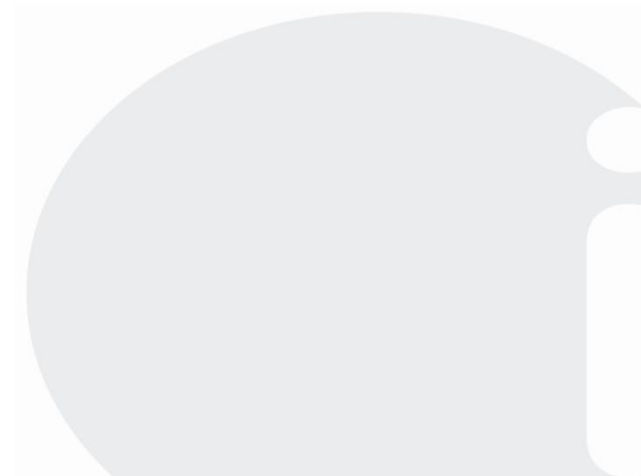
[dh@davidhodson.com](mailto:dh@davidhodson.com)

+44 (0)20 3178 5668

+44 (0) 7973 890648

[www.iflg.uk.com](http://www.iflg.uk.com)

@DMHodson





# Dovaston Law

Specialist Family Solicitors

**DIGITAL DIVORCE**



# KAREN DOVASTON

- Solicitor, admitted 1995
- Arbitrator (Finance)
- Secretary Forum of Family Arbitrators
- Law Society Accredited Family Law
- Resolution member
- Contributor to PAG Focus Group
- Member, The Law Society Family Law Committee
- [karen@dovastonlaw.co.uk](mailto:karen@dovastonlaw.co.uk)

(c) Karen Dovaston March 2022



Dovaston  
Law

Specialist Family Solicitors

# PORTAL TRANSITION



Still same manage case v manage org



Must SUBMIT by 4pm on 31.03.2022



Anything in draft not submitted is gone



'Old' law portal closes 4pm on 31.03.2022



'New' Law portal opens 10am on 06.04.2022



In interim, urgent apps to email box

## 'NEW' PORTAL



Same log on screen



Watch the cookies! Log in and case lists....



Remember CAA has to assign the case



Drop down menu 'old' vs 'new' choice



Can still manage old cases through same log on



Notice of Change to be added

## OPTIONS AVAILABLE



Still division between Citizen and Solicitor



FamilyMan case numbers gone



Sole solicitor/sole applicant journey



Two solicitors/joint applicant journey



One solicitor/joint applicant journey



Notice of Change should allow claiming

## 'QUIRKY' BITS



Still division between Citizen and Solicitor



Will have separate case numbers for finance



Legal Help and HWF clients



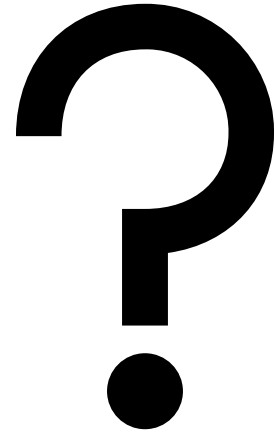
Nullity and judicial separation – new address



Divorce or dissolution civil partnership



Dispute goes off line



Dovaston  
Law

Specialist Family Solicitors

QUESTIONS?