

**Report focus**

Analysis of the regime for divorce costs and implications for costs post-reform.

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Emotionally charged

Costs on divorce and dissolution



About this report

The Divorce, Dissolution and Separation Act 2020 will reform the ground for divorce and civil partnership dissolution in England and Wales from April 2022. This report considers the implications of that reform for costs, that is, who should pay for the divorce process itself. It is the final report from the *Finding Fault* study, led by Professor Liz Trinder and funded by the Nuffield Foundation. For all reports in the study, please see:

www.nuffieldfoundation.org/project/finding-fault

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1. Summary

What is this report about?

- The basis for divorce and civil partnership dissolution in England & Wales is set for a major reform on 6th April 2022. The Divorce, Dissolution and Separation Act 2020, which comes into force on that date, will remove the requirement to use one of the five ‘facts’ - adultery, behaviour, desertion, two-year separation with the respondent’s consent or a five-year separation – to prove to the court that the marriage or civil partnership has broken down irretrievably. The main policy objective of the reform is to remove the elements of divorce law that had been shown to provoke, or exacerbate, conflict between the parties, contrary to wider family law and policy.
- The focus is now on the implementation of the Act and devising the procedural rules for its effective operation. One issue that has arisen is the question of costs, that is, who should pay for the divorce process itself. Those costs include the £550 court (petition) fee, plus any legal fees. Currently, it is usual that petitioners asking for the respondent to pay the costs in a divorce granted on adultery, behaviour or desertion will be successful. Costs orders are less common in separation-based divorces.
- The removal of the five facts therefore raises questions about the appropriate basis upon which the court can make decisions about costs in future or, indeed, whether it should still be appropriate for costs to be ordered. This report addresses those questions by analysing how the costs regime has been working under the current law and considering the implications for the new legal framework for costs post-reform.

Methods

- The report draws upon analysis of the costs data collected, but not previously analysed, for the *Finding Fault* study, a large, multi-method study conducted in 2015-17 under the existing divorce law.
- This new analysis uses data relating to costs from qualitative interviews with petitioners and respondents, focus groups and qualitative interviews with family lawyers, analysis of court files of 300 undefended and 150 defended cases, observation of 292 cases being scrutinised, and interviews with legal advisers and judges.

Key findings

- The analysis identified multiple problems with how the current costs regime operated in practice. Some of those problems mirror those found by the earlier *Finding Fault* research in relation to the divorce process itself, including differential access to justice, procedural fairness and conflict triggered, or exacerbated, by the legal process.
- Costs were not equally accessible to all petitioners. Only a fifth of petitioners claimed costs, but were almost guaranteed to be awarded costs if they did apply for them. Both applications and orders for costs were far more likely where the petitioner was legally represented and for those using the adultery and behaviour facts. Only 3% of unrepresented petitioners got costs, compared to 34% of represented petitioners. In total, 90% of costs awards were for fault divorces.

- Decisions about whether a petitioner is entitled to a costs order are often made by legal advisors (legally qualified court service employees) and are usually endorsed by a judge when the divorce or dissolution order is made.
- The decision-making process appeared both highly formulaic and procedurally unfair to respondents. Costs were awarded in fault cases regardless of the respondents' objections. The justification was that respondents could ask for an oral hearing to contest the decision. However, that remedy was inaccessible to litigants in person or risked exacerbating conflict for represented parties.
- More broadly, there were multiple indicators that the legal process caused or exacerbated conflict between the parties. Some of this was due to the arbitrariness of the rules on costs, with fault respondents angry that costs were awarded when allegations might not be accurate or where they could equally have been the petitioner. The adversarial language and horse-trading around costs also runs contrary to wider family policy which focuses on attempting to reduce conflict between parties.
- Many of the difficulties around costs can be attributed to the fault-based premise of current practice. However, simply removing fault may not remove all problems. There was evidence that whether and how one claimed for costs could reflect moral judgements and attribution of blame between the parties that did not map neatly onto the five facts.
- There was also a strong message from some interviewees that the £550 cost of the divorce petition can put extreme pressure on family finances post-separation, regardless of whether costs were claimed or awarded.

Implications for the Divorce, Dissolution and Separation Act 2020 (DDSA)

- The removal of the five facts from the legal framework will mean that the existing Family Procedure Rules are likely to assume a much greater significance in relation to costs. The Rules provide a broad framework for costs, but do leave some issues unresolved that could undermine the policy goals of the DDSA.
- The report recommends that costs in matrimonial cases should only be available on the basis of litigation misconduct and that 'conduct' is tightly defined to exclude conduct prior to proceedings and/or as a consequence of proceedings. Costs may therefore only be claimed at conditional order stage, not on application
- It further recommends that any costs awards are restricted to compensation for additional expenses arising directly from the litigation conduct, therefore excluding the initial application (petition) fee or initial legal advice.
- The report recommends great focus on measures to prevent difficulties giving rise to litigation misconduct. Those measures could include: freezing or reducing the issue fee of £550 so that its financial significance is reduced; encouraging the voluntary sharing of the costs of the application; ensuring that information for respondents is clear and accessible, sets out precisely what steps respondents must take together with clear, but respectful, warnings about potential liability for costs for delayed or non-response; and ensuring that family justice stakeholders - lawyers, HMCTS and the judiciary – are clear about the cultural change that the DDSA introduces for costs.
- Finally, the report recommends the monitoring of the operation of the new costs regime to ensure consistency with the policy aims of the DDSA.

2. Introduction

The Divorce, Dissolution and Separation Act 2020 (hereafter 'DDSA') is due to be implemented on 6th April 2022. The Act represents a major reform of the basis for divorce and civil partnership dissolution in England & Wales. Irretrievable breakdown of the marriage or civil partnership will remain as the sole ground for divorce or dissolution. However, irretrievable breakdown will be proved solely on the basis of the applicant's statement to that effect. The current requirement to prove irretrievable breakdown by reference to one of five 'facts' – adultery, behaviour, desertion, two-year separation with consent or five-year separation – will be removed.¹

It will also be possible for the parties to make a joint, rather than just a sole application, as now. In addition, it will no longer be possible to defend the divorce or dissolution, but it will be possible to dispute the case on the basis of jurisdiction or the validity or subsistence of the marriage or civil partnership.

The main policy objective of the reform was to try to remove the elements of the legal process that had been shown to provoke or exacerbate conflict between the parties, contrary to the non-confrontational approach generally taken in family law and policy.² The requirement to evidence irretrievable breakdown had meant a very heavy reliance upon the fault facts, particularly behaviour, as petitioners had sought to avoid a lengthy wait to meet the separation requirements. That was found to result in parties having to work together to manipulate the law to produce an adequate behaviour petition or it might mean respondents having to accept allegations against them that they disputed, but would be unable (or unwise) to defend, and that the court only had time to rubber stamp.³ The *Finding Fault* study summarised the position as "something tantamount to immediate unilateral divorce 'on demand', but masked by an often painful, and sometimes destructive, legal ritual with no obvious benefits for the parties or the state".⁴ The Ministry of Justice's policy goal was therefore to move to a legal process "that does not introduce or aggravate conflict, will better support adults to take responsibility for their own futures and, most importantly, for their children's futures" and "which promotes amicable agreement, which is fair, transparent and easier to navigate, and which reduces opportunities for misuse by abusers who are seeking to perpetrate further abuse".⁵

¹ Adultery is not available as a fact to evidence the irretrievable breakdown of a civil partnership. With this exception, there is no substantive difference between the law on divorce and civil partnership dissolution. Hereafter, 'divorce' or 'marriage' should be read as also incorporating dissolution and civil partnership.

² Ministry of Justice, *Reducing family conflict: Reform of the legal requirements for divorce* (October 2018), especially Chapter 2 'How the current law aggravates family conflict'.

³ Liz Trinder et al, *Finding Fault?: Divorce Law and Practice in England and Wales* (Nuffield Foundation, 2017) available at <https://www.nuffieldfoundation.org/project/finding-fault-divorce-law-in-practice-in-england-and-wales>

⁴ *Finding Fault*, p10.

⁵ Ministry of Justice, *Reducing family conflict: Government response to the consultation on reform of the legal requirements for divorce* (April 2019), p 5.

The policy focus has now moved to the implementation of the Act and devising the procedural rules for its effective operation. One issue that has arisen is the question of costs, that is, who pays for the divorce process itself.⁶ This is an issue of real financial and emotional significance for the parties, given that the court fee itself is £550 and any legal fees will be at least a few hundred pounds.

It is also of legal and policy significance as whether the petitioner is granted costs currently is largely determined by whether the divorce is granted on a fault or a separation fact. The full legal position is set out below, but practice is that petitioners are generally granted costs against the respondent in adultery, behaviour and desertion cases, whereas separation cases do not usually attract costs. The removal of the five facts does therefore raise questions about the appropriate basis upon which the court can make decisions about costs in future or, indeed, whether it will still be appropriate for costs to be ordered.

There has been no previous empirical research on costs in divorce. However, concerns about costs were raised by the Booth Committee report on Matrimonial Causes Procedure⁷ in the mid-1980s. The committee noted the potential unfairness to the respondent in undefended fault cases where “The court hears no evidence and is in no position to assess whether or not it is just to make an order for costs. It is very much thrown back to the expedient that costs should follow the event and that where the petitioner seeks such an order it should be made.” The Committee noted that the implication that the respondent was to blame for the divorce and so must pay costs “may be far from the reality of the situation” and would be likely to cause “considerable bitterness”.⁸ The Committee recommended that there should be no costs in undefended cases.⁹

This report therefore explores how the costs regime has operated under the existing law, particularly in relation to the fairness of the process and any impact on conflict between the parties. It then considers what lessons might be drawn from that analysis for costs under the new Act, particularly given the policy goal of making the legal process of divorce less conflictual and establishing a legal process that is fair, transparent and easier to navigate, and which reduces opportunities for misuse.

⁶ How the finances of the couple are to be divided post-separation or dissolution is an entirely separate process. This report deals only with the question of who should pay the costs of the legal process to secure the divorce or dissolution, not the financial consequences of that divorce or dissolution.

⁷ Booth Committee, *Report of the Matrimonial Causes Procedure Committee* (HMSO, 1986)

⁸ Para 4.199

⁹ Para 4.202

3. Methods

The report draws upon analysis of the costs data collected, but not previously analysed, for the *Finding Fault* study, a large, multi-method study conducted in 2015-17 under the existing divorce law. The research was designed to shed light on two key processes: the production of divorce petitions and scrutiny of entitlement to a divorce, both relevant to discussion of costs.¹⁰

This further analysis of the data on costs explores three main questions:

1. How did the costs regime operate in practice?
 - Who applied for what and why?
 - What were the outcomes of applications and what shaped decisions?
2. How well did the costs regime work?
 - What was the perceived impact of the process on relationships, if any?
 - How fair was the process?
3. What are the likely implications for costs under the DDSA, given past practice?
 - What will be the new legal framework for costs in the absence of the five facts?
 - How are the parties and the courts likely to behave post-implementation? What impact is the removal of facts likely to have on a) applications for costs and b) decision-making?
 - To what extent will reform negate any problems associated with the costs regime under the old law and/or introduce new ones?
 - What do the lessons of the past suggest about how any costs regime should be constituted in future?

The costs analysis draws on three elements of the *Finding Fault* study: the *petition journey study* designed to shed light on what factors shape who petitions and on what basis, the *court scrutiny study* to explore the scrutiny process in a sample of 300 undefended cases and the *contested cases study* designed to explore the nature and outcomes of cases where there was an intention to defend or an actual defence. Details of each study are set out in Table 3.1.¹¹

¹⁰ A comprehensive technical appendix setting out all the components of the project is available at <https://mk0nuffieldfounpg9ee.kinstacdn.com/wp-content/uploads/2019/11/Finding20Fault20Technical20Appendix1.pdf>

¹¹ The study also included a national opinion survey and comparative analysis, but no costs data was gathered for those elements.

Table 3.1: Methods and samples for the three study elements relevant to costs

Study element	Method	Sample size	Sample source
1. Petition journey study	Qualitative interviews with petitioners and respondents	110 interviews with 81 people (57 petitioners, 22 respondents, 2 other)	Wikivorce ¹² ; Splitting Up? ¹³ and Resolution ¹⁴
	Focus groups with lawyers	4 regional focus groups with 5-8 participants in each	Volunteers recruited via Resolution
2. Court scrutiny study	Main court file analysis	300 divorce cases issued Q4 2014 to Q4 2015 (75 from 4 Regional Divorce Centres (RDCs))	Samples identified by Ministry of Justice (MoJ) Analytical Services
	Observation of scrutiny process	17 observation sessions from 4 RDCs scrutinising a total of 292 cases	Negotiated locally with approval from HMCTS and the Judicial Office
	Interviews with legal advisers and judges	16 from 4 RDCs	Approval from HMCTS and the Judicial Office
3. Contested cases study	Contested cases court file analysis	100 files (25 from each of 4 RDCs) where there was an intention to defend	Samples identified by MoJ Analytical Services
	Contested cases court file analysis – Answers booster sample	50 files (from 3 receiving courts) where an Answer was filed	Samples identified by HMCTS
	Interviews with family lawyers about high conflict cases	Interviews from four areas	Volunteers recruited via Resolution

¹² Wikivorce – an online service providing advice and resources to support people through the divorce process <https://www.wikivorce.com/divorce/>.

¹³ Splitting Up?: Put Kids First - an online space hosted by OnePlusOne where people can access a programme on skills to ease the pressure on children and develop a parenting plan.

¹⁴ Resolution represents around 6,500 family justice professionals, the vast majority of whom are family lawyers.

4. The current legal framework for costs: a hangover from the distant past

Before looking at the empirical evidence on how costs have worked in practice to date, it is important to understand the current legal framework and how it has developed over time. As we will see, the origins of the law on costs go back to at least the nineteenth century and much was left largely unchanged by the last major reform of divorce law in 1969. This has left a legacy that has been increasingly at odds with the evolution of family law.

4.1 What can be claimed?

Currently, the petitioner or applicant may claim costs from the respondent in relation to a divorce or civil partnership dissolution. The costs that may be claimed include any associated court fees. Most often, this will mean the fee for issuing the divorce petition (or application for civil partnership dissolution). That fee increased from £410 in March 2016 to £550.¹⁵ In some cases, there may be fees for additional court application(s), including to amend a petition (£95).

Besides court fees, the petitioner may also ask the court to order the respondent to pay the petitioner's legal costs. Costs may vary from a few hundred to thousands of pounds. Where there are difficulties with service, the petitioner may also seek the costs of effecting service. Costs will vary but a process server costs around £150-200.

4.2 By whom and on what basis?

The law that determines whether costs are granted has been fairly settled since the early seventies. At its most general, the court has a wide discretion to “at any time make such order as to costs as it thinks just”.¹⁶ Costs in matrimonial proceedings are, at least in theory, on a clean sheet basis, that is with no presumption about whether an order should be made, or on what basis. The general civil rule that ‘costs follow the event’, in other words that the ‘loser’ pays, is specifically disapplied in family proceedings.¹⁷ Rayden & Jackson note that “There is a wide discretion and each case will turn on its facts”.¹⁸

However, whilst the theoretical starting point for costs in matrimonial proceedings is a clean sheet, in practice the practitioner texts set out ‘guidance’ on how that discretion is generally exercised in practice. As we see below, the ‘guidance’ as set out in the practitioner texts might be better characterised as fairly fixed ‘rules’ in practice.

The other important point to note is that, despite the theoretical ‘clean sheet’ starting point, in practice costs in matrimonial cases are largely fault-dependent. In other words, whether costs are ordered against a respondent is determined largely upon which of the five facts was used to evidence irretrievable breakdown.

¹⁵ Fee remission is available for those on benefits or very low incomes, see <https://www.gov.uk/get-help-with-court-fees>

¹⁶ Family Procedure Rules (hereafter FPR) 2010 r 28.1

¹⁷ FPR r 28.2 disapplies CPR r 44.2(2)

¹⁸ Trowell & Williams eds, *Rayden & Jackson on Relationship Breakdown, Finances and Children* (LexisNexis 2021) para 29.137.

Where a petition is brought on a fault ground – adultery, behaviour or desertion – the practitioner texts are agreed that costs will generally be ordered against the respondent.¹⁹ Wilkinson & Hunton note costs are “*usually* awarded to the party who is found to have been aggrieved” in fault cases;²⁰ Cook on Costs note “*most* courts appear to order costs against the respondent when one is sought” for fault facts;²¹ Rayden & Jackson state that “courts *often* order costs in fault cases”²²; and Butterworths note that “it is *usual*” for costs to be made in fault proceedings, subject to objections from a respondent.²³

In contrast, the consensus is that costs in two- and five-year separation cases are awarded “much more rarely”²⁴ or “not usually awarded”.²⁵

There is also a distinction between the separation facts. In two-year separation cases it is “not usual”²⁶ to order costs, unless agreed by the parties. The court may make an order for the parties to share costs, if agreed.²⁷ However, respondents are entitled to give consent to the divorce on condition of no liability for costs.

The position is slightly different for five-year separation cases. In those cases, orders for costs should not normally be made,²⁸ unless either party has behaved in a way that is plainly unreasonable in the proceedings, leading to increased costs.²⁹

4.3 Why is there a distinction between fault and separation cases?

Until 1969, there were four grounds for divorce - adultery, desertion, cruelty and incurable sanity – with the first three based on fault or ‘matrimonial offences’. Those matrimonial offences carried with them a moral imperative that the ‘guilty’ party should pay, not just by a decree of divorce against them, but also financially. Historically, that financial penalty had been in the form of actions for criminal conversation in adultery cases. In the nineteenth and twentieth centuries that penalty was converted into damages against the co-respondent.³⁰ Importantly, it had also meant orders for costs of the divorce proceedings against the respondent and/or co-respondent throughout the nineteenth and twentieth centuries.

¹⁹ Costs may also be ordered against a co-respondent – the ‘third party’ – in adultery cases.

²⁰ Wilkinson & Hunton, *Costs in Family Proceedings* (2nd edn, Bloomsbury 2020) para 4.40(b). Emphasis added.

²¹ Middleton & Rowley, *Cook on Costs* (LexisNexis 2021) para 39.17. Emphasis added.

²² Trowell & Williams eds, *Rayden & Jackson on Relationship Breakdown, Finances and Children* (LexisNexis 2021) para 29.132. Emphasis added.

²³ Howell, Montgomery & Moor, *Butterworths Family Law Service* (LexisNexis 2021) para 2048. Emphasis added.

²⁴ Trowell & Williams eds, *Rayden & Jackson on Relationship Breakdown, Finances and Children* (LexisNexis 2021) para 29.137.

²⁵ Wilkinson & Hunton, *Costs in Family Proceedings* (2nd edn, Bloomsbury 2020) para 4.39(a).

²⁶ Howell, Montgomery & Moor, *Butterworths Family Law Service* (LexisNexis 2021) para 2048

²⁷ *Hymns v Hymns* [1971] 3 All ER 596; *Beales v Beales* [1972] 2 All ER 667.

²⁸ *Chapman v Chapman* [1972] 3 All ER 1089 (CA); *Grenfell v Grenfell* [1978] 1 All ER 561 (CA)

²⁹ *Wright v Wright* [1973] 3 All ER 932n; *Hadjimilitis v Tsaviris (costs)* [2003] 1 FLR 81.

³⁰ Damages for a petitioning husband (but not wife) in adultery cases were still available in the 1960s, as provided for by Section 41 of the Matrimonial Causes Act 1965.

The Divorce Reform Act 1969 replaced the old grounds of adultery, desertion, cruelty and incurable sanity with a single, and non-fault, ground of irretrievable breakdown of the marriage.³¹ However, irretrievable breakdown had to be evidenced by one of five facts. The separation facts – two years with consent, otherwise five years – represented an entirely new legal approach. In contrast, the three faults, or conduct, facts of adultery, behaviour and desertion were essentially a carry-over of the pre-1969 matrimonial offences of adultery, cruelty and desertion.

There appears to have been fairly limited consideration of how costs might be factored into this new legal framework. There was no mention of costs in parliament during the passage of the Divorce Reform Bill. Whilst the Law Commission did manage to secure the abolition of damages for adultery,³² the Commission had not adopted a clear position in relation to costs, other than to suggest that all the factors in the case should be considered in making cost orders.³³ There was also some evidence that the concept of the matrimonial offence still lingered in the Commission's thinking. The Law Commission did not, for example, oppose the normal practice of the co-respondent still being liable for costs in adultery cases which Cretney argues was contrary to the principles of the 1969 Act.³⁴

It was therefore unclear what would happen once the Act was implemented on 1st January 1971. The author of the leading practitioner text of the time thought that the adoption of irretrievable breakdown as the ground "will initially result in problems as to the costs of the proceedings".³⁵ However, there was an expectation of some continuity with the previous costs regime. Passingham argued that costs "must necessarily" be linked to the choice of facts. As before, he also suggested that for behaviour and desertion "it seems likely that... costs will normally follow the event. The decree may not be based upon the commission of a matrimonial offence, but the facts proved do reveal such an offence".³⁶ For adultery he thought that costs would depend upon whether the court saw the co-respondent as the instigator of the breakdown of the marriage.³⁷

Passingham's predictions proved to be largely accurate. Despite the adoption of the new non-fault ground of irretrievable breakdown, costs for fault divorces continued to be granted on the same basis as before 1969. In the absence of a policy lead, or of any significant

³¹ Later consolidated into the Matrimonial Causes Act 1973. Section 1 of the MCA sets out the ground for divorce until the implementation of the DDSA in April 2022.

³² Law Commission, *Report on Financial Provision in Matrimonial Proceedings* (Law Com No 25, 1969) para 102 recommended abolition of damages for adultery. That was enacted by Section 4 of the Law Reform (Miscellaneous Provisions) Act 1970.

³³ The Law Commission noted that a 'costs should follow the event' rule would not be appropriate if the Divorce Reform Bill were implemented. The Law Commission's view may have been based on the mistaken view that that it would be the (no-fault) ground for divorce, rather than the facts themselves, that would shape decisions on costs, noting "Divorce jurisdiction will then [post-DRA] be based on breakdown rather than on matrimonial offence" Law Commission, *Report on Financial Provision in Matrimonial Proceedings* (Law Com No 25, 1969) para 105.

³⁴ Stephen Cretney, 'Law Reform (Miscellaneous Provisions) Act 1970' (1970) 33 *Modern Law Review* 534.

³⁵ Bernard Passingham, *Law and Practice in Matrimonial Causes* (Butterworths 1971) 182.

³⁶ Bernard Passingham, *Law and Practice in Matrimonial Causes* (Butterworths 1971) 186.

³⁷ Bernard Passingham, *Law and Practice in Matrimonial Causes* (Butterworths 1971) 187.

litigation to reconsider the approach, the courts continued to exercise their discretion on costs for divorces proved on the fault/matrimonial offence facts of adultery, behaviour and desertion by making respondents (and any co-respondents) liable for costs.

In retrospect, this appears surprising given that the Divorce Reform Act had established that the fact alleged was evidence of the reality of the breakdown of the marriage. It was not intended that the fact proven was evidence as to *why* the marriage had broken down. Indeed, it was soon established that the act relied upon did not have to be causally related to why the marriage broke down.³⁸ The upshot was that a respondent could be liable for costs even though it may have been the petitioner's behaviour that had triggered the breakdown of the relationship. As we will see below, this has been a source of unfairness for respondents ever since.

In contrast to the fault facts, there was no existing costs regime for the new separation facts. Given the absence of any substantive discussion of costs for separation cases, it was left to the courts to devise a new regime. The courts recognised immediately that separation should be treated differently. In the very first reported divorce granted on the two-year fact, there was no order for costs against the respondent husband on the basis that there had been no findings on his conduct.³⁹

The President of the Family Division, however, was not content with the costs falling solely upon the petitioner. In *Hymns v Hymns* he set out explicitly to counter the *Kershaw* position by establishing the principle that each party should pay half of the costs in consent cases,⁴⁰ later describing the approach as based on "fairness and justice".⁴¹

The equal division principle lasted less than a year. In *Beales v Beales* the President had to backtrack and accept that it was possible for a respondent to, in effect, trade their consent to a two-year separation divorce to avoid any liability for costs. That remains the current position for two-year with consent cases – that the court may endorse an agreement for shared costs, but cannot impose shared costs.

The situation in five-year separation cases remained unclear. Lord Denning used *Chapman v Chapman* to provide guidance that he reported that judges were seeking. Building on the approach to consent cases in *Beales*, Denning's approach was that, in the absence of fault, it was the initiator (or buyer) who should pay: "He is the one who wants the divorce. He should pay the costs of it".⁴² Further, allowing claims for costs would only encourage litigation to resist costs, adding to the expenses for both parties. In five-year separation cases therefore, it was established that there should ordinarily be no claim or order for costs.

The somewhat different approach to two-year consent and five-year separation cases may also reflect moral assumptions about the nature of the cases. Divorces on two-year separation were generally conceptualised as reflecting mutual decisions of the former

³⁸ *Stevens v Stevens* [1979] 1 WLR 885.

³⁹ *Kershaw v. Kershaw*, [1971] The Times, January 12.

⁴⁰ *Hymns v Hymns* [1971] 3 All ER 596 per Sir George Baker P.

⁴¹ In *Beales v Beales* [1972] 2 All ER 667.

⁴² *Chapman v Chapman* [1972] 3 All ER 1089 (CA) at 1091.

couple, whereas five-year separations were typically portrayed as reflecting a reluctant, possibly distraught, respondent who it would be unfair to also penalise financially.⁴³

In the following sections we explore how this legal framework works in practice and, in particular, the implications of continuing to base decisions about costs on the fact chosen.

5. Making claims for costs: what was being sought by whom and why?

We now turn to look at the empirical evidence of how costs have been used under the current law, prior to implementation of the Divorce, Dissolution and Separation Act 2020. We start by looking at the volume and composition of costs cases.

5.1 Only a minority of undefended cases involved costs

Claiming costs is a two-stage process. A petitioner must first register an intention to claim costs on the petition to alert the respondent (and any co-respondent) to the issue.⁴⁴ The petitioner must then repeat that request at application for decree nisi stage to signal to the court that costs are still being sought.

At petition stage, 41% of the *Finding Fault* petitioners registered an intention to claim costs. That figure fell to 24% at decree nisi stage. Taking both stages together, only a fifth or 21% of the 272 petitioners applying for decree nisi were *always claimers*. A further fifth (21%) were *initial claimers* having claimed only at petition stage, and 3% were *late claimers* who had only sought costs at decree nisi stage. Just over half (56%) of the sample were *never claimers*, having made no attempt to claim costs at any stage of the court process.

Costs can also be agreed privately by the parties, outside of the court process. According to respondents,⁴⁵ an agreement for costs was in place in 30 of the 150 cases where there was no claim for costs on the petition. This *privately ordered costs* group represents 12% of all 250 cases reaching decree nisi. Whilst that is likely to be an underestimate of private agreements, it means that costs were sought or had been agreed privately in a third of all cases reaching decree nisi.

5.2 Claims for costs could be attempts to secure compliance with the process

We noted above that only half of petitioners who had indicated an intention to apply for costs on the petition actually did so on the application for decree nisi. Part of the explanation for that drop is that some initial claims may have been designed more to encourage compliance with the process, rather than to recover the costs of the divorce. A third (36%) of the 122 petitions seeking costs at petition stage were what we called ‘contingent costs claims’, that is

⁴³ Passingham, for example, argues that five-year separation cases were “principally the fault of the petitioner” as otherwise they would rely on desertion or two-year’s separation with consent: Bernard Passingham, *Law and Practice in Matrimonial Causes* (Butterworths 1971) 186

⁴⁴ FPR 2010 7.12 (9). The guidance notes for the D8 petition form also stated (at the time of fieldwork) that costs could only be claimed if done so on the petition.

⁴⁵ As reported on the Acknowledgement of Service. Of course, petitioners may have disputed that there was an agreement.

costs would only to be sought if the petition were to be defended and/or there was unreasonable delay in returning the acknowledgement of service.

It is not possible to say for certain that contingent costs claims did encourage respondent compliance, but it is notable that 85% of the contingent costs claims were dropped at decree nisi, compared to 29% of unqualified claims. In most of these dropped contingent cases there had been no defence or service problems.

5.3 Costs claims were strongly associated with fault facts

As might be expected given the legal framework set out above, there were significant differences in cost-seeking between fault and separation cases. At petition stage, more than half of behaviour petitioners and two-fifths of adultery petitioners were seeking costs, compared to a fifth of separation petitioners (Table 5.1). Two of the three desertion petitioners also sought costs.

That pattern continued at decree nisi. As Table 5.1 shows, just over a third of behaviour and adultery petitioners were seeking costs, compared to just 9% of two-years and 5% of five-year separation cases.

Table 5.1: Percentage of cases where costs were sought at petition and decree nisi, by fact

	Adultery	Behaviour	Desertion	Two-years	Five-years	All facts
Costs sought on petition	42%	61%	67%	17%	21%	41% (n=299)
Costs sought at decree nisi	36%	37%	0%	9%	5%	24% (n=273)
Costs sought at both stages	29%	34%	0%	8%	3%	21% (n=196)

In contrast, parties who were reported to have reached their own agreement outside of the court process were more likely to be proceeding on separation facts. The 30 *privately ordered costs* group consisted of 16 two-years with consent cases and three five-years separation cases, with just 11 fault petitions.

Although the sample is small, there were clear differences in the use of unconditional and contingent cost claims by fact. As indicated by Table 5.2, petitioners relying on fault-based facts were more likely to seek costs on an unconditional basis, whereas separation petitioners were more likely to seek costs only in the event of a defence or delay in response.

Table 5.2: Percentage of cases with unconditional and contingent costs at petition stage, by fact

	Adultery	Behaviour	Desertion	Two-years	Five-years	All facts
Unconditional costs	71%	71%	100%	40%	22%	64%
Contingent costs	29%	29%	0%	60%	78%	36%
Total cases	14	82	2	15	9	122

5.3 Represented petitioners were far more likely to claim costs

Besides the fact, a second determinant of whether the petitioner applied for costs was legal representation, or lack thereof. Only a tenth of litigants in person (LiPs) ever indicated that they would apply for costs, including just 3% ‘always claimers’ who sought costs at both stages (Table 5.3). In contrast, where petitioners were represented or advised, it was much more likely that costs would be claimed through the court, or less commonly, by private agreement. Two-thirds of represented or advised petitioners applied for costs at some stage, with a third claiming at both stages. A further 18 of 30 cases where costs had been privately agreed were represented.

Table 5.3: Pattern of costs claiming by representation status, cases reaching decree nisi (percentage)

	Litigants in person	Represented or advised ⁴⁶	All cases
Never claimers	88%	32%	56%
Early only claimers	6%	31%	21%
Late claimers	3%	2%	3%
Always claimers	3%	35%	21%
Total cases	116	156	272

Represented petitioners were also twice as likely to seek unqualified costs, compared to contingent claims (72 compared to 38 cases respectively). Unrepresented petitioners were equally likely to use contingent and unqualified claims on the petition (6 each of 12 cases).

What explains this significant disparity between the cost-claiming behaviour of represented parties and LiPs? First, it is important to recognise that represented parties were significantly more likely to use fault facts that are closely associated with claiming costs.⁴⁷ Taking the sample as a whole, 69% of represented/advised petitioners relied on the adultery, behaviour or desertion facts, compared to 42% of LiPs.

⁴⁶ There were 11 petitioners ‘receiving advice’. Their cost-seeking profile was very similar to represented parties. They have been grouped with represented parties given the small sample sizes.

⁴⁷ Liz Trinder et al, *Finding Fault?: Divorce Law and Practice in England and Wales* (Nuffield Foundation, 2017), see especially chapter 3.

That said, fact choice is only a partial explanation given that over a third of LiPs also used fault facts. Represented parties will, of course, have more incentive to claim given the additional expense of covering their legal fees. Yet that is also an insufficient explanation given that, unless exempt, all petitioners will have to pay the quite considerable £550 issue fee, often the largest single expense. Indeed, the great majority (84%) of LiP petitioners did have to pay the issue fee, little different from represented parties (87%).

A further explanation is lack of accessibility – that LiPs either do not realise that they can pursue costs and/or they do not have the skills, capacity and confidence to do so. As we set out below, the costs process is fairly opaque and quite complex, resulting in errors by both litigants (and their advisors) and the court. The requirement, for example, that costs must be claimed on both the petition and D80 was not particularly clear or prominent in court materials when the fieldwork was conducted. Not surprisingly, all but one of the six ‘late claimers’ were LiPs.⁴⁸

A possible parallel lies in the very limited take-up of financial orders⁴⁹ by the LiPs within the sample, similarly requiring significant knowledge, capacity and confidence. It is striking that 63% of represented parties in the sample were seeking both costs and financial orders for the petitioner, compared to just 5% of LiPs. That same disparity continued at decree nisi where 27% of represented parties were seeking costs and financial remedy orders, compared to just 3% of LiPs.

5.3 Women petitioners were more likely to claim costs

The other influence on the likelihood of an application for costs was gender. A third of women were always claimers, compared to only 6% of men (Table 5.4). Women were also more likely than men to claim unconditional costs. Nearly two-thirds of the costs claims by women were unconditional, compared to a third of those by men.

Table 5.4: Pattern of costs claiming by gender, cases reaching decree nisi

	Male	Female	All cases
Never claimers	68%	48%	56%
Early only	22%	19%	21%
Late claimers	4%	2%	3%
Always claimers	6%	31%	21%
Total cases	107	165	272

The reason for the apparent gender difference is at least partly explained by patterns of representation and fact use. Historically, women have always relied more on fault facts than men. In this sample, 61% of female petitioners relied on fault facts, compared to 50% by male petitioners. Women were also more likely to be represented than men, 59% compared to 52%. Both factors are related to likelihood of claiming costs.

⁴⁸ All six failed to get costs.

⁴⁹ For example, maintenance pending suit, periodical payments, lump sum order or property adjustment order.

6. What orders were made: the formulaic nature of decision-making

6.1 The delegation of decision-making

We now consider the outcomes of those applications and what factors appear to shape the decision-making process. As we will see in this section, decision-making on costs was quite rule-bound, with deviations from those rules appearing to be a result of errors, rather than a considered exercise of discretion to “at any time make such order as to costs as it thinks just” as permitted by the FPR.⁵⁰

The formulaic approach to decision-making may have been enabled, or required, by the fact that it was legal advisors,⁵¹ rather than judges, who were in effect the decision-makers on entitlement to costs orders. The practice in the Regional Divorce Centres was that part of the role of legal advisors when processing applications for decree nisi was to identify whether costs had been claimed and if there was evidence of entitlement to a costs order. One legal advisor described this as “you’re really sort of preparing the ground for [judges] to make a costs order if appropriate... (Legal Advisor #16). In practice, however, it seemed that the ‘preparation’ done by the legal advisors was the de facto decision on entitlement to costs. It was the legal advisors who had the case file information to make the decision, whilst judges only had a list of names when pronouncing decree nisi, unless the case involved a formal objection:

DJ: The certificate that the legal advisor deals with will give what is effectively a provisional order for cost. We don’t have the files when we deal with the decree nisi list. You just simply say ‘decree nisi’ and you log cost orders according to the certificates unless somebody has filed a proper objection. So, there’s no reconsideration of the cost orders.

Interviewer: Right, okay, you're going on the legal advisor's certificate?

DJ: Yes”. (District Judge #3)

In these circumstances, and given the real time pressures on legal advisors,⁵² it is perhaps not surprising that the discretionary element appears missing. Legal advisors are not judicial officers and so it would be surprising if they exercised wide discretion.

Nor would they have the time or resources to do so, even if it were appropriate. Aside from time, the analysis of the files and observation of legal advisors indicated that there was no contextual information provided or sought in relation to costs, such as the financial position of the parties or why a costs order might be fair or not.⁵³ Nor were there any cases where litigation behaviour appeared to have been factored into decision-making or awards.

⁵⁰ Family Procedure Rules 2010 r 28.1.

⁵¹ Formerly known as Clerks to the Justices. Legal advisors are legally-trained employees of HMCTS, but not judicial officers.

⁵² Our observational data showed that legal advisors took only four minutes on average to process each case, including any applications for costs. See Liz Trinder et al, *Finding Fault?: Divorce Law and Practice in England and Wales* (Nuffield Foundation, 2017) especially p67-70.

⁵³ The standard paper Acknowledgement of Service form in use during fieldwork had a blank space with only room for a few words next to the question about the respondent’s view on costs.

6.2 The success rate for petitioners was very high

Orders for costs were made in only 21% of all cases reaching decree nisi stage. However, that figure reflects the low number of applications for costs, not a high rate of refusal. We saw above that only a select group of petitioners applied for costs, primarily those with legal representation using fault facts. However, once over the costs application hurdle, the petitioner was almost guaranteed success.

Not surprisingly, none of the ‘never claimers’ were successful (Table 6.1). Conversely, only five ‘always claimer’ applications for costs were refused. That very high 91% success rate would be even higher, at 96%, if three apparently erroneous refusals of ‘always claimer’ applications were included in the calculation.⁵⁴

Table 6.1: Orders for costs made by procedural compliance, cases reaching decree nisi

	Number of cases	Order for costs made %
Never claimers	149	0%
Early-only claimers	56	5%
Late-only claimers	7	14%
Always claimers	56	91%
Total cases	268	21%

Besides procedural compliance, Tables 6.2-6.4 illustrate the key factors that shaped the outcomes. Consistent with the legal framework described above, fact-choice was a critical determinant of outcomes of costs applications. Costs orders were made in a third of all adultery and behaviour cases, but only one in twenty separation cases (Table 6.2).

That pattern largely reflected who applied, rather than significant differences in the success rate by fact. The ‘success’ or ‘strike’ rate was high for fault facts, ranging from 93-100% for behaviour and adultery cases respectively (Table 6.2). The success rate for separation facts were also high, but the very small numbers conceal some differences. Two of the six two-year separation applications were refused, whilst the only five-year separation award was made in error.

Table 6.2: Orders for costs and success rate by fact, cases reaching decree nisi

	Adultery	Behaviour	Desertion	Two-years	Five-years	All cases
Total cases reaching decree nisi	30	123	3	78	37	271
Percentage of cases with order for costs	30%	33%	0%	5%	5%	21%
Total ‘always claimer’ cases	9	40	0	6	1	56
Success rate (as % of ‘always claimers’)	100%	93%	-	67%	100%	91%

⁵⁴ Errors are discussed further in Section 6.3 below.

The outcomes of applications by representation also largely follow what one might expect given the distribution of applications. Only a tiny number of LiPs applied for and got costs, compared to represented parties. As Table 6.3 shows, just 3% of LiPs got costs, compared to 48% where both parties were represented. As with fact choice, the small sample sizes produced some anomalies in relation to success rates. All three of the very small self-selecting group of LiPs who applied for costs were awarded them, with the refusals all being made to represented parties.

Table 6.3: Orders for costs and success rate by representation, cases reaching decree nisi

	Neither rep	Respondent only	Petitioner only	Both rep	All cases
Total cases reaching decree nisi	110	4	101	56	271
Percentage of cases with order for costs	3%	0%	26%	48%	21%
Total 'always claimer' cases	3	0	25	28	56
Success rate (as % of 'always claimers')	100%	-	88%	93%	91%

In terms of gender, the higher proportion of costs applications by women were reflected in the fact that just under a third of women got a costs order compared to only a tenth of men (Table 6.4). However, the only refusals for 'always claimers' petitioners were women. The smaller proportion of men who did apply were always successful.

Table 6.4: Orders for costs and success rate by petitioner gender, cases reaching decree nisi

	Male	Female	All cases
Total cases reaching decree nisi	109	162	271
Percentage of cases with order for costs	8%	29%	21%
Total 'always claimer' cases	6	50	56
Success rate (as % of 'always claimers')	100%	90%	91%

6.3 The formula underpinning decision-making

Based on case file analysis, observation and interviews with legal advisors and judges, we identified the basic formula that appeared to govern decision-making on costs. In broad terms, it could be expressed as:

$$\text{fact} + \text{request on D8} + \text{request on D80 (+ agreement reported by petitioner)} - \text{error} = \text{order for costs}$$

Thus, a fault petitioner ticking the appropriate boxes for costs on both forms would get an order for costs, unless there is an alternative agreement and/or the court makes an error. We describe the operation of these rules below.

Rule 1: procedural compliance – the double tick

Unless the court made an error, an essential step to securing costs was to comply fully with the procedural requirements of the petitioner asking for costs on both the D8 petition (so the respondent was aware of the position) and on the D80 when applying for Decree Nisi. The importance of the double-tick was highlighted above in the outcome data - 51 of the 56 (91%) *always claimers* petitioners who asked for costs on both the petition and D80 were granted them (Table 6.1 above).

Our observations of legal advisors processing cases and qualitative interviews with judges and legal advisors highlighted the critical importance of that procedural compliance: “The absolute basic is they’ve got to put it in both [the petition and D80]” (District Judge 3). It is important to note that ‘asking for costs’ simply meant ticking a single box on each form. No further background information or justification was required.

However, there were also four cases where a costs order was made even though costs were not claimed at both stages. These did not appear to be exceptions to the procedural compliance rule, but instead all four seem to have been an oversight/errors by the court. Three of the four were *early-only* claimer cases where the court appeared to have missed that costs had not been claimed on the D80. In those cases, it is unlikely that costs were granted on the basis of an exercise of discretion as it would not be clear that the petitioner was still seeking costs. The sole successful *late-claimer* case also happened to be a five-year separation case and so should not have attracted costs in any case.

Rule 2: Endorsing any agreement about who should pay what (as set out by the petitioner)

As a legal advisor noted in interview, the second ‘rule’ was to look for any agreement between the parties: “I mean obviously if the petition’s ticked for costs and the statement’s ticked for costs, then you’d be looking towards whether or not there’s been any agreement to pay or any division” (Legal advisor #16).

There were no examples in the file or observation study where the court did not endorse what was presented as an agreement by the petitioner. There was one case where the petitioner sought full costs and the respondent referred to an alternative ‘agreement’.⁵⁵ In that case, it was the petitioner’s view – that there was no agreement - that prevailed.

Rule 3: Decisions about costs are determined according to the fact pleaded. Specifically, the court will order costs against the respondent in behaviour cases, despite respondent objections

Absent an agreement (and errors), the court file and observational data showed that costs were always ordered in behaviour cases. There was no consideration of whether it would be fair or just to do so in the particular case and orders would be made regardless of

⁵⁵ In case M201 the respondent claimed on the Acknowledgement that it had been agreed that costs would be equally shared. A covering letter from the petitioner’s solicitor made no reference to any agreement and noted “we confirm” the petitioner’s claim for full costs against the respondent. Full costs were ordered against the respondent, again without reference to the respondent’s claims about an agreement for shared costs.

respondent objections.⁵⁶ In contrast, no costs were ordered in either of the two cases based on two-year's separation where the respondent had objected to costs. Consistent with *Beales*,⁵⁷ costs were only ordered in two-year's separation cases where there were no respondent objections.

There were ten cases in total where the petitioner had sought costs and the respondent objected on the Acknowledgement to costs being made. Eight of these were behaviour cases and two were two-year separation with consent. All eight of the behaviour respondents had costs orders made against them, despite their objections. Indeed, the presumption in favour of costs in behaviour cases seemed so strong that costs awards were made even when it was not clear that the petitioner was still seeking them. In case M062, for example, the respondent had objected to costs. The costs box on the D80 form had a scribble inside it and the petitioner's initials next it, suggesting that petitioner had decided against following through on the claim for costs. An order for costs was made regardless.

These findings are entirely consistent with the legal position set out above – that fault petitions will result in costs against the respondent, but costs awarded in two-years with consent only by agreement or if shared between the parties. However, although the numbers are small, and we had no examples of respondent objections in adultery, desertion or five-years separation cases, there appears to be no element of discretion at all. The 'guidance' described in the practitioner texts is more appropriately characterised as fixed rules.

Rule 4: Rules 1-3 apply without exception, unless the court falls into error

The observational and file study data showed no evidence of the exercise of discretion in relation to costs, and indeed we questioned above whether it would be possible or appropriate given that it was legal advisors who were, in effect, making the decisions about costs and whilst under considerable time pressures. Where Rules 1-3 were not followed it appeared to be the result of error, rather than a considered choice.

Costs orders being made apparently in error

There were two types of (apparently) erroneous orders: costs being made routinely in five-year separation cases and those where the petitioner had not applied for costs at decree nisi.

The case law indicates that costs should not be granted in five-year separation cases unless a party has behaved unreasonably and that behaviour has incurred or increased costs, for example through evading service.⁵⁸

There were two five-year's separation cases where costs were sought and granted in our relatively small sample of costs cases. Both appeared to be inappropriate applications for

⁵⁶ Respondents are required to return an Acknowledgement of Service which includes the following question about costs: "Even if you do not intend to defend the case do you object to paying the costs of the proceedings? If so, on what grounds?"

⁵⁷ *Beales v Beales* [1972] 2 All ER 667.

⁵⁸ *Wright v Wright* [1973] 3 All ER 932n; *Hadjimilitis v Tsavlis* (costs) [2003] 1 FLR 81.

costs followed by costs orders made in error. In L034 the respondent had returned the acknowledgement promptly and so there appeared to be no basis for the award at all.⁵⁹ The respondent in L072 had lived abroad for many years. Costs were sought on the petition, even though it was a five-years case. There were difficulties with service, but it was unclear whether the respondent was ever served. Costs were awarded against the respondent without explanation, but it seems quite unlikely that the decision was based on an assessment of the respondent's litigation behaviour as in the test set down in *Wright*.⁶⁰

Whilst there were no examples of successful claims that had not been raised on the petition, there were three initial-only cases where costs had not been claimed at decree nisi, but were granted by the court nonetheless.

Costs seemingly refused in error

Only five 'always-claimed' cases were refused. Two of those were separation cases where the respondent objected to costs and so were appropriately refused according to case law. The other three refusals were behaviour cases where there was no obvious reason why the presumption in favour of costs in behaviour cases had been disapplied and the refusal appeared to have made an error. In case M126 there was no agreement or objection from the respondent and so no apparent reason for refusal. In M128 the petitioner sought costs if there was delay or defence. The acknowledgement was not returned, creating delay. There was no explanation on file why the court had not granted costs.⁶¹

The case of L010 was more marginal, but probably still questionable. The petitioner had asked for costs if defended. The petition was not defended, but the petitioner had to get deemed service. It is not clear whether the refusal to grant costs was an oversight or a strict interpretation of the contingent costs 'only if defended' wording.⁶² If so, it would have the effect of encouraging petitioners to always claim full (non-contingent) costs.

7. Challenging decisions: the inaccessibility of the remedy for behaviour respondents

7.1 Reliance upon costs hearings as a safeguard

The current case law provides that respondents to a fault petition may be liable for costs, if claimed and there is no objection. We noted above that that rule is applied rigidly, including in cases where respondents object to costs. There are two potential safeguards in place for respondents in this situation, but as we will see, neither afford much protection against summary decisions that may require them to pay hundreds of pounds in costs.

⁵⁹ The court's error was matched by the errors by the petitioner's legal team. As well as being unaware of the presumption against costs in five-year cases, they also applied for decree absolute too early. Only the second error was picked up by the court.

⁶⁰ This was another case with multiple errors by lawyer and court. Aside from the claim for costs in a five-year case, no Statement of Reconciliation was ever filed, an error that the court missed.

⁶¹ This was a case where the petitioner had alleged very serious domestic abuse on the petition.

⁶² Ironically, the statement of case focused on the respondent's mismanagement of the family finances.

The first potential safeguard is that, according to Butterworths, the court may seek a further statement from the respondent “if not satisfied that the reasons for objecting to payment of the costs are sufficiently explained” to enable the court to reach a decision.⁶³ However, it would seem unlikely that this option could be widely used given the formulaic nature of decision-making in the context of the very limited time available to scrutinise each file. Not surprisingly, there were no examples of this option being used to elicit further information in any of the 592 undefended cases included in our combined court file analysis and observation samples.

The second potential safeguard was the option for respondents to ask for a hearing on costs once notification of entitlement to the costs order has been made. Paragraph 7.21 of the FPR sets out that a respondent may ask for a hearing by giving written notice not less than two days before the pronouncement of decree nisi.⁶⁴

This second option is the one that courts appeared to rely upon when making costs orders in the face of respondent objections on the Acknowledgement. In one of the observations of the scrutiny process, the respondent to a behaviour petition had objected to costs on the basis that the parties had agreed that they would pay their own costs. The legal advisor commented that that was contrary to what the petitioner had said and completed a notification of entitlement to costs on the basis that the respondent could apply for a hearing if they wanted to be heard on the matter.⁶⁵ It seems likely that similar reasoning was employed in the eight costs orders made against respondent objections in the case file sample.

7.2 The limitations of costs hearings as a remedy

Although courts appeared to rely on the remedy of a costs hearing when making costs orders over respondent objections, in practice the mechanism is of limited availability or use to respondents. The process of asking for a hearing is complex and challenging, particularly for LiPs. Of 56 orders for costs, including eight made against respondent objections, only two went to a costs hearing. Nor did any of the three refused behaviour petitioners seek to challenge the court’s (apparently erroneous) decision.

There were no examples of LiPs who were successful in asking for a hearing on costs. One did write a plaintive letter to the court asking it to change the decision, to no avail.⁶⁶ Even solicitors found the rules on costs hearings difficult to navigate, with examples of solicitors arguing with the court about the interpretation of the rules on costs hearings.⁶⁷

The process is also unlikely to be cost effective for represented parties. Our lawyer interviews highlighted that solicitors were generally reluctant to challenge costs orders, recognising that to do so would itself incur further costs, with no guarantee of success:

⁶³ Howell, Montgomery & Moor, *Butterworths Family Law Service* (LexisNexis 2021) para 483.

⁶⁴ In practice, the Regional Divorce Centres had agreed that the time period should be seven days before pronouncement.

⁶⁵ Observation - 11.34 131 File 9, Behaviour, petitioner only represented.

⁶⁶ L185

⁶⁷ L111 involved an exchange of letters about the requirements for notice of intention to attend the costs hearing. The court refused to change its position and the costs order stood.

"It used to be that you'd be sent down to court, particularly as a trainee or newly qualified, to argue about costs. I haven't done that for years; it's just not worth it.... so by the time you've had a ding-dong about a couple of thousand pounds, it's not worth it.... You have to deliver the message carefully, but as lawyers, we tend to be quite pragmatic and say, "Pick your battles. This isn't one of them." But again, this is something that usually happens quite close to the beginning, so you don't want the client to think, "Oh, well you're not fighting my corner then, etc."". (Contested cases Solicitor 10).

Respondents are also not able to claim costs for attending costs hearings. So, unless solicitors were prepared to work pro bono, the only option was to send a respondent who is insistent on challenging costs to argue costs themselves. This is likely, however, to raise the temperature and further damage relations between the parties. The two cases in our court file sample where a costs hearing was held were both already high conflict cases. The costs hearing provided a further opportunity for that conflict to be played out.⁶⁸

There was also some evidence of a possible brinkmanship strategy around costs hearings. In two behaviour cases (M173 and L182) where an entitlement to costs order had been made, the lawyers for the respondents asked for a cost hearing. In both cases the represented petitioners wrote immediately to the court withdrawing the application for costs and asking for the hearing to be vacated. In both cases the reasoning given was to avoid the risk of incurring additional greater costs.

Again, it is hard to see that this is consistent with public policy in seeking to reduce conflict. Both cases were already highly conflicted. The dispute over costs provided an additional battleground for those disputes to be continued. It is also highly likely that the process heightened feelings of injustice for the respondent having to threaten a court hearing to have their say and for the petitioner having costs denied in a case where they would ordinarily be granted.

7.3 Being on the receiving end: a case study

One of the arguments that led to the DDSA was that the divorce process was unfair to respondents who had to simply accept any allegations made against them in behaviour petitions, given the emotional and financial cost of defending a divorce.⁶⁹ In many respects, the process for determining costs mirrors the problems with the divorce process itself. To claim costs, the petitioner has simply to ask for them, with no need to provide any supporting evidence. For fault petitions at least, costs will be granted, regardless of the respondent's

⁶⁸ The outcomes were mixed. In M170 the respondent had proposed on the Acknowledgement that costs were shared. The court instead made a full costs order against the respondent, as sought by the petitioner. The respondent attended the costs hearing in person and his proposal was accepted by the court. In contrast, in L176 the court upheld the original decision to order full costs against the respondent, but 'by consent' after both parties attended the hearing in person.

⁶⁹ Ministry of Justice, *Reducing family conflict: Reform of the legal requirements for divorce* (October 2018) 20-21. For the background research see Liz Trinder et al, *Finding Fault?: Divorce Law and Practice in England and Wales* (Nuffield Foundation, 2017) especially chapter 8 and Liz Trinder & Mark Sefton, *No Contest: Defended Divorce in England and Wales* (Nuffield Foundation, 2018).

objections on paper and even though, as the Booth Committee noted, the court will not be able to assess whether an order for costs would be just.⁷⁰

The other point of similarity with the divorce process is that whilst there is a remedy available for respondents in both processes – defending the divorce or a costs hearing - it is a mechanism that is inaccessible for respondents, particularly LiPs. Even if it were available, it would be counter-productive in terms of increasing both costs and conflict.

A single case study illustrates some of the procedural unfairness for respondents who face summary justice without a viable remedy. L185 was a case where the represented husband petitioned on a strong behaviour petition. He also sought costs into four figures. The respondent wife was a litigant in person. She wrote to the court stating that the husband's statement of case was incorrect and that she was instead a victim of domestic abuse and coercive control. She also objected to costs.

Decree nisi was pronounced with full costs against the wife, following the usual process of making costs orders in behaviour cases, regardless of respondent objections. The wife wrote again to the court to say that she had received a letter from the husband's lawyer stating that she must pay the full costs within 14 days or face bailiffs, with the risk of a custodial sentence if she still could not pay. She told the court that she was on benefits and could not pay.

The court responded to her letter by stating that she must make an application to the court if she wanted the order set aside, but with no further explanation of what that might mean or any reference to the £95 issue fee to make the application. The wife wrote a further letter to the court asking the case to be deferred as she could not pay court costs, clearly not understanding that a formal application was required. No further action was taken by the court and decree absolute was pronounced.

On the face of it, the automatic granting of costs in behaviour cases, regardless of whether it would be fair to do so in the particular case, against respondent objections and without an accessible remedy, is unjust. In circumstances of domestic abuse and coercive control, such as those alleged by this respondent, it also enables the petitioner to use the costs process to continue their apparent victimisation. Clearly, it is not possible to know whether the respondent was indeed the victim of domestic abuse and whether the petitioner was using coercive control as alleged, but at the same time, nor did the court know that when making the order for costs against her.

8. What do costs represent and why do they matter? Costs as a vehicle for conflict

So far, the analysis has focused primarily on the court process and its limitations. In this section we take a step back and explore how costs may impact on the relationship between the parties, particularly the potential to trigger or exacerbate conflict, over and above that

⁷⁰ Booth Committee, *Report of the Matrimonial Causes Procedure Committee* (HMSO, 1986).

caused by the divorce process itself. We start by exploring the evidence that costs can cause conflict and then examine why that might be the case.

8.1 Costs do trigger or exacerbate conflict

There were multiple indicators of costs having caused conflict, from the start of the process through to the end. Indeed, one of the problems with costs is that the issue has to be raised at the start and that can set the tone for the whole process:

What doesn't help at the beginning is that with the recent changes you automatically have that claim for costs in right at the beginning, which in itself is quite charged. (Solicitor focus group F)

That ill-feeling can carry through to the conclusion of the process. Some solicitors suggesting that it can be particularly difficult where LiPs have had costs orders against them:

They feel aggrieved, because one hasn't been represented and it's been pushed through, and so they've got costs orders that they didn't understand, all sorts of things, and they've felt very beaten up by the process. (Solicitor, contested cases sample, area D)

Some insight into the reaction of respondents can be gained from their responses to the question on costs on the Acknowledgement. A quarter of respondents did lodge an objection to costs, with unqualified costs attracting more objections than contingent costs (Table 8.1). Extrapolated nationally from our representative sample of 300 cases, that quarter would represent about 24,000 respondents each year, a not insignificant number.

It is also worth noting the potential for costs to cause worry or anger even when they were not claimed. Twelve per cent of all respondents objected to costs where the petitioner had not claimed them.

That said, the majority of respondents reported an agreement over costs or no objection to costs that were being claimed. Of course, no objection or an agreement on costs does not necessarily mean that the discussion of costs had not caused difficulties in the relationship.

Table 8.1: Reaction of respondents by whether costs were sought on the petition, percentages

	No costs claimed	Unqualified costs	Contingent costs	Total cases (percentage)
No objection or qualification	59%	38%	39%	51%
Objects wholly or partly	21%	31%	25%	24%
Cites agreement	20%	31%	36%	25%
Total cases	150	64	36	250

There was no statistical difference in respondent acceptance or objections to costs between fault and separation cases. Separation respondents were just as likely to accept or object to

costs as fault respondents. There was also no difference between represented and unrepresented respondents.

As a further indicator of the potential for costs to cause or exacerbate conflict, there also appeared to be a link between costs and a case being defended. This took multiple forms. Cases where the respondent registered an intention to defend or there was an actual defence were much more likely to include claims for costs on the petition as undefended cases, with 73% of the former including costs claims compared to 41% of the latter. Note, that the comparison is not exact as the *Finding Fault* defended cases sample was not drawn as a nationally representative like the undefended sample. That said, we can be fairly confident that there is real difference in the propensity to claim costs between defended and undefended cases.

Nor can we say whether claims for costs contributed to the likelihood that a petition would be defended or whether the petitioner's decision to claim costs reflected an already more conflicted relationship. However, our qualitative interviews with lawyers did suggest that costs could be an additional trigger for a defence. In some cases, solicitors reported choosing not to claim costs to avoid the risk of triggering a defence: "we're adding that as kind of almost a sweetener, look please don't defend and we will pay the costs" (solicitor focus group E).

8.2 What is it about costs that causes conflict?

There were multiple reasons why costs could cause or add to conflict, at least from the perspective of respondents. These included a perceived sense of injustice about the costs process as well as the rules themselves.

Unfairness and the arbitrariness of costs rules: Why should I pay?

As we saw above, the practice is that, in effect, costs follow the event in fault cases. Yet that assumes that there has been 'an event' and that the respondent is the guilty party. In reality, who petitions, and on what fact, is not necessarily closely related to who has done what,⁷¹ and in law, the fact chosen does not have to be the cause of the relationship breakdown in any case.⁷² In the mid-1980s, the Booth Committee had pointed to the problem of the court assuming that the respondent was responsible for the divorce and the considerable bitterness that was likely to arise as a result.⁷³ Indeed, one of the most commonly cited problems by our interviewees was the arbitrariness and unfairness of the rules expecting respondents to pay in fault cases. There were a number of elements to this.

Respondent not at fault or allegations not true or exaggerated

Respondents could be upset or angry where costs were awarded based on fault allegations that the respondent thought were not true, or that might have an element of truth but were

⁷¹ Liz Trinder et al, *Finding Fault?: Divorce Law and Practice in England and Wales* (Nuffield Foundation, 2017) chapter 3.

⁷² *Stevens v Stevens* [1979] 1 WLR 885.

⁷³ Booth Committee, *Report of the Matrimonial Causes Procedure Committee* (HMSO, 1986) para 4.199.

not the reason for the breakdown of the marriage. In those types of case asking the respondent to pay the petitioner's costs was akin to adding insult to injury:

That was the background. That she [petitioner] had, as he [respondent] saw it, had an affair. She then filed a behaviour petition against him and now was seeking costs from him as well. He was like 'Is there anything more this woman could do?' (Solicitor focus group E)

Arbitrariness of choice of respondent – I could have been the petitioner

Linked to the former point, a widely used argument was that it was unfair to expect the respondent to bear the costs when they could just as easily have been the petitioner. There were cases where that argument was successful in pre-issue negotiations, though it may still have raised the temperature between the parties:

In their original petition they included a claim for the full costs, and I went back and said that we were only really prepared to pay half, because we could have brought our own petition. And they did concede on that point. Which was the only point they were prepared to agree on (Solicitor interview 3)

In other cases, the argument was not successful. The respondent in case file M163 stated on the acknowledgement that they objected to costs in principle, not least as they could also have petitioned on behaviour. They offered to pay costs capped at a certain amount, but the court ordered full costs against the respondent instead.

Objections as it was not the respondent's choice

The third argument highlighting the arbitrariness of the costs following the event rule was that the divorce was the petitioner's choice, not that of the respondent. Requiring someone to pay for something that they have not necessarily chosen or would welcome, is likely to cause upset. It puts the respondent in the unusual legal position of paying for a forced purchase.

Some petitioners recognised the unfairness of that and decided not to pursue costs. A LiP interviewee WK03, for example, was very aware that her husband did not want the divorce and so opted to pay all the costs herself. In contrast, where a respondent was already struggling with accepting the divorce as well as a behaviour petition against them, being asked to have to also pay for the privilege could be very wounding:

And she [the petitioner] had applied for costs as well which was, sort of, an extra stab to the heart. (Contested cases solicitor interview 1)

How much? The affordability of costs awards

There were a number of issues relating to the size of costs awards that caused upset and anger for respondents. In some cases, it could be a surprise at how much the bill would be, particularly given that it was being imposed on an apparently arbitrary basis:

Like you said the costs which is like an extra stick to beat with them, so actually they might say 'Oh fine, you can petition against me', but by the way the standard position is the respondent has to pay the costs. And then suddenly they're saying 'all right well that's 1,200 quid' something like that

- which does not go down that well ... and already you're at loggerheads with your opponent on it. And then meanwhile both parties are effectively running up a bill arguing over 1,500 pounds. (Solicitor focus group E).

A related argument was based on affordability, that the respondent could not afford to pay and/or the petitioner was equally or better placed financially to foot the bill. Lawyers were aware that it could be perceived to be unfair if the poorer party were liable for costs:

If it's the wealthier party claiming costs that's an insult, isn't it? It feels like a slap on the face. (Solicitor focus group F).

The respondent in case file L111 argued unsuccessfully that he was unemployed and that he and the petitioner had similar savings and so costs should be shared. Similarly, the lawyer in case L157 noted on the acknowledgement that his client was a single parent living on benefits and could not afford costs. In both cases the argument was unsuccessful and full costs were made against the respondent.

The adversarial language and practice of costs

Finally, what was also evident was that the degree of horse-trading and adversarial language around costs fits uneasily with the non-conflictual ethos of family law. Lawyers reported that it was common practice to include costs as part of the negotiations about who would petition and on what basis. The following descriptions of the negotiation process were typical of the accounts that we received, and it is fairly easy to see how costs could become a highly charged issue for the parties:

It was that difficult thing that we were like 'if you withdraw your claim for costs we'll allow it to proceed'. But he was very much 'No it's my petition, it's my petition I was in there first. And it's that one upmanship isn't it, I'm in there first and therefore ... which is just unnecessary. (Solicitor interview 8)

So we prepared a divorce petition, we wrote to the husband and sent him a copy of the draft divorce petition. We asked him to pay towards her costs, so we said if he consented to the divorce we would limit our costs to a certain amount. (Contested cases lawyer 1)

8.3 Costs as proxies for fault and blame

The current legal framework is predicated upon a division of costs based on (notional) responsibility for marriage breakdown as reflected in the fact used, unless displaced by agreement or argument. The law is therefore sending a very clear message about blame through the framework for costs: fault respondents are (notionally) guilty and should pay.

In theory, the removal of the fault facts will end the relationship between assumed responsibility for the marriage breakdown and costs. However, that is only part of the costs story. In practice, our data suggested that there has been a more complex use of costs that is not tied straightforwardly to the use of the five facts. In particular, analysis of behaviour petitions highlights the varying ways in which blame and facts were related and how the parties could use costs as a proxy for moral judgements.

The standard position is, of course, that a behaviour respondent should pay costs, based on historical ideas about the matrimonial offence. Indeed, the majority of adultery and behaviour

petitions in our sample resulted in full costs to the petitioner (5 out of eight adultery petitions and 27 out of 39 behaviour petitions).

In contrast, there were multiple examples of the exact same behaviour fact being used, but where the parties had agreed to share costs, seemingly to send a very different moral message. Seven of the 39 behaviour cases where a costs order was made resulted in shared costs. There were five more where the division was just under or over 50%. What the parties appeared to be trying to do in these cases was to use shared costs to send signals about (supposedly) equal responsibility for the divorce, despite having to use the behaviour fact. An example was Case M130 where the parties were apparently seeking to ensure that neither party was seen as more or less culpable. The petition was so mild and so even-handed in the description of the 'behaviour' that it was initially rejected by the court. The petitioner also sought, and was granted, shared costs.

There was also evidence of this use of costs as a vehicle for alternative moral messages in our interviews with the parties. SP10, for example, was the respondent to a behaviour petition, but where his wife had chosen not to pursue costs. SP10's interpretation was that that was due to her guilt about having caused the breakdown:

"[the Acknowledgement] asks you whether you should pay costs – why you shouldn't pay costs. And the reason I shouldn't pay costs is because, actually, she may be alleging unreasonable behaviour but, in fact, in fact the basis of the divorce is that she- cheated. And she'd agreed to pay costs at the beginning. Although she may rue that now, she'd agreed to pay the costs which is unusual. Normally the person who petitions asks for costs in the application.... Well, at that stage I think she felt some guilt.

The removal of the facts after the implementation of the DDSA will, of course, remove that opportunity to set out a charge sheet against the respondent. But it will not necessarily end the way in which costs are used to send moral messages or the way in which costs become part of the negotiations about the allocation of responsibility. As we have seen above, how costs are used has not mapped neatly onto facts. There is a possibility therefore that those who wish to continue to send moral messages could use costs to do so under the new regime, with costs perhaps becoming the main vehicle for blaming in a 'post-fault' regime.

8.4 Money is not just symbolic – it is food on the table

Finally, it is important to appreciate that costs are not just sources of conflict or vehicles for making moral judgements. Whether a costs order is made is of great practical difference to some parties. Whilst some judges and lawyers spoke about costs as being relatively small amounts of money,⁷⁴ for the parties 'even' half the cost of the issue fee of £550 was a sum that was far beyond their normal reach.

Case L018 in the court file study, for example, was having difficulty finding £50 for a certified copy of his marriage certificate. In writing to the court for advice on what to do, he noted that

⁷⁴ District judge 1 noted, for example, that costs "might be not a lot. It might be just if they're acting in person effectively, and a lot of them are now, there isn't going to be much more than the fees". One of the lawyers in focus group F noted "I mean costs can be quite highly charged, but overall, the costs of the petition aren't really ... you know if someone's doing it themselves and it's undefended it's not really ... it's really the time isn't it?"

it had taken him nearly two years to save up for the divorce fee (then 'only' £410). An interviewee (WK17) similarly reported having to delay making the divorce application for months whilst she prioritised paying for repairs to her car.

The most powerful statement came from interviewee WK12 who was incensed about how high the £410 issue fee was and even more so when it went up overnight to £550. His experience highlights just how tight many people's budgets are, whether they are the petitioner paying the issue fee or a respondent potentially liable for costs:

"It took me ages to save up my half of the money, because I've got kids and a house. Do you know what I mean? It took me ages. £200 for some people might be a drop in the ocean, but to me it's food on the table. So saving that up, which I think it was £410 when we started. So I saved up my £200-ish and I was ready. And then I got the forms and it was £550. And honestly I could have just fallen off my chair. And that was also then having to go to my respondent and saying, "Look, I want some more money off you". And I'll be honest: that did cause an argument. And the government caused that because they didn't tell anybody. There was no warning. It was overnight. It was if you got divorced on a Thursday it was £410; if you got a divorce on a Friday it was £550. And it was as black-and-white as that as well. That was the night they changed it. Do you know what I mean? And to me, well, what's happened there? Who's getting this money? Do you know what I mean? And it hasn't gone up by a tanner; it hasn't gone up by 5%. It's gone up about 25-30% here. Where's the justification? They're going to say to these people "I know you've been through a bit of a rough patch, so we're going to put the price up!" Do you know what I mean? (Laughter). No. It's disgusting. And unfortunately, it's turned me a bit bitter. I used to be, "Ah yes, but that's just how much things cost". And I'm not now. It turned me a little bit bitter because then you start thinking, "Well, who's getting that money, then?" Because I'm not. I'm certainly not seeing any of that money. And then you start wondering which big fat cats are getting that money in their pocket?" WK12

In WK12's case, he and his wife had agreed to share the costs of the issue fee. One can imagine how much more difficult it must be for respondents in a similar financial position to WK12, but who are ordered by the court to pay costs up to three or four figures simply for having the misfortune to be a respondent to a fault application.

9. Looking ahead: what is likely to happen on implementation of the DDSA?

9.1 What next?

The analysis of the existing costs regime has provided further evidence, if any were needed, that divorce reform was long overdue. The costs regime replicated, if not extended, many of the problems with the operation of the divorce law that had also led to the 2020 Act. Just as the reliance upon fault had created conflict, so have costs, contrary to wider family law and policy. Just as the rubber-stamping of behaviour petitions was procedurally unfair to respondents, particularly without an accessible remedy, so too was the rubber-stamping of applications for costs without any consideration of their fairness. And just as the

informational inequalities between those who could and could not afford lawyers was unfair for parties seeking divorce, so too were those inequalities in relation to costs, as evident in the near exclusion of LiPs from costs awards.

The question now is what is likely to happen with costs after the implementation of the DDSA. The Act will leave the sole ground of irretrievable breakdown intact, but as we have seen, that ground has hitherto provided no real legal steer in relation to costs on divorce. The costs regime has instead been shaped entirely by the pre-Divorce Reform Act case law for the fault facts and, from the early seventies, by case law for the separation facts. That case law will no longer be relevant.

In this section we explore what this is likely to mean for costs in matrimonial cases under the DDSA. We start by identifying what the default or fall-back legal framework will be under the new Act and then how the parties and practitioners are likely to respond to, and perhaps shape, the new framework. We look first at factors likely to sustain and reduce demand for costs and then at the types of costs cases that are likely to occur. A key question to explore throughout is whether and how the existing problems with costs will be addressed, or indeed whether the new framework might give rise to new and different problems.

9.2 What will be the fallback legal position, absent the five facts?

The removal of the five facts will not produce a legal vacuum. Instead, the Family Procedure Rules are likely to assume a much greater significance than they have had hitherto in matrimonial proceedings. The broad outline of how that is likely to work is relatively clear, however, there are important questions about what precisely that will mean in practice.

At its most general, the Family Procedure Rules give the court a wide discretion to make such orders as to costs as it thinks just.⁷⁵ That wide discretion is subject to some restrictions, as set out in rules 44.2(4) and (5) of the Civil Procedure Rules. Rule 44.2(4) requires the court to have regard to all the circumstances, including the conduct of all the parties, whether a party has been successful and any offers to settle.

The 'conduct' of the parties is defined further in Rule 44.2 (5) to include:

- (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;
- (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
- (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

The overriding objective of the FPR, set out in Rule 1.1, also requires courts to deal with cases justly, that is expeditiously and fairly, in ways which are proportionate to the nature, importance and complexity of the issues, ensuring that the parties are on an equal footing and saving expense.

⁷⁵ Rule 28.1 Family Procedure Rules 2010 https://www.justice.gov.uk/courts/procedure-rules/family/rules_pd_menu

It remains to be seen how the courts might interpret these rules for costs in matrimonial cases. The emphasis on litigation misconduct in Paragraphs 44.2(4) and (5) will shift the focus of costs from presumed behaviour in the marriage under the old law to behaviour in the course of litigation. At the same time, the fairly broad definition of conduct, especially the inclusion of conduct *before* proceedings, may offer the potential for fault to re-enter by the backdoor, under the guise of costs. In theory, that could include an applicant seeking costs because of the respondent's adultery or behaviour pre-proceedings. That would, of course, run entirely counter to the policy objectives of the DDSA.

Looking at other family law practice areas gives somewhat mixed messages about whether the FPR framework would enable a more expansive or restrictive costs regime for matrimonial cases, or whether courts would adopt a narrow or wide definition of conduct. In children cases and financial remedies, the bias is towards a very restrictive regime on the basis that costs are likely to undermine cooperation between family members, inflame conflict and diminish family resources.⁷⁶ Costs orders are rare in children cases and FPR Rule 28.3(5) provides specifically that the "general rule" in financial remedy cases is that the court will not make a costs order.

In both practice areas, the exception to the no-costs position is for serious litigation misconduct. For children matters the bar is set high at "reprehensible behaviour or an unreasonable stance"⁷⁷, such as repeatedly pursuing or defending applications and so generating significant legal bills for the other party.⁷⁸ For financial remedies, FPR 28.3(6) provides that the court may make a costs order based on "the conduct of a party in relation to the proceedings (whether before or during them)". Paragraph 28.3 (7) sets out specific examples of conduct, including failure to comply with the rules, how an issue was pursued or contested, the financial effect of any costs order and any other relevant aspect of a party's conduct in relation to proceedings.

In contrast, it appears that the FPR enables a more expansive approach to costs for non-molestation and occupation orders under Part IV Family Law Act 1996. Although there is no empirical data available, Butterworths note that costs are "more likely" if the application is successful, especially where litigation conduct has been an issue.⁷⁹ Cook on Costs also note that costs are more common where applications are opposed.⁸⁰

Historically, divorce is an area where there has traditionally been an expansive costs regime, much closer to the approach to costs in Part IV applications, than to children and financial remedies. Whether that more expansive approach prevails may depend upon the nature of demand from below, considered next.

9.3 What will demand look like?

Alongside the legal framework and possible judicial interpretation, a second significant factor will be how lawyers and the parties react to the new environment and what pressure they will

⁷⁶ *Sutton London Borough Council v Davis (No 2)* [1994] 1 WLR 1317.

⁷⁷ *Re T (Children)* [2012] UKSC 36.

⁷⁸ *Re E-R (Child Arrangements)* [2016] EWHC 805.

⁷⁹ Howell, Montgomery & Moor, *Butterworths Family Law Service* (LexisNexis 2021) para 2089.

⁸⁰ Middleton & Rowley, *Cook on Costs* (LexisNexis 2021) para 39.14.

exert from below. There are a number of factors that could reduce, as well as sustain or increase the demand for costs.

As we have seen, the five facts provided a clear and almost guaranteed basis upon which to apply for costs and for them to be awarded. In the absence of that clear foundation, and the legal certainty it has provided, it seems reasonable to assume that demand will be reduced.

The demand for costs will also be reduced if, as predicted by the Ministry of Justice,⁸¹ fewer applicants have to rely on lawyers to navigate the much-simplified process for divorce. The removal of defence (other than for procedural irregularities) should also greatly reduce the need for extended and expensive legal advice and representation at contested hearings. Historically, LIPs seldom apply for costs.

At the same time, the lessons from the past also suggest that costs are unlikely to simply disappear, at least without a very clear steer. The implementation of the Divorce Reform Act in 1971 provides a clear illustration of the consequences of legal inertia in relation to costs where, in the absence of an explicit policy steer, the costs regime from the past was carried over on implementation for the fault-based facts, despite running contrary to the policy intentions driving reform.

A second factor that might sustain the demand for costs is the legal culture. Claims for costs currently have a routine quality that is deeply engrained in legal practice. Changing that will require a complete cultural shift for practitioners who may still see costs as a way to advance their client's interests. It will also mean a cultural shift for some parties where the divorce process and costs has been based largely on blame. We saw above that costs can be highly symbolic and that they can be used to send signals about moral judgements and blame that are not necessarily straightforwardly related to fact choice. Simply removing fault and the ability to defend will not, in itself, immediately and automatically eradicate ideas about fault and responsibility. Those ideas could still find potential expression through applications for costs.

9.4 What types of case are likely post-implementation?

There are likely to be three types of cases seeking costs within the existing FPR framework, each posing different challenges for DDSA policy goals (see Table 9.1 for a summary). The three case types are:

- Contested cases – primarily to recover legal fees in contested cases
- Service compensation cases - to compensate for addressing service resistance
- Approval cases - seeking court endorsement of private agreements on costs

Contested cases

Although it will no longer be possible to defend the divorce on the basis of a failure to establish irretrievable breakdown, it is likely that there will continue to be some contested

⁸¹ Ministry of Justice, *Reducing Family Conflict: Reform of the legal requirements for divorce: Impact Assessment* (MoJ017/2018, 2018) paras 31, 36-7.

cases where there is a dispute about jurisdiction, the validity or subsistence of the marriage or civil partnership, cases of fraud or abuse of process. In some of those cases applicants or respondents might seek costs, as with defended cases currently. Cases where the applicant elected to effect service personally from the beginning, rather than through the court, might also give rise to applications from respondents if there are procedural irregularities with service.

Examples of litigation misconduct that might attract costs would be a respondent continuing to contest a divorce without any real prospect of success, resulting in significant legal costs for the petitioner or an applicant having proceeded knowing there was an issue with jurisdiction.

As well as addressing the unfairness of leaving the 'victim' to pay for unexpected costs caused by litigation behaviour, the availability of costs in these cases could discourage spurious contests or attempts at a backdoor defence.

It is less clear that costs should be available where there is no evidence of litigation misconduct. The risk of allowing costs in these types of cases is that costs could become a vehicle for expensive and acrimonious satellite litigation, contrary to the policy objectives of the DDSA.

Table 9.1: Potential post-implementation case types

	Contested cases	Service compensation	Approval cases
Definition	Costs of resolving disputes over jurisdiction, fraud etc.	Costs of effecting service after respondent resistance	Seeking approval of private agreements or the applicant's proposals
Currently possible	Yes	Possible, but little used	Yes
Potential beneficiary	Applicant or respondent	Applicant	Applicant
Potential size of group	Very small	Comparatively large	Medium?
Likely size of costs award	High - £0000s	Low £000s	Mid?
Costs award to cover	Legal advice and representation, application fees	Costs of alternative service	Issue fee and (probable) legal fees
Justification for inclusion	Some cases consistent with FPR emphasis on litigation conduct	Consistent with FPR emphasis on litigation conduct Fairness for low-income or everyday cases	Continue previous approach of endorsing agreements?
Reasons for exclusion	Encourage disputes and expensive satellite litigation?	Proportionality. Procedural fairness if routinised determination process?	Proportionality - waste of court resources. Autonomy – no reason for court to support private agreements. Risk of 'agreements' being used to reflect moral concerns Unclear basis for determination

Service compensation cases

The second possible type of cost case are those where petitioners might seek to reclaim the costs of effecting service following respondent resistance. Under current law, there has been a significant problem with respondents delaying or refusing to return the acknowledgement of service, resulting in additional costs to the petitioner to effect service. No acknowledgement of service was ever returned by the respondent in 14% of undefended

cases in the *Finding Fault* sample, more were returned late.⁸² Petitioners had to pay for some form of alternative service in 10% of all undefended cases.⁸³

Some of this resistance was associated with the use of fault facts, and particularly where there were allegations of domestic abuse. The removal of fault should therefore reduce the extent of service resistance, but it is likely that service problems will continue to be an issue in some cases.

Whilst it has been possible to claim costs for service resistance, hence the contingent claims based on delay, there was little indication that service resistance factored into the court's decision-making, in our undefended cases at least. However, depending upon policy and judicial decisions, this could be the most common type of costs case in future.

Whilst costs in these cases are likely to involve objectively small sums, the amount of money expended, and potentially recovered, can be highly significant to petitioners. Recovering expenses through costs orders may well be their only remedy given that only a third of divorcing couples apply for financial orders.⁸⁴ For those on low incomes and victims of domestic abuse and coercive control, a costs order might make the difference between being able to progress the divorce or not.⁸⁵ The threat of potential costs may also help to deter or reduce respondent non-compliance.

However, there would be real challenges in finding a proportionate and fair method to address these claims. Much would depend upon whether it is possible to develop a fairly simple application and preliminary adjudication process based on information available through the court service's administrative records.⁸⁶ The respondent could then challenge that ruling by providing evidence, for example, of incorrect contact details that had led to the delay.

The risk is that any process remains inaccessible to the applicants who might most need it, primarily LiPs, and/or that the more routinised decision-making process replicates the procedural unfairness of the current system.

It will also be a matter of judgement about whether the attempt to provide fair compensation to applicants offsets the potential risk of exacerbating conflict between the parties over relatively small sums.

⁸² Liz Trinder & Mark Sefton, *Taking Notice: Non-standard Divorce Cases and the Implications for Law Reform* (Nuffield Foundation, 2019) Section 4.2

⁸³ Including applications for bailiff, alternative, deemed or dispense with service. Extrapolated nationally, 10% of cases would amount to about 10,000 cases annually.

⁸⁴ Family Court Statistics Quarterly, <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2020>

⁸⁵ There were examples in the Finding Fault study where the petitioner appeared to have been unable to afford the expense of personal service in the face of respondent resistance, including cases of domestic abuse and coercive control. In some cases, the divorce then appeared to have stalled.

⁸⁶ For example, the system does log whether an Acknowledgement is returned and whether alternative methods of service have been used to effect service.

Approval cases

The third potential type of costs case are the 'approval' cases. These would largely continue the current practice of asking the court to endorse agreements on costs made between the parties in both fault and separation divorces. There may even be pressure to endorse proposals just put forward on behalf of the applicant. This type of claim would not involve litigation misconduct but might be accommodated within the court's wide discretion to make any order for costs that it thinks fit under FPR 28.1.

Whilst this may be an attractive option for some lawyers advising their clients, there are questions about whether it is appropriate, necessary or proportionate to use the court to regulate private agreements, particularly where the court will no longer be required to adjudicate on the substantive issue of whether the marriage has broken down irretrievably and would have no basis to scrutinise the agreement. Nor, in the absence of existing case law based on fact choice, would there be any obvious basis upon which to make decisions where a proposal has been put forward by the applicant only.

It would also be difficult, if not impossible, to distinguish cases where costs are simply part of a straightforward financial agreement and cases where those negotiated packages are used to reflect and convey moral judgements about the conduct of the parties during the marriage and their responsibility for the marriage breakdown. Given the way in which negotiations about costs are used currently to convey moral concerns, there would be concerns about a vehicle that could allow fault in through the back door.

10. Designing a new costs system: conclusions and recommendations

In the previous section we considered what might be the basic fallback position on costs offered by the FPR without any further significant policy steer. It is clear, however, that that leaves many questions unanswered in relation to costs, with the potential for practice to develop in a way that could undermine the policy aims of the DDSA. The lessons of the hands-off approach to costs during the implementation of the Divorce Reform Act 1969 does raise concerns about what might happen if policy development were left to litigation, probably by highly atypical cases.

In this final section therefore, we draw together the analysis to identify what additional policy interventions might be needed to ensure that the costs regime is consistent with the policy aims of the DDSA.

10.1 What principles should inform the costs regime?

The starting assumption is that it should be possible to claim costs in matrimonial cases. The question is what principles should frame the regime, not least to provide a counter-weight to the enduring legacy of fault.

The FPR embodies a number of principles to shape a costs regime. The FPR currently places 'justice' at the centre of a scheme. The overriding objective also prioritises proportionality and procedural fairness to put the parties on an equal footing.

By themselves, those three principles are important, but insufficient in shaping a costs regime. ‘Justice’ is an inherently open-ended principle that will necessarily be determined on the basis of atypical hard cases and reflecting the circumstances and priorities of (probably) wealthier litigants benefitting from legal representation.

Whilst proportionality is critical in a context of limited resources, it is also important that that principle and the goal of procedural fairness are also balanced with a focus on accessibility. Being placed on an equal footing at court is vital, but so is the ability to be able to reach the court in the first place, especially for those unable to afford legal advice. A principle of accessibility would point towards ensuring that the ability to claim costs is also available to those low-income applicants for whom a £95 application fee and the cost of a process server to address respondent resistance can be beyond their reach.

The policy goals set out for the DDSA also point to additional principles that can and should inform the costs regime under the new Act. The original Ministry of Justice objectives for the DDSA called for a legal process “that does not introduce or aggravate conflict, will better support adults to take responsibility for their own futures and, most importantly, for their children’s futures” and “which promotes amicable agreement, which is fair, transparent and easier to navigate, and which reduces opportunities for misuse by abusers who are seeking to perpetrate further abuse”.⁸⁷

A focus on conflict avoidance or harm-minimisation does not provide a very clear steer on costs, given that costs are double-edged: they can provide a continuing opportunity for the expression of conflict, whilst at the same time an inability to claim costs caused by the litigation behaviour or another can be another source of conflict. Orientating the system to an approach based solely upon litigation conduct would remove sources of unnecessary system-induced conflict. The emphasis on the protective function of family law would also prioritise the continuing availability of service compensation costs as the most effective tool to prevent abusers from using the system to perpetrate further abuse.

Finally, the policy goal of supporting adults to take responsibility for their own future – or autonomy – could point to no costs regime at all, leaving it entirely to the parties to make their own decisions on costs. That strong version of autonomy would, however, undermine the principle of protection, particularly in abuse cases. In a weaker form, autonomy could be appropriately translated into a residual regime for litigation misconduct, but with a prohibition on the current practice of asking the court to endorse private agreements for routine costs for fault and separation cases.

10.2 What type of costs regime?

There are a range of principles that could be used to underpin a costs regime. Inevitably, some principles are in opposition to each other – notably protection against proportionality and autonomy. Taking a holistic view, and taking into account the lessons from how costs have operated in the past, the strongest case appears to be in support of a residual costs regime focused on litigation misconduct in relation to service resistance and contestation.

⁸⁷ Ministry of Justice, *Reducing family conflict: Government response to the consultation on reform of the legal requirements for divorce* (April 2019), p 5.

Rebalancing the costs regime away from (inferred) marital behaviour and onto actual litigation behaviour would provide a fairer basis for a new and clearer scheme that is both proportionate and supportive of autonomy, whilst reducing the potential for system-generated conflict and protecting victims of abuse.

Shifting the costs regime to one that focuses on litigation conduct does also raise issues about who should pay the expected or routine costs of the divorce, i.e., the petition/application fee and any basic legal fees. Currently, the costs regime is almost entirely centred on those routine costs, allocating them according to fact and/or party agreement. The question then arises as to whether it would still be appropriate to seek to influence how those expected or routine costs are allocated, and if so, based on what principles.

There are four main options in relation to routine or anticipated costs: leaving it to the applicant to pay, expecting the bill to be shared, requiring the best off financially to pay or sidestepping the issue by getting the state to pay all, or most, of the bill.

Each approach has advantages and disadvantages, as set out in Table 10.1. In practice, assigning the bill partially or fully to the respondent is likely to be unenforceable and unfair where the respondent is opposed to the divorce. Nor does it seem likely that the state will pick up the tab, although aligning the fee with the actual costs to the state would be very welcome.

What is left is essentially that it is the applicant who is responsible for ensuring that costs are paid, whether shouldering the cost themselves or by reaching a voluntary agreement with the respondent. This may be difficult for applicants who are less well off than the respondent or for those who would not have 'chosen' for the relationship to end but have decided that the legal marriage should be terminated. However, past experience has shown that the court is not able to determine fairly who should pay and it would not be proportionate to conduct an inquiry into who could, or should, pay. There is no real alternative other than leaving the issue to the parties, where in the absence of a private agreement, it will inevitably fall on the shoulders of the applicant.

Table 10.1: Principles for determining anticipated costs

	Advantages	Disadvantages
Choice ('buyer' or applicant pays)	Reflects longstanding reasoning in separation cases: "He is the one who wants the divorce. He should pay the costs of it" Avoids conflict with the respondent Practical and achievable solution Does not preclude the parties reaching a private agreement	The applicant may be less able to afford the fees than the respondent The application may reflect 'necessity' rather than 'choice'
Equal sharing or presumptive 50/50 split	Reflects reality that the 'marriage' is a joint venture	Unfair to reluctant or distraught respondents Intrusive Unenforceable in practice
Affordability ⁸⁸ (according to means)	Fairer where significant differences in financial resources	Detailed assessment of means would be expensive and/or impractical Affordability is not relevant elsewhere – costs orders can be made despite inability to pay ⁸⁹ Unfair to reluctant respondents
State pays (free or greatly reduced issue fees) or extended eligibility for exemption	Current issue fee greatly exceeds the actual cost for all cases and the disposable income for some applicants Would sidestep the costs problem in most cases	Political sensitivity about making divorce 'easy' Other competing financial priorities within the family justice system

⁸⁸ Affordability has been taken into account in the past to some extent. Until the 1960s general practice was that costs orders were not generally made against wives on the assumption that they would not be able to pay given their financial dependence upon their husbands. However, that practice was based on a broad assumption about means, rather than a detailed assessment.

⁸⁹ *Joy v Joy-Morancho* (No 3) [2015] EWHC 2507 (Fam).

10.3 Recommendations

The following recommendations are based on a costs regime for matrimonial cases that is restricted to litigation conduct, based on principles of justice, proportionality, procedural fairness, harm-minimisation, protection and autonomy.

What is in scope

- Costs in matrimonial cases should only be available on the basis of litigation misconduct, consistent with FPR r 44.2(4) and (5).
- To prevent costs becoming a backdoor route to fault and to limit satellite litigation, the definition of 'conduct' under Rules 44.2(4) and (5) should be drawn tightly to include only (a) resistance to service by a respondent, without reasonable excuse and resulting in avoidable additional costs to the petitioner and (b) in contested proceedings, where the respondent has persisted in contesting the divorce with no or very limited prospect of success or where an applicant has pursued an application despite being aware of procedural or jurisdictional problems.
- Conduct prior to proceedings and/or as a consequence of proceedings (e.g., costs of Children Act proceedings triggered by the divorce application) should be explicitly flagged as out of scope for costs in matrimonial cases.
- It is questionable whether it would be appropriate to include costs for service where the applicant had chosen from the beginning to effect service instead of the court. It would not be desirable to incentivise the use of personal service.
- It should no longer be possible for the parties to ask the court to approve a private 'agreement' as this is not a proportionate or appropriate use of the court's resources and risks becoming a vehicle for exercising private moral judgements.

What may be included in costs awards

- Any costs award should be restricted to direct compensation for those additional expenses needed to ensure that a divorce is not inappropriately delayed or derailed by service resistance or unreasonable contestation of the divorce, or, in very rare cases, for the respondent's legal fees where the petitioner had proceeded knowing that an application was fraudulent or outside of the jurisdiction.
- The costs of the initial application (petition) fee or initial legal advice are not related to litigation misconduct and so should not be included in any costs award. It is always the responsibility of the applicant(s) to pay the initial application fee, subject to any alternative private agreement between the parties or fee waiver.

The timing of applications for costs

- Given that costs may only arise from litigation misconduct, it should only be possible to apply for costs at decree nisi/conditional order stage and following evidence of litigation behaviour. The current practice of seeking contingent costs at petition/application stage is needlessly inflammatory in many cases and should be prevented

Joint applications

- The decision about who pays for a joint application should be left to the parties themselves. Any presumption about costs sharing might deter the use of joint applications, nor would it be enforceable.

Preventative measures

- It would be helpful to give much greater emphasis to the prevention of problems that might give rise to disputes or claims about costs. Preventative measures could include:
 - Freezing or reducing the issue fee of £550 so that its financial and emotional significance is reduced
 - Encouraging the voluntary sharing of the costs of the application in any court service information. This may empower the applicant to ask for a contribution and could increase the likelihood that the respondent may assist
 - Ensuring that information for respondents is clear and accessible, sets out precisely what steps respondents must take and when, and giving clear, but respectful, warnings about potential liability for costs for delayed or non-response
 - Ensuring that family justice stakeholders - lawyers, HMCTS and the judiciary – are clear about the cultural change that the DDSA introduces for costs and, in particular, the high bar needed for costs in contested cases

Monitoring and evaluation

- It will be important to monitor the operation of the new costs regime after implementation of the DDSA. Any evaluation should identify trends in volume, case type and outcomes to assess whether the costs regime as implemented is consistent with the policy aims of the DDSA and meets the core principles of harm-minimisation, fairness and accessibility.