

JERSEY / JUDGMENT

D v E (Matrimonial) 19-Apr-2021

[2021] JRC 116 (19 April 2021)

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judgment

the bailiff: 1. On 8 th March 2021, the Court sat to hear argument relating to directions that should be given for the determination of the ancillary matters in the above captioned proceedings and also for an application by the Petitioner that he be given leave to apply for the Decree Absolute. This judgment deals with this latter aspect. 2. D ("the Petitioner") and E ("the Respondent") married in England on 31 st March 1995. They separated on 28 th March 2017, and have been involved in divorce proceedings since November 2017. On 2 nd November 2017, the Respondent's English legal advisers wrote directly to the Petitioner indicating that the Respondent had brought proceedings for divorce before the Courts of England and Wales. It appears that, in fact, those proceedings had not been formally issued. On 3 rd November 2017, the Petitioner filed for divorce before this Court and the Petition was issued on 6 th November 2017. The Respondent's divorce petition was issued in the English Courts on 14 th November 2017, and on 5 th January 2018 the Respondent's English divorce petition was stayed. Since that time matters had proceeded before this Court exclusively. 3. I do not need to set out the procedural history in great detail but there appears to have been a dispute as to who would continue as petitioner and on what basis but it was eventually decided that the Petitioner would petition on the grounds of two-years separation. This was recorded in an Act of this Court on 28 th November 2019 ("the Act of Court") which also, at paragraph 6, contained the following: "The parties each undertake not [to] apply for Decree Absolute until the final determination of their respective ancillary relief claims, without the consent of the other parties or leave of the Court." 4. Decree Nisi of the divorce was pronounced on 9 th December 2020, and the Petitioner has asked for the leave of the Respondent to apply for the Decree Absolute. As at 3 rd March 2021, the Respondent had not given that consent nor, so it appears to me, fully articulated reasons for refusal. Hence the Petitioner's current application before this Court. 5. It appears to be common ground that were it not for the undertaking provided in the Act of Court, the Petitioner would have been entitled to apply for the Decree Absolute at any time from 22 nd January 2021. 6. Article 11 of the Matrimonial Causes (Jersey) Law 1949 ("the Law") makes particular provision in connection with an application for Degree Absolute in separation cases. It states as follows: "11 Special protection for respondent in separation cases (1) Provision shall be made by rules of court for the purpose of ensuring that where, in pursuance of Article7(2)(a), the petition alleges

that the respondent consents to a decree being granted, the respondent has been given such information as will enable the respondent to understand the consequences to the respondent of his or her consenting to a decree being granted and the steps which the respondent must take to indicate that he or she consents to the grant of a decree. (2) Where in any case the court has granted a decree of divorce solely on the ground of one year's separation coupled with the respondent's consent, the court may, on an application made by the respondent at any time before the decree is made absolute, rescind the decree if it is satisfied that the petitioner misled the respondent (whether intentionally or unintentionally about any matter which the respondent took into account in deciding to give his or her consent. (3) The following provisions of this Article apply where - (a) the respondent to a petition for divorce in which the petitioner alleged one year's or 2 years' separation coupled, in the former case, with the respondent's consent to a decree being granted, has applied to the court for consideration under paragraph (4) of the respondent's financial position after the divorce; and (b) the court has granted a decree on the petition solely on the ground of one years' separation coupled with the respondent's consent, or solely on the ground of 2 years' separation, as the case may be. (4) The court hearing an application by the respondent under paragraph (3) shall consider all the circumstances, including the age, health, conduct, earning capacity, financial resources and financial obligations of each of the parties, and the financial position of the respondent as, having regard to the divorce, it is likely to be after the death of the petitioner should the petitioner die first; and, subject to paragraph (5), the court shall not make the decree absolute unless it is satisfied - (a) that the petitioner should not be required to make any financial provision for the respondent; or (b) that the financial provision made by the petitioner for the respondent is reasonable and fair or the best that can be made in the circumstances. (5) The court may if it thinks fit make the decree absolute notwithstanding the requirements of paragraph (4) if - (a) it appears that there are circumstances making it desirable that the decree should be made absolute without delay; and (b) the court has obtained a satisfactory undertaking from the petitioner that the petitioner will make such financial provision for the respondent as the court may approve." 7. In the light of those provisions, the Petitioner gave an undertaking in the hearing before me to comply with any orders that this Court might make both procedural or substantive with regard to financial provision and accordingly it appears to me that the provision in Article 11(5)(b) of the Law has been met. 8. Both of the parties have been in relationships with other persons for some time. 9. It appears to me that the nature of the undertaking given in the Act of Court is that it is dependent upon the consent of the other party or an order of this Court. It is not, therefore, a question of any variation of the undertaking but a simple adherence to the terms of that undertaking for the Petitioner to make the application that he now does for leave to apply for Decree Absolute. Furthermore, whilst I make no determination on that point, it does appear that a number of offers have been made by the Petitioner to the Respondent in which the Respondent would get a very substantial share of the matrimonial assets and although I do not need to make a determination that the offer is fair and reasonable given the undertaking obtained from the Petitioner, which I view as satisfactory, it does in addition appear to me that it could not on the surface be said that those offers were unfair or unreasonable. 10. The financial aspects to this divorce should have been resolved in June of last year but the date set aside for the hearing

needed to be adjourned and the final hearing is not to take place now for some months. The Petitioner's counsel submits that had the delay been anticipated at the time, the Petitioner would not have agreed to the undertaking relating to the Decree Absolute. 11. For the Respondent it was argued that the matter was complex and that is why there were reciprocal undertakings relating to the Decree Absolute. It had been done, in the light of competing divorce petitions, to ensure that neither of the parties were prejudiced in a financial sense. The nature of the case had changed in January 2020, so it was argued, because it appeared to the Respondent that steps had been taken to deny her ownership of a substantial asset in the United Kingdom, namely the shares in a company. It is argued that there may be a stamp duty issue in connection with a transfer if the Respondent is no longer the Petitioner's spouse and that tax issues were still being considered. The Respondent had not progressed negotiation because she had been concentrating of the issue of the shareholding. It was the pandemic that had caused the delay and was not the Respondent's fault and there is no reason not to wait. 12. In reply, the Petitioner argues that the stay of the English petition started by the Respondent was an inevitable consequence of the English statutory regime, and the Respondent's application to stay the Petitioner's Jersey proceedings failed after argument. The Respondent, so it is argued, has had more than enough opportunity to consider the tax consequences. As to the issue of stamp duty, the Petitioner argues that the transfer of shares for nil consideration will be stamp duty exempt or give rise to a stamp duty of £5 only. With regard to the Respondent's concern relating to "pension and succession issues", only the Petitioner has a pension of a value (approximately £261,456.00 as at February

2020) it is submitted, that is relatively de minimis in relation to the overall assets and there are substantial assets which can compensate the Respondent for any loss of benefit if necessary. 13. The Respondent has not demonstrated that she will suffer any financial prejudice should the Petitioner be given leave to apply for the Decree Absolute. 14. I was referred to the English case of *Miller-Smith v Miller-Smith*

[2009] EWHC 3623 (Fam) which was considering the provisions of the Matrimonial Causes Act 1973, which are extremely similar if not identical to the provisions of the Law quoted above. That case was not precisely on point because it was an application by the wife in those proceedings, for an order than any application for the Decree Nisi to be made Absolute should be adjourned until in effect the conclusion of the ancillary relief between the parties. There was no pre-existing undertaking reflected in an Order of the Court. In that case the Court has approached the matter on the basis that it was for the wife to show special or exceptional circumstances to resist the granting of the Decree Absolute and that she had failed to do so. 15. Although, in that case, there was no undertaking it seems to me that the effect that the wife was seeking to achieve was the same as the withholding of the consent by the Respondent in this case. The norm is that the Decree Absolute follows within a reasonable period of the Decree Nisi and it seems to me that there must at least be some significant basis for one party to resist the other's desire to apply for a Decree Absolute. In the instant case, however, the presumption in favour of an application for the Decree Absolute prior to the conclusion of the ancillary matters has become a presumption against. That seems to be inherent in the nature of the undertaking. 16.

However, although the presumption is as explained above in determining whether it should give its consent the Court should carry out a balancing exercise and reach a decision that in its view is just in all of the circumstances. 17. The only Jersey case put before me is that of *In the matter of RR*

[2010] JRC 097B before Registrar Obbard. In that case, the husband who had obtained a Decree Nisi of divorce against his wife on the grounds of her adultery wished to apply for a Decree Absolute. The wife applied to stay such an application until all ancillary matters had been agreed between the parties. At paragraph 13 of the judgment the Registrar cited with approval *Miller-Smith* (above) as follows: "13. Is there any case law in either Jersey or the UK to help the Court in applying Article 20(1) and Rule 41 where a respondent objects to the grant of a decree absolute I am unaware of any local precedent, but Jersey Law follows the precedent provided by United Kingdom case law. The most recent UK authority is the case of *Miller-Smith-v-Miller-Smith* (No.2)

[2009] EWHC 3623 (FAM) . In that case, it was the petitioner ("husband") (as in this case) who was applying for the absolute. It was the respondent ("wife") (as in this case) who intended to resist. The Court found:- "The focus of the wife's concern is that if the decree is made absolute and the husband dies, she will lose financial benefits that she would have enjoyed had they still been married. It cannot of course be asserted that this necessarily gives her a right to resist the decree absolute. Financial disadvantage is not a ground for refusing a divorce and the statutory obligation at one stage imposed on a court when considering an application for ancillary relief to strive to put the parties in the position they would have been in had the marriage not broken down has long been abandoned. If, however, a respondent can establish that she would suffer a financial or other disadvantage if the petitioner dies after the decree absolute for which she could not receive compensation, it is possible that the delay of the decree absolute under the inherent jurisdiction may be ordered. [My emphasis.] Mr Wilson, however, drew my attention to the unreported decision of the Court of Appeal in *Dart-v-Dart* (27th October 1995) in which Butler-Sloss LJ (as she then was) quoted the passage from Brandon LJ's judgment in England cited above and commented as follows:_"Consequently, one starts from the proposition that the husband has the right to a decree absolute after the appropriate period from decree nisi, and that period has now elapsed. In the normal course of events he would be able to make the decree absolute unless the wife is able to show special circumstances to defer it. At the end of the day it is an exercise of the discretion of the trial judge, but that exercise of discretion weights the granting of the decree absolute against the special circumstances very heavily in favour of the grant. It is not a balancing exercise in the ordinary sense." 14. In the present case the wife respondent has a number of concerns which are set out in her advocate's skeleton argument. Her application to resolve ancillary matters is at a very preliminary stage. The formal application has only just been made, despite the grant of a decree nisi having been made on 21st April 2010. The wife's skeleton argument states that there has been no formal financial disclosure. Neither party has any idea of the possible financial impact of

the termination of their spousal status, for example, inheritance, social security entitlements or pension benefits. 15. The assets for distribution in this case include a house, presently for sale. They each have an Aviva pension. The wife has also a work pension. Both parties have Skandia multifund shares. They each have motor vehicles. It is argued that the wife will lose her widow's entitlement to the husband's pension on divorce and will have to pay her own social security stamp." 18. In that case the ancillary matters were at a preliminary stage. At paragraph 16 of the judgement the Registrar said this: "16. Should the wife's concerns lead to the Court placing a stay on the application for a decree absolute until after the resolution of ancillary matters? I think not. The argument that the respondent will lose a potential benefit from the petitioner's pension might prevail under different circumstances, but in this case, the principle asset is the former matrimonial home and there is enough capital to enable the Court to provide a fair settlement, even if she loses her entitlement to share in his pension in the event of his death. The only necessary safeguard, which it is right for me to impose is an undertaking to be given by the husband to continue, until further order, to make the mortgage payments, to pay other premiums, for instance, with regard to insurance policies and to continue to pay the older child's college fees until ancillary matters have been determined." 19. In that case, as well, there was no undertaking and consequently the situation there was not the same as it is in this case.

Conclusion

20. The undertaking not to apply for the Decree Absolute without, amongst other things, the consent of the Court, absent agreement with the other party, creates an environment in which the appropriate arguments for or against the grant of a Decree Absolute should be placed before the Court for determination. That is what has happened. 21. There are very substantial assets in this case and it is clear that there are potentially issues of some financial complexity to resolve. I have heard no clear or compelling argument, however, to suggest that in reality the Respondent's position is prejudiced in any manner in resolving those issues and receiving her proper entitlement by the fact that the Petitioner may have obtained the Decree Absolute. 22. I agree with the Respondent's submission that the mere passage of time is not necessarily a factor that determines whether or not it is appropriate to apply for the Decree Absolute where such an undertaking has been given. The passage of time can be taken into account. In this case, the parties commenced proceedings in 2017, and it has taken a significant period to reach the stage where a hearing to deal with the financial matters may be reasonably anticipated. Furthermore, there has been an additional period caused by the vacation of the hearing dates in June of last year. 23. In the circumstances, it does not seem to me to be appropriate to refuse the issuing of a Decree Absolute when anticipated delays have taken place and there are no clear reasons provided why the Respondent in this case might be materially prejudiced. It seems to me that any potential prejudice can be addressed in the final financial order made and of course as I have indicated above the Court and, more importantly the Respondent, has the benefit of

the Petitioner's undertaking to abide by any orders the Court makes for financial disposal in this case. 24. Accordingly, in my judgment, the Petitioner should be entitled to apply for the Decree Absolute and I so order. Authorities Matrimonial Causes (Jersey) Law 1949. Miller-Smith v Miller-Smith

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