

JERSEY / JUDGMENT

# K -v- L (Matrimonial) [2013]

## JRC 186 (25 September 2013)

[2013] JRC 186

---

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

---

### judgment

the deputy bailiff: 1. This judgment concerns two matters raised in relation to some family proceedings between the petitioner ("the wife") and the respondent ("the husband"). The first is an application by the husband to have a decree nisi set aside and the second is an appeal by him from a decision of the Family Registrar to refuse to hold a fact finding hearing in relation to disputed issues of domestic violence. The applications have been settled by consent and an order has been entered accordingly, but as with any consent order, it is necessary that the Court approves the terms of the order, and both in deference to the Family Registrar and also because the issues raised address relatively unusual points of law, I have thought it appropriate to deliver a short reasoned judgment. 2. The parties were married in April 2008. A son was born to them some three months later, and they separated in October 2011. The husband last had contact with his son in January 2012. In March 2012, the wife issued an Order of Justice in which allegations of domestic violence were made against the husband. The proceedings were placed on the pending list with the interim injunctions remaining in place. In April 2012, the husband filed an answer to the Order of Justice, denying the allegations of domestic violence. The wife filed a reply. The action was adjourned sine die by agreement in August that year with the interim injunctions remaining in force. The proceedings were withdrawn in April 2013. 3. The same day on which the Order of Justice was returnable in the Royal Court following service on the husband, with the interim non-molestation injunctions, the wife also issued divorce proceedings, alleging that the husband had perpetrated domestic violence against both her and her son. The petition was served on the husband on 24 th April, 2012, almost exactly two weeks after the injunction proceedings were placed on the Pending List. The husband did not defend the divorce proceedings in any way, including the allegations of domestic violence. The Greffier's certificate was issued on 29 th June, 2012, and there was a hearing on 1 st August, 2012, at which the husband was not present, where the decree nisi was pronounced. No decree absolute has yet been granted. 4. The husband's case is that he did not defend the petition at the time because he did not appreciate the nature of the documents served upon him and he did not receive legal advice in respect of them. The husband has recently been assessed by the principal forensic psychologist at HMP La Moye as cognitively and intellectually impaired. He is in the bottom 10%, compared to his cohorts, in terms of his cognitive and intellectual capabilities. In the skeleton

argument filed on his behalf, it is said that the fact that an answer was filed in the injunctive proceedings in which he disputed the allegations of domestic violence is some evidence that he cannot have understood the terms of the petition when it was served upon him or the implications of not defending it. 5. On 1 st March, 2013, the husband issued proceedings for contact with his son, with an application for interim contact made on 22 nd May, 2013. These proceedings have not been determined. The parties are currently awaiting the outcome of a family psychological assessment and a JFCAS report, and a hearing date has been fixed for 17 th December, 2013, at which interim contact will be considered. In the course of these proceedings, on nd May, 2013, the Family Registrar, having noted that the decree nisi pronounced on 1 st August, 2012, recorded that the wife had sufficiently proved the content of her divorce petition, including the allegations of domestic violence both to the wife and to the child of the marriage, ordered that it was unnecessary to hold a fact finding hearing regarding the allegations of domestic violence perpetrated by the husband. She reached that conclusion on the basis of the overriding objective as set out in Rule 4 of the Children Rules 2005 and indicated that she would give directions for taking forward the husband's application for contact with his son, but on the basis that he had been violent both to his wife and their child. It is against that background that an appeal has been entered against this order of the Family Registrar and that an application has been made seeking a setting aside of the decree nisi. The Law 6. Article 20 of the Matrimonial Causes (Jersey) Law ("the Law") provides insofar as is relevant:- "(1) Every decree for a divorce... shall, in the first instance, be a decree nisi not to be made absolute until after the expiration of such period, not exceeding six months, from the pronouncing thereof, as may be prescribed... (2) After the pronouncing of the decree nisi, and before the decree is made absolute, any person... may, in the prescribed manner, show cause why the decree should not be made absolute by reason of the decree having been obtained by collusion or by reason of material facts not having been brought before the Court, and in any such case the Court may make the decree absolute, reverse the decree nisi, require further inquiry or otherwise deal with the case as the Court thinks fit. (3) Where a decree nisi has been obtained and no application for the decree to be made absolute has been made by the party who obtained the decree then, at any time after the expiration of three months from the earliest date on which that party could have made such an application, the party against whom the decree nisi has been granted shall be at liberty to apply to the Court and the Court shall, on such application, have power to make the decree absolute, reverse the decree nisi, require further inquiry or otherwise deal with the case as the Court thinks fit." 7. Rule 40 of the Matrimonial Causes Rules 2005 ("the Rules") provides:- "(1) If, after a decree nisi has been pronounced but before it has been made absolute, or after a decree of judicial separation has been pronounced, the petitioner and the respondent have become reconciled, either party may apply to the Greffier by summons for an order rescinding the decree by consent." 8. This is clearly not an application that falls within Rule 40 of the Rules. The parties are not reconciled. Indeed both the husband and the wife consider that it is appropriate that there should be a divorce. 9. The provisions of Article 20(2) of the Law indicate that the decree nisi should not be made absolute if the decree was obtained by collusion or if there are material facts which were not brought before the Court which granted the decree. There is little local authority on how the Court should proceed in relation to an application under this paragraph. 10.

The only case which has been put before me is Greenhall-v-Hayden Taylor

[2006] JRC 112A,

[2006] JLR Note 21 . In this case, the wife issued a petition on 22 nd February, 2006, which was served personally on the husband two days later, accompanied by Forms 3 and 4. The husband was required to file the acknowledgement of service giving notice of intention to defend, if that were his intention, within eight days of service. In fact he filed the acknowledgment of service only on 17 th March. The same date, the Deputy Registrar issued the Greffier's certificate pursuant to Rule 28(1) of the Rules, having been satisfied that no notice of intention to defend had been given by any party and that the time limit for the giving of such notice had expired. As a result, the petition went to trial undefended on 5 th April, 2006, and a decree nisi was pronounced on that date. The husband applied for the decree nisi to be set aside. 11. The Court in that case was in no doubt that although the husband indicated he could not recall receiving the Greffier's certificate, he did in fact receive it within a day or two of its posting on 20 th March. That certificate indicated that the divorce would proceed undefended on th April. The Court found that the husband had taken no steps to prevent that hearing taking place

- he did not file an answer, he did not go back to the Greffe enquiring how the Greffier's certificate could have been issued when he had filed his acknowledgment of service giving notice of intention to defend, he did not raise the matter with his lawyers, he attended before the Deputy Registrar on 1 st April for a directions hearing on maintenance matters but did not object to the fact that the divorce was to proceed undefended a few days later on 5 th April, and he did not attend on 5 th April to object. Finally when the decree nisi was posted to him, he did not write to the Greffe complaining about what had happened in the light of his wish to defend the case, and it was only some six weeks later, after the decree nisi was granted, that he issued a summons to have the decree nisi set aside. 12. The Court exercised its discretion against the husband in that case on the basis that he left matters far too long, and that this was not therefore misconduct which amounted to a minor failure to comply with the required timetable. In its judgment, the Court specifically notes that the husband was a highly intelligent man who would not have had any difficulty in understanding the meaning of the Greffier's certificate. 13. The present case is very different. In the circumstances it is helpful to look at a number of English cases which have been concerned with the Court's ability to set aside a decree nisi. 14. In Owen-v-Owen

[1964] P 277 the Divisional Court was considering an application by the wife for a rescindment of a decree nisi and a retrial, in order that the husband's petition, based on the wife's alleged cruelty, could be defended and her cross petition based on her husband's alleged adultery and cruelty could be considered. One has to be cautious about matrimonial decisions of this kind taken before the enactment of the current legislation, but it is nonetheless to be noted from the decision of the Divisional Court that in matrimonial matters, there is more than the private interest to be considered. There is the public interest as well which it was the Court's duty to consider. Scarman J said, at page 284:- "We think that today the

justification for the existence of the court's power to order a rehearing is the public interest and that its exercise should be governed primarily by that consideration. The true nature of the public interest is, as Pilcher J remarked in *Tucker-v-Tucker*, to see that in matrimonial matters, where questions of status are involved, any order made by the court is made upon the true facts. Certainty is not within the power of the court to achieve; but it must be satisfied that there are substantial grounds for the belief that a decree has been obtained contrary to the justice of the case before it takes the serious step of setting aside an order of the court obtained by due process of law. It is, we think, in this context, that the conduct of the parties has to be considered. If the court is satisfied that there are substantial grounds for believing the decree to have been obtained contrary to the justice of the case, not even gross laches by the applicant, as in *Winter-v-Winter*, nor deliberate suppression of documents, as in *Peek-v-Peek*, will defeat the application. But, if a respondent, in possession of her faculties, with the facts of her married life in mind, and with the benefit of clear legal advice and her solicitor's explanation of the issues involved, takes a deliberate decision not to defend or not to pursue her cross charges in circumstances which negative any suggestion of "hoodwinking" the court, then this court should, in our opinion, view a subsequent application for a new trial with a degree of reserve... The question thus arises as to the way in which it is proper for the court to deal with, and assess, evidence adduced in applications under this rule. Both members of the court touched upon the subject in *Tucker-v-Tucker*. Although their choice of language differed, both accepted that the court had to come to a conclusion whether or not there was material upon which it was reasonable to suppose that a decree had been obtained contrary to justice." 15. In *Stevens-v-Stevens*

[1965] P147, Davies LJ said at page 162:- "As it seems to me, these applications in the Divisional Court fall into at least two classes. There is the class where the applicant comes along and says "I was not served; I knew nothing about it" or "I was deceived; or the proceedings took place behind my back". In that sort of case the applicant obtains a rehearing almost automatically. The other class... [is] where an applicant may come along and say "I knew all about this: I chose not to defend: but it was all wrong: let me defend now and grant me a rehearing". In a case of the latter kind, speaking for myself, I think that for an applicant to succeed he has to convince the Divisional Court, or this Court if it comes before this Court, that on the evidence before the Court on the application as a whole it is more probable than not that the decree was obtained contrary to the justice of the case." 16. In *Nash-v-Nash*

[1968] P 597, Cairns J considered there was another class of case, namely that where the respondent was aware of the proceedings, was anxious to defend, but through ignorance or lack of proper advice failed to take the necessary procedural steps to preserve his position. In those circumstances Cairns J considered that the Court should not automatically grant a rehearing, but on the other hand should not require to be satisfied that a different result would be obtained if it did. He considered it was sufficient that the applicant to set aside the decree nisi should satisfy the Court that he had a case which he

wished to put forward which, if accepted, might lead to a different result. 17. These cases were considered by the Court of Appeal in *Mitchell-v-Mitchell*

[1984] FLR 50. The Court of Appeal confirmed that in its view an application to set aside a decree nisi and file an answer out of time fell into three classes:- (i) Where the applicant knew nothing of the proceedings (i.e. was not served or was deceived). In these cases the Court would grant a rehearing almost automatically. (ii) Where the applicant knew of the proceedings and deliberately chose not to defend. In these circumstances a rehearing would be refused unless the respondent could show that there were substantial grounds for the belief that the decree had been obtained contrary to the justice of the case. (iii) Where the applicant, knowing of the proceedings, wanted to defend but through ignorance or lack of appropriate advice had failed to take the necessary procedural steps to preserve his position. Here a rehearing would be directed if the respondent satisfied the court that he had a case to put forward which, if accepted, might lead to a different result. 18. In the present case, the husband contends that there are elements of all three classes of case. However the dominant features put the case in the third category. He was acting under a complete misapprehension. The petition was served only two weeks after injunction proceedings had been commenced, and it was clear from the answer filed in the injunctive proceedings that he wished to defend the allegations of violence which had been made against him. 19. I accept that this case is very different on the facts from *Greenhall*. The husband in this case is a cognitively and intellectually challenged man, without proper assistance or legal advice on divorce, who did not understand the nature of documents given to him, and for whom English was not his first language. That is a wholly different factual position from that facing the Court in *Greenhall*. 20. In addition, the wife consents to the order setting aside the decree nisi on these grounds. By doing so, she must be taken to have agreed that the case was appropriately viewed as falling into the third class of the three cases mentioned on the authorities. In the circumstances, the person who had most to complain about in relation to the impact of this decision on her private interests has agreed that the order should be set aside. There is thus an alignment of public and private interest and I have no hesitation in endorsing the draft consent order put before me to set aside the decree nisi. The appeal 21. The second matter raised is the appeal against the decision of the Family Registrar to refuse to hold a fact finding hearing in relation to disputed issues of domestic violence on the husband's application for contact. She took that course because the domestic violence had already been established by the grant of the decree nisi, and she proposed to deal with the husband's application for contact on the basis that he had been violent both to his wife and to his son. 22. The setting aside of the decree nisi removes the substratum for the Family Registrar's decision which itself therefore must be set aside. In the circumstances it is unnecessary to say much more about the other points which have been raised on this appeal. However, in summary what is really being said is that whereas the doctrine of issue estoppel is well established in Jersey, as for example in *Minorities Finance Limited-v-Arya Holdings Limited*

[1994] JLR 149 , the approach in family law ought to be to reserve a discretion and flexibility around the issue, particularly where the Court has a statutory duty under the Children (Jersey) Law 2002 to take decisions in circumstances where the child's welfare is the Court's paramount consideration. Furthermore it was contended that the order refusing to hold a fact finding hearing was incompatible with the father's right to a fair hearing under Article 6, and the child's right to family life under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 , and therefore contrary to the Human Rights (Jersey) Law 2000 . 23. This has not been the subject of full argument before me, and I therefore will not express any opinions on it. However it is right to note that there are dicta in the English Courts to the effect that when considering the doctrine of issue estoppel in childcare cases, the Court has to balance the two-fold considerations of public policy - the important principle of certainty of decision, and the protection of the litigant from being vexed twice for the same complaint, on the one hand and, on the other hand, the requirements under the legislation that decisions should be taken in relation to child issues by having regard to the paramount consideration of the best interests of the child. This is perhaps particularly true in cases where the earlier decisions were given in default of defence. 24. The disputed question of whether the husband has committed domestic violence on his wife and his son, particularly the latter, is obviously capable of being of importance in the contact proceedings which have just been commenced. The result of the orders which are made by consent is that, if the question of domestic violence is raised in the contact proceedings as an objection to contact taking place, the Family Registrar will have to give directions as to how the facts in dispute will be resolved. 25. Accordingly it is ordered by consent that:- (i) The Greffier's certificate dated 29 th June, 2012, be set aside; (ii) The decree nisi dated 1 st August, 2012, be set aside; (iii) The order of the Family Registrar made at the hearing on 22 nd May, 2013, that a fact finding hearing was unnecessary be set aside; (iv) The matter be remitted back to the Family Registrar to be heard for directions; and (v) Each party shall bear its own costs incurred to date. Authorities Children Rules 2005. Matrimonial Causes (Jersey) Law 1949. Greenhall-v-Hayden Taylor

[2006] JRC 112A (

[2006] JLR Note 21 ). Greenhall-v-Hayden Taylor

[2006] JLR N 21. Owen-v-Owen [1964] P 277. Stevens-v-Stevens [1965] P147. Nash-v-Nash [1968] P 597. Mitchell-v-Mitchell [1984] FLR 50. Minorities Finance Limited-v-Arya Holdings Limited

[1994] JLR 149 . Children (Jersey) Law 2002. Convention for the Protection of Human Rights and Fundamental Freedoms 1950. Human Rights (Jersey) Law 2000. Page Last Updated: 03 Feb 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

## Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

**ORIGINAL SOURCE**      <https://www.bailii.org/je/cases/UR/2013/>

**CASE PAGE**              <https://chat.esheria.ai/case-law/jersey/k-v-l-matrimonial-2013-jrc-186-25-september-2013>

Prepared on 29 October 2026 · Esheria