St.Mary's
FAMILY LAW SPECIALISTS

Divorce Proceedings

January 2025

A case referred to HHJ Simmonds as the National Lead Judge on Divorce to determine whether a conditional order should be made final and to give guidance on how the Court should exercise its discretion following the coming into force of the Divorce, Dissolution and Separation Act 2020 and the new Part 7 of the Family Procedure Rules.

HK v SS [2025] EWFC 5 (B)

14 January 2025

Full judgment can be found here.

Judgment of HHJ Simmonds (National Lead Judge on Divorce)

The issues before the court were as follows:

1. *This is an application by HK for the Court to exercise its discretion and permit the making of a conditional order to be made final notwithstanding the passage of 12 months and where the parties had reconciled between conditional order and this application. This has been referred to me as the National Lead Judge on Divorce to give guidance on how the Court should exercise its discretion following the coming into force of the Divorce, Dissolution and Separation Act 2020 and the new Part 7 of the Family Procedure Rules.*

2. *The issues that I need to consider are;*

   a) Whether a conditional order should be made final where parties have reconciled for a period of 15 months following the granting of the conditional order

   b) If not, whether the conditional order should be rescinded, and the divorce Application be dismissed.

   c) Generally, how the Court should exercise its discretion pursuant to r.7.19(6)(b)

The judge provided the background to the proceedings from paragraph [3] onwards:

3. *The parties married in June 2011. The marriage had broken down by 2022 after a marriage of some 11 years; no children have been born of the marriage. The applicant issued a sole divorce application on the 12th May 2022 on the ground that the marriage has broken down irretrievably. The matter was uncontested, and the applicant applied for the conditional*

order on the 30th September 2022, the certificate of entitlement was issued on the 7th October 2022 and the conditional order was granted on the 27thOctober 2022.

4. *The applicant was then entitled to apply for the final order on or after the 9th December 2022 and the Respondent could have applied on notice three months thereafter. Neither party did so.*

5. *The parties reconciled in March 2023 but separated again in June 2024 returning to sleep in separate rooms. The reconciliation had lasted some 15 months.*

6. *In August 2024 the applicant applied for the conditional order to be made final. The matter came before DDJ Wilkinson on the papers who directed that the applicant should file further information and on the 23rd August 2024 the applicant's solicitors emailed the court;*

> *"In response to paragraph (2) of the attached Order made by Deputy District Judge Wilkinson, the Applicant instructs that the parties reconciled in March 2023, but the marriage sadly broke down again around 2 months ago".*

7. *DDJ Wilkinson referred the matter to me on the basis that there was a lack of guidance as to how the court should exercise its discretion when parties had reconciled for a significant period.*

Legal principles

The judge summarised the change in the law brought into effect by The Divorce, Dissolution and Separation Act 2020 (DDSA 2020) and the previous procedural rules and case law:

17. *The previous rule in respect of applications for Decree Absolute received after 12 months was r. 7.32 which provided*

(3) Where notice is received more than 12 months after the making of the decree nisi or the conditional order, it must be accompanied by an explanation in writing stating-

> *a) why the application has not been made earlier;*
>
> *b) whether the applicant and respondent have lived together since the decree nisi or the condition order and, if so, between what dates;*
>
> *c) if the applicant is female, whether she has given birth to a child since the decree nisi or the conditional order was made and whether it is alleged that the child is or may be a child of the family;*
>
> *d) if the respondent is female, whether the applicant has reason to believe that she has given birth to a child since the decree nisi or conditional order was made and whether it is alleged that the child is or maybe a child of the family*

(4) Where para (3) applies the court may;

a) Require the applicant to file an affidavit verifying the explanation and to verify the explanation with a statement of truth, and;

b) Make such order on the application as it thinks fit, but where it orders the decree nisi to be made absolute or the conditional order to be made final that order is not to take effect until the court is satisfied that none of the matters mentioned in para (2) (a) to (i) applies.

18. *Elements of the previous rule were not continued in the new rule but an explanation of the delay remained together with the court's discretion.*

19. *Having considered r.7.32 I also refer myself to the case law before the DDSA 2020. I take particular note of the dicta of Wood J in Savage v Savage [1982] Fam 100. In that case the court was faced with a petition on the grounds of unreasonable behaviour where the parties had reconciled for a period of three and a half years after decree nisi. The wife applied for the decree to be made absolute which was refused, and the decree rescinded. Wood J in his Judgment on reconciliation said this at 104B:*

> *"In looking at the period of cohabitation it was argued that the quality of the cohabitation should be examined in each case to see how long the reconciliation continued. I am not convinced that that is the correct approach in view of the wording of many parts of section 2 of the Matrimonial Causes Act 1973. It is also extremely difficult to assess such a test and although cohabitation will always be with the hope of reconciliation, it is the living together which is the period which must be examined, in my judgment. All the factors which I have mentioned above lead me to the inevitable conclusion that the inference originally drawn under the special procedure, that the wife could not reasonably be expected to live with the husband, was the wrong inference, looked at in the light of all the circumstances now known.*
>
> *To approach the problem in this way is not to undermine attempts at reconciliation. There is the period of 12 months referred to in rule 65 of the Matrimonial Causes Rules 1977 to which I have already referred and the periods of time outlined in section 2 of the Act of 1973 are within that span, thereafter the court has a discretion. It is perhaps surprising that the substantive law does not direct that a decree nisi shall lapse after a given period - possibly two years. This might help to cement any reconciliation which had taken place within that period and to encourage finality where the condition of the marriage was in reality hopeless."*

20. *The Court of Appeal in Olga Cazalet v Walid Abu-Zalaf [2023] EWCA Civ 1065 held that that approach "dovetailed" with the approach of Cobb J in NP v TP (Divorce) [2022] EWFC 78,*

"one of the first points of reference should be whether there has been a "new even or material change of circumstances which invalidates the basis, or fundamental assumption, upon which the order was made" going on to formulate the test as (para 55)

> *"is the evaluative exercise carried out upon granting a decree nisi which led to the conclusion that it was unreasonable to expect the applicant to live with the respondent still valid in light of subsequent events? I have adopted the test as phrased in Savage, but the test applies to both elements of the decree nisi, namely the decision that the wife could not reasonably be expected to live with the husband and that the marriage has irretrievably broken down" (My emphasis)*

Submissions and discussion

The judge considered the many reasons for delay but commented that the parties have not usually reconciled.

The applicant's submissions are at paragraphs [23] - [24]. He argued *"that the purpose of the DDSA was to make the divorce process less challenging for couples and from preventing a party/parties being tied to a marriage that had broken down."*.

The judge concluded that:

25. *A marriage subsists until the making of a final order. If the Court does not grant the application, then it follows that it would have to rescind the conditional order a step that the Court does not take lightly.*

26. *Parties should not be dissuaded for reconciling or attempting to reconcile, and the court must acknowledge the changes that the DDSA have heralded. In my judgment the test in Olga Cazalet v Walid Abu-Zalaf applies.*

27. *The question for the Court then becomes for what period should parties be allowed to attempt to reconcile before it invalidates the basis upon which the conditional order was made and that the original statement that the marriage has broken down irretrievably can no longer stand?*

28. *The parties could attempt to reconcile for just under a year between conditional and final order without any enquiry from the Court. Reconciliation may be gradual, and time should be allowed, adopting the words of Wood J, to allow any attempted reconciliation to "cement in".*

29. *Prior to the DDSA one of the facts to prove the marriage had broken down irretrievably was that the parties had been separated for two years and the other party consented. In my*

Judgment that further supports the argument that two years is a reasonable period to allow parties space and time to decide their future and decide if they wished to remain separated.

30. *This case highlights that an attempted reconciliation takes time, and parties should be permitted that time. During that attempt the original basis for the divorce still stands. In my Judgment Wood J's observations in Savage stand true some 40 years on. In this case the court is faced with an attempted reconciliation that has not worked and the marriage remains irretrievably broken down.*

31. *The application should be entitled to apply for final order.*

32. *In my judgment any period of reconciliation under two years should be seen as an attempt at reconciliation but not a bar to the Court allowing a final order to be made. This case highlights that parties need time to reflect. They should not feel the pressure of an artificially imposed court timetable. Further in this case if I refuse the Application either party would be able to issue a new divorce application the following day.*

33. *Any period over two years may amount to evidence that the marriage has not irretrievably broken down and that the reconciliation for such a long period could amount to a material change in circumstances that invalidates the basis upon which the conditional order was made. The Court of course approaches such applications by exercising its discretion and that includes at the final order stage taking into account all the facts known to it. That is a wide discretion but in my judgment parties and those that advise them need some guidance as to how that is likely to be exercised and I hope this provides that.*

Practical consequence

This judgment offers valuable guidance in situations where the parties reconcile following a conditional order, only for the marriage to break down again, leading them to seek a final order.

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