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IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2019] EWHC 3806 (Fam)



No. 2019/0084

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 6 December 2019

ON APPEAL FROM THE ORDER OF HIS HONOUR JUDGE ROGERS
IN THE MATTER OF THE MATRIMONIAL CAUSES ACT 1973

Before:

MRS JUSTICE THEIS

B E T W E E N

FN

Appellant

- and -

AC

Respondent

MR ALEXANDER CHANDLER appeared on behalf of the Appellant.

MR DAVID BURLES appeared on behalf of the Respondent.

J U D G M E N T

MRS JUSTICE THEIS:

Introduction

- 1 This matter concerns the husband's appeal from a case management order made by His Honour Judge Rogers dated 17 June 2019 within financial remedy proceedings. Permission to appeal was given on 6 September 2019. I am giving this *ex tempore* judgment because the parties are anxious to know the outcome of this hearing so that they can then move onto the next stage. I am enormously grateful to both counsel, Mr Chandler and Mr Burles, for their extremely helpful and concise skeleton arguments, supplemented by their respective persuasive oral submissions.

Background

- 2 The appeal is within proceedings where the wife is the applicant for financial provision, following the parties' separation after 29 years of marriage. They married in 1987, have two children who are now both over 20, and separated in 2016. The wife issued her application in April 2018, the first appointment was in September 2018, when standard directions were made. I am calling the parties 'husband' and 'wife' with their agreement, even though they have been separated for some time.
- 3 It is accepted that all the assets of the parties were built up during the marriage. The headline figures are in the region of just under £6m for the husband, and just over £4.7m for the wife, made up of the former matrimonial homes (£1.7m), a property in Ibiza (between £1.2m and £1.4m), and other investments where there remains some dispute about. The table produced by Mr Burles indicated the areas of dispute between the parties. In addition, there is a trust that was set up during the marriage in 2004, which has a value of about £4.2m. There are issues about the trust; for example, the circumstances in which it loaned some money to the husband to enable the property in Ibiza to be purchased and whether that will then need to be repaid. Also, whether it is a resource that is available for the husband.
- 4 Following the first appointment in September 2018, it is accepted the parties embarked on some direct negotiations to try and resolve the proceedings between them. It is accepted the parties met on three occasions: on 27 March 2019, at the wife's solicitor's offices; on 15 April 2019, again at the wife's solicitor's offices in the afternoon until 6 p.m., thereafter moving to the husband's business offices in a separate location until about 10 p.m. then, finally, on 17 April at the husband's business offices at 4.30 p.m. with a document having been signed by them at about 9.50 pm. This document was then photographed and sent to their respective solicitors. The document is in the bundle at E10; it consists of seven paragraphs; it confirms that in effect they will keep the respective properties, so the wife will keep the Ibiza property and contents, and the husband the former matrimonial home and its contents. Each party will keep the assets already in their sole name with a lump sum payment of £1.375m paid by the husband to the wife by way of four instalments of differing amounts ranging between £250,000 and £500,000. Each party will be responsible for their own liabilities, and both parties will use best endeavours to assist minimising such liabilities, a clean break and each party to pay their own costs. That document was sent to their respective solicitors. In email exchanges between the solicitors in the few days afterwards, as referred to in the husband's statement, there was reference in the wife's solicitor's correspondence to sorting out the detail following the agreement. The husband's solicitors sent a proposed draft order on 25 April, and their email dated 29 April was entitled: "Preparation for Final Settlement".

- 5 The husband's solicitor chased the wife's solicitor on about 14 May, as there had not been recent correspondence with them. This elicited a response on 17 May to say that the wife did not consider herself bound by the agreement. That prompted the husband to issue an application dated 20 May 2019 for the wife to show cause why an order should not be granted in the terms of the agreement reached between them. That application was listed on 17 June, at the same time as the matter had been scheduled for a financial dispute resolution appointment before His Honour Judge Rogers, as well as a maintenance pending suit application which had been issued by the wife.
- 6 The husband's application was issued in accordance with what Mr Chandler has described as the "well-trodden path" set out in the case of *Xydhias* [1999] 1 FLR 683, where the court in certain circumstances can direct what is termed an "abbreviated hearing" that will involve, as he said, three stages: one, to establish whether or not there was an agreement; secondly, whether there are vitiating factors of the agreement with the result that it should not be relied upon, and, thirdly, even though the parties have reached an agreement the court still has to undertake its overarching evaluation under Section 25 of the Matrimonial Causes Act 1973
- 7 Prior to the hearing on 17 June both parties filed statements setting out the circumstances of the meetings that took place between them. In the wife's statement she raises the issue of undue influence and the pressure that was put on her by the husband by virtue of his behaviour, in the context of what she said reflects his behaviour towards her during the marriage. She said the pressure that put on her, in the circumstances of the meetings going on as they did for extended periods of time, often with limited or no breaks or any refreshments, and the overall unfairness of the arrangement means that the court should not rely on any agreement which was reached. Although the husband has not responded to this statement, it has been taken as read that he denies that there was any such pressure or any such behaviour. He asserts the wife is somebody who is financially astute, that she dealt with financial matters during the marriage, and when the court looks at the schedules that were produced in between the various meetings it indicates her financial knowledge. He says the allegations relied upon in relation to his behaviour during the marriage relate back an event that was over 15 years ago.
- 8 At the hearing on 17 June the Judge had detailed written submissions from the parties together with oral submissions from counsel for both parties. In relation to the husband's application to show cause why an order should not be made the Judge was faced with four options, two at opposite ends of the scale and the other two in the middle. The first was to make an immediate order in the terms of the husband's application, to reflect the agreement made on 17 April. The second was to list what was termed as an abbreviated final hearing with no further valuation evidence, to consider the husband's application to show cause why the agreement should not be made into an order. The third was to dismiss the husband's application, and the fourth to case manage towards the eventual final hearing at which the agreement would be one of the Section 25 factors. In the order the Judge sets out that he rejected options one and three and refused the option of an abbreviated hearing for the reasons set out in his judgment. In his judgment, he dealt with the background between paragraphs 1 - 10. In paragraph 11 he set out some of the authorities he was referred to. Whilst he did not specifically refer to the case of *Xydhias*, it is accepted that it was referred to in the various case management documents and he was referred to it in oral argument in court. In paragraph 11, after referring to cases including *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42; [2011] AC 534, *Crossley v Crossley* [2007] EWCA Civ 1491; [2008] 1 FLR 147 the Judge said as follows:

“Efficient case management and adherence to the overriding objective makes any suggestion of an abbreviated or proportionate hearing a highly attractive proposition, but I caution myself in that, that should only apply and can only be used to curtail the natural investigative forensic processes if fair and appropriate, such as was the position on the facts of the individual cases that gave rise to *Crossley v Crossley* and *S v S (Ancillary Relief)* [2008] EWHC 2038 (Fam); [2009] 1 FLR 254. There is no doubt that the suitable use of an abbreviated procedure is an extremely useful tool in situations of that sort, although, as is obvious, every case depends on its own circumstances. The value of the assets, the degree of complexity and so on will all come into play. It is perhaps indicative of the enormous wealth involved in *S v S*, a decision of Eleanor King J, as she then was, that even the abbreviated process on her direction was to take some three days. It is therefore hugely important to ensure that procedural straightjacket matches the factual internal status of the case.”

In that paragraph he made it perfectly clear that he was very aware of the balance the court would have to undertake including the importance of upholding agreements that had been reached between parties and that there is a route he could go down to have a shortened or proportionate hearing, but, as he rightly reminded himself, each situation is fact specific in relation to the individual case.

- 9 He then dealt with the submissions of the parties and then set out his conclusion. I am going to read paragraphs 14 to 19 because that reflects the rationale for the decision that he reached. He said:

“14. Unlike the other cases to which I have referred, there is no clear substratum of established fact in this case. Even such complicated and sensitive issues of domestic violence or dominant behaviour going years are raised. They are not capable of determination simply by reading the competing arguments, or even by a relatively summary determination. There is no middle ground, either they are there and they are in play or they are incorrect and therefore factually have no relevance at all, and the court at some point, in a proportionate way, but nevertheless clearly, will have to grapple with those issues. Similarly, the financial acumen or personal confidence of the wife in conducting the litigation are very much in issue, as, on the other side, is the position of the husband in terms of his financial competence and his personality.

15. Even setting aside those factors, the net effect of the agreement is in itself in dispute. If the wife is right on the face of it there is a very substantial departure from equality in a sharing case where, in addition, she says such capital as she does derive from the agreement or ultimate award of the Court will have to be used in part to generate income, unlike her husband. That net effect factor alone, says Mr Burles,, even without looking in depth at the more complicated factors, is a strong contra indication to this agreement being magnetic, and he would submit even points in the opposite direction towards the proposition that it tends to suggest that a circumvention of section of Section 25 has occurred with the creation of unfairness.

16. I accept, of course, the *Radmacher* points about personal autonomy and the desirability of upholding agreements freely entered into are powerful factors, but they cannot, it seems to me, be determined centrally today. They are for another occasion.

In the light of that analysis and taking account of the factors so well made on each side, I am unable to say that the position is as clear as Ms Fothergill”,

who represented the husband at the hearing below

“contends, and so it is with somewhat of a heavy heart but no hesitation, I have come to the clear conclusion I cannot accept that a significantly abbreviated process is appropriate in this case. That is not to give the wife false hope. The agreement is there and, as I teased out in argument, there are some important contra points to be made which she will have to deal with, and they cannot simply be explained away, they will have to be investigated.

17. It may be therefore that the agreement once investigated remains determinative; it may remain a factor; or it may be of no significance at all. That will depend upon a detailed analysis. Even if not magnetic, its relevance may be such that it will be important for the Court nevertheless to take it into account in formulating a view on the overall fairness. For one thing, the way in which costs have been expended, and no doubt substantially increased, could be a factor to be considered, not necessarily inter-parties but in the overall determination and proper adjustment of assets in this case.

18. In my judgment, therefore, the matter will need to be further case managed. I see merit in having a Financial Dispute Resolution Hearing. I am not prepared to dispense with it and move directly to a final hearing. I accept it will have some limitations, but I also can see that there will be a value to be placed on an independent evaluation of the competing factors, not only purely financial but of the tactical and forensic vulnerabilities of the respective parties, given the way the case has panned out, and I hope with some goodwill there may be some to-ing and fro-ing and movement each way so that a negotiated settlement can be achieved. It will, in the end, be a very substantial financial saving for both.

19. If that is unsuccessful, there will need to be a hearing. That will be a hearing where it seems to me inevitable that the trial Judge will have to look at some privileged material. As I have discussed with counsel, trying to ring fence the agreement into a preliminary issue is both wrong in principle and an out of date approach, but of course the parties can continue with without prejudice negotiations outside the scope of that agreement, and those privileged conversations will remain confidential.”

Submissions

- 10 This appeal seeks to challenge that decision on two main grounds. Firstly, that the Judge erred by refusing to set down the appellant’s show cause application for hearing, instead directing that it would be considered as one of the issues in a conventional final hearing. Secondly, the Judge erred by making a number of case management directions which would be unnecessary if the show cause application was successful, including the expert valuation of properties, chattels, tax and updating financial disclosure. The third ground is now not pursued because the parties have been able to agree the level of maintenance pending suit. The main ground is the first ground of appeal, and it seems to me that if that fails then the second ground fails, as well.
- 11 The parties have been able to agree that the case of *S v S (Ancillary Relief)* [2008] EWHC 2038 (Fam); [2009] 1 FLR 254, a decision of Eleanor King J (as she then was) dealt with a similar situation within proceedings, where the parties had reached agreement between them and one then sought to resile from that. At paragraph 23 she sets out in some detail seven

headline points that the parties agree (save for two points I will come to at the end) set out the structure under which the court should consider these matters. She said:

“Firstly, the existence of a concluded agreement is a matter of great weight. Secondly, the court when considering whether there is an agreement and its effect, if there is, does so against the backdrop of Section 25.”

She then refers to what Thorpe LJ set out in *Xydhias* page 394 recognising the flexibility in relation to how to case manage a situation where there is an agreement against the backdrop of Section 25, including how much or not there is a need to delve into the other Section 25 considerations. Thirdly, she said:

“An application for a notice to show cause is therefore an appropriate means by which an aggrieved party can bring the matter before the court”,

and she refers to the position set out in *Xydhias*. Fourthly:

“Public policy requires the court to consider whether there has been an agreement and also to exclude from trial lists unnecessary litigation.”

Fifthly, she referred to the overriding objective to deal with cases justly, as set out in Rule 2.5(1)(d) of the Family Procedure Rules 1991, now the Family Procedure Rules 2010 Rule 1.1:

“Which allow judicial case management to seek to save expense and deal with the matter in a way that is proportionate to the financial position of the parties and allots an appropriate share of the court’s resources.”

Then, sixthly:

“It is not necessary for every detail to have been resolved prior to the court taking a view that there is an agreement to which a party should be held.”

Seventhly:

“In determining whether there has been an agreement, the court will look at all the circumstances, including the extent to which the parties themselves attached importance to the agreement and the extent to which the parties themselves have acted upon it.”

Both Mr Chandler and Mr Burles agree that sets out an accurate analysis of the relevant principles.

- 12 Mr Chandler also referred the court to two additional paragraphs in *Radmacher*. He took the court to paragraphs 75 and 81, under the sub-heading of “Fairness”, and referred to what had been said in 2010 in the case of *MacLeod v MacLeod* [2008] UKPC 64; [2009] 1 FLR 641, that:

“The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.”

And then a little further on at paragraph 81, again within the context of what is fair, Lord Phillips stated:

“The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement.”

- 13 Mr Chandler submits that the Judge below erred in several respects. Firstly, he failed by proceeding on the basis that the court exercises a discretion whether, or not, to list an abbreviated hearing of the show cause application. Secondly, in applying guidance from a number of cases, he applied guidance from a number of cases which involved a different area of the law relating to pre and post-nuptial agreements, as opposed to the law relating to an agreement to compromise financial remedy litigation. Thirdly, denying the husband a hearing of the notice to show cause application, save as was directed as being part of a conventional financial remedy hearing.
- 14 In his skeleton argument, supplemented by his oral submissions, he sought to suggest that the Judge erred in relying on *NA v MA* [2006] EWHC 2900 (Fam); [2007] 1 FLR 1760, as that case concerned a post-nuptial agreement where he submits different considerations arose. Whilst he accepts the law relating to pre and post-nuptial agreements set out in the Supreme Court decision of *Radmacher*, he submits the law relating to agreements to compromise litigation is set out in the Court of Appeal decision of *Xydias*. He accepts that there are many points of similarity but submitted that the court’s approach is not identical, and to conflate the two, as he says the Judge did, means the Judge has fallen into error. He identified in oral submissions four differences between the pre and post-nuptial agreement cases with those dealing with the *Xydias* situation. Firstly, the pre and post-nuptial agreements tended to express and refer to the assets in very broad terms, for example, pre-marital or post-marital assets, whereas an agreement that is within proceedings is very specific because it refers to particular assets which are already identified between the parties. Secondly, the pre or post-nuptial agreements are dealt with in what can be termed as non-contentious circumstances, whereas, by definition, in proceedings it is contentious. Thirdly, the distinction about the different levels of disclosure in situations where there may be generalised disclosure in the pre or post-nuptial situation, whereas within litigation there will have been substantial disclosure as a result of the forensic process. Fourthly, pre and post-nuptial agreements are dealt with through open correspondence, whereas within the proceedings they are dealt with through without prejudice correspondence. So, whilst accepting the pre-nuptial agreement is to be considered as one of the issues at the final hearing, he seeks to draw a distinction where an application for a notice to show cause has been made the court should direct the application is heard where it relates to an agreement to compromise litigation.
- 15 He submitted the Judge erred by firstly not expressly referring to the *Xydias* case when he dealt with the law at para.11 of his judgment, although he accepted it was before the Judge in skeleton arguments and referred to in oral submissions and there was very little material he could point to within the judgment that indicated the Judge had taken a wrong course. Secondly, the Judge had misunderstood the fact that he can determine a factual dispute within an abbreviated hearing dealing with a notice to show cause application. It is right that can take place, and it seems that was acknowledged by inference, if nothing else, by the fact that the Judge referred in his judgment to the hearing in *S v S*. Thirdly, the Judge fell into error at para.16 by use of the word “significantly”, which he said indicated that he perhaps failed to understand that an abbreviated process had flexibility as to how much or not it is actually abbreviated. Fourthly, in para.19, referring to it as a preliminary issue, he had

misunderstood the *Xydhias* process and the three stages outlined above. Finally, he submitted that the Judge had fallen into error by listing the matter for a Financial Dispute Resolution Hearing, although he accepted that that was not actually one of the grounds of appeal.

- 16 In relation to the overriding objective by making the order he did, he submits that the case has been delayed; by linking the application into the final hearing many of the directions made would not be required if it was limited to the notice to show cause application, and the course the Judge took resulted in a disproportionate use of resources by listing the matter in the way that he did. By doing so, submits Mr Chandler, he effectively denied the purpose of the application which could avoid costs and delay of a final hearing. In his oral submissions he said that the hearing he expected on his scenario would take about two days, but if it was a full final hearing it would take five days, although he recognised if he was not successful in his abbreviated hearing it was very likely the matter would not be concluded in two days and would have to be put over for yet another hearing.
- 17 Mr Burles, on behalf of the wife, resists the appeal. He submits, firstly, the order made by the Judge was within his discretion; he was exercising his case management powers and could not be described as wrong. He relied on the Court of Appeal decision of *Re: TG (A child) (Care Proceedings: Expert Evidence)* [2013] EWCA Civ 5; [2013] 1 FLR 1250, a decision of the former President, Sir James Munby. At paragraph 35 he endorses previous decisions, emphasising the importance of supporting first instance Judges who make robust but fair case management decisions. He said:

“The Court of Appeal can interfere only if satisfied that the Judge erred in principle, took into account irrelevant matters, failed to take into account relevant matters, or came to a decision so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the Judge.”

He went on in that paragraph to set out the rationale that supports that position. If there is any encouragement in relation to appealing interim orders, all it does is build in delay in relation to the litigation process. Secondly, Mr Burles rejected any suggestion that the Judge applied the principles from the wrong area of the law. He submits, both *Crossley v Crossley* and *S v S*, concerned financial remedy applications, and *S v S* concerned a similar situation to this case in terms of the fact that there had been an agreement which was said to have been reached within the context of litigation. Thirdly, here there are factual disputes, and an abbreviated hearing risked being an expensive, time consuming and disproportionate exercise because if an abbreviated hearing is not successful there would be yet further hearings. Fourthly, on the facts of this case the division relied upon raises issue of fairness, although it is recognised there is a dispute about that due to the differences in relation to the way the asset schedules have been set out. Fifthly, he relies on the references in a number of cases to the importance of there not being a straightjacket procedure in relation to these cases as they are each fact specific. He refers, in particular, to the observations made by Thorpe LJ in *Crossley* in paragraph 15, repeated by Eleanor King J in *S v S* at paragraphs 17 and 18 making it clear that what Thorpe LJ had said in *Crossley* was very much in her mind throughout that judgment. This is supported by Baroness Hale in *Radmacher* at paragraph 170:

“There can be no inflexible rule about how a judge should approach the task. It may be that a judge, if called upon to decide matters, will find it convenient to conduct the usual section 25 exercise before deciding what weight to give to the agreement. He or she will then have a view of how the usual principles would apply to the particular facts of the case. It may be, on the other hand, that the case is so clear cut, as in

Crossley v Crossley, that it is more convenient to begin with the agreement. If, for example, all the agreement seeks to do is to preserve property acquired before the marriage for the benefit of the spouse to whom it belongs, the court would be most unlikely to interfere unless the outcome would put a spouse or children in real need. It is not for this Court to be prescriptive about how a trial judge should conduct the statutory exercise.”

Continuing at para.171:

“In principle, though, I agree that the test should be the same, whether the agreement is a compromise of the proceedings, a separation agreement, a post-nuptial agreement made while the couple are together, or an ante-nuptial agreement. But the way in which it works out may be very different, depending on the facts of the case.”

Sixthly, the Judge was right, submits Mr Burles, on the facts of this case to reject any suggestion of an abbreviated hearing being appropriate due to the potential vitiating factors in relation to the agreement reached between the parties in April, in particular whether there were threats made by the husband as described by the wife, whether the husband’s negotiating style in the context of the parties’ relationship took advantage of that position in circumstances where the agreement was signed late at night, after a long meeting in difficult circumstances where the wife could be said not to have a full appreciation of her position. The court would need to consider these factors and whether they vitiate the agreement.

Decision

- 18 Having considered the submissions of the parties, I have reached the conclusion that this appeal should be dismissed. I do so for the following reasons.
- 19 Firstly, I reject any suggestion that in making the directions he did the Judge was wrong, erred in law or considered an irrelevant consideration. He was perfectly entitled to make the order he did for the reasons he set out. Whilst there appears to be no dispute that the meetings took place and that the document was signed at the end of the third meeting, there is a significant dispute between the parties as to the circumstances of those meetings; whether, for example, the wife was placed under undue pressure. Those matters would need to be considered at any hearing, which would take some time. I agree with Mr Burles that such a course risks being an expensive time consuming and difficult exercise and that such a course would be contrary to the overriding objective, as if the husband fails there may be yet a further adjournment with consequent expense and further delay. The Judge reached his decision for reasons he was able to clearly rationalise in the paragraphs I have set out above.
- 20 Secondly, the Judge clearly had in mind the observations made in *Radmacher* about personal autonomy and the desirability of upholding agreements being entered into. But, as he said, that could not be determined at that hearing due to the factual disputes on the information he had. The position was not as clear as counsel for the husband submits. In paragraph 11 of his judgment, whilst he did not expressly refer to *Xydhias*, Mr Chandler accepted the Judge was referred to it during the hearing and at paragraph 11 he refers to the relevant competing considerations that the court needs to take into account in relation to efficient case management, the overriding objectives which makes any suggestion of an abbreviated or proportionate hearing a highly impractical proposition and should only be directed if fair and appropriate.
- 21 Third, I reject the submission that there are any significant differences in dealing with the pre and post-nuptial agreement cases and the *Xydhias* situation. In fact, there are many

cross over principles. This is demonstrated by the fact that the parties have been able to agree the list of relevant legal principle in *S v S* which include principles drawn from both situations.

- 22 Fourthly, as has been repeated in a number of applications, namely, Thorpe LJ in *Crossley* and Eleanor King J in *S v S*, and most recently by Baroness Hale in *Radmacher*, it is quite clear these cases are fact specific. There is no inflexible rule as to how the proceedings should be conducted. I reject the suggestion by Mr Chandler that the factual situation, whether pre or post-nuptial cases, mean that they should be dealt with in a different way. As Mr Burles points out, the notice to show cause procedure has no specific procedural structure in the rules, or anywhere else. It is a creative and helpful procedure in appropriate cases, dependent on the particular facts. In the case management process applications are considered with a wide discretion, as set out under Part 4 of the Family Procedure Rules 2010, in particular the discretion set out in Rule 4.1. To suggest, as Mr Chandler submits, that by issuing such an application creates some kind of entitlement that the application will be heard unless doing so would serve no purpose is not supported by authority. Previous cases have repeatedly observed over the years that these applications are fact specific, there is a need to have the flexibility, and, adopting the words of Baroness Hale, “there can be no inflexible rule” in this situation.
- 23 The appeal is dismissed on all grounds for the reasons set out. In doing so I echo the words of the Judge that dismissing the appeal is not to give the wife false hope. The existence of the agreement does not appear to be in dispute. There are and may be valid points that can be made on both sides.
- 24 It is of concern there has been further delay in concluding these proceedings. The parties have already spent between £80,000 and £90,000 each on legal costs to get to this stage. That is a matter of enormous regret. Even though I know the parties have had difficulties within this litigation, I repeat the message given by the Judge on 17 June, there is still a possibility for the parties to be able to negotiate through their lawyers to try and reach an agreement. That can bring them certainty and finality, which continuing litigation will not. It will reduce the impact of continued and increasing legal costs and will enable them to get on with their lives. I urge the parties to continue to try and resolve this litigation.
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CERTIFICATE

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This transcript has been approved by the Judge.