SHERIFFDOM OF FORFAR SHERIFF COURT

[2024] SC FOR 25

FFR-F38-24

JUDGMENT OF SHERIFF MUNGO BOVEY KC

in the cause

CM

Applicant

against

DM

Respondent

Forfar, 4 June 2024

[1] This note gives reasons why I have decided to grant decree of divorce in this case.

[2] Part XI of the Ordinary Cause Rules deals with SIMPLIFIED DIVORCE APPLICATIONS and rule 33.73(1) sets out the circumstances in which such an application can be made. These include non-cohabitation for two years and:

> "(d) there are no children of the marriage under the age of 16 years;
> "(e) neither party to the marriage applies for an order for financial provision on divorce."

[3] Rule 33.73 (2) provides: "If an application ceases to be one to which this Part applies at any time before final decree, it shall be deemed to be abandoned and shall be dismissed."

[4] Rule 33.78 provides:

> "(1) Any person on whom service or intimation of a simplified divorce application has been made may give notice by letter sent to the sheriff clerk that he challenges the jurisdiction of the court or opposes the grant of decree of divorce and giving the reasons for his opposition to the application.

> (2) Where opposition to a simplified divorce application is made under paragraph (1), the sheriff shall dismiss the application unless he is satisfied that the reasons given for the opposition are frivolous.
>
> (3) The sheriff clerk shall intimate the decision under paragraph (2) to the applicant and the respondent.
>
> (4) The sending of a letter under paragraph (1) shall not imply acceptance of the jurisdiction of the court."

[5] By application dated 7 February 2024 the applicant sought divorce in terms of this part of the rules on the basis of no cohabitation for two years. But for the matters canvassed in this note, the application is in proper form and falls to be granted. The application was intimated to the respondent.

[6] On 12 March 2024 the Court received a letter from the respondent quoting simplified divorce guidelines to the effect that one can only apply "…if money is not an issue at the time of the divorce … This means that neither … spouse … wishes to ask for maintenance … and/or … A lump sum…"

[7] The respondent continued:

> "I therefore must oppose the granting of a divorce at this time as C[..] is due me child maintenance for our child […] (totalling £1050.49). The child maintenance service has recently informed me that they are looking to recover this money from Mr M{…] in the form of regular payments until it is cleared. Once this balance has been paid to myself, I will be more than willing to agree to a divorce…"

[8] On 26 April 2024 Forfar Sheriff Court wrote to the respondent:

> "I write in reference to your letter stating opposition to the granting of the Simplified Divorce.
>
> The Sheriff has considered your opposition and noted the following:
>
> > "The defender has not applied for a financial order or said that she will do so. Rather, she says that the Child Support Agency is pursuing the pursuer. It doesn't seem that OCR 33.75(2) applies yet.

> Please advise the court in writing how you wish to proceed … We would suggest if you are unsure that you should seek legal advice or contact the Citizens Advice Bureau."

[9] By email dated 29 May 2024 the respondent replied: "I am happy to proceed with this divorce only once I have received the unpaid child maintenance due to myself."

[10] Meanwhile, on 8 May 2024, the Court sent the applicant the respondent's letter of 7 March 2024 and the Court's letter of 26 April 2024 in response. Although he responded, it is the objection of the respondent that requires to be considered here.

[11] It is clear that the respondent does not make or intend to make a financial claim against the applicant. If the result of her objection were the dismissal of the application, the applicant would require to seek divorce by an ordinary action. It is clear that there is no defence to such an action. The applicant would simply be put to additional expense and the divorce to which he is otherwise entitled would be delayed.

[12] In the circumstances, the most favourable view of the respondent's opposition is that it is legally misconceived. The issue is whether it falls to be rejected and, in particular, whether I am satisfied that the reasons given for the opposition are frivolous.

[13] In *Appeal in terms of section 154 of the Children's Hearings (Scotland) Act 2011 by CM against a decision of the Children's Hearings at Kirkintilloch on 22 March 2017 in respect of AB & BB*, 13 September 2017 [2017] SC GLA 58, Sheriff A Y Anwar considered a motion to have the appellant deemed a frivolous and vexatious litigant in terms of section 159 of the Children's Hearings (Scotland) Act 2011. Section 159 prescribes consequences where the sheriff is satisfied that an appeal was frivolous or vexatious.

[14] At paragraph 31 of her note, Sheriff Anwar considered what constitutes a frivolous or vexatious appeal:

> The Oxford English Dictionary defines the term 'frivolous' as 'not having any serious purpose or value'. It denotes something which is trivial, lacking in substance or which does not merit consideration, something which is 'futile, misconceived, hopeless or academic' (per Lord Bingham LCJ in *R* v *North West Suffolk (Mildenhall) Magistrates Court* [1998] Env LR 9). A frivolous appeal includes one which has no basis in law (*MB* v *Hill*, supra at para 25). A frivolous appeal does not require to be one made in bad faith; an appeal can be frivolous even when made in good faith if it is hopelessly misconceived (per Lord Kingarth in *Law Society of Scotland* v *Scottish Legal Complaints Commission* 2011 SC 94). 'Vexatious' appeals, on the other hand, involve an abuse of process. The meaning of the term "vexatious" was considered by the Inner House in *Lord Advocate* v *McNamara*, supra at paragraphs 31 et seq. The Inner House agreed with the view expressed in *HM Advocate* v *Frost* 2007 SLT 215 (at paragraph 30) that 'legal proceedings may be properly seen as 'vexatious' if they are devoid of reasonable grounds for their institution'".

[15] At paragraph 35 the Sheriff found one of the appeals in question frivolous by reason that it was "…entirely trivial, without merit and lacked any basis in law."

[16] In *R* v *North West Suffolk (Mildenhall) Magistrates Court* cited above, a magistrates' court had refused to state a case for the opinion of the High Court on the ground that the application was frivolous within the meaning of section 111(5) of the Magistrates' Courts Act 1980. In the Court of Appeal Lord Bingham LCJ considered a number of definitions of frivolous before concluding:

> "I think it very unfortunate that the expression 'frivolous' ever entered the lexicon of procedural jargon. To the man or woman in the street 'frivolous' is suggestive of light-heartedness or a propensity to humour and these are not qualities associated with most appellants or prospective appellants. What the expression means in this context is, in my view, that the court considers the application to be futile, misconceived, hopeless or academic."

[17] It is difficult to disagree with the proposition that legislation should avoid words that mislead the uninformed reader.

[18] *Waugh* v *Waugh* 1992 SLT (Sh Ct) 17 concerned the predecessor of the present rule which was in the same terms. The sheriff dismissed the application after receipt by the court of a letter in the following terms: "I simply do not want a divorce. Married in Church, I took vows, and on oath made my commitment. Neither emotionally or religiously have I altered my mind."

[19] The pursuer appealed to the Sheriff Principal against dismissal of the application, arguing that the reason given was "I simply do not want a divorce."; In the common or garden sense of the word "frivolous", not wanting a divorce was certainly not a frivolous reason for opposing the granting of divorce, but the word required to be given a meaning that accorded with the terms of the statute. Irretrievable breakdown of a marriage, in terms of the statute, was established by non-cohabitation for five years. This was regardless of whether one of the parties did not want divorce. The only justification envisaged by the Act itself for not granting decree where there had been non-cohabitation for five years was that granting decree would result in grave financial hardship. Even if it was competent for the court to have regard to a party's simply not wanting divorce, in the circumstances of this case, opposition on that ground was clearly frivolous: the party objecting had been divorced previously and he and his wife of this marriage had not lived together as man and wife for over 10 years.

[20] Allowing the appeal, Sheriff Principal N D Macleod QC held that:

> "… the reason given here for opposition to the application for divorce, cannot, at law, justify dismissal of the application in terms of rule 140 (2). So far as the law is concerned the terms of the letter indicate no more than that the husband in this case does not consent to the granting of decree of divorce. Consent is relevant to the granting of divorce following two years' non- cohabitation, but is of no relevance to the granting of decree of divorce following five years' non-cohabitation. The reasons given by the writer of the letter may be regarded as religious or moral justification for his withholding consent, but cannot be regarded as providing any justification at

> law for not granting decree of divorce on the ground of the irretrievable breakdown of the marriage as demonstrated by five years' non-cohabitation.
>
> One does not question the serious nature of the objection expressed by the writer of the letter. However, in the context of the Act these reasons fall, in my view, to be regarded as 'frivolous'. I am thus of opinion that the contents of the letter referred to do not afford justification for dismissing the application. I have accordingly recalled the interlocutor dismissing it and remitted the application to the sheriff for his consideration."

[21] All the legal definitions of "frivolous" I have seen involve a complete lack of legal merit in the objections. I consider that the respondent's opposition is obviously lacking in legal merit to the extent that satisfies me that the reasons given for the opposition are frivolous. That being so, I do not dismiss the application. Rather, having set aside the only obstacle to its success, I grant decree of divorce.