IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

No. FA-2020-000090

ON APPEAL FROM THE FAMILY
COURT AT NEWCASTLE UPON TYNE)
[2020] EWHC 3729 (Fam)

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 27 October 2020

Before:

MR JUSTICE COHEN

B E T W E E N :

MARJAN ATAPOUR — Appellant

- and -

KOUROSH REZAI-NAMAGHI — Respondent

MR I. KENNERLEY (instructed by DMA Law) appeared on behalf of the Appellant.

MR B. MATHER (instructed by Silk Family Law) appeared on behalf of the Respondent.

J U D G M E N T

MR JUSTICE COHEN:

1 On 17 April 2020 Recorder Salter ("the recorder") sitting at the Family Court at Newcastle Upon Tyne delivered a reserved judgment on the applications before him which were threefold; first, an appeal including an application for a stay of execution by Mr Rezai-Namaghi, the husband ("H"), against the financial remedy order dated 10 June 2019 for which permission had not yet been granted; secondly, an application by H to vary the periodical payments order contained within the order of 10 June 2019 and, thirdly, an application by Marjan Atapour, the wife ("W"), for a declaration under the court's inherent jurisdiction that a decree nisi was granted on 25 January 2019 and that the same should now be recorded on the court file.

2 The recorder's conclusions are to be found in the judgment and order, which provided that the court determined that (a) no decree nisi had been pronounced pursuant to the Certificate of Entitlement dated 25 January 2018; (b) accordingly, the final financial remedies order dated 10 June was a nullity and, therefore, it followed that the husband's applications were redundant.

3 The recorder went on to list the matter for the next available date for pronouncement of decree nisi in accordance with a certificate of entitlement dated 25 January 2019 and the financial proceedings for directions before a district judge. The listing for pronouncement of decree and the directions appointment were stayed until the happening of various events including the determination of any appeal for which permission is granted.

4 Knowles J granted W permission to appeal and so the stay has remained in place and it was that appeal which I heard yesterday.

5 It is important to set out the factual background which I take from the judgment of the recorder and from the chronology which has been prepared by the appellant W for this hearing and which is not challenged. In doing so, I bear in mind that the issue at the heart of this case is what happened on 25 January 2018.

THE HISTORY:

6 The parties married in 2011 and finally separated in May 2016. In August 2016 H issued a divorce petition and in October 2016 W issued her application for financial remedy orders by means of a Form A. The financial remedy case went through all the usual steps, including a FDR, and I am told and of course accept that at all relevant hearings it was brought to the court's attention that there had not been a decree nisi.

7 The matter was listed for a two day final hearing before, as she then was, Deputy District Judge Bailey. I describe her in that way because at some stage later in the proceedings she became a full time district judge. I am told that at the start of the hearing on the 24th it was pointed out to the deputy district judge that there still was not a decree nisi. What happened thereafter I take from the recorder's judgment.

8 The deputy district judge indicated that she would deal with the matter and the transcript of the second day of the hearing, that is 25 January 2018, records the hearing starting with these words:

> "So this is day two of this final hearing. Sorry I'm slightly late to the (inaudible) but inevitably there were some administrative matters this

> morning, but I can say that I have dealt with the issue of decree nisi at this point."

9 It is quite clear from what counsel then said that counsel took it as that there had been a decree, because he went on to say, that is counsel for H:

> "I am grateful you (sic) indicating that we have the decree nisi now."

So it was that the case proceeded on the assumption that the judge had made or had caused to be made an order for a decree nisi.

10 The central issue is whether or not a decree nisi of divorce was indeed pronounced on 25 January 2018. It might be thought that if it was, then the appeal succeeds and if it was not, the appeal will fail but, says W, the recorder should not even had touched the issue because the district judge (as she had then become) in her draft judgment expanded on the matter further.

11 Before coming to that, it is important that I deal with the further progress of the proceedings. It was, I am told, apparent on 25 January that there was no prospect of the hearing finishing within the two days that had been allotted. A further day was allowed for on 12 February and the matter was once again unfinished and was adjourned part-heard. It did not come back before the court until 8 October when the hearing was concluded with judgment reserved. As I understand it, the delay was in part caused by illness of counsel and in part because the deputy district judge, either then or very soon thereafter, was appointed a full time district judge on a different circuit. It took until 18 March 2019 before a draft judgment was circulated by the district judge.

12 At para.33 she said this:

> "The decree nisi was pronounced by me on day 1 of the trial, given that this had not previously been attended to, and without which this court would not have jurisdiction to hear this case."

13 Whatever else happened, it is agreed that the decree nisi was not pronounced on 24 January and, says H, that and other errors indicate the difficulty that the district judge was in trying to deal with matters so long after the event.

14 It was not until 10 June 2019, some 18 months after the hearing began, that the judgment of the district judge was perfected and handed down and a financial remedy order was made on that day.

15 Within the allowed time H made application for permission to appeal the financial remedy order and sought a stay and applied also to vary the periodical payments order contained within the provision. W would like me to record that the order for payment of the lump sums contained within the district judge's order and periodical payments have not been honoured in any way by H.

16 Before examining what happened on 25 January it is important to set out the legislative framework and I now turn to the Family Procedure Rules, starting at Rule 7.16 under the heading "Chapter 3" which is headed "How the Court Determines Matrimonial and Civil Partnership Proceedings. I shall refer only to those passages which seem to me to be relevant for the purposes of this judgment. At 7.16, "General rule - hearing to be in public."

> "(1) The general rule is that a hearing to which this Part applies is to be in public."

At subparagraph (3) it sets out some exceptions but they are not relevant for these purposes.

17 Rule 7.19 under the heading, "Applications for a decree nisi or conditional order" states

> "(i) An application may be made to the court for it to consider the making of a decree nisi ... (
> a) at any time after the time for filing the acknowledgment of service has expired, provided that no party has filed an acknowledgment of service indicating an intention to defend the case."

18 I move next to Rule 7.20, "What the court will do on an application for a decree nisi, a conditional order, a decree of judicial separation or a separation order," and at

> (2) "If at the relevant time the case is an undefended case, the court must
> (a) if satisfied that the applicant is entitled to –
> (i) in matrimonial proceedings, a decree nisi or a decree of judicial separation (as the case may be) ...
> so certify and direct that the application be listed before a judge for the making of the decree or order at the next available date."

19 It is then necessary to travel back to Rule 7.18 which provides as follows under "Notice of hearing":

> "The court officer will give notice to the parties –
> (a) of the date, time and place of every hearing which is to take place in a case to which they are a party; and
> (b) in the case of a hearing following a direction under rule 7.20(2)(a), of the fact that, unless the person wishes or the court requires, the person need not attend."

20 What actually happened on 25 January is now very much in issue. Whilst the parties plainly worked on the basis that there had been a decree nisi pronounced, it is (putting it at its lowest) very far from clear that the judge had either said or intended that to be the case. The wife relies wholly on the judge saying "I have dealt with the issue of the decree nisi," and the additional paragraph in her judgment to which I have referred.

21 It is plain that there were a number of important procedural hiccups

> (1) the judge did, it is now clear, sign a certificate of entitlement on 25 January, very probably just before going into court;
>
> (2) what the judge said was that the matter, the issue, had been "dealt with." She did not say that the decree nisi had been pronounced;
>
> (3) no notice of the decree hearing had been given to either party;

(4) no determination had been made as to whether or not the decree should not be pronounced in public in the usual way and I mention this only because it is plain that what happened if a decree was pronounced was that it happened in private;

(5) there was no listing of the decree nisi;

(6) there is no tape on which a decree nisi can be heard to be pronounced;

(7) there is no record of the decree nisi anywhere on the file either that it be listed or heard or pronounced;

(8) no decree nisi was ever sent to the parties.

22 The recorder's concerns about the process can be seen at paragraphs 30-33 of his judgment. The material passages read as follows:

> "If I look at the words used by the deputy district judge on the second day of the final hearing, it is difficult to conclude that they refer to anything other than her signing the certificate of entitlement (Form D30), which she did. I have little doubt that she imagined that the certificate would be processed in the normal way and a decree nisi pronounced in open court in due course."

23 He then went on to refer to the fact that the court makes available for use by district judges a suitable form of words for pronouncement. At 31 he said this:

> "The transcript of 25 January 2018 does not reveal that there was any pronouncement of a decree nisi as such."

And at 33:

> "I do not regard informing the parties and counsel that she has dealt with the issue of decree nisi as being the equivalent of pronouncement."

In essence, therefore, he found that the use of the words "dealt with" along with the (clearly erroneous) reference to the decree having been pronounced on 24 January could not rectify the deficiencies set out at paragraph 21 above.

24 In my judgment, the recorder was plainly correct. Being "dealt with" cannot equate to the pronouncement of a decree. However counsel for the parties took it is immaterial as to whether or not a decree was pronounced. It was known that the case was going to go part-heard and it was entirely understandable that the deputy district judge thought that she had put in motion a process that would lead to a decree being pronounced before the case concluded.

25 Neither I nor the advocates in this case, between us having over a century of family law experience, have come across a situation where the court has proceeded from entitlement to decree to decree nisi telescoped into a matter of seconds in the way that W would require in this case, let alone in such an ambiguous manner.

26 The pronouncement of the end of a marriage is normally a public event and formalities are set out. They can be adjusted or abridged by judicial decision but they cannot be completely overlooked.

27 What happened thereafter is that, for reasons no one has been able to explain, the certificate of entitlement was overlooked and none of the procedural steps that should have taken place thereafter ever happened or indeed have happened to this day. Remarkably, it seems to me, it crossed no one's mind, neither the parties nor the advisers, to question why they had never received a certificate of decree nisi. If they had, this situation would never have arisen.

28 That might be thought to be the end of the matter, but Mr Kennerley on behalf of W, goes on to raise a number of ingenious arguments. First, he says that the recorder had no business going behind the district judge's statement within her judgment and he says that the recorder effectively set himself up as an appeal court from the district judge on an area that had not been appealed.

29 Mr Kennerley accepts that W was not in any way taken by surprise at the hearing in April 2020 by this issue which had arisen by the late summer of 2019 when the parties applied for decree absolute and were met with the response from the court that there has been no decree nisi.

30 I ask rhetorically what the recorder was meant to do. The parties had applied for the decree absolute which the court said they could not give them because there was no record of a decree nisi. The transcript of the hearing of 25 January had been obtained. No one said that he should not deal with the issue and indeed it was plainly before him as his recital at the start of his judgment setting out the issues makes plain. True he might have remitted the matter back to the district judge, but no one asked him to do that and there were obvious practical problems with the district judge then sitting on a different circuit.

31 In my judgment, he had to deal with the situation before him and I do not accept Mr Kennerley's categorisation of what he did as akin to granting a declaration, a power reserved to the High Court, and nor was he overturning what the deputy district judge/district judge had done. He was simply ascertaining what had (or had not) been done.

32 W goes on to say that even if there was no decree nisi pronounced on 25 January (1) the defect does not undermine the order in circumstances where both parties acted throughout as if there had been a decree nisi pronounced and (2) to take any other course would be a breach of natural justice.

33 To deal with the first argument, in my view, the law is clear, it is set out in a series of cases including *Pounds v Pounds* [1994] 1 FLR 775, *JP v NP* [2015] 1FLR 659 and *K v K* [2017] 1 FLR 541 and I refer to the summary contained in the judgment of Cobb J at para.20 where he paraphrases Eleanor King J (as she then was) in *JP v NP*:

> (a) The district judge had power under rule 29.15 of the FPR 2010 to direct that a judgment shall take effect from such later date as the court may specify."
>
> (b) …
>
> (c) It is necessary to look at whether the judgment delivered at the end of a contested hearing is a 'final determination taking effect from the moment of judgment' or 'an indication of outcome with the

> consequential order to be drawn and made at a later date (here upon the making of decree nisi).
>
> (d) If the order is to be made at a later date (i.e. after decree nisi), there is no necessity or requirement for any fresh appraisal.
>
> (e) If the court purports to make an order or provides for a judgment to take effect prior to decree nisi, the resulting order will be a nullity…

34 These cases clearly established that it is possible for the judge to conduct a hearing and come to a conclusion but with the order only coming into effect after decree nisi but the parties agree that in this case the order was intended to take immediate effect and, therefore, Rule 29.15 cannot remedy the situation.

35 Mr Kennerley seeks to argue that the grant of the certificate is the last judicial act as pointed out in *Day v Day* [1980] FLR 381 and that, therefore, what happens thereafter is purely administrative.

36 To say that there is no further requirement runs counter to the authorities that I have cited and I respectfully disassociate myself from the commentary in the Family Court Practice at p.1444 where by reference to *Day* the authors say:

> "At this stage (i.e., the court having been given notice of the date of pronouncement) no decree or final order has been made, but this intermediate phase has been defined by the Court of Appeal as equivalent to a decree ..."

37 I do not read *Day* as saying that at all. A certificate of entitlement is <u>not</u> the equivalent of a decree.

38 Mr Kennerley has referred to various authorities as to circumstances where decrees nisi or decrees absolute have been held to be void or voidable. It is not necessary for me to lengthen this judgment by reference to them because, in my view, they are not relevant to the issue before me. Is it a breach of natural justice? No, in my view. It is very unfortunate but it is not a breach of natural justice.

39 I recognise that the parties have spent, as I am told, over £100,000 on financial remedy proceedings and what has happened is deeply unfortunate. It was a great pity that no one picked up the absence of the expected paper work over the course of the following 18 months.

40 I am not convinced that it is quite as disastrous as Mr Kennerley suggests. The husband would be likely to have to show a fundamental change of circumstances or a clear error by the judge for a like order not to be made again, quite possibly in an abbreviated hearing. I recognise that it is deeply unsatisfactory for the parties, four years after financial remedy proceedings were commenced, not to have a final order but, in my judgment, that is where they are.

41 Accordingly, I dismiss the appeal. I am content to do anything that I can to assist the parties by making directions, either agreed or otherwise, if that will remove the need for an appointment before the district judge but they must address me on that.

42 As I have already indicated, I order that there should be a transcript of this judgment at public expense. That concludes my judgment.

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CERTIFICATE

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