The final decree of divorce: Timing is absolutely everything

by Emma Nash

Q: Why does the timing matter of the application for the final decree of divorce?

A: Because it brings the marriage to an end.

Ask a silly question? Perhaps, but the timing of such an application may be extremely important. The couple may be keen to move on with their lives particularly if they want to remarry. There may be a temptation to make the application at the earliest opportunity. After all, a financial order can still be made after the final decree has been granted and there is no limitation period on bringing a financial claim after a divorce. However, the adverse consequences of prematurely bringing the marriage to an end could be unexpected and far reaching particularly if there are outstanding financial matters. A few things to think about are set out below.

(For non-English lawyers, the final divorce under English procedure is in two parts. The first is known as the decree nisi which means that the court is satisfied that the parties have proved that the marriage breakdown is irretrievable. The second, following a short period of time, is the decree absolute. Neither require any attendance at court. The decree absolute is the end of the marriage and gives the right to remarry. England does not have freestanding financial applications. A person must have issued a petition to be able to make a financial claim, and there are crucial time elements between the divorce suit itself and the financial orders.)

Loss of Matrimonial Home Rights

A spouse who has no legal interest in the matrimonial home (i.e. it is not in their name or held jointly with their spouse) can protect their position by registering their ‘home rights’ with the Land Registry. This prevents a spouse from dealing with the property, e.g. by selling it or taking out a further charge against it, without notice being given to the other spouse. However, a person is only entitled to home rights whilst they are married to the legal owner. This protection is lost from the day the marriage is formally ended and the Land Registry will remove the restriction on the register when presented with a valid certificate of decree absolute. Home rights can be extended beyond the granting of the decree absolute to allow for financial proceedings to be concluded but this does not happen automatically and requires a continuation order from the court. It is therefore good practice to delay the application for decree absolute to preserve Home Rights until a financial settlement has been reached particularly if there are concerns over the premature disposition of the
matrimonial home.

Death

If someone dies then the question of whether they were legally married is hugely important. It will affect how the deceased’s estate is distributed. If a financial order has been made, either by consent or through contested proceedings, then that order will not become enforceable until decree absolute has been granted. If decree absolute has not been granted and one a spouse passes away before the final divorce decree then the marriage will end on their death and the financial order will never become enforceable. Decree absolute cannot be granted when one spouse is deceased. A person cannot bring a financial claim under the Matrimonial Causes Act 1973 against a deceased spouse, the recent case of Robert v Woodall [2016] EWCH 2987 (ch) has made that abundantly clear.

In the circumstances of death before decree absolute, the deceased spouse’s estate will be distributed according to either their will, if they had one, or the rules of intestacy. A surviving spouse may end up doing better than the financial settlement particularly if there are jointly owned assets if the deceased spouse did not have a valid will. If, however, the deceased spouse did make a will which disinherited or made inadequate provision for the surviving spouse then they could find themselves in difficult financial circumstances and yet without the benefit of making a financial claim on divorce. The surviving spouse could bring a claim against the deceased spouse’s estate under the Inheritance (Provision for Family and Dependents) Act 1975 but this is not ideal and could be challenged by other beneficiaries. Moreover this type of claim is not available if the deceased spouse died domiciled abroad which could leave the surviving spouse without any means of making a claim.

An alternative scenario would be where the decree absolute has been granted but there is no financial order when one spouse dies. Again, the surviving ex-spouse would not be able to bring a claim on divorce under the Matrimonial Causes Act 1973. They would also be unlikely to inherit under a will and the intestacy rules, where property passes to a spouse, would no longer apply to them. Any financial claim would have to be brought under Inheritance Act 1975 but, as an ex-spouse, their claim would be limited to maintenance only. This could make a significant difference if there are considerable matrimonial acquired assets in their former spouse’s sole name. It is worth noting at this point that the prejudice an ex-spouse might suffer by being limited to a maintenance claim under the Inheritance Act 1975 would not, on its own, be sufficient to delay the making of the decree absolute. This is explored in more detail below.

Pensions

Pensions can be particularly tricky if something unexpected happens to one party. A pension sharing order only comes into effect on the later of the granting of the decree absolute or 28 days from the date of the pension sharing order. If the decree absolute is granted and a spouse passes away within 28 days of the order then there is a chance that the pension sharing order will fail. This is because the pension fund with have terminated on
the member’s death before the pension sharing order came into effect. In addition, as the marriage has been formally ended by the decree absolute, the surviving ex-spouse would not be entitled to any spousal benefits under the pension, for example, a widow/widower’s pension. They would be left with no provision whatsoever. Whilst there may be a small window of risk, this scenario does occur and inevitably the surviving spouse is very unhappy at the outcome. Accordingly it is probably good practice in cases where there is a pension sharing order, to wait at least 28 days from the date of the order before making the application for decree absolute. There can then be no chance of being left without both the pension share and spousal benefits under the pension itself.

Incentive

It is quite common for the petitioner to delay the application for decree absolute until a financial agreement has been reached. Whilst there could be extremely good reasons for this (as discussed above) it can also incentivise the respondent to negotiate a financial settlement, particularly if they are keen to move on or re-marry. This advantage is not indefinite. The petitioner is entitled to apply for the decree absolute from six weeks and one day from the date that the decree nisi is granted, whereas the respondent must wait until a further three months have passed. After that time, if the petitioner is still dragging their feet in the hope of maintaining a negotiation advantage, then the respondent could make an application for the decree absolute. Unless the petitioner can show that there are special circumstances which mean they would be prejudiced by the ending of the marriage then the respondent’s application is likely to be successful and the petitioner may find themselves paying the respondent’s costs. This scenario is considered in more detail below.

Prejudice and Special Circumstances

This has recently been considered by Mr Justice Moor in the High Court case of Thakkar [2016] EWHC 2488. A wife had petitioned for divorce and made an application for financial provision. She was disputing the husband’s financial disclosure and was concerned that, if the decree absolute was granted before her financial claim had been resolved, she could miss out significantly on certain assets. She therefore asked the husband to undertake not to make the application for decree nisi to be made absolute until financial matters had been resolved notwithstanding the fact that he would be in a position to do so once three months had passed from the date she had been entitled to make the application. This is a very normal request. But the husband did not provide this undertaking and he did proceed with such an application once the relevant time period was up. The wife objected and asked that the decree nisi not be made absolute until the final determination of her application for financial provision.

Mr Justice Moor referred to previous case law, specifically Dart [1996] 2 FLR 286 and England [1980] 10 Fam Law 86. He determined that as long as the application is made after the appropriate period has elapsed (6 weeks for the petitioner and a further 3 months for the
respondent), then there was a strong presumption in favour of making the decree absolute and ending the marriage and that this presumption would only be overridden in special circumstances.

He considered the case of Re G (Decree Absolute: Prejudice) [2002] EWHC 2842 and found that the following scenarios were not sufficient for the Court to delay the making of absolute:

- That the objecting spouse would be under a disadvantage under the Inheritance Act 1975 (as discussed above);
- That there had been allegations of a failure to provide full and frank financial disclosure; or
- That the other party would be likely to disengage with the proceedings.

Moor J went on to find that the scenario in Thakkar was exceptional and that special circumstances did exist. This was despite the fact that the wife could not identify exactly what prejudice she would face if the decree absolute were to be granted. Moor J himself acknowledged that he could not do this as there had been no findings of fact as to the husband’s assets, nor could there be pending a final hearing on the matter. What Moor J could do was identify a potential prejudice to the wife which was significant and which distinguished it from the earlier cases. This potential prejudice was in respect of an offshore structure which contained significant assets and which was in dispute. It was the existence of these unusual structures that gave rise to the special circumstances. Moor J had already acknowledged that such structures “raise notoriously difficult issue for the Family Court,” (paragraph 14). He went on to say:

“The difference between Re G, as against this case, is that there was no offshore structure in Re G that concerned the court. I take the view that that makes all the difference. It is the fundamental issue in this case. I take the view that there is potential for very considerable prejudice indeed in cases where there are such offshore structures. Whether or not you are a wife or an ex-wife can make all the difference.” (paragraph 17)

The fact that the wife could not identify the exact prejudice she would suffer if the marriage were ended did not prevent her from delaying the granting of decree absolute. All she had to show was that there was a potential for significant prejudice which had to go beyond the usual consequences of becoming an ex-spouse. The existence and dispute over the offshore structure allowed her to do this. The husband’s application for decree absolute was therefore dismissed.

This case provides useful guidance in considering what type of scenarios will and will not be sufficient to delay an application for decree absolute. It also highlights that such cases will be highly fact specific and the threshold for overriding the presumption that the marriage should be brought to an end is a high one.
Statute

Thakkar involved an application made by the respondent after three months had passed from the date the petitioner could make the application for decree absolute. The court therefore had jurisdiction to hear the application under section 9(2) of the Matrimonial Causes Act 1973 which states that:

“Where a decree of divorce has been granted and no application for it to be made absolute has been made by the party to whom it was granted, 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 it was granted may make an application to the court, and on that application the court may exercise any of the powers mentioned in paragraphs (a) to (d) of subsection (1) above.”

This section does not apply to petitioners or to applications made by the respondent prior to three months passing from the earliest date the petitioner could have applied. However, it is well established in case law that the court can consider such applications under the Court’s inherent jurisdiction. This may be in circumstances where a one party wishes pre-emptively to block the other’s application for decree absolute pending a financial settlement or full financial disclosure. This scenario was discussed in Thakkar with reference to the cases of Dart and England but the 2009 case of Miller Smith (No.2) (2009) EWHC 3623 (Fam) is also clear on this point. The same requirement of showing special circumstances would apply and so such applications should not be made lightly and will fail if the only prejudice is the usual consequences of becoming an ex-spouse.

Conclusions

The application for the decree nisi to be made absolute may appear to be one of the simpler applications to make within the context of matrimonial proceedings generally. The form (D36) is only one page long. There is no need to attend a Mediation Information Assessment Meeting (a MIAM) and there is no fee to pay. However, the consequences of making this particular application are considerable and so it is important to think about the timing of the application carefully regardless of the level of complexity of the case. There could be both disadvantages and advantages to delay or one party may need to take pre-emptive action to prevent the other from getting there too soon.

The entire scenario faced by the wife in Thakkar might have been avoided if she had simply delayed her application for the first decree, the decree nisi, and not started the clock running for either herself or her husband for the decree absolute application. Might this now mean it is prudent practice to delay the application for the decree nisi as long as possible to avoid the petitioner finding themselves in a situation where there could be financial prejudice if, for example, there was to be a final divorce before the final financial settlement? Whilst there may be other special circumstances which would meet the requirements, most cases do not involve the existence of uncertain complex offshore holdings and so are unlikely to come
within the narrow definition of exceptional. There are still many cases where one spouse could be significantly prejudiced by, for example, a death after a final decree of divorce yet before a financial order. It has already been established that the usual consequences of becoming an ex-spouse are not sufficient to block the decree absolute being made. Why then should those whose finances are complex have this additional protection? It is not a fair system if the statutory remedy is only available in exceptional cases involving exceptional assets. The English family law system needs a law that is fair for all and available for all, not a law that is fair for those with complex finances.

Moreover, delaying the application for the first decree will be massively problematical. A court could not at a successful Financial Dispute Resolution appointment then make a financial order because there had been no decree nisi. If the petitioner will not apply, the respondent would then commence their own cross petition. There would be more tactical manoeuvrings about who was the petitioner and possibly further proceedings at the expense of the parties.

At the beginning of this article it was noted that there is no free standing application for finances in this country and that a financial order can be made after the marriage has ended. Perhaps this problem could be addressed by making a final financial order a requirement before the final decree is granted. This would avoid cases such as Wyatt v Vince [2015] UKSC 14 where claims are brought decades after the marriage had ended with uncertainty surrounding the status of any financial claims. It would also ensure that no one suffered undue prejudice by virtue of the marriage ending prior a financial settlement being reached and provide everyone with certainty as to their financial position on divorce. There are, of course, downsides to this approach as many couples will not be in a position to negotiate a fair financial settlement at the time they wish to divorce and it may add unnecessary delay and stress to an already difficult situation.

Thakkar has highlighted a real problem in daily family practice. There is arguably a strong case for review either judicially or through legislation so that we have a fair law for all before the family courts. In the meantime, practitioners need to be alive to the timing issues of the decrees.

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