SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT BANFF

[2017] SC BAN 60

F33/16

NOTE BY SHERIFF PHILIP MANN

In the cause

PETER WILLIAM RAY

Pursuer

Against

JEAN SUSAN SMITH or BOTT or RAY

Defender

Banff, 5 September 2017

[1] This sole purpose of this note is to address the competency of granting the crave for divorce now before the court.

[2] Section 1 of the Divorce (Scotland) Act 1976, as amended and so far as relevant to this note, is in the following terms:

> "(1) In an action for divorce the court may grant decree of divorce if, but only if, it is established in accordance with the following provisions of this Act that -
> (a) the marriage has broken down irretrievably; or
> (b) …
> (2) The irretrievable breakdown of a marriage shall, subject to the following provisions of this Act, be taken to be established in an action for divorce if -
> (a) since the date of the marriage the defender has committed adultery; or
> (b) since the date of the marriage the defender has at any time behaved (whether or not as a result of mental abnormality and whether such behaviour has been active or passive) in such a way that the pursuer cannot reasonably be expected to cohabit with the defender; or
> (c) [repealed by section 12 of the Family Law (Scotland) Act 2006]
> (d) there has been no cohabitation between the parties at any time during a continuous period of one year after the date of the marriage and immediately

> preceding the bringing of the action and the defender consents to the granting of decree of divorce; or
> (e) there has been no cohabitation between the parties at any time during a continuous period of two years after the date of the marriage and immediately preceding the bringing of the action."

[3] This action was raised on 13 July 2016, the crave for divorce being in the following terms:

> "To divorce the defender from the pursuer on the grounds that the marriage has broken down irretrievably as established by the defender's behaviour towards the pursuer"

[4] It was established in evidence that the parties had separated, at latest, by the early part of January 2015, so as at 13 July 2016 they had not yet been separated for a period of two years. On 27 January 2017, the court allowed a minute of amendment and in terms thereof allowed the deletion of the existing crave for divorce and the substitution therefor of a crave in the following terms:

> "To divorce the defender from the pursuer on the ground that the marriage between the parties has broken down irretrievably as established by the parties' non-cohabitation for a continuous period of two years or more"

[5] In the case of *McNulty* v *McNulty* 2016 Fam. L. R. 145, Sheriff Collins queried the correctness in law of the way in which a similar situation had been dealt with by Lord Murray in the case of *Duncan* v *Duncan* 1986. S.L.T. 17. Lord Murray had decided to the effect that an amendment to a summons for divorce introducing a separation ground for divorce constituted the bringing of action on that ground for the purposes of calculating the period of separation.

[6] Although Sheriff Collins did not require to, and did not, make a decision on the point he expressed concern about two things. The first was that he could see only one ground for divorce, namely irretrievable breakdown of marriage. The second was that allowance of a minute of amendment substituting a crave for divorce referring to non-cohabitation for a

crave for divorce referring to adultery could not and did not affect the fact that the date of bringing the action was the date when the action was originally brought on the basis of the original crave. At the date of bringing the action as thus determined the parties had not been separated for a period of two years. That being the case, irretrievable breakdown of marriage could not be established and divorce could not be granted on that basis.

[7] The approach that I take is in line with that of Lord Murray in *Duncan* v *Duncan.* But, in doing so, I prefer to focus on the issue of irretrievable breakdown of marriage. Properly read, section 1 of the Divorce (Scotland) Act 1976, as amended, provides four separate grounds for establishing irretrievable breakdown of marriage on the basis of which the court may grant decree of divorce. The first is adultery, the second is the defender's unreasonable behaviour and the third and fourth are periods of non-cohabitation immediately preceding the bringing of the action.

[8] There were originally five paragraphs in section 1(2) of the Act. One of those paragraphs was repealed by section 12 of the Family Law (Scotland) Act 2006 which has as its heading: "Irretrievable breakdown of marriage: desertion no longer to be ground". That is a clear indication that the legislature considered desertion to be a separate ground upon which irretrievable breakdown of marriage could be established. If desertion was a separate ground then so too were, and are, adultery, unreasonable behaviour and periods of non-cohabitation.

[9] What a pursuer in an action for divorce actually asks the court to do is to establish the irretrievable breakdown of marriage on one of the four grounds as a basis for allowing the court to grant decree of divorce. Current and long established practice is and has been to express a crave for divorce in a way that asks the court to grant divorce on the ground of

irretrievable breakdown as established in one or other of the four permitted ways. It would be more accurate to express a crave for divorce as follows:

> "to find that the marriage between the parties has broken down irretrievably on the ground that since the date of the marriage [specify one of the four grounds] and thereafter to grant decree divorcing the defender from the pursuer."

I am prepared to read the crave for divorce in this case in that way.

[10] Sheriff Collins in *McNulty* suggested that, by seeking to amend, the pursuer in that case was not seeking divorce on a new or different ground than before but was simply asking to be allowed to lead different evidence to establish the same ground in a different way. But, if there were no substitution of one ground for another there would be no need to introduce a new crave by way of amendment because any change in the way in which it was proposed that the ground be proved would be effected by adjustment or amendment of the articles of condescendence. In both *Duncan* and *McNulty* and also in this case what, actually, was being changed by the amendment, and properly so, was the ground for establishing irretrievable breakdown. That is in no way affected by the fact that it is only upon irretrievable breakdown being established that the court may grant decree of divorce.

[11] This action can be described as an action for divorce seeking to establish irretrievable breakdown of marriage originally brought on the ground of unreasonable behaviour but now brought on the ground of non-cohabitation. What the court did by allowing the minute of amendment was to allow the pursuer to abandon his action on one ground and of new to bring it on another ground. I am in no doubt that the action now before the court is an action that was brought as at the date of the allowance of the minute of amendment. That is the date of bringing the action for the purpose of section 1(2)(e) of the 1976 Act.

[12] The evidence establishes that as at that date the parties had not cohabited for a period of at least two years. Accordingly, irretrievable breakdown has been established and it is competent for decree of divorce to be granted.