SHERIFFDOM OF HAMILTON SHERIFF COURT

[2025] SC HAM 30

HAM-F67-25

NOTE BY SHERIFF MUNGO BOVEY KC

in the cause

JM

Applicant

against

RM

Respondent

Applicant: JM
Respondent: RM

Hamilton 26 March 2025

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

[2] Part XI of Chapter 33 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. The relevant conditions include non-cohabitation for 2 years and that: "(f) neither party to the marriage suffers from a mental disorder;"

[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."

[5] "mental disorder" has the meaning assigned in section 328 of the Mental Health (Care and Treatment)(Scotland) Act 2003:

> "(1) Subject to subsection (2) below, in this Act 'mental disorder' means any—
> (a) mental illness;
> (b) personality disorder; or
> (c) learning disability,
> however caused or manifested; and cognate expressions shall be construed accordingly.
>
> (2) A person is not mentally disordered by reason only of any of the following—
> (a) sexual orientation;
> (b) sexual deviancy;
> (c) transsexualism;
> (d) transvestism;
> (e) dependence on, or use of, alcohol or drugs;
> (f) behaviour that causes, or is likely to cause, harassment, alarm or distress to any other person;
> (g) acting as no prudent person would act."

[6] By application dated 12 February 2025 the applicant sought divorce in terms of this part of the rules on the basis of no cohabitation for 2 years. The application is in proper form and, but for the matters canvassed in this note, falls to be granted. The application was intimated to the respondent.

[7] On 6 March 2025 the court received a letter from the respondent:

> "I am writing to you as on the form my ex-husband has stated I have no mental health issues. Yes this is correct.
>
> But he has and has still ongoing since before I met him had mental health issues & went to counselling hence the reason he left. He left when his mother was dying and told my mother he had to deal with his own mental health problems. In fact this is the whole reason he changed his name; didn't discuss it, just decided to do it. So I had to go along. So it didn't break down irretrievably as he is stating. He also went bankrupt and because I didn't want to go bankrupt the joint payments had to go to me so I'm left to pay them.
>
> The whole reason he is going for a quick divorce is because he's met someone else, but there would be no chance ever of reconciliation! When I met him he was on a trust deed then when he left he went bankrupt. Don't know why it was allowed as he had good wages. He wrote to me not long after he left for a divorce and I says

> gladly but as long as you say on it tell the truth & say you have ongoing mental health issues as on form it asked this as it does on this one…"

[8] My analysis of this is that the respondent does not, as such, object to the granting of divorce. Rather, she provides information and asserts that the requirements for use of the simplified procedure may not be satisfied. This brings to attention an unfortunate feature of the procedure followed in this and every other such case; Although the requirement in the rule is that "…neither party to the marriage suffers from a mental disorder…" the question to which the applicant responded in the negative at section 9 of the prescribed form is: "As far as you are aware, does your spouse have a mental disorder? (whether mental illness, personality disorder or learning disability) *(Tick box which applies)* YES [] NO []"

[9] The applicant has ticked the "NO" box. The form contains no guidance to this section of the form.

[10] It follows that the court has no formal information as to the applicant's mental health other than that provided unasked by the respondent.

[11] The Courts have taken a robust approach to the capacity of parties to divorce; in *Gibson* v *Gibson* 1970 SLT (Notes) 60 Lord Hunter granted divorce to a pursuer detained in the state hospital who was "… a feeble-minded, mentally defective patient but …capable of understanding the meaning, effect and consequences of an action of divorce." Lord Hunter could see no reason in principle why mental disorder falling short of insanity should in itself disqualify a person from raising an action of divorce.

[12] In so proceeding, Lord Hunter distinguished the leading case of *Thomson* v *Thomson* 1887 14R 634 where the fact that the pursuer was in a lunatic asylum was sufficient to disable her from bringing an action of divorce.

[13] More recently, Sheriff Aisha Y Anwar in the cause *Anderson* v *Anderson* (2015 SCGLA 65) 6 October 2015 refused to set aside a financial agreement entered into in the context of a divorce: "She may have made an irrational decision as a result of her poor state of mind; however, she was aware of the consequences of doing so."

[14] In *AB* v *CB* 1937 SC 408 the Second Division observed that the onus upon the defender in establishing at a preliminary proof his plea that his wife's action of adherence and aliment was incompetent by reason of her unsoundness of mind was a very heavy one.

[15] It its Public Consultation: on the simplified procedures for divorce and dissolution of 19 November 2024 the Scottish Civil Justice Council said of the relevant rule:

> "38. The original policy intention when making reference to 'mental disorder' would have been to avoid any one party taking advantage of the other. That said it could be seen as discriminatory if it unfairly excludes a person from using a simplified procedure that could have got to a decree faster and at less cost.
>
> 39. The main outcome sought is to establish whether a person has the 'mental capacity' to make a decision in the full knowledge of the consequences, rather than a need for the court to explore the impact of every possible mental illness.
>
> 40. The proposal is to replace that current reference to 'mental disorder with a reference to 'mental incapacity' instead; and then add an associated definition of incapacity which would read 'someone who is incapable of: acting, making decisions, communicating decisions, understanding decisions, or retaining memory of decisions... The Council would welcome feedback on that additional change which has not yet been narrated within the draft rules; as the Scottish Government will also address that option when consulting on the other proposed changes to section 8 of the Civil Evidence (Scotland) Act 1988."

[16] That definition of "incapacity" is as used within the Adults With Incapacity (Scotland) Act 2000, section 1(6) of which provides that:

> "'incapable' means incapable of— (a) acting; or (b) making decisions; or (c) communicating decisions; or (d) understanding decisions; or (e) retaining the memory of decisions … by reason of mental disorder or of inability to communicate because of physical disability; but a person shall not fall within this definition by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise); and 'incapacity' shall be construed accordingly."

[17] In *AB* v *CB* cited above the Second Division held it proper to have a preliminary proof on the defender's plea that his wife's action of adherence and aliment was incompetent by reason of her unsoundness of mind. But rule 33.79 provides that parole evidence shall not be given in a simplified divorce application. The decision is made on the papers.

[18] I consider it significant that the applicant has signed an affidavit which is part of the form in front of a Justice of the Peace. The information from the respondent is detailed in relation to conduct on his part that demonstrates an ability manage his affairs and entirely general in relation to his mental disorder – the only specific example prayed in aid being his change of name.

[19] It is clear that if I were to dismiss the present application, the applicant would be in a position to bring an ordinary action to which there would be no defence. More significantly, it is also clear that the court would take no interest in whether the pursuer had a mental disorder, there being nothing to suggest that he lacks the capacity to seek divorce.

[20] In the circumstances, I consider it appropriate to grant the decree sought and do so.