IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2020] EWHC 1116 (Fam)

QB-2019-003423

1st Mezzanine
Queen's Building
Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 22 April 2020

Before:

SIR ANDREW MCFARLANE

PRESIDENT OF THE FAMILY DIVISION

(**In Private**)

B E T W E E N :

X

Applicant

- and -

Y

Respondent

REPORTING RESTRICTIONS / ANONYMISATION APPLIES

MR W. TYZACK (instructed by Hunters Law LLP) appeared on behalf of the Applicant.

THE RESPONDENT was not present and was not represented.

J U D G M E N T

SIR ANDREW MCFARLANE:

1 This is an application brought by the applicant Mr X against the respondent Miss Y to rectify, as he sees it, a decree of divorce granted in relation to his marriage to Miss Y as long ago as 1997 by the Principal Registry of the Family Division, sitting here at London.

2 Form the recent voluminous correspondence that I have seen, in which today's hearing is referred to a number of times by the solicitors now acting for Mr X and by Miss Y herself, I am satisfied that Miss Y has had full notice of this hearing. She has not made any representations to the court, is neither present nor represented at this remote hearing and she has indicated that she would not be attending. At the start of the hearing I therefore concluded that the case could proceed in her absence.

3 Mr X and Miss Y were married, first of all at a ceremony in Madrid on 25 May 1993, and that, for reasons Mr X explains in his statement, was conducted without the knowledge of any member of the wider family, either of the bride or the groom. It seems that relationships between the wider families mellowed to a degree, and there was apparently a second ceremony of marriage conducted in a Registry Office in London on 31 May 1994, attended by some family members from each side.

4 Unfortunately, the marriage did not prosper, the couple separated, and a divorce petition was filed with Mr X as the petitioner in 1996. The grounds of divorce alleged adultery. That allegation was not contested, and the divorce proceedings moved swiftly through the court process. A decree nisi was pronounced on 20 January 1997, and decree absolute on 13 March 1997. In between those two, on 28 January 1997, a consent order was made, resolving the financial issues between the parties.

5 On that summary it all sounds very straightforward, but the divorce petition had been based upon the assertion that the marriage to be dissolved was the second marriage, namely the one conducted in England in May 1994. No reference was made to the earlier marriage conducted in Madrid in 1993.

6 This court has seen what purports to be the certificate of marriage issued by the Registry Office in Madrid on 25 March 1993. I am bound to say that there is no translation, and it is not readily possible to read from that document, which is largely completed in handwriting, the precise date, but I am satisfied that a valid marriage did take place between this couple on that date. I am able to be satisfied firstly because Mr X asserts that that is the case, and he produces the document, but secondly because Miss Y in a range of correspondence that she has undertaken recently, both directly with Mr X and with the solicitors who now act for him, relies upon the validity of the Spanish marriage. Her case now in 2020, in a nutshell, is that she considers that she is still married to Mr X, and that the Spanish marriage governs their status, and that they cannot be divorced unless and until there are divorce proceedings in Spain. She has, however, indicated a willingness to agree to a contrary outcome, provided a very substantial financial settlement is now made in her favour.

7 Both parties, therefore, assert the validity of the Spanish marriage and, so far as I can tell from the certificate, the certificate also reflects that this couple were married in Madrid in May of that year. The consequence is that I accept that the first marriage between this couple, namely the marriage therefore that governed their status, was valid, and was the Spanish marriage on 25 May 1993.

8 Mr X instructed reputable solicitors in 1996 when he was undertaking his divorce proceedings. He says, and I accept, that he told those solicitors of the two marriage ceremonies. Quite why the solicitor chose only to refer to, to plead and rely upon the second ceremony, I simply do not know. That second ceremony, whilst it may have been important in social and emotional terms in bringing both sides of the two families together, had no legal impact on this couple in terms of their legal status. They were already married.

9 Be that as it may, the petition only referred to the 1994 marriage, and it was that marriage that was referred to in the decree nisi and the decree absolute. It is important to Mr X that the declaration of his divorced status is sound for reasons which I need not go into. He therefore seeks to rectify the decree absolute, and before it the decree nisi, so that they reflect that the marriage being dissolved was the Spanish marriage in 1993.

10 I have been greatly assisted by Mr William Tyzack, counsel, who appears for Mr X, both on paper in his very clear skeleton argument, and also today. It seems to me, on the basis of Mr Tyzack's submissions that there was no jurisdictional advantage in Mr X ignoring the Spanish marriage in order to come before the English court with divorce proceedings in 1997. In those days, which were prior to the Brussels II Regulation coming into force, which it did on 1 March 2005, jurisdiction was governed by section 5 of the Domicile and Matrimonial Proceedings Act 1973, in particular section 5(2), which reads:

> "The court shall have jurisdiction to entertain proceedings for divorce or judicial separation if (and only if) either of the parties to the marriage (a) is domiciled in England and Wales on the date when the proceedings are begun or (b) was habitually resident in England and Wales throughout the period of one year ending with that date."

11 It was asserted in the divorce petition that Mr X was domiciled in England and Wales, and all the evidence suggests that that was the case. So, on that basis, under the law as it was in 1997, I am satisfied that he could validly seek the dissolution of the Spanish marriage in English divorce proceedings in 1996 / 1997.

12 The question remaining therefore is whether this court has jurisdiction, and whether it should exercise it, to make the alteration that is sought. Again, I have been assisted by Mr Tyzack, who has drawn attention to the main authority on this area of the law, namely the case of *Thynne v Thynne* [1955] 3 All ER 129, which is a decision of the Court of Appeal by a majority. In short, the facts in that case were not dissimilar to the present case. The parties had secretly married in October 1926, and then went through a more public ceremony almost exactly a year later in October 1927. The petition, some 25 years later, relied upon the second marriage, and did not refer to the first marriage. Subsequently, one of the parties published their memoirs, spoke of the existence of the earlier marriage, and the need to correct the divorce process became a live issue between them, ending up, as I have said, in the Court of Appeal.

13 The court held in *Thynne v Thynne* that where a decree of divorce had been granted by a competent court, in accordance with the law, putting an end to the status of marriage between the parties, but the decree gives the wrong date of the effective marriage, the decree was not rendered void by that error, and there was a discretion in the court to correct the error, so that the record would refer to the correct date of marriage. The decree of divorce, however, had remained valid from the moment it had been pronounced 25 years earlier, and was not affected by the internal error in the pleading of the date.

14 Mr Tyzack plainly relies very heavily on this authority. It has not been superseded so far as the court is aware by any subsequent authority to the contrary. Indeed, very recently, Sir James Munby P, sitting in the Family Court in a case reported as *M v P* [2019] EWFC 14, [2019] FLR 431, relying upon the power under Rule 4.1(6) of the Family Procedure Rules 2010, varied a decree of divorce by altering the grounds to unreasonable behaviour rather than two years' separation with consent. Mr Tyzack submits that that in some ways is a more significant alteration than the one that is now sought.

15 Although I am satisfied that this court does have jurisdiction to entertain this application, the application and, if it were granted, the order that flows from it, has no impact at all on the status of this couple. They were divorced by a valid order of this court made absolute on 13 March 1997. The impact of the order that I will make today is simply, but importantly, to record that the marriage that was dissolved on that day was the true legal marriage between the couple, namely that celebrated in Madrid on 25 May 1993, and not the subsequent English marriage a year later which had no legal impact on their status. The purpose of today's order is to resolve and put right that which should have been the case all the way along.

16 The court has a choice as to whether to exercise the jurisdiction to grant the order that is sought under Rule 4.1(6) of the Rules or under the inherent jurisdiction of the High Court. I favour undertaking that task under the Rules. It seems to me that what is being corrected here is an error of process, and there is no need for the court to look to exercise any higher or more esoteric jurisdiction. In earlier days, in the case of *Thynne*, the rules were not as clear and detailed as they are now, and the inherent jurisdiction was more often resorted to by the court, to do right between the parties. There is no need to do that here. We have a rule, and, just as Sir James Munby relied upon the same rule in *M v P*, it seems to me that that is the proper course for this court to take. I, therefore, propose to grant the order that is sought, thereby rectifying the decree nisi and the decree absolute, so that they record the marriage that was being dissolved as being the Spanish marriage of 1993, and that is my judgment.

_____

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

This transcript has been approved by the Judge