

## The timing of financial orders

10/05/2016

**Family analysis: Discussing the judgment in *K v K (Financial Remedy Final Order prior to Decree Nisi)*, Grant Howell, partner at Charles Russell Speechlys LLP, points out that family judges have a noble history of concern as to the implications of the outcome of their orders but their hands are tied if statute is not followed.**

### Original news

*K v K (Financial Remedy Final Order prior to Decree Nisi)* [2016] EWFC 23

*In December 2014 the husband issued a petition for divorce and in the following month issued an application for financial relief. At the final hearing the wife was represented by solicitors and counsel and the husband was not represented. At the conclusion of the hearing judgment was delivered, with the district judge making a number of adverse findings against the husband, and his conduct, and a limited number of substantive orders, including for the sale 'forthwith' of the former matrimonial home, with 60% of the net proceeds of sale being paid to the wife. In addition the district judge ordered a clean break in respect of all other forms of financial relief, including pension. Within the order, after the words 'It is ordered that', there followed the words 'with effect from Decree Absolute'. The judge's order also reflected a number of provisions which were to have immediate effect. When considering enforcement measures, the wife's solicitors discovered that at the time the order was made, decree nisi had neither been applied for nor granted. The court concluded that it is trite law that orders for financial relief may only be made on the granting of a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute) (per section 23 of the Matrimonial Causes Act 1973). The matter was therefore remitted back to a district judge (other than the judge who made the order) for rehearing.*

### What issues did the case raise? Why is it significant?

The key issue was that, although family law is a discretionary area as to the outcome of financial applications, statute must be followed as to process. A court only has jurisdiction to make a financial remedy order linked to a divorce that takes effect either on or after decree nisi. As the judge in *K v K* said, this is 'trite law'. Family judges have a noble history of concern as to the implications of the outcome of their orders but their hands are tied if statute is not followed. This is even the case, as here, where the decision means having to return to 'square one', with the resulting extra costs, and where the outcome suits the purpose of a party who had already been sanctioned in costs for deliberate attempts to frustrate the process. The need for the court to bear in mind proportionality, and the overriding objective under Family Procedure Rules 2010, SI 2010/2955, 1.1, is not enough in itself to remedy the making of an order specifically worded to be effective despite no decree nisi having been granted, even if that fact was unbeknown to the judge. The added significance of the case is that it provides a further example of the implications of the rise in litigants in person, as the petitioner was here. The petitioner had not applied for the decree nisi and was found not to have been aware of the implications of not doing so. In making his decision the judge in *K v K* noted that it was:

'...a depressing outcome for both parties, who are now returned to the place they were in shortly before the final hearing in December 2015. It is I recognise particularly frustrating for the wife who, perhaps with justification, considers that the husband has taken steps along the way to frustrate the process...this outcome appears to militate against the fundamental objective of disposing of cases justly, fairly and with an eye to their cost. A return for a re-hearing feels disproportionate, and I am conscious that it is undoubtedly profoundly unwelcome to the wife. I trust that the case can nonetheless be listed swiftly, and with minimal further preparation.' (para [26])

### How helpful is the judgment in clarifying the law in this area? Are there any remaining grey areas?

The judgment does not need to clarify the law in this area, as it is clear both on the face of the statute and on previous authority. However, it is helpful in closing down potential arguments such as the attempt to pray the overriding objective in aid of seeking to avoid the financial order being found to be a nullity. Likewise, it makes clear that unless an order obtained in advance of decree nisi makes absolutely clear that it is only to take effect on or after decree nisi, the wording

used in the order is not sufficient to save it. In this case, reference was made to the fact that the sale of the matrimonial home was stated not to take effect until decree absolute, thereby implying there would need to be a decree nisi. That was held to be insufficient of itself to enable the financial order to survive.

### What does all this mean for lawyers and their clients? Any best practice tips?

Five points arise:

- never overlook the basics
- have in mind what happens next and whose responsibility it is that it is done
- prepare a brief chronology whenever you see a client or go to court, that includes the parties' ages, the date the relationship began, the date of the marriage, the ages of children, the date of separation, and the date of the various steps in the divorce process including the issue of the petition, the filing of the acknowledgement of service, and the dates of the decree nisi and the decree absolute
- remember that you cannot transfer your responsibility to others—in this case, it might have been hoped that the court at the financial dispute resolution appointment, or at the final hearing, would have picked up there was no decree nisi, as had been the case in previous authorities cited in the judgment, but it is not the court's job to do so, and
- if acting for a respondent, on filing the acknowledgement of service, a request should be made of the petitioner, or the petitioner's solicitors if there are any, to confirm receipt of the acknowledgement and to confirm when the request for the decree nisi to be made has been lodged—the position should thereafter be checked direct with the court

### How does this judgment fit in with other developments in this area? Do you have any predictions for future developments?

Two points occur:

- the decision in *K v K* is a further example of the implications of the rise in numbers of litigants in person in family proceedings who cannot be expected to be up to speed with the court processes or with the implications of failing to follow them—reference should also be made generally to 'Litigants in person: guidelines for lawyers' published jointly by the Law Society, Bar Council and the Chartered Institute of Legal Executives in June 2015, and
- that we appear to be inexorably on a path to the process of divorce being fundamentally reformed—while the details are awaited, the process may well be modified to render obsolete the current steps leading to divorce that are well-known to practitioners for many years and the implications of such reform as regards the interaction with the obtaining of financial orders on divorce will be one aspect to consider—watch this space

**PSL practical point:** see also *Practice Note: Litigants in person, for practical guidance on issues to be taken into account when dealing with a litigant in person in family proceedings including procedural requirements, guidance and the requirements of the Solicitors Regulation Authority Code of Conduct. The Practice Note also sets out Law Society and Resolution guidance on litigants in person and resources that may be of assistance to a party acting in person.*

*Grant Howell acts for clients both in England and from around the world on English family law matters. His caseload includes acting for expatriates based in the Middle East and working in liaison with leading international family lawyers, as well as giving expert evidence on English family law. Grant was managing partner of Charles Russell LLP for eight years. He was the first Chair of the Forum of Family Arbitrators and is also a trained collaborative lawyer. He also has substantial experience in drawing up pre-nuptial agreements. Throughout his career, Grant has involved himself in family law organisations at the forefront of legal training and reform and gives presentations on family law matters regularly, both in England and abroad. He is joint General Editor of Butterworths Family Law Service.*

*Interviewed by Kate Beaumont.*

*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor*



CLICK HERE FOR  
A FREE TRIAL OF  
LEXIS®PSL

[About LexisNexis](#) | [Terms & Conditions](#) | [Privacy & Cookies Policy](#)  
Copyright © 2015 LexisNexis. All rights reserved.