

Family case update: Owen s v Owens [2017] EWCA 182

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CATEGORY:

ARTICLE

The Court of Appeal decision in Owens v Owens [2017] EWCA is undoubtedly a depressing read; there is no question that Mr and Mrs Owens are both unhappy with their current position, and the Court of Appeal judges were equally unhappy with the current legal position. The question is what should be done.

THE CURRENT LAW

Mr and Mrs Owens were in the unenviable, but mercifully rare, position where one of them wishes the marriage to end and the other does not. Mrs Owens believes that her marriage has irretrievably broken down and so she needed to prove that to the court. It often comes as a surprise to clients that in order to become divorced it is necessary to prove to the court that the marriage has irretrievably broken down by proving at least one of only five potential facts:

1. Your spouse/civil partner has committed adultery (they cannot rely on their own adultery) and you find it intolerable to live with them. It is not possible to rely this fact if you have lived together for a period totalling 6 months after discovering the adultery;
2. Your spouse/civil partner has behaved in such a way that you cannot reasonably be expected to live with them;
3. Your spouse/civil partner deserted you 2 years ago;
4. You have lived apart for at least 2 years and your spouse/civil partner agrees to the divorce;
5. You have lived apart for 5 years.

In Mrs Owens' case she sought to show that Mr Owens had behaved in such a way that she could not be expected to live with him. She put forward 27 allegations as to his behaviour but none were considered sufficient. Having read the judgment, it is easy to see why. The examples of behaviour could be easily found in any number of happy marriages with a promising future. It would be surprising if any married person reading the judgment could not recognise some element of their own marriage in the various descriptions.

What is perhaps less explicable is the conclusion that the divorce petition cannot proceed, and so the parties must remain married. If Mr Owens continues to refuse to agree to a divorce, Mrs Owens must wait until they have been separated for 5 years before she can obtain a divorce without his consent. It is the consequence of the judge's decision that is difficult to fathom.

THE IMPLICATIONS

The implications for Mrs Owens are significant: without a divorce, Mrs Owens will have only limited financial claims against Mr Owens; she will not be able to re-marry and her life will be effectively on hold until she is able to progress the divorce. However, it is hoped that this decision will not impact the way that the court views future petitions based on unreasonable behaviour. In the vast majority of cases the divorce is not defended, and so the court does not analyse the petition in such detail, and it would be expected that 'mild' behaviour particulars that have been agreed between the parties will continue to be sufficient. It would be an enormous step in the wrong direction to encourage parties to file detailed allegations of unreasonable behaviour, which would set an unfortunate tone for the rest of the proceedings. Parties' conduct during the marriage is so rarely relevant to the financial proceedings and the current emphasis on encouraging parties to mediate, negotiate, communicate and find appropriate solutions would be far more difficult in a toxic atmosphere of detailing all the mistakes that were made during the marriage.

However, in cases where there are jurisdictional disputes – when the parties disagree about which is the right country to hear their divorce proceedings – it may be that filing a petition on the basis of unreasonable behaviour will become a far riskier option. If one party can persuade the court to dismiss that petition, they may be free to pursue divorce proceedings elsewhere.

A significant implication of this decision is that it has engendered further debate on no fault divorce.

THE DEBATE

It is interesting that the immediate response to this decision from many is that there should be a no fault divorce. This suggestion has been proposed to Parliament in various forms, most recently by Richard Bacon MP in October 2015. In fact his proposed amendment would not have helped Mrs Owens; Mr Bacon wanted there to be an option for a joint petition so that if both agreed that the marriage had broken down then that would be sufficient.

Those against 'no fault divorce' are concerned that it makes divorce too easy, and that it does not allow for sufficient reflection on what is wrong

with the marriage and whether it can be fixed. Sir Edward Gainsborough when speaking against Mr Bacon's proposed bill in the House of Commons said that research shows that introducing no fault divorce will significantly increase the divorce rate which will have a detrimental impact on society as a whole and particularly women and children.

THE FUTURE

The frustration felt by the Court of Appeal in making its decision was palpable. When the President of the Family Division describes the law which the judges have to apply and the procedures which they have to follow as being 'based on hypocrisy and lack of intellectual honesty' it is little wonder that there are calls for reform. The question is in what form. A joint petition would not have helped Mrs Owen, but is that the right alternative to fault based petitions? Perhaps a good balance would be that there can be no fault divorce but there must be a longer period of reflection before it becomes finalised (Mr Bacon's proposed 12 months) and this should assuage those who are reluctant for divorce to be too quick and easy. Although, I think that once a petition has been issued (in however an anodyne form) it is unlikely that reflection will result in the marriage being saved (although it does sometimes happen).

The focus of the commentary on this case has been that Mrs Owens is trapped in a loveless marriage, but it is important to remember that Mr Owens has a right to defend the petition. Is this right worth preserving? If a no fault divorce does not require his consent, then he would be left without a right to defend it.

This must have been a difficult and costly (both financially and emotionally) process for Mr and Mrs Owens, and while this debate continues, this issue is once more in the minds of the public. It is an important issue and worthy of Parliamentary attention.

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