

Spotlight on- Villiers v Villiers

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Judgment:

<https://www.supremecourt.uk/cases/docs/uksc-2018-0114-judgment.pdf>

What do practitioners in England and Wales need to know, following Villiers?

- What orders can the Scottish courts make?
- When do the Scottish courts have jurisdiction?
- Beartraps to be alive to, and opportunities you may not have in E & W

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Divorce

The (rough) process- and a glossary!

Where?

- Scotland wide jurisdiction in the **Court of Session** (and exclusive jurisdiction for 1980 Hague). This is where more complicated, international, high-value and/or weird cases are **raised** (we don't issue!)
 - BRII jurisdiction, and
 - Excluded actions where one/both of the parties has a Scottish domicile (eg. US, Australia etc- so you may have people who have never set foot in Scotland who have jurisdiction to divorce with us. Very useful for ex-pats)
 - Actions are raised by way of **Summons** or **Petition**, with **Defences** and **Answers**, respectively
 - The applicant is the **Pursuer** (or **Petitioner**) and the opponent is the **Defender** (or **Respondent**)

- Service is effected by **Messengers at arms**, if you need personal service
- Claims are made in numbered **conclusions**- the orders you are looking for, eg. divorce or a property transfer order. These go at that start of the summons. The next bit is the **condescendence**- the 'story' that you say justifies the orders you are looking for. Finally, you have the **pleas in law**- a summary of the law or legal principle that you say, with regard to the contents of the condescendence, justifies the remedy you seek in the conclusions
- Court orders are **interlocutors**. Note that the court clerks write them, not you! They need to be check carefully immediately after the hearing (you get them by email within a couple of hours and if they are incorrect or miss things the clerks will tweak them)
- Appealing is called **Reclaiming**
- The **Outer House** is where first instance cases are heard and the **Inner House** is for appellate matters
- Local **Sheriff** courts. There are six **Sheriffdoms** and thirty nine **Sheriff** courts across Scotland. This is where the majority of matters are dealt with- especially the child law matters. There is a gazetteer to help you identify the correct sheriff court <http://scotcourts.gov.uk/the-courts/gazetteer>
 - **Sheriffdoms:**
 - Glasgow and Strathkelvin
 - Grampian, Highland and Islands;
 - Lothian and Borders;
 - North Strathclyde;
 - South Strathclyde, Dumfries and Galloway;
 - Tayside, Central and Fife
 - BR11 jurisdiction, and
 - Excluded actions where one/both of the parties has a Scottish domicile **PLUS** either/both party needs to be resident in the Sheriffdom for forty days before the action is raised (note: 'resident', not 'habitually resident' and within the Sheriffdom, not the jurisdiction of the particular Sheriff court)

- Actions are raised by way of **Initial Writ**, with **Defences**
- **Pursuers** and **Defenders** again
- Service is effected by **Sheriff Officers**, if you need personal service.
- Claims are made in numbered **craves**- (the conclusions in a court of session summons) the orders you are looking for, eg. divorce or a property transfer order. These go at that start of the Initial Writ. The next bit is the **condescence**- (same word as in court of session practice) the 'story' that you say justifies the orders you are looking for. Finally you have the **pleas in law**- (again, the same as court of session) a summary of the law or legal principle that you say, with regard to the contents of the condescence, justifies the remedy you seek in the craves
- Court orders are **interlocutors** again. Same comments on authorship as for the court of session
- Appealing is called **Appealing** (!) and is usually to the **Sheriff Appeal Court**, but can be straight to the Inner House of the Court of Session

Some general points:

- We don't separate out divorce and financial provision and there is no **decree nisi/absolute** equivalent. Once you are divorced you lose the right to seek financial provision in all but the rarest of cases. **Part III 1984 Matrimonial and Family Proceedings Act** claims cannot be made intra-UK.
- Keep in mind that there are different jurisdictional bases for different kinds of claims (at the moment!). Think carefully about what you are asking for and whether (i) the Scottish courts do have jurisdiction and, (ii) if we have a remedy for the issue.
- Remember we **do have rights for cohabitants** (and the cohabitation doesn't need to have been in Scotland- rights can be available following a breakup or on death); we **don't have Schedule 1**; we **don't have Inheritance Act claims** and we **don't have beneficial interest, TOLATA claims**.

- If someone contacts you before they have separated think about whether they will do better in Scotland or England- the jurisdiction that will trump in all matters (other than claims for maintenance) is the place where the spouses 'resided together' (**Domicile and Matrimonial Proceedings Act 1973**- Schedule 1 for you, Schedule 3 for us). That can be a party or dirty weekend- they don't need to be habitually resident in that place. So think about couples who have connections with Scotland and England & Wales and advise them of options.
- As far as **maintenance** claims are concerned- at the moment- the issue is where the action was raised first (unlike the DMPA, it is *lis pendens*, for maintenance claims). **You seize on issuing, we seize on service.**

Note two things: first, you can raise **Matrimonial Causes Act 1973 section 27 failure to maintain claims** when your client is habitually resident in England- so you don't need long to have jurisdiction! Secondly, you can have bi-furcated proceedings- DMPA jurisdiction in Scotland and **Maintenance Regulation** jurisdiction in Scotland (or vice versa). Watch this space to see how it works in practice...

- Financial provision on divorce for us is about sharing the net value of the **matrimonial property**- what has been acquired since marriage until separation (excluding gifts or inheritance- as long as they have not subsequently changed form during the marriage BUT we do include a home and contents- **furniture and plenishings**- acquired before marriage, for use as a family home) less the value of debts built up during the same time. The default sharing is fifty/fifty. We then look at five factors:
 - (1) Are there **special circumstances** that justify a departure from equal sharing? For example, we can take account of the **source of funds**- so if something has been acquired during pre-separation it is **matrimonial property**, but if it was bought with, say, pre-marriage funds we can depart from equal sharing of the net value of the matrimonial property.
 - (2) We can do 'bolt on' claims- has there been economic disadvantage sustained because of contributions to the other person or the family or economic advantage derived from contributions?
 - (3) Will one party have the economic burden of caring for children under sixteen? This is about capital, not income- do you need a bigger house than you would need as a single person, does it have to be in a particular area? etc

(4) Has the spouse been dependent to a substantial degree on the support of the other and will need to adjust to that loss of support on divorce? If so, they can get support for a maximum of three years post divorce. That has to be capitalised if it can be (if there is inadequate capital, or it would be inappropriate to capitalise, this can be paid periodically, eg, monthly)

(5) If the spouse seems likely to suffer serious financial hardship as a result of the divorce they can get support over a reasonable time (ie. not time limited). Again that has to be capitalised if it can be (if there is inadequate capital, or it would be inappropriate to capitalise, this can be paid periodically, eg, monthly)

- Spousal support prior to divorce is called **aliment** and post divorce is called **periodical allowance**
- You can **divorce immediately after marriage**- we don't preclude divorce in the first year, as you do
- Your **extract decree of divorce** will just record that you are divorced, it won't say on what basis the divorce was granted. There are two grounds- (i) that the marriage has broken down irretrievably (which can be evidenced by one of four bases: the couple have lived apart for a year and agree to divorce; have lived apart for two years; that the defender has committed adultery or, finally, that the defender has behaved in such a way that you cannot reasonably be expected to live with them, 'unreasonable behaviour colloquially), or (ii) that an interim gender recognition certificate has been issued to either party
- If no financial claims are to be made (see below), you have no children under 16 and you are using a separation ground (one or two years) you can use **Simplified Procedure Divorce** (often called DIY Divorce). You download forms from www.scotcourts.gov.uk, complete them and then send to court with a fee of £125 (with will be waived if you are on certain benefits) and your Extract marriage certificate. Before sending to court you need a notary public to swear an affidavit (which is pre-printed on the form), and many people come in to see a solicitor to get the form signed, but you can do it for free through the court, if you prefer. **Decree of Divorce is Extracted** immediately in simplified cases, and cannot then be appealed

- **When an action of divorce is raised against you, if you do nothing, the divorce will be granted without further reference to you.** That could be as quickly as three weeks after service, so don't delay! In non-simplified cases, the Decree will be Extracted three weeks after Decree has been granted, and is then not capable of being appealed
- **Divorce can be expedited** if necessary- with cooperation, you can dispense with the need for service on the defender (a solicitor can accept service on behalf of the client) and also with the period of notice (which is twenty-one days in both the Court of Session and Sheriff Court, other than overseas, non-EU, cases, where it is forty-two days). It is theoretically possible to get Extract decree of divorce within twenty-four hours (albeit you would need cooperation, a lot of smiling and much crawling to clerks)
- Anyone named as a person who it is alleged has been in an adulterous relationship is known as the **paramour**, and has to have the action served on them too
- We don't have **CAFCASS** (or an equivalent). If the court is being asked to make **interim** orders (orders for the time being, before evidence has been tested) and/or if the court wants to ascertain if children want to express a view and, if so, to give them the opportunity to speak to someone, the most common approach is for a **Child Welfare Report**, or **Bar Report** to be obtained from a local family lawyer (in the Sheriff court) or advocate (who does some/all family work), who is appointed as **Reporter**
- We still have **legal aid** for financial and child law matters. We don't have legal aid franchises and every solicitor in Scotland has (or can get) a legal aid reference number and is then able to offer legal aid in any area they feel they are suitably qualified to advise upon
- The vast majority of our cases settle by agreement and few financial cases are litigated to conclusion. There were less than two hundred reported cases in the first thirty years of the **Family Law (Scotland) Act 1985** (which is where our law on financial provision comes from). The norm is that a contract called a **Minute of Agreement** or **Separation Agreement** is entered into. This is binding and ousts the jurisdiction of the court to review the settlement terms reached by the couple.

There is no requirement for such a contract to be in a particular form, for there to have been disclosure, any cooling off period or for the parties to have had legal advice. Documents that they parties draw up themselves in half-arsed fashion can still be binding and oust the jurisdiction of the court.

Once a Minute of Agreement has been signed there is no need (in virtually all cases) for there to be any court orders for finances- a Minute of Agreement that has been registered in the **Books of Council and Session** can be enforced as though it were a court Decree. The norm is that there is a Minute of Agreement followed by Decree of Divorce alone (ie. no orders being sought other than for divorce). We don't have (or need) a **Judgment Summons** procedure therefore.

A Minute of Agreement can **only be set aside** or varied on divorce. So if you are divorced already, you will be held to the contract. To set aside or vary the Minute of Agreement on divorce you need to be able to show that it was not 'fair and reasonable at the time it was entered into'- Family Law (Scotland) Act 1985 section 16. The bar is high- the fact that you entered into a bad, even very bad, bargain is not enough.

Historically after they were signed Minutes of Agreement were registered in the **Books of Council and Session** (properly the Register of Deeds and Probative Writs in the Books of Council and Session) which dates back to 1500 odd. There were where the register of court orders were kept. We don't generally register these days. The upsides to registration are that the document can never be lost or mislaid and that you can enforce on it. The downside is that it is public.

If a document is **registered for enforcement** (simply with the addition of these words) the **Extract** that is subsequently issued has a **warrant that grants authority for all lawful execution**. That means you can give the Extract to Sheriff Officers or Messengers at Arms to **serve a charge**. If thereafter there is non-payment of a **pecuniary** (money) debt the person's bank accounts etc can be frozen.

- **Pension sharing** is usually done in a **Qualifying Agreement**, rather than a court order. A qualifying agreement is a contract (and can be part of a Minute of Agreement). It provides for pension sharing post divorce. You need to intimate the intention to share to the pension fund trustees before signing. We separate out the qualifying agreement from the Minute of Agreement (but that is still not the norm in Scotland), because it **MUST** be registered in the Books of Council and Session (and has a lot of personal data on it- names, DOB, addresses, NI numbers, details of the

pension schemes etc). It's weird and we have raised this repeatedly with the Scottish Office of the Information Commissioner with no traction. What we can do is restrict to the bare minimum the information in the public domain, which we do by having two **deeds**- one which is solely the qualifying agreement and the other which is the minute of agreement, which deals with the other settlement terms). If pension sharing is by way of qualifying agreement, rather than court order, you need to intimate the **Extract Qualifying Agreement and Extract Decree of Divorce** to trigger implementation

- We have no forms to initiate applications- each Summons or Initial Writ is a bespoke document. There is light touch case management in the Court of Session and greater structure in the Sheriff court. There is no equivalent to your **FDR** process and are no **directions hearings**
- We don't have **MIAMS** (yet- this is likely to come)
- **Pension sharing can be done by way of a fixed sum** in Scotland, in addition to the percentage basis that you have. Pension sharing can be way of court order or qualifying agreement (see above)
- We have **expenses**, rather than costs, and we have no obligation to produce estimates to our clients, let alone tell the court what we have billed, or anticipate billing. If clients are unhappy about the bills we charge the **Auditor of Court taxes** the account. **Law Accountants** are the people who usually draw up accounts for **taxation** and conduct the **diet of taxation** for you
- Final hearings are called **Diets of Proof**, usually just shortened to Proof
- Applications to the court for specific procedure are made by **Motion**
- You stay, we **sist**
- Documentary (which can include electronic) evidence is called **vouching**
- Property is **corporeal** or **incorporeal** (tangible, vs intangible assets) and can be **heritable** or **moveable** (bricks and mortar, vs, well, moveable assets!)
- We don't have **legal services payment orders**. You pay your own legal expenses

- **Litigation loans** are rare.
- We don't have **mortgages**, we have **standard securities**
- There is no general **duty of disclosure** and no equivalent to your Form E. In the majority of cases, it is in the interests of the parties to make disclosure, because if they don't inference can be drawn but it is difficult to identify and locate assets if you have a recalcitrant party on the other side. What you do is make a list of the things that you want to find. You group each category of assets into **calls** and then list them in a **specification of documents in relation to which commission and diligence is sought**, which is usually shortened to a **spec** (unsurprisingly). A call would look like this-

“All agreements, correspondence, memoranda, records and other documents of a similar nature showing or tending to show the basis upon which Big Deal Investment Fund account number XYZ12345 came to be transferred from the joint names of the parties to the joint names of the defender and Ms Delight Brown between 5 April 2014 and 14 February 2017.”

You need to have **record** (a basis in your written **pleadings**) to justify recovery- you can't do a **fishing diligence**, and seek to recover random documentation just because he has shacked up with Ms Brown and your client thinks that he is a bad lot.

Once the spec has been granted you can use the **optional procedure** and serve it on anyone you think may have information covered by it- these people or organisations are called **havers** (because they may 'have' something. Note this is very different to 'havering' which you will know from the Proclaimers I'm Gonna Be (500 miles). Havering is wittering). They need to comply within seven days. You can also call havers to **commission**, on forty-eight hours notice, to come to court and give evidence to the **Commissioner** about what documents they have, had, have passed on etc

What documents are publicly accessible in Scotland?

- Anything registered in the **Books of Council and Session**. Often Minutes of Agreement from previous marriages (which can be useful in subsequent divorce asset tracing); Trust deeds and Wills

- Details of heritable property owned in Scotland- we can search against names, addresses, counties in the **Land Register** or **Register of Sasines**
- Unreported decisions- eg. if your client knows that their spouse was divorced in Scotland and there was a Proof with a written judgment, even if it wasn't reported, it can be obtained. **Our default is that everything is public.**

Top tip:

- **Domicile!** This matters now and it will matter a million times more after the transition period. Establish your client's domicile (because you can't tell from their name, what they look like or their accent):
 - Where were they born
 - Were their parents married?
 - If so, how long had their father lived where they were born (if he did)? Where was he from? If he had lived in the place your client was born for less than twenty years, were his parents married and where did they come from?
 - If unmarried parents, ask the same (above) questions about the client's mother
 - What's the client's chronology? Where have they lived since birth- where was their closest connection when they were young? Where have they lived- was it with work, school or were they intended to be permanent moves?
 - What connections, if any, do they have with other jurisdictions?
 - Where do they plan to be buried?
 - Where do they envisage being in future?

Phone a Scottish solicitor! (but expect us to do a conflict check before we say much- Scotland is a small place)

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