

CA on appeal from High Ct (Hughes J) before Thorpe LJ, Potter LJ, Mr Justice Munby 27th November 2002

JUDGMENT : LORD JUSTICE THORPE

1. Hughes J decided a dispute between Mr and Mrs Mark as to whether or not Mr Mark's petition for dissolution had some jurisdictional basis. He found for Mrs Mark, rejecting the submission that her claim to domicile within the jurisdiction was fatally flawed as a consequence of her doubtful immigration status in this jurisdiction.
2. The judge had to choose between two lines of authority. He elected for a line of authority which required him to depart from an earlier decision in the Family Division of the then President, Sir George Baker.
3. Not surprisingly an application was made for permission. The judge refused it although acknowledging that the issue was one of pure law of some general significance. It is whether a spouse whose residence in the United Kingdom is unlawful may acquire a domicile of choice in England and Wales. However, he went on to state his view of the realities. He said: *"Disproportionate costs have already been expended on both sides in a case in which (a) both now assert very limited sources (b) both assert a wish for a divorce and (c) it is common ground that subject to jurisdiction, even if the divorce were to be obtained abroad, an application under Part 3 of the 1984 Act would inevitably follow, raising the issue whether the former matrimonial home vested in a discretionary trust was one in which either spouse had a beneficial interest in possession. Quite apart from other jurisdictional issues."*
4. Subsequently, he went on to deal with the costs at the hearing in October. He made an order in the exercise of his discretion, which is again challenged by Mr Mark. Accordingly the applications for permission in relation to both the principal judgment and the costs judgment came to this Court on 8th October and 8th November respectively and were ordered in for oral hearing without notice.
5. The wife's solicitors, Messrs Osibanjo Ete & Co, have written to the Court seeking to support the trial judge's point on proportionality. They say both parties agree that the marriage has broken down irretrievably: they both want a divorce and costly litigation will inevitably follow the divorce, in the form of maintenance proceedings of some sort, depending on where the divorce takes place. They say that it is therefore important to bear in mind the need to abate the steadily rising costs, which are now close to £2 million, excluding the costs of this present application before the Court of Appeal, when divorce has not even been dealt with.
6. So, we have to balance the simple point that the judgment below seems to settle a pure point of law after a survey of conflicting decisions not just in this jurisdiction but also in a number of other common-law states. Furthermore, the issue goes to the very fundamental question of whether the court has jurisdiction to dissolve the marriage of the parties and the basis upon which the Court has jurisdiction to make adjustive financial orders between them.
7. It seems to me that the resolution between that strong ground of application and the strong considerations of proportionality has to fall in favour of the resolution of the point of law. So, I am in no doubt that Mr Howard makes good his submission that this is a case that the Court of Appeal simply cannot avoid. But I am forcibly struck by the complete folly of the war of total attrition that this couple is waging.
8. The sum of £2 million which has been tossed away in legal costs is a sum which would manifestly have made comfortable provision for this wife for the rest of her mortal span. Accordingly, it seems to me important to emphasise to this couple that this Court places a very high importance upon mediation as an alternative to litigation in family cases, particularly where the root question is simply cash.
9. So, I would qualify the grant of permission to appeal by a direction that no further step be taken in the appeal until each of the parties has responded fully to an invitation from the court to mediate their differences with the benefit of a mediator appointed by the court, the whole mediation process to be within the Court of Appeal ADR scheme and administered through the office lawyer with responsibility for mediation.
10. **LORD JUSTICE POTTER:** I agree.
11. **MR JUSTICE MUNBY:** Also agree.

MR C HOWARD QC & MR P MARSHALL (instructed by HUGHES FOWLER CURUTHERS) appeared on behalf of the Applicant