



In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2017 No: 33

BETWEEN:

C

Petitioner (Applicant Wife)

v

C

Respondent (Respondent Husband)

CHAMBERS RULING

Date of Hearing: 7 November 2017

Date of Ruling: 30 November 2017

Petitioner Georgia Marshall, Marshall Diel & Meyers Limited

Respondent Litigant in Person

Administrative capacity of the Assistant Registrar

Clarification on Procedural Rules for Ancillary Relief Applications

Applications for leave to file further affidavit evidence in Ancillary Relief proceedings

(Matrimonial Causes Act 1974 s. 30 / Matrimonial Causes Rules 1974 Rules 68-84)

RULING of Registrar Shade Subair Williams

Introduction

1. The Petitioner and the Respondent were married in 2009. A Decree Absolute was pronounced in August 2017. There is one child of the marriage of toddler age. The Petitioner

has full time employment and the Respondent is employed in a family business where he is also a co-owner.

2. This matter has come before the Court on the Petitioner's application filed on 18 August 2017 under Rule 68(1) of the Matrimonial Causes Rules 1974 for ancillary relief by way of: (1) periodical payments for the child of the family; (2) lump sum provision; and (3) a property adjustment order in relation to the former matrimonial home. The Petitioner further seeks an order that the Respondent pay the costs of her application for ancillary relief.
3. The Petitioner's application was made returnable for 12 September 2017 to appear before the learned Assistant Registrar (Relief), Rachael Barritt in her administrative capacity. Terms of a Consent Order were reached in respect of directions for the filing of affidavit evidence. However, the draft Consent Order, dated 12 September 2017 ("the Consent Order") was erroneously signed by the Assistant Registrar because she had no judicial powers to make an Order of the Court.
4. Notwithstanding, the Consent Order essentially provided that no further affidavit evidence would be admissible without leave of the Court. However, on 23 October 2017 the Respondent filed further affidavit evidence.
5. The Respondent now applies to the Court for retroactive leave to file the additional evidence sworn in his own name and filed on 23 October 2017.

The Affidavits Filed in these Proceedings

6. In support of the Petitioner's Notice of Application for Ancillary Relief filed on 18 August 2017, the Petitioner filed an affidavit in her own name (the Petitioner's first affidavit).
7. Also on 18 August 2017, the Petitioner filed third party affidavit evidence from her father, without leave of the Court. The Assistant Registrar sought to grant leave retroactively by the 12 September 2017 Consent Order.
8. The Respondent filed a reply affidavit on 11 September 2017 (the Respondent's first affidavit).
9. In compliance with the first term of the Consent Order, the Petitioner filed a second affidavit on 6 October 2017.

10. The Respondent's application before me arises out of the further affidavit evidence filed by the Respondent without leave on 23 October 2017.

The Facts in Issue

11. The former matrimonial home, which is still occupied by both parties, was purchased by the parties in 2010 in their joint names for the sum of \$750,000.00. In aid of this purchase, the Petitioner's parents gifted the sum of \$300,000.00 in addition to closing costs. The balance sum of \$450,000.00 was taken out as a mortgage. The monthly mortgage and related maintenance fees are paid out of the parties' joint bank account.
12. The Petitioner through her affidavit evidence has claimed sole ownership of the \$300,000.00 gift from her father. The Respondent, however, says that this lump sum of money was a gift to both parties as a married couple and was clearly intended for the purchase of the matrimonial home for equal benefit to the parties to the marriage. Of course, findings of facts are a matter for the trial judge and not the Registrar. I only state the facts so to identify the main issues in dispute.
13. On the face of the affidavit evidence, the parties are in dispute as to the following:
 - (i) The true market value of the former matrimonial home;
 - (ii) The rightful owner of the sums spent by the Petitioner's parents for purchase of the vehicles used by both parties (\$23,700.00 for a motor car used by the Petitioner and approximately \$20,000.00 for a truck which was registered to the Respondent);
 - (iii) The rightful owner of the furniture in the former matrimonial house (The Respondent stated in his first affidavit that the household contents were gifts received by the parties when they were newlyweds. The Respondent also specified that during the parties' pre-marital cohabitation in his bachelor style apartment, the Petitioner's father, of his own accord, disposed of his household contents and replaced his belongings with more valuable furnishings. The Petitioner in her second affidavit stated that her father purchased a new sofa, television set, curtains and carpet for the apartment without objection from the Respondent. The Petitioner says that this was a decision taken jointly between the parties);
 - (iv) Petitioner's evidence on her monthly expenditures for groceries;

- (v) The circumstances behind the purchase of the Petitioner's wedding ring (The Respondent alleged in his first affidavit that the Petitioner demanded that he sell his car to enable him to purchase a wedding ring for the Petitioner. This is entirely refuted by the Petitioner); and
 - (vi) The level of the Petitioner's transparency on her income during the marriage (The Respondent claimed in his first affidavit that the Petitioner was not forthcoming about her earnings during the marriage and that he first became aware of her income sums after having instructed an attorney in these proceedings).
14. Some of these disputed issues listed may not prove relevant at trial. However, that will be a matter for the judge and not the Registrar.

The Respondent's Second Affidavit filed without leave of the Court

15. The Respondent filed a 3 page affidavit on 23 October 2017. The Petitioner's Counsel has objected to the admission of this evidence on the basis that it was filed without leave of the Court. Mrs. Marshall further argues that the admission of the Respondent's second affidavit will invariably and unnecessarily increase the costs of this litigation as the Petitioner would in turn seek leave to file further affidavit evidence in reply.
16. The Respondent's second affidavit briefly outlines his version of the father's involvement in replacing his former bachelor apartment with new furnishings. The Respondent, in his affidavit, colorfully described the Petitioner's father as a man who made lavish purchases for his daughter's happiness and his own convenience.
17. The Respondent also referred to his former father in law's payment of a second hand \$7000 Mitsubishi Lancer car for the Petitioner which he says was later upgraded to a BMW which was then sold to enable the Respondent to purchase the Petitioner's wedding ring.
18. In this second affidavit, the Respondent claimed that the Petitioner's father gifted him with the truck which was not intended to be a loan. The Respondent explained that his attempt to make some repayment to his father in law was only as a measure of good faith.
19. At paragraph 14 of his affidavit, the Respondent stated that the Petitioner's father gifted him and his other family and colleagues with expensive items in return for repair type services for him. The Respondent illustrated this point by reference to an \$11,000 boat which he stated to have been gifted by the Petitioner's father to the Respondent's brother. This is all presented as evidence on the background leading up to 2008 when the parties married one another.

20. The affidavit then goes on to speak on about the Petitioner's father's payment of the \$100,000 wedding ceremony and surprise Mediterranean cruise honeymoon. Paragraphs 19 and 20 of the Respondent's second affidavit provide the Respondent's version of how the Petitioner's father came to gift the parties with the down-payment for the former matrimonial home. Paragraphs 21-24 outline the Respondent's position on the cheque which was paid by the Petitioner's father for the down payment. The Respondent further exhibited a copy of the joint escrow account with the parties' previous conveyance attorney as evidence to support his contention that the gift was made to the parties jointly. The Respondent stated that his agreement to purchase the matrimonial home and his commitment to make payments over the course of seven years was done on the assumption that he owned the property with his wife as joint equal tenants.

THE LAW

Procedural Rules for filing of Evidence in Ancillary Relief Applications

21. Ancillary Relief is defined in the Matrimonial Causes Rules 1974 (the Rules) in the Interpretation section as follows:

“ancillary relief” means-

- (a) an avoidance of disposition order,*
- (b) a financial provision order,*
- (c) an order for maintenance pending suit,*
- (d) a property adjustment order, or*
- (e) a variation order*

22. Section 30 of the Matrimonial Causes Act 1974 applies to the commencement of proceedings for ancillary relief:

“30(1) Where a petition for divorce, nullity of marriage or judicial separation has been presented, then, subject to subsection (2), proceedings for maintenance pending suit under section 26, for a financial provision order under section 27, or for a property adjustment order may be begun, subject to and in accordance with rules of court, at any time after the presentation of the petition.

(2) Rules of court may provide, in such cases as may be prescribed by the rules-

- (a) that applicants for any such relief as is mentioned in subsection (1) shall be made in the petition or answer; and*

(b) that applications for any such relief which are not so made, or are not made until after the expiration of such period following the presentation of the petition or filing of the answer as may be so prescribed, shall be made only with leave of the court.”

The Requisite Application Notices in Ancillary Relief Proceedings

Form 11

23. Where a Petitioner or Respondent, *not* having applied to be heard on an application for ancillary relief in divorce pleadings, intends to make such an application, Rule 68(2) requires the said Petitioner or Respondent (the Applicant) to obtain leave of the Court (unless agreed between the parties) for notice of the application to be given in Form 11.
24. Pursuant to Rule 70, the Applicant then has four days within which to serve a copy of Form 11 on the other spouse.

Form 12

25. Form 12 applies to a Respondent’s Application for the Court’s consideration of his/her financial position post-divorce.
26. Rule 57 requires a Respondent’s application for consideration of his financial position post-divorce to be made by notice in Form 12.
27. Pursuant to Rule 70, the Applicant then has four days within which to serve a copy of Form 12 on the other spouse.

Form 13

28. Where a Petitioner or Respondent, having applied to be heard on an application for ancillary relief in divorce pleadings, intends to proceed with the application, Rule 73 requires the said Petitioner or Respondent (the Applicant) to give notice of the application in Form 13.
29. Pursuant to Rule 73, the Applicant then has four days within which to serve a copy of Form 13 on the other spouse.

Form 14

30. Form 14 is a notice of allegation in proceedings for ancillary relief. A notice in Form 14 is required where an affidavit in ancillary relief proceedings contains an allegation of adultery or of an improper association with a named person.

The Rules on Filing of Evidence in Ancillary Relief Proceedings

Filing Evidence: Applications for Maintenance Pending Suit and Financial Provision Orders

31. The Respondent to the application is required to file the first affidavit for ancillary relief applications.
32. Rule 73(2) provides that the Respondent to the Ancillary Relief application who is served with a copy of the Form 11 or Form 13 application (where no application for a property adjustment order or an avoidance of disposition order or a variation order is made therein) shall file an affidavit in answer to the application within fourteen days of having been served with the Form 11 or Form 13 application.
33. Within 14 days thereafter, it is then for the Applicant to file an affidavit pursuant to Rule 73(3).

Filing Evidence: Applications for Property Adjustment or Avoidance of Disposition Orders

34. As provided by Rule 74, a Form 11 or Form 13 application for a property adjustment order or a disposition order must be supported with an affidavit by the Applicant stating the facts relied on.
35. The requisite particulars to be contained in the Applicant's supporting affidavit are set out in Rule 74(2):
 - (2) *The affidavit in support shall contain, so far as known to the applicant, full particulars-*
 - (a) *in the case of an application for a transfer or settlement of property-*
 - (i) *of the property in respect of which the application is made,*
 - (ii) *of the property to which the party against whom the application is made is entitled either in possession or reversion;*
 - (b) *in the case of an application for ail (sic) order for a variation of settlement-*
 - (i) *of all settlements, whether ante-nuptial or post-nuptial, made on the spouses, and,*
 - (ii) *of the funds brought into settlement by each spouse;*
 - (c) *in the case of an application for avoidance of disposition order*
 - (i) *of the property to which the disposition relates,*
 - (ii) *of the persons in whose favour the disposition is alleged to have been made, and in the case of a disposition alleged to have been made by way of settlement, of the trustees and the beneficiaries of the settlement.*
 - (3) *Where an application for a property adjustment order or an avoidance of disposition order relates to land, the affidavit in support shall, in addition to containing any particulars required by paragraph (2) give particulars, so far as known to the applicant, of any mortgage of the land or any interest therein.*

(4) A copy of Form 11 or 13, as the case may be, together with a copy of the supporting affidavit, shall be served on the following persons as well as on the respondent to the application, that is to say-

(a) in the case of an application for an order for a variation of settlement order, the trustees of the settlement and the settlor if living,

(b) in the case of an application for an avoidance of disposition order, the person in whose favour the disposition is alleged to have been made,

(c) in the case of an application to which paragraph (3) refers, any mortgagee of whom particulars are given pursuant to that paragraph, and such other persons, if any, as the registrar may direct.

(5) Any person served with notice of an application to which this rule applies may, within 14 days after service of the affidavit, file an affidavit in answer.

36. The Respondent to the application may then file a reply affidavit within 14 days of service pursuant to Rule 74(5).

Filing Evidence: Applications for Variation Orders

37. Rule 75 requires an affidavit for a variation order to be supported by an affidavit from the applicant setting out the full particulars of the applicant's property and income and the grounds on which the application is made.

38. The Respondent to the application may then file a reply affidavit within 14 days of service pursuant to Rule 75(2).

Filing Evidence: Respondent's Application to consider financial position post-divorce

39. Save where an affidavit has already been filed by the Petitioner under specific circumstances in the divorce proceedings¹ or where the Petitioner has already filed an affidavit in respect of an application for ancillary relief under Rule 73(2), a Petitioner shall within 14 days after service of the Respondent's notice, file an affidavit containing full particulars of his property and income in answer to the Respondent's application.

40. Within 14 days after having been served with the Petitioner's affidavit (or other such period as the Court may fix), the Respondent shall file his affidavit in reply containing full particulars of his property and income unless already given in an affidavit for an ancillary relief application made under Rule 73(3).

¹ Such circumstances refer to an affidavit filed under Rule 8(3) where a petition for divorce alleging five years separation contains a unilateral proposal by the petitioner to make a financial provision for the respondent. An affidavit filed under this Rule is required to contain brief particulars from the Petitioner of his means and commitments.

41. Rule 57(4) provides: “*The powers of the court on the hearing of the application may be exercised by the registrar*”.
42. Rule 57(6) provides: “*At any time before the hearing of the application is concluded (and without prejudice to any right of appeal), the registrar may, and if so requested by either party shall, refer the application, or any question arising thereon, to a judge.*”

Filing of Further Evidence

43. On my assessment of the Rules, there is no right conferred on either party to file more than one affidavit in proceedings for an Ancillary Relief application of any kind.
44. However, the Registrar has a judicial power of discretion to order further evidence. Rule 77(5) empowers the Registrar to take oral evidence and to order the attendance of any person for the purpose of being examined or cross-examined. The Registrar may also require further affidavit evidence to be filed. This is not to be misconstrued for a right of either party to file a second affidavit.

The Role of the Registrar for Ancillary Relief Applications

Appointment to Investigate Ancillary Relief Applications

45. Rule 77 applies to the role of the Registrar in investigating ancillary relief applications. Rule 77(1) provides: “*On or after the filing of a notice in Form 11 or 13 an appointment shall be fixed for the hearing of the application by the registrar.*”

Power to Order to Disclosure of Requested Documents

46. The Registrar is also charged with the important function of managing the parties unresolved disclosure requests. Rule 77(4) provides:
“*Any party to an application for ancillary relief may by letter require any other party to give further information concerning any matter contained in any affidavit filed by or on behalf of that other party or any other relevant matter, or to furnish a list of relevant documents or to allow inspection of any such document, and may, in default of compliance by such other party, apply to the Registrar for directions.*”
47. In my previous ruling delivered in *B v B [2017] SC (Bda) 23 Div (21 March 2017)*, I considered the law on the duty of both parties to give full and frank disclosure on their financial affairs. I also cited the judgment of the learned Justice Stephen Hellman in *Vernetta Mae Shelley Howe v Douglas Colby Howe (SC) No. 55 of 2012 (14 March 2016) at para. 30* where he correctly held that if one party fails to properly discharge their duty of disclosure, this may give rise to adverse inferences against that party.

Power to Order Further Evidence and Direct further Conduct of Proceedings

48. Rule 77(5) also gives the Registrar a discretionary power to order the filing of further affidavit evidence. Rule 77(6) empowers the Registrar to give directions as to the filing and service of pleadings and as to the further conduct of the proceedings.

Registrar's Power to make Interim Orders

49. Under Rule 78(3) the Registrar may, pending the final determination of the application, make an interim order upon such terms as is thought to be fit.

Duty of Registrar for Application for Avoidance of Disposition Orders

50. Rule 79(1) specifically applies to applications for an avoidance of disposition order and any other related financial applications which are listed to be heard at the same time as the application for an avoidance of disposition order.

51. Here, the Registrar is required to:

- (i) Complete an investigation under Rule 77;
- (ii) Report the result of that investigation in writing to a judge; and
- (iii) Adjourn the application to be heard before a judge

52. Rule 79(2) governs the requisite content of the Registrar's report: "The registrar's report shall contain an estimate of the financial relief to which, in his opinion, the applicant is entitled (if he has not already obtained an order for financial relief), and of the relief to which, in the registrar's opinion, the applicant would be entitled if the application were granted.

53. As provided by Rule 79(4), "...on the hearing of the application the judge may confirm or vary the Registrar's report or make such order as he thinks just."

54. Rule 79(5) gives the Registrar the power to sign Consent Orders containing agreed terms between the parties.

Registrar to arrange for Application to be heard by Judge

55. Rule 78(2) permits the Registrar to refer an ancillary relief application to a judge at any time in the proceedings, save for applications for an avoidance of disposition order where Rule 79 applies.

56. Rule 82 reads:

“(1) Where an application for ancillary relief or any question arising thereon has been referred or adjourned to a judge, the registrar shall fix a date and time for the hearing of the application or the consideration of the question and give notice thereof to all parties.

(2) The hearing or consideration shall, unless otherwise directed, take place in chambers.”

Analysis

The Admission of the Further Affidavit Evidence filed by the Petitioner

57. The Assistant Registrar’s Consent Order, on its face, gave the Petitioner the green light to file two affidavits beyond that which is expressly provided by the Rules: (i) the affidavit of the Petitioner’s father filed on 18 August 2017 and (ii) the second affidavit of the Petitioner filed on 6 October 2017. The allowance of additional affidavit evidence is a judicial exercise for the Registrar alone. The Assistant Registrar, notwithstanding her signature on the Consent Order, was not empowered to exercise the Registrar’s judicial function. The Assistant Registrar’s capacity is a purely administrative one, notwithstanding ongoing efforts for modernize the role so to grant judicial powers to an Assistant Registrar.

58. For these reasons, I find that the Consent Order signed by the Assistant Registrar on 12 September 2017 is irregular and has no force. Notwithstanding, I accept that a refusal of leave to retroactively allow the affidavits already filed by the Petitioner would produce an unjust result as that evidence appears to now form an essential component of the Petitioner’s claim for a property adjustment order. I, therefore, grant leave for the admission of the affidavits already filed by the Petitioner.

The Admission of the Further Affidavit Evidence filed by the Respondent

59. I now turn to the Respondent’s second affidavit. During the 7 November 2017 hearing, the Respondent explained that he found it difficult to fully comprehend these proceedings as a litigant in person, notwithstanding his use of the Court handbook for litigants in person. He stated that he did not appreciate that he needed permission to file further evidence. Mrs. Marshall urged to Court to reject this explanation.

60. To further explain his need for retroactive leave to file his second affidavit, the Respondent suggested that the Petitioner’s first affidavit exhibit letter of 12 March 2010 had been fabricated. The Respondent used this as a basis for his need to file a second affidavit as he did on 23 October 2017. However, no such allegations of fabrication were made out in the Respondent’s second affidavit.

61. Mrs. Marshall submitted that the facts deposed in the Respondent's second affidavit are irrelevant. I disagree. I find that a judge, in hearing this application, may likely treat much of the Respondent's second affidavit as relevant background evidence to his contention that the Petitioner's father gifted the down payment for the former matrimonial home to both parties.
62. Having carefully examined the Respondent's second affidavit, it is clear to me that the facts asserted are equally as relevant and pertinent to the Respondent's case as the Petitioner's additional affidavits are to the Petitioner's case. I, therefore, allow the admission of the Respondent's second affidavit.

The Petitioner's Request for leave to File Further Affidavit Evidence

63. While Mrs. Marshall strongly opposed the admission of the Respondent's second affidavit, she requested leave and directions to file further evidence in reply to the Respondent's second affidavit if the Court affirmed its admission in the end. Effectively, to grant leave for the Petitioner to file further evidence would be to allow the Petitioner to file a third additional affidavit in these proceedings. Granting the Petitioner leave to file further evidence at this stage would also give the Petitioner the benefit of the last word. The Rules, however, expressly provide for the last word in reply affidavit evidence to be given by the Respondent in property adjustment applications.
64. The only basis upon which I would find it just to allow further evidence from the Petitioner in this case would be to address a disputed topic which had not been previously raised. Such is not the case here. While, the Respondent has asserted additional facts in his second affidavit, he has not raised any new issues in dispute between the parties. For those reasons, I refuse the Petitioner's request for leave to file further affidavit evidence.

The Respondent's Attempts to bring a Cross-Application for Ancillary Relief

65. While the Respondent did not file a Notice of Application for Ancillary Relief, he itemized the orders he seeks in the terms of ancillary relief in his first affidavit as follows:
 - (a) *Order requiring Petitioner to continue with payment of 50% (\$600) of nursery fees...*
 - (b) *Order dispensing with Petitioner's request for ongoing maintenance payment or lump sum provision in respect of the child of the family.*
 - (c) *Periodical payments for the child of the family*
 - (d) *A property adjustment order in relation to the former matrimonial home known as... located ... with lump sum provision being;*

- (i) *Sale of (former matrimonial home) located at....with lump sum provision, as this Honourable Court sees fit, upon division of the net equity remaining in the property; or*
- (ii) *Transfer of (former matrimonial home) located at...., conditional upon payment of lump sum to the Respondent.*

66. At paragraph 15 of the Respondent's first affidavit he also requests "to employ the services of a forensic accountant should it be deemed necessary post disclosure." At paragraph 31 of his affidavit, a request for a "thorough tracing of monthly deductions be performed on the Petitioner's account to confirm that (the Respondent's) contributions were applied solely to the household expenses and expenses for (the child of the marriage)".

67. Notwithstanding any likely off-the record legal assistance available to the Respondent, I necessarily keep in mind that he is effectively a litigant in person on the other side of Bermuda's most senior and leading matrimonial attorney. It would not be just, on my assessment of this case, for the Respondent to be prevented from filing a cross-application for ancillary relief. I, therefore, grant leave to the Respondent to file a Notice of Application for Ancillary Relief in Form 11 in pursuance of a property adjustment order and a financial provision order by way of periodical payments.

68. However, no further affidavit evidence may be filed in relation to any such cross-application. Further, the hearing of a cross-application is to be listed together with the hearing of the Petitioner's application for ancillary relief.

Conclusion

69. The Consent Order signed and issued by the Assistant Registrar on 12 September 2017 is struck out on the basis that it is irregular.

70. The Order of this Court in respect of the admission of further evidence shall instead read:

- (i) *The Petitioner's third party affidavit sworn by her father and filed on 18 August 2017 is allowed;*
- (ii) *The Petitioner's second affidavit filed on 6 October 2017 is allowed;*
- (iii) *The Respondent's second affidavit filed on 23 October 2017 is allowed; and*
- (iv) *The Petitioner, the Petitioner's father and the Respondent shall each attend the hearing to be cross-examined.*

71. Unless either party applies within 14 days by letter filed in the Registry to be heard as to costs, I make no order as to costs.

72. This matter is adjourned to Tuesday 19 December 2017 at 11:00am for review.

Dated this 30th day November of 2017

SHADE SUBAIR WILLIAMS
REGISTRAR OF THE SUPREME COURT