# In The Supreme Court of Bermuda

## DIVORCE JURISDICTION

## 2012: No. 110

**BETWEEN:**

**Denise Anne Peniston**

**Petitioner**

**-and-**

**David Stuart Peniston**

**Respondent**

*Ancillary Relief Proceeding: Agreed Consent Order:*

*Two applications: Petitioner seeks enforcement of order for monthly payments plus payments of arrears of maintenance.*

*Respondent seeks variation of consent order to reduce amount of monthly payments because of financial hardship.*

*The Respondent complains that the consent order was entered into under duress from his counsel: Material Non-Disclosure –*

*Legal advice upon making the consent order: Respondent blames lawyer bad advice.*

*Delay between order and application to set aside- principle of finality.*

*Matrimonial Causes Act 1974 section 35*

Dates of Hearing: 16 and 17 November 2015

Date of Judgment: 11 April 2016

Petitioner (wife) in person

Phoenix Law Chambers – Rick Woolridge for the Respondent (husband)

DECISION

**Parties**

1. The parties in this matter are the wife (Petitioner) and the husband (Respondent), so-called even though they are divorced.

2. The parties were married for over 25 years. They married on 21 May 1987. They have one child: a daughter (born 14 April 1991) who was pursuing a Master's degree when the marriage ended. The wife petitioned for divorce on 11 July 2012. On 31 August 2012, decree nisi was granted; it was made absolute on 8 October 2012.

**Consent order**

3. On 22 January 2014, the parties agreed to a consent order ('the Order') regarding ancillary relief. The Order states inter alia:

> *...*
>
> *1. The Respondent shall transfer to the Petitioner all his shares in the DDP Company with the intent that the Petitioner shall be the sole owner of the property in Chester, Vermont known as 1057 Quarry Road ("the Chester Property"). ... The Respondent shall leave no debt owing in respect of land tax, state/federal levies and legal fees relating to the Chester Property or its holding company which could be claimed from the Petitioner or which could become a lien on the property if remaining unpaid save that the Petitioner shall be solely responsible for any legal fees or other debts incurred by her which could become a lien on the said property. Such share transfer shall take place on or before 31st January 2014, shall provide full and good title to the shares and shall be in full compliance with the laws and customary practice of Vermont.*
>
> *2. The Respondent, with the cooperation of his siblings, shall cause all the shares in the New England Wildflower Co Inc. to be transfer[red] to the Petitioner's sole name with the intent that the Petitioner shall be the sole owner of New England Wildflower Co. Inc. which owns the Weston Property in Weston, Vermont situated at 54 Summit Trail Road. ... The Respondent shall leave no debt owing in respect of land tax, state/federal levies and legal fees relating to the Weston Property or its holding company which could be claimed from the Petitioner or which could become a lien on the property if remaining unpaid. Such transfer shall take place on or before 31st January 2014, or so soon thereafter as is practicable and shall provide the Petitioner with good and full title to New England Wildflower Co. Inc. and such transfer*

*shall be in full compliance with the laws of Vermont and customary practice in that jurisdiction.*

*3. The Respondent shall pay to the Petitioner the sum of $2,500 so as to assist the Respondent with meeting the cost of conveying the Weston property from the New England Wildflower Co. Inc to herself outright.*

*4. The Respondent shall continue to pay to the Petitioner periodical payments at the rate of $3000.00 per month by deposit to the Petitioner's bank account with Capital G Bank Limited, account number ... such payments to continue to be made on the 1st day of each calendar month until the Petitioner shall die or remarry, whichever shall first occur. On 27th February 2014 the said monthly sum shall be increased by 1.5% and thereafter annually on the anniversary of this date.*

*5. The Petitioner shall retain all the contents and tools and equipment in and about the Chester and Weston Properties for her sole use and benefit, save that the Respondent's designated agent may collect from the Petitioner's designated agent within 30 days of the implementation of Clauses 1 and 2 of this Order the following items located in the Weston Property, namely, items of taxidermy: the mounted caribou head, the bear rug, the free standing baby bear; 2 birds, 1 fox and the boar head.*

*6. The Respondent shall retain all the contents and tools and equipment in and about the former matrimonial home known as Old Cottage in Bermuda for the Respondent's sole use and benefit, save that the Respondent shall deliver up to the Petitioner's attorneys at 20 Brunswick Street in Hamilton, Bermuda the Petitioner's grandfather's graphic art framed pictures numbering 6, which items shall be delivered within 7 days of the date of this Order.*

*7. There shall be no order as to costs.*

**Applications**

4. There are two applications before the Court: both concern paragraph 4 of the 22 January 2014 consent order.

5. The Petitioner seeks enforcement of the Order regarding monthly payments to her by the Respondent. She also seeks funds in arrears that are due to her because the Respondent has not fully complied with the Order regarding those monthly payments.

6. The Respondent seeks a variation of the Order to reduce the amount of his monthly payments to the Petitioner. He wishes to have the Order set aside.

Evidence considered by the Court

7. For these proceedings, the parties swore and filed supporting affidavits. The Court also heard oral evidence from both parties.

Delay in this decision

8. The hearings concluded in November 2015, but – perhaps due to a clerical error – the Court did not receive an electronic copy of the Respondent's submission until February 2016. This resulted in a delay in rendering this decision.

**Background: current proceedings**

9. On 12 March 2015, the Petitioner made an ex-parte application by summons for the enforcement of the 22 January 2014 consent order, in particular paragraph 4 of the order.

10. On 2 April 2015, the parties appeared before the Court. The Petitioner informed the Court that the Respondent had not been paying the full amount under the Order. She stated that the total owed at that date was $9,610 including the month of April. The Respondent argued that he did not have the money: he could not afford to pay the Petitioner $3,000 and more each month.

    The Court adjourned the matter.

    The Respondent was given permission to file and serve a summons on or before 23 April 2015, with a supporting affidavit setting out his claim seeking a variation of the consent order. The Petitioner was to file a reply by 14 May 2015.

11. On 21 May 2015, the return date, the parties came before the Court. The Petitioner had not received the Respondent's application. The Respondent said that he had sent the documents to the wrong address.

12. On 13 July 2015, the parties appeared before the Court. The Respondent appeared distraught and insisted that he was not able to make the $3,000 per month payments to the Petitioner. Accordingly, the Court granted an interim order to temporarily vary the Respondent's monthly payment amount from $3,000 to $2,000 commencing 1 August 2015 and until a final order of the Court.

13. On 14 July 2015, the Respondent (the husband) made an application by summons and supporting affidavit to vary the consent order. The summons reads:

    > *1. The Consent Order settled between the Parties dated 22 February [sic] be varied on the grounds set out in this Application.*

*2. The Consent Order entered into by the Respondent was entered into under Duress in the belief that the cost of opposing the terms would have been insurmountable.*

*3. That the financial position of the Respondent does not support his purported ability to meet the terms of the Consent Order ab initio.*

*4. There ought to be a clean break between the Parties as there are no minor children and said periodic payments do not represent a clean break.*

**Petitioner's (wife's) submission**

14. In her summation, the Petitioner maintains that the Respondent reduced his monthly maintenance payments 'from $3,040 to $1,250' without Court approval.

    She asserts that she attempted to contact the Respondent and his then lawyer to no avail:

    > *I was willing to cooperate with them if some arrangements could be made. When I did not hear back from either party, I proceeded with court action in April. Since then, [the Respondent] has sought to vary the court order in an attempt to reduce the amount of maintenance it was agreed on in the final divorce settlement from January 2014. We have since met in Court on four occasions in an attempt to settle this matter.*

15. The Petitioner states that at the 13 July 2015 court appearance, the Respondent and his lawyer were directed to 'provide an affidavit by August 10th, 2015 which was to make full and frank disclosure and clearly state the reasons why a variation should be considered.'

    They failed to do so until over four months later. The Petitioner did not receive the affidavit until the morning of the 16 November 2015 court appearance.

    She maintains:

    > *The fact that it was even allowed in Court is unfair to me, as I was given no chance to either read it or prepare a reasonable response to it. The inexcusable delay and further acceptance of it is just another bullying attempt to wear me down, cause me further debt, and to continue to delay a final decision. As well as failing to produce an Affidavit and despite my numerous enquiries, [the Respondent] has made no effort to repay the arrears balance which now totals $16,696.08 and does not include any interest for the last 13 months. As of December 2015, the arrears will total $17,786.75 not including interest.*

16. With regard to the consent order, the Petitioner claims:

    > *The Penistons unloaded a $9,000 per year US tax burden on me in the divorce settlement by allowing me the one and a half unkempt houses in the United States. They refused a lump sum settlement insisting on the monthly maintenance route instead. I believe they planned from the beginning to vary*

*the order following settlement knowing I did not have the money to continue to fight for a lump sum settlement and hoping I would give up.*

17. The Petitioner asks:

> *…that the Court make a final decision in this case based on the facts previously provided … [and] on the divorce settlement agreement and court order of January 2014 which is as follows:*
>
> *That [the Respondent] deposit into my Clarien account on the first of every month the current amount due of $3,090.67. As at March 1, 2016 the monthly amount due is $3137.03*
>
> *That "the said monthly sum shall be increased by 1.5% and thereafter annually on the anniversary of this date", being 27th February 2014.*
>
> *That these payments continue until I "shall die or remarry, whichever shall first occur".*
>
> *That [the Respondent] pay the arrears balance currently at $16,696.08 but at year end 2015 will be $17,786.75 plus 5% interest for the last 13 months which is the interest rate I pay for the loan at Clarien Bank.*
>
> *That [the Respondent] pay a minimum of $5,000 toward loss of wages and travel expenses I have incurred in order to attend these past 4 court proceedings*
>
> *That this matter be final and closed as per the original Court order.*
>
> *That [the Respondent] be responsible for all charges and fees incurred by his Trustees and lawyers in this matter.*

**Respondent's (husband's) submission**

18. In his written submission, Mr Woolridge (Counsel for the Respondent) states:

> *It is the Respondent's position that despite the hardship, under the terms of the Consent Order, the Petitioner is entitled to some of the arrears, but that under the circumstances, the Court is urged to reduce the amount to be paid.*

However, moving forward, the Respondent asks the Court to reduce the amount to be paid 'because of the hardship that it places on his finances'. To support this, the Respondent submitted his income and expenditure before the Court to show these are 'void of extravagance'.

19. Mr Woolridge further submits that the Respondent is under financial strain and refers to his 'burden of paying for the $200,000 borrowed by the Trust to cover his legal expenses as well as the repayment of the value of the equitable shares in the property … that was conveyed to the Petitioner.'

20. Mr Woolridge maintains:

> *The Respondent is almost 60 years old and realistically has a limited span of time in which he can be employed in his field. He is of limited education and works as a maintenance man.*
>
> *The Petitioner does not work but is able. She at the time of the hearing resided with her sister in California. She claims that she cannot work because of her need to return to Bermuda often for these proceedings. The Petitioner has dual citizenship between the US and Bermuda.*

21. After noting that the law allows for variation of a consent order 'in a limited number of ways and for an even more limited number of reasons', Mr Woolridge points out that one reason for granting a variation is material non-disclosure.

22. The Respondent contends that the Petitioner has not disclosed 'funds, gifts, grants etcetera [which she] purports that she no longer receives from her family contrary to the evidence of the Respondent's brother'. He maintains, among other things, that the Petitioner was evasive when asked about the proceeds of the sale of matrimonial properties and assets.

23. Mr Woolridge submits:

> *It is the Respondent's contention that the change of circumstances arises out of the truth of circumstances that ought to have been put before this Honourable Court ab initio.*

24. With reference to the consent order, Mr Woolridge asserts:

> *The law is settled throughout the cases stemming from White -v- White that the court will start with a 50/50 split of the assets and adjust either way according to the circumstances.*
>
> *The asset conveyed to the Petitioner in the form of the Peniston Trust property was not entirely the Respondent's to give. His siblings loaned him the value of their shares with the proviso that he repays them from his pay and or any funds that fall due to him from the rentals under their family trust.*
>
> *The Respondent maintains that he signed the Consent Order under duress; said duress coming from his own counsel. The threat of having legal fees to the sum of $220,000 with another $100,000 to be paid to go to trial.*

25. Mr Woolridge concludes:

> *The Respondent is almost at the end of his working lifespan. He has no savings and no notable means of survival in his twilight years.*
>
> *In the circumstances, this Honourable Court is urged to take into account the true state of affairs as to the resources available to this Respondent.*
>
> *It is open to this Honourable Court having heard the evidence and having the Respondent's circumstances placed before it to set aside the Consent Order and replace [it] with an order that would be fair in the circumstances.*

**The Court**

26. The Court has taken into account the authorities cited, and the affidavit and oral evidence of the parties and their witnesses, in arriving at this decision. Whenever there is a conflict or discrepancy between the evidence of the Petitioner and the Respondent or any of his witnesses, the Court accepts and prefers the evidence of the Petitioner.

27. Although the Court has not restated all the facts, it has highlighted the relevant facts needed to make this decision comprehensible.

Matrimonial Causes Act (MCA) 1974

28. The 22 January 2014 order was a clean break consent order.

29. The Respondent seeks a variation of the Order on the basis that the amount he agreed to pay ($3,000 with 1.5% annual increase) was 'impossible ab initio' as he struggles to make the payments.

30. Section 35 of the MCA 1974 allows a party to apply to the court for an order varying, discharging or suspending any part of a consent order:

> *35 (1) Where the court has made an order to which this section applies, then, subject to this section, the court shall have power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.*
>
> *(2) This section applies to the following orders—*
>
> *(a) any order for maintenance pending suit and any interim order for maintenance;*
>
> *(b) any periodical payments order;*
>
> *(c) any secured periodical payments order;*
>
> *(d) any order made by virtue of section 27(3)(c) or 31(7) (b) (provision for payment of a lump sum by instalments);*
>
> *(e) any order for a settlement of property under section 28(1)(b) or for a variation of settlement under section 28(1)(c) or (d), being an order made on or after the grant of a decree of judicial separation*

31. The power under section 35 of the MCA is to be used sparingly. Also this power can only be used when the anticipated circumstances have changed significantly and/or there exists cogent reasons rendering it quite unjust or impracticable to hold the payer to the overall agreed sum. No such reasons have been advanced before this Court.

32. It is clear that the Respondent is trying to break the consent order by attacking its basis. However, to break the consent order, the Respondent must show that at least one of the following events occurred: non-material facts, fraud and misrepresentation, undue influence,

or supervening events. The matters relied upon by the Respondent do not represent the kind of change in circumstances contemplated by the law.

Disclosure and the principle of finality

33. The principle of full and frank disclosure in proceedings of this kind is crucial, and has long been enforced by the courts. The principle applies not only to contested cases, but also to the exchange of information between the parties and their attorneys. Full and frank disclosure is essential for a court to make orders without the need for further enquiry by that court.

34. This is reiterated by Lord Brandon of Oakbrook in Jenkins v Livesey (1985) AC 424:

> *My Lords, once it is accepted that this principle of full and frank disclosure exists, it is obvious that it must apply not only to contested proceedings heard with full evidence adduced before the court, but also to exchanges of information between parties and their solicitors leading to the making of consent orders without further inquiry by the court. If that were not so, it would be impossible for a court to have any assurance that the requirements of section 25(1) were complied with before it made such consent orders.*

Lord Brandon concludes with a caveat:

> *I would end with an emphatic word of warning. It is not every failure of frank and full disclosure which would justify a court in setting aside an order of the kind concerned in this appeal. On the contrary, it will only be in cases when the absence of full and frank disclosure has led to the court making, either in contested proceedings or by consent, an order which is substantially different from the order which it would have made if such disclosure had taken place that a case for setting aside can possibly be made good. Parties who apply to set aside orders on the ground of failure to disclose some relatively minor matter or matters, the disclosure of which would not have made any substantial difference to the order which the court would have made or approved, are likely to find their applications being summarily dismissed, with costs against them, or, if they are legally aided, against the legal aid fund."*

35. Shaw v Shaw [2002] EWCA Civ 1298 [2002] 2 FLR 1204 is a very useful authority in cases where applicants seek to reopen a final order. Lord Justice Thorpe said:

> *44. ...*
>
> *i) ... The residual right to reopen litigation is clearly established by the decisions in Livesey v Jenkins and Barder v Caluori. But the number of cases that properly fall into either category is exceptionally small. The public interest in finality of litigation in this field must always be emphasised.*

With regard to full and frank disclosure, Thorpe LJ continues:

> *44. ii) Attempts to reopen final orders in reliance on either Barder v Caluori or Livesey v Jenkins share the same objective but the categories are otherwise obviously distinct, since one asserts a fundamental flaw in the trial process*

*and the other an unforeseen supervening event. … there has been some debate as to whether a distinction is to be drawn between the various vitiating factors including fraud, mistake, misrepresentation, duress and material non-disclosure. The authorities suggest that in other fields fraud stands alone, such is the public interest in its suppression. However the duty of full and frank disclosure that operates in ancillary relief litigation is distinctive. In almost every case the application to reopen will rest on an allegation of material non-disclosure. Litigants are invariably informed of the duty. … In practice there is probably but a single vice, namely intentional non-disclosure achieved either by active concealment or passive failure to mention.*

*iii) There are a number of routes that may be taken in an endeavour to reopen a final order. … Given the importance of the overriding principle of finality in litigation, whatever the chosen route the court should clearly exact promptitude and censure delay.*

36. The Respondent seeks to rely on the Petitioner's alleged non-disclosure. The Court rejects the change of circumstances relied on by the Respondent. If the Respondent had strong supporting evidence of material non-disclosure, he should have immediately applied to have the order set aside but he did not.

37. The Court finds no evidence supporting the suggestion that the Petitioner or her counsel misrepresented facts or failed to disclose any material information which induced the Respondent to agree to the making of the consent order.

Legal advice: making the consent order

38. When parties are represented by legal counsel, each attorney is relied on to make adequate enquires into all matters (pursuant to section 29 of the MCA 1974) before advising their clients on whether to agree to making a consent order by a court.

39. The Court accepts that both parties were represented by experienced counsel when the consent order was made.

    During their divorce, the Petitioner and the Respondent consulted different attorneys about their marital problems. Their lawyers exchanged correspondence relating to the affairs of the parties, and negotiated an agreement to a proposed consent order on behalf of their clients. On 22 January 2014, the court made the consent order. Paragraph 4 of that order is at the heart of the current applications before the Court.

40. The Respondent claims that when he made the agreement he settled the matter because of duress from his lawyer. He submits that his then lawyer informed him that in addition to the $200,000 already incurred in legal costs, it would cost an additional $100,000 to go to trial. In the Court's view the unusual scenario described cannot be relied upon. Also, the situation does not constitute duress i.e. such pressure that saps a person's will.

41. The Respondent asserts that he acted on bad legal advice when he agreed to the consent order. However, bad legal advice is not in itself a reason to set aside a consent order.

42. The Court is of the view that the Respondent was left in no doubt as to the terms of the Order. His current stance lacks plausibility.

Delay

43. The Court notes the delay between the making of the consent order on 22 January 2014, and the Respondent's application on 14 July 2015. The Respondent's application was made almost 18 months after the Order, and only after the Petitioner sought to have the terms of the Order enforced because of the Respondent's failure to comply with paragraph 4.

44. Given the reasons relied on by the Respondent, the Court finds that there was unreasonable delay between the making of the consent order, and his application to set it aside.

Closing remarks

45. The Respondent has not provided evidence to show that his application is within the exceptionally small category of cases that would allow the Court to set aside a consent order. Given these factors, the Respondent's application is disallowed.

46. The Petitioner's application to enforce the 22 January 2014 consent order is allowed.

47. The 13 July 2015 hearing had to be adjourned because the Respondent failed to file papers in time. The Court therefore ordered the Respondent to pay costs thrown away by his application.

    The Petitioner asks that the Respondent pay at least $5,000 towards her loss of wages and travel expenses in order to attend court proceedings. However, she has not provided documentary evidence to the Court to support this.

    Accordingly, the Court will allow $2,000 to the Petitioner as her airfare costs in these proceedings. This is the amount the Court considers fair under the circumstances. This sum should be added to the outstanding arrears owed by the Respondent.

48. It is hereby ordered that:

i. The Respondent comply with the periodical payments to the Petitioner, and the annual increase, as in the 22 January 2014 consent order.

    The Respondent shall continue to make the stipulated payments on the 1st of each month until the Petitioner dies or remarries, whichever shall first occur, unless otherwise ordered by the Court.

ii. As this ruling supersedes the 13 July 2015 interim order (which temporarily allowed the Respondent to pay $2,000 per month commencing 1 August 2015), the Respondent is to pay all outstanding amounts for that period as if the interim order had not been granted.

He is to pay the remainder of the full monthly amounts for that period, in accordance with the 22 January 2014 consent order.

The total outstanding amount – for each month affected by the interim order – should be added to the arrears that the Respondent has to pay to the Petitioner.

iii. The Respondent is to pay costs of $2,100 to the Petitioner to cover her airfare costs in these proceedings. This sum should be added to the arrears owed by the Respondent.

iv. The Respondent shall pay arrears to the Petitioner.

The Respondent is to pay the total arrears – for all missed monthly payments, incomplete payments, and a contribution of $2,000 towards the Petitioner's airfare costs – in monthly instalments of $300 to the Petitioner's bank account commencing 1 June 2016 until all the money he owes to the Petitioner is paid in full.

The Respondent does not have to pay the Petitioner interest on the monthly amounts he failed to pay.

v. If the parties are unable to agree the figures, liberty is granted to apply to the Registrar to assist with verification of the exact amount owed in arrears.

49. The Court invites Mr Woolridge to prepare an order which should be sent to the Petitioner and then to the Court for signing on or before 20 April 2016.

Dated ___ day of April 2016

_____

Justice Norma Wade-Miller
Puisne Judge