



In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2011: No. 198

BETWEEN:

M-L

Appellant

-and-

P

Respondent

Date of Hearing: 21 January 2016

Date of Judgment: 3 February 2016

Marshall Diel & Myers – Adam Richards for the Appellant (husband)

Wakefield Quin Limited – Margaret Burgess-Howie for the Respondent (wife)

JUDGMENT

The parties

1. The parties in this matter are the husband (Appellant) and the wife (Respondent), so-called even though they are divorced.
2. The parties met when they were very young. They married on 2 October 2006, and have two children (one is 10 years old and the other is 8 years old). The parties had a tempestuous relationship. Decree nisi was granted on 24 February 2012 and made absolute on 12 April 2012.

The appeal

3. This is an appeal against a 10 March 2015 order made by the Registrar (Ms Scott). The Registrar ordered (among other things) that:
 - i. The husband should pay maintenance for the two children monthly in the sum of \$866.
 - ii. The husband should maintain the children of the family on his major medical health insurance policy.
 - iii. The parties are to share the expenses of regular summer/holiday camps and after-school fees.
 - iv. The parties are to share the expense of the children's school uniforms.
 - v. The husband is to pay for the children's care, uniforms and extra-curricular from summer 2014.
 - vi. The husband is to pay the costs of the application which are to be agreed, and if costs are not agreed then the matter should be taxed before the Registrar.
4. To appeal against an order or decision made by the Registrar, an appellant must comply with rule 131 of the Matrimonial Causes Rules 1974. Rule 131 stipulates that a party may appeal to a judge in chambers by summons to be issued within five days of the decision or order. The appellant is seeking an extension of time to comply with rule 131.

Appellant (husband's) submission

5. The Appellant is seeking: leave to appeal out of time; that the Registrar's 10 March 2015 order be overturned; and that he be granted his costs of this appeal.

6. The Appellant submits that the Registrar's decision should be overturned on the grounds that:

a) the order for child maintenance was manifestly excessive having regard to the means of the [husband];

b) the order was made without hearing oral evidence from the parties so that the evidence before the court could be challenged;

c) the Registrar failed to give any proper reasons for her decision;

d) the order for costs is excessive and wrong in law in that it (i) failed to give proper and due consideration to the impact on the [husband's] financial position when coupled with his ability to pay the child maintenance, and (ii) failed to have regard to the fact the [husband] was successful on certain issues.

The delay

7. The Appellant maintains that even though it would have been a struggle to meet the payments ordered by the Registrar he was going to try and live with the decision. However, when he was served with the bill of costs to pay the wife's legal fees, this compounded his feeling that the Registrar's 10 March 2015 order was inequitable. He therefore sought legal advice from Marshall Diel & Myers on 13 April 2015.

8. In an attempt to avoid an appeal, his counsel (Adam Richards, Marshall Diel & Myers) and the wife's counsel (Margaret Burgess-Howie, Wakefield Quin) entered into without prejudice preliminary discussions. Shortly afterwards the wife's counsel, Mrs Burgess-Howie, became ill and was away from office on long-term medical leave. Mr Richards, Counsel for the Appellant, submits that he did not want to take advantage of Mrs Burgess-Howie's absence. Also, given the limited means of the parties – and as no one else from Wakefield Quin took over from Mrs Burgess-Howie – Mr Richards waited until she had returned to work. When Mrs Burgess-Howie returned to work and confirmed that the matter could not be settled, Mr Richards filed the appeal forthwith.

Mr Richards maintains that the only real delay was approximately one month from the Registrar's order to when the Appellant instructed him.

9. Notice of appeal was filed on 10 August 2015 – five months after the Registrar's decision.

Respondent's (wife's) submission

10. Mrs Margaret Burgess-Howie, Counsel for the wife, opposes the application for an extension of time. She maintains that while the Court has the discretion to extend time for filing, it can refuse an extension by applying the following factors: the length of and reason for the delay;

the chances of the appeal succeeding; and the prejudice to the Respondent if the application is granted.

11. Mrs Burgess-Howie argued that, amongst other things, her illness should not be relied on as part of the Appellant's reason for delay.

The Court

12. The Court has taken into account the authorities cited by each counsel, the submissions, and all the evidence before it in arriving at this decision. Although the Court has not restated all the facts, it has highlighted the relevant facts needed to make this decision comprehensible.

Delay and leave to appeal out of time

13. The Court has considered all the factors including the length of the delay; the reason for the delay; the chances of the appeal succeeding; and the prejudice to the Respondent if the application is granted.
14. The Court has had regard to the husband's (the Appellant's) explanation for the delay. The Appellant was reasonable in his approach in the litigation before the Registrar. The Court bears in mind that he was self-represented before the Registrar. As a self-represented litigant, the Appellant was unaware of the timeframe within which he had to file his appeal against the Registrar's decision.
15. The Court finds that there was good reason for the delay. It accepts Counsel for the Appellant's explanation that he did not press ahead with the appeal during Mrs Burgess-Howie's absence on compassionate grounds, and because they were trying to resolve the matter.
16. Additionally, having regard to the submissions from both parties, the Court finds there are points of dispute. In these circumstances, leave to appeal out of time is hereby granted.
17. In summary, the Court finds that there was good reason for the delay. The Court exercises its discretion to allow Counsel for the Appellant leave to appeal out of time – by extending the time within which to file the appeal to the date when the appeal was filed.

The appeal

18. Having allowed the husband leave to appeal out of time, the Court moves on to consider the appeal *de novo* (which is by way of a rehearing).

19. In considering this appeal the Court notes three sections of the Matrimonial Causes Act (MCA): sections 27(f), 29(1) and 29(2):

Section 27(f) authorises the Court to make financial provision for the children of the family.

Pursuant to section 29(1) the Court must consider the income, earning capacity, property and other financial resources of the parties. It must also consider the financial needs, obligations and responsibilities that each party has, or is likely to have in the foreseeable future.

Section 29(2) instructs the Court to have regard to (among other things) the financial needs of the child and the standard of living enjoyed by the child before the breakdown of the marriage.

Order and costs

20. The Court does not propose to review the minutiae of the living expenses of the parties, however it has considered all aspects of their budgets.
21. The Court has scrutinised the budget put forward by the wife to cover the household and the children. The Court accepts and finds as a fact that the wife's boyfriend (even if he does not reside permanently at her home) spends a significant amount of time at her residence and provides her with considerable support (for example he looks after the children before and after school, and during school holidays). Also, the Appellant arranges access to the children through the wife's boyfriend. It is not unreasonable to assume that the wife's boyfriend adds to the household expenses and would or should make a contribution to help pay for these expenses.
22. The husband presently earns approximately \$5,000 per month net as a bartender. The Court accepts the evidence that the Registrar's order left him in considerable financial difficulty and that he has had to request extra shifts from his employers to comply with the 10 March 2015 order.

Mr Richards submits that the Appellant's current income is not sustainable. He maintains that, realistically, the husband's income is approximately \$4,500 per month without the extra shifts.

23. During the hearing before the Registrar, the wife's evidence was that she earned a net income of approximately \$4,000 monthly as an education officer. At the final hearing of this matter she updated her earnings and provided her payslip to show that she now earns \$2,793.91 monthly as she is only working 4 days per week.

The wife's overall budget includes \$352 monthly for medical insurance. The Court accepts that this amount is deducted from her net income and therefore constitutes double accounting in her budget. Her rent is now \$1,800 monthly as she has moved and is now living in an apartment owned by her boyfriend's mother.

24. When the financial circumstances of the parties, and the needs of the children, are considered this appeal is allowed in part.
25. The Appellant is hereby order to pay \$800 monthly in maintenance for the children. He is to pay 50% of the cost of their school uniforms, but is no longer required to contribute towards the children's holiday camps. The Appellant is to continue to maintain the children on his major medical insurance policy.
26. Each party should bear their own costs for the Registrar's hearing.
27. Each party is to bear their own costs of these proceedings.

Dated ___ day of February 2016

Justice Norma Wade-Miller
Puisne Judge