



In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2007: No. 101

BETWEEN:

H. F.

Petitioner

-and-

M.F.

Respondent

Date of Hearing: 12th February 2010

Date of Judgment: 15th March 2010

Ms. Ann Frith Cartwright of Ann Frith Cartwright, for the Petitioner;
Mrs. Georgia Marshall of Marshall Diel & Myers for the Respondent.

RULING

1. In this application by the wife, in these ancillary relief proceedings, she seeks an order that the affidavit of their 13 year old daughter filed on behalf of the husband be struck out.
2. The marriage of the wife and husband lasted some 17 years. They have two children, daughters, now age 19 and 13. In 2006 the parties agreed that mother move to Canada with the two girls so that she could provide a home for them –

particularly the elder child who was diagnosed with a mild form of epilepsy – while they attended school as day students. Decree Nisi was pronounced in September 2006. The wife and the children lived in jointly held matrimonial property. It is clear that the wife formed an association with a male companion sometime in 2007.

3. Mrs. Cartwright on behalf of the husband submits that the affidavit should not be struck out as it is material and necessary to fully inform the court of relevant matters. It goes to the issue of whether or not the wife has been truthful about her cohabitation to date and use of the monies sent to her by the husband. The aim of the evidence is to show that she is cohabiting in a house which is jointly held matrimonial property and is supporting a boyfriend who is not making any contribution to the household. The wife has denied this in sworn affidavit and in correspondence. The child's affidavit supports the husband's assertion.
4. In support of her application on behalf of the wife Mrs. Marshall submits that that there is no direction and nor leave for the filing of this affidavit. The filing of affidavit is governed by the Matrimonial Causes Rules 1974 and the husband failed, pursuant to 77(5) and (6) of the rules, to apply by summons and obtain the leave of the court in order to file this affidavit.
5. Further the aim of the evidence is to prove that mother is supporting her boyfriend. However, the nature of the evidence is simply hearsay and conjecture. It is potentially damaging to the mother and child relationship. Mrs. Marshall maintains that the wife either has to accept this evidence or allow her daughter to be extensively cross-examined. Additionally, the husband's behavior is very intrusive. He has had an ongoing relationship with a woman whom the wife says

caused the breakdown of the marriage and since the inception of the breakdown he has been cohabiting with her.

6. Mrs. Cartwright countered that credibility is an important factor in this case and the husband at no point denied his relationship with his cohabitee and has now remarried. She argues that the relevant legislation which governs strike out application is to be found in the Supreme Court Act 1905 and Order 18 Rule 19 of the Rules of the Supreme Court. She stressed, that the grounds for striking out are limited – if a pleading discloses no reasonable cause of action or defense, it is scandalous, frivolous or vexatious; or it may prejudice, embarrass or delay the fair trial of the action or it is otherwise an abuse of the process of the court. Alternatively, she urges that if leave is required to adduce this evidence she would ask that leave be granted.

7. In order to adjudicate upon ancillary relief proceedings the task of the court is clearly laid out by section 29 of the Matrimonial Causes Act 1974. A judge, accordingly in this case would not need to decide such matters by reference to a child of the parties' affidavit – particularly in the terms of the proposed affidavit which I agree is replete with hearsay and conjecture. It would be necessary for the mother to attempt some enquiry of the child through cross-examination as to why or how she has come to certain views. Alternatively, as Mrs. Marshall suggest the wife would have to accept this evidence if she does not want to place her daughter in this position. In my judgment it is not necessary nor should the mother or the child be placed in such an invidious position and that is so especially in view of the fact that the proposed evidence is, or is likely to be of little or no utility on the issues I would have to decide. Further this places far too high a burden to bear on this young girl. It is unreasonable to place her in a position where she would be forced to take sides between her mother and father.

8. In any event, I am satisfied that this evidence is not relevant nor required nor necessary for a fair disposal of the matter.

9. Given these factors, and bearing in mind also that the husband did not secure the leave of the court to file this affidavit I allow the application and order that this affidavit should not be used in these proceedings.

Dated the 15th of March 2010.

The Hon. Justice Norma Wade-Miller
Puisne Judge