



In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2010 No. 222

BETWEEN:

J.L.F

Petitioner

-AND-

E.K.F

Respondent

Date of Hearing: Tuesday, 17th May 2011
Date Judgement Delivered: Thursday, 16th June 2011

Mrs. Georgia Marshall, Marshall Diel & Myers
Mr. David Kessaram and Mrs. Louise Charleson, Cox Hallett Wilkinson

for the Petitioner
for the Respondent

1. This is an appeal from the decision of Registrar, Ms Charlene Scott, which was made during the course of divorce proceedings. A divorce petition was filed by the Respondent wife. An answer and cross petition has been filed by the Appellant husband. No directions for trial have been filed. In the meantime the Petitioner made an application for maintenance pending suit and on 10th May 2011, the Registrar made an order that the husband should pay \$60,000 per month interim maintenance including \$10,000 figures for legal fees.
2. It is unnecessary to go into the lengthy historical details, which can be gleaned from the affidavit evidence, which are a matter of record. In any event, I am dealing with this matter purely from my recollection and my notes of evidence since, while I was away on vacation the file was removed from my chambers. The parties require this decision before 31st May. Consequently, I needed to make a decision on the weekend of May 28.
3. The first appearance on the application for interim maintenance came before the Registrar on 5th April 2011. At this hearing the Appellant husband gave an undertaking to pay \$20,000 per month to the Petitioner. At that hearing the matter was listed for mention on 10th May 2011 and the interim application listed for hearing on the 31st May, 2011.
4. Counsel for the Appellant husband submits that the Appellant had some difficulty filing his affidavit within the time limit and unsuccessfully sought an agreement for an extension from the Petitioner's Counsel. The Appellant husband applied by Summons for the extension which was also listed for the 10th May.
5. Counsel, Mrs. Charleson, appeared fully prepared to argue the extension of time application. When she appeared before the Registrar the Petitioner's Counsel Mrs. Marshall requested the Registrar to deal with the interim application then and there and the Registrar allowed herself to be persuaded to hear the interim maintenance application.
6. Counsel for the Appellant husband further submits that the reason the Registrar gave for dealing with the application was that "she had time because she had nothing else listed". Counsel for the husband maintains that the Registrar was wrong to do this even if her motive was good. She said that she had no evidence before her to contradict the Petitioner's evidence. Consequently, she accepted what the Petitioner said to be true. Thereafter, she proceeded to order the Appellant to pay \$60,000 per month including \$10,000 for legal fees. Counsel for the wife Mrs. Marshall, submitted case authorities and came prepared for a fight to preempt the hearing for the wife which was scheduled for 31st May 2011.
7. The Registrar was led astray and as a result disregarded the Appellants Natural Justice rights. There was no Summons or notice by Mrs. Marshall, a leading matrimonial specialist, that the wife was going to take this course. On the other hand Mrs. Charleson was called to the Bar one year ago and was not given an

opportunity to prepare for this application. During this hearing the Registrar made the order and then granted the extension of time within which the Appellant should file his affidavit. The Appellant has now filed an 85 page affidavit.

8. Counsel for the husband maintained that the Registrar's order is irregular in several respects among them:
 - (a) The case was only scheduled for mention on that day and there was no summons or indication that the matter was being brought forward.
 - (b) An order for directions existed.
 - (c) The Registrar's order sought to vary a previous order but it there was no order; it was an undertaking.
9. The Appellant maintains that the Registrar having made the order the Appellant has sworn that he cannot afford it. Because of the procedural unfairness he has asked this court to either rehear it or send it back to the Registrar for a proper hearing on 31st May 2011.
10. Mrs. Marshall, Counsel for the Petitioner, opposes the application. She says that an application was made on 2nd March 2011, which was returnable on 5th April, 2011, seeking 'interim interim' maintenance provision for the wife and two children of the family. She reviewed a number of letters which was written to Counsel for the husband indicating that the Petitioner was strapped for cash and needed to have an expedited hearing. The Petitioner tried to have an amount agreed upon. The wife said that she was exiled into this 4,000 square foot mansion in Florida where she has been living with the children since July 2010. The husband used to pay the running cost of the property and he now fails to do so.
11. It is clear that on the 5th April the Registrar's record notes says that the husband has given an undertaking but there are other bits to sort out. They were going to go back on the 10th May to review the bits to be sorted out. In response to a letter written on 2nd May 2011 by Counsel for the wife, the 'die is cast' and the Appellant unequivocally told the Petitioner that she needs to pay all her expenses out of the \$20,000. The Registrar was asked to order the husband to pay the expenses that he traditionally paid. For example, the electricity and water supplies were cut off because the accounts were not paid and the housekeeper's hours were reduced. Additionally, the husband refuses to make any allowance for the Petitioner's legal fees while he deploys family resources to cover his legal fees.

12. Mrs. Marshall further submits that it is beyond argument that the assets in all the trusts are matrimonial assets. The Petitioner is only asking to receive what belongs to her. It cannot be right that he has all the assets, all the money and all the documents. All the directions have been frustrated because of the husband's unilateral conduct in not filing the relevant affidavit as ordered. If the goal is to do justice between the parties, the Registrar can make an 'interim interim' award. It is an appropriate exercise to maintain the status quo until the matter can be heard.
13. On a petition for divorce, the court may make an order for maintenance pending suit. Such an order requires either party in the marriage to make periodical payments for his or her maintenance and the maintenance of any children for such term, (being a term beginning not earlier than the date of the presentation of the petition and ending with the date of the determination of the suit) as the court thinks reasonable.
14. The measure to be applied in determining the application is impartiality.
15. A very important factor in determining what is reasonable and fair in the circumstances is the marital standard of living.
16. In my judgment, Registrar Ms. Charlene Scott did fall into error in her approach to the exercise of her discretion. She should not in my view have started from the hypothesis that she had time to "deal with the application because she had nothing else listed". As a result she proceeded to deal with the application although Counsel for the husband was not prepared for a hearing.
17. In my judgment in light of the undertaking to pay \$20,000 per month there must be some compelling factors to justifying a court granting a threefold increase of the undertaking without hearing the other side. I have now had an opportunity to read the Appellant's affidavit and I get the sense that there are some matters to argue about, and the decision thereafter made.
18. I should add that, based on the authorities the court is empowered to include an element towards the payee's legal cost when ordering maintenance pending suit.
19. In the circumstances I allow the appeal and remit the matter to the Registrar so that the husband's affidavit evidence can be considered.

Circulated 30th day of May 2011

Dated the 16th day of June 2011

WADE-MILLER J