



In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2012: No. 54

BETWEEN:

A. H.

Petitioner

-and-

H. H.

Respondent

Date/s of Hearing: June 5, 2013

Date of Judgment: June 18, 2013

No Appearance, for the Petitioner;

Marshall Diel & Myers – Alexandra Wheatley for the Respondent.

JUDGMENT / RULING / REASONS FOR DECISION

1. There are two applications before this Court:

The first is a Notice of Application for Ancillary Relief dated 18 January 2013 seeking an order that (a) the wife pay to the husband a lump sum of \$113,176.00 which is equivalent to one half of the short fall between the current outstanding mortgage secured against the property and its current market value; and

(b) the wife's interest in the property be transferred to him and that all associated costs of the transfer be paid by the wife;

(c) the wife pay \$1,000 monthly towards D's ongoing expenses backdated to 1 January 2013 until she completes full time education.

2. The second Application was filed on the 19 April 2013 seeking orders that:-

(a) D is a child of the family pursuant to section 45 (1) and 45 (6) of the Matrimonial Causes Act 1974;

(b) he be granted the custody, care and control and access of D with generous access of D to the wife; and

(c) that travel restrictions relating to the child be waived.

3. I will first deal with the issues relating to D. The parties were married on 21 July 2007 and Decree Nisi was granted on 25 January 2013. Decree Nisi was issued in error as it should not have been granted until there was a determination as to whether or not 'D' is a child of the family.

4. Before dealing with these applications I had to be fully satisfied that the Petitioner had adequate notice of them. I am completely satisfied that the Petitioner has had notice of the application and has decided not to participate. For example, in Respondent exhibit 1 the Petitioner by an e-mail dated May 1, 2013 wrote to Counsel for the Respondent as follows:

"I have been informed that you have contacted my former employer, HSBC Bank Bermuda Ltd. for my contact information. You may contact me at this email address as I have opened it specifically for this purpose. This email address was provided to Supreme Court upon filing my Notice to Act in Person. You may contact me here at this email. Regards, T H." She provided an e-mail address

In another e-mail dated 15 May 2013 the Petitioner stated unequivocally that she has "washed her hands of the whole matter and will not be returning to Bermuda for absolutely any reason whatsoever..."

It is clear to the court that the Petitioner has been properly notified of the proceedings and has no intention of participating.

5. I accept the Respondent's evidence that the Petitioner has been assisting with D even before the parties were married. During the wedding ceremony, I have had an opportunity to watch a video of the ceremony; the Petitioner took a vow to D and presented her with a pendent with the wedding date engraved on it as a gift.

6. D has lived with the parties for the 6 years duration of the marriage. The wife bought D gifts. Indeed, I accept the Respondent's evidence that the Petitioner was very instrumental in convincing him to place the child in a private school at the Bermuda Institute as financially he could not afford the fees. Also, I am satisfied that the Petitioner agreed to assist with the payment of the fees and contributed by defraying a portion of this expense

7. Given these factors I am satisfied and find that D was not the Petitioner's biological child nevertheless, she assumed responsibility to contribute substantially towards her maintenance. The Petitioner was living in a household where she knew that she had a greater earning power than the Respondent and contributed at least 50% to the total household expenses and 50% towards D's educational cost.
8. In paragraph 29 of his affidavit dated 11 April 2013 the Respondent sets out \$1,598.67 as D's direct monthly expenses. The Respondent's personal monthly expenses are \$2,421.46.
9. In paragraph 32 of the husband's affidavit he states that his total monthly expenses are \$8,404.33 and, given that his average monthly income is \$8,031.80 he is currently living from paycheck to paycheck. The mortgage is falling into arrears of at least \$500.00 monthly. He says that this figure does not take into account the potential increase mortgage payment of \$5,500 monthly in the event that increase occurs as they are presently receiving a preferential interest rate because of the wife's employment with HSBC at the time the property was purchased.

Child of the family

10. Having regard to the facts of this case I am satisfied that the husband and wife constituted a family and without hesitation I find that the wife treated D as a child of the family. The wife completely embraced D. She took a vow (corroborated by a DVD presented in evidence) pledging loyalty to the child during the wedding ceremony and, she presented D with a heart shape pendant with the wedding date engraved on it. The wife insisted that the child be enrolled in a private educational institution and gave her assurance that she would pay half of her tuition. Accordingly, it is declared that D is a child of the family. The husband has custody, care and control of D with liberal access to the wife and, travel restrictions are waived. The wife is to pay the cost of this application to be taxed or agreed.
11. Insofar as the maintenance of D is concerned I hereby order that the wife should pay \$700.00 monthly towards her maintenance until she completes her full time education or as otherwise ordered by the Court. Payment is to be made through the collecting officer of the Magistrates Court retroactive to May 1, 2013. I find that the biological mother bears some responsibility in caring for this child and the husband should make the appropriate application for the biological mother to contribute if he needs further assistance. Liberty to apply.

Ancillary Relief

12. As regards the application for ancillary relief, the court is satisfied that the former matrimonial Home is the only existing matrimonial asset. The husband is seeking an order that the wife pay A lump sum of \$113,175 which is equivalent to one half of the shortfall between the current outstanding mortgage secured against the property located in Smith's Parish and its current value. Further that her interest be transferred to him and that she pays all the associated costs of that transfer.
13. The property was purchased jointly by the husband and wife for \$996,000.00 (inclusive of closing costs). They were able to secure 100% financing from HSBC Bermuda the wife then employers. Additionally, by virtue of the wife's employment with HSBC they received a preferential interest rate. The current market value of the property is \$725,000.00 (Bermuda Realty Valuation dated 28 May 2013)

14. Counsel for the husband submits that if the property was to be sold now taking into account various expenses on the sale the balance would be 673,650.00. Once the mortgage of 900,000 is deducted it would leave a negative equity of \$226,350. In effect the property is “underwater.”
15. This is a most unusual application in the sense that the husband is seeking an order for the wife to pay him 50% of the negative equity and, additionally, to transfer the property to him.
16. Counsel for the husband was unable to provide the Court with any authority where a court had made an order of the kind being sought by the husband namely, an order for a lump sum where there is negative equity only. He is seeking a lump sum of 50% of the negative equity on the basis that she would be liable to the mortgage for that sum if the HSBC foreclosed.
17. I have considered all the Section 29 Matrimonial Causes Act 1974 factors in considering this Ancillary Relief claim. On the factual issues the court does not believe it would be proper or principled of the Court to make an award based on the negative equity where there are no other assets. It is the Court’s view that the negative equity only matters if the property is being sold now. At any rate even at the full price based on the old value the husband would have been entitled to only 50%. The wife has abandoned the property and, by her email dated May 1, 2013 the wife has decided to give up give her 50% of the equity. The husband is therefore getting the entire property.

In the court’s view any valuation is merely an estimation. The true value of any property can only be ascertained when it is sold. The question of a negative equity only arises if the property having been sold there is an outstanding balance due to the mortgagor. Otherwise, it is purely speculation.

18. The wife Petitioner left the matrimonial Home in February 2012 and the parties have been separated since that date. The Petitioner is currently working at HSBC, in the United Kingdom where she has taken up residence since February 2012. I attach the text sent to Counsel for the husband on May 1, 2013. The wife has taken no part in these proceedings. The court has indicated that the property was purchased in joint names and it is satisfied that the court can reasonably make the order for the property to be transferred to husband.
19. In considering whether or not the court should order the wife to pay the husband 50% of the negative equity, it is important to note that it was the Petitioner who made it possible for them to acquire this family asset through her employment with HSBC which provided 100% financing and holds the mortgage. There is an argument that can be made that the Petitioner continues to be responsible to the bank for 50% of the mortgage debt and if the property is sold or transferred and there is a shortfall between the mortgage and the sale price 50% of any negative equity.
20. The Respondent has an argument for discounting the Petitioner’s missed mortgage payments, but it should be borne in mind that the husband had exclusive use of the property during that period.

In light of the fact that the wife is entitled to half of the property and she has given up or abandoned her 50% interest in the property the husband is getting 100% interest. If the husband hopes to acquire her half he must take the risk and the benefit. The question of a negative equity

only arises if having sold the property if there is an outstanding balance on the mortgage. Otherwise, it is purely speculation as presently the question of a negative equity is hyperthetical.

21. In order for there to be a “clean break” between the parties it is important for the Court to sever the property connection. In these circumstances the court orders that the wife shall transfer her entire interest in the property to the husband within 60 days. If she fails to do so the Registrar of the Supreme Court is empowered to sign the requisite documents. Alternatively, the property is to be sold and after HSBC is paid the parties split any difference – positive or negative – equally. The husband is to bear the cost of the transfer. Consequently, in consideration of the wife giving up the upside benefit in the future the husband must assume the down side risk. In the circumstances I decline the request to order the wife to pay 50% of the notional equity of \$113,175.00. If necessary the parties have leave to apply to the court to put into effect the terms of this order.
22. The parties shall retain all assets in their sole name or possession as their property absolutely.
23. I invite Counsel to prepare an order for the court’s approval.
24. The wife is to pay 50% of the husband’s costs of this application to be agreed or taxed.

Dated June 18, 2013

Justice Wade-Miller, PJ