

IN THE SUPREME COURT OF BELIZE, A.D. 2014

CLAIM NO. 175 of 2013

BETWEEN:

FRANCES EVE WILSON

Claimants/Applicant

AND

GLENCOE CHARLES WILSON

Defendant/Respondent

Before: Hon. Mde Justice Shona Griffith

Date of Hearing: 28th April, 2014

Appearances: Mrs. Robertha Magnus-Usher, Counsel for Claimant.
Ms. Lisa Shoman S.C., Counsel for Defendant.

RULING

Dated 25th June, 2014

[Divorce Proceedings – Application for Security for Costs – Matrimonial Causes Rule 90 – Interpretation and Application].]

Introduction

1. This is an Application for Security for Costs during divorce proceedings, the proceedings and application filed by the Petitioner Frances Eve Wilson. The Respondent Glencoe Charles Wilson is the Petitioner's husband, the parties having been married on 8th October, 2010 in Belmopan, Belize.

2. These proceedings commenced by Petition for Judicial Separation filed on 31st July, 2013. At that time, it is noted, that 3 years had not yet elapsed since the celebration of the marriage. Filed at the same time as the Petition for Judicial Separation, was an Application for Injunction. This application was filed as urgent and ex parte. The petition and urgent application were both supported by affidavits sworn by the petitioner.
3. Thereafter, up to the current application, a number of applications were heard within these proceedings. Given that the subject matter of the application before the Court is that of costs, it is useful to itemize the proceedings to date, as practical illustration of at least one factor that will be taken into consideration by the Court in its dispensation of the application.

The Proceedings

4. The following is an account of the proceedings to the time of the application for security for costs.
 - (i) Petition for Judicial Separation – filed 31/7/13
 - (ii) Ex Parte Application for Injunction - filed 31/7/13 by Petitioner
 - (iii) Order for Injunction on hearing of Ex Parte Application - dated 2nd August, 2013
 - (iv) Order for Injunction extended on 26th August, 2013.
 - (v) Summons to convert Petition for Judicial Separation into Petition for Divorce and interim maintenance – filed 4/10/13 by Petitioner
 - (vi) Answer and Cross Petition by Respondent – filed 15/10/13
 - (vii) Reply to Answer and Cross Petition – filed 24/10/13
 - (viii) Divorce Petition – filed 5/11/13 by Petitioner
 - (ix) Summons for leave to amend petition, interim maintenance and other relief – filed 29/11/13 by Petitioner
 - (x) Order to amend Divorce Petition and award of interim maintenance in sum of \$5000 and other relief – granted 25/10/13
 - (xi) Amended Divorce Petition – filed 10/12/13
 - (xii) Answer to Amended Divorce Petition and Cross Petition – filed 23/12/13
 - (xiii) Reply and Answer to Cross Petition – filed 13/1/14

- (xiv) Grant of Order for increased interim maintenance in the sum of (total) \$9,500 – granted on 15/1/14
 - (xv) Bill of Costs – filed 18/2/14 filed by Petitioner.
 - (xvi) Application for Leave to Appeal (interim maintenance order) – filed 19/2/14 by Respondent.
5. In between and in support of all of the proceedings listed above there were substantial affidavits filed by both parties. These affidavits numbered approximately 14 (not including formal affidavits) and represented continuous denials and assertions by both parties as to certain events during and after the celebration of marriage and subsequent separation.
6. The above setting the stage for the actively contentious conduct of the proceedings, the Court now examines the Application for Security for Costs which was heard on 28th April, 2014.

The Application

7. By summons dated 29th November, 2013 the Petitioner (at paragraph 6 of the relief claimed in the Summons) sought security for her legal costs in the proceedings. The question of security for costs was next addressed on 15th January, 2014 when a Bill of Costs for the Petitioner was filed but withdrawn and substituted by a new Bill of Costs filed 18th February, 2014. At the time the summons was filed, the cause had not been set down for hearing.
8. By the time the application for security for costs came to be heard, the cause had been set down for hearing on 24th March, 2014. The Application was filed pursuant to the court's power under Rule 90 of the Matrimonial Causes Rules, to order a husband to provide security for a wife's costs – whether as petitioner or respondent. In this case, the order was sought as Petitioner.

Submissions on behalf of Applicant

9. In advancing the application before the Court, Counsel for the Petitioner submitted that the relevant considerations for the Court to take into account were as follows;

- (i) The probable cost of the proceedings
- (ii) The means of the husband and the wife
- (iii) Any other relevant circumstances, for example the conduct of the parties or delay in bringing the action.

10. Learned Counsel then examined these considerations against the circumstances of the present case:

Probable cost of proceedings:-

It was submitted on behalf of the Petitioner that the probable costs of the proceedings is likely to be high. Reference in support of this submission was made in relation to the fact that the matter started as a petition for judicial separation along with urgent applications for injunctions and maintenance. It was also submitted that these applications required two hearings and were subject to several adjournments on account of the Respondent's absence. Additionally, that the proceedings were opposed by the Respondent and thereafter the Petitioner was required to respond to all allegations raised in answer by the Respondent forcing the Petitioner to put her full case before the Court. The Petition for Judicial Separation was also converted into one for divorce after sufficient time had passed permitting the divorce to be filed.

11. Additionally, the application for interim maintenance was not expeditiously heard due to the Respondent's failure to file an answer to the application. The Respondent received time to file an affidavit in answer to the application for interim maintenance. The application

having finally been heard and an order made, the Respondent sought leave to appeal that order, further complicating and delaying the proceedings.

12. In summarizing the position with respect to the probable cost of the proceedings, counsel for the Petitioner concluded that the proceedings have been subject to delay and adjournments caused by the Respondent and that the proceedings are multitudinous, again due to the fault of the Respondent. It is also alleged that the Respondent is possessed of several substantial assets, including vehicles, shares in companies and other real estate.

The means of the husband and wife

13. In light of the fact that the Petitioner is unemployed, she clearly does not have any means whereas the Respondent has more than adequate means. He declares a salary of BZ\$20,000 monthly, gets free housing and telephone use and his credit card bills demonstrate a lavish lifestyle.

Other relevant circumstance

14. The Respondent, it is submitted on behalf of the Petitioner, has been the cause of delays in this matter on account of the many adjournments at his behest, failure to abide by the injunctions and maintenance orders issued by the Court. The authority of **Maclean v Maclean [1951] 1 All E.R. 967** was relied upon in relation to the application of the issue of delay in the determination of the award of security for costs for the wife in divorce proceedings.
15. With these three considerations to be viewed in favour of the wife, Counsel for the Applicant submitted that as the wife has no separate estate and the Respondent having failed to show any good reason why not - he should be ordered to secure the Applicant's

costs. In respect of the question of separate estate, the jointly owned matrimonial home did not amount to separate estate as the home was the subject matter of the ancillary proceedings that would follow the divorce. Additionally, that the wife's share is undivided and would not be determined until the division of property is dealt with by the Court.

16. Finally, it being established that an order for security for costs should be made, Counsel for the Applicant addressed the issue of quantum. Counsel's Bill of Costs in the sum of \$70,567 was urged upon the Court in its entirety. The Bill charged a retainer and thereafter additionally charged itemized services, disbursements and expenditures.

Submissions of Counsel for the Respondent:-

17. In response, Counsel for the Respondent submitted that the Court's power was discretionary and ought to be exercised based upon need and not upon the ability of the husband to pay. As it relates to the considerations identified by Counsel for the Applicant it was submitted that the probable cost of proceedings being high was entirely due to the Applicant. That the matter was not a complex one but merely voluminous as a result of the multitude of applications and affidavits filed at the election of the Applicant. Further that the Applicant's position in relation to being without means was a matter of her choice in opting not to seek employment. As regards the purported delay of the matter, it was submitted that the length of the proceedings thus far were all due to the multitude of proceedings pursued by the Applicant. Particularly, that ex parte injunctions had not been justified and that it was the Applicant's choice to file for judicial separation instead of waiting for the time to be able to file for divorce

18. As regards the question of separate estate the Applicant was indeed possessed of separate estate in the form of her share in the matrimonial home which was jointly held by both

parties. The value of the matrimonial home was not disputed to be \$500,000 thus at the very least it was submitted, the wife was entitled to half of that amount and furthermore it was the Applicant's case that she is entitled to the whole. In the circumstances the Applicant possessed sufficient means to pay her legal costs. Additionally, the wife was in receipt of \$8000 per month as maintenance which ought to provide sufficient means from which to cover her legal costs.

19. As regards the question of good cause being shown as to why the security should not be ordered, the Respondent had by his affidavits established that he would be unable to pay the costs requested. Further in this respect, that an order for security for costs should not be awarded where the effect would be to stifle the Respondent's ability to legally pursue his claim.

20. With respect to the Bill of Costs filed, Counsel for the Respondent submitted that the itemized costs ought to have been covered under the retainer thus there was an element of double charging. Additionally, that albeit the matter was a voluminous one (that being the fault of the Applicant), it was not a complex matter thus there was no reason for costs to be certified fit for two counsel.

21. It was finally submitted that in the event that the Court were minded to order security for costs that the Respondent not be ordered to pay cash as that would cause undue hardship to the Respondent. Instead, the Respondent's at least half share in the matrimonial home would be offered as security.

Reply to Respondent's Submissions:-

22. In short, Counsel for the Applicant replied to the Respondent's submissions to the effect that there could be no question of security being offered in respect of the matrimonial

home as it would subject to division of property proceedings. Further, that the \$8000 interim maintenance ordered in favour of the Applicant would not have contemplated legal costs as it was ordered for her living expenses. All applications filed by the wife were necessary because of the actions before or conduct during the proceedings on the part of the Respondent.

The Court's Consideration:-

23. The Court recognizes firstly that the question of security for costs as provided in Rule 90 of the Matrimonial Causes Rules bears no relation to that under the Civil Procedure Rules. The consideration of the rule therefore is restricted to the wording of the rule itself and relevant authorities relating to the same or similar matrimonial provisions. Rule 90 is set out in its entirety as follows (emphasis mine):

90. *After the Registrar's certificate that the pleadings are in order has been given, or at an earlier stage of a cause by order of the Court to be obtained on summons, a wife who is a petitioner or has filed an answer may file her bill or bill of costs for taxation as against her husband, and the Court shall ascertain what is a sufficient sum of money to be paid into Court or what is a sufficient security to be given by the husband to cover the costs of the wife of and incidental to the hearing of the cause and may thereupon unless the husband shall prove to the satisfaction of the Court that the wife has sufficient separate estate or show other good cause issue an order upon the husband to pay her costs up to the setting down of the cause and to pay into Court or secure the costs of the hearing within a time to be fixed by the Court. The Court may in its discretion order the costs up to the setting down to be paid into Court.*

24. In examining this rule as a whole, the Court finds that it provides for costs to be secured in a two stage process:

- (i) Costs up to the setting down of the cause; and
- (ii) Costs of and incidental to the hearing of the cause.

Costs in paragraph (i) are required to be paid to the wife or the Court may in its discretion order same to be paid into Court. Costs in paragraph (ii) may be paid into Court or secured by bond.

25. In order to prevent an order being made a husband is required to establish to the Court either (a) that the wife has sufficient estate of her own or (b) other good cause as to why security ought not to be ordered. Failure of the husband to establish either sufficient separate estate or other good cause will result in the Court being required to order security in favour of the wife. In terms of quantum, the Court is to ascertain what is a sufficient sum to be ordered as security, from the bill of costs filed on behalf of the wife. The amount so ordered however is to be reckoned by the Court.

26. The first question is that of the husband establishing sufficient separate estate or showing other good cause. Both Counsel addressed the matrimonial home in terms of being separate estate of the wife. The Court finds that the matrimonial home is separate estate as she is legally the owner of a share therein, albeit an undivided share. The fact that this share came to her through her marriage to the Respondent makes it no less an interest that she is entitled to in her own right. At this stage of the proceedings however, that share is neither realizable nor capable of being properly ascertained thus the Court does not consider that interest capable of amounting to *sufficient* separate estate. Similarly, the interim award of maintenance in the sum of \$8000 was not granted by the Court in

contemplation of legal fees. Inasmuch as that sum can be regarded in relative terms by someone objectively assessing such an amount coming into the wife's hands, it is not the Court's place, of its own motion, to interfere with that award so as to be able to say that some amount of legal costs can properly be satisfied there from. It was awarded as maintenance and so it remains at this stage.

27. In relation to the question of 'other good cause' – what is 'good cause' is not defined, but in the present case the Court considers itself spared the exercise of determining what is good cause as the Respondent has not really advanced any reason as to why he should not be ordered to secure his wife's costs. At the very most the Respondent pleads financial hardship as good cause why he ought not to be ordered to secure his wife's costs. The affidavit filed by the Respondent as was the case with prior affidavits filed in the proceedings, contained no clear, much less substantiated information regarding the Respondent's financial position.

28. Instead, the Respondent's affidavit contained denials as to ownership of any assets in Belize besides the matrimonial home. Inasmuch as the Court recognizes the difficulty in proving a negative, the Respondent could nonetheless have put forward his bank statements, salary receipts or some form of financial documentation in order to establish his financial position. In the absence of such, the Court is therefore unable to objectively assess the Respondent's claim that he is financially ill-able to provide security for costs. By contrast, the Court has available to it, some evidence as to the Respondent's means which without making any conclusive finding of fact, the Court on the face of it, can attribute the ability to pay his wife's costs, on the part of the Respondent.

29. In the circumstances of the issues of sufficient separate estate and other good cause not having been established by the Respondent, the Court therefore finds the Respondent liable

to secure his wife's costs and now has to consider what is an appropriate amount to order in respect of the wife's costs up to setting down and also of and incidental to the hearing.

Before embarking on this exercise however, the Court finds it necessary to clarify its understanding of its obligations under Rule 90, especially given that learned Counsel for the Respondent, questioned the contextual relevance of the Rule in today's environment.

Rule 90 considered:-

30. The matrimonial rules in Belize are archaic and in need of reform. Drawing from authority relied upon by Counsel for the Applicant in her submissions, the Court sets out what was stated as the rationale of the rule (the English equivalent whenceforth rule 90 originated). In **Gower v Gower [1950] 1 All E.R. 27** Barnard J, cited a passage from **Robertson v Robertson (1881) 6PD 113**, re the origin of the rule which the Court finds useful to extract in full:-

“Now on principle, it is plain that the whole foundation of the rule depends on the liability of the husband to pay the necessary and fair costs of the wife's defence. I take it that that rule is founded on the old English law, which gave the whole personal property of the wife to the husband, and gave him also the income of her real estate; so that in the absence of a settlement (which as we all know, is a comparatively modern introduction) she was absolutely penniless, and, therefore, the ecclesiastical court not only provided for the costs of her defence, but also gave her alimony pendente lite so as to provide for her maintenance...I have given what I believe to be the true view of the origin of the liability of the husband; but I am not oblivious to the nobler view, if I may so express it, held in the House of Lords, that no gentleman, indeed no man of right feeling would wish that his wife should not have the means of fairly investigating and fairly defending herself against so odious a

charge as that of adultery. Really, if there had not been, as I do believe there is, the common and pecuniary reason for fixing the husband with the costs, I think that that reason ought to be sufficient to all right-minded men”.

31. This principle, as it was referred to by Barnard J, was explained as having been stated prior to the passage of the Married Women’s Property Act, 1882 (enacted in Belize in August, 1953) which of course abolished the rule at common law, by which married women were not able to own property in their own right. The principle so stated however, was regarded as unaffected by the passage of the MWPA and Barnard J further cited the case of **Williams v Williams [1929] P 118** and again, for useful purposes of illustration, the cited passage is extracted as follows:’

“ The old basis for the rule, namely, that all the wife’s property on marriage passes to the husband, and therefore the husband alone can foot the bill, has gone altogether, and now you must consider whether in the circumstances the wife can foot the bill, and it is a very important matter to consider whether the solicitor can conduct the business without something in court to pay him up to setting down and without security.”

32. I have extracted these passages simply to say this. The original context of rule 90 by virtue of statutory intervention is no longer viable. The nobler view expressed in relation to the perceived obligations of a ‘right feeling man’, is in the Court’s view, also not particularly relevant given the great strides and advances made by women in today’s society. It is however, not within the purview of the Court, much less one of first instance, to attempt to meddle with the provisions of written law - and that law as written, still has the effect, that

its application by the Court, is required to be carried out in the manner reflective of its primitive origins, once the conditions giving rise to its operation are satisfied.

33. The Court is faced in the instant case with an Applicant of no means, in circumstances where a right thinking person in today's context, might question the reasonableness of the continuance of this position. It is not the Court's place, to assess the reasonableness or otherwise of the Applicant's position, but to apply the law. The law to be applied requires that the Applicant's costs be paid and secured in the manner provided by the Rule. We now therefore turn to the question of Counsel for the Applicant's Bill of Costs.

The Bill of Costs

34. In relation to the Bill, the first issue considered by the Court is Counsel for the Respondent's objection to the Applicant's costs being certified fit for two counsels. The Court agrees with this view expressed by Counsel for the Respondent. The proceedings before the Court are not found to be complex. They are voluminous and the volume is largely evidentiary.

35. The Court also finds merit in the observation of Counsel for the Respondent that the retainer of \$20,000 charged by Counsel for the Applicant apparently does not cover any of the services individually itemized on the bill. In response to this observation Counsel for the Applicant contended that there was no legal authority presented to establish that a retainer has to be a deposit for services to be rendered. Well there was no authority presented by Counsel for the Applicant to the contrary either and in determining the question of costs the Court must consider what is reasonable. The individually charged items on the bill of costs from the institution of the proceedings ought reasonably to have

been included in the retainer. The amount of the retainer is therefore deducted from the final cost of the bill.

36. The Court also finds that no substantive increase in costs ought to have been occasioned by the conversion of the proceedings from judicial separation to divorce nor the subsequent amendments to the petition. A petition for judicial separation is enabled by the legislation on the same grounds as that as divorce. Any costs incurred from a failure to fully plead her case when the facts were available to be pleaded from the inception should not be borne by the Respondent and this view also applies in relation to the subsequent amendment of the divorce petition. Costs for conversion and subsequent amendments are also not allowed. The Court does however accept that the cost of the proceedings exceeded the initial retainer and will allow an additional \$20,000 to the retainer for a total of \$40,000.
37. The Court is also required to order the amount to be secured by the Respondent of and incidental to the hearing.
38. The Court notes its discretion in deciding whether the costs up to setting down can be paid into Court. Given that on a strict application of rule 90, especially in the peculiar circumstance of the Applicant being of no means, the costs up to setting down appear to be payable in any event regardless of outcome. The Court thus finds no basis to order the amount payable into Court and instead, the Respondent is to pay to Applicant her costs up to setting down of the cause, in the sum of \$40,000. The costs of and incidental to the hearing are to be secured by payment into Court.

The Court's Ruling is therefore as follows:

1. The Application for security for the Applicant's costs is granted.
2. The Respondent is to pay the Applicant's costs up to setting down of the cause in the sum of \$40,000.
3. The costs of and incidental to the hearing of the divorce are to be secured in the agreed estimated sum of \$20,000 by payment into Court.
4. The hearing of the cause is fixed for 2nd and 3rd October, 2014.
5. Failure to pay the Applicant's costs up to setting down or failure to secure the costs of and incidental to the hearing shall result in a stay of the cross petition.

Shona O. Griffith
High Court Judge.