IN THE SUPREME COURT OF BELIZE A.D. 2019
(DIVORCE)

ACTION NO. 152 of 2019
BETWEEN

JASMINE MIDDLETON **PETITIONER**

AND

EARL ARTHURS **RESPONDENT**

Before:	**The Hon. Mde. Justice Shona Griffith**
Dates of Hearing:	**[4th July, 2019]; [22nd July, 2019 Oral Decision]**
Appearances:	**Ms. Naima Barrow for the Petitioner/Respondent and Mrs. Robertha Magnus-Usher S.C. for the Applicant/Respondent.**

DECISION

Introduction

1. This is an application by the Respondent Earl Arthurs to strike out the petition for divorce which was filed by his wife Jasmine Middleton ('the Petitioner') in May, 2019. This divorce petition ('the new petition') is in fact a second petition filed by the Petitioner so that there are at present two separate divorce petitions filed by the same person, for the same relief, pending before the Court for determination. There are peculiar circumstances attendant to these petitions. The first petition was instituted in September, 2017 and was answered by the Respondent along with a cross prayer for dissolution. It is thus a contested divorce in which both parties base their respective prayers for relief on the ground of cruelty.
2. The determination of the first petition was interrupted by a contested application for interim maintenance which was eventually heard and concluded in August, 2018. The divorce was thereafter set down for hearing, and directions for trial were issued by the Court. The trial had been scheduled for March, 2019 but during the time for compliance with directions, Counsel for the Petitioner filed an application to amend the petition, in order to include the entirely new ground of 'consent'.

This new ground of consent, had been introduced by amendment to the Supreme Court of Judicature Act, by Act No. 21 of 2018, taking effect from the 8th December, 2018. The introduction of this new ground however, was not accompanied by any subsidiary legislation governing procedure or making provision for transitional issues.

3. Senior Counsel for the Respondent objected to the proposed amendment and the Court expressed the preliminary view that the amendment could not be effected, given that the change in the law would not have been in existence at the time when the petition was presented. Counsel for the Petitioner eventually withdrew this application to amend, but thereafter, went ahead and filed a new petition, based on the sole ground of consent. Senior Counsel for the Respondent entered a conditional appearance and filed a summons to strike out this new petition, on the basis that (i) there was already the existing petition which had yet to be determined; and (ii) the Respondent had not in fact consented to the divorce. The Court issued its oral decision dismissing the new petition with costs to the Respondent on 22nd July, 2019. The reasons for so doing are now reduced into writing.

Issues

4. The summons to strike out raises the following issues for determination:-

(i) Is it permissible for there to be more than one petition (for dissolution of marriage), in existence before the court, at any one given time?

(ii) Given the absence of rules accompanying the introduction of section 129A of the Supreme Court of Judicature Act, Cap. 91 which provides for divorce on the ground of consent:-

(a) what procedure should be utilized by parties with petitions awaiting determination by the Court, which were presented prior to the effective date of the amendment, who now wish to rely on the ground of consent?; and

(b) within the circumstances of this case, has the Petitioner established the Respondent's consent to divorce?

Issue (i) – Can a petitioner file a second petition without disposal of the first ; and Issue (ii)(b) has the Respondent consented to divorce?

Submissions

5. The Respondent's summons to strike out contended that a petitioner was not permitted to file a second petition for dissolution of marriage without the first being disposed of, as the Matrimonial Causes Rules ('the Rules') make no provision for this to be done. Senior Counsel for the Respondent referred to the English Matrimonial Causes Rules (1957), in which the filing of a second petition by the same petitioner was expressly prohibited, but thereafter allowed by amendment (MCR 1961), with the leave of the court[1]. In particular, it was submitted that the new petition amounted to nothing more than an amendment of the existing petition which could not have been effected without the leave of the court.[2] Further, the hearing of the existing petition would be prejudiced by reason of (i) how advanced it was towards trial; (ii) delay of the hearing in order to allow for pleadings to be filed in the new petition; (iii) but most importantly, the Respondent would be put to further expense as he was obliged to answer the new petition. Senior Counsel submitted that the appropriate course of action for the Petitioner was for her to have sought the dismissal of the old petition and refile a new petition incorporating the new ground of consent. Alternatively, it was submitted that the Petitioner ought at the very least, to have sought the Court's leave to file the new petition which had not been done. Accordingly, it was submitted that the new petition ought to be dismissed.

6. Counsel for the Petitioner's response to the application to strike out was firstly that unlike the English Rules, Belize's MCR are silent on the issue of the filing of a second petition. In such circumstances, there was nothing precluding the Petitioner from doing so. By way of contrast, Counsel adverted to the fact that prior to the UK MCR 1957 the English position was that the applicable rules were silent on the filing of a second petition where an existing petition remained before the court undetermined.

[1] UK MCR 1957 R. 3.2; MCR 1961 R. 3.2
[2] Belize MCR R.25

Counsel submitted that this position was illustrated by the UK Court of Appeal decision of **Demetriou v Demetriou**[3] which was decided before the express prohibition against filing a second petition was introduced in the MCR 1957. Reference was made to Asquith LJ's acknowledgement in that case, that there was no statutory provision nor rule in the MCR 1947 which provided that a second petition could not be filed. However, the Lord Justice referred to a statement by Sir Boyd Merriman, P in ***H v H***[4] to the effect that there was an '*established practice'* of the ecclesiastical courts (for fifty years) that it was '*impossible to have two petitions on the file in respect of the same marriage at the same time...a fortiori when the two petitions both deal with the same subject-matter.*'

7. Counsel for the Petitioner acknowledged the remark of Asquith LJ that this statement from **H. v H.** was most probably obiter, as well as his observation that there was an absence of reported cases on the issue. Asquith LJ however found support for the practice against allowing a separate petition to be filed, in *Onslow v Onslow et al*[5]. The thrust of Counsel's submission however, arose from the judgment of Jenkins LJ in **Demetriou**, insofar as the Lord Justice countenanced a departure from what he also accepted as the long established practice of not allowing the second petition, in circumstances where such a departure could be found warranted. Counsel was therefore relying on the fact that in England when the legal position was the same in relation to there being no legal provision forbidding the filing of a second petition, the court in **Demetriou** would have departed from the long established rule, had the circumstances been found favourable for doing so. Counsel therefore contended that if the Court in the instant case were minded to view the long established practice as an applicable common law rule, the circumstances of this case would certainly justify a departure from that rule.

8. It was submitted that the circumstances of this case are exceptional in a variety of ways. Firstly, the ground sought to be relied upon became available in law after the presentation of the old petition; second, the Petitioner would not be allowed to amend her petition and there are no rules which enable her to expand her petition to include the new ground;

[3] [1950] 2 All ER 1327
[4] [1938] 3 All ER 418
[5] (60 L.T. 681)

thirdly, that contrary to the submission of Senior Counsel for the Respondent, there would have been no time or expense spared had the Petitioner sought the dismissal of the old petition in order to refile the new one. The Respondent's cross prayer would survive the dismissal of the petition and the Court would be obliged to consolidate the remaining cross prayer with the new petition or in any event new evidence would have to be filed in the new petition thereby the issues of delay and expense would still arise. Counsel for the Petitioner also contended that there was no means by which leave could have been sought prior to the presentation of the new petition, as it was a new action separate from the existing petition.

Discussion and Analysis

9. It is a fact that Belize's MCR are silent on the issue of whether or not a second petition (by the same petitioner seeking the same relief against the same party) can be filed when there is already an existing petition before the court. It is also a fact that the English position whereby such a second petition can be filed (with leave), emanates from the express provision of Rule 3(2) of the UK's 1957 and thereafter 1961 MCR. Belize's rules are based on the UK's 1937 MCR, which contained no such prohibition against the filing of a second petition. The Court is guided by **Demetriou v Demetriou**[6], which was cited by Counsel for the Petitioner, as this case would have been decided when the applicable UK rules were also silent on the issue. In this case the UK Court of Appeal was faced with the appeal of a wife against a refusal to permit her to lodge a second petition pleading desertion by her husband, where the three years required to plead desertion expired after she presented her first petition. As referred to by Counsel for the Petitioner in her submissions, Asquith LJ in **Demetriou** cited **H. v H.**[7]per Sir Boyd Merriman, P. who adverted to the *'established practice of the court…established by authority and practice for fifty years* – [that] *it is impossible to have two petitions on the file in respect of the same marriage at the same time, and* a fortiori *when the two petitions both deal with the same subject-matter.'*

[6] Supra fn 3
[7] Supra fn 4

10. The Court considers that in the absence of any express provision speaking to the issue, the position in Belize would be the common law position applicable at the time of the UK 1937 MCR. This position in the first instance, is that a petitioner may not file a second petition without the disposal of the existing petition already on file. The Court however does take note of the dictum of Jenkins LJ in **Demetriou**, which was commended unto the Court by Counsel for the Petitioner. Jenkins LJ accepted that there was the long established practice by which the filing of a second petition was not permitted, but expressed a view in the following terms (emphasis mine):-

> *"The court is being asked to make a departure from a long-established practice, and applications of this sort are necessarily viewed with a critical eye. <u>If one finds a practice for which it is difficult to account and which has no positive warrant in any statute or rule, one would be disposed to try to find a way out of the difficulty in a case in which adherence to the practice might mean a denial of justice</u>."*

Jenkins LJ went on to find, as had Asquith LJ, that there was no good reason in that case to depart from the long established practice and the wife's appeal against refusal to file a second petition was dismissed. This result nonetheless, the Court does find favour with Counsel for the Petitioner's submission that the instant case can be viewed as one in which the Court is able to find several good reasons to depart from the practice precluding the filing of a second petition.

11. The reasons which the Court accepts, include firstly, the introduction of legislation altering the Petitioner's entitlement to ground her divorce, after the presentation of the Petition. Even though Counsel had withdrawn her application for amendment, the Court affirmatively rules that it was not legally permissible for the Petitioner to seek to amend her Petition in order to rely on the ground of consent. This is so because at the time of presentation of the Petition, this ground did not exist in law, and an amendment relates back to the date of the original petition. This is illustrated by **Blacker v Blacker**[8], in which it was held that a petition could neither be amended nor a supplemental petition filed[9] where at the time of presentation of the petition, the qualifying time for the ground of

[8] **Blacker v Blacker** [1960] 2 All ER 291
[9] The supplemental petition does not exist in Belize, but is provided for in the UK, first introduced in Matrimonial Rules (from 1957) Rule 15(1) and thereafter in further amended rules.

desertion had not yet arisen. Further, the Court observes that the rationale alluded to by Jenkins LJ in ***Demetriou,*** for the practice forbidding the filing of a second petition, concerned possible abuse of process in relation to the qualifying period for desertion, which is not the situation in the case at bar. The Court also accepts Counsel for the Petitioner's point that contrary to the submission on behalf of the Respondent, even if the Petitioner had sought the dismissal of her original petition and thereafter filed a new petition with the original ground of cruelty and the new ground of consent, time and expense would not be spared as the Respondent's cross prayer for relief would be forced to await the new petition maturing for hearing.

12. The Court notes that the introduction of the new ground of consent is not qualified in any way, nor does its introduction circumscribe a party's entitlement to rely on any of the existing fault grounds. Therefore, without the possibility of amending her existing Petition, there was no legal way for the Petitioner to invoke the additional ground for dissolution afforded her by law. In these circumstances, the Court considers in the first instance that there is good and sufficient reason to depart from a practice which it considers itself bound by common law – that is, that a petitioner may not file a second petition for the same relief against the same party, when the existing petition remains undetermined. That being said, the Court is not of the view that the Petitioner was at liberty to simply file the new petition without seeking the leave of the Court. As submitted by senior counsel for the Respondent, the filing of the new petition has implications for the conduct of the existing proceedings, which were at the time of the new filing, advanced to the point of being ready and set down for hearing. There would be a delay of the existing proceedings arising from the obvious need for the petitions to be consolidated and heard together, not to mention additional costs occasioned by the other party in responding to the new case.

13. The wider question is whether it would be just in the circumstances for the Petitioner's case to be expanded, as contrary to Counsel for the Petitioner's contention, the cause brought before the Court by the new petition is in effect the same as the existing one, as it seeks the same relief of dissolution of the parties' marriage.

The Court considers that if an amendment very clearly could not be made to the existing cause without the leave of the court, *a fortiori*, a new petition in respect of the same cause should also not be permissible without the leave of the Court. Counsel for the Petitioner submitted that there was no procedural mechanism by which such leave could have been sought, as the necessary application by summons could not have been filed without moving the Court in an originating action. The Court rejects this contention. It was entirely permissible and in the Court's view, plain, that leave could have been sought in the existing petition. It would also have been permissible to have moved the Court by way of originating summons, in the same manner done where leave is sought to file a petition for dissolution prior to the expiry of three years of the marriage[10].

14. It is appreciated however, that given the silence of the Rules, Counsel for the Petitioner approached the matter of the new petition on the basis that leave was not required at all. The question now arises however, as to whether in spite of the failure to obtain the leave of the Court, the new petition should be allowed to stand as opposed to being dismissed. Counsel for the Respondent had referred to the case of **Cooper v Cooper**[11] **(**albeit it being decided with reference to the UK position which is based on the express rule prohibiting the filing of a new petition except with the leave of the court), in support of her contention that the Petitioner ought at the very least to have sought leave to file the new petition, if the Court accepted that she was entitled to do so. This case was cited as it held that the failure to obtain leave did not render the new petition filed therein without leave a nullity, but merely an irregularity which the court had jurisdiction to set aside. Herself relying on this authority, Counsel for the Petitioner contended that in the instant case, the Court ought to decline to strike out the new petition, but instead consider whether it is a case in which leave would have been granted and the petition thus be allowed to proceed. The Court accepts the guidance of this authority, even in the absence of the corresponding statutory provision, but on the basis that the effective position at law is considered the same.

[10] Section 131 SCJA, Cap. 91
[11] [1964] 1 WLR 1323

It is accepted that the new petition is not a nullity, but the Court must and will consider whether the case is one in which leave could properly have been granted for the new petition to be filed.

15. It is considered that the question of whether leave ought to have been granted is already substantially answered by reason of the Court's finding that a second petition would exceptionally be allowed within the circumstances of this case. There is however the remaining issue as raised by senior counsel for the Respondent, of whether or not the Respondent has consented to the divorce as alleged by the new petition. Senior Counsel's position is that notwithstanding his cross prayer for dissolution, the Respondent has not consented to the marriage being dissolved *on the ground of consent*. The Respondent's position is that the marriage be dissolved on the ground of the Petitioner's cruelty and he has asked the Court to so find. Counsel for the Petitioner submits that by reason of his cross prayer for dissolution, the Respondent has clearly signaled his desire for the marriage to come to an end. It is the Respondent's unequivocal intention in this regard that Counsel for the Petitioner submits as forming his consent to the divorce. Counsel relied upon two cases in support of her submission on the issue of consent. The first was **Smith v Huson**[12] which concerned the consent of a father required by statute, for marriage of a minor child. In this case the consent of the father to the marriage of the minor child was challenged after marriage by the husband in his quest to have the marriage annulled.

16. The minor wife and family resisted the challenge to the father's consent (who was by then deceased). By means of evidence of the father's conduct towards the parties and the marriage, both before and after the marriage, the court was able to impute his consent to the marriage and the annulment failed. Counsel for the Petitioner relied on aspects of the judgment of Sir John Nicholl wherein he construed the statutory requirement for a father's consent to marriage of a minor in terms that *'…it has not been held that an express and direct consent is necessary to the very fact of marriage at that particular time and place.*' Instead, that *'…a general consent to marriage was sufficient.*'

[12] 1 Phill. Ecc. 287

Thereafter, the judgment considered what was required in relation to how that general consent was to be given – i.e. – whether impliedly by conduct, or expressly in words. It was accepted that based on authorities, the conduct of the party who's consent was required had often been held sufficient and on those authorities, the conduct of the father in **Smith**, was accepted as indicative of his consent to his minor daughter's marriage. Senior Counsel for the Respondent rejected that this case could be viewed as establishing authority of any general principle on the broad legal issue of consent. The Court entirely agrees. An acceptance of this authority would be to equate the status of a parent's consent to marriage of a minor child, as the same in nature and effect to a competent party's autonomy in relation to the status of their marriage. The two legal processes are entirely different in nature as are the roles of the persons whose consent is required.

17. Further, the consent of the parent is recognized as capable of being retracted and there was recognized (by Sir John Nicholls), a rebuttable presumption applied in favour of the legitimacy of the marriage of the minor in the first place. A spouse in a divorce petition is the person who's consent must be obtained, and all things equal, there is no other person legally charged with any capacity in this regard. It is therefore not considered that this case assists the Petitioner in relation to the issue of consent. Counsel for the Petitioner also cited **McG (formerly R) v R**[13]. This decision does bear some promise for its application to the instant case, as it arose after the change in law in the UK following the Divorce Reform Act, 1969 which introduced the no fault ground of irretrievable breakdown. Section 2(1)(d) of that Act provided for the fact of the irretrievable breakdown of the marriage to be proved by two year's separation plus the consent of the respondent. It was the wife who petitioned for dissolution in that case, on the ground section 2(1)(d) – irretrievable breakdown evidenced by two years separation plus consent. Her solicitors mistakenly failed to send the updated form requiring the husband's acknowledgment of consent and sent only the old form for acknowledgment of service instead.

[13] [1972] 1 All ER

18. The husband's only response was by way of letter from his solicitors indicating that he was unconcerned with the proceedings and wished only for '*this affair to be brought to finality*'. It was held that the husband's lack of objection to the decree did not amount to consent within the meaning of section 2(1)(d). Counsel for the Petitioner herein relied on the ratio of that case, to the effect that consent was said to be a positive requirement, which in the case at bar is to be gleaned from the Respondent's clear indication from his cross prayer for dissolution that he wishes the marriage to be dissolved. Senior Counsel for the Respondent rejected this submission and pointed out that **McG v R** was actually more supportive of the Respondent's position that he had not consented to the divorce. The Court agrees. It is obvious that the Respondent desires the dissolution of the parties' marriage. However, the ground of consent has not replaced or otherwise qualified the availability of any of the remaining grounds, to a point where a party is obliged to proceed on the basis of consent for mere reason that both parties are desirous of dissolving their marriage. A party may have his or her own reasons for choosing to rely on one of the previously existing grounds, even in circumstances where it may be incomprehensible to an onlooker as to why, if both parties are desirous of ending their marriage, either party would refuse to proceed on the ground of consent.

19. As incomprehensible as that might seem to the onlooker, the existing grounds of divorce remain available and a party is entitled to rely upon them. The question of who should have to bear the cost of any such insistence in any given circumstance however remains an entirely different matter which is not at this point before the Court. For avoidance of doubt, the Court expresses its view that reliance on consent as a ground for divorce requires a respondent to consent to dissolving the marriage on the basis of that ground; as opposed to merely not objecting to the dissolution; not responding to the petition; or by seeking dissolution on some other available ground. In the circumstances before the Court, the Respondent has not agreed to the divorce proceeding on the ground of the mutual consent of the parties. The Respondent's position is that either the Petitioner has to prove her original petition on the ground of cruelty, or he proves his cross prayer on the ground of cruelty.

Given that the new petition cannot establish the Respondent's consent within the Court's understanding of section 129A of Cap. 91, there is no longer any basis upon which to consider whether leave ought to be granted in relation to the filing of the new petition. The application to strike out the new petition is accordingly granted.

Issue (ii) – transitional and procedural issues.

20. Pertinent questions remain in relation to the procedural issue arising from the absence of transitional provisions to address persons with petitions filed prior to the date of the amendment providing for consent, who wish to rely on that new ground. In light of the fact that this issue may continue to arise prior to enactment of rules or substantive transitional provisions, the Court expresses its view on what is an appropriate course of action. Where a petitioner in a divorce petition (or respondent cross praying for dissolution) filed prior to the effective date of section 129A of Cap. 91 wishes to rely on the additional ground of consent, this cannot be accomplished by way of amendment of the existing petition. A new petition praying consent has to be filed. Given the acceptance of a long established practice at common law which prohibited a second petition being filed by the same petitioner (or respondent who has sought relief by cross prayer), where the old petition has not yet been determined by the Court, the leave of the Court has to be obtained in order to file such a new petition. Leave to file such a new petition would best be sought within the existing petition to be determined within the discretion of the judge, having regard to all circumstances relevant to each particular case. Guidance on this position is taken from the **UK Practice Direction (Divorce: Petition)**[14] issued shortly after the institution of the Divorce Reform Act, 1969 in England, which introduced the no fault ground of irretrievable breakdown in place of the previously existing fault based grounds.

21. For the avoidance of doubt however, it is not the case that the Court is of the view that as a general rule a new petition for divorce can be filed, even with leave, where there is an existing undetermined petition already before the Court.

[14] [1971] 1 All ER 893

The Court's position is that a party is entitled to rely on the additional ground of consent as provided by law and in the absence of legislation making provision for the exercise of that right, the Court at the very least should entertain an application for leave to file such a new petition. As an alternative to seeking leave within the existing petition, it is also possible to apply for leave by way of originating summons, having regard to the procedure employed by a party who seeks leave to present a divorce petition before the expiry of three years of marriage, (i.e., pursuant to section 131 of the Supreme Court of Judicature Act, Cap. 91). The other procedural issue arises from the absence of rules providing for the form of consent to be utilized in relation to a petition presented on the ground of consent. Until such rules are introduced, there must be produced to the satisfaction of the Court, formal written proof of a respondent's consent such as a duly sworn and executed affidavit; or in the case of a respondent outside of Belize, the consent would have to be notarized, in accordance with the standard requirement for documents executed outside of Belize.

Disposition

22. The Court makes the following determinations upon the Respondent's summons to dismiss the petition filed on 24th May, 2019:-

(I) As a general rule, a petitioner for dissolution of marriage is not permitted to file a second petition where the existing petition has not been disposed of;

(II) The Court may however, in an exceptional case, allow a second petition to be presented where the existing petition has not been disposed of, upon an application for leave to do so;

(III) A new petition in the instant case would exceptionally have been allowed for reason that:-

(a) the existing petition was filed prior to the addition of consent as a new ground of divorce by virtue of section 129A of the Supreme Court of Judicature (Amendment) Act, No. 21 of 2018; and

(b) the existing petition is advanced towards trial so that its dismissal in order for the new petition to be filed would not have saved any delay or further expense as the Respondent's cross prayer for relief would remain to be determined;

(IV) The Respondent has however, not consented to the dissolution of the parties' marriage by means of the parties' mutual consent as contemplated by section 129A;

Accordingly, **IT IS HEREBY ORDERED** as follows:-

(i) The Petition filed on the 24th May, 2019 seeking dissolution of the parties' marriage on the ground of consent is dismissed;

(ii) The Respondent is entitled to his costs upon the dismissal of this Petition.

Dated this 14th day of August, 2019

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Shona O. Griffith
Supreme Court Judge, Belize.