[2023] JMSC Civ. 204

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

MATRIMONIAL DIVISION

CLAIM NO. 2015M03329

BETWEEN	**HOWARD GEORGE HYLTON**	**PETITIONER**
AND	**NATALIE ANTONETTE HYLTON**	**RESPONDENT**

IN CHAMBERS (on paper)

Karolin Jones instructed by Nigel Jones & Company for the Petitioner

Heard: October 13, 2023

Family Law - Divorce - Application for Decree Absolute - Issues relating to custody of relevant child unsettled - Whether Decree Absolute should be granted - Matrimonial Causes Act Section 27 - Civil Procedure Rule 76.12, 76.14

SARAH THOMPSON JAMES, J

Background

[1] The petitioner, Howard George Hylton on December 3, 2015 filed a Petition for Dissolution of Marriage seeking to dissolve the marriage between himself and the respondent Natalie Antonette Hylton on the ground that the marriage has broken down irretrievably. Two relevant children were named in the Petition, Howard Nathaneal Hylton born October 19, 2004 and Brianna Alyssa Hylton born November 8, 2011. In the Affidavit Accompanying the Petition filed December 3, 2015, the petitioner, particularized the arrangements for the care, maintenance, education and upbringing of the relevant

children. He sought custody of Howard and requested that custody of Brianna be given to the respondent. The Petition was uncontested.

[2] On October 20, 2016, the petitioner filed a Notice of Application for Court Orders in which he sought, among others, an order relating to custody in similar terms as requested in the Petition. The application came on for hearing on March 17, 2017 before Laing J. The application was not granted. The Record of Proceedings and Minutes of Order indicates that only counsel for the petitioner was present at the hearing.

[3] On March 5, 2018, the petitioner filed a Notice of Application to Dispense with Hearing with affidavit in support, a draft Decree Nisi for Dissolution of Marriage, Affidavit of Search and Affidavit of Service of the Petition. On March 19, 2019, the petitioner filed amendments to these documents. He also filed a Husband's Amended Petition for Dissolution of Marriage and a Supplemental Affidavit Accompanying Petition. The petitioner did not pray for an order for custody in the Amended Petition. His Supplemental Affidavit in Support of the Petition made no mention of custody instead the petitioner stated under the heading custody "the Petitioner has care and control of the Howard while the Respondent has care and control of Brianna" (sic). In his Supplemental Affidavit in Support of Notice of Application to Dispense with Hearing of Petition, the petitioner's evidence as to custody remained the same as set out in his Supplemental Affidavit Accompanying Petition with the addition that his application for custody was not granted.

[4] After further amendments were made to the Notice of Application to Dispense with Hearing. Master P. Mason, on June 28, 2019, granted the Decree Nisi and certified that the arrangements for the maintenance, care and upbringing of the relevant children were the best that could be devised in the circumstances.

[5] On March 24, 2023, the petitioner filed Notice of Application for Decree Nisi to be made Absolute along with Affidavit of George Howard in Support of Application for Decree Absolute, draft Decree Absolute, Affidavit of Delay and Affidavit of Search. The information relating to custody in the Affidavit in Support of the Application for Decree

Absolute remained the same as that filed in the Supplemental Affidavit in Support of Notice of Application to Dispense with Hearing of Petition.

Issue

[6] The issue for the court's determination is whether the court can grant the decree absolute in circumstances where an order for custody of the relevant child was not granted and there is no evidence in the Affidavit in Support of the Application for Decree Absolute regarding arrangements for custody of the said child.

Law and Analysis

[7] Section 23 of the Matrimonial Causes Act (herein after referred to as the "MCA") empowers the Supreme Court to make orders relating to the custody, maintenance and education of any relevant child. The court may make such orders in any proceedings for dissolution of marriage before, by or after the final decree.

[8] By rule 76.4 (5) of the Civil Procedure Rules (herein after referred to as the "CPR").

> A petition for a decree of dissolution of marriage, for a decree of nullity of marriage or for a decree of presumption of death and dissolution of the marriage may include a claim for maintenance, custody, education of or access to children, division of property and any other relief relating to matters concerning the marriage, the union between the parties or any relevant children.

[9] The CPR require that where there are relevant children, who are minors or are under the age of twenty-three and are being educated in a tertiary institution, that an affidavit accompanies the petition. That affidavit should set out the particulars of the arrangements for the care, maintenance, education and upbringing of any relevant child – see rules 76.4(7) and 76.4(8). At the initial stages of the proceedings the petitioner complied with these rules by setting out in an affidavit the arrangements for the care, maintenance, education and upbringing of the relevant children which included arrangements made for custody. Notwithstanding, the petitioner sought to have the issue of custody resolved by filing a Notice of Application for Court Orders. Rule 76.4(8) allows

for the grant of an order for custody, maintenance, education of or access to children or division of property upon an application for court orders. The use of this method to settle the issue of custody was however unsuccessful as the orders requested were refused. The reasons for the refusal is unknown. Therefore, the issue of custody was still left to be determined.

[10] Rule 76.12(2) permits a petitioner to proceed in default. He does so by filing an application to dispense with hearing accompanied by an affidavit in support of the application. Where there are relevant children, the affidavit should set out evidence to include arrangements made for their care, maintenance and upbringing sufficient to satisfy a judge or master that in the circumstances the welfare of the relevant children is adequately protected – see rule 76.12(2)(iv). In this case, the petitioner in his Supplemental Affidavit in Support of Notice of Application to Dispense with Hearing of Petition filed March 19, 2019 set out the arrangements for the welfare of the relevant child. However, no evidence of the arrangements regarding the custody of the relevant children were provided. Notwithstanding, the petitioner was granted a decree nisi with the Master's certification that the arrangements for the maintenance, care and upbringing of the relevant children were the best that could be devised in the circumstances.

[11] Section 16 of the MCA provides that "A decree of dissolution or nullity of marriage under this Act shall, in the first instance, be a decree nisi." The MCA does not make the grant of the decree nisi conditional on the courts satisfaction of arrangements for the maintenance, care and upbringing of the relevant children as is required by Section 27(1) which deals with the grant of the decree absolute. However, CPR 76.12 (6) provides as follows:

> Where the decree nisi is being granted the Judge or the Master:
>
> (a) must, if satisfied, certify that, having regard to the evidence of the applicant together with any other relevant evidence, the arrangements for the maintenance, care and upbringing of any relevant child are satisfactory or are the best that may be devised in the circumstances.

(b) may make such orders as to the custody, care and upbringing of the relevant children as, in all the circumstances, he deems fit.

(c) if not satisfied with the arrangements for the maintenance, care and upbringing of any relevant children or that the arrangements are not the best that can be devised in the circumstances, must defer consideration of the certification.

[12] In **Keisha La-Georgia Watson Bailey v Floriziel Al Bailey** JM 2008 SC 3, Brooks J (as he then was) had for consideration whether an application for decree nisi is to be refused or deferred where the judge is satisfied that the marriage has broken down but the evidence in respect of the arrangements for the children is insufficient or unsatisfactory. He held that the decree nisi should not be granted until there is satisfactory evidence from the petitioner concerning the arrangements made for the maintenance, care and upbringing of the relevant child. He reasoned that rule 76.12(4)(a) impliedly requires that the judge at the decree nisi stage be satisfied as to the arrangements concerning the maintenance, care and upbringing of the relevant children in order to reach the decision that the decree nisi should be granted and to make the mandatory certification to that effect. He adjourned the hearing of the decree nisi pending the furnishing of evidence to satisfy the court of the financial provisions made for the relevant child.

[13] The learned judge considered rule 76.12(4) which was then the applicable rule. Rule 76.12(4)(a) was replaced by rule 76.12(6)(a) on September 10, 2015. However, rule 76.12(4)(a) is similar to both rules 76.12(6)(a) and 76.14(11)(a), except that the word nisi replaces absolute in the latter rule and the court is now permitted to consider not only the applicant's evidence but any other relevant evidence. Rule 76.12(4) was in the following terms:

Where the decree nisi is being granted the judge must:

(a) certify that, having regard to the evidence on oath of the applicant, the arrangements for the maintenance, care and upbringing of any relevant children are satisfactory or are the best that may be devised in the circumstances; and

> (b) make such orders as to the custody, care maintenance and upbringing of any relevant children as in all the circumstances, may seem fit.

[14] Brooks J considered whether the requirements of rule 76.12(4)(a) improperly exceed the provisions of the MCA which does not require that the court be so satisfied at the decree nisi stage. He held that it did not. The learned judge reasoned that what the CPR requires is that the judge is satisfied about all the relevant elements namely, the duration of the marriage, the period of separation, the likelihood of reconciliation and the arrangement for the children before deciding that the decree nisi should be granted. Thereafter, it is purely procedural in that it merely requires a certificate to be issued concerning the arrangements for the care and upbringing of the relevant children where the judge has arrived at the conclusion that the decree nisi should be granted. He also considered that, section 4(2)(a) of the Judicature (Rules of Court) Act empowers the rules committee to make rules for regulating and prescribing the procedure and practice to be followed in the Supreme Court and the CPR was implemented pursuant to that Act.

[15] The judge therefore in determining an application for a decree nisi should be satisfied of the arrangements made for the maintenance, care and upbringing of the relevant child, before making a decision to grant the decree nisi and making a certification in terms of rule 76.12(6)(a) of the CPR.

[16] In any event, at the decree absolute stage, the court has an obligation to ensure that satisfactory arrangements are made for the care and upbringing of any relevant child before the decree absolute is granted. This mandate is set out in section 27 of the MCA which provides:

> (1) Notwithstanding anything in this Act but subject to subsection (2), the Court shall not make absolute a decree for the dissolution or nullity of marriage in any proceedings unless it is satisfied as respects every relevant child who is under eighteen that-
>
> (a) arrangements for his care and upbringing have been made and are satisfactory or are the best that can be devised in the circumstances; or

(b) it is impracticable for the party or parties appearing before the Court to make any such arrangements.

(2) The Court may, if it thinks fit, proceed without observing the requirements of subsection (1) if it appears that there are circumstances making it desirable that the decree should be made absolute or should be made, as the case may be, without delay; and the Court has obtained a satisfactory undertaking from either or both of the parties to bring the question of the arrangements for the children before the Court within a specified time.

[17] By CPR 76.14(11), the judge once satisfied with the arrangements made for the maintenance, care and upbringing of any relevant children is to make a certification to that effect. It states:

Where the decree absolute is being granted the Judge:

(a) must, if satisfied, certify that, having regard to the evidence of the applicant together with any other relevant evidence, the arrangements for the maintenance, care and upbringing of any relevant children are satisfactory or are the best that may be devised in the circumstances.

(b) may make such order as to custody, care and upbringing of the relevant children as, in all the circumstances, he deems fit.

(c) if not satisfied with the arrangements for the maintenance, care and upbringing of any relevant children or that the arrangements are not the best that can be devised in the circumstances, must defer consideration of the certification.

[18] The interpretation to be given to the section 27 of the MCA was considered in the case of **Sebastian v Sebastian** JM 1993 CA 25. In that case, the husband petitioner in his petition for dissolution of marriage sought an order for joint custody of the relevant child. In his affidavit in support of the petition, he proposed that the relevant child, who resided with the maternal grandparents since the marriage broke down, resides with either him or the respondent. He stated further that if the relevant child resides with him, then he would make the necessary arrangements for accommodation and for a helper to see to her welfare. He deposed that he would seek to educate and provide financially for the relevant child and that access should be given to the party without physical control of

the relevant child. The respondent in her affidavit failed to state her true place of abode which was outside the jurisdiction. Her evidence was that she saw the relevant child during school holidays either in this country or in Florida.

[19] The husband petitioner was granted a decree nisi on February 18, 1992. However, the question of custody of the relevant child was reserved for hearing in chambers. When the summons for custody came on for hearing on May 26, 1992 it was adjourned sine die. The parties were restrained from removing the child from the jurisdiction and the father was granted access.

[20] On September 25, 1992, the motion for decree absolute came on for hearing before Reckford J. The respondent was absent from the hearing. The petitioner requested that the decree absolute be granted. The court considered his affidavit which stated that the respondent desired to contest the summons for custody. Further, that the respondent had left the jurisdiction prior to the proceedings for custody in chambers on May 26, 1992 and that he is in the process of having investigations conducted as to the whereabouts of the respondent and the relevant child in Florida with a view to having the child returned to the jurisdiction so that the court can make an order as to her custody and general welfare. The learned judge held that he was not satisfied with the arrangements for the care and welfare of the relevant child and ordered that the decree nisi should not be made absolute. The petitioner appealed. The Court of Appeal dismissed the appeal. The Justices of Appeal relied on section 27 of the Matrimonial Causes Act.

[21] The court held that on the facts before Reckford J he could not be satisfied in respect of the arrangements with regard to the child for none had been made. There was therefore no evidence before the court for the court to grant the decree absolute under section 27(1)(a). Further, the judge found that the evidence of the petitioner that he is “in the process of having investigations conducted as to the whereabouts of the respondent” fell short of the civil standard of proof which he had a duty to satisfy. As such, the court could not grant an order under section 27(1)(b) of the MCA.

[22] The court stated that the question of granting a decree absolute without being satisfied as to the arrangements only arises in circumstances to which section 27(2) is applicable. The court outlined the principles applicable to the exercise of jurisdiction under this section as follows: If there is an issue regarding custody which is to be heard at a later date then the court can withhold the grant of the decree absolute if the delay is fairly short. If a considerable time is likely to elapse the consideration should be given to the de facto arrangements, if these appear reasonably satisfactory though not necessarily the best that can be devised in the circumstances then the court can grant the decree absolute under section 27(1). If there is a difficulty the court may consider making an order under section 27(2) unless there is some positive advantage to be gained for the relevant child/children in deferring the decree absolute. The court found that there was no evidence on which it could rely to exercise its jurisdiction under section 27(2).

[23] Carey P (ag) at page 2 referring to section 27 of the Matrimonial Causes Act stated that "*This provision in my view, imposes a duty on the court to ensure that satisfactory arrangements are made for the care and upbringing of the child*."

[24] At page 4 he stated the principles as follows "*In my view, so as to be able to be concerned with the interests of the child, the judge must be given material as to the arrangements on which he can exercise his discretion whether to grant or withhold the decree absolute. Even when no arrangements can be made by the petitioner because it is impracticable to do so, nevertheless, as it seems to me, material must be provided to enable confirmation of that fact. I venture to suggest that if the norm is satisfactory arrangements or those which are the best, then, where no arrangements are at all possible, there is, if anything a greater onus on the party before the court to provide material showing that it is impracticable to make such arrangements."*

[25] By Carey P (ag) at page 7 "*It is plain from what is stated in the above extract, that always some arrangements must either have been made or where none has been made, there is in prospect some certainty that they will be made so that an undertaking can be had under section 27(2) of the Act. Where it is wholly impracticable to make such arrangements, then it seems to me clear that the reasons therefore must be demonstrated*

by cogent evidence because the very mischief which the provision is designed to obviate would occur: the child would be bound to suffer. I am quite unable to accept that a judge is seised of the interests of the child when he knows absolutely nothing of any arrangements for the child's welfare by either party.

[26] Sebastian v Sebastian, determined that the petitioner must place before the court material that can be used to make a determination regarding the arrangements for the welfare of any relevant children as without this material to satisfy the court, the court is prohibited from granting the decree absolute. Additionally, if the court, is to make its certification pursuant to rule 76.14(11), it must have regard to the applicant's evidence or any other relevant evidence. The Supplemental Affidavit Accompanying the Husband's Amended Petition for Dissolution of Marriage does not particularize arrangements for custody of the relevant children. Neither does any of the affidavits filed at various stages of the proceedings since the filing of the Affidavit in Support of Notice of Application for custody, particularly the Affidavit of Howard George Hylton in Support of Application for Decree Absolute filed on March 23, 2024. The decree nisi having been granted, the petitioner must ensure, having regard to the restriction imposed by section 27(1) of the MCA and rule 76.14(11), that there is satisfactory evidence before the court of the arrangements made for the custody of the minor child. Howard Nathaneal Hylton born on October 19, 2004 is no longer a minor. A custody order need not be made in relation to him. However, the affidavit supplied information in relation to his future education and based on section 16(3) of the Maintenance Act, the petitioner has a duty to maintain him until he attains the age of 23. If it is impracticable to make arrangements for the custody of the minor child, Brianna Hylton, then evidence to this effect should also be supplied[1]. The court is without evidence for the judge to determine whether satisfactory arrangements are in place for the custody of Brianna and whether to grant the decree absolute.

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[1]Section 27(1)(b) of the Matrimonial Causes Act

[27] The court is only permitted to grant a decree absolute in the absence of satisfactory evidence of the arrangements for the care and upbringing of the relevant child where the circumstances makes it desirable that there should be no delay and there is an undertaking from either party to bring the issue of arrangements before the court within a specified time. There is no evidence before this court that there is an issue regarding custody which is to be heard at a later date. Therefore, the court would have no information about the period of time it would take to determine such an issue. The court is not permitted to grant the decree absolute without evidence that will satisfy it of the arrangements regarding custody of Brianna.

[28] CPR 76.14(10) empowers the court to defer the granting of the decree absolute and to give such direction for the future conduct of the proceedings.

> By 76.14 (10) – The application for a decree absolute must be referred to a judge who may consider same on paper and may:
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> (a) grant or defer the granting of the decree absolute;
>
> (b) refer the determination of any issue relating to the custody, care, maintenance and upbringing of any relevant child to be heard separately and give directions for the future conduct of such a hearing; or
>
> (c) issue such direction for the future conduct of the proceedings as may seem fit.

[29] Rule 76.14(8) provides that an application to make a decree nisi absolute must be accompanied by affidavit evidence which should attest to, among other things, whether there are any relevant children at the time of the application and the arrangements made for their maintenance, care and upbringing or otherwise as provided by section 27(1)(b) of the MCA. In light of the foregoing, the court may defer the grant of the decree absolute and request the filing of a supplemental affidavit in support of the application to make the decree nisi absolute.

Conclusion

[30] The court is empowered to deal with the issues relating to the custody, maintenance and education of any relevant child during proceedings for the dissolution of marriage. However, these issues can be dealt with before or after the proceedings. They may also be dealt with on a Notice of Application for Court Orders. The MCA does not restrict the grant of a decree nisi where the court is not satisfied of the arrangements for the maintenance, care and upbringing of the relevant child. However, based on the interpretation to be given to rule 76.12(6)(a), the court must be so satisfied in order to make its certification required by that rule.

[31] At the decree absolute stage of the divorce proceedings, section 27 of the MCA and rule 76.14(11) (a) prohibits the judge, when considering whether to grant the decree absolute, from so doing unless he or she is satisfied of the arrangements for the minor child. Since the issue of custody was not settled before the proceedings for the dissolution of marriage, the unsuccessful attempt to settle same on Notice of Application and the lack of evidence before the court as to the arrangements made for the custody of the minor child, the grant of the decree absolute must be deferred pending the presentation of evidence capable of satisfying the court, on a balance of probabilities, of the arrangements made. There is also no evidence that it is impracticable for the petitioner to make arrangements for custody or that there are circumstances making it desirable for the decree absolute to be granted without the issue of custody of the minor child first being settled or without delay.

Order:

1. The petitioner is to file and serve a Supplemental Affidavit in support of the application for decree absolute stating that custody of Brianna be to the respondent unless the parties otherwise agree to joint custody. Howard, being over the age of 18 years old and no longer a minor, it is not necessary to make any order relating to his custody.