IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN FAMILY DIVISION
CLAIM NO. M 1029 OF 2007
IN CHAMBERS

BETWEEN	KEISHA LA-GEORGIA WATSON BAILEY	PETITIONER
A N D	FLORIZIEL AL BAILEY	RESPONDENT

No Representation (application considered on paper)

Divorce – Application for Decree *Nisi* – Application being considered on paper – Arrangements for children of the marriage not acceptable to judge – Whether application for Decree *Nisi* not to be granted as a result – Rule 76.12 (4) of the Civil Procedure Rules

Heard: 11th January 2008

BROOKS, J.

The introduction in September 2006, of new matrimonial causes rules as a part of the Civil Procedure Rules (CPR), has resulted in a number of changes in the process of considering grants of decrees for the dissolution of marriage. Significant teething pains have attended the changes.

One major change brought about by the new rules is that applications for decrees *nisi* may now be considered on paper by a judge, without the need for a hearing. The result is that there is, at the time of consideration, no witness readily available to clarify or expand on the affidavit evidence. Where in such applications, there are relevant children to be considered, rule 76. 12 (4) of the CPR requires the judge to issue a certificate approving the arrangements existing for the care and upbringing of those children.

What however, should be the situation where the judge is satisfied that the marriage has broken down but does not consider that the evidence in respect of the arrangements for the children is sufficient or satisfactory? Is the application for the decree *nisi* to be refused or deferred pending the correction of the difficulty with the evidence concerning the arrangements, or may, as occurred under the previous rules, the decree *nisi* be granted but the certificate withheld?

Rule 76.12 (4) states:

> "(4) 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;" (Emphasis supplied)

I have emphasised that the rule requires the judge to do two things; namely, to certify the arrangements and to make orders. The precondition assumed by the rule is that the judge is satisfied that the requirements of the Matrimonial Causes Act ("the MCA"), concerning the grant of a decree *nisi*, have been met. Since the MCA does not mention the need for satisfaction of arrangements concerning children at the stage of the decree *nisi,* the question which arises from a reading of rule 76.12 (4) is whether its requirements improperly exceed the requirements set out in the provisions of the MCA.

Section 27(1) of the MCA stipulates that, normally, the court will not make absolute a decree *nisi* unless it is satisfied as to the arrangements for the care and upbringing of the relevant children. It is in the following terms:

> **"27. Restrictions on decrees for dissolution or nullity.**
>
> 27. (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 -
>
> (a) 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
>
> (b) 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."

It is fair to say, that on a careful reading, it will be observed that section 27(1) is not definitive that a decree *nisi* may be granted without the court having been satisfied as to the arrangements for the care and upbringing of the relevant children. The fact that no decree absolute should be granted unless the court is so satisfied, does not necessarily prevent such a requirement at the *nisi* stage.

The previous rule (rule 37 of the Matrimonial Causes Rules "the MCR") clearly permitted a judge to grant a decree *nisi,* despite being not satisfied as to the arrangements concerning the care and upbringing of the relevant children. Rule 37 (2) of the MCR stated:

> "A decree nisi of dissolution of marriage shall be in accordance with Form 14 or Form 14A in Appendix 1. In pronouncing any such decree the Judge **may** certify, if that be the case, that he is satisfied as to the arrangements for the care and upbringing of the relevant children or as being the best that could be devised in the circumstances." (Emphasis supplied)

Under the previous regime, in the event that the judge at the decree *nisi* stage did not certify the arrangements, then the relevant material (usually with adjustments) would be placed before a judge at the decree absolute stage, for consideration. The latter judge would then decide whether or not to grant the certificate.

The provisions of rule 76.12 (4) (a) of the CPR alter that previously existing position. The implication of the new requirement to certify the arrangements is that, if the judge is not satisfied concerning those arrangements, then the decree *nisi* would not be granted.

It seems to me that what the rule requires is for the judge to be satisfied about all the relevant elements, namely the duration of the marriage, the period of separation, the likelihood of reconciliation **and** the arrangements for children, **before** deciding that the decree *nisi* should be granted. Viewed in this way the rule, thereafter, is purely procedural, in that

it merely requires a certificate to be issued concerning the arrangements for the care and upbringing of the children, where the judge has arrived at the conclusion that the decree *nisi* should be granted. On this reasoning, if I am correct, the rule would not be inconsistent with the terms of the MCA.

I should not part with this discussion without considering Section 16 of the MCA which states that a decree of dissolution of marriage shall, "in the first instance, be a decree *nisi*". There is no restriction in the MCA, in the context of the welfare of the relevant children, on a decree *nisi* being granted. That restriction only exists in the context of the decree absolute, as pointed out above. Rule 76.12 (4) (a) in requiring the certificate does not conflict with Section 16. It is the function of the Rules Committee to make rules "for regulating and prescribing the procedure ...and the practice to be followed in ...the Supreme Court in all causes and matters ... in or with respect to which those Courts ...have ...jurisdiction" (Section 4(2) (a) of the Judicature (Rules of Court Act). The CPR was implemented pursuant to the last-mentioned act. If therefore, the rule is not inconsistent with the MCA, then despite its seeming inconvenience and its definite departure from the previous regime, it must, except in special circumstances (which I shall presently mention), be obeyed.

It is important, for these purposes, to note that Section 27(2) of the MCA permits the court, in specific circumstances, to grant the decree

absolute even without granting the certificate. It is also important to note that under rule 76.14 (11) of the CPR, the judge at the decree absolute stage is required, as in the case of rule 76.12 (4), to grant a certificate concerning the care and upbringing of the relevant children. The terms of the latter rule are identical to those in rule 76.12 (4) except that the word "absolute" replaces the word "*nisi*".

Neither rule 76.12 (4) nor rule 76.14 (11) contemplate the implementation of the provisions of Section 27(2) and to that extent those rules are in conflict with the section and may therefore be ignored in appropriate cases. For the sake of transparency however, the judge should, in such cases, explain the reason for the departure from the procedure required by the relevant rule.

Though not essential to the instant case, I should mention the other limb of rule 76.12 (4). Rule 76.12 (4) (b) introduces a new element which was not specified in the rules, in this context, under the previous regime. This element is the requirement to make orders as the circumstances may require. The use in the paragraph, of the term "as in all the circumstances, may see fit", would seem to allow the judge to make no orders at all, if the arrangements outlined to the court are fully satisfactory. The use of the word "must", in the preamble of the rule, is therefore qualified by these words used in paragraph (b).

Conclusion

The light of the fact that rule 76.12 (4) uses the phrase, "the judge must", it is my view that the requirement that the certificate, concerning the care and upbringing of the relevant children, be granted, is a mandatory requirement, subject only to Section 27(2) of the MCA. Rule 76.12 (4) (a) impliedly requires that judge at the decree *nisi* stage to be satisfied as to the arrangements concerning the care and upbringing of the relevant children in order to reach the decision that the decree *nisi* should be granted. If the judge is not so satisfied then no decree and therefore no certificate, would be granted. The terms of the rule therefore require a purely consequential order based on the decision reached; namely that the decree *nisi* should be granted.

Since section 27(2) of the MCA allows for situations where even decrees absolute may be granted despite less than satisfactory arrangements regarding the relevant children, then it would be for the individual judge, in an appropriate case, to specifically state why it is that the there is a departure from the requirements of rule 76.12 (4).

In the instant case, though I am satisfied that the marriage has broken down irretrievably and that the parties have been separated for in excess of a year, I am not satisfied with the evidence concerning the financial provision for the relevant children of this marriage. Based on my interpretation of rule 76.12 (4) as explained above, the application for the decree *nisi* must be

adjourned pending a resolution of the provision of financial support for the child by the Respondent.

It is therefore ordered that:

1. The application for decree *nisi* is adjourned for a date to be fixed by the Registrar.

2. The Registrar is to inform the Petitioner that the arrangements in respect of the care and upbringing of the relevant children are not satisfactory to the court.