[1991–92 Gib LR 313]

PEIRIS v. PEIRIS

SUPREME COURT (Alcantara, A.J.): May 14th, 1992

Family Law—financial provision—application after decree absolute—under Matrimonial Causes Rules, 1957, r.3(3)(ii), may apply for leave to seek ancillary relief by notice in Form 2, even after decree absolute—leave granted if applicant justifies failure to apply in petition or answer—refused if unreasonable delay, order unlikely to be made, or relief would be oppressive or inappropriate due to changed circumstances

The petitioner applied for ancillary relief after obtaining a decree absolute of divorce.

The parties were divorced after 14 years of marriage, and no application for ancillary relief was made in the proceedings. A month after the granting of the decree absolute, the petitioner applied for the distribution of the matrimonial property.

The respondent submitted that (a) under the English Matrimonial Causes Rules, a wife could not apply for ancillary relief after the granting of a decree absolute; and (b) even if the earlier 1957 Rules applied, the petitioner was precluded from obtaining relief under r.3(3)(ii) since she had not made her application by Form 2 or at the trial of her petition, as specified in that rule.

Held, making the following ruling:

By the Supreme Court Rules, r.8(2), the Matrimonial Causes Rules, 1957 applied to divorce proceedings in Gibraltar. Under r.3(3)(ii) of those Rules, a party could seek leave to apply (by Form 2) for ancillary relief even after the granting of a decree absolute. Subsequent forms provided the means by which the other party could contest that leave. The opportunity to apply for leave after divorce was part of English practice, which the court was entitled to follow in the absence of a specific provision in local legislation. Leave would be granted only if the court was satisfied with the applicant's explanation for his or her omission to claim the relief in the original petition or answer. It would be refused if there had been unreasonable delay, if circumstances had changed so as to make the relief sought inappropriate, if no order was likely to be made, or if it would be oppressive (paras. 3–4; paras. 6–9).

Legislation construed:

Matrimonial Causes Ordinance (1984 Edition), s.9: The relevant terms of this section are set out at para. 6.

Supreme Court Rules, r.8(2), as amended by L.N. No. 182 of 1990: The relevant terms of this sub-rule are set out at para. 3.

Matrimonial Causes Rules, 1957 (S.I. 1957/619), r.3(3): The relevant terms of this sub-rule are set out at para. 4.

E.C. Ellul for the petitioner;
D.W. Forcer Evans for the respondent.

1 **ALCANTARA, A.J.:** The petitioner applies for an order relating to the distribution of all matrimonial property. The parties were married on June 20th, 1977. There are no children of the marriage. The wife petitioned for divorce. In her petition she did not claim any ancillary relief. On May 3rd, 1991, she obtained a decree *nisi* of divorce dissolving the marriage by reason of irretrievable breakdown. On July 20th, 1991 she was granted her decree absolute. A month later she issued the present application.

2 When the application came for hearing Mr. Forcer Evans, for the husband (the respondent), took up a preliminary issue and submitted that the wife was not entitled to any ancillary relief. Once she had secured her decree absolute she was not entitled to claim anything, and the court is not empowered to award anything. In support of this contention, he referred me to r.68 of the Matrimonial Causes Rules, 1968.

3 Mr. Ellul, for the wife, pointed out that the 1968 Rules do not apply to Gibraltar. We are governed by the 1957 Rules. This is so. Rule 8(2) of the Gibraltar Supreme Court Rules provides:

> "The following rules, formerly in force in England, shall apply in the court, to the exclusion of any rules which in England replace them—
>
> (a) the Companies (Winding-up) Rules, 1929 (S.R. & O. 1929 No. 612) . . .
>
> (b) the Matrimonial Causes Rules, 1957 (S.I. 1957 No. 619 . . .);
>
> (c) the Bankruptcy Rules 1952 (Statutory Instrument 1952 No. 2113 . . .)."

4 The equivalent of Mr. Forcer Evans's r.68 is to be found in r.3 of the Matrimonial Causes Rules, 1957, the relevant part of which reads:

> "(3) Every application for ancillary relief shall be made in the petition or, where an answer claiming relief is filed, in the answer. Provided that—
>
> . . .
>
> (ii) a judge may give leave for an application for ancillary relief which should have been made in the petition or answer to be

> made subsequently, either by notice in accordance with Form 2 issued out of the Divorce Registry or at the trial."

5 Mr. Forcer Evans's interpretation of this rule is that the wife, by not having done one or the other, is now precluded from claiming any ancillary relief. He argues that the phrase "at the trial" in the context of r.3(3)(ii) must mean the last opportunity a petitioner has in claiming relief. Once the trial is over and a decree absolute has been pronounced that is the end of the matter. Mr. Ellul argued to the contrary, but neither counsel has referred me to any authority or as to what the practice is in England.

6 The present practice and procedure in England is important as a guide because of s.9 of the Matrimonial Causes Ordinance, which provides:

> "The jurisdiction vested in the court by this Ordinance shall so far as regards procedure, practice and powers of the court be exercised in the manner provided by this Ordinance and by any subsidiary legislation made hereunder; and where no special provision is contained in this Ordinance or in any subsidiary legislation with reference thereto, any such jurisdiction shall be exercised in accordance with the practice, procedure and powers for the time being in force in the High Court of Justice in England with reference to matrimonial proceedings."

7 But first, let me set out Form 2, referred to in r.3(3)(ii) of the Matrimonial Causes Rules, 1957: "TAKE NOTICE that the Petitioner intends to apply to the Court for an order that (here set out the ancillary relief claimed). (Insert here in appropriate cases the contents of Form 8 and/or 10)." The governing words in the above notice are that there is an intention to apply. Form 8 refers to acknowledgement of service and Form 10 is the opportunity for the other side to file evidence. In other words, the other side must be given full opportunity to contest whether leave should be granted. If this procedure is followed and leave is obtained, there appears to be no reason why an application for ancillary relief might not be heard and adjudicated upon, even after decree absolute.

8 Following English practice, this seems to be the case. 13 *Halsbury's Laws of England*, 4th ed., para. 1069, at 495 deals with the matter thus:

> "Where, after the hearing of the suit, a petitioner wishes to apply for such relief which should have been made but is not claimed in the petition, leave to make the application by notice in the prescribed form must be obtained from the court."

9 Whether leave will be granted is another matter. 1 *Rayden on Divorce*, 14th ed., at 715 (1983) has this to say:

> "A reason or explanation must be given for the omission of the claim from a petition or answer claiming relief (i.e. prayer for a decree) . . . If the application for leave appears to have an arguable case the proper place to argue it is on the substantive application, but leave will be refused where there has been unjustifiable delay, or where circumstances have so changed as to make the relief claimed inappropriate, or where no order is likely to be made, or where it would be oppressive to grant leave."

10 One of the difficulties I have experienced in this case is that unfortunately, the wife has sought the wrong remedy. She has asked for ancillary relief when she should have asked first for leave. On the husband's side, the argument has not been tendered that leave should not be given, or that this is not a proper case for leave, but that the court has no power to grant relief after a decree absolute. The course I should take would be to dismiss the present application and hear an application for leave at short notice, if the wife so desires. However, I think I should hear the parties first as to what course I should follow, because there are circumstances in this case which require a prompt hearing if leave were to be granted.

11 The main factor is that the wife obtained a *Mareva* injunction against the husband, limited to £10,000, restraining him from disposing of any redundancy payment or gratuity which is due to be made by his previous employers, N.A.A.F.I., Gibraltar. Another factor is that the wife is not asking for maintenance or alimony, but only for property which, according to her, belongs to her. Still another factor is that it was agreed that subject to the jurisdictional point raised, I should hear all the evidence. This I did. I now invite the parties to address me on what course they want me to take.

Ruling accordingly.