

[2003–04 Gib LR 429]

ROCCA v. ROCCA

SUPREME COURT (Schofield, C.J.): May 20th, 2004

Family Law—divorce—costs—costs unnecessarily increased by amendment to petition after late filing of answer and cross-petition following earlier indication that not contested—party causing increase liable for costs

The wife petitioned for divorce on the basis of the husband's unreasonable behaviour.

After service of the petition, the husband's solicitor wrote to the wife explaining that he would not contest the petition, that he had left the matrimonial home and would not return without his wife's consent, that he wished to have joint custody of their three children and to have flexible access to them by his wife's arrangement, and that he agreed to continue paying maintenance for them of £100 per week. However, the husband returned to the matrimonial home without his wife's consent and refused to leave, forcing her to move out and subsequently obtain ouster and non-molestation orders from the magistrates' court. The husband also stopped making the maintenance payments, which it took further proceedings to remedy. By this stage one of the children was living with him (and was taken by him to England for Christmas 2003 without the wife's consent) and the maintenance ordered was consequently reduced to £60 per week. On the day fixed for the uncontested hearing, the husband filed an answer and a cross-petition, which were both refused by the court, but following discussions, an amended petition was filed, and an uncontested *decree nisi* was granted. Matters progressed to the entering of an ancillary order by consent which covered all issues except maintenance. An application was made for a costs order to help the parties to determine the amount of maintenance that would be suitable.

The wife submitted that (a) when the husband filed an answer and cross-petition on the date fixed for the hearing of the (intended) uncontested petition, it caused an adjournment, which could have been avoided; (b) when he entered the matrimonial home without consent, refused to leave, and stopped paying maintenance, it forced her to obtain orders from the magistrates' court, increasing her costs; (c) when he took the child to England for Christmas he did not ask for her consent or give contact details until she threatened court action, which required her to seek legal advice; and (d) she should be awarded the whole of the costs as his conduct had therefore increased her costs unnecessarily.

The husband in reply submitted that (a) there had been no need for her to consult her legal adviser in order to obtain contact details for the child under his care over Christmas, as he had been willing to give her such details; and (b) there should be no order for costs as his conduct had not been such as to warrant the court burdening him with the whole of the costs of the divorce.

Held, awarding costs as follows:

The wife would be ordered to pay her own costs of the divorce petition, save that the husband would be ordered to pay her costs of, and occasioned by, the amendment to the petition resulting from his late filing of an answer and cross-petition. He had clearly increased the costs unnecessarily by indicating that he would not contest the petition and then filing an answer and cross-petition at such a late date that no agreement could be reached on the amended petition. The husband would also be ordered to pay 50% of the wife's costs of the ancillary proceedings, since his returning to the matrimonial home and subsequent behaviour increased the costs further. The order was only for 50% because he could not be held responsible for the increase in the wife's costs caused by her attempting to obtain the contact details for their child over the Christmas of 2003, and the uncontested ancillary order was basically in the wife's favour, indicating that he had already made some concessions (paras. 10–12; para. 14).

S. Bullock for the petitioner;

E. Phillips for the respondent.

1 **SCHOFIELD, C.J.:** The parties have agreed some ancillary issues in this matter which have been incorporated into my order of March 19th, 2004. They have been unable to agree the question of costs and these are my orders thereon, made on the written submissions tendered by their counsel.

2 The petition for divorce, based on the respondent's unreasonable behaviour, was filed on June 13th, 2003, after a marriage which lasted over 16 years. There are three children of the union, the eldest being 16 years and the youngest 10. After service of the petition, Mr. Ellul wrote to Mr. Bullock on July 1st, 2003, in the following terms:

"I am instructed by Mr. Rocca, the respondent in the above matter, who has handed to me his wife's petition and other documents. My client will not be contesting the petition and I am enclosing his acknowledgement of service duly signed by him.

He has left the matrimonial home and agrees not to return without his wife's consent. He wishes to have joint custody of the children with his wife and to have flexible access to them by arrangement with his wife. He is paying them £100 per week maintenance and

proposes to continue with such maintenance, which is all he can afford on his very low wages. I understand your client is on legal aid. My client will not be in a position to pay any legal costs.

If your client accepts the above terms, perhaps you might obtain a consent order at the hearing of the petition, in order to obviate the need to go back to chambers for this. If she does not, please adjourn the ancillary matters to chambers and serve me in due course with her summons and affidavit in support.”

3 One could have expected from that communication a steady course towards an uncontested divorce, but it was not to be. On August 1st, 2003, the respondent returned to the matrimonial home without the petitioner’s consent. He refused to leave and the petitioner had to move out. On August 5th, she obtained ouster and non-molestation orders from the magistrates’ court. From August 1st, 2003, the respondent failed to pay the maintenance he had agreed to pay and so the petitioner had to lodge a further complaint in the magistrates’ court, which was not heard until October 7th. By that date, the parties’ second child had moved over from the petitioner to the respondent and so the Stipendiary Magistrate ordered the respondent to pay maintenance in the sum of £60 per week, instead of the £100 per week he had offered in his letter of July 1st, 2003. This order was incorporated in an interim order I made on October 24th, 2003, which was the date set down for the uncontested divorce.

4 By October 24th, 2003, the respondent had changed legal representatives and had, on the day fixed for the uncontested hearing, filed an answer and cross-petition. As a result of an indication from the court, the parties entered into discussions and the matter was stood down. I refused to let in the respondent’s answer and cross-petition and discussions between the parties led to the filing of an amended petition by the petitioner from which is deleted some of the allegations of unreasonable behaviour on the part of the respondent. On that basis, the *decree nisi* was granted, uncontested.

5 The child in the care of the respondent was taken by him to England for Christmas 2003. The petitioner claims that this was without her consent and that she was not told of the address at which the child would be staying until she threatened further court action. All this, she claims, increased the costs. The respondent, on the other hand, claims that the child wanted to spend Christmas in England and that he willingly gave the petitioner the child’s contact address and telephone number, and that there was no need for the petitioner to consult her legal adviser on the matter.

6 Matters progressed to the entering of an order by consent on March 19th, 2004, which gives the petitioner sole custody, care and control of

the three children, refers the question of access to the children to the Social Services Department, provides for the transfer of the tenancy of the former matrimonial home to the petitioner, requires the respondent to pay arrears of rent, and also requires him to transfer disability and married person's allowance to the petitioner.

7 What is still left in the air is the amount of maintenance to be paid. I am asked by counsel to the parties to make an order in respect of the payment of costs thus far incurred, which, as I understand it, will assist them to come to a settlement of the remaining issues. The petitioner claims that the respondent's conduct over the proceedings has increased her costs unnecessarily and that she should be given the whole of the costs. The respondent says that there should be no order for costs because his conduct has not been such as to warrant the court burdening him with the whole of the costs of this divorce.

8 Mr. Bullock, for the petitioner, has split his application for costs into two, the first being the costs of the petition and the second being the costs of the ancillary proceedings.

9 I have been referred to various authorities, some of which assist, but some of which are not relevant to a case such as this. I do not consider that I need to review them. I think both parties agree that in litigation such as this, I should take into consideration their conduct in pursuit of it and throw it into the balance, particularly if one side or the other is guilty of increasing the costs thereof.

10 So far as the costs of the petition are concerned, there is no doubt that the conduct of the respondent in filing an answer and cross-petition and contesting certain parts of the petitioner's grounds at the eleventh hour, particularly when he had indicated, after taking legal advice, that he was not contesting the divorce, increased the costs of this action. Having received Mr. Ellul's letter of July 1st, 2003, the petitioner was fully entitled to proceed to fix a hearing of the uncontested petition. An earlier indication from the respondent that he disagreed with some of the allegations of unreasonable behaviour would undoubtedly have resulted in the agreement which was ultimately reached, that the petition be amended. That early indication would have avoided any adjournment of the hearing of the petition. I have already ordered the respondent to pay the costs of, and occasioned by, the amended petition. This, in my view, meets the justice of the costs situation on the divorce petition.

11 So far as the costs of the ancillary proceedings are concerned, it is clear that by re-entering the matrimonial home and refusing to leave until the petitioner obtained orders in the magistrates' court, and that by thereafter failing to fulfil his obligations to pay maintenance, the respondent increased the costs of this litigation. However, Mr. Bullock

tells me that the costs in the magistrates' court, amounting to something like £600, may be irrecoverable. I shall make my decision on the basis that the petitioner will not seek to recover those costs, which, if they were recoverable, ought to have been paid by the respondent.

12 It is impossible for me, on the material I have, to lay the blame for the costs involved in obtaining the contact details of the child over the Christmas 2003 period, at the door of the respondent. Furthermore, he has agreed some of the terms of the ancillary order. However, the order of March 19th, 2004, is basically in the petitioner's favour, which is some indication that concessions had to be drawn from the respondent. The indications that he would seek to avoid confrontation, and the offer of weekly maintenance, have not been completely fulfilled. In all the circumstances, I consider the respondent should pay 50% of the petitioner's costs of the ancillary proceedings.

13 The petitioner seeks the handing over of a car, on which she claims to have made payments, as security for the costs, but I can see no justification for that.

14 The upshot is that I order the petitioner to pay her own costs of the divorce petition, save that the respondent will pay her costs of, and occasioned by, the amendment to the petition filed on November 7th, 2003. The respondent will pay 50% of the petitioner's costs of the ancillary proceedings. These costs will be taxed, if not agreed.

Order accordingly.
