

[2005–06 Gib LR 270]

GRACIA v. GRACIA

SUPREME COURT (Dudley, A.J.): August 3rd, 2006

Family Law—financial provision—costs—normally follow event and each party pays own costs if consensus between parties or neither party clearly successful on specific issues

Family Law—financial provision—security for payments—court may secure husband’s payments on his taxi licence if unreliable in making maintenance payments to family

The petitioner, who was legally assisted, applied for costs in respect of her divorce petition, later injunctive relief against her husband (the respondent), the hearings of ancillary matters and subsequent applications concerning the mode of dealing with costs.

The wife had succeeded in her divorce petition and successfully obtained an injunction excluding the husband from the family home, and preventing his causing further damage there. She had the custody of the children, who were apprehensive about their father’s violence if they shared the home with him. The parties embarked upon a mediation, as a result of which the wife would have obtained very little but the husband did not in fact seek a consent order in those terms. In due course, he modified his position and offered her the right to return to the family home, though she remained concerned about her ability to sustain it, given the husband’s unreliability in making maintenance payments. He was a taxi driver and derived his income from that trade, his taxi licence being one of his most valuable assets.

Held, making the following orders:

(1) The petitioner was the successful party in respect of the divorce petition and the later injunctive relief, and costs would follow the event. The respondent would be ordered to pay the petitioner’s legal assistance costs in these matters (para. 4).

(2) The ancillary matters concerning the children were largely agreed and each party should bear his or her own costs. Those concerning financial matters were settled by the husband’s agreeing to make regular maintenance payments, which the court secured on his taxi licence, and giving undertakings not to enter the family home. The court broadly approved that division, and as there was no obviously successful party on these issues, each should bear his or her own costs (paras. 5–9).

(3) The petitioner's costs would be the subject of legal assistance taxation with the petitioner's contribution to the Consolidated Fund being assessed at nil (para. 10).

Legislation construed:

Legal Aid and Assistance Ordinance (1984 Edition), s.17:

“(1) A court may make an order for costs in favour of or against a person receiving legal assistance in the same manner and to the same extent as it may make an order for costs in favour of or against any other person . . .

(4) Where a sum in respect of costs is paid out of the Consolidated Fund in accordance with the provisions of this section, there shall be payable to the Consolidated Fund by the assisted person against whom the order for costs was made such sum, or such lesser amount as may have been assessed as the limit of liability of such assisted person in accordance with rules made under section 19.”

Legal Aid and Assistance Rules (1984 Edition), r.26:

“(1) Where an order for costs is made against an assisted person, the determination of the amount of his liability for costs shall be made at the trial or hearing of the action, cause or matter:

Provided that the court may, if it thinks it expedient in the interests of justice and upon such terms, if any, as it thinks fit—

(a) postpone or adjourn the determination for such time and to such place, including chambers, as the court thinks fit, so however that the determination shall take place before the judge before whom the trial or hearing took place . . .

(2) The court may direct—

(a) that payment under the order for costs shall be limited to such amount, payable by instalments or otherwise, as the court thinks reasonable having regard to all the circumstances; or

(b) that payment under the order for costs be suspended either until such date as the court may determine or sine die, where the court thinks it reasonable either for payment under paragraph (a) not to be made immediately, or for the assisted person to have no liability for payment.”

Ms. J. Evans for the petitioner;

C. Gomez for the respondent.

1 **DUDLEY, A.J.:** Following the grant of the decree nisi, I ruled on the ancillary matters on March 21st, 2006. The issue of costs was adjourned to a date to be fixed by the registry. Following further applications on

June 5th and July 3rd, counsel asked that I deal with the costs of the action without an oral hearing but on the basis of written submissions.

2 The rule when dealing with costs in the divorce and matrimonial jurisdiction is that applicable in civil actions, namely that costs follow the event. The petitioner is legally assisted.

3 In the present case, the question of costs needs to be considered in the context of broadly four distinct issues which have fallen for determination:

- (a) The substantive petition.
- (b) The injunctive relief granted on April 12th, 2006, and subsequent applications in respect thereof.
- (c) The ancillaries.
- (d) The hearings of June 5th and July 3rd.

4 As regards the divorce petition and the injunctive relief, it is apparent that the petitioner was the successful party on these matters and therefore right that the respondent pay her legal assistance costs in respect thereof.

5 As regards the ancillaries, the issues relating to the children of marriage and the financial matters need to be considered separately. As regards the custody, care and control of and access to the children, there was a degree of consensus between the parties such that in so far as those issues are concerned an order that each party bear its own costs is appropriate.

6 As regards the financial matters, the issues are somewhat more complicated. At an early stage of the proceedings, the parties embarked upon a process of mediation, the result of which was that the petitioner would have obtained very little. Surprisingly, the respondent refused to enter a consent order on those terms. When the matter came before me, I was certainly concerned that the terms of the “agreement” following mediation failed to take account of the needs of the children who would be staying with the petitioner.

7 In due course, when the matter came for hearing, the respondent had tempered his position and at that stage offered that the petitioner return to and keep the former matrimonial home whilst he would retain the taxi licence. Whilst in essence that is how I distributed the assets, it is fair to say that the petitioner had good reason for not wanting the matrimonial home—in that the children were worried about the respondent’s potential behaviour should they return to the home, whilst she was concerned that she would not be able to keep the property partly given the respondent’s erratic payment of maintenance.

8 The terms of my order were such that the payment of maintenance was secured on the taxi licence and the respondent gave certain

undertakings not to enter upon the property. There was therefore no obvious successful party on the financial issues. In the circumstances, the proper order in that regard is that each party bear its own costs.

9 Subsequent to my orders of March 21st, the petitioner had to come back to court to seek further relief in the context of matters which had been agreed in November 2005 and which were not live when I dealt with the ancillaries, and in respect of alleged damage to the matrimonial home. The respondent did not substantively oppose the relief sought. Therefore the petitioner is to have the costs of the applications of June 5th and July 3rd, 2006.

10 As I indicated before, the petitioner is legally assisted and therefore, by virtue of s.17(4) as read with r.26 of the Legal Aid and Assistance Rules, it is incumbent upon me to determine the extent of her liability *vis-à-vis* the Consolidated Fund. I take the view that had it not been for my reluctance to approve the settlement arising from the mediation, the petitioner might well have settled the matter and the costs of the hearing on the ancillaries would not have been incurred by her. Taking account of that factor and also of the petitioner's limited financial means, I determine her liability to the Consolidated Fund as nil.

11 The upshot of the foregoing is that I make the following orders:

- (a) The respondent pay the petitioner's costs of the petition, the application for injunctive relief and consequential applications and the applications heard on June 5th and July 3rd, 2006.
- (b) Each party bear its own costs in respect of all other matters.
- (c) The petitioner's costs be the subject of legal assistance taxation with the petitioner's contribution to the Consolidated Fund being assessed at nil.

Order accordingly.
