

1 **IN THE MATTER OF THE GRAND COURT**
2 **HOLDEN AT GEORGE TOWN, GRAND CAYMAN**

3

4

CAUSE NO. D66 OF 2008

5

6 **BETWEEN: THOMAS MARTIN DEWITT**

7

PETITIONER

8

9 **AND: EDNA VANDEEN DEWITT**

10

RESPONDENT

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12 **Appearances: Mr. Philip Boni of Higgs & Johnson**
13 **for the Petitioner**

14

15 **Ms. Vanessa Allard of Brooks & Brooks**
16 **for the Respondent**

17

18 **Before: Hon. Justice Henderson**

19

20 **Heard: May 3, 2011**

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JUDGMENT

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24 1. In this matrimonial cause, the Petitioner Thomas Martin Dewitt passed away in
25 January 2011 during the course of the proceeding. The applicants before me now
26 are the executors of Mr. Dewitt's will. I have already granted an order of probate

1 and directed those executors to file an inventory within six months. The applicant
2 executors now seek an order confirming that certain matrimonial assets which
3 were the subject of evidence and argument during the proceeding have fallen into
4 the deceased's estate.

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6 2. The procedural history is relevant. The petition was filed in May 2008. It alleges
7 that the marriage has broken down irretrievably due to unreasonable behaviour by
8 Mrs. Dewitt. An answer and cross-petition were filed on her behalf. The answer
9 denies the allegations of fact set out in the petition. The cross-petition alleges that
10 the marriage has indeed broken down irretrievably, but that has occurred because
11 of the unreasonable behaviour of Mr. Dewitt. The Petitioner has filed a reply. It
12 denies the allegations of fact in the cross-petition.

13

14 3. Thus both parties are agreed upon the conclusion of law which the Court should
15 arrive at - that the marriage has broken down irretrievably. However, there is no
16 agreement at all upon the truth or falsity of the various allegations of fact
17 asserting unreasonable behaviour which might enable the Court to arrive at a
18 conclusion that the marriage has indeed broken down irretrievably.

19

20 4. On September 10, 2009 a Judge of this court signed a consent order that: "the
21 petition and cross-petition proceed by way of mutual petitions."

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2 5. A certain amount of financial disclosure was made. Mr. Dewitt then took out a
3 summons asking this Court to make a final disposition of the ancillary issues. I
4 began to hear that application on March 24th 2010. In my written judgment of
5 May 20, 2010, I determined which assets were matrimonial assets. Some were
6 not. I determined that the division of property should proceed on an asset-by-asset
7 basis. I determined the value of a number of assets and I awarded some assets to
8 one party or the other.

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10 6. However, my task was not completed. I was not satisfied with the adequacy of the
11 disclosure with respect to certain of the assets. I ordered the parties to obtain
12 additional evidence of value regarding the business known as Sea Beauty, a
13 jewelry business, and of certain shares and chattels including paintings in the
14 matrimonial home. No further hearing has been held.

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16 7. I have now settled the order of May 20, 2010 as my jurisdiction to do that cannot
17 be affected by the untimely death of the petitioner.

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1 The Position of the Parties

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3 8. The executors of Mr. Dewitt say that I should now consider the fresh evidence
4 which has been presented and proceed to make a final order effecting the division
5 of assets. Mr. Dewitt's share of the matrimonial assets would then be distributed
6 under the law of Probate in accordance with his will. Mrs. Dewitt says that I have
7 no jurisdiction to make further orders in the matrimonial cause in light of Mr.
8 Dewitt's death.

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10 Analysis

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12 9. Our *Matrimonial Causes Law* differs from that of England and Wales. We do not
13 issue *Decrees Nisi* in this jurisdiction. A Decree of Dissolution is pronounced
14 under s.10 of the *Matrimonial Causes Law* (2005 Revision) which reads, in its
15 material part:

16 "10. (1) A decree of dissolution of marriage may be pronounced by the
17 Court in respect of a marriage on the ground that since
18 the celebration of the marriage- ...

19
20 (b) the respondent has behaved in such a way that the petitioner
21 cannot reasonably be expected to live with the respondent; ...

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23 if the Court, after inquiring so far as it can into the facts of the
24 case, is satisfied that-

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- (i) the grounds for the petition have been established;
- (ii) the marriage has broken down irretrievably; and
- (iii) no material impediment under this Law exists to the pronouncement of the decree."

10. The section requires that a decree be pronounced only after the Court has inquired "so far as it can into the facts of the case." The Court must be "satisfied that the grounds for the petition have been established." A conclusion that the marriage has broken down irretrievably is not by itself sufficient to support a decree.

11. Mr. Boni argues that the order that "the petition and cross petition proceed by way of mutual petitions" is intended to be a final determination that the grounds for divorce have been proved to the required standard. I cannot read the order that way. The order says nothing about whether the allegations in the petition or, alternatively, in the cross-petition have been established. They are mutually inconsistent so it cannot be the case that both the petition and the cross-petition have been proved. If the order was intended to show that certain allegations of fact have been established to the satisfaction of the Court more specific language would have been used. This order is merely an interlocutory procedural order confirming that both petition and cross-petition may be heard at a single hearing.

1 12. I am required to postpone the pronouncement of any Decree of Dissolution until
2 all ancillary issues have been disposed of.

3

4 13. I refer to s. 12(5) of the *Matrimonial Causes Law* which reads:

5 "12.(5) The Court shall postpone pronouncement of a decree under subsections
6 (2) to (4) until it is satisfied that provision has been made for the custody
7 and care of all the children of the marriage and that no application for any
8 order for-

9 (a) settlement of marital property;

10 (b) financial provision; ... remains outstanding."

11 14. Secondly, I refer to s.21 of the same *Law* which reads:

12 "21. At the time of pronouncing a decree under this Law, the Court
13 shall, as appropriate, make orders for- ...

14 (b) the disposition of matrimonial property, including
15 the matrimonial home;"

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18 15. I emphasize the words "at the time of pronouncing a decree." The effect of s. 21 is
19 that at the time of pronouncing the Decree, I must also make the final order of
20 disposition of the matrimonial property. This was recognized by Taylor, J.A. in
21 *Wight v Wight* 2006 CILR 416, when he said:

22 "The Matrimonial Causes Law (2005 Revision) provides only for a
23 single, and thus final, Decree of Dissolution of marriage. This may,

1 under s.12(5), be granted only when provision has been made for
2 all ancillary matters, including the settlement of matrimonial property
3 and other financial arrangements, as well as care and custody of
4 children, and when no application for any order in respect of such
5 matter remains outstanding. The practice is for the court first to
6 determine whether the facts alleged in support of the petition for
7 dissolution have been established, which is usually done by
8 affidavit, and thereafter, when an order has been made that
9 these have been proved, to deal with any ancillary matters. Only
10 after orders have been made disposing of the ancillary matters
11 is a Decree of Dissolution of marriage granted. Until the Decree
12 of Dissolution is granted, any order disposing of matrimonial
13 assets is without effect, since the marriage remains until then in
14 effect and could, indeed, be terminated by death, in which
15 case a different disposition of the matrimonial property might
16 take effect."

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18 16. Although the passage may be, as Mr. Boni argues, *obiter*, I respectfully agree
19 with Taylor, JA. A suit for divorce is a personal action. At common law, such an
20 action is abated upon the death of a plaintiff or petitioner. Even in the United
21 Kingdom, where the rule of automatic abatement upon death has been superseded
22 by statute, a claim for a division of matrimonial property cannot survive the death
23 of either party.

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25 17. I refer to the 5th Edition of *Halsbury's*, volume 73, para 684. The body of that
26 paragraph starts off by mentioning the general rule that proceedings abate where
27 one of the parties dies and then says that in light of English legislation there are
28 three considerations involved in determining which, if any, aspects of the

1 proceeding may nevertheless survive the death. The third of those three questions
2 which must be considered is:

3 "(3) the applicability of the statutory provisions which abolished
4 the common law rule that personal actions died with the person."

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6 18. That consideration is explained in detail in footnote 4 which reads, in part:

7 "4. A right to apply for financial provision in family proceedings is
8 not a cause of action within the meaning of the Law Reform
9 (Miscellaneous Provisions) Act 1934. (see WILLS AND INTESTACY
10 vol 103 (2010) para 1279); if, therefore, either party dies before an
11 application for financial provision or a property adjustment order
12 has been determined, the court's jurisdiction will lapse: see
13 *Dipple v Dipple* [1942] P 65, [1942] 1 All ER 234, HL (wife's right
14 to apply for secured maintenance did not survive the husband's death);
15 *D'Este v D'Este* [1973] Fam 55, sub nom *D(J) D(S)* [1973] 1 All ER 349
16 (no jurisdiction to entertain an application by the husband's
17 personal representatives against the wife for variation of a
18 post-nuptial settlement). See also *Thomson v Thomson and Rodschinka*
19 [1896] P 263, CA (no jurisdiction to entertain an application by the
20 personal representatives of the husband to vary a post-nuptial settlement).
21 In *Re Bramwell, Campbell v Tobin*, [1988] 2 FLR 263 at 267, Sheldon J
22 stated: "In these circumstances, in my judgment, it is clear -- as
23 has been recognised and acknowledged without recorded dissent for over
24 40 years -- that in matrimonial proceedings a claim for financial provision
25 neither gives rise to nor becomes a 'cause of action' within [the Law
26 Reform (Miscellaneous Provisions) Act 1934 s 1(1)] unless an order has
27 been made in respect of it before the death of the deceased: until such an
28 order has been made, therefore, it remains a mere hope or contingency
29 which survives neither against nor for the benefit of the deceased's estate."

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32 19. In *Mosey v Mosey and Barker* [1956] P 26, a wife was the beneficiary of an order
33 awarding to her £300 per annum "to be secured on part of the husband's real

1 property, that part to be selected if agreement has not been reached between the
2 parties by the Registrar". The order was held to create an enforceable claim
3 against the husband's assets after his death. However, the marriage had already
4 been dissolved and the case must be distinguished on that basis.

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6 20. In the case at bar, the parties remained married at the date of Mr. Dewitt's death. It
7 cannot be said that a Decree of Dissolution based on the petition or upon the
8 cross-petition was inevitable. A finding that the alleged behaviour did in fact
9 occur and a judicial conclusion that the proved behaviour was reasonable had yet
10 to be made. The ruling awarding to Mr. Dewitt certain of the matrimonial assets,
11 including a share in the matrimonial home, was a provisional ruling which could
12 only be perfected by a Decree of Dissolution. Until such a decree was
13 pronounced, any interest he could be said to have in those assets was no more
14 than an expectation which was conditional upon one party or the other proving his
15 or her grounds of divorce to the satisfaction of the Court.

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17 21. It is also true that I have no jurisdiction now to consider the fresh evidence which
18 has been presented, and I have no jurisdiction to make any order effecting a
19 division of assets or to grant a Decree of Dissolution.

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1 22. I have not overlooked the submission that Mrs. Dewitt is in contempt of my
2 earlier disclosure order. Assuming (without deciding) that that is so, it cannot
3 have any effect upon the present ruling. Mrs. Dewitt is not the applicant. She does
4 not find herself in the position of a suitor who seeks the assistance of this Court
5 while persisting in flouting a prior order. She cannot be deprived of the benefit of
6 this ruling through her earlier failure to make proper disclosure: see *Baker v*
7 *Baker (No 2)* [1997] 2 FCR 249.

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9 23. For these reasons I make an order declaring that the ownership of assets possessed
10 by Mr. and Mrs. Dewitt has not been altered or affected by this matrimonial
11 proceeding, which is now dismissed as abated.

12 Dated this 3rd day of May, 2011

13

14 Henderson, J.
15 Judge of the Grand Court

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