COMMONWEALTH OF THE BAHAMAS **2021**

IN THE SUPREME COURT **FAM/div/00524**

FAMILY DIVISION

BETWEEN

N.L.A. nee B.

Petitioner

AND

W.B.A.

Respondent

Before: **The Hon. Madame Justice J. Denise Lewis-Johnson MBE**

Appearances: Alexander Maillis of Counsel for the Petitioner

Lillith Smith-Mackey of Counsel for the Respondent

Hearing Dates: 25th June 2025; 2nd & 14th July 2025; 5th August 2025; 7th August 2025

Divorce - Family Law – Ancillary Relief – Hearsay Evidence – Whether hearsay evidence should be struck out – Whether any exceptions to hearsay rule applies – Inadmissibility - Whether the purported rental receipt should be deemed inadmissible

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RULING

Background

1. N.L.A ("the Petitioner") and W.B.A ("the Respondent") were married on 2nd September 1989. The marriage produced five children, A.A.A a female born on 2nd March 1990, O.O.A, a female born on 8th March 1993, N.B.A, a female born on 10th February 1994,

and twins W.B.A Jr. and W.B.A, both males born on 6th September 2002, all of whom are sui juris.

2. The Petitioner was granted a Decree Nisi on 21st March 2023 on the ground that since the celebration of the marriage the Respondent treated her with cruelty. A Notice of Intention to Proceed with Ancillary Relief and an Affidavit of Means were filed by the Respondent on 10th May 2024. The Respondent filed a Supplemental Affidavit on 30th January 2025. Shortly thereafter, the Petitioner filed an Affidavit of Means on 14th February 2025. A Third Affidavit was filed by the Respondent on 6th May 2025 in response to the Petitioner's Affidavit of Means.

3. During the trial of Ancillary matters, a dispute arose as to the admissibility of certain evidence.

4. On 14th July 2025, the court asked both Counsel to lay over submissions on the respective issues of admissibility of evidence and the hearsay rules. Submissions were laid over by Counsel for the Petitioner on 5th August 2025 and Counsel for the Respondent on 7th August 2025.

5. The statements made by the Respondent in his Affidavit of Means filed on 10th May 2024 and which are the subject of this application is specified below:

> *"25. Since vacating the matrimonial home, the Petitioner has collected all of the rental income notwithstanding me asking her to share the rental proceeds. I am currently unaware what is collected by the Petitioner monthly, however* ***I have been told by the children of the marriage that the Petitioner has allowed the premises to become unkept. I have been contacted by the Department of Environmental Health regarding the state of the premises.*** *"*
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> *"31. In addition to the Wulff Road property, the Department of Environmental Health has contacted me regarding the appearance and the condition of the property.* ***I know for sure that some of the complaints may have been lodged by some of the previous tenants who informed me that they would report the state of the property to the Department of Environmental Health.*** *"*
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> *"34. The Petitioner has become so out of touch with our adult children, she informed them that if they wanted to reside on the premises they must pay a rent.* ***The children have expressed to me that they have been constantly harassed by the Petitioner threatening to evict them from the home.*** *"*

6. The purported rental receipt exhibited in the Respondent's Affidavit of Means as "WBA-9" is disputed by the Petitioner as to its admissibility in these proceedings.

The Petitioner's Submissions

7. Counsel for the Petitioner submits that the Civil Procedure Rules (2022) does not apply to matrimonial matters. Order 41 (5) and (6) of the Rules of the Supreme Court of England (1978) ("the RSC") applies which states:

> "5. (1) Subject to Order 14, rules 2(2) and 4(2) , to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.
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> (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.
>
> 6. The Court may order to be struck out of any affidavit any matter which is scandalous irrelevant or otherwise oppressive." (My emphasis)

8. Unless there is an exception to the hearsay rule, generally hearsay evidence is prohibited, see section 39 of the Evidence Act, Ch. 65. It is the Petitioner's submissions that the hearsay exceptions do not apply to the instant matter. Further, there has been no order made introducing any particular fact into evidence which would *"invoke the protection of Order 38 Rule 3 of the Rules of the Supreme Court."*

9. Similarly, as this is not a Summary Judgment matter, Order 14 rules 2(2) and 4(2) which were indicated at Order 41 Rule 5 of the Rules of the Supreme Court of England (1978) do not apply.

10. The Petitioner further submits that the exception to the hearsay rule is not available to the Respondent, even though the statements which the Petitioner considers ("offending statements") contains information to some extent with the grounds there because the matter is not an interlocutory proceeding.

11. It is clear that the offending statements made by the Respondent are hearsay which do not contain facts which he can prove. The statements include information that he states were made by his children, tenants and/ or members of the Department of Public Health. None of those persons are witnesses that have sworn an affidavit in this matter or are available to be cross examined to test their credibility. Further, there has been no Notice filed to adduce hearsay evidence. It is the Petitioner's submission that to permit such evidence would be considered oppressive and scandalous.

12. The offending statements were made only to question the Petitioner's character which Counsel submits is in violation of Order 41, Rule 5 and 6 of the RSC.

13. Counsel submits that the proper foundation must be laid prior to a document being allowed into evidence. The Petitioner states at paragraph 21 of the submissions that *"The*

document exhibited at WBA-9 contains no visible indication of authorship – no signature or name of the maker, against whom the veracity or intent of the document can be tested. No leave of the Court to produce it was obtained by the Respondent, and none of the criteria being prerequisites set out in Section 60 apply here. Moreover, the document termed a "rental receipt" by the Respondent but without there being any foundation – no indication of the purpose behind the recorded payments being "Rent" on the face of a document itself and CANNOT therefore in our humble submissions, be admissible as "evidence of any fact stated therein."

14. The Petitioner submits that the offending statements be struck from the record and that Exhibit WBA-9 be declared inadmissible.

The Respondent's submissions

15. Counsel for the Respondent submits that the statements made by the Respondent were for the purpose of establishing his state of mind, concerns and basis for action taken in relation to the matrimonial home and not for the truth of its contents.

16. Counsel is of the view that the statements made by the Respondent were as a result of conversations held directly with his adult children and former tenants. It is Counsel's submissions that the statements were not given as proof of criminal, regulatory findings, or evidence from third parties.

17. In accordance with r. 25 of the MCR, affidavit evidence is admissible. This evidence is admissible to prove particular facts, inclusive of facts grounded on belief and information and sources where applicable.

18. Further, the Court can order under r. 25(3) of the MCR for witnesses to be examined to test their credibility. The Petitioner has not had the opportunity to be examined in court.

19. The hearsay exceptions do not apply to interlocutory proceedings. This matter is a final hearing.

20. The court has the power to decide pursuant to r. 25 (1)(c) and (d) whether to admit the statements on belief and determine weight at the hearing. Exclusion of the both the statements and the rental receipt is unwarranted and may indicate prejudice.

21. Counsel for the Petitioner stated at paragraph 7 of her submissions *"Furthermore, the Court retains the liberty to call the children to give evidence directly should it consider their testimony material and necessary to the fair determination of the issues. The Respondent notes that the children are now adults and therefore there is no issue as to their competence or capacity to give direct evidence. This reinforces the reliability and admissibility of the statements attributed to them. This ensures procedural fairness and transparency in the fact-finding process."*

22. It is further submitted by the Respondent that the statements are not scandalous, vexatious or oppressive. The statements refer to the dynamics between the Petitioner and the Respondent and issues concerning the maintenance, use and condition of the matrimonial property.

23. There has been no attempt made to present third party hearsay as proof of fact. If the Petitioner wishes to challenge the Respondent's credibility on cross examination, she is free to do so.

24. Section 60 of the Evidence Act allows documents where

    (i) The information contained therein is derived from a person under a duty to record it;
    (ii) The document supports facts material to the case; and
    (iii) The court grants leave and the witness responsible for the content can be examined.

25. In the present matter, the document is being produced to demonstrate that payments described as rent were made at the time when the Petitioner was supposed to be making payments to The Department of Inland Revenue towards the taxes. Additionally, the Respondent was not consulted prior to the Petitioner asking the children of the marriage to pay rent. It is Counsel's submission that document can be tested in court during oral evidence. If the court wishes for the children to be called to verify the evidence, arrangements can be made for them to do so.

26. The Petitioner has not established that the Respondent was mandated to obtain leave of the court under s. 60(2)(a) or (b). Counsel submits at paragraph 13 of the submissions that *"The absence of a signature is not fatal to admissibility. The document is part of a factual narrative about financial contributions and rental arrangements, and forms part of the Respondent's account of events. This rental receipt also assists the Respondent's case regarding the Petitioner's conduct during the marriage, particularly with respect to the collection of rent and the distribution of those funds."*

27. In relation to hearsay rule, Counsel is of the view that the statements are exceptions to the rule as it falls within section 39(2) of the Evidence Act. The court should consider if any part of the affidavit is oppressive or irrelevant to allow it to be completely redacted. *"The Respondent maintains that none of the challenged content meets that threshold as its very nature relates to the Petitioner's conduct during and after the breakdown of the marriage."*

Issues

28. The issues for the court's consideration are:

i. Whether the statements made by the Respondent at paragraphs 25, 31 and 34 in his Affidavit of Means are deemed hearsay and ought to be struck from the record?
ii. Whether the rental receipt exhibited at "WBA-9" of the Respondent's Affidavit should be declared inadmissible?

The Law

29. The jurisdiction of the court in matrimonial matters is stated under Section 14 of the Supreme Court Act, Ch. 53 ("the Act"). Section 15 (a) of the Act gives the court power to exercise its jurisdiction. These sections provide:

> "14. (1) The Court shall have such jurisdiction in relation to matrimonial causes and matters as is vested in it by the Matrimonial Causes Act or any other law.
>
> 15. The jurisdiction vested in the Court shall so far as regards procedure and practice, be exercised — (a) in the manner provided by this Act or by rules of court;"

30. In accordance with s. 25 of the Matrimonial Causes Rules, Ch. 125 ("the MCR"):

> "25. (1) Subject to the provisions of the Supreme Court Act, and of the Act and this rule, the witnesses at the trial of any matrimonial cause shall be examined viva voce and in open court:
>
> Provided that the judge or the Registrar may —
> (a) subject to the provisions of paragraph (2) of this rule, order that any particular facts to be specified in the order may be proved by affidavit;
> (b) order that the affidavit of any witness may be read at the trial on such conditions as the judge or the Registrar may think reasonable;
> (c) order that evidence of any particular facts to be specified in the order shall be given at the trial by statement on oath of information and belief, or by production of documents, or entries in books, or by copies of documents, or entries, or otherwise as the judge or the Registrar may direct; and
> (d) order that not more than a specified number of expert witnesses may be called.
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> (2) Where it appears to the judge or the Registrar that any party reasonably desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit, but the expenses of such witness at the trial shall be specially reserved.
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> (3) Any party may apply for the appointment of an examiner or for a commission or for letters of request to examine a party or witness in any cause, and for leave to give the depositions taken on the examination in evidence at the trial and the

provisions of Rules 6 to 25 of Order 37 of the Rules of the Supreme Court of England shall apply to the examination, save that in rule 16 of the said Order there shall be substituted for the reference to the Central Office a reference to the Registry.

(4) Nothing in any order made under this rule shall affect the power of the judge at the trial to refuse to admit evidence tendered in accordance with the order if in the interests of justice he should think fit to do so."

31. Further, section 68 of the MCR states at:

"68. Subject to the provisions of these Rules and of any enactment, the Rules of the Supreme Court of England shall notwithstanding the provisions of rule 1(3) of Order 1 thereof, apply with the necessary modifications to the practice and procedure in any cause or matter to which these Rules apply."

32. Section 39 of the Evidence Act, Ch. 65 outlines the exceptions to the hearsay rule. This section reads:

"39. (1) Subject to subsection (2) and to this Act, hearsay evidence shall not be admitted in evidence.

(2) Hearsay evidence may be admitted —

(a) where the statement is a necessary part of any fact or transaction which is being investigated by the court;

(b) where the knowledge, intention, motive, state of feeling, state of mind or state of body of any person is a fact in issue and the statement proves or disproves the said knowledge, intention, motive, state of feeling, state of mind or state of body;

(c) where the statement is an admission or confession made by or to the prejudice of the party against whom it is sought to be proved but subject to the provisions of sections 14 to 19;

(d) where the statement was made in the presence and in the hearing of the person against whom the evidence is tendered, and where such person had an opportunity of replying to such statement;

(e) where the statement is contained in any official record, book or register, kept for the information of the Crown or for public reference and was made as the result of inquiry by a public servant in discharge of a duty enjoined by the law of the country in which such official record, book or register is kept;

(f) where the statement was made by a person since dead as to the cause of his death or as to any of the circumstances of the transaction resulting in his death in cases in which the person's death is the subject of a criminal charge:...."

33. The admissibility of certain records as evidence of facts is captured under s. 60 of the Evidence Act. This section provides:

"60. (1) Without prejudice to section 61, in any civil proceedings a statement contained in a document shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if the document is, or forms part of, a record compiled by a person acting under a duty from information which was supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information and which, if not supplied by that person to the compiler of the record directly, was supplied by him to the compiler of the record indirectly through one or more intermediaries each acting under a duty; and applies also where the person compiling the record is himself the person by whom the information is supplied.

(2) Where in any civil proceedings a party desiring to give a statement in evidence by virtue of this section has called or intends to call as a witness in the proceedings the person who originally supplied the information from which the record containing the statement was compiled, the statement —

(a) shall not be given in evidence by virtue of this section on behalf of that party without the leave of the court; and
(b) without prejudice to paragraph (a) shall not without the leave of the court be given in evidence by virtue of this section on behalf of that party before the conclusion of the examination-in-chief of the person who originally supplied the said information.

(3) Any reference in this section to a person acting under a duty includes a reference to a person acting in the course of any trade, business, profession or other occupation in which he is engaged or employed or for the purposes of any paid or unpaid office held by him."

Decision

34. The Court invited the Parties to consider the case of **Finethic Limited and in the Matter of a Winding-up Petition filed in relation to the said Finethic Limited etal (2022) 1BHS J No 179** as to the evidentiary rules of hearsay.

35. Justice Loren Klein in the Finethic case while discussing hearsay evidence stated "The provision of those rules are almost too-well known to require repeating, but Ord. 41, r. 5 requires that an affidavit *"may only contain such facts as the deponent is able of his own knowledge to prove"*, although an affidavit for use in interlocutory proceedings may contain statements on information and belief with sources and grounds identified. Rule 6 permits the court to strike out of an affidavit any matter which is *"scandalous, irrelevant or otherwise oppressive."*

36. One of the exceptions to the hearsay rule is its use in interlocutory hearings, Klein J. further stated:

> "On the point of admissibility of the evidence, I start by pointing out the obvious that the hearing of an application for the appointment of provisional liquidators is not the hearing of the petition. It is an interlocutory application basically to preserve the status quo pending the determination of the winding up proceedings and therefore the provision of Ord. 41, r. 5(2) permitting the use of statements of belief with the sources identified are applicable. But even this exception is subject to clear limits. In *Savings & Investment Bank Ltd. v Gasco Investments (Netherlands) B.V and Others* [1984] 1 WLR 271, Peter Gibson J. said [282]:
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> *"Neither counsel has been able to cite any authority which elucidates the scope of what is or is not permitted by Ord. 41, r. 5(2). It is obvious from the sub-rule itself that it operates as an exception from the primary rule of evidence stated expressly in Ord. 41, r. 5(1), that a person may only give evidence as to facts, which he is able of his own knowledge to prove. Rule 5(2), by its including statements of information or belief, plainly allows the adduction of hearsay. It also allows a statement of belief, that is to say, an opinion; but in its context that belief must be that of the deponent, and such statements will have no probative value unless the sources and grounds of the information and belief are revealed. To my mind the purpose of r. 5(2) is to enable a deponent to put before the court in interlocutory proceedings, frequently in circumstances of great urgency, facts which he is not able of his own knowledge to prove but which, the deponent is informed and believes, can be proved by means which the deponent identified by specifying sources and grounds of his information and belief. What the sub-rule allows the deponent to state that he had obtained from another must, in my judgment, be limited to what is admissible as evidence." [Emphasis supplied.]*

37. In this trial, the Respondent is asking the court to rely on what he states, he was told and accept it as factual. He does not intend to call any witness or produce any document to corroborate this evidence, I find this to be a clear breach of the rules of evidence as stated above.

38. I accept the argument of the Petitioner that this is not a case of summary judgment, that the statements are hearsay, made by persons none of whom are witnesses and are not available for cross examination.

39. While the Court has jurisdiction to summon a witness to give evidence, this is not an occasion where it should be done. The adult children are competent witnesses and both parties failed to avail themselves of these witnesses.

40. Having considered the submissions of counsel and the applicable laws, I find as follows:

    1. The disputed statements in the Respondent's Affidavit at paragraphs 25, 31 and 34 are hearsay and should be struck from the record.

2. The Exhibit "WBA-9" of the Respondent's Affidavit is declared inadmissible.

Dated this 1st day of September, A.D. 2025

The Hon. Madam Justice J. Denise Lewis-Johnson MBE