

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. M. 03652 OF 2007

BETWEEN DESMOND BROOKS PETITIONER
AND DELORIS BROOKS RESPONDENT

Heard in Chambers February 22 and October 28, 2010

Mr. B. Frankson instructed by B.E. Frankson & Co for Applicant
Mr. G. Steer instructed by Chambers Bunny & Steer for the
Respondent

**Maintenance Act, sections 6, 8, 18; Application for
maintenance of wife and major child; whether
maintenance may be ordered for major child
attending tertiary institution where no order made
before child attained majority**

ANDERSON J:

1. This is an application by the wife (Respondent in the Divorce petition), "Mrs. Brooks", that her husband, Desmond Brooks ("Mr. Brooks") the Petitioner in this divorce suit, pay maintenance of \$50,000.00 per month to her for herself and her daughter, Desmarie Brooks, a child of the marriage born on the 30th day of October, 1990.
2. The applicant, in her affidavit, depones that she is a teacher who is in receipt of a net monthly income of \$74,177.00 and that after payment each month of \$25,000.00 on a bank loan, she is left with disposable income of just over \$49,000.00. On the other hand, she alleges that her husband, an Assistant Commandant in the Island Special Constabulary Force has a monthly income of \$130,000.00. She also states that the loan

she is repaying was taken out in order to finance tuition fees at the University of Technology for her daughter who has been a student at that institution since September 2008. She further averred that she believed that her husband's salary had now been increased to a sum in excess of \$170,000.00 per month, in light of a recent promotion.

3. It was also stated in her affidavit that in addition to their daughter's tuition fees, there is the need to cover the cost of her daughter's off-campus boarding of \$10,000.00 per month while she attends the University Of Technology, (UTECH) the cost of glasses and other expenses of a domestic and/or personal nature of approximately \$50,000.00 monthly. Importantly, she makes the point that in documents supplied in support of his petition for a decree nisi, he had stated in his affidavit accompanying his petition, that he had been contributing between \$7,000.00 to \$10,000.00 per month towards his daughter's maintenance and also contributed to her other expenses. It should be noted that at the time of his affidavit in November 2008, he had said that Desmarie was a student at Glenmuir High School and may be going to Sixth Form.
4. In his affidavit in response to that of the Applicant, Mr. Brooks acknowledges that he had in fact been promoted to Assistant Commandant and that his salary was now over \$218,900.00 per month. However, he claims that he is required to repay to his credit union a sum of \$100,000.00 in relation to a loan he had taken to pay his tuition. It is not revealed in his affidavit evidence, to what that tuition related. He further stated that,

because of the breakdown between himself, on the one hand, and the wife and daughter on the other, he had been unaware that Desmarie had entered UTECH and that neither Mrs. Brooks nor his daughter had advised him that she had applied to enter that institution. Had he been so aware, he might have been able to try to get her a scholarship.

5. In any event, Mr. Brooks stated in his response that he was willing to pay \$10,000.00 per month which can be put towards her off-campus boarding expenses as well as half of her tuition expenses.
6. Mr. Frankson, counsel for Mrs. Brooks, urged the Court to make an award for the maintenance of the Applicant in light of the apparent disparity between earnings of the respective parties. This was resisted by Mr. Steer for Mr. Brooks, on the basis that that the Applicant had not presented the court with any substantive evidence of her own expenses in respect of the claim for maintenance for herself. Therefore the court had no basis on which to award her maintenance for the Applicant. In other words, she had failed to demonstrate the need for the award of maintenance for herself, a pre-requisite for such an award.
7. Mr. Frankson was unable to contradict Mr. Steer's submission that the Applicant had not provided any evidence of her own expenses which would have been the foundation upon which an award for her own maintenance would have to be based. However, he submitted that from the evidence, it seemed clear that Mr. Brooks was in a much better financial position and

ought to pay at least \$30,000.00 per month. He said it was clear that Mr. Brooks was not in anyway contributing to the cost of his child's tertiary education.

8. Mr. Steer also took a preliminary point in relation to a claim for maintenance for the child, Desmarie, who is now approaching her twentieth birthday. He submitted that pursuant to sections 16 and 18 of the Maintenance Act, the Court had no jurisdiction to order maintenance in respect of a child already over eighteen (which the child in this case is) on the basis that she is pursuing a course of education, unless there had previously been a maintenance order in force. He referred in particular to section 16(3). The relevant sections are in the following terms:

16. (1) Subject to the provisions of this section and section 18, a maintenance order shall remain in force-

(a) in the case of a child, until the child attains the age of eighteen years; and

(b) in the case of any other person, for such period as may be specified in the order.

(2) Where a dependant is unable to maintain himself or herself by reason of old age or an illness or infirmity which is likely to be permanent, a maintenance order may be made to be in force for the rest of the natural life of that dependant.

(3) Where the Court is satisfied that-

(a) a child in respect of whom a maintenance order has been made is or will be engaged in a course of education or training after attaining the age of eighteen years; and

(b) for the purposes of such education or training it is expedient for payments under the order to continue after the child has attained that age, the Court may direct that the order remain in force for such period as may be specified in the order, being a period not extending beyond the date on which the child attains the age of twenty-three years.

Section 18 is set out below.

18. At any time after a maintenance order or an order of attachment has been made under this Act, a Court may, upon the application of –

- a) Any of the parties to the proceedings in which such order was made;
- b) Any person having the actual care and custody of a child who is a dependant; or
- c) Any person to whom any payment was directed in such order to be made,

vary the order in such manner as the Court thinks fit, suspend the order, revive a suspended order or cancel the order if the circumstances warrant.

9. The effect of the foregoing sections according to Mr. Steer, is that maintenance is normally only awarded in relation to dependant children until they reach the age of eighteen (18) years. Thereafter, the period of maintenance in respect of the child, may be extended to a date not beyond the child's twenty-third birthday where "for the purposes of (such) education or training it is expedient for payments under the order to continue". However, this may only be done where the

beneficiary of the maintenance is a "child in respect of whom a maintenance order has been made". No order having been made in respect of this child, it is not competent for this Court now to make such an order.

10. With respect to the application for maintenance by Mrs. Brooks, I agree with the submission of Mr. Steer that the Applicant has not, in her evidence, provided the Court with her evidence of her expenses and in those circumstances there is no evidential basis to award her maintenance. There is also a claim for maintenance of the child Desmarie, who is a tertiary education student which is a separate claim.

11. In considering the submissions by Mr. Steer in respect to the maintenance for the child Desmarie, one may wonder whether such a result was intended by the legislature; that because a child was not the subject of an order made on or before her eighteenth (18th) birthday, she would not be entitled to such maintenance, despite the fact that the child was in fact pursuing tertiary education. By this analysis, if a child had finished her secondary schooling at seventeen (17) and had then decided to do voluntary work in the National Adult Literacy Programme for a year before going on to University, but no order had been made before she turned eighteen (18) and commenced tertiary education, the court could not thereafter make such a maintenance order in relation to her maintenance. This would seem quite strange on the face of it. However, Courts are not legislators and where the statute is clear and un-

ambiguous, it must give the words of the statute their natural and ordinary meaning.

12. Indeed, when one looks at the words of section 8 of the Maintenance Act, it would seem clear that it is not contemplated that a maintenance order could be made after the child has attained majority, notwithstanding that the said child had commenced study at a tertiary institution.

Section 8 of the statute provides in relevant part:

8. (1) Subject to subsection (2) every parent has an obligation, to the extent that the parent is capable of doing so, to maintain the parent's unmarried child who---
- (a) is a minor; or
 - (b) is in need of such maintenance by reason of physical or mental infirmity or disability.
- (2) Every grandparent has an obligation to the extent the grandparent is capable of doing so, to maintain the grandparent's unmarried grandchild to whom the provisions of subsection (1) (a) or (b) apply, in the event of the failure of the grandchild's parents to do so owing to death, physical or mental infirmity or disability.

It is clear that the obligation to maintain only relates to minor children, unless the child has special needs.

13. The Jamaican provision which clearly only provides for maintenance of minors is to be contrasted with the provisions of other jurisdictions such as Australia. In that jurisdiction, section 66L of the Australian Family Law Act 1975 provides as follows:

Children who are 18 or over

(1) A court must not make a child maintenance order in relation to a child who is 18 or over unless the court is satisfied that the provision of the maintenance is necessary:

(a) to enable the child to complete his or her education; or

(b) because of a mental or physical disability of the child.

The court may make such a child maintenance order, in relation to a child who is 17, to take effect when or after the child turns 18.

(2) A court must not make a child maintenance order in relation to a child that extends beyond the day on which the child will turn 18 unless the court is satisfied that the provision of the maintenance beyond that day is necessary:

(a) to enable the child to complete his or her education; or

(b) because of a mental or physical disability of the child.

(3) A child maintenance order in relation to a child stops being in force when the child turns 18 unless the order is expressed to continue in force after then.

14. It is clear that the Australian provision allows the court to make an order in respect of a child who is over 18, if it allows that child to complete its education. This is in contra-distinction to the Jamaican provision set out above. Although I have taken note of the averment in Mr. Brooks' affidavit in support of his Petition for Decree Nisi, that he had in fact been paying Seven Thousand Dollars (\$7,000.00) per month in respect of maintenance of the said child, I have formed the view that I do not have the jurisdiction to make the order sought by the Applicant in respect of the child

15. While that is the position, I think that Mr. Brooks, having averred that he has been making certain payments, it may be that he would agree to a consent order being made in those terms and avoid further litigation.
16. The application for maintenance for both Mrs. Brooks and the child, Desmarie, is hereby denied. I make no order as to Costs.