NMCS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN FAMILY DIVISION
SUIT NO. F 1994/C 021

BETWEEN	PAUL COLLINS	PETITIONER
AND	MELANIE COLLINS	RESPONDENT

Mrs. M. Gordon-Simmonds instructed by Grant, Stewart, Phillips & Co for Applicant.
Miss J. Cooper instructed by Chambers Bunny and Steer for Respondent.

Heard - November 13,25 1997

SUMMONS TO VARY MAINTENANCE ORDER

HARRISON J

The Petitioner/Applicant has filed a summons to vary an order for maintenance made by Harris J on the 7th day of March 1996 whereby it was ordered that the husband/petitioner do pay to the Respondent a sum of $7,250 per month for her maintenance as well as medical expenses incurred by her. The husband now seeks to have that order varied as follows:

1. That no medical expenses be paid or in the alternative that ½ medical expenses relating to her chemical imbalance stated in her affidavit sworn to on the 18th day of January, 1996 be paid for six(6) months only.

2. That the sum for maintenance be reduced to Two Thousand Dollars ($2000) per month for 12 months only.

3. Cost of this application be the Respondent's.

4. Liberty to apply.

Mrs. Gordon-Simmonds referred to the affidavits filed by the applicant and submitted that he was not in a position financially to meet the monthly payments and this would warrant the court revisiting the earlier order to vary it. She also submitted that the conduct of the respondent was a relevant factor to be taken into consideration when the Court comes to decide if the sum should be reduced. She referred to the following cases in support of her submissions:

1. J (HD) v J(AM) [1980] 1 All E.R 156
2. Underwood v Underwood (1945) 2 KBD 561.
3. Stanford v Stanford 19 WIR 306

In relation to the changed circumstances the applicant has deposed in affidavit sworn to by him on the 2nd April 1997, as follows:

> "4. ....I have paid the Respondent $7,250 for each of the months April to June 1996, and $5,000 thereafter until September 1996 when my circumstances changed in that I was faced with an unplanned payment of $38,000 for tuition fees and books for our daughter Amanda at the University of Technology as she was denied further loan facilities from the Student Loan Scheme, which sum I borrowed and had to repay.
>
> 11. That .....I remain a Cargo Systems Manager at AGAS Limited but deny that I earn in excess of $2,000,000 per year and state that my gross salary has now reached Nine Hundred and Fifteen Thousand Three Hundred and Eighty-nine Dollars and Seventy-six cents ($915,389.76) per annum.....my most recent pay slip showing payment to me of Forty-six Thousand Eight Hundred and thirty nine Dollars and Thirty-six cents ($46,839.36) net for March 1997.
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> 12. That.....prior to the hearing on March 7, 1996 I had bought a derelict house. That subsequently Rachael, Amanda and I co-signed for a Mortgage from Rachael's employer to assist with the repairs thereof so as to make it habitable for us and to

provide shelter for the children should I not be able to do so. That we repay Twenty-two Thousand Eight Hundred and Twenty-eight Dollars and Sixty-nine cents ($22,828.69) per month for mortgage.....That to qualify for the mortgage I have had to increase insurance coverage on my life and monthly premium is now Five Thousand Eight Hundred Dollars ($5,800).

13. That my monthly expenses though not limited to these include:

Mortgage including peril insurance.....$22,828.69
Rent (until May, 1997).....$10,000
Contribution to household expenses.....$10,000
Transportation, lunch, uniform, books
clothes etc.....$6,000
Insurance on my life.....$5,800
Lunch and personal expenses.....$3,000

$57,628.69

14. That as is evident I am unable to meet my monthly expenses from my income and am only able to do so through contribution to these expenses by Rachael. That I am however willing to continue meeting the medical expenses for the respondent and as from June will be able to contribute Two Thousand Dollars ($2000) per month towards maintenance.

In affidavit sworn to on the 25th June 1997 the applicant states inter alia:

"4. That up until 1991 the Respondent used to continually beat our children, hurl threats at them, embarrass them before friends and strangers alike and virtually made our lives a living hell.

....

18. That to the best of my knowledge information and belief the Respondent abuses substances and that it is my opinion formed from what I myself have seen her do that she will go to great lengths to obtain these substances and that the money that I give her is channelled to that end.

19. That I do not have unlimited resources available and that any maintenance which the respondent receives from me will necessitate a reduction in the financial contribution I make towards the children's welfare, maintenance and education.

20. That the children and I live together and since April, 1996 Rachael and I pool our incomes which pool Rachael manages for the maintenance of the household including the accommodation itself and for the education of the children.

.....

23. .....Rachael's tuition fees to the University of the West Indies to the tune of Ninety Thousand Dollars ($90,000) which is due and payable is still outstanding and I do not know when we will be able to afford same....

24. That my own medical expenses for treatment of hypertension and diabetes are substantial and I am aided in this by my employer.

Miss Cooper submitted on the other hand, that allegations of misconduct which existed before the order for maintenance was made, should be disregarded. She further argued that the Court should look at the daughter's financial assistance to the applicant when his means is being considered (See Nott v Nott (1901) P. 241.) According to her, circumstances have changed for the better as the applicant's salary has increased since the making of the order and in addition, he has been receiving

voluntary assistance from his daughter Rachael. So far as the children's educational expenses were concerned, she submitted that these facts were put before the learned trial judge who made the order for maintenance. She contends that when all the circumstances are taken into consideration, there is no basis upon which the order for maintenance can be varied downwards (See Foster v Foster [1964] 3 All E.R 541).

This court has the jurisdiction to vary its orders in respect of maintenance but in doing so it will have regard to all the circumstances of the case, including any increase or decrease in the means of either of the parties. Pearson L.J stated inter alia in the case of Foster v Foster [1964] 3 All E.R 541 at page 545:

> "... what the court has to do is to consider whether an order to vary should be made, and, if so, by how much the order should be varied. Prima facie, it is not a jurisdiction, to re-fix de novo the amount of maintenance. Secondly, the Court is specifically directed to take into consideration any increase or decrease in the means of either of the parties...."

One will therefore have to take the order of Harris J as the starting point since there is no appeal from that order.

The applicant deposes that prior to the order for maintenance that his gross annual salary was $761,674.75 and in addition he was given a fully maintained company car. Subsequently to the making of that order he now deposes that his gross salary has now reached Nine Hundred and Fifteen Thousand Three Hundred and Eighty-nine Dollars and Seventy-six cents ($915,389.76) per annum. The difference in earning is $153,715 annually. He has made no reference to his fully maintained company car but it is my considered view however, that if that allowance was discontinued he would have mentioned it in his affidavit evidence in order to show additional expenses in the maintenance of a motor vehicle.

The applicant contends that if the respondent takes her medication which is prescribed she could secure and hold a job thereby contributing to the resources which are required to maintain the children and assist with their education. She has deposed however, in her affidavit sworn to on the 19th September 1997 that she has been going to several job interviews but has been unsuccessful. It was argued by Mrs. Gordon-Simmonds that this fact is indicative of her readiness and ability to work. That may very well be true but as it stands it does seem from the affidavit evidence that she is not currently employed nor will she be employed in the near future. Her financial predicament is further highlighted in the said affidavit where she deposes that since the making of the order for maintenance her niece who bore the burden of their finances is now un-employed and that she is unable to function on what the court ordered. She has denied that her conduct was unbecoming and has stated that husband is the one who would embarrass and humiliate her and constantly beat her.

The applicant did depose that Rachael and himself pooled their incomes and she manages it. He states however, that he has not forced her to contribute to the household and that she does so under a feeling of moral obligation. Furthermore, he has said that she is free to leave the home and to cease contributing at any time. I do agree with Miss Cooper however, that the Court should look at the financial assistance to the applicant when his means is being considered. President Jeune stated inter alia in Nott v Nott (supra) at page 242:

> " It seems to be only common sense that when you are dealing with actual income, you must take into account the total income, without considering from what source it is derived. The justices ought, therefore, in arriving at the amount of the wife's income, to have taken into account the voluntary allowance which the wife was receiving..."

Mrs. Gordon-Simmonds relied strongly upon the case of J(HD) v J(AM) supra in support of her submissions regarding the respondent's conduct. The facts of that case reveal that it is a decision

of first instance. A husband was ordered to pay periodical payments for the wife. He had re-married and from the date of his re-marriage his first wife conducted a sustained campaign of malice and persecution against him and his new wife. The husband applied to the court for a variation of the order for periodical payments and sought in effect to have the payments reduced to a nominal amount because of the wife's conduct. The Court held inter alia, that on an application to vary an order for periodical payments the court could take into account not only a party's conduct between the dissolution of the marriage and the original for financial relief but also his or her conduct between the making of the original order and the hearing of the application to vary it, for conduct during the latter period was part of all the circumstances of the case for the purposes of the Matrimonial Causes Act. The Court further held that any conduct during those periods which interfered with the other party's life or standard of living (whether or not it affected the other party's finances) and which was so gross and obvious that to order the other party to support the party whose conduct was in question would be repugnant to justice was relevant in considering the application to vary an order.

The applicant in the instant case has relied upon facts relating to his wife's conduct. He has sworn inter alia, in his affidavit of the 26th February, 1996 in response to the wife's application for maintenance as follows:

> "14....The respondent/applicant is a trained secretary. She has not worked since 1987-1988. She is a chain smoker and an alcoholic and the chemical imbalance from which she suffers results from alcoholism. That she has not been able to remain in gainful employment because of this.
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> 15. That I have been told by Dr. Aggrey Irons who has treated the applicant, and verily believe that the applicant will be fine if she does not drink. In fact he has told me she is not medically unfit to work and that working would be therapeutic."

He further swore in his affidavit of the 25th June 1997 that:

"4. That up until 1991 the respondent used to continually beat our children, hurl threats at them, embarrass them before friends and strangers alike and virtually made our lives a living hell.

6. That between the years of 1984 and 1991 I was placed under great strain emotionally and mentally and even my performance at my job was severely affected because the children simply refused to stay at the house with the respondent.....

7. That the respondent has often times provoked me to a response of defence against bodily harm to our children or to me.

What is abundantly clear from the authorities is that any conduct that effectively reduces the other party's means, income or ability to earn a living may be taken into consideration. It is my considered view however, that the case of J(HD) v J(AM) is distinguishable from the facts of the instant case. There is no affidavit evidence in the instant case showing that the applicant's means has been reduced having regard to any improper conduct on the part of the respondent. The evidence indeed, shows the opposite where the applicant's job is concerned. There has been increased earning in his favour. As a matter of fact, he did state in one of his affidavits filed in support of this application that sometime around September 1996, he had to borrow $38,000 in order to pay Amanda's tuition and this he had to repay. I do verily believe and I so hold that the applicant has not satisfied this court that there are circumstances existing at present which would cause the court to vary the order of Harris J. Accordingly, the summon to vary is dismissed with costs to the wife/respondent to be taxed if not agreed.