IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

FAMILY DIVISION

SUIT NO. F 2002/C120

BETWEEN	KYNAN COOKE	PETITIONER
A N D	SHARON NORA COOKE	RESPONDENT

Mrs. Pamela Benka-Coker Q.C. instructed by Mrs. Debra McDonald for the Respondent/Applicant

Mr. Gordon Steer instructed by Chambers, Bunny & Steer for the Petitioner/ Respondent.

Heard: 20th & 22nd May, 2003

Mangatal, J. (Ag.)

1. This is a matter in which the Petitioner/Respondent to the present application filed a Petition for Dissolution of Marriage in the latter part of last year.

2. Pursuant to the Matrimonial Causes Act, the Applicant applied for Ancillary relief and a Summons was issued on her behalf for orders in respect of the custody, access, care, control and maintenance of the child of the marriage.

3. On the 30th of April 2003, the application came on for hearing before me. After several hours during which the parties, who were represented by Attorneys-at-Law, engaged in discussions, I recorded the following as a consent order:-

By consent -

(1) Custody, care and control of the child born on the 13th June 1999 to the Respondent (wife). The Respondent agrees to consult with the Petitioner on matters concerning the child's welfare.

(2) The Petitioner do have access to the child as follows:-

(i) Every other weekend

(ii) Monday & Wednesday afternoons from 4:00 p.m. to7:30 p.m.

(iii) One half of every school holiday, subject to the necessary domestic arrangements being put in place by the Petitioner.

(3) The Petitioner do pay to the Respondent the sum of $38,000.00 each month towards the maintenance of the child to be paid on the 1st day of each month to begin on 1st May 2003.

(4) The Petitioner do pay the reasonable costs of the child's medical, dental and optical expenses.

(5) The Petitioner do pay the costs of school fees, educational expenses and half the costs of swimming lessons.

(6) Each party to bear their own costs.

4. The formal order/Judgment has not yet been signed or perfected, although the Minute of Order has been signed. By the time the matter came before me on the 20th May 2003, the first payment had been made.

5. On the 2nd of May 2003, the Summons for Custody and Maintenance was re-listed for hearing before me on 20th May 2003. This was supported by an Affidavit of Sharon Cooke, sworn to on the 5th of May 2003. That Affidavit in so far as material, states as follows:-

(2) That this matter was set down for hearing on the 30th April 2003. On that date, my Attorney-at-Law, the Attorney-at-Law for the Petitioner, the Petitioner and myself entered into discussions with a view to arriving at an amicable settlement of this matter. Arising from these discussions, a Consent Order was signed by the Petitioner and myself as to the terms agreed for custody, access and maintenance.

(3) That I misunderstood the purport of what I consented to as relates to the maintenance of my daughter.

6. Before me, Counsel for the Respondent has urged that I reopen the question of maintenance and has submitted that the Court provides for exactly these situations without any Appeal, or application to set aside or vary, as long as no formal order has been entered into. She stated consent may be withdrawn at any

time before the Judgment is entered and she stated that in this case, consent was withdrawn immediately.

7. She further submitted that it is competent for Mrs. Cooke, having suffered misapprehension to seek to reopen the question of the amount of maintenance awarded.

8. Counsel for the Petitioner has urged that there are two matters that arise:

(1) Does the error materially affect any order that the Court would have made, based on the Petitioner's income?

(2) The option of the Respondent is to apply to set aside, appeal, or to vary. He correctly states that there is no such application before the Court.

9. In looking at the various relevant authorities, it seems to me that this area concerning compromises and consent orders is by no means straight forward.

10. Nevertheless, it appears to me that the following principles can be gleaned:-

(i) Generally, a judgment by consent is binding until set aside and acts as an estoppel – See White Book 1988 – p.602, para. 2010 and para. 6-09 – Law & Practice of Compromise by Foskett, Litigation Library.

(ii) Ordinarily, (subject to what is said in point (v) below), fresh proceedings must be commenced if it is sought to set aside a final judgment or order by

consent after perfection of the order. See para. 2010 of the White Book and para. 6-09 – Law & Practice of Compromise.

(iii) If it appears, before the judgment or order has be perfected, that a consent has been given by reason of any matter which would vitiate a contract of compromise, that consent may be withdrawn with the leave of the Court and the order or judgment set aside. Although the case of ***Holte v Jesse*** (1876) 3 Ch. D. 177 is cited for that broad proposition in the excerpt from the White Book, I intend to say something about that case further on.

(iv) In the Privy Council case of ***DeLesalar v DeLesalar*** [1980] AC; it was observed, at p.560, that:

> "Financial arrangements that are agreed upon between the parties for the purpose of receiving the approval and being made the subject of a consent order by the Court, once they have been the subject of the court order no longer depend upon the agreement of the parties as the source from which their legal effect is derived. Their legal effect is derived from the Court order ..."

See also para. 19 – 33 p.301 of the Law & Practice of Compromise.

(v) The effect of this need for the Court's approval and the statutory and inherent jurisdiction of the Court in relation to matrimonial financial orders is that, even where the order has been perfected, an application to vary, alter or discharge a consent order can be made in the same Suit. See paras. 19-06, 19 – 29, 19 – 55 Law and Practice of Compromise.

(vi) Where the order in proceedings such as the present has been perfected any factor which undermines to a significant degree or otherwise invalidates the basis upon which one or other or both parties agreed to the making of that order may constitute a ground for setting aside the order. – 19 – 57 – Law & Practice of Compromise.

(vii) Where an order has been made, the jurisdiction under the Matrimonial Causes Act to vary orders in relation to the maintenance of the wife, and to vary orders for maintenance of children, may be invoked to vary a prior consent order for periodical payments on the ground of a mistake as to the practical effect of the order. The mistake is one of "all those circumstances" which the Court is entitled to take into account. In any event, it is an interlocutory order, over which the Court retains control under its inherent jurisdiction. The case of ***Brister v Brister,*** or ***B (GC) v B(BA)*** [1970] 1 ALL ER 913 is authority for that proposition.

Also see para. 19 – 55 – Law & Practice of Compromise.

(viii) By parity of reasoning, the same considerations should apply in relation to other orders which the relevant sections of the Acts or the inherent jurisdiction of the Court, ordain as being variable and which are also interlocutory for this purpose.

(ix) Whilst there would appear to be no fundamental distinction between an interlocutory consent order and a final consent order, since both have a

contractual foundation, the Court retains for itself, under its inherent jurisdiction, a general control over interlocutory orders, notwithstanding that they may have been made by consent. Whereas in the case of final orders, a consent based on a matter which would vitiate a contract may be withdrawn prior to perfection, in the case of interlocutory orders, a mistake "on one side only" may afford grounds for setting aside. - See para.9 – 09, 19 – 29 Law & Practice of Compromise.

(x) Ordinarily, where unilateral mistake is to vitiate a contract, it is not a mistake on one side only. It is a mistake which, though emanating from only one party, the other party is aware of. In that regard, I think that the case of ***Holte v Jesse*** is either an example of a case where the order is of an interlocutory nature or there is some statutory jurisdiction being invoked, or alternatively the case has gone somewhat wider than other cases in applying law relating to the instructions and authority of Counsel, to the question of a party's own mistake.

(xi) Whether an order is viewed as a final maintenance order, under which the Court is exercising its statutory jurisdiction of approval under the relevant Act, or it is viewed as an interlocutory order because it can be varied, where the order is perfected, it can be set aside on the ground that there is a

mistake on one side only, not appreciated by the other side - ***Re B(GC) v B(BA).***

(xii) In relation to maintenance of a child, the Court will have regard to the best interests of a child.

(xiii) The Court must endeavour to strike a balance between competing factors. On the one hand, there is need for the Court to retain a fair degree of control over agreements and consent orders in disputes between Husband and Wife. On the other hand, consistent with an approach that encourages amicable settlement it is vital that the Court's control should not be used as a mechanism by which parties break their bargains and seek to revive matters which were once perfectly well concluded.

(xiv) The burden of satisfying the Court that a mistake occurred lies on the party alleging the mistake.

Though the point is not free from difficulty and technically it may be that where the order is not yet perfected, the basis for setting aside should be the ordinary contract basis, it seems to me that the principles involved should allow the Court to set aside on the grounds of one party's mistake, particularly where it would work injustice to allow the order to remain.

11. Whilst Mr. Steer was right that there is no application before me in terms specifically applying to set aside, in my view it would be just for me to consider

this relisted application as an application to set aside the Agreement between the parties embodied in the Court order. Essentially, the Respondent is asking the Court not to bind her to the Consent Agreement.

12. I do not accept the submission that there need be no application to set aside the judgment/Agreement. Consent may be withdrawn, but the Court must set aside the judgment or order - See para. 6 – 09 – Law & Practice of Compromise. Further, I do not consider it appropriate to deal with this matter as an application for a variation since the necessary matters to be considered upon such an application have not been put before me and the application could not be said to have been formulated in that way.

13. It is for the Respondent to discharge the burden of demonstrating that there was a mistake. However, the Affidavit of Mrs. Cooke is very brief. I do not think that it does much to satisfy me that she has made a mistake; it does not give any details as to the nature and extent of her misapprehension.

Whilst her Counsel it is who has indicated to me, and fleshed out para.3 of the Respondent's Affidavit i.e. that she misunderstood the purpose of what she consented to as it relates to the maintenance of her daughter, in that she did not realize that the figures in her last Affidavit sworn to on 11th March, 2003 had already been halved, the Respondent has not gone on Affidavit and said so.

15. I have thought long and hard about whether I should ask Counsel to undertake to pu. this information in an Affidavit in the interests of Justice. In my view this course should not be adopted.

16. Even if there was such a sworn statement before me, that would not in all the circumstances satisfy me that the Respondent made a mistake, or the mistake suggested. In the first place, the matters set out in the Affidavit of 11th March, 2003, are not in fact consistently half of what the Respondent originally set out. For example, in her Affidavit of 7th November 2002, Para.41 she puts medical expenses at $5,000, and here in the March 2003 Affidavit she does the same. In respect of entertainment she has $5,000, here extra curricular $5,000. Whilst some items e.g. food may have been stated at half, i.e. instead of $30,000.00, $15,000.00, the sum in the March 2003 Affidavit also included the amount for the nanny at full cost. Food is also counted twice.

17. Further, I also take into account that a part of the order which was agreed was for the Petitioner to pay the entire school fees, and all educational expenses. This would include uniforms and related expenses. It was also agreed that the Petitioner would pay all medical, dental, optical expenses and half the cost of swimming lessons.

18. In the case of ***Holte v Jesse*** where Vice Chancellor Malius rejected the application which was predicated on the basis that there was no consent, at p.182 he said –

"Now, I can only say that this is an order which, if Mr. Jesse did not consent to, he ought to have consented to most cheerfully and thankfully".

The Court went on to indicate that it was satisfied that Mr. Jesse did in fact consent to the order.

19. Whilst it would not be appropriate for me to say exactly the same in the matter before me, given the difference in the nature of the applications in ***Holte v Jesse*** and the instant case, it does seem to me that there are a number of matters which militate against a finding that the Respondent was affected by mistake, and which point in the direction of consent. I have already alluded to the figures above. Secondly, the figures put forward by the Respondent for e.g. electricity, and telephone, as part of the half figure of $20,000.00 for utilities, (see para.41of Mrs. Cooke's Affidavit), Mr. Cooke in paragraph 36 of his Affidavit sworn to 3rd December, 2002, labels as exaggerated for this 3 year old child, and he says that one implication of the figures advanced by the respondent is that the child would be telephoning and using electricity amounting to over $13,000 per month. I state all this to say that it seems quite probable to me that, given the fact that some of the claims were unsubstantiated by any supporting evidence, and are in dispute,

Mrs. Cooke took a round approach on balance, particularly having regard to other items agreed to be paid by the Petitioner, and accepted $38,000.00 as a reasonable figure for maintenance of the child. I juxtapose to this the fact that her Counsel and instructing Attorneys are experienced Attorneys with expertise in this area of law, and they are not on Affidavit or on record as labouring under any corresponding misunderstanding about halved figures. All the affidavits were available to the parties as the matter was set for hearing on the same day.

20. In ***Holte v Jesse*** – p.184, it is stated:-

> "... here, where the whole facts are stated in a page and a half, where the Counsel who ask me to decide this do not pretend to say that they were not in possession of every material fact which was necessary to their consent in the case, and the solicitors do the same, and the Defendant himself was in the same position, I think if I were to accede to this application it would be a general licence to parties to come to this Court and deliberately give their consent, and afterwards at their will and pleasure come and undo what they did inside the Court ..."

21. It is difficult to accept that Mrs. Cooke would have been unaware of the actual magnitude of the expenses in relation to her daughter at the time when she gave her consent.

22. Mrs. Benka- Coker also submitted that I should have regard to what is in the interests of the child in dealing with this application and I agree with that submission. Whilst it is true that where Counsel of experience are involved and indicate a Consent, the Court will pay serious regard to it, I did not rubber stamp this Agreement, since the Court has to fulfill its statutory duties to ensure the

welfare of the child. In a sense the Court is really approving the settlement . By analogy, when the Court is hearing an application for a Decree Nisi, even where the parties agree to arrangements in respect of the children, the Court does not automatically certify those arrangements as being satisfactory. I thought on the occasion of the Consent order that its terms were more than reasonable and were well- advised. I indicated as much to the parties. Had it been otherwise, I would not have made the order without more, or without further enquiry.

23. I am not satisfied that there is any injustice in allowing this order to continue in place.

24. On a related note, Mr. Steer had submitted that the Respondent must show that the Court would have made an order substantially different from that which it did make. Whilst I think that may be true in a case such as in ***B.(G.C.)*** as to the Applicant's actual means and its impact upon the possibility of performance of the Court's order, and similarly in a case of non-disclosure, I do not think it applies here where the Respondent and her Attorneys could not, as Mrs. Benka Coker said in response, have known what I intended to order. However, how related principles do manifest themselves in this case is that I must be satisfied that the original order was inappropriate and that it would be unjust to insist on its continuance. I do not so find. Indeed, the allegation that the Respondent made a mistake because she did not realize that the figures in her March Affidavit were

already halved, shrouds in an air of unreality, the figures she alleges are actually involved in maintaining her three year old daughter.

25. The application, which I have treated as an application to set aside is dismissed. I am heartened by the fact that an application can be made to vary the order if there are any new needs emerging as the child grows older, or if there are any other changes in the relevant circumstances.

26. I think it would be appropriate as in ***Holte v Jesse***, to make no order as to Costs.