

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**CIVIL DIVISION****SUIT NO. F.D. 01471 OF 2005****BETWEEN NADINE HEYWOOD APPLICANT****AND AUDLEY HEYWOOD DEFENDANT**

Mrs. Pamela Benka-Coker, Q.C., and Ms. Debra McDonald for the applicant.

Ms. Charmaine Patterson, instructed by Charmaine Patterson & Associates, for the defendant.

Application under section 15 of the Maintenance Act- Order for Maintenance of Children- Application for Lump Sum Payment- Application for Transfer of Half Interest in Property to the other Spouse.

IN CHAMBERS

Heard May 10 and June 2, 2010.

F. Williams, J (Ag.)

Introduction

By way of an Amended Notice of Application dated February 4, 2010 and filed on the 5th, the Applicant seeks some eight orders, three of which form the crux of the matter and are set out in full hereunder:-

“(1) That the Respondent do pay to the Applicant the sum of \$10,000,000.00 being a lump sum payment for the maintenance of the minor children of the marriage in lieu of the monthly and other sums payable for maintenance of the children set out in the Order of the Court made on the 31st day of July, 2006 in Suit No. D – 01471 of 2005.

(2) That the said lump sum payment be provided by way of a transfer to the Applicant of the Respondent’s one half interest in the property known as Lot 48 Hermitage Dam Road,

Stony Hill, Kingston 8 in the parish of St. Andrew.

Volume 192 folio 988 of the Register Book of Titles.

(7) The Respondent do pay forthwith to the Applicant, the sum of \$1,414,910.56 being sums due to the Applicant for outstanding maintenance, reimbursements and costs relating to the children of the marriage pursuant to the Order of the Court made on the 31st July, 2006 and or such other sums as may be due to the Applicant at the time of making the Order.”

Summary of the Applicant’s Case and Submissions

The applicant’s case is largely based on its submission that the defendant has demonstrated repeated recalcitrance in complying with the court order for maintenance, made on July 31, 2006. He has failed or refused to make the payments for maintenance of his children as and when they fall due, causing considerable arrears to accrue. The result of this is that the applicant has had to “fill the gap” from her own resources and by way of loans. She, on the other hand, has honoured her obligations pertaining to the court’s order for joint maintenance of the children. In order to get the defendant to pay, she has had to invoke the assistance of the court (spending money to pay her attorneys-at-law to do so) by putting him before the court on more than one occasion. It is only when faced with imprisonment that he has made a serious effort to clear his arrears; and, once the threat of imprisonment passes, he causes considerable arrears to accrue again. The amount that is owed in relation to paragraph (7) of the Notice of Application is now \$351,359.18 for maintenance and \$930,000 for costs, making a total of \$1, 281,359.18 as at May 10, 2010. If the court were to make the orders being sought, that would be in the best interest of the children.

Summary of the Defendant’s Case and Submissions

Although the defendant has in the past fallen behind in his payments, he has, by his recent payments, demonstrated his seriousness and commitment to clearing his arrears and remaining current in his payments. He has taken steps to gain additional income by

constructing two apartments at the home jointly owned by himself and the applicant, from which he hopes to earn some \$60,000 per month. His dilatoriness in making the payments was due to a decline in his business, which has resulted, *inter alia*, in his closing one of his business places in St. James. A court order compelling him to transfer his interest in the property to the applicant will not have the desired effect, and will only deprive the children of a home that they have come to know and love. An amount of \$180,000 that is being claimed for costs is being disputed for the reason that it was never agreed or taxed and so this sum is to be deducted from the sum of \$930,000 as it is not properly due.

The Maintenance Act

Section 15 of the Maintenance Act, so far as is relevant to this matter, reads as follows:-

- “15.-(1) In relation to an application for a maintenance order, the Court may make an interim or final order requiring-
- (a) that an amount be paid periodically whether for an indefinite or limited period, or until the happening of a specified event;
 - (b) that a lump sum be paid or held in trust;
 - (c) that property be transferred to or held in trust for or vested in the dependant, whether absolutely, for life or for a term of years;...”

It will be apparent that the 2006 court order was based on paragraph 15 (1) (a). What is now being sought are orders pursuant to paragraphs (b) and (c).

Whether the applicant is entitled to the orders she seeks may best be seen from an examination of the history of the matters and sections of the affidavit evidence.

The History of the Matter

The history of the matter may best be seen from an examination of the various orders that have been made, leading up to the present application.

First, there was the order of Daye, J made on July 31, 2006 after a hearing on November 28, 2005. By that order, custody care and control of the two children were awarded to the applicant, with access to the defendant. More importantly for the purposes of this application are the following two orders:

- “(4) That the Respondent do pay to the Applicant the sum of \$60,000 per month for the maintenance of the relevant children together with one half of all expenses relating to education, extra curricular activities, medical, dental and optical fees;
- (5) The Respondent is to reimburse the Applicant one half of all sums expended by her on behalf of the children within fourteen (14) days of receipt of the invoice or receipt.”

Second, there was the order of Campbell, J made after a hearing on December 8 and 13, 2006. By that order, the respondent (husband) was ordered to pay an outstanding sum for maintenance of \$29,493.81 within 14 days of the order or be committed to prison. The order of Daye, J was also varied to make the sum of \$60,000 payable on the first of each month. There was also a consent order that the respondent be restrained from going to the home or workplace of the applicant and that he remain at least ten feet from her. The costs of the application were also awarded to the applicant to be agreed or taxed and paid within 14 days of that order.

Third, there was the order of D.O. McIntosh, J on the 30th November, 2008. Like the second order, this order came “upon the Application for Court Orders and Request for Enforcement of Judgment”. It was ordered that the Respondent immediately pay the sum of \$713,094.24 for outstanding maintenance and reimbursements within seven days of the order or be committed to prison. He was also ordered to pay the costs of that application in the sum of \$250,000 within the said seven days. An application for a lump sum payment was adjourned for hearing in chambers.

Fourth, there was another order of D.O. McIntosh, J on the 28th January, 2009. This order was made “Upon the Application for Stay of Execution and to set aside Order dated 6th

January, 2009. It was ordered that the husband pay “the full amount of \$706,307.56 by the 28th February or be imprisoned ... for three (3) months”. Costs were awarded to the wife.

Summary of the Affidavit Evidence

The Applicant's Evidence

In paragraph 5 of her affidavit, the applicant depones that the first court order had to be sought as a result of the husband's delinquency in making the maintenance and reimbursement payments. She states that even after the making of the order the situation deteriorated further. She has had to struggle (she states in paragraph 11) to pay all the costs relating to the children even after the last order in January, 2009.

Paragraphs 14, 17 and 20 to 22 are set out hereunder:-

“14. That for the past 14 years, the Respondent has operated a successful auto repair business from premises jointly owned with me and for which I also do not receive rent or any compensation.

17. That the Respondent's effort to purchase my interest in the former matrimonial home failed and the sale was cancelled. He has since blocked the sale to a third party by refusing to allow access to the house by the realtors and potential purchasers. In the circumstances, I have to pay to accommodate the children, while the Respondent lives rent free and has also maliciously taken steps to prevent me from recovering the value of my one half interest in the property which would assist me financially, while at the same time he is failing to maintain the children.

20. That notwithstanding several letters from my attorney to his attorneys-at-law, the Respondent has continued to fail and/or refuse to make full and timely reimbursements of sums due to me and to pay the maintenance on time and up to date.

21. That I am of the view that the Respondent's actions are motivated by malice and spite towards me which has blinded

him to the fact that his behaviour has an adverse effect on our children and their well being. At the very least he is negligent and uncaring.

22. That it appears that my having to take the Respondent to Court for outstanding maintenance of our children has become a pattern. It is extremely time consuming and costly, distracts from my duties at work, and consumes far too much energy.”

The last valuation of the premises (done in November 2007) put the market value at \$21,000,000.

She has also exhibited a spreadsheet which contains calculations as to the cost of maintaining the children until they complete tertiary education. Adjusted to reflect present-day values, each party’s share would be \$10,003.751.30.

She also asks that the Respondent pay the costs of the transfer of the property.

The Defendant’s Affidavit Evidence

In paragraph 6, he challenges the sum of \$180,000 as a part of the sum claimed for costs. on the basis that that sum was never agreed or taxed.

In paragraph 11 he states that the total owing for maintenance is \$585,000 and that the sum of \$147,603 being claimed for reimbursement is not known to him as he has not seen any invoices or bills in support of this sum.

He maintains his children (he states in paragraph 12) by, for example paying for guitar lessons and visits to the doctor without any contribution from the applicant.

He also states that it was the applicant’s refusal to sign documents from the National Housing Trust in respect of his efforts to purchase the applicant’s half interest in the

matrimonial home that led to the failure of the planned sale. Additionally, that also led to a decline in his business and personal finances. It was only after the deposit was returned that he was able to pay the outstanding maintenance.

He does not live free (see paragraph 17) but pays the mortgage and is "... still willing to pay the Applicant the value of her one-half interest in the said home. This will be done as soon as the Applicant signs the relevant documents".

In paragraph 21 he contends that maintenance is being claimed for a period when the children are with him during the holiday.

In paragraph 22 he states that there is no basis for the figures given in respect of projected maintenance payments in the applicant's spreadsheet.

Applicant's Affidavit in Reply

In her second affidavit, the applicant indicates that she had never received any notification from the Respondent of any financial difficulties he has been experiencing. More particularly, she states that "Visits to his motor vehicle repair business operated on premises owned by the both of us for 14 years indicate that the Respondent continues to enjoy a high level of patronage". (paragraph 4).

Some of the money that he expended, he did so without any consultation with her.

In circumstances in which the property was being transferred to the husband as sole owner, she could not reasonably sign the joint mortgage financing application forms as that would have ensured a continued mortgage obligation on her part (see paragraph 12). The respondent's net half share in the matrimonial home, which is estimated at \$7,900, 000, will not be enough to maintain the children through to first level tertiary education. (paragraph 20).

The Respondent's refusal to co-operate in the process of buying her half share, resulted in the Registrar of the Supreme Court having to execute a letter of instruction to the realtors, along with her (exhibit NH 2 in paragraph 14).

Resolution

I find that the fact that it was necessary for the Registrar to have signed the exhibit NH 2, lends support to the applicant's contention of a lack of co-operation on the part of the defendant in doing what was necessary to acquire her half share.

I also find that the applicant's refusal to sign the joint mortgage application forms was quite reasonable – given the nature of the transaction, and the unwanted consequence of a continued debt obligation for her, had she signed.

Any consequences that might have flowed from the failure of his efforts to purchase her half share were therefore not caused by or attributable to her; but instead, to him.

It is interesting to note that in respect of paragraph 14 of the applicant's first affidavit where she alleges that he has operated a successful auto repair business for 14 years at premises they jointly own without her getting any compensation, that paragraph he says is "neither denied nor admitted" (see paragraph 13 of his affidavit). (He does say elsewhere that he faced financial challenges, however).

The history of the matter, in the court's view, lends considerable support to the submissions of learned Queen's Counsel for the applicant, that a clear pattern of delinquency and recalcitrance has been established on the part of the defendant. The affidavit evidence and the several orders reveal a kind of brinkmanship on the part of the defendant: waiting until the last minute when his committal to prison threatens, to pay just enough to avoid it, then becoming delinquent immediately after and then having to be put before the court again to make further and more consistent payments. With this kind of history, his promises of doing better henceforth, ring somewhat hollow- the pattern of his behaviour does not support or give credence to such assurances.

He is correct. however, when he contends, through his counsel that the sum of \$180,000 should not be awarded as it has not yet been agreed or taxed.

I accept the submissions made by Mrs. Benka-Coker, Q.C., that the affidavits present cogent evidence in support of the application. Additionally, there is no reason, from a reading of section 15 of the Maintenance Act, why the orders sought should not be made. It seems to the court that, making the orders will have the effect of bringing some finality to this matter, or, certainly, to reduce the number of applications that might be necessitated as a result of the applicant's recalcitrance. Making the order will, it seems, save time and resources. In this regard, it is entirely in keeping with the overriding objective set out in Part 1 of the Civil Procedure Rules, 2002 (revised, as at September 18, 2006). The court will, therefore, make the orders prayed with a few amendments.

Disposition

It is hereby ordered:-

- (1) That the Respondent do pay to the Applicant the sum of \$10,000,000 being a lump sum payment for the maintenance of the minor children of the marriage in lieu of the monthly and other sums payable for maintenance of the children set out in the Order of the Court made on the 31st day of July 2006 in this suit.
- (2) That the lump sum payment be provided by way of a transfer to the applicant of the respondent's one half interest in the property known as Lot 48 Hermitage Dam Road, Stony Hill, Kingston 9 in the parish of St. Andrew, Volume 1292 Folio 968 of the Register Book of Titles, the respondent's said half interest to be held in trust for the minor children until they attain the age of majority.
- (3) That the Respondent do execute an Instrument of Transfer to give effect to the aforementioned orders within fourteen (14) days of the date of this order.
- (4) That in the event that the Respondent fails and/or refuses to execute the Instrument of Transfer, the Registrar of the Supreme Court is hereby empowered to execute same on behalf of the Respondent and to give effect to this order.

- (5) That the Respondent vacate the premises and deliver over in good condition vacant possession of same by delivery of the keys to the Applicant's attorney-at-law within thirty (30) days of the execution of the Instrument of Transfer by the Respondent or by the Registrar of the Supreme Court.
- (6) That the Respondent do pay the costs of this application, to be agreed or taxed, together with costs pursuant to the order of the Court made herein on the 30th day of December, 2008 for costs of \$250,000, and any other outstanding award of costs within fourteen (14) days of the date of this Order.
- (7) That the Respondent do pay forthwith to the Applicant, the sum of \$1, 281,359.18 being sums due to the Applicant for outstanding maintenance, reimbursements and costs relating to the children of the marriage pursuant to the Order of the Court made on the 31st July 2006 and such other sums as may be due to the Applicant at the time of making the Order.
- (8) That the Respondent do pay the costs of the transfer of his said half interest in the premises.
- (9) That, in the event that the Respondent fails to comply with any of the orders herein, he may be committed to the St. Catherine Adult Correctional Centre within fourteen (14) days of the default.