JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S MISCELLANEOUS APPEAL NO. 5/99

FAMILY COURT

COR: **THE HON. MR. JUSTICE FORTE, P.**
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE COOKE, J.A. (Ag.)

BETWEEN	**CARL JARRETT**	**APPELLANT**
A N D	**VERONA JARRETT**	**RESPONDENT**

Dr. Lloyd Barnett and **Judith Cooper** instructed by **Chambers, Bunny & Steer** for the Appellant

Respondent unrepresented

31st May and 20th July 2000

FORTE, P:

I have read in draft, the judgment of Cooke, J.A. (Ag.) which follows and agree with the reasoning and conclusion therein. I wish however to add a few words of my own.

To state without more, that a husband should continue to maintain his wife after they have been divorced, imports a seemingly unreasonable and unfair situation. However, such a decision in accordance with the

legal provisions must be determined in the circumstances of each particular case. Dr. Barnett, to simplify his submissions, maintained that as Section 12 of the Maintenance Act puts a liability on a "husband" to support his "wife" then that obligation ceases when the particular status comes to an end on the granting of a decree absolute. In the absence of express provisions to that effect, I would be reluctant to put such an interpretation on the Statute. I agree with the construction placed on the relevant sections (Sections 5(c) and 7) of the Summary Jurisdiction (Married Woman) Act 1895 by the English Judges, and with my brother Cooke, J.A. (Ag.) that section 7 of that Act is pari materia with Section 10 of the Maintenance Act. The dicta of Lord Evershed, M.R. referred to by Cooke, J.A. (Ag.) which I will set out hereunder in my view clearly state the correct approach to cases such as the subject of this appeal. Lord Evershed, M.R. stated in ***Wood v. Wood*** [1957] 2 All E.R. 14 at page 22:

> "It is, in my judgment, clear that the decision of the court in ***Bragg v Bragg*** [1925] P. 20 was founded on the language of the Act of 1895, and of s. 7 in particular, which was interpreted as having the necessary effect that an order for maintenance, once made, was not determined by the automatic effect of dissolution of the formerly subsisting marriage and that there had been conferred on the appropriate court, after and notwithstanding the cesser of the marriage status, a discretion to decide on the application of either party whether the order should be discharged or varied either by reduction or increase of the sums ordered to be paid including, of course, the sums ordered to be paid for the maintenance of children."

In keeping with those words with which I agree and which in my view apply equally to our own Statute, I would conclude that a divorce does not automatically bring to an end a subsisting order for maintenance, as in the instant case and that such an order can only be varied etc in accordance with Section 10 of the Act, at the discretion of the Court. The fact of the divorce must obviously be an important consideration in determining the correct order to be made under section 10 of the Act. In the instant appeal, there was no challenge as to the exercise of the discretion of the learned judge and consequently no decision on that is necessary. I agree that the appeal should be dismissed.

BINGHAM, J.A.

I have read in draft the Judgment of Cooke, J.A. (Ag.) and the supporting comments of the learned President. Cooke, J.A. (Ag.) has fully addressed the issue which falls for our determination. I agree with his reasoning and the conclusion reached and there is nothing further that I could usefully add.

COOKE, J.A. (Ag):

There is one ground of appeal which is:

> "That the learned Resident Magistrate erred in finding that the order for maintenance of wife subsisted after granting of the Decree Absolute".

Obviously, instead of "Resident Magistrate" there should have been Judge of the Family Court, but that shall not detain me. The background that gave rise to this ground of appeal is succinctly set out by Her Honour Miss W. H. Henry in her admirable reasons for judgment. It is this:

> "On the 15th May, 1997 by consent it was ordered that Mr. Carl Jarrett (whom I will hereafter call the husband) pay maintenance of $3,000.00 per week to his wife Mrs. Verona Jarrett (whom I will hereafter call the wife). Payments to commence on 16th May, 1997 and remain in force for two years. At that time an order was also made for maintenance for the child of the marriage. The husband complied with the order until 24th April, 1998. On 20th November the wife laid a complaint for arrears of maintenance in the sum of $90,000.00 (Ninety Thousand Dollars) for the period 1st May, 1998 to 20th November 1998. The husband laic an information on 4th December 1998 requesting the revocation of the order for maintenance to his wife, on the ground that the parties were now divorced.
>
> Both applications were heard on 18th January 1999 and 1st February, 1999. The parties did not give evidence. It was agreed that the parties were divorced and maintenance for the wife had not been paid from 1st May, 1998 to 20th November, 1998".

Having set out fully the rival submissions addressed to her she proceeded to comprehensively review the English authorities. These

included ***Bragg v Bragg*** [1925] P. 20; ***Mezger v Mezger*** [1936] 3 All ER 130; ***Wood v Wood*** [1957] 2 All ER 14 and ***Bowen v Bowen*** [1958] 1 All ER 14. She concluded that she would "rely on the applicable English case law" and said:

> "In the circumstances and relying on the authority ***Wood v Wood*** the Maintenance Order of the 15th May, 1997 did not automatically come to an end on the dissolution of the marriage on 30th April, 1998. The maintenance order having survived the divorce proceedings and upon the application to revoke the order, this Court had a discretion to either grant the application for revocation or allow the order to remain in force. In ***Wood v Wood*** the maintenance order was not only upheld but it was also increased."

Dr. Barnett in his usual enviable economical style put the following propositions which were set out in the appellant's skeleton arguments:

> "1. The learned Resident Magistrate followed the English decisions which held that dissolution of a marriage does not necessarily revoke a maintenance order made by a court of summary jurisdiction. It is submitted that this approach is only justified if the statutory provisions are in ***pari materia.***
>
> 2. The relevant English statutes are the Summary Jurisdiction (Married Women) Act, 1895 and the Summary Jurisdiction (Separation and Maintenance) Act, 1925. The relevant Jamaican Statute is the Maintenance Act which was enacted in 1881 and contains significant distinctions. Accordingly, the English authorities are not applicable to the Jamaican statute - ***Plummer v Plummer*** [1939] 3 JLR 200.
>
> 3. The jurisdiction to make orders of maintenance against a man in favour of a woman is based on the specific obligation of the husband to support his

> wife, which is declared in section 12 of the Act. If the woman by virtue of the dissolution of the marriage ceases in law to be his 'wife' the obligation of the man under this particular statute disappears and the legal foundation for the order is removed."

Propositions (1) and (2) will be dealt with together as they require a comparison of the relevant English statutes and our Maintenance Act. Proposition 3 although it seeks to draw a conclusion on the assumed correctness of the two prior propositions may be examined by itself within the context of the Maintenance Act. This I shall now do.

Section 12 of the Maintenance Act is introduced by the following words:

> **"12.** For the purposes of this Act, every man shall be liable and is hereby required to maintain his wife, irrespective of her being able to maintain herself..."

It is these words that ground proposition 3. But there are other sections of the Maintenance Act which are germane to the resolution of the issue before us. There is Section 10 which states:

> **"10.** At any time after any order of maintenance or attachment has been made under this Act, any Resident Magistrate having jurisdiction to make such an order, may, upon the application of any of the parties to the proceedings in which such order was made, or of any person having the actual care and custody of any child entitled to be maintained under this Act, or of any person to whom any payment was directed in such order to be made, vary such order in such manner as the Resident Magistrate may think, fit , or suspend such order, or, such order having been suspended,

> revive the same; and if the Resident Magistrate, upon application as aforesaid shall be satisfied that the circumstances so warrant, he shall cancel the said order".

This section is pertinent to any order of maintenance made under the Maintenance Act. As such it must be speaking to orders made pursuant to section 12 whereby a husband may be ordered to make payments to a wife. Now the section says that "at any time after an order has been made any of the parties to the proceedings in which such order was made", may make an application in respect of that order. The section then sets out the jurisdiction of the Magistrate as regards such applications. The words "at anytime" is without limitation. Certainly, if a divorce brought to an end an order for maintenance made during the subsistence of marriage, I would expect to see that stated in this section. When there is a limitation in respect of the right of a recipient to benefit from an order or prospective order such limitation is expressed. Section 8 of the Act is as follows:

> "**8.** Any order of maintenance made under this Act shall subject to the provisions of section 10, in the case of a child be made to hold good until such child attains the age of sixteen years, or, if the Resident Magistrate shall think fit, until such child attains the age of eighteen years, and in the case of any other person for such period as may be named in the order:
>
> Provided always, that any order may be renewed at any time by any Resident Magistrate having jurisdiction to make an order:

> Provided also, that when the person to be maintained is unable to maintain himself by reason of old age, or by reason of an illness or infirmity which is likely to be permanent, it shall be lawful for the Resident Magistrate to make an order of maintenance for the rest of the natural life of such person:
>
> Provided further that where the Resident Magistrate is satisfied that the child in respect of whom an order of maintenance has been made is or will be engaged in a course of education or training after he attains the age of eighteen years, and that 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 Resident Magistrate may by order direct that that order of maintenance shall hold good for such period, not extending beyond the date or which the child shall have attained the age of twenty-one years, as may be specified in the order".

It will be observed that subject to the provisions of section 10 (supra) there are limitations to which the continuance of maintenance should continue in respect of a child:

(a) until such child attain the age of 16 years;

(b) if the Resident Magistrate shall think fit, until such child attains the age of eighteen; and

(c) the maintenance period must cease when the child shall have attained the age of twenty-one years.

Significantly, in my view, this section apart from orders in respect to a child, makes no reference to any time limit in respect of the continuance of orders. It states no time limit in the case of any other person (i.e other than a child) for the period as may be designated in the order.

Thus, in respect of orders made pursuant to Section 12, there is no restriction imposed on the Resident Magistrate in respect of the duration of the time that an order should be in force. Again if a divorce automatically brought to an end a subsisting order, I would expect that limitation to be stated therein. Then there is a part of Section 8 which I would think gives a conclusive answer and puts the issue beyond the pale of debate. For emphasis, I now repeat the relevant part:

> "Provided also, that when the person to be maintained is unable to maintain himself by reason of old age, or by reason of an illness or infirmity which is likely to be permanent, it shall be lawful for the Resident Magistrate to make an order of maintenance for the rest of the natural life of such person".

When this section refers to "unable to maintain himself" that reference includes 'herself'. Section 4 of the Interpretation Act states:

> "**4.** In this Act and in all Acts, regulations and other instruments of a public character relating to the Island now in force or hereafter to be made, unless there is something in the subject or context inconsistent with such construction, or unless it is therein otherwise expressly provided –
>
> (a) words importing the masculine gender include females; and
>
> (b) words in the singular include the plural, and words in plural include the singular".

It is unquestionably clear that if any of the circumstances set out in this part so warrants, an order can be made under Section 12 that is to continue for the natural life of a wife. The legislative intent must have

been for an order made pursuant to Section 12, to survive a divorce. My understanding of the rationale of the Maintenance Act is that it is a particular status which provides the entitlement to come within the provisions of the Act. Once that status is established the emphasis is on the need of the person so entitled. The introductory words to Section 12 to which mention has already been made speaks to the entitlement of a wife to make an application for maintenance order under the Act. These introductory words were merely a statutory statement of the common law. I would respectfully say that the rationale of the Maintenance Act in its recognition of need is not to be decried.

When a maintenance order is made in respect of a wife such an order is made because of the particular circumstances which beset that woman. The tribunal, as was done in this case, having considered all the relevant factors would then make an appropriate order. Such an order would no doubt consider the justifiable needs of the applicant. The duration of the order would be based on the tribunal's assessment of all the circumstances including of course any submissions that have been put forward by the husband. A divorce does not put an end to the needs of that woman who was the beneficiary of an order. It could not be just that a divorce should automatically wipe out an order made under Section 12 of the Maintenance Act.

For the reasons stated above I am of the view that proposition 3 is without merit. Having come to this conclusion perhaps, it may not be strictly necessary to deal with propositions (1) and (2). I will do so, nonetheless, and deal with them together.

Dr. Barnett's contention is that the relevant English statutes in comparison with our Maintenance Act "contains significant distinctions". The English statutes to which reference is made are the Summary Jurisdiction (Married Woman) Act 1895 and the Summary Jurisdiction (Separation and Maintenance) Act 1925. As the latter Act does not concern the issue under discussion, I shall not refer to it. It is the 1895 Act which is relevant and it is that Act which for the purposes of this case was subject to English judicial attention in respect of the authorities to which the learned Family Court Judge addressed her mind. The relevant Sections of the 1895 Act are 5(c) which states:

> "**5** (c) A provision that the husband shall pay to the applicant personally, or for her use, to any officer of the court or third person on her behalf, such weekly sum not exceeding two pounds as the court shall, having regard to the means both of the husband and wife, consider reasonable".

and 7 which states:

> **"7.** A court of summary jurisdiction acting within the city, borough, petty sessional or other division or district, in which any order under this Act or the Acts mentioned in the schedule hereto, or either of them, has been made, may, on the application of the married woman or of

> her husband, and upon cause being shown upon fresh evidence to the satisfaction of the court at any time, alter, vary, or discharge any such order, and may upon any such application from time to time increase or diminish the amount of any weekly payment ordered to be made, so that the same do not in any case exceed the weekly sum of two pounds".

In the 1895 English Act there are no words comparable to what I have described as the introductory words to Section 12 of the Maintenance Act. Dr. Barnett seized on that absence to submit that such absence was proof that in the English statute the designations "Married Women" and "Husband" were "procedural" by which I understand him to mean that orders under the 1895 English Act required as a matter of procedure that the applicant at the relevant time be "a married woman" and the order was being sought against "the husband" of the married woman. That being so, his argument proceeded, there was nothing in the English statute which showed that liability to pay maintenance under that statute was dependent on the relationship of "husband" and "wife". I would think that, although not so specifically stated in section 5 (c) (supra), that section assumes that there is an obligation of a husband to maintain his wife. This obligation, I suggest is founded in the common law. If this is correct, then the importance which Dr. Barnett attaches to the introductory words of section 12 of the Maintenance Act would appear unwarranted. I suspect the President (Sir

Henry Duke) had this common law obligation in mind when he said in ***Bragg v Bragg*** (supra) at p. 23:

> "On the face of it, it seems anomalous that a woman who has obtained an order for maintenance as a wife, such maintenance to be provided by her husband, when she has put an end to the relation of her husband and wife may still say that the order for the maintenance of the wife by her husband subsists. It is not because it seems anomalous that that may not be the result of the statutory provision, and neither is it conclusive to show that it is contrary to common sense."

However, there are other reasons why Dr. Barnett's submissions cannot be favourably viewed.

When the President speaks of "the statutory provision" in the passage just cited, that is a reference to section 7(supra). This is the section which gives the court the jurisdiction to vary or discharge any order which had been previously made under section 7 (supra). It is the interpretation of this section which determined the decision. I will again cite a passage from the judgment of the President (at p. 25) to support this view:

> "Mr. Frampton says the description of the payee as a 'wife' and the payor as a 'husband' operates as a limitation of the rights of the wife and of the obligation of the husband. Mr. Barnard, on the other hand, says: No, the Act is describing persons who may claim remedies, and the words are mere words of description of persons standing in certain relationship at the time the Court of summary jurisdiction comes to deal with them, not limiting the jurisdiction to the time during which they

> answer to that description. Sect. 7 is, he says, the only section which limits the operation of the order when it has once been obtained. Under that section it is in the power of the Court of summary jurisdiction upon fresh evidence to alter, vary or discharge the order and to increase or diminish the amount of the weekly payment. Then there is this proviso: 'If any married woman upon whose application an order shall have been made under this Act,' and so on, 'shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged'. That is the only limitation the Legislature imposed. When this Act was passed in 1895 a woman who added to desertion a grievance of her husband's adultery might proceed for a divorce. One must assume that the authors of this Act and the Legislature which enacted it were aware of that elementary fact. They took the view which this appellant took, that such an order once made and while the parties are alive is not got rid of except by an order of the Court of summary jurisdiction, and that an application must be made. On the whole, I think the appellant was right in his original view that he must go to a Court of summary jurisdiction to get rid of this order, although there had been a decree absolute for divorce, and it seems to me to follow from that that if there were not the statutory grounds of discharge of the husband from his obligation under the order, then before the appellant could succeed he must satisfy the magistrate that justice required that the order should be altered, varied or discharged".

Bragg v Bragg was approved by the Court of Appeal in ***Wood v Wood*** [1957] 2 All ER 14. Here again, there is the emphasis on the interpretation of section 7 (supra). On page 22 at letter (c) Lord Evershed. M.R. said:

> "It is, in my judgment, clear that the decision of the court in ***Bragg v Bragg*** [1925] P. 20 was founded on the language of the Act of 1895, and of s. 7 in particular, which was interpreted as having the necessary effect that an order for maintenance, once made, was not determined by the automatic effect of dissolution of the formerly subsisting marriage and that there had been conferred on the appropriate court, after and notwithstanding the cesser of the marriage status, a discretion to decide on the application of either party whether the order should be discharged or varied either by reduction or increase of the sums ordered to be paid – including, of course, the sums ordered to be paid for the maintenance of the children".

Since it is clear that the English authorities based their decision on the interpretation of section 7 of the Summary Jurisdiction (Married Women) Act 1895, it is incumbent to compare that section with section 10 of the Maintenance Act in order to test the worth of Dr. Barnett's submission. Both sections have been previously set out. The comparison will reveal that the wording of the respective sections are different. But the substance and import are the same. In both sections either party (i.e. husband and wife) may after an order for maintenance has been made, apply to the court in respect of that order. In section 7 the application can be to "alter, or vary or discharge any such order". In Section 10 the application can be to "vary such order" "or suspend such order, or, such order having been suspended, revive the same" or "cancel the said order". In both sections the application may be made "at any time". In both sections it is the exercise of the court's discretion

which will determine the outcome of any application by either party. In section 7, the discretion is exercised within the context of "upon cause being shown upon fresh evidence to the satisfaction of the court". In Section 10, the discretion is exercised "as the Magistrate may think fit" or "shall be satisfied".

Having now established by analytical comparison that the relative sections that are subject to review are similar in substance and import, it is the same question of construction which is applicable to both. This critical question is whether a divorce **ipso facto** brings to an end an order of maintenance? In the appellant's first proposition it was not contended that the English decisions based on the construction of section 7 of the Summary Jurisdiction (Married Woman) Act 1895, were subject to criticism. I respectfully agree that those decisions are in accordance with the proper construction of that section. Therefore since that section (section 7 supra) and section 10 of our Maintenance Act (supra) presents a similar question of construction, it is my view that the learned Judge of the Family Court was not in error when she said she would "rely on the applicable English case law". I conclude that Dr. Barnett's contentions in propositions 1 and 2 cannot be sustained.

Dr. Barnett also made reference to the fact that the 1895 English Act was unconcerned with criminal sanctions if a husband failed to honour his obligations under an order made pursuant thereto while the

Maintenance Act provided for such a course of action. This he said was of significance in saying that the comparable statutes were not in **pari materia**. I do not agree. Subsequent criminal sanctions for being unfaithful to an order of the court is not relevant to the circumstances of the legal foundation upon which such order was founded. It cannot therefore be said that in following English decisions there was any error.

It is only left for me to say that the appeal is dismissed. The orders of the learned judge of the Family Court are upheld. As the Respondent was unrepresented, there will be no order as to costs.