IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018HCV00473

BETWEEN	**AVA MARIE MAXAM**	**CLAIMANT/RESPONDENT**
A N D	**ROBERT CHARLES CLINTON DAVIS**	**DEFENDANT/APPLICANT**

IN CHAMBERS

Mrs. Judith Cooper-Batchelor instructed by Chambers, Bunny & Steer for the Defendant/Applicant

Mrs. Alexi Robinson with Mr. Daniel Gyles instructed by Myers, Fletcher & Gordon for the Claimant/Respondent

HEARD: March 11, 2024 and April 12, 2024

Family Law – Maintenance – Application to Vary Maintenance Order – Children (Guardianship & Custody) Act s. 7(5) – Whether or not the Court Can Vary a Consent Maintenance Order – Whether or Not the Court Should Vary a Consent Maintenance Order to Remove a Reference to Updating Existing Sum for Maintenance by Utilizing the Consumer Price Index Without the Need for a Hearing for a Variation of Maintenance Order.

D. STAPLE J

BACKGROUND

[1] The factual matrix of this application is mercifully rather narrow and the parties are essentially agreed on same. On the 10th October 2018 J. Pusey J made an order for the custody and maintenance of the child of the parties in this matter. This was a consent order.

[2] Amongst the orders made was number 5 which reads as follows:

***5. The Defendant shall pay**:*

(i) the sum of Seventy Thousand Dollars ($70,000.00) on the last day of each month towards Erin's Maintenace which said amount shall be subject to adjustment every two (2) years on the anniversary of this Order using the Consumer Price Index as published by the Statistical Institute of Jamaica;"

[3] Years passed and the circumstances of the parties changed dramatically. The Defendant/Applicant retired from his previous occupations; the Claimant/Respondent has migrated to Trinidad and Tobago with the child in pursuit of greater earning opportunity; and COVID-19 happened which had a serious effect on the earning power of everyone.

[4] In 2020, the Defendant/Applicant was to have made payment of an increased sum for maintenance in accordance with the terms of the same consent order made in 2018. That sum was $75,600.00. He did not so do. Instead, he paid a sum of $103,400.00 in August of 2022. This is the unchallenged evidence from the Claimant/Respondent in her affidavit sworn on the 12th July 2023 at paragraph 8.

[5] There was another automatic increase in October 2022 to $89,600.00. This increase is currently being paid as at May 2023.

[6] The Defendant/Applicant has now applied to fix this amount as being the amount for maintenance and remove the aspect of the maintenance order which gives an automatic increase every 2 years based on the CPI prevailing at the agreed time period.

[7] The Defendant/Applicant's fundamental argument (I mean no disrespect to the diligence of either counsel in the preparation of the matter by reducing their arguments) is that the indexing of the maintenance to the CPI, without reference to the actual needs of the child, is contrary to the principles upon which maintenance awards (or variations) are to be done; his circumstances have changed significantly and he is not in a position to go above the present sum

automatically; and there has been no demonstrable need for the increase by the Claimant/Respondent.

[8] The Claimant/Respondent's counter argument is that the Defendant/Applicant agreed to the terms under legal advice and should not be made to back out now simply because his obligations are proving more onerous; and the CPI adjustment is a valid aspect of a maintenance order and helps to preserve the real effect of the maintenance order and save the time and expense of periodic applications for adjustment.

THE ISSUES

[9] These are the issues I have identified for resolution of this matter in all the circumstances:

a) **Can the Court vary the consent order and what are the factors to be considered?**
b) **If yes, should the Court vary the maintenance order as prayed for by the Defendant/Applicant.**
c) **If the Court is to vary the Order, what variation would be in the best interest of the child?**

CAN THE CONSENT ORDER BE VARIED AND WHAT ARE THE FACTORS?

[10] This is the easiest of the three questions to answer. Section 7(5) of the **Children (Guardianship and Custody) Act** makes it plain that every maintenance order made under s. 7(3) can be varied.

[11] I will go to section 7(3) firstly as it contains an interesting provision that is relevant to this application. Section 7(3) says as follows:

> **(3)** Where the Court under subsection (1) makes an order giving the custody of the child to the mother, then, whether or not the mother is then residing with the father the Court may further order that the father shall pay to the mother towards the maintenance of the child such weekly or other periodical sum as the Court, **having regard to the means of the father** (emphasis mine), may think reasonable.

[12] The maintenance order under s. 7(3) must be made **having regard to the means of the father**. So right away, one can see that the means of the father is pivotal in any decision as to how much a father is to pay in a maintenance order – even a consent order. In other words, the Court cannot endorse a Consent Order for maintenance under s. 7(3) in circumstances where the Court is not satisfied that the father has the means to honour the maintenance payment.

[13] Even under the 2005 **Maintenance Act** there is reference to the means of the parent in relation to their obligation to pay maintenance for the relevant child(ren). Section 8(1) says,

> Subject to subsection (2), every parent has an obligation, **to the extent that the parent is capable of doing so** (emphasis mine), 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.

[14] Incidentally, there was no consequential amendment to the **Children (Guardianship and Custody) Act** upon the passage of the 2005 **Maintenance Act** insofar as maintenance payments under the former were concerned. Therefore, the more expansive considerations contained in the **Maintenance Act** for the making of maintenance payments (and the variation of same) are not referenced in any applications to vary maintenance order made under the **Children (Guardianship and Custody) Act**. This is a curiosity to which Parliament could give consideration. A glaring gap, for example, is that in a custody matter, if the father is awarded custody, he cannot get a maintenance payment under the **Children (Guardianship and Custody) Act** from the mother. He would have to then make a separate application, in the Family or Parish Court under the **Maintenance Act** for a maintenance order from the mother.

[15] The fundamental point being that means is always relevant.

[16] The Court is empowered under s. 7(5) of the **Children (Guardianship and Custody) Act** to vary an order for maintenance made under s. 7(3). When one reads ss. 7(3) and 7(5) together, the effect is, in my view, that when one is varying an existing maintenance order made under s. 7(3), the means of the father are just as relevant to the question of variation of the order as they were to the making of the initial order.

[17] Support for this position is obtained from the case of ***Paul Campbell v Diahann Campbell***[1] as cited by the Applicant. In that case, Brooks J (as he then was) was grappling with the question of the variation of a maintenance order under the **Children (Guardianship and Custody) Act.** Among the issues for determination was whether or not the Court should consider the means of the mother in determining whether to vary a maintenance order.

[18] It was argued by counsel for the father, that her means was important. Counsel for the mother argued that the **Children (Guardianship and Custody) Act** provided only for the means of the father to be considered as a relevant factor.

[19] Brooks J suggested to the parties that they consider the provisions of the then relatively new **Maintenance Act 2005** which would have allowed for such considerations. Both parties opined that that legislation was not applicable as the application before the Court was pursuant to s. 7(5) of the **Children (Guardianship & Custody) Act**. Having considered the matter, Brooks J formed the view that the general principles under the **Maintenance Act** could be applied and he said he would have allowed consideration of the means of the mother as part of the general considerations for the welfare of the child[2].

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[1] Unreported Claim No. 2000 E528, Supreme Court, Jamaica, delivered April 4, 2008.
[2] Id at pp 10-11

[20] I am minded to agree with Brooks J (as he then was). Considerations for maintenance of a child are, in my view, of general application regardless of the statute under which one is applying. Therefore, the principles and factors relevant to varying an order under s. 7(5) of the **Children (Guardianship & Custody) Act** are similar to what one would consider under s. 18 of the **Maintenance Act**.

[21] One of the key principles underlying this area is the right of a litigant to be heard **before** the amount he is to pay under a maintenance order is increased. This was heavily emphasised in the decision of the Court of Appeal in ***Morgan v Williams-Morgan***[3]. That case concerned an appeal from a decision of a Parish Court Judge to vary a maintenance order without having given the concerned party a chance to be heard before the making of the order.

[22] The Court of Appeal upheld the appeal and directed that the application be heard afresh before a different Judge. McDonald-Bishop JA, writing for the Court of Appeal, emphasised the need for a hearing in applications for variation under s. 18 of the **Maintenance Act**. She said as follows[4]:

> **[25] Section 18 is clear that the appellant would have had the legal right to seek a variation of the maintenance order at any time after the order was made. There is evidently no limit to the number of times he could choose to do so. The same would apply to the respondent. [26] Furthermore, the emphasised portion of the section "if the circumstances so warrant", strongly suggests that it was within the contemplation of the legislature that there must be some consideration of the circumstances surrounding the application, the reasons for the application and the likely impact of the variation on the relevant parties before the order for variation is granted. A judge would never know if the circumstances "so warrant", if there is no enquiry into all the relevant circumstances attendant on the application or which would have a bearing on it. Miss Samuels' submission that the examination of the circumstances of the particular case is a necessary pre-condition to the exercise of the discretion to vary a maintenance order is accepted. Therefore, the**

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[3] [2016] JMCA Civ 53

[4] Id at paras 25-26

learned judge was obliged, by virtue of section 18, to enquire into the relevant circumstances that would have touched and concerned the grant or refusal of the variation order. That was the only way he would have been able to ascertain whether the circumstances warranted a variation of the order.

[23] Again, even though McDonald-Bishop JA was dealing with an application under the **Maintenance Act,** I see no difference in application of the broader principle that if a litigant is to be materially affected by the exercise of a judge's discretion, they have to be heard. So from these authorities, I come to the conclusion that the Order for maintenance, even if by consent, can be varied. Among the factors to be considered are the means of the father to pay the varied sum as proposed.

SHOULD THE ORDER BE VARIED?

[24] In my view the order should be varied to remove the provision relating to the automatic escalation of the amount for maintenance depending on the prevailing CPI every two years.

[25] Where an Order for maintenance has been made already (in particular a consent order) the Court considering the application to vary the original order has to presume that that previous Court had fully weighed and considered the matters that were present before it in order that it might come to its decision. Therefore, this Court should tread very carefully in seeking to vary such an order and would only vary such order where it is demonstrated that circumstances have changed to such a degree as to warrant the interference with the Order[5].

[26] In the South African case of ***Georghiades v Janse van Rensburg***[6] it was held as follows at paragraph 16: "In considering whether or not sufficient reason for variation of the present maintenance order has been shown, it is important to bear in mind that the order in question is contained in a consent paper, which was made

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[55]See paragraph 33 of the judgment of McIntosh JA in *LM v CS* [2013] JMCA Civ 12

[66] 2007(3) SA 18 (C) ("Georghiades")

an order of court at the time of the divorce. The consent paper deals not only with 'the payment of maintenance by the one party to the other'. **As such, it constitutes a composite, final agreement entered into by the parties, purporting to regulate all their rights and obligations inter se upon divorce. For the court now to interfere in that arrangement by varying one component of the agreement, while leaving the balance of the agreement intact, would fly in the face of the time hallowed principle that 'the court cannot make new contracts for parties; it must hold them to bargains into which they have deliberately entered'**. The principle of *pacta sunt servanda* is equally relevant in this context'."

[27] The factual circumstances of the parties, I find as proven, have changed dramatically so as to warrant interference.

[28] The Applicant has now gone into retirement with his income going down from $9m from salary earnings annually to around $2m annually from his remuneration from directorships he still has. This evidence was not challenged by the Respondent in cross-examination. Despite the submission from the Respondent at paragraph 14 of her written submissions that the Applicant has not proven his diminution in income, I disagree that he has not so proven.

[29] In paragraph 11 of his Affidavit filed on the 14th July 2023, he said he was retired and earning $2.33m from his two directorships. This evidence was not challenged in cross-examination and I accept his evidence of such. Then in his affidavit filed on the 27th November 2023, at paragraph 3, he testified that he was earning $9m as the General Manager of the Technology Division of XSOMO International at the time when the Consent Order was made in October 2018. This evidence was also unchallenged and I accept same as being credible.

[30] In my view, such a drop in annual income is quite significant and warrants a re-examination of the Consent Order.

[31] It was also established that the child has moved to another country. There is no evidence as to what her needs are currently and whether or not they are being adequately met by the current payment in conjunction with what the Respondent is now currently earning.

[32] There are authorities that seem to support the idea of built-in escalation clauses as part of maintenance agreements. In the South African case of ***G.P. v A.P. et al***[7], there was a challenge to a consent order for maintenance of a minor child by the Applicant G.P that formed part of a divorce settlement agreement between the parties. The relevant portion of the consent order was as follows:

> **"7 MAINTENANCE: THE MINOR CHILDREN IN TERMS OF SECTION 18 (2)(d) OF THE ACT"**
>
> **7.1 It is the responsibility and duty of both parents to at all times maintain the minor children fully and in all respects as envisaged and referred to in Section 18 (2)(d) of the act.**
>
> **7.2 The Defendant will pay maintenance to the Plaintiff in respect of the minor children at the rate of R15, 000.00 (Fifteen Thousand Rand) per month per child until they become self-supporting.**
>
> **7.3 The maintenance payable by the Defendant in respect of the minor children shall escalate annually on the anniversary of the date of the final decree of divorce of each year by the same percentage as the Consumer Price Index ("CPI") for the Republic of South Africa, as notified from time to time by the Director of Statistics but not more than the percentage increase earned by the Defendant for the said year."**

[33] This portion of the consent order was upheld by the High Court as being valid and enforceable. The Applicant had sought to argue that because he had been retrenched and out of work for sometime due to a restraint of trade clause, there had been no increase in his earnings and so the escalation did not trigger. The Court dismissed his application and held that as the Applicant had failed to put

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[7] Unreported, Case No. 10225/2013 High Court of South Africa, delivered 19th September 2017.

evidence before the Court of what his actual increase was across his various earnings outside of his salary, he was bound to the methodology of calculating the increase agreed by the Consent judgment.

[34] The learned Judge highlighted the benefits of an escalation clause based on the prevailing CPI at the anniversary of the order. At paragraph 24 of the judgment she said, "The CPI is a measure of the average change over time in the prices paid by urban consumers for a market basket of consumer goods and services. The annual percentage change in the CPI is well recognized as a measure of inflation or the general depreciation in the value of currency. Its application can ensure that the consumption power of money is not eroded over time and compensates for the diminishing value of money."

[35] There is also the decision of ***Richardson v Richardson***[8] from the Supreme Court of Canada on appeal from the Court of Appeal of Ontario. Among other things, the Supreme Court decided (by majority of 6-1) that an escalator clause should not be inserted into a maintenance agreement where none had existed before. The Court of Appeal had struck out the escalator clause inserted into the Divorce Settlement entered into between the parties by the trial judge. The Appellant sought to challenge this striking out by the Court of Appeal and the Supreme Court ruled as follows[9]:

> *"The appellant also challenges the Court of Appeal's decision to strike out the escalator clause inserted in the decree nisi by Perras L.J.S.C. This case does not require us to examine the question whether in general a trial judge has power to insert an escalator clause in a decree nisi. This case requires us to decide only whether a trial judge can insert an escalator clause in the decree nisi where the parties do not have such a clause in their settlement agreement. Since there has been no change in circumstances of the kind*

[8] [1987] 1 RCS 857
[9] Id at p. 873

required to justify a variation of the Minutes of Settlement entered into by the parties, the trial judge's action in this regard cannot stand."

[36] This decision therefore leaves open the possibility that escalator clauses may be valid parts of maintenance agreements.

[37] In the case of ***Paul Campbell v Diahann Campbell***[10], Brooks J (as he then was) declined to use the updated figure from the CPI to **set** the maintenance figure, but rather to **test** whether the figure he arrived at would be appropriate given the change in means of the person paying the maintenance and the needs of the child at the time of the application for variation. Brooks J explained his reluctance to use the CPI to set the maintenance award in this way[11],

"I acknowledge that there are inherent weaknesses in the approach. There is nothing to confirm the appropriateness of the sum arrived at by consent in 2004. One has to assume that it was neither unduly high nor low. It must also be considered that B's needs would have changed over the years; some things would have become less important or even unnecessary, while others have become more prominent as she matured. The benefit of using the CPI, however, is to determine whether the standard, then set, is being maintained by the new order."

[38] So here I have before me two approaches. One is to utilise the CPI as **the means to set the award**; whilst the other is to utilise it as a **benchmark** for determining whether the proposed updated award is maintaining the standard already judicially determined or sanctioned. In this case, I recognise that the former approach was sanctioned by the Order of J. Pusey J (Ag) (as she then was). I also note that the agreement of the parties is not generally to be interfered with. The strong submissions of the Respondent that a party should not be allowed to avoid a consent agreement due to "bad advice" is well founded and noted[12].

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[10] N 1 supra

[11] N1 at pp 12-13

[12] See the submissions of the Respondent at paragraph 17 and the authority therein of *Harris v Manahan* [1997] FLR 205.

[39] Jurisprudentially speaking, however, I prefer the approach of Brooks J (as he then was). To my mind, when it comes to the variation of maintenance orders, there are innumerable circumstances that can arise between the granting of the original award or the making of the original agreement and when the need for the variation arises. To automatically vary an award, in the way proposed in the agreement, could potentially be unfair to both the beneficiary of the award (the minor in his case) and/or the person making the payment.

[40] For one, the updated award using the CPI may not even cover the current expenses of the minor. In that case the agreement would have to be avoided as so to do would be in the best interests of the child; if the updated award would result in a figure far in excess of what would be in the best interests of the child, it would not be reasonable to force the payor to pay such a sum; there is also a scenario where the updated award could far outstrip the means and ability of the payor to pay. This would cause him/her to be exposed to very serious sanctions if he/she breaches the maintenance order – for example imprisonment.

[41] The other serious question that arises is whether or not an automatic increase violates the right of a person to a fair hearing, especially when the raising of a maintenance award is so consequential. The Court of Appeal certainly thought that to refuse to reduce a payment for maintenance without hearing from the person affected would violate this right. This was the *obiter* conclusion in the case of ***Morgan v Williams-Morgan***[13]*.*

[42] To my mind, to allow the escalation clause to remain would sacrifice fairness to all concerned on the altar of expedience. As attractive as expedience might look, in my view, the consequence of so doing are potentially too serious. I would therefore

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[13] Supra n. 3 at para 49.

say that the clause 5(i) of the Consent Order of Pusey J (Ag) should be varied as follows:

a) **Substitute the words and numbers "Eighty-Nine Thousand Six Hundred Dollars ($89,600.00) for the words and numbers "Seventy Thousand Dollars ($70,000.00);**
b) **Remove the word "adjustment" and substitute the words "review by the Court"; and**
c) **Remove the words "using the Consumer Price Index as published by the Statistical Institute of Jamaica" after "Order".**

[43] This way, the maintenance order comes for review within a reasonable period of time and the parties can make submissions for same to remain or be adjusted accordingly.

DISPOSITION

1 Clause 5(i) of the Consent Order of Pusey J (Ag) made on the 10th October 2018 is varied as follows:

a. **Substitute the words and numbers "Eighty-Nine Thousand Six Hundred Dollars ($89,600.00) for the words and numbers "Seventy Thousand Dollars ($70,000.00);**
b. **Remove the word "adjustment" and substitute the words "review by the Court"; and**
c. **Remove the words "using the Consumer Price Index as published by the Statistical Institute of Jamaica" after "Order".**

2 No Order as to costs.

3 Leave to appeal is granted.

4 Applicant's Attorneys-at-Law to prepare, file and serve this Order on or before the 19th April 2024 by 4:00 pm.

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D. Staple, J