In The Supreme Court of Bermuda

DIVORCE JURISDCITION

2011 No: 102

BETWEEN:

S. P.

Petitioner

and

A. W.

Respondent

JUDGMENT

Child Maintenance; Back-dating of child maintenance

Date of Hearing: 27 June 2018
Date of Ruling: 13 February 2019

Keivon Simons of Smith & Co. for the Petitioner
The Respondent appearing In Person

JUDGMENT of Acting Registrar Alexandra Wheatley

Introductory

1. The Petitioner and the Respondent were married on 12 July 2002. The Decree Nisi was granted 28 October 2011 and made absolute on 8 December 2011. There are two children of the family. The older child of the family was a child the Petitioner had from a previous relationship. This matter only relates to the youngest child of the family.

2. The Petitioner initially made an application for child maintenance payments on 8 November 2011 ("the First Application"). In this application the Petitioner also sought sole custody, care and control of the children of the family. During the course of the application for custody, care and control, the Court ordered a Social Inquiry Report to be carried out. A Social Inquiry Report was submitted to the Court on 11 October 2012 ("the SIR") and only provided recommendations for the younger child, who at the time was eight years old. The contents of the SIR evidenced the parties had agreed to the recommendations set out therein:

> "*The following recommendations put forth have been jointly agreed upon by the parents with regards to the on-going care of the child of the marriage, eight year old, [younger child]. The parents have on outstanding matters either before the court or with each other with the exception of the co-parenting of their daughter…*"

3. The relevant recommendations made by the SIR for the purposes of this matter are as follows:

> "*1. [The Petitioner] and [the Respondent] will share joint custody and joint care and control of the [younger child].*
>
> *…*
>
> *3. [The Respondent] will contribute 50% towards the child's gymnastic fees which are $1350.00 per year or $450.00 per term. There are three terms*

per year. It was agreed that [the Respondent] will pay $225.00 per term directly to the Bermuda Gymnastics Association."

4. However, thereafter, no order was made by the Court for the issues of custody, care and control or child maintenance as it was confirmed in correspondence from the Petitioner's attorneys dated 7 April 2014 that they were unable to resolve the terms of a Consent Order. As such, on 14 July 2014 the Petitioner filed her Notice of Application for Ancillary Relief ("Ancillary Relief Application"), *inter alia*, seeking periodical payments for the child of the family.

5. Directions were given for the Ancillary Relief Application; however, the parties never complied with the directions and the matter did not go to final hearing. There is no correspondence on the Court file from either party respect of his and her respective positions as it related to the Ancillary Relief Application when no further action was taken in 2014.

6. During hearing the Petitioner articulated that back in 2014, she decided not to proceed with her Ancillary Relief Application as she believed the parties had agreed to the terms set out in the SIR. Further, she expressed her belief the "*Court would honour the terms of the agreement*".

7. The Respondent has now made his own application by way of a Summons dated 10 November 2017 ("the Respondent's Summons") seeking the following relief:

    1) Child maintenance from the Petitioner; and

    2) The Order for child maintenance be back-dated to October 2016.

8. The parties were referred to the Court Appointed Mediator by way of the Order dated 25 January 2018 made by the Learned Justice Stoneham. Attempts were made through the mediation process for approximately 5 months to attempt to reach an agreement on the

Respondent's Summons, but regrettably, the parties were unable to reach an agreement. The matter therefore proceeded to final hearing.

Preliminary issue

9. Remarkably, at the commencement of the hearing, Counsel for the Petitioner submitted the matters for me to determine were not only those set out in the Respondent's Summons, but also the relief sought in the Petitioner's Ancillary Relief Application.

10. I explained to Mr Simons the Ancillary Relief Application was not before me and it was only the Respondent's Summons which would be determined. The Court file clearly indicated the Petitioner did not pursue her Ancillary Relief Application and no order for directions had been made in relation to the same since 2014. Moreover, Mr Simons at no time filed an application or at the very least wrote to the requesting that the Ancillary Relief Application be reinstated. Counsel had difficulty grasping this reality at which point I had to further advise Counsel of his client's evidence before the Court is only that set out in her Affidavit and he could not at this stage request his client to provide *viva voce* evidence to the Court outside of the scope of what had been set out in her Affidavit. I further explained the prejudice the presentation of *viva voce* evidence provided by the Petitioner at this stage of the matter would place on the Respondent as he would have no knowledge of what evidence the Petitioner would be giving and as such may not be in a position to respond in a manner which may require him to submit his own evidence should it be disputed.

11. Counsel and the Petitioner both seemed to be perplexed by this position, so I gave Counsel the opportunity, a short period of time, to advise the Petitioner as she became quite distraught. Despite this unusual position, I allowed the Petitioner to give *viva voce* evidence on issues not set out in her Second Affidavit which she believed were relevant to the determination of this application. I could not deprive the Petitioner a right to a fair

hearing, particularly in circumstances where she appeared to have been misguided and/or poorly represented by her Counsel.

12. I thoroughly explained to the Respondent of the request being made by Counsel as he was a litigant in person and his rights to a fair hearing. The Respondent most graciously consented to the Petitioner providing the additional *viva voce* evidence. He understood he would have an opportunity to respond to the Petitioner's *viva voce* evidence and should he need to submit any evidence to new matters raised, I would give him time to do so. The Respondent was most understanding and composed throughout the hearing despite the troublesome start for which I am extremely grateful.

The facts

Respondent's position

13. The Respondent's income continues to be minimal as it was back in 2012 when the SIR was completed. This is clearly evidenced by the agreement that he would pay just $1,350 per year; i.e. $112.50 per month for the child which represented half of gymnastics fees. No other sums of maintenance were agreed back in 2012 when the SIR was completed.

14. The Respondent is employed at Divots and produced a pay advice dated 4 December 2017 representing his pay for the week of 27 November 2017 to 3 December 2017. His net pay for this week was $312.00. The Respondent confirmed his hours change so his weekly pay fluctuates. The pay advice also evidences his net year-to-date earnings as being $10,492. This is an average net salary of $953.82 per month (based on the 11 months shown in this pay advice); i.e. $220 per week. The Respondent further confirmed in cross-examination in addition to his base salary he earns tips which can vary from $30 to $150 per day. I find that on average he earns $90 per day in tips. As such, in addition to his net weekly average salary, $90 per day for 5 days amounts to an additional income of $450 per week. Therefore, it can be estimated his average weekly salary is $670; i.e. $2,903.33 per month. I accept this is the Respondent's only source of income.

15. The Respondent set out his expenses in his Affidavit as follows:

BHS	$1,130.00
Belco	$175.00
Cell phone	$100.00
Groceries	$600.00
Activities	$300.00
Clothes/shoes	$200.00
Internet	$160.00
Transportation	$300.00
Cable	$100.00
Misc.	$400.00
TOTAL:	**$3,465.00**

16. The Respondent confirmed that he is unable to meet the monthly expense to BHS given his income as well as due to the Petitioner not providing him with any financial support for the child of the family since October 2016. He further gave evidence which is supported in his Affidavit that he is in arrears of the BHS tuition fees in the sum of $15,162.66 as at the date of the hearing. The Respondent further confirmed his mother had to pay two lump sums of $1,000 (September 2017) and $4,000 (January 2018) respectively in order for the child to remain at BHS.

17. I queried the lack of payment of rent or a mortgage listed in his expenses. The Respondent confirmed he resides at his family homestead with the child of the family and indicated he has an agreement with his family members that he is not required to pay any rent and/or a contribution to the mortgage secured against the property. This agreement is in place due to his family accepting he is in dire financial circumstances.

18. I accept the expenses submitted by the Respondent are accurate and reasonable, bearing in mind these expenses relate to not just to the Respondent, but also to the child of the

family (direct and indirect expenses). It should be noted the only expense which was challenged by Counsel upon cross-examination was in relation to the payment of tuition for BHS. The Respondent's evidence is that he has paid $24,000 in tuition for the 2016/2017 and 2017/2018 academic years as the child obtained a bursary of $8,000 for each of these years. The arrears being $15,162.66 as at the date of the hearing as stated above.

19. The history as it relates to the child's enrollment at BHS in 2016 is the basis of which the Petitioner is contesting she is liable to make any contribution towards. For the academic year 2016/2017, the child was due to commence attending a school overseas. This was an agreed position, but one which was initiated by the Petitioner. Prior to this the child had been attending BHS. At this time she was 12 years old. The Respondent accompanied the child to the school overseas to settle her in. The Respondent's evidence is that the child was very uncomfortable in the new school and he remained with her for 5 weeks in order to see if she would settle in. The Respondent indicated the child would cry every weekend he visited and she would beg him not to leave her there. The Respondent articulated in the hearing he attempted to contact the Petitioner several times to discuss their daughter's distress in remaining at the school, but the Petitioner refused to have any discussions and eventually refused to answer any of his phone calls.

20. Due to the Petitioner's refusal to communicate and his daughter's sever anxiety about remaining at the school, he accepted he made the unilateral decision to remove her and return with her to Bermuda. It was at this time in October 2016, the Respondent enrolled the child at BHS where she had previously attended. The Respondent accepts he enrolled her at BHS without the consent of the Petitioner, but reiterated it was solely due to the Petitioner's refusal to communicate with him. Since this time the Respondent has had sole care and control of the child and the Petitioner has refused to have any communication or access with her. The Petitioner accepts she has made no financial contribution towards her daughter's expenses since her return in October 2016. Her justification for this is that she neither consented to her removal from the overseas school, nor her re-enrollment at BHS. The Petitioner disputed this expense on this basis as well

as purported that she would not have consented to her re-enrollment in BHS as she did not and does not have the means to finance this expense.

21. The Respondent is seeking for the Court to back-date this Order to reflect the Petitioner's non-contribution towards the child of the family's expenses since October 2016 for which he has had the sole burden.

Petitioner's position

22. The Petitioner provided one of her pay advices from her employment at the Department of Education for the year ending 31 December 2017. This confirms she receives a net monthly salary of $5,916.29. I accept this is her monthly income and that she does not receive income from any other source.

23. The evidence presented in her Affidavit sworn on 24 January 2018 ("the Second Affidavit") was quite disappointingly, virtually identical to her Affidavit sworn on 30 December 2011 ("the First Affidavit"). The lack of variation between her First and Second Affidavit demonstrated an entirely inaccurate picture of the Petitioner's expenses as the Petitioner admitted during her cross-examination she no longer had several of the expenses listed in her Second Affidavit. Undoubtedly, this was as a result of the template used by her Counsel to draft the First Affidavit being used to produce her Second Affidavit. This undoubtedly shows a complete lack of scrutiny and professionalism given to the compilation and finalization of the Petitioner's evidence on the part of her Counsel; however, the Petitioner also had a duty to thoroughly review her Second Affidavit to ensure it was accurate which was certainly not done.

24. Without any supporting evidence of the Petitioner's expenses, I find the following to be the Petitioner's reasonable monthly expenses:

Rent	$2,250[1]
Telephone (Long Distance UK)	$100[2]

[1] The Petitioner confirmed "Mortgage Bermuda" was inaccurate as she does not own property in Bermuda and this expense should be for "Rent".

Cable	$120
Electricity	$140
Clothing for children	$0[3]
Clothing for self	$50
Entertainment	$100
Cell phones (x2)	$330
Medication	$20
Credit card payments	$700[4]
Lunches for children	$0[5]
Legal fees	$100
TOTAL:	**$3,910**

25. It should be noted the Petitioner confirmed in her cross-examination that she no longer has the following monthly expenses despite them being listed in paragraph 3.2 of her Affidavit: Loan Payment $680; Gas (transportation) of $400; Gymnastics $400; In Motion Dance $400; and BHS $300. These expenses alone reduced the Petitioner's monthly expenses by $2,180.

26. Therefore, based on the Petitioner's monthly income of $5,916.29 and monthly expenses of $3,910, she would be left with a surplus of $2,006.29 each month. As the Respondent has had sole care and control of the child of the family since October 2016, I find this has been the Petitioner's financial position since this time. Moreover, the disparity in the

[2] The $500 the Petitioner purports to have this monthly expense to speak with her son who resides in the UK is excessive given the many means of technological communication available to everyone which come at little to no cost. Interestingly, the Petitioner averred to incur this exact amount for this same expense in her Affidavit sworn on 30 December 2011.

[3] The Petitioner accepted she has not had care of the child of the family for 2 years and has not contributed financially to her care since October 2016, so this is not an expense she has incurred.

[4] The Petitioner confirmed there is approximately $2,000 outstanding on her credit cards which she pays the minimum monthly contributions on each card. She confirmed she has not used these two credit cards in approximately 2 years, so I accept there would not be a double accounting of the expenses she has purported to have each month.

[5] The Petitioner accepted she has not had care of the child of the family for 2 years and has not contributed financially to her care since October 2016, so this is not an expense she has incurred.

parties' evidences, the Petitioner earning 67% of the parties' joint income and the Respondent earnings representing 33%.

27. The Petitioner continued to attempt to rely on her not consenting to the child being enrolled in BHS as eliminating any liability for a contribution towards this expense. Further, the Petitioner averred her and the Respondent had a verbal agreement in 2014 that they would both contribute equally to their daughter's tuition expense at BHS. The Respondent accepted that he did agree to this; however, he did submit he had never been able to fully meet this expense due to his financial circumstances. The Petitioner's further argument is that due to the Respondent not contributing towards the expenses at BHS for this time, she should not be expected to contribute towards the BHS expenses incurred for the two academic years since her return to Bermuda in October 2016.

28. I can entirely appreciate the Respondent's best intentions, but it was clear both in 2012 and 2014 based on the evidence presented to the Court at that time he did not have the means to do so. I therefore cannot accept the Petitioner would have any reasonable basis for which to expect the Respondent to meet this expense. This position is additionally validated, in my view, by her not pursuing her Ancillary Relief Application in 2014.

29. The Petitioner's refusal to communicate with the Respondent regarding the child's return to Bermuda in October 2016 due to the extreme emotional distress she was exhibiting at the overseas school, does not obviate her responsibility to contribute towards her daughter's financial care. Further, the fact the child was enrolled in BHS directly prior to her being enrolled in a school overseas does not support the Petitioner's argument that she would not have consented to her being re-enrolled upon her return to Bermuda. In fact, the Petitioner's financial position had improved since 2014 due to the reduction in her expenses evidenced above. I do not accept the Petitioner did not have the means to contribute towards the tuition expenses for her daughter being enrolled in private schooling since 2016, even more so as this was the *status quo*.

The law

30. When deciding what financial orders made under Sections 27 or 28 of the Matrimonial Causes Act 1974 ("MCA"), I have a statutory obligation to have regard to all the components set out in Section 29 of the MCA in order to take into consideration all the circumstances of the case. The first consideration is given to the welfare whilst a minor of any child of the family. When assessing "needs" courts will have regard, in particular, to the matters set out in section 29(2):

> *"29 ...*
>
> *(2) Without prejudice to subsection (3), it shall be the duty of the court in deciding whether to exercise its powers under section 27(1)(d), (e) or (f), (2) or (4) or 28 in relation to a child of the family and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say—*
>
> *(a) the financial needs of the child;*
> *(b) the income, earning capacity (if any), property and other financial resources of the child;*
> *(c) any physical or mental disability of the child;*
> *(d) the standard of living enjoyed by the family before the breakdown of the marriage;*
> *(e) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained;*
>
> *and so to exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in subsection (1)(a) and (b), just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him.*" [Emphasis added]

31. In addition to the factors taken into consideration in relation to the child set out in Section 29(2) of the MCA, I must then consider the circumstances of the parties, the elements of which are set out at Section 29(1) as follows:

> "*29 (1) It shall be the duty of the court in deciding whether to exercise its powers under section 27(1)(a), (b) or (c) or 28 in relation to a party to the marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters -*
>
> *(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;*
> *(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;*
> *(c) the standard of living enjoyed by the family before the breakdown of the marriage;*
> *(d) the age of each party to the marriage and the duration of the marriage;*
> *(e) any physical or mental disability of either of the parties to the marriage;*
> *(f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contributions by looking after the home or caring for the family;*
>
> *.....*
>
> *and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.*" [Emphasis added]

Conclusion

32. I find the Respondent is entitled to child maintenance from the Petitioner since the child has been in his sole care since October 2016 and taking into the elements set out in Section 29(1) and 29(2) of the MCA. They have set out above the findings I have made in relation to each of these factors, the emphasis of which is on the needs of the child and the income/earning capacity of the parties.

33. I also find the Petitioner had the means since 2016 to contribute towards the private education of the child of the family, particularly as this had been the status quo. Had I found the Petitioner not to have the means and had the child not previously been enrolled in private education my decision would be entirely different.

34. I therefore, order the Petitioner shall pay to the Respondent, $1,200 per month by way of child maintenance which shall be backdated to 1 October 2016. The sum represents a contribution of 70% of the child of the family's monthly tuition at BHS ($791), plus a modest contribution towards the child's other direct as well as indirect expenses incurred by the Respondent in maintaining a roof over her head in the sum of $409.

35. Due to the backdating of this Order, this results in there being arrears of maintenance owed to the Respondent. These arrears shall be paid by way of monthly installments of $500 per month. Therefore, the Petitioner's total monthly child maintenance payments to the Respondent shall be $1,700 per month, until such time as the arrears are extinguished, at which point the monthly sum will be reduced to $1,000. The Petitioner also has the option of paying towards the arrears by way lump sum if she so chooses, but I will not require her to do so.

36. The $1,200 monthly child maintenance payments payable by the Petitioner to the Respondent (subject to the arrears being paid in full) shall come to an end in the event that the child of the family commences overseas education, at which time the parties are

encouraged to reach an agreement, the terms of which can be compiled in a Consent Order for the consideration of the Court. Alternatively, either party will have to make an application to the Court seeking a variation of this Order.

37. Both the monthly child maintenance payments as well as the payments against the arrears shall be made by way of an attachment of earnings payable through the Collecting Office of the Magistrates' Court. The Petitioner should be aware there may be a delay in the commencement of the attachment of earnings. As such, until such time as the attachment of earnings commences, she shall make all monthly payments directly to the Collecting Office of the Magistrates' Court.

38. Each party shall bear his and her respective costs in this application.

13 February 2019

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ALEXANDRA WHEATLEY
ACTING REGISTRAR FOR THE COURTS OF BERMUDA