The Court of Appeal for Bermuda

CIVIL APPEAL No. 14 of 2009

M

Applicant

-and-

W

Respondent

Before: **Zacca, President**
Evans, JA
Ward, JA

Date of Hearing: Tuesday, 17 November 2009
Date of Decision/Order Tuesday, 17 November 2009
Date of Reasons for Decision: Thursday, 18 March 2010

Appearances: Ms. G. Marshall for the Appellant
Ms. MacLellan for the Respondent

REASONS FOR JUDGMENT

WARD, JA

1. M & W are the parents of Max who was born on 10 May 2004. They co-habited for 3½ years but were not married to each other. At that time she was 27 and he was 45 years of age. They are both professional high-earning individuals. She is a broker and he is an underwriter. W's salary is $140,000 per annum with a housing allowance of $110,291 in addition to a subsidy of $13,972 for school fees for Max and a discre-

tionary bonus. M's Salary is $314,000 annually with a housing allowance of $152,400. His discretionary bonus in 2008 was $230,000 but in 2009 it was reduced to $140,000.

2. By Order of 17 March 2009 Kawaley J. awarded them joint custody of Max with care and control to W, the mother, and generous access to M, the father. In addition M was ordered to pay the sum of $8,947.59 per month as maintenance for Max with effect from 1 November 2008 with said payments being reduced to $6,473.53 per month on the happening of a certain event, namely, when W's fiancé shall begin to cohabit with W and Max. Further the Order provides for an annual increase based on the rise in the Consumer Price Index.

3. M has appealed against that Order. On 17 November, we allowed the appeal and varied the Order to the extent that in lieu of $8,947.59 M was ordered to pay the sum of $7,420 and in lieu of $6,473.53 the sum of $5,357.40 per month with no Order as to costs of the Appeal. We now give our reasons.

4. The application was made under s.12 of the Minors Act 1950 and s.36 of the Children Act 1998. Kawaley J. ruled that it fell to be determined under the Minors Act which reads:

> *"12 (1) In this section "the court" means the Supreme Court or, subject to section 5, a Special Court.*
> *(2) The court upon the application of—*
> *(a) either of the parents of a minor; or*
> *(b) any guardian of a minor; or*
> *(c) any person related to a minor in a degree nearer than the degree of first cousin; or*
> *(d) any person for the time being having actual charge of a minor; or*

(e) any children's officer appointed under the Protection of Children Act 1943 [title 13 item 6],

may make such orders as it may think fit in relation to the guardianship, custody or maintenance of the minor and the right of access thereto and the control and management of any property of the minor, having regard to the welfare of the minor and to the conduct and to the wishes or representations of either parent or of any guardian or of any person having the actual charge of the minor."

A parallel legal provision may be found at ss.36.1c and 36.1d of the Children Act 1998 which reads:

"Order for support
36.1C (1) A court may, on application, order a person to provide support for his or her dependants and deter mine the amount of support.

(2) An application for an order for the support of a dependant may be made by the dependant or the dependant's parent.

(3) In making an order under this section in respect of a child the court shall

- *(a) recognize that the parents have a joint financial responsibility to maintain the child; and*
- *(b) apportion that obligation between the parents according to their relative abilities to contribute to the performance of their obligations.*

(4) In determining the amount of payments to be made under an order in respect of a child the court shall consider all the circumstances of the case including—

- *(a) the mother's and father's current assets and means;*
- *(b) the assets and means that the mother and father are likely to have in the future;*

(c) the mother's capacity to provide support for the child;

(d) the father's capacity to provide support for the child;

(e) the mother's and father's age and physical and mental health;

(f) the needs of the child;

(g) the measures available for the mother or father to become able to provide for the support of the child and the length of time and cost involved to enable the mother or father to take those measures;

(h) any legal obligation of the mother or father to provide support for another person;

(i) the desirability of the mother or father remaining at home to care for the child.

(5) In an application for support under this Part the court may make a determination of paternity pursuant to Part IIA.

Powers of court

36.1D (1) In an application under section 36.1C, the court may make an interim or final order.

(a) requiring that an amount be paid periodically, whether annually or other-wise and whether for an indefinite or limited period, or until the happening of a specified event;

(b) requiring that a lump sum be paid or held in trust;

(c) requiring that some or all of the money payable under the order be paid into court or to another appropriate person or agency for the dependant's benefit;

(d) requiring that support be paid in respect of any period before the date of the order;

(e) requiring payment of expenses in respect of a child's prenatal care and birth;

(f) requiring the securing of payment under the order, by a charge on property or otherwise.

(2) An order for support binds the estate of the person having the support obligation unless the order provides otherwise.

(3) In an order made under subsection (1)(a), the court may provide that the amount payable shall be increased annually on the order's anniversary date by the indexing factor as defined in subsection (4).

(4) The Indexing factor for a given month is the percentage change in the Consumer Price Index for Bermuda for prices of all items since the same month of the previous year, as published by the Department of Statistics."

5. The learned Judge found that the application fell to be determined under the Minors Act 1950 but that the said Minors Act and the Children Act 1998 are concurrent jurisdictions and that a similar approach should be adopted whether a matter is brought before the Supreme Court under the Minors Act or the Family Court under the Children Act, so that there will be a measure of consistency of results in the two jurisdictions.

6. The learned Judge added that in terms of principles which govern the Court's discretion, Part IV of the Children Act appears to be designed to approximate to some extent the maintenance powers of the Family Court with respect to unmarried parents to the powers enjoyed by the Supreme Court in respect of divorced parents under the Matrimonial Causes Act 1974.

7. Kawaley J. concluded that the Court may properly recognize that both parents have a joint financial responsibility to maintain the child and should apportion that obligation between the parents according to their relative abilities to contribute to the performance of their obligations.

8. The appeal is against the apportionment of their respective obligations.

9. In arriving at his award of $8,947.59 and $6,473.53 respectively per month, the learned Judge had taken gross sums of $12,341 and $8,929 respectively as costs necessary to meet the needs of Max in the station of life in which he lived as a child of his parents. The sum of $8,929 was the sum accepted by the Judge after the mother's finance moved in with the mother and child. The breakdown of the $12,341 under the various headings was:

   A. Direct Expenses: $1,537

   B. Nanny's Expenses: $3,980

   C. Housing Costs for Max and Nanny: $6,824.

10. The learned Judge then apportioned the gross sums according to the ratio of the joint income of the parents as to 72.5% for the father and 27.5% for the mother.

11. In passing I would observe that on the face of it, the gross sums accepted by the Judge appear to be rather high, for it can be argued with conviction that no five year old child in Bermuda who is not suffering a disability, whether that child resides in Tucker's Town or Back-of-Town or somewhere in between, could reasonably require $12,000 per month to satisfy its needs.

12. In monetary terms W applied for $11,181 per month from 1 November 2008 for the maintenance of Max, which sum would be reduced to $10,397 per month when W's fiancé commenced cohabitation with them.

13. M offered to pay 50% of the Nanny's Expenses of $3,480 or $1,740 (housing being excluded), 100% of Max's school fees not covered by a scholarship provided by W's employers being $261.50, 100% of Max's direct expenses of $3,766.50 – in total $5,768 per month. On appeal the Appellant's submission was that he should be required to pay an equal share of the child's needs or the sum of $4,000 per month from the date of the application to June 2009 when the mother commenced cohabitation with her fiancé, and thereafter the sum of $3,100 per month.

14. Counsel for W argued that a principle of proportionality should be applied and that each parent should pay the proportion of Max's expenses based on the respective proportion of their joint income. As there was an income split of 72.5% to 27.5% in favour of M, M should pay 72.5% of Max's expenses and W 27.5%. The learned Judge accepted this submission and based his calculations thereon.

15. The first Ground of Appeal is that when determining the contribution to be made by each parent to the reasonable maintenance needs of the child, the learned Judge erred in ascribing to the Appellant 72.5% of the costs of the child and further erred in adopting a formulistic approach which is a fetter on his discretion.

16. Counsel for the Appellant argued that the approach adopted by the learned Judge in determining the proper level of maintenance was wrong in principle. She submitted that support is to be provided in ac-

cordance with need and the first consideration is to determine the needs of the child. She added that the needs of Max can be shown to be $8,006 per month and that each parent has the capacity to contribute equally to those needs.

17. There is a flaw in that argument for the Court has to consider more than the needs of the child. The Children Act 1998 s.36.1C(4) lists a number of factors which must be taken into account apart from needs namely assets of parents, capacity to provide support, age, physical and mental health, other legal obligations, etc.

18. When those factors are taken into account, we are of the opinion that neither adherence to a rigid principle of proportionality nor a contribution by each parent on the basis of equality should be strictly followed. In exercising its discretion the Court must consider all the circumstances.

19. Mrs. Marshall stressed that there is no obligation under the Children Act or the Minors Act for a parent to support a child in the same manner or to the same extent as exists under the Matrimonial Causes Act 1974 where the aim is to place the child in the position he would have been in if the marriage of his parents had not broken down. This point is discussed further under Ground 5 of the Grounds of Appeal in paragraphs 33 to 35 below.

20. Ground 2 of the Grounds of Appeal is that if the learned Judge did not err as contended in Ground 1, then in the alternative the learned Judge erred in attributing to the Appellant on a "go forward" basis an income of $696,000 per annum which included his purely discretionary bonus, which in 2008 amounted to $250,000. The learned Judge failed to take the discretionary nature of the Appellant's bonus and the uncertainty of

the current world-wide economic downturn/recession into account in so far as the Appellant's current year bonus and future bonus is concerned when fixing the Appellant's contribution to the child's expenses.

21. The father's salary plus housing allowance is $466,000 per annum. That level of income is sufficient to provide adequately for the needs of a five year old child in Bermuda. To that extent a discretionary bonus of $250,000 or $140,000 or zero is therefore largely irrelevant and should not have been used on a "go forward" basis in fixing the father's contribution to the child's expenses.

22. We accept that in high income cases a discretionary bonus is unrelated to meeting the needs of the child and care must be taken lest a consideration of such bonus should produce an unbalanced result.

23. Ground 3 is that the learned Judge erred in ascribing to the child 100% of the cost of the nanny in the sum of $3,480 per month. The apportionment of 100% of the nanny's cost to the child fails to take any account of the nanny's services as housekeeper for the Respondent and in the near future for the Respondent's husband. In the circumstances an apportionment of 100% of the costs of the nanny as being a direct expense for the maintenance of the child was wrong.

24. In response, Mrs. MacLellan submitted that the child had a nanny during cohabitation and the services of a nanny are essential to the mother who works full-time. Moreover, the salary of the nanny would be the same whether or not she performs housework during the day and the father should contribute to the associated expenses. In addition the nanny must be available to work at various hours throughout the day to meet the needs of the child.

25. As an expatriate nanny, as this one is, must be engaged for full-time service, we find merit at this time in Mrs. MacLellan's response. As the child grows older, the position may have to be reviewed.

26. Ground 4 is that the learned Judge erred in arbitrarily apportioning to the child 50% of the household expenses and further erred in adopting a formulistic approach which is a fetter on his discretion. Such a formulistic approach has no support in law or in principle.

27. Counsel for the Appellant argued that the apportionment of 50% of the household expenses to the child – three persons being in the house namely the mother, the child and the nanny – is unrelated to the needs of this five year old child and was plainly arbitrary.

28. Counsel continued forcefully that the correct approach when considering joint household expenses would have been to take into account what the mother would reasonably have paid for her own housing and household expenses and deduct that from the total household expenses so that a distinction is made between needs of child and needs of mother. Mrs. Marshall submitted that the mother and her husband would have had their own household expenses which they should be required to meet to maintain the standard of living that they elected to enjoy. It is only the additional expenses which are incurred because of the child and to meet the needs of the child to which the father should be required to contribute.

29. We accept that the expenses attributable to a person resident in the household cannot be determined simply by dividing the gross household expenses by the number of persons residing therein. Other factors such as age, special requirements and position in the household would have to be taken into account.

30. Ground 5 is that the learned Judge erred in failing to apply any discount to the Respondent's rent in circumstances where the decision to take up accommodations at a level of $12,500 per month was taken unilaterally and unreasonably by the Respondent without any input by the Appellant and despite his objections. The learned Judge erred in principle in failing to take into consideration that save for applications under the Matrimonial Causes Act, there is no basis in principle for the Court to take into account the standard of living enjoyed by the parties during cohabitation as a benchmark in determining the proper level of maintenance for a child.

31. For the mother Mrs. MacLellan submitted that the needs of the child were established by its parents during their cohabitation and included such things as private school fees, nanny expenses and standard of living. Needs in that context were given wider meaning than basic necessities of food, clothing and shelter.

32. In addition Mrs. MacLellan submitted that pursuant to s.18A of the Children Act 1998 no distinction must be made between children born in wedlock and those born outside a marriage, and the principles which apply with respect to maintenance of the former should also apply with equal force to the latter.

33. We accept that the standard of living of the child during the cohabitation of the parents is a factor to be considered. The rental allowances which both parties receive are indicative of the standard of accommodation which they are expected to enjoy. A child in that environment would enjoy the same.

34. In *J v C* (Child: Financial Provision) [1999] 1 F.L.R. 152 Hale J. held that the child was entitled to be brought up in circumstances which bore some sort of relationship with the father's current resources and the father's present standard of living with the caveat that one must guard against any use of an application such as this as "gold digging" on the part of the mother.

35. In *F v G* (Child: Financial Provision) [2005}1 F.L.R. 261 Singer J. held that although standard of living was not one of the specific considerations listed in para. 4(1) of Schedule 1 to the Children Act 1989, the extent to which the unit of primary carer and child had become accustomed to a particular level of lifestyle could impact legitimately on an evaluation of the child's needs, reasonably to be viewed against his or her history.

36. The Respondent receives a housing allowance of $110,291 per annum or $9,190.91 per month. We are not persuaded that that sum is insufficient to provide suitable accommodation for the mother, child and nanny. The mother has rented accommodation at $12,500 per month. But she now has a husband so it would not be unreasonable to expect him to make a contribution towards the rent.

37. Ground 6 is that the learned Judge erred in ordering that maintenance should be increased annually commencing on 1st January 2010 in that the single largest component in the maintenance comprises a contribution towards the Respondent's rent of $12,500 per month which is itself fixed for the next three years.

38. It was submitted that the indexing factor should bear some relationship to the nature of the expenses incurred by the mother and to which the father is making a contribution for the welfare of the child. Both the

rent and the cost of the nanny are fixed for determinate periods and are not subject to fluctuation by changes in the cost of living index.

39. We found merit in the submission that this is not a suitable case for use of the indexing factor.

CONCLUSIONS

40. Pursuant to s.36.1C(3) of the Chldren Act 1998 both parents have a joint financial responsibility to maintain the child and the Court must apportion that obligation between the parents according to their relative abilities to contribute to the performance of their obligations.

41. As it is a joint obligation, the correct starting point is a 50/50 split. But that has to be adjusted, as necessary, after all the listed factors have been taken into account. Nor is the apportionment to be done according to a rigid mathematical formula or calculation based on the percentage that one parent's income bears to the other. Rigid application of such a formula would be to ignore the other considerations mentioned in s.36.1C(4) of the Act and the broad discretion given.

42. Although both parties on their own are financially able to care for Max, in considering the respective earnings and prospects of the parties, we are left in no doubt that the father is in a much stronger position under both heads. He should therefore be required to make a bigger financial contribution to meet the needs of Max to whom he has liberal access and for whose expenses he is responsible when he has the child with him.

43. Bearing in mind all the circumstances and the factors which must be taken into account, we have concluded that using the figures which

support this high standard of living, the justice of the case would be met by a 60/40 split in favour of the mother.

44. The appeal is allowed and the Order varied as indicated above.

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Ward, J.A.

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I agree Zacca, J.A.

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I agree Evans, J.A.