



IN THE SUPREME COURT OF BERMUDA

DIVORCE JURISDICTION

2000: No. 188

BETWEEN:

G

Petitioner

-and-

G

Respondent

(Re: C-Child Maintenance)

RULING

Date of hearing: July 19, 2007

Date of Ruling: July 31, 2007

Mr. Christian Luthi, Conyers, Dill & Pearman, for the Petitioner

Ms. Keren Lomas, Lomas & Co., for the Respondent.

Introductory

1. The Respondent mother applies by Summons dated August 25, 2006 to increase the Petitioner father's child maintenance obligations under a May 31, 2001 Consent Order ("the Consent Order") which resolved all ancillary relief matters.
2. Since then, it is common ground: (a) C, the child of the family, is six years older. He was then 9, and is now 15; (b) the mother has acquired a comfortable home by way of investment of her lump sum settlement; and (c) the mother continues to work in a professional capacity and has remarried.
3. The parties have done well to avoid recourse to the Court for so long, but a meeting of minds was simply not possible on the extent to which the father's financial obligations should be increased. The father's ability to pay what the mother sought is not in dispute and it was conceded by him that the passage of time necessitates some uplift in the amounts ordered six years ago. The Court is required to decide what amount is objectively reasonable, having regard to all the circumstances illuminated by the evidence placed before the Court.
4. In essence, the mother contends that her expenses have materially increased while the father insists that there has been no material change of circumstances (cost of

living increases apart) and that, if anything, the mother's circumstances have improved.

The Consent Order and the modifications sought

5. Paragraphs 7-10 of the Consent Order provide as follows:

“7.The Petitioner shall pay to the Respondent the sum of One thousand two hundred United States dollars (US\$1,200.00) per month by way of maintenance for the child of the family, namely [C] born on the 28th February 1992, such sum to be paid monthly on the first day of each month and to continue until the said child reaches the age of eighteen (18) years. In the event that the said child undertakes full time further education beyond that age, the parties shall endeavour to agree the quantum of ongoing periodical payments. Failing agreement, there shall be liberty to apply.

8. Subject to both parties agreeing the choice of private school for the child of the family to attend, the Petitioner shall pay eighty percent (80%) of the ongoing educational expenses of the child of the family immediately upon the said educational expenses becoming due and payable, including but not limited to, private educational fees, and any and all direct educational expenses, such as but not limited to, books, school uniforms, etc. In the absence of agreement in relation to the choice of private school there shall be liberty to apply.

9. In addition to paragraph 8 above, the Petitioner shall pay eighty percent (80%) of those extra-curricular activities, including school programmes, school trips, enrichment programmes and like activities as he has agreed with the Respondent to pay in advance of the activity or expense being undertaken. There shall be liberty to apply if there is failure by the parties to agree.

10. The Respondent shall provide the Petitioner with a quarterly statement, in arrears, of those expenses arising pursuant to paragraph 9 above and the Petitioner shall pay to the Respondent the amount due thereunder within seven (7) days of receipt of the said quarterly statement.”

6. The mother's Summons seeks the following relief:

“1.Clause 7 of the Consent Order herein made 31st May, 2001 be varied to provide for monthly periodical payments for the one child of the family, namely, [C], born 28th February, 1992, of \$4,500.00 per month, such increased periodical payments to continue to be made until the said child completes his full time education or until further order of this Court.

2. That Clause 8 of the said Consent Order be varied to reflect that the Petitioner shall pay 100% of the said child's educational costs;

3. *That Clauses 9 and 10 of the Consent Order be deleted provided that the periodical payments increased by this Honourable Court under Clause 7 are sufficient to enable the Respondent to meet the expenses referred to therein; and*
4. *That the monthly periodical payments increased under Clause 7 hereof be increased annually at the rate of 5% per annum;*
5. *That the costs of this application be the Respondent's in any event."*

The father's open offer

7. In his third Affidavit of June 26, 2007, the father made an open offer to settle the mother's application to vary the terms of the Consent Order. This offer was reproduced in Appendix 1 to the Submissions of the Petitioner as follows:

"Mr. [G]'s Offer

1. Bearing in mind the Learned Judge's guidance, the Husband has made an open offer to the Wife as follows:

(i) Cost of Living Increase

The Husband has made an offer based on a cost of living increase. Namely that, based on the fact that for the years 2001-2006 the costs of living increased as follows;

- (a) 2001: 2.6%*
- (b) 2002: 1.4%*
- (c) 2003: 2.1%*
- (d) 2004: 2.7%*
- (e) 2005: 4.1%*
- (f) 2006: 3.3%*

Applying these percentage increases to the present maintenance figure of \$1,200 per month yields \$1,407, a \$207 per month difference.

Increased Expenditure

2. The Husband has offered an additional \$343 per month to take into consideration any increased expenditure as a result of [C]'s age.

Fixed Sum for Extra Curriculars

3. Taking into consideration the last year's extra curricular expenses paid by the Husband, (which were \$2,180) the Husband offered the additional Wife the sum of \$2,500 per annum to cover extra curricular activities. This works out to be an additional \$208 per month.

4. The total sum offered monthly works out to be \$1,958. Inclusive of the mobile phone payment this sum works out to be \$2,008.

Increases Going Forward

5. Going forward, the Husband proposes to increase the total figure annually by the costs of living increased as fixed by the United States Social Security Cost of Living adjustment.

Costs of Education

6. Mrs. [B] currently pays 20% of the education expenses. Mr. Gerry has offered to pay for the son's college tuition, over and above the sum that the Wife has saved to date for education (\$30,000).

7. Other than the above increases, the Husband proposes that the original Consent Order remain the same. Mr. [G] proposes no change to the Wife's existing contribution to education expenses.

8. Further, the proposal implicitly assumes the Wife will continue to contribute to the expenses of extra curricular activities as originally contemplated in the Consent Order of May 2001."

Legal findings

8. Section 27(1)(d) of the Matrimonial Causes Act empowers the Court to make periodical payments orders in respect of the children of a marriage, and section 27(4) of the Act provides that this power is "exercisable from time to time". Section 29 provides as follows:

"Matters to which court is to have regard in deciding how to exercise its powers under ss.27 and 28

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 made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;

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.

(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]

9. Section 35 (1) of the Act confers on the Court a discretion to vary any periodical payments order, and the breadth of this discretion is clear from subsection (7), which provides as follows:

“(7) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order to which the application relates and, where the party against whom that order was made has died, the changed circumstances resulting from his or her death.

10. And it appeared to be common ground the burden lay on the applicant mother to demonstrate a change in the relevant circumstances which must be deemed to have been taken into account when the Consent Order was made, having regard to the current position. I accept Ms. Lomas’ submission that “*there might be circumstances other than a change in means which would justify a variation of the original order*”: *Garner-v-Garner* [1992] 1 FLR 573¹. Mr. Luthi correctly pointed out that section 35(7) does not, as in England, explicitly provide that the Court must have regard to welfare of the child. But this is a distinction without a difference, in my judgment, because section 6 of the Minors Act provides that where “*in any proceedings before any court the custody or upbringing of a minor, or the administration of any property belonging to or held on trust for a minor, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the minor as the first and paramount consideration...*” In my judgment an application in relation to periodical payments for the benefit of a child is an application to which section 6 of the Minors Act applies in that it brings into question the upbringing of the child.

11. I find it helpful, in addition, to refer to two Bermudian cases concerned with the principles applicable to applications to vary periodical payment orders. Firstly, the Court of Appeal for Bermuda observed (Sir Denys Roberts, President) in *Avery-v-Avery* [1994] Bda LR 15²:

“*The judge was correct in commenting that it is the duty of a court, when exercising its power to order a variation of an order under section 35...to have regard to the ‘means of the parties as they stand at the time when the case is before it and to approach the matter as if it were fixing the payments de novo.’ This means that the court should take into account any changes which have taken place in any of the factors...set out in section 29...*”

12. In *Avery*, a consent order was varied because the husband’s ability to meet the payments had “*worsened*”³ since the original order was made. An earlier Court of Appeal for Bermuda panel, of which Sir Denys Roberts was also a member, defined the applicable legal principles in similar terms. In a case where a wife sought to increase periodical payments in favour of herself and a child, *Robinson-v-Robinson* [1989] Bda LR 13, the Court of Appeal opined as follows⁴:

“*The judge, as was agreed on behalf of the wife, applied Lewis –v- Lewis (1977) 3 All E.R. 992 (CA), whereby it is the duty of a court, when exercising its jurisdiction under section 31 of the Matrimonial Causes Act, 1973 (Section 35 of the Bermuda Matrimonial Causes Act, 1974) to have regard to the actual means of the parties as they stand at the time when the case is heard by it. Thus a court will not take into account only those changes in the means of the parties which have taken place since the original order was made. It must approach the matter as if it were fixing*

¹ Transcript, page 8.

² Judgment, page 2, affirming the decision of Meerabux J at first instance.

³ Judgment, page 5.

⁴ Judgment, page 4.

the payments afresh and make an order which is reasonable in current circumstances.

This does not, however, mean that an earlier order should be ignored when assessing the proper order to be made on the basis of current circumstances. It may happen, for example, that a large capital payment has already been made, as happened in this case. It would be wrong to discount this in later calculations.”

13. In *Robinson*, where the wife had purchased a property with her lump sum settlement after her application to vary the order was filed and could have had more income if she had rented alternative property, the appellate court declined to grant the variation sought because (a) “*what the wife is really seeking is a further contribution by the husband to the acquisition by her of capital for herself*”, and (b) the judge was entitled to regard “*the total annual commitment of the husband in respect of the former marriage as already sufficient.*”
14. These cases, which were not referred to in argument, are merely helpful in illustrating both the agreed principles which govern the present variation application, and how other judges have applied those principles in similar cases. The present case, as the submissions of both counsel rightly reflected, turns primarily on its facts. Ms. Lomas for the mother, however, referred to the case of *Re P (Child and Financial Provision)* [2000] EWCA Civ 837 in support of her submission that some accommodation costs must be included for the child. This case was not instructive as it dealt with a case outside of marriage where the father was “*fabulously rich*” and the mother had never had her own career; the Court was involved in the process of deciding what house the father should purchase for mother and child. As May LJ, who described the father’s resources as “*unlimited*”, observed in that case⁵:

“There is, however, in my view a danger that the necessary expression of the considerations which lead to individual conclusions in the present case may be regarded as relevant and perhaps necessary considerations to take into account in other cases in which the available resources are necessarily smaller and, in most cases, in a quite different league.”

Factual findings: change of circumstances

15. The father’s proposal that he pay 100% of C’s college expenses over and above what the wife has saved to date towards these expenses (\$30,000) has been accepted. According to the mother’s budget, she saves \$100 per month towards such expenses from which she will now be relieved.
16. I accept the mother’s evidence that it is unreasonably inconvenient for her to seek approval and reimbursement of the extra-curricular expenses the father is liable for, as contemplated by paragraph 10 of the Consent Order. The opportunity for conflicts between the parents over money would be greatly reduced, with obvious benefits for the child, if the father were to make a single monthly child maintenance payment encompassing living and other expenses. This is not to diminish the father’s right to be consulted and/or informed of any significant activities the mother arranges for their son.
17. The first important difference between the parties is their estimate as to how much is reasonably required for extra-curricular activities. I accept the father’s evidence that based on past experience this amounted to \$2180 last year, or roughly \$181 per month. He is willing to pay an additional \$208 per month or a total of just under \$290 in this regard. The mother seeks \$667 per month for extra-curricular

⁵ Paragraph 74.

activities unrelated to school, roughly \$8000 per annum, and explains that \$1500 would cover golf, \$1500 supplemental squash and \$5000 a summer enrichment trip to Japan. She contends that because of the difficulty of accounting for and obtaining reimbursement for such expenses, she has not always bothered to seek reimbursement for all such expenses. I find this to be plausible.

18. However, to allocate \$5000 per year for summer trips is excessive, bearing in mind that the father pays for additional activities which C is involved in while with him, and seems improbable that such an expensive summer activity would occur every year. I would assess the reasonable extra-curricular expenses at \$5000 per year in total, of which the father's share under the Consent Order is 80%, or \$4000 annually and \$333.33 monthly.
19. The mother presently receives total child support payments, according to her own budget, of \$15,000 per year and seeks to increase those payments to \$54,000, or \$4500 per month. The broad case is that her total expenses presently marginally exceed her income, and she is unable to save. If she received the substantial uplift she seeks, she would be able to save \$10,000 per year. In addition, and this is linked more directly to the child, she would be better able to extend to him a lifestyle more commensurate to that he enjoys when with his father. The main change in her financial position is that at the time of the Consent Order, she was renting a small apartment and now has a far larger mortgage.
20. The father calculates cost of living factors alone would increase the monthly payments of \$1200 to \$1407 per month. However, taking into account increased expenditure attributable to C's age, he offers an additional \$343 per month or \$1750 in total. He is willing to pay \$50 towards C's cell phone (the mother says actual costs are often in excess of \$150 per month), which would, if accepted by this Court, take the total monthly payment with the \$333.33 for extra-curricular expenses to \$2133.33.
21. It remains to consider two important issues: (a) whether the payments made by the father should be designed to ensure that his lifestyle with the mother is commensurate with what he enjoys when with his father, and (b) what contribution, if any, should the father be required to make towards the costs of C's accommodation.
22. I accept the evidence of the mother, that her lifestyle is more modest than that of the father. He is a senior executive while she is a senior manager whom, Mr. Luthi correctly argued, has a comfortable life by most people's standards. I do not accept the argument, bearing in mind the fact that this is not a case where the mother is herself being maintained as a person who was wholly dependent on the father during the marriage, that the law requires that the child be maintained by the primary carer in a substantially similar material manner to the lifestyle enjoyed by the father. It is a fact of life that all people are compelled to live within their means, and that different people have different means. Income differentials may in part reflect abilities, lifestyle choices and pure luck. Western democracies guarantee equality of economic opportunity, not economic equality in outcome terms. The mother's concerns about the disparate lifestyles between her own household and her ex-husband's, as commented upon by the child, is understandable in emotional terms.
23. However, the Court cannot accept the submission that the child maintenance payments must be such as to guarantee an equivalent lifestyle, when there is no convincing evidence that the income-gap between mother and father has materially increased since the Consent Order was made. This submission is also based on the implicit assumption that the father's lifestyle is more beneficial to the interests of the child than the mother's, or, alternatively, that the child's parental respect is inextricably intertwined with his parents' income levels or lifestyles. The reality is that each parent has a different lifestyle, and that difference, sensibly managed by both parents, should add to C's personal development rather than detract from it.

24. On the other hand, the basic child maintenance payments ought to contain an element of contribution to the child's accommodation expenses. The challenge is where to draw the line between the extremes of, in effect, asking the father to contribute to the mother's own capital asset, on the one hand, and ordering no contribution at all, on the other hand. It is unclear to what extent the \$1200 payable under paragraph 7 of the Consent Order took this expense into account. However, the mother's rent then was approximately \$1900 per month, so that payment represented roughly 63% of the mother's total accommodation expenses. Assuming this percentage to have been just, the basic payment (excluding the \$333 now due in respect of extra curricular expenses, and ignoring the cell-phone charges as the mother is being saved \$100 per month by the father's college fees offer) should now be 63% of \$4533 or \$2855.79, subject to considering any related accommodation expenses. To this one would add the fixed monthly extra-curricular fee of \$333.33, which would result in a total payment of \$3189.12.
25. Yet the mother is in effect now seeking child maintenance payments of \$4500 or nearly 100% of her accommodation expenses. If other living expenses are roughly \$2100, the mother's claim would represent a \$2400 contribution to the accommodation expenses, some 52.9% plus living expenses on top. The Consent Order provided for some 63% of the total accommodation expenses to be paid, but this covered all living expenses as well. It only excluded (a) education expenses (paragraph 8), and (b) extra-curricular expenses (paragraph 9). In addition, by paragraph 2 of her Summons, the mother seeks to vary paragraph 8 so that the father pays 100% (instead of 80%) of C's education expenses. The coming year's school fees will be \$25,000, so the mother seeks relief in respect of \$5000 per annum or \$416.66 per month, and an abandonment of the requirement to account for education expenses under paragraph 10 of the Consent Order.
26. In effect, she seeks a total monthly payment \$4916.66, some 108% of her total mortgage costs, although to be fair an additional property-related expenses have also to be met. Nevertheless, one must also have regard to the fact that (a) her income has increased, (b) the equity in her home (which is seemingly worth in excess of \$800,000) is growing, and (c) she has re-married, and has potential (if not actual) financial support from her current husband. In these circumstances, it is not reasonable to require the father to contribute substantially more in percentage terms to the mother's total accommodation expenses than he was required to do at the time of the Consent Order. After all, the Court is not being asked to revisit the entire ancillary relief application, but only the child maintenance elements of the agreed regime. That regime provided for no maintenance for the working mother, but a lump-sum settlement which would enable her to purchase a home for herself and C, or invest the capital in such other way as she chose. It provided for the father to pay for 80% of education and extra-curricular expenses, and provided an accounting mechanism for the latter which I find is administratively inconvenient. This is illustrated by the father's apparent refusal to pay for certain expenses because, contrary to the terms of paragraph 9, his prior approval was not obtained⁶.
27. The Consent Order provided for a basic maintenance figure, which must be deemed to have been intended to represent the father's contribution to the child's living expenses, accommodation included. The change of circumstances relied upon by the wife, principally the increased accommodation costs, is not beyond the reasonable contemplation of the parties when the Consent Order was made. No coherent case for increasing the father's responsibility for school fees and other direct school expenses from 80% to 100% has been made out. It was submitted by Ms. Lomas that this formula was illogical. But this is simply the bargain which was struck, reflecting the fact that the mother's earnings were roughly 20% of the father's. I refuse this aspect of the variation application. I accept the father's broad submission that the main architecture of the agreement

⁶ Ms. Lomas in her written submissions asked the Court to order that \$8778 be paid. This issue will be dealt with below.

reached should not be altered by the present application. A simple way of analysing the bargain the parties struck is that it was agreed that the basic maintenance figure should be approximately 63% of the mother's reasonable total accommodation costs, which were \$1900 per month rent for a small apartment when the Consent Order was made. I accept that she is not living extravagantly in terms of her choice of home, having regard to what appears to have been the standard of living throughout the marriage. But the possibility of refinancing her mortgage or obtaining more assistance from her current husband than he is presently providing cannot be ruled out. And requiring the father to contribute at a higher percentage level, simply because he can afford it, would in my view represent an impermissible means of requiring him to contribute further to the mother's capital assets. The position would be otherwise if, through misfortune, the mother's overall financial position had completely collapsed, or at least materially diminished.

28. What are the total reasonable accommodation costs? In addition to the mortgage (including property taxes and insurance) of \$4533 per month, I would allow in part the monthly home maintenance expense claimed by the applicant mother, including the \$400 per month for landscaping (referred to in her oral evidence) but excluding the additional costs of what appeared to me to be maintenance expenses which would add value to her capital investment. The basic monthly payment should therefore be varied to 63% of \$ 4933, or \$3107.79 + \$333.33 (fixed extra-curricular expenses) = \$3441.12. This in my judgment is as fair a way of varying the Consent Order to reflect an increase in the accommodation and other living expenses of C as carrying out a minute analysis of the individual expense items based solely on inherently inexact best estimates. It ensures that in terms of a proportion of the mother's living expenses attributed to maintaining C, the father's contribution remains the same as under the Consent Order, and ties the increase to the principal change of circumstances which the mother has proven.
29. It remains to consider the mother's contention that the maintenance payments should be increased by 5% each year and the father's response that this increase should be based on the United States Social Security Cost of Living Adjustment, which has been 2.31% on average since the Consent Order. If regard is had to the US Inflation Rate, however, that rate has been under 5.5% since 1991. I find that the most reasonable measure of inflationary increase is the US Department of Labor Consumer Price Index, and order that the varied monthly maintenance payments should be increased each year based on the annual inflation rate assessed at or shortly after the end of each calendar year by that Department⁷.

Effective date of variation of periodical payments order

30. Ms. Lomas submitted that the variation should take effect retrospectively from the date of the application on the basis that this is what generally occurs. Mr. Luthi did not dissent from this proposition, which is in any event supported by the approach of this Court approved by the Court of Appeal for Bermuda in *Robinson-v-Robinson* [1989] Bda LR 13. This Court's discretion in respect of backdating orders arises under section 32 of the Matrimonial Causes Act, and is probably broader than the position under current English law⁸.
31. This is not a case where it might be suggested that backdating the order to the date of the mother's application will create a financial burden which the father cannot meet. I accordingly order that paragraph 7 of the Consent Order is varied with effect from August 25, 2006.

⁷ <http://www.dol.gov/>. So far in 2007, the rate appears to be 5%.

⁸ The earliest date under section 32(1) is arguably the date of the initial application for a periodical payments order, not the current application before the Court. The breadth of the British counterpart provision, section 29 of the 1973 U.K. Act, may well have prompted the enactment of The Maintenance Orders (Backdating) Order 1993. This Order created, by way of amendment to the Matrimonial Causes Act 1973, an "earliest permitted date", which is the later of six months before the application or six months before the last assessment of the amount due under a periodical payments order: section 29(6).

Arrears

32. The mother seeks arrears of \$8778. I accept her evidence that these expenses were incurred on C's behalf. The father has agreed to pay \$1800 towards the cost of braces provided the mother ensures she obtains the best possible medical insurance cover. This is without prejudice to the fact that the mother is ordinarily responsible for medical expenses. I would direct the mother to see whether better cover can be obtained, having regard to the course of cross-examination on this issue. The mother also seeks \$710 in respect of an airline ticket⁹ she purchased for C to travel to the father, an expense which the father denied knowledge of in his First Affidavit, insisting he had paid all travel expenses of which he was aware. He also denied knowledge of the basis of the \$6268 claimed as overdue in respect of extra-curricular expenses.
33. The mother under cross-examination found the father's denial of knowledge of this outstanding reimbursement request in respect of what was clarified in her Reply Affidavit to be a 2001 expense in respect of a tennis camp to be "unbelievable", but she herself was unsure whether she had sought prior approval for this significant expense. She agreed that the Consent Order contemplated prior approval for such expenses, with liberty to apply to Court in the absence of agreement. She denied that the father had refused to pay his proportion of this extra-curricular expense because he had not agreed with it. The father stated that in his First Affidavit he had not denied all knowledge of the tennis camp. Contemporaneous documentation in the summer of 2001 suggests that the father's refusal to agree to pay for the tennis camp and to reimburse the mother for expenses incurred by her with respect to a ticket for C which was not used was based more on poor parental communications at the time than on reasons of substance.
34. I will accordingly order the father to pay the mother the sum of \$8778 which she claims with respect to these items.

Costs

35. The mother was seeking \$4500 per month and the father offered to pay in effect just over \$2000 per month. I have awarded her \$3441.12, which represents 76.5% of what she sought. She also recovered the arrears she sought in full. Applying traditional principles, the mother has in substance succeeded and should be entitled to her costs. However, I would also be required to take into account the fact that the father substantially succeeded in the contested discovery application (the costs of which I reserved). He has also made the helpful offer to assume 100% of the child's college expenses in excess of the \$30,000 the mother has already saved.
36. If the parties had more or less equal financial resources, and having regard to the family context, I would most likely have made no order as to the costs of the variation application with a view to (a) acknowledging that both parties had enjoyed a measure of success, and (b) with a view to encouraging the parties to move forward in a non-contentious manner, having regard to the best interests of the child. However, the father admits that the mother earns merely 20% of what he does, a factor which underpins the formula according to which educational and other expenses were split under the Consent Order.
37. In these circumstances, it seems to me to be most just to award the wife 80% of her costs, assessed by her at \$34,462 plus reasonable costs for the final day's hearing. I will also accept Ms. Lomas' costs submission and order a lump sum to be paid in this regard to avoid the further costs of taxation, following *Leary-v-Leary* [1987] 1 FLR 384, and exercising the discretion conferred by Order 62 rule 7(5). The father shall therefore pay by way of costs 80% of \$35,000 (\$538 being awarded in respect of the last day's hearing) or \$28,000.

⁹ And related credit card charges.

Summary

38. Paragraph 7 of the Consent Order is varied as follows:

“7. The Petitioner shall pay to the Respondent the sum of Three thousand four hundred and forty-one United States dollars (US\$3,441.12) per month by way of maintenance for the child of the family, namely[C] born on the 28th February 1992, such sum to be paid monthly on the first day of each month and to continue until the said child reaches the age of eighteen (18) years. The said amount shall be payable with effect from August 25, 2006 and shall be increased each calendar year commencing January 1, 2008 in accordance with the United States Consumer Price Index published by the United States Department of Labor. In the event that the said child undertakes full time further education beyond that age, the Petitioner shall pay 100% of the said child’s tertiary –level education expenses in excess of \$30,000 to be paid by the Respondent.”

39. Paragraph 9 of the Consent Order is varied as follows:

“9. The parties shall consult with each other and use their best endeavours to agree in advance any extra-curricular activities, including school programmes, school trips, enrichment programmes and like activities that the child is enrolled in.

40. Paragraph 10 of the Consent Order shall be deleted.

41. The Petitioner shall pay the Respondent \$8778 in respect of outstanding dental expenses (on an ex gratia basis) and extra-curricular and travel expenses which could not previously be agreed. The Respondent shall ensure that she obtains the best possible medical insurance coverage for the child.

42. The Petitioner shall pay the Respondent 80% of the costs of the present application, which are assessed at \$28,000.

43. I will hear Counsel, if necessary, on the precise wording of the Order.

Dated this 31st day of July, 2007

KAWALEY J