IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION
2008: 195

IN THE MATTER OF SECTION 12 OF THE MINORS ACT 1950

AND IN THE MATTER OF SECTION 36 OF THE CHILDREN Act 1998

AND IN THE MATTER OF M.M., A MINOR

W	Applicant
-v-	
M	Respondent

RULING

Date of hearing: March 4, 2009
Date of ruling: March 17, 2009

Mrs. Jacqueline MacLellan, MacLellan & Associates, for the Applicant
Mrs. Georgia Marshall, Marshall Diel & Myers, for the Respondent

Introductory

1. The Applicant mother applied by Originating Summons dated September 2, 2008 for joint custody of M.M (born on May 10, 2004), care and control to the mother and related financial relief. Because the parents are not married to each other, the

application was made under section 12 of the Minors Act 1950 and section 36 of the Children Act 1998 (as amended in 2002).

2. The Respondent father did not oppose the application for joint custody; however he sought joint care and control as well. He did not oppose the principle of paying reasonable child support. However, he challenged the amounts actually sought by the Applicant (a) on the grounds that this Court had no jurisdiction to grant certain heads of relief because the Children Act did not apply; and (b) on the grounds that the amounts sought by the Applicant were excessive.

3. Neither party gave oral evidence, the father's ability to pay not being in dispute. Both parties were clearly well-paid professionals who appeared to have little difficulty in communicating as regards the important matter of the father's access to the child. The controversy, perhaps understandably, turned on the proper scope of the father's child maintenance obligations in circumstances where both parties had apparently acquired[1] new and similarly well-paid romantic partners.

Legal findings: jurisdiction

4. I accept Mrs. Marshall's submission that Part IVB of the Children Act 1998 ("*SUPPORT OBLIGATIONS*") only applies to applications before the Family Court. Section 2(1) of the 1998 Act provides as follows:

> "*'court' means the Family Court and, where the context so requires, includes the Magistrates' Court and the Supreme Court;*"

5. The normal rule is that the "*jurisdiction conferred upon the court by or under this Act shall be exercised by a Special Court established under section 12 of the Magistrates' Act 1948…known as the Family Court*": section 13 Children Act 1998. As the Respondent's counsel pointed out, where the draftsman intends a provision to apply to the Supreme Court, the reference is explicit (e.g. applications for a declaration of parentage, section 18E). In any event, the Applicant seeks relief from this Court under section 36.1D of the 1998 Act, which section is found in Part IV. Section 36.1C(1) provides that a "court may, on application, order a person to provide support for his or her dependants and determine the amount of the support". And section 36.1A crucially provides:

> "*in this Part-*
> *...*
> *'court' means the Family Court…*"

6. The present application therefore falls to be determined under the following provisions of the Minors Act 1950

[1] It appears that the father has married and the mother will marry later this year.

"*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."

7. Accordingly, this Court clearly possesses the jurisdictional competence under section 12 of the Minors Act 1950 to make the orders sought in relation to custody (including access, care and control) and maintenance (Amended Summons, paragraphs 1-4).

8. Does this Court further possess the power to make orders relating to (a) the maintenance of a life insurance policy for the benefit of the child (this head of relief was abandoned at the hearing), (b) the establishment of an educational trust fund for the child's university education, and/or (c) the making of lump sum payments in respect of family costs? No authorities were placed before the Court in the present case in support of the proposition that section 12 confers, by necessary implication, a power broad enough to encompass the sort of relief which is expressly provided for under section 36.1D of the Children Act. On the other hand, it was not contended that the Children Act 1998 had, by necessary implication, repealed any aspect of this Court's jurisdiction under the 1950 Act.

9. The position appears to me to be that a litigant has an unfettered right to choose whether to seek relief from the Family Court under the 1998 Act or the Supreme Court under the 1950 Act. It seems to be the case that persons of substantial means tend to elect to seek relief from this Court which is accustomed to dealing with such litigants in the context of this Court's Divorce Jurisdiction. Meanwhile, the Family Court typically deals with maintenance applications involving persons of more modest means, commensurate with its status as a court of summary jurisdiction. Section 12(5) of the Magistrates' Act 1948 provides: "*Every matter brought before a Family Court shall be heard and determined in a summary*

way."[2] Although only the Family Court has the modern array of statutory powers contained in the Children Act and this Court does not, a similar approach should be taken in a similar case brought before this Court wherever possible.

10. Ideally, perhaps, Part IVB of the 1998 Act might have explicitly applied to both the Family Court and this Court, perhaps with a jurisdictional filter feature similar to that under section 16 of the Magistrates' Act 1948 in relation to civil actions. Under the UK Children Act 1989, the position seems to be that maintenance applications may be made at the discretion of the applicant to either the Magistrates' Court or the County Court[3].

11. As a matter of general principle, I see no reason for construing section 12 of the Minors Act as fettering the Court's discretion to make whatever order may necessary for the exercise of its express maintenance powers. Whether a jurisdictional power may be implied as a matter of necessary implication will, in my judgment, not be an abstract question of law. Rather, this question will ordinarily turn on the relevant facts. In particular, if the Court is requested to make more than a simple maintenance order, the Applicant must demonstrate that the order sought is *necessary* to ensure that the child is maintained.

12. In terms of the principles which govern the Court's discretion, Part IVB of the Children Act, especially sections 36.1C and 36.1D, appears to be designed to approximate to some extent the maintenance powers of the Family Court in respect of unmarried parents to the powers enjoyed by this Court in respect of divorced parents under the Matrimonial Causes Act. The 1998 Act provisions state as follows:

> **"*Order for support***
> *36.1C (1) A court may, on application, order a person to provide support for his or her dependants and determine 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*

[2] However, this pre-1968 provision must be read in such a way as to conform to the constitutional fair trial rights under section 6(8) of the Bermuda Constitution.

[3] http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claimeng_en.htm

(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 otherwise 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."

13. Section 27(1)(e),(f) of the Matrimonial Causes Act 1974 empowers the Court to make periodical or lump sum payments for the benefit of a child. Section 29(1)(a) provides that in exercising such powers, regard shall be had to "*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*". These sort of pragmatic guiding principles for the making of child maintenance orders, like the equivalent provisions in section 36.1C of the Children Act, are simply common sense in statutory form, and may be read by necessary implication as applying to the making of maintenance orders under section 12 of the Minors Act. So this Court may properly (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*", applying the principles set out in section 36.1C(3) of the Children Act by analogy in the present case.

Factual findings: care and control

14. It is not seriously disputed that M.M. has been under the primary care of the Applicant mother since the parties separated in or about November, 2006. However, the Respondent father seeks shared care and control on the grounds that he has enjoyed access every weekend, often overnight, and for one or two days during the week as well.

15. In my judgment there is no sufficient evidence before this Court to justify taking the exceptional course of making a shared care and control order. Such an order, absent agreement and/or by way of confirming the status quo, would ordinarily be made only after consideration of a Social Inquiry Report, as Mrs. MacLellan rightly submitted. There is no suggestion that the father's presently generous access will not continue or that his agreed rights as joint custodian will be compromised unless combined with joint care and control.

16. Accordingly, I find that the Applicant is entitled to care and control of the parties' child, with generous access to the Respondent, as prayed.

Factual findings: child maintenance payments

17. The Applicant seeks $11,181 per month from November 1, 2008 reduced to $10,397 per month when her fiancé moves in with her by way of child maintenance. This claim is based on the premise that the monthly costs attributable to M.M. are $16,526 and that her annual compensation ($264, 168) is 27.5% and the Respondent's ($696,000) 72.5%, of their combined income. The Respondent should pay 72.5%. It is contended that each parent should pay the same proportion of the income based on their means.

18. The Applicant also seemed to feel strongly that, the above calculations apart, it was unfair that she should be required to use her housing allowance towards living costs while the Respondent, whose wife's housing allowance is reportedly used for his living expenses, is able to save his allowance. This concern, no matter how well-founded, can have no material relevance to what the child's maintenance needs are and how much the Respondent ought to contribute in a case where his ability to pay is not in issue.

19. The Respondent, on the other hand, appears to strongly object to even indirectly contributing to the Applicant's living expenses by meeting any of his son's notional housing and related costs. This concern, no matter how genuinely felt, can have no material bearing on what the Respondent ought to pay by way of child maintenance, it being well established that contributions to housing-linked living expenses are ordinarily ordered to be paid. He offered to pay 50% of the nanny's expenses (excluding any portion of the Applicant's accommodation expenses attributable to the nanny), 100% of the net school fees and 100 % of the child's direct expenses: $3,766.50 per month. By his calculations, the Applicant would still have a monthly surplus of $5,467.66 per month.

20. In my judgment, the appropriate way to determine the maintenance obligations of the Respondent is to determine what the expenses attributable to the child are, and then to require him to pay an amount which is proportionate having regard to the resources of each party. Accordingly, I accept the submission of the Applicant's counsel that the Respondent's apportionment should be 72.5% of those expenses as it is not disputed that this represents his proportion of their joint income based on 2008 numbers.

21. The Respondent accepted the non-household figures attributable to the nanny (extracted from the Applicant's own schedule) as $3480 per month, including what his counsel contended was an inflated gasoline figure and an unnecessary English lessons amount. The mother's evidence as to these expenses was not contradicted by other evidence and I accept it. The father also agreed that $1,775 per month, though on the high side, plus $261.50 being net school fees (together $2036.50) was directly attributable to M.M. He also accepted that the mother's household expenses (after deducting her housing allowance) were $4,459 per month. She contends 66% of those expenses are attributable to the child and the nanny; I consider that 50% (or $ 2229.50) is a more realistic apportionment. This is admittedly a very rough and ready estimate; however, having regard to the status of the nanny (compared with the well-paid professional mother) and the age (under 5) of the child, it seems a reasonable apportionment. On this basis the total monthly expenses to be paid would be $3480 + $2036.50 + 2229.50 = $7746 @ 72.5% = $5615.85. But this figure is not acceptable having regard to two significant contentious issues.

22. The first significant controversy is whether it is fair that, in calculating the expenses attributable to the child, the housing allowance which the Applicant receives should be deducted from those expenses when calculating what the Respondent's payment obligations ought to be. The mother seeks to distinguish an allowance which is essentially part of the remuneration package, and a benefit which is not (the education reimbursement which can only be applied to school fees). However she has included both as part of her compensation package. The happenstance that the Applicant has married someone whose own housing allowance is applied towards the Respondent's rent cannot provide a principled basis for increasing what he contributes to his son's accommodation expenses.

23. On the other hand, it is obviously inequitable for the child's notional share of the actual housing costs paid for by his mother out of her total remuneration package to be reduced by an element of that remuneration, particularly when the mother's benefit in respect the child's education expenses is also being deducted and applied to more than 75% of the school fees. Moreover it seems inherently rational to deduct from expenses taken into account for maintenance purposes monies for which the claimant is actually reimbursed and inherently irrational to deduct portions of that person's remuneration which though separately labelled as an allowance do not in substance constitute reimbursement for a specific expense.

Unless one delineates expenses which count from those that do not in some coherent manner, one will be led to the conclusion that contributing parents are only liable to contribute to expenses the custodial parent could not afford to pay.

24. In the present case the Applicant's education benefit is fairly regarded as part of her remuneration package and yet nevertheless deducted for child maintenance computation purposes. This is so because under the terms of her contract of employment she is apparently only required to pay school fees in the amount (if any) by which fees exceed the agreed education benefit. In these circumstances, there can be no justification for regarding the full rent which the Applicant presently pays as not being an expense at all except to the extent that it exceeds her housing allowance; because this allowance, for present purposes at least, is merged with all other aspects of her remuneration package (the education allowance apart).

25. Accordingly, I find that the Respondent ought to pay, in addition to the sum of $5615.85 calculated on the basis set out above, 72.5% of $4595.50 (being the 50% portion of the housing allowance added back in to the Respondent's household expenses total) or $3331.74. The total payable is accordingly $5615.85+ $3331.74 = $8947.59 with effect from November 1, 2008.

26. The second controversial issue is what provision to make for the period (likely to commence in or about May, 2009) when the Applicant's fiancé joins her household. She suggests that the household expenses attributable to the child should be regarded as 50% when this occurs. I have held that 50% is an appropriate apportionment under the present status quo, on the basis that, as Mrs. Marshall argued, it seems unrealistic to simply divide such expenses in three, attributing equal amounts to mother, nanny and child. What should the position be when the Applicant marries and/or is joined by her fiancé in any event? In the absence of positive evidence to the effect that the fiancé is likely to earn significantly less than the Applicant, her new husband will assume joint responsibility for the household expenses. While it seems logical to assume that he will not contribute (or should not be required to contribute to) expenses directly attributable to the child (and his nanny), it seems artificial to assume that he will contribute less than 50% of the rent, electricity and other housing related expenses. The Applicant's coyness about her fiancé's anticipated earnings makes it obvious that he is not going to be a burden on her finances. It seems more likely than not that her future husband earns in the same range or more than the Applicant herself.

27. Once the fiancé moves into the Applicant's home, having taken up employment in Bermuda, her total household expenses should in my judgment be regarded as 50% of what they are today and the Respondent's child maintenance obligation will be to pay 72.5% of 25% of those costs, on the basis that half of the Applicant's own household expenses are attributable to the nanny and child. The monthly maintenance payment at this juncture will be payable reference the

following expenses: $3480 (nanny direct) + $2036.50 (M.M. direct) + 3412.50 (25% of $13,650 household costs) = $8929 @ 72.5% = $6473.53.

28. In light of this periodical payments order, I am not satisfied that this Court possesses the jurisdiction to make the lump sum payment sought in connection with the purchase of a car. This is not a case where a lump sum order is essential to provide for the maintenance of the child. This Order automatically binds the Respondent's estate so no order to this effect is required. Those aspects of the relief sought are refused. However, with a view to avoiding unnecessary Court applications, the maintenance amount hereby ordered shall be increased each year commencing January 1, 2010 by the indexing factor defined in section 36.1D(4) of the Children Act 1998. This indexing factor is used for convenience, the power to deal with inflation being a necessary incident of the power to provide for maintenance under section 12 of the Minors Act 1950[4]. This of course does not preclude the parties reaching some other agreement to meet contingencies which cannot presently be foreseen.

Summary

29. The parties are awarded joint custody of their son M.M. with care and control to the mother and generous access to the father. The Respondent is ordered to pay $8947.59 per month by way of child maintenance with effect from November 1, 2008. However on the first of whichever month (likely June) which commences with the Applicant's fiancé sharing her home, the monthly payments shall be reduced to $6473.53. The amount payable shall be increased each year (commencing January 1, 2010) by the indexing factor defined in section 36.1D(4) of the Children Act 1998, unless otherwise agreed.

30. I will hear the parties as to costs and the terms of the formal Order to give effect to this Judgment (in particular any arithmetical corrections which may be required to the calculations set out above).

Dated this 17th day of March, 2009

KAWALEY J

[4] The Court routinely deals with inflation in maintenance orders made under the Matrimonial Causes Act despite the absence of any explicit statutory provisions in this respect.