

**IN THE SUPREME COURT OF BERMUDA**

**DIVORCE JURISDICTION**

**2007 No. 238**

**T. S.**

**Petitioner**

**-and-**

**D. B.**

**Respondent**

Petitioner in person  
A. Richards for the Respondent

**DECISION**

The two applications before the court for resolution are for variation of the interim maintenance order for the child of the family, and for access arrangements.

**HISTORY**

1. The parties were married on the 12<sup>th</sup> day of August 2001. There is one child of the family, who was born on the 12<sup>th</sup> day of December 2004. A decree nisi was granted in divorce proceedings on the 28<sup>th</sup> day of March 2008, and made absolute on the 29<sup>th</sup> May 2008. The orders made on decree nisi were for joint custody with care and control to the Respondent. No Order for access was made at that time.
2. The Respondent (herein after referred to as the “Mother”) applied by way of Notice of Intention to Apply for Ancillary Relief dated 8<sup>th</sup> April 2008 for an interim maintenance order. That application was heard by the Registrar on the 2<sup>nd</sup> July 2008.
3. By an order of the Registrar bearing even date the Petitioner (hereinafter referred to as the “Father”) was ordered to pay until further order half the cost of nursery fees in the sum of \$400 per month; and in addition by way of ongoing maintenance the sum of \$800 per month, for a total monthly payment of \$1,200. Said payments were ordered to be paid by attachment of earnings through the Collecting Office.
4. The Father filed a summons dated the 3<sup>rd</sup> of November 2009 for a variation of the interim maintenance order made by the Registrar dated the 2<sup>nd</sup> of July 2008.

5. The Mother filed a summons dated the 20<sup>th</sup> November 2009 for various orders including: joint custody, sole care and control with reasonable access. Additionally her application sought to remove the child of the family from the jurisdiction for the purpose of the mother pursuing further university education.
6. The parties reached a consent regarding the removal of the child from the jurisdiction and the court made a consent order pursuant to that agreement dated 26<sup>th</sup> November 2009 granting the mother leave to remove the child of the family from the jurisdiction. By that same order the parties were granted joint custody with care and control to the mother (an order that had already been made by the court). Reasonable access was to be agreed by the parties or failing agreement adjourned for determination by the court at the time of the maintenance hearing.
7. The Father's summons for a variation of the maintenance order was heard on the 26<sup>th</sup> November 2009. Counsel for the Mother resisted the Father's application. Upon hearing the Father in person and counsel for the Mother the court made an interim order reducing the maintenance payment to \$600 per month on the basis of the financial and other information then before the court based primarily on the fact that the child of the family was no longer attending nursery. The Father had also not agreed to the child attending a private fee paying school.
8. At that hearing directions were given for the filing of affidavits and for the hearing date to be fixed.

## **THE HEARING**

9. The matter came on for hearing on the 9<sup>th</sup> March 2010 and was completed on the 12<sup>th</sup> April 2010.
10. At the hearing, on oath, each party confirmed and, where appropriate, updated their affidavit evidence. They were each subjected to cross-examination. After hearing the evidence of the parties, counsel for the Mother and the Father in person were given leave to supplement their financial documents by forwarding the details to the court after the hearing. Each did so within the parameters provided by the court.

## **Access**

The Father's Case

11. The Father has asked for a very generous access order to be made in his favour. His evidence is that the child of the family has been deprived of a substantial amount of access to him due to his relocation to Florida. His view is that lost time should be restored.
12. His evidence is that the child had formed a close relationship with the father's new partner and daughter. He also testified that he had commenced to make arrangements for his partner's mother to travel to Bermuda with the requisite immigration approval so that she could care for the children in his absence from the home.

#### The Mother's Case

13. The Mother argues that she is the primary care giver and because the child of the family is young, he should not spend any lengthy overnight stays away from her. She argues further that the child should remain with her to the extent that the Father will be working, as it is his intention to have a stranger looking after the child during his absence from the home.
14. The Mother also had plans to attend a family cruise and wishes to have the court's leave to have the child with her for that purpose.
15. Each party has submitted an access schedule of their preference. Further the affidavits are redolent with proposals concerning access made prior to the Mother's move to Florida. The parties had made proposals concerning some holiday periods, however their evidence appears to suggest defined periods for the Cup Match holidays for this year only with no clear agreement on other holiday periods.

#### **Guiding Principles**

16. An application for leave to remove a child from his home to relocate abroad, even for a short duration, is distressing for a parent. In this case the father has stated and I accept that he has suffered a disruption in his relationship with his son. The Father further complains that his new family has also suffered that loss as they were all close.
17. The court has no doubt that the child has felt this loss as well. Indeed one of the aims of the Human Rights Convention (which is applicable to Bermuda) is to protect a meaningful parental relationship for children particularly in respect to the non residential parent in cases of divorce. The implication for the child of the family is that he has a right to adequate access to his father and indeed, in the circumstances of this case, to family life with his father.
18. Courts having the responsibility to protect and promote a child's welfare must on the one hand manage and on the other encourage effective access arrangements.

This has the potential to put demands on one if not both parents. It can as well be trying for the very child in issue before a court particularly when the parents are at odds one with the other. The extent to which a parent or the parents may not be satisfied with a court ordered arrangement stands in testament to the disparities that bring them to court in the first place.

19. In access matters each case is determined on its own facts. In this case there has been no accusation of abuse or lack of care made by the Mother against the Father. There is no evidence to suggest that the Father does not have adequate accommodation for the child or that the child is not safe while in his care.
20. There was no credible suggestion that the child would be placed in harm's way if left with the new partner or with her mother whom they intend to have assist them with the care of the child of the family. I find that there is nothing in the history or on the facts in this case that militate against the child of the family having direct, and lengthy staying access to the Father and his new family.
21. The Mother has indicated that she would like to have the child with her during the Christmas holiday period to facilitate her and the child of the family attending her family cruise that has been in the planning for some time. In principle the Mother is as entitled as the Father is to provide family time for the child. However, in effect the Mother is asking the court to further curtail the child's access to his father in circumstances where she has had the child in her care for a great majority of this year and will in all probability next year.
22. In my estimation for the court to accede to the Mother's request would not conceivably be in the interest of the child. It would mean that the child would be further deprived of the Father's presence and at a period when the child would have the opportunity to bond with his Father and sister sharing the holiday, or part thereof together in his father's home. The court would be remiss in its duty to the child and unfair to the Father in the circumstances to make such an order. The Father of course has the right if he wishes to facilitate the Mother's plan.
23. Having considered the evidence of the parties and having reviewed the suggestions for an access schedule I find that it is in the child's best interest to have defined staying access to the Father in the terms set out below. Access is granted while the child is in Bermuda. If the Mother fails the return the child to Bermuda the Father may travel to the United States of America to make effective access.
24. The purpose of the access order is to provide some structure and predictability which the parties are not presently capable or willing to arrange them selves for the benefit of the child of the family. However it is the courts ultimate aim and its duty to encourage the parties to come to amicable agreement on matters of access. For that reason the access order shall provide scope for agreement between the

parties with in its terms. It is always open to the parties to come to agreement beyond the scope of the order.

It is ordered that access shall be defined in the terms that follow:

A. For the 2010 summer holidays:

1. From the day the mother returns said child to Bermuda for the summer holidays or from 9 am on the 4<sup>th</sup> day of July 2010 which ever is the sooner until the 18<sup>th</sup> day of July 2010. The father shall be responsible for collecting the child from the mother, (which includes collecting the child from the mother in Florida and returning to Bermuda with the child if the mother does not intend to return to Bermuda by the 4<sup>th</sup> July 2010).
2. During said period the mother shall have reasonable telephone contact with the child. The child shall be collected by the mother for overnight each Wednesday at 4 pm or such other time of the day as may be agreed between the parties and returned to the father at 8am on the Thursday morning or such other agreed time of the day (providing the mother is in Bermuda).
3. The father shall return the child to the mother on Sunday 18<sup>th</sup> July 2010 at 9 am. The father shall have 2 hours of access to the child on Wednesday 21<sup>st</sup> July 2010 at a time to be agreed between the parties. Failing such agreement from 4pm until 6pm.
4. The child shall stay with his father from Sunday 25<sup>th</sup> July at 9 am until 5 pm the Saturday of the week preceding the mother and child's departure from Bermuda. The father shall be responsible for collecting the child from and returning the child to the mother.
5. During this period the mother shall have reasonable telephone contact with the child. The child shall be collected by the mother for overnight each Wednesday at 4 pm or such other time of the day as may be agreed between the parties and returned to the father at 8am on the Thursday morning or such other agreed time of the day (providing the mother is in Bermuda).
6. The mother shall have the child overnight from 8 am on Thursday the 29<sup>th</sup> day of July until 8am on Friday the 30<sup>th</sup> day of July, or such other times of the day as the parties may agree. The mother shall be responsible for collecting the child from and returning the child to the father.

B. After the 2010 summer holidays:

1. All school holidays are to be divided equally between

the mother and father according to what the parties agree, provided such agreement is reached 21 days before the start of the relevant holiday. Failing agreement, the following schedule shall apply:

2. Save as is mentioned below the child shall stay with the father for the first half of any school holiday of 5 school days or more (including any such holiday while the mother remains abroad).
3. The child shall stay with the father at the father's election either Christmas day or Boxing Day in 2010. The child shall stay with the father at his election for New Year's Day 2011. There after the parties shall alternate Christmas day, Boxing Day and New Year's Day each year.
4. The Child shall stay with the father at the mother's election either Good Friday or Easter Sunday 2011. Thereafter the parties shall alternate Easter Sunday and Good Friday each year.
5. In order to facilitate the over night stays on the occasions in 2 and 3 above the parties shall agree the times for the father's collection and delivery of the child. Failing agreement staying access commences at 9 am on the elected day and ends at 9 am on the following day.

C. Once the mother has completed her studies abroad and returned permanently to Bermuda subject to the holiday schedule set out above the child shall stay with the father as follows:

1. On the first and third Thursday of each month the father to collect the child from school and return the child to School on the following Monday.
2. On Wednesday of each subsequent week in the month for 2 hours at a time of day to be agreed between the parties or failing agreement from the end of the child's school day or extra curricular activity which ever shall be the later. The father shall be responsible to collect and return the child to the mother.
3. The father and the mother to have reasonable home telephone contact with the child as appropriate to this schedule. The parties to facilitate the same by exchange of home telephone numbers.

## **MAINTENANCE**

### **THE LAW**

25. The power of the court to order maintenance payments by a parent for a child of the family in divorce proceedings is provided by Section 27 (1) (d) of the

Matrimonial Causes Act 1974. The duty of the court is spelled out in Section 29 (2). It provides:

“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), 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.”

Paragraphs (a) and (b) of subsection 1 provide that in so far as the parents are concerned the court has a duty to have regard to the following as it applies to the them.

“(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;”.

## **The Facts**

26. At the hearing of the variation of maintenance application the Father sought a permanent order to have the maintenance reduced based essentially on two facts; that the child of the family was no longer in nursery, thus obviating the need for the \$400 per month payment. In addition he argued that because of an increase in his own expenses he could no longer afford maintenance at the sum of \$1,200 per month.
27. Since the divorce the father has purchased a family home for which he incurred a mortgage. He shares that home and related expenses with a new partner whom he indicated he intends to marry. He has in fact started a new family as a daughter has been born of that union. The Father admits that the new partner contributes to the mortgage and household expenses.
28. The Father has indicated that he will incur some cost associated with the care of his youngest child when the mother of that child returns to full time employment. His plan is to bring the maternal grandmother to Bermuda for that purpose with the attendant cost thereof. Further the father maintains that he should not be

saddled with private school fees as it was never the parties' agreement that the child of the family would attend private school.

29. The mother opposes the Father's application for the variation downward. Her case is essentially that by reason of her relocation abroad the only school available to the child of the family is a fee paying school; that the court has granted her permission to remove the child to Florida; therefore it is only reasonable for the father to share the educational expenses.
30. Her position is further that the increase in the Father's expenses was offset by both increases in his income and the benefit of shared living arrangements. It is her case that the Father's income is greater than hers thus requiring him to bear a more equitable if not greater share of the child's financial needs.
31. On the facts of this case it is clear that subsections (a) and (e) of section 29 (2) are of relevance in this case, the financial needs of the child, and the manner in which the parties expected him to be educated. The latter is particularly relevant considering the position of the parties on that point.

## **INCOME**

### **The Father**

32. The Father is employed as a teacher at a secondary school. His net monthly income from that employment is approximately \$5,000 per month. He has after school income of just over \$1,300 per month during the school term as a science coordinator and a teacher in a private educational institute. He performed some voluntary teaching at another institution prior to the child's departure however his only reward for that had been free tuition to that institution for the child of the family when he was in Bermuda.
33. If the Father is employed during summer school the Father can earn approximately \$2,000 in additional income. However his evidence is that that income is not guaranteed and he does not intend to work throughout this summer if he is to have his son residing with him.
34. The Father claims approximately \$5,569 in monthly expenses and anticipates costs of approximately \$300 per month associated with the care of his daughter, which sum I accept as fact and as reasonable. If the Maternal grandmother is not available to care for the infant a care giver will have to be employed or a nursery as the mother of that child works outside of the home. He shares the expenses of the household and mortgage with his partner, and his monthly expenses as presented reflect that fact.

### **The Mother**

35. The Mother is also employed as a teacher. She is currently in receipt of her full salary while she is abroad on study leave. Her net monthly salary is approximately \$5,900 to that is added the \$600 in child maintenance that she has been receiving. She is in receipt of some financial supplements as part and parcel of her study leave.
36. While financial assistance that is paid directly for her course should as a matter of principle not be counted toward her monthly disposable income, there is an effect on her finances when she benefits in other ways from paid study leave. On the evidence as presented she has received a personal benefit of some \$3,000 by the Father's account.
37. The Mother testified that she has not been guaranteed an additional year of study leave although her course of study will extend beyond the current period covered. She has however applied for or will apply for other educational benefits. Further she has preserved a substantial sum of approximately \$30,000 from a personal loan of \$50,000 that she arranged in the event that she does not succeed in having her sabbatical extended. It is her case that she has received a round trip air fare as part of her sabbatical package.

## **FINDINGS**

38. Both parents accept that they have a financial responsibility to the child of the family. The above referred law makes it clear that the primary objective of the court is to meet the financial needs of the child.
39. Mr. Richards for the Mother submitted that the court ought not to take into consideration the financial implications of the newly acquired property of the father as his responsibility to the child of the family should come first. He did not support this proposition with any principle of which the court is aware, nor did he supply any authority in support.
40. This submission in my view flies in the face of section 29 (1) (b) which requires the court to have regard to the financial needs, obligations and responsibilities which a party has, or is likely to have in the foreseeable future. It seems plain to me that a secured roof over a parent's head is a necessity and can not be considered to be less so because the other parent does not own property.
41. I find that the principle thus established by section 29 (1) (b) is that parents must meet their own essential needs first and a secured home is as much an essential need as a rented one. Children of course have priority over non essential payments from a parent's income.
42. Indeed if it were not for subsection (b) children of a subsequent union, as we have in the case, could be left bereft of the financial support of a parent. I find that the principle clearly established is that a child born of a subsequent or other union has

an equal right to a parent's financial support as the child for whom the court is making provision. What is more, where special needs are not a consideration, such a child, it stands to reason has a right to equal support from the relevant parent.

43. The issue of the private school fees for the child of the family is a contentious one. The issue need not have arisen at all if the Mother had carried out an appropriate level of investigation and communication with the Father. I find that the contention arose because she failed to find out the true position about the school system as it related to the child of the family in a timely fashion. Further she failed to adequately or at all communicate it to the Father in a timely fashion.
44. The alternative to the child being removed from the jurisdiction, as submitted by the father, is that the child could have remained in Bermuda with him. Had the parties agreed to that, the subsequent litigation would not have arisen. Notwithstanding that the Father's wishes may have made financial sense, he ultimately consented to the child's removal. This did not resolve the major disputed item of costs concerning the child's educational costs.
45. I find in all of the circumstances, and bearing in mind the welfare of the child, that it was reasonable for the mother to enroll the child in the school. The expense relates to a need created by the child's particular situation as he accompanied the parent with care and control of him. As a matter of principle as this is a reasonable and necessary expense incurred for the child, it should be allowed.
46. The Father ought not to be relieved of this expense by reason only of the father's misapprehension about the lack of availability of a non fee paying school; or his lack of consent to paying fees. The father could not have had it in his contemplation during the marriage that the child should be kept from school or forced by circumstances to repeat nursery school.
47. None the less the court finds that the consequences on his finances are onerous to him. This is particularly so because he was saddled rather late with this reality, leaving him emotionally and financially unprepared for the expense. The expense was certainly not in his financial plans.
48. There was not much that separated the parties on the issue of the after school care expenses both for the first year's expenses and the anticipated costs for the upcoming school year. These again are costs that are necessary based on the need created by the child's particular circumstances as they relate to the Mother's educational pursuit.
49. In so far as the extra-curricular costs are concerned, in principle, the Father is not obliged to bear all such costs. His evidence is that he is only willing to do so to the extent of \$75 per month based on his half contribution to any such activity. It

is to be noted that the Mother has not decided which activities she will enroll the child in during the next school year.

50. There was evidence that showed that the child had been involved in a multiple of activities in Bermuda. There was no evidence to suggest however that this was paid for in addition to the maintenance that the Father paid.
51. Taking all of the circumstances into account I find that it is reasonable to have the father bear half only of the cost of one such activity. It is convenient in the circumstances for him to bear the cost for example of karate the one extra curricular activity associated with the after school care programmes. It is an activity in which the child was involved in Bermuda.
52. This child is by no means being deprived of socializing opportunities, one of the benefits of extra curricular activities. The mother has also claimed an entertainment expense for the child and extra activities are included, at additional costs in his preschool setting. The father has expressed a willingness to agree to share the costs of additional extra extracurricular activities when he is able to. I find this a reasonable attitude to take in light of his demonstrated financial liabilities. Further this should encourage an open dialogue between the parents for the benefit of the child in the future.
53. The Mother has claimed 50% of her housing costs as being attributed to the child of the family. She seeks to have the Father pay one half of the child's 50% and she has assumed the responsibility for the other half of the child's 50%. I can understand the Father's concern that a child of 4 years of age does not consume 50% of the amenities associated with the Mother's monthly indirect expenses. However subject to one item following below I consider the mother's apportionment of these costs to the child to be reasonable in the circumstances.
54. The one item of concern is that the Mother has claimed 50% of the cost of leasing a car while she is in university in Florida. Her evidence is that there is a lack of public transportation available to accommodate her and the child's transportation needs. She also stated that she was unable to purchase a car for lack of a social security number and that leasing was the best option for her.
55. I do not believe that the leasing of a car is properly recoverable as an expense associated with the maintenance of the child in the circumstances. I am confirmed in this belief because a car is not necessary to the child's subsistence. The purpose for which a parent's obligation arises to pay support in the form of child maintenance is to meet the child's subsistence needs in the form of food, housing, clothing and health care. Other items of expense should only be considered where the Fathers ability to pay is not called into issue.
56. Needs also include educational needs; it may as well include costs and expenses created by any particular circumstances related to the child. Once these needs

have been met other claims will depend on the financial ability of the paying parent to bear a share of the costs. The lease of a car does not in my estimation qualify under the above description of a child's needs.

57. The lease of this car was in any event the expressed preference of the mother, which suggests that other options were available. The purchase of a low cost previously owned vehicle for example may have been more economic as it could have been sold at the end of the stay in Florida. In all the circumstances of this case I hold that this expense should not be allowed.
58. The Father has argued that having providing her net salary, which includes deductions for health and dental insurance at source, the Mother has gone on to claim insurance costs along with her other monthly expenses thereby reducing her available income after expenses.
59. The Father's portion of the child's insurance is included in the direct costs for the child which he will have to pay. I agree with the Father that what the Mother has done appears to be a double accounting. In the result the mother's disposable income is at least \$300 greater than her figures have reflected.

## CONCLUSION

60. Counsel for the Mother submits that the court should adopt a broad brush approach in dealing with the matters which the court has to take into consideration in an application concerning the maintenance of a child of the family. I accept that statement as an established principle of this area of the law.
61. Counsel also referred the court to an authority of the Court of Appeal: **M and W** Civ. App. No. 14 of 2009 which suggests that the court should not adhere to a rigid principle of proportionality, or to a contribution on the basis of equality. The courts reasoning was that to do so would be to disregard the list of matters to which the court is to have regard when exercising its powers such as that provided by sections 27 and 29 above.
62. I also accept this guiding principle and hold that this is not an appropriate case for proportionality or equality. The parents have a mutual obligation to support the child of the family imposed by the law but not necessarily an equal one.
63. The Father, who was not represented in this application, couched his application for a variation in terms of his inability to meet the ordered maintenance payment of \$1,200 per month because of a change in his financial circumstances. I have stated above that a change in finances is a valid point in respect to both cost associated with the purchase of his home and costs associated with his responsibilities toward the daughter of his current partnership. I find that he is unable to meet such a payment.

64. Apart from that it is open to the court to consider, as he has asked the court to do, the reasonableness of some of the mother's claims. The court has done so in respect to its duty in determining the financial needs of the child. It is a confirmed principle of law that the court does not equate the child's needs with a parent's desires.
65. Having accepted these principles I find that the Mother has more than a marginally greater disposable income than the Father. Taking into consideration the Father's obligations to his youngest child, the items identified above that should not be allowed and the resources available to the Father and the Mother and applying the broad brush approach, the Father shall pay \$950 per month in maintenance for the child of the family for the period up to and including June 2010. In the result, the post June contribution from the Father for the child shall be in the sum of \$750 per month.

#### **Adjusting the monthly maintenance payment**

66. From the time the father succeeded in reducing the nursery school payment he continued to pay the Mother \$600 per month in maintenance by way of attachment of earnings. That sum was based on the child's needs in Bermuda at the relevant time. Having found that the cost of school fees for the child in Florida was a necessary though onerous expense for the Father, he will now have to make up the arrears in the maintenance for the period up until June 2010.
67. In so far as \$950 per month payment is concerned, the Father will have to pay the difference back dated from January 2010 up until and including June 2010.
68. In consideration of the financial resources available to the Father and his stated liabilities he shall make up the arrears by equal monthly payments of \$50 commencing in July until paid in full.
69. In so far as the ongoing maintenance payments from July 2010 are concerned the Father will be required to pay \$750 per month in maintenance for the child of the family.
70. The Father is therefore ordered to pay \$750 per month in ongoing maintenance with effect from the 1<sup>st</sup> July 2010 and in addition \$50 per month to offset the arrears until they are paid in full. Said payments are to be made by attachment of earnings.

#### **COSTS**

71. This is a case where the history, facts and the justice of the case suggests that the court should in the exercise of its discretion not make any order for costs.

However, that is a provisional view and I shall hear the parties on cost if they wish to be heard.

Dated this 12<sup>th</sup> day of July 2010

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Charles-Etta Simmons  
Puisne Judge