In The Supreme Court of Bermuda

CIVIL JURISDICTION

2012 No: 161

IN THE MATTER OF SECTION 36.1 OF THE CHILDREN ACT 1998

AND IN THE MATTER OF C

BETWEEN:-

A

Applicant

-v-

B

Respondent

EX TEMPORE RULING

(In Chambers)

Date of hearing: 26th October 2012
Date of ruling: 26th October 2012

Ms Alexandra Wheatley, Marshall Diel and Myers Limited, for the Applicant
Ms Ann Frith Cartwright for the Respondent

Introduction

1. By an originating summons dated 4th May 2012 the Applicant, A, seeks an order that the Respondent, B, makes periodical payments to her for the benefit of their child, C, until C completes her full-time university education, and that he be required to contribute towards C's university expenses. C was born in 1994 and is 18 years old.

2. The application is brought under Part IVB (support obligations) of the Children Act 1998 ("the Act" or "the Children Act"). The Applicant relies on:

   (1) Section 36.1B(1), which provides that:

   "*Every parent has an obligation, to the extent that the parent is capable of doing so, to provide support, in accordance with need, for his or her child who is unmarried and … if eighteen years or over, is enrolled in a full-time program of education …*"

   (2) Section 36.1C(1), which provides that:

   "*A court may, on application, order a person to provide support for his or her dependants and determine the amount of support.*"

   (3) Section 36.1A, which provides that in Part IVB:

   " *'dependant' means a person to whom another has an obligation to provide support under this Part.*"

3. Ms Cartwright, counsel for the Respondent, objects that this Court has no jurisdiction to make an order for periodical payments under the Act and asserts that the application should have been brought before the Family Court of the Magistrates' Court.

4. Ms Wheatley, counsel for the Applicant, disputes this. She submits that it is inconceivable that the Legislature intended that the Family Court but not the Supreme Court should have jurisdiction to order periodical payments under

the Act. She further submits that in this Court there is an accepted practice of hearing matters under the Act. She suggests that in a serious, lengthy or complex case, or one such as this, which involves quite a large number of documents, there may be sound practical reasons why this Court should hear matters under the Act, and that the Legislature should be taken to have been aware of these reasons.

5. This is a ruling on that preliminary point. The ruling, while not reserved, is not unconsidered. In addition to the helpful oral submissions of counsel I have had the opportunity to read and reflect on their detailed skeleton arguments prior to the hearing.

Voluntary submission to jurisdiction

6. The Applicant submits that the Respondent has surrendered to the jurisdiction of the Supreme Court, and that he is therefore precluded from disputing it, as he did not make a prompt application disputing jurisdiction and has complied with the directions of the Court as to the filing of affidavit evidence.

7. I disagree. The Respondent raised the jurisdiction issue in clear terms in his affidavit of 13th June 2012. More fundamentally, the parties cannot by agreement confer jurisdiction upon the Court. See Bennion on Statutory Interpretation, Fifth Edition, at page 105. That is something that can only be conferred by statute.

8. In any case, and irrespective of whether either party has raised the issue, I cannot hear this matter unless satisfied that I have jurisdiction to do so.

Relevant statutory provisions

9. In interpreting the Act I shall not try to shoehorn its meaning to fit with a preconceived notion of what the Legislature must have intended, but rather to discern the legislative intent from the words enacted.

10. Section 36.1A (definitions) provides that in Part IVB:

" *'court' means the Family Court.*"

11. Section 13 provides 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, and a Special Court when sitting to exercise such jurisdiction shall be known as the Family Court*".

12. This is consonant with section 2 (interpretation), which provides that in the Act, "*unless the context otherwise requires*":

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

13. There are a number of instances where the context does require that "*court*" includes the Supreme Court:

(1) In Part IIA (establishment of parentage), section 18E (declaration of parentage) provides at subsection (1):

"*Any person having an interest may apply to the Supreme Court (in this Part referred to as the 'court') for a declaration that a male person is recognized in law to be the father of a child or that a female person is the mother of a child.*"

(2) In Part III (abuse of children), section 22 (notice of entry in Register) provides at subsection (2) that a person whose name is entered on the Register may apply to the court to have his name removed from the Register. Section 22(3) provides that:

"*Any person aggrieved by a decision of the court pursuant to subsection (2) may appeal to the Supreme Court ...*"

(3) In Part IV (care and supervision), section 34 (orders pending appeals in cases about care or supervision orders) provides at subsection (5) that:

"*Where –*

(a) an appeal is made against any decision of a court under this section; or

(b) any application is made to the Supreme Court in connection with a proposed appeal against that decision,

the Supreme Court may extend the period for which the order in question is to have effect, ..."

14. Sections 36.1B and 36.1 C are not, on the face of it, such instances. Section 36.1A, read in conjunction with section 13, provides that in Part IVB "*court*" means the Family Court: this would appear to preclude "*court*" in Part IVB from including the Supreme Court.

15. Before reaching a settled conclusion on the point, however, it is necessary to consider the relevant case law.

Cases on statutory jurisdiction

16. In W v M [2009] SC (Bda) 18 Civ at paragraph 4 Kawaley J (as he then was) accepted a submission, "*that Part IVB of the Children Act 1998 ... only applies to applications before the Family Court*". His reasoning was expressed at paragraph 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…' "

17. Kawaley J decided the case instead under the analogous provisions of section 12(2) of the Minors Act 1950 ("the Minors Act"). He was able to do so because section 12(1) provided that in this section the meaning of "*the court*" included the Supreme Court. However the Minors Act route is not open to the Applicant in the instant case because section 2 of the Act provides that " *'minor' means a person who has not yet attained the age of eighteen years*".

18. The learned Judge stated at paragraph 9 that a litigant had an unfettered right to choose whether to seek relief from the Family Court under the Children Act or the Supreme Court under the Minors Act. He did not state that a litigant had an unfettered right to seek relief under the Children Act in either the Family Court or, if the litigant so chose, the Supreme Court, having found that in most cases the Supreme Court had no jurisdiction to make orders under that Act.

19. The case went to the Court of Appeal in M v W [2009] CA (Bda) 18 Civ. Although the appeal was successful, the Court did not demur from Kawaley J's analysis of the Children Act and the Minors Act and the interrelationship between the two. The Court of Appeal stated at paragraph 5 that the learned Judge had found that the two Acts were "*concurrent jurisdictions*": it did

not state that he had found that the Supreme Court and the Family Court exercised concurrent jurisdiction with respect to the Children Act.

20. I have been referred to three other cases. Ms Wheatley suggests that they are representative of the approach generally adopted by the Court. Ms Cartwright does not agree: she suggests that when considering these cases I should be mindful that the Court was adopting a pragmatic approach to the issues with which it was confronted, involving as they did young children and in one case a vulnerable adult.

21. Re JT [2010] SC (Bda) 8 Civ (10 February 2010) concerned proceedings for the custody, care and control of a child. The father brought one set of proceedings in the Family Court under the Children Act. The applicant then brought a rival set of proceedings in the Supreme Court under the Minors Act. Simmons J ordered that the Children Act proceedings be transferred to the Supreme Court. Ms Wheatley submitted that the Children Act contains no express power of transfer. But this raises rather than, as she contended, answers the question of whether the Act should be taken to include an implied power of transfer. Be that as it may, that appears to have concluded the Children Act proceedings, as the learned Judge went on to deal with custody, care and control under the Minors Act alone. The case is therefore of little assistance in determining whether the Supreme Court has jurisdiction to deal with an application under Part IVB of the Children Act.

22. In R v R, Civ, No 15 of 2009, the mother sought a restraining order under section 36.1I of the Children Act. The father objected that the Supreme Court had no jurisdiction to make the order. Wade-Miller J noted that the Court had previously made an access order with respect to the child. She found at paragraph 6 that the Court could therefore make a restraining order under its inherent jurisdiction to supervise its own orders, in this case the access order, although she declined to do so on the merits. She did not rule on whether she had jurisdiction to make an order under section 36.1I of the Children Act.

23. That the Court has an inherent jurisdiction to supervise its orders is undoubted. See, eg the judgment of Ackner LJ (as he then was) in Bekhor v Bilton [1981] 1QB 923, CA at 942 G – H:

"*In so far as [counsel] contends that there is inherent jurisdiction in the court to make effective the remedies that it grants, this seems to me merely another way of submitting that, where the power exists to grant the remedy, there must also be inherent in that power the power to make ancillary orders to make that remedy effective. This I have accepted.*"

See also the judgments of Griffiths LJ (as he then was) at 949 B and Stephenson LJ at 954 B – C.

24. In Harshaw v Reid [2012] SC (Bda) 18 Civ (23 March 2012) the plaintiff, who was a barrister and attorney, sued the defendant for unpaid fees for legal services that he had provided in a matter concerning her son, a minor. The defendant disputed the bill. Both litigants appeared in person.

25. Simmons J dismissed the plaintiff's claim. She was critical of certain aspects of his conduct of the proceedings in the Supreme Court for which he had billed. Pertinently, she stated that he had failed to appreciate that certain provisions in the Children Act was applicable to the proceedings. These included sections 36F and 36L (custody and access), which were mentioned at paragraph 21 of the judgment; section 36.1I (restraining order), which was mentioned at paragraph 44 of the judgment; and sections 36.1D and 36.1F (orders for support), which were mentioned at paragraph 89 of the judgment.

26. Sections 36F and 36L fall within Part IVA of the Act. I am not concerned with the meaning of "*court*" within this part. However sections 36.1D, 36.1F and 36.1I fall within Part IVB. By reason of section 36.1A, "*court*" has the same meaning throughout Part IVB. There is therefore a conflict as to the correct construction of Part IVB between the decisions of this Court in W v M and Harshaw v Reid.

27. I prefer the Court's approach in W v M. It is supported by a reasoned analysis, which I find persuasive, and from which the Court of Appeal did

not dissent. In Harshaw v Reid, however, the learned Judge, who was no doubt focused on the practical resolution of the dispute before her, gave no reasons for her approach to the construction of Part IVB. She does not appear to have been referred to W v M, as this case is not mentioned in her judgment. In W v M the Court had the benefit, as have I, of submissions from two counsel with substantial experience of family law. In Harshaw v Reid, on the other hand, neither party was represented. Although one of the parties was a practising attorney, it is clear from the judgment that family law was not his specialist area.

28. I am therefore satisfied that the Court has no jurisdiction to order periodical payments under part IVB of the Act.

Inherent jurisdiction

29. I have considered whether the Court has an inherent jurisdiction to order periodical payments. It has an inherent jurisdiction with respect to children. This is acknowledged by section 2(1) of the Act, which defines "*family proceedings*" to mean, inter alia, "*proceedings in relation to a child – (a) under the inherent jurisdiction of the Supreme Court*". Although section 2(1) also defines "*child*" as meaning, except in Part IX, "*a person who is under the age of eighteen years*", in section 36.1B(1), as noted above, "*child*" expressly includes a person who, "*if eighteen years or over, is enrolled in a full-time program of education …*"

30. The Court's inherent jurisdiction with respect to children is analysed in Bennion on Statutory Interpretation at pages 1044 – 1045:

"*In line with the presumption that Parliament intends to safeguard the welfare of minors, and others who are not of full legal capacity, there is a presumption that the wardship jurisdiction of the Crown (now largely regulated by statute), which is the modern expression of the parens patriae doctrine, is not ousted by other provisions for the welfare of children such as those under which local authorities are granted care orders. However it*

may be restricted by a specific enactment, though it remains available to fill any lacuna in child welfare legislation."

31. The Court exercises a closely analogous inherent jurisdiction with respect to incompetent adults. See, eg, the judgment of Munby J (as he then was) in Re SA (Vulnerable Adult with Capacity: Marriage) [2006] 1 FLR 867, HC, at paragraph 37. In Westminster City Council v C and others [2009] 2 WLR 185 the Court of Appeal considered the relationship between that inherent jurisdiction and the Mental Capacity Act 2005. Ward LJ, with whom Hallett LJ agreed, approved at paragraph 55 the following formulation of Roderic Wood J at first instance:

"*Consistent with long-standing principle, the terms of the statute must be looked to first to see what Parliament has considered to be the appropriate statutory code, and the exercise of the inherent jurisdiction should not be deployed so as to undermine the will of Parliament as expressed in the statute or any supplementary regulatory framework.*"

32. In my judgment this approach applies equally to the Court's inherent jurisdiction with respect to children. In Bermuda the Legislature has provided a comprehensive statutory scheme for the provision of financial support to children by their parents, of which Part IVB of the Children Act forms part. For me to assert an inherent jurisdiction to supplement that scheme by making an order for periodical payments would be to undermine the will of the Legislature. That I decline to do.

33. For the avoidance of doubt, however, the Court's inherent jurisdiction with respect to children remains available as a safety net to catch matters outside the statutory scheme. See the judgment of Ward LJ in Westminster City Council v C and others at paragraph 61.

Conclusion

34. I therefore find that I have no jurisdiction to make an order for periodical payments, whether under Part IVB of the Act or pursuant to the Court's

inherent jurisdiction. That disposes of this application, which is dismissed. I cannot exercise a jurisdiction which I do not have.

35. I agree that it is anomalous that an application for maintenance with respect to a child under 18 years of age may be brought in either the Family Court under the Children Act or the Supreme Court under the Minors Act, but with respect to a child who has reached 18 years of age may only be brought in the Family Court under the Children Act. The cure for that anomaly, however, lies not with the courts but with the Legislature.

36. I shall hear the parties as to costs.

Dated this 26th day of October, 2012 _____

Hellman J