In The Supreme Court of Bermuda

APPELLATE JURISDICTION
CIVIL APPEAL 2013: NO. 5

S

Appellant

-v-

F

Respondent

(Re Child Maintenance)

EX TEMPORE JUDGMENT

(In Court)

Date of hearing: May 9, 2013

Mr. Saul Dismont, Christopher's, for the Appellant
The Respondent appeared in person

Introductory

1. In this matter the Appellant appeals by Notice of Appeal dated March 16, 2012 against the decision of the Family Court (Wor. Nicole Stoneham and Panel) dated March 6, 2012 to refuse her application for child maintenance.

The proceedings before the Family Court

2. The Record of the proceedings indicates that the Panel heard the parties, who each appeared in person, and made the factual determination that the application should be refused.

3. The essence of the Appellant's case before the Panel was that the Respondent was in arrears with payments and had not supported the children "for a while now". She told the Court that she paid all of the bills herself and that the Respondent gave her no money at all for the children.

4. The Respondent told the Panel that he supported all of his children. He did not always give them money but supplied them with food. He suggested that the Appellant was misleading the Panel and that he had in fact been paying $50 per week when one of the children was at the Sunshine League and for all of the children $450 in total. He also indicated that he has made financial contributions to the Appellant herself and stated that she had spent money travelling to the United States for the Obama Inauguration and the Michael Jackson funeral. He also complained that she spent almost $3000 on suitcases. He gave the Panel a detailed account of the contributions that he and his wife make towards the children.

5. Having retired to consider their decision, the Panel reached the following decision. They found as a fact that the Respondent:

    (a) was a guarantor for the Appellant's residential property;

    (b) had a daily presence at the residence;

    (c) consistently provided weekly groceries and washing detergent, amongst other things;

    (d) provided transportation for the Appellant;

    (e) provided medication daily to the child S;

    (f) provided the children's sandwich lunches.

6. The Learned Magistrate concluded as follows:

    "*In totality, the above satisfy the Panel, that Mr.* [F] *more than adequately financially supports and maintains within his means , the children-*[S] *and* [S]*, and in so doing greatly assists Ms.* [S] *with her own personal finances and with the welfare of all the children of the family 4 in total*.

    Consequently, we find that Ms. [S]*'s application is without merit and* [is] *therefore denied.*"

The grounds of appeal

7. The Notice of Appeal was filed by the Appellant as a litigant in person and essentially complained of the merits of the decision below. Mr. Dismont, however, appeared for her on this appeal and he prepared a very legalistic attack on the decision.

8. He opened his submissions by pointing out the importance of the fair hearing rights under section 6(8) of the Bermuda Constitution and contended that the Court was duty bound to assist litigants in person. He fortified this submission by reference to section 5 of the Children Act 1998, which provides as follows:

> "*5 The purposes of this Act are to protect children from harm, to promote the integrity of the family and to ensure the welfare of children.*"

9. He then referred to section 6 of the Children Act which sets out the welfare principle as follows:

> "*6 In the administration and interpretation of this Act the welfare of the child shall be the paramount consideration.*"

10. He also referred to section 6 of the Minors Act 1950 which states the welfare principle in a somewhat more elongated form. Finally, counsel referred the Court to Article 3 of the United Nations Convention on the Rights of the Child which, in slightly different verbiage, sets out the welfare principle as well.

11. Against this broad policy background Mr. Dismont contended that it was of vital importance that the Family Court ensures that litigants in person are aware of the legal procedures which should be followed in the applications which they make in the Magistrates' Court. The substantive breach of the procedural framework under the Act that counsel relied upon in this appeal was non-compliance with the requirements in particular of section 36.1F, which provides as follows:

> "***Financial statement***
> *36.1F In an application under section 36.1C or 36.1E, each party shall serve on the other and file with the court a financial statement verified by oath in such form as the court may direct."*[emphasis added]

12. Section 36.1C(4) requires the Court to take into account in determining the amount of payments to be made under an order:

> "*(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."

Findings

13. In the course of argument I put to counsel that the Family Court must have some flexibility in the procedure that they adopt. In this case counsel properly conceded that the Learned Magistrate pointed out in her supplementary comments at the end of the Record had noted that the Respondent cannot read or write. Counsel submitted that even if an informal oral hearing might be necessary to enable the Respondent to fully and fairly participate, the Family Court could still have adjourned and directed the parties in simple terms to go away and prepare the necessary evidence. Section 36.1F is expressed in mandatory terms and the question that this Court has to grapple with to resolve the present appeal is whether "shall" in this context means "shall" or whether, as has been recognised, means in this context "may"[1].

14. The supplementary complaint which Mr. Dismont made was that if there was any reason to depart from the statutory requirements which appear to be set out in obligatory form, then the course which the Panel ought to have taken was to have formally recorded their reasons for departing from these clear requirements.

15. On balance, I am bound to find that the scheme of the Act does not envisage that financial statements under section 36.1F should be filed in each and every case as a matter of mechanical obligation. "Shall" in this context must in my view mean "may"[2]. It would lead to absurd results if in cases where the parties could reach

[1] The section itself, carefully read, is by its express terms partly mandatory and partly permissive.
[2] In other words, the Court may direct the filing of reports; and only if it so directs the parties shall be obliged to file them.

agreement they had to incur the trouble and expense of preparing financial statements in circumstances where an order can be entered at the outset by consent. The power to order financial statements must be one that is to be exercised judicially based on the practicalities of the case before the Panel.

16. The other concern which Mr. Dismont placed somewhat less emphasis on was the fact that the Family Court dealt with this matter too informally. It appears that the Court heard the parties without requiring them to give sworn evidence. That in my judgment was something which the Family Court had the power to do in the exercise of its discretion. One of the main functions of the Family Court is to be a Panel before which a litigant in person can appear and can present themselves in an informal and non-legalistic manner so that the Court is able to adjudicate the applications before it in a practical manner without regard to excessive formality[3].

17. Having said that there is always a need for the Family Court to be astute to ensure that in departing from a more legalistic procedure that the respective parties' fair hearing rights are not being compromised. In this case, although the position is not crystal clear, this was not a fresh application being made by an applicant who was not known to the Court; the children concerned were not babies. And it seems to me to be reasonable to infer based on the material presently before this Court that in addition to the oral presentations made by the parties on the day in question before the Panel in question, there was additional information before the Panel about the financial position of the parties.

18. What the Panel appears to have done, having regard to the representations which were made, was to form a clear and decisive view that the Respondent to this appeal was making satisfactory contribution to the children and that there was no factual basis for the Court to order him to pay the money which the Appellant sought. That sort of factual judgment by a first instance tribunal which has seen and heard the parties is not the sort of finding which this Court would lightly interfere with.

19. So even if the Family Court has erred in any technical sense by failing to explain or articulate why it is that they departed from the usual rule of requiring in a contested matter financial statements to be prepared, in my judgment that technical error is not sufficient to justify this Court disturbing the merits of the decision the Panel reached to refuse the application. That said, the jurisdiction of the Family Court is always a continuing one and to the extent that Applicant may wish to make a fresh application in the Family Court that is something which is always open to her[4].

[3] Section 12 of the Magistrates' Act 1948 provides: "*(5) Every matter brought before a Special Court shall be heard and determined in a summary way.*"

[4] Of course it may be necessary for her to demonstrate that a material change of circumstances has occurred since the Order affirmed by this Court was made.

Conclusion

20. In my judgment, having reviewed the Record, heard counsel for the Appellant and heard briefly from the Respondent in person, this appeal must be dismissed. I would propose to make no Order as to costs.

Dated this 9th day of May 2013 _____

IAN RC KAWALEY CJ