The Court of Appeal for Bermuda

CIVIL APPEAL No 1 of 2016

Between:

EDWARD MANUEL TAVARES

Appellant

-v-

JENNIFER ANN TAVARES

Respondent

Before: **Baker, President**
Bell, JA
Bernard, JA

Appearances: Mr. Peter Sanderson, Wakefield Quin Limited, for the Appellant
Ms. Jacqueline MacLellan, MacLellan & Associates, for the Respondent

Date of Hearing: **31 October 2016**

Date of Judgment: **10 November 2016**

JUDGMENT

Section 33 of the Matrimonial Causes Act 1974 – failure to secure order extending maintenance in respect of child over 18 years pursuing further education.

Bell, JA

Introduction

1. This is an appeal from a judgment of Mrs. Justice Wade-Miller dated 11 December 2015, in which the learned judge set the amount of the outstanding maintenance owed by the Appellant ("the Father") to the Respondent ("the

Mother") in respect of their child Matthew, who was born on 1 March 1990. By Reasons for Order dated 2 December 1993, Ground J (as he then was) had set the level of maintenance payable in respect of the child at $115 per week. That level of maintenance was never changed, but was not always paid in a timely manner, and, as the record shows, there were many applications between the parties in regard to the enforcement of the 1993 order.

Relevant Statutory Provisions

2. The provisions relating to the duration of continuing financial provision orders in favour of children appear in section 33 of the Matrimonial Causes Act 1974 ("the MCA"), which is in the following terms:-

> "33 (1) Subject to subsection (3), no financial provision order and no order for a transfer of property under section 28(1)(a) shall be made in favour if a child who has attained the age of eighteen.
>
> (2) The term to be specified in a periodical payments or secured periodical payments order in favour of a child may begin with the date of the making of an application for the order in question or any later date but –
>
> (a) shall not in the first instance extend beyond the date of the birthday of the child next following his attaining the upper limit of the compulsory school age (that is to say, the age that is for the time being that limit by virtue of section 40 of the Education Act 1996) unless the court thinks it right in the circumstances of the case to specify a later date; and
>
> (b) shall not in any event, subject to subsection (3), extend beyond the date of the child's eighteenth birthday.

(3) Subsection (1), and subsection (2)(b), shall not apply in the case of a child, if it appears to the court that-

(a) the child is, or will be, or if an order were made without complying with either or both of those provisions would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or

(b) there are special circumstances which justify the making of an order without complying with either or both of those provisions."

Thus, in the first instance, a financial provision order made in favour of a child does not, by reason of subsection 2(b) of the section, extend beyond the date of the child's eighteenth birthday. However, that provision may be the subject of an exception where the child is receiving instruction at an educational establishment, or undergoing training for a trade, profession or vocation. In those circumstances, subsection 3 of the section requires that an order of the court be obtained for the original order to extend beyond the child's eighteenth birthday, and for maintenance to continue to be payable.

Enforcement Proceedings

3. In this matter, there were many affidavits filed and orders made from 2010 onwards. In the Supreme Court, these appear to have been made in the context of directions given for the filing of evidence, at a time when the Mother was trying to enforce the arrears of maintenance which had accrued, and the Father was seeking to make an application to bring the continuing maintenance obligation to an end. In the Magistrates' Court, orders were made regarding enforcement, where one particular order deserves mention. This was the order made by the Wor. Tyrone Chin on 22 April 2010, at a time when the Mother was legally represented, when the magistrate confirmed that, having

heard counsel, the Father was to pay $115 per week for maintenance by virtue of the Supreme Court order date 2 December 1993. That could not properly have been an order made under the provisions of section 33 subsection 3 of the MCA, because section 1 of that act defines "court" as meaning the Supreme Court. It is to be noted that when that order was made, the child had just attained the age of 20.

4. The Father then made application in September 2015, asking for the dismissal of various Magistrates' Court orders, as well as the Mother's claim for arrears of maintenance. It was that application which led to the judge's order of 11 December 2015, fixing the amount of the outstanding arrears of maintenance at $28,410 and making provision for payment of those arrears. The judge appears to have done this without having considered the application of section 33 of the MCA, and the absence of any order having been made, at or about the time that the child attained the age of 18 years, providing that the termination provisions of section 33 (2) should not apply. Of particular interest in the material forming part of the record was some correspondence which took place in January 2008, when attorneys acting for the Mother sought consent from the Father for the original order of 2 December 1993 to be varied, so as to include the words "such payment to continue until the said child completes his undergraduate degree at university"; in other words, consent was sought to an extension of the existing maintenance order pursuant to section 33(3) of the MCA. The Father did not consent to such a variation of the 1993 order, and in the event the next step taken was by way of further enforcement proceedings, in 2010, rather than by any application made in 2008 to ensure that the terms of the original maintenance order should continue in full force and effect.

5. For the Mother, it was contended by Ms. MacLellan that there had been "implied consent" on the part of the Father to the original order of 2 December 1993 having continued in existence past the child's eighteenth birthday. However, as Ms. MacLellan was bound to concede, this implied consent had

never been evidenced in writing, and indeed all of the written material suggested the very opposite, namely that the Father was trying to bring his maintenance obligations to an end. Ms. MacLellan relied upon a statement made in the Mother's 5 March 2010 affidavit, in support of an application in which she asked the court to order a continuation of the current level of maintenance. But the reality is that no order was made pursuant to that request, and it is only an order of the Supreme Court which can have the effect of continuing maintenance beyond the child's eighteenth birthday. What was needed was for an order of the court to be obtained, as had been envisaged in the 2008 correspondence.

6. It was also suggested for the Mother that the various Magistrates' Court proceedings evidenced the Father's consent to the continuation of the 1993 order. It should be understood that in this context the Magistrates' Court's jurisdiction is an enforcement one. Supreme Court orders cannot be varied in Magistrates' Court enforcement proceedings, and with respect, the magistrate making the order in April 2010 should have appreciated that.

7. Counsel for the Mother referred to two authorities, which can be dealt with briefly. The first was *Henderson v Henderson* [3 Hare 100], the well-known authority requiring parties to litigation "to bring forward their whole case, and (not to permit) the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward...", applying the principle of res judicata. Reliance upon this authority demonstrates a fundamental misunderstanding of the procedural process underlying the dispute in this case. This is that it was for the Mother to obtain an order that child maintenance should continue beyond the child's eighteenth birthday, in accordance with the provisions of section 33 (3) of the MCA. It was not incumbent upon the Father to make any application, because the effect of Section 33 was that, absent an application by the Mother, the order for child

maintenance could not extend beyond the child's eighteenth birthday, but rather came to an end by operation of law.

8. The other case relied upon behalf of the Respondent was that of *W v M* [2009] SC (BDA) 18 Civ. That case is authority for allowing a litigant to choose whether to seek relief from the Family Court under the Children Act 1998 or from the Supreme Court under the Minors Act 1950. It has no application to the present case, and certainly does not affect the position which I have referred to above, namely that Supreme Court orders cannot be varied by Magistrates' Court enforcement proceedings.

Summary

9. At the end of the day, it seems to me that the point is a narrow one. For the order of 2 December 1993 to have continued beyond 1 March 2008, the date of the child's eighteenth birthday, there needed to be a specific order of the Supreme Court. No such order was ever made, although it seems possible that such may have been applied for, and the need for one to be obtained was clearly appreciated by counsel for the Mother in 2008.

10. It is, unfortunately, not possible for this court to say how the figure of $28,410 given by the judge as the level of outstanding maintenance, was calculated, and more particularly how much of this amount was incurred before the December 1993 order lapsed by virtue of the provisions of section 33 of the MCA. In his original application for leave to appeal, the relief sought by the Father was the discharge of all of his financial obligations from July 2007. However, once the Father was represented by counsel, a formal Notice of Appeal was filed, dated 30 May 2016, in which the Father sought, first, to quash any order requiring him to pay maintenance after the child's eighteenth birthday, and, secondly, the return of the sums which he had paid towards the child's education under compulsion of the Family Court orders.

11. We do not know whether there were arrears of maintenance owed at the date when the orders lapsed by operation of law, and if so, in what amount. Neither do we know what amounts the Father maintains he had paid towards the child's education when there was no legal obligation on him to do so. All that we can say is that the order of 2 December 1993 did not extend beyond 1 March 2008. Hopefully, it will be possible for counsel to calculate and agree the amount of any arrears or overpayments. In the latter event, any claim for the recovery of such overpayment should be made to the Supreme Court.

Bell, JA

Baker, P

Bernard, JA