In The Supreme Court of Bermuda

DIVORCE JURISDICTION
2016: No. 050

BETWEEN:

C.R.M.R

Applicant

- and -

K.L.R

Respondent

Before: **Hon. Chief Justice Hargun**

Appearances: **Mr. Adam Richards, Marshall Diel & Myers Limited for the Applicant**

Ms. Jacqueline MacLellan, MacLellan & Associates, for the Respondent

Date of Hearing: **16 February 2021**

Date Draft Circulated: **4 March 2021**

Date of Judgment **11 June 2021**

JUDGMENT

Ancillary relief; Object of spousal maintenance; Section 29(1) of Matrimonial Causes Act 1974; review for the purpose of determining whether maintenance in favour of the husband should continue; relevant test to be applied

Introduction

1. By paragraph 2 of the Order dated the 22 March 2019, the Court ordered that C.R.M.R ("the Wife") shall pay $14,500 in monthly maintenance to K.L.R. ("The Husband") which shall be backdated to the date of the Registrar's judgment being 7 November 2017 and which shall continue until further Order of the Court. The sum of $9,700 shall be attributed to spousal maintenance and the sum of $4,800 shall be attributed to the child maintenance.

2. Paragraph 5 of the said Order provided that the above Order shall be reviewed in October 2020 for the purposes of considering, *inter-alia*, whether the maintenance orders should be continued or terminated subject to the Husband having completed his intended education. Paragraph 5 provided that either party may apply to the Court for such a review at any time after April 2020, so as to allow an effective hearing before the Court in October 2020. Paragraph 5 further provided that for the avoidance of doubt, the amount of maintenance shall not cease or be reduced until such time as there is an Order from the Court either by consent or by way of review.

3. This is the application for such a review. In summary the Wife seeks an order that the maintenance Order in favour of the Husband be terminated now or at some defined date in the future. The Husband contends that the Court should not make any substantive order but simply schedule a further review of the position in four months' time by which time the Husband will hopefully know the result of his ESERC application, which will determine whether he can engage in gainful employment in Bermuda.

The Background

4. The background to these proceedings is set out in my Judgment dated 28 January 2019 ("**the Judgment**") and in particular at paragraphs 9 to 14 thereof. The essential facts for the purposes of this application are that (i) the Wife is an OB-GYN; (ii) the husband has not worked for a number of years and the husband stated that he wished to return to education and obtain a Bachelors degree and Masters degree; and (iii) the party share custody and care and control of one child of the family, born on 15 June 2009 and is therefore almost 12 years old. The proceeding which led to the Judgment was in fact an appeal against an Order for maintenance made by the Acting Registrar, R Barritt ('**the Registrar**") in a judgment dated 7 November 2017.

5. In the Judgment, the Court noted that the parties have reached, in full and final satisfaction of all claims of a capital nature, an agreement which provides that the Husband receives a payment of $250,000; the Husband retains the benefit of the $150,000 that was the subject of the injunction proceedings; the Husband retains the property he owns with his mother in his native South Carolina; the Husband retains one of the former matrimonial cars; the Wife retains the full benefit of a business; and the Wife retains the second former matrimonial car.

6. After a review of the authorities, I concluded at paragraph 35 of the Judgment, that the end result is that unless a party can legitimately make a claim based upon the principles of sharing and compensation, the party's claim for ancillary relief would be determined by reference to the needs principle. I referred to *SS v NS (Spousal Maintenance)* 2014 EWHC 4183, where Mostyn J reviewed the underlying policy rationale or spousal maintenance orders and the inherent limits of such orders. In particular Mostyn J emphasises that a maintenance award should only be made by reference to needs, save in exceptional case where it can be said that sharing or compensation principle applies:

> *"46. Pulling the threads together it seems to me that the relevant principles in play on an application for spousal maintenance are as follows:*

i) A spousal maintenance award is properly made where the evidence shows that choices made during the marriage have generated hard future needs on the part of the claimant. Here the duration of the marriage and the presence of children are pivotal factors.

ii) An award should only be made by reference to needs, save in a most exceptional case where it can be said that the sharing or compensation principle applies.

iii) Where the needs in question are not causally connected to the marriage the award should generally be aimed at alleviating significant hardship.

iv) In every case the court must consider a termination of spousal maintenance with a transition to independence as soon as it is just and reasonable. A term should be considered unless the payee would be unable to adjust without undue hardship to the ending of payments. A degree of (not undue) hardship in making the transition to independence is acceptable." (emphasis added)

7. Based upon the decision of the Registrar, the Court anticipated that the Husband would have completed his studies by or around October 2020 and therefore fixed the review in October 2020. The purpose of the review was to determine whether, assuming the Husband had completed his education, the maintenance order should be terminated. This is reflected in paragraph 71 and 72 of the Judgment:

"(5) Review Period

71. The Court does not order at this stage that the maintenance award is for a fixed period. However, consistent with the English authorities such as SS v NS (Spousal Maintenance) [2015] 2 FLR 1124 and BD v FD (Financial Remedies: Needs) [2017] 1 FLR 1420, it is the expectation of the Court that, assuming the Husband has completed his intended education, the maintenance Order is expected to come to an end at the end of the four years period unless there are unforeseen circumstances. In other words, it is the expectation of the Court that, as long as the

Husband has completed his intended education, the maintenance award made by this Court will come to an end in October 2020 with the expectation that after that date, the parties will lead independent financial lives. However, the Court recognises that in all the circumstances such a decision should be made at that time.

72. In order to ensure that the review by the Court does take place in October 2020, both parties are at liberty to file an application for such a review at any time after April 2020. I confirm that the amount of the maintenance shall not cease or be reduced until such time as there is a court order either by consent or by way of review."

8. In relation to this review, the Husband filed his affidavit on 24 September 2020. In this affidavit he advised the Wife and the Court for the first time that he registered for MBA degree in February 2019 with the aim of commencing his studies in April 2019. However, he says that in April 2019 his mother, who is now 75 years of age, was diagnosed with lung cancer and as a result he opted for postponing the start of the course. The end result is that the Husband did not pursue any educational courses during the period April 2019 to October 2020, a period of 18 months. In the letter from MacLellan & Associates dated 9 February 2021 it is said that *"our client is looking to complete the MBA in 10-15 months."*

9. In her responsive affidavit dated 6 October 2020 the Wife complains that the Husband's unilateral decision not to pursue his studies is a significant change of circumstances and one which the Husband should have advised her about. In particular, she notes that she has been providing maintenance for the relevant 18 months period which includes a significant sum for tuition fees and travel costs which have not been incurred.

10. The Wife's position is that whilst she can accept that the circumstances of the Husband's mother's ill health may have had an impact on the Husband's ability to fully focus on his studies at times, it is more difficult to accept, however, that the Husband could not have completed any studies at all during that 18 months period of. The Wife points out that the Husband primarily resides in Bermuda whilst his mother lives in North Carolina. The

Husband has continued to be mainly based in Bermuda during the past two years as he has had care of the child of the family given that the parties share care and control.

11. The Wife submits that the purpose of the maintenance award was to allow the Husband with the opportunity to obtain qualifications to allow him to transition to independence as soon as possible. The Husband has chosen not to take those steps and simply expects her to continue to pay maintenance for the next 2 years.

12. The Wife also complains about the Husband's inability to secure a work permit so that he can engage in gainful employment in Bermuda. It appears that the Husband was refused an ESERC due to failing to complete the application correctly. The Wife's attorneys wrote to the Husband's attorneys as long ago as 11 September 2018 pointing out that the Husband had incorrectly completed section B, question 3. The Court was advised, by a copy of the letter from MacLellan & Associates, that the Husband had now received advice that the best course to adopt was to file a new application with the Ministry of Immigration. The Husband advises that he filed a new application on 14 January 2021, a month before the scheduled review hearing. Not surprisingly the Wife complains that the Husband's lack of any meaningful actions to obtain a work permit to engage in gainful in Bermuda is entirely unreasonable and that she should not be required to shoulder the financial burden resulting from that unreasonable conduct.

13. In relation to this review, Ms. MacLellan asked the Court to keep firmly in mind the terms of section 29 (1) of Matrimonial Causes Act 1974 and she referred the Court to [3.22] of Jackson's Matrimonial Finance emphasising that "… *on every application within divorce and nullity proceedings the court has a duty to consider whether a clean break order is appropriate in light of all the relevant factors and giving first consideration to the welfare of any child of the family."* I accept the Court is bound to take into account these considerations. I also keep in mind that the impact of section 29 (1) was considered in detail in relation to the circumstances of this case in my Judgment dated the 28 January 2019. I will of course keep in mind the circumstances which have arisen since the Judgment.

14. Mr. Richards, for the Wife, reminds me of the passage in the judgment of Mostyn J in *SS v NS (Spousal Maintenance)* [2014] EWHC 4183, at [44] emphasising that the Court considers whether it was impossible to achieve independence in the time frame contemplated by the previous order:

> *"Both parties here agree that the spousal maintenance order should be for a term; but they dispute whether it should be extendable. How easy is it to enlarge an extendable term? In Fleming v Fleming [2003] EWCA Civ 1841; [2004] 1FLR 667 at para 12 Thorpe LJ stated that "the exercise of [the] power to extend obligations requires some exceptional justification". In Miller at para 97 Lord Nicholls and at para 155 Lady Hale accepted that this set an applicant a "high threshold" to surmount. However, in McFarlane v McFarlane [2009] EWHC 891 (Fam) Charles J stated at para 104 that "the test or approach described and applied in Fleming does not survive". I agree. An application by a payer to discharge and an application by a payee to extend should be decided by reference to the same principles. Charles J points out that "the reasoning behind the earlier order that a party seeks to vary is a relevant circumstance of the case, and therefore on an application to vary it can be assessed whether the purpose of the earlier order has been fulfilled and, if it has, this would be a relevant (and perhaps a decisive) factor in favour of refusing an extension or variation." Therefore, on an extension application an examination would have to be made of whether the implicit premise of the original order of the ability of the payee to achieve independence had been impossible to achieve. Similarly, on a discharge application an examination would have to be made of the assumption that it was just too difficult to predict eventual independence. This is to state the obvious. However, I believe that if the choice between an extendable term and a joint lives order is finely balanced the statutory steer should militate in favour of the former." (emphasis added)*

16. In considering this application, whilst the Court does understand and accept that the news of the Husband's mother's illness must necessarily have affected him, it is difficult to accept that this could justify the Husband completely abandoning his Masters degree course for a period of 18 months during the period April 2019 to October 2020. The Court

is bound to conclude that the Husband's decision to abandon all education during the period April 2019 to October 2020 was unreasonable in all the circumstances and it is not appropriate that the Wife should be expected to fund the Husband's unreasonable choices. I accept Mr. Richards's submission that the conduct is particularly unreasonable having regard to the facts and circumstances that (i) in breach of the requirement of ongoing full and frank disclosure, the Husband did not advise the Wife that his mother was ill and/or he was not studying; (ii) the husband primarily resided in Bermuda for the past 2 years and as such his involvement in the care of his mother must have been limited and the Wife estimates that he was in the US for approximately 15 weeks which was in keeping with his usual travels; (iii) the onset of Covid and the closure of the Bermuda airport further prevented him from travelling at all during the first half of 2020; and (iv) the husband stated that he was to recommence his course in November 2020, only after the request for review was issued.

17. I also accept that it is unreasonable for the husband to file a fresh ESERC application on 16 February 2021, over 2 years after the issue was first identified.

18. An appropriate solution in my view is to extend the Husband's maintenance for a fixed period, at the expiry of which the Wife's obligation to make maintenance payments to the Husband will cease under the terms of the Order of 22 March 2019. I consider this is necessary in order to provide the Husband with the encouragement to take the required steps to gain independence by a certain date. I should confirm that the Husband will still continue to receive child maintenance payments of $4,800 per month, his health insurance would continue to be met by the Wife, and the Wife would continue to meet all direct expenses for the child of the family. In my view these arrangements should allow the Husband to transition to independence, albeit with an acceptable level of hardship.

19. Ms. MacLellan submitted that if the Court was minded to terminate maintenance at some defined date in the future the Court should extend it for a further period of period of 15 months or at the very least until December 2021. In all the circumstances I consider that the Wife should continue to make maintenance payments to the Husband under the Order dated 20 to March 2019 until 31 December 2021 but the obligation to make maintenance

payments shall cease thereafter other than in the nominal amount of $1.00 per month. In terms of the quantum of the maintenance, I consider that it should continue to be payable at current levels. In particular, I do not make any deductions on account of the fact that the tuition fees have already been paid by the Wife under the payments already made to the Husband or on account of the fact that the Husband has been paid on account of travel which he has been unable to undertake.

20. In relation to the costs of this application relating to the review my provisional view is that each party should bear its own costs. However, if either party wishes to contend that I should make some other order, that party must so advise the Registrar in writing within the next 14 days.

Dated this 11th day of June 2021.

_____

NARINDER K HARGUN

CHIEF JUSTICE