In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2020: No. 028

BETWEEN:

M

Appellant

and

F

Respondent

JUDGMENT

Maintenance of Child, Parents not married, Joint financial responsibility

Date of Hearing: **2 March 2021**
Date of Judgment: **5 April 2021**

Appearances: **Appellant in Person**

Respondent in Person

Judgment of Mussenden J

Introduction

1. The mother ("**M**") and the father ("**F**") are the parents of the child ("**C**"), a seven (7) year old boy. They are not and were not married to each other. M has one other child not related to these proceedings and F has two other children not related to these proceedings.

2. By a summons dated 24 September 2020 M seeks financial support from F for C pursuant to the Children Act 1998. After a hearing before the Family Court Panel of the Magistrates' Court, a Consent Order dated 19 October 2020 by the Family Court Panel ordered that F pay $50 per week contributions, by way of maintenance for C in addition to the contributions he was already making. For a year, the $50 weekly payment amounts to $2,600 annually.

3. M has appealed against that Order on the grounds as follows:

    a. The Magistrate was biased in his decision ordering only $50 per week in maintenance payments as he appears to know the Respondent; and

    b. $50 per week is not enough for the ongoing care of the child. She seeks $100/week which amounts to $5,200 annually.

4. The relief that M seeks is a more reasonable amount of maintenance as C is a growing child and more maintenance is needed.

Ground 1 - Bias

5. Ground 1 - Bias - M complains that in the Family Court, the hearing started with an exchange between the Learned Magistrate and F about the Learned Magistrate knowing him from the football programme attended by their sons. M, in a letter dated 23 October 2020 to the Senior Magistrate and now a part of the Record of Appeal, states that the conversation went as follows:

- *Magistrate to F: "I know you Mr [F], our sons play on the same football team for [school]. You're a great support; very involved."*

6. M complains that as a result of this exchange, she felt uncomfortable, that she had lost the case before she had even presented it, and that she had not seen this conduct before in a court.

7. The Learned Magistrate submitted a report dated 19 November 2020 with the Record of Appeal and in respect of the ground of bias, the Learned Magistrate stated as follows:

> *"9. Inasmuch as the Applicant Mother's Notice of Appeal alleges that "The Magistrate was biased" on the basis that " ... he appears to know the Respondent". It was made clear at the outset of the hearing when the Parties entered the Court that, whilst I did not know his name, I recognized the Respondent Father as the parent of a child who played on the same football team as my son for one season at least three years ago. It was clear to the Court, and the parties, that that child - my son's former teammate - was not [C]. I declared immediately my acquaintance with the Respondent Father, with whom I believe I made clear I have – on a handful of occasions - done no more than exchange pleasantries on the touchline, and the Applicant Mother took no issue with me continuing with the matter. Clearly, having turned my mind to the matter, I did not consider that I was conflicted or ought to recuse myself in the circumstances.*
>
> *10. Further, the impugned Order of 19th October 2020 was agreed unanimously by the Court as denoted by the other members of the panel affixing their signatures to it, and neither [Mr. T nor Mr. S] – who formed the panel - indicated that they had any prior knowledge of the parties."*

8. M, having reviewed the above paragraphs of the Report, submitted that the Learned Magistrate should have recused himself as she thinks it was an unfair hearing as she felt

there was a more detailed conversation than just exchanging pleasantries at football games; the Learned Magistrate did not exchange pleasantries with her at anytime; it was more than one football game; and the Learned Magistrate had formed an opinion of F's character. In respect of the Family Court Panel being unanimous on the outcome of the case, M still maintained that the hearing was unfair as the Learned Magistrate was biased and that the order for $50 per week was a result of the bias and favouritism for F. Finally, she stated that she did not know that she could say something to the Learned Magistrate about this issue.

9. F submitted that at the hearing, there was never a conversation, only that the Learned Magistrate declared that he knew F from their sons' football team; he never knew the Learned Magistrate was a magistrate; they never had conversations at football games; there was only ever a headnod in passing and there were only a handful of occasions where this happened; he never took the Learned Magistrate's declaration to mean that the Learned Magistrate was going to be in his favour; the Family Court Panel was not biased; and M had the opportunity at the declaration and at the end of the hearing to voice her concerns about bias but chose not to do so.

Ground 2 – The Order for $50 per week

10. Ground 2 – the Order for $50/week - The Appellant M complains that $50/week in Bermuda is not livable for a 7 year boy when $100/week appears to be the minimum payment which she now requests without 'breaking F's pockets'. In respect of expenses, M stated that she has been paying for C's expenses including bi-weekly payments for afterschool programme for 7 years; doctor's visits; extracurricular activities (football and jujitsu), educational materials, hot lunch and haircuts.

11. The Parties completed and filed a Form 2 Income and Expense Statement for the hearing before the Family Court Panel. M listed expenses of interest for C as follows:

a. Football programme – fee is $924/season which includes items such as $450 for the registration fee of which F paid half, $75 for the tracksuit and $100 for the match day kit.
b. Jujitsu activity is now the kickboxing activity – fee is $75/month plus twice a year expenses of uniform of $75 and gloves of $50.
c. Reading Clinic – fees are in a range of $162 - $400/month;
d. Afterschool programme – fee is $30/week – F used to pay it when it was $50/week but F now refuses to pay the fee of $30/week for the Government programme.
e. Health insurance - C is currently on F's health insurance plan along with his other 2 sons at a premium of $210.46/week for himself and all 3 sons. M submitted that C can go on her own health insurance plan.
f. School Clothing - F was paying for school clothes prior to the current school year, but for the current school year, M has paid for school uniform, school clothes, gym clothes and gym shoes;
g. In summary, as a result of the Magistrates Court Order, F was paying $50/week plus the health insurance which covered F and all three sons.

12. M submitted that a review of F's Form 2 would show that he had the ability to pay more as follows:
    a. The full-time monthly net wages of $3,732.30 was supplemented by 'overtime pay' of $600/month, for a total monthly income of $4,332.20; and
    b. F needs to cut back on other expenses as he always has the 'latest' in terms of clothing and jewelry.

13. F submitted as follows:
    a. That if he was required to do more, then he would prefer to return to the "week on/week off" arrangement where each parent would have C for one week at a time on a rotational basis when he would cover more expenses such as food, accommodation and other expenses as they arise.
    b. Re overtime of $600 per month – this was an estimate and it was not guaranteed particularly as overtime is now very limited due to the Covid-19 Pandemic which

has had a negative effect on the number of shipping containers being handled as part of his work as a stevedore. Sometimes overtime was more than $600/month and other times it was less but this should not be a basis for an increased weekly maintenance. In a pay slip submitted after the hearing as ordered by the Court, for a week in February 2021 the overtime recorded was one hour at $77.45. Using that figure for 4 weeks would give a total of $309.80 for the month.

c. Football - there were other club programmes for lesser fees.
d. Shared custody arrangements - he picks up C after school on Fridays and returns him to school on Mondays although as he makes work at 8:00am, he drops C back to his mother who takes him to school; When school is out for holiday, F has C and continues to pay weekly maintenance
e. School uniforms – he pays for the school uniforms when C is with him;
f. Meals - when C is with him, he pays for meals and school lunches;
g. Extra-curricular activities – on request he pays half the fee;
h. Health Insurance – he pays $210.46/week for him and his 3 sons. He submitted that if C went on M's insurance then his health insurance premium would remain the same as he still had to pay of himself and his other two sons.

14. In response to whether he could increase his weekly payments, F submitted that the $50 was fair; he has a car payment of $649.86/month ending 29 November 2024[1]; he has some savings that could assist in paying more but that he is saving in order to provide a better life for his children and himself.

The Consent Order

15. The Learned Magistrate in his Report dated 19 November 2020 in the Record of Appeal set out the approach the Panel took in reaching the $50/per week maintenance payment. This involved taking account of the expenses that F already paid, (football programme fees, health insurance, meals when C is with F), converting other various expenses to arrive at an approximate weekly amount and then determining the monthly residual salary/wages of

[1] F submitted a Promissory Note dated 26 November 2019

both parents. He states that F answered in the affirmative when he was asked if he could pay $50/week. In turn, when M was asked if this was acceptable, she replied "I mean it's something … I just want help". The Learned Magistrate took this as an acceptance of the amount and therefore proceeded with the Consent Order.

16. When M was questioned by this Court about giving her agreement to the Consent Order, she submitted that she was not aware that she could not give her agreement to a Consent Order of $50 per week on the basis that she wanted an increased amount; that she was taken aback by the exchange about football at the start of the hearing; and that she was in tears explaining that she only wanted F to do things with C as he did with his other children.

The Law on Bias

17. In respect of a tribunal's independence and impartiality, in the case of *Davidson v Scottish Ministers* [2004 if] UKHL 34 at 6 Lord Bingham stated:

> *"6. The rule of law requires that judicial tribunals established to resolve issues arising between citizen and citizen, or between the citizen and the state, should be independent and impartial. This means that such tribunals should be in a position to decide such issues on their legal and factual merits as they appear to the tribunal, uninfluenced by any interest, association or pressure extraneous to the case. Thus a judge will be disqualified from hearing a case (whether sitting alone, or as a member of a multiple tribunal) if he or she has a personal interest which is not negligible in the outcome, or is a friend or relation of a party or a witness, or is disabled by personal experience from bringing an objective judgment to bear on the case in question. Where a feature of this kind is present, the case is usually categorised as one of actual bias. But the expression is not a happy one, since "bias" suggests malignity or overt partiality, which is rarely present. What disqualifies the judge is the presence of some factor which could prevent the bringing of an objective judgment to bear, which could distort the judge's judgment."*

18. In respect of the test of apparent bias, in *Porter v Magill* 2001 UKHL 67 adopted in the recent Bermuda case of *Dr. Gina Tucker v The Public Service Commission* [2020] SC (Bda) 8 Civ at 49 the test was set out as follows:

> *"49. The accepted test for determining bias is whether a fair minded reasonably informed observer would conclude that there was a real possibility of bias on the part of the decision maker."*

19. In respect of apparent bias and unconscious bias, in the case of *Hofstetter v The London Borough of Barnet* [2009] EWHC 3282, Charles J stated:

> *"104 I invited Counsel to comment on the test for apparent bias approved by the Court of Appeal in R (PD) v West Midlands and North West Mental Health Tribunal [2004] EWCA Civ 311 at paragraphs 6 and 8 of the judgment of Lord Phillips MR in the following terms:*
>
> > *"6. Silber J summarised the relevant principles to be deduced from recent authorities as follows:*
> >
> > > *(a) in order to determine whether there was bias in a case where actual bias is not alleged " the question is whether the fair-minded and informed observer, having considered the facts would conclude that there was a real possibility that the Tribunal was biased" (per Lord Hope of Craighead in Porter v Magill [2002] 2 AC 357 at 494 [103]). It follows that this exercise entails consideration of all the relevant facts as "the court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased" (ibid [104]).*
> > >
> > > *(b) "Public perception of a possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach. This idea was succinctly expressed in Johnson v Johnson [2000] 200 CLR 488, 509 at paragraph 53 by Kirby J when*

he stated that "a reasonable member of the public is neither complacent nor unduly sensitive or suspicious"" (per Lord Steyn in Lawal v Northern Spirit Limited [2003] ICR 856, 862 [14]),

(c) in ascertaining whether there is a case of unconscious bias, the court must look at the matter by examining other similar analogous situations. "One does not come to the issue with a clean slate; on the contrary, the issue of unconscious bias has cropped up in various contexts which may arguably throw light on the problem" (per Lord Steyn in Lawal v Northern Spirit Limited (supra), 862 [15]),

(d) the approach of the court is that "one starts by identifying the circumstances which are said to give rise to bias – [a court] must concentrate on a systematic challenge and apply a principled approach to the facts on which it is called to rule" (per Lord Steyn in Lawal v Northern Spirit Limited (supra), 864-5 [20]),

(e) the need for a Tribunal to be impartial and independent means that "it must also be impartial for (sic) an objective viewpoint, that is it must offer sufficient guarantees to exclude any legitimate doubt in this respect" (Findlay v United Kingdom (1997) 24 EHRR 221 at 224-5 and quoted with approval by Lord Bingham of Cornhill in R v Spear [2003] 1 AC 734 [8]."

8. We would endorse the judge's summary of the relevant legal principles. We would add only this comment in relation to the judge's statement that one must consider a case where unconscious bias is alleged by examining "other similar analogous situations". Lord Steyn stated that these "may arguably throw light on the problem". The natural reaction of the lawyer to any problem is to look for case precedent and this is true even where the issue is essentially one of fact. In such circumstances precedent can be helpful in focusing the mind on the relevant issues and producing consistency of approach. In a case such as the present, however, the search is for the reaction of the fair-minded and informed observer. The court has to apply an

objective assessment as to how such a person would react to the material facts. There is a danger when applying such a test that citation of authorities may cloud rather than clarify perception. The court must be careful when looking at case precedent not to permit it to drive common sense out of the window."

The Law on Maintenance

20. The Children Act 1998 Section 36.1C sets out as follows:

Order for support

36.1C (1) A court may, on application, order a person to provide support for his or her dependants and determine the amount of support.

(2) An application for an order for the support of a dependant may be made by the dependant or the dependant's parent.

(3) In making an order under this section in respect of a child the court shall—

(a) recognize that the parents have a joint financial responsibility to maintain the child; and

(b) apportion that obligation between the parents according to their relative abilities to contribute to the performance of their obligations.

(4) In determining the amount of payments to be made under an order in respect of a child the court shall consider all the circumstances of the case including—

(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.

21. In the Bermuda Court of Appeal case of *M v W* [2010] Bda LR 87 Ward JA stated as follows:

> *"17. … the Court has to consider more than the needs of the child. The Children Act 1998 section 36.1C(4) lists a number of factors which must be taken into account apart from needs, namely assets of parents, capacity to provide support, age, physical and mental health, other legal obligations, etc.*
>
> *18. When those factors are taken into account, we are of the opinion that neither adherence to a rigid principle of proportionality nor a contribution by each parent on the basis of equality should be strictly followed. In exercising its discretion the Court must consider all the circumstances.*
>
> *40. Pursuant to section 36.1C(3) of the Children Act 1998 both parents have a joint financial responsibility to maintain the child and the Court must apportion that obligation between the parents according to their relative abilities to contribute to the performance of their obligations.*
>
> *41. As it is a joint obligation, the correct starting point is a 50/50 split. But that has to be adjusted, as necessary, after all the listed factors have been taken into account. Nor is the apportionment to be cone according to a rigid mathematical formula or calculation based on the percentage that one parent's income bears to the other. Rigid application of such a formula would be to ignore the other considerations mentioned in section 36.1C(4) of the Act and the broad discretion given."*

Analysis of Ground 1 - Bias

22. In my view, I find that a fair minded observer would not conclude that there was a real possibility of bias on the part of the Learned Magistrate for several reasons. First, I accept that the Record shows that the Learned Magistrate was making a declaration to the Court at the start of the hearing about his recognition of F. In my view, that was his duty to the Court to bring to the attention such recognition so that any parties could have made submissions on it. I reject M's assertions that the exchange in Court amounted to pleasantries or familiarity as it was an exchange in furtherance of the Court's proceedings.

23. Second, I accept that the Learned Magistrate, although he recognised F from their sons' football programme, did not know his name and they had only ever exchanged pleasantries on the sidelines at least three years ago. I also accept F accounts that there were only a few exchanges although he puts it as headnods in passing. I am unable to accept M's assertions of what took place at the matches as that would be speculation on her part. Also, in my view the facts show that the Learned Magistrate did not have a personal interest in the outcome of the matter, was not a friend or relative of F and there was no basis to say that he could not be objective.

24. Third, in my view there is no actual bias when applying *Davidson v Scottish Ministers* where Lord Bingham stated that 'the rule of law requires that judicial tribunals ……. should be independent and impartial", "should decide such issues on their legal and factual merits as they appear to the tribunal uninfluenced by any interest, association or pressure extraneous to the case". There is no basis to support a contention that the Learned Magistrate was influenced by any interest, association or pressure extraneous to the case. The Learned Magistrate went on with the other members of the Panel to deal with the substance of the application in a methodical manner and thus in my view, the fair minded observer would not conclude that the Learned Magistrate or the Panel were not impartial in determining the issues.

25. In respect of the Learned Magistrate and apparent bias I rely on the line of cases citing the test in *Porter v Magill*, namely *Dr. Gina Tucker v the Public Service Commission* and

Hofstetter v The London Borough of Barnet. I am of the view that based on the same factual matrix above, that the fair-minded and informed observer would not conclude that there was a real possibility of bias on the part of Dr. Richmond once all the facts of the circumstances were considered.

Analysis of Ground 2 – The Order for $50 per week

26. The Learned Magistrate stated in his report that in the respective Income and Expenses Statements, the residual monthly income for M was $213.74 and for F it was $12.34.

27. In determining the proper amount of maintenance to be paid, as stated in *M v W* I am reminded of the requirements of the Act to take into account several factors including the needs of the child, the assets of the parents and the capability of the parents to provide support. The Court is not required to follow strictly a rigid principle of proportionality or equality of contribution but must take into consideration all the circumstances in exercising the discretion to order a particular amount of maintenance. I also recognise that the parents have a joint financial responsibility for the maintenance of the child and that a starting point is a 50/50 split with adjustments as necessary.

28. In respect of the needs of the child, the main expenses are food and accommodation, clothing including school clothing, miscellaneous items including the after-school programme, the extra-curricular activities of football and kickboxing, the reading clinic and health insurance.

29. In respect of accommodation and food, M has the child Monday to Thursday whilst F has him Friday to Monday. During those periods each parent meets the expenses of food and accommodation. In my view, M is covering more than half of these costs on a weekly basis except during holidays when F has the child and covers the expenses whilst continuing to pay the weekly maintenance thus bringing the share of expenses back to a level of equality.

30. In respect of miscellaneous maintenance items, there are expenses for haircuts, afterschool programme, doctor visits, clothing and food. A stated above, both parents are contributing

equally over time to the expenses for food and accommodation. Therefore, expenses to be covered are $15/week for haircuts, $30/week for afterschool programme, $50/week for clothing and $11/week for doctor's visits ($65 spread over 6 months).

31. In respect of the football programme, I reject F's submission that C could attend another cheaper football programme. There are myriad reasons why a parent would place their child in a particular sports programme, for example, proximity to school and home, nature and quality of the programme and family ties to the programme. In respect of the current club fees, the total annual cost is $924. Out of that, the registration fee is $450 of which F paid $220 leaving M to cover $230. The balance of football related expenses is $474 (or $9/week). In my view, F should pay 50% of the $9/week which is $4.50/week.

32. In respect of health insurance, M intends to move coverage for C to her health insurance plan from F's health insurance plan. This transfer appears negligible to both parties as they both have other children and the parents submitted there would be no change in insurance fees for the addition or deletion of one child to their health insurance plans.

33. In respect of education, F pays $94.99/month for workbooks, flash cards and online learning games. Therefore expenses to be covered are $24/week.

34. In respect of the other extra-curricular activities, F stated that he pays half of the fees when requested. These activities are the kickboxing and the reading clinic. These activities appear to be paid for by M unless she request support from F. The kick boxing on a weekly basis is $19/week ($75/4 weeks) plus gloves/uniform $5/week ($125/26 weeks).

35. In respect of school uniforms, F has not paid for school uniforms this year but there is a clothing expense as dealt with above.

36. The weekly calculations set out above are (a) $15/week for haircuts; (b) $30/week for afterschool programme; (c) $11/week for doctor's visits; (d) $50/week for clothing including uniforms; (e) $4.50/week for the non-registration football fees; (f) $24 a week for education; (g) $19/week for kick boxing; and (h) $5/week for kick boxing gear for a total of $158.50 per week to be covered between the parents. In my view, it is highly likely

that there will be other unexpected and further miscellaneous items that are bound to arise on an ad hoc basis. These are difficult to list and quantify at this stage but all parents are nonetheless aware of such circumstances and expenses. On that basis, I am of the view that the weekly expense amount can reasonably be rounded up to $170/week.

37. I am obliged to consider the ability of both parents to provide support. In my view, in respect of F's ability to provide financial support, he has fluctuating overtime as well as the asset of savings. The Court is entitled to take into account these sources of funds with the effect being that over time F's residual monthly amount on his Income and Expense Statement is likely to average out more than $12.34/month. On that basis, I am satisfied that he has the capability to meet an equal share of C's expenses. In respect of M's ability to provide financial support, I note that her monthly income is considerably in excess of F's monthly income. This applies to the residual income also. I am also satisfied that she has the capacity to meet an equal share of C's expenses.

Conclusions

38. Ground 1 is dismissed.

39. Ground 2 is allowed and the Order varied such that the weekly expense of $170.00 as calculated above should be shared equally such that F pays one-half, that is, $85.00/week to M for the stated expenses by way of Attachment of Earnings commencing 16 April 2021 and F is to make payments into the Collecting Office until the Attachment of Earnings is amended.

Dated 6 April 2021

HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT