



In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2011 No: 102

BETWEEN:

S. P.

Petitioner

and

A. W.

Respondent

RULING

Child Maintenance; Over-payment of Child Maintenance; Release of Funds Being Held by The Collecting Office of the Magistrates' Court; Re-payment of Over-payment of Child Maintenance

Date of Hearing: 30 August 2022

Date of Ruling: 19 October 2022

The Petitioner appearing In Person

The Respondent appearing In Person

RULING of Registrar, Alexandra Wheatley

Introductory

1. The Petitioner and the Respondent were married on 12 July 2002. The Decree Nisi was granted 28 October 2011 and made absolute on 8 December 2011. There are two children of the family. The older child of the family was a child the Petitioner had from a previous relationship. This matter only relates to the youngest child of the family.
2. On 14 July 2014 the Petitioner filed her Notice of Application for Ancillary Relief (“Ancillary Relief Application”), *inter alia*, seeking periodical payments for the youngest child of the family.
3. Directions were given for the Ancillary Relief Application; however, the parties never complied with the directions and the matter did not go to final hearing. There is no correspondence on the Court file from either party respect of his and her respective positions as it related to the Ancillary Relief Application when no further action was taken in 2014.
4. The Respondent made an application on 10 November 2017 (**the Respondent’s Application**) seeking the following relief:
 - a) Child maintenance from the Petitioner; and
 - b) The order for child maintenance be back-dated to October 2016.
5. I made the following findings and orders in relation to the Respondent’s Application at paragraphs 32 to 37 of my Judgment of 13 February 2019:

“32. *I find the Respondent is entitled to child maintenance from the Petitioner since the child has been in his sole care since October 2016 and taking into the elements set out in Section 29(1) and 29(2) of the MCA. The have set out above the findings I have made in relation to each of these factors, the emphasis of which is on the needs of the child and the income/earning capacity of the parties.*

33. *I also find the Petitioner had the means since 2016 to contribute towards the private education of the child of the family, particularly as this had been the status quo. Had I found the Petitioner not to have the means and had*

the child not previously been enrolled in private education my decision would be entirely different.

34. *I therefore, order the Petitioner shall pay to the Respondent, \$1,200 per month by way of child maintenance which shall be backdated to 1 October 2016. This sum has been calculated on the basis. The sum represents a contribution of 70% of the child of the family's monthly tuition at BHS (\$791), plus modest a contribution towards the child's other direct as well as indirect expenses incurred by the Respondent in maintain a roof over her head in the sum of \$409.*
35. *Due to the backdating of this order, this results in there being arrears of maintenance owed to the Respondent. These arrears shall be paid by way of monthly installments of \$500 per month. Therefore, the Petitioner's total monthly child maintenance payments to the Respondent shall be \$1,700 per month until such time as the arrears are extinguished at which point the monthly sum will be reduced to \$1,200. The Petitioner also has the option of paying towards the arrears by way lump sum if she so chooses, but I will not require her to do so.*
36. *The \$1,200 monthly child maintenance payments payable by the Petitioner to the Respondent (subject to the arrears being paid in full) shall come to an end in the event that the child of the family commences overseas education, at which time the parties are encouraged to reach an agreement, the terms of which can be compiled in a Consent Order for the consideration of the Court. Alternatively, either party will have to make an application to the Court seeking a variation of this order.*
37. *Both the monthly child maintenance payments as well as the payments against the arrears shall be made by way of an attachment of earnings payable through the Collecting Office of the Magistrates' Court. The Petitioner should be aware there may be a delay in the commencement of the attachment of earnings. As such, until such time as the attachment of earnings commences, she shall make all monthly payments directly to the Collecting Office of the Magistrates' Court." [Emphasis added]*

6. On 29 June 2022, the Petitioner made an application seeking the following relief:

- a) Cessation of her Attachment of Earnings;
- b) The Respondent to repay and over payments in child-maintenance she has paid to him since 2019;

- c) Release of the current child maintenance payments being held by The Collecting Office of the Magistrates' Court until further direction by this Court; and
- d) Confirmation that any outstanding fees owed to BHS are the sole responsibility of the Respondent.

The facts

- 7. This is an unfortunate case as neither party informed the Court that the child of the family commenced her education overseas which triggered the ending of the child support payments the Petitioner was required to pay to the Respondent. It is now approximately three years on where the Petitioner has an attachment of earnings in place which should have been extinguished once the obligation of the backdating of the child maintenance payments for the period 1 October 2016 to 1 August 2018 had been met. Instead, the attachment of earnings order against the Petitioner has continued to be active well past the court ordered period for her to pay child maintenance to the Respondent.
- 8. The only facts which need to be looked at to determine this application are as follows:
 - a) Both parties confirmed that the child of the family recommenced her overseas education in September 2018. This means the child maintenance payments from the Petitioner to the Respondent would have come to an end at this time.
 - b) For the period 1 October 2016 to 1 August 2018 (the last date the Petitioner was obligated to pay child maintenance), the total payments the Petitioner was required to pay the Respondent was \$26,400 (22 months multiplied by \$1,200 per month).
 - c) There is still currently an attachment of earnings order in place against the Petitioner in the sum of \$1,700 per month which was never reduced or ceased in accordance with the Order dated 13 February 2018 (**February 2019 Order**).
 - d) What sum has the Petitioner paid over and above her child maintenance obligations in accordance with the Order dated 13 February 2019. Since February 2019, The Collecting

Office of the Magistrates' Court has received total payments of \$73,100. Of this sum, \$11,900 is currently being held by The Collecting Office until the determination of this application.

9. These facts were not disputed by the Respondent.

The law

10. Section 37 of the Matrimonial Causes Act 1974 (MCA), provides the Court the jurisdiction for the Court to order repayment of child maintenance where there has been a change in circumstances since the initial order was made. It states as follows:

“Orders for repayment in certain cases of sums paid under certain orders

37 (1) *Where on an application made under this section in relation to an order to which this section applies it appears to the court that by reason of—*

(a) a change in the circumstances of the person entitled to, or liable to make, payments under the order since the order was made; or

(b) the changed circumstances resulting from the death of the person so liable,

the amount received by the person entitled to payments under the order in respect of a period after those circumstances changed or after the death of the person liable to make payments under the order, as the case may be, exceeds the amount which the person so liable or his or her estate representatives should have been required to pay, the court may order the respondent to the application to pay to the applicant such sum, not exceeding the amount of the excess, as the court thinks just.

(2) This section applies to the following orders—

(a) any order for maintenance pending suit and any interim order for maintenance;

(b) any periodical payments order; and

(c) any secured periodical payments order.

(3) An application under this section may be made by the person liable to make payments under an order to which this section applies or his or her estate representatives and may be made against the person entitled to payments under the order or his or her estate representatives.

(4) An application under this section may be made for—

(a) the variation or discharge of the order to which this section applies; or

(b) leave to enforce, or the enforcement of, the payment of arrears under that order.

(5) An order under this section for the payment of any sum may provide for the payment of that sum by instalments of such amount as may be specified in the order.” [Emphasis added]

Conclusion

11. I find the Petitioner has over-paid child maintenance to the Respondent in the sum of \$46,700 (total of \$73,100 paid, less the total obligation of \$26,400 = \$46,700); however, the sum of \$11,900 currently being held by The Collecting Office of the Magistrates’ Court which has not been paid out to the Respondent. As such, this sum of \$11,900 shall be released immediately to the Petitioner and reduce the sum owed by the Respondent to the Petitioner to \$34,800.
12. As it relates to the repayment of the \$34,800 from the Respondent to the Petitioner, this shall be paid in the sum of \$1,200 per month until such time as the debt is extinguished. It shall also be paid by way of an attachment of earnings which is payable through the Collecting Office of the Magistrates’ Court. The first payment shall be effective on 1 November 2022 and the first day of each month thereafter.
13. The attachment of earnings order currently in effect against the Petitioner shall cease with immediate effect and The Collecting Office of the Magistrates’ Court shall take all steps necessary to ensure this is actioned as a priority in order that no further sums are deducted from the Petitioner’s monthly salary. Confirmation of the cessation of the attachment of earnings order shall be sent to both parties as well as to the Supreme Court for their respective records.
14. As it relates to the current outstanding arrears at BHS, I declare that those arrears are the sole responsibility of the Respondent given the child maintenance payments he was receiving from the Petitioner accounted for a reasonable contribution towards the tuition at BHS from which he should have been paying the said tuition.

15. Each party shall bear his and her respective costs in this application.
16. For the avoidance of doubt, the Respondent raised at the hearing on 30 August 2022 the issue of contributions towards the child of the family's overseas education expenses. At that time I informed the Respondent that the current application before me was solely in relation to the previous order that was made by me and as there was no order in place regarding those expenses, a new application would be required to be made by either party if they chose to do so. I also reiterated the directions I gave at paragraph 36 of my previous Judgment regarding the requirement for the parties to make a further application to the court if they were unable to reach an agreement regarding their child's overseas education expenses.

DATED this 19th day of October, 2022



ALEXANDRA WHEATLEY
REGISTRAR OF THE SUPREME COURT