In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2023: No. 34

BETWEEN:

MS

Appellant

-v-

TO

Respondent

JUDGMENT

Date of Hearing: **11th August 2025**

Date of Judgement: **16th January 2026**

Appearances: **The Appellant in Person**
Ms Chardonnai Hughes and Ms Victoria Pearman, Legal Aid Office, for the Respondent

Appeal against an order of the Family Court concerning child support

JUDGMENT of Richards J

Introduction

1. The order under appeal was made on 26th October 2023 and the Notice of Appeal was filed on 3rd November 2023. It first came before me for hearing on 29th July 2025, but was adjourned to 8th and then 11th August 2025. I regret that I have not been able to issue this

judgment sooner, but the matter should clearly have been heard and determined much earlier than it was.

2. In his Notice of Appeal, the Appellant seeks to challenge a single paragraph (5) of the Order of 26th October 2023 ("**the Order**"). A number of issues connected with the parties' child ('the Child') were before the Family Court (Wor. Magistrate Auralee Cassidy et al.) on that date, but this appeal is limited to the following determination:

> "Maintenance application by father is refused. Maintenance is recalculated to consider father's financial position improvement. The existing obligation dated 17th November 2020 of $175.00 per week plus $25.00 per week towards arrears (totalling $200.00 per week) (excess of $1300.00 per month[1]) maintenance is increased to $300.00 per week plus $50.00 per week towards arrears effective 15th November 2023."

3. The Appellant asserts that the Family Court *"erred in law failing to give due consideration to the following items"*:
   (1) *"Figures in the Respondent's Parental Income & Expenses Statement are inaccurate."*
   (2) *"The Respondent failed to justify the need for the $100 increase."*
   (3) *"The Respondent did not seek an increase in maintenance payments."*
   (4) *"The Applicant's current financial position."*

4. In response the Respondent argues on this appeal that the order was within the Family Court's powers and supported by the evidence that was before them.

The Record of Appeal

5. During the course of the hearings before me, it became apparent that at least some material documentation is missing from the Record of Appeal compiled by the Family Court in this matter. That may in part be attributable to the fact that appeals under the Children Act 1998

[1] The precise meaning of the contents of these parentheses is unclear; it may be a reference back to a rough calculation that the Family Court had made of the expenses for the child rather than an attempt to convert $200 per week into a monthly amount.

are governed by the Criminal Appeal Act 1952 ('**CAA**'). Surprisingly perhaps, section 18 of the Children Act 1998 ('**ChA**') provides:

> "Any child or other person aggrieved by any order made under this Act may appeal from the order to the Supreme Court in the manner and subject to the conditions provided by the [CAA] as though the order appealed against were an order made on a conviction by a court of summary jurisdiction."

6. I have previously had occasion respectfully to question the efficacy of this approach in the context of an appeal against a care order[2]. The present case has reinforced my view that a bespoke statutory regime for appeals under the ChA would be preferrable. Section 13(2) of the CAA 1952 governs the composition of a record of appeal. The list of items that it should contain makes perfect sense in the context of a criminal appeal, but does not translate well to this context. It may well be that the deficiencies in this Record of Appeal are the result of understandable adherence to these inapposite requirements.

7. The Appellant appeared in person on this appeal. The Respondent was represented by Ms Hughes, but she had only recently come into the matter and did not appear for her at the time the Order was made. If either or both sides had been represented sooner, the deficiencies in the Record of Appeal may well have been appreciated at an earlier stage and could then have been rectified. However, I am grateful to Ms Hughes for obtaining some further pertinent documentation and placing it before the Court. I understand that she inspected the Family Court files and flagged certain documents. At my request, those which pre-dated the order under appeal were copied, supplied to this Court and thence to the parties. Ms Hughes also put forward some other documents, which I understand her to have obtained either from her client or a file maintained by a colleague (who previously represented the Respondent). Initially the Appellant objected to the introduction of these further documents and said that he wished to proceed with the appeal based purely on the Record of Appeal.

8. Under section 16(2)(e) of the CAA, I have the power to supplement the Record of Appeal *"by ordering or allowing the production and the examination at the hearing of the appeal*

[2] *DS & NK v DCFS* [2025] SC (Bda) 106 app – see the stay ruling annexed to the substantive appeal ruling.

of any document, exhibit, article or thing, whether or not it was in evidence in the proceedings before the court of summary jurisdiction." I may do so on the application of either party or of my own motion (see section 16(3)) if *"it is made to appear… that in the interest of justice it is reasonable to do so."*

9. One of the documents Ms Hughes supplied was an Affidavit sworn by the Appellant, dated 12th October, 2023. This was clearly prepared in support of his application for *"a reduction of maintenance payment"* (amongst other things). It contains number of references to exhibits with the reference "MS-1…", which I do not have. Further, it is apparent from documents that are included in the Record of Appeal, that he must actually have filed two Affidavits because there are some exhibits with the reference "MS-02…". However, that second Affidavit was not before me on this appeal.

10. The Appellant applied to the Family Court for a number of changes in relation to the support, access, custody and care of the Child on 27th April 2023. A number of preparatory hearings were held in advance of the determinative hearing on 26th October 2023. On 16th August, 2023, Wor. Magistrate Sofianos ordered both parties to file and serve Parental Income & Expense Statements together with supporting documentation (as required by section 36.1F of the ChA). The Respondent was also ordered to file the Child Questionnaire. However, the Record of Appeal contains only one Parental Income & Expenses Statement – the Appellant's. Ms Hughes put forward copies of what appear to be the documents which the Respondent was required to file. Unlike the Appellant's they are undated and unsworn. The Appellant contended that these documents were not before the Family Court. The Respondent maintained that they were and Ms Hughes pointed out that the first of the Appellant's grounds of appeal (see above) suggests that the Respondent did indeed file a Parental Income & Expenses Statement in the court below and that the Respondent was aware of its contents.

11. In future the parties to appeals such as this should bear in mind that the record of appeal may need to be supplemented. Since they may often be unrepresented, the Court may also need to pay this issue more attention when giving directions. For so long as appeals of this type

are governed by a procedural regime that was designed for very different matters, it seems likely that the records of appeal generated in accordance with that regime may not include all the material documentation.

The Children Act 1998 – Part IVB "Support Obligation"

12. This part of the Act comprises sections 36.1A to 36.1M. Section 36.1E provides as follows (emphasis added):

> "(1) A dependant or respondent named in an order made under this Part may apply to the court for variation of the order.
>
> (2) If the court is satisfied that there has been a material change in the dependant's or respondent's circumstances or that evidence not available on the previous hearing has become available, the court may discharge, vary or suspend a term of the order, prospectively or retroactively, relieve the respondent from the payment of part or all the arrears and make any other order under section 36.1D that the court considers appropriate in the circumstances.
>
> (3) No application for variation shall be made within six months after the making of the order for support or the disposition of another application for variation in respect of the same order, except by leave of the court."

13. Thus, before the Family Court may vary the terms of support, it must be satisfied of a material change of circumstances. If it is so satisfied, it seems to me that it must then look to section 36.1C in order to structure a fresh determination as to the appropriate level of support in light of the new circumstances as it finds them to be[3]:

> **"36.1C Order for support**
>
> (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—

[3] See observations of Kawaley CJ (as he then was) in *S v F* [2013] Bda LR 41

(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."

14. The local Court of Appeal has given some guidance on the effect of this section. In *M v W* [2010] Bda LR 87, Ward JA stated:

"16. Counsel for the Appellant argued that the approach adopted by the learned Judge in determining the proper level of maintenance was wrong in principle. She submitted that support is to be provided in accordance with need and the first consideration is to determine the needs of the child. She added that the needs of C can be shown to be $8,006 per month and that each parent has the capacity to contribute equally to those needs.

17. There is a flaw in that argument for 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."

Analysis and Decision

15. The Appellant sought on this appeal to argue that, since the Respondent had not made an application to increase the amount of the support he was paying, the Family Court lacked jurisdiction to make the order that it did. In reply, Ms Hughes argued that the appeal amounted to *"a procedural objection that is inconsistent with the Appellant's prior acceptance of court-initiated maintenance orders and fails to displace the Court's duty to act in the best interests of the child."* I do not fully agree with either party on this point, but I think Ms Hughes made a better argument when she submitted that *"if Parliament had intended to restrict or limit the Magistrates' Court's jurisdiction under section 36F[4], it would reasonably have included express qualifying language, such as a "subject to" clause or other limiting provisions. The absence of such language strongly indicates Parliament's intention to confer broad and flexible authority on the Court."*

16. There is nothing in the language of section 36.1C, 36.1D or 36.1E that persuades me that the Family Court could not lawfully alter the terms of support in a manner adverse to the person seeking a variation in an appropriate case. However, it does seem to me that principles of natural justice dictate caution when a court is considering not only rejecting a party's application, but making an order that would put that party in a worse position than they were

[4] This section actually concerns applications for custody and access, but I think the same point can be made re sections 36.1C, 35.1D, and 36.1E.

before they made that application. In such circumstances it will ordinarily be incumbent on the court to give some indication of its thinking before reaching a decision because, in the absence of an opposing application, the applying party may not anticipate any need to defend itself. With respect to the Family Court, it is not apparent to me that any such caution was employed on this occasion. It may have been, but that is denied by the Appellant (who was not contradicted in that submission). He submits that the Order was a surprise to him and there is nothing in the Record to suggest otherwise.

17. Section 12(5) of the Magistrates' Act provides that *"Every matter brought before a Special Court (such as a Family Court) shall be heard and determined in a summary way."* It is also right to acknowledge that, on this occasion, the court had a number of issues before it. Against that background it is unsurprising that it did not devote many sentences to the determination re support, but ultimately I have not been satisfied that it adequately explained its decision. The position may have been otherwise if it had simply rejected the Appellant's application or if it had accepted a clear application by the Respondent for an increase. In those scenarios it might have been possible to infer that the court was simply accepting or rejecting that which had been asserted by the relevant party. Here, however, it appears to have gone beyond rejecting the Appellant's application and effectively granted an application that the Respondent never made (the basis for which the court could not, therefore, be inferred to have adopted).

18. The short reasons given for the "*recalculation*" the Family Court performed identify a change of circumstance (albeit one that had actually occurred over a year earlier, when the Appellant secured new employment) sufficient to trigger a variation of the order under section 36.1E. They do not, however, clearly demonstrate that they went on to reevaluate *"all the circumstances of the case"* as required by section 36.1C(4) and underscored in *M v W*.

19. During the course of argument, I suggested to Ms Hughes that I could ask the Magistrate to offer a fuller explanation for the Order subject to appeal. This would arguably have been permissible under section 15(1)(a) of the CAA:

"…the Court may order the magistrate comprising the court of summary jurisdiction or, (in the case of a Family Court), presiding over the court of summary jurisdiction, to submit to the Court a supplementary report giving his opinion upon any point arising in the proceedings."

Ms Hughes sought to persuade me to do that and I did seriously consider it, over the Appellant's objections. Having reflected further, however, I decided that it would not be a sensible course. The section authorises this step (and others) *"if it appears to the Court to be necessary or expedient in the interests of justice."* If this appeal had come on quickly after the Order was made, I may well have sought a supplementary report. As it is, however, the Family Court's recollection of what transpired during this hearing is unlikely to be fresh and, even if they were to go to the trouble of looking again at the material that was before them two years ago, that assessment would not assist the parties greatly as to what ought to happen now. Neither party seemed to disagree with me when I hypothesised that circumstances have necessarily moved on since then.

Conclusion

20. In the circumstances it seems to me that a fresh determination of the appropriate level of support needs to be made in this case based on current financial information from both parties. That material needs to be evaluated carefully by reference to all the circumstances of the case, and in particular those factors set out in section 36.1C(4).

21. Section 18(5)(c) of the CAA gives me the power to *"by reason of any imperfection or irregularity… instead of allowing or dismissing the appeal, [to] order a new trial… before a court of summary jurisdiction."* [5]

22. During the appeal hearing I was told that, although the Appellant has paid consistently since the Order under appeal, there are previously accumulated arrears in the sum of approximately $5,600.

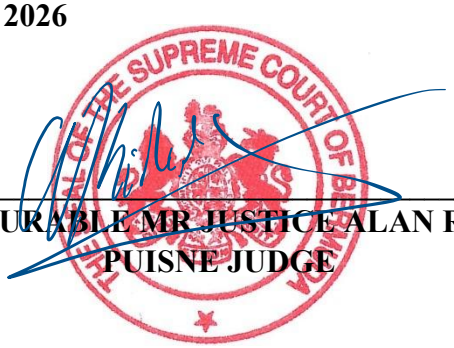
[5] See paragraphs 31 – 39 of DRP v R [2025] SC (Bda) 131 app for a more detailed explanation of my understanding of section 18, albeit in a criminal context.

23. The appeal is accordingly neither allowed nor dismissed, but the case is remitted to the Family Court and a fresh determination of the support payable by the Appellant is ordered. The difference between the support he was paying prior to 15th November 2023 (the effective date of the Order under appeal) and the amount payable since (i.e. $300 - $175 = $125 per week) shall be reapplied to the arrears.

24. In order to avoid a sudden and unexpected change in the amount of support received by the Respondent, I shall direct that payments are to continue at the current rate (i.e. a total of $350 per week, but with $175 being applied to the arrears instead of only $50) until 28th February 2026, or further order of the Family Court.

25. There shall be no order as to costs.

Dated this **16th** day of **January 2026**



THE HONOURABLE MR JUSTICE ALAN RICHARDS
PUISNE JUDGE