



In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2014 No: 63

BETWEEN:

J. L. B.

Petitioner

and

P. E. B.

Respondent

JUDGMENT

Application for Cessation and Variation of Child Maintenance

Date of Hearing: 20 June 2018

Date of Ruling: 31 July 2018

Both parties acting in person.

JUDGMENT of Acting Registrar Alexandra Wheatley

Introductory

1. The Petitioner and the Respondent were married for approximately thirteen years, being married on 2 June 2011 and the Decree Absolute being granted on 8 August 2014. There are three children of the marriage.

2. The Petitioner's substantive application for ancillary relief dated 11 September 2014 was heard by the learned Justice Hellman over a period of three days in 2016. Hellman J delivered his Judgment on 3 August 2016 ("the Judgment").
3. Subsequently, Hellman J provided a Supplemental Judgment dated 9 March 2017 ("the Supplemental Judgment") in order to provide clarification to the Magistrates' Court for the enforcement of the child maintenance payments ordered in his Judgment for the Respondent to pay to the Petitioner.
4. The terms of the orders made by Hellman J both in the Judgment and the Supplemental Judgment were combined into an Order dated 3 August 2016, amended on 9 March 2017 ("the Final Order"). The parties also pursued various applications before this Court as well as the Court of Appeal, but the detailed history of these applications irrelevant for current purposes.
5. There are two applications before the Court for determination:
 - (1) The Respondent's application dated 17 April 2018 seeking the following:
 - (i) Reduction of child maintenance payments paid to the Petitioner to reflect the eldest child of the family completing her university education in July 2018; and
 - (ii) Reduction of child maintenance payments paid to the Petitioner to reflect the middle child of the family completing her tertiary education in May 2019.
 - (2) The Petitioner's application dated 23 May 2018 seeking the following relief:
 - (i) That Paragraph 4 of the Supplemental Judgment dated 9 March 2017 be enforced and the Petitioner collect on the quarterly top-up maintenance payment of \$5,200 in arrears.
 - (ii) That the Court order the arrears be paid forthwith.
 - (iii) That no adjustments to the maintenance order be addressed at this time. However, in the Petitioner's position filed before the Court and during the hearing, she confirmed her desire to seek an increase of child maintenance to \$250 per week, per child or alternatively \$200 per week, per child. This sum is being sought by the Petitioner based on her submission that the Respondent is currently paying \$133.33 per week, per child for child maintenance taking into consideration the payments set out in paragraphs 1 and 2 of the Final Order.
 - (iv) Costs to the Petitioner.

6. The terms of the Final Order which are relevant to these applications are as follows:

- “1. *The Respondent is to pay maintenance¹ of \$1,500.00 dollars per month (with the first payment due forthwith, being a payment for July 2016). This payment is to be subject to an attachment of earnings order and enforced by the Collections Office of the Family Court.*
2. *Further, the Respondent is to make quarterly top up payments of child maintenance of \$5,200.00 payable on the first day of November, February, May and August of each year. They are to be made to the Collections Office of the Family Court, which will be responsible for their enforcement.”*

7. The issues I therefore must determine can be summarized as follows: (1) whether the child maintenance payments for the eldest child of the family should continue following the completion of her university education; (2) if there should be an increase in child maintenance in respect of all three of the children of the family; and (3) are there any current arrears of maintenance (either spousal or child) which need to be addressed.

The facts

Respondent’s position

8. At the time the substantive application was heard, Hellman J made the followings findings of fact as it related to the Respondent’s income at paragraph 10 of the Judgment:

- “10. *H is employed as a firefighter. His average net monthly salary was \$6,003.85 in 2014 and \$6,794.39 in 2015. The precise figure varies from month to month. Without overtime H’s net monthly salary would be only \$4,900. These figures are net of deductions for pension and health insurance...”*

9. The Respondent’s income has not changed since the Judgment; he remains employed as a firefighter. Two pay advices were provided in support of his income position for March and April 2018. The year-to-date net salary shown in the April 2018 pay advice is \$16,413.37. This is an average net salary of \$4,103.34 per month. There is currently an attachment of earnings in the sum of \$3,233.33 per month which represents both the spousal maintenance payments of \$1,500 per month and the \$5,200 quarterly payment for

¹ The Final Order initially read “child” maintenance; however, this was amended by Hellman J in accordance with his Order dated 30 September 2017. Further, upon review of the Judgment paragraph 41 clearly provides the distinction between periodical payments for the benefit of the spouse (\$1,500 per month) and periodical payments for the benefit of the children (\$5,200 per quarter).

child maintenance. It is important to note of the earnings evidenced in these pay advices, a total of \$6,649.91 gross represents over-time payments for 33.5 hours as of 30 April 2018.

10. The Petitioner attempted to challenge the Respondent's position that his only source of income was from his position as a firefighter by referencing payments made from a business account in 2016 and 2017. This did not support such a position and was overall unhelpful as the business was dealt with in many aspects by Hellman J in his Judgment. I do not put any weight on the suggestion the Respondent earns an additional source of income.
11. Upon questioning the Respondent during the course of the hearing, he confirmed his monthly expenses as follows:

Rent	\$1,800.00
Belco	\$120.00
Cell phone	\$100.00
Groceries	\$300.00 ²
Internet	\$165.00
Water	\$58.33 (based on estimate of 7 loads of water per annum at \$100 per load)
Gas for bike	\$80.00
Bike license & insurance	\$29.17 (\$350 per annum)
Bike maintenance	\$25.00 ³ (\$300 per annum)
TOTAL:	\$2,677.50

12. I accept these expenses to be accurate and reasonable, whilst also bearing in mind these expenses do not include any personal expenses of the Respondent such as clothing and the like.
13. The Respondent's submission to the Court is that given the eldest child will graduate this month, his obligation to pay a monthly maintenance fee for her benefit should come to an end. Further, and in an attempt to inevitably return to Court in 2019 for the cessation of child maintenance for the parties' middle child, that I make an order now for his obligation to pay child maintenance for her should be made now, but with effect from May 2019 which is when she is due to complete her university degree.

² The Respondent explained that his colleagues generally purchase food and cook collectively whilst working which is why his monthly estimate for food is this low. I do accept this to be the case as it relates to the sharing of food; however, I still believe this sum is extraordinarily low and as such substitute \$300 as being a more reasonable estimate of this monthly expense.

³ The evidence given by the Respondent was that he spent \$1,000 per annum on maintenance for his bike; however, I do not believe this is an accurate reflection of the actual sum. I believe \$300 per annum is a more realistic and reasonable estimate.

14. In addition to the eldest child completing her first degree, the Respondent presented evidence of previous contributions towards university expenses for the children. The Petitioner also challenged these propositions. The lump sum contributions ordered by Hellman J in his Judgment fully dealt with all of these issues and as such I have not considered these as being relevant factors to consideration in determining the applications currently before me. I must say it is regrettable that both parties throughout the hearing attempted to raise matters which were comprehensively dealt with in the Judgment. Evidently neither party appeared to be satisfied with the decision of Hellman J in 2016; however, both parties fully exhausted his and her respective recourses as it related to appealing the Judgment. The matters for consideration now are not the appropriate forum to disguise the historical turpitude between the parties.

Petitioner's position

15. At the time the substantive application was heard, Hellman J made the following findings of fact as it related to the Petitioner's income at paragraph 9 of the Judgment:
 - “9. *W is employed full time by Swiss Edge Limited as a senior portfolio manager. Her net monthly salary is \$9,673.55. Most years, it is subject to an increase in January or February – the annual increase to the net monthly salary in 2016 was about \$200. At around that time, W also receives an annual bonus. This was around \$7,000 in 2014; \$7,500 in 2015; and \$4,000 in 2016. Her income is manifestly not sufficient to pay household and living expenses her herself and Jayunae, the mortgage, and the cost of the two elder children's university education.*”
16. Paradoxically, the Petitioner whilst providing a lengthy affidavit in response and presenting detailed analysis as it relates to the Respondent's alleged arrears, failed to provide any evidence of her current net income. The Petitioner merely confirmed when cross-examined that she is still employed with Swiss Edge Limited and earns approximately \$10,000 net per month.
17. On further cross-examination, the Petitioner admitted she had also received a bonus in the sum of \$7,000 in February 2018. Thus, the Petitioner conceded in February 2018 her total income (made up of her net monthly salary, her bonus and the \$3,233.33 received from the Respondent) was a total of \$20,233.33.
18. Despite the Petitioner accepting her net monthly income being \$13,233.33 (inclusive of payments received from the Respondent), she still was adamant in her disagreement that there is a large disparity between her and the Respondent's income. For a professional woman to remain steadfast in such an illogical position, to me, speaks volumes of her emotions potentially blurring her rationale. It is indisputable that the parties have a significant disparity in their respective incomes and indeed in the Judgment it was found that the Respondent's income was less than the Petitioner's. Paragraph 40 states as follows:

“40. I take into account that H’s income is less than W’s. However that makes no difference to the amount of maintenance which he should pay as their combined income is not sufficient to cover these expenses fully....”

19. When the Petitioner was questioned about the use of her \$7,000 bonus she resisted the questioning submitted it was not relevant; however, I confirmed her income and expenses are directly relevant to this application and so her bonus and the expenditure of it is reasonable evidence to be questioned on. Reluctantly, the Petitioner confirmed the bonus this was used for a trip to Los Angeles earlier this year with the three children of the family. The bonus covered all expenses of this trip. The Petitioner further responded that “if I work hard, I should spend the money how I like”.

20. The monthly expenses confirmed by the Petitioner during the hearing are as follows:

Mortgage	\$2,275.00
Belco	\$250.00
Cell phone	\$300.00
Groceries	\$650.00 (\$150 per week)
Internet and cable	\$175.00
Gas for car	\$300.00 ⁴
Car license & insurance	\$250.00 (\$3,000 per annum)
Car maintenance	\$83.33 ⁵ (\$1,000 per annum)

TOTAL: \$4,283.33

21. These expenses are not even inclusive of the university expenses for the children (one of which has now come to an end), summer camps for the youngest child, other direct expenses relating to the children such as personal hygiene products, etc. Moreover, the Petitioner also has personal expenses which she evidences she is unable to afford.

22. Due to the parties’ inability to collectively be able to afford the children’s university expenses, the Petitioner took out an education loan which she stated has a current outstanding balance of \$15,000. The payments for this loan are \$2,000 per month which is an increase from the usual monthly payments as there are arrears.

23. Further, the Petitioner confirmed the mortgage payments in respect of the former matrimonial home (“FMH”) where she resides with the children of the family are in arrears and the mortgagor has requested the FMH be sold. The position in 2016 was that the outstanding mortgage of the FMH surpassed its value. It is doubtful this has shifted over the past two years; particularly given arrears have now accumulated.

⁴ The Petitioner’s estimate for gas was \$100 per week, but I believe this is excessive and accept \$300 per month as a more reasonable sum.

⁵ The evidence given by the Petitioner was that she spent \$5,000 per annum on maintenance for her car; however, I do not believe this is an accurate reflection of the actual sum. I believe \$1,000 per annum is a more realistic and reasonable estimate.

24. The Petitioner is also alleging the Respondent is in arrears of his payments as per the Final Order. This is a point of extreme contention for the Petitioner which is clearly demonstrated throughout her affidavit evidence as well as during the hearing. The Petitioner submitted a spreadsheet allegedly setting out the sum of \$5,200.04 was outstanding at the time of filing her affidavit on 10 April 2018. I have had the benefit of reviewing the file from the Magistrates' Court Collecting Office as well as being provided an up-to-date status report from the Collecting Office as of 31 July 2018. The said status report shows total payments made by the Respondent of \$71,266.61 and a "Balance due of \$3,233.39" which I am advised will be cleared (save for \$0.06) upon receipt of the Respondent's attachment of earnings for July 2018. However, it should be noted the sum of \$5,200 representing the final payment as per the Final Order became payable in arrears in the Magistrates' Court Collecting Office accounting as of 1 August 2018.

The law

25. Section 35 of the Matrimonial Causes Act 1974 ("the Act") provides the Court with the statutory jurisdiction to vary an order in relation to ancillary relief applications. Section 35 sets out the following:

"Variation discharge, etc., of certain orders for financial relief

35 (1) *Where the court has made an order to which this section applies, then subject to this section, the court shall have the power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.*

(2) *This section applies to the following orders:*

...

(b) any periodical payments order;

....

(7) *In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order to which the application relates."*

26. Now addressing the circumstances in which the Court will exercise its powers under Section 35 of the Act, in the case of *A v A* [2016] Bda LR 2, Hellman J summarized at paragraph 26 of his judgment as follows:

"26. ...*Where, as in the present case, the order is very recent, the Court is unlikely to exercise that jurisdiction unless there is a good reason to do so, e.g. because there has been a material change in circumstances or material non-disclosure by one of the parties. If the Court does decide to*

reopen the order, then it may do so in whole or in part, giving such weight to the existing order as it sees fit.” [Emphasis added]

27. If accepted there has been significant change in circumstances which would cause me to consider varying the Final Order, I have a statutory obligation to have regard to all the components set out in Section 29 of Act.
28. Further consideration must be given to the timeframe the Court is able to grant periodical payments for the benefit of a child(ren) of the family. This is statutorily defined in Section 33(1) of the Act:

“Duration of continuing financial provision orders in favour of children, and age limit on making certain orders in their favour

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 of 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) and 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...”

29. In the case of *Tavares v Tavares* [2016] Bda LR 102 COA, the Court of Appeal found that where a Court does not specify an order for child maintenance is to extend beyond his or her eighteenth birthday, the order is deemed to terminate on the child’s eighteenth

birthday. Therefore, in this case, I must be satisfied there are “*special circumstances*” in accordance with Section 33(3)(b) of the Act to justify extending an order for child maintenance if the said child is over the age of eighteen and has completed his or her education.

Applying the facts to the law

30. The stark reality is that when parties’ divorce it is often the case, that the end result is the family is in a worse off financial position. Parties are required to support two households on two incomes rather than one household on two incomes. At paragraph 35 of the Judgment, Hellman J stated as follows:

“35. *Section 29 contains a legislative steer requiring the Court to exercise these powers so as to place the parties and the children of the marriage, so far as it is practicable and just to do so, in the financial position in which they would have been if the marriage had not broken down and the parties had properly discharged their financial obligations and responsibilities towards each other. Often, the parties and the children of the marriage will be in a worse financial position as a result of the divorce that they would have been had they remained together.*”

31. The circumstances of this case clearly evidence the consequential financial detriment both parties have experienced following the divorce. The combined income of the parties are far from capable of covering their chosen lifestyle expenses for the three children of the family let alone their own household expenses as well as his and her own personal expenses. This was undoubtedly the same position the parties were in when they appeared before the Courts in 2016.

32. It is apparent the Petitioner has not accepted the reality of the parties’ financial tribulations. Whilst I am most sympathetic of her frustrations and her desire to fully fund her children’s tertiary education, in some instances this is not achievable. Both parties are doing their best with his and her respective financial resources based on the evidence presented. Having said this, the Petitioner’s use of a \$7,000 for a trip when there are arrears of a mortgage, an outstanding education loan and ongoing education expenses for the children is not the best allocation of these funds when resources are limited.

33. In terms of the relief being sought by the parties, I find there have been no material changes in respect of either of the parties’ financial circumstances since the granting of the Final Order, save for the eldest child of the family having now completed her university education (graduation in July 2018). The evidence of the parties is that they earn approximately the same level of income now as they did in 2016 and their expenses have also not changed.

34. I find it is not reasonable for the Respondent to continue to pay any level of child maintenance for the parties' eldest daughter now that she has graduated from university. There have not been any special circumstances presented to this Court for me to justify extending a child maintenance order for a child who is now over the age of eighteen and completed her full-time education.
35. Given the child maintenance payments are \$5,200 per quarter; i.e. \$1,733 per month for all three children; in accordance with the Final Order, this sum will be reduced to \$1,156 per month for the two children who remain in fulltime education. This represents payments of \$578 per child, per month. The variation will commence with effect from 1 August 2018. For the avoidance of doubt, these payments will no longer be quarterly and commence monthly with effect from 1 August 2018.
36. Further, the child maintenance payments of \$1,156 which commence on 1 August 2018 as above, will be further reduced to \$578 per month with effect from 1 June 2019 at which time the second daughter would have completed her university degree. Should there be a change of date in the second daughter's graduation, upon the Petitioner providing evidence of the same to the Court and to the Respondent, consideration will be given at that time as to whether this order should be extended beyond 1 June 2019.
37. As an application was not made for the variation of the periodical payments of \$1,500 per month, I am not making any variation to these payments. The level of periodical payments for the benefit of the Petitioner may be a matter the parties should consider revisiting after the next reduction in child maintenance payments to take effect on 1 June 2019.
38. Therefore, the total monthly payments to be made by the Respondent to the Petitioner shall be \$2,656 which is inclusive of the periodical payments (\$1,500) as well as the reduced child maintenance payments for the two younger children of the family (\$1,156). These monthly payments shall continue to be paid by way of an attachment of earnings payable to the Magistrates' Court Collecting Office.
39. In respect of the alleged arrears of the quarterly child maintenance payments, this has regrettably created unnecessary confusion for both the Petitioner and the Respondent. As stated in paragraph 24 above, the accounting of the Magistrates' Court is done in arrears as it is the enforcement arm of the Court. As such, the Magistrates' Court does not have any jurisdiction to enforce any order unless there are arrears. As such the criticisms made by the Petitioner of the Magistrates' Court, the Magistrate and the administrative staff in respect of the alleged arrears of periodical payments are completely unfounded and unhelpful. It is accurate the Respondent was required to pay the sum of \$5,200 representing the final quarterly payment due under the Final Order. Therefore, this sum is still required to be paid by the Respondent in accordance with the Final Order. The Respondent will be required to pay this outstanding sum of \$5,200 by 28 September 2018.
40. The Petitioner has also requested to be granted costs of her application. Given that neither party has been granted the full relief sought in their respective applications and

taking into consideration the extent to which both parties are financially stretched, I do not believe it would be reasonable to inflict this additional financial burden on the parties and the children of the family. Therefore, each party shall bear his and her respective costs.

31 July 2018

ALEXANDRA WHEATLEY
ACTING REGISTRAR OF THE SUPREME COURT