



# In The Supreme Court of Bermuda

## DIVORCE JURISDICTION

2011 No: 7

S.A.T.

**Petitioner**

-and-

K.A.C.T

**Respondent**

## JUDGMENT

(In Chambers)

### *Variation of Maintenance*

Date of Hearing: 30<sup>th</sup> and 31<sup>st</sup> January, 2017,

Date of Judgment: June 22<sup>nd</sup> 2017

Mr. Peter J. Farge for the Petitioner

S. Tavares, the Petitioner

Ms. Alexandra Wheatley for the Respondent

K. Corkery Tavares, the Respondent via Skype

**Introduction:**

1. In this judgment I shall refer to the Petitioner as the "Husband" and to the Respondent as the "Wife".
2. By a Summons dated 2<sup>nd</sup> August 2016, the Wife seeks the following relief:-
  - a) That the Orders suspended in paragraph 1 of the Order dated 7<sup>th</sup> April 2016 be reinstated with immediate effect;
  - b) That the Husband contribute a reasonable sum toward the tertiary education expenses of the child;
  - c) That the Husband pay a reasonable sum to cover the costs of the Wife and child's rental accommodations in the USA;
  - d) That the Husband reimburse the sum of \$3,745.86 representing the total sum of monies paid by the Wife for insurance co-payments for the child of the family as well as reimbursement paid to the Husband by the insurer where the Wife had paid in full in the first instance;
  - e) That the Husband provide health insurance coverage for the child with immediate effect;
  - f) A Declaration that the Husband is the owner of the BMW motor vehicle with license plate No. 36813, and
  - g) And such other relief as may be just in the circumstances.
3. The Wife's application is supported by three affidavits:-
  - i. The first Affidavit sworn 25<sup>th</sup> July 2016, and
  - ii. The second Affidavit sworn 27<sup>th</sup> November 2016.
  - iii. The Affidavit sworn on 10<sup>th</sup> January 2017.

4. The Husband filed an affidavit sworn the 27<sup>th</sup> September 2016 supported by an affidavit of Janice White sworn 23<sup>rd</sup> September 2016.

**Background Facts:**

5. The Husband is Bermudian and the Wife is American. They married in 1998 and at that time, the Husband was a maintenance man and the Wife was a fitness instructor. The Husband and Wife resided throughout the marriage in Bermuda.
6. The marriage lasted some 15 years. Decree Nisi was pronounced on 26<sup>th</sup> July 2013 and it was made absolute on 11<sup>th</sup> September 2013. There is one child of the family.
7. During the entirety of the marriage the Wife was a homemaker caring for the one child of the family. At the time of this hearing the Wife was aged 50 years and residing in the USA without any form of employment.
8. During the marriage the Husband was the sole breadwinner earning approximately \$8,000 - \$11,000 per month. At the time of the hearing the Husband was aged 50 years and residing with a friend.
9. The one child of the family, who although no longer a minor, continues in fulltime college education in the USA. She possesses dual Bermudian/American nationality and is the recipient of educational scholarships and loans.
10. There have been a number of Orders made during the course of these parties ancillary relief proceedings. I will not refer to them all save that on 17<sup>th</sup> September 2013, upon the Husband undertaking to the Court *“to pay the private school fees, the rent, the child’s health insurance, and to pay all other bills in his name and to keep them current*

up until 1<sup>st</sup> October 2013” the Registrar ordered the Husband to pay the sum of \$2,700 per month to cover the Wife and child’s “basic needs”.

11. Subsequent orders were made by Wade-Miller J (“**the 2015 Orders**”) enforcing the 2013 Undertakings and confirming, *inter alia*, that the Husband “shall continue to pay the {Wife} \$2700 on the 1<sup>st</sup> of each month”.
12. The Husband fell into arrears of the 2015 Orders. The quantum of arrears is disputed.
13. In 2016 the Wife applied to enforce the 2015 Orders against the Husband. On 7<sup>th</sup> April 2016, Hellman J ordered, *inter alia*, the suspension of the Husband’s payment obligations under the 2015 Orders (without prejudice to the amount of arrears outstanding under those Orders), and ordered the Husband to pay maintenance for the child in the sum of \$100 per month via the Collections Office of the Magistrates’ Court. This order was endorsed with a penal notice.
14. On 29<sup>th</sup> September 2016 this Court (Stoneham J) varied the 7<sup>th</sup> April 2016 Order upwards such that the Husband was to pay, directly into the Collecting Office of the Magistrates’ Family Court the sum of \$100 per week for the maintenance of the one child of the family until further order.
15. To date the Husband is in compliance with the 29<sup>th</sup> September 2016 child maintenance obligation of \$100 per week.

## The Parties Positions

### The Wife:

16. Mrs. Wheatley, Counsel for the Wife contends that the Wife experienced a material change in her financial circumstances in July 2016. In July 2016 the Wife was evicted from the former matrimonial home in Bermuda and given that she had nowhere to live in Bermuda, she relocated to the USA where she would be in close proximity to her family and where the child of the family was about to commence a private college.

17. The Wife contends that living in the USA would better her financial position, where her household expenses were stated to be \$3,216.66 per month. On her evidence, such expenses comprise the following:-

Rent	\$1,250.00
Electricity & Heat	\$ 500.00
Groceries	\$1,000.00
Gas for car (\$50 per week)	\$ 216.66
Telephone	\$ 50.00
Internet	\$ 150.00
Water	\$ 50.00

18. The Wife contends that she is unable to meet additional personal monthly expenses totalling \$450 which include a cell phone, clothing, hairdressing, and excess sums not covered by insurance.

19. The Wife asserts that the one child of the family, excluding college expenses, has similar personal monthly expenses totalling \$420 which she is unable to meet.

20. The Wife asserts that she has experienced great difficulty in obtaining employment since the divorce due in part to her age and

absence from the job market during the 15 year marriage. She also contends that she is a type 1 diabetic with heart issues.

21. Moreover, Counsel for the Wife contends that the Wife is owed \$16,700 in maintenance arrears from the Husband.

The Husband:

22. Mr. Farge, Counsel for the Husband contends that since the making of the 2015 Orders, there were material changes in the Husband's circumstances.
23. Starting in November 2015, the Husband was terminated from his long-term employment and thereafter, Mr. Farge contends that the Husband suffered long periods of unemployment, such that he became dependent on friends to provide "a roof over his head", that he developed a medical condition which severely restricts his ability to perform sustained physical labour, and that he suffered severe emotional and financial stress. He contends that in all the circumstances the Husband simply can no longer afford the 2015 Orders.
24. Moreover, Mr. Farge asserts that the Husband is in deep financial debt such that he is "at his wit's end" owing in excess of \$40,000 in legal fees, \$15,768.22 in bank loans and approximately \$28,389.25 in other debts.
25. In addition to these debts, the Husband acknowledges that he is in arrears of the 2015 Orders in the sum of \$14,540 representing the period of October 2015 to April 2016. He does not accept the figure put forward by the Wife.
26. The Husband contends that he has recently obtained employment painting and power washing roofs earning between approximately \$2,000 and \$3,450 per month, contingent on weather conditions.

Such earnings, Mr. Farge highlighted are significantly less than the Husband's earnings during the marriage and at the time of the granting of the 2015 Orders. Moreover, the Husband contends that if it rains or if he is ill, he does not get paid.

27. The Husband's monthly expenses were stated in his affidavit evidence to be approximately \$4,094.31. However, the Husband contends that he is not always able to afford his stated monthly expenses which include the following:-

HIP insurance	\$433.31
Utilities contribution	\$300.00
Groceries	\$500.00
Clothing	\$ 20.00
Bike insurance/gas/licence	\$200.00
Medical/prescriptions	\$200.00
Bank (BMW Loan)	\$616.00
Various Legal fees	\$650.00

28. The Wife disputes the Husband's stated penury and drew attention to the Husband's current living arrangement with a lady friend and to a BMW motor car which she contends is owned by the Husband.
29. The Husband disputes that he owns the BMW and contends that he transferred ownership to Ms. White in lieu of their cohabitation arrangement.

#### **The Law**

30. Pursuant to Section 35 of the Matrimonial Causes Act 1973 ('the Act') the Court has the power to vary, discharge or suspend any previous order for financial relief.
31. Section 35 of the Matrimonial Causes Act 1973 ('the Act') provides in material part as follows:-

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

*(2) This section applies to the following orders, that is to say-*  
*a) any order for maintenance pending suit and any interim order for maintenance;*  
*b) any periodical payment order*  
*...”*

32. Furthermore, Section 29 of the Act imposes a duty on the Court to 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”*.
33. Section 36.1B (1) of the Children Act 1998 imposes an obligation on every parent, to the extent the parent is capable of doing so, to provide support for his or her child who is unmarried and, if eighteen years of age or over, is enrolled in a full-time programme of education.
34. The Court has a duty to apportion this obligation between parents according to their relative abilities to contribute to the performance of their obligation. However, the Court will not require parents who do not have the means, to reduce themselves to a pennilessness existence to pay for the expense of a college education.
35. In exercising its statutory duties, the Court must strive to reach an overall outcome which is fair to each party whilst giving first consideration to the one child of the family in this case, who although no longer a minor, continues in full time college education.



## Findings

36. I accept that in 2105 it would have been fair and reasonable for the Court, having carefully considered the Section 29 (1) and (2) factors, to have ordered the Husband to pay the sum of \$2,700 per month to meet the basic needs of the Wife and child in Bermuda.
37. After careful analysis of the affidavit and oral evidence of the parties, it is obvious to me that since the granting of the 2015 Orders the circumstances of this family have materially changed. It is regrettable that these matters were not brought to the court earlier.
38. The one child of the family has completed private school education in Bermuda and is now 18 years old. She has commenced a fulltime private college education in the USA and no longer resides in Bermuda. Her education is mostly funded by means of scholarships and loans.
39. The Wife has relocated to the USA where she has incurred additional debt in the form of rental arrears.
40. The Husband's long-term employment in Bermuda within the maintenance service industry earning between \$8,000 and \$11,000 per month has come to an end, together with the health insurance benefits enjoyed.
41. What has not changed is that the Husband's earning capacity as a labourer remains subject to the mercy of an employer, and the Wife's expectations of the Husband post-divorce remain the same as during the marriage as she remains unemployed.
42. In addition, she has still not yet disengaged emotionally from the hurt sustained on the breakdown of the marriage. As a result, I did not find the Wife's oral evidence via Skype particularly helpful. She

presented as extremely resentful and often required direction to suppress her emotion. Consequently, her credibility was impacted.

43. Notwithstanding this finding, the Wife's affidavit evidence regarding a financial shortfall incurred by the child after educational scholarships and loans is accepted. Likewise, it is accepted that the now college aged child would require health insurance for so long as she is enrolled as a fulltime student.
44. On considering the Wife's oral and affidavit evidence regarding her continued unemployment, I accept that upon the dissolution of the marriage in 2013, the Wife at 46 years of age might not have immediately walked into fulltime employment in Bermuda.
45. However, she has earning capacity, given that four years have lapsed since the dissolution of the marriage and the Wife still puts forward the same reasons to explain her lack of employment in Bermuda and now in the USA. I am not sure whether she is desirous of ever attaining any form of employment, whether fulltime or part-time, to attain a level of self-sufficiency.
46. On examining the Wife's monthly expenses, I accept that the figures presented might well be her actual expenses save for the monthly expense of \$1,000.00 stated to be the costs of groceries for her and the child of the family, which I find might be inflated.
47. Turning now to the Husband's evidence; having the opportunity to generally observe the Husband's demeanour during these proceedings and during his cross examination, I find him to be emotionally fragile often requiring the opportunity to physically pause to gather himself during the proceedings.
48. I find the Husband's evidence truthful regarding the difficulties he experienced since termination of his employment in late 2015 and through to March/April 2016. Moreover, given that the Husband's

skill set is labour concentrated and is dependent on weather conditions, I accept that his current rate of earnings would be far less than those earned during the marriage.

49. Likewise, I accept that after termination of his employment in late 2015 he fell into arrears of the 2015 Order and amassed various other financial debts, which he could not satisfy each month when they fell due.
50. In this regard, I am sympathetic to the Husband's position given that during the marriage he was the sole breadwinner and yet with his skill set managed to provide accommodations for his family; albeit rental accommodations, and for the most part was able to pay, *amongst other things*, for the one child of the family to attend an eminent private school in Bermuda.
51. Moreover, notwithstanding the Husband's current diminished earnings and outstanding debts, he maintains a desire to provide for the child during her tertiary studies.
52. In my judgement, given the diminished earnings of the Husband and his future earning capacity as a labourer in Bermuda, it would be totally unrealistic for the Wife, who is still relatively young, to now not expect to work to generate some form of annual income to contribute to the child's educational expenses, and to meet her own debts and domestic expenses including those shared with the child on rental accommodations in the USA, food, clothing, cell phones, hairdressing, electricity, heat, and associated motor car expenses.

**Conclusion:**

53. I have fully considered Section 35 and the statutory considerations provided for under Section 29 (1) and (2) of the Act and the obligations imposed on parents under the Children Act 1998.

Furthermore, I have considered the oral and written submissions of Counsel and applied, in my judgement, the principle of fairness.

54. Having carried out my statutory duties and considered all the evidence before me, I am satisfied to conclude that the purpose of the 2015 Orders has been fulfilled.
55. Moreover, I am satisfied to conclude that the Husband's diminished income and the uncertainty of the mother's motivation to obtain any form of employment, has greatly impacted the financial reality of this family.
56. This reality does not afford the one child of the family the privilege of an all-expense paid private college education in the USA nor even a handsome contribution from her parents toward such private college education expenses.
57. The beacon of light in these proceedings is that this family's financial reality, combined with the ongoing acrimony between the Wife and Husband, has not derailed the child's motivation to attend college and to source scholarships and loans to fund such educational expense.
58. In my judgment, the Wife and Husband have achieved the ultimate goal of parenting in that they have raised a self-sufficient child, who might now consider securing part-time employment to meet the shortfall in her private college educational expenses. Alternatively, she might give consideration to enrolling in a US State educational institution at a significantly reduced expense.
59. I am satisfied to conclude that the Husband should continue to pay child maintenance in the sum of \$100 per week, for so long as she remains in full-time tertiary education (to the first degree level only).

60. The Wife shall be responsible for filing into the Collecting Office of the Magistrates' Family Court written confirmation of the child's annual enrolment status each September, marked to the attention of the Family Support Manager - [cfurbert@gov.bm](mailto:cfurbert@gov.bm) or [aslsmith@gov.bm](mailto:aslsmith@gov.bm). Such confirmation shall be on the letterhead of the college institution.
61. Moreover, in my judgment it would be fair and reasonable that the Husband should contribute the sum of \$3,000 per annum toward the child's combined college expenses including her health insurance expenses, for so long as she remains in full-time private or state tertiary education (to the first degree level only).
62. As regards, when the said \$3,000 per annum should be paid, I conclude that the Husband should make two equal instalments of \$1500 on or before the 15<sup>th</sup> September and on or before the 15<sup>th</sup> January, each year, directly into the Magistrates' Family Court Collecting Office commencing September 2017.
63. In so far as the Wife's claim that the Husband should reimburse her the sum of \$3,745.86 representing the total sum of monies she paid for health insurance co-payments for the child of the family and reimbursement paid to the Husband by the insurer, I am satisfied to conclude that it would be fair to dismiss this claim having regard to all the circumstances of this case, including the fact that the Husband continues to pay debts jointly accrued by the parties. To conclude otherwise, in my judgment would be counterproductive to achieving a fair outcome.
64. I am satisfied that the Husband's diminished income is not sufficient to meet all of the Wife's domestic expenses and his own expenses. Given that the one child of the family is no longer a minor, and is enrolled in college, it would be fair to conclude that the Wife no longer has childcare responsibilities. In this circumstance, the Wife,

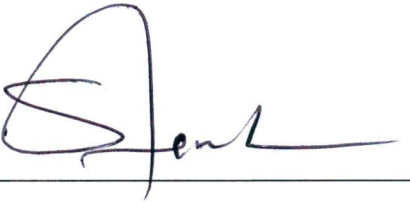
in my judgment, therefore ought to find employment as a means of transitioning to self-sufficiency.

65. I am therefore satisfied to conclude that it would be fair and reasonable, to vary the Husband's maintenance obligation to the Wife downward to the sum of \$700 per month, as of 2<sup>nd</sup> August 2016, the date of the Wife's application. The Husband should pay this directly into the Collecting Office of the Magistrates' Court.
66. Moreover, I am satisfied to conclude that upon the child of the family completing tertiary education (first degree only) or discontinuing full-time enrolment, it would be fair that the Husband's obligation to the Wife decrease to \$500 per month until such time that the Wife re-marries or attains the age of 60 years, at which time the Husband's obligation should immediately cease.
67. The Clerk to the Magistrates' Family Court Collecting Office shall establish separate from the child maintenance account, an education account and a spousal support account and shall monitor the Husband's payments into each account as if an order of the Magistrate's Family Court.
68. The Clerk shall register an outstanding spousal support arrears balance of \$23,320 representing \$15,620 (the midpoint of the outstanding arrears acknowledged by the Husband and the sum contended by the Wife), and the sums owed by the Husband as of August 2016 through end of June 2017 at \$700 per month = \$7,700.
69. The Magistrates' Family Court shall have the power to enforce the said spousal maintenance arrears and orders herein in the same manner as any order made pursuant to Section 36.1L of the Children Act 1998.
70. As regards, the ownership of the BMW motor car, I am satisfied on the evidence that the Husband has an outstanding bank loan in

respect of its purchase and that the bank therefore has a continued legal interest in the vehicle. Consequently, I am not satisfied to grant the declaration prayed for.

71. There is no need in my view to order a review of the Husband's obligations to the Wife and child of the family.
72. I shall hear from the parties as to costs and as to any further directions which may be required for the implementation of this judgment.

Dated this 23rd day of June, 2017

A handwritten signature in black ink, appearing to read 'Stoneham J', is written above a horizontal line.

Stoneham J