

**BARBADOS**

[Unreported]

Suit No: FL 154 of 2002

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**Family Division**

**BETWEEN**

**SANDRA MATTHEW-HAREWOOD - APPLICANT/WIFE**

**AND**

**DAVID HAREWOOD - RESPONDENT/HUSBAND**

**Before The Honourable Madam Justice Maureen Crane-Scott, Q.C.,  
Judge of the High Court(ag)**

**2007: December 13,**

**2008: January 23**

**March 17**

**Miss. Donna Symmonds for the Applicant/Wife**

**Mr. Philip Pilgrim for the Respondent/Husband**

**DECISION**

- [1] **Crane-Scott J:** This is an application brought by the Applicant/Wife for variation of a maintenance order agreed to and embodied in a Consent Order made on the 6<sup>th</sup> day of August, 2004 and contained in an executed Agreement which was made an Order of the Court on August 6, 2004 before *Moore J.*
- [2] Under and by virtue of the said Consent Order and Agreement the Respondent/Husband agreed and was ordered to pay to the Applicant/Wife the sum of \$500.00 per month as maintenance in respect of the two children of the marriage together with one half of all medical, dental, ophthalmic and educational expenses and to pay for the purchase of all school uniforms for one child of the marriage upon presentation of the bills, receipts or invoices for such expenses incurred by the Applicant/Wife.
- [3] The Applicant/Wife also sought to recover from the Respondent/Husband arrears of maintenance due pursuant to Clauses (b) and 18 respectively of the said Order and Agreement. The Applicant/Wife's claim for arrears was subsequently abandoned as the arrears had been paid by the time the application came on for hearing.
- [4] Although the application of the Applicant/Wife for variation of the maintenance order was filed as far back as December 16, 2005, it only finally came on for hearing in December 2007. The application was contested by the Respondent/Husband and legal arguments were concluded before me on January 23, 2008.

**The Case for the Applicant/Wife:**

- [5] The following documents were filed on behalf of the Applicant/Wife:
- (a) Application for Other Relief in a Matrimonial Cause filed December 16, 2005;
  - (b) Affidavit of Sandra Matthew-Harewood in support filed December 7, 2005;
  - (c) Statement of Financial Circumstances of Applicant/Wife filed December 7, 2005;
  - (d) Updated Statement of Financial Circumstances of Applicant/Wife filed August 27, 2007;
  - (e) Supplemental Affidavit of Sandra Matthew-Harewood filed January 17, 2008.
- [6] In her affidavit, the Applicant/Wife sought to justify her request that the Respondent/Husband be ordered to pay an increased monthly amount of \$500.00 per child or a total of \$1,000.00 per month in respect of both children with no contribution towards medical, dental, ophthalmic, pharmaceutical or educational expenses.
- [7] She stated that when the Agreement and Consent Order were finalized in 2004, the Respondent/Husband had indicated that all he could afford was a total of \$500.00 per month for both children or \$250.00 per month for each child plus half of all educational and health costs.
- [8] She indicated that she had agreed to what she characterized as “this small sum” in 2004 to facilitate a speedy settlement of the matter. However, she complained that while the Respondent/Husband has paid the ordered maintenance, he has paid nothing towards health care as agreed and ordered.

- [9] She stated that while she had not requested the Respondent/Husband to provide reimbursement of costs incurred for the children's health care, she had incurred expenses with regard to both children e.g. ophthalmic and dental expenses and Craig's disposable contact lenses.
- [10] The Applicant/Wife also complained that while the Respondent/Husband had contributed to the cost of school supplies, he had refused to pay half of the total educational expenses as per the agreement. She cited one instance when the Respondent/Husband had refused to pay for Ryan's summer school expenses at UWI.
- [11] The Applicant/Wife urged the Court to have regard to the fact that the Respondent/Husband is self-employed and has multiple steady and dependable sources of income from his professional accounting practice and is earning far more than in 2004 when the Agreement was made. She expressed her opinion that the Respondent/Husband was healthy and earning well enough to provide reasonable maintenance regularly for the children of the marriage in the sum of \$500.00 per month for each child.
- [12] The Applicant/Wife also expressed her belief that the Respondent/Husband should meet his fair share of the expenses of the children and that he should not have the choice of whether he will or will not reimburse her for the educational or health expenses that she had met for the children.
- [13] In her Supplemental Affidavit filed on January 17, 2008, the Applicant/Wife sought to provide the Court with a three-year projection of the estimated costs which she was likely to incur on account of both children's medical, dental, ophthalmic, educational and other expenses.

- [14] Counsel for the Applicant/Wife, Miss. Donna Symmonds submitted that since the Respondent/Husband was already obligated to reimburse the Applicant/Wife for certain expenses incurred by her in respect of the children of the marriage, the Applicant/Wife was not really asking for an increase in maintenance, but was only asking for the Court to vary the existing order to include a fixed monthly pre-estimate of the reimbursable expenses likely to be incurred on behalf of the two children of the marriage.
- [15] She urged the Court to vary the form of the existing maintenance order and to award instead, an increased flat monthly amount or lump sum payment which would provide an increased fixed level of maintenance for the children and relieve the Applicant/Wife from the stress and humiliation of having to seek reimbursement from the Respondent/Husband each time medical, educational and other expenses were incurred by her on behalf of the two children of the marriage.
- [16] In support of the Applicant/Wife's case that the Respondent/Husband is now in a financial position to provide regular increased monthly maintenance for the children of the marriage in the sum of \$500.00 per month for each child, Miss. Symmonds urged the Court to have regard to the three Financial Statements filed by the Respondent/Husband in 2003, 2006 and 2007 respectively which clearly showed an increase in his income over the period.
- [17] Miss. Symmonds submitted that based on the Statement of Financial Circumstances filed by the Respondent/Husband there was substantial room for the Court to make the variation order which the Applicant/Wife was seeking. She questioned the items listed as loans

and submitted that the Respondent/Husband had given no indication as to whether the loans were personal or business loans. She urged the Court to view the expenses identified in the Respondent/husband's Financial Statements "with skepticism".

- [18] In response to a question raised by Mr. Pilgrim regarding the monthly cost of food and household supplies of \$2,050.00 listed in the Applicant/Wife's Statement of Financial Circumstances filed on December 7, 2005, Miss. Symmonds submitted that this item of expenditure covered the monthly cost of food and household supplies for the Applicant and two teenaged boys. She also urged the Court to take judicial notice of the cost of food and of the cost of living in Barbados.

**The Case for the Respondent/Husband:**

- [19] The following documents were filed on behalf of the Respondent/Husband:

- (a) Affidavit in Reply of David Alister Harewood filed May 31, 2006;
- (b) Statement of Financial Circumstances of Repondent/Husband filed May 31, 2006;
- (c) Updated Statement of Financial Circumstances of Respondent/Husband filed September 10, 2007;
- (d) Affidavit in Reply of David Alister Harewood filed January 22, 2008.

- [20] Counsel for the Respondent/Husband, Mr. Philip Pilgrim submitted that the basis for the application by the Applicant/Wife for variation of the maintenance order was weak. Referring to paragraph (b) of the Consent Order filed in August 2004, he submitted that the Order

- mirrored the usual practice which requires that bills, receipts and invoices must be presented by one party in order to claim reimbursement for expenses incurred by the other party on behalf of the children of the marriage. He submitted that at paragraph 6 of her affidavit, the Applicant/Wife had clearly admitted that she had not requested reimbursement of the health related costs and expenses which she had incurred in connection with both children.
- [21] With respect to the allegation in paragraph 7 of the Affidavit of Sandra Matthew-Harewood filed on December 7, 2005 in support of the application that the Respondent/husband had refused to pay for one half of the total educational expenses of the children of the marriage, Mr. Pilgrim referred to paragraph 4 of the Affidavit in Reply of David Alister Harewood filed on May 31, 2006 in which the allegation had been denied.
- [22] Mr. Pilgrim submitted that the fulcrum of the application was grounded in section 62 of the *Family Law Act, Cap. 214*. He referred to section 62(2)(a)(i) and (ii) and argued that the Applicant/Wife was required to satisfy the Court that the circumstances of the Applicant or the Respondent had changed as to justify the making of the order.
- [23] Mr. Pilgrim further submitted that if the Applicant was seeking to establish a case for variation under section 62(2)(b) of the Act on the basis of a change in the cost of living, it was incumbent on the Applicant to provide the Court with evidence of any increase in the cost of living using the retail price index published by the Statistical Department. According to him, no such evidence had been adduced.
- [24] Mr. Pilgrim referred to “Exhibit SHPMHV4” attached to the Supplemental Affidavit of Sandra Matthew-Harewood filed January

- 17, 2008 and to the list of projected annual medical, dental ophthalmic, educational, clothing and other expenses which the Applicant/Wife had compiled in order to establish the expenses which would be likely to be incurred on behalf of the two children of the marriage over the next three (3) years.
- [25] He submitted that the listed expenses are unreasonable, unnecessary and excessive and that the list was not a good guide to determining the children's estimated annual expenses. He submitted that some items which had been included in the list such as the living room suite and dining table were items of expenditure which were not solely for the benefit of the children of the marriage and would inure for the benefit of the Applicant/Wife.
- [26] Mr. Pilgrim also submitted that the items of estimated expenditure in the list included matters which were in the nature of 'one-off' expenses and ought not be included in an order for payment of monthly maintenance. He submitted further that with the inclusion in the list of so many 'one-off' items of expenditure, it would be dangerous for the Court to have regard to the list or to include them in an increased monthly maintenance order.
- [27] Mr. Pilgrim submitted that it was incumbent on the Court to examine the circumstances of both parties and in particular, the ability of the Respondent/Husband to pay the increased monthly amount sought by the applicant/Wife.
- [28] He urged the Court when exercising its discretion under section 62 of the *Family Law Act, Cap. 214* to examine what had changed since the making of the maintenance order in 2004. He referred to the affidavit evidence of the Respondent/Husband and to the evidence that his

- client's ability to pay the increased monthly maintenance amount sought by the Applicant/Wife was severely hampered by his having, since 2004, increased his mortgage payment with First Caribbean International Trust and Merchant Bank (Barbados) Ltd from \$1,810.00 per month to \$4,350.00 per month.
- [29] Mr. Pilgrim pointed out that the affidavit evidence clearly established that upon settlement of all matters between the parties in August, 2004, the Respondent/Husband had been required to pay to the Applicant/Wife a lump sum payment of \$165,000.00.
- [30] He drew the Court's attention to the fact that in order to comply with the Consent Order and the Agreement, the Respondent/Husband had borrowed substantially and increased the current mortgage with First Caribbean International Trust and Merchant Bank (Barbados) Ltd from \$220,000.00 to \$490,000.00.
- [31] Referring to the Affidavit in Reply of David Alister Harewood filed on January 22, 2008, Mr. Pilgrim pointed out that since 2004, the Respondent/Husband was in a weak financial position. According to the evidence, the Respondent/Husband was meeting obligations under the Agreement and generally playing a supporting role to the Applicant/Wife wherever possible. However, due to the state of his financial resources, he was unable to make a higher contribution towards the maintenance of the children.
- [32] Mr. Pilgrim cited the Western Australian Supreme Court case of *Maher v. Maher (1980) Family Law Cases, ¶¶90-834*. While conceding that the facts in the case were not directly on point, Mr. Pilgrim submitted that the principle to be distilled from the case was that in assessing the amount of maintenance payable the Court is

obliged to take into account the present financial circumstances of each of the parties and ought not to award maintenance at the rate claimed by the petitioner if the respondent is in no position to pay. He urged the Court to have regard to his client's weak financial situation and allow the Respondent/Husband in this case to "catch himself".

[33] Mr. Pilgrim concluded by urging the Court to find that by comparison, the Applicant/Wife was able to afford to keep the children of the marriage and in better placed to support the children with a degree of ease.

**Application of the Court's discretion:**

[34] As the heading suggests, Part VI of the *Family Law Act, Cap. 214* contains the relevant provisions governing maintenance and property issues and proceedings in respect thereof.

[35] Subsections (1), (2) and (7) of section 62 provide:

*"(1) In proceedings in respect of the maintenance of.....a child of a marriage..., if there is in force an order...in respect of the maintenance of.....that child by the other party to the marriage.....,*

*(a) made by the court; or*

*(b) ...;*

*the court may*

*(c) ...;*

*(d) ...;*

*(e) ...;*

*(f) subject to subsection (2), vary the order so as to increase or decrease any amount ordered to be paid or in any other manner.”*

*“(2) The court shall not make an order increasing or decreasing an amount ordered to be paid under a previous order unless it is satisfied*

*(a) that, since the order was last made or varied,*

*(i) .....*;

*(ii) The circumstances of the person liable to make payments under the order have so changed;*

*(iii) .....*;

*as to justify its so doing;*

*(b) that since the order was made, or last varied, the cost of living has changed to such an extent as to justify its so doing; or*

*(c) that material facts were withheld from the court that made or varied the order, or material evidence previously given before the court was false.....”*

*“(7) For the purposes of this section, the court shall have regard to sections 50, 51, 53 and 54.”*

[36] Section 51 provides:

*“The parties to a marriage, or union other than a marriage, are liable, according to their respective financial resources, to maintain the children of the marriage or of the union who are unmarried and have not attained the age of 18 years.”*

[37] According to section 52:

*“In proceedings with respect to the maintenance of a party to a marriage or union, or of a child of the marriage, or of a union, the court may make such orders as it thinks fit for the provision of maintenance in accordance with this Part.”*

[38] Section 53 provides:

*“(1) In determining the amount of maintenance, if any under section 52, the court shall take into account only the matters set out in subsection (2).”*

[39] The matters to be taken into account in determining maintenance include (inter alia)-

- *the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;*
- *whether either party has the care or control of a child of the marriage...who has not attained the age of 18 years;*
- *the financial needs and obligations of each of the parties;*
- *where the parties have separated or the marriage has been dissolved, a standard of living that in all the circumstances is reasonable;*
- *any fact or circumstance that, in the opinion of the court, the justice of the case requires to be taken into account.*

- [40] The main thrust of the Applicant/Wife's case for variation of the maintenance order appears to be her belief (expressed at paragraphs 8, 9 and 11 of her affidavit of December 7, 2005) that since the Respondent/Husband is healthy, self-employed and has multiple steady, dependable sources of income from his accounting practice and presently earns more than he was earning in 2004 when the Consent Order and Agreement were made, he is now in a financial position to provide an increased level of monthly maintenance for the two children of the marriage.
- [41] Attention was drawn to the three Financial Statements filed by the Respondent/Husband in 2003, 2006 and 2007 respectively, and to the fact that his annual income had increased from \$61,604.00 in 2003, to \$92,000.00 in 2006 and to \$104,000.00 in September 2007.
- [42] An added reason for the Applicant/Wife's application for variation of the maintenance order, appears to be the Applicant/Wife's reluctance or unwillingness, on her own admission, to request reimbursement from the Respondent/Husband for amounts expended by her towards the children's health care and other expenses as provided by the 2004 Consent Order and Agreement.
- [43] Despite admitting that she had not requested the Respondent/Husband for reimbursement of these expenses, a claim was, somewhat surprisingly, made by the Applicant/Wife for non-payment of the reimbursable expenses due pursuant to Clauses (b) and 18 respectively of the Consent Order and Agreement. According to Miss. Symmonds, the Applicant/Wife feels that the Respondent/Husband's behaviour was deliberately intended to aggravate and humiliate her

and that she was forced to file the application as a means of obtaining regular maintenance.

- [44] Having regard to the state of the evidence and in particular to the absence of any cross-examination which would have tested or added weight to the affidavit evidence of the Applicant/Wife on the one hand or of the Respondent/Husband on the other, the Court is of the view that the Applicant/Wife's belief regarding the Respondent/Husband's improved financial position does not appear to be borne out by the facts.
- [45] In particular, having regard to section 62(2)(a)(ii) of the Act, the Court is not satisfied that the circumstances of the Respondent/Husband have so changed for the better as would justify the making of an order increasing the amount ordered to be paid under the previous maintenance order.
- [46] On a consideration of the totality of the evidence the Court is satisfied that at the present time, notwithstanding the increases in his income levels since 2003, the Respondent/Husband is in a tenuous financial situation. Despite his occupation as an accountant, his standard of living is somewhat unsatisfactory and he is, at this time, clearly in no position to pay to the Applicant/Wife the increased level of monthly maintenance which she seeks.
- [47] The Court's conclusion is based on the fact that, as appears from the three Financial Statements filed by the Respondent/Husband in 2003, 2006 and 2007 respectively, the Respondent/Husband's expenditure in respect of mortgage payments increased from \$21,722.52 per annum in 2003 to \$52,200.00 in 2006 and in September 2007 now stands at \$55,872.00 per annum. These figures are clearly consistent with the

- affidavit evidence of the Respondent/Husband to the effect that his expenses have risen considerably and are way in excess of his income.
- [48] Additionally, the figures stated in the Respondent/Husband's three Financial Statements support the assertion made in paragraph 6(i) of his Affidavit in Reply filed in January 2008 that his annual expenses for food and household supplies have been kept to the barest minimum and indeed, have not increased since 2003. At the same time, it is of some significance that whereas the Respondent/Husband was in 2003, in a financial position to spend \$1,000.00 per annum in clothing, his expenditure for clothing in 2006 had reduced to \$600.00 per annum and to \$700.00 in September 2007.
- [49] Consistent with the Respondent/Husband's evidence that his property at Lot 5 Drax Hall, St. George was in a poor condition due to his being financially unable to effect any repairs, examination of his three Financial Statements clearly shows that whereas he had been in a position to spend \$1,500.00 for house repairs in 2003, no such expenditure is reflected in the Statements for 2006 or 2007.
- [50] The evidence before the Court also establishes that despite his poor financial situation and deteriorating standard of living, the Respondent/Husband has been meeting his obligations under the Agreement and in general playing a supporting role to the Applicant/Wife in maintaining both children of the marriage wherever possible.
- [51] The fact that the Respondent/Husband has been honouring his legal obligation to maintain his children is, quite significantly, also corroborated at paragraph 6 of the affidavit of the Applicant/Wife filed on December 7, 2005 and is also clearly reflected in the income

and expenditure columns of the Financial Statements filed by both parties to the proceedings.

- [52] During the course of the legal arguments, it became obvious that an argument was being advanced on behalf of the Applicant/Wife pursuant to section 62(2)(b) of the *Family Law Act, Cap. 214* that an increase in the monthly maintenance payable by the Respondent/Husband was justified having regard to the cost of living and the high cost of food. Miss. Symmonds also invited the Court to take judicial notice of the high cost of living in Barbados.
- [53] As the retail price indices for the relevant years since 2004 when the maintenance order was made were not placed before the Court, there is no evidential or factual basis on which an assessment can be made as to whether the cost of living in Barbados had changed to such an extent as to justify the increase in maintenance sought by the Applicant/Wife on behalf of the children of the marriage. The Court accordingly declines to make any assessment of the cost of living for purposes of section 62(2)(b).
- [54] As required by section 62(7) of the *Family Law Act, Cap. 214* the Court, in considering an application for variation of a maintenance order, is also obliged to take into account, the matters set out in section 53(2) of the Act.
- [55] The Court is satisfied and finds that comparatively, the Applicant/Wife is in a much better position financially than the Respondent/Husband. Like the Respondent/Husband, she is in receipt of a steady salary from her employment as a Forecast Analyst. However, she is also in receipt of the fixed annual maintenance of \$6,000.00 which she has been receiving from the

- Respondent/Husband in respect of the two children of the marriage pursuant to the Consent Order and the Agreement.
- [56] Additionally, as clearly appears from her Financial Statement of 2007, the Applicant/Wife is, now also receiving rental income of in excess of \$12,000.00 per annum from two apartments which she had constructed since the maintenance order was made in August 2004.
- [57] During the course of the arguments, and in answer to a query from Mr. Pilgrim, Miss. Symmonds informed the Court that the rental income of \$12,000.00 shown in the Applicant/Wife's 2007 Financial Statement should be increased to reflect an additional \$9,600.00 per annum since the second apartment had since the filing of the Financial Statement been completed and was being rented for \$800.00 per month.
- [58] The Court finds as a fact that, although her annual income as stated in her 2007 Financial Statement marginally exceeds her expenditure, the financial position of the Applicant/Wife is, by comparison, considerably stronger than that of the Respondent/Husband whose annual expenses consistently exceed his income and whose financial situation and standard of living clearly appear to have declined since 2003.

**Disposal:**

- [59] Having regard to the totality of the evidence, the respective legal arguments, the applicable law and the foregoing findings of fact, the Court finds that the Applicant/Wife has not established pursuant to section 62(2)(a)(ii) of the Act that the Respondent/Husband's circumstances have so changed as to justify the Court making an order for increased maintenance as prayed.

- [60] The Court is satisfied instead that the Respondent/Husband is in no position financially to pay the Applicant/Wife increased maintenance and the application for variation pursuant to section 62(2)(a)(ii) is, accordingly, refused.
- [61] For reasons already outlined at paragraphs [52] and [53] above, the Court is unable to make any assessment of the cost of living for purposes of section 62(2)(b) and the application for variation on this ground is also refused.
- [62] In accordance with section 94(1) of the Act, each party shall bear his or her own legal costs.

**Maureen Crane-Scott,  
Judge of the High Court**