

**BARBADOS**

[Unreported]

Suit No: FL 218 of 1995

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**Family Division**

**BETWEEN**

**SUSAN B. D. COLBY - APPLICANT/WIFE**

**AND**

**CHRISTOPHER E.S. ROBINSON - RESPONDENT/HUSBAND**

**Before The Honourable Madam Justice Maureen Crane-Scott, Q.C.,  
Judge of the High Court [In Chambers]**

**2009 May 7 and 8**

**Mrs. Beverley Walrond, Q.C. for the Applicant/Wife  
Miss. Bernadette Callender for the Respondent/Husband**

**INTERIM DECISION**

- [1] **Crane-Scott J:** This is an application brought by the Applicant/Wife for an order for maintenance in respect of two adult children of the marriage who are both pursuing tertiary-level education in England.
- [2] The application is brought pursuant to s. 54(3) of the *Family Law Act, Cap. 214* of the Laws of Barbados. The application was filed on October 10, 2008 under a Certificate of Urgency and was supported by the following documents:
- 1) Affidavit of Susan Brigitte Delys Colby filed October 10, 2008;
  - 2) Wife's Statement of Financial Circumstances filed October 10, 2008;
  - 3) Further Affidavit of Susan Brigitte Delys Colby filed May 7, 2009.
- [3] The Applicant/Wife also urged the Court to have regard to all previous affidavits filed in the Suit.
- [4] On March 24, 2009, the Applicant/Wife filed formal Requests for Discovery and Production of the Respondent/Husband's passports, specified financial records and credit card statements, Income Tax Returns and other documents connected with commissions which he may have earned as a real estate agent since 2005.
- [5] The application is opposed by the Respondent/Husband who filed the following documents:
- 1) Affidavit in Reply filed May 7, 2009;

2) Respondent's Statement of Financial Circumstances filed May 7, 2009.

- [6] **Oral Arguments:** At the outset, Counsel for the Applicant/Wife, Mrs. Beverley Walrond, Q.C. indicated that she had only just been served with the Respondent/Husband's documents on the morning of the hearing. She stated that the Respondent/Husband's Statement of Financial Circumstances was not accepted as a correct statement of his financial affairs.
- [7] She advised the Court that the Respondent/Husband had not made discovery nor produced the documents which the Applicant/Wife had requested and stated that until discovery was made, she was unable to fully present her case. She, however, indicated that she would nonetheless proceed to present the Applicant's case and reserve her right to cross-examine the Respondent/Husband on his financial circumstances when the information was available.
- [8] She urged the Court not to be stymied by the failure of the Respondent/Husband to give discovery and urged the Court to consider making an interim maintenance order notwithstanding the absence of discovery.
- [9] After outlining the evidence in the Applicant/Wife's 2 affidavits, Mrs. Walrond turned her attention to the Respondent/Husband's Statement of Financial Circumstances and his affidavit-in-support, she urged the Court to have regard to the fact that the Respondent/Husband had attempted to mislead the Court in relation to an earlier maintenance application. According to her, the attempted deception was only discovered after a subpoena had issued and it was discovered that the Respondent/Husband had retained sole signing rights over a bank

- account containing a substantial sum which had been opened in his mother's name.
- [10] Mrs. Walrond submitted that the Respondent/Husband earned at a different level. She stated that under Australian practice, it was important to establish how people earn over a period of time which is why discovery had been requested in respect of the Respondent/Husband's financial affairs for the period 2005 to present.
- [11] Mrs. Walrond referred the Court to extracts from the *Australian Family Law and Practice, 2003 edition*, in which sections of the Australian law corresponding to section 54 of the Barbados *Family Law Act* were discussed under the headings, 'Maintenance of Child Over 18' and 'Parental Ability to Pay'.
- [12] Counsel for the Applicant/Wife drew the Court's attention to a 5-point checklist identified by the Victorian Full Court in the Australian case of *C v. C (1962) 4 FLR 461* for matters which had to be considered on an application for continuation of maintenance to enable a child to undertake or complete tertiary education.
- [13] On the issue as to whether maintenance was necessary for the two adult children to undergo tertiary-level education as envisaged by s. 54(3) of the *Family Law Act*, Counsel for the Applicant/Wife asked the Court to take account of the wife's evidence to the effect that the adult children of the marriage have no property of their own. She also urged the Court to take into account the fact that the Respondent/Husband had a university degree. She submitted that there was also evidence in the form of a voluntary agreement which had been entered into by the Respondent/Husband on the dissolution of his second marriage and in which he had agreed to underwrite

- maintenance for his 2 other minor children whom he expected to undertake tertiary-level education.
- [14] Mrs. Walrond ended her submissions by undertaking to file an additional affidavit on behalf of the Applicant/Wife which would respond in more detail to the allegations in the Respondent/Husband's affidavit in reply which had only been seen that morning.
- [15] In response, Counsel for the Respondent/Husband, Miss. Bernadette Callender urged the Court not to take into account events which had transpired years before in any earlier proceedings and which, in her view, were not relevant to the current application.
- [16] She cited the Australian cases of *In the Marriage of Gamble (1978) F.L.R. 198* and *In the Marriage of O'Dempsey (1990) F.L.R. 158* which involved applications for a child maintenance order during tertiary education under Australian provisions which correspond to s. 54(3) of the Barbados *Family Law Act*.
- [17] Miss. Callender submitted that there is a clear distinction in approach between the provision of maintenance for a child who is under 18 years and a child of the marriage who is an adult and is over 18 years. She highlighted dicta of *Fogarty J* in the *Gamble Case* outlining the statutory history of a parent's liability for the maintenance and education of a child
- [18] Referring to the 5-point checklist identified in the case of *C v. C*, cited in the extract produced by Mrs. Walrond, Miss. Callender submitted that the burden was on the Applicant/Wife to establish that maintenance was necessary. She contended that the evidence adduced in support of Applicant/Wife's application had not addressed many of the points identified in the checklist. For example, she noted that no

- breakdown had been placed before the Court as to the costs which were being claimed in relation to the son's course of study. She submitted unless the Applicant/Wife established that maintenance was necessary, it would not be possible for the Court to make an interim order, much less a final order
- [19] She urged the Court to consider the viable and cheaper alternatives for the childrens' tertiary education which the Respondent/Husband had identified in his Affidavit in Reply. She submitted that less expensive Government-funded tertiary education was available in Barbados or in Canada where they are also citizens. The children had instead, without prior consultation with him, chosen the most expensive tertiary education in England and it could not be reasonable for the Respondent/Husband with his limited means, to assist.
- [20] Miss. Callender submitted that had the children chosen to undergo tertiary education in Barbados, they could have supplemented the cost of their education by working in part-time jobs as was the case in *Mercer v. Mercer (1976) FLC 75*.
- [21] Turning to the Respondent/Husband's means, Miss. Callender submitted that he had deposed that he is unable to underwrite in any way the courses which his adult children have undertaken and which are the subject of the application. She referred to his Statement of Financial Circumstances and his Affidavit in Reply and urged the Court to take note of his age and the fact that he also has 2 minor children from a subsequent marriage who he is obligated to provide for.
- [22] In reply, Mrs. Walrond reiterated that she had been disadvantaged due to the fact that the Respondent/Husband's Affidavit-in-Reply had

been filed and served on her at the last minute. She urged the Court for some latitude to enable her to make additional submissions to enable her client to explain why educating the son in Barbados was not an option. She referred to an affidavit of Susan Colby which had been filed on October 2, 2007 and to “Exhibit SC2” which was a letter dated June 19, 2006 in which the Respondent/Husband had warned the Applicant/Wife about the threats of physical assault which the son had been receiving from another child in Barbados. She submitted that this was evidence to support the desirability for the son to be out of Barbados.

- [23] The Applicant/Wife was then sworn and gave oral evidence as to the breakdown of the costs per term which she had incurred in respect of each of the 2 adult children of the marriage and which she had notified the Respondent/Husband about earlier this year. Mrs. Walrond undertook to file a supplemental affidavit covering the additional points.
- [24] Following Mrs. Walrond’s submissions, the Court indicated that it would consider the matter overnight and decide whether, having regard to the evidence, it would be in a position to make an interim order as to maintenance.
- [25] **Exercise of the Court’s discretion:** Having considered the evidence before it, together with the submissions of Counsel for both parties and the applicable law, the Court is unable, at this interim stage, to make the threshold determination under s. 54(3) of the Act as to whether “*the provision of maintenance is necessary to enable [the children] to complete their tertiary education*”. The Court’s reasons for declining to make the interim order are as follows:

- a) The Court is not satisfied that the evidence adduced by the Applicant/Wife shows that the educational alternatives for each child identified by the Respondent/Husband in his Affidavit in Reply were considered prior to their enrollment in the English educational institutions which they now attend. Nor have the reasons why the alternatives were not considered feasible or practical been placed before the Court;
- b) Having regard to the case law, including the extract from *Australian Family Law and Practice* cited by Mrs. Walrond, the Court finds that other relevant matters such as whether the courses to be pursued by the children are going to help them to earn an income and whether the children were qualified to pursue and profit from the courses, have not been specifically addressed in the evidence but appear to have been left for the Court to infer;
- c) The issue whether the children have or are eligible for scholarship income or are eligible for student loans or other assistance has also not been addressed in the evidence;
- d) Nothing is known about the skills or earning ability (if any) of either of the children and whether they are or are not in a position to earn income and themselves contribute to their continuing education;
- e) There is also no evidence as to whether any hardship would result to the children if they had to abandon their courses of study through lack of means;

- f) Finally, and most importantly, the Respondent/Husband's means and his sworn evidence regarding his apparent inability to pay has not yet been effectively challenged by the Applicant/Wife;
- g) The Respondent/Husband's Statement of Financial Circumstances and paragraph 5 of his Affidavit in Reply of May 7, 2009 clearly establish that he is, on paper, in a weak financial situation;
- h) Although, Mrs. Walrond has verbally challenged the bottom line shown in the Respondent/Husband's Statement of Financial Circumstances which she states is not correct, he has not yet been cross-examined on it and his evidence remains unchallenged. The Court is accordingly, at this early stage of the proceedings, unable to accept Mrs. Walrond's submission that the Respondent/Husband "*earns at a different level*";
- i) As Mrs. Walrond has also submitted, she is awaiting discovery and production by the Respondent/Husband of the requested information to enable her to ascertain the truth of his financial circumstances;
- j) In those circumstances, as the Respondent/Husband would appear to have no means, there is no legal basis on which the Court can make the interim maintenance order which the Applicant/Wife seeks.

[26] **Order:** In the circumstances, the Court declines to exercise its general powers under s. 59(i) of the *Family Law Act*, to make an interim order pending the disposal of the proceedings. However, with a view

to securing an early hearing of the application, the Court makes the following order and gives the following directions:

- i) the Respondent/Husband shall within thirty (30) days, comply with the Applicant/Wife's Request for discovery and the Notice to Produce filed in the proceedings on March 24, 2009;
- ii) Both parties shall file any additional or supplemental affidavits in support of their respective cases on the application;
- iii) Leave is granted to either party to cross-examine the other party on their affidavits;
- iv) The application is adjourned for an early date to be fixed for continuation of the hearing before me.

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