

BARBADOS

**IN THE SUPREME COURT OF BARBADOS
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION**

FAMILY SUIT NO. 3 of 2008

BETWEEN

C M O P

APPLICANT/HUSBAND

AND

C P A P

RESPONDENT/WIFE

Before the Honourable Mr Justice Alrick Scott, Judge of the High Court (Acting).

Date of Reasons for Decision: 14th May 2019.

Ms Margot Greene, QC for the Applicant/Husband.

Mrs Beverley Walrond, QC for the Respondent/Wife.

REASONS FOR DECISION

INTRODUCTION

[1] The circumstance of this application for enforcement of spousal maintenance is rare. On 18th July 2018, the Respondent/Wife in the action (the “Wife”) filed an application seeking, among other things, an order for enforcement of arrears of maintenance which accrued over approximately nine years, in the sum of

\$192,000.00. The Applicant/Husband in the action (the “Husband”) had not complied with the orders for disclosure made approximately nine years earlier. I extended the time to comply with various orders on two occasions. Even then the Husband had not complied with all the orders. Counsel for the Wife then made an oral application for payment of arrears of maintenance for the two years preceding the hearing, in the sum of \$24,000.00. It is that latter application that I was asked to decide.

- [2] Madam Justice Maureen Crane-Scott initially made the order for spousal maintenance on 27th October 2009. The order was for the Husband to pay the Wife the sum of \$5,000.00 monthly commencing on 31st October 2009 and continuing the last day of each month until further order. The order specified that it was urgent maintenance. The order was therefore made under section 55 of the Family Law Act Cap 214 (FLA). It was an order for urgent maintenance, which continued to date. Orders under sections 27 and 42 of the FLA were also granted.
- [3] On 14th November 2018 I gave an oral decision. I refused the Wife’s oral application for an order for payment of arrears of spousal maintenance for two years. I took the position that, given the time which had elapsed since the making of the order for urgent maintenance, it was imperative that finality is brought to the financial relationship between the parties. And, that finality may be best achieved by all the issues between the parties being dealt with holistically, and not in a piecemeal way.

BACKGROUND

Wife’s Narrative from Affidavits & Submissions

- [4] The Wife was 62 years old when the matter was before me. The Husband was 58 years old. They were married on 23rd October 1992. They cohabited for

approximately six years before the marriage. The relationship before the marriage produced two children: M P on 9th November 1988 and A P on 25th December 1990.

- [5] The Husband and the Wife initially lived in Grenada. He worked for Shell Antilles & Guianas Ltd (“Shell”). He had a rewarding position with Shell. She was a realtor. The Husband was transferred by Shell to St. Kitts, where the family joined him there. The Wife states that the Husband’s work required him to travel often. During that time, she looked after the children, and performed other chores that he asked her to do. Her immigration status did not allow her to work in St Kitts.
- [6] The Husband’s work brought him to live in Barbados in August 1993. The family moved to Barbados with him. The Wife states that her immigration status of visitor did not allow her to work in Barbados. However, the Husband enjoyed a good salary with good perquisites, which allowed the family to live well. The Husband’s work, she states, required him to continue his frequent travels. The Wife states too that she continued to look after the Husband, the home and their children. Her status continued as that of visitor to Barbados.
- [7] The Wife states that while in Barbados, she applied to the University of the West Indies to do a Bachelor of Arts degree in business management, but that the Husband refused to pay for the degree. She undertook a degree in theology through the People’s Cathedral, which she said was inexpensive. She also undertook a course in radio broadcasting and another in property management. The latter was pursued at the Samuel Jackman Prescod Polytechnic. She also took a course in Art as a hobby.
- [8] After completing the course in property management, the Wife set up in business with one of her fellow students in the course with her. She applied and obtained a work permit for five months. She says that she tried to get it extended, but the Husband did not assist her by paying for the work permit. The business produced the sale of one property. At the time, the parties were still living together.

- [9] The Wife adds that when Shell sold its business in Barbados to SOL in 2004, the Husband chose to be severed and was paid \$1.85 million for his years of service and his pension, in 2005. After leaving Shell, the Husband set up a consulting firm, and according to the Wife, he has parlayed his well-known skills internationally as well as locally.
- [10] The marriage broke down in July 2006. The Husband paid the rent for the Wife's housing and paid the utilities while the daughter, A P resided with the Wife. Sometime after A P left for university, the Husband started giving the Wife \$5,000.00 to cover her rent and other outgoings. However, some months after that, he stopped. Accordingly, the Wife sought an order for spousal maintenance. On 27th October 2009, Crane-Scott J made an order for urgent spousal maintenance for \$5,000.00 monthly.
- [11] The Husband paid the Wife the sum of \$5,000.00 for a few months, and then he started paying her \$3,000.00 monthly. This he did, the Wife states, despite her rent being \$2,500.00, her car payment of \$1,200.00 monthly, and other outgoings of gasoline, car maintenance, utilities, food and clothing amongst others. She states that it left her owing to various persons or entities at the end of each month. She states further that when she encountered a financial emergency, he would curse her, but would sometimes assist financially. Some months, he paid the sum of \$3,000.00 late. She estimates that the Husband owes her \$192,000.00. She says that she would gently remind him of his obligation to pay her maintenance, and she did not let her attorney know that she was not receiving maintenance as ordered.
- [12] Since the breakdown of the marriage, the Wife ministered for a short period as a pastor at the People's Cathedral, for which she was paid \$2,200.00 monthly. She also worked, for a short time, as the operations manager at Hardwood Housing project, which closed down. Later, she again worked for the People's Cathedral in setting up their radio station, Christ Is The Answer, 90.1 FM. She was paid \$6,000.00 for approximately six months by the People's Cathedral for her services.

- [13] The Wife states that since then, she has had no means of earning. Currently, she is using her radio broadcasting skills to earn a living at a Christian radio station which started in 2017 with eleven other persons. It has made no money as yet.
- [14] The Wife states too that she has had to juggle her various bills, with crises arising because of her inability to keep her bills current. These include her rent, her car payments, and her credit cards. She adds that matters reached a point in December 2017, when she had to give up her rented accommodation, put her belongings in a container and move into a bedroom at her daughter's rented home. The Husband assisted her in saving her car from being repossessed. In summary, she states that she is virtually homeless and is dependent on the goodwill of her young daughter for shelter. She blames the Husband.

The Husband's Narrative from Affidavits and Submissions

- [15] The Husband paints a somewhat different picture. He states that when he met the Wife, she was then twice divorced with a young daughter. He contributed to her household expenses and assisted with the maintenance of her young daughter since her biological father did not. He transported the minor child to and from school and looked after her when the Wife was unable to do so.
- [16] He states that the Wife purchased a property in Grenada in 1991. During that same year he was transferred to St. Kitts by his employer. Sometime in 1992, the Wife informed him that her real estate business was in trouble and asked that he consider taking her and the children to live with him in St. Kitts so that she could relocate and get a new start. The Wife and the children moved to St. Kitts in October 1992. He states that at the time, the Wife rented her house in Grenada at the rate of EC \$700.00 per month. He notes that when she moved to St Kitts, she brought the children's nanny with them. Not only did she take the children and the nanny, but he says that she brought with her a trail of debt, totalling EC \$150,000.00, which he paid off. He says that a pattern emerged and continued over thirteen years of he

paying off the Wife's debts. He recounts that the family was provided with furnished accommodation in St Kitts, with a housekeeper who did all of the household chores. He denies that the Wife was ever required to provide any household chores or to entertain for him. He notes too, that during their time together in Barbados, they had household help and gardening service, and that the Wife did not have to perform any of these duties while she lived in Barbados.

[17] The Husband recalls that he paid for courses for the Wife in the hope that she would become trained and be able to earn a living and be self-sufficient. But that all of his efforts proved futile. He started by trying to take advantage of the Wife's interest in Art by purchasing Art materials and paying for her to attend Art classes. She pursued that for a short time. She sold a few paintings and then showed no more interest in that activity. He states that he paid for her to enroll in a radio broadcasting course, following which she started to host Christian radio programmes. But, he says, she soon lost interest in that as well.

[18] He next paid for her to undertake a course in real estate offered by the Extra-Mural Department of the University of the West Indies. He intended that the training would qualify her to work in real estate, but that never materialised. He recounts too that she pursued a three-year course in theology with the intent of becoming a pastor or counsellor, but that too proved futile. She next turned her attention to being a songwriter and producer, which he says also failed, but which cost him \$40,000.00, paying the producer, production company and a bank loan related to the production of one record. She decided to become a drug counsellor, and undertook training and gained practical experience through the Teen Challenge Programme where she functioned as director for some time. He also states that she was an administrator at the People's Cathedral Primary School, which she was practically running before she switched to theology. He states that, in short, the Wife never followed through with any of the potential income earning activities

which he paid for, preferring to abandon them when she became bored or if they required too much effort.

- [19] After the breakdown of the marriage, the Husband assumed full responsibility for the maintenance of the minor children of the marriage, including putting both children through university with no assistance from the Wife. He states that he supported the Wife and the children at the rate of about \$13,000.00 per month as the children pursued university degrees. He rebuilt the house in Grenada after the hurricane in 2005.
- [20] The Husband states that he paid the monthly sum of \$5,000.00 as ordered for some time, but then it became too onerous. He then paid her the sum of \$3,000.00, which he continued to pay to date. He says that she accepted the reduced amount for maintenance and that he regularly assisted when she called upon him. He says that while she has brought an action to recover the arrears of maintenance, she has not acknowledged any of the monetary assistance which she has received from him over the years, apart from the sum of \$3,000.00 which he was paying.
- [21] The Husband says that his financial position is dire. Also, that he has significant credit card debt and struggles to stay afloat. He adds that he finds it difficult to pay at the level he does (\$3,000.00 monthly) and cannot afford an increase in spousal maintenance.
- [22] I have not sought to make any findings of fact in the matter, which would bind the Trial Judge in the future. The above is just an abbreviated narrative of the parties' stories from their affidavits and written submissions without any attempt whatsoever to make any findings of fact.

DISCUSSION

Relevant Approach

[23] Both parties referred me to section 50 of the FLA and the two threshold questions under that section, and to the comprehensive list of factors under section 53(2). They addressed me extensively on the two sections. Section 50 of the FLA provides:

“(1) A party to a marriage or union other than a marriage is, subject to subsection (2), liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so.

(2) The liability of a party under subsection (1) arises only where the other party is unable to support herself or himself adequately, whether by reason of having the care or control of a child of the marriage or union who has not attained the age of 18 years, or by reason of age or physical or mental incapacity for appropriate gainful employment, or for any other adequate reason, having regard to any relevant matter set out in section 53(2).”

[24] Subsections (1) and (2) of section 53 of the FLA provide as follows:

“(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).

(2) The matters to be taken into account for the purposes of this section are as follows:

- (a) the age and state of health of each of the parties;
- (b) 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;
- (c) whether either party has the care or control of a child of the marriage or union other than a marriage, who has not attained the age of 18 years;
- (d) the financial needs and obligations of each of the parties;

- (e) the responsibilities of either party to support any other person;
- (f) the eligibility of either party for a pension, allowance, or benefit under any Act or rule, or under any superannuation fund or scheme, or the rate of any such pension, allowance, or benefit being paid to either party;
- (g) where the parties have separated or the marriage has been dissolved, a standard of living that in all the circumstances is reasonable;
- (h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;
- (i) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;
- (j) the duration of the marriage or union other than a marriage, and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration;
- (k) the need to protect the position of a woman who wishes only to continue her role as a wife and mother;
- (l) if the party whose maintenance is under consideration is cohabiting with another person, the financial circumstances relating to the cohabitation;
- (m) the terms of any order made or proposed to be made under section 57 in relation to the property of the parties; and
- (n) any fact or circumstance that, in the opinion of the court, the justice of the case requires to be taken into account.”

[25] Presumably, I am to reopen the threshold questions under section 50 of the FLA on an application to enforce arrears of maintenance. Further, presumably, the

comprehensive list of factors under section 53(2) is also relevant on an application for arrears of maintenance. I say presumably because the parties addressed me extensively on them. I do not think those sections are relevant to an application for arrears of maintenance. The Court is given the power to enforce arrears of maintenance under an entirely different section, namely, section 86 of the FLA and Part XIII of the Family Law Rules, 1982. That section (section 86) does not mandate that the factors under section 53(2) be taken into account on an application to enforce arrears of maintenance. Section 86 gives the Court a general and complete discretion to enforce or not to enforce arrears of maintenance in whole or in part.

[26] The Court is concerned, on an application for enforcement of arrears of maintenance, as to why its order has not been complied with. The Court is concerned with matters after the order for spousal maintenance was made. Lisa Young, Adiva Sifris, Robyn Carroll and Geoffrey Monahan, *Family Law in Australia*, 9th edition, make the point thus, at para 10.39:

“Steps to enforce spousal maintenance orders may be taken either under the FLA and the Family Law Rules 2004 (Cth) (FLR) Ch 20, or under the child support legislation. Section 105 of the FLA, which confers a general power of enforcement, is discretionary and the court may refuse to enforce one of its own orders. In exercising that discretion the court will consider whether circumstances have arisen that make it inequitable to enforce the original order. The court’s discretion is not limited by equitable doctrines; rather, the discretion is to be exercised after consideration of the relevant facts and circumstances in the context of the legislative scheme, and founded on conduct or events that occurred after the orders were made.”

[27] On an application for arrears of spousal maintenance, one or more of the following would be relevant when exercising the general discretion to enforce or not to enforce an order for spousal maintenance:

- (a) the efforts of the defaulting spouse to comply with the order for spousal maintenance;
- (b) the reasons why the defaulting spouse did not comply with the order for spousal maintenance;
- (c) the reasons why the beneficiary spouse allowed the arrears to accumulate before bringing an application for enforcement of arrears of maintenance;
- (d) any change in circumstances since the order was made. This would include a change in financial circumstances, such as new financial obligations in relation to family, for example, a spouse has a new responsibility for a child since the order;
- (e) whether the defaulting spouse is in a financial position to pay and can pay the arrears now or in the future;
- (f) the hardship to one or the other party by either remitting in part or in whole the arrears of maintenance or ordering payment in whole or in part, the arrears of spousal maintenance, and
- (g) any other circumstance which the court considers relevant.

Orders for Spousal Maintenance

[28] Under the FLA, the Court may make one of three orders for spousal maintenance: an order for urgent maintenance (section 55), or an interim order, or a permanent order for spousal maintenance (section 59 (i)). Section 55 provides as follows:

“Where, in proceedings in respect of the maintenance of a party to a marriage or union, or of a child of a marriage or union, it appears to the court that the party or child is in immediate need of financial assistance, but it is not practicable in the circumstances to determine immediately what order, if any, should be made, the court may order the payment, pending the disposal of the proceedings, of such periodic sum or other sums as the court considers reasonable.”

[29] The nature of an order for urgent maintenance has been examined in a number of cases: *Sadlier v. Sadlier* [2015] Fam CAFC 130; *Ashton v. Ashton* [1982] Fam CA

9 and *Page v Page* [1986] Fam CA 66. The order for urgent spousal maintenance is designed to meet pressing needs. It is in the nature of a stopgap measure. An application for urgent maintenance is heard at a time when all the evidence needed for an application for an interim or final order is not yet before the court. It may be made *ex parte*. It may be dealt with in a summary way, on whatever evidence is before the court at the time. By its very nature, and the basis upon which it is made, it should be for a brief time until the court can hear and determine an application for spousal maintenance on the evidence. An urgent order for spousal maintenance, if allowed to continue indefinitely, risks doing an injustice to one or the other spouse, since it was not decided on the merits.

[30] By section 59(i) of the FLA, the Court may also make an interim or final order for spousal maintenance. In my view, under the FLA, an order for interim spousal maintenance is different from an order for urgent maintenance. On an application for urgent maintenance, the Court is exercising its power under section 55, whereas on an application for interim maintenance, it exercises its power under section 59. The interim order for spousal maintenance is also intended to be temporary, usually to continue until the court makes a final decision. But interim orders are normally made after hearing each party. The Court has a better understanding of each party's case than on an application for urgent maintenance. An interim order may thus be for a period of longer duration than an order for urgent maintenance under section 55.

[31] In *Sadlier v Sadlier* [2015] FamCAFC 130, the Court made the following distinction between an urgent maintenance order and an interim maintenance order thus (para 37):

“Urgent maintenance orders are often referred to as “stop-gap” orders (*Page & Page* [1986] FamCA 66; (1987) FLC 91-806) which are provided to assist with an immediate need of the spouse until a hearing can be set down for spousal maintenance orders pursuant to

ss 72 and 74 of the Act. Nygh J analysed the difference between urgent and interim maintenance orders in *Ashton & Ashton* [1982] FamCA 9; (1982) FLC 91-285 (at pp 77,613–77,614):

‘An application for interim maintenance is basically different from an application for urgent maintenance. An application under s 77 is heard at a time when all the evidence is not yet to hand. It may have to be made ex parte or may have to be made on such evidence as the husband is able to supply in the short period before the matter is set down for hearing. An application for interim maintenance is a creature whose exact nature has not been adequately defined but, as I understand it, differs only from an application for permanent maintenance in that the order which is sought is an order until further order.
...

On an application for interim maintenance, the normal procedures relating to applications for maintenance under s 74 must be observed and an application for maintenance can only be heard after each party has had the opportunity to adduce evidence, that is to say, the normal procedure for the filing of affidavits by both parties and the filing of financial statements must be observed.’”

[32] An order for permanent spousal maintenance needs no elucidation. However, such orders are rare. The authors of *Family Law in Australia*, cited above, observed that (para 10.40):

“However, spousal maintenance orders on a final basis remain relatively rare in Australia, and both contested or agreed awards are likely to remain a statistical abnormality. It has been suggested that the latter is partly due to the emphasis on property division in the process of financial adjustments”

[33] The order made by Crane-Scott J was an order for urgent maintenance. It is expressly stated to be an order for urgent maintenance. What should have been an order for a limited time, has operated as an interim order for approximately nine years. An interim order for spousal maintenance for that period is in itself extraordinary under the FLA.

The Policy or Scheme of FLA

[34] Section 60 of the FLA requires the Court, as far as practicable, to make orders that will finally determine the financial relationship between the parties to the marriage and avoid further proceedings between them. This is normally referred to as the ‘clean break’ principle. If a marriage has been dissolved, an application for spousal maintenance or a property order must be made within twelve months of the final divorce order, unless leave is granted to apply out of time (section 23(3)). The section 23(3) restriction is a reflection of or is consistent with the ‘clean break’ principle expressed in section 60 of the FLA, and is designed to ensure that these matters are dealt with within a reasonable time.

[35] Our courts have never applied a twelve-month bar to recovery of arrears of spousal maintenance. But the policy behind the twelve-month bar in Australia was that applications to recover arrears of maintenance should be brought within a reasonable time. In *Sinckler v Sinckler* (Civil Appeal No. 1 of 2014, unreported) Barb CA, the Court of Appeal, in relying on section 61(8) of the FLA, observed that no time limit had been placed on making an application to recover arrears of maintenance. However, the Court of Appeal in *Sinckler v Sinckler* observed that applications for arrears of maintenance ought to be brought within a reasonable time. In *Sinckler v Sinckler*, Goodridge JA wrote, at paragraph [41]:

“The framers of the Act and the Rules used as their model the 1975 Family Law Act and Rules of Australia. In interpreting and applying our legislation, both the courts and legal practitioners have generally been guided by the Australian authorities. However, the 12 months rule has not been adopted or applied in this jurisdiction. While no time limit has been set out in section 61, the practice has been that a person seeking to recover arrears of maintenance must take action within a reasonable time.”

Resolving the Dispute

- [36] When enforcing arrears of maintenance, the starting point must be what is the proper amount due at the time of the application. In this case, it is agreed that the Husband did not pay the sum of \$5,000.00 as ordered by the Court. He paid the sum of \$3,000.00 per month for a substantial part of the time after the order was made. The Wife has estimated the arrears in the amount of \$192,000.00. But he says that he made various payments on the Wife's behalf. There is no actual figure before me as to what the value of the payments made by the Husband to the Wife is. I think it would be proper for any court to take the value of these into account in deciding what the arrears proper are. By the Wife's admission, the Husband had recently, that is within the past twenty-four months, assisted her in saving her car from being repossessed. Without the proper value of what the Husband did for the Wife, there is a risk that an injustice may be done to one or the other party to make an order at this time for payment of arrears of spousal maintenance, or part thereof.
- [37] The Wife must explain the delay in bringing an application for enforcement of arrears approximately nine years after the order was made. She blames the Husband's failure in making financial disclosure for the absence of all the necessary financial information being before the Court. There is no dispute that the Husband has failed to comply with the orders for disclosure. But the Wife did nothing about his failure for approximately nine years. Counsel for the Wife has blamed the system as well. I do not accept it. The Wife could have, at any time applied to enforce the order for maintenance or the order for disclosure and bring the matter back before the Court, in the same way she has done now. She could have brought an application to enforce the orders of the Court one month, two months, six months or twelve months after the Husband ceased making the payment of \$5,000.00 in full, and upon his failure to give disclosure. A court should not be forced into making an order in the absence of all the evidence where a person has stood on her right for nearly a decade. Were I to draw a tentative and preliminary non-binding inference,

it would be that both parties were happy with the approach to compliance with the order. The Husband could have applied to the Court to vary the order or the Wife could have applied to the Court to enforce the arrears of spousal maintenance and orders for disclosure. But neither one acted as he or she could have, for a significant period.

[38] The Husband states that the Wife accepted the payment of \$3,000.00 per month. She says she reminded him of his obligation. I do not know wherein lies the truth. I say no more than that this is a possible relevant issue or matter in determining whether the arrears should be remitted in whole or in part. Such an issue could only be resolved after hearing both parties under cross-examination.

[39] Counsel for the Wife argued that the Wife has pressing needs. I do not doubt that she does. However, I do not think that I am entitled to deal with an application for arrears of maintenance, or part of the arrears of maintenance, as a stopgap measure, in the same manner as an application for urgent spousal support under section 55. I must consider the discretionary factors set out at para [27] above. The factors I have identified at para [27] above, can only be adequately and appropriately dealt with after all the evidence is before the Court, and there is cross-examination on the disputed facts in this case. At this time all the relevant information has not been disclosed, and I should not, given the stage and age of this matter, be dealing with the matter in a piecemeal way, and in the same manner as an application for urgent maintenance under section 55.

[40] The Court's approach to the current application must bear in mind the policy or scheme of the FLA, in seeking to bring to a close (or a clean break to) the financial relationship between the parties. This requires, having regard to the time which has elapsed, that all the outstanding issues in the matter be dealt with holistically, including the property settlement application, the application for a final or permanent order for maintenance, and the application to recover the arrears of

maintenance. These should be dealt with as expeditiously as possible as well. I have no doubt that is the better approach.

[41] The time that has elapsed since the order was made is unusual. The attorneys for both parties are family law practitioners of eminence and substantial experience in the area. Counsel for both parties argued the application before me with admirable skill and great force. None of the attorneys for the parties pointed me to any case where the court has ordered urgent spousal maintenance or interim spousal maintenance for the period the order was in place in this action. I accept that every case must be decided on its facts. I do not know the outcome of the application for permanent spousal maintenance. But given the time which has elapsed, I consider that all the outstanding issues between the parties should properly be dealt with together, and soon.

CONCLUSION

[43] To give effect to the policy of the FLA, of bringing finality to the financial relationship between the parties, it is best that all the issues between the parties are dealt with together and holistically, and that all matters be brought to an end once and for all, as soon as possible.

[44] The parties are now closer to trial. Orders should be made to bring the matter to trial, and there should be an expedited trial of the issues between the parties.

DISPOSAL

[45] For the reasons given above, the Wife’s application for twenty-four months of arrears of spousal maintenance is refused. This does not restrict the discretion of the Trial Judge hearing the application for arrears of maintenance when disclosure is given, and all the evidence is before the Court.

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ALRICK SCOTT
Judge of the High Court (Acting)