



[2021] JMSC Civ. 53

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2020CV02540

BETWEEN KHIA JOSINA DUNCAN CLAIMANT/APPLICANT
AND STEPHEN STEELE DEFENDANT/RESPONDENT

IN CHAMBERS

Ms Annaliesa Lindsay, instructed by Lindsay Law Chambers for the Applicant/Claimant

Mr. Gordon Steer instructed by Chambers Bunny and Steer for the Respondent/Defendant

Heard: February 11, 12 and March 8, 2021

Application for Interim Spousal Maintenance – Whether Threshold Finding can be made – Maintenance Act, 2005 Sections 6, 14(4) and 5(2) – No longer Cohabiting Partners

MASON, J. (AG)

BACKGROUND

[1] On November 13, 2020, the Claimant/Applicant filed an application for interim spousal maintenance in the sum of \$300,000 pursuant to sections 4, 5, 14 of the Maintenance Act, 2005 (MA). The grounds relied on by the applicant are that the:

- i. contributing spouse (the respondent) had supported the family in wealth for the 17 years of the relationship;
- ii. respondent no longer pays the household expenses;

- iii. relationship ended abruptly; and
- iv. applicant is pursuing graduate studies.

[2] On 11th February 2021, the applicant by way of an oral application was declared a legal spouse under the MA. The evidence supporting this oral application was contained in affidavits filed prior to the hearing. This issue was not contested by the respondent. Leave was granted pursuant to rule 11.6 (2) of the CPR and in the interest of the overriding objective.

ISSUES

[3] The issues to be determined in this matter are:

- i. Whether the respondent can afford to maintain the applicant;
- ii. Whether maintenance claimed by the applicant is necessary;
- iii. Whether the applicant's needs are reasonable; and
- iv. Whether it is impractical for the applicant to wholly or partially satisfy those needs.

SUBMISSIONS

Applicant

[4] Based on the applicant's various affidavits and the submission filed on 5th February 2021, it was submitted that her earnings are not sufficient to support her in the lifestyle to which she is accustomed as she was supported and spoiled by the respondent from the start of the relationship in 2004. In her 2nd Affidavit filed on November 13, 2020, the applicant states that her salary is \$337,107.33; however, her salary slip for January 2021 shows a net pay of \$380,768.69. The applicant contends that due to covid she is restricted in the number of hours she can work as she is in a high risk area. In addition, her private practice is in the

early stages and her online practice at MDLink is not fruitful. Furthermore, she will not get a promotion in the foreseeable future.

- [5]** The applicant stated that the respondent has stopped paying household expenses for which he was solely responsible during their relationship. As a result, her expenses totalled \$280,300. She has also claimed additional expenses other than those for the household such as medical insurance (\$102,553.81) and personal protective equipment (\$93,724.08). In paragraph 21.13 of the submissions, however, it was stated that expenses are \$544,000.00. In her 4th affidavit filed December 15, 2020, the sum claimed for groceries was altered to \$80,000 resulting in total expenses being \$310,300.00.
- [6]** She further states that she requires support from the respondent until she is finished studying and a year after. Her training ended in December 2020 to become an ENT Specialist and she commenced as a specialist in otolaryngology on 4th January 2021. She is now pursuing a Master's in Public Health to be completed in December 2021.
- [7]** Finally, it was hinted that the applicant's affiliation to politics assisted the Defendant in his financial success.
- [8]** The applicant's position can be summarized, according to paragraphs 22.4 and 22.5 of the submission, as: that the applicant was accustomed to a certain lifestyle which over the 17 year period was funded and maintained by the respondent. The financial obligations she now faces, she never had and her new reality, caused by the abrupt termination of the relationship, would necessitate her receiving the requisite assistance from the respondent so that she can maintain herself in a manner that would sustain a reasonable standard to which she has become accustomed. The respondent's actions, she states, are an attempt at financial embarrassment.

Respondent

- [9] The respondent is of the view that the applicant can afford to maintain herself. She is a medical doctor and an ENT Specialist. Additionally, her salary outlines a gross income of \$665,966.37 and a net income of \$402, 599.37 plus \$93,000 for savings. She also has her private practice at 4 different locations and works online. Further, if she wants to buy the respondent's share of \$70,000,000 in the house, she obviously has money to maintain herself.
- [10] He emphasized that he is paying \$150,000 maintenance per month for their child plus all educational expenses and half of the medical. He believes that she does not need more than 1 helper and the sum of \$58,000 for 'maintaining the home' is questionable. Also, the utility is being used by his daughter who he is already supporting.
- [11] He is adamant that she did little to contribute to his financial success as shareholders make decisions for the company.
- [12] In submissions, counsel for the Respondent made 4 primary arguments: maintenance matters are Parish Court matters, section 4 of the MA does not apply since the parties were not married, the respondent is paying for child's maintenance and the applicant has not passed the threshold to be entitled to a maintenance order.
- [13] In cross examination it was gleaned that the applicant has been continuously employed from 2007. She does not pay rent or mortgage. Her income ranges from as little as \$100,000 to \$400,000 or more. Further, she spends little on the relevant child as most of her income was spent on her personal benefit and education as she also had to buy supplies whilst in residency. She admitted that she finished her course in December 2020 but will not get a raise at this time. She rebuts the respondent's claim by stating that the \$93,000 shown in her salary slip was for the child.

LAW

- [14] The relevant law is found in the Maintenance Act Sections 6, 14(4) and 5. Section 4 pertains to parties who are still married or cohabitating:

Section 6

6(1) In the case of cohabiting parties and subject to the provisions of this section, after the termination of cohabitation each spouse has an obligation, so far as he or she is capable, to maintain the other spouse to the extent that such maintenance is necessary to meet the reasonable needs of the other spouse, where the other spouse cannot practicably meet the whole or any part of those needs having regard to:

(a) the circumstances specified in section 14(4); and

(b) any other circumstances which, in the opinion of the Court, the justice of the case requires to be taken into account.

(2) An application for maintenance upon the termination of cohabitation may be made within twelve months after such termination, and the Court may make a maintenance order in accordance with Part VI in respect of the application.

(3) Where a Court acts under subsection (2):

(a) the provisions of section 5 shall apply with the necessary modifications;

(b) the Court shall, as far as practicable, make such orders as will finally determine the financial relationship of the parties and avoid further proceedings between them.

Section 14(4)

In determining the amount and duration of support, the Court shall consider all the circumstances of the parties including the matters specified in sections 5(2), 9(2) or 10(2), as the case may require, and:

a) the respondent's and the dependant's assets and means;

b) the assets and means that the dependant and the respondent are likely to have in the future;

c) the dependant's capacity to contribute to the dependant's own support;

d) the capacity of the respondent to provide support;

- e) the mental and physical health and age of the dependant and the respondent and the capacity of each of them for appropriate gainful employment;*
- f) the measures available for the dependant to become able to provide for the dependant's own support and the length of time and cost involved to enable the dependant to take those measures;*
- g) any legal obligation of the respondent or the dependant to provide support for another person;*
- h) the desirability of the dependant or respondent staying at home to care for a child;*
- i) any contribution made by the dependant to the realization of the respondent's career potential;*
- j) any other legal right of the dependant to support other than out of public funds;*
- k) the extent to which the payment of maintenance to the dependant would increase the dependant's earning capacity by enabling the dependant to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;*
- l) the quality of the relationship between the dependant and the respondent;*
- m) any fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account.*

Section 5

- (1) A maintenance order for the support of a spouse shall:*
 - (a) contain such provisions as will ensure that the economic burden of child support is shared equitably;*
 - (b) make such provision as the Court considers fair with a view to assisting the spouse to become able to contribute to that spouse's own support.*
- (2) In determining the amount and duration of support to be given, to a spouse under a maintenance order, the Court shall have regard to the following matters in addition to the matters specified in section 14(4):*
 - a) the length of time of the marriage or cohabitation;*

- b) the spouse's contribution to the relationship and the economic consequences of the relationship for the spouse;*
- c) the effect of the responsibilities assumed during the marriage or cohabitation on the spouse's earning capacity;*
- d) the spouse's needs, having regard to the accustomed standard of living during the marriage or cohabitation;*
- e) whether the spouse has undertaken the care of a child of eighteen years of age or over who is unable, by reason of illness, disability or other cause, to care for himself*
- f) any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse were devoting the time spent in performing that service in remunerative employment and were contributing the earnings to the family's support;*
- g) the effect of the spouse's child care responsibilities on the spouse's earnings and career development;*
- h) the terms of any order made or proposed to be made under the Property (Rights of Spouses) Act in relation to the property of the parties;*
- i) the eligibility of either spouse for a pension, allowance or benefit under any rule, enactment, superannuation fund or scheme, and the rate of that pension, allowance or benefit.*

[15] I must first highlight that the Supreme Court has jurisdiction to hear any matter under the Maintenance Act, 2005 (MA). The following argument put forward by counsel for the respondent does not state the correct position of the law:

“An application for Maintenance of Spouse in and by itself cannot be made in the Supreme Court as this Act is a Parish Court Act”

[16] Section 3 of the MA permits the Resident Magistrate’s Court (now the Parish Court) and the Family Court to hear applications. It does not exclude the Supreme Court which is a superior Court of Record (Judicature (Supreme Court) Act). This is seen from the fact that ‘may’ is used, that is, ‘....a person may apply to the Resident Magistrate’s Court...or.....to the Family Court...’ This should be contrasted with the Matrimonial Causes Act which makes it clear that only the Supreme Court can hear matters under the said Act as it states at section 3:

“The Supreme Court (hereinafter referred to as the Court) shall have and exercise, subject to the provisions of this Act, jurisdiction and power in relation to matrimonial causes instituted or continued under this Act”

[17] Furthermore, in the definition section of the MA, ‘Court’ is said to be:

“Resident Magistrate, Judge or court referred to in section 3;”

[18] When read in conjunction with relevant sections, for example section 6(2), it is clear that Supreme Court is authorized to grant orders under the MA:

“An application for maintenance upon the termination of cohabitation may be made within twelve months after such termination, and the Court may make a maintenance order in accordance with Part VI in respect of the application.”

[19] I will now address the substantive issues.

[20] The primary issues under section 6 of the MA, is explained in paragraph 52 of **Suzette Ann Marie Hugh Sam v Quentin Chin Chong Hugh Sam** [2015] JMMD- FD 1 (Hugh Sam), as:

“It must be demonstrated by evidence, firstly that the spouse who is tasked with the responsibility of spousal maintenance has the capability to fulfil that role. Secondly, the claimed maintenance must be demonstrably necessary. Thirdly, the needs being considered must meet the bar of reasonableness. Finally, the evidence must show that it is impractical for the spouse to wholly or partially satisfy those needs”.

[21] This means that there is no entitlement (automatic right) to maintenance. There is now a marked difference between cases heard before the passing of the MA and those heard under the Act. The court is no longer:

(1) looking at whether one is in penury and the other lives in luxury; and

(2) considering available resources as was applicable in **Hewin Wesley Kerr v Andrean Dejoy Kerr 2002FDK00011** and **Mary Salome Morrison v Errol York St. Aubyn Morrison 1999FDM00201**.

Rather, the duty is circumscribed by capability, necessity, reasonability and practicality as decided in the case of **Hugh Sam**, supra.

- [22] The issue of whether it is impractical for the spouse to wholly or partially satisfy his or her needs is a condition precedent to making a maintenance order. It, therefore, serves as a 'threshold' that must be crossed even if other factors are satisfied (see **Hugh Sam; Alfred Robb v Beverley Robb D01148/2005; Leonie Agatha Hutchinson v Johnette George Hutchinson** [2018] JMSC Civ 28). The court has a wide discretion in considering the entire circumstances of the case as justice requires. These circumstances include those expressed in section 14(4) and 5(2) of the Maintenance Act.
- [23] If the threshold is crossed, then the court will consider the amount and time for payment. Several factors are then to be considered. Section 14(4) and section 5 of MA serve as relevant guides to this end.
- [24] The parties are expected to be forthright in producing evidence of income and expenditure. If not, the court will seek to obtain information by using its powers to have the parties disclose documents, answer questionnaires, issue witness summons or produce documents (**Eutetra Bromfield (Appellant) v Vincent Bromfield (Respondent) (Jamaica)**[2015] UKPC 19). If not, the court may assess a person's standard of living as a guide to his level of income (**Brett v Brett** [1969] 1 All ER 1007 as accepted in **Hugh Sam, supra**).

ANALYSIS

Issue #1: Whether the respondent can afford to maintain the applicant

- [25] The respondent's Affidavit of Disclosure filed December 4, 2020 shows an income of \$832,263. Expenses are declared as \$591, 500. This leaves a balance of \$240,763.
- [26] A number of expenditures outlined are at best questionable; however, I will leave such an issue for the substantive hearing fixed for May 2021. It is unnecessary to

ask for further details at this time. In any event, I find that based on the overall income and assets disclosed, the respondent has the capacity and will be able to find the means to afford sums should the court find that the applicant succeeds on other issues.

Issue #2: Whether maintenance claimed by the applicant is necessary

[27] The applicant claims \$300,000 on the basis of the following expenses:

Affidavit Filed November 13, 2020

(a)	Light Bill	\$ 46,000.00
(b)	Water Bill	\$ 8,3000.00
(c)	Housekeepers	\$100,000.00
(d)	Family home maintenance	\$ 58,000.00
(e)	Groceries	\$ 50,000.00
(f)	Transportation	\$ 18,000.00
	Total	\$280,300.00

Affidavit Filed December 15, 2020

(a)	Light Bill	\$ 46,000.00
(b)	Water Bill	\$ 8,3000.00
(c)	Housekeepers	\$100,000.00
(d)	Family home maintenance	\$ 58,000.00
(e)	Groceries	\$ 80,000.00

(f) Transportation	\$ 18,000.00
Total	\$310,300.00

[28] The applicant also mentions personal protective equipment and medical insurance in her affidavit filed February 5, 2020.

[29] The 'family home maintenance' was not adequately explained and as such I cannot find that as necessary. The other items I find are reasonably necessary for the household, well-being of her daughter and (in her capacity as a doctor) needed for the applicant to continue to work to provide for herself and her daughter.

Issue #3: Whether the applicant's needs are reasonable

[30] The applicant has not provided documentary proof for her claim for the light bill, housekeepers, groceries, and transportation. She has provided documentation for medical insurance and medical equipment.

[31] The court will examine the sums claimed for each item in order to determine whether they are reasonable:

(1) Light bill - \$46,000.00: Will accept part is also used by daughter. Not contested. Therefore, accepted as reasonable.

(2) Water bill - \$8,300.00: Will accept part is used by daughter. Bill provided and accepted as reasonable.

(3) Housekeeper - \$100,000.00: The respondent argues that only one housekeeper is necessary. I am of the view that, in the circumstances, two are necessary to give the applicant the opportunity to have more time to earn and still maintain the well-being of her daughter. This is a part of the standard of life to which she has become accustomed. Therefore, the sum is reasonable.

(4) Groceries - Initially stated as \$50,000.00 but in the applicant's affidavit filed on 15th December 2020, it is stated as \$80,000.00. I will consider the initial sum of \$50,000.00 and will accept that part is also used by her daughter. The Scotiabank credit card statement dated September 7, 2020 shows a figure closer to \$50,000.00 than \$80,000.00. This sum was not disputed. It is accepted as reasonable.

(5) Transportation- \$18,000.00: not contested therefore it can be seen as reasonable.

[32] I have also considered that the respondent is paying \$150,000.00 per month for child's maintenance. This sum can reasonably be subtracted from the sums quoted above. Furthermore, the applicant admitted in cross examination that the defendant does provide additional sums when required by the child. I, therefore, find that the remaining sum of \$72,300.00 (that is, excluding 'family home maintenance') is reasonable in the circumstances.

[33] Sufficient information, based on receipt and invoice, has not been provided in regard to medical equipment. Although not contested by the respondent, it is not clear that certain items are strictly needed due to covid and would fall in the category of personal protective equipment needed monthly: aspirer suction machine, micro ear fcps str serr, surgical forceps etc. As such, I will not consider them.

[34] Sufficient information was also not provided for stated 'miscellaneous expenses' claimed in the applicant's third affidavit filed 15th December 2020 for the sum of \$100,000.00. I, therefore, will not consider it.

[35] I am also unable to consider medical insurance as it is not clear how this is paid (\$102,553.81 whether per year or per month or per quarter) and if it was in fact paid.

[36] I acknowledge that section 5(2) (d) of the MA allows for consideration of:

...the spouse's needs, having regard to the accustomed standard of living during the marriage or cohabitation;

[37] I also noted the applicant's statement in paragraph 9 of the applicant's affidavit filed February 5, 2021:

"I also reiterate that my financial position, notwithstanding the Defendant's paying maintenance for our daughter, is still not sufficient and is far less to that to which I was accustomed when I had full financial and unquestionable support from the defendant"

[38] The applicant has not shown any other 'needs' particularly regarding her accustomed standard of living. There is also no information on the cost of her current studies. Without more, I have limited my assessment to expenses disclosed in affidavits and submission.

Issue #4: Whether it is impractical for the applicant to wholly or partially satisfy those needs

[39] I have noted that the income of the applicant seems variable. Initially, the sum of 337,107.33 was stated as a set monthly figure. In later affidavits, her net pay was shown to be \$380,768.69 or \$402,599.37. In cross examination, she stated that it depends on the hours worked. She could earn as low as \$100,000.00 or as high as \$400,000.00 or more. I have decided to confine my analysis to what was stated in the second affidavit filed 13th November 2020 and shown in later affidavits by her exhibited salary slips. Her income may be as low as \$337,107.33 and high of \$380,768.69 or \$402,599.37. I accept that MDLink is not currently a significant source of income. I also accept that the applicant's private practice at 4 locations has not been as fruitful although no documentation was provided to show income or expenditure from this endeavor.

[40] The applicant has not disclosed any mental or physical issues that has or will prevent her from continuing to be gainfully employed. She is a medical doctor and an ENT Specialist who has disclosed that she is continuously engaged in further education and has the capacity to earn far more than she earns now.

- [41]** The applicant has been gainfully employed from 2004. Although she is legally required to provide financially for her child, it seems that most of the responsibility rests on the respondent for the past 17 years. It is also noteworthy that the respondent is now legally responsible for the child's entire educational expenses as provided by the interim court order made on 15th October 2020.
- [42]** The Applicant has not shown that she incurred any debts or liabilities during the period she was expected to pay household expenses. She has also not shown that funds had been reallocated to meet her reasonable needs. There is no evidence of her being deprived of items that she had grown accustomed to during the relationship. I have observed from the credit card statements exhibited in affidavit filed 15th December 2020 that she is able to make payments to her credit cards in such sums as \$300,000.00, \$278,356.60 etc. It would appear that she has been able to satisfy her financial needs.
- [43]** It is noted that she has finished the educational course she had pursued whilst this application was filed. She has now commenced further studies to end in December 2021. Her having taken on this additional expense shows that she is capable of meeting her expenses.
- [44]** The applicant in the case at bar has only declared that she cannot adequately fulfil her financial obligations and that she is 'stymied in combatting or preparing myself at this time'. This, however, has not been proven by affidavits or in cross examination. The calculations show a surplus in disposable income. This is so despite no contribution from the respondent. This means expenses are adequately covered by her declared income. I have not seen proof of expense of \$544,000.00 as stated in paragraph 21.13 of the applicant's submissions. It could very well be that the respondent wishes to embarrass her financially; however, she has shown that she is well able to meet her expenses.

[45] I find, therefore, that it is practical for the applicant to wholly satisfy her reasonable needs in the interim. As such, an interim periodic payment is not appropriate at this time.

ORDERS

[46] Accordingly, I hereby order as follows:

1. The Claimant's notice of application for spousal maintenance filed on November 13, 2020 is refused
2. The Claimant, Khia Josina Duncan, is declared the spouse of the Defendant Stephen Steele
3. Cost to the Defendant to be agreed or taxed
4. The Claimant's attorney-at-Law to prepare, file and serve this order.