[2016] JMSC Civ. 217

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016 HCV 02428

BETWEEN	**VICTORIA MARIE MEEKS**	**CLAIMANT**
AND	**JEFFREY WILLIAM MEEKS**	**DEFENDANT**

IN CHAMBERS

Robert Collie instructed by Hussey Collie Attorneys-at-Law for the Claimant

Gordon Steer, Mrs. Judith Cooper-Bachelor and Mrs. Kaye-Anne Parke instructed by Chambers, Bunny & Steer Attorneys-at-Law for the Defendant

Heard: November 16, December 5, 2016

Preliminary Point - Sections 20, 22 of the Matrimonial Causes Act - Section 3 of the Maintenance Act - Jurisdiction - Application commenced by Fixed Date Claim Form - Whether an Application under the Matrimonial Causes Act can be brought by way of a Fixed Date Claim For - Application for Interim Maintenance Order - Power of the Court to make an Order for Child Maintenance under the Matrimonial Causes Act and under the Property (Rights of Spouses) Act.

CORAM: JACKSON-HAISLEY, J. (AG.)

PRELIMINARY POINT

[1] Counsel for the Respondent has made a preliminary objection on a point of law. This matter concerns an Application brought by way of a Fixed Date Claim Form (FDCF) filed June 13, 2016 pursuant to which the Claimant, Victoria Marie Meeks, seeks orders against the Defendant, Jeffrey William Meeks, for division

of property, spousal maintenance, child maintenance and custody of a relevant child. According to the FDCF these orders are sought pursuant to the Property (Rights of Spouses) Act (hereinafter PROSA) and the Matrimonial Causes Act (hereinafter MCA). The hearing of the FDCF is set for April 26 and 27th 2017. In the Affidavit in Support of the FDCF, the Claimant exhibits a copy of a Petition for Dissolution of Marriage filed by her in this Court on October 6, 2011. No decree nisi has yet been granted in respect of the Petition.

[2] On July 19, 2016 the Claimant now Applicant filed a Notice of Application for Court Orders pursuant to which she seeks interim orders for child maintenance, spousal maintenance, retro-active maintenance and cost against the Defendant now Respondent. It is that application that came before me for hearing on November 16, 2016. On that date Counsel for the Respondent argued a preliminary point that concerns the jurisdiction of this Court and so that has to be resolved before the Notice of Application for Court Orders can be heard. For the purposes of this ruling on the preliminary point it is not necessary to delve into the facts of the matter.

[3] Counsel for the Respondent has submitted that the Court has no jurisdiction to hear the application for an interim order for child maintenance because the substantive matter is not properly before the Court, it having been filed under the MCA under which proceedings are to be brought by way of Petition and not FDCF. Therefore, he submitted that there is no proper Claim before this Court under the MCA. Further, that although under section 23 of the MCA the Court has certain powers including the making of an Order as it thinks just in any proceedings under section 10 of the MCA or any proceedings for dissolution of marriage before, by or after the dissolution of marriage, the Order being sought for child maintenance cannot be considered on this Application because it is not properly grounded under the MCA.

[4] Counsel argued further that neither can the matter be properly brought under the Maintenance Act because jurisdiction under the Maintenance Act, in respect of a child, would only lie in the Parish Court or the Family Court. He relies on section

3(1) of the Maintenance Act which stipulates that a person may apply to the Parish Court or to the Family Court for a maintenance order. Further that the Court would have to consider whether or not the Claimant would be entitled to an order for child maintenance under section 3(2) of the Maintenance Act which empowers a Court hearing proceedings under PROSA to make a maintenance order, but only with respect to a spouse.

[5] He submitted further that Rule 8 of the Civil Procedure Rules (CPR) provides that an application of this nature must state under which Act or Legislation it is being brought. Further, that since the matter is not properly brought under the MCA, and since it cannot be brought in this Court under the Maintenance Act, the court has no jurisdiction to consider this application for interim orders for maintenance with respect to the child.

[6] The Applicant on the other hand argued that pursuant to Rule 8.1(4)(f) of the CPR any proceedings which before the CPR came into effect could have been brought by petition or originating summons, can now be brought by way of FDCF and so this is a non-issue. He submitted further that pursuant to section 3(2) of the Maintenance Act, there are no words that limit maintenance orders to only those for spousal maintenance. Further, that a parent has an obligation to maintain his/her minor child and based on the fact that the child is a minor, it would be unfair to exclude an order for her maintenance.

ISSUES

[7] This preliminary objection gives rise to three issues for my consideration. Firstly, whether the use of a FDCF is the appropriate way to bring the substantive application. Secondly, whether under the MCA this Court has jurisdiction to hear this application for child maintenance. Thirdly, whether under PROSA an order for child maintenance can be granted.

WHETHER THE USE OF THE FDCF IS APPROPRIATE

[8] Based on the arguments made, I have to consider what is the proper method of commencing a matter under the MCA. Under this Act the term "matrimonial causes" is defined to include proceedings between the parties in respect of maintenance of one of the parties and also maintenance of a relevant child. Under the CPR, pursuant to amendments made in 2006, there is a whole section entitled "Matrimonial Proceedings". Under Rule 76.4(1) there is a mandatory provision for proceedings for dissolution of marriage to be commenced by way of Petition. There is no such provision in respect of other proceedings under the MCA. In fact by way of Rule 76.4(15) the following is said:

> *"Nothing in these rules precludes the commencement of any matrimonial proceedings, other than proceedings for the dissolution of the marriage, nullity of marriage and presumption of death and dissolution of marriage, by fixed date claim form. (*Rule 8.1(4) (f) indicates, the procedure where an enactment specifies the originating process*)"*

[9] Counsel for the Applicant indicated that the FDCF was filed in reliance on Rule 8.1(4)f which provides that a FDCF must be used where by any enactment proceedings are required to be commenced by petition, originating summons or motion.

[10] The provisions of Rule 76.6 specifically mention applications for custody, maintenance, education or access to children or division of property, and set out how such an application can be made and are worthy of being quoted in full:

> *"Where in any petition or fixed date claim form a part of the relief claimed is custody, maintenance, education of or access to children or division of property, such relief may be granted upon an application for court orders.*

[11] In the Court of Appeal decision of **Gregory Oneil Gordon v Pauline Victoria Gordon** [2012] JMCA Civ. 51, a similar issue came up for consideration, although the converse argument was made that a Notice of Application for Court Orders was not the proper way to make such an Application. In reliance on rules 76.4(5) and 76.6(1) of the Civil Procedure Rules 2002 submissions were made to the effect that it is only where a petition or fixed date claim form includes the

relevant form of relief that that relief may be granted upon an application for court orders. In response it was submitted that the established method of bringing those matters to the court's attention is by way of an application for court orders. Brooks J.A. pointed out that neither the Matrimonial Causes Act nor the CPR stipulates any distinct procedure for that consideration and that Rules 76.4(5) and 76.6(1) are the provisions which deal with the issues regarding children and the issues regarding property. He opined that these provision do not discriminate between the types of relief and reiterated that the objective is to deal with cases in a manner which saves expense and ensures that they are dealt with expeditiously and fairly (rule 1.1(2)(c)).

[12] There is in this case a Petition for Dissolution of Marriage before this Court and so based on Rule 76.6 such an application may be granted by way of an application for court orders. The use of the word "may" here is instructive. It does suggest that this is not mandatory, in other words the Applicant can choose to do so. Based on the provisions of Rules 76.4(15) and 76.6(1) when read together, an applicant has two options on how to commence an application for custody, maintenance or division of property. For tactical reasons a party may choose to commence an entirely new action by way of FDCF as opposed to applying by way of a Notice of Application for Court Orders on the existing Petition. The Applicant herein has chosen to go by way of FDCF. Pursuant to Rule 8.1(4)f she is therefore not precluded from making an Application under the MCA by way of a FDCF. I find that this matter is properly before me.

WHETHER UNDER TO THE MCA THIS COURT HAS JURISDICTION TO HEAR THIS APPLICATION FOR AN INTERIM ORDER FOR CHILD MAINTENANCE

[13] In the FDCF the Applicant indicates that the Orders are being sought pursuant to both the MCA and PROSA. According to the Respondent, in any event there is no matter for child maintenance properly before this Court because the FDCF has failed to comply with Rule 8 which makes provisions for what is to be

contained in a FDCF. Rule 8.8(c) of the CPR specifically provides that where a Claim is being made under an enactment the Claim Form must state what the enactment is.

[14] Although the Application will entail a consideration of the factors outlined in the Maintenance Act, and although this is specifically mentioned in the Notice of Application for Court Orders, there is no reference to the Maintenance Act in the FDCF. Under section 20(1) of the MCA the Court has the power to make certain financial provisions. Section 20(1) provides that on any decree for dissolution of marriage, the Court may, if it thinks fit make certain financial provisions as follows:

> *"(a) order a spouse (hereinafter in this section referred to as the contributing spouse) to secure to the other spouse (hereinafter in this section referred to as the dependant spouse), to the satisfaction of the Court-*
>
> *(i) such gross sum of money; or*
>
> *(ii) such annual sum of money for any term not exceeding the life of the dependant spouse, as having regard to the means of the dependant spouse, the ability of the contributing spouse and to all the circumstances of the case, the Court thinks reasonable;*

Section 22 provides as follows:

> *"When a petition for dissolution or nullity of marriage has been presented, proceedings under section 20 or section 23(2) may, subject to and in accordance with rules of court, be commenced at any time after the presentation of the petition:*
>
> *Provided that no order under any of the sections referred to in this section (other than an interim order for the payment of money under section 20) shall be made unless and until a decree nisi has been pronounced, and no such order, save in so far as it relates to the preparation, execution, or approval of a deed or instrument, and no settlement made in pursuance of any such order, shall take effect unless and until the decree is made absolute."*

[15] Based on the provisions of sections 20(1) and 22 no Order can be made for maintenance, save for an interim one, before the grant of a decree nisi. There has been no decree nisi granted in the instant case and so if the matter were brought pursuant only to the MCA, then no final Order could be made.

[16] Support for this position is gleaned from the judgment of E. Brown J. in **Suzette Ann Marie Hugh Sam v Quentin Chin Chong Hugh Sam** [2015] JMMD:FD 1. where he pronounced:

> *"The court's power to make financial provisions on any decree for dissolution of marriage is derived from section 20 of the Matrimonial Clauses Act (MCA). Under section 22 of the MCA proceedings under section 20 may be commenced at any time after the filing of the petition for dissolution of marriage. However, under the proviso to section 22 only an interim order may be made, prior to the pronouncement of the decree nisi. No decree nisi has been pronounced in the instant case. Therefore, I am in agreement with learned counsel for the contributing spouse that the court is presently confined to make only an interim order for maintenance."*

[17] Similarly in the judgment of Fraser J in **Ivor Allen Francis v Pearl Francis**, [2013] JMSC Civ. 25, submissions were advanced that the court had no jurisdiction to entertain an application which initially indicated that the application was being made under the Maintenance Act instead of the Matrimonial Causes Act. In subsequent submissions the Applicant's counsel indicated that the application was actually being made pursuant to the Matrimonial Causes Act as that Act was being used to dissolve the marriage and that the factors for consideration were outlined in the Maintenance Act. The Court ruled that the application could proceed by virtue of section 23 (1) (a) of the Matrimonial Causes Act, as proceedings were in being for the dissolution of the marriage between the parties and that Section 23 (2) empowers the court to make the maintenance order sought, which if granted should be made in accordance with the factors outlined in the Maintenance Act.

[18] The application herein is pursuant to both PROSA and the MCA. Even if it were only brought pursuant to the MCA, it is clear that I would not be precluded from making an interim order for maintenance.

WHETHER UNDER PROSA AN ORDER FOR CHILD MAINTENANCE CAN BE GRANTED

[19] This brings me to the third issue raised on this preliminary point. This question would only be relevant if I am found to be wrong on the preceding questions. The issue is whether or not under PROSA an order can be made for the maintenance of a child. What distinguishes applications under PROSA from applications under the MCA is the widening of the powers of the court to make final orders not only upon the grant of a decree nisi but also where the parties have separated and there is no reasonable likelihood of reconciliation. In order for this application to be properly grounded it must be made within twelve months of separation, termination of cohabitation or dissolution of marriage. That issue is however not before me for consideration.

[20] Under section 3(1) of the Maintenance Act a person may apply to a Parish Court or a Family Court for a maintenance order. It is only when the application is coupled with an application under PROSA that a Judge of the Supreme Court has the power to hear an application for maintenance. This is made clear by the provisions of section 3(2) of the Maintenance Act. If there was any doubt in that regard the judgment of McDonald Bishop in **Sharon Surdeen v John Surdeen** 2005/HCV-5509 (unreported) clarifies this position.

[21] If the arguments of the Respondent that section 3(2) only contemplates an order for spousal maintenance were correct, it would mean that a Court considering maintenance in respect of a spouse may not have the benefit of knowing what maintenance a court would order for the child. It would also mean that an applicant may have to approach two different courts to get full relief. That would be a rather inefficient way of dealing with such matters and would not be in keeping with the overriding objective of the CPR.

[22] Moreover an interpretation of section 3(2) does not support that position. An examination of that provision is essential. It provides as follows:

> *"In any case where an application is made for the division of property under the Property (Rights of Spouses) Act, the Court hearing the proceedings under the Property (Rights of Spouses) Act may make a maintenance order in accordance with the provisions of this Act."*

[23] Under section 2 of the said Act a maintenance order is defined as an order made under this Act for the maintenance of a dependant. A dependant is defined as a person to whom another person has an obligation to provide support under this Act. Section 8(1) provides that subject to subsection (2), every parent has an obligation to the extent that the parent is capable of doing so to maintain the parent's unmarried child who is a minor. A minor as defined in section 2 is a person under the age of eighteen years.

[24] On a strict interpretation of section 3(2) of the Maintenance Act, there is therefore nothing which prevents the making of an order for maintenance for a child under an application under PROSA. If the legislators had intended for children to be excluded they would have said so expressly. When a marriage breaks down it is in the interest of the parties to secure a clean break by settling all outstanding issues such as division of property, custody of children, spousal maintenance and child maintenance in the most efficient way. In fact before a decree nisi can be granted the Court must certify that in respect of children, arrangements for their care, upbringing and of course maintenance are the best that can be devised in all the circumstances. So important is maintenance that although it was not originally included in Part 76 of the CPR, the Amendments to Part 76 in 2015 made it mandatory to certify arrangements in respect of maintenance on the dissolution of a marriage.

[25] In the absence of any express provision restricting the granting of a maintenance order for a child under section 3(2) of the Maintenance Act I am of the view that it applies equally to children as it does to spouses. Moreover the inclusion of both orders for spousal maintenance and child maintenance would also be in keeping with the overriding objective of the CPR which is expressed in Rule 1.1(2)(c) which is to ensure that matters are dealt with in a manner which saves expense and ensures that matters are dealt with expeditiously. Based on the forgoing, I

find that this Court has jurisdiction to hear the Notice of Application for Court Orders.