



[2021] JMSC Civ 17

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018HCV01997

BETWEEN

S.B.W

CLAIMANT

AND

V.W

DEFENDANT

IN CHAMBERS

Mrs. Judith Cooper-Batchelor instructed by Chambers, Bunny and Steer for the Claimant

Miss Kayann Balli instructed by Norman Manley Law School Legal Aid Clinic for the Defendant

November 10 and 11, 2020 and February 5, 2021

Custody, care and control- Joint custody- Parents must be able to communicate and co-operate in the upbringing of the child- Welfare of the child and what is in the best interest of the child is of paramount importance- Considering the wishes of the child- - Joint obligation to maintain child- Spousal maintenance - Clean break- Lump sum payment

WOLFE-REECE, J.

BACKGROUND TO THE CLAIM

[1] The parties to this claim are the parents of a thirteen (13) year old son. They are married but have been separated since 2017; they however have been engaged in acrimonious relations regarding the upbringing and maintenance of their child. The Claimant is seeking sole custody and care and control of the child as well as spousal maintenance. The husband strongly challenges this. It is trite law that each case will turn on its own circumstances and this Court will consider same in resolving the

issues which arise herein. In an effort to protect the child, he will be referred to as NW.

THE CLAIM

[2] On October 11, 2018, the Claimant filed an amended fixed date claim form seeking the following Orders, that:

- (1) The care and control of NW born on the 11th day of June 2007 be granted to the Claimant;
- (2) There be sole custody of NW awarded to the Claimant;
- (3) In the interim the Claimant be awarded residential access to NW;
- (4) The Defendant pay reasonable maintenance for NW;
- (5) The Defendant pay reasonable wife maintenance for the Claimant;
- (6) The Defendant be restrained from any way whatsoever interfering with the Defendant 's occupation of the matrimonial home known as 11-13 Kingsway Manor Kingston 10 in the parish of St. Andrew;
- (7) The Defendant pay all costs with respect to the Claimant's occupation of the said matrimonial home;
- (8) Further or other relief

[3] This claim was supported by affidavits filed by the Claimant on the 13th day of July 2018 and the 22nd day of January 2019. The Defendant also filed an affidavit in response on the latter date. On the 23rd day of January 2019, the Court made interim orders that the Claimant was to have access to NW on Sundays and Dr. Kai Morgan (hereinafter referred to as Dr. Morgan) was to provide a report with respect to NW and the relationship with his parents. On the 27th day of May and 9th day of July, 2019, the Claimant filed two more affidavits and the Defendant filed his second affidavit on the 20th day of November, 2019.

[4] The parties were also ordered to attend parental counselling commencing January, 2020. The matter came on for trial on the 10th-11th of November, 2020. Dr. Morgan's report dated May 6, 2019 is also before the Court to assist in the determination of the issues.

ISSUES:

[5] The following issues arise for determination:

- (1) Whether the Claimant is to be granted sole custody and/ or care and control of NW?
- (2) Whether an order for maintenance for NW should be made? and
- (3) Whether the Defendant is to pay to the Claimant spousal maintenance?

LEGISLATION

[6] There are three (3) primary pieces of legislation which arise for the Court's consideration in resolving the issues before it; they are:

- (1) The **Children (Guardianship and Custody) Act** (hereinafter referred to as **CGCA**);
- (2) The **Matrimonial Causes Act** (hereinafter referred to as **MCA**); and
- (3) The **Maintenance Act** (hereinafter referred to as the **MA**).

[7] This Court will address the issues under the following sub-headings: -

- (1) Custody;
- (2) Child maintenance; and
- (3) Spousal Maintenance

Custody:

Issue No. 1- Whether the Claimant is to be granted sole custody and/ or care and control of NW?

Submissions:

[8] The Claimant made the following submissions, that:

- (1) The welfare and best interest of NW will be best served with custody, care and control being returned to and vested in the Claimant and thus she seeks an Order for custody in accordance with s. 7 of the **CGCA** and s. 23 of the **MCA**;
- (2) The Defendant has been contemptuous of Orders of the Court to grant access to NW to the Claimant;
- (3) The demands of the Defendant's career and professional responsibilities are time consuming and leave little time to be present in NW's life and to provide the added support he needs. The Court is asked to take note of the reported irregularity of school attendance as well as reports of NW sleeping in class. Conversely, the Claimant is not currently employed and has the time and the motivation to devote herself to NW's care, routine and oversight;
- (4) The Court is asked to note that it was on the Claimant's initiative that NW become legally a child of the family and it was her who for most of NW's life up to December 2017, provided complete parental support, nurturing and guidance. She has provided extensive and detailed evidence of the type of enrichment and other activities in which she frequently engaged with NW when he lived with her as well as her efforts in helping him with school work.

- (5) She further asserted that it was through her keen observation that NW was tested and arrangements made to identify a specialist who could provide the support he needed. Additionally, she is an experienced teacher who has the necessary skill sets and training to provide daily encouragement and oversight of NW's academic development which the Defendant is either unable or unwilling to provide;
- (6) The abrupt upheaval of NW in 2017 by removing him from the only home he knew, a change of school and limited contact with his mother was a major disruption in the child's life and is the primary cause of his current behavioural, emotional and academic challenges as evidenced by the psychological reports. Further, by all indications NW was developing well up to December 2017;
- (7) The Court is asked to find therefore that NW was in a stable nurturing and healthy environment with the Claimant up to the time of disruption in 2017 and that his new environment with the Defendant has resulted in the deterioration of his behavioural, developmental and academic performance. It is in his best interests that he be returned to that environment with the Claimant where his needs can be adequately addressed and support provided; and
- (8) The Court is asked to find that the Claimant is best able to attend to NW's welfare and it is in his best interest to grant custody, care and control to the Claimant with liberal access to the Defendant.

[9] The Defendant made the following submissions:

- (1) That the Court is empowered to make such Order as it deems fit with regard to the custody of any relevant child by virtue of s. 7 of the **CGCA** together with s. 23 of the **MCA**. This power however is qualified by s. 18 of the **CGCA** which requires the Court to have regard to the welfare of the said child as the first and paramount consideration in making such an Order and establishes equality between the applications of either parent of the child.

- (2) The Court can only rule based on evidence that is properly before it. The Defendant contends Claimant's affidavit is rife with hearsay and in so far as those passages are concerned, the Court should not consider such assertions in its deliberation and determination of these proceedings;
- (3) That NW's relationship with the Claimant is broken. Each party blames the other and there is a detailed history of the relationship. The most important consideration at this juncture is NW's current situation and his welfare moving forward. The Claimant's request through her application for an Order for care and control of NW does not take into account the child's best interest, but is plagued by her own personal desires regardless of the possible impact on the child;
- (4) The Claimant has not set out, to any reasonable degree, the arrangements that she would have for NW should she be granted custody;
- (5) That the psychologist report made by examiners Kai A.D. Morgan and Verol Billett of K.A.D. Morgan & Associates. This unbiased review of the child's mental stability and recommendations for improvement ought to heavily guide the Court in adjudicating this matter. By the assessment and findings of the psychologists, it is obvious that the relationship between the child and the Claimant is strained and possible alteration of his current living situation could prove traumatic. The Court is asked to accept the findings of the psychologists named above.
- (6) It is not disputed that there is an Order for access and NW has not seen the Claimant as stipulated in the Court Order. This Court is asked to take into consideration NW's age (13 years old) and the report of the psychologist. The Court is also asked to consider and find that NW and the Claimant make their own arrangements for visitation and that the Defendant is in no way restricting access to the Claimant. NW is old enough to make arrangements for visitation

with the Claimant. In fact, he has been doing so and the Court is asked to consider this;

- (7) The Court is asked to consider the attentiveness of the Defendant as has been acknowledged by the psychologists in their report, not only at the sessions with the child, but his vigilance in noting the child's academic and behavioural challenges observed by the child's teachers, that was not fully appreciated by the Claimant;
- (8) The Court is asked to appreciate the Claimant's financial position. Though she is highly qualified and able-bodied, she has stated that she faces financial difficulties for whatever reasons she has failed to substantiate. How then will she be able to provide a stable home for the relevant child? Conversely, the Defendant, is in a position to financially support NW and provide him with a stable environment and has done so without the assistance of the Claimant;
- (9) That the Court should find that an Order for Joint Custody is inappropriate based on the acrimony that exists between the parents.

Summary of Claimant's Evidence:

[10] In determining this issue, only the evidence that is material to the resolution of same will be assessed. According to the Claimant since 2007 when NW became a part of the family she remained at home for two years caring for and nurturing him. They had a helper who assisted her but she was his primary care giver. She primarily took him to and from school and suspecting that he had learning challenges she decided to have him tested. She further added that she supervised his homework and read to him nightly, facilitated playdates, played games together and taught him how to ride a bicycle, play football and cricket amongst others. She said that she also took him to varied places for recreational activities and they also attended church and Sunday school regularly.

- [11] She contended that as time continued she found herself operating more as a single mother to NW. She worked as a Realtor and it became customary for her to take NW with her on her real estate appointments in the evenings when the housekeeper left or on weekends. During this time, she maintained that the Defendant's time for family remained limited. She and NW complained about this and eventually they began attending counselling sessions at church but many times the Defendant would not make follow up appointments as he said he was too busy. She also took NW to counselling elsewhere.
- [12] She opined that the Defendant undermined her authority with NW and it is this act by the Defendant in addition to the disrespect and belittling of the Claimant in front of NW that led to NW becoming emboldened and out rightly disrespecting the Claimant. Following from this, NW has refused to listen to her and his education began to suffer. At a meeting between the parties mediated by a family friend the Defendant admitted that NW was better off with her and he would be in a more structured environment. She said she and NW were constant companions but that he missed the Defendant very much and wanted to have a closer relationship with him.
- [13] Since January 2018, the Defendant has taken control of NW but he has complained that at times he is lonely and sad and for the most part he is at home with the helper. He also says he is bored, has no friends in Portmore (where he resided at the time) and no one to play with except the Defendant who infrequently plays football with him. The Defendant's mother is not in good health stays with NW but is not in a position to give him a great deal of attention. At present she is unemployed and has considerable time and would like to spend some with NW. She says that NW's academic performance has deteriorated with poor attendance; however, she does agree that his conduct and work for the last term of Grade 6 has improved. She explained that this has resulted from the special attention and circumstances which followed her repeatedly requesting the school to remind the Defendant of NW's needs for extra classes. She maintained that his attendance was sporadic.

- [14] It is her view that NW's best interest is that she has custody of him and given the demands of the Defendant's practice and that he is often away from the house in which he has placed NW, NW should remain with her at the family home. She is prepared to give the Defendant generous access so he can see NW regularly. She denies being rough and harsh with the NW. She believes that NW is being deliberately alienated from her by the Defendant and brainwashed. She says she constantly reassures him that it is okay to love both parents.
- [15] She denies ever being abusive but noted that both parents discipline him in various ways. She asserts that this was planted in his head to create animosity between them and that NW would do anything to get to spend time with the Defendant and the Defendant has exploited this. She says NW is always well groomed, loves the outdoors and has expressed several times that he feels that he is living in prison since he spends most of his time locked up on the apartment playing video games. He also complains that his father does not spend enough time with him.
- [16] On cross examination, she denied that NW was reluctant to visit her but then explained that there was some reluctance when the Defendant initially took him away. She said the reluctance went away in November 2019 as NW indicated that he wanted his mother to be involved in his life

Summary of Defendant's Evidence

- [17] The Defendant said he saw to the needs of NW when he was at home; he took him to school, prepared breakfast every morning but the Claimant did the majority of the pickups after school. He accepted too that it was the Claimant who found the Specialist as NW had a reading challenge. He also agreed that she engaged in recreational activities with him and taught him how to ride a bicycle. He however said that the Claimant was rough with NW and constantly shouted and bullied him. He describes the Claimant's relationship with their son as one of love and hate. He explained that NW is usually happy to see her at first but this gives way to quarrelling and discord after a few minutes together.

- [18] He said the Claimant does not understand that she needs to give him time and space. He denied that the Claimant was ever a single parent and said that she rarely took NW with her to show properties. He disciplined NW in moderation but the Claimant would beat him with belt or slippers. He admitted that he gave him the numbers for Half Way Tree CIB and that he did tell him that he would rescue him as he continued to complain about the verbal and physical abuse by his mother.
- [19] NW refuses to go to the Claimant's home but he believes that he should visit his mother as it is in his interest that their relationship improve. He averred that he has made professional sacrifices for NW and has cut back on his practice so he can spend more time with him; he does not stay on the road late in the nights working as he did before. He denies putting anything into NW's head or exploiting him.
- [20] He denied that NW spent most of his time with the Claimant but accepted that she supervised the persons who came to the house to tutor NW and that she helped him with his homework. He agreed that his job took up a lot of time and that there were different types of disciplining methods for children including spanking and the taking away of toys or gadgets. He denied that it was because he was not at home, the Claimant was in charge of NW because according to him he was always there and he is flexible despite his busy practice.

Law & Analysis:

- [21] The CGCA grounds the principles to be considered by the Court when litigants approach the Court to determine issues of custody and access. In particular S. 7 (1) of the **CGCA** provides that:

*"The Court may, upon the application of the father or mother of a child, make such order as it may think fit regarding the custody of such child and the right of access thereto of either parent, **having regard to the welfare of the child, and to the conduct of the parents, and to the wishes as well of the mother as of the father,** and may alter, vary or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act; and in every case may make such order respecting costs as it may think just."* (emphasis mine)

[22] S. 18 further provides that:

“Where in any proceeding before any Court the custody or upbringing of a child or the administration of any property belonging to or held on trust for a child, or the application of the income thereof, is in question, the Court in deciding that question, shall regard the welfare of the child as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.”
(emphasis mine)

[23] In **Dennis Forsythe v Idealin Jones**, SCCA 49 of 1999, the Court of Appeal endorsed what the Court must focus on in determining the issue of custody in the following words:

*“Despite the wishes and desires of the parent, the **welfare of the child is the ‘first and paramount consideration’.***

This emphasis on the welfare of the child should therefore be the primary focus of a court considering a custody application. However, the court is required to take into consideration, in determining that primary question, the conduct of the parties in all the circumstances of the case. - see p.7 (emphasis mine)

A court which is considering the custody of the child, mindful that its welfare is of paramount importance must consider the child’s happiness, its moral and religious upbringing, the social and educational influences, its psychological and physical well-being and its physical and material surroundings, all of which go towards its true welfare. These considerations, although the primary ones, must also be considered along with the conduct of the parents as influencing factors in the life of the child and its welfare.... - See p. 8

[24] Each parent is asking for sole custody of NW. Neither party is seeking to deny the other access. The evidence is that each party believes that the other should be in NW’s life. It was noted in the case **LMP v MAJ** [2017] JMCA Civ 37 that often there is a belief that an order for sole custody gives the parent who is the beneficiary of the Order a right of control in determining serious issues regarding the child. The Courts posture is that a parent is always entitled to be consulted on any issue with

regard to his or her child. If there is disagreement with the custodial parent, then the he has a right to come before the Court to have the issue resolved.

[25] It is clear from the evidence that that the parties choose not to communicate with each other. Having observed both of them during trial I have found them to be both persons with strong personalities and whatever issues they have with each other has found its way in how they deal with raising NW. They seem to be unable to find a middle ground, even though I am of the view that they both want what is best for NW. It is my considered view that both parents may need to commit themselves to professional counselling to learn how to separate themselves from the hurt feelings and animosity they have for each other to be in a position to effectively co parent NW.

[26] The evidence reveals that even since the imposition of the Order for access to the Claimant, that the parties have left the decision of when and how the access is to be effected to the child. I have found this is so not because of the fact the child is old enough to make the arrangements but because that parties do not want to deal with each other. This in my view is very telling because the Court in determining the issue of custody has to address the ability of the parties to communicate and interact to make important decisions in relation to NW. The Court recognizes that even in the best of relationships there will be differences of opinion but the parties must be able to communicate come to decisions in the best interest of child.

[27] I find that both parents want to see NW be successful. I believe that having interviewed NW myself that the Claimant needs to focus on rebuilding the bonds that she once had with NW. I accept that the process has already begun. I find that the last five or so years has not been easy on NW. The relationship between his parents has affected him greatly and he seems to now be gaining some stability which hopefully will assist in overcoming his academic challenges.

[28] In **LMP v MAJ** [2017] JMCA Civ 37, Brooks JA (as he then was) offered significant guidance regarding custody issues, starting at paragraph 42 he stated:

[42] What may be distilled from the cases cited by counsel for the parties, is that each case is to be considered on its own set of circumstances. This is what was said in *George Kaplanis v Patricia Kaplanis* (2005), 249 DLR (4th) 620, a decision of the Court of Appeal for the province of Ontario, delivered on 17 September 2003. In that case, Weiler JA, in delivering the judgment of the Court of Appeal, said at paragraph [9]:

“Family law cases are, by their nature, fact-based and discretionary. It is unnecessary to address this court’s prior jurisprudence regarding the issue of joint custody to resolve the issue of custody in this appeal.”

*The principle that each case has to be assessed on its own facts, may reasonably be inferred from *Caffell v Caffell*, where Omerod LJ spoke to the circumstances of particular cases.*

[43] *Kaplanis v Kaplanis* also provides some guidance in respect of the matter of optimism and orders of joint custody. Weiler JA gave that guidance at paragraph [11] of the judgment of the court: **“The fact that one parent professes an inability to communicate with the other parent does not, in and of itself, mean that a joint custody order cannot be considered. On the other hand, hoping that communication between the parties will improve once the litigation is over does not provide a sufficient basis for the making of an order of joint custody. There must be some evidence before the court that, despite their differences, the parents are able to communicate effectively with one another. No matter how detailed the custody order that is made, gaps will inevitably occur, unexpected situations arise, and the changing developmental needs of a child must be addressed on an ongoing basis. When, as here, the child is so young that she can hardly communicate her developmental needs, communication is even more important.”** (Emphasis supplied)

[29] Having reviewed the evidence herein and taken into account the report/recommendations of Dr Morgan I believe that stability must be achieved in the life of NW. That coupled with the legal principles in this area, I am of the considered view that joint custody should be granted to the parents, care and control to the Defendant (father) with reasonable access to the Claimant (mother), as well as residential access to the Claimant (mother) on every other weekend (commencing Friday at 5 pm to Sunday 5 pm) and half of all major school holidays. I have come to this view bearing in mind the evidence given by the parties, despite their less than desirable attitude towards each other I am not of the view that the

evidence is such that they cannot communicate at all. I have considered NW's own wishes, the Orders of the Family Court and the psychological report. I find that NW is deeply loved by both parents; he is aware of this and he loves them also. I find that both parents have a vital role to play in his life and his development. They both have unique qualities that will influence and have a positive impact on the life of NW.

[30] I find that much of what has come out in the evidence has emerged from the fact that they are two separate personalities with two very different parenting styles. I do not find the Claimant to be an abusive parent, nor do I accept that she has been operating as a single parent. Given the nature of the relationship they shared prior to separation, it was simply an arrangement where the Defendant was the financial provider and this enabled the Claimant to spend more time focused on raising their son. As it is now, I am of the considered opinion that the Order for joint custody with care and control to the Defendant is in the best interest of NW.

Maintenance of NW

Evidence, Law & Analysis:

[31] The evidence herein reveals the following:

- (1) The Defendant has been the primary, if not sole financial provider for NW prior and post- separation;
- (2) The Claimant is unemployed, (besides selling roti which she does from her home); and
- (3) The Defendant has given unchallenged evidence that his income is \$850,000.00 monthly but his expenses exceed a \$1M monthly.
- (4) Both parties have put before this Court estimates of monthly expenditure

[32] S. 8 addresses the obligation of every parent, to the extent that they are able, to maintain their unmarried child who is a minor; or is in need of maintenance by reason of physical or mental infirmity or disability.

[33] S. 9 provides as follow-

(1) *A maintenance order for the support of a child-*

Shall apportion the obligation according to the capacities of the parents to provide support; and

May make an award for the payment of a sum of money for expenses in respect of the child's prenatal care and birth.

(2) *In considering the circumstances of a dependant who is a child, the Court shall have regard to the following matters in addition to the circumstances specified in section 14(4)-*

- a. That each parent has an obligation to provide support for the child;*
- b. The child's aptitude for, and reasonable prospects of, obtaining an education; and*
- c. The child's need for stable environment.*

(3) *The Court shall have regard to the matters set out in subsection (4) in considering whether any and what order should be made under this section for requiring any party to make any payment towards-*

- a. The payment of expenses in respect of the prenatal care and birth; or*
- b. The maintenance or education,*

of a child who has been accepted by that party as a child of the family.

(4) *The matters referred to in subsection (3) are-*

- a. The extent (if any) to which that party had, on or after such acceptance of the child, assumed responsibility for the child's maintenance; and*
- b. The liability of any person, other than the persons who cohabitated, to maintain the child.*

[34] It is clear from the law that both parents have a duty to maintain their child. They may not be able to pay equal amounts but they each should pay a sum commensurate with their ability. As previously noted, given the history of the nature of the parties' relationship, the Defendant was the primary financial provider.

however, the Court must assess the Claimant's to ability to assist in maintaining NW.

[35] The evidence is clear that the Claimant is currently unemployed. I am however of the view that the Claimant has not seriously sought employment since the breakdown of the marriage and she seems to be of the view that the status quo should remain. When the Claimant was questioned as to her attempts to gain employment since the separation she was very vague in her responses. I am not convinced that she has or is making genuine efforts to find work. I find that the Claimant is a qualified teacher, has experience and training as a realtor and has experience as a claims investigator. I find that this shows the industry of the Claimant mother and her ability to flourish in different fields of work. I can only conclude that she is more than capable of earning to assist in maintaining her child.

[36] She has worked part-time, I accept that based on the current situation and the Defendants earnings, which I believe were very conservatively stated, that the Claimant would not be able to equally contribute in this regard. I must note that the current climate of the pandemic would affect them both. I also take into account that the Defendant has another minor child to support. I take into account that NW has learning challenges which require him to be in a specialized schooling environment and have the assistance of tutors. Therefore, considering the of expenses attributed to NW by the Claimant. I am of the view that at this time the Claimant should pay \$40,000 monthly to the Defendant for the maintenance of NW which is to commence May 1, 2021. Additionally, the Defendant is bear all medical educational expenses for a period of two years from the date of this Order after which they are to be split equally between the parties.

Issue No. 3- Whether the Defendant is to pay to the Claimant spousal maintenance?

Spouse Maintenance:

Submissions:

[37] The Claimant submitted that:

- (1) The Claimant is still the Defendant's wife and the evidence is that it was the Defendant who dissuaded the Claimant from working once they adopted NW so that she would be able to provide undivided attention to their adopted son. Consequently, she became primarily a home-maker to attend to NW's needs. She was however previously employed as a Teacher, then a Statistician and has gone on to obtain her license as a Realtor. Despite the Defendant's refusal to permit her to operate evening and weekend classes at their former home, she has made and continues to make efforts towards financial independence and career progression;
- (2) She further asserts that she was the sole breadwinner up to a certain point in the relationship before the Defendant opened his own practice. She assisted the Defendant to pay off his student loan debt and also contributed to his law practice in various ways. While contributing her resources and time to the Defendant's practice, she took care of the household and NW'S primary caregiver. This allowed the Defendant the freedom to build his practice;
- (3) Conversely, the Defendant has done little to encourage and support the Claimant in her career development and income earning potential. The parties maintained joint accounts into which all of the Claimant's income and savings were contained. However, the Defendant by virtue of several transactions and withdrawals, has drained these joint accounts leaving her with nothing but a credit card. Further, without notice, consultation or warning, the Defendant has stopped paying the gardener and helper as well as the bills for the home and consequently the utilities were disconnected, forcing the Claimant to borrow money to pay these bills and buy food. Additionally, there is an outstanding sum of One Hundred and Forty-Six Thousand Dollars (\$146,000.00) for maintenance of the property which the Defendant has failed to contribute to and/ or pay.
- (4) Prior to the breakdown of the marriage, the parties lived very comfortable lives, taking vacations, enjoying road trips and going out to restaurants regularly.

The parties were able to afford luxury vehicles and were assisted in purchasing a BMW motor car by virtue of the Claimant's concessions;

- (5) The unilateral actions of the Defendant have caused a drastic diminution in the standard of living the Claimant has experienced. Without the support of the Defendant, the Claimant will find it extremely difficult to recover and re-enter and establish herself in her regular employment whilst continuing to care for NW;
- (6) Ss. 4-5 and 14 of the **MA** provide that spouses have a duty to maintain each other so far as each is able. The circumstances of this case are such that the Claimant has been and continues to be in a far worse position than when the parties met or while they cohabited. The Defendant on the other hand has benefitted greatly from the constant encouragement, financial contribution and support by the Claimant during the marriage and has now been raised in professional esteems and financial security so much so that the Defendant is more than capable of supporting his wife financially;
- (7) The Defendant has a thriving law practice and now has a new family complete with a younger sibling for NW;
- (8) Conversely, the Claimant has now been financially and emotionally reduced and the Claimant will indeed require support in order to get back on her feet and move on with her life. The Court is asked to find that this is a case in which the Claimant can and should benefit from the provision of spousal support and be granted an order for wife's maintenance in the sum of Three Hundred and Seventy Thousand, Four Hundred Dollars (\$370,400.00);
- (9) This has been a long marriage spanning some twenty-two (22) years during which time the parties built a life and created a family together. Though regrettable, when the decision to end a commitment of this nature, duration and sacrifice is made, the law should provide that the parties part on the best

terms as possible and in the best interest of the children in particular. The Orders sought herein aim to do just that; and

- (10) The current status quo between the parties is inequitable and is doing more harm than good to all concerned. The Court's intervention is required to restore equity between the parties. It is just and equitable and in the best interest of the relevant child for the Orders sought herein to be granted.

[38] The defendant submitted that:

- (1) The Order regarding the matrimonial home is to be taken into account when deciding whether the Court ought to grant spousal maintenance to the Claimant;
- (2) An Order for maintenance is not solely based on the means of the other party but must account for the expenses of the paying party and should be limited to enable the other party to reasonably meet their needs;
- (3) The Claimant's failure to meet her reasonable needs is not by reason of inability, but rather unwillingness and as such the defendant should not be made to carry such an exorbitant burden. The truth is the Claimant is simply unwilling to work or to seek employment by utilizing her varying qualifications. She can make a contribution to her own maintenance but instead wishes the Court to direct the Defendant to maintain her at an amount she is capable of earning on her own;
- (4) The Claimant is resourceful and has asserted that she assisted the Defendant in myriad ways. She has failed to provide evidence of any such assistance and the Defendant has vehemently denied these assertions; it is prayed that the Defendant's evidence be preferred in these proceedings;
- (5) The Court is asked to disregard the Claimant's assertions that the Defendant is the sole cause of her financial position when considering the Order for spousal maintenance;

- (6) The Court is asked to take judicial notice of the pandemic and the impact that it has had on the income of some professionals, namely attorneys who are sole practitioner. It is only reasonable that the income previously earned by the Defendant has been significantly reduced with no realistic timeline that such will be rectified. Considering this reduced earning capacity of the Defendant, the likely award the Claimant faces from the division of their matrimonial home, the Defendant's financial responsibility to NW and his child from another union and the Claimant's ability to earn, it is only fair and equitable that the Court deny the claim for spousal maintenance; and
- (7) Given that there are already restraining Orders made against both parties in the Family Court under the Domestic Violence Act, to request a restraining Order in these proceedings amounts to an abuse of process. In any event the Court may make an Order for the sale of the respective property which will render the Claimant's injunction redundant as her interest is in keeping the Defendant out of the family home. If there is no longer any family home, then the whole basis of the Claimant's application for an injunction fails.

Summary of Evidence:

[39] The Claimant has expressed that it was the Defendant who encouraged her to stay at home and take care of the family. This the Defendant denies. She also said that financially she contributed to his practice in the early years as well as she carried the financial burden of their union then. This he also denied. He did however agree that he received some clients from her and her contribution to the home remains unchallenged. It is equally clear that she taking on the full time responsibility of their son enabled him to have more time to build his practice. He did give evidence that now that he has NW, he does not spend late nights working as before.

Law & Analysis:

[40] S. 4 of the **MA** stipulates that:

“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 –

The circumstances specified in section 14 (4); and

Any other circumstances which, in the opinion of the Court, the justice of the case requires to be taken into account.”

[41] S. 5 (1) provides that 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.*

[42] Subs. 2 provides that:

“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 s. 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."*

[43] S. 14 (4) provides that-

- a) *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-*
- b) *The respondent's and the dependant's assets and means;*
- c) *The assets and means that the dependant and the respondent are likely to have in the future;*
- d) *The dependant's capacity to contribute to the dependant's own support;*
- e) *The capacity of the respondent to provide support;*
- f) *The mental and physical health and age of the dependant and the respondent and the capacity of each of them for appropriate gainful employment;*
- g) *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;*
- h) *Any legal obligation of the respondent or the dependant to provide support for another person;*
- i) *The desirability of the dependant or respondent staying at home to care for the child;*
- j) *Any contribution made by the dependant to the realization of the respondent's career potential;*
- k) *Any other legal right of the dependant to support other than out of public funds;*

- l) 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 adequate income;*
- m) The quality of the relationship between the dependant and respondent;*
- n) Any fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account.*

[44] The parties have been married for over twenty (20) years; this was by no means a marriage of short duration. The Claimant has no doubt also become accustomed to a certain kind of lifestyle. The end of their union will no doubt contain much adjustment for her. I am however mindful that although she is not currently working, she is employable and there is no evidence that she is suffering from any illness or infirmity. It would also appear that she is still within the working age group. I have also noted that she has also not sat idly by during the marriage, as she has acquired further skills and qualifications in varying areas.

[45] It is important to note that spousal maintenance is not perpetual and the Defendant does have a new family. I do find however that, however indirectly, she has contributed significantly to the Defendant's professional and personal advancement. In these circumstances and considering the factors listed above, I am of the view that given the nature of the parties relations, a clean break is what is best. I am mindful that ss. 15 allows for a lump sum payments and I am of the view that this is the best approach.

[46] In **Antoinett Nancy West Lehmann v Peter Lehmann** [2017] JMSC Civ 186, Shelly-Williams J posited that

"[42] The age of the Claimant was never divulged but she appears to be a much younger person than the Defendant. There was no evidence given as to why she is not currently working. There was no evidence that she was suffering from any illness or infirmity. No evidence was solicited as to her monthly bills and why she is in need of maintenance.

[43] Despite the lack of evidence, the Defendant had maintained the Claimant during the course of the marriage and the Claimant is currently

not working and has not worked for a number of years. In keeping with the principle of a clean break and taking all the issues into consideration I will award the sum of one million dollars to the Claimant as maintenance. The sum is to be divided into four tranches and paid over one-year period.”

- [47]** I am in agreement with the position that Shelly-Williams, J adopted. I find it to be an equitable approach and I adopt same. The Claimant has provided a list of her expenses and requested the sum of \$370,400 per month for maintenance. The Defendant’s evidence is that he earns approximately \$850,000.00 per month and has expenses of over million dollars. The Court has concluded he is asking the Court to conclude he cannot afford to pay spousal maintenance.
- [48]** I find that there was no physical proof to support this estimation of income. I conclude that it is a conservative estimate and I accept that his income will fluctuate from month to month. There was no evidence placed before the Court as to how this excess expenditure over income is dealt with. The only evidence of any outstanding sums relate directly to the matrimonial home and the maintenance of same. I also note that the Defendant refers to his earnings as 850,000 dollars. On assessment it is unclear whether this is what the practice earns or what he pays himself. I also note that his expenses include the expenses of running the office. It seems to the Court based on the life style the parties once enjoyed and their joint decision that the Claimant should have remained home for a considerable period of time that spousal maintenance would assist in her adjusting to what is now the new normal. I find that that the Defendant has the means to pay a reasonable sum based on the circumstances
- [49]** I hereby conclude that spousal maintenance should be paid and the Defendant has the means to pay same. I order a lump sum payment of two million dollars (\$2,000,000.00) to be paid to the Claimant as spousal maintenance. It is to be divided into four tranches and paid over a specified period.

DISPOSITION:

[50] The Court makes the following Orders:

- (1) The Claimant (mother) and Defendant (father) are granted joint custody, with the Defendant (father) having care and control of NW date of birth 11th June 2007 with reasonable access to the Claimant (mother), as well as the Claimant (mother) is to have residential access every other weekend (from Friday 6 pm to Sunday 6 pm) commencing February 12, 2021 and half of all major school holidays;
- (2) The Claimant (mother) is to pay maintenance of \$40,000.00 per month to the Defendant (father) for the minor child NW, date of birth 11th June 2007, until he attains 18 years of age. This is to commence of 1st May, 2021 and is payable the 1st day of each month thereafter.
- (3) The Defendant (father) is to solely bear all medical and educational expenses for a period of two (2) years from the date of this Order after which the medical and educational expenses for NW are to be split equally between the parties
- (4) The Defendant (husband) is to pay to the Claimant (wife) spousal maintenance. I order a lump sum payment of \$2M to the Claimant (wife). This sum is to be paid in four equal tranches as follows;
 - 30th April 2021,
 - 31st October 2021,
 - 31 March 2022, and
 - 30th September 2022
- (5) Liberty to apply
- (6) Each party is to bear their own costs.

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Hon. S. Wolfe-Reece
Pusine Judge