

GRENADA:

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 1 of 1977

BETWEEN: RAMONDE GITTENS - Appellant

and

BERNARD GITTENS - Respondent

Before: The Hon. Sir Maurice Davis, Q.C. - Chief Justice
The Honourable Mr. Justice Peterkin
The Honourable Mr. Justice Berridge (Acting)

Appearances: E. De Freitas for Appellant
instructed by J.H.V. Redhead.
D. Williams for Respondent.

1978, January 25, April 26

J U D G M E N T

BERRIDGE J.A. (AG)

This is an appeal by the wife against the decision of Nedd, J dated 6th June, 1977, varying a maintenance order made by the consent of the parties on 10th April, 1974, for the payment by the Respondent husband of \$240 per month for the maintenance and education of the child of the marriage, Amanda, and \$160.00 per month for the maintenance of the Appellant who was granted a divorce from the Respondent.

The Respondent fell into arrears with his payments, and on 19th July, 1976, he was ordered to pay off the arrears by equal monthly instalments of \$50.00. On 10th September, 1976, the Respondent filed an application for the variation of the maintenance order supported by affidavit evidence to which there was a reply

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by the Appellant also by affidavit. Neither side was cross-examined. On 6th June 1977, the Judge having heard argument from both sides, varied the order to one of \$170 per month for the maintenance and support of the child, and \$120 per month for the maintenance of the Appellant.

The grounds of appeal are,

1. The learned trial judge erred in law in that:-
 - (a) he did not deal adequately or at all with the fact that the order sought to be varied was a consent order
 - (b) he failed to appreciate that the burden of proof imposed on the respondent was to show a material change in his circumstances and that mere re-marriage and/or the assertion that he consented to the order in the belief that he would be able to comply with its financial provisions would be insufficient to ground an application for variation.
 - (c) he failed to deal with as he was bound to the fact that the predominant consideration is to place the petitioner and the child in the financial position they would have been in if the marriage had not broken down.
2. The learned trial judge did not deal with the question of income tax payable by the respondent on the amounts ordered to be paid to her nor did he take into account the fact that such payments are allowed as a deduction to the respondent.
3. The decision of the trial Judge is against the weight of evidence generally and in particular
 - (a) the evidence of the respondent's declining financial position (if any)
 - (b) the evidence of the respondent's borrowing powers or ability
 - (c) the evidence of the Respondent's ability to invest in a business.

In his affidavit the Respondent has given his practice as a private medical practitioner as the only source of his income, which he has put at not more than \$1,500 per month. The wife on the other hand has estimated the Respondent's average monthly income

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to be \$3,000 in 1972. At pages 39 and 40 of the record the Judge has stated,

"From the items of expenditure which he has to incur, details of which he set out in the affidavit filed on 10/9/76 in support his application, he is now spending \$23,227 and some cents per annum. The marriage a second time of the Respondent has increased his expenditure even though his second wife earns \$290 per month that is \$3,480 per annum out of which she pays according to paragraph six of his affidavit of 10/9/76 a total of \$553 per annum in respect of premiums of two insurance policies. The Respondent claims that following this marriage his expenditure in expense of groceries and transport has increased. He had not stated to what extent, taking into account his second wife's income, the second expenditure was increased. There are other respects in which information regarding the respondent's expenditure has been lacking."

And again,

"While this, put with other evidence may help to establish that the Respondent is not financially in a position to comply with the Order of 10th April 1974, the amount at which the Respondent's income may be assessed for income tax purposes may well be misleading for purposes of ascertaining his resources for the purposes of an order for periodical payments to a spouse and child."

Then, after setting out the income of the wife and that of the Respondent's second wife, the Judge concluded,

"Despite the paucity of facts from either party, it does appear that the Respondent's circumstances have altered and not for the better."

He then went on to vary the order.

While Counsel for the Respondent argued that the point in the case was whether or not there had been material or substantial change, and that the Judge did have evidence of such, Counsel for the Appellant submitted that at the end of the day the onus of proof still remained on the Respondent to prove this.

Unfortunately the report of the case of Lewis v Lewis, 1977 3 A.E.R., 992, was not available to the Judge hearing the application. This case has decided that on the true construction of Section 31

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of the Matrimonial Causes Act of 1973, which gives the Court power to vary or discharge a periodical payments order made in divorce proceedings, the court, in considering an application for variation is not confined to looking at changes in the means of the parties since the original order was made, but is required to look at the actual means of the parties as they stand at the time when the case is before it and to approach the matter as if it were fixing the payments de novo. This approach which unfortunately was not followed in the instant application becomes all the more necessary in my view when it is borne in mind that the first order was made by consent. In the light of this, and of the Judge's remarks concerning the paucity of evidence, I think it is true to say that the various assumptions of the position of the parties have never been properly canvassed.

Further to this, Ormrod J in the case mentioned above expressed the view that in order that the Court can know the precise impact on the net income of the parties where the quantum of a periodical payments order is in issue, it is important, particularly where children are concerned, that the position of each party after tax has been paid, on the various assumptions which are to be canvassed in the Court, be worked out in advance and be available to the Court.

For the reasons given I would allow this appeal. I would discharge the variation order and restore the original order made by consent.

(N.A. Berridge)
JUSTICE OF APPEAL (Acting)

I agree.

(N.A. Peterkin)
JUSTICE OF APPEAL

I also agree

(Sir Maurice Davis)
CHIEF JUSTICE