

THE EASTERN CARIBBEAN SUPREME COURT
SAINT KITTS AND NEVIS

THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHMT2011/0065

BETWEEN:

MARLENE CECELIA LIBURD

Applicant

And

STEVEN AEMILIUS LIBURD

Respondent

Appearances:

Mr Jason Hamilton of Hamilton and Co. for the Applicant
Ms Sherry-Ann Liburd of Gonsalves Hamel-Smith for the Respondent

2012: September 24;
2012: October 08;
2012: November 28.

DECISION

- [1] **THOMAS J (Ag):** On May 1st May 2012 the applicant, Marlene Decelia Liburd filed a summons seeking to be heard on an application for an order that the respondent, Steven Aemilius Liburd, pay, *inter alia*, maintenance for the children of the marriage in the respective sums of \$953.00 per month for Zoe Liburd and \$1258.00 per month for Israel Liburd. Also sought is a further order that the respondent continues to pay the children's school fees.

Affidavit in Support

- [2] In her affidavit in support of even date applicant outlines her business operations and the attendant debts incurred. It is also deposed that the respondent is a self-employed contractor for more than 20 years.

[3] With respect to the maintenance of the children the applicant contends that the respondent has failed to provide toward the maintenance of the two minor children since divorce proceedings were commenced in November 2011. It is further deposed that the respondent only purchases food when he is agonized to do so because the children complain about their hunger. Further still, that the utility bills are only paid after they go into arrears.

[4] At paragraph 14 of her said affidavit contends that in or about September 2010 at a meeting with lawyers for both sides it was agreed that the respondent would contribute \$500.00 weekly towards the maintenance.

Affidavit in Response

[5] In his affidavit in response the respondent deposes that he has always taken financial responsibility for the maintenance and upbringing of the children of the marriage and that presently he is solely responsible for a mortgage of \$6000.00 per month with respect to the former matrimonial home where he resides with the applicant and the two minors. It is further deposed by the respondent that he currently pays school fees of \$2300.00 for each of the two minor children.

[6] In so far as his employment is concerned, the respondent admits that he is a contractor but says that the construction sector has suffered a decline in the last 4 years which impacted negatively on his business. In this context the applicant deposes that his monthly household expenses amounts to EC\$12,806.00.

Supplemental Affidavit

[7] The applicant in a supplemental affidavit filed on 26th July, 2012, the applicant states that prior to the breakdown of the marriage the respondent did dutifully maintain the children of the marriage, but failed or refused so to do after the breakdown of the marriage.

[8] A number of matters are also further addressed by the applicant including: the residence of the respondent now being Wades Garden and he only visits the matrimonial home occasionally, the transfer and increase of the mortgage debt and the mortgage payments from \$300,000.00 and

\$3000.00, respectively; the cessation of money being made available to her for the payment of the utility bills; the part payment, late payment or non-payment of school fees; the contention that if \$2500.00 per month is spent on groceries it is not consumed at the matrimonial home; the nature of her business is such that it does not require the use of the limited groceries purchased by the respondent; and the non-use of the domestic supply of cooking gas.

- [9] At paragraphs 14 and 15 of her supplemental affidavit, the applicant lists a number of construction projects in which the respondent is involved. Also deposed to are various sources of rental income.

Affidavit in Reply to Supplemental Affidavit

- [10] In his supplemental affidavit in reply the respondent denies that he failed or refused to maintain the children of the marriage. Also denied is the applicant's contention that he no longer resides at the matrimonial home.

- [11] With respect to paragraphs 4 to 6 of the applicant's supplemental affidavit (which deals with the mortgage debt and mortgage payments) the respondent says that these matters "have absolutely no relevance to the applicant's application for maintenance of the children ...".

- [12] The change of mortgage from Bank of Nova Scotia to the Royal Bank of Canada is not denied. After addressing the quantum of the mortgage debt and the mortgage payment the respondent deals with the matter of non contribution to the mortgage payments by the applicant and the actual monthly payments.

- [13] The allegations in relation to construction projects and rental income are addressed thus:

- (1) I am not the contractor for three projects as alleged by the applicant in paragraph 14(a). My contract in relation to work that I was doing at Half Moon Bay was terminated in June 2012. I currently have one job to construct a residential building at West Farm, St. Kitts.
- (2) I do not collect rent of EC\$4,000.00 from the two apartments connected to the matrimonial home. The applicant is well aware that I collect a total of EC\$3200.00 for the two apartments when the two are rented.
- (3) In relation to the two apartments rented at Wades Garden, I do not collect EC\$3000.00 monthly as rent. However, I wish to indicate that I do not get any income whatsoever from Wades Garden. In fact at present, it is a liability to me. I pay a mortgage to FINCO in relation to the renovations done at Wades Garden in the sum of EC\$2700.00 monthly plus property insurance in the sum of approximately EC\$300.00 per month. FINCO has an

assignment of rents in relation to the property at Wades Garden so at present the rents are paid directly to FINCO.

- (4) In relation to the two self contained units mentioned in paragraph 14(e) only one unit is currently rented. Generally, the income from those two units goes directly to the previous owner of the property pursuant to an agreement that was made between myself and the previous owner. It was understood and agreed that consequent upon the transfer of legal ownership that the rental income generated from the self contained apartments would be paid to the previous owner until his death".
- [14] In cross-examination the applicant conceded that she does not contribute to the payment of the utilities at the matrimonial home, the mortgage or the children's school fees. According to her, these amounts involved are paid by the respondent.
- [15] With respect to insurance for the minor children of the marriage, the applicant admitted that she does not pay \$233.00 per month and she went on to testify that she was not aware that the respondent pays insurance for himself and the children.
- [16] In so far as her employment is concerned the applicant's testimony is that she operates a food cart 3 to 4 times per week and earns between \$225.00 and \$250 per week.
- [17] The respondent under cross-examination said that for most of the marriage he provided solely for the children.
- [18] With regard to his income, he said it was \$8000.00 per month when things are "smooth". And he admitted that in his affidavit he did not indicate income he receives from the rental of apartments.
- [19] In terms of money spent on food for the children Mr. Liburd maintained that he spent \$2500.00 per month but at times it can be \$500.00 if he has no work. According to him, he does not consult the respondent in this regard as most of the shopping is done by his daughter who has a list.
- [20] The respondent gave extensive evidence regarding income received from the rental of 4 apartments at Wades Garden and the manner in which it is disposed of.
- [21] In re-examination the respondent testified that there is nothing to stop him from supplying for the children which he did from the time they were born. He added that he will continue to do so "until they leave".

ISSUE

The issue for determination is whether the order sought by the applicant should be granted, and if so, on what terms?

Submissions by Applicant

[22] Submissions were filed on behalf of the applicant of which the following are considered to be essence thereof:

- “8. (1) The respondent has failed to provide reasonable maintenance and; where maintenance is provided, it is done in a sporadic and haphazard manner that is not under an order of the court.
12. The applicant admits that the respondent has provided maintenance since the breakdown of the marriage, the contention however is that given the irregularity of such maintenance which is paid in whatever at the whim and fancy of the children and the applicant in the absence of a court order which compels the respondent.
16. [T]he status quo ante the breakdown of the marriage should be of consideration before the court in determining the application.
The respondent was the primary financial provider while the marriage existed for both the applicant and the children of the marriage. It cannot now be in the respondent's mouth to say that both parties are equally responsible for the provision of maintenance in all the circumstances considering the function provided [by] the respondent during the cohabitation pursuant to section 13(4)(b) of the said Act”.

[23] The main submissions on behalf of the respondent are in these terms:

- “13. The Applicant also admitted that the Respondent provides lunch money for the children, purchases school supplies and pays for school fees on his own. She also admitted that she made no contribution to the purchase of the school supplies for the new term that commenced in September 2012. Therefore, in all material respects the Applicant has admitted that the Respondent maintains and supports the children of the marriage. He pays for clothing, shelter, utilities, food, school expenses. If the Respondent is already providing for the children, it begs the question as to what is the purpose of this application? Our submission is that the Applicant is not being honest when she stated in her affidavit that the Respondent has failed to maintain the children of the marriage. There is absolutely no reason why the Court should make an order upon the basis that the Respondent has failed to maintain the children of the marriage when all evidence points to the contrary.
21. Our submission is that the Applicant has not demonstrated that this is an appropriate case to make an order in the circumstances, our position is that the responsibility for maintenance of the children should rest on both parties. At present the Applicant is the person who is not contributing not the Respondent. The fact that the Respondent is the father and the Applicant is the mother does not mean that the Respondent should pay sums to the Applicant especially in light of the fact that both parents have care and control

of the children. However, if the Court is minded to make an order, the Court should look at the means of the parents as well as the needs of the children in order to determine an adequate sum payable for maintenance. The Applicant is a self employed Vendor. Her evidence is that she lives at the former matrimonial home rents free and that she does not pay any expenses in relation to said home. Further, the Applicant gave evidence that she makes minimum wage as income from her.

25. The Applicant claims EC\$1,453.00 for the two children of the marriage and does not exhibit any receipt to show the amounts she spent on food for the children. How can the Applicant take home EC\$250.00 per week and spend EC\$1,453 on food monthly? It does not add up. Our position is that the Applicant has exaggerated this amount for food. The Respondent's evidence is that he purchases food for the entire household of 5 persons in the sum of EC\$2,500.00 monthly.
26. It is our submission that if the court is minded to make any order for support, then the sum of EC\$1,000.00 per month is a reasonable estimate of the monthly expenses of the two children of the marriage".

Analysis

Jurisdiction

[24] Section 13 of the Divorce Act 2005 imbues the court with power to make orders for support. Of immediate relevance are subsections (1) and (4) which are in these terms:

- "1. A court of competent jurisdiction may, upon an application by either or both spouses make an order requiring one spouse to secure or pay such lump sum or periodic sum or such lump sum and periodic sums as the court think reasonable for the support of
 - (a) the other spouse;
 - (b) any or all children of the marriage;
 - (c) the other spouse and any or all children of the marriage.
4. The court shall, in making an order under this section, take into consideration the condition, means, needs and other circumstances of each spouse and of any child of the marriage for whom support is sought, including
 - (a) the length of time the spouses cohabited;
 - (b) the functions performed by the spouse during the cohabitation;
 - (c) any order, agreement or arrangement relating to support of the spouse or child.

[25] And in section 2(1) of the said Act "child of the marriage" means a child of two spouses or former spouse, who at the material time (1) is under the age of sixteen years.

[26] It is common ground that the applicant and the respondent are former spouses and Zoe Liburd and Israel Liburd are children of the marriage who are under 16 years of age. These facts give the court jurisdiction to make an order with respect the said children, if warranted.

- [27] Basically the applicant's case is that because of the sporadic nature of the respondent's maintenance seeks the following amounts of \$953.00 and \$1258.00 for the two minor children of the marriage. The monthly amounts are in relation food, transportation, extra-curricular activities and insurance in each case. Food attracts the highest amount being \$593.00 for Zoe Liburd and \$860.00 for Israel Liburd.
- [28] As noted before, the applicant admitted under cross-examination that she does not contribute to the utility bills or the children's school fees. However she did testify that she does provide school supplies for the children.
- [29] The applicant's main emphasis is on the respondent's income from his construction business and rental income from the rental of apartments. But the court accepts that the respondent is being truthful as to the decline of his income from this construction business and the manner in which this rental income is disposed of. On the whole the court accepts the respondent as a witness of the truth.
- [30] It is common ground that the responsibility for the maintenance of children of the marriage falls on both parents. However, in this regard the court must take into account; *inter alia*, the circumstances of each parent.
- [31] The respondent's circumstances are that she lives in the former matrimonial home rent free, she does not contribute to the payment of the utility bills, she does not contribute to the mortgage on the former matrimonial home which is \$6000.00 per month; she operates a food cart selling various foods in Basseterre from which she earns between \$225.00 to \$250.00 net weekly.
- [32] The applicant also by her evidence claims to spend various sums for the maintenance of the two children of the marriage. Expenses pleaded include food, transportation, extra-curricular activities and insurance. But on the whole the applicant under cross-examination admitted that she does not pay any insurance for the children and was aware that the respondent pays insurance for himself and his children. The matter of the absence of proof of expenditure does not help the applicant's case.
- [33] On the whole the applicant does not dispute the respondent's contribution to the maintenance of the two children. Her difficulty lies in the sporadic nature of whatever he does. This includes food,

school fees, and utility bills. But the respondent gave evidence to the effect while he may have had many construction projects in the past this is not so today and hence the decline in income and his monthly deficit in excess of \$4000.00. The court accepts the respondent's evidence in this regard.

[34] In any event, the respondent in re-examination re-affirmed his commitment to provide for the children until they leave.

Conclusion

[35] Having regard to this evidence of the maintenance provided by the respondent, which the court accepts, the court agrees with the submissions on behalf of the respondent that the applicant has not succeeded in showing that the respondent failed to provide maintenance for the children of the marriage.

ORDER

- [36]
1. The application filed on 1st May 2012 by the applicant is dismissed on the ground that the applicant has failed to show that the respondent did not provide maintenance for the children.
 2. The applicant must pay costs of \$1200.00 to the respondent.

Addendum

[37] At the time of the delivery of this decision it was indicated by the court that the typing of the manuscript was not started because of lack of secretarial support. Therefore, for the purposes of any further proceedings the operative date is 4th December 2012, rather than the date of 28th November, 2012.

Errol L Thomas
High Court Judge (Ag)