

IN COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Family Division

Claim No. 2024/FAM/div/00117

B E T W E E N:

J. G. N. L.

Petitioner

v

E. E. L. nee M.

Respondent

Before: The Honourable Justice C.V. Hope Strachan

Appearances: Marylee Braynen-Symonette for the Petitioner
Cyd Ferguson for the Respondent

Hearing Date: 7th March, 2025

*Matrimonial causes act, matrimonial causes rules, maintenance pending suit (MPS),
modification/variation of order, remission of arrears*

JUDGMENT

BACKGROUND FACTS

[1] The Petitioner (“the husband”) by Summons supported by Affidavit filed 28th May, 2024 has applied for modification of an Interim Order dated 16th April, 2024. The Interim Order for Maintenance Pending Suit (MPS) was granted at the instance of the Respondent (“the wife”) wherein the husband was ordered to pay to the wife the sum of \$3,467.00 per month on or before the 19th day of April, 2024 and on 19th of every month thereafter until further order. He was also

ordered inter alia to arrange the transfer of a bedroom furniture set, inclusive of a queen bed, nightstand and wardrobe to the wife. The Order was made under the auspices of a Certificate of Urgency filed by the wife on 8th April, 2024.

[2] The wife's application was made pursuant to Section 26 of the Matrimonial Causes Act for Maintenance Pending Suit by way of periodical payments. This Section specifically relates to the provision of maintenance prior to the grant of the Decree Nisi. The wife contends that the husband has failed to obey the Order dated 16th April, 2024 and as at the filing of the husband's application was in arrears \$21,336.00. He had also failed to cause the said bedroom set to be transferred to her. She filed an application on 29th July, 2024 seeking enforcement of the Court order.

[3] The wife's initial response to the modification application was to apply for a "Hodkinson Order" which ostensibly should be issued because the husband, being in arrears of those maintenance payments, was in contempt of Court and should not be heard until he had purged his contempt. This matter was thoroughly ventilated by the parties before this court and it was determined that the husband had not yet been adjudged to be in contempt of court. Such ruling was delivered on 14th March, 2025. Presently, the wife's response to the application has changed but only slightly. The wife still says that the modification application should be denied and that the husband should be ordered to pay the outstanding sums immediately and to return the items ordered by the court to her.

THE HUSBAND'S EVIDENCE IN SUPPORT OF HIS APPLICATION

[4] By his Affidavit filed 24th May, 2024 among other statements the husband makes the following assertions which are pertinent to this application;

- (i) At the hearing of the wife's application for Maintenance Pending Suit, he did not have sufficient time to provide the court with a full picture of his financial position. That he did the best he could by attempting to average his income.
- (ii) That he suffers from a condition known as ADHD which causes him not to have the financial aspects of his business in order.
- (iii) That to provide \$3,467.00 per month to the wife is financially prohibitive.
- (iv) That he was since assisted by his mother to compile a record of his income over the past year (which he exhibited) and they were able to determine that his income over the past year was **\$3,830.57**

- (v) With his parents' contribution to him of \$300.00 per week he has paid the wife \$500.00 per week. His parents have informed him that they cannot continue the financial assistance.
- (vi) That during the marriage the couple lived with his parents who also paid the utility bills but have said they can no longer continue. Now he will have to assume payment of his own utilities which he averages to cost \$1,623.00 per month and the upkeep of the home.
- (vii) That his other monthly expenses which includes pool maintenance, gardener, generator maintenance, food, medication, car insurance, gasoline and Amiyah's maintenance total \$3,000.00.
- (viii) That based on his salary of \$3,830.57 when compared to the sum ordered to be paid for MPS \$4,623.00, leaves him with only \$792.43 to manage his other financial obligations.
- (ix) That when they moved into his parent's house it was fully furnished with furniture belonging to his parents, including the Queen Bedroom set ordered to be transferred to the wife. Since the bedroom set does not belong to him he is unable to comply with that term of the order. Moreover, his parents are unwilling to part with the said bedroom set.
- (x) He says that he has been made aware of the possibility of imprisonment for disobedience of the court order.
- (xi) He is willing to discharge his financial obligation to his infant daughter but he can only do so within his means.
- (xii) That unless the Court modifies the order he fears the wife will seek to have him imprisoned.

[5] A joint affidavit of the father (G.L.) and mother (J.L.) of the husband was sworn to support his case. I have extracted and summarized that which is relevant for this application as follows;

- (i) The husband has been diagnosed as ADHD and a medical report is produced to verify.
- (ii) Husband acquired boat Captain's license with mother's help. She also assists him financially with employment /business pursuits.
- (iii) They are both semi-retired and live out of jurisdiction, so allowed husband and wife along with wife's mother to live rent free.

- (iv) They paid all utilities for the house except the gardener, pool and generator maintenance.
- (v) They never released beneficial interest in said house to husband. Also, they paid rent for an apartment in Fort Lauderdale.
- (vi) That since Court Order of 16th April, 2024, the husband was stressed, so they assisted him to pay by giving him \$300.00 per month.
- (vii) Can't continue to assist as semi-retired and in any event assistance was only to be given until husband could stand on his own.
- (ix) Queen Bedroom set was purchased from Wood You by them about Five (5) years before couple came to live with them.
- (x) Wife has crashed their vehicle loaned to her and did not repair damages of \$14,000.00

THE WIFE'S EVIDENCE IN SUPPORT OF HER POSITION

[6] By her Second Affidavit filed 29th July, 2024 the wife contends the following;

- (i) That since the making of the order dated 16th April, 2024 up to the date of her enforcement application, the husband had paid only \$4,000.00 of the \$13, 868.00. The sum of \$9,868.00 is therefore due and owing. The payments made were \$500.00 x 5 during April and May 2024 and the sum of \$200.00 x 6 during May, June and July 2024 and one payment of \$800.00 also during July 2024.
- (ii) That the husband failed to return to her a comprehensive list of items for their infant daughter Amiyah, certain jewelry belonging to her and her mother and other household items belonging to her.
- (iii) That at the time of the order she was unemployed and unable to make income to take care of their daughter. The husband was the primary financier during the marriage. At no time during the marriage did she ever pay a bill.
- (iv) That she is now disheartened that she is the primary caregiver for Amiyah while the husband is more than financially capable of maintaining their daughter.
- (v) The husband is now subjecting her to financial abuse, having suffered emotional, mental, physical and verbal abuse over the two (2) years of the marriage.
- (vi) That the husband has two (2) Scotiabank accounts, One (1) Royal Bank of Canada account. An Amex Platinum card and a TD Bank account in the United States. He

has ten (10) full time clients and a minimum of an additional five (5) seasonal clients. She knows this because she assisted with his billings during the marriage.

- (vii) That the husband accepts large amounts of cash from his boat Charter business, LMS Group Ltd. During the time, when he was involved in chartering the Midnight Express vessel named "Ellinor" with his American business partner, R. T. doing regular charters to Rose Island, Eleuthera and Exuma. The Vessels used by LMS are customized speed boats valued at \$275,000.00 to \$1,000,000.00.
- (viii) The last several months have been frustrating and she has had to seek funds to find an apartment and to purchase basic necessities to care their infant daughter. The husband's failure to return the listed items have made it more difficult for her.
- (ix) The husband has continued over the months to run charters and sponsor events with his company Lampkin Marine. He sponsored an event for \$3,000.00. He also had to pay to fuel the vessel while his daughter is not being financially maintained.
- (viii) That she knows the husbands' business is Vessel Management, Vessel Deliveries, Maintenance, and Repair Services and Captain Charter Services.
- (ix) That she asks that the court not vary the order but set a deadline for the outstanding arrears to be paid and to hold the husband in contempt.

[7] Affidavits were also sworn on behalf of the wife by her father S.M. and her mother B.C.M. only some of which is relevant to the subject application as follows.

EVIDENCE OF THE WIFE'S FATHER S.M.

- (i) Purchased all of the furnishings for his granddaughter's nursery.
- (ii) Sent his daughter a total of \$8,000.00 in 2024 to assist her with finding a new apartment.

EVIDENCE OF THE WIFES MOTHER

- (i) Her daughter, the wife left home in 2023.
- (ii) She overly extended herself financially during April 2023 and in March 2024.

THE ISSUES

- [8] (i) Whether the Order dated 16th April, 2024 should be modified/varied by reducing the monthly maintenance pending suit payable by the husband to the wife.
- (iii) Whether this application should be seen as an appeal.
- (iv) To what extent does the time between the date of the order and the date of the application for variation impact the courts determination of the subject application.

THE LAW

[9] The legislation referred to in this ruling is the Matrimonial Causes Act (“the act”) and the Matrimonial Cause Rules (“the rules”) buttressed by authorities.

DISCUSSION AND ANALYSIS

[10] The husband has correctly brought his application for modification/variation of the court order pursuant to Rule 44 of the Rules which provides:

s. 44; ‘A petitioner, or a respondent if he has entered an appearance to the petition, may at any time apply for a modification order.’

Additionally, under s. 35 of the Act the court also has jurisdiction to vary or discharge the order or to suspend any provision temporarily;

S.35 (1) of the Act Where the court has made an order to which this section applies, then, subject to the provisions of this section, the court shall have power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.

(2) This section applies to the following orders, that is to say —

(a) any order for maintenance pending suit and any interim order for maintenance;

(b) any periodical payments order;

[11] This is an MPS order made pursuant to s. 26 of the Act and is therefore subject to the s. 35 provisions allowing for modification and/or variation.

s. 26 of the Act: On a petition for divorce, nullity of marriage or judicial separation, the court may make an order for maintenance pending suit, that is to say, an order requiring either party to the marriage to make to the other such periodical payments for his or her maintenance and for such term, being a term beginning not earlier than the date of the

presentation of the petition and ending with the date of the determination of the suit, as the court thinks reasonable.

[12] I accept Counsel for the husband's submissions that s. 26 applications do not fall within the meaning of financial provision orders as defined by s. 25 of the Act which are specifically under s. 27 intended for the purposes of adjusting the financial position of the parties to a marriage and any children of the family." Rather it is meant to address the immediate needs of the spouse by making an income-based orders.

*Moylan J's pronouncement in the case of **BD v FD** [2014] EWHC 4443 (Fam) (Tab 1) addressing s. 22 of the U.K.s Matrimonial Cause Act, the corresponding provision to s.26 of our Act, said;*

"the purpose of this provision is clear as, for example, expressed in the Family Court Practice 2014 where it is said; "the section is intended to address the immediate needs of the spouse by making income-based orders. Issues of capital or long-term expenditure are better dealt with at the final hearing. '[Emphasis Mine]

[13] I do not accept as suggested by the wife's counsel that the provisions of S. 29 (2) of the Act is applicable to applications for MPS brought pursuant to s. 26 of the Act. The Act clearly states;

S 29. (1) of the Act - "It shall be the duty of the court in deciding whether to exercise its powers under section 25(3) or 27(1) (a), (b) or (c) or 28 in relation to a party to a marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters that is to say —a-g [Emphasis Mine].

Clearly if Parliament intended that the s.29 considerations should be applicable to a s.26 MPS application it would have been easy enough to include it in the provision. Instead, regard need only be had to all the circumstances of the case with the court conducting a broad assessment as opposed to a comprehensive analysis. [Emphasis mine]

[14] The Court's jurisdiction in MPS applications resides in statutory powers. Therefore, I accept that the income based broad assessment does not contemplate *a division of capital assets*. It stands to reason that the wife's references to the husband's ownership in several boats and sea going ventures are irrelevant, as these assets are not available to the court for disposition on this MPS application. Boats are regarded as capital assets falling within the purview of **Wicks v Wicks** [1998] 1 ALL ER 977.

[15] Moreover applications brought pursuant to s.26 does not permit the exercise by the court of *any residual or separate authority* to deal with capital assets on an MPS application. The

principle was thoroughly analyzed by the Court of Appeal in **Wicks** whereupon the case of **F v F** (Ancillary Relief; Substantial Assets) [1985 2 FLR 45] became central to their decision. In this case the wife of a rich man sought a court order for the purchase of a home for herself and the children on an MPS application. The court of Appeal held to *Thorpe J's* exposition which concluded;

.... If the substantive law laid down by the Matrimonial Causes Act does not permit that to happen, then the court has no inherent jurisdiction to do that which parliament has not granted power to do. Once again with regret for there is no doubting the need to do justice in the individual cases, I come to the unhappy conclusion that there is no inherent jurisdiction in the court to grant the petitioner any of the relief she seeks."

[16] This principle is so settled that even if the court were inclined to look beyond the statute to do what is believed to be fair, there is no jurisdiction to do so. In **Goyal v Goyal** [2016] EWCA Civ 792 the Court of Appeal held;

..... " In the context of family law, the authority of Wick v Wicks and other cases make it plain that there is no separate residual or inherent jurisdiction available for deployment to fill in any perceived gaps or to meet what court may see as the justice of the case if that outcome cannot be achieved by an order within the statutory scheme."

Counsel for the husband rightly pointed out that much of what was included in the wife's affidavit was irrelevant, particularly inflammatory and mostly should have been reserved for the substantive hearing of the Decree Nisi Petition. It appears that it might have been included in her affidavit to evoke an emotional response from the court but clearly the Goyal authority demonstrates that even had she succeeded in doing so the court does not possess the jurisdiction even inherently to allow any emotion or intention towards fairness to determine the outcome of this application.

[17] It is common ground that the husband is employed by a company LMS Group Ltd. However, this is a separate legal entity whose assets are not available for distribution to the wife on this application, on the principle in **Wicks** but see also **Prest v Petrodel Resources Ltd. And Others** 2013 UKSC 34.

[18] I find the husband's argument about the time constraints, he had to produce his financials to ready himself for the hearing of the wife's urgent application to have impacted him negatively at the hearing of the application. The husband did not produce audited financial statements or statements prepared by an accountant at the hearing. This has led the wife to conclude that the

husband was deliberate in failing to give full and frank disclosure per *Thorp J.* in **Burns v. Burns** [2004] EWCA Civ 1258 and upon which they relied;

"The effect of these decisions is to establish that if a party is in breach of the duty of candour, whether by actively presenting a false case or passively failing to reveal relevant facts and circumstances, then the court has the power to set aside the order and do justice, whether not the order was made by consent."

[19] I accept that it might have been difficult to produce proper personal financial records upon the short notice given for the urgent application, when the couple's finances and financial obligations were all tied up and apparently co-mingled with the LMS Group Ltd and with the husband's parents. I reject the wife's submissions through her counsel that the husband's failure to disclose accounts prepared by an accountant was deliberate and offended the requirement for full and frank disclosure. Therefore, I do not see this as a basis to dismiss the husband's application.

[20] The husband in support of this application and after producing a spreadsheet of his earnings for the past year was able to demonstrate that his yearly earnings from the LMS Group Ltd. is \$3,830.57 / \$3,859.57. The wife has not provided any convincing evidence to controvert the husband's assertions notwithstanding her assertions, about earnings from the husband's boat charter business, which took the form of large cash receipts. The evidence as presented by the wife will require this court to speculate as to earnings of the ventures which is beyond the jurisdiction of the court on an MPS application.

[21] The husband was ordered to pay to the wife the sum of \$3,467.00 notwithstanding that he asserted that his income at the time was \$4,600.00 per month and that his expenses were \$4,481.00 at the time. This meant that after paying the wife he would have only \$1,133.00 to pay those expenses. It stands to reason that this level of financial obligation had to be otherwise supported. Hence it is easy to appreciate that the husband's parents were contributing to the couple's lifestyle considerably.

[22] Changed circumstances is a major consideration when determining whether to modify or vary a MPS Order. The Husband and the wife have both alluded to changed circumstances. The decrease in the husband's income from \$4,600.00 to \$3,830.57 / \$3,859.57 is exacerbated by his parents opting out of continuing to support him. They will no longer provide a furnished rent and mortgage free home for the couple or even the husband to live in nor assistance with utilities. I accept that the husband's parents contributed mightily to this couples' financial obligations. The best evidence of this was the fact that the wife's mother also resided in the parent's home

with them and the couple. There is no doubt in my mind that the husband's circumstances have changed placing a greater financial obligation upon him.

[23] The wife who was unemployed at the time the MPS order was made is now employed as a skin therapist at 'Dermatologica Skin Care' now earning a salary of \$2,233.17 per month. Notwithstanding her unemployment she listed her and Amiyah's expenses at \$5,540.00 per month. Since the MPS she was also given a lump sum of \$20,000.00 by her father which I regard as helping to offset some of the contributions the husband's parents made to the couple and the wife's mother during the currency of the marriage.

[24] While it is typical, although unacceptable that parties tend to overstate their financial obligations and understate their income when litigating financial provision applications, I am cognizant that changed circumstances often call for a reordering of priorities for both parties. In this case given the involvement of parents in the financial affairs of the parties such reordering is inevitable, and there will be less opportunity for extravagance.

[25] I am satisfied that in all the circumstances of the case a modification/variation of the order dated 16th April, 2024 notwithstanding just a year and several days ago is justified. Considering the wife's present employment and income just less than the husband's by \$1,626.00. The sum of \$800.00 offered by the husband is reflective of putting the parties on equal footing however taking into consideration the vagaries the wife might face with expenses for Amiyah I increase that sum by \$200.00. The husband will therefore pay the sum of \$1,000.00 to the wife each month towards her and the child's maintenance. I consider this to be reasonable in all the circumstances of the case as required by s. 26.

[26] The court makes the variation retrospective to 16th April, 2024 having regard to **Richard Stephen Wilson v Jason Smith** at all SccivApp No. 136 of 2016 which the husband's counsel commended to the court *Sir Barnett JA* as he then was when he stated;

*"35. In an application to vary or discharge an order for periodical payments the court has the power to remit arrears of maintenance by backdating the variation order. In **Macdonald v MacDonald** [1964] P 1 the English Court of Appeal in considering section 28 of the English Matrimonial Causes Act, 1950 (which is identical to s. 35 of the Bahamas Statute) said "the High Court has the power to back date its orders even if that does result indirectly in maintenance already accrued being remitted or written off."*

[27] I am also satisfied that the queen bedroom set is the property of the husband's parents and is therefore not capable of being transferred by the husband to the wife.

[28] On the question posed by the wife as to whether the husband's application for modification in the circumstances where it was made only a month and a few days after the Interim MPS order was in fact an appeal I reject that proposition on the basis that;

- (i) The Order was sought and made as a result of an urgent application.
- (ii) It was made on an interim basis and is in effect only until a final order is made at the substantive hearing on an ancillary application; and
- (v) S. 35 of the Act which says; "*the court shall have power to vary or discharge the order or to suspend any provision thereof temporarily,*" upon a true interpretation suggests that any time constraints are at the discretion of the court taking all the circumstances into account.

CONCLUSION AND DISPOSITION

[1] Paragraph 1 of the Order dated 16th April, 2024 is modified and varied to read: 1. "The Petitioner shall pay to the Respondent maintenance pending suit in the monthly sum of One Thousand (\$1,000.00) such payment to commence on 16th April, 2024 and shall continue thereafter on the 19th day of each succeeding month until further order."

[2] Paragraph 3 of the Interim Order is discharged insofar as it relates to the queen bedroom furniture set which is comprised of a queen bed, nightstand and wardrobe.

[3] Any arrears found to be due after calculating the MPS at \$1,000.00 per month from the 16th April, 2025 shall be paid to the wife on or before 30th June, 2025. The parties are at liberty to offset the costs owed to the husband by the wife pursuant to the court's ruling and order on costs dated 14th March, 2025.

Date the st 21 day of May, A.D. 2025



The Honourable Justice C.V. Hope Strachan

Justice of the Supreme Court of the Commonwealth of the Bahamas