IN THE COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Family Division

2019/FAM/div/FP/00049

B E T W E E N:

T R J

Petitioner

AND

L J

Defendant

Before: The Honourable Madam Justice Constance Delancy

Appearances: Mrs. Tashana Wilson for the Petitioner
Mrs. Shavanthi Griffin-Longe for the Respondent

Hearing Dates: 15 January, 2025 and 31 January, 2025

RULING

DELANCY, J.

[1.] This an Application by the Petitioner to vary or discharge the Consent Order filed herein.

Background

[2.] By a Consent Order ("Consent Order") filed on 20 October 2020 the parties agreed the following:

> *IT IS HEREBY ORDERED BY CONSENT:*
>
> *1. That custody of the minor child of the marriage namely KJ born on the 16th day of March A.D. 2004 be granted jointly to the Petitioner and the Respondent with physical care and control to the Respondent and reasonable access to the Petitioner.*
>
> *2. That the Petitioner do contribute the sum of $250.00 per month towards the maintenance of the minor child;*
>
> *3. That the Petitioner do continue to pay the high school tuition for the minor child of the marriage;*

4. That the Petitioner and the Respondent be equally responsible for the payment of the costs of books, school supplies and uniforms for the minor child of the marriage;

5. That the Petitioner do pay to the Respondent an additional $250.00 in the month of August to assist with back to school expenses for the minor child of the marriage;

6. The parties shall share equally the college tuition expenses for KJ until his 22nd birthday inclusive of his allowance of $200.00 per month;

7. The Petitioner shall cover the cost of airfare to and from The Bahamas should KJ attend college abroad. All decisions concerning the college that KJ attends shall be mutually agreed by the parties;

8. That the parties including KJ are directed to attend at least 5 counselling sessions at the Department of Social Services;

9. The total outstanding tuition for LJ of $8,550.00 shall be paid by the Petitioner in 2 equal lump sum instalment the first on or before December 31, 2020 and the second on or before March 31, 2021. The Petitioner shall continue to pay the sum of $2,850.00 per semester towards LJ's tuition expenses until her 22nd birthday together with an allowance of $100.00 per month;

10. The Petitioner shall cover the cost of airfare to and from The Bahamas for LJ until her 22nd birthday.

11. That all payments in respect of the children of the marriage are to be paid directly into the Respondent's bank account at Fidelity Merchant Bank, Freeport, Grand Bahama, Bahamas.

[3.] The Respondent filed an Originating Application on 23 October, 2023 seeking leave to commence committal proceedings to commit the Petitioner pursuant to Part 51 of the Supreme Court Procedure Rules, 2022 ("CPR") for his contempt of court for failing to obey the Consent Order. Leave was granted on the 16 November, 2023.

[4.] On 22 January 2024 the Respondent was granted an order to commit ("the Committal Order") the Petitioner upon the Court being satisfied that the Petitioner was guilty of contempt of court for failing to obey the Consent Order. It was also ordered that the Petitioner pay the sum of $21,309.98 by 11:59 p.m. on 23 February, 2024 to the Respondent or her attorney and failure to do so would result in committal to prison.

[5.] The Petitioner filed a Notice of Stay of Proceedings (of the Committal Order) and Affidavit in Support thereof on 20 February, 2024. The application has not been heard. The Petitioner filed and then withdrew an appeal of the Committal in the Court of Appeal in or about March, 2024.

[6.] The Petitioner (acting pro se) filed a certificate of urgency on 30 September, 2024 seeking to move the Court to enforce the Committal Order which was supported by an Affidavit filed 9 January, 2025.

[7.] The Petitioner filed a Summons on 20 January, 2025 seeking an Order that the Committal Order be discharged and/or set aside pursuant to Section 35 of the Matrimonial Causes Act ("MCA"), Rule 57 of the Matrimonial Causes Rules ("MCR"), Part 51 of the CPR and under the inherent jurisdiction of the Court. The grounds of the application being:

> (1) The Respondent/Judgement Creditor failed to serve the Petitioner/Judgment Debtor with demand letter and the Consent Order giving the Debtor time to remedy his breach of the order;
>
> (2) The Respondent/Judgement Creditor prematurely filed the Notice of Motion prior to obtaining the leave of the Court;
>
> (3) On the true interpretation and construction of paras. 6,7,9 and 10 of the Consent Order the Petitioner/Judgment Debtor in any event is not liable to the Respondent/Judgement Creditor for total sum of $21,309.98;
>
> (4) Consideration was not given as the whether the Petitioner/Judgment Debtor had he means necessary to comply with the financial burden of the order.

Issue

[8.] The Court must determine whether the Petitioner's application for variation or stay of the Consent order ought to be dismissed or stayed on the grounds that he is in contempt of court.

Law and Analysis

[9.] The procedure for applications in Divorce and Matrimonial proceedings is governed by the Matrimonial Causes Rules ("MCR"). Where the MCR (see Rule 68) is silent the Rules of the Supreme of England ("ERSC") are to be applied (1998 Supreme Court Practice "White Book"). Matters under the Matrimonial Causes Act are not governed by the CPR as per Part 2(4).

[10.] The procedural steps in Committal for contempt of court for leave to commence applications and after leave has been granted are set out in Order 52 r.2 and r.3 ERSC which mirrors Order 52 r.2 and r.3 of the Rules of Supreme Court, 1978 ("RSC"):

> 2. (1) No application to the Supreme Court for an order of committal against any person may be made **unless leave to make such an application has been granted in accordance with this rule.**
>
> (2) An application for such **leave must be made ex parte** to the Supreme Court, and **must be supported by a statement** setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, **and by an affidavit, to be filed before the application is made, verifying the facts relied on**.
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> 3. (1) When leave has been granted under rule 2 to apply for an order of committal, the application for the order must be made by motion to the Supreme Court and, unless the

Court or judge granting leave has otherwise directed, there must be at least 8 clear days between the service of the notice of motion and the day named therein for the hearing.
(2) Unless within 14 days after such leave was granted the motion is entered for hearing the leave shall lapse.
(3) Subject to paragraph (4), **the notice of motion, accompanied by a copy of the statement and affidavit in support of the application for leave under rule 2, must be served personally on the person sought to be committed**.
6. (1) The Court by whom an order of committal is made may by order direct that the execution of the order of committal shall be suspended, for such period or on such terms or conditions as it may specify.
(2) Where execution of an order of committal is suspended by an order under paragraph (1), the applicant for the order of committal must, unless the Court otherwise directs, serve on the person against whom it was made a notice informing him of the making and terms of the order under that paragraph.
7. (1) The Court may, on the application of any person committed to prison for any contempt of court, discharge him.

[11.] Counsel for the Petitioner contends that the Respondent failed to serve the Consent Order with a penal notice endorsed therein as required in committal proceedings. Counsel for the Respondent countered that the lack of penal notice is not fatal and in the not required instance of enforcing a Consent Order. The Court accepts the Respondent's submission on this point.

[12.] In the case of **Sheila Narine Plaintiff v The Representative Of The Estate Of The Late Terry Fernander** 2016/CLE/gen/607 *Charles, J.* (as she then was) at para. 3 in the summary of her Ruling thereof stated:

> Modern case law demonstrate that the omission of the penal notice is not fatal to enforcement by committal once the person who is sought to be committed was well aware of the consequences of disobedience: **Sofroniou v Szgetti** [1991] FCR 332 and **Circuit Judge of Staines County Court** [2000] 2 FLR 69. The case of **American Express Travel Related Services Co. v King** [2004] BHS J. No. 35 No. 1113/2001 applying **Beeston Shipping Ltd v Babnaft International SA, The Eastern Venture** [1985] 1 All ER 923. distinguished. In the present case, the Order was a Consent Order signed by both parties so there is no requirement for a penal notice.
>
> [Emphasis added].

[13.] Counsel for the Respondent submits that it apparent from the record that the Petitioner was fully aware of the terms of the Consent Order. It was drafted at his behest by his Counsel while the Petitioner appeared pro se. Further that he failed to comply with the Consent Order and the Court ought not entertain any applications made by him until he has purged himself of that contempt.

[14.] Counsel for the Petitioner contends that the terms of the Consent Order in particular paras. 6, 7, 9 and 10 requires interpretation by the Court and disputes the quantum of the sums which the Respondent claims are owed by Petitioner. The paras. in question are as follows:

> *6. The parties shall share equally the college tuition expenses for Kanye Johnson until his 22nd birthday inclusive of his allowance of $200.00 per month;*

7. The Petitioner shall cover the cost of airfare to and from The Bahamas should Kanye Johnson attend college abroad. All decisions concerning the college that Kanye Johnson attends shall be mutually agreed by the parties;

9. The total outstanding tuition for LATIYAH JOHNSON of $8,550.00 shall be paid by the Petitioner in 2 equal lump sum instalment the first on or before December 31, 2020 and the second on or before March 31, 2021. The Petitioner shall continue to pay the sum of $2,850.00 per semester towards LATIYAH JOHNSON'S tuition expenses until her 22nd birthday together with an allowance of $100.00 per month;

10. The Petitioner shall cover the cost of airfare to and from The Bahamas for LATIYAH JOHNSON until her 22nd birthday.

[15.] Counsel for the Petitioner contends that under Section 35 of the MCA and under its inherent jurisdiction the Court has the discretion to vary or discharge an Order:

> …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**;
>
> (c) any secured periodical payments order;… [Emphasis added].

[16.] Counsel for the Petitioner also contends that the Court ought to consider whether the Petitioner has the financial means of meeting the obligations under the Consent Order. Counsel for the Respondent contends that the Respondent attempted to engage the Petitioner directly and through Counsel in broking a settlement of the financial matters that affect their children. It is not disputed that the parties agreed the terms of the Consent Order as reflected by the signed off by them of the same which was then presented to and approved by Court. I observed that neither party provided the Court with evidence of their respective means at the time of perfection of the Consent Order.

[17.] In the British Virgin Islands case of **Vance Lewis v Joyce Lewis** [2010] ECSC J1130-8, *Hariprashad-Charles, J.* (as she then was) quoted a passage from **Arlidge, Eady and Smith on Contempt**:

> An effective sanction (deriving from canon law) was the practice that one who was in contempt might not be heard further in the same litigation, for his own benefit, unless and until he purged his contempt. In the words of Lord Brougham: "**It is a general rule of all Courts that no party shall be allowed to take active proceedings, if in contempt**." This was clearly a practice primarily coercive in nature rather than punitive. It was by no means universally applied. There have also been recognized so-called "exceptions", that for example a contemnor might be heard on an application to purge the contempt; or for the purpose of setting aside the order breach of which had put him in contempt; or of appealing against the order of committal for lack of jurisdiction; also, he was not precluded from defending himself in the action itself. So too, it has been held that a defendant in breach of the terms of an Anton Pillar (now known as a "search

and seizure") order might seek to have the order set aside, although he could still be punished for contempt.

[18.] In case of **Dr. Paul D. Fuchs v Lockhart & Co. (A Firm)** 2023/CLE/gen/00763, *Fraser, Snr. J.* at para.22 opined:

> The Court has **a discretion to refuse to hear a contemnor on any application unless and until he purges his contempt.** This was expressly stated in the English Court of Appeal decision of **Hadkinson v Hadkinson** [1952] p. 285 ("**Hadkinson**"). There, the Court opined:
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> > "It is the plain and unqualified obligation of every person against, or in respect of whom, an Order is made by a Court of competent jurisdiction, to obey it unless and until that Order is discharged. **The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an Order believes it to be irregular or even void**….
> >
> > Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an Order of the Court (and I am not now considering disobedience of Orders relating merely to matters of procedure) is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to the Court by such a person will be entertained until he has purged himself of his contempt. It is the second of these consequences which is of immediate relevance to this appeal. The rule, in its general form, cannot be open to question. There are many reported cases in which the rule has been recognised and applied and I need refer only to (Garstin v. Garstin 4 Swaby & Tristram, 73) and (Gordon v. Gordon 1904 Probate, 163)…
> >
> > …**such exceptions is that a person can apply for the purpose of purging his contempt and another is that he can appeal with a view to setting aside the Order upon which his alleged contempt is founded**; neither of those exceptions is relevant to the present case. A person against whom contempt is alleged will also, of course, be heard in support of a submission that, having regard to the true meaning and intendment of the Order which he is said to have disobeyed, his actions did not constitute a breach of it; or that, having regard to all the circumstances, he ought not to be treated as being in contempt. The only other exception which could in any way be regarded as material is the qualified exception which, in some cases, entitles a person who is in contempt to defend himself when some application is made against him (see e.g. Parry v. Ferryman — referred to in the notes to Chuck v. Cremer, 1 Cooper 205)...
> > It is a strong thing for a Court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a Court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance. In this regard I would like to refer to what Sir George Jessel, M.R. said in a similar connection in (In re Clements v. Erlanger 46 Law Journal, Ch. 375, page 382): "I have myself on many occasions had to consider this

> jurisdiction, and I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction". **Applying this principle I am of opinion that the fact that a party to a cause has disobeyed an Order of the Court, is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the Court to ascertain the truth or to enforce the Orders which it may make, then the Court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed**."
>
> [Emphasis added]

[19.] The Respondent sought to enforce the payment of KJ's college expenses which according to the Consent Order the parties agreed share equally (para.6) provided all decisions concerning the college that KJ attends shall be mutually agreed by the parties. No evidence was advanced that such an agreement was arrived at or that the Respondent sought to have the Court vary the term thereof. The Court finds that in the absence of evidence of a consensus it would be unjust to not to allow the Petitioner to be heard.

Disposition

[20.] The Court hereby suspends the Committal Order herein and will hear the parties' respective applications with reference to enforcement of arrears and variation of the Consent Order at a date to be fixed by the Court.

[21.] The Court makes no order as to costs.

Dated: 27 May, 2025

[Original Signed and Sealed]

Constance A. Delancy
Justice