



In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2017: No. 130

BETWEEN:

N. E.

Mother

and

W. E.

Father

RULING

Before: Hon. Alexandra Wheatley, Registrar

Appearances: The Father, In Person
Mr David Kessaram of Cox Hallett Wilkinson Limited, for the
Mother

Dates of Hearing: 2 May 2023
Date of Submissions: 10 May 2023
Date Draft Circulated: 6 December 2023
Date of Ruling: 8 December 2023

*Child Maintenance; Obligation to provide Full and Frank Financial Disclosure;
Adverse Inferences*

RULING of Registrar, Alexandra Wheatley

INTRODUCTORY

1. The Mother (hereinafter referred to as **the Mother**) made an application dated 17 June 2022 (**the Mother's Application**) wherein she is seeking child maintenance from the Father (hereinafter referred to as **the Father**) for the two children of the family who are 17 and 15 years old respectively.
2. The parties were married for nineteen years, having obtained the Decree Absolute on 15 December 2017. The Mother was granted care and control of the children and it is an accepted fact that the agreement between them upon divorce was that the costs of raising the children would be shared equally between them which included the children's private school fees. The Mother's Application was made as she claims that the Father has not been paying his equal share of the children's expenses. She is therefore, seeking an order that he pay the sum of \$2,283.75 per month for the two children which represents one half of the children's monthly, direct expenses.
3. In support of the Mother's Application, the Mother relies on two affidavits, the first one being sworn on 30 August 2022 (**the Mother's First Affidavit**) and the second on 24 January 2023 (**the Mother's Second Affidavit**). The Father relies on his affidavit which was sworn on 15 November (**the Father's Affidavit**). Both parties also gave *viva voce* evidence at the hearing updating their respective financial positions since the filing of their respective affidavits and both were cross-examined.

THE FACTS

Mother's evidence

4. The Mother is a public school teacher and is 52 years old. Her current net, monthly salary from this position is \$5,655.26.

5. The Mother resides in a property which is her family homestead (**the Property**). Her parents transferred the property to her and her brother and retained life interests for themselves. The Property consists of the main house where the Mother resides with the two children and there are two rental units. There is a mortgage secured against the Property and the monthly payments are approximately \$3,000 per month. The agreement between the Mother and her parents was that she could reside in the main house rent free as well as receive the rental income from apartments; however, this is subject to the Mother being responsible for all remaining mortgage payments as well as all of the outgoings for the Property such as, land tax, insurance, repairs, grounds maintenance, etc. The balance of the mortgage loan at the time of the wife's first affidavit was \$97,824.78. In addition, the wife has an outstanding loan which was taken to cover her legal expenses for this application the outstanding balance at the time of the hearing of this loan was \$27,710.06.

6. The total monthly rental income received by the Mother is \$3,900 which the father noted gives her an extra \$1,000 every month after payment of the mortgage. Therefore, her total monthly income is \$9,555.26.

7. At paragraph 11 of the Mother's Second Affidavit set out her household and personal monthly expenses are approximately \$6,853 per month. This sum is broken down as follows:

Expense	Amount (\$) per month
Telephone	99
Mobile phone	160
Internet	275
Link Bermuda	20
Belco	350
Car (licensing, insurance and maintenance – prorated annual expense)	297
Groceries	650
Clothing	200
Personal care (haircuts)	150
Uninsured medical costs	130
House insurance	450
Land tax	75
Watlington Water Works	400

Grounds maintenance	150
Pet food and care	50
Personal loan for legal costs	441 ¹
Renovation loan/mortgage	2,956
Total	\$6,853

8. The monthly expenses for the children are as follows:

Expense	Amount (\$) per month
School tuition	2,137.50 ²
School uniforms	110.00
School supplies	70.00
Clothing	170.00
Shoes	70.00
Grooming	130.00
Uninsured medical costs	180.00
Groceries/Food	1,200.00
Heritage Education Savings Plan	250.00
Educational Savings Fund	150.00
Pathfinders Club Membership	100.00
Total	\$4,567.50

9. For the most part the Father did not dispute the children's expenses. His main objection was that some of the expenses listed such as school uniforms, school supplies, shoes, and clothing were not expenses that the Mother pays each month. It was however, clarified during the hearing that the Mother does not in fact pay these expenses monthly and confirmed the sums represent a prorated amount for the entire year. The Father accepted this.

Father's evidence

10. The Father is also a teacher in the public school system. There was a great deal of contention regarding his actual monthly earnings. The Father's position is that he earns

¹ The Mother's *viva voce* evidence at the hearing was that the total expenses were calculated incorrectly as it included the wrong monthly sum for the payment of the loan she obtained to pay legal fees. The cost of her monthly payment for legal fees has increased from \$278 to \$441.25 as she has had to obtain further borrowing to cover her legal costs which took her total to \$6,779; however, my calculation of the total amounts to \$6,853.

² The monthly sum initially produced was \$1,924 in the Mother's First Affidavit; however, this sum increased to \$2,137.50 at the time of the hearing.

\$6,675.18 net per month (or \$7,749.28 gross per month) as a substitute teacher. Prior to being a substitute teacher, he was employed as a permanent teacher from 1998 to 2014. At the time the Father resigned in 2014 he was earning at the top scale of a teacher which was \$8,207.50 gross per month. The Father stated that he resigned due to “*mental and emotional stress*”; however, he also stated that he has been attempting to obtain a permanent position since 2020 but has not yet been successful which will see him being unemployed at the end of the 2022/2023 school year.

11. There was a great source of contention arising from the father's salary. Essentially the father said that there was a significant contradiction between the contract he received stating he would obtain \$92,000 per annum and his actual payment of \$80,000 per annum. He says that because of this he earns \$2,000 a month less than he did before. The father says that when the parties agreed to pay equally the children's expenses that was in 2017 and was at a time when he was residing at home. The father's evidence is that he is in the worst financial position he has been in in his life since September 2022. He said he's also had to borrow money from other teachers to meet his monthly expenses.
12. An analysis was also completed on the Father's bank statements which shows that he received a total of \$17,700 in the period from August 2021 until 27 September 2022 from his mother. The husband said these payments were made with his mother's full knowledge and consent as he explained that he has access to his mother's accounts. During his *viva voce* evidence the Father stated that he no longer had access to obtain funds in the manner he has done in the past from his mother as his sister has taken over control of his mother's finances by the way of power of attorney. No evidence was provided by the Father to support the sister's position.
13. The Father also gave evidence that he uses his mother's debit card to purchase day-to-day items such as groceries. There was no way to ascertain how much the husband was using his mother's debit card and he was unable to say on average how often it was used or an average amount of money he charges to it.

14. At previous times the father accepted that he drove a taxi to earn additional income as well as run a track and field club. The Father's evidence was that he could not afford to renew his taxi license which is about \$300 and stated due to his working hours as a teacher it would be extremely difficult to drive a taxi during the most profitable hours.
15. The Father set out his monthly expenses at paragraph 12 of his Affidavit which are as follows:

Expense	Amount (\$) per month
Rent	2,200.00
School tuition (for youngest child)	1,012.50
Personal loan repayment ³	516.00
Groceries	500.00
Tithe	570.00 ⁴
Cell phone	136
Cell phone (oldest son)	136
Internet/cable	185
Electricity	139
Car maintenance, gas and oil	410
Rent #2	370
Child maintenance paid to the Mother	500
Total	6,674.50

16. The Father also listed his car insurance and license fees being \$919.20 and \$1,022.04 respectively per annum; however, he confirmed he was unable to pay these fees so his car is not on the road. The same is the case for his bike which he says is a total of approximately \$400 per annum for license and insurance.
17. It was the Father's evidence that given his total monthly expenses and his net earnings of \$6,675.18 he is only left with \$70.60 per month. It is unclear how this was calculated, as my calculation of his monthly expenses totals \$6,674.50 (as set out in paragraph 14 above) which only leaves a surplus of 68 cents per month.

³ The Father says this loan was obtained in order to cover his summer expenses when he did not receive any income in 2019 and 2021.

⁴ In cross examination, the father admitted that he continues to pay a monthly tithe to the church despite no longer being a member.

18. The Mother disputed several of the Father expenses. For example, the Father included \$500 per month which he says he pays to the Mother as well as monthly tuition of \$1,012.50 which he says is paid directly to the school. However, Mr Kessaram for the Mother having analyzed the Father's bank statements over an eighteen-month period shows that the Father on average, only transferred to the Mother \$258.10 per month. Additionally, there were arrears of the tuition that the Father purportedly was paying monthly.
19. The Father's car expenses were also challenged as the car has been off the road since January 2023 which means he is not incurring the expense for maintenance, gas and oil of \$410 per month. In addition, the Mother contended that the Father also does not pay the oldest child's cell phone bill of \$136 as the oldest child uses his earnings as a grocery packer to contribute \$60 each month for this expense.
20. The Mother also contested the Father's monthly expense of \$516 for loan repayments which she says are overstated. Mr Kessaram submitted that from the bank statements provided, there were only 3 instances where his monthly loan payment was over \$400; \$405.07 on 30 June 2021; and two transactions on 13 October 2021 of \$372.52 and \$359.59 respectively. Therefore, the Mother believes this expense has been overstated by the Father.
21. One further point of contention is the sum of money the Father has paid to his current wife. Analysis of the Husband's bank statements show that for the period 27 May 2021 to 9 December 2022 he transferred \$29,748.51 to his U.S. bank account. From the Father's U.S. bank account statements, it is shown that the majority of the payments received from the Father's HSBC bank account were then transferred using the online money transfer service "Remitly". These transfers using Remitly totaled \$26,592.06 for the period 1 June 2021 to 29 December 2022.
22. When the Father was asked in cross examination as to whom the payments using Remitly were being made, he revealed that \$370 each month was being paid to his current wife to cover her rent. Mr Kessaram noted that the Respondent did not provide any evidence in his affidavit regarding paying funds to his wife, save for the entry in his list of expenses

stating the description of the \$370 per month as “Rent #2”. There was no explanation in his affidavit as to what this related to. The bank statements also revealed that there were a few payments using Remitly which the Father says were to his wife. The payments were in excess of \$370 and he was unable to explain why this is the case. There were also other transfers using Remitly. The Father was unable to explain for whom those transfers were made.

23. The Father did indicate that his wife suffers from cancer, and he was assisting her to pay her medical expenses. He also stated in cross examination that his wife suffered a foot injury in September 2022 and was required to assist with her medical bills. Mr Kessaram noted that the Father did not produce any evidence to support these assertions.
24. Furthermore, on cross examination the Father confirmed that in 2022 he travelled on three separate occasions to the Dominican Republic to visit his wife as well as on two occasions in 2021. He also returned to the U.S. when his mother was unwell for a period of three weeks in the summer of 2022.
25. The Mother also didn't accept that the Father paid her \$500 per month. The Father said that he transfers \$500 per month to the Mother's bank account; however, his bank statements show that over a period of eighteen months, the Father only transferred a monthly average of \$258.10.
26. Mr Kessaram for the Mother submitted that the Court should draw adverse inferences in relation to the Father's finances because it was only as a result of the close examination of his bank statements as well as the evidence provided in cross examination that it became clear that:
 - a) He has received gifts of money from his mother in the period June 2021 to December 2022 amounting to \$17,700.
 - b) He has had the use of his mother's debit card to purchase goods and services free of any obligation to repay her.
 - c) He has used a money transfer service to transfer money amounting to approximately \$27,000 to other persons.

27. It is a matter of trite law that both parties in proceedings regarding ancillary relief have a duty to both the Court as well as to each other to make full and frank disclosure of his and her perspective financial circumstances (*Livesey v Jenkins* (1985)). It was submitted that such adverse inferences may extend to findings as to the availability of assets or income that did not belong to a party, for example, in this case, the resources that the Father's mother was willing to make available to him. Mr Kessaram relied on the case of *Thomas v Thomas* [1995] 2 FLR 668 as well as *Moher v Moher* [2020] Fam 160.
28. Therefore, it was incumbent on the Father to prove that the funds sent overseas could not have been applied to supporting his children in Bermuda. The same also relates to the monies received from his mother, for example, if it was a gift, that he has no reasonable expectation of receiving similar gifts in the future. Whilst the Father averred the funds provided by his mother were for emergencies only, there were neither examples provided by the Father, nor any correspondence produced from his mother suggesting that such support is unlikely to continue. Taking this into account, Mr Kessaram asserted the Court would be entitled to find that the transfers of money to the Father from his mother were gifts, and the Court is justified to infer that the Father's mother would make future gifts to him moving forward.
29. Lastly, the father failed to produce or provide any explanation that his wife required his financial support for her rent and medical expenses and whether such financial support is still required. It was submitted that an appropriate inference for the court to draw is that he is under no requirement to pay any amount to his wife and that any amount paid to his wife over and above her rent, is a gift.

THE LAW

30. Section 27(1)d) of the Matrimonial Causes Act 1974 (**the Act**) is the statutory provision which gives the court jurisdiction to make orders for child maintenance. When assessing the appropriate sum of child maintenance, the courts will have regard, in particular, to the matters set out in section 29(2):

“29

...
(2) *Without prejudice to subsection (3), it shall be the duty of the court in deciding whether to exercise its powers under section 27(1)(d), (e) or (f), (2) or (4) or 28 in relation to a child of the family 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) *the financial needs of the child;*
- (b) *the income, earning capacity (if any), property and other financial resources of the child;*
- (c) *any physical or mental disability of the child;*
- (d) *the standard of living enjoyed by the family before the breakdown of the marriage;*
- (e) *the manner in which he was being and in which the parties to the marriage expected him to be educated or trained;*

and so to exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in subsection (1)(a) and (b), just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him. [Emphasis added]

31. The factors set out in section 29(1)(a) and (b) of the Act referenced in section 29 (2) are as follows:

“29 (1) *It shall be the duty of the court in deciding whether to exercise its powers under section 27(1)(a), (b) or (c) or 28 in relation to a party to the marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters—*

- (a) *the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;*
- (b) *the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;*
...” [Emphasis added]

32. Regarding the question of how child maintenance payments should be apportioned between parents, the Court of Appeal in *M v W* [2010] Bda LR 87 considered this issue on appeal as it related to the apportionment granted in the Supreme Court. The case concerned wealthy parents who enjoyed a high standard of living, albeit the application was made

under the Minors Act 1950 and the Children’s Act 1998, it is accepted that the same principles are applied to applications under the Act. It was held that neither adherence to a rigid principle of proportionality, nor a contribution by each parent on the basis of equality should be strictly followed. The Court of Appeal confirmed that when exercising its discretion, the court must consider all the circumstances. Justice of Appeal Ward concluded as follows:

- “17. ... the Court has to consider more than the needs of the child. The Children Act 1998 section 36.1C(4) lists a number of factors which must be taken into account apart from needs, namely assets of parents, capacity to provide support, age, physical and mental health, other legal obligations, etc.
18. When those factors are taken into account, we are of the opinion that neither adherence to a rigid principle of proportionality nor a contribution by each parent on the basis of equality should be strictly followed. In exercising its discretion the Court must consider all the circumstances.
- ...
40. Pursuant to section 36.1C(3) of the Children Act 1998 both parents have a joint financial responsibility to maintain the child and the Court must apportion that obligation between the parents according to their relative abilities to contribute to the performance of their obligations.
41. As it is a joint obligation, the correct starting point is a 50/50 split. But that has to be adjusted, as necessary, after all the listed factors have been taken into account. Nor is the apportionment to be done according to a rigid mathematical formula or calculation based on the percentage that one parent’s income bears to the other. Rigid application of such a formula would be to ignore the other considerations mentioned in section 36.1C(4) of the Act and the broad discretion given. [Emphasis added]

FINDINGS

33. I fully have considered all the affidavit evidence, the parties’ *viva voce* evidence as well as their respective submissions as it relates to the facts.
34. The Father appeared to stumble over his evidence during cross-examination; however, it is very plausible that this was solely due to the fact that he was representing himself, and so, was not in a comfortable position when having to be questioned by a seasoned attorney.

Having said this, the rather large gaps in the Father's evidence as it relates to the sending of sums of money overseas is troubling. Whilst the Father did state that this was the first time he was having to draft and submit evidence to the courts, it was clear that the Father understood from the outset of these proceedings that the parties' respective incomes and expenses would be closely scrutinized. One does not need to be a trained attorney to know that when a hearing concerns the parties' income and expenses, payments from his mother and the use of her debit card should be disclosed to the other party as well as to the Court.

35. Additionally, it is very unusual that the Father's listed expenses were almost identical to his monthly salary (within 68 cents). I cannot recall a case which I have determined where a party's income and expenses matched when round numbers were not presented.
36. Therefore, where the Father's evidence conflicts with the Mother's, I prefer that of the Mother.
37. The Mother's income was not contested and based on the evidence provided, I see no reason to make any findings to the contrary. As such, I accept her total monthly income as being \$9,555.26. Additionally, the Mother's household expenses as well as those for the children are accepted as being accurate and reasonable.
38. Despite the Father providing numerous documents regarding his salary and referring to the same in his affidavit evidence, I am still unclear as to the alleged discrepancy of his monthly salary. Furthermore, without having the benefit of being provided any helpful or formal documentation from the Accountant General or the Department of Education's Human Resources section (or the newly formed Department of Employee and Organizational Development), I am not in a position to make any findings as it relates to the discrepancies of the Father's salary. As such, I can only accept the Father's monthly salary as being what is evidenced in his salary slips submitted from the Accountant General.
39. I do however, accept the submissions from Mr Kessaram that the Father has access to funds received from his mother (both by money transfer and use of the mother's debit card), the

Father having not submitted any evidence to the contrary and drawing adverse inferences from his non-disclosure of these sources of income.

40. As it relates to the Father's expenses, I have removed the costs for the car maintenance and fuel for the car as his car has not been licensed and insured in 2023. Further, I have reduced the sum of the monthly personal loan repayment to \$400 given his bank statements evidence the maximum monthly payment over the last eighteen months has been no more than \$400. The item listed for his oldest son cell phone has also been reduced from \$136 to \$60 based on the Mother's evidence of the son's contribution to this monthly payment. For there to be a clear picture of the Father's monthly expenses, I have also removed the items regarding payment of one of the children's tuitions as well as the alleged payment to the Mother for the children's expenses.
41. Furthermore, I have removed the Tithe monthly payment of \$570 given that the Father has confirmed he is no longer a member and as such, do not believe that it is reasonable for this expense to be incurred.
42. It was very clear based on the responses the Father provided in his cross examination that a great deal more is being sent to his wife in the Dominican Republic over and above the \$370 per month for her rent. In fact, had the Father only provided \$370 per month to the wife, he would have transferred to her only \$4,400 in a one-year period. The transfers that the Father was able to identify as being sent to the wife amounted to approximately \$26,600 which would amount to an average of \$1,478 for the eighteen-month time frame his bank statements were analyzed. I have taken note of the Father's lack of disclosure provided in his affidavit surrounding his expenses to his wife as well as the fact that no evidence has been provided to support any of the alleged medical expenses that he has been required to assist with. Moreover, the total expenditure for monies sent overseas was approximately \$30,000 which is an average of \$1,667 per month.
43. I set out below the monthly expenses which in my view are fair and reasonable for the Father:

Expense	Amount (\$) per month
Rent	2,200.00
Personal loan repayment ⁵	400.00
Groceries	500.00
Cell phone	136.00
Cell phone (oldest son)	60.00
Internet/cable	185.00
Electricity	139.00
Rent #2	370.00
Total	3,990.00

44. Therefore, taking the Father's current salary of \$6,675.18 per month, there would be a remainder of \$2,685 after having paid the revised expenses listed above.

CONCLUSION

45. Applying my findings to the legal principles cited, the Father shall pay the sum of \$2,300 per month to the Mother for child maintenance in respect of the two children of the family which represents fifty percent of the children's monthly expenses. Whilst there is a marked difference of salaries between the parties on paper, this is not a complete picture of their respective income positions as an accurate disparity (if any) is unable to be calculated due to it being unknown exactly what monies the Father's mother has and continues to contribute as well as the fact that the Father still disputes his monthly salary with his employer.

46. Furthermore, this sum of monthly payments shall be backdated to be effective from June 2022 which is when the Mother made her application. I appreciate that during the period from June 2022 to date that the Father has made contributions for the benefit of the children directly to the Mother as well as through payment of one of the children's school tuition fees. I have not completed an analysis of the sums that those payments represent for this period, so I will leave that exercise for the Mother's attorneys to be presented to the Father for agreement. Should the parties not be able to resolve the differences of payments, the Mother shall have liberty to apply to the Court. If this occurs, the dispute will be determined on the papers so any submissions made to the Court must clearly set out the basis of the parties'

⁵ The Father says this loan was obtained to cover his summer expenses when he did not receive any income in 2019 and 2021.

respective calculations. Any arrears required to be paid shall be paid at a rate of \$200 per month in the event that the Father is unable to pay via a lump sum within fourteen days from the date of this ruling.

47. Furthermore, the said payments shall be paid via an attachment of earnings to be paid directly to the Mother.
48. Mr Kessaram urged that there be a costs order made in favour of the Mother in this case. He conceded that in accordance with Order 62, Rule 3 (5) of the Rules of the Supreme Court 1985 the general rule that costs follow the event does not apply to matrimonial proceedings. Mr Kessaram relied on the case of *Arajuo v Araujo* SC (Bda) (17 March 2008) wherein Justice Bell awarded costs to the wife. The Father stated that he did not intentionally attempt to mislead the Court by not referencing the payments to his wife overseas as well as the funds received from his mother. He confirmed that he was largely responding to the Mother's Affidavit and had not truly turned his mind to what was required of him as he was "*just trying to survive*". He further submitted that if he had obtained legal advice that "*it would've been put together differently*".
49. Whilst in part of the findings, I drew adverse inferences from the Father's non-disclosure, I do not believe that the Father was deliberately intending to act in a manner which would make it necessary to find his litigation conduct was so egregious so as to order costs against him. I do however, find that taken into consideration all of the circumstances of this matter proceeding to hearing in addition to my findings that the Mother had little choice but to proceed with this litigation based on the hardships of the Father's non-payment had caused her and the children. For example, one of the children almost being unable to sit his school exams as the Father was in arrears of his tuition payments. Therefore, I will award the Wife 50% of the costs of her application which shall be taxed on a standard basis if not agreed.
50. I invite Counsel for the Mother to prepare the order reflecting the terms of this ruling for my review and consideration.

Postscript

51. Given that it is becoming increasingly common for parties to represent themselves before the courts due to financial circumstances, I must state it would be of extremely great benefit for such persons to obtain independent legal advice at some point during the proceedings. Even if attorneys were simply retained for one hour to explain the law and procedure surrounding applications, the monies invested in this could have the potential to save both parties a great deal of legal expenses down the road and ultimately will benefit the children whom the parties now must maintain in two separate households.

DATED: 8 December 2023



**ALEXANDRA WHEATLEY
REGISTRAR OF THE SUPREME COURT**