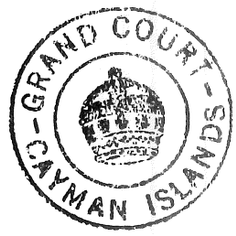
C.J. 3.11.93.

IN THE MATTER OF THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

Civil #1/93

FABIAN SAMBULA v. ENID MARIE LONGSWORTH



JUDGEMENT

3-11-93

Mr. Collins for the Appellant
Ms. Brooks for the Respondent

Schofield J.

The appellant is the father of the respondent's child Melinda Rochelle who was born on 30th May, 1991. The child is now nearly two-and-a-half years old. By an affiliation order made on 18th September, 1992, the appellant was ordered to pay the sum of CI$50 per week maintenance for Melinda. That was at a time when $50 per week represented the maximum payable under such an order. The position changed when the Affiliation (Amendment) Law, 1992, came into force on the 17th November 1992, and by an amendment to Section 5 of the Affiliation Law, 1973, the Summary Court on making an affiliation order is not bound by any statutory limit. However a new subsection (9) was added to Section 5 which requires the Court when calculating the sum of money to be paid on the making of an affiliation order to "have regard to the means of the parties and all the circumstances of the case".

The respondent, by summons filed on the 23rd May 1993, applied for the order of 18th September, 1992, to be increased to $120 per week. Briefly stated she based her application on the grounds that the appellant could always have afforded more than $50 per week and that he had had an increase in income from the date the original order was made. By an order dated 10th September, 1993, the learned Magistrate increased the original order to $100 per week and made such order effective from 1st June, 1993. The appellant now appeals against that order for variation.

The appellant is a Police Superintendent with the Royal Cayman Islands Police Force. He had a relationship with the respondent from September, 1988 which ended just before the birth of their child. The respondent was born in Belize and now lives there. She was the secretary to the Financial Secretary of these Islands but chose to leave her job to take up citizenship of the United States shortly before the baby was born. In the United States the respondent earned US$1,500 per month gross as a secretary. Initially she lived in an apartment which cost her $300 per month but she moved to other accommodation which cost her more than twice that amount and which she shared with a sister. When the sister moved out the respondent was left to pay that rent on her own which she could not afford. She went to live with a friend and then moved back to Belize to live with her family because, she said, she could not afford to make ends meet in the United States.

The appellant assisted the respondent with her medical expenses for her confinement. He bought her a car which she took to Belize but which she says was wrecked on the bad roads there. He assisted her to pay a loan with Cayman National Bank. He paid US$600 per month to the respondent when she moved to the United States but reduced this payment to $500 per month in April, 1992. Since the affiliation order was made the appellant has merely kept up the CI$50 per week, but he did contribute to certain medical expenses for Melinda.

Turning to the current position the respondent lives with her brother in Belize City. She helps him with his business, Hertz car rentals, in return for which she is accommodated and kept. She says she has difficulty in getting a well-paid job because she is a United States citizen and requires a work permit and there is prejudice against her brother who is involved in politics. The last offer she received was for a salary of B $250 per week which equates to US$125 per week. Her evidence was that the standard of living in Belize is low, the cost of food is high

and it is not her choice to live there.

The appellant earns CI$3,478 per month plus a housing allowance of $200 per month. This is the list of his expenses (less the amount paid under the affiliation order) deposed to in an affidavit of 25th June, 1993.

Loan payments to Barclays Bank	$2,203.00
Loan payments to Credit Union	1,200.00
Loan payments to CNB	690.00
Living expenses	700.00
Global Life insurance premiums	114.97
National Life of Canada premiums	136.34
Police Welfare Fund	32.00
Police Association	4.00
	$5,080.31

The appellant's expenditure is greater than his earnings. His wife earns approximately $3,500 per month working for Cable and Wireless. The couple have two houses, the matrimonial home and a house in Prospect Park, and the wife owns a ninety-eight percent share in a company called Bargain Cleaners Ltd., a laundry and dry cleaning business. The loans which take up a substantial proportion of the appellant's expenditure were for the purchase of the houses and the building in which the cleaning business is situated and for equipment for the business. The appellant testified that the business barely makes ends meet. The second house in Prospect Park is at present not rented out. Part of the loan is to renovate that house. Once it is ready for occupation it will rent out at $1,350 per month.

Two other factors were the subject of evidence and of consideration by the learned Magistrate. Firstly, Melinda has suffered from twitching, particularly when asleep. In mid July, 1993 she had a convulsion caused by fever. She was taken to Miami for investigation. Although no specific treatment was indicated she has to be kept under close supervision and closely monitored if her temperature rises above 101^{o} F. It is noteworthy that the appellant has offered to assist to pay for the medical treatment in Miami.

Secondly, there was evidence from one William Dawson, carpenter from West Bay. He was born in Belize and he went to Belize in April, 1993 to explore the situation there. He found that average wages were far below those in Cayman but it seems to be cheaper to live there. The appellant's affidavit listed salaries of various workers in Belize which shows a level of salaries much lower than in Cayman.

Let me deal with this last aspect of the evidence first. The learned Magistrate took into consideration the difference in the cost of living between Belize and Cayman when assessing the means of the parties. It was right and proper that he did. The means of the parties cannot be assessed in a vacuum; the real value of money is related to the environment in which it is earned and spent and it would be as wrong to assess the respondent's means in Caymanian terms as it would to assess the appellant's means in Belizian terms. However, the learned Magistrate did make an error in his judgment when he said, in comparing salaries earned in Belize with salaries earned in Cayman, that a Superintendent of Police in Belize earns US$1,775 per month whereas an officer of equivalent rank in Cayman earns CI$3,478 per month. The evidence was that in Belize a Police Superintendent earns B $1,775 per month or half that which the learned Magistrate quoted in his judgment. Be that as it may, I do not think that this error led the learned Magistrate into any wrong approach on his consideration of factors relevant to the decision. It was not lost on him that the purchasing power of CI$100 per week is far greater in Belize than in Cayman.

The learned Magistrate found that the respondent gave uncontradicted evidence of "her own straightened means." It is difficult to know how the appellant could contradict her evidence. He lives in Cayman. The respondent lives in Belize. Nor am I convinced that her circumstances are as straightened as she testified to or as straightened as the learned Magistrate found they were. I consider the Magistrate may have been led

into error in assessing the respondent's circumstances. She was earning US$1,500 gross in the United States of America. It is on record that she could, and at one time did, rent accommodation for $300 per month. She is a secretary with substantial experience and with good earning potential. It does not ring true that she left the United States because she could not make ends meet there. Her testimony is that she cannot get a job because of work permit problems in Belize. Yet she helps her brother, a man in politics and who has the Hertz car rental agency. It is not unreasonable to infer that her family is in business in a substantial way and that she benefits thereby. After all she can afford to turn down a job. She can take Melinda to Miami for medical tests. She can afford to fly to Cayman to pursue this case. All this is, of course, at her family's expense, but she works for her family. If her family can afford to assist her with these expenses why can she not afford the air fare to Miami to resume employment in the United States? The inference is that she does not want to do so. These answers in cross-examination demonstrate not only her standard of living but her expectations:

> "I must wash diapers? I must reduce to Belize standards? I have a helper to look after the child."

Dealing with Melinda's medical problems, it is clear that the past expenses are being taken care of. The latest medical report shows that there is no immediate need for treatment. The child needs care and supervision. Only if there is a recurrence would Melinda need prophylactic anti-convulsant therapy. There is no evidence that such therapy is unavailable in Belize or evidence as to its possible cost. There is nothing to suggest that Melinda has suffered or will in the future suffer from lack of medical treatment through lack of funds to pay for it. The appellant has proved responsible in that connection in the past and if substantial treatment is necessary in the future it can be met with a variation of the terms of the order if the appellant refuses or neglects to assist voluntarily.

Now let us turn to the appellant's means. He maintains he can afford no more than CI$65 per week in maintenance for Melinda. Unfortunately we do not know how he has arrived at this figure. He has given the Court an impressive picture of his expenses, which frankly cannot include all items of expenditure usually associated with life on Cayman. He puts his living expenses at $700, but makes no mention of utilities, car maintenance etc. The overall picture is that the family income from salaries is just over $7,000 per month. In view of the interaction of salaries between the appellant and his wife the Court must look at the overall family circumstances. Out of the $7,000 we can deduct approximately $4,000 for the loans to pay for his houses and his business. The family is left with $3,000 per month as living expenses, out of which must be maintained a family of four with accommodation provided. The learned Magistrate was right to consider the extra potential income from the second house of $1,350 per month for it is an imminent income. Although the appellant says he earns nothing from the laundry business he produced no accounts and, for him to move the business as he has done recently, does not demonstrate that the business is in its death-throes. On the figures before the learned Magistrate the appellant is well-placed financially. I do not think the learned Magistrate can be criticized for his conclusion that the appellant has the means to pay CI$120 per week maintenance for Melinda.

In all the circumstances, therefore, even taking into account my view that the respondent is not as badly placed financially as she would have the Court believe, it cannot be said that an order of CI$100 per week maintenance is an erroneous order. On all the evidence before him the learned Magistrate came to a fair and proper figure of weekly maintenance. The appellant can afford $100 per week and it is right that he should give Melinda the same chance in life as he gives his legitimate children.

The learned Magistrate ordered that the variation of the

order take effect from 1st June, 1993: in other words he made an order which operated retrospectively. There is a presumption against such retrospection. I quote the following passage from Halsbury's Laws of England, Fourth Edition, Vol. 44, para 922:

> " The general rule is that all statutes, other than those which are merely declaratory, or which relate only to matters of procedure or evidence, are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. Similarly, the courts will construe a provision as conferring power to act retrospectively only when clear words are used."

The power to vary an affiliation order is contained in subsection (7) of Section 5 of the Affiliation Law, 1973. It reads:

> "(7) At any time after an affiliation order has been made the court may, upon the application of the putative father or of the mother or guardian of the child, vary such order in such manner and to such extent as it may think fit, or suspend such order, or, such order having been suspended, may revive the same."

Although the words "in such manner and to such extent" appear to give the Court very wide powers to vary an existing order they do not in clear and unambiguous terms give the Court power to order increased or decreased weekly payments retrospectively. The term "affiliation order" includes an order to pay a lump-sum towards burial expenses of a dead child and a lump-sum towards confinement expenses and is not restricted to weekly maintenance payments. This may be the reason for the wide terms of the wording in subsection (7). Be that as it may, clear words are not used to enable the Court to make an order with retrospective effect such as is contained in subsection (4) of Section 5, which reads:

> "(4) If the application is made before the birth of the child, or within two calender months after the birth of the child, the weekly sum

> may, if the court thinks fit, be calculated from the birth of the child, and if the child is dead may be calculated from the birth of the child, and if the child is dead may be calculated at a rate not exceeding the rate aforesaid from the birth of the child up to the date of its death."

That is an example, in the same section of the same Law, of the Legislature giving the Court clear power to make an order with retrospective effect. Such clear words are not contained in subsection (7).

In my judgment the learned Magistrate erred in back-dating the effect of the variation to 1st June, 1993. The order should have been expressed as taking effect seven days from the date of his order.

The appeal succeeds only to the extent that the variation of the order takes effect from 17th September, 1993.

I consider in the circumstances a just decision on costs to be that each party will bear his own costs of the appeal. I do not propose to interfere with the order for costs in the Summary Court.

Judge

GRAND COURT CAYMAN ISLANDS

Dated this 3rd day of November, 1993