



applications made in the Summons were resolved on 2 October 2020 when a Residence Order in favour of the mother in relation to the relevant child, who is aged 12, was confirmed. The remaining matter to be dealt with arising from that Summons is the Mother's request that:

“the Court grant an order to enforce the lump sum payment of CI\$40,000 (representing CI\$3,300 for 6 months in monthly maintenance arrears payments February to July 2019 and 50% of all expenses incurred by dependent child...for the period of 6 years.”

The mother also seeks arrears which she has arisen under the contribution provisions relating to education and medical costs in the Order.

3. In her Summons dated 25 June 2020 she seeks:

“an order to enforce the direct lump sum payment of \$46,050 from any eligible pension account held in the name of Mark Antony Manderson to beneficiary Delisa Cecile Manderson.”

4. For the sake of convenience, intending no discourtesy, I will refer to the parties as the mother and the father in this Judgment .

Background

5. The parties were married on 22 November 2007, separating in around October 2010 when it was agreed that the father would leave the former matrimonial home. There is



only the one child of the marriage, a male born on 30 July 2008 and who is aged 12. The child resides with the mother¹ and has had no contact with his father since 2014.

6. The Divorce Petition was filed on 2 August 2011 and the Certificate of Dissolution was granted on 28 March 2013 following the parties' resolution of the outstanding financial and child arrangements in the Order. The mother was legally represented at the time, whereas the father was not. The relevant parts of that order for the present matter are:

"3. The Petitioner shall pay child maintenance in the sum of CI\$550 per month by way of an attachment of earnings order on or before the last day of each month, commencing April 2013. Payments shall continue until the child reaches the age of 18 years or until completion of full time education (21 years), whichever is the later.

4. The parties shall share equally all reasonable education costs and any uninsured medical, dental and optical costs in respect of the child. Educational costs shall be taken to include, but not limited to, tuition, books and uniform expenses." [My emphasis]

At that time, an Attachment of Earnings Order was also processed and a copy was directed to the father's then employer. By agreement, the former matrimonial home was transferred to the mother, with whom the child resided. The equity in the property was then in the region of CI\$16,000. At the time, the mother also had a loan with Fidelity and a credit card debt.

¹ Most recent 'child arrangement' order is a Residence Order made on 2 October 2020 which replaced a "sole care and custody order" made by McMillan J on 16 September 2019.



7. When the Order was made the mother was employed by the Royal Cayman Islands Police Force earning approximately CI\$2,828/month. The mother is currently employed by a bank and her salary is \$4,061/month. The father was employed as an IT Support Specialist and his salary was approximately CI\$2,937/month. On 8 January 2019 the father received a letter from that employer informing him that his employment had been terminated forthwith due to serious misconduct and that he would receive final pay of CI\$144. He was informed that his health insurance was paid until 31 January 2019 and that coverage would be extended until 30 April 2019 or sooner if he found employment elsewhere.

8. Criminal charges resulted from the allegations made against the father by his employer. He informed the Court that the criminal trial is due to start in the Grand Court in January 2021 and that it may last for up to six weeks. The father has since been and remains unemployed. He says that, despite making a number of employment applications for IT jobs and even for work in the construction industry, he has been unable to find work because employers are aware of his upcoming criminal matter. I have seen written evidence² of a number of job applications made by him and I am satisfied that he has been actively trying to seek employment, even in areas outside of his IT experience. At this time, he does not appear to have an income capacity or disposable income and he has only been able to survive on the small salary earned by his current wife who works as a teller at a supermarket. He has no savings and it is evident that he has bank debts exceeding CI\$13,000, which are being actively pursued by lenders.

² Exhibited to the father's affidavit sworn on 15 October 2020.



9. On 16 September 2019 the mother's first Summons came on before McMillan J. There is no order on file, but the Learned Judge's Minute of Order records:

“Upon hearing the parties in person on the Respondent's Summons Application for (1) an Order to vary the Order of William (sic.) J. dated 27 March 2013; (2) that the Respondent be granted sole care and custody of the child; (3) that the Petitioner be directed to sign a parental responsibility consent letter and provide a copy of his passport to facilitate the renewal of the child's Cayman Islands passport; (4) that the Court enforce payment of arrears of maintenance of C.I \$40,000.00: the Court orders (1), (2) and (3), and adjourns sine die (4) , until there is satisfactory evidence of the petitioner being gainfully employed.” [My emphasis]

It is evident that McMillan J did not conduct the exercise of assessing the arrears figure.

10. Despite the terms of McMillan J's Order, in a situation where the father was still not gainfully employed, the mother sought to restore her application in relation to alleged arrears. She filed her Notice of Intention to Proceed along with her second Summons on 25 June 2020.
11. The two Summonses came on before me on 20 August 2020. At that hearing I dealt with a number of issues. It was agreed that, if the Order was not varied and, as of 19 August 2019, the monthly periodical payments due under paragraph 3 of the Order were CI\$12,100. In order to assess the contribution payments provided for in paragraph 4 of the Order, which the mother was stating that the father had failed to pay, she was directed to file an affidavit detailing the sums now being sought, setting out in separate schedules



the expenditure she made in chronological order, preferably verifying her figures with receipts.

12. At the hearing on 20 August 2020, the father indicated, for the first time, that he wished to apply to vary the maintenance order and to remit any arrears. He was informed that if he wished to make such an application he would need to file a summons setting out the orders that he sought with a supporting affidavit by or on 3 September 2020. He was also directed to file an affidavit in reply to the mother's Summonses by or on 28 September 2020. The parties were warned about the Court's concern about the appropriateness of bringing an application for the order sought in the second Summons by means of a Summons as well as the feasibility of her obtaining the orders sought against an unnamed pension provider in that Summons. With those concerns in mind, the parties were provided with a copy of the Chief Justice's Judgment in *Franklin v Franklin* FAM 183 of 2001.
13. The father filed his Summons for variation and for remission of arrears with supporting affidavit on 1 September 2020.
14. The mother filed her affidavit with exhibits on 14 September 2020. In relation to any arrears that may have accrued arising from paragraph 4 of the Order, the onus is on the mother to satisfy the Court, on the balance of the probabilities, (i) that relevant expenditure was made; (ii) that the expenditure was reasonable; (iii) how much that expenditure was; and (iv) that the father failed to make his ordered 50% contribution. The



direction concerning the schedules was given to enable the mother to provide that information to the Court in a structured manner. If she is unable to satisfy the Court about the above to the requisite standard of proof because of the manner in which she presented her evidence, then she will not succeed on unsubstantiated claims.

15. The mother exhibited a number of schedules with receipts for her claimed expenditure during the period 2016-2020 to her affidavit. During the hearing, the Court took the mother through each of the exhibited receipts. That rather laborious exercise resulted in the mother satisfying the Court that she had made the following relevant expenditure:

- (i) in 2016/2017 totalling CI\$442.84;
- (ii) in 2018 totalling CI\$747.28;
- (iii) in 2019 totalling CI\$1,128.52; and
- (iv) up to 9 December 2020 CI\$1,414.78.

Neither party appeared to contest the accuracy of these figures. The father's 50% contribution pursuant to paragraph 4 of the Order should have been CI\$1,866.71. The father accepted that he had not made any contributions to the expenditure set out in the receipts.

16. Accordingly, the sum due from the father pursuant to his obligations arising from paragraph 4 of the Order is CI\$1,866.71.



17. The matter next came before me on 2 October 2020. The Court noted that the mother had not filed her affidavit until 14 September 2020, and that the father had not been served with her affidavit until 28 September 2020. Therefore an order was made extending the time for the mother to file that affidavit. The father was directed to file his affidavit in reply by or on 16 October 2020, and he complied by filing it on 15 October 2020. The parties were informed that they should seek a hearing date at which the Court would try to:

- (i) determine the level of actual arrears in relation to the contribution payments;
- (ii) consider what arrears, if any, could be remitted;
- (iii) determine what the final arrears figure if the Court had the jurisdiction to remit arrears;
- (iv) determine what orders should be made in relation to payment of the assessed arrears; and
- (v) determine whether the current assessed arrears figure should be reduced.

I would add to that list that the Court will consider whether the Order should be varied and whether any variation made could be applied retrospectively. If it is decided that the Order should be varied and that any variation should apply retrospectively, depending on the date of retrospective application, the Court will need to determine what the arrears figures are in relation to both the monthly maintenance payments and the contribution to expenditure payments.

Issue – Wife’s Second Summons



18. Unfortunately, the Summons is procedurally incorrect and misconceived. Although the actual words are not used in the Summons, what is in effect being sought is a garnishee order. That application cannot be made by Summons. The ex parte application for a ‘Garnishee Order nisi’ must be made pursuant to *Grand Court Rules Order 49* and using the appropriate form and procedure. The application must be supported by an affidavit showing that the judgment has been recovered and is still unsatisfied. The affidavit must also give the name of the proposed garnishee, which in this case would require naming the relevant pension company. The affidavit must also state that to the best of the information or belief of the applicant the named garnishee is within the jurisdiction and is indebted to the judgment debtor. The affidavit must also state that sources of the dependent’s information or the grounds for her belief.

19. The application is also misconceived as the sum of \$46,050 is sought to be paid from “any eligible pension account”. Apart from the failure to name the garnishee, the figure quoted is only what the mother contends the arrears to be and it is not a judgment as the Court is still to assess the arrears figure. Lastly, even if the application had been brought in a procedurally correct manner and even if there was a judgment to be enforced, the mother could only obtain a garnishee order over a debt due or accruing due to the father. The wife would also need to satisfy the Court that there was a debt due and accruing from the pension company, again something not addressed by her in her affidavit evidence.

20. Accordingly, even if I find there to be arrears, I will make no order on the wife's summons dated 25 June 2020.

Issue - Remission of Arrears

21. In *A.T v T.T D13 of 2002*, the Chief Justice considered an application to enforce a child maintenance order. In that case the father argued that the Court should not enforce arrears which are due for more than one year. Counsel referred to s.32(1) Matrimonial Causes Act 1973 and contended that the approach in England and Wales had been applied “*by way of Convention*” by the Grand Court. The Chief Justice rejected that submission, finding that there was no such convention and that the Court had no jurisdiction to remit arrears. The Chief Justice placed great importance on the fact that the beneficiaries of child maintenance orders are the relevant children. He stated at paragraph 13:

“I therefore proceed on the basis that the respondent is entitled to bring these proceedings for enforcement of maintenance arrears although the period of the arrears go back a number of years. I am particularly mindful of the fact that the obligation to pay maintenance is not one owed in personam to the respondent. It is an obligation owed for the welfare of the minor children of the marriage who had no say in whether or not their mother, the respondent, should have sought to enforce the Order earlier. The recovery of the arrears remains an obligation for their benefit which she is entitled to pursue.”

22. In his written judgment dated 13 June 2014 in *Franklin v Franklin D 183 of 2011*, the Chief Justice, citing his decision in *A.T v T.T*, again refused an application to remit arrears of maintenance for want of jurisdiction. At paragraphs 56 and 57 of his Judgment, the Chief Justice stated:





“23. To be clear, I recognize the undoubted jurisdiction of the Court to vary maintenance orders made both under the MCL and the Children’s Law and to do so retrospectively in circumstances where a party is shown to have been no longer able to meet the terms of an order.³ I also recognize the jurisdiction to be exercised in the manner (as I read the case) spoken of and approved in Warden v Warden (above) to make a variation of a maintenance agreement (that is: effective from the date specified in the order). The remission of sums which are accrued and owing and so are properly already due to a party under an order, is altogether a different matter. That, in my view, requires that the Court’s jurisdiction is clearly vested by law before it might be engaged for the making of such orders. In the absence of a clear statutory power, that jurisdiction is not to be grasped and for the reasons explained in A.T. v T.T., it would, in my view, be inappropriate for the Court to invoke its inherent powers to bridge the jurisdictional gap.

24. I note, in passing, that the need for legislative change was perceived in England and Wales to vest the similar jurisdiction in the courts there, as also explained in A.T. v T.T. and that this was so, despite the currency of the provisions discussed in Warden v Warden (above).”

25. In light of the Chief Justice’s finding in A.T v T.T., the Grand Court does not have a discretionary power to remit arrears similar to that established by many decisions in the Ecclesiastical Courts and in the Family Division (as mentioned in cases such as *Campbell v Campbell* [1922] P.187 and *Wilson v Wilson* [1830] 3 Hag Ecc 329n). The Chief Justice found that no similar practice has developed to remit arrears in the Grand Court. The force in the Chief Justice’s view that there would need to be a legislative provision in place to ground jurisdiction to remit is also fortified by the fact that s.31(2A) of the England and Wales the Matrimonial Causes Act 1973, the piece of legislation which is

³ My emphasis by underlining.



oft referred to when considering the application of the Matrimonial Causes Law, contains the express provision that the Court has the power to remit the payment of all or some part of arrears which have accrued under any order for maintenance.

Variation of Maintenance Order and Contribution Order

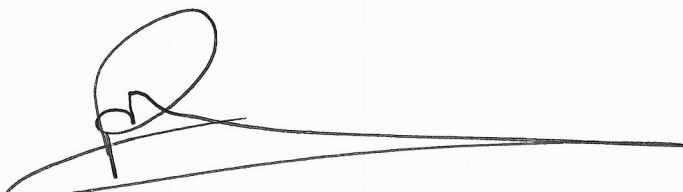
26. Due to my findings about the father's circumstances, including his lack of income capacity, set out in paragraph 8 above I vary paragraph 3 of the Order and now make a nominal maintenance order for the child in the sum of \$1 per annum. For the same reasons I suspend the operation of paragraph 4 of the Order. However, moving forward, the father is directed to promptly inform the mother about the outcome of his criminal trial. The mother may, armed with that information, then review the circumstances and decide whether, especially if the father is acquitted, the Court should consider whether he again has an income capacity that would enable him to pay maintenance for the child.
27. Adopting the Chief Justice's above guidance in *Franklin*, although the Court may not remit arrears, I am satisfied a variation made to any periodical payments order may be applied retrospectively. As the Order was one made in divorce proceedings, an application for variation is an application for ancillary relief. The general principle of ancillary relief applications is that an order may be backdated to the date of the application. However, there are instances where it can be backdated further if the facts justified it.⁴

⁴ *MacDonald v Macdonald* (1964) P. 1. *Morley-Clarke v Jones (Inspector of Taxes)* [1986 Ch 311].



28. In this matter, I have considered whether I should apply the variation retrospectively. If I were to backdate it to the end of January 2019, when the father lost his employment, the arrears in monthly payments which had accrued to that date were CI\$1,650. If I were to backdate it to 1 September 2020, the date when he filed his Summons to vary the Order, then the arrears would be CI\$12,100. If any variation was to be applied as of the end of November 2020, the arrears would be \$13,750.
29. I have carefully considered all three of the above options. I do not feel that the facts merit a retrospective variation to the date when the father lost his employment. Those seeking a downward variation based on a significant change in their employment status should promptly file their application to vary. They should not simply sit back and make no or reduced payments without the authority of the Court. The parent to whom the maintenance is being paid for the benefit of the child is entitled to have an expectation that the order will be complied with and to have an expectation that if the payer is of the belief that he cannot keep up the payments that he will then promptly apply to the Court for a variation. In the present matter, the father simply hoped that the obligation would go away and he made no payments. If he had applied to vary soon after he lost his employment, an order to vary the amount payable may well have been made at that time.
30. I am satisfied that the variation should be backdated to the date that the father made his application, namely 1 September 2020. Accordingly, I assess the arrears of the monthly payments ordered under paragraph 3 of the Order to be CI\$12,100.

31. I have also considered what should happen in relation to the arrears figure assessed as being the amount which the father has failed to contribute to the health and educational expenses for the child. I find no justifiable reason why the father should not remain liable to meet the liability which has arisen due to his failure to comply with paragraph 4 of the Order.
32. Accordingly, I assess the arrears of contributions for health and educational expenses ordered and to be payable under paragraph 4 of the Order to be CI\$1,866.71.
33. The total arrears that have accrued are CI\$13,966.71. Having regard to my findings about the father's circumstances set out in paragraph 8 above, I am today unable to make an order as to how they should be paid. However, adopting my views expressed about a future review of the monthly maintenance figure, the enforcement of the arrears may be best reconsidered after the conclusion of father's criminal trial.


Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT

