

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN DIVORCE

SUIT NO. D1982/B099

BETWEEN

NORMA THERESA BUTLER

PETITIONER

AND

RADCLIFFE DAVID BUTLER

RESPONDENT

Mr. Gordon Steer of Chambers and Bunny on behalf of the Petitioner

Mr. David Muirhead Q.C. on behalf of the Respondent

HEARD: JUNE 3, 4 and 28, 1991.

JUDGMENT

HARRISON J. (Ag).

This application before me is to vary a Consent Order for Maintenance.

On the 25th January 1983 Radcliffe Butler (hereinafter referred to as the "Respondent") by consent was ordered to pay to Norma Butler (hereinafter referred to as the "Petitioner") the sum of Eight Hundred and Fifty Dollars (\$850.00) monthly for maintenance of his children Tisha Butler and Rhett Butler apportioned in the sum of Four Hundred and Twenty-Five Dollars (\$425.00) in respect of each child. It was further ordered by consent that the Respondent pays all medical, school, dental and optical expenses reasonably incurred on behalf of the children.

The Petitioner is now seeking to have this order varied to Seven Thousand (\$7,000.00) monthly. The Respondent on the other hand has offered to increase the monthly payment to Two Thousand Dollars (\$2,000.00).

Respondent was cross-examined on his affidavit.

The evidence of the Petitioner discloses that the cost of maintenance has increased dramatically since the making of the order. She claims that she is no longer in a position to adequately maintain them with the Eight Hundred and Fifty Dollars (\$850.00) monthly in addition with her salary. She is an Accounts Assistant employed to Air Jamaica Limited. Her gross monthly salary is \$5,560.00 and she takes home \$2,722.03 after deductions. No other source of income was proven in respect of her.

The evidence further discloses that Respondent is Managing Director of Moo Young Butler Associates, an Accounting and Public Relations Firm. The Petitioner has described it as "growing from strength to strength" over the

One Thousand Dollars (\$1000.00) monthly for the children was submitted to be extravagant spending. It was further submitted that items in respect of medical, school and dental expenses should be excluded from the breakdown of monthly expenses as these expenses have to be taken care of by the Respondent by virtue of the Order dated 25th January 1983. These latter items if they were to be excluded would amount to \$1,125.00.

I consider next the monthly expenses of the Respondent. His affidavit dated February 11, 1991 discloses a total of \$11,209.13. These expenses are set out hereunder:

- |                                                                     |                    |
|---------------------------------------------------------------------|--------------------|
| 1. Living expenses including food, utilities, helper and nurse-maid | \$7,400.00         |
| 2. Maintenance for Tisha and Rhett                                  | 850.00             |
| 3. Life Insurance Coverage in respect of children                   | 1,361.11           |
| 4. Mortgage and Maintenance payment for Apartment                   | <u>1,598.02</u>    |
|                                                                     | <u>\$11,209.13</u> |

Other expenses such as school fees are paid on a term basis; property tax and Insurance on 32 Upper Melwood Avenue are paid on a yearly basis.

The Respondent has admitted under cross-examination that there would be a surplus of \$4,663.02 monthly in his hands after deducting his monthly expenses from the income he receives. He agrees that this sum would be available to assist Petitioner's children. He further admitted that profits made by Moo Young Butler Associates were re-invested in the company. He states when cross-examined "my partner and myself have never taken a penny out of the company by way of profit. It is as a result of that why the company is in a position particularly at times like this to rarely use its overdraft facilities". This profit he says was used to purchase equipment for the company.

Mr. Muirhead made the following submissions:-

- (a) "Having regard to the provisions of the Matrimonial Causes Act and Rules made thereunder as well as the forms devised to give effect to the law and rules and regard to sections 7 and 7B of the Children (Guardianship and Custody) Act, the court is concerned with maintenance orders with the means of both parties and awarding a sum towards the maintenance thereby taking into account the obligation of the other parent to provide support for children".

years. He is a shareholder in this firm and is also shareholder in Carib Ocho Rios Apt. Limited. He deposes that he receives a monthly income totalling \$17,309.00. In addition, \$20,000.00 is allocated monthly for travelling and entertainment on behalf of Moo Young Butler Associates. He travels locally and overseas and is obliged to submit bills and receipts evidencing expenditure of the \$20,000.00. The evidence does not reveal whether he spends this sum of \$20,000.00 each month. There is evidence however that when he spends in excess of the \$20,000.00, the difference is treated as a loan from the company.

Allegations relating to the payment of \$120,000.00 annually to the Respondent as Director of Carib Ocho Rios were not proved. The Respondent on the other hand presented evidence of an Auditor's Report in respect of Carib Ocho Rios showing a deficit of \$718,301.00 on the balance sheet for the year ending December 31, 1990. It was his contention that no Director's remuneration was paid having regard to the deficit.

The relevant children are Tisha and Rhett. The court must consider inter alia, their age, whether they are attending school and their standard of life when it comes to consider their needs on the question of maintenance. It is my view that similar considerations must be given where there is an application to vary a maintenance order. The court should also decide whether the means of both parents should be taken into consideration when exercising the discretion to vary such an order.

Both children are attending High School. Tisha who is now seventeen years of age is attending Hillel Academy. Rhett is twelve years old and is a student at Wolmer's Boys School. Both children reside with the Petitioner at 32 Upper Melwood Avenue, Cherry Gardens which is jointly owned by the parties. The children were students at Hillel Preparatory at one stage. Rhett was successful at the Common Entrance Examination and won a place at Wolmer's Boys. Tisha has continued however to attend Hillel.

The Petitioner claims in Affidavit dated March 21, 1990 that monthly expenses for the maintenance of the children amount to \$7047.00. She states that she has to be borrowing from her family in order to survive. Mr. Muirhead submitted that items for electricity, water, groceries and household helper on this list should be apportioned between the parties. Clothing amounting to

Mr. Steer in support of his arguments submitted that:-

- (i) Tisha being a minor and living with her parents could not by herself apply for maintenance and also could not instruct her parent or guardian not to apply for support. Therefore he submits, it was not within Tisha's capacity to state that she did not want maintenance. (He refers to section 7 (3) of the children (Guardianship and Custody) Act; "Family Law Cases and Commentary" by Findlay Bradbrook and Bailey-Harris paragraph 8203 page 491).
- (ii) The court should find that the \$20,000.00 paid monthly to the Respondent is a part of his salary in the same way he receives \$5000 monthly for the lease of his car to the company.
- (iii) The \$4663.68 admitted by Respondent as being surplus should be made available to the Petitioner.
- (iv) The Petitioner and Respondent have been living in Cherry Gardens since marriage.
- (v) The court will have to look at the means of the parties being an application to vary maintenance. He submits further however the words "towards the maintenance of child" (which are referred to in the Children (Guardianship and Custody) Act) can mean the entire amount it takes to support the child. This he said would have to take in the ability of the father to pay and if he can't then the mother should make up the shortfall.
- (vi) The figure of Seven Thousand Dollars (\$7,000.00) monthly sought by the Petitioner is reasonable having regard to the needs of the children and the ability of the Respondent to pay.

He cites in support:

1. Rayden on Divorce 12th Edition pp. 995 and 1016.
  2. Re T (an infant) [1953] 2 All E.R. 830
  3. Re Ward Another [1956] 1 All E.R. 368
- (b) That according to information obtained and exhibited from the Statistical Institute of Jamaica the sum of \$2691.10 would be the equivalent today of the sum of \$850 ordered in 1983.
- (c) That re-marriage of the Respondent with the added responsibility of two young children would be factors the court take into consideration when making the variation order. (He refers to Rayden on Divorce 12th Edition p. 799 letter G).
- (d) That the monthly maintenance could be supplemented if premises 32 Upper Malwood Avenue were rented. He submits that based on Affidavit evidence of Respondent it could attract a rental between Twelve Thousand to Sixteen Thousand Dollars monthly.
- (e) That having regard to Tisha Butler's affidavit dated November 23, 1990, "it is the clearest evidence that she does not wish the court to make any order varied or otherwise of her continued support by her father".
- (f) That a distinction must be drawn between the Respondent personally and the Company which he is part of. That the Respondent only receives a salary and re-imburement of travelling and entertainment.
- (g) That the surplusage of \$4,663.68 monthly does not represent an amount available out of which further payment by way of increased maintenance could be paid having regard to the Respondent's re-marriage and added responsibilities.
- (h) That the Petitioner by failing to comply with an access order would be in contempt and therefore she would be disentitled to the variation sought.
- (i) That the re-imburement of the \$20,000.00 monthly should not be treated as income.
- (j) That the offer by the Respondent to increase the sum from \$850 to \$2000 monthly was "an exceedingly generous offer".

Having regard to the evidence and authorities cited, I hold:

- (a) That the means of both parties must be considered when deciding to vary the maintenance order.
- (b) That the needs of the children are paramount when considering what sum ought to be ordered for maintenance.
- (c) That the re-marriage of the Respondent along with the added responsibility of young children are factors to be taken into consideration.
- (d) That the sum of \$7,400.00 monthly referred to in the Respondent's affidavit dated 11th February 1991 already takes care of (c) above.
- (e) That Tisha Butler has not repudiated her right to be maintained by the Respondent she being a minor.
- (f) That the rental which could have been derived from 32 Upper Malwood Avenue is not a factor to be considered when deciding the added sum to be paid by the Respondent. Further, that the Court will not disturb the present accommodation in respect of Petitioner and children.

I bear in mind also the Respondent's personal expenses, his responsibility for the payment of school, medical, dental and optical expenses reasonably incurred. In all the circumstances, I accordingly order that the maintenance order made on the 25th January 1983 be varied to Three Thousand Dollars (\$3,000.00) monthly with effect from 3rd June 1991 apportioned in the sum of One Thousand Five Hundred Dollars (\$1,500.00) in respect of each child. The Respondent will continue to pay 75% of school fees in respect of Tisha and that he will continue also to pay all medical, school, dental and optical expenses reasonably incurred in respect of both children.

There shall be costs to the Petitioner to be taxed if not agreed.

Certificate for Counsel granted.

Having regard to the evidence disclosed from the several affidavits filed, the evidence revealed in cross-examination of the Respondent and the submissions of both Counsel I find:

1. That the sum of Eight Hundred and Fifty Dollars (\$850.00) is inadequate in these times for the maintenance of both children.
2. That the average monthly net income of the Petitioner amounts to approximately \$2,722.00.
3. That after the Respondent's monthly expenses are taken care of, he retains a sum of \$4,663.00 approximately, which could be regarded as surplus.
4. That having regard to the evidence relating to the allocation of \$20,000.00 monthly for travelling and entertainment this sum cannot be regarded as income as he is obliged to submit bills and receipts in proof of expenditure.
5. That there are no other proven sources of income apart from those figures i.e. \$17,309.00 which the Respondent sets out in his affidavit of the 11th February 1991.
6. That the sum of \$1,125.00 being expenses for medical, dental and school and which the Respondent is obliged to pay, must be excluded from the sum of \$7,047.00 being claimed by the Petitioner as monthly expenses.
7. That the expenses listed in relation to groceries, household help, electricity, water and telephone must be apportioned having regard to the benefit which the Petitioner would derive from these heads.
- 7(a) That the expenditure of \$1,000.00 monthly for children's clothing is extravagant.
8. That the profits made by Moo Young Butler Associates are re-invested in the company and the proceeds used to purchase additional equipment for the company.
9. That as a result of the deficit shown in the affairs of Carib Ocho Rios and the lack of proof otherwise, the Directors have not been paid any remuneration.