IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

FAMILY DIVISION

SUIT NO. F2001/C088

IN CHAMBERS

BETWEEN ELGETA EVETT CHIN PETITIONER/APPLICANT

AND GAMEL ALKIRK CHIN RESPONDENT

Mr. Ravil Golding instructed by Sheron Henry for Petitioner
Miss Alicia Thomas instructed by K. Churchill Neita & Co. for Respondent

Heard : December 18th & 20th, 2002

BROOKS J.

This was a Summons for Orders for Custody and Maintenance for the relevant child of the marriage of the aforementioned parties, as well as an application for maintenance of the Wife/Petitioner.

Very early in the hearing of the applications the Applicant abandoned the applications for the custody of the child and for the maintenance of the wife. It was revealed that an order for custody in favour of the Petitioner/Applicant had already been made at the hearing of the petition for divorce. The application for maintenance of the wife was abandoned because the Applicant indicated that she was now working and earning a salary and no longer needed support from her husband.

Prior to those concessions being made however, two preliminary points were taken, one by each side. The first was an objection by the Respondent that the Applicant had proceeded by way of an incorrect procedure in her application for maintenance for herself.

The thrust of the argument was that the Applicant ought to have proceeded by way of an application for ancillary relief and therefore the present summons for maintenance for wife was therefore fatally flawed. The Applicant's attorney in response submitted that the relevant provisions of the Matrimonial Causes Rules were directory and not mandatory and that they go to form and not to substance.

It would be helpful at this stage to outline the terms of the document before the court. The document is headed "Summons for Maintenance". The relevant part of the body of the summons reads as follows:

> "Let all parties concerned attend...for the hearing of an Application by the Petitioner Elgeta Evett Chin for maintenance of:
> (a) The relevant child ...
>
> (b) The Petitioner..."

It is to be noted that there was no specific prayer for maintenance contained in the Petition for Divorce and no subsequent notice given to the

Respondent as is required by rule 43 of the Matrimonial Causes Rules that a claim for ancillary relief would be made.

The preliminary objection was overruled on the basis that although the provisions of rule 43 do provide the procedure for applying for maintenance once a petition for divorce has been filed, the policy of the court is not to have matters struck out for mere want of form. The information before the court on the present application is substantially that sought to be elicited by the provisions of rule 43. In the circumstances of the instant case therefore, "no useful purpose can be served by commencing the matter de novo", to use the concise phraseology of Patterson J.A. in the unreported case of Goodison v. Goodison S.C.C.A.95/94 (delivered April 7, 1995) at page 40 of the judgement of the court.

Authority for the ruling on the preliminary point was found in the judgement of their Lordships in the case of Eldemire v. Eldemire (1990) 38 W.I.R. 234, where it was said at p. 238-9 that, in "general, the modern practice is to save expense without taking technical objection, unless it is necessary to do so in order to produce fairness and clarification." Though this was said in the context of the procedure for Writs of Summons as opposed to that for Originating Summonses, the principle remains applicable in these circumstances and was applied in the Goodison case (*supra*). In the

latter case Forte J.A. (as he then was) stated (at p.16) that, "where given the circumstances of the case, the issues can be fairly resolved in spite of the irregularity in procedure, the Courts will allow the matter to proceed in order to determine the substantive issues". It cannot be ignored, however, that later in that very judgement the learned Justice of Appeal ruled that the failure to follow the provisions of rule 43 *supra* was fatal to the application for maintenance made in that case. The result of that failure according to the learned judge at first instance in that case was that, "there was no opportunity given to the Respondent to file evidence of his means" (p. 17).

Forte J.A. in upholding the learned judge's ruling said, in relation to that incorrect procedure; "the application, however must be made by the correct procedure, which is geared at presenting as full a picture as possible to the court which is asked to make the order". (p. 20).

In Goodison the applicant sought, ostensibly under the provisions of the Matrimonial Causes Act, declarations in respect of the respective interests of the spouses in the former matrimonial home, and orders for the sale of the said property and for the payment from the Respondent's portion of the proceeds of sale, such lump sum as "may seem just by way of financial provision for the maintenance, education and benefit of ...the relevant child of the marriage".

The summons, on appeal, was allowed to be heard in respect of the declarations of the respective interests of the parties in the premises and of the sale thereof, as if the matter had been brought by an Originating Summons under the Married Women's Property Act. The application in respect of the ancillary relief was disallowed for the reasons outlined above.

The instant case is, however, very different. The affidavits which have been filed in this matter, comprehensively address the matter of the Respondent's income and expenditure and thus there would be no prejudice to him to have the matter heard on this summons.

As earlier indicated, the applicant abandoned this aspect of the summons and therefore the preliminary point eventually proved to be otiose, certainly in the manner in which it was framed, that is, with reference only to the issue of the wife's maintenance.

The second preliminary point was taken by the Applicant, and was to the effect that the Respondent had failed to observe and obey, in full, the terms of the interim order for maintenance made by this Court in April of this year, and was therefore in contempt of court. The consequence of this disobedience was therefore, it was submitted, that the Respondent could not be heard on the Application. The Respondent's counsel, in his defence,

sought to advance that he was unable to afford the sums ordered, to be paid, by the interim order.

The ruling on this preliminary issue was that whereas the Respondent was in contempt and could not properly initiate any motion or application to the court because of his disobedience, he was, nonetheless, entitled to be heard, in resisting the application of another party.

Authority for that position was found in the case of Chuck v. Cremer (1846) 1 Coop. T. Cott. 338 (Vol. 47 E.R. 820). That principle of a party's right to be heard was applied in the unreported case of Dexter Chin v. Money Traders & Investment Ltd. SCCA 113/97 (delivered 24/3/98).

Despite the ruling on the preliminary point, parties are to bear in mind that orders of the court are not to be disobeyed regardless of their view of such orders. The party bound by such an order is to apply to discharge, stay or vary it, but until such discharge, stay or variation occurs, the order is to be obeyed in its full terms.

These preliminary issues having been disposed of, the substantive application was fairly straightforward in nature. The Applicant claims the sum of $15,000.00 per month as maintenance for the relevant child of the marriage, who is now six years old. In addition the Applicant prays for an

order that the Respondent pays for all of the medical, educational, optical and dental expenses incurred for the said child.

For his part, the Respondent has indicated that he earns approximately $50,000.00 per month, based on his regular earnings, and that his monthly expenses of approximately $55,700.00, make him unable to afford maintenance payments at that level. He, however, does occasionally earn extra overtime income in the vicinity of $12,000.00 per fortnight. The Respondent also provided evidence that he has the benefit of medical insurance from which the child can benefit, provided that the requirements of the insurer as to the proof of the expenditure are met.

There were two significant issues which arose from the affidavits and were the subject of much of the submissions to the court.

The first was that the Applicant had removed the child from one school where the fee was $10,000.00 per term to one with fees of $20,000.00 per term. Because she has been granted custody the Applicant has undoubted right to keep the child in the more expensive institution. The question which arises is whether the Respondent would be obliged to pay the fees at any institution chosen by the Applicant. Obviously affordability must be taken into account in such decisions and the court must bear this in mind in making its order.

The other issue was the occupancy of the former matrimonial home (owned in part, by the Respondent, and for which he services a mortgage loan), which is presently unoccupied, being used only for storage of the Applicant's furniture. In the face of the impracticality of the situation, good sense has prevailed, and the Applicant has agreed to remove her furniture to enable the Respondent to relocate to the premises and so avoid the expense of the monthly rental of $12,000.00 at his present accommodation. He says that he will not be able to relocate until March, 2003.

Having taken the evidence from both sides into account, the fact that the Applicant now earns an income and also that the Respondent will be relieved of the expense of the payment of rental in the near future, the order of the Court is as follows:

1. The Respondent shall pay to the Petitioner/Applicant the sum of $8,000.00 per month on the first day of each month up to the twenty-eighth of February 2003, and as of the first day of March 2003, the sum of $12,000.00 per month for the maintenance of the child of the marriage. The said increase shall take effect only if the Petitioner/Applicant shall have vacated the former matrimonial home by the thirty-first January 2003. In the event that the Petitioner/Applicant shall fail to vacate the said matrimonial home

by that date the increase shall not take effect until the first day of the month following the expiry of thirty days of the Petitioner/Applicant vacating the said matrimonial home.

2. The Respondent shall pay all medical, dental, and optical expenses and one-half of all educational expenses for the said child.
3. The aforesaid payments shall continue until the child shall attain the age of eighteen years or until such further order of this court.
4. The interim order of the Court made on the 29th April 2002, is hereby superceded, except in relation to the aspect of access of the Respondent to the relevant child.
5. Liberty to apply
6. No order as to Costs.