

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN FAMILY DIVISION

SUIT NO. F.D. 2002 /K011

BETWEEN HEWIN WESLEY KERR PETITIONER/RESPONDENT

A N D ANDREAN DEJOY KERR RESPONDENT/APPLICANT

Miss Arlene Beckford for the Petitioner/Respondent.

Miss. Dundeen Ferguson instructed by Ferguson, Campbell & Company for
the Respondent/Applicant.

**MAINTENANCE - APPLICATION FOR MAINTENANCE OF WIFE -
QUESTION OF QUANTUM**

Heard: 4th & 12th April & 30th June, 2006

BROOKS, J.

The Kerr's marriage has ended in divorce. Mrs. Kerr alleges that there is now a significant imbalance in their respective financial positions. She is a seamstress and he a telecommunications engineer and a senior executive with a major telecommunications provider in Jamaica. She seeks an order of maintenance whereby he would pay to her the sum of \$10,000.00 per month. Mr. Kerr asserts that he simply cannot afford to pay that or any sum as he is already bearing a heavy financial burden. It is for the court to decide what if any sum should be awarded.

Mrs. Kerr's situation

Mrs. Kerr states that she is not permanently employed. She works part-time, and occasionally she gets to sew some items to supply the University Hospital through a contract secured by a friend of hers. She has in the past been able to go to the United States, for three or four months at a time, where she has been able to earn an income. That situation is however not certain, nor, it appears, legal. She sets out her expenses as being \$24,103.69 per month (para. 15 of her affidavit filed 14/10/2005). Her expenses do not include housing, as Mr. Kerr pays the mortgage for the house in which she lives, with their son. That sum is just under eight thousand dollars per month. The court was however not told Mrs. Kerr's income from her part-time employment. Neither was the court told why it was that she was not engaged in a full time job.

Miss Beckford, on behalf of Mr. Kerr complains that Mrs. Kerr has not sought to place herself in a position where she is independent, but rather has deliberately remained underemployed.

Mr. Kerr's situation

Mr. Kerr earns a net monthly income in the vicinity of \$87,000.00. He is expected to receive a pay rise shortly as the new contract period for his bargaining unit at his place of employment commenced at the beginning of

April, 2006. He also receives a number of perquisites from his employer. Among these are free local cellular phone service up to a maximum of \$4,000.00 per month, concessionary internet service, free local calls on a telephone land-line account, subsidized lunch, health insurance and a motor car. From his income he has to bear the cost of maintaining two households, as he has since remarried. There is an interim order in place requiring Mr. Kerr to pay \$6,000.00 per month to Mrs. Kerr for her maintenance. His new wife has recently had a baby and she brought a child with her to the marriage, which child Mr. Kerr has accepted and maintains. I agree with Miss Ferguson for Mrs. Kerr that in setting out his monthly expenses Mr. Kerr has exaggerated the figures for a number of items. Based on his affidavit, he would be spending in the region of \$127,000.00 per month to meet his commitments (para. 9 of his affidavit filed June 25, 2004). His new wife is employed, though she is currently on maternity leave. The court was however not informed of the level of contribution that she makes to their household. It seems however that he also incurs expenses in respect of her maintenance such as the purchase of a car.

The findings of fact

Both parties were cross examined on their respective affidavits. When the oral testimony is assessed along with the affidavit evidence, it is

my view that there is a serious imbalance in the circumstances of these two households resulting from the separation and divorce of the parties. Mr. Kerr, despite the fact that he continues to pay the mortgage for the former matrimonial home, and provides the major financial support for their son, still has some disposable income. He enjoys the privilege of purchasing a car for his new wife and seems to have a comfortable home environment.

On the other hand it seems that Mrs. Kerr has not achieved her earning potential. Whether that is as a result of a failure to try or otherwise is not clear. It does seem however that there is still need for some supplementing of her income.

The Law

The authorities make it clear that after the breakdown of a marriage, there should not be such an imbalance in the circumstances to the extent that one party is in penury while the other enjoys luxury. The court is required to seek to correct gross imbalances. In doing so it is the need of each party balanced against the available resources which is the main guide for the court. In *Valentine v. Valentine* (1992) 29 J.L.R. 35, the Court of Appeal at p. 38 said:

“It seems to us that a judge who is called upon to determine the quantum of money which a husband should pay to his wife as maintenance pending suit must have regard to the husband’s ability to pay and the reasonable requirements of the wife. The rule to the determination of a reasonable award is not charted by any fixed rule of law or practice although as a

guide the judge would look to see what result the application of a one-fifth of the joint income rule would produce. In order to be faithful to the statutory duty to take into account the wife's means, the ability of the husband to pay and all the circumstances of the case, it would be improper for the judge to fashion a straight-jacket for himself and to rely wholly upon a fixed percentage."

That guide would apply to permanent alimony as well as maintenance pending suit. The statute provides guidance for the court. Section 20 of the Matrimonial Causes Act stipulates, in part, that:

"20. (1) on any decree for dissolution of marriage the Court may, if it thinks fit, order the husband, to the satisfaction of the Court to secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her own life, as having regard to her means, to the ability of the husband, and to all the circumstances of the case it deems reasonable...

(2) In any such case as aforesaid the Court may, if it thinks fit, by order, either in addition to or instead of an order under subsection (1), direct the husband to pay to the wife during their joint lives such monthly or weekly sum for her maintenance and support as the Court may think reasonable."
(Emphasis supplied)

Conclusion

The breakdown of the marriage of these parties has resulted in a serious imbalance in their respective fortunes. Mrs. Kerr lives at a significantly lower standard than does Mr. Kerr. The so called "one-third" or "one-fifth" rule is not applicable to every case, and in the absence of clear evidence about Mrs. Kerr's income it would seem that it is inappropriate in this case. I am of the view that she is entitled to continue to receive maintenance from him. I am however not convinced that Mrs. Kerr is maximizing her potential for income earning. It is my view that she ought to be seeking to achieve

independence and that Mr. Kerr should not have the burden of bearing the cost of two households indefinitely. I find that Mr. Kerr should be ordered to pay the sum of \$8,000.00 per month as maintenance to Mrs. Kerr, and that he should continue to do so for a period of three years. She should by then have so arranged her affairs as to be able to fend for herself. At that level, bearing in mind the mortgage payments, Mr. Kerr would be spending in the vicinity of \$16,000.00 on expenses which would directly benefit Mrs. Kerr. It is true that he also benefits from the amount paid for the mortgage, but she secures the saving in not having to pay for housing. I have also taken into account that Mr. Kerr is scheduled to get a pay rise which should allow him to accommodate the increase in the sum payable as a result of this ruling.

The order of the court therefore is:

1. The Petitioner shall pay to the Respondent the sum of Eight Thousand Dollars per month by way of maintenance for herself. The payments shall commence on the 1st day of July 2006 and shall continue to be made on the first day of each month thereafter for a period of three years.
2. The Petitioner, also by way of maintenance for the Respondent, shall pay monthly all commitments to discharge the joint and several obligations of the Petitioner and the Respondent to the institution holding the mortgage of the premises at Lot 309 East Ascott 20, Braeton Phase 3, in the parish of Saint Catherine, until such commitments are fully discharged.
3. Costs to the Respondent to be taxed if not agreed.