

**In the Supreme Court of Judicature of Jamaica**

**In the Civil Division**

**Claim No. D01148/2005**

**Between Alfred Robb Petitioner/Respondent**

**And Beverley Robb Respondent/Petitioner**

**Maintenance Act – spousal maintenance – condition precedent to maintenance order – amount and duration of support.**

**The obligation to maintain one's spouse is in the first instance, latent. It is activated by the inability of the other spouse to maintain himself or herself. So, the court has to make, as a condition precedent to a maintenance order, a threshold finding that the dependant spouse cannot practicably meet the whole or any part of her reasonable needs. The maintenance order reflects that assessment, together with the capability of the respondent to maintain the applicant to the extent that is necessary to meet her reasonable needs.**

**Miss KayAnn Balli instructed by Lightbourne and Hamilton for the Respondent/Applicant.**

**Mr. Leon Palmer instructed by Williams, McKoy and Palmer for the Petitioner/Respondent.**

**Heard: 9th November, 2009 & 11th December, 2009**

**Coram: Evan J. Brown J. (Ag.)**

- 1) This is an application for spousal maintenance by a fifty-seven year old arthritic higgler from a sixty-six year old pensioner, being a retired security guard. The parties' marriage of seventeen (17) years was dissolved, absolutely, on 20<sup>th</sup> October, 2006, they having taking their nuptials on the 4<sup>th</sup>, October, 1989. In a bizarre twist of fate, the matrimonial home, and more particularly the former bedroom of the parties mysteriously suffered

pyroligneous damage shortly after the applicant /respondent's time to give up possession on 23<sup>rd</sup>, February, 2009. The marriage crashed and burned in ways more than one.

- 1) The applicant's evidence is contained is contained in four affidavits and cross examination in chambers. In her affidavit filed on 25<sup>th</sup>, April, 2006, she said she was diagnosed with arthritis. That renders her unable to work sometimes as her "hands seize (sic) up". Her only source of income was four thousand dollars (\$4,000.00) per month being largess from two of her children, a son and a daughter. On the other hand her monthly expenditure totalled twenty-three thousand dollars (\$23,000.00). There was an order from the Resident Magistrate's Court for the parish of Clarendon, in the year 2000, for the respondent to pay to her three thousand dollars (\$3,000.00) per week for two years. Save for five months, the award was wholly dishonoured by the respondent. Consequently, she requested the sum of five thousand, seven hundred and fifty dollars (\$5,750.00) per week, or twenty-three thousand dollars (\$23,000.00) per month, for the remainder of her life.
- 2) That position changed in her affidavit filed on 15<sup>th</sup>, January, 2009. She deponed to be a higgler, earning five hundred dollars (\$500.00) per day, working Mondays, Fridays and Saturdays only. The inflow from one of her children remained at two thousand dollars (\$2,000.00) monthly, while that from the other decreased to five hundred dollars (\$500.00) every two weeks. Her additional income was therefore three thousand dollars (\$3,000.00) per month. On the other hand, her monthly expenses decreased to fourteen

thousand, two hundred and forty dollars (\$14,240.00). Correspondingly, the requested order changed to eight thousand dollars (\$8, 00.00) per month for five (5) years.

- 3) The application was unchanged in her affidavit filed on the 11<sup>th</sup>, May, 2009. This was after the fire adverted to above. The applicant had now moved in with her daughter and the flow of money became inverted, the applicant now claimed four thousand dollars (\$4,000.00) as assistance to her daughter. Her income was constant but her expenses moved to ten thousand, seven hundred and forty dollars (10, 740.00) monthly, with a request to factor in seven thousand and five hundred dollars (\$7, 500.00) for alternative accommodation.
- 4) In her final affidavit filed on the 15<sup>th</sup>, October, 2009, her request for maintenance was kept at eight thousand dollars (\$8, 000.00) per month for five (5) years. She swore to deteriorating financial and health conditions. She was being force into difficult choices of food or arthritis medication in the face of burgeoning impecuniosity. Her monthly expenses amounted to thirteen thousand, five hundred dollars, (\$13,500.00) with a request for consideration of a reasonable sum for rental. Her monthly earnings remained at six thousand dollars (\$6,000.00). She remained silent on the continued contribution of two thousand dollars (\$2,000.00) per month from her son. To exacerbate her already parlous condition, the respondent was in flagrant breach of an interim order to pay to her five thousand dollars (\$5,000.00) per month, made on the 13<sup>th</sup>, May, 2009.
- 5) Under cross examination, the applicant admitted that she was no longer paying four thousand dollars (\$4,000.00) per month for electricity supply. However, that was an item

of expenditure contained in her affidavit of 15<sup>th</sup>, January, 2009 and not repeated in any of the two succeeding affidavits. Another concession elicited in cross examination was that she no longer gave her minor son two thousand dollars (\$2,000.00) per month for lunch money and bus fare.

- 6) In her most recent affidavit, 15<sup>th</sup>, October, 2009, two thousand dollars (\$2,000.00) is listed as pocket money for her son. So described, in my judgement that would be discretionary expenditure as opposed to reasonable need, and would have been disallowed in any event. At the end of cross examination the other items remained unchallenged. So then, her monthly expenditure was left at eleven thousand, five hundred and forty dollars (\$11,540.00). So what of her income?
  
- 7) The applicant maintained that she suffered from such chronic, debilitating arthritis which has so incapacitated her as to reduce her ability to earn for herself to three days of the week. The veracity of such a claim should have been established with consummate ease. However, not one scintilla of medical evidence was put forward. Lurking in the penumbra of this assertion, are two receipts for office visits, treatment and medication. These of course do not speak to the medical condition requiring the services for which she paid. The respondent appeared to have been unconcerned by this state of affairs as no questions were asked of her in cross examination in this area. Neither did the respondent speak to it in his affidavit. With such unequivocal acceptance by the respondent, the court can do no less.

**Respondent's Means & Assets**

- (9) It is common ground that the respondent is the sole legal and beneficial owner of the former matrimonial home. That has already been judicially determined. The fire damaged, but did not utterly destroy the house. At the time of the hearing, it was under repairs. It was sufficiently habitable to allow the repairman to reside there, since about 3<sup>rd</sup>, October, 2009. Additionally, he is in receipt of a monthly pension of fifteen thousand, one hundred and thirty-seven dollars (\$15,137.00). The exhibited pay advice slip is dated 22<sup>nd</sup>, January, 2009. He denied receiving any additional income from painting and gardening. The former activity he ceased in 2008 and the latter in 2004.
- (10) On the other side of the balance sheet, the respondent gave the following summary of his monthly expenses:

1. Rent	\$5,000.00
2. Light/Water	\$2,000.00
3. Furniture payment	\$3,000.00
4. Repairs	\$2,000.00
5. Grocery	\$2,000.00
<hr/>	
	\$14,000.00

He swore that, "as a result to the house [he is] unable to occupy it and have to paying rent of five thousand dollars per month." Save for groceries and utilities, all other items of expenditure have been occasioned by his having to reside elsewhere.

- (11) Among those items is three thousand dollars (\$3,000.00) per month for a bed that he took out under a hire purchase agreement in 2004 when he left the matrimonial home. He said two things about this during cross examination. First, "I used to pay three thousand dollars (\$3,000.00) per month for the bed." In the very next sentence he said, secondly, "I am still paying for the bed". At paragraph 10 of his affidavit, the respondent said he "had to take on credit items of furniture from Courts furniture store which I have to pay three thousand, five hundred (\$3,500.00) per month." That was because of the fire.
- (12) Similar to the cases of the rent and utility bills, no documents were produced to support the payment to Courts. That is significant for five reasons. First, though he spoke of 'items', only the bed was identified. Is it one other item or more? The import of this is that, of his payment to Courts, all of three thousand dollars (\$3,000.00) is for the bed, so what exactly is he paying five hundred dollars per month (\$500.00) for? Secondly, he initially said, "I used to pay", denoting a cessation of payments. Thirdly, if he's 'still paying for the bed', then he has been locked in a hire purchase agreement for five years, on one version of his evidence. While that is unheard of, I cannot take judicial notice of the length of hire purchase agreements at Courts, as was submitted by counsel for the applicant. Finally, in his affidavit evidence, the respondent said that the purchase of the items was occasioned by the fire at the matrimonial home but under cross examination he said he bought the bed in 2004 when he removed from the matrimonial home into an unfurnished one bedroom. That he had furniture at the matrimonial home from 2004 was hotly denied.

(13) The respondent's evidence about having to pay Courts, whether three thousand dollars (\$3,000.00) or three thousand, five hundred dollars (\$3,500.00) per month is nothing more than a tall tale. That he was spinning a yarn is manifestly obvious. So, his list of monthly expenses has to be reduced accordingly. To do otherwise would be to infuse the bounds of credibility with infinite elasticity. Can rent and repairs bear similar scrutiny?

(14) No estimate of the damage to the matrimonial home was given. At the time of the hearing, the windows had already been replaced. It is unknown if the three damaged doors have been repaired or replaced. The respondent said that the slab roof was blackened. It was pebble dashed and "required mason work and painting."

(15) While "the repairs are expensive" to the point where the respondent can ill-afford "to pay for material and workmen", no documentary proof was provided. The respondent said his brother assisted with buying materials and paying workmen. Unfortunately, the extent of this financial assistance was no where articulated. Since the respondent's outlay is a mere two thousand dollars (\$2,000.00) monthly, his brother must truly be his keeper. The pace and expected duration of the repairs have been jettisoned to the forbidden realm of speculation. Be that as it may, the description of the damage does not propel one to the view that repairs will be continuing when the trumpet sounds, heralding the second coming. Therefore, at some point in the future it will no longer be necessary for the respondent to allocate seven thousand dollars (\$7,000.00) towards rent and repairs.

(16) As a further demonstration of his inability to pay, the respondent pleaded in aid a lack of capacity to obey the interim order. At the time of the filing of his affidavit, 4<sup>th</sup>, November, 2009, he should have paid to the applicant thirty thousand dollars (\$30,000.00). When he deponed, he had paid only twelve thousand dollars (\$12,000.00). He said, “no matter how many sacrifices I make I have not been able to make the payments.” He mentioned the order for maintenance in the Resident Magistrate’s Court but only to say it had expired. He did not refute the delinquency under that order attributed to him by the applicant.

#### **The Law & Ratiocination**

(17) An application for an order of spousal maintenance is governed in the first place by section 4 of the **Maintenance Act**. It is both convenient and instructive to set out section 4 in full:

Each spouse has an obligation, so far as he or she is capable, to maintain the other spouse to the extent that such maintenance is necessary to meet the reasonable needs of the other spouse, where the other spouse cannot practicably meet the whole or any part of those needs having regard to –

- (a) the circumstances specified in section 14(4); and
- (b) any other circumstance which, the justice of the case requires to be taken into account.

(18) The obligation to maintain the other spouse is, in the first instance, latent. It is activated by the inability of the other spouse to maintain himself or herself. So, the court has to



make, as a condition precedent to a maintenance order, a threshold finding that the dependant spouse cannot practicably meet the whole or part of her reasonable needs. The maintenance order reflects that assessment, together with the respondent's capability to maintain the applicant to the extent that is necessary to meet her reasonable needs.

(19) There can hardly be any question that the applicant's items of expenditure remaining at the end of the cross examination constitute reasonable needs. The sum of those items is eleven thousand, five hundred and forty dollars (\$11,540.00). Her income remained at six thousand dollars (\$6,000.00) per month with little or no prospect of increased earning capacity, having regard to her unchallenged medical condition. Therefore, from her income she cannot practicably meet a part of her reasonable needs. That being the case, can the respondent discharge the activated obligation?

(20) Section 14(4) (d) enjoins the court to consider, "the capacity of the respondent to provide support". The respondent's vaunted inability to contribute to his former spouse's support becomes less so when the so-called Courts expenditure is removed from the balance sheet. Further, in the future, the respondent's means will improve when the repairs to the damaged home are completed.

(21) That of course will also increase the value of the asset. In that vein, the order made under the **Property (Rights of Spouses) Act** vested the former matrimonial home absolutely in the applicant. The effect of which is that after a marriage lasting just shy of its platinum anniversary, the applicant must either revert to rented premises or, more precariously, a tenant at will of her daughter.

(22) The respondent's means could be further improved if he were to take advantage of his apparent capacity for appropriate gainful employment. His claim to being no longer able to obtain employment as a painter because of an inability to climb a ladder, like every other assertion, was unsupported by anything documentary. He intimated that by reason of being a geriatric he has ceased to do gardening. I bear in mind that he is just short of the biblical three score and ten but he appeared to be a man enjoying reasonably good mental and physical health. His denials in cross examination that he was currently employed in these areas impressed the court as overzealousness to paint a portrait of penury. This was the point at which he misrepresented his age.

(23) That overzealousness was perhaps born of the quality of the relationship between the parties. Although the marriage ended, *de jure*, in 2006. The marriage had *de facto* terminated much earlier, evidenced by the application for maintenance which was granted in the year 2000. Further, the applicant had taken the respondent to court because "he used to beat me to come out (of the house)". So, as in commonly said, to be unforensic for a moment, the marriage had been on the rocks some time in advance of its dissolution. Neither did the wrangling over the matrimonial home achieved more than to pour oil, literally, on troubled waters.

(24) It is against this background that the respondent's failure to comply with the existing interim order and that of the Resident Magistrate's Court must be viewed. It is curiouser and curiouser that the respondent has sought to explain his disobedience of the former but

not the latter order. Not only is the poor quality of the relationship between the parties impelling the respondent to contemptuously disregard the orders, it seems also to be driving him to inflate his expenditures to deceive the court into thinking he is incapable of discharging his obligation towards the applicant. I am likewise not unmindful that the applicant may have overstated her position.

(25) Nevertheless, I am firmly of the view that the respondent is capable to maintain the applicant to the extent that it is necessary to meet her reasonable needs. The deficit of her reasonable needs is five thousand, four hundred and forty dollars (\$5,540.00) per month. The respondent's surplus once the repairs are completed will be ten thousand dollars (\$10,000.00) per month, without taking into consideration his potential for appropriate gainful employment. In two and a half years the respondent will be approximately seventy years old. With the advancing years he may yet incur increased medical expenses and may not be able to do much manual labour. On the other hand, the applicant will be just about sixty years old and, barring increased arthritic disability will still be able to continue working.

I therefore make a maintenance order of six thousand dollars (\$6,000.00) per month for a period of two and a half years, commencing on the 1<sup>st</sup>, January, 2010 and payable on the first day of each month thereafter until the expiration of the period. Costs to the applicant to be agreed or taxed.