



# In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2017: No. 31 & 51

RE C (ENFORCEMENT OF CHILD MAINTENANCE ORDERS)

EX TEMPORE JUDGMENT

(in Court)

*Appeal against enforcement of child maintenance order by imposing term of imprisonment in default of payment-procedural requirements for enforcement- Children Act 1998 section 31.L*

Date of hearing: 14<sup>th</sup> September 2017

Mr. Adam Richards, Marshall Diel & Myers Limited, for the Appellant

The Respondent appeared in person

## **Introductory**

1. In this matter, the Appellant, appeals two orders of the Family Court (Worshipful Maxanne Anderson, Chair) dated the 24<sup>th</sup> of March 2017 and 7<sup>th</sup> of July 2017, respectfully. The common issue in both appeals is whether enforcement orders made in relation to previous maintenance orders were made in accordance with the scheme of section 36.1L of the Children Act 1998.

2. The complaint that the Appellant makes is that in both cases, the Orders were made without adequate enquiry as to the Appellant's means without considering other sanctions, and by imposing a term of imprisonment in default of compliance with the arrears orders without having made a determination that the Appellant had wilfully refused to make the relevant payments.

### **The proceedings before the Family Court**

3. The background to the present appeals need not be explored save to the following extent. The record of the hearing on the 24<sup>th</sup> of March 2017 indicates that the parties appeared before the court with the respondent in person and the appellant being represented by counsel, Mr. Richards. The Court heard certain brief submissions and the Respondent informed this Court that that hearing was listed as a result of a warrant, which was issued against the Appellant returnable in February, which warrant was issued of the Court's own motion by way of enforcement of the relevant maintenance order. The order that was made on the 24<sup>th</sup> of March was as follows;

*“1) That the parties need to take the dispute regarding maintenance for the August 2016-January 2017 to the Supreme Court for determination;*

*2) That there will still be an arrears balance of at least 2 months should the Supreme Court find in [the Father]'s favour. Therefore, [the Father] is to pay the \$1600, (2 months arrears maintenance) on/before the 31<sup>st</sup> March 2017. Default of payment, 7 days imprisonment;*

*3)Defaulter's Review: Friday, 12<sup>th</sup> May 2017 at 10:30 am in Family Court for an update from Supreme Court.”*

4. The notes of the hearing do not indicate that any specific information about the Appellant's ability to pay was elicited from the Appellant. Nor is there any indication from the record that the Family Court had regard to the duties which Mr. Richards relies on in this appeal, namely to consider other enforcement measures before considering imprisonment and then only for wilful ability to pay. I mention this because this is relevant to the question of costs, that there is no indication and this is conceded that counsel for the Appellant raised with the Family Court the jurisdictional issues which form the basis of the present appeal.
5. The 7<sup>th</sup> of July hearing was somewhat similar in what occurred. The Appellant was again represented by counsel, and on this occasion the Respondent was not present. The reference was made by the Court to arrears being at the level of \$8000 and that the Appellant needed to make an effort towards meeting the arrears which were climbing monthly. The Appellant made reference to his full-time employment but indicated that

due to the America's Cup work was slow. He also identified by way of explanation of non-payment that his children had been with him for a period of 5 months. This issue of the need for some credit to the Appellant for that period is an issue which has been referred to the Supreme Court for determination (in separate proceedings).

6. At the end of the hearing, again without any specific enquiry, it appears, as to how much could be paid, and again without any regard to other enforcement measures, the Court ordered the Appellant "*to pay at least \$500 per month towards the arrears or 7 days imprisonment*". The Appellant's counsel, it must be again noted, does not appear from the record to have enjoined the Family Court to have regard to the provisions of section 36.1L of the Children Act 1998. That issue is again relevant to costs, because by July of 2017 the appeal against the 24<sup>th</sup> March 2017 order had already been filed. And so even if the point was not in the forefront of the Appellant's legal advisor's minds in March, it should have been by July.
7. And so, although this is not dispositive of the appeal on its merits, it is noteworthy that the Appellant did not avail himself of the remedy of requesting the Family Court to make the appropriate enquiries before making any further order with respect to the arrears.

### **The relevant statutory provisions**

8. The requisite proper enquiries are apparent on a straightforward reading of the relevant statutory provisions. Mr. Richards explained that the maintenance order having been made by this Court in its Divorce Jurisdiction, the Family Court becomes involved in the matter because of section 44A of the Matrimonial Causes Act 1974. That section reads as follows:

*"44A. (1) Where the court makes an order under this act for maintenance pending suit or for periodical payments, the court may in the order direct that payment of any sum payable under the order shall be made to the clerk of the magistrates' court and, in any such case, payment may be enforced by the clerk of the magistrates' court in the same manner as payment required to be made by and order is enforced [sic] under Section 36.1L of the Children Act 1998."*

9. That section reads as follows:

#### ***"Enforcement***

*36.1L (1) Where any person who has been ordered to make a payment under the [sic] Part fails without reasonable cause to comply with the*

*order, the court may, after giving the person an opportunity to be heard, do one or more of the following –*

- (a) enforce payment by issuing a warrant for distress and sale of his goods;*
- (b) attach any pension income, salary or wages payable to him or garnishee debts owing to him by a third party;*
- (c) require him to surrender his passport or other documents enabling him to travel outside of Bermuda;*
- (d) after having considered all sanctions other than imprisonment that are reasonable in the circumstances and after being satisfied that the person has wilfully refused to make payments under the order, impose a term of imprisonment.*

*(2)Where the court imposes a term of imprisonment it shall –*

- (a) in the first instance, imprison him for a period of one week and impose a requirement that he undergo such counselling as the court may direct;*
- (b) in the case of a continuing wilful refusal to make payments, imprison him for a period of three months.*

*(3)The court may direct that a term of imprisonment be served intermittently.”*

10. One question which is raised by this provision, which was helpfully identified by Mr. Richards, is the question of whether or not it is at all possible in light of Section 36.1L to impose a term of imprisonment in default. It seems to me, without deciding this narrow point, the most straightforward way of complying with Section 36.1L is, having followed the various steps required by the section, to impose a specific term of imprisonment rather than imposing imprisonment by default.
11. That approach would ensure that the pre-conditions for imposing a term of imprisonment have been met before any term is served. The difficulty with a default term of imprisonment being imposed is that circumstances may change between the time that the order is made and when the term of imprisonment in default is enforced, giving rise to doubt as to whether or not in fact the pre-conditions for imprisonment have been met (i.e. at the time when the custodial order takes effect).

## **Disposition of appeal**

12. In summary, it seems clear that the Family Court did not have regard to the provisions of Section 36.1L of the Children Act 1998 and that accordingly the Orders that were made on the 24<sup>th</sup> of March and 7<sup>th</sup> of July 2017 respectively in respect of arrears must be set aside.
13. However, in light of all the circumstances of the present case, including the significant fact that the appeal has been brought to resolve an issue that was not raised by a party who was legally represented in the Family Court, I consider it inappropriate, having regard to the overriding objective and the need to maintain a level playing field, not to award the Appellant his costs of the present appeals. So the appeals are allowed and the impugned Orders set aside, but I make no order as to costs.
14. For the avoidance of doubt the relevant matters are remitted to the Family Court to be reheard.

Dated this 14<sup>th</sup> day of September 2017 \_\_\_\_\_  
IAN RC KAWALEY CJ