

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA**

CLAIM NO. ANUHCV 2008/0045

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 15 OF THE DIVORCE ACT,
1997**

BETWEEN

SHARON PHILLIP

Applicant/Petitioner

AND

DR. CECIL PHILLIP

Respondent

Appearances:

Dr. David Dorsett for the Applicant

Mrs. Tracy Benn-Roberts for the Respondent

2012: May 29

DECISION

BACKGROUND

- [1] **REMY J.:** Dr. Cecil Phillip and Mrs. Sharon Phillip were married on the 25th July 1987. Unhappy differences arose between them and their marriage ended in divorce on the 25th October, 2009. On the 30th May 2008, Mrs. Phillip filed an application for ancillary relief, seeking among other things, an order for monthly payments for her support. On the 15th September 2008, Thomas J., after hearing evidence in the matter, made the following order with respect to the application for ancillary relief:-

1. "The Respondent (Dr. Phillip) shall pay monthly support to the Applicant (Mrs. Phillip) in the sum of \$2,000.00 on the last working day of each month commencing in September 2008 until she re-marries.
2. The Respondent shall pay the Applicant's costs in the amount of \$2,500.00
3. Liberty to apply."

[2] By Notice of Application filed on the 7th April 2011 (the present application), the Applicant Mrs. Phillip applied to the Court for a variation of the Order of 15th September 2008, "so that the Respondent pays to her the sum of \$2,500.00 on the last working day of each month until she re-marries, instead of the sum of \$2,000.00 per month." Additionally, that the Order is to have retroactive effect from the last working day of January 2011. Mrs. Phillip seeks in the alternative an order that Dr. Phillip pay to her the lump sum of \$50,000.00. The grounds of the application are stated as follows:-

- a. The Applicant has consumed all of her savings to purchase a house with the help of a mortgage. The amount of the Applicant's housing costs is \$1,859.27 per month and as a proportion of the Applicant's income, greatly exceeds that for affordable housing that was once her privilege and enjoyment.
- b. There has been a change in condition, means and other circumstances of the Applicant which merits an increase in the quantum of spousal support.

[3] Both Mrs. Phillip and Dr. Phillip filed Affidavits in the matter. When the matter came up for hearing on the 27th day of March 2012, both Counsel declined to cross examine the parties. The Court heard oral submissions from Counsel and reserved its ruling in the matter.

[4] Mrs. Phillip in her Affidavit filed on the 7th April 2011, deposed that she now lives in her own house which is financed partly by a loan in the amount of \$150,000.00 payable over a period of 15 years, partly by the sale of her land, and partly by an investment with CLICO that was utilized. The cost of this "modest" house is approximately \$450,000.00. The house is built on her land. Mrs. Phillip deposed further that her

monthly mortgage payment consumes more than 32% of her cash inflow, and that this is posing "somewhat of a strain" on her. She states that she is making this application for a variation of her spousal support so that "her housing costs as a proportion of her cash inflow is restored to an affordable basis." She states that she used to enjoy affordable housing, but now that is not the case. Paragraph 12 of the Affidavit sums up her position thus:-

"I was married for 17 years. During all of this time I had affordable housing. As a result of the breakup of the marriage, and notwithstanding my best efforts towards economic self-sufficiency, I am unable to live in affordable housing."

- [5] In his Affidavit in Reply filed on the 10th June 2011, Dr. Phillip deposes, among other things, that there has been a decrease of \$6,373.27 in his monthly income as a result of the fact that he is no longer employed by the Government of Antigua and Barbuda. He states that his monthly income has been cut down to half of what it used to be at the time of the making of the Order of September, 2008. He states that additionally, the cost of running his private practice has "skyrocketed" within the last year alone as the cost of supplies and utilities have increased, as well as the fact that several of his patients request a deduction in the fee after consultation as they don't have enough money to pay. He states that he is also responsible for paying tuition for his children and that he is "truly struggling" to make the payments. He states that within the last 5 months in particular, his personal mental and physical health have deteriorated "trying to keep up with all the financial obligations and keep everybody happy." Dr. Phillip deposes that he cannot afford an increase in the maintenance payment sought by Mrs. Phillip. In paragraph 14 of the Affidavit, Dr. Phillip deposes:-

"... I simply cannot afford to pay any more monies to the Applicant. I cannot afford the present monthly sum of EC \$2,000.00 either."

SUBMISSIONS OF COUNSEL

- [6] Dr. Dorsett, Learned Counsel for Mrs. Phillip, stated that the Application is grounded and stands on a simple point of law; in particular, Section 15 of the Divorce Act which provides for variation of a spousal order, which includes variation with retrospective effect. He

stated that there are two brief grounds for the Application. Firstly, the factual grounds are that the Applicant has consumed all of her savings to purchase a house with the help of a mortgage; so there is the housing cost incurred by the Applicant. There is also evidence as to her income. Secondly, there are the "Section 15 grounds". He states that there has been a change in the circumstances and means of the Applicant. He submits that those changes have been properly made out on the Applicant's evidence.

[7] In developing his submissions, Dr. Dorsett states that the Order granting the Applicant spousal support was an Order made on 15th September, 2008 (per Thomas J.). Since that time, more than three years have passed and in those three years, it is clear from the Affidavit evidence that the Applicant has not just sat down and done nothing, but has "dusted herself", "pulled herself by her boot straps and has sought to live a productive life". She has obtained employment; further she has liquidated substantial assets in order to acquire a home. This is not a case where she is "laying up for herself treasure on earth". She's making a considerable effort to maintain a decent and reasonable standard of living. In particular she sold lands. Whether "by foresight or otherwise", she liquidated an investment in Clico; she also obtained a mortgage loan. With all of that, she has attained "a very modest house."

[8] Dr. Dorsett states that the case has been made that there has been "a change in circumstance" of Mrs. Phillip. He states that the statutory requirements upon which the Court can properly grant a variation have been made out. He further states that in the response of Dr. Phillip, he (Dr. Phillip) seems to suggest that he ought not to be contributing in these circumstances because he will not obtain a proprietary interest in the house. Dr. Dorsett states that the purpose of the Order, if the court is minded to make a variation of that order (that of 2008), is not to grant the person who is under the burden of the order a proprietary interest in anything belonging to the Applicant. He states that, "in the words of government, the order for spousal support is in the form of recurrent expenditure, it is not capital expenditure"; and so any person who is subject to an order ought not to get the view that they are buying something.

[9] I now turn to the rival submissions of Mrs. Benn-Roberts, Learned Counsel for Dr. Phillip. Mrs. Benn-Roberts submits that it is true that the application of Mrs. Phillip is grounded under Section 15 of the Divorce Act which basically deals with variation and changes in conditions to warrant a Court entertaining an application for variation. Counsel contends, however, that in considering the application, the Court must not just take into consideration the change in circumstances as alleged by the Applicant, but also the circumstances facing the Respondent. In other words, contends Counsel, if the Applicant has made out what on paper appears to be reasonable grounds, the Court ought not to simply grant the Order for variation without any consideration of the Respondent's financial circumstances. Counsel referred the Court to the Affidavit in Response of Dr. Phillip filed on June 10th 2011. At paragraph 4 of that Affidavit, the Respondent begins by outlining his financial situation; he points to his decrease in income since the granting of the Order in 2008. That decrease in income became effective in February 2011 and was brought about by the fact that he is no longer employed by the Government and as such the salary, the perks and the benefits associated with the employment no longer exist. While employed with the Government, the Respondent received a salary which is noted in paragraph 4 of the affidavit as being \$ 6,373.27. The perks and benefits which that particular employment brought comprised a housing allowance, a gratuity and other benefits which would have been granted on a yearly basis. Additionally, the Respondent who is presently operating only from a private practice speaks at paragraph 5 of his Affidavit of the financial difficulties he has been encountering in keeping the practice open. Paragraph 6 of the Affidavit also further explains the reason why his private practice is not as productive as he would like it to be.

[10] Mrs. Benn-Roberts further states that the Respondent, in addition to his normal everyday living expenses has also contributed since 2008 and continues to contribute to the educational advancement of his children. Reference is made to paragraph 7 of the Affidavit in Response which outlines his present monthly and yearly commitment towards tuition, accommodation and payment of utilities in relation to his daughter who is presently a medical student at the Harvard University in the U.S.A. Counsel referred the

Court to the Certificate of exhibits filed on June 15th 2011. The exhibits are in relation to a letter from the Government of Antigua and Barbuda which verifies that the Respondent is no longer employed and the reason stated at paragraph 2 of that letter is that the Respondent has attained the age of 60 and is therefore no longer eligible for employment with the Government. Also, as part of the exhibits filed, are two letters from Harvard University which verify that the Respondent's daughter is a student there and also the tuition applicable at that particular time. Counsel further states that, as part of the Court's consideration as to whether or not to grant the order for a variation, it is important to bear in mind the change in circumstances and means that the Respondent has been faced with since the original granting of the order in 2008 and which affects negatively his ability to afford a variation. To be noted, Counsel submitted, is that, at present, the Respondent is paying the sum of \$ 2,000.00 (E.C.) per month since September 2008, and this has not changed despite his change in financial circumstances.

- [11] Mrs. Benn-Roberts submits that the circumstances which have been noted in the application and Affidavit in Support and on which the Court is being urged to vary the 2008 Order are that the Applicant has constructed a home and as such is no longer able to meet her expenses. She states that Counsel for the Applicant has quite colorfully painted an image of the Applicant taking what he describes as steps to improve herself and also that she has had to liquidate certain assets in order to assist in the construction of that home. She contends that while all of that may be true, that those reasons ought not to be the only circumstances that the Court will depend on to arrive at its ruling on this application. She further submits that the Court ought not to impose on the Respondent any variation in the Order which will only result in the Respondent being further unduly prejudiced and most likely not being able to comply with the order. Rather, that the Court ought to take into consideration all the circumstances of the case affecting both the Applicant and the Respondent. She states that an important point that the Court ought to consider is the age of the Respondent who is presently 63 years old and of his ability to work in the upcoming years.

[12] It is Mrs. Benn-Robert's contention that the two things to be kept in mind as it relates to the Respondent are: -

- (a) His change in circumstances and means, more particularly, that his circumstances have worsened and his financial means have decreased since the granting of the order in 2008.
- (b) His present financial commitments and of his inability to be able to afford a variation of the order of 2008.

[13] I will now consider the issues raised by the submissions of Counsel in light of the Statutory framework. The power to vary is contained in section 15 of the Divorce Act 1997 (the Act). Section 15(1) of the Act, with which this application is concerned, reads thus:-

15(1) - "A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

- (a) A support order or any provision thereof on application by either or both former spouses; or
- (b)

The Order of 15th September 2008 is therefore capable of being varied and can be varied retroactively.

[14] The procedure for making an application for variation is governed by the Divorce Rules 1998 (the Rules).

[15] Section 23 of the Rules states: -

"A person who wishes to vary, suspend or rescind a final order for support, custody or access under section 15 of the Act or to obtain such an order after a divorce shall do so by application by summons."

[16] The Court notes that by virtue of Section 2 of The Interpretation (Amendment) Act 2000 of Antigua and Barbuda, "Originating motion" or "Originating summons" includes a fixed date claim as defined in the Eastern Caribbean Supreme Court Civil Procedure Rules, 2000.

[17] Section 24 of the Rules states: -

“An Affidavit in support of the application shall set out;

- (a) the place or ordinary residence of the parties and the children of the marriage;
- (b) the current marital status of the parties;
- (c) particulars of the change in circumstances relied on;
- (d) particulars of current custody and access arrangements and of any proposed change;
- (e) particulars of current support arrangements and any proposed change;
- (f) particulars of any arrears of support under an order or agreement; and
- (g) particulars of any efforts made to mediate the matters in issue or of any assessment made in relation to custody or access.”

[18] The Court notes that Counsel for the Applicant has not fully complied with Section 24 of the Rules. However, the Court has been able to glean from the Affidavit of Dr. Phillip as well as the submissions of Counsel for Dr. Phillip that Dr. Phillip is not in arrears of the support payments to Mrs. Phillip.

[19] Subsection (4) provides for the manner in which the Court is to proceed on an application for a variation. That subsection reads:-

“(4) - Before the court makes a variation order in respect of a support order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of either former spouse or of any child of the marriage for whom support is or was sought occurring since the making of the support order or the last variation order made in respect of that order, as the case may be, and, in making the variation order the court shall take into consideration that change.”

[20] In the exercise of its discretion, the Court must therefore have regard to all the circumstances of the case and shall take into consideration any changes since the original Order (that of 15th September) was made.

[21] As submitted by Mrs. Benn-Roberts, the change in circumstances as stated in the Application and Affidavit in Support of Mrs. Phillips is that she has constructed a home and is no longer able to meet her expenses.

[22] The further Affidavit of Mrs. Phillip filed on the 26th August 2011, which is in response to the Affidavit of Dr. Phillip filed on the 10th June 2011, states that her application for variation is based on her "need of additional support" to cover her "needs", including her "need for housing". In paragraph 2 of the said Affidavit, Mrs. Phillip deposed as follows:-

"...The variation to the order of 15th September 2008 has nothing to do with an interest in property but simply with an increase in support. The increase in support is necessary as it is the case that whilst I have exercised my best efforts to obtain economic independence and self-sufficiency I am in need of additional support to cover my needs, including my need for housing. I am not asking for a housing allowance, I am asking for spousal support - support to cover all reasonable needs."

[23] The Court must also consider the criteria stated in Section 15(7) of the Act. That subsection provides:-

15 (7) "A variation order varying a support order that provides for the support of a former spouse should

- (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
- (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to subsection (8);
- (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
- (d) **in so far as practicable** promote the economic self-sufficiency of each spouse within a reasonable period of time."(my emphasis).

[24] It is significant that the criteria set out in section 15(7) are identical to those set out in Section 13(7), namely that which the Court must consider in making an order for support,

and to which Thomas J. gave regard before making the Order of September 15th 2008. After hearing submissions of Counsel with respect to Section 13 (5) and (7), the learned Judge had this to say in his Judgment:-

Paragraph 34 - "In the view of the Court both submissions are credible in the context and it would be correct to say that the purpose of section 13 of the Act in particular is to ensure that there is no economic demise of either party to a marriage. Rather, there should be economic self sufficiency."

Paragraph 53 - "Parliament in its wisdom has used the qualifying phrase "in so far as practicable" in relation to paragraph (d) of section 13(7) of the Act. This is in recognition that such self sufficiency will not always be practicable, depending on the particular circumstances."

Paragraph 55 - "The Court considers that economic self sufficiency is not practicable in the case of the Applicant."

Paragraph 56 - "The remaining matter is that of the relief of economic hardship. ... To relieve the economic hardship the Court considers that a monthly payment of \$2,000.00 should be made by the Respondent to the Applicant until she remarries."

[25] An application to vary under Section 15(1) of the Act is not an appeal. As stated by Cazalet J. in **Garner v Garner**¹:-

"Almost invariably an application to vary an early periodical payments order will be brought on the basis that there has been some change in the circumstances since the original order was made; otherwise, except in exceptional circumstances, the application will, in effect, be an appeal. If the order is not appealed against, or is made by consent, then the presumption must be that the order was correct when made. If it was correct when made, then there will usually be no justification for varying it unless there has been a material change in the circumstances."

[26] Section 15(4) of the Act speaks of a "change in the condition, means, needs or other circumstances of either former spouse..." In the view of the Court, the conjoined effect of Sections 15(4) and 15(7) of the Act is that the Court, on an application for variation, must look at the original order, and satisfy itself that it has given due consideration to the matters set out in Section 15(4), while giving regard to the criteria set out in Section

¹ [1992] 1 FLR 573 at 581, 582

15(7). In doing so, the Court is of the view that it would be in a better position to consider whether it would be appropriate to vary the Order.

[27] In the case of **Gittens v Gittens**², Berridge J.A., referring to and following the English Court of Appeal decision of **Lewis v Lewis**³, had this to say:-

"In *Lewis v Lewis*, the Court held that on the true construction of Section 31 of the Matrimonial Causes Act of 1973 (which is almost identical to Section 15(1) of the Divorce Act 1997 of Antigua and Barbuda), which gives the court power to vary or discharge a periodical payments order made in divorce proceedings, the Court, in considering an application for variation is not confined to looking at changes in the means of the parties since the original order was made, but is required to look at the actual means of the parties as they stand at the time when the case is before it and to approach the matter as if it were fixing the payments de novo."

[28] In **Flavell v Flavell**⁴ the English Court of Appeal held that "jurisdiction to vary an order does not depend upon an exceptional or material change of circumstance, although the absence of such change may affect the exercise of the Court's discretion." The Court reiterated that "the Court is not required to proceed from the starting point of the original order, but will consider the matter de novo."

[29] I will now look at the events since the Order of September 2008 and deal with the position of Mrs. Phillip subsequent to that Order. The evidence before the Court is that Mrs. Phillip is gainfully employed. She is employed with the Government of Antigua and Barbuda. In the words of Dr. Dorsett, she has "pulled herself up by the boot strap and has "improved herself". She has liquidated "substantial assets" and taken a loan and built herself a house. She states that it is a "modest house". Her evidence, however, is that the house cost \$450,000.00 to build. The house is built on her land. Although her Affidavit does not state so, there is a presumption that Mrs. Phillip will receive a pension when she reaches retirement age. Since Mrs. Phillip did not disclose her age in her Affidavit, the Court will not speculate as to how far she is from that

² Civil Appeal No. 1 of 1977

³ 1977 3 ALL ER, 992

⁴ 1997 1 FLR 353

retirement age. No evidence has been presented to the Court that Mrs. Phillip is suffering from any serious illness or from the debilitating effect of any serious illness. She states that her "monthly mortgage payment consumes more than 32% of her cash inflow." She says that this is "posing somewhat of a strain" on her. The basis of her application for variation of the Order is stated thus:-

"I am making this application for a variation of my spousal support so that my housing costs as a proportion of my cash inflow is restored to an affordable basis."

[30] Mrs. Phillip has not presented any evidence of a change in any of her other "needs" to which she alludes in paragraph 2 of her Affidavit of 26th August 2011 (referred to in paragraph 22 above). Additionally, no evidence has been presented to the Court by Mrs. Phillip to prove that the circumstances of Dr. Phillip have improved. Significantly, Mrs. Phillip does not claim that this is so.

[31] I must also take into account the fact that Dr. Phillip is now 63 years of age. I must take into account that, having reached retirement age, he is no longer employed with the Government of Antigua and Barbuda. His income has therefore decreased. He also has lost the perks and benefits which came with his Government employment, one of which was housing. This evidence was not disputed by Mrs. Phillip. I must also take into account the fact that his private practice, which is now his only source of income, does not generate the income that it once did. This evidence was not challenged by Mrs. Phillip. In fact, Mrs. Phillip has conceded that Dr. Phillip has "realized some challenges" since the loss of his Government contract. (see paragraph 5 of her Affidavit of 26th August 2011.) Although Dr. Phillip has produced no medical records to prove that his health has deteriorated, it is a fact that advancing age decreases the quality of one's health and does not enhance it. The risk of ill health for someone who depends for his income from private practice is a real factor to be taken into account.

[32] It is the submission of Dr. Dorsett that Dr. Phillip's evidence is to be judged by what he (Dr. Phillip) "has done or failed to do", namely that he "has failed to put in an application over these many years for a variation". With the greatest of respect, I find

this submission simply untenable. Dr. Dorsett seems to be inviting the Court to take a negative view of the effort of Dr. Phillip for trying to comply with the Court Order and to shoulder his responsibilities. His reasoning in that regard is, with respect, flawed.

CONCLUSION

[33] In arriving at my decision in this matter, I must look at the present circumstances of both Mrs. Phillip and Dr. Phillip, look at the 2008 Order, and examine any change made in the circumstances of either of the parties since the making of that Order. I must then decide, having regard to all the circumstances of the case, what is a just and fair Order. I must take into account that a fair and just order would, among other things, relieve any economic hardship of the spouses arising from the breakdown of the marriage. It will usually be unavoidable that the standard of living by both parties will diminish following their separation - see **RvR**⁵. However, it cannot be that the economic hardship of one spouse can be relieved at the expense of the other spouse. It is a question of what is just and equitable in the circumstances of each case.

[34] In light of the above, I am of the considered view that the Applicant Mrs. Phillip has not made out a case for variation of the Order of 28th September 2008. I am not satisfied that there is cogent evidence sufficient to persuade me that there should be a departure from the Order of Thomas J. dated 15th September, 2008.

[35] With respect to the issue of Costs, the law is settled that costs lie in the Court's discretion. The Court notes that, on the assumption that Mrs. Phillip would have succeeded in her application, Dr. Dorsett urged the Court to award costs against Dr. Phillip. The Court in this case is of the view that an award of costs against Mrs. Phillip in the sum of \$ 2,500.00 is fair and reasonable.

⁵ [1994] 2 FLR 1044

ORDER

- 1) The application of Mrs. Sharon Phillip is hereby dismissed.
- 2) Costs to the Respondent in the sum of \$2,500.00.

A handwritten signature in black ink, appearing to read 'J. Remy', with a stylized, cursive script.

JENNIFER REMY
High Court Judge