

[2014] JMCA Civ 30

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CIVIL APPEAL NO 3/2014

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE MANGATAL JA (Ag)

BETWEEN ROSEVELT ROWE APPELLANT

AND BEVERLY BROWN RESPONDENT

Miss Tamara Greene instructed by Cecil July for the appellant

The respondent in person

20 May and 11 July 2014

ORAL JUDGMENT

MORRISON JA

[1] I have read the judgment prepared by Mangatal JA (Ag). I agree with it and have nothing to add, save to say that I share her regret at the conclusion to which the Court has been constrained by the statutory provisions. As I indicated to Miss Greene during the hearing of the appeal, I regard the appellant's behaviour as an inexplicable denial of his son's legitimate wish to access further education.

DUKHARAN JA

[2] I agree with the comments made by Morrison JA and agree with the reasoning and conclusion of my sister Mangatal JA (Ag).

MANGATAL JA (Ag)

[3] This is an appeal from the order of Her Honour Mrs Sonya Wint-Blair, Resident Magistrate for the parish of Saint Elizabeth, which was made on 2 December 2013. The learned Resident Magistrate made an order ('the extension order') extending a maintenance order made on 3 November 2008 (the reasons of the learned Resident Magistrate seem to erroneously state the year as being 2006). The maintenance order had been made in respect of a male child of the appellant and the respondent, being Jonnoie Rowe ('Jonnoie'), who was born on 22 June 1995. The learned Resident Magistrate extended the maintenance order until Jonnoie attains the age of 23 years.

[4] The extension order was made at the instance of the respondent Beverly Brown ('the mother') against the appellant Rosevelt Rowe ('the father'). The stated ground of the application was that "the child is still attending Maggotty High School". The application for the extension was filed on 8 August 2013, approximately seven weeks after Jonnoie had reached 18 years of age.

[5] Two grounds of appeal were filed by counsel, Miss Greene, on behalf of the father, who was represented by counsel before this court and in the court below. The

mother appeared in person, as she did in the court below. The following are the grounds filed:

"1. That the Learned Resident Magistrate erred in law when she granted an order for the extension of maintenance, when the existing order had expired. The individual had ascertained the age of eighteen years on June 22, 2013, the application for the extension of maintenance order was not made until August 8, 2013 and the order for the said extension was granted on December 2, 2013.

2. That the judge also erred when she granted an order for the extension of maintenance up to the age of twenty three years."

[6] The background to the extension order is as follows:

(a) On 3 December 2001, Her Honour Mrs S George, Resident Magistrate for the parish of St Elizabeth (as she then was), made an order under the Affiliation Act, for the father to pay maintenance in respect of Jonnoie in the amount of \$1,500.00 per week, effective 7 December 2001.

(b) An application for variation of that order was made on 3 November 2008 before His Honour Mr S Clarke under the Maintenance Act increasing the amount of maintenance from \$1,500.00 per week to \$2,500.00 per week. It is to be noted that the Maintenance Act which came into force on 7 December 2005, repealed the Affiliation Act and there were no transitional provisions addressing orders made under the latter Act in respect of persons who at the time of the Maintenance Act had not yet attained the age of 18 years.

[7] The relevant sections of the Maintenance Act are sections 2, 16 and 18, which state as follows:

"2...

'minor' means a person under the age of eighteen years;

...

Duration of order 16.-(1) Subject to the provisions of this section and section 18, a maintenance order shall remain in force –

(a) in the case of a child, until the child attains the age of eighteen years; and

(b) in the case of any other person, for such period as may be specified in the order.

(2) ...

(3) Where the Court is satisfied that-

(a) a child in respect of whom a maintenance order has been made is or will be engaged in a course of education or training after attaining the age of eighteen years; and

(b) for the purposes of such education or training it is expedient for payments under the order to continue after the child has attained that age,

the Court may direct that the order remain in force for such period as may be specified in the order, being a period not extending beyond the date on which the child attains the age of twenty-three years.

**Variation,
suspension
or cancellation
of orders**

18. At any time after a maintenance order or a order of attachment has been made under this Act, a Court may upon the application of-

- (a) any of the parties to the proceedings in which such order was made;
- (b) any person having the actual care and custody of a child who is a dependant; or
- (c) any person to whom any payment was directed in such order to be made,

vary the order in such manner as the Court thinks fit, suspend the order, revive a suspended order or cancel the order if circumstances so warrant.”

[8] Miss Greene filed well-reasoned written submissions on behalf of the father. In relation to ground one, she argued that on 22 June 2013, the order made by His Honour Mr S Clarke came to an end by an effluxion of time, Jonnoie having attained the age of 18 years. Therefore, she continued, when the application was filed on 8 August 2013, and on 2 December 2013, when the extension order was made, there was no maintenance order in place. It was submitted that the court could not grant an extension of an order that has expired and no longer exists.

[9] Counsel submitted that there is a distinction to be drawn between an order that has expired and one that has been suspended. Reference was made to *The Oxford Popular English Dictionary & Thesaurus* for the meaning of the words “expire” and “suspend”. It was argued that this is not an order that was suspended and can be revived pursuant to section 18 of the Maintenance Act. Further, that for an extension of

time to be granted, the application would have had to be made before Jonnoie's 18th birthday, and consequently, before the order had expired. Reference was also made to the definition of a "child" in the Child Care and Protection Act, where in section 2, "child" is defined as meaning "a person under the age of eighteen years".

[10] In relation to ground two, counsel submitted that the learned Resident Magistrate also erred when she granted an order for the extension of maintenance up to the age of 23 years. Firstly, the application for an extension did not specify and/or request the age to which the extension should be granted. It was admitted on behalf of the father, that Jonnoie at the time of the application was still at Maggotty High School. However, it was argued that there was no evidence before the court and/or presented to the court, for example, no payment voucher for CXC subjects, and no application to an educational or training institution or an acceptance letter from such an entity.

[11] It was, counsel pointed out, evident that the latest age at which Jonnoie would be engaged in a course of study was until he attained the age of 19 years on 22 June 2014, at the Maggotty High School. It was further argued that, in extending the order until the age of 23 years in circumstances where there was no evidence to suggest that Jonnoie would be engaged in a course of study after leaving Maggotty High School, the learned Resident Magistrate misdirected herself into believing that the only course open to her was to make an order until the age of 23 years. However, it was submitted that the Act does not make the age of 23 years mandatory. A lesser period could have been

awarded if the facts of the case so suggested, assuming (which was denied), that there had been power to make the order in the first place.

[12] The father asked that the appeal against the order be allowed and that costs be granted to him.

[13] The court explained to the mother, who as stated before was unrepresented, the submissions made by counsel on behalf of the father. The mother outlined certain difficulties that she had encountered in getting the court's office to deal with the matter. Some of the delay related to difficulties she encountered because of other family commitments, and other reasons related to conversations with court staff about collecting the summons. On one occasion, she claims that the papers which were duly filed by her in court could not be found. The mother also claimed that she had shown certain receipts regarding the payment for the CSEC examinations to the learned Resident Magistrate in court. Be that as it may, at the end of the day, the mother was unable to deny the crucial fact that the application was not filed until after Jonnoie's 18th birthday had already passed.

[14] With some regret, I find myself in agreement with the submissions of Miss Greene. In relation to ground one, based upon the language of the relevant sections of the Maintenance Act, an application for a maintenance order to remain in force pursuant to section 16(3), must be made before the child attains the age of 18 years. The argument that the order made by His Honour Mr S Clarke had expired on 22 June

2013, when Jonnoie reached 18 years of age, appears unassailable in light of the wording of section 16(1)(a) of the Maintenance Act (“... a maintenance order shall remain in force ... (a) ... until the child attains the age of eighteen years”). Further, we agree that the learned Resident Magistrate had no power under sections 16 or 18 to extend an order which had in effect already expired. Nor would such an order be capable of being revived, unlike a suspended order, referred to in section 18. Thus, the learned Resident Magistrate erred in deciding that “If the court can revive a suspended order at paragraph [sic] (c), it would appear that the court can enlarge time if the circumstances warrant” (page 2 of the reasons for judgment). The two concepts are wholly different, and the power to enlarge time “if the circumstances warrant” unfortunately cannot be extrapolated from the power to revive a suspended order. An order that is suspended still exists and has not expired; it is simply in abeyance. Nor have we been able to discover a power to enlarge time, as claimed by the learned Resident Magistrate, within the four corners of the Maintenance Act, or indeed, within any other arguably relevant legislation.

[15] As regards ground two, counsel for the father is also correct that, even if the power to extend the time had existed, there was no evidence upon which the learned Resident Magistrate could have granted the extension order beyond the one year that Jonnoie would have been continuing at Maggotty High School, and which would have come to an end when Jonnoie reached the age of 19 years. In the last paragraph of her reasons, the learned Resident Magistrate merely stated the following with regard to the time period of the extension:

"In the instant case the subject child is still a student at Maggotty High School. The circumstances warranted the continuation of the maintenance order so that the subject child may graduate and perhaps further his education. The maintenance order was extended by order made on December 2 [sic] 2013 to the subject child's twenty-third birthday." (underlining emphasis provided)

It seems plain that the learned Resident Magistrate did not have a proper evidential basis upon which to make the order until the age of 23. With respect, it appears (no doubt with the most benevolent of intentions), that the learned Resident Magistrate wandered into the perilous arena of speculation. Section 16(3) requires that a proper evidential foundation be provided, and based upon the evidence, the order can be made to extend up to any age between the age of 18 and 23 years. The section does not mean that when an extension is granted, it must be made up to the age of 23. Twenty three is simply the maximum age up to which the order may be extended.

[16] As regards the costs of the appeal, reasoning by analogy to rule 64.6(3) of the Civil Procedure Rules 2002, I would make no order as to costs, having regard to all the circumstances of this case.

[17] Accordingly, I would propose the following orders:

1. The appeal is allowed.
2. The order of Her Honour Mrs Wint-Blair made on 2 December 2013, extending the maintenance order made by His Honour Mr S Clarke is set aside.

3. No order as to costs.

MORRISON JA

ORDER

1. The appeal is allowed.
2. The order of Her Honour Mrs Wint-Blair made on 2 December 2013, extending the maintenance order made by His Honour Mr S Clarke is set aside.
3. No order as to costs.