[2016] JMCA App 29

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 29/2016

APPLICATION NO 154/2016

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**KARIN DANIELS**	**APPLICANT**
AND	**WAYNE DANIELS**	**RESPONDENT**

Davion Vassell for the applicant

Miss Tashell Powell instructed by Zavia Mayne & Company for the respondent

31 October 2016

ORAL JUDGMENT

MORRISON P

[1] This is an application to vary or discharge an order made by F Williams JA on 21 July 2016, in which the judge ordered the stay of an interim order made by Batts J in the Supreme Court on 19 February 2016. This is the judgment of the court.

[2] The brief background to the matter is as follows. The applicant filed an application in the Supreme Court for an order extending a previously made maintenance order in respect of the two children of the marriage until age 23, pursuant

to section 16(3) of the Maintenance Act ('the Act'). The ground of the application was that the children were either engaged in, or about to embark upon, a course of tertiary education.

[3] When the matter came on for hearing before Batts J in the Supreme Court on 19 February 2016, the learned judge made a number of orders, including (i) an order adjourning the application to 20 October 2016, for hearing in open court for two hours; and (ii) an interim order extending the maintenance order previously made by Morrison J on 1 November 2011 to 20 October 2016.

[4] In the substantive appeal in this matter, the respondent contends that Batts J had no power to make the order extending Morrison J's order, on the grounds that (i) as at the date of the latter order, the relevant children had passed the age of 18 years; and (ii) because the application to extend Morrison J's order to the age of 23 years was not made before the expiration of the earlier order, the court was therefore not competent to make an order in those terms.

[5] The respondent's application for a stay of execution of Batts J's order pending appeal was heard by F Williams JA, who, on 21 July 2016, made an order staying Batts J's order until the hearing of the appeal. It is against this background that the applicant now seeks an order varying or discharging F Williams JA's order.

[6] The single issue which arises on this application is whether, at the time of the hearing of the application for a stay of execution pending appeal, the respondent had demonstrated that he had an appeal with some prospects of success, it being

acknowledged on both sides that this is a pre-condition to the grant of an order for a stay of execution. Mr Vassell for the applicant contends that the appeal has no reasonable prospects of success and that F Williams JA ought not therefore to have granted a stay of execution. On the other hand, Miss Powell for the respondent contends the opposite, maintaining that there was a reasonable prospect of success on appeal and that therefore this court should not interfere with F Williams JA's exercise of his discretion.

[7] Section 16(1)(a) of the Act provides that, in the case of a child, "… a maintenance order shall remain in force … until the child attains the age of eighteen years". Section 16(3) permits the extension of such an order in the following circumstances:

> "(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."

[8] At the outset of the hearing of the application, the court drew to the attention of counsel its decision in the case of **Rosevelt Rowe v Beverley Brown** [2014] JMCA

Civ 30, which was an appeal from a decision of the learned Resident Magistrate for the parish of Saint Elizabeth. In that case, the learned Resident Magistrate purported to make an order under section 16(3) extending a maintenance order made some years previously. It was common ground that the application for the order extending the previous order was made after the relevant child had passed the age of 18. So the question for this court on appeal was whether the Resident Magistrate had the power to extend the previous order in these circumstances.

[9] In a judgment written by Mangatal JA (Ag), the court came to the conclusion that the Resident Magistrate had no such power. It was held that, for an order for maintenance to be extended pursuant to the provisions of section 16(3), it was necessary for the application for an extension of the order to be made within the lifetime of that order. Accordingly, once the order expires upon the relevant child or children attaining the age of 18 years, the court is no longer competent to make an order 'extending' the previous order. The crux of the decision is to be found in paragraph [14] of Mangatal JA (Ag)'s judgment:

> "… 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."

[10] So **Rosevelt Rowe v Beverley Brown** provides clear confirmation that an application to extend a maintenance order beyond the age of 18 years must be made, in the sense of having at least been filed, before the child reaches the age of 18:

otherwise the order will expire and the court has no power to revive it. It follows from this that, as Mr Vassell quite properly accepted, this appeal clearly does have a good prospect of success and that F Williams JA's exercise of his discretion to grant a stay cannot in these circumstances be successfully impugned. The application to vary or discharge his order must therefore fail.

[11] We then went on to canvas with counsel the possibility of treating the hearing of this application as the hearing of the appeal, given the fact that the single point in the appeal is the very point which we have been considering. That is, whether the court has any power, on an application made after the expiration of the original order, to extend a maintenance order beyond the age of 18. Both counsel, having taking instructions from their respective clients on the matter, sensibly agreed that there was nothing remaining in the appeal and that it was therefore right that they should give consent on behalf of the parties for the hearing of the application to be treated as the hearing of the appeal. It further follows from all of that that the substantive appeal itself must be allowed, as Batts J clearly fell into error by making an interim order for maintenance in circumstances in which it was plain that he had no jurisdiction to do so.

[12] So, in the result, the order which the court makes is as follows:

1. The application to vary or discharge the order of F Williams JA made 21 July 2016 is dismissed.

2. By and with the consent of the parties, the hearing of the application is treated as the hearing of the appeal.

3. The appeal is allowed and the interim order for maintenance made by Batts J on 19 February 2016 extending the order of Morrison J made on 1 November 2011 to 20 October 2016 is set aside.

Conclusion

[13] In common with the court which heard the appeal in **Rosevelt Rowe v Beverley Brown**, this court has absolutely no enthusiasm for the result it has felt constrained to announce. We say this because it is the policy of the law, as the court understands it, that children are entitled to support in order to enable them to maximise their potential as persons. Section 16(3) of the Act demonstrates a particular concern in relation to the question of education. It therefore seems to us to be a matter for regret that, on an issue such as this, it continues to be necessary for that question to be dragged through the courts in respect of offspring who, albeit over 18 years of age, remain innocent victims in the contest between their parents. It is for this reason that we consider that, although the respondent has ultimately prevailed in the appeal, this is not a case in which we ought to order costs in his favour.