1988 January 20

[MALACHTOS DEMETRIADES STYLIANIDES JJ]

IN THE MATTER OF THE COURTS OF JUSTICE LAW 14/60 SECTION 40,

AND

IN THE MATTER OF A MAINTENANCE APPLICATION BY ANDROULLA CONSTANTINOU PERSONALLY AND AS NATURAL GUARDIAN AND NEXT FRIEND OF HER INFANT DAUGHTER MARIA CONSTANTINOU

Appellants-Defendants,

and

FRANGISKOS (FRANCIS) CONSTANTINOU,

Respondent

(Civil Appeal No 6947)

Maintenance — Of a child of the marriage — Principles applicable — Analysis of authorities — There must be adduced evidence as to the child's needs and the father's ability to pay — Conflicting affidavits, but no evidence on behalf of applicant, whilst the husband gave evidence that he was unemployed having as his sole income the unemployment benefit from Social Insurance Fund — The application was rightly dismissed for lack of evidence — Fact that child taken away without her father' s consent, who did not know of her whereabouts — Has no bearing — The Courts of Justice Law, 14/1960, section 40

Androulla Constantinou is married to the respondent They have one daughter, the appellant The latter' s application against her father for a maintenance order was dismissed

In support of the application Androulla Constantinou filed two affidavits The respondent filed one affidavit in support of the opposition The first of the two affidavits of A Constantinou asserted that the respondent was earning £910 per month Respondent s

affidavit asserted that he was unemployed, having no income from any work or business The second affidavit of A Constantinou gave particulars of her actual monthly expenses

At the trial, counsel for the appellant stated that he would rely on the affidavits and would not call any evidence The respondent, however, gave oral evidence to the effect that he is unemployed and has no income, other than an unemployment benefit of £140 - per month from Social Insurance, out of which £29 - were retained for his daughter

With regard to the whereabouts of his daughter, he said that the mother took her out of Cyprus without his consent and that he did not know what her needs were and where she was living

The trial Court dismissed the application for lack of evidence and on the ground that the child was taken away without the respondent's consent and the respondent did not know her whereabouts

Having analysed the authorities relating to the obligation to provide maintenance, the Court,

Held, (1) When the husband leaves the marital home, he has a duty to provide reasonable maintenance for the support of those members of the family that are dependent upon him and that it is for the Courts to decide whether the amount paid by a husband for the maintenance of the family if he does so, is in the circumstances sufficient for their reasonable maintenance and support It is not for the husband to decide the amount

(2) Considering that there was no evidence regarding the income of the husband and the wife at the time of the hearing of the application, and what the financial needs of the child were, the trial Judge was absolutely right in dismissing the application of the wife as natural guardian and next friend of the infant daughter

(3) The facts that the father did not know of the whereabouts of his child and that she was taken away without his consent, have no bearing in cases of this sort

Appeal dismissed No order as to costs

Cases referred to

Papadopoulos v Papadopoulos [1929] All E R Rep 310,

Brannan v. Brannan [1973] 1 All E.R. 38;

Gray v. Gray [1976] 3 All E.R. 225;

Weatherley v. Weatherley, 142 L.T. 163;

Attwood v. Attwood [1968] 3 All E.R. 385;

Constantinou v. Demosthenous (1983) 1 C.L.R. 250.

Appeal.

Appeal by applicant against the judgment of the District Court of Nicosia (Artemides, P.) dated the 16th May, 1985 (Appl. No. 40/84) whereby her application for a maintenance order against her father was dismissed.

N. Pelides, for the appellant.

A. Skordis with A. Sophocleous, for the respondent.

Cur. adv. vult.

MALACHTOS J.: The judgment of the Court will be delivered by H.H. Mr. Justice Demetriades.

DEMETRIADES J.: This appeal is made against the judgment of H.H. Artemides, P.D.C., by which he dismissed the appellant' s application for a maintenance order against her father, the respondent.

The person who appears in the title of the appeal as the natural guardian and next friend of the applicant is married to the respondent and they have one daughter, the appellant, who at the material time was 14 years old. The wife was originally a co-applicant for an order of maintance but during the hearing of the application she withdrew her claim and her application was dismissed.

In April, 1984, the parties, for reasons unknown to us, fell apart and the husband left the marital home. As a result, the wife, in June 1984, filed, on behalf of herself and the infant daughter, a maintenance application by which she claimed the sum of £300.- per month as maintenance. The husband opposed the application.

In the affidavit filed in support of the application, the wife claimed that the husband, since the time he left the marital home,

paid nothing for her and their daughter' s maintenance. She further claimed that the husband was employed by an international Telecommunications company, that he received a net monthly salary of £410.- and that he was, also, earning approximately another £500.- per month from a business enterprise of his own.

After the husband filed his opposition and in reply to allegations made by him in his affidavit in support of it, in which he alleged that he was unemployed having retired from the international company due to bad health, and his denial that he was the owner of a business enterprise, the wife filed a supplementary affidavit in which, amongst other allegations she made, she gave particulars of her actual monthly expenses. After stating that she was employed by the Co-Operative Credit Society of Morphou at Limassol and receiving a monthly salary of £229.-, she set down a list of her expenses which related to transport of herself and her daughter, rent and private tuition fees for her daughter and which, she alleged, amounted to £176.50 cents per month. She claimed that she needed a further sum of £152.50 c. for the remaining needs of herself and her daughter, like food, electricity, water etc. In her said affidavit she mentioned nothing of how her salary was spent, nor did she mention what were the needs of the daughter for food, clothing and other necessaries.

The application was set down for hearing and counsel for the applicants then withdrew the claim of the applicant mother and stated that he was to proceed with the claim of the daughter only. At the same time he stated that he was going to rely on the two affidavits filed by the wife and that he was not calling oral evidence.

Counsel for the respondent then informed the Court that he had given notice to the other side that he wanted to cross-examine the wife but her counsel stated that she and the infant child were in Greece where they had permanently settled and that the wife had no intention of returning to Cyprus.

In the light of this statement the Court proceeded to hear the evidence of the respondent. In giving evidence he alleged that he was unemployed; that with the money he received as compensation on leaving his work he paid his debts; that he was on the dole; that he could not secure as yet another work; that his unemployment allowance was £140.- per month, which he received for six months only, and that out of this amount £29.-

were kept by the Social Insurance for the maintenance of his daughter. This amount, that is the £29.-, the respondent said, had never been collected by the mother although she was told about it. He further said that as he could not make ends meet, his brother was helping him financially.

With regard to the whereabouts of his daughter, he said that the mother took her out of Cyprus without his consent and that he did not know what her needs were and where she was living.

The making of maintenance orders by our Courts is provided by subsection 1 of section 40 of the Courts of Justice Law, 1960 (Law 14/60), which reads:

> «If any ecclesiastical tribunal of the Greek Orthodox Church or of a Church to which the provisions of paragraph 1 of Article 111 of the Constitution apply (hereinafter referred to in this section as 'the Church') would have power to entertain a matrimonial cause brought by a wife in respect of her marriage, and the husband has been guilty of wilful neglect to provide reasonable maintenance for his wife or infant children of the marriage, a President of a District Court or a District Judge, on application of the wife, may make a maintenance order directing the husband to make to her such periodical payments as may be just.»

From the wording of this section it is clear that no maintenance order in favour of the wife and the infant children of the marriage can be made unless the husband is guilty «of wilful neglect to provide reasonable maintenance to them.»

What is meant by «wilful neglect» has not been given precise interpretation but useful guidance may be found in the English case law such as in the cases of *Papadopoulos v. Papadopoulos,* [1929] All E.R. Rep. 310, *Brannan v. Brannan,* [1973] 1 All E.R. 38, *Gray v. Gray,* [1976] 3 All E.R. 225, and *Weatherley v. Weatherley,* 142 L.T. 163.

In the *Papadopoulos* case, supra, Hill J. said the following (at p. 315):-

> «Neglect means failure in a duty to provide maintenance. And the question is whether he was under a duty to maintain the wife. Prima facie he was. That is the common law of England, and it was for the husband to show that he was excused from that duty. A husband may show it in various

ways. For instance, he may show that ..... or that she has deserted him and was continuing to desert him, ...»

In the case of *Gray,* supra, Purchas J. summed up the term as follows (at p. 229):-

«Wilful neglect to provide reasonable maintenance imports an existing duty to provide such maintenance. Under the common law the duty to provide maintenance only arose in respect of a wife who was not herself in default.»

Sir George Baker P., in the *Brannan* case, supra, had this to say (at p. 45):-

«There are two lines of cases in which wives have alleged that their husbands have been guilty of wilful neglect to provide reasonable maintenance although they have previously entered into agreements, whether by deed or otherwise, under which the amount of maintenance has been fixed. One line establishes that, where a husband is paying reasonable maintenance under an agreement, he cannot be found guilty of wilful neglect to provide reasonable maintenance because he and his wife have already decided what they regard as reasonable and the husband has fulfilled his part of the agreement. Such a case is *Morton v. Morton (No.2).* On the other side there are cases to the effect that, if, owing to a change in the value of money or other changes in the circumstances, the maintenance payable under an agreement is not adequate provision for the wife, she can apply to the court for an order on the ground of wilful neglect to provide reasonable maintenance. The observance of the agreement does not absolve the husband because the amount of maintenance is insufficient in the changed circumstances which have arisen. Two such cases are *Tulip v. Tulip* and *Dowell v. Dowell.* It is also clear on the authorities that the husband will not be held guilty of wilful neglect owing to changed circumstances unless the changes have been brought to his notice by some communication from the wife or her solicitors or otherwise.

These cases suggest that 'wilfulness' in this context does not connote any malice or wickedness but that the misconduct, if it is appropriate to use that word, consists only in the failure to pay to the wife sums which, in the opinion of the court, are in all the circumstances sufficient for her reasonable maintenance and support. The wilfulness amounts to nothing

more than this, that the husband knows what he is doing and intends to do what he is doing.»

Finally, I quote the words of Lord Merrivale in the *Weatherley* case, supra, where (at p. 165) he said:-

«What seems requisite, before a husband can be found guilty of a wilful breach of his duty to maintain his wife, is that there must be a refusal to maintain, which has no explanation reasonable in common sense and good faith. I am not going to try and define the state of things in which it might arise, but I will say that where, upon proved facts, the husband against whom the charge is maintained is shown to have done his duty to the best of his ability, and never wilfully to have failed in his duty to discharge his marital obligations, taking them generally as the relations of husband and wife, there is very great difficulty in conceiving a case where a woman can disclaim her proper obligations to her husband .....»

Although the cases referred to above do not directly answer the issue before us, because in the present case the order sought is for a maintenance order in favour of the infant child of the marriage, the conclusion which can be drawn from them is that when the husband leaves the marital home, he has a duty to provide reasonable maintenance for the support of those members of the family that are dependant upon him and that it is for the Courts to decide whether the amount paid by a husband for the maintenance of the family, if he does so, is in the circumstances sufficient for their reasonable maintenance and support and it is not for the husband to decide the amount.

What are the considerations for a Court dealing with applications for maintenance have been set down by Sir Jocelyn Simon P. in delivering the judgment of the Court in the case of *Attwood v. Attwood,* [1968] 3 All E.R. 385, 388. These guide lines were adopted and applied in *Constantinou v. Demosthenous,* (1983) 1 C.L.R. 250, where the following are stated (at pp. 254, 255):-

«(i) In co-habitation a wife and the children share with the husband a standard of living appropriate to his income, or, if the wife is also working, their joint incomes. (ii) Where co-habitation has been disrupted by a matrimonial offence on the part of the husband, the wife's and children's maintenance should be so assessed that their standard of living does not

suffer more than is inherent in the circumstances of separation, though the standard may be lower than theretofore (since the income or incomes may now have to support two households in place of the former one where household expenses were shared). (iii) Therefore, although the standard of living of all parties may have to be lower than before there was a breach of co-habitation, in general the wife and children should not be relegated to a significantly lower standard of living than that which the husband enjoys. As to the foregoing, see *Kershaw v. Kershaw* [1964] 3 All E.R. 635, at pp. 636, 637, and *Ashley v. Ashley* [1965] 3 All E.R. 554. (iv) Subject to what follows, neither should the standard of living of the wife be put significantly higher than that of the husband, since so to do would in effect amount to imposing a fine on him for his matrimonial offence, and that is not justified by the modern law. (v) In determining the relevant standard of living of each party, the court should take into account the inescapable expenses of each party, especially, though not exclusively, expenses of earning an income and of maintaining any relevant child. (vi) If the wife is earning an income, or if she has what should in all the circumstances be considered as a potential earning capacity, that must be taken into account in determining the relevant standards of living: see *Rose v. Rose* [1950] 2 All E.R. 311, per Denning, L.J., [1950] 2 All E.R. at p. 313, and *Levett-Yeats v. Levett-Yeats* [1967], 111 Sol. Jo. 475. (vii) Where a wife is earning an income, that ought generally to be brought into account, unless it would be reasonable to expect her to give up the source of the income: *Levett-Yeats v. Levett-Yeats* (1967), 111 Sol. Jo. 475. (viii) Where the wife is earning an income, the whole of this need not, and should not ordinarily, be brought into account so as to ensure to the husband's benefit: *Ward v. Ward* [1947] 2 All E.R. 713 at p. 715, and J. v. J. [1955] 2 All E.R. 617, per Sachs, J. [1955] 2 All E.R. at p. 91, and per Hodson, L.J. [1955] 2 All E.R. at p. 621. (ix) This consideration is particularly potent where the wife only takes up employment in consequence of the disruption of the marriage by the husband, or where she would not reasonably be expected to be working if the marriage had not been so disrupted. (x) At the end of the case, the Court must ensure that the result of its order is not to depress the husband below subsistence level: *Ashley v. Ashley* [1965] 3 ALl E.R. 554. (xi)

An appellate court will not interfere with an award of maintenance unless, to use the words used in *Ward v. Ward* [1948] P. at p. 65, 'it is unreasonable or indiscreet'; that is to say that the justices are shown to have gone wrong in principle or their final award is otherwise clearly wrong.»

Considering that there was no evidence regarding the income of the husband and the wife at the time of the hearing of the application, and what the financial needs of the child were before the trial Judge, he was, we find, absolutely right in dismissing the application of the wife as natural guardian and next friend of the infant daughter.

Before concluding, however, we would like to say that the finding of the trial court that one of the reasons for dismissing the application of the child of the marriage was that the father did not know of the whereabouts of his child and that she was taken away without his consent, has no bearing in cases of this sort. For an order of maintenance to be made there must be evidence before the court of the financial needs of the child and the ability of the father to provide reasonable maintenance and support for it.

For the above reasons, the appeal is dismissed but, in the circumstances, we make no order as to costs.

Appeal dismissed.
No order as to costs.