

IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO.776/86

In the matter of:

PATRICIA MARIAN WILBRAHAM

Applicant

and

JOHN WILBRAHAM

Respondent

CORAM:

HANNAH, C.J.

FOR THE APPLICANT:

MR. P. DUNSEITH

FOR THE RESPONDENT:

MR. G.L. OSCROFT

JUDGMENT

(20/03/87)

Hannah, C.J.

This is an application by a wife for the interim custody of the two children of the marriage and for maintenance pendente lite for herself and the children. The question of custody is not in dispute.

According to the wife's summons in the main action for divorce the husband deserted her in March 1984. In his plea the husband admits desertion but avers that it occurred in December 1984. The marriage had therefore broken down by the end of 1984 at the very latest.

In June 1985 the wife signed a maintenance agreement drawn up by the parties' attorneys and in July of that year the agreement was also signed by the husband. The agreement made generous provision for the maintenance of the wife and the children, namely that the husband should pay to her a monthly supplement paid to him by the Government of the United Kingdom currently worth £14,148.00 per annum (approx. E50,000). The agreement also stipulated that immediately after signature the wife should commence an action for divorce but this she failed to do. Her action for divorce was not commenced until August 1986 and as a result

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of the delay the husband contended that he was no longer bound by the agreement and ceased to pay the full amount of the supplement. The validity of the agreement is an issue in the divorce proceedings.

In her unsworn statement filed in support of the application the wife seeks an order for maintenance pendente lite for herself and the two children of an amount equivalent to that set out in the agreement, namely E50,000 per annum. She sets out an estimate of her expenditure amounting to E54,615 per annum and contends that maintenance of E50,000 per annum would be reasonable not only in that she actually requires such a sum but also on the ground that by signing the agreement the husband recognised this to be so.

Mr. Oscroft, for the husband, makes three submissions. Firstly, he contends that in bringing this application the wife is in reality seeking to enforce an agreement the validity of which has been called in issue in the main action and which has not yet been adjudicated upon. For this reason he submits that the application is an abuse of court and should be dismissed. Mr. Dunseith's reply to this submission is that the wife is not seeking to enforce the agreement at this stage but is merely using the amount agreed upon

as a guide to the figure which this Court should order as interim maintenance. The reference to the agreement made in the prayer to this application was merely a shorthand device. I accept this to be so.

Mr. Oscroft's second submission is that the wife's real remedy is to pursue the divorce proceedings expeditiously and thus obtain an adjudication on the validity of the agreement. In my judgment, while this may be one course open to her if she does not choose to take it she is not thereby precluded from making an application for maintenance pendente lite if she considers that the maintenance of £700 per month currently being paid is inadequate.

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Mr. Oscroft's third submission concerns the adequacy of the maintenance of £700 per month. He submits that when account is taken of the fact that the wife herself now earns E1 1,388 per annum, maintenance of £700 per month is more than adequate to meet her reasonable needs. £700 he says is the equivalent of E2,471 or E29,652 per annum and the wife therefore enjoys a total income of E41,040. Her estimate of annual expenses of E54,615 is, he submits, grossly exaggerated and when properly analysed at most comes to E32,915 per annum.

I therefore proceed to examine the expenses estimated by the wife but in doing so recognise that in the case of an interim application maintenance "cannot be determined with that degree of precision and closer exactitude which is afforded by detailed evidence". See *Taute v Taute* 1974 (2) S.A. 675. Another factor which cannot be ignored is that in an application for maintenance pendente lite the Court is more concerned with the present rather than the long term needs of the applicant.

Mr. Oscroft concedes that many of the items of expenditure set out by the wife in her statement are reasonable. Those with which he takes issue are E9,600 per annum in respect of rent, E2,200 per annum for telephone, E6,000 for purchase of a motor car, E3,060 per annum for maintenance and repairs to her motor car, E2,000 per annum for holidays for the family and a contingency amount of E2,500 per annum for such items as medical treatment, holidays, extra school activities and so on.

The wife is at present residing in a government house and the rent is paid by the husband. Mr. Dunseith concedes that in the light of this, the item of E9,600 for rent should be ignored. This, he says is a notional figure and was included in the statement should the wife have to find accommodation for herself. Mr. Oscroft submits that provision of E2,200 per annum for telephone rental and calls is unnecessarily high.

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Mr. Dunseith, on the other hand, says that the wife is entitled to enjoy the same standard of life now as during the marriage and if she wishes to make international telephone calls to her family abroad that is a matter for her. In view of the conflict as to whether large telephone bills were incurred during the marriage, a conflict which it is not possible to resolve without further evidence, it is for the Court to determine what is reasonable. In my view, E1,000 per annum would be reasonable and therefore the amount estimated must be reduced by E1,200.

The wife's case in respect of the motor car is not clear. She sets out a figure of E6,000 for purchase of a motor car but does not state whether this was the price paid or whether it is the cost of financing a loan for the purchase of a car. Mr. Dunseith says it should be construed as the latter and says that the cheapest new car today costs in the region of E18,000 plus. However, if it is a new car I cannot see the need to make provision of E940 for repairs. New vehicles normally fall under warranty. After some hesitation I will take into account E6,000 per annum but will disregard the sum of E940. Although Mr. Oscroft contends that the wife's estimate of expenditure on servicing the car and for petrol is too high he did not include these items in his list of items to be deducted or reduced and accordingly I shall make no deductions for these items although I agree that they do appear to be rather extravagant.

As for holidays, I see no reason why the wife should not include E2,000 under this heading and, if the joint income is large enough. I see no reason why she should not also make provision for contingencies,

The wife's estimate of annual expenditure will therefore be reduced by E11,740 leaving a sum of E42,875.

The wife earns E11,388 per annum and while I accept that by working her expenses are necessarily increased it appears that by and large much of such increase is included in her estimated expenditure. If E10,000

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of her annual income is taken to be free to be applied to the cost of maintaining herself and the children there is, therefore a short-fall of E32,875. In my view, this should form the basis for an award of interim maintenance and rounding this figure up I consider that the provision which the husband should make for his wife and family should be E33,000 per annum or, in other words, E2,750 per month. This is some E300 per month more than the husband is at present paying but on the figures available is an amount which the husband can well afford to pay. This sum will be divided between the wife and the children in the proportions set out in the agreement, nemely E16,500 per annum or E1,375 per month for the wife and E8,250 per annum or E687 per month for each child. Further, I see no reason why the order should not be back-dated to the month when the application was made and accordingly I make the following order:

1. The interim custody of the two children of the marriage is awarded to the applicant.
2. The respondent is to have reasonable access to the two children of the marriage.
3. While the applicant resides rent free in the house currently occupied by her the respondent is ordered to pay to her the monthly sum of E2,750, such payments to commence from 1st November, 1986 and credit to be given for payments already made.
4. Liberty to apply on the present papers should the wife's present residential position change.

N.R. HANNAH

CHIEF JUSTICE