

**IN THE SUPREME COURT OF BELIZE A.D. 2003
(DIVORCE)**

ACTION NO. 49 OF 2003

BETWEEN

ALBA ARGENTINA SOSA

PETITIONER

AND

ANDRE BRYAN SOSA

RESPONDENT

Before: The Hon Mr Justice Westmin R.A. James (Ag)
Delivered: 18th December 2020
Appearances: Robertha Magnus Usher SC for the Petitioner
Darlene M. Vernon for the Respondent

DECISION ON VARIATION OF MAINTENANCE ORDER

1. This is an application by way of summons filed on the 18th March 2020 by the Petitioner, Alba Argentina Sosa for a variation of a maintenance Order made on the 15th day of May, 2008. The application was for the variation of the Maintenance Order in respect of Eoin Sosa the youngest of the three children between the Petitioner and the Respondent.
2. The starting point for the consideration of this type of application is that a parent is obligated to maintain and educate their child.¹ A maintenance order is valid until the child attains the age of 18 except in certain circumstances outlined in the Act.² Section 71 of the Families and Children Act ('the Act') provides for the extension of the time for maintenance beyond the age of 18. It states:

71.-(1)If, on the application of the parent or guardian of a child, it appears to the court that the child is or will be engaged in a course of education or training after attaining the age eighteen years, or that the child is suffering from a mental or

¹ Families and Children Act secs 5-6, 48-49

² Families and Children Act sec 70

physical disability, and that it is therefore expedient for payments to be made under the order after the child attains that age, then subject to subsection (2) below, the court may by order direct that payments be so made for such period not exceeding three years from the date of the order as may be specified in the order.

(2) The period specified in an order made under subsection (1) may from time to time be extended by a subsequent order so made, but shall not in any case extend beyond the date when the child attains the age of twenty-one years except in the case of a disabled child or a child pursuing full time education.

3. The child in question, Eoin Edoardo Sosa attained the age of 18 on 19th March 2020 and is currently enrolled in the Universidad del Valle de Guatemala pursuing a degree in mechatronic engineering and therefore falls under this provision.
4. Pursuant to section 77 of the Act the sum of maintenance that should be awarded by the Court is based on the general maintenance and education needs of Eoin Sosa subject to the personal circumstances and ability to pay of the parents.³ Overarching consideration in making any of these determinations is that the Court will consider the best interest of the child.⁴
5. The evidence from the Petitioner was not entirely consistent as to what was necessary for the maintenance of Eoin. The expenses varied in her various affidavits. The first Affidavit estimated those expenses which included University fees, food, books, clothing and other expenses at \$2,790.00 which was revised to \$1,780.00 then revised again to \$5,500.00 in her third Affidavit wherein she requested the Petitioner pay half or \$2,750.00 and revised again to \$3,910.00 in an affidavit which was filed late.
6. There is no question that the Petitioner has borne the majority of the maintenance of the three children between the Petitioner and the Respondent over the past sixteen years. On 29th October 2004, the Court awarded maintenance of \$400.00 per child to be paid by the Respondent to the Petitioner for the maintenance of each of the children between them. The youngest child Eoin was 2 years old at the time. The children lived with the Petitioner and considering inflation, the costs of growing children for housing, transportation,

³ See also *Arthur Lockwood v Adelaida Lockwood*, SCC No 72 of 2008

⁴ See

medical, school fees and the fact that the two older children went on to University one studied medicine and the other law, there can be no contention of this fact. While the Petitioner has never sought a variation of that order until now this cannot be held against the Respondent as that was a choice of the Petitioner. However, the Respondent likewise who having benefited from paying only \$400.00 per month for 16 years and in fact stopped in December 2019 for a child who is now at University would agree that \$400.00 is incredibly inadequate now. Even if the Petitioner didn't have her current health challenges a Court looking at this case now would find that a variation is absolutely necessary.

7. In 2019, the Petitioner who like the Respondent was a doctor, fell seriously ill and was diagnosed with Amyotrophic Lateral Sclerosis (ALS). This incredibly debilitating condition left the Petitioner a quadriplegic, wheel chair bound, unable to work and require full time care. There has thus been an incredible change in circumstances which would necessitate a variation of the 16-year-old order. The principal not the sole responsibility for the maintenance of the Eoin will now have to be borne by the Respondent.
8. The Petitioner has indicated that she is currently living with her mother but has some assets which include an unencumbered property in Belize, property in Guatemala and vehicle she is seeking to sell. The Petitioner is completely reliant on others and unable to work. The Petitioner as a result of her illness have serious medical expenses and has indicated she needs to be assisted financially by her relatives.
9. The Respondent is a doctor who remarried and has two minor children with his second wife. The Respondent's career and finances improved since the first maintenance order. He has an active medical practice at several establishments. He was appointed the Chief of Staff of one of the hospitals he is engaged with.
10. The Respondent indicated his income was \$21,975.43. He said that before March 2020 he was earning an extra \$4,500.00 in rental income. The Respondent indicated that his monthly expenses were \$24,103.46 which includes

- a mortgage for the primary residence of \$4,711.00
- a mortgage of \$6,358.51 for a second residence
- two vehicle loans of \$1,198.10 and \$1,245.50 a secondary loan of \$499.57 per month
- School tuition for his two minor children totally \$670.00
- Groceries in the amount of \$2,000.00
- Two electricity bills totally \$680.00 per month
- Two water bills totally \$110.00
- Two phone/internet bills totally \$617.00
- Cable \$67.00
- Yard maintenance for two properties \$400.00
- Gas in the amount of \$500.00
- Higher Purchase items with Courts \$438.00
- Miscellaneous which he describes as clothing medicine extra-curricular and credit card totally \$2,500.00

11. The Respondent submits that his expenses are more than his income and he has been using his savings which he laid out as \$71,171.21 to meet his monthly expenses. The Respondent also indicates that his current wife is unemployed.

12. My assessment of the Affidavits is that neither of the parties was completely open with the Court. The Petitioner was not completely open with the actual expenses of the Eoin and in fact could be said to have exaggerated his needs while the Respondent has understated his income. I find that the Respondent was evasive about some details of his income and the documents he submitted showed that there were further streams of income like a commercial property and other income stated as salary on his statements not being from one of the sources he indicated. Further the documents displayed showed expenses that do not accord with the fact that he is earning less than his basic expenses. In fact, the Respondent during the pandemic obtained a \$60,000.00 loan from Atlantic Bank in June 2020, a Scotia bank loan in February/March 2020 for \$23,517.92 one of which was for a new vehicle.

13. I am fortified in that view since the Respondent has not provided evidence of his tax returns which would give a fuller picture of income and expenses. Further from the Respondent's evidence he has \$14,000.00 in loan obligations and if you take his income as the highest, it would put his income to debt service to ratio at almost 50%. It is very unlikely that a financial institution would grant loans to someone with such a high income to debt to service ratio during a time that the Respondent is indicating that he was earning less than his expenses. That therefore means that the Respondent's income is much more than he is letting on. Despite the exaggeration of the Petitioner and understatement by the Respondent, I got some impressions about the income of the parties and the needs of the child.

14. In *Mc Ewan v Mc Ewan* 1972 1 WLR 1217 at 1223 Rees J. stated:

“Whether the man is in employment or not it is open to justices in an appropriate case upon direct evidence or justifiable inference to make an order on the basis of potential earning capacity. An order may more readily be made where justices are satisfied that a husband has not been frank in his evidence before them.”

15. In *Mc Ewan* it was held, inter alia, that since the justices had concluded that the husband had not been frank as to his financial position, they were entitled to have regard to the realities and to draw the inference that his actual or potential earning capacity was greater than he had stated and they were entitled to find on the whole of the evidence that the husband's earning capacity justified the order which they had made.

16. In *Gengler v Gengler* [1976] 2 All ER 81 the Family Division of England approved of the one-third rule on an application of this nature. At page 84 Latey J. stated:

“I entirely and respectfully agree with what Sir George Baker P. has said about the one third calculation being a fair and useful starting point in proceedings in the Magistrate's Court as it is in proceedings in this division. It is to be remembered that it is only a starting point. It may and often does end up also as the finishing point. But in many cases it does not ...”

17. In *Rodewald v Rodewald* [1977] 2 WLR 191 Omrod LJ stated at p. 197

“the Divisional Court following on Wachtel v Wachtel 1973 Fam. 72 invariably takes the two gross incomes to arrive at the joint incomes”.

18. I am therefore entitled to have regard to the realities and to draw the inference about the Respondent’s actual or potential earning capacity.
19. I do accept that the Respondent’s income has decreased to some extent due to the pandemic which is very difficult time for everyone. While this is the case, as indicated the Respondent has not been totally honest with the Court as to all his streams of income.
20. The Respondent has indicated that he is approaching retirement age and so his income would decrease. The Respondent being a medical practitioner can work well after the retirement age for public servants. In fact, the Respondent’s expenses for mortgages and car loans carry him well beyond his retirement age. I find it highly unlikely that a financial institution would grant the Respondent loans including some that were taken out this year to go well beyond his retirement age if the Respondent could not show an ability to pay beyond that time.
21. I estimate on the whole of the evidence that the Respondent’s income or earning potential is likely to be more in the region of \$30,000.00 a month and justifies the order I am about to make. Having regard to the current circumstances I am willing to base my calculation on an income of \$25,000.00
22. I am of the view that 20% of the Respondent’s gross income is a very fair, reasonable and quite frankly conservative starting point for maintenance of his three remaining children. Based on the Respondent’s income he could afford \$1500.00 per child. This amount is only \$300.00 more than he was he accustomed paying in totality for the three children he shared with the Petitioner. This court therefore finds that the amount would not be considered to stretch the Respondent to an extent way more than he was already used to paying.
23. Having taken all the circumstances of the case into account bearing in mind the factors set out in various pieces of legislation. In addition to the nature and source of the respondent's income and expenses which include support for two other minor children. I also considered

the income and expenses of the Petitioner, the Petitioner's current health circumstances, and the amount needed for Eoin schooling and the assistance received.

24. The application is therefore allowed to the extent limited by my assessment of the maintenance sum and hold that

1. The Respondent do pay or cause to be paid to the Petitioner for the maintenance and education of Eoin Edoardo Sosa, the sum of \$1,500.00 per month from the March 2020 until he turns 21 years or until further order.
2. Each of the said sums to be paid by the end of every calendar month commencing December 2020.
3. The Respondent to pay the arrears of maintenance for Eoin Edoardo Sosa from December 2019 to February 2020 and from March 2020 to November 2020;
4. The payment of the arrears to be determined at the next hearing 22nd January 2021
5. The respondent to pay the petitioner her costs in the amount of \$5,500.00 to be paid in two parts, the first to be paid prior to the next hearing date of January 22nd 2021

Judgment accordingly.

Westmin R.A. James
Justice of the Supreme Court (Ag)