1986 February 6

[TRIANTAFYLLIDES, P., DEMETRIADES, KOURRIS, JJ.]

IACOVOS ARISTIDOU,

Appellant-Respondent,

v.

NIKI ARISTIDOU,

Respondent-Applicant.

(Civil Appeal No. 6901).

Maintenance—The Courts of Justice Law 14/60, s. 40(1)—No maintenance order for the wife and children of the marriage can be made unless the husband is guilty "of wilful neglect to provide reasonable maintenance to them."

In the course of the hearing of this appeal which is directed against an order for maintenance of the appellant's wife and two children counsel for the appellant submitted that it would be in the interests of justice, if he was allowed to argue, at this stage, the following ground of appeal, namely that the trial Court erroneously decided, and in any event the evidence adduced did not warrant the finding, that in the present case the appellant had wilfully neglected to provide reasonable maintenance.

Counsel for the respondent consented to the submission of counsel for the appellant and the Court, after considering the application, decided to allow this course.

Counsel for the appellant submitted that as the trial Court found that the amount that was reasonable for the maintenance of the family was £420.- per month and as the appellant was contributing a larger sum, namely over £450.- according to his allegations, the finding of the trial Court that the appellant was guilty of wilful neglect in providing reasonable maintenance was wrong and not supported by the evidence.

Counsel for the respondent, on the other hand, submitted that the finding of the trial Court, that the maintenance provided by the appellant was unreasonably low and that the appellant was guilty of wilful neglect, was correct and warranted by the facts before it.

Held, (1) From the wording of sub-section 1 of section 40 of the Courts of Justice Law 14/60 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 to provide reasonable maintenance" has not been given judicial interpretation by our Courts until now, but useful guidance may be found in a number of English cases.

(2) In the light of the authorities and in particular the guide lines set down in *Attwood* and *Demosthenous* cases (infra), it is too early to decide whether the appellant has wilfully neglected to provide reasonable maintenance for his family and for this reason directions would be given that the appeal must proceed to be heard on all grounds.

Order accordingly.

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* [1929] 142 L.T. 163;

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

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

Application.

Application by appellant's counsel that the following ground of appeal, namely that the trial Court erroneously decided that the appellant had wilfully neglected to provide

reasonable maintenance for the respondent and her children, be argued and decided first.

L. Papaphilippou, for the appellant.

K. Talarides, for the respondent.

Cur adv. vult.

TRIANTAFYLLIDES P.: The decision of the Court will be delivered by Mr. Justice Demetriades.

DEMETRIADES J.: In the course of the hearing of this appeal counsel for the appellant submitted that it would be in the interest of justice if he argued, at this stage, the following ground of appeal, namely -

> that the trial Court erroneously decided, and in any event the evidence adduced did not warrant the finding, that in the present case the appellant had wilfully neglected to provide reasonable maintenance.

He contended, in this respect, that if the Court found in his favour on the issue of wilful neglect, the matter would end there, otherwise this would shorten the proceedings considerably.

Counsel for the respondent consented to the submission of counsel for the appellant and the Court, after considering the application, decided to allow this course.

The facts that led to these proceedings are that the appellant, a senior member of the Civil service of the Republic, who is married to the respondent, left the marital home in January, 1983 and since then he has failed to return. Out of the marriage there are two children.

Although the appellant pays to the respondent a sum of money for her maintenance and that of their two children, the respondent considered this amount unsatisfactory and as a result she applied to the Court on her behalf and on behalf of the two children, who at the time of the filing of the action were minors, claiming the sum of £668.- per month as being the reasonable amount for her and the children's maintenance.

It is an undisputed fact that the appellant pays to his wife every month a sum of money for the maintenance of his family and, in addition, he pays tuition fees and other expenses of his children. The appellant considers these amounts to be reasonable, if not excessive, in view of his net income.

We do not think that it is necessary at this stage of the appeal to go into more details of the admitted facts and the allegations put forward by the parties.

Counsel for the appellant submitted that as the trial Court found that the amount that was reasonable for the maintenance of the family was £420.- per month and as the appellant was contributing a larger sum, namely over £450.- according to his allegations, the finding of the trial Court that the appellant was guilty of wilful neglect in providing reasonable maintenance was wrong and not supported by the evidence.

Counsel for the respondent, on the other hand, submitted that the finding of the trial Court that the maintenance provided by the appellant was unreasonably low and that the appellant was guilty of wilful neglect was correct and warranted by the facts before it.

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 to provide reasonable maintenance has not been given judicial interpretation by our Courts until now, but useful guidance may be found in a number of English cases, such as *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*, [1929] 142 L.T. 163.

In *Papadopoulos* case, supra, Hill J. had this to say (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. had this to say (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 grounds 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 approriate 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."

Also, in *Weatherley* case, supra, Lord Merrivale had this to say on this issue (at p. 165):

"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...."

In our mind the conclusion that can be drawn from the above cases is that when the husband leaves the marital home, as in the present case, he has a duty to pay reasonable maintenance for the support of the members of the family that are dependant on him and it is for the Courts to decide whether the amount paid by a husband for the maintenance of the family 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 *Demosthenous* v. *Constantinou*, (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."

In the light of the above authorities and, in particular, the guide lines set down in the *Attwood* and *Demosthenous* cases, supra, we find that it is too early to decide whether the appellant has wilfully neglected to provide reasonable maintenance for his family and for this reason we direct that the appeal must proceed to be heard on all grounds.

Order accordingly.