

[2003–04 Gib LR 380]**IN THE MATTER OF LARA**

SUPREME COURT (Schofield, C.J.): March 5th, 2004

Legal Aid and Assistance—assessment of resources—cohabitees—Legal Assistance (Assessment of Resources and Scale of Contribution) Rules, r.6 only requires consideration of resources of spouses—resources of cohabitee to be considered in Registrar’s discretion if clearly pooling resources and sharing family expenses at time of application

The appellant applied to the Registrar for legal assistance to commence proceedings to enforce a maintenance order against her former husband.

The appellant had a child by her former husband and an order was made for him to make payments for the maintenance of the child. For some time she had been cohabiting with another partner, with whom she had two children and lived in a Government flat, the tenancy of which was in their joint names.

The appellant obtained legal assistance to enforce the maintenance order when the husband fell into arrears with his payments. She disclosed her cohabitation when making the application but made no statement as to her partner’s income. The husband made representations to the Registrar seeking the revocation of the appellant’s legal assistance certificate on the basis that her partner’s means had not been taken into consideration—an inquiry by the Registrar revealed that the joint income of the appellant and her partner would take the appellant outside the financial limits for entitlement to legal assistance. The Registrar then revoked the appellant’s legal assistance certificate, specifically on the basis that she should have considered the partner’s income as a “common-law spouse.”

On appeal, the appellant submitted that r.6 of the Legal Assistance (Assessment of Resources and Scales of Contribution) Rules clearly specified that the “resources of a person’s husband or wife” should be treated as that person’s resources, and to interpret this to include unmarried cohabitees would be improper since (a) it involved importing words into legislation where they were not required; and (b) to do so would mean that the Registrar would have to examine in detail the solidity and financial situations of cohabiting relationships of all those who applied for legal assistance, which would be time-consuming and result in very little saving of expenses for the Legal Assistance Fund.

Held, dismissing the appeal:

(1) The Registrar's decision to revoke the legal assistance certificate would be upheld. She had been entitled, and indeed obliged, to take into account the appellant's partner's income in making the decision to grant or refuse (or in this case revoke) the legal assistance certificate, which was entirely within the discretion of the Registrar. It would have been wrong to have refused legal assistance on the basis of r.6 of the Legal Assistance (Assessment of Resources and Scale of Contribution) Rules, as that rule clearly applied only to married couples, but the circumstances of the appellant's relationship made it proper to assume that they pooled resources and shared expenses, and therefore the view taken of her financial circumstances rightly included her partner's income. Although it was true that the applicant and her partner may not have made a formal lifetime commitment to each other (as in the case of marriage), this had no effect on their financial circumstances at the date of the application, which was the critical date at which to assess an applicant's resources in deciding whether or not to grant legal assistance (paras. 7–8; para. 10).

(2) In any case, legal assistance should not have been granted, as it was not an appropriate case in which to employ a legal representative. It would be a misuse of public funds to provide legal assistance in a simple case of non-payment of a maintenance order, as enforcement could be obtained using a very simple administrative procedure without any need for legal representation (para. 9).

Legislation construed:

Legal Aid and Assistance Ordinance (1984 Edition), s.12(4): The relevant terms of this sub-section are set out at para. 7.

s.14(4): The relevant terms of this sub-section are set out at para. 7.

Legal Assistance (Assessment of Resources and Scale of Contribution) Rules (1984 Edition), r.6: The relevant terms of this rule are set out at para. 5.

Ms. A.L. Balestrino for the appellant;

R. Pilley for Mr. McCarthy, an interested party.

1 **SCHOFIELD, C.J.:** Mrs. Deborah Lara has a child, Louise Anne McCarthy, by her former husband, Richard McCarthy. An order was made in the magistrates' court for Mr. McCarthy to pay the sum of £35 per week towards the maintenance of Louise. Apparently, Mr. McCarthy is in arrears with his payments and the applicant seeks to enforce the order in the magistrates' court. Her solicitor, Ms. Balestrino of Messrs. Phillips, applied to the Registrar for legal assistance to commence such proceedings and the Registrar granted a certificate for those purposes on December 2nd, 2003. On February 18th, 2004, the Registrar formally revoked the legal aid certificate and this is an appeal against the decision

to revoke the certificate. As is customary in such an appeal, it is done on the papers, and I consider I have all the relevant material before me and do not need to hear the parties.

2 When submitting the application, Ms. Balestrino informed the Registrar that (a) the applicant is living with a Mr. Terence Lane and that together they have two children, aged three and two respectively; (b) Mr. Lane has two children by a previous marriage for whom he pays maintenance at the rate of £45 per week; and (c) the applicant has no savings and does not own a vehicle.

3 At some stage, it seems that Mr. Pilley, who acts for Mr. McCarthy, made representations to the Registrar that the applicant's legal assistance certificate ought to be revoked on the grounds that the applicant, being a cohabitee, ought to be put on the same basis as a married person and her partner's income taken into account for the purposes of assessing entitlement to legal assistance. I am sure that Mr. Pilley's concern in the matter is to safeguard the legal aid fund and is not to gain any advantage over the applicant for his client in the proceedings before the magistrates' court. As a result of this representation, the Registrar sought details of Mr. Lane's income. It seems, at a hearing before the learned Stipendiary Magistrate, Mr. Lane's wage slips were produced which showed that his basic wage is £185 per week. However, in the 2002–03 tax year, his net income, with overtime, was £17,954.17. If Mrs. Lara and Mr. Lane were married, this income would have taken Mrs. Lara outside the financial limits of entitlement to legal assistance.

4 Rule 19 of the Legal Aid and Assistance Rules gives the Registrar the power to reconsider the grant of a certificate and, on such reconsideration, to discharge or revoke the certificate. Before doing so in this case, the Registrar considered further representations made by Ms. Balestrino in a letter dated February 10th, 2004. The reasons given by the Registrar for revoking the certificate are contained in her letter to Ms. Balestrino dated February 18th, 2004, the relevant parts of which read:

“I consider that now that your client has been living with her partner, Mr. Lane, for some time and has two children by him, he could be considered to be a ‘common-law spouse’—albeit I appreciate that the Ordinance relates only to ‘spouses.’

It may well be that consideration should be given to amending the law to accommodate situations such as this (and I have several similar applications to deal with), having in mind that in this day and age, couples decide, for all sorts of reasons, to live together rather than marry. You say that the relationship could end—but then so do a high proportion of marriages. It seems inequitable to me that a couple can live together, have children, have a common financial

pool and lead a family lifestyle, yet the ‘partner’ can selectively opt out of supporting the other partner, thereby precipitating an application for legal assistance.”

5 Before considering the applicant’s arguments, it is as well to set out r.6 of the Legal Assistance (Assessment of Resources and Scale of Contribution) Rules, which reads:

“Any resources of a person’s husband or wife shall be treated, for the purposes of these Rules, as that person’s resources, unless that person is legally separated from the husband or wife.”

6 Clearly the Registrar considered that for the purposes of granting legal assistance to Mrs. Lara she should be treated as if she were married to Mr. Lane. In her letter of February 11th, 2004, setting out the grounds of appeal (which, for some reason, pre-dates the Registrar’s formal withdrawal of legal assistance), Ms. Balestrino says:

“I do not agree with such forced construction of r.6 and am not aware that such an interpretation has been adopted in any other case.

The terms of the rule are specific and it uses the words ‘husband’ and ‘wife’ specifically. The suggestion, advanced by Mr. Pilley to the Registrar, to which the Registrar appears to have given some credence, that my client is the ‘common-law wife’ is a legal nonsense, there being no such status known to law.

The rule adopts the words ‘husband’ and ‘wife’ intentionally, intending to attribute to each spouse the financial solidarity which spouses have a reasonable expectation of receiving and to which they have, in large measure, a legal right to enforce against their spouse. Moreover, the advantage of a successful legal claim to either of a married couple is of economic significance to the other.

The position is completely different in the case of cohabitees. A cohabitee has no right to maintenance. She may actually be kept in part by the other, but has no legal right to continue this or to make claims for financial assistance. Cohabitees vary very greatly in the degree of commitment between the parties. Financial obligations, such as that imputed to spouses under r.6, are likely to destroy most such liaisons, removing the practical effect of the rule if actually extended from husbands and wives to include cohabitees.

If this were attempted, then it would be necessary for the Registrar to inquire into the solidity of every unmarried relationship of an assisted party and speculate as to how it would progress during the next 12 months, so as to establish the party’s reasonable expectations of income over the relevant period for the assessment.

It is submitted that simply to list the difficulties shows the practical futility of attempting to interpret the words of the rule to say something they very plainly do not say.

In this case, the legally assisted party has fully and honestly declared her income and resources throughout, and is eligible for legal assistance, unless the income and resources of her cohabitee are attributed to her. It is submitted that r.6 does not permit any such attribution and an attempt to read it otherwise exceeds the limits of statutory construction, that the legislature never intended it to be read in that way, and that if it were so read, great practical difficulties would arise for the Registrar, great uncertainties for many applicants, and that in practice there would be very little saving of expense for the Legal Assistance Fund.”

7 I should point out at once that the grant or refusal of a certificate for legal assistance is entirely within the discretion of the Registrar. By s.12(4) of the Legal Aid and Assistance Ordinance, an applicant may be refused legal assistance “if it appears to the Registrar unreasonable that [she] should receive it in the particular circumstances of the case.” By s.14(4) of the Ordinance, the Registrar is obliged to “investigate the means of the applicant” and should grant legal assistance only if she is “of opinion that the matter is a proper one” for an order to be made under the Ordinance.

8 I agree with Ms. Balestrino that it would be wrong of the Registrar to refuse legal assistance on the basis of r.6, for that rule clearly applies only in relation to married couples. Furthermore, I agree that cohabitees vary greatly in the degree of commitment as between each other. It may be that in some instances parties cohabit without sharing their financial resources and commitments, in which case an applicant’s means can be adjudged as if he were not cohabiting. However, in a case such as the instant case, where the applicant has been cohabiting with her partner for some period of time and has two children by him and indeed holds the tenancy of a Government flat in joint names with him, it is reasonable and proper to assume that the partners pool resources and share expenses. It cannot be a true representation of the applicant’s means in this case that her only income is a family allowance of £80 per month. It is reasonable and proper to assume that she has a joint household with Mr. Lane and he provides for her and the children. In such circumstances, the Registrar was entitled, and indeed obliged, to take into account Mr. Lane’s income in exercising her discretion to grant or refuse legal assistance, or in this case to revoke the certificate. To have done otherwise would have been to have taken an unrealistic view of the applicant’s circumstances and to have placed the applicant in a more favourable position than a similar applicant who takes the step of marrying her partner. It may be the case

that the applicant and her partner have not made a lifetime commitment to each other but that does not affect their current financial circumstances. An applicant must be assessed on her current means, and where an application is granted or refused on the basis of financial circumstances it is always possible for those circumstances to change for the better or worse, affecting the applicant's entitlement to legal assistance. In this case, the fact that the parties are unmarried and therefore do not have the solidity of a more permanent relationship does not affect the applicant's financial circumstances as at the date of the application.

9 The Registrar revoked the certificate of legal assistance on the basis of the applicant's means. I would go further and deny legal assistance because this is not an appropriate case in which to employ a legal representative. In my judgment, it is a misuse of public funds to provide legal assistance in a simple case of non-payment of a maintenance order in the magistrates' court. There may be such cases which throw up complex issues, although it is difficult to imagine them, but this does not appear to be such a case. I am told by the clerk to the justices that if a maintenance order is payable through the court it is simply a question of the applicant presenting herself to his office and signing a form authorizing him to take enforcement action on her behalf. There are rare cases where maintenance is ordered to be paid direct, in which case a complaint may be made direct to the court office and, again, the procedure is simple. It is far from the case that without legal assistance a party will be unable to enforce the order. I consider it a very rare case indeed where an order for legal assistance is justified to enforce a maintenance order in the magistrates' court.

10 For these reasons, I uphold the Registrar's decision to revoke the certificate for legal assistance in this case.

Appeal dismissed.
