

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. F.D. 1998/D053

BETWEEN            DENNIS DARBY                            PETITIONER  
AND                    JOYCE MARJORIE DARBY            RESPONDENT

Ms. Gillian Mullings, instructed by Patrick Bailey and Co. for the Petitioner.

Mrs. P. Benka-Coker, instructed by Ms. Carol Vassall for the Respondent.

**Heard: 12<sup>th</sup> June, 6<sup>th</sup> and 13<sup>th</sup> December 2002, 26<sup>th</sup> March, 9<sup>th</sup> and 10<sup>th</sup> July, 17<sup>th</sup> and 18<sup>th</sup> December 2003, 22<sup>nd</sup> January, 26<sup>th</sup> February, 31<sup>st</sup> May and 1<sup>st</sup> June 2004, 7<sup>th</sup> and 18<sup>th</sup> April 2005 and 13<sup>th</sup> June 2007**

**Campbell J.**

(1) The parties were married on the 5<sup>th</sup> September 1946, Mr. Darby was then aged 22 years old and Mrs. Darby, 18 years. Almost fifty-two years later the husband swore a petition dated 29<sup>th</sup> June 1998, seeking dissolution of the marriage. He averred in his affidavit in support of his petition, that he had left the matrimonial home in July 1970 'and have not returned since'. The wife contends that it was in May 1975. If one accepts the wife's date, the parties have been living separate and apart for approximately 32 years. On the husband's account, it is a period of 37 years.

(2) Decree nisi was granted on the 25<sup>th</sup> March 1999. The wife opposed the application for decree absolute, contending that the husband "had not fully disclosed a true and accurate inventory of all of his assets." On 20<sup>th</sup> March 1999, she filed a notice of an application for ancillary relief. She asked the court for orders, (1) that a lump sum payment of \$7,000,000.00 be paid to her immediately and (2) the sum of \$35,000.00 per month be paid until her death as maintenance. The parties are agreed that since leaving the home the husband has made payments to the wife, which ceased in 1996.

(3) On the 30<sup>th</sup> April 2001 the wife was granted an interim order for \$20,000.00 per month. The husband paid the amount of \$40,000 and owes an amount in

excess of \$780,000. The husband states that he only became aware of the order three months after it was granted.

(4) In her affidavit in support of her claim for maintenance filed 20<sup>th</sup> May 1999 Mrs. Downer states at paragraph 28

“That the petitioner operates a quarry, built the Port Henderson Plaza and built a shopping complex consisting of approximately 12-16 shops, valued at one hundred and fifty million dollars (\$150,000,000.00) and owns heavy equipment which he started working for the Bauxite Industry and to West Indies Home Contractors worth a further fifty million dollars (\$50,000,000.00).”

(5) She further alleges, at paragraph 33 “That the Petitioner has numerous tractors and heavy equipment of which I am unable to say there exact location due to the period which has elapsed since we have lived together.”

(6) In response, the husband admits at paragraph 33 of his affidavit dated 18<sup>th</sup> November 1999, that he built a shopping complex, built 34 shops and operated a quarry on a section of the premises. He explains in succeeding paragraphs that he took a loan from the Bank of Nova Scotia in the sum of \$465,000.00 to purchase a tractor which shortly thereafter became unserviceable. The quarry was closed by dint of a ministerial order. His effort at refinancing the loan was subject to high interest rates as a result he was forced to sell the matrimonial home and thirty four of the shops to satisfy the refinancing loan. He denies that he has interest in several companies.

(7) The petitioner says that the relationship he has entered into has produced three children, and he is the breadwinner for his family. He says he earns \$50,000.000 from two shops that he has at the Portmore Plaza. His monthly expenses are \$96,000. Whatever assets he has, has been dissipated in maintaining his dependents.

(8) He says at paragraph 33, that the respondent earns in excess of \$70,000.00 per month, is provided with a company car and the rental of her house is paid by the company. And that she is a shareholder in Telestar, a company with considerable assets, earning well in excess of \$1,000,000.00 per month.

## Analysis

The applicable law

S. 20(2), and 25(1) of the Matrimonial Causes Act

(9) Section 25 reads as follows; “Where a husband has failed to provide reasonable maintenance for his wife - Then, without prejudice to the provisions of subsections (2) of 28, the Court may, on the application of the wife, order the husband to make to the wife such periodical payments (hereafter referred to as maintenance) *as may be just.*”

(10) Section 20 (2) states “ In any such case as aforesaid, the Court may, if it thinks, by order under subsection (1) direct the husband to pay to the wife during their joint live such monthly or weekly sums for her maintenance and support as the Court *may think reasonable*”

(11) Both sections confer a wide discretionary power on the Court to determine the issue of maintenance. The Court must consider all the circumstances of the case among which are (1) of the means of the wife and (11) the ability of the husband to pay.

(12) **In Valentine v Valentine (1992), 29 JLR 35**, at page 38, letter i, Rowe, P stated the relevant principle thus

“It seems to us that a judge who is called upon to determine the quantum of money which a husband should pay to his wife as maintenance pending suit must have regard to **the husband’s ability to pay** and the **reasonable requirement of the wife**. The rule to the determination of a reasonable award is not chartered by any fixed rule of law or practice although as a guide the judge would look to see what result the application of one-fifth of the joint income rule would produce. **In order to be faithful to the statutory duty to take into account the wife’s means, the ability of the husband to pay all and all the circumstances of the case, it would be improper for the judge to fashion a straight jacket for himself and to rely upon a fixed percentage.**”(Emphasis mine)

### **The wife's means**

(13) Ms. Mullings argues that there was no full and frank disclosure by Mrs. Darby of her means. The husband had asserted that she was the Managing Director of Telestar Cable Company that was founded by her late son. Telestar is a private limited liability company. At the hearing, she admitted to a monthly income of \$240,000.00 per month and lists her expenses as \$240,000 per month. She says that her electricity and telephone bills are paid for by the Telestar. Among her expenses is listed \$39,000.00 per month for Optical, dental and medical treatment and for gardening services. It was estimated that for the period of the first eight years, she earned in excess of \$23,000,000.00. She presently resides in what is described as an "upper class neighbourhood, with facilities that include three bedrooms, a swimming pool and has a private exercise instructor. The husband alleges that she has a relatively new car, which is maintained by the company. She limits her ownership in Telestar to one share or one per cent of the company.

(14) Mrs. Darby claims that her husband ceased paying maintenance of \$10,000.00 in 1996. He claims that she stopped collecting it when she assumed the top post at Telestar. Mrs. Darby well manicured coiffure and immaculately attired presence in all her appearances in court contrasted with her evidence in relation to the financial hardships she endured during the period she lived as man and wife with Mr. Darby. It is clear when her present living standards are compared with what existed during the course of the marriage, that Mrs. Darby is much better off now. See her affidavit filed on 17<sup>th</sup> November 1999 paragraph 1 – 35. She admitted in cross-examination that she could save \$50,000.00 a month for the succeeding four years. She did not deny that she could save and purchase a home.

### **The husband's ability to pay**

(15) From the evidence adduced, it is quite clear that Mr. Darby is no longer the successful businessman of his earlier years. He lives in rented accommodations in a much humbler community than the respondent does. He has been without a motorcar for one year. He states his income is solely derived from the rental of two shops that he owns, this amounts to \$50,000 per month. He denies that he owns the entire Port Henderson Plaza, and in his affidavit filed on the 3<sup>rd</sup> May 2002, stated that he owed \$447,000.00 in property taxes. The front end loader and tractor, vital tools of his trade in quarrying were both disabled and have been inactive for an extended period.

(16) The uncontradicted evidence before the court is that the quarry he mined at Port Henderson Quarry Zone was closed by the Commissioner of Mines on the 5<sup>th</sup> June 1989, the environmental impact having grown too great for the neighbourhood. Also uncontradicted is the evidence that Hillrun and Cross Pen Quarries for which he holds leases, have become overrun with criminal elements and have been abandoned. He has large loans on both properties. He has five dependents and lists the expenses for his household as \$96,000. As a consequence he has been liquidating his assets to make good the budget deficit.

### **All The Circumstances of The Case**

(17) It is a relevant circumstance that Mr. Darby has maintained his wife, from the breakdown of the marriage, to her assumption of the management of Telestar in 1996. That except for a period of 16 months, when she lived with her son, Mrs. Darby occupied the matrimonial home, and thereafter rented accommodations, for which Mr. Darby paid the rental up until 1996. He provided Mrs. Darby with the use of a motorcar until 1997. This conduct indicates that he accepted his responsibility to support and maintain his family. During this period the children who were initially dependents have become professionals.

(18) Is a relevant circumstance, that the wife had ceased collecting the maintenance payments in 1996. She made an application for its resumption some three years later, when her husband had filed for dissolution of marriage. She has not complained, neither has there been any evidence of a decline in her standard of living during the period when she was not in receipt of maintenance. Indeed she states that she used the maintenance provided, over the years, to pay for the service of a domestic helper. To my mind, her conduct demonstrates that she has the means with which to maintain herself.

(19) The wife on the evidence adduced enjoys a higher standard of living than the husband. Her income of \$240,000 amounts to almost five times that of her husband. Further, his income has to meet the expenses of himself and his dependents. She has no dependants. She has access to a motorcar he has none. The husband is older and a diabetic, a condition which he says has severely affected his health and has caused a great fall in his energy levels. This condition was obvious to the court. The wife is also diabetic, and has glaucoma; she however appears in much better physical condition. He asserts that the interim order has caused him hardship and he is unable to maintain his household. I find that, to cause him to maintain her would further increase the disparity which presently exists in the living standards of the parties.

(20) The wife has consistently alluded to the conduct of Mr. Darby during the marriage. Ms. Mullings submitted that the very basis of Mrs. Darby's affidavit and her evidence is that she wants maintenance as a compensation for her suffering in the marriage. It has not been disputed that her evidence is replete with complaints of Mr. Darby's conduct. The purpose of maintenance is not to punish for matrimonial offences. In her affidavit dated 20<sup>th</sup> May 1999, she states at paragraph 39;

“That finally, I am happy to be free of this most reprehensible, adulterous man, but on the basis of my hard work, I am claiming a settlement commensurate with 52 years of ‘*sheer mental agony*’ and to enable me to get a roof over my head.” (Emphasis mine)

It is noteworthy that Mrs. Darby includes in her computation of the years of sheer mental agony, the 32 years (on her evidence) the parties have lived apart.

(21) The applicant filed an affidavit on the 6<sup>th</sup> April 2005, alleging “a vast and fundamental change in my circumstances,” which indicated that the Board of Telestar has asked her to resign as Managing Director of the company, she indicates she was no longer in receipt of allowances \$26,000.00 per month for transportation allowance, and entertainment allowance of \$39,973.00. The affidavit admissibility was strenuously opposed by Ms. Mullings. The affidavit further highlights the great difference in living standard that exists between the parties. In addition, it does not mention any arrangement in respect of retirement benefits redundancy payments that are available by law to employees of a company. The condition under which her service was terminated has not been disclosed to the court. What is clear from the figures tendered she would have had during her years with the company, annual disposable income of approximately \$150,000.00. There is no explanation whether those funds are now available to the applicant.

(22) In **Atwood v Atwood (1968) 3 All ER. 385**, the court recognized that the breakdown of the marriage is likely to lead to a lowering of the living standard of both parties and cautioned that it should not result in creating or increasing the disparity in their living standard. Sir Joscelyn Simon, P. at page 386 of the judgment, in giving considerations which the Court should bear in mind in

applications for maintenance, after deprecating an award that would result in lowering of the wife's standard below that of the husband's, said;

“(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.”

(23) I find that Mrs. Darby has not made out a need for maintenance. The living standard she presently enjoys is significantly higher than that of Mr. Darby. Neither has it been demonstrated that Mr. Darby has the ability to make any payments to Mrs. Darby, without causing great hardship to himself and his dependents. The only asset Mr. Darby has remaining is Hollers Pen. The applicant has not proven that there will be monies available after the provision of the subdivision requirements. The lots were sold many years ago in forced circumstances. I am unable to say on the state of the evidence he would be able to make any periodic payment. I can say he is unable to make any lump-sum payments. The summons for relief is dismissed. Application for a lump sum payment is refused as is the application for a periodic payment.

No order as to cost.

