IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN FAMILY DIVISION

SUIT NO. F.D. 1999/M201

BETWEEN	MARY SALOME MORRISON	APPLICANT
AND	ERROL YORK ST. AUBYN MORRISON	RESPONDENT

Mrs. Carol Davis for the Applicant.

Mr. Scharschmidt, instructed by Hugh Levy & Co. for the Respondent.

Heard on 23rd April, 18th and 19th November and 20th December 2002

Campbell J.

The Applicant filed an Originating Summons dated 8th December, 1999, seeking an Order that;

1. That the Respondent pay to the Applicant for her life;

   (1) Such gross sum of money as this Honourable Court deems reasonable.

   (2) Alternatively such annual sum of money in advance or alternatively.

   (3) During their joint lives, such monthly sum for her maintenance and support.

2. That the Respondent be ordered to secure to the Applicant for life;

   (1) Such gross sum of money as this Honourable Court deems reasonable.

(2) Alternatively such annual sum of money in advance or alternatively.

(3) During their joint lives, such monthly sum for her maintenance and support.

On the 2nd March, 2000 an Interim Order was made as follows;

2 The Respondent to continue to pay to the Applicant health insurance, and provide herewith a motor vehicle.

3 That in respect to premises at 6 Montclair Drive, Beverly Hills, the Respondent continue to pay all household expenses, utilities, maintenance, and insurance, and to pay the gardener and helper.

The parties were married on the 30th March 1970, whilst the Respondent was a post-graduate student in the United Kingdom. The Applicant, who is a Maltese, was a qualified teacher. The Applicant never worked as a teacher, until she came to Jamaica. They returned to Jamaica in 1971 with Ruth, the first of the couple's three daughters.

The Respondent, an Endocrinologist, is a Pro Vice-Chancellor of the University of the West Indies and Dean of Graduate Studies and Research. He has distinguished himself nationally and internationally for his research and learning in respect of the disease of diabetes.

The Applicant, at paragraph 9 of her affidavit in support of the Originating Summons states;

> "From 1971, we both worked very hard. The Respondent, as a Doctor of Medicine, had very irregular hours. My continuing in teaching was very convenient for the family. I was the one who had the major responsibility for looking after the household and all the children. With my teaching job, I was able to do the taking to and picking up from school. I also dealt with the extra curricular activities.
>
> Meanwhile, both parties sacrificed and saved. In 1974, we were able to build a duplex off Mannings Hill Road, Kingston 8, and moved into our own first townhouse. In 1976, we were able to buy a house at 6 Montclair Drive, Beverley Hills, Kingston 6 in the name of both parties and moved in."

Her further contribution to the family income is recited at paragraph 17(c) of her affidavit dated, 8th December 1999 where, in relation to a farm acquired by the Respondent in 1982, the Applicant asserts;

> "The Respondent is not a farmer. He did not have any time to supervise the farm. I had to drive a heavy duty vehicle with standard gear shift to purchase chicken manure in St. Catherine, other fertilizers and various materials and drive the said vehicle with goods from Kingston to Portland several times weekly. On each trip, I returned to Kingston the said day to take care of our children and household duties, as a result, I became ill and was badly affected for six years."

And at paragraph 18;

(a) "I assisted the Respondent to achieve the maximum height of his profession. The Respondent is one of the foremost

Consultants in Jamaica and the Caribbean in the field of Endocrinology, and his services in this are likely to continue to be in high demand....."

(c) "I sacrificed my time, personal needs and laboured for twenty-seven (27) years for the Respondent to make him financially strong and progressive. Now, I am left alone to struggle with my four children for mere existence and approximately 9,000 miles away from my family in Malta."

Paragraph 19;

> "The Respondent is a very traditional man, always expected his wife to look after all his domestic needs. For the last twenty-seven (27) years and until he left home, I took care of all his domestic needs, even though I was working fulltime and had the major responsibility of dealing with the children. Indeed even after he left the matrimonial home he still brought his own dirty linen from his doctors office for me to wash and I washed them."

The Respondent, says that these assertions are untrue and are matters of conjecture, not facts and claims that her anti-social behaviour had led to his relative ostracism and that it was only since he has left home that he has become more acceptable amongst his colleagues. He states that the house built at Mannings Hill Road was built entirely by his mother from her own resources, and the deposit on 6 Monclair Drive was paid by his mother, thereafter he paid all the monies to complete the sale with no contribution from the Applicant. He does not refute the Applicant's claim in her Affidavit in Response that;

> "The Respondent and I bought land at 8 Crayne Way, Mannings Hill Road. The title was transferred into the name of the Respondent's mother for her to obtain financing as a contractor to build a duplex house on the land."

and that,

> "We subsequently sold 8 Crayne Way for $46,000 and used these monies in addition to additional savings that we had accumulated for the purpose of purchasing 6 Montclair Drive."

He claims that the house at 4 Montclair Drive was built from his own resources, and is mortgaged in the sum of Ten Million Dollars ($10,000,000). In relation to the farm, he said he had always hired two drivers, but the Applicant did volunteer to visit the farm and drive her own Pajero jeep, but it was not a duty required of her. The Respondent contends that he has been the sole bread-winner for the family. In response, the Applicant states that the house at 4 Montclair was brought from their joint resources.

At paragraph 12 of her affidavit, she lists her monthly expenses as being $291,000 and states, "At present most of my expenses are met by the Respondent, and I verily believe that he can well afford to continue to maintain me at this standard."

At paragraph 16(f) of her affidavit of 8th December 1999, she lists the sources of the Respondent's income as follows;

(1) His salary at U.W.I.

(2) His free house at U.W.I.

(3) His free car, etc., at U.W.I.

(4) His pension benefits at U.W.I.

(5) His free medical insurance at U.W.I.

(6) His fees for lectures abroad.

(7) His medical practice in Jamaica through the Diabetes Centre Ltd. is in excess of $900,000 monthly and

(8) Rent from the premises at 4 Montclair Drive, Beverley Hills.

The Respondent, in cross-examination by Ms. Davis, admitted to affairs during the course of his marriage. He said his wife assisted in organizing the home and the family. He however denied that she assisted in his medical practice other than two occasions.

At paragraph 19 of the Applicant's affidavit in response to the Respondent's affidavit sworn to on the 21st March 2000, it is stated;

In the context of the above, I verily believe the Respondent's monthly income to be as follows;

From U.W.I	$369,555
<u>From Diabetes Centre</u>	
Medical practice	$1,000,000

From Diabetes Centre

Rental of space (floors 1, 2 and the Ground floor) & pharmacy	$500,000
From rental of 4 Montclair	$105,600
From Diabetes Association	Unknown to Applicant
From 7 acres coffee farm	Unknown to Applicant
Income from deposits abroad	Unknown to Applicant

The Respondent states that he has five bank accounts. He has a foreign exchange account with his daughters. His account at Bank of Nova Scotia (BNS), Cross Roads he had with his daughter Ruth. One of the savings account is with daughter, Sephora. He said he had an investment account in the United States, which contained US$20,000.00 but has since "went bust".

The important feature of the Respondent's income was his relationship with the Diabetes Centre (hereinafter called the Centre). This is so because the Applicant alleges that the Centre earns approximately $1,000,000 per month, which accrues to the account of the Respondent. The Respondent on the other hand, says that the Centre is unable to meet its overheads, and its income is supplemented by contributions from him. In any event, the Respondent contends he derives no income from the Centre. It is therefore fundamental to the issue of the Applicant's income to

determine the income of the Centre, and to what extent is Professor Morrison benefited from this income.

In answer to an Order on Summons for Discovery & Inspection of documents, ordering delivery of among other things, bank statements for the Diabetic Centre Limited (the Centre), the Respondent stated that he had no shares in the Centre, and was therefore unable to deliver such statements.

The Respondent testifies that "the Diabetes Centre Ltd. is not a company in which I have an interest, I own no shares in it. I am a director of the Company, all four daughters are directors." He stated that the income that accrues to the Centre is derived not only from his services, but also from the services of four other doctors. Of those doctors, the Respondent is regarded as the Chief. One of the doctors, Dr. Da Costa pays directly into the Centre, of the others he testifies that their fees are collected for them. These doctors do not pay a rental, but make a contribution towards the mortgage on the building.

Professor Morrison has testified that he does not get one cent from his private practice, and that there is no net income provided by the Center. He was unable to state what the gross income of the Centre was - whatever the figure was, *it goes directly back to pay the mortgage*. The income of the Centre, according to the Respondent, does not pass through his hands. He

was cross-examined, that he had deponed that the Centre "provides a gross income to me." He said that he had said it but had later corrected it.

Professor Morrison further testified that the building that houses the Centre does not belong to the Centre, but belongs to the Diabetes Association (the Association), which is the parent company to the Centre. The mortgages that provided funding for the construction was of two loans amounting to $25,000,000. They were secured by mortgages on 4 Montclair Drive, the Respondent's motor vehicles and personal loans to the Respondent. Professor Morrison testified that the building is to be stratified, with ownership residing in the Centre. He states that "*the Diabetes Centre, which is the only legacy I will leave my children..... it represents a legacy to my children..... it is owned by my children. I am the provider, the sole Guarrantor for that mortgage.*" *He said he transferred all his interest in the Centre in 1998.*

Before the transfer he had a 50 percent interest in the Centre. He claims to have redistributed his shareholding amongst his daughters. In 1998 there were 200 shares, 180 of which were owned by the Respondent, 10 by his daughter Ruth and 10 by daughter, Sephora.

He denies that he has the requisite power to produce the accounting records of the Association, and claims that power resides with the

Association. The Respondent has said that a letter of the Association dated 26th June 1998, which states that the Association acknowledges that the Centre has taken full responsibility for the repayment of all loans to date amounting to J$28.63 Million obtained for the erection of the building located at 1A Downer Avenue and agree to convert this repayment to the full and final purchase price of floors 1b and 2 of the said building, indicates an expression of his intention in the event of his demise.

Professor Morrison testified that the Association is a charitable organization. The Association runs a Clinic, where there are no fees charged the users, but donations of $500.00 are asked of each patient. The Respondent testifies that the Centre's patients pay a *more realistic fee than what the Association charges.*

The Respondent claims that the payment on the mortgage for the building at Downer Avenue is $531,000 per month. He is provided with a vehicle, a Pajero, for the Association's out-reach work, for which the Centre provided maintenance. The Respondent claims he now undertakes this maintenance personally. He denied that he was provided with a vehicle by the Centre or that he received any benefit from either entity. He previously had a 1991 Mercedes Benz from the Centre, and currently drives a new

Mercedes Benz. He claims that his net salary from the University is $245,000.00. He says he no longer has a farm, having sold same in 1994.

Professor Morrison claims that the Centre receives all the income from his patients. When shown paragraph 12 of his affidavit, which states, *'my income from private practice is substantially depleted by workers salaries and utilities'*; the Respondent reasserts his position that he has no income from his private practice. He says the fees charged for the services that he provides are basic $3,000.00, but ranges from $2,000 - $5,000. He works at his private practice three afternoons per week and on Saturday mornings. He says he sees a maximum of five patients per session. It was suggested to Professor Morrison that his average monthly income from his private patients was $465,815 for the year 1997. He responded that that income was not in keeping with reality, but was a concoction. It was suggested that the figures were authentic having been produced by a Ms. Johnson, whose responsibility was to record payments made by the Respondent's clients. He denied that she was hired to do any such thing and claimed that she had been dismissed for theft. He denied that his wife kept the Centre's records for a period in 1997. He denied that funds from the Centre were used to construct the Association's building. The Respondent says that he is putting all that he has earned into the building. He also

denied that the rental of space on the building accrues to him. He admits however that none of his daughters receives any income from the Centre. He admits 6 Montclair Drive is occupied by the Applicant and 4 Montclair is rented to the Haitian Ambassador at a rental of US$2,400. He has denied that the Applicant worked at his practice from 1st January 1997 to 30th June 1997.

Counsel for the Applicant submitted that inclusive of use of the motorcar, his income from the University is in excess of $300,000 per month; rental from 4 Montclair is US$2,400 or J$120,000 monthly; and that income from private practice is between $800 - $1M monthly. In respect of the Respondent's earnings from private practice, Ms. Davis states that the Respondent's affidavit is singularly unhelpful. That an award of $300,000 per month is being sought on behalf of the Applicant. She contends that this constitutes one-fourth of the Respondent's proven income. Mr. Sharschmidt contended that the Respondent's income was $240,000, being his salary from the University of the West Indies.

It was submitted on behalf of the Applicant that a good starting point for an award by the Court was one-third of the joint incomes of the parties. In Watchel v Watchel (1973) 1 AER 829, at page 839, per Lord Denning;

> "In awarding maintenance, the divorce courts followed the practice of the ecclesiastical courts.

> They awarded an innocent wife a sum equal to one-third of their joint incomes. Out of it she had to provide for her own accommodation, her food and clothes, and other expenses. If she had any rights in the matrimonial home or was allowed to be in occupation of it, that went in reduction of maintenance."

However, in 1992 the Court of Appeal (on an application for maintenance pending suit pursuant to S. 20(1) of the Matrimonial Causes Act) in John Valentine v Margaret Valentine (1992), 29 J.L.R. 35, preferred the one-fifth rule. Rowe P. said at page 37;

> "Mr. Small submitted that the usual method of assessing the sum to be paid to the wife as alimony pending suit is correctly stated at Para. 745 of Vol. 12 of the Third Edition of Halsbury Laws of England, that is to say, 'it is usual to allow to the wife such an amount as will make her total income one-fifth of the joint-incomes.' Mr. Small readily admitted that this was no hard and fast rule. In the Fifteenth Edition of Rayden and Jackson's, Law and Practice in Divorce and Family Matters, Vol. 1 at page 829, the learned authors say;
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> 'It was the practice for along time to allow an amount which would bring the income of the wife up to approximately one-fifth of the joint incomes. There is now no hard and fast rule, and each case stands on its own merits. There is no fixed rule and no certain proportion. The allowance is entirely in the discretion of the court, and if the husbands income is very large, the proportion, if the court thinks for some particular reason that the appropriate approach in any given case is to have regard to a proportion, may be smaller, whilst it may be even more necessary to ignore all question

> of proportion when the means are very small. The overriding consideration is the actual needs of the parties pending suit;...."

Mr. Scharschmidt contended in so far as there is a rule existing, it is one-fifth of the joint-incomes that is relevant in this jurisdiction. I would agree.

The case of Attwood v Attwood (1968) 3 All E.R. 385, the considerations that should be borne in mind, in a matter of this nature were listed by Sir Josclyn Simon, P. at page 388 where he said:

> 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 and Ashley v Ashley. (iv) Subject to what follows, neither should the standard of living of the wife be put significantly higher than that of the husband,..... (v) In determining the relevant standard of living of each party, the court should take into account the inescapable expenses of each party, ... (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."

The Respondent's attorney-at-law maintained that the duty of the Husband is to maintain his spouse in a condition as closely proximating as practicable that to which she was accustomed during the marriage. Counsel submitted that the Court ought to pay attention to the (1) needs of the wife

(2) the ability of the husband to maintain her as close to the level she was accustomed during the course of the marriage. He further submitted that whatever is earned by the Centre is swallowed up by the mortgage payments.

Is there evidence before the Court of the Respondent deriving an income from his private practice? There is abundant evidence to that effect. I find, as a matter of fact, that the Respondent sees on the average five patients per session at an average fee of $4,000.00 per patient. His average weekly income is assessed at $80,000. It is clear that there is a mortgage on the property, as also certain other expenses are to be incurred, e.g., utilities to maintain a building of that type. There is a dearth of evidence coming from the Respondent as to any other source of income other than his salary from the university. His evidence in this area was less than frank and full. His testimony was replete with contradictions and inconsistencies, and it appeared that the Respondent was unable or reluctant to assist the Court. The words of Byron JA, in Hughes v Hughes (1993) 45 WIR 149. At page 154 letter b is apposite:

> What is clear from the evidence is that the appellant gave much less than a full and frank disclosure of his assets and income. From his evidence it was clear that his income exceeded his salary but he left it open to the court to make estimates of that income. It was also clear he had

> beneficial interest in property and business of value, but it was left to the court to make estimates of that income. The burden of proof could not be placed on the Respondent because this knowledge was peculiarly in the possession of the appellant and he was under a duty to make full and frank disclosure. The power of the court to draw inferences adverse to him in such circumstances was expressed in Payne v Payne (1968) 1 all ER 113 at page 117 by Willmer LJ in this way;
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> "It is well established that the Court is entitled to draw inferences adverse to a husband who has not made a proper disclosure of his available resources. That was held by Sachs J in J (1955) 2 All E.R. 85, A decision which was subsequently upheld, so far as that point at any rate was concerned, by this court. It was also held by Lloyd-Jones J In Ette v Ette (1965) 1All ER 341, where it was again decided that it was proper to draw inferences adverse to the husband from the fact of his failure to make a proper disclosure."

The Respondent had testified that he was leaving the Centre as a legacy to his daughters. They, according to him, are the present owners. There is no doubt that there are fees due to the doctor as a result of his private practice. What he chooses to do with those fees are not a matter for our concern, however, even if he would make a donation of these fees to a charitable institution, or make a gift of it to his daughters, that is no bar for those fees being assessed to provide maintenance or support for his wife, or put another way, he may not escape providing for his wife by giving away his entire income.

I bear in mind the admonitions that the "assessment by the Court must bear a genuine relationship to the available assets". For those reasons, I cannot find that the rental of the building accrues to the Respondent's net income; similarly I am unable to treat the rental from #4 Montclair Drive as a net benefit to the account of the Respondent. The Respondent's relevant income for assessment is therefore his salary from the UWI, which I find to be $280,000. I find that he derives from his private practice an income of $320,000 per month for a total of $600,000 per month. I think in the circumstance of this case, the requirements of the wife should enable her to enjoy as closely as possible the standard that existed throughout her marriage. This standard should proximate the standard that the Respondent enjoys. It is clear from the evidence that he travels quite frequently, and can satisfy his altruistic tendencies, e.g., providing a legacy for his daughters. His wife on the other hand was unable to attend the funeral of a parent in Malta. She complains that the house is in need of repairs and that the vehicle that she drives is aging. I take into account that she occupies the matrimonial home and has only recently left the classroom. She does not appear, from the evidence, to enjoy the best of health and frequently requires specialist treatment. She had enjoyed trips overseas and local vacations during her marriage. The interim order which has been valued at $70,000

per month by the Respondent is inadequate to address these needs of the Respondent. I make an award for the Respondent to pay the sum of $150,000 per month for the maintenance and support of the Applicant during their joint lives and to provide herewith, a motor vehicle of a similar value to the one she presently drives. The vehicle so provided, not dated more than five years. Cost to the Applicant to be agreed or taxed.