JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 28/91

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN	JOHN VALENTINE	RESPONDENT/APPELLANT
A N D	MARGARET VALENTINE	PETITIONER/RESPONDENT

Richard Small instructed by Mrs. Pamela Whittingham of Vaccianna and Whittingham for the appellant

Paul Dennis instructed by Myers, Fletcher and Gordon for the respondent

January 13, 14 and February 28, 1992

ROWE P.:

The appellant, (hereinafter called the husband) and the respondent, (hereinafter called the wife) were married on April 28, 1984. Then the husband was aged 26 and the wife aged 35 years. Almost to the day, the parties separated five years later, that is to say, on April 29, 1989 and a petition for dissolution of the marriage which was presented by the wife on the 7th day of September 1990 prayed inter alia for maintenance pending suit. Reckord J. ordered the husband to pay the sum of four thousand ($4,000.00) per month by way of maintenance pending suit with effect from September 30, 1990. From this order this appeal arises. After hearing arguments on both sides we dismissed the appeal and as promised we now reduce our reasons to writing.

At the date of the marriage and up to the time of the hearing before Rockord J. the wife was employed as a Secretary at Industrial Commercial Developments Limited. It was common ground that in October 1990 the wife had a net income from her salary of $57,000.00 while the husband had a net salary of $150,781.00 plus the use of a fully maintained motor car. The wife owned a 1989 Suzuki motor car; jewellery valued at $150,000.00; 150 non-voting shares and 100 ordinary B shares in a private company called TRAH Limited and joint or sole ownership in five german-shepherd dogs. Her monthly expenses since the break-up of the marriage amounted to $10,442.00 which sum this Court found to be of a very conservative nature. The husband's personal effects were valued at $20,000.00 and he held 500 Cement Company shares.

A submission at trial that the wife should either sell or somehow turn her jewellery into income-bearing assets was not repeated before us, nor was any point made concerning her kennel of dogs. The gravamen of the husband's contention on the question of the wife's means was that the Court ought to have permitted an enquiry into the value of her shares in TRAH Limited before embarking upon the trial of the general issue of maintenance pending suit and further the judge misdirected himself in holding that the wife's interest in TRAH Limited was irrelevant as no dividends had been declared by the company.

The husband alleged in his affidavit of means that he believed that his wife was beneficial owner of 150-A shares in TRAH Limited out of a total of 500 non-voting shares, "there being a further 100 ordinary B shares", that the company owned a 3 bedroom 2 bathroom house at 16 Tennis Way, worth about $1.2 million which was rented for not less than $6,000.00 per month; that the company owned a 3 bedroom apartment at Worthington Towers worth about $800,000.00, which was also rented; and that he believed that the company owned at least a 50% interest in the concession for two gas stations, one in Bog Walk and the other in Linstead. To these allegations the wife replied saying:

> "I currently derive no income from shares in company TRAH Limited referred to in Paragraphs 9 and 10 of the Respondent's Affidavit, and have not done so since 1982. The said company does not own premises at 16 Tennis Way. These premises are owned by Norma Hart, my mother. Nor are the premises situate at Worthington Towers now owned by TRAH Limited. I have no detailed knowledge of the business or assets of the said company and cannot say whether it operates or has an interest in the service stations mentioned in Paragraph 10 of the Respondent's Affidavit."

Rockord J. refused an application by the husband's counsel for an adjournment and for an order that the wife produce balance sheets for TRAH Limited for the years 1987-1990. The latest available balance sheet for that company was for the year 1986. The learned trial judge must have been influenced by the submission of counsel for the wife to the effect that the company, TRAH Limited was a separate legal entity from the wife and its income and assets were separate from those of the wife. Consequently, so the submission ran, only dividends declared by the company in favour of the wife could form part of her income. He argued further that the wife's disclosure of her shareholding in TRAH Limited was sufficient in the circumstances.

It is true that the wife had no control over TRAH Limited and could not determine the time at which the audited accounts would become available but the value of her interest in the company was a relevant matter for disclosure.

Mr. Small submitted that the joint income of the husband and wife is the basis for assessing the award for maintenance pending suit, and therefore the cases which decide that all of the husband's property must be disclosed are equally applicable to a wife who holds property in her own name. In Crampton v. Crampton and Armstrong [1862] 32 N.S. Probate, Matrimonial and Admiralty Reports, 142, the Court held that the value of shares held by the husband in a joint-stock company ought to be disclosed in the husband's answer to an application for alimony pending suit, although no dividend was payable on those shares

and in Harris v. Harris 162 E.R. 610, the Consistory Court of London held that the estimated value of all marketable securities must be included in the calculation of the husband's income for purposes of assessing the allotment of alimony pendente lite.

In a case where the shares are held in a public company quoted on the stock-market, once the number of shares held by husband or wife is known, their value can be easily ascertained. It is otherwise when the shares are held in a private company, and are not traded openly and as the cases show, balance sheets might not even tell the entire story. The industry of Mr. Dennis was rewarded with his location of the case H. v. H. [1981] LS Gaz R. 786 reported in the Digest of Annotated British Commonwealth and European Cases 27(3) 1988. At para. 10579 the report states:

> "Wife's assets - Value of shares in private company - Disclosure of company documents -
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> On a wife's application for application for financial provision after divorce, her husband maintained that she possessed considerable assets, including shares in a private company, the value of which could not be ascertained from information provided by the wife. Leave was granted to issue a subpoena duces tecum against the company for the production of material documents relating to rents received by the company. The company's chairman, although conceding that the material was relevant, applied for the subpoena to be set aside on the ground that it was oppressive. **Held**, what was being sought was information about the present value of an asset of the wife, not about some asset which might come to the wife in the future. The balance sheets alone were not sufficient to ascertain the true value and the production of the material would avoid costly cross-examination. It was not oppressive and the application would be refused."

We think that we ought not to interfere with the exercise of discretion by Reckord J. not to adjourn the application indefinitely. On an application for maintenance pending suit, the Court must act with deliberate speed so that a wife who is entitled to maintenance might not be overly embarrassed financially. Were he, in this case, to have adjourned the application sine die, there would still be nothing to encourage the directors of the company to produce balance sheets in a timely manner. The course adopted by the husband in H. v. H. (supra) was effective as it reached out to the company directly and did not depend upon the intervention of auditors. On balance and in the light of the uncontradicted affidavit evidence of the wife denying the real estate ownership by the TRAH Company, the exercise of discretion by the tribunal of fact ought not to be disturbed.

Section 20(1) of the Matrimonial Causes Act enables a Court upon any petition for the dissolution of a marriage to make interim such orders for payment of money by a husband to a wife as the Court may think reasonable. 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 3rd Ed. of Halsbury's 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:

> "It was the practice for a long 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 husband's 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 questions of proportion when the means are very small. The overriding consideration is the actual needs of the parties pending suit; ..."

Lord Merriman P. emphatically denied the existence of any fixed rule. In Ward v. Ward [1948] P. 62, he said:

> "It is said that the order is wholly unreasonable. It is admitted that every case must be decided on its own merits. Nevertheless, not for the first nor, I fear, for the last time the well known authority of Cobb v. Cobb [1900] P. 294 has been cited to us, in spite of the fact that as long ago as 1930 Lord Merrivale in Jones v. Jones [1930] 142 L.T. 167, 168, said that 'the conventional standard in the Divorce Court derived from the old jurisdiction of the ecclesiastical courts, by which a wife is not likely to get more than one-third of the joint income, is very difficult to apply to a man earning wages and a woman able to earn money.' I do not know how many times I have ventured to say the same thing in even stronger terms. Nevertheless I am told that, possibly because nobody has thought it worth while to report utterances to that effect, Cobb v. Cobb, (supra), is still set up as the standard by which justices must act. I hope that some day textbooks will take note of the fact that it has been repeatedly laid down since 1930 that it is quite absurd to apply automatically - and especially to working-class people - a standard which applied in the days when income tax was 1s. in the pound, rent-rolls were £10,000 a year and pin-money was £2,000 or £3,000 a year; and that what justices have to discover is what is a reasonable award in the circumstances of the particular case."

Wallington J. strongly deprecated the suggestion that there should be any fixed standard and agreed with Lord Merriman P. that at the end of the hearing the question for the Court of Appeal is: Was there anything so unreasonable or indiscreet in the award of maintenance as to entitle the review Court to interfere with the Order made in the Court below?

Notwithstanding the very strong language used in Ward v. Ward (supra) to discourage judges from applying a hard and fast rule in arriving at the quantum of alimony pending suit, in Slater v. Slater [1982] Times 26th March 1982, Arnold P. said the one-third guideline was unhelpful in cases involving very large sums but in cases in-between it was still useful. May L.J. in that same case said:

> " ... although one could not approach the case in a strictly arithmetical way, it would clearly be of assistance to the parties' advisers to have as precise a line of approach as was possible."

The Court of Appeal considered Slater v. Slater (supra), in Potter v. Potter [1982] 3 All E.R. 321 and concluded that the one-third rule did not apply to a re-distribution of assets between the spouses but remained a useful guide in cases dealing with periodical payments. Dunn L.J. after referring to the dicta in Slater v. Slater (supra) said at p. 324:

> " Slater v. Slater was concerned with periodical payments, and it was in that context that this court made the observations which it did in relation to the one-third guideline. In straightforward cases of applications for periodical payments where the incomes of the parties are readily ascertainable, the one-third guideline is indeed a useful rule of thumb, and one that has been adopted by the profession for many years as a readily ascertainable approach to the kind of income liability under which a husband might be expected to find himself."

And as Ormrod L.J. pointed out the one-third rule for permanent maintenance was helpful to practitioners to have a clear understanding of what principles were likely to be applied so that they could feel confident as to how to advise their clients and for the parties to know that the issues would not be determined by caprice or judicial idiosyncrasy.

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 requirements of the wife. The route to the determination of a reasonable award is not charted by any fixed rule of law or practice although as a guide the judge would look to see what result the application of a one-fifth of the joint incomes 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 and all the circumstances of the case, it would be improper for the judge to fashion a straight-jacket for himself and to rely wholly upon a fixed percentage.

Our attention was drawn to the decision in Attwood v. Attwood [1968] 3 All E.R. 305 and to the ten general considerations suggested by Sir Jocelyn Simon P. in fixing maintenance. The President recognized that upon the break-up of a single family unit, the standard of living of both wife and husband might be lowered but cautioned that the wife should not be placed at a significantly higher level than the husband, nor should the wife be relegated to a significantly lower standard than the husband. Included in the general considerations is that account should be taken of the inescapable expenses of each party.

In the instant case Reckord J. was addressed by counsel upon the desirability of applying either the one-fifth or the one-third rule to the joint incomes of the husband and wife and then either to make no award or a nominal award. He clearly rejected these methods of procedure and relied instead upon the discretion given to him by section 20(1) of the Matrimonial Causes Act to fix a sum having regard to the wife's means and the husband's ability to pay.

Mr. Small submitted that although the trial judge warned himself correctly as to some of the matters to be taken into account in making his order, he did not heed his own warning in that he did not place a value upon (a) the wife's jewellery valued at $150,000.00; (b) the wife's car; (c) the wife's shares in TRAH Limited; (d) the wife's employment in the same job which she held prior to the marriage.

In the circumstances of this case these were not assets which enhanced the wife's standard of living over and above that of her husband. He had the use of a fully maintained motor car both for official and private purposes while the wife had to maintain her own car. Mr. Small who had not appeared in the Court below did not seek to contend that it was unreasonable of the wife not to sell her jewellery and turn the money into income-bearing assets. There was no dispute as to the wife's salary, all of which was brought into account and there was no dispute that she had not received any income from her TRAH shares since 1982.

The husband had voluntarily surrendered the lease of the matrimonial home for which up to then he paid the rent and the wife was forced to seek rented accommodation.

The husband's net income after payment of income tax was $158,781.00 while that of the wife was $66,750.00. The husband's expenses were quantified at $63,000.00 per annum while that of the wife amounted to $10,442.00 per month, including a payment of $4,500.00 per month for rent. On these figures the husband had surplus income of $95,781.00 p.a. while the wife had a shortfall of $58,554.00 p.a. If this situation was allowed to continue the husband's standard of living would be significantly improved while that of the wife would be lowered beyond subsistence level.

There was one disputed item of expense as claimed by the husband. He alleged that he made a monthly payment of $2,000.00 to his aged mother. On the evidence it was unclear what were the means of the husband's mother, and the trial judge found that the mother

did not appear to be in need as she was then making plans to purchase a motor car. The learned judge was not impressed with the husband's credibility and from the size of the award, it can be inferred that he doubted whether the husband was in fact making the monthly payments to his mother.

The learned trial judge considered that the respondent's behaviour was of some importance and adverted to two events in the marriage, viz. that the husband surrendered the tenancy of the matrimonial home without the wife's knowledge thereby forcing her to seek rented premises at $4,500.00 per month and that since the separation he had made no payment whatsoever to the wife although he alleged that he was making a monthly payment to his mother.

It was a relevant circumstance that the wife had had to secure rented accommodation at short notice and consequently would have had limited scope for choice. It was also a relevant circumstance that the husband had at his disposal $24,000.00 per annum which he elected to give to his mother whether or not she had a need for this sum and it was a relevant matter for the Court's considerationb that the husband had made no payment whatever to the wife since their separation. However, because the trial judge gave prominence to the heading of a paragraph: "Respondent's behaviour", that enabled Mr. Small to argue that in his award the judge penalized the husband for what the judge regarded as wrong-doing on the husband's part.

The decided cases show that where the statute empowers a Court to take into account the conduct of the parties when fixing the amount of maintenance, "conduct" there does not mean conduct which has contributed to the breakdown of the marriage. Conduct can be taken into consideration as a factor which may modify the otherwise predictable result, e.g., financial recklessness in the husband or some wholly unaccepted social behaviour by the wife which suggests that in justice some modification of the order

should be made - Wachtel v. Wachtel et al [1973] 1 All E.R. 113. In the instant case no provision is specifically made in section 20(1) of the Matrimonial Causes Act for the conduct of the parties to be taken into account but the phrase "all the circumstances of the case" is wide enough to encompass the examples of conduct taken from Wachtel's case.

Reckord J. properly considered that the wife's rental of $4,500.00 per month was not exorbitant in the circumstances and that the payment to the husband's mother was not justified on the evidence.

Although the marriage had lasted only five years, the wife had adjusted her life style quite considerably in her new situation. Her rent was being paid by her husband, he assisted her in the payments on her car and they shared the household expenses. At the break-up of the marriage it would be unreasonable to suggest that she was only entitled to a nominal award as was the case in Graves v. Graves [1973] Vol. 117 Sol. Journal p. 679. There Ormrod J. said that where a marriage was of short duration and the parties were young, a nominal order was the appropriate order unless there were children or the wife was handicapped in some way which prevented her from working. That marriage had lasted less than one year and there were no children. In the instant case there were no children but the marriage had subsisted for five years, a period which cannot be compared to a one year marriage.

The prevailing view of how a Court of Appeal will act when asked to review an award of maintenance is as set out by Simon P. in Attwood's case (supra). He said:

> "An appellate court will not interfere with an award of maintenance unless, to use the words used in Ward v. Ward (supra), '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."

This wife will have to adjust her expenses downwards while the husband will have in hand over $47,000.00 per annum after he has paid his own inescapable expenses and alimony pending suit. We held that the award was reasonable in all the circumstances, and dismissed the appeal with costs to the wife/respondent to be agreed or taxed.

FORTE J.A.:

I have had the opportunity of reading in draft, the judgment of Rowe P., and agree with the reasons therein. Consequently I have nothing to add.

GORDON J.A.:

I agree.