Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

FAMILY DIVISION

SUIT NO. F1996/W80

BETWEEN	NORMAN EGERTON WRIGHT	PETITIONER
A N D	JANET DELORES WRIGHT	RESPONDENT

Mrs. Angella Hudson-Phillips, Q.C.
instructed by Miss Leila Parker
for applicant.

Heron Dale for respondent.

JUDGMENT

Heard: 20th and 25th February, 1997
11,12,and 20th March, 1997

IN CHAMBERS

HARRISON, J.

By an application for ancillary relief dated the 2nd day of September 1996, the wife/respondent, (hereinafter called the applicant) sought against the husband/petitioner, (hereinafter called the respondent) an order that the respondent pay to the applicant,

> "1. ... such gross sum of money as this .... court deems reasonable;
>
> 2. Alternatively, ... such annual sum of money for any term not exceeding her own life.....
>
> 3. Alternatively ... during their joint lives, such monthly or weekly sum for her maintenance and support...."

The applicant and respondent were married on the 3rd day of June 1987, having lived together previously for approximately five years. The marriage broke down, the respondent filed a suit

of dissolution and a decree nisi was granted on the 28th day of November, 1996.

The applicant, formerly a flight attendant, is now a salesperson with a company, Quality Dealers Ltd; the respondent is an attorney-at-law.

In 1981, on the evidence of the applicant, or in 1983, according to the respondent, they began living together, along with the applicant's daughter, in the respondent's home at Lot 17 Fort George Heights, Stony Hill, St. Andrew.

The applicant and her aunt, Miss Annette Pascal bought an apartment 12 Queens Court, Constant Spring Road, St. Andrew. This court finds that the deposit was paid by both the applicant and Rupert McIntosh, on behalf of Annette Pascal, and rejects the contention of the respondent that he bought the apartment as a gift to the applicant and consequently retained an equity in it. It is unlikely that, as donor and being the attorney-at-law involved in the purchase, he would have advised that the transfer be effected in the names of the applicant and Annette Pascal, as tenants in common, for the reason that the applicant told him she wished to include Annette Pascal's name because she was "like a mother" to her. The tenure of the legal estate is more consistent with distinct contributions by both the applicant and Annette Pascal. Annette Pascal, in September, 1996, purchased the applicant's half share in the said apartment with a downpayment of £60000 (six thousand pounds). I regard this as a genuine sale of her asset to pay arrears of mortgage on her property at Caledonia, Westmoreland for the reason that:

> "During a period of my unemployment, that is from October, 1994 to May, 1995, my loan payments fell into arrears..."

I do not find this inconsistent with the said latter property having been "..... not purchased until May 1995."

The applicant while the marriage subsisted, purchased for the matrimonial home numerous household items, including appliances, glassware and other items, paid for cooking gas supplied up to October 1996 and for electricity supplied up to January 1996, contributed to the weekly supermarket purchases and occasionally to the expenses of the household worker. The applicant also paid the concessionary airfares from which both parties benefitted.

Since October 1996, the applicant has been employed at a salary of $25,000 per month, plus commission on sales. The applicant's monthly living expenses, as projected, inclusive of $20,000 per month for rent, is $37,900.

The applicant owns property, namely;

(1) Apartment at Queen's Court valued at $2,500,000; she holds a half interest, with her daughter who owns the other half interest and is the tenant. This apartment is subject to a mortgage of $60,000. The respondent values this apartment for $3,500,000 and states that it may be rented for $25,000 per month.

(2) a property of 3½ acres in Westmoreland purchased in 1995 for $950,000 and subject to a mortgage in excess of $460,000; the respondent values it at $2,000,000.

(3) a building lot at Chancery Hall, St. Andrew, in which she holds a none half-interest is valued at $1,000,000; the respondent values it at $3,000,000.

(4) a beauty salon - Fajan's Hair Care. The applicant states that she does not operate nor get any income from this business. The income tax returns exhibited support this. The respondent claims that the applicant hold a 50% interest in it.

Rule 46 of the Matrimonial Clauses Rules, 1989, requires the respondent to file an affidavit,

> ".... setting out full particulars of his property and income...."

The respondent's assets as set out of his affidavits dated the 17th day of February, 1997 and the 19th day of February 1997 are as follows:

(1) Premises 22-24 Duke Street - offices - half interest owned by the respondent. A value of $5,000,000 is given by the respondent and though "1/3 of which is rented" no rental

income is stated. The applicant values it at $20,000,000.

(2) Apartment at Ocean Towers. The respondent states that it is "rented from time to time, but ... presently unoccupied..... in need of repairs." He does not state the annual rental but gives a value of $1,500,000. The applicant values it at $5,000,000.

(3) Townhouse, Fort Charles, Long Lane. The respondent states that this is owned by Nosfort Holdings Ltd., a company in which he is a shareholder. He has omitted to state the extent of his shareholding, the value of his shares or the rental value he receives from the company. The applicant states that the house is valued at $6,000,000 and that it is rented.

(4) Apartment at Sand Castles, Ocho Rios. The respondent has stated the value is $1,500,000, has not stated the rental and merely states, "The rental ... is reflected in my Affidavit ...."

(5) Dwelling house of respondent at Fort George Heights - The respondent values it at $7,000.000 but the applicant states a value of $18,000,000.

(6) Lot at Chancery Hall. The respodent values it at $1,500,000; the applicant states a value of $2,500,000.

The respondent gives his gross earnings for the last three years as $6,450,000 realizing an average of 42,150,000 per annum. His annual expenses exceed his income; it is given as 42,287,900.00 to which must be added an additional amount of 25% of his taxable income.

This Court has noted that no motor car is listed as an item of property owned, but a total in excess of $280,000 is claimed for annual loan payments and other expenses concerning a "motor car."

Mrs. Hudson-Phillips for the applicant argued that this application under section 20 of the Matrimonial Causes Act requires the court in making an order to take into consideration the means

of the applicant, the husband's ability to pay and all the circumstances of the case; that in the context of divorce a clean break was desirable and therefore a lump sum order is preferable to one of periodical payments; that the applicant has declared her assets and is not claiming a beneficial interest in the respondent's property because she did not contribute to its purchase; that the respondent has free assets and therefore possesses the ability to pay if the Court considers the sale of assets to satisfy the order; that the standard of living that the applicant enjoyed before the breakdown of the marriage should be taken into account as one of the circumstances in the case. She referred to Wachtel vs Watchtel [1973] 1 All ER 829 observing that though based on the interpretation of Matrimonial Proceedings and Property Act 1970 (U.K.) is helpful. She concluded that the order should be for the payment of a gross sum, not of an amount to "cripple" and so punish one side, nor inflate the fortune of the other because the court recognizes that the "fault" aspect no longer exists.

Mr. Dale for the respondent submitted that under the said section 20 a gross or annual sum is payable out of income or available liquid funds and to be way of sale of assets; that the value of assets is irrelevant except in so far as it generates income; that the award should not be for the purpose of providing for the applicant a house, which she already has, holding therein the majority share with her aunt; that the applicant attempted to divest herself of her apartment and her salon business in order to assist her in her claim; that the applicant made a limited contribution to the welfare of the family and was the primary beneficiary and therefore is not entitled to an order in her favour; that this is a property claim disguised as ancillary relief and if an award is made it would abolish the distinction between a contributing and a non-contributing spouse; that "gross sum" should be interpreted to mean periodical payments and is only ordered where the husband has liquid assets - he referred to Davis vs.

Davis [1967] 1 All ER 123. Continuing, he said that if such an order is made and the respondent has to liquidate his assets in order to satisfy it, that would amount to a reduction of his source of income, impose a fine on marriage and would be unreasonable.

The power of the court under section 16 of the Married Women's Property Act was restricted to declaring the existing rights of spouses in property - a strict determination; whatever was owned as the property of a spouse generally remained his or her property despite the intervention of marriage.

Section 20 of the Matrimonial Cause Act, 1989, introduced a new feature in matrimonial matters. It permitted a court to transfer property to a wife as a financial provision, as a consequence of the marriage. This power never existed before in Jamaica.

In addition, the section directs the court on the nature of the orders it may make and the matters to be taken into consideration when making such an order.

Section 20 reads:-

> "20-(1) On any decree for dissolution of marriage the court may ... order the the husband, ... to secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her own life, as having regard to her means, to the ability of the husband, and to all the circumstances of the case it deems reasonable.."

The primary matters therefore that the court is required to take into consideration when making an order for the payment of a gross sum of money or an annual sum in the nature of a life interest, are,

(a) the means of the wife and

(b) the ability of the husband to pay.

These orders are distinctly different from order for maintenance, because, subsection (2) empowers the court to make

maintenance orders, in addition to or in lieu of the said orders.

> "2..... the Court may, by order, either in addition to or instead of an order under subsection (1) direct the husband to pay to the wife during their joint lives such monthly or weekly sum for her maintenance and support as the Court may think reasonable."

There have been no prior cases in Jamaica showing the operation of this section. We must therefore look within the statutory provision itself or any comparable legislation for guidance.

In the case of Davis vs. Davis [1967] a All E.R. 123, referred to by Mr. Dale for the respondent, the English Court of Appeal dealt for the first time with an order for a lump sum payment in addition to a maintenance order on behalf of a wife, made under the Matrimonial Causes Act 1965 (U.K.); section 16(1) of that Act is in pari materia, to our section 20 of the Matrimonial Causes Act. It reads,

> "16(1) On granting a decree of divorce or at any time thereafter ... the court may, ... make one or more of the following orders -
>
> (a) an order requesting the husband to secure to the wife ... such lump or annual sum for any term not exceeding her life as the court thinks reasonable having regard to her fortune (if any), his ability and the conduct of the parties;
>
> (b) an order requiring the husband to pay to the wife during their joint lives such monthly or weekly sum for her maintenance as the court thinks reasonable; ....." **(Emphasis added)**

The "conduct of the parties" is rarely a relevant circumstance, the element of fault having been eroded.

William, L.J. in his judgment, in acknowledging that the power to grant to the wife a lump sum was a new power given to the Court under the Act, examined the income and capital assets of the husband in relation to his ability to pay and the lack of income of the wife, and siad of the lump sum payment at page 126,

> "... The only guidance to be obtained from the words of the statute is that the sum must be such as the court thinks reasonable having regard to the matters to which I have ..... referred. It seems to me that in these circumstances the question is one very much for the discretion of the judge who has to deal with it. I do not think it is right for the Court to interfere unless satisfied that the judge below arrived at a wholly erroneous figure...."

He then observed that a lump sum order could only properly be made against a husband with sufficient capital assets to justify it, and sought to explain the rationale of the legislature in making provision for a lump sum payment in addition to or in lieu of an order for maintenance. He said, at the said page 126,

> "What is suggested here is that the wife, who while living with her husband has been accustomed to a high standard of living, playing the part of wife to the chairman of a large commercial organization, should be entitled to such a lump sum payment as will enable her to set herself up in a home commensurate with that to which she has been accustomed.
>
> There is no doubt that, in assessing an ordinary claim for maintenance, it is proper to have regard to the standard of living to which the wife was accustomed during the marriage; ... the dictum of Lord Merrivale, P., in N. vs N. [1928] All E.R. Rep. 462 ... and followed by Sachs, J., in Schlesinger vs Schlesinger [1960] 1 All E.R. 721, I see no reason why the same should not apply to a claim made under the Act of 1965 for a lump sum payment. If the wife has been accustomed during the marriage to live in a luxuriously appointed house, I think that she is entitled to ask for a lump sum payment of such an amount as will provide her with a standard of living commensurate with that to which she has been accustomed."

A lump sum payment order was further examined by Lord Denning in the case of Wachtel v Wachtel [1973] 1 All ER 829. The order was under the amending statute, the Matrimonial Proceedings and Property Act 1970. (U.K.).

Section 2, provides,

> "2(1) On granting a decree of divorce ... the court may ... make ... (c) an order that either party to the marriage shall pay to the other such lump sum or sums as may be..... (specified) ..." (Emphasis added).

The Jamaican statute permits the wife only to benefit from such an order.

Lord Denning, referred to the practice of the divorce courts making maintenance orders to award a wife one-third of their joint income. He regarded this as a "good and rational..... starting point ..." in sharing the capital assets with the wife, under the 1970 Act, more applicable where the marriage has lasted for many years and the wife has been at home with the children, rather than where the marriage has lasted for a short time and there are no children. Of the lump sum he said inter alia, at page 841,

> "In every case the court should consider whether to order a lump sum to be paid by her husband to her .... No order should be made for a lump sum unless the husband has capital assets out of which to pay it - without crippling his earning power ... when the husband has available capital assets sufficient for the purpose, the court should not hesitate to order a lump sum."

The rationale for the sharing of the capital assets between the spouses, is that the legislature accepted that where the parties living together in a marriage, acquired assets for the benefit of the family and the wife had contributed valuable time and effort in caring for the home and family, including children, and in some cases giving up her employment, it was only just that her contribution should be translated into a share of the capital assets. A lump sum payment was recognized by the legislature as one method of doing so. The 1970 Act (U.K.) helpfully recites the matters which the court should have regard to, in making such an order.

In Hughes vs Hughes (1993) 45 W.I.R. 149, the Court of Appeal of the Eastern Caribbean States, awarded a lump sum to a spouse , in accordance with section 24(1)(c) of the Matrimonial Proceedings and Property Act 1990 of Anguilla, a section similar to section 2(1) of the 1979 Act (U.K.) The Court did not regard the "one-third rule," as endorsed by Lord Denning in Wachtel v Wachtel (supra), in awarding a lump sum, as excessive. The court held also, that where one party failed to make a full and frank disclosure of income and assets the court is entitled to draw inference adverse to that party.

Section 20 of the Matrimonial Causes Act, 1989, therefore circumscribes the ambit of this court to have regard to the means of the wife, the ability of the husband to pay and "to all the circumstances of the case it deems reasonable", in making a order to pay the wife a gross sum of money or an annual sum "not exceeding her own life". The circumstances, in this case, do not attract the application of the "one-third" rule. If this court ascertains what the annual sum for the wife amounts to, it can arrive at a reasonable idea of an adequate lump sum for her life. This will provide a reasonable indicator of what the "gross sum" is likely to be. In the instant case, the applicant is not claiming to have contributed to the acquisition of any assets of the marriage nor to have otherwise releived the respondent of specified responsibilities leaving him otherwise relieved the respondent of specified responsibilities leaving him free to pursue his acquisition of the family assets. In any event that is not a pre-requisite to an order under section 20. However, the unchallenged evidence that the applicant contributed to the matrimonial home by means of the various items purchased, the gas and electricity supplies paid for and the concessionary air fares provided, is not an insignificant contribution to the harmony and comfort of the home, the act of sharing in the context of the marriage unit and for

the welfare of the marriage itself.

In her affidavit dated the 13th day of February, 1997 the applicant states that her living expenses amount to approximately $38,000 per month, inclusive of a rental payment of $20,000. This amounts to net annual living expenses of $456,000. Of course, the court has to take into account the means of the applicant.

The applicant is now 49 years of age and presumably will attain the end of her functionally productive working life at age 65. Her life span however could reasonably be placed at age 75. A lump sum of money, in the context of annual payments for life, payable now, may be ascertained. Using a multiplier of 11, (75 - 49 yrs. = 26), the total sum would be $5,016,000.

The court needs to ascertain the means of the applicant and take it into consideration in arriving at an acceptable sum to be provided by the respondent.

(1) Salary - $25,000. Her working life to age 65 provides a multiplier of 7. Of this gross salary, the net sum is approximately $17,000. The annual earnings are $17,000 x 12 x 7 = $1,428,000.00

(2) Queen's Court apartment. Half of rental of $20,000 (her own projected rental) = $10,000 less $2,000 mortgage payments and $2000 maintenance and repairs, - an arbitrary figure - $6,000 x 12 = $72,000

Note: This rental will cease and be unavailable as an income to the applicant when the sale is complete - effecting a reduction to her means.

(3) Westmoreland property - valued at $900,000- the gross annual value of one half = $45,000

(4) Lot, Chancery Hall - valued at $1,000,000 the gross annual value of one-half = $50,000

167,000

In the absence of an actual income from these properties the court uses the gross annual value to ascertain their potential worth. The sum of $167,000 taxed down by 25% yields a sum of $125,000 and multiplied by 11 in relation to the applicant's life span yields a figure of $1,375,000.00.

The lump sum for life, taking into consideration the means of the applicant would be:-

	Total living expenses		$5,016,000.00
Less Assets			
(a)	Salary to age 65 - $1,428,000		
	Income from capital assets	- 1,375,000	$2,803,000.00
		Balance	$2,213,000.00

Generally, in matters of this nature, the court looks at the potential earning capacity of an individual in addition to the actual sum available. The applicant has been gracious, viewing in the respondent's favour the expenditure for the tuition of his son in the United States of America. These expenses of $1,050,000.00 is the largest of the listed items of the annual expenses of the respondent and represents almost one-half of the average annual income of the respondent. Although it is both desirable and parentally praiseworthy on the part of the respondent and respresents almost one-half of the average annual income of the respondent to absorb this expense, the tenor of section 25(2)(a) of the Matrimonial Causes Act limits the maintenance obligation of a parent to the age of twenty-one years in respect of a child "engaged in a course of education or training." For the purpose of this exercise this is not justifiable expense of the respondent; in any event it is unlikely to be an expenditure continuing for very many years.

The Court finds that the respondent has been less than frank, the respondent earns and has an available net sum of approximately $2,000,000 after all expenses and consequently sufficient

assets to make a payment of a gross sum. Such an order can be made without "crippling his earning power". One of such assets, i.e the lot at Chancery Hall, the respondent himself describes it as one that "produces no income", making it a realizable asset.

The applicant in her projected annual expenses of $37,000 contemplates rented accomodation, a circumstance which in a Jamaican context, is a step away from the standard to which she had grown accustomed. The apartment in which she enjoyed a half-interest is realistically, on the documentary proof, no longer available as a residence to her. The respondent's offer of a lump sum of $400,000 is irrevocably relegating the applicant to this rental existence. She is not now and has not been so accustomed to so live since her marriage in 1987. Such an offer is inappropriated.

The payment of a gross sum by the respondent, in all the circumstances, to afford the applicant sufficient funds to acquire by purcahse adequate accomodation, is most reasonable and appropriate.

The sum of $2,213,000 calculated as the lump sum payment for the provision of the annual payment for "a term not exceeding her own life" is a reference point which takes into consideration the means of the applicant. The price of residences are reflected in the affidavits filed. A sum in the region of $3,000,000 would satisfy the requirement of the provision of a gross sum to the applicant in all the circumstances of this case.

It is ordered that the respondent pay to the applicant the sum of Three Million Dollars ($3,000,000), such payment is to be effected forthwith, costs to the applicant to be agreed or taxed, certificate for counsel; leave to appeal granted. Stay of execution granted; the condition is that the respondent pays to the applicant the sum of $1,000,000 forthwith. The further condition is that the respondent is obliged to permit the applicant to reside in the matrimonial home until the respondent pays the said sum of $1,000,000. Liberty to apply.