ANGUILLA

IN THE COURT OF APPEAL

Civil Appeal No.7 of 1992

BETWEEN:

FRANKLYN HUGHES

Appellant

and

ORONICA HUGHES

Respondent

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice
The Honourable Mr. Justice Dennis Byron, J.A.
The Honourable Mr. Justice Satrohan Singh, J.A.

Appearances: Mr. Mario Michel for the Appellant
Miss Paulette Harrigan for the Respondent

1993: May 11, 12, 24.

JUDGMENT

BYRON J.A.

This is an appeal against an order made by d'Auvergne J. on 25th September 1992 for relief ancillary to the dissolution of the marriage of the parties hereto. The appellant has appealed against orders to pay the respondent;

a. US$500.00 per month for housing accommodation for herself and the two children of the family until the younger attains the age of 18 years, and

b. a lump sum of $40,000.00

on the ground that the awards are excessive and against the weight of the evidence.

There was no appeal against the orders for the appellant to pay $400.00 per month for maintenance for each of the two children and to provide educational books, private tuition including music lessons for them until they attain the age of 18 years.

The appellant and the respondent formed a romantic association in 1978 and got married in 1983. The two children of the marriage are Shani born on 2nd March 1980 and Shirba born on 21st January 1984. In April 1984, after 14 months, the marriage became irreconcilably broken down. A decree nisi of divorce was granted on 10th October 1991.

There was evidence before the court in the form of two affidavits sworn by the appellant, one affidavit sworn by the respondent and oral testimony from both of them.

This revealed that during their relationship the appellant had been a medical student and resided in Jamaica. The respondent was a civil servant and resided in Anguilla. The appellant used the entirety of his financial resources in his own educational development and it was left to the respondent to use her own resources to look after herself and the children of the family.

For the past thirteen years the respondent has been providing a home for the children at her own expense apart from a short time in 1983 when the parties lived with the appellant's parents when he was at home on vacation from University. She now provides accommodation for them at a rental of US$500.00 per month. There was nothing to suggest that this was an extravagant expenditure. The order for the appellant to pay this sum for the 11 years until Shirba reaches 18 years could be regarded as a method of compelling him to contribute to the parental obligation of providing shelter for the children of the family.

The breakdown of the marriage coincided with the appellant's return to Anguilla as a medical practitioner in 1984. Since then the parties have lived separate and apart.

The evidence disclosed that the respondent's salary was $2080.00 subject to an increment of $50.00 per year, and that as she had already reached the level of executive officer the prospects of substantial increases were not good.

The appellant on the other hand was drawing a salary of $8,300.00 per month. In addition he had a private practice. The income from this source was not quantified but he admitted that he provided medical services to hotels in the island at US$100.00 per call. In addition he managed a family trucking business and was promoting an apartment building project on family land. No evidence of the income from these ventures was adduced. It is clear from the evidence that his income is substantially more than $8,300 per month and bearing in mind the recent date of his qualification the prospect of increases in his income is very good.

The evidence also revealed that the respondent had no capital assets in her own name. On the other hand the appellant owned an undivided one half share in two half acre parcels of land. There was no proof of the net value of this land but one parcel was stated to be subject to a mortgage of $48,000.00. The appellant also had the beneficial interest in fixed deposits of $32,000.00 and a motor car valued at $28,000.00 which was registered in his mother's name. In addition the respondent alleged that the appellant built a house on family land, and that it has a rental value of US$12,000.00 per annum which the appellant collected. The appellant did not admit these allegations. His evidence suggested that he had a beneficial interest in the house on the land but that the rental value was only US$375.00 per month. There was also evidence that the appellant was involved in a family trucking business and in the promotion of a family apartment building project. The capital value of these ventures was not given, but the appellant mentioned in his evidence that they were subject to secured loans in excess of two million dollars. The evidence concerning these assets was vague and imprecise.

The trial Judge did not give any reasons for the orders she made and as a result of this unsatisfactory situation we are not aware of the facts she found nor the factors which influenced her decision.

In **WARD v JAMES [1965] 1 All E.R. 563** Denning M.R. said at p.570: -

> "It sometimes happens that the Judge has given reasons which enable this Court to know the considerations which have weighed with him; but even if he has given no reasons, the court may infer from the way he has decided that the Judge must have gone wrong in one respect or another and will thereupon reverse his decision."

I think that is open to the court to infer the trial Judge's reasons from the evidence before her and the orders she made, so as to determine whether the decision was in accord with principle or not.

We can conclude that the orders under appeal were made under the Matrimonial Proceedings and Property Act 1990. The order for the payment of US$500.00 per month was made for the benefit of the children of the family under section 25(2)(a) which provides for the court to make: -

> "An order that a party to the marriage shall make to such person as may be specified in the order for the benefit of a child of the family, such a child, such periodical payments and for such term as may be so specified."

and the award of the lump sum of $40,000.00 was made under section 24(1)(c) which provides: -

> "1. On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any

time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute,) the court may, subject to the provisions of section 34(1), make the following orders:

"c. an order that either party to the marriage shall pay to the other such lump sum as may be so specified."

Counsel for the appellant submitted that the orders were excessive and were not justified on the basis of the evidence before the court.

His arguments briefly put were that: -

(i) the respondent made no or no sufficient contributions to justify the award of any or so large a lump sum

(ii) the marriage was too short to justify the payment of any lump sum

(iii) it was wrong for the Judge to have considered assets acquired after the separation had taken place; and

(iv) the evidence of the appellant's capital worth and income did not justify such large awards.

__Contributions__

These parties did not have any family assets in the sense of a home or other property that they purchased together or that the appellant purchased with any direct contributions from the respondent.

In section 27 of the Matrimonial Proceedings and Property Act 1990 the factors to be taken into account in assessing whether and to what extent a lump sum should be paid are set out there include:-

27 (1)(f)

"Contributions made by each of the parties to the welfare of the family."

There is abundant authority that these contributions need not be financial or directly related to the acquisition of any property and would include the fact that the respondent used her own resources to look after herself and the children while the appellant devoted his resources to his own educational and economic advancement. See **WACHTEL v WACHTEL [1973] 1 All E.R. 829.**

__Duration of Marriage__

Counsel for the appellant argued that the effective duration of the marriage was only 14 months and as a result the respondent's contribution was too minimal to justify any or any substantial lump sum.

CUMBERS v CUMBERS [1975] 1 All E.R. 1 is authority for the proposition that the short duration of a marriage does not necessarily debar a wife from benefiting from a lump sum order if she had played a part in the marriage which deserved compensation. In that case the marriage was very short, the parties having separated about 18 months after their marriage. The husband had acquired a house on mortgage shortly before the marriage and was paying the instalments on it during the marriage. The wife had one child and the court found that she helped the family by going out to work. After the break up of the marriage the husband sold the house for a net sum of ₤1600.00 and the Court of Appeal ordered that the wife be awarded ₤500.00 which was just about one third of its net value despite the short duration of the marriage and the fact that she had no proprietary interest in the house, because of her contribution to the welfare of the family.

<u>Property Acquired after the Separation</u>

Counsel for the appellant also argued that the award should not be based on capital worth which the appellant acquired after the marriage had broken down and the parties had separated from each other.

This argument was rebutted by reference to section 27 (1)(a) of the Act which specifically requires the court to have regard to all the circumstances of the case including property which parties have or is "likely to have in the foreseeable future" and a number of cases in which the court did take into account property acquired after the separation of the parties. See **TRIPAS v TRIPAS [1973] 2 All E.R. 1.** and **O'DONNELL v O'DONNELL [1975] 2 All E.R. 994.**

<u>The Amount</u>

The so called "one third rule" in **WACHTEL v WACHTEL [1973] 1 All E.R. 829** was accepted by counsel as a reasonable basis for assessment. Denning M.R. had said at 840: -

> "If she has one third of the family assets as her own - and one third of the joint earnings - her past contributions are adequately recognised, and her future living standard assured so far as may be."

In this case we have been deprived of the advantage of knowing what figures the trial accepted to represent the value of the family assets and their joint earning capacity. 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 that he had beneficial interests in property and businesses of value, but it was left to the court to make estimates of his net capital value. The burden of proof could not be placed on the respondent because this knowledge is peculiarly in the possession of the appellant and he was under a duty to make full and frank disclosures. The power of the court to draw inferences adverse to him in such circumstances was expressed in **PAYNE v PAYNE [1968] 1 All E.R. 1113 P.1117** by William L.J. in this way: -

> "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 Sarks J. in J.V.J. 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**, 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."

On the other hand the assessment made by the court must bear a genuine relationship to the available assets. See the observations of Denning M.R. in **WACHTEL v WACHTEL [1973] 1 AlL E.R. 829** at p.840: -

> "In every case the court should consider whether to order a lump sum to be paid by her husband to her"............
> "One thing is, however, obvious. 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. Another thing is this: when the husband has available capital assets sufficient for the purpose, the court should not hesitate to order a lump sum. The wife will then be able to invest it and use the income to live on."

The total order for periodical payments came to $2150.00 plus what was described as a minimal amount for the education of the children. On the basis of the evidence before the trial Judge this could not be considered an excessive order as the Judge would have been justified to have assessed his income at a level which would accommodate such an award.

With regard to the lump sum if the trial Judge used "one third" as the basis of her assessment the award of $40,000.00 presupposed that the appellant had a net capital worth of $120,000.00 an assumption which on the state of the evidence I would hesitate to categorise as being unreasonable.

The evidence of the appellant's ownership of the undivided share in the two lots of land, his cash deposits, his beneficial interest in the house on family land, his interest in his family's trucking business and apartment building project support the conclusion that his net capital worth is not less than $120,000.00. In those circumstances the award made by the trial Judge could not be said to be excessive.

I would therefore dismiss the appeal with costs.

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C.M. DENNIS BYRON
Justice of Appeal

I concur.

....
SIR VINCENT FLOISSAC
Chief Justice

I concur.

....
SATROHAN SINGH
Justice of Appeal