

EASTERN CARIBBEAN SUPREME COURT

**FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2019**

CLAIM NO. SKBHMT2004/0016

BETWEEN:

DANIELLA THERESE HALL

Petitioner

and

THOMAS LEE HALL

Respondent

Appearances:

Mrs. Sherry-Ann Liburd Charles for the Petitioner
Defendant Unrepresented.

March 2019: 1st

JUDGEMENT

- [1] **CARTER J.:** The application before the court is an application for Ancillary Relief filed by the Petitioner.

Factual Background

- [2] By way of background the petitioner in their closing submission gives a narrated description of events which led to the filing of said application. Such events are outlined as follows:

“2. On 21st December 2004, the Petitioner filed an application against the Respondent for Alimony Pending Suit of US\$7,500.00 monthly and for the payment of a secured sum of US\$4.6 million dollars pursuant to s 22(1) of

the Matrimonial Causes Act Cap 50. The application was supported by an affidavit of the Petitioner filed on 21st December, 2004.

3. On 25th February 2005 the Respondent filed an affidavit in response to the Petitioner's affidavit. By order of His Lordship Justice Davidson Baptiste the Petitioner was awarded alimony pending suit of US\$7,500.00 per month until the decree Nisi was made absolute. The application in respect of the secured provision was adjourned to 4th March, 2005. The application for secured sum is still outstanding and is currently before the Court."

- [3] During the course of 4th February 2005 to 6th December 2006, the respondent filed an affidavit of means in addition to an application for ancillary relief. On 6th December 2006, the petitioner filed a further application for leave to file an application for maintenance pursuant to section 22(2) of the Matrimonial Causes Act Cap 50. Leave was granted on 8th March, 2013. On 4th April 2013 the petitioner filed the said application for maintenance pursuant to section 22 (2) of the **Matrimonial Causes Act**.
- [4] The court then set a trial date for the hearing of all applications and ordered the petitioner to be present in person and for the respondent to be notified of the trial date.
- [5] At the trial, there was no appearance of the respondent. Thus, the petitioner's applications were heard ex parte on same date. At the conclusion of the trial, the court reserved judgment and ordered that written submissions be filed.
- [6] The respondent has not made any appearance or filed any applications or affidavits in this matter since 2005. The respondent was served and is aware of the petitioner's first application of 21st December, 2004. The respondent was present when the order for alimony pending suit was made on 25th February 2005.
- [7] The respondent also had notice of the petitioner's second application of 4th April, 2013. Errol Thomas J. on 31st May 2013 ordered substituted service of the petitioner's application by electronic means. The application, affidavit and draft

order were served on Mr. Hall as evidenced by the affidavit of service of Denise James filed on September 20th 2013.

[8] Further, on 12th January 2015, in accordance with the directions given by the court, a notice of adjourned hearing was served on the respondent via e-mail informing him of the trial date. An affidavit of service with certificate of exhibits evidencing this service was filed in this matter on 14th January, 2015.

[9] In light of the foregoing, permission was requested and approved by the court, for the petitioner to proceed ex parte. Rule 58 of the Matrimonial Causes Rules 1937 allows for the court to proceed in the absence of a party that does not attend for hearing, once the court is satisfied that notice of the hearing was given:

“58. ...If any party to the summons does not appear after the lapse of a reasonable time after the time appointed in the summons the Judge or Registrar, as the case may be, may proceed in his absence upon being satisfied by affidavit that any party not in attendance had due notice of the time appointed.”

[10] The Petitioner's attorney submitted at trial that because the Respondent has not demonstrated any interest in these matters through his inaction and his non-appearance coupled with his former Solicitor Mr. Fitzroy Eddy's indication in his application to be removed from record, that he had had no communications with the Respondent for several years, that this court should find that there was a clear intention on the part of the Respondent not to pursue his applications or to oppose the Petitioner's applications. Counsel invited the court to exercise its power in such circumstances to strike out the Respondent's applications and affidavits for want of prosecution.

[11] Counsel referred to Attorney General v Kenny Anthony HCVAP2009/031 (TAB 1), wherein the Court determined that because an Appellant had not appeared for cross examination, his affidavit could not be used without the Court's permission. In that case as in the instant matter there was no explanation advanced for appellant's failure to attend for cross examination and no application had been

made to rely on his affidavit. His affidavits were not considered as evidence. The Petitioner submits that on the instant application, in reliance on this case, the Respondent's affidavit and applications should be struck for want of prosecution.

[12] This court is persuaded by these arguments and finds that the Respondent's applications as detailed below should be struck for want of prosecution:

- (i) Summons by the Respondent for leave to Deliver Interrogatories filed on 25th February, 2005 (pages 115 -118 of Bundle 1);
- (ii) Summons for Order for Discovery of documents relating to means of the Petitioner filed 25th February, 2005 (pages 119 - 121 of Bundle 1);
- (iii) Notice of an application by the Respondent for Ancillary Relief filed 25th February, 2005 (pages 122 – 124 of Bundle 1);
- (iv) Notice of Application filed 3rd December, 2005 (pages 147 – 149 of Bundle 1).

No Order is made to strike out the affidavits filed by the Respondent in support of these applications as the Petitioner seeks to depend on the contents of these in support of her application for ancillary relief as detailed below at paragraph 14 and they will be used for that purpose only. In any event, these may be useful to understand the full picture and context of the issues between the parties.

[13] The petitioner relies on the viva voce evidence given at the trial of this matter as well as her four (4) affidavits filed in support of her applications as follows:

- a) Affidavit of 21st December, 2004
- b) Affidavit of 4th April, 2013
- c) Affidavit of 10th December, 2013
- d) Affidavit of 1st July, 2014

[14] She likewise depends on Mr. Hall's affidavit of means that were filed in this matter as follows:

- a) Affidavit of means filed on 4th February, 2005
- b) Affidavit of respondent filed on 23rd February, 2005
- c) Affidavit of respondent in compliance with order dated 18th February, 2005 filed on 4th March, 2005.

Issues to be Determined by the Court

[15] The application for ancillary relief is governed by the provisions of the Matrimonial Causes Act.

[16] Section 22 (1) of the Matrimonial Causes Act Cap 50 states:

“ The Court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband, and to the conduct of the parties, the Court may deem to be reasonable

In any such case as aforesaid the Court may, if it thinks fit, by order either in addition to or instead of an order under subsection (1), direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sums for her maintenance and support as the Court may think reasonable.”

[17] There are two (2) main issues for the court's determination:

(1) Should the court make an order for a secured sum and/or maintenance and, if yes,

(2) What sums should be awarded.

[18] Interestingly, Counsel for the Petitioner submits that a separate application for maintenance having been properly made by the Petitioner, the Court “can and ought” properly to consider whether such application under s.22(2) should be made in addition to, or instead of and that both applications of the Petitioner should be considered simultaneously.

The Wife's Means

[19] The petitioner and the respondent were together for six (6) years prior to their marriage which lasted over a year. The petitioner states that as a result of the

marriage, she relinquished her career as an attorney, her home and belongings to work with the respondent and build his wealth. She states that she was not paid for the services as she was married to Mr. Hall and expected to share in the profits. The petitioner expresses that Mr. Hall was her sole financial provider. However, after the break down of the marriage the petitioner was cut off from the support she had grown accustomed to.

[20] The Petitioner is now 55 years old. She does not own her own home. She is unable to afford basic necessities like health insurance. The Petitioner explained in her evidence that the cost of private insurance is prohibitive at about US\$800.00 to US\$1000.00 monthly. She simply cannot afford this. The Petitioner has never remarried and has no children. She has been unable to practice in her chosen profession for a number of years. This court accepts that she would have to take the Bar examinations in order to resume her career and that this would prove difficult given the time that she has not practised, complicated by her present age.

[21] In her supplemental affidavit in further support of notice of application for ancillary relief filed on 1st July 2014, the petitioner states in paragraph 3 the following:

My lifestyle with the respondent was one of opulence. Prior to and during my marriage to the respondent, I enjoyed a very high standard of living as follows:

a) The respondent and I stayed in two multi-million dollar buildings and four homes which included a five story Victorian mansion next to the Governor's Mansion in the State of Alaska. Our home was named as a National Historic site, a five story, twelve room mansion with views of the ocean and a staff of housekeepers and maintenance workers.

b) The respondent and I had use of over fifteen private planes, five airplane hangers, fleet of passenger vans and German sports cars throughout the United States. The Respondent and I would weekly fly to our other homes in Alaska and another multi-million

dollar home near Aspen, Colorado where we would host and enjoy lavish dinner parties and entertainment. Expensive shopping and sports filled our time while travelling. All of these were paid for by the Respondent.

c) I worked for the Respondent and relied completely on him being the sole provider where in return, he appointed me on the Board of Directors for all his companies and I became his legal counsel and financial advisor to his companies and in that capacity I discovered his wealth being over 45 million US dollars.

...

e) Before travelling throughout the world, the respondent required me to “fire” sale my real properties including a large private home in Juneau, Alaska, a yacht and all other properties I personally owned. Thereafter, I gave the funds from the sale of these properties to respondent who temporarily opened joint savings and checking accounts with both our names at several financial institutions throughout Europe and the United States.

...

i) Over eight years and especially during our marriage with the respondent, I provided my husband services that greatly advanced his wealth and upon reliance of he being the sole provider, I diligently worked every day to legally protect and significantly, expand our wealth. The respondent inappropriately obtained my professional services without just compensation.”

[22] Counsel referred the Court to the case of **Rose v Rose**¹ on this issue of a wife's means on an application for maintenance. Lord Denning, L.J. stated that the following considerations should be kept in mind when determining the proper form for a wife's maintenance: “If a wife did earn, then her earnings must be taken into account; or If she were a young woman with no children and obviously ought to go

¹ [1951] P 29

out to work in her own interest, but does not do so, then her potential earning capacity ought to be taken into account; or If she had worked regularly during the married life and might reasonably be expected to work after the divorce, again her potential earnings ought to be taken into account. Except in cases such as these, it did not as a rule, lie in the mouth of a wrongdoing husband to say that the wife ought to go out to work simply in order to relieve him from paying maintenance.”

[23] In closing submissions, Counsel for the petitioner submits that due to the breakdown in communication and marriage, the petitioner, has faced certain obvious financial disadvantages and that a lump sum award of maintenance should be made to her client in those circumstances.

[24] Counsel further submits that due to the petitioner's financial constraints the respondent should be made to assist the petitioner. The petitioner should be able to buy a home, a vehicle, complete the bar and afford the protection of insurance. Counsel submits that a lump sum award would place the petitioner in a position to do so.

The duration of the marriage

[25] Counsel for the Petitioner submits that although the petitioner was married to the respondent for over a year before she instituted divorce proceedings, the parties were involved for approximately six (6) years prior to the instituting of divorce proceedings. She contended that the because of the Petitioner's contribution in increasing and securing the respondent's wealth as outlined in petitioner's affidavit of 21st December 2004, and further amplified in her affidavit of July 2014, that the short duration of the marriage does not bar an award of a secured provision, or being able to benefit from a lump sum order if she had played a part in the marriage which deserved compensation.

[26] She referred the court to **Cumbers v Cumbers**² where the couple separated 18 months after their marriage. The husband had acquired a house on mortgage shortly before the marriage and was paying the installments on it during marriage. The wife had one child and the court found that she helped the family by contributing directly to the housekeeping expenses. After the break-up of the marriage the husband sold the house for a net sum of £1,600.00 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.

[27] The Respondent's statement in relation to the length of the marriage: *"I have been married only a brief time to the petitioner. The time span between the marriage on March 3, 2003 and the time I was asked to sign a marital settlement agreement on September 15, 2003 was only 171 days. During that time I only cohabited with my wife about 100 days. The time span from the marriage until divorce papers were filed against me in St. Kitts was only 320 days of which time the petitioner and I only cohabited around 150 days..."*

The Husband's Ability to Pay

[28] This issue surrounds the Petitioner's application for a gross secured sum for the duration of her life, secured from Mr. Hall's capital assets.

[29] In Watchel v. Watchel Lord Denning stated as follows:³ *"...this so-called rule is not a rule and must never be so regarded. In any calculation the court has to have a starting point. If it is not to be one-third, should it be one-half? Or one-quarter? A starting point at one-third of the combined resources of the parties is as good and rational a starting point as any other, remembering that the essence of the*

² 1 WLR 1331

³ [1973] 1 All ER 929_at page 839

legislation is to secure flexibility to meet the justice of particular cases, and not rigidity, forcing particular cases to be fitted into some so-called principle within which they do not easily lie. There may be cases where more than one-third is right. There are likely to be many others where less than one-third is the only practicable solution. But one third as a flexible starting point is in general more likely to lead to the correct final result than a starting point of equality, or a quarter."

- [30] Counsel for the Petitioner asks the court to adopt a similar starting.⁴
- [31] The Respondent's ability to pay is a relevant factor to be considered on this application. According to Mr. Hall's affidavit of means filed 4th February 2005, he stated his net worth at the time, to be US\$12,144,854.00. However, Counsel argues that this amount does not include other assets belonging to the respondent, including real property.
- [32] Additionally, in the petitioner's affidavit filed on 21st December 2004, she states the respondent's means to be US\$20 million dollars⁵ but contends that the court should take into account the many years that have elapsed and that all things being equal, Mr. Hall's wealth since 2003 has been tax free and therefore is likely to have grown significantly.
- [33] Yet in Mr. Hall's affidavit in response to application by petitioner for ancillary relief filed on 25th February, 2005 he states the following:
- "4) My financial assets were acquired solely through my business and entrepreneurial endeavors prior to meeting the petitioner...I co-founded Neuromedical Systems, Inc. (NSIX) in 1989 and patented the use of artificial neural networks for the purpose of automated screening of cervical pap smears. The U.S. Food and Drug Administration approved PAPNET in the NASDEQ. Shortly thereafter NSIX had a public offering of*

⁴ See also *Hughes v Hughes (1993) 45 WIR 149*

⁵ Bundle 1 - page 7, Paragraph 5

the NASDAQ. I divested myself of all interests in NSIX and sold all claims to the patent in 1996 before entering into my relationship with the petitioner in 2000.

...

6) I have provided to the petitioner a minimum of US\$696,368 in total funds since the effective date of the premarital agreement. Of this amount, US\$444,935 was provided during the time of the marriage...

7) As financial consideration for the premarital agreement, I agreed to fund "for the sole benefit of Daniella T. Loper semi-annual contributions of thirty thousand dollars" (¶ 8). I have contributed to the petitioner an overpayment conservatively estimated at US\$539,217.54...

8) I have provided funds to the petitioner for the purchase of a condominium unit at Leeward Cove after the petitioner requested that I "loan" the petitioner funds so that she could have sole ownership of title. I requested that she draft a loan agreement which the petitioner had not been by the time the transfer of funds needed to take place. Again the petitioner stated she would draft the loan agreement as soon as she returned to Leeward Cove from the bank. The petitioner never did so as verbally promised...

9) I have provided funds to the petitioner for the purchase of 50,000 shares of Cable & Wireless St. Kitts & Nevis Ltd. and 72,430 shares of SKNA National Bank Ltd...These shares were initially purchased by the petitioner during the marriage in October 2003 largely from funds previously provided to her by myself. In November 2003 the petitioner requested that I repurchase these shares from her as she claimed she was in immediate need of a large amount of cash and could not wait to conduct the share transaction on the open market. I reluctantly agreed to do so and a purchase agreement was signed November 24, 2003...I then transferred US\$182,179 into the petitioner's account as financial consideration...I subsequently discovered that the purchase agreement was insufficient documentation to consummate the sale and suspect that

the petitioner had prior knowledge of the proper forms as she had recently purchased these shares. I believe this to be an intentional deception.

10) I have provided funds to the petitioner after she asked me to sign a marital separation agreement while we were both United States citizens living in Spain...dates September 15, 2003...The petitioner drafted the document herself and both parties signed two original copies of the financial settlement on September 15, 2003. The petitioner received as consideration an amount equivalent to an additional year of payment under the terms of the premarital agreement although I had already overcompensated the petitioner under its terms...

...

13) I have provided funds well in excess of US\$250,000 during the premarital period in order to fulfill the financial obligation of the Premarital Agreement..

14) I have provided all of the living expenses for the petitioner and myself from my retirement funds since the time I went to meet her in Colorado during the summer of 2000 until January, 2004. The petitioner has been able to save virtually all of the funds given to her as financial consideration not to seek alimony or claim any right to my retirement funds. The petitioner has never contributed any funds to the marriage and I have never co-mingled funds nor held joint accounts with the petitioner.

15) I am considerably older than the petitioner who graduated...in 1990 and still retains the ability to live and work in the United States while I can be forever barred from re-entry under the onerous U.S. expatriation code.

16) I have lost more than half of the net worth derived from the sale of my shares in NSIX during my association with the petitioner as a result of the stock market crash of 2000-2001...I left my accounts in the hands of a Merrill Lynch financial advisor and failed to monitor his shift of virtually my entire portfolio into high tech stocks just prior to the crash. Other financial losses occurred as result of an unprofitable regional airline Carrier, various financial scams, and company insider theft...My brother assumed

control of my businesses when I became a bit dysfunctional after having returned from my extended vacation accompanied by the petitioner and having discovered the enormous financial losses.

- [34] The Court is mindful that it does not have an updated affidavit of the Respondent's means. It is also mindful that the Respondent has not appeared to provide any support for these matters that were raised in this affidavit and that the Petitioner takes issue with the matters stated therein in her further affidavits filed in this court on the 10th December 2013 and on the 1st day of July 2015. Counsel for the Petitioner submits that if the court was to be guided by the respondent's own admission as to his means then by any standard the amount stated by the respondent is sufficient to merit an award of a secured gross sum for the duration of the petitioner's life or a lump sum payment.

The Conduct of the Parties

- [35] The conduct of both parties is a further relevant consideration in determining the issue of maintenance for a wife under the regime that was governed by Matrimonial Causes Act Cap 50. The Petitioner was granted a decree nisi on the ground of cruelty. Her Affidavit of 10th December, 2013 to which a psychological report from Ms. De la Coudray-Blake at Social Services was attached details Ms. De la Coudray-Blake's assessment of a possible diagnosis of Post Traumatic Stress Disorder and that upon examination of the Petitioner she presented with symptoms of "intense fear, anxiety, feelings of helplessness an hopelessness an persistent re-experience of traumatic events". These, the Petitioner states, were all as a result of prolonged and extreme physical and mental abuse suffered at the hands of the Respondent.
- [36] Further, in her viva voce evidence the Petitioner indicated that the physical abuse meted out by the Respondent had long term consequences in that as a result of a bad physical beating in 2003 she had a miscarriage during the marriage with the

Respondent. The Petitioner does not have any children. The evidence of the Petitioner is that for her own safety was forced to vacate the matrimonial home leaving personal and other items therein as a result of the abuse from the Respondent. The Petitioner states further the physical and mental abuse that she suffered during the marriage directly affected her ability her job prospects and also her ability to re- enter the job market at the same level as prior to the marriage.

[37] The Petitioner's conduct was not called into question at the Decree Nisi Hearing. There is evidence that the Respondent has admitted to having rage episodes that caused inappropriate behavior.⁶

[38] Counsel for the petitioner therefore states that after full consideration of all of these factors that the Petitioner is deserving of an award of a secured sum. She collated these reasons as follows:

- a) She is in financial need as evidenced from her current unemployment;
- b) The petitioner's inability to meet normal expenses and her current low standard of living;
- c) The fact that the petitioner gave up her career as labour arbitrator and legal consultant and prospects in the United States and followed the respondent to a foreign country where her earnings and advancement prospects were limited to whatever gifts she received from the respondent;
- d) The financial dependency of the petitioner upon the respondent in the years prior to and during the marriage;
- e) The promises of the respondent to take care of the petitioner, to give her a return on her investment prior to and during the marriage;
- f) The loss of income the petitioner suffered during the years she worked as the financial and legal advisor for over 6 years without pay;
- g) The petitioner's direct contribution to the increasing of the respondent's wealth. The petitioner worked as legal executive for the respondent for a

⁶ See at Bundle 2 at page 15

number of years during which she assisted with the renunciation of US citizenship for the respondent which resulted in a tax-free status from 2003 onwards.

- h) The co – mingling of the parties' funds. The petitioner gave the respondent her retirement cheque, plus the proceeds of sale from her house and sail boat;
- i) The age of the petitioner (currently in her 50's) and her limited prospects for re- marriage;
- j) The fact that the petitioner's needs further education in order to move forward in her chosen career field as an attorney;
- k) The fact that the nearly 9-year gap and financial insecurity has prevented the petitioner from reestablishing her career as an attorney."

Court's conclusions

[39] This court has carefully considered the evidence of the Petitioner from her affidavits in support of ancillary relief as well as her viva voce evidence and the submissions and authorities filed for the Court's consideration.

[40] There is no doubt that given the evidence presented that the Petitioner is entitled to a financial contribution from the Respondent upon the breakdown of the marriage. She has shown her need as well as evidence that is now uncontradicted of her contribution to the Respondent's improved financial position during the course of their relationship and then marriage. It is also evident that the Respondent has the means to make such a contribution.

[41] The Court is minded to make a conservative estimate of the Respondent's wealth in all the circumstances, even given the fact of his failure to appear at the hearing or to involve himself in these proceedings despite all efforts by the Petitioner and the Court to ensure that he had notice of the proceedings.

[42] It appears to this Court that it would be in the parties' interest for the court to make a onetime lump sum payment in all the circumstances and not an order for periodic maintenance. The order of the Court is that the Petitioner shall be awarded a sum of \$4,046,262.66 to represent one third of the US\$12,144,854.00 that the Respondent by affidavit dated 4th February 2005 agreed to be his net worth.

[43] The Court makes no Order as to costs.

Justice Marlene I Carter
High Court Judge

By the Court

Registrar