

ANTIGUA AND BARBUDA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO ANUHMT2011/O127

BETWEEN:

DWAYNA DUPIGNEY DERRICK

Applicant/Petitioner

AND

EDWIN FOSTER DERRICK

Respondent

Appearances:

Mr Dexter Wason holding for Mrs Monica Francis-Gordon for Applicant
Ms Kathleen Bennett for Respondent

.....
2012: September 27; October 9; November 19
2013: January 30
.....

JUDGMENT

Introduction and background

- [1] **LANNS, J** [Ag] The Applicant/Petitioner seeks an order for support in respect of two adult children.
- [2] The parties were married in 1986. The union produced two children, namely, Ariel Phyllis Derrick and Alyssa Eunice Derrick who are now over the age of sixteen years. They are Canadian Citizens and are presently pursuing tertiary education in York University in Toronto, Canada.
- [3] Ariel, the eldest child of the marriage, has been in University for the past two years. Her field of study is Marketing and Liberal Arts. Alyssa has been in University for the past year. Her field of study is Business Management and Accounting. Alyssa gained a scholarship from the Board of Education for her outstanding performance in the Cape Examination. Ariel's mother secured a scholarship from her employer to the value of \$27,000.00 per

year for the duration of her studies. The Respondent tried to obtain scholarships for his daughters from the Defence Force. His efforts failed.

[4] On 4th November 2011, the wife filed a Petition for the Dissolution of the Marriage. The marriage has not yet been dissolved.

[5] In furtherance of the Petition, the wife has applied to the court for the following orders:

- (1) That the respondent shall pay 50 % of all expenses incurred by the adult child of the marriage namely ARIEL PHYLLIS DERRICK born on 31st March 1991, in pursuing her college education, including, without limitation tuition, application fees, cost of books, supplies, room and board, food and all other incidental expenses associated with education while she shall continue in full time tertiary education up to the date of her 24th birthday in the sum of EC\$1,318.33 monthly;
- (2) In the event that the Adult Child ARIEL PHYLLIS DERRICK shall cease to receive a scholarship covering in whole or in part, the cost of her tuition fees, the Respondent shall be responsible for the payment of 50% of any shortfall in tuition fees due in respect of the said adult child. The said payment shall be made to the applicant no later than 1st August in the given year that the fees are due;
- (iii) The Respondent shall forthwith reimburse the Petitioner the sum of \$8,194.52 being 50% of the tuition fees for the Adult Child ALYSSA EUNICE DERRICK for the academic year 2011/2012;
- (iv) The Respondent shall hereafter pay 50% of tuition fees of the said Adult Child ALYSSA EUNICE DERRICK to the Petitioner no later than 1st August in each year that such fees are due and payable;
- (v) The Respondent shall pay 50% of all expenses incurred by the adult child of the marriage namely ALYSSA EUNICE DERRICK, born on 26th March 1993 in pursuing her college education including, without limitation tuition, application fees, cost of books, supplies, room and board, food and all other incidental expenses associated with education while she shall continue in full time tertiary education up to the date of her 24th birthday in the sum of EC\$2,485.00 monthly, and increasing at the rate of 10% each September;
- (vi) The Respondent shall hereinafter pay 50% of the airline travel expenses of the adult children ARIEL PHYLLIS DERRICK and ALYSSA EUNICE DERRICK twice annually to and from University for Christmas and Summer recesses. The payments shall be made to the Petitioner no later than May 30th each year in respect of the summer recess and no later than 30th November each year in respect of the Christmas recess.

- [6] The wife filed an affidavit in support of the application, together with supporting documents; and the husband filed an affidavit in response to the application, together with supporting documents. The wife replied.
- [7] Husband and wife were cross examined on their affidavits, and at the end of the hearing, they were ordered to file and serve closing arguments, which they did, albeit out of time.

Issues

- [8] The main issues which arise for determination are:
- (1) Whether or not Ariel and Alyssa are “children of the marriage’ for the purposes of the present application before the court;
 - (2) If the answer to the question is yes, whether or not their father and mother have a legal duty to maintain them for the duration of their university education?
 - (3) If the answer to that question is yes whether or not the means of the father demonstrate that he can meet 50% of the needs of his adult daughters while in full time education in Canada; or some lesser amount
 - (4) If not, what is the appropriate amount of monthly support?

Issue No 1: Whether or not Ariel and Alyssa are “children of the marriage’ for support purposes.

- [9] The answer to the first question can be found in Section 2 (1) (b) of the Divorce Act No 10 of 1997 (the Act) which reads:

“2 (1) In this Act,

“Child of the marriage means” a child of two spouses or former spouses who, at the material time,

(a) ...

(b) is sixteen years or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life.”

- [10] There is no dispute that Ariel and Alyssa qualify as children of the marriage. They are over sixteen years, and by reason of their pursuing full time Tertiary Education, they are not self

sufficient and are unable to withdraw themselves from their parents' charge to provide for their necessities. Accordingly, I find that Ariel and Alyssa are both children of the marriage within the meaning of the Act.

Issue No 2. Whether or not the father and mother have a legal duty to support or maintain Ariel and Alyssa for the duration of their university education?

- [11] Section 13(2) (b) of the Act, and the cases that interpret that section provide an answer to the second issue. Section 13 (2) provides in part:

“2. A court of competent jurisdiction may, on application by either or both spouses, make an order requiring one spouse to secure or pay, or secure and pay, such lump sum or periodic lump sums as the court thinks reasonable for the support of

- (a) ...
- (b) Any or all children of the marriage.
- (c) ...”

- [12] Our courts have always interpreted section 13 (2) (b) as including sums to cover full time Tertiary Education of children of the marriage over the age of sixteen years. This was the interpretation given by the High Court in Antigua and Barbuda in the cases of:

- (i) **Archibald v Archibald**¹
- (ii) **Willet v Willet** ²
- (iii) **Abbott v Abbott**³

- [13] In **Archibald v Archibald** the child of the Marriage was 17 years of age. The High Court in Antigua made an Order that the father continue to support the child until she attained the age of 18 years or when the child completed her Tertiary Education whichever was later in time.

- [14] In **Willet v Willet** the child was 17 years of age and in full time university education. The High Court in Antigua and Barbuda made a maintenance order in her favour.

- [15] And in **Abbott v Abbott**, the court, having previously made a maintenance order in respect of an adult child, who had subsequently abandoned her course of study, refused to make a second order in favour of that child.

- [16] The cases cited above provide ample guidance to the court, and I am content to adopt the interpretation given in them. Therefore, I find and hold that the mother and father have a legal duty to maintain their children Ariel and Alyssa for the duration of their Tertiary

¹ Claim No ANUHMT 1997/0089

² Claim No ANUHMT 1999/0013

³ Claim No ANUHMT 2004/0112

Education, because the pursuance of Tertiary Education is a good reason for them to be unable to provide for their necessities.

Issue No 3. Do the means of the father demonstrate that he can meet 50% of the needs of Ariel and Alyssa while in full time education in Canada, or some lesser amount?

- [17] In determining whether the father can meet 50% of the financial needs of Ariel and Alyssa, the Court must have regard to the condition, means, needs and other circumstances of the father and mother, as well as the condition, means, needs and other circumstances of both Ariel and Alyssa including any existing arrangements in place for their support.⁴ This requirement calls for an examination of the evidence.

The evidence

- [18] **The Wife:** In summary, the wife's evidence is that she and her husband were married in 1986. The union produced two children Ariel and Alyssa who are now adults. For some time now, she and her husband had been experiencing marital difficulties and have lived separate and apart since the year 2000. During the period of separation, the husband supported each child at a monthly rate of EC\$500.00. That contribution was insufficient and she augmented it with her own funds and with financial assistance of her brother and the paternal grandfather of the children.
- [19] She is employed by Hadeed Motors as an Accounting and Human Resources Administrator. Her gross monthly salary is \$10,000.00 and her net monthly salary is \$8,964.08. In addition to her full time job, she is engaged on a part time basis as a Book Keeper for ERA, receiving \$700.00 per month. She also receives a monthly sum of \$1,150 for being a Board Member of a Corporation. These two extra sources of income raise the wife's monthly disposable income to \$10,814.08.
- [20] At paragraph 15 of her affidavit, the wife states that her monthly expenses are approximately \$11,039.00 which includes a mortgage of \$2,500.00. She prepared and exhibited a spreadsheet of her monthly income and expenditure but apart from her pay slip from Hadeed, there is no documentary proof to support the additional income or the monthly expenses.

The wife sets out her monthly income and expenses as follows:

INCOME		
	Salary	\$10,000.00
LESS	SOC SC	135.00
	MED BEN	269.50
	EDU LEVY	161.42

⁴ Section 13 (5) of the Divorce Act No 10 of 1997.

INC TAX	470.00
BALANCE	\$ 8,964.08
BOARD FEES	\$ 1,150.00
CONSULTANCY	\$ 700.00
TOTAL INCOME	\$10,814.08
EXPENSES	
MORTGAGE	\$ 2,500.00
FOOD	\$ 1,600.00
HOME INSURANCE	\$ 430.00
LOAN F & DEV	\$ 733.00
INSURANCE (PERSONAL)	\$ 688.00
HOUSE KEEPER	\$ 1,600.00
CHURCH OFFERING	\$ 500.00
ELECTRICITY	\$ 838.00
WATER	\$ 100.00
TELEPHONE	\$ 250.00
CELL PHONES	\$ 300.00
PEST CONTROL	\$ 100.00
SECURITY M'TENANCE	\$ 100.00
C/CDS	\$ 500.00
PERSOANALGROOMING	\$ 300.00
MISC - ENT ETC	\$ 500.00
TOTAL EXPENSES	\$11,039.00
MONTHLY DEFICIT	\$ 225.00

- [21] The wife deposes that the conservative cost to maintain each child including tuition, room, board, books, health plans etc at York University is approximately CAN\$21,300.00 or EC\$59,640.00 per school year. Being Canadian Citizens, Ariel and Alyssa qualify for the home student rate of fees for the academic year 2011/2012. Ariel's tuition fee was CAN\$ 5,158.44 or EC\$14,446.43. Alyssa's tuition fee for academic year 2011/2012 was CAN **\$5,808.30** or EC\$16,389.04.
- [22] The wife deposed that she procured a partial scholarship in the amount of EC\$28,000.00 annually for Ariel. This amount, she says, covers tuition, room and board. She and her husband had long been discussing the need to provide for the children's Tertiary Education since they were excellent students.
- [23] Ariel's University Costs, including personal expenses have been listed as follows:

TUITION	\$ 5,400.00
MEAL PLAN	\$ 4,000.00
ROOM & BOARD	\$ 5,100.00
BOOKS	\$ 1,200.00
HEALTH PLAN	\$ 225.00
PERSONAL EXPENSES	\$ 2,000.00
TOTAL PER YEAR	\$ 17,925.00 CANADIAN or \$ 50,190.00 EC

SCHOOL & DORM SUPPLIES, WARM CLOTHING \$ 3, 500.00 US or EC\$ 9,450.00
CAR RENTAL, HOTEL ETC FOR TRIP TO CANADA

TRAVEL FOR VACATION – SUMMER AND CHRISTMAS \$ 4,500.00 EC.

- [24] Alyssa's University Costs are identical to those of Ariel's.
- [25] There are no supporting documents for these costs. They lack particularity. To the same effect is the list of expenses provided by the wife. The husband's learned counsel correctly made the observation that (1) the wife has not provided the court with any documentary evidence to verify her monthly expenses; so the accuracy or reasonableness of these expenses cannot be assessed (2) the university fees are not included in the wife's list of expenses. So the inference to be drawn is that she makes no contribution from her income to the children's university fees; or that she has not disclosed all of her sources of income.
- [26] Under intense cross examination, the wife admitted that she has not provided the court with sufficient documentary evidence verifying her personal expenses.
- [27] Skilful cross examination further disclosed that the wife holds about three savings accounts, two of which allegedly have small balances not exceeding \$5000.00. There is a savings account at the Bank of Nova Scotia with a balance of approximately EC\$17000.00. Of this amount, the sum of \$12,150.00 represents monies obtained from the Board of Education as a Scholarship for Alyssa. I find that she had a duty to disclose this information on her own initiative.
- [28] The wife also disclosed under cross-examination that she owns the land on which her home stands, and a parcel of land at Scotts Hill. She confirmed that both Ariel and Alyssa are receiving partial scholarships and that they are willing to work part-time while pursuing their studies.
- [29] **The Husband:** The husband's evidence is that he is employed by Antigua Packaging Materials Ltd. He earns a weekly gross income of \$1615.00 and a net of \$1378.49 or \$5,513.96 per month. His monthly expenses amount to \$3,470.52. This includes the sum of \$500.00 per month for each of the children of the marriage. He sets out a table of those

expenses, and goes on to say that he is also indebted to Hadeed Motors in the sum of \$1955.00 for car parts.

[30] The husband's income and his monthly expenses are listed as follows:

INCOME (Net)	\$ 5,513.00
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EXPENSES

APUA Telephone	\$ 68.77
ELECTRICITY	\$ 1,255.89
WATER	\$ 305.83
CTV (Cable)	\$ 241.50
DIGICEL (cell phone)	\$ 114.14
CHILD SUPPORT:	

Ariel Derrick	\$ 500.00
Alyssa Derrick	\$ 500.00
Aedan Derrick	\$ 500.00

FOOD	\$ 1,600.00
INTERNET	\$ 194.95
PROPANE	\$ 54.12
CREDIT CARD PAYMENTS	\$ 868.50
MISCELLANEOUS	\$ 600.00
HOME MAINTENANCE	\$ 152.85

TOTAL EXPENSES	\$ 6,956.55
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MONTHLY DEFICIT	\$ 1,443.55
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[31] At paragraph 6 of his affidavit, the husband says that he is not in a position to pay more than \$500.00 per month for each adult child. He states that whenever he is able to afford more, he usually gives more and will continue to do so according to his finances. The husband exhibited copies of his Bank Statements for the period January 2011 to April 2012 showing transfers of monies for use by Ariel and Alyssa.

Wife's reply

[32] In her reply affidavit, the wife challenged her husband's earnings by stating that the husband has other sources of income. She says that she was advised and do verily believe that her husband breeds and sells the very rare and highly sought after African Grey Parrot which is widely known to be the best talker in the parrot kingdom. She asserts that the sale of these birds can realize in excess of US\$1500.00. She has not been able to provide any evidence to substantiate this allegation.

- [33] The husband was subject to cross examination. He testified that he loves his daughters very much and that he was very proud of their academic achievements. He would like their level of academic achievement to continue. .
- [34] He owns no land at present. He previously owned land but he handed over those lands to his father as repayment for a loan from him. He accepted that some of the educational expenses incurred, or intended to be incurred by Ariel and Alyssa, were reasonable. However, he expressed concern about whether some of the living expenses of his daughters were unreasonable. In general, I would characterize his testimony as being fully supportive of his children's university education expenses; although he was of the view that attending University in the West Indies might have been less expensive.
- [35] In the closing submissions, the wife's learned counsel forcefully refuted the husband's earnings. She carefully dissected and scrutinized his schedule of income and expenses and came to the conclusion that the husband has understated his income, over stated his expenses and has underestimated his allowance for the children. As far as the wife's counsel was concerned, the husband's true monthly income is \$6,156.38. She argued that the husband's earnings are calculated on a four week month basis, when there are 52 weeks in the year; so there is an additional sum which the respondent will have to add to the figure he submitted as earnings.
- [36] Counsel further argued that the amount claimed to be owing to Hadeed Motors is statute barred and therefore unenforceable. She was however of the view that the husband's estimation of his Miscellaneous Expenses was reasonable.
- [37] Counsel was careful to point out that the husband has not disputed the wife's allegation at paragraph 18 of her affidavit filed 28th March 2012, that he receives a house allowance, and vehicle and gas allowances from his employer, and consequently, that allegation must be taken as accepted. She was of the view that those allowances must be taken as forming part of his net earnings. It is noteworthy that counsel has not quantified those allowances.
- [38] In her closing arguments, the wife's learned counsel also referred to the wife's allegation contained in her affidavit filed 19th July 2012, alleging that the husband had additional income of US\$1500.00 or EC\$4,032.30 from the breeding and sale of Grey Parrots. Interestingly, this issue was never raised in cross-examination.
- [39] In her written closing arguments and submissions, counsel for the wife seemed to have abandoned or modified the orders sought for in her application. She recast the wife's requirements to state:

“While we now accept ... that the Respondent does not have the means to meet 50% of the educational expenses of the parties' adult children while in University, the evidence presented does show that the Respondent can do more than he is currently doing for the benefit of the parties' Adult Children and as such we would submit that it is only just and equitable for the Respondent to be ordered to

- (1) Pay the sum of \$1,212.62 monthly for the maintenance of his adult daughter Ariel Derrick while she shall remain in Tertiary education
- (2) Pay the sum of \$2,225.86 monthly for the maintenance of his adult daughter Alyssa Derrick while she shall remain in tertiary education;
- (3) Pay 60% of the proceeds of sale from his African Grey Parrots within 7 days of each such sale to the Petitioner/Applicant to be used to supplement the cost of tuition as well as travel for their adult daughters Ariel and Alyssa Derrick to and from University in Canada annually.

Discussion and decision

- [40] Parents have an equal financial obligation under the law to maintain their children.⁵ The court must apportion that obligation between the parents according to their relative abilities to contribute to the performance of the obligation.⁶ However, the court must avoid making orders that are beyond the means of the party ordered to pay.
- [41] Having seen and heard the parties, and on reviewing all the evidence, including the monthly income and expenses of the parties; and upon considering the written submissions; I have no difficulty in finding that the husband does not have the means to pay 50% of the educational expenses of Ariel and Alyssa. The wife has gracefully conceded that point.
- [42] I am satisfied, too, based on the evidence before me that the mother earns almost twice as much as the father. It is obvious that the mother will have to bear more of the responsibility of educational expenses of the children and meeting any short fall in their tuition costs, and personal expenses until the husband's earnings are enhanced.
- [43] It is reasonable to presume that the father's income will increase in the future and that he will be able to contribute more towards the maintenance of his children and thus lighten the burden on the mother. This is not to say that I am convinced that the father can contribute no more than the \$500.00 per month which he claims that he can afford; far from that. Indeed, he has admitted that he sometimes pays more than the \$500.00, and there is evidence to support that claim. The evidence discloses that the father has been paying \$500.00 (with various occasional increases) since the year 2000. Children's needs change significantly from year to year. It is twelve years now that he has committed to paying \$500.00. This is a good time to change that situation.

⁵ Section 13 (8) of the Divorce Act

⁶ Section 13 (8) of the Divorce Act

- [44] It is also reasonable to presume that Ariel and Alyssa will actively pursue and obtain part-time jobs while studying, thereby assisting with their educational expenses and general maintenance, thereby reducing the burden on their parents.
- [45] The scholarship funds are obviously managed by the mother. The court takes account of the evidence of wire transfers to York University on behalf of the children. I take it that most of this money comes from the scholarship funds held at the Bank of Nova Scotia and elsewhere, in the wife's name. The wife has not disclosed what amount of her personal expenses goes towards the children's educational expenses. The court is left to speculate which it should not do.
- [46] Each party accuses the other of overstating their expenses. However, the court is not convinced that either party has been forthright with the court as to their income and expenses. Obviously, there are many gaps in the evidence on both sides, and I am not of the view that there has been full and frank disclosure by the parties of their income and expenditure, their assets and liabilities.

Issue No 4. What is the appropriate amount of monthly support?

- [47] Having considered the relevant factors as set out in section 13 of the Act, the court considers it reasonable to calculate the proportionate share of maintenance to be paid by the father to be \$1000.00 per month per child.

Disposition

- [48] It is hereby ordered that:
- [1] The Respondent Edwin Foster Derrick shall pay the monthly sum of \$1000.00 towards the living expenses of his adult daughter Ariel Phyllis Derrick commencing on the 1st day of February 2013 and continuing on the first day of each and every month thereafter while she shall remain in Tertiary Education or until further order
 - [2] The Respondent Edwin Foster Derrick shall pay the monthly sum of \$1000.00 towards the living expenses of his adult daughter Alyssa Eunice Derrick, commencing on the 1st day of February 2013 and continuing on the 1st day of each and every month thereafter while she shall remain in Tertiary Education; or until further order
 - [3] In relation to payments in respect of ARIEL, these are to be effected by payments of the monthly sum of \$1000.00 to Account No 183259006254 in the name of ARIEL P Derrick at the Bank of Nova Scotia, St John's, Antigua.
 - [4] In relation to payments in respect of ALYSSA, these are to be effected by payments of the monthly sum of \$1000.00 to account No 183289006255

in the name of ALYSSA E. DERRICK at the Bank of Nova Scotia, St Johns, Antigua.

[6] The parties have liberty to apply.

[7] The parties shall bear their own costs.

[49] I am grateful to counsel for their helpful submissions.

Pearletta E. Lanns
High Court Judge [Ag]

in the name of ALYSSA E. DERRICK at the Bank of Nova Scotia, St Johns, Antigua.

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