

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO: ANUHMT 2006/0057

BETWEEN

RAYMOND DICKENSON

Petitioner/Respondent

And

ESTHER TONGE-DICKENSON

Respondent/Applicant

Appearances:

Mr. Dane Hamilton Q.C. for the Claimant

Ms. C. Debra Burnette of Henry & Burnette for the Respondent/Applicant

.....
2007: October 23

2008: March 07
.....

JUDGMENT

[1] **Harris J:** This is an application by Mrs. Esther Tonge-Dickenson the Respondent/applicant, for an order for spousal support under section 13(2) of the Divorce Act No. 10/1997 ("the Act"). She is asking for the sum of \$4,000.00 per month.

[2] The application is opposed on the ground (i) that the applicant Mrs. Esther Tonge-Dickenson has not established that the Petitioner/Respondent, Raymond Dickenson has sufficient means to support her (ii) that the applicant's list of recurring monthly expenses are grossly exaggerated and (iii) that the applicant is capable of providing for herself.

- [3] Both parties filed affidavits in the matter¹. Counsel submitted written submissions on which they relied. An interim order for monthly payments of \$1,000.00 commencing from 5th October, 2007 was made pending judgment.

THE LAW

- [4] Section 13(2) empowers the Court to make an order requiring one spouse to pay such periodic sum as the court thinks reasonable for the support of the other spouse. Section 13(3) provides for the making of an interim order which includes requiring one spouse to pay such periodic sum as the court thinks reasonable for the support of the other spouse. To this end the interim order dated the 4th October, 2007 was made securing the interim payment to the applicant of EC\$1,000.00/mth.

- [5] Section 13(5) enumerates the criteria which the court shall take into account in making a spousal support order under section 13. The subsection provides:-

“In making an order under this section the court shall take into consideration the condition, means, needs and other circumstances of each spouse and of any child of the marriage for whom support is sought including:-

- (a) the length of time the spouses co-habited**
- (b) the functions performed by the spouse during the co-habitation**
- (c) any order, agreement or arrangement relating to support of the spouse or child.”**

- [6] Further considerations impact upon a spousal support order and in this regard Section 13 (7) of the said Act in so far as is relevant to this matter provides as follows:-

“An order made under this section that provides for the support of a spouse should:-

- (a) recognize any economic advantages or disadvantages to the spouse arising from the marriage or its breakdown;**
- (b)**
- (c) relieve any economic hardship of the spouse arising from the breakdown of the marriage; and**
- (d) in so far as practicable, promote the economic self sufficiency of each spouse within a reasonable amount of time.”**

¹ The Affidavit of Esther Tonge-Dickenson filed on December 19, 2006 and the Affidavit in Reply of Raymond Dickenson filed on January 26, 2007.

THE EVIDENCE

- [7] The parties were married on the 13th day of April, 1996. There is one child of the marriage and two children of the family who are now 22 and 26 years of age and gainfully employed. The Petitioner/Respondent alleges that both children presently reside with the Applicant/Respondent. A Divorce¹ was granted on the 26th January, 2007.
- [8] The affidavit evidence of the Applicant/Respondent is that the Petitioner had one time purchased several motor vehicles for her, licensed, insured and maintained them. She says that since 2005 he had ceased licensing and insuring the vehicle.
- [9] The Respondent/Applicant says that she is a Teacher/Principal of a primary school in the employ of the Government on a salary of \$3,783.00 per month. She is entitled to a travel allowance of \$301.00 per month but because her vehicle is registered in the name of the Petitioner she is unable to receive the said travel allowance.
- [10] Further, she says that she obtained a loan to finance her daughter's education which the Petitioner/Respondent undertook to pay but since the "differences" arose between the Petitioner and the Respondent he has ceased paying it, leaving with her this substantial burden. A burden she is unable to carry alone.
- [11] The Respondent/Applicant goes on to set out her itemized list of monthly expenses repeated here for convenience, as:-

Groceries	\$1,500.00
Loans	\$1,020.00
Medical expenses	\$ 83.33 (2,000.00 per year)
Medical insurance	\$ 400.00
Domestic helper	\$ 720.00
Maintenance of motor car	
Licence	\$ 686.00
Insurance	\$ 335.67
Servicing	\$ 291.17
Cleaning	\$ 180.00

¹ The Decree Nisi was granted and to take effect 31 day after the date of the order – 26th January, 2007

Fuel	\$ 500.00
Clothing	\$ 416.66 (5,000.00 per year)
Vacation	\$ 333.33 (4,000.00 per year)
Cooking Gas	<u>\$ 100.00</u>
	\$ 6,649.49
	=====

- [12] Mrs. Tonge-Dickenson says after deduction her take home pay is \$3,383.00.
- [13] On the other hand, Mrs. Tonge-Dickenson alleges that the Petitioner Mr. Dickenson earned a net monthly income of \$10,000.00 derived from a combination of sources.
- [14] She says that he earns an income from rent collected from “*apartments located at the matrimonial home, Rowan Henry Street and at Paynters ...*” Further, she says, he has a ‘*contract with the Central Board of Health in the Ministry of Health for the collection of garbage ...*’ for the sum of \$1,640.00/wk. Additionally asserts the Respondent/Applicant the Petitioner/Respondent generates income from the business of buying and selling engine parts as he is a mechanic by trade as well.
- [15] The Respondent goes on to say that the Petitioner paid for her annual vacations to destinations outside of Antigua.
- [16] Further, asserts the Respondent, the Petitioner “*knows that he has an economic advantage over me and has used the same to deny me the fruits of my labour.*”
- [17] The Respondent avers that pursuant to a loan by her (from her mothers money on a fixed deposit) to the Petitioner, the Petitioner still has due and owing a sum of interest to her. The interest sum was not quantified for the Court and the Petitioner denies owing interest.
- [18] The Petitioner on the other hand says that the Respondent/Applicant resides in a house owned by the Respondent rent free.

- [19] Further, he says that the EC\$1,020.00 loan payment itemized by the Respondent as a recurring monthly expense is the responsibility of her daughter, Ishawn James 26 years old, who graduated from Baruch University in May of 2005 and is currently employed. The payment slips in relation to the said student loan exhibited to the Affidavit of the Respondent are not dated. The last payment was made on January of 2007.
- [20] The Petitioner/Respondent submits that the food bill as itemized by the Respondent/Applicant is exaggerated and perhaps represents the total food bill for the Respondent/Applicant and the two (2) gainfully employed adult children. Further, he says, the salary for a helper is not applicable because by her own admission in para. 17 of her Affidavit, no helper has been employed since March of 2006.
- [21] The Respondent has claimed a monthly sum of \$686.00 for the licensing of the vehicle a sum the Petitioner claims is grossly exaggerated from the actual sum calculated as EC\$57.00/mth. Further, he says the third party premium insurance on the motor vehicle is an annual sum and so properly reduced to a monthly sum, is EC\$28.00.
- [22] The Petitioner/Respondent Mr. Dickenson, asserts, without evidence in support, that the Respondent/Applicant Mrs. Dickenson is paid a travelling allowance based on the vehicles maintenance and not ownership.
- [23] The Petitioner testifies at para. 7 of his Affidavit in reply, that the Respondent/Applicant obtains apart from her monthly salary, an allowance of \$182.00 bringing her salary up to "\$4,266.00 monthly a sum very few persons in our society earns."
- [24] The Petitioner testifies that his woodwork shop is unproductive and financially unsound since the advent of 'Courts', 'Furniture Gallery', 'GiGi Industries' and other businesses selling household furniture. He says that the business is on the verge of collapse and operated for years primarily due to his love of wood work.

- [25] The Petitioner/Respondent says he has six rentable residential units at Friars Hill and two units at Paynters and is indebted to the bank, ABIB, in the monthly sum of about \$8,000.00 and is in arrears at the time of making the Affidavit. The income received from these properties is \$9,500.00/mth. He has to expend monies monthly on their maintenance. There is a \$1,500.00 a month differential between rent and loan commitment alone.
- [26] He argues that although he also has a contract for garbage collection paying \$1,640.00/wk, out of that, he has to pay his driver \$400.00 wkly, plus stationery, statutory outgoings and fuel to the tune of \$300.00 wkly. This discloses an income here of \$3,760.00 a month.
- [27] The Petitioner has set out his various expenses, commitments and indebtedness in paras. 11-15 of his affidavit in reply which notably places his indebtedness to ABIB at \$468,549.83. His total net income is calculated at \$5260.00 per month.¹
- [28] The Applicant has itemized her monthly recurring expenses. She has asserted that pursuant to an agreement between herself and the Respondent she always bore the expense of food for the household. At paragraph 3 of the Affidavit in Support of the application for spousal support the applicant referred to the agreement like this: *"During this time, the Petitioner and I agreed that he would pay the bills which include electricity, water and telephone and I would purchase food for the household. In addition, the Petitioner would contribute a weekly sum of \$300."*
- [29] The items listed other than food, presumably are the expenses she now bears that were previously borne by the Petitioner/Respondent during the subsistence of the marriage.
- [30] At the onset, let me say that I am unable to support the view that an economic disadvantage has befallen the Applicant/Respondent arising from the marriage and very little economic disadvantage arising from the breakdown of the marriage. In my view economic disadvantage is not the same as merely being in a lesser financial position than

¹ This is the sum of the net income derived from the sources referred to in para 26 and para. 27 above.

the other spouse prior to or after the breakdown of the marriage. The *disadvantage* referred to in the 'Act' is more in the nature a spouses incapacity to properly sustain themselves *as a result of*, the marriage or its breakdown.

- [31] There is nothing in the evidence before me that suggests that the applicant suffered any economic disadvantage as a result of the marriage. She attained her appointment as a primary school principal, the pinnacle of her chosen profession, during the subsistence of the marriage. This was a source of employment independent of her spouse and the marriage, and there is no evidence that upon the breakdown of the marriage she lost any of her economic benefits as a public service teacher/principal. Presumably, she has retained her salary, allowances, prospect for further advancement and terminal benefits.
- [32] I do not believe I would be wrong to act on the basis that her emoluments are fixed at a level expected to maintain her at least at a level consistent with the relatively lofty and respected status of a Principal of a Government Primary School in Antigua and Barbuda.
- [33] The itemized recurring expenditure set out by the Applicant/Respondent Mrs. Dickenson, are also excessive in the circumstances.
- [34] I accept the evidence of the Petitioner that the student loan commitment referred to on the list is not entirely that of Applicant/Respondent. The loan application form and subsequent communication between the Bank and the parties herein which are exhibited to the applicants Affidavit in Support and the Petitioner/Respondent affidavit in reply is unclear as to who the principal parties to the loan are. It appears on the balance, to be a loan with three (3) parties, the applicant, the Respondent and the daughter/student loan beneficiary.
- [35] It is unclear whether the Petitioner and Respondent are guarantors and the daughter the principal or all three are principals. The Petitioner appeared to have secured the loan with the matrimonial or other property (see Exhibit RD1). The Petitioner's ultimate intention to take responsibility for the loan is clear. What is clear also is that the beneficiary of the loan is an adult person, gainfully employed and needs to take up her responsibility and meet

the commitments for which she is at the very least partially legally liable. The burden is on the applicant to satisfy the court of her financial obligations in relation to the student loan and the Petitioner's obligation to her. In any event, on the exhibit evidence, the loan is secured with property registered in the Petitioners name.

[36] The Petitioner's exhibit RD1 discloses an 'ABIB' document that suggests that 'ABIB' have made the "*irrevocable assignment of Esther's salary a condition of this loan*". There is no evidence that the Bank has moved to recover against the applicant or any other person. But if the 'irrevocable assignment' was effected ¹ the applicant would have been the primary source from which the periodic loan commitment would be satisfied. The Petitioner's portion of this indebtedness that he shall bear (independently of his liability under any other law or proceeding thereto) is one third, amounting to \$340.00 per month.

[37] I accept, on the evidence that the Applicant/Respondent no longer has a helper, since 2006. There is nothing in the evidence to suggest that she has suffered any economic *hardship* or *disadvantage* as a result of this or that the provision of a helper would "relieve any economic hardship"(emphasis mine) or *disadvantage* which arose from the breakdown of the marriage nor "promote economic self sufficiency" of the Applicant/Respondent. This for instance, is not a situation where a mother of minor children would require assistance to baby sit children whilst she is at work or to generally assist in taking care and providing for the children. The Petitioner is a 50 yr old single person. The needs of the other two (2) adult children residing with the applicant are not relevant here. I accept the evidence of the Petitioner as consistent with reality when he says that the applicant indicated that she was not interested in having any more maids. I discount the 'list' by the amount stated for this item, \$720.00.

[38] Groceries are listed by the Applicant/Respondent as \$1,500.00/mth. I consider the cost of groceries as an integral contributor to the cost of living. In Antigua and Barbuda, as in any other jurisdiction the cost of groceries is something of a "notorious fact" that the court can take judicial notice of. The amount stated by the Applicant is exaggerated in relation to a

¹ There is insufficient evidence to establish that the 'irrevocable assignment' was in fact effected.

single person. A realistic assessment of this item reduces it to \$1,000.00/mth. In any event the cost of food for the entire family is a burden the applicant says she bore. The breakdown of the marriage has brought with it an economic advantage in that she no longer has to bear this food costs for the other three (3) members of the family.

[39] Medical expenses are stated as \$2000.00/yr. The applicant also claims the monthly sum of \$400.00/mthly (\$4,800.00/yr) for Medical Insurance¹. This in my view amounts to a double benefit. A standard health insurance plan would cater for major medical benefit and I would suggest be more advantageous to the applicant. Looked at in the light of the provisions of the Divorce Act, I ask the question, what is the economic disadvantage resulting to the applicant from the breakdown of the marriage in relation to her health expenditures/commitments? The Respondent/Applicant Mrs. Dickenson, has not led any evidence of her health related expenditure during the subsistence of the marriage. The provision of Health Services on the National grid is unaffected by the matrimonial stresses of the parties and are presumably still available to the applicant.

[40] The access to advanced health services are a basic requirement in any modern society, indeed, something of a right. Pursuant to s.13 (2) of the Divorce Act the court is empowered to award a periodic payment as the court thinks reasonable for the support of the other spouse.

[41] No where in the Applicant/Respondent affidavit nor the Petitioner/Respondent reply has any of them referred to the Petitioner meeting this medical or this type of expense. That monies would have been expended on medical services during the marriage is obvious I would think. That this type of expense even if borne by the applicant herself would have been made easier because her husband was bearing other household expenses is a reasonable if not inescapable conclusion. That she would suffer economic disadvantage now is also a reasonable if not inescapable conclusion. The sum of \$2000.00/yrs I find to be an expense item which is fair and reasonable and for which the applicant ought to have

¹ The Petitioner in para. 9 of his Affidavit in reply says this relates to a British American Life Insurance and that the applicant was paying this even before they got married. I accept this evidence. In any event it is not refuted by the applicant. The receipt exhibited is for \$335.67 and not \$400.00.

the Petitioner contribute towards. I have no basis for making a finding in favour of the applicant with respect to the Medical Insurance commitment.

[42] The Applicant/Respondent is claiming that her overseas vacation expenses be met by the Petitioner. Overseas vacations are not a right or indeed even a need. The evidence does not disclose some undertaking from the Petitioner or a reasonable expectation by the applicant during the subsistence of the marriage that the overseas vacations would continue as a matter of course and/or indefinitely. The loss of overseas vacation is not in my view in the circumstances of this case an economic “disadvantage” or “hardship”. The applicant of course is presumably still entitled to be paid vacation leave as a public servant. The evidence of the vacations in para. 5 of the Petitioner's Affidavit in Reply is a colourful one and accords with high financial liquidity. I have no doubt that the Applicant enjoyed it at the time but must now get over it. It must have occurred to her at the time and now, that that lifestyle was transitory and certainly restricted to better financial times.

[43] The applicant has further sought to secure a periodic payment for the servicing of the vehicle which the Petitioner has supplied to her. She suggests four (4) services per annum and supports this by a written estimate/opinion from “Benjies Workshop” exhibited to her Affidavit in support of her application. Frankly speaking, I think this maintenance regime is simply over-the-top. There is no evidence that this was the regime followed during the marriage and does not appear to be a reasonable proposition. The applicant will have to bear two (2) of these services and the value of the other two 3000 miles services be borne by the Petitioner. This amounts to EC\$700/yr. Further, the Petitioner shall continue to pay the annual insurance and vehicle license. As to the values of cleaning and fuel expenses, I can find no evidence of those expenses being met by the Petitioner, neither can I find any good reason why he would have then or now, paid for these expenses. The applicant will bear these expenses and for the same reasons bear her expenses in relation to clothing. The applicant to carry her own cooking gas expense.

- [44] On the question of the amount claimed for licensing the vehicles and insuring the vehicle¹ counsel for the Petitioner in his written submissions suggests in para 5 (v) that the amount claimed under these two heads are incorrect. The Petitioner however shall continue to pay the insurance and the vehicle license as calculated in this judgment.
- [45] The Respondent/applicant Mrs. Dickenson, has exhibited the Motor Vehicle Board's Examiner Certificate for 2006 and a related receipt/invoice #441401 for "VEH. LICENSE F" in the sum of \$758.33. This is an annual fee. The monthly amount is \$63.19. The insurance on the other hand shall be paid directly to the Insurance Company by the Petitioner on or before the 7th day immediately prior to the annual due date².
- [46] This court has to take into consideration various factors in relation to both spouses.
- [47] I accept the evidence of the Petitioner/Respondent that his furniture business was once a thriving business but due to the forces of competition from businesses such as 'Courts', 'Furniture Gallery', 'GiGi Industries' among others "rendered woodwork shops such as mine obsolete, unproductive and financially unsound ³."
- [48] I accept his evidence and it is not disputed that he is indebted to the financial institution ABIB to the tune of \$8,000.00/mth and further, that he is in arrears. The Petitioner goes on to say that he does generate an income from the several properties that he owns, to the value of \$9,500.00 monthly, but is also saddled with the maintenance of the several apartments and sustaining the cost of operating the failing workshop. This evidence is not refuted and I accept this evidence in any event.
- [49] The Petitioner deposes to supplementing his income by operating a garbage collection business the contract earnings of which are \$1640/wk. He says that out of this he pays a driver \$400.00/wk plus Social Security, Medical Benefit and Education Levy. These other

¹ The applicant gives evidence and exhibits a receipt for motor vehicle insurance for 2006 of \$437.50 for period 2006-2007. That is apportioned to the monthly payment of \$36.45.

² See factors set out in s.13 (5) of the Divorce Act 10 of 1997.

³ para 10 of Petitioner Affidavit in Support

deductions are statutory deductions and I do not presume that he is not paying them. In any event they are small in comparison to the wage payment. The Petitioner says he has other expenses related to that business, all of which appear to be reasonable¹.

[50] In his affidavit in reply, the Petitioner Mr. Dickenson, sets out his indebtedness with documentary support exhibited to (i) APUA - \$13,641.74, (ii) ABIB - \$468,549.83 and (iii) another loan at Antigua Commercial Bank - \$57,152.00 with payment of \$1,699.57.

[51] On the evidence, I accept the Petitioner evidence of his indebtedness and somewhat impecunious circumstances; an economic disadvantage generated during the course of the marriage. There is no evidence before the court that the Petitioner maintains a lifestyle inconsistent with these circumstances.

[52] However, the Petitioner/Respondent, Mr. Dickenson, has stopped short of stating his net income. The burden of proof as it were is on the Petitioner/Respondent to disclose his income, this knowledge being in the peculiar possession of the Petitioner/respondent. In **Hughes v Hughes**, Byron JA at p.153 citing the case of **Payne v Payne (1968) 1 AER 1113 (1117)** made the point that the court is entitled to draw inferences adverse to a party who has not made proper disclosure of his available resources.

[53] In this case the adverse inference is that he does not have expenses beyond that disclosed in his affidavit and therefore has an income sufficient to maintain himself and contribute to his ex-wife's support.

[54] I have determined that the economic disadvantage suffered by the applicant arising from the marriage is the liability created by the student loan and have apportioned the Petitioner's share of that liability for our purposes here. Further, I have determined that the economic disadvantage suffered from the breakdown of the marriage to be that which now leaves the applicant with the unexpected burden of meeting expenses she did not previously have to meet or which she was otherwise alleviated from the full impact of

¹ The tube purchase seems a bit extensive, but in any event not a significant cost item.

meeting such as the \$1,000.00 food bill, \$83.00 medical expense, \$58.33 car servicing bill, \$36.45 car insurance bill and the \$63.19 motor vehicle bill to a total of \$1240.95, I add the student loan liability of the Petitioner of \$340.00. The Respondent/applicant is residing in a house free of rent and drives a vehicle¹ provided by the Petitioner/Respondent.

- [55] I Have considered the length of time that the spouses cohabited and the fact that they both pursued their own career and economic interests during that period, the applicant ending up with a secured pensionable employment in the upper echelons of the Public Service of the Government of Antigua and Barbuda and the Petitioner/Respondent with an unsecured failing wood work business albeit buttressed by a potentially sound real estate business and a small garbage collection business. To award the sum requested by the applicant, in the circumstances, would tend to the promotion of the degradation of the economic self sufficiency of the Petitioner/Respondent and impose unwarranted economic hardship upon him. A sum, calculated to give effect to the 'Act' for the benefit of both parties is what is required here. In the face of the unrefuted 'ABIB' debt and commitment thereto, that sum I determine at \$1,580.00² a month.

ORDER

- [56] **IT IS HEREBY ORDERED:**

- (I) That the Petitioner/Respondent Raymond Dickenson do pay the Respondent/Applicant Esther Tonge-Dickenson in spousal maintenance the monthly sum of \$1,580.00 commencing on April 1st 2008 and each consecutive month thereafter.
- (ii) That cost of this application be \$1,200.00 to the applicant Mrs. Esther Tonge-Dickenson, or as otherwise agreed between the parties within 21 days of this order.

DAVID C. HARRIS
Judge
The High
Court of Justice
Antigua and Barbuda

¹ This court has not been called upon to make any determination with respect to the ownership of the vehicle or the matrimonial home.

² Calculated as in para. 54 above. Other expenses whether borne by her previously or not, are to be borne by her now.