



# **IN THE SUPREME COURT OF BERMUDA**

## **Divorce Jurisdiction**

**2006: No. 119**

**BETWEEN:**

**HEATHER DARRELL LITTLEJOHN**

**Petitioner**

**and**

**DAVID CHARLES LITTLEJOHN**

**Respondent**

## **JUDGMENT**

Date of Hearing: 29 and 30 January, and 6 February 2009

Date of Judgment: 13 February 2009

Mrs. Georgia Marshall, Marshall Diel & Myers, for the Petitioner

Ms. Keren Lomas, Lomas & Co, for the Respondent

## **Introduction**

1. This judgment is given on appeals from an order of the Registrar made on 18 December 2008. The Registrar's order covered both periodical payments and outstanding discovery matters, in respect of which the petitioner (the "Wife") filed an appeal, and the respondent (the "Husband") filed a cross-appeal. Although the cross-appeal dealt in part with the outstanding issues of discovery which the Registrar had dealt with in her order of 18 December, it was agreed during the course of argument that all outstanding discovery matters should be dealt with by the Registrar, so that at the end of the day the appeal was concerned only with the Registrar's order in relation to periodical payments. Counsel were agreed that matters should be dealt with by me on the basis of re-hearing the application before the Registrar. In this regard, I did allow in the Wife's sixth affidavit sworn on 17 December 2008, which the Registrar had not, and I also extended time in relation to the appeal and cross-appeal, so that all matters could be dealt with on the merits.
2. The order of 18 December 2008 followed an application made by the Husband by summons dated 3 November 2008, in which he sought the discharge of an earlier order which had been made by the Registrar on 28 August 2007. That order provided that the Husband should pay to the Wife \$2,500 per month, plus an amount of \$4,000 per month to be payable from the business operated by the Husband known as North Rock Brewing Company ("NRBC"). The order made by the Registrar on 18 December 2008 was in the following terms:
  - (i) That the Husband should pay to the Wife monthly periodical payments of \$5,000 until the determination of the Wife's application for ancillary relief.
  - (ii) That the Husband should pay to the Wife the sum of \$19,500 which had accrued by way of arrears under the previous order of 28 August 2007.
  - (iii) That the Husband should either provide the Wife with major medical health insurance under the umbrella of NRBC, or pay

to the Wife the sum of \$635 per month to cover the cost of the medical insurance which the Wife effected, and

- (iv) That the Husband's periodical payments of \$5,000 per month should be deducted from any final award made in favour of the Wife.

### **Background**

- 3. The parties were married in 1982, and the decree nisi of divorce was made absolute in September 2006. There are two children of the family, Christine and Nichola, both of whom are over the age of 18 and have completed full time education.
- 4. The main point at issue in these proceedings, and which will no doubt be the main point when ancillary relief falls to be determined, is that the Husband is a discretionary beneficiary of some four family trusts established by his parents, the assets of which are substantial. At this stage of the proceedings, it is not necessary to make findings in relation to the trusts, but no doubt it will be helpful to provide some detail on them. What is necessary is to consider the benefits which the Husband receives from the various trusts, and then to consider how these benefits might impact on any order which the Court would otherwise make in relation to periodical payments.

### **The Littlejohn Family Trusts**

- 5. The position of the parties is not agreed in relation to these various trusts, so I will start with those aspects which are uncontentious. First, I would identify the different trusts as the Magnolia Settlement, the Littlejohn Trust, the Ivory Trust, and the Puppet Trust. All but one was settled by the Husband's parents, and that one was an offshore trust, and no doubt settled at the request of the Husband's parents. The first three were all settled in the 1970s, and the Puppet Trust was established by the Husband's mother in June 1996.
- 6. The principal asset of the Magnolia Settlement is a substantial piece of Bermuda real estate of some 30 acres, on which there are a number of properties, two of

which are substantial. These are Magnolia Hall, which is occupied by the Husband's brother, and Magnolia Cottage, which is occupied by the Husband and which was formerly the matrimonial home. The Wife described Magnolia Cottage as "a substantial three bedroom, four bath, large, recently renovated executive home." This trust also owns the real estate from which NRBC operates, for which no rent is payable. The Wife produced unaudited financial statements for the Magnolia Settlement for the period ending 31 December 2004, and these showed the net assets of the trust to exceed \$20 million, with the value of the land put at almost \$18 million. The notes to the statements indicated that the market values of land and property were considered to be in excess of cost, and this caused the Wife to suggest that the value of the assets held in the Magnolia Settlement was likely to be two or three times that figure of \$20 million. Two points arise in regard to the Magnolia Settlement; the first is that the Magnolia property is said to be maintained to some extent by monies from the Puppet Trust. The second is that the Husband receives a significant benefit by virtue of his residence of Magnolia Cottage rent free. This is a home of more than 6,000 square feet, which Mrs. Marshall suggested would rent for \$15,000 per month. I was not taken to any evidence supporting this figure, but the Court can take judicial notice of the fact that luxury homes such as this would certainly be expected to rent for more than \$10,000 per month, and the figure might well be as high as \$15,000. Similarly, the Husband no doubt benefits through NRBC from the fact that that entity does not pay rent for its occupation of the premises from which it carries on business.

7. The Littlejohn Trust has assets of just under \$1.5 million and was apparently used principally to pay education expenses for the settlors' grandchildren, an expense which no longer arises.
8. The Ivory Trust has an investment portfolio said to be worth between \$700,000 and \$800,000, but its major asset is a flat in London owned by a company named Gibbett Investment Ltd, the shares of which are owned by the Ivory Trust. The Husband has had the benefit of the use of the flat from time to time.

9. The last of the trusts is the Puppet Trust, which owns a very substantial investment portfolio. As mentioned, this trust was settled by the Husband's mother, and there is a letter of wishes from her indicating that the trustees should hold the fund in equal proportions for the benefit of the settlor's children, who are now just the Husband and his brother. More significantly, perhaps, there is a request that the trustees should consult with the children to see if either of them wishes to receive his share outright, or prefers to leave that share in trust. No doubt that will be an issue at the full hearing, not least because the trustees responded to a letter written by the Husband in relation to interim periodical payments, saying that they would not look favourably on assisting the Husband by making distributions in respect of those payments, the Wife not being a beneficiary. There is other correspondence from the trustees in a similar vein. In his first affidavit, the Husband indicated that he understood that there may be \$15 million in the Puppet Trust, but by December 2008, he was saying that that figure was now down to \$12.5 million. For the Wife, Mrs. Marshall referred to financial statements of the underlying company suggesting that as at February 2000, the market value of assets held by the Trust was in excess of \$26 million. With the events of the last 6 months in the world financial markets, historical figures are of little assistance.
10. All of the above led the Wife to say in her fifth affidavit of 5 December 2008 that the Husband was the beneficiary, jointly with his brother, of a vast fortune considerably in excess of \$50 million and likely closer to \$100 million.
11. For the purpose of this appeal, it matters little what the true figures of the value of these various trusts are. Suffice it to say that they are considerable, but as indicated earlier, the more critical question is to consider the benefits which the Husband receives from the various trusts.

### **The Financial Positions of the Parties**

12. I will start with the Wife's income, which she first put at \$111,000 per annum, which equates to \$9,250 per month. The Wife initially gave figures which included the payments being made to her by the Husband, but without these, the Wife's income comprises what she refers to as a "stipend" from her mother in the sum of \$40,000 per annum, and an income from her investment portfolio which was once put at \$40,000 per annum, but was said by the Wife in her first affidavit to have reduced to \$23,000 per annum. In addition, the Wife receives a relatively nominal amount from boarding horses, and a similarly nominal amount from the rent of her interest in Epsilon Island. So the true position in relation to her income is that it is in the region of \$5,500 per month.
13. The Wife carried on to say in her affidavit that her annualised expenses totaled approximately \$180,000 per annum, or \$15,000 per month. Those figures increased somewhat over time, and when the Wife swore her fifth affidavit on 5 December 2008, she exhibited a schedule for the six month period between April and September 2008. The total monthly expenses then approximated to \$15,850 per month, although these did include the payment of some legal fees, the amount of which could not be identified from the detail given.
14. The Wife also explained the basis upon which she had been receiving an amount of \$4,000 per month from NRBC, which amount had been continued as part of the terms of the Registrar's order of 28 August 2007. The Wife had worked in the business with the Husband, but there had been an incident involving an employee, the outcome of which was that the Husband and Wife had agreed that the business would continue to pay her the salary which she had then been receiving of \$4,000 per month, but on the basis that the Wife would no longer work there. The \$2,500 per month which was the balance of the Registrar's order for interim periodical payments of 28 August 2007 represented a 50% contribution by the Husband to the Wife's rent of \$5,000 per month. However, the Husband indicated in his affidavit of 16 May 2007 that he considered the payments a fair contribution until settlement was reached, whereas the Wife commented in her affidavit of 15

August 2007 that the Husband was by then threatening to terminate the payment of \$4,000 per month from NRBC, and she was becoming fearful as to her financial position. The Husband effectively acknowledged that in correspondence his attorney had put a deadline on the continued interim payments in order to “press the matter of negotiations to conclusion”, which is perhaps a euphemism for the type of pressure being applied by the Husband. In the event, the Husband did unilaterally cease making payments at the end of September 2008, (notwithstanding the currency of a court order), such that arrears totaling \$19,500 had accrued by the end of December. No doubt in consequence of comments I made during the course of hearing, the Husband discharged those arrears. However, the Husband had also unilaterally removed the Wife from the payroll of NRBC, which had the effect of terminating her health insurance coverage, in consequence of which some medical expenses which the Wife expected would be paid by insurers were not so paid. This accounted for provision (iii) in paragraph 2 above.

15. The Husband began by putting his total monthly income at \$7,583 per month, coming principally from his wages of \$6,500 per month taken from NRBC, to which were added a director’s fee and some investment income. He put his expenditure at just over \$5,000 per month, but complained that he was using his credit card and depleting his savings in the so-called custodian account in order to make ends meet. Over time, his position too changed, so that when he filed his fourth affidavit on 12 December 2008, the Husband referred in some detail to the declining financial fortunes of NRBC, which he said had meant that he had not been able to draw a salary for the months of November and December 2008.
16. Beyond that, the affidavits are replete with accusation and counter-accusation. The Husband declares that the Wife’s payment of rent of \$5,000 per month is “a ruse”, since apparently the house in which the Wife lives was bought at her request by her mother, although it is said for the Wife that the mother used a trust vehicle to purchase the property, and the Wife is not a beneficiary of that trust. For the purpose of this appeal, I do accept that the Wife makes a rental payment

of \$5,000 per month, and given the lifestyle which she enjoyed during the marriage, that does not seem to me to be an excessive figure. The Husband also complains that the Wife should be seeking gainful employment and could earn between \$4,000 and \$5,000 per month in her field of book-keeping and accounting. But the reality is, as the Wife says, that she married at 19, has no post-secondary education, and it appears that the salary that the Wife received from NRBC was increased at some stage from \$1,400 per month to \$4,000 per month simply to reflect the Wife's need for income, so does not represent a true reflection of what she might earn in the marketplace.

17. Counsel for the Wife referred to various payments which had been made by the trustees of the Puppet Trust to the Husband. A number of these were for education expenses for the parties' daughter Christine, but there were also substantial payments from the Puppet Trust made to the Husband's custodian account. One was in the sum of \$30,000 made in April 2005 to cover Christine's 21<sup>st</sup> birthday celebration and gift, and another was for \$35,000 paid in July 2006 to cover maintenance at Magnolia Cottage, travel expenses, and the purchase of items for the London flat. In her affidavit of 5 December 2008, the Wife prepared summaries of the amounts which the Husband had received from the Puppet Trust and the Magnolia Settlement for a period of approximately 18 months while the parties were still cohabiting, during which the Husband received \$202,244 from the two trusts. In a similar exercise covering the position following the parties' separation, the total payments received by the Husband over approximately a year amount to \$233,000.

### **Summary of the Parties' Incomes**

18. At this stage, it is not possible to do more than approximate the true position, but it does seem to me that in broad terms the Wife's income and expenditure position is largely as set out in her affidavits, while the Husband's position is not, with respect, quite so straightforward. First, it does ignore the fact that he lives in a substantial property rent free; but more significantly, it is quite clear that the Husband's lifestyle and his total expenditure, not unreasonably, reflect the fact



that he is a beneficiary of substantial trust funds, and the trustees have, in accordance with the exercise of their discretion, made substantial advances to the Husband to enable him to continue to enjoy the lifestyle he chooses. Hence it does seem to me that the position as he sets it out in his affidavit evidence is not a realistic reflection of his income. The true position is that the Husband's income has largely been a consequence of his own perception of his needs, or lifestyle, by additional payments made to him by the trustees. In these circumstances, it does seem to me that it is wholly artificial to treat the Husband's income as if it is derived from NRBC and the other minor sources mentioned.

19. I would, therefore, put the Wife's income at approximately \$5,500 per month, with her current level of expenses at approximately \$15,850, leaving a shortfall of approximately \$10,000. For the reasons referred to above, it is not possible to do a corresponding exercise so far as the Husband is concerned. The Husband described his change of lifestyle and increased expenditure following the separation as "a fling", and said that during this time his spending, while fairly rapid, was controlled and balanced and has now ceased "for the time being."

### **The Parties' Positions**

20. The Wife seeks an order equivalent to the Registrar's order of 28 August 2007, pursuant to which the Husband was ordered to pay the Wife \$2,500 per month, and to secure the payment from NRBC of \$4,000 per month. The Husband seeks the discharge of the interim periodical payments order, and in the alternative submits that if the Court is minded to make an order that the Husband should supplement the Wife's income, it should do so for a limited period, such as three or six months.
21. Ms. Lomas for the Husband indicated that both counsel agreed that the Registrar had been wrong to include provision in her order that the periodical payments which she had ordered should be deducted from any final award made in favour of the Wife. It seems to me that that must be right. If the Wife is entitled to an

order for interim periodical payments, then she should receive them, and not be obliged to pay them back from any lump sum which she might receive.

### **The Applicable Law**

22. First, I should refer to the submission made by Ms. Lomas for the Husband that the effect of the Registrar's order was to require the Husband to make periodical payments to the Wife from his savings, and she urged that the Husband's income should be confined to the income which he earned as manager of NRBC. Against this position Mrs. Marshall relied upon the cases referred to in the footnotes to Rayden & Jackson on Divorce and Family Matters, and I would just refer to the case of *Robinson –v- Robinson* [1981] 2 FLR 1. In that case, the court was concerned with financial provision generally, but there are two passages in the judgment of Scarman LJ to which I would refer. The first is in these terms:

“It is a commonplace that very wealthy men arrange their affairs to suit their own legitimate requirements, whether those requirements be tax, family or any other type of requirement. No man is to be criticized for doing that, and certainly these courts do not exist to impose this, that or the other financial regime upon a rich man. But these courts must keep their commonsense and they must look to the standard of life that the man nevertheless maintains – in fact, at his whole life style – and one does not need any very great research into the authorities to observe that the courts have consistently refused to be blinded by arithmetical science in determining the ability of a rich man to make provision for his wife and children.”

And the second is as follows:

“I deduce from the case law that in a case such as this the court must look at the total resources of the husband and the way in which they are organized; and approaching the matter broadly, must determine what is appropriate, bearing in mind the standard of life that he chooses to maintain and his capacity and ability to provide maintenance.”

23. Both counsel also referred me to the case of *TL –v- ML* [2006] 1 FLR 1263. This was a case decided by Nicholas Mostyn QC, sitting as a deputy High Court judge,

in which the wife contended that in assessing the husband's resources under the relevant provisions of the Matrimonial Cause Act 1973, the court should include the "bounty" that the husband was likely to continue to receive from his parents, and that her claim should be ordered on the basis that his parents be "judicially encouraged" to make funds available to the husband to meet the claim. The learned judge in the course of his judgment reviewed the appropriate authorities with care, and particularly the case of *Thomas –v- Thomas* [1995] 2 FLR 668. The facts of *Thomas* were slightly different from the facts of the case before Mr. Mostyn QC. In *Thomas* the husband was the joint managing director of a successful family business which paid relatively low salaries and ploughed back profits into the business. The income award made at first instance in favour of the wife consumed the great majority of the husband's monthly income, but the husband's appeal against that order was dismissed. Mr. Mostyn QC set out an extract from the judgment of Waite LJ to which I would also refer, and which is in the following terms;

"the court is not obliged to limit its orders exclusively to resources of capital or income which are shown actually to exist. The availability of unidentified resources may, for example, be inferred from a spouse's expenditure or style of living, or from his inability or unwillingness to allow the complexity of his affairs to be penetrated with the precision necessary to ascertain his actual wealth or the degree of liquidity of his assets. Another is that where a spouse enjoys access to wealth but no absolute entitlement to it (as in the case, for example, of a beneficiary under a discretionary trust or someone who is dependent on the generosity of a relative), the court will not act in direct invasion of the rights of, or usurp the discretion exercisable by, a third party. Nor will it put upon a third party undue pressure to act in a way which will enhance the means of the maintaining spouse. This does not, however, mean that the court acts in total disregard of the potential availability of wealth from sources owned or administered by others. There will be occasions when it becomes permissible for a judge deliberately to frame his orders in a form which affords judicious encouragement to third parties to provide the maintaining spouse with the means to comply with the court's view of the justice of the case. There are bound to be instances where the boundary between improper pressure and judicious encouragement proves to be a fine one, and it will require attention to the

particular circumstances of each case to see whether it has been crossed.”

24. Mr. Mostyn QC also considered the relationship between a trustee and the beneficiary of a discretionary trust, with particular reference to comments made by the Royal Court of Jersey in the case of *Re The Esteem Settlement* [2004] WTLR 1. Mr. Mostyn QC then said:

“This exposition sets out with clarity the very different nature of, on the one hand, the relationship between a fiduciary and his beneficiary; and, on the other, that of mere donor and donee. If the court makes a reasonable request of trustees to make funds available to meet an ancillary relief award, then it can assume that ordinarily the trustees will accede to such a request. The same cannot be assumed of a request of a mere donor, for it is his prerogative to be unreasonable, if that is his inclination.”

25. Ms. Lomas drew my attention to that part of Mr. Mostyn QC’s judgment in which he referred to the possibility that a trustee might decline to yield to so-called judicious encouragement. In this regard, I have referred in paragraph 9 in general terms to the exchange of correspondence between the Husband and the trustees of the Puppet Trust, the Littlejohn Trust, and the Magnolia Settlement. The Husband’s letters to the trustees referred to the forthcoming hearing for interim periodical payments, indicated that the amount being ordered would exceed his ability to pay by \$5,000 per month, and asked whether he could look to the trustees to underwrite the situation if he became obliged to pay more than he was capable of paying through his personal resources. An employee of the Bank of Bermuda on behalf of the trustees responded that the trustees would not look favourably on making such distributions, but put the basis for this position as being that they would consider distributions in this situation to be contrary to the provisions of the trust deed, as payments would not be for the benefit of a beneficiary, but rather by way of support for a third party.
26. With respect to the trustees, their response either mis-states or misunderstands the position, perhaps because of the way the Husband worded his enquiry. The

trustees are not a party to these proceedings, and there is no question of this Court making an order whereby the trustees would be obliged to make a payment in favour of the Wife. However, that seems to me a very different issue than making an order as against the Husband on the basis that the Court should look at the reality of his financial situation and resources. In this regard, I would go back to the judgment of the Court of Appeal in *Thomas*, and add this further reference from the judgment of Glidewell LJ, which is in the following terms;

- “(b) The court should not, however, be “misled by appearances”; it should “look at the reality of the situation”.
- (c) If on the balance of probability the evidence shows that, if trustees exercised their discretion to release more capital or income to a husband, the interests of the trust or of other beneficiaries would not be appreciably damaged, the court can assume that a genuine request for the exercise of such discretion would probably be met by a favourable response. In that situation if the court decides that it would be reasonable for a husband to seek to persuade trustees to release more capital or income to him to enable him to make proper financial provision for his children and his former wife, the court would not in so deciding be putting improper pressure on the trustees.

## **Finding**

27. In all the circumstances, it does seem to me that the Husband should pay interim periodical payments to the Wife, pending determination of her claim for ancillary relief. However, I do not think it would be right to simply take the Wife’s present shortfall and fix interim periodical payments in this sum, on the basis that the Husband has the resources to meet an order at that level. The fact is that the Wife does have some capital resources of her own, and looking at matters as best I can, it seems to me that the right level of an order for periodical payments is \$5,000 per month. I am not clear whether the Husband did make a payment to the Wife in the sum of \$5,000 for the month of January, but in the circumstances I would make my order effective as of 1 January 2009, so that if such payment was not made for the month of January, that payment should now be made.

28. I am conscious of the fact that Ms. Lomas urged that any order which the Court might make should be for a short fixed period. It does seem to me that the interim periodical payments should be payable until the final determination of the Wife's substantive claim for ancillary relief. Hopefully, that will be within a matter of months. I appreciate that there are further discovery applications to be made to the Registrar, but would comment that there is already a very considerable volume of material on the file, and I would encourage the parties to ensure that the substantive ancillary relief hearing takes place with the minimum of delay.
29. I have referred to the fact that the Husband discharged the arrears of \$19,500 which arose by virtue of his decision to cease making payments in accordance with the Registrar's order of 28 August, 2007. As appears from paragraph 14 above, the effect of the Husband ceasing payments from NRBC was that the Wife incurred medical expenses totaling \$1,689. In the circumstances, it does seem to me that the Husband should repay that amount to the Wife, and I so order.

### **Costs**

30. Looking at matters broadly in relation to the appeals, I would regard the Wife as the successful party. The effect of the Registrar's order of 18 December 2008 was that the interim periodical payments were effectively an advance against any lump sum ultimately payable. The position now is that there will be significant payments. Subject to there being any *Calderbank* correspondence, I would order that the Wife should have her costs of the appeals.

Dated this            day of February 2009.

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Hon. Geoffrey R. Bell  
Puisne Judge