



In The Supreme Court of Bermuda
DIVORCE JURISDICTION
2007 No. 80

BETWEEN:

LILIA IVETH ALEMAN DE SMITH

Petitioner

- and -

ARNOLD LIVINGSTON CONYERS SMITH

Respondent

Date of hearing: 19, 20 and 21 April 2010

Date of Judgment: 16 June 2010

Ms. Lomas for the Petitioner; and
Mr. Woolridge for the Respondent.

RULING

INTRODUCTION

1. This ruling is given on the wife's application for financial relief for herself and the child of the marriage. The parties were married in a civil ceremony in Panama on 7th September 2001, although there was a subsequent church ceremony, also in Panama, on 15th February 2002. The wife is Panamanian and has very little English, the hearing being conducted through an interpreter. The husband is Bermudian. They met when he was vacationing in Panama in 2001. Following the church ceremony the wife and her daughter by a previous marriage, Hilda, arrived in Bermuda on 19th February 2002, and took up residence with the Respondent. At that point Hilda was 15 years old. An adult son by a previous marriage, Carlos, also followed, arriving in Bermuda a year later in February 2003.

2. There is one child of the marriage, Nicole, who was born on 18th May 2003. The husband alleges that the wife deliberately allowed herself to become pregnant against his wishes in order to secure her position in Bermuda. I have dealt with that further below.

3. The husband had two children by a previous marriage, being a daughter, Elisha, born on 3rd November 1992, and a son, Desai, born on 16th October 1986. It may be that stresses caused by the merger of the two families contributed to the break-up. The son is still attending a Technical College in the United States, but will graduate in May¹.

4. The marriage came to an end when the wife left the home on 30th December 2006. There are counter-allegations as to why this came about, but I do not think that I need (or should) decide those for the purposes of this hearing. I take that, however, as the point when the marriage broke down². The wife then issued proceedings for willful neglect to maintain by way of an Originating Summons of 28th February 2007, and on 27th March 2007 the Registrar made an interim award of \$825 p.m. for the support of the child Nicole. That was later reduced by the acting Registrar to \$650 per month by an order of 31st July 2007.

5. These divorce proceedings were then commenced by Petition of 9th April 2007, and the wife's notice of intention to proceed with her application for Ancillary Relief was issued on 3rd May 2007, supported by an affidavit of the same date. Since that date there has been a prolonged exchange of affidavits supplemented by documentary disclosure, about the inadequacy of which the wife makes complaint. In the meantime, on 26th September 2007, Simmons J ordered interim maintenance for the wife in the sum of \$225 per month, in addition to that paid for the child. The issue of Nicole's custody was resolved by a consent order of 8th June 2009, which provided for joint custody with care and control to the wife, and liberal access to be agreed to the husband. Finally, on 13th July 2009 an attachment of earnings order was made by Wade-Miller J in the sum of

¹ The evidence, which was given on 20th April, was that he would graduate "next month"

² There was a subsequent attempt at mediation in August 2007, but this came to nothing.

\$201.92 per week (\$875 per month), that representing \$650 per month for the child under the variation order of 31st July 2007, plus \$225 for the wife under the order of 26th September 2007. In addition, the husband still covers Nicole's major medical insurance, but not the wife's, which ceased earlier this year.

THE WIFE'S FINANCIAL POSITION

6. After the break-up of the marriage the wife wanted to stay in Bermuda. She lived for a short while with relatives of the husband and then took a series of apartments with her daughter, Hilda. She obtained employment at the Elbow Beach Hotel in the laundry. At that time Hilda was also employed at that Hotel as a room attendant. At the time of the hearing the wife had averaged \$522.33 net per week, or \$2,263.43 per month, over the preceding 12 months. That represents gross basic pay of \$18.782³ per hour for an average 32.5 hour week (1,686.5 hours per annum). The number of hours worked per week are in fact irregular, and I assume that that depends on her employer's demand, and is partly seasonal.

7. It may be that she could do better than this. I note that her daughter is earning \$22 per hour, for a 62.5 hour week as a cleaner. On the other hand, no evidence was led as to other available jobs, and she was not cross-examined on other opportunities. I also accept that she is not Bermudian, has poor English and no real skills. She had worked in Panama as a receptionist, but I accept that that is not a realistic proposition in Bermuda because of her limited English. I also take note that the economic downturn has adversely affected the employment market. In the circumstances, in the absence of any real evidence to the contrary, I accept that her current income is realistic and is not being artificially depressed by her for tactical reasons.

8. She puts her monthly expenses at \$4,064.88, giving a shortfall of \$1,801.45 per month, although that has been further mitigated by the \$825 maintenance by way of attachment of earnings. Her expenses would all increase if she lived on her own. In

³ She does seem to have got some double time for working on rest-days and public holidays, so that her total gross income for the year was \$33,198.90, and not the \$31,676 that straight time throughout would have produced.

respect of rent, electricity and other utilities she shares the cost with her daughter, Hilda. It seems that the reality of her position is that Hilda makes up any shortfall in her income over expenses. However, Hilda, who gave evidence, expressed a desire to get on with her own life, and said that she could not continue to support her mother indefinitely.

9. The wife has no real capital. She says that in Panama she lived in her sister's apartment, and did not have property of her own. There is no evidence to contradict that. She had savings of \$10,000 accumulated during the marriage, but she has now run that down to \$2,775 on living and similar expenses.

THE HUSBAND'S INCOME

10. The husband works for Bermuda Telephone Company as a Universal Business and Data Technician in the Business Development Division. His gross annual salary as at 25th July 2008 was \$66,830.40⁴. More recently he produces 14 pay slips for the period 1st June 2009 to 13th September 2009, showing a gross pay of \$25,914.07 (or an average of \$1,851 per week, which would give \$96,252 per annum, and \$8,021 per month) although the weekly sum varies considerably, depending upon overtime. His net income for that period was considerably less, being \$14,022 (or an average of \$1,001.6 per week; \$52,083.5 per annum; and \$4,340 per month), but that is artificially depressed by the deduction of \$400 per week savings, and a voluntary additional pension contribution of \$90.90. When those are factored back in his real earned net income was \$20,620.65 for the 14 weeks, or **\$6,382.50 per month** (\$1,472.90 per week, and \$76,590 per annum).

12. In his evidence in chief the husband alluded to the possibility of redundancy as BTC have announced 25 redundancies. He said that his job could be directly affected as his employer has ceased selling business systems, and will be phasing out maintaining them within the next 5 years, although that may be counterbalanced by a new venture. He was unable to say how all this might affect him.

⁴ See the letter from his employer of 25th July 2008. As at 28th February 2007 it had been \$64,563.

THE HUSBAND'S EXPENDITURE

13. In paragraph 11 of his affidavit of 10th May 2007 he put his expenditure at \$4,569.45 per month, being

1,130	Loan payments	
562.52	Car Loan payments	
54	Land Tax	[now \$97.47]
226	Electricity	[now \$300]
26	Telephone	
519.60	Food	
75	Overseas Telephone	[now \$185]
450	Petrol	
150	Car Licence and insurance	
80	Car Maintenance	
41.33	Gas/utilities	
50	Internet	
60	Clothing for self and child (say \$30 for him alone)	
120	Entertainment	
825	Child Maintenance/Sand castle nursery	
200	Gift Club for travel and miscellaneous expenses	

14. There are some slight updates to that from his disclosure, which shows the land tax at \$584.87, which I understand to be bi-monthly, giving \$97.47 per month, and electricity at \$300, overseas telephone calls at \$185, but by and large the picture remains the same. Leaving out the payments for the child, and 'Gift Club', his expenses for himself come to something in the region of \$3,750 per month. Setting that against his net income of \$6,382.50, he has a surplus in the region of \$2,600.

15. During submissions it emerged that the husband has now remarried. There was no disclosure as to this, and he did not update the court to this effect when giving evidence-

in-chief although he took that opportunity to deal with his wife's pregnancies and the possibility of his redundancy. I was then told by counsel that the remarriage was on 19th March 2009. The new wife is Jamaican, and she came to Bermuda on 7th November 2009. She is not now working, but is seeking work. I do not know how that impacts upon his expenses, although Mr. Wooldridge told me that it was agreed that the financial record remains the same.

OVERVIEW OF THE HUSBAND'S CAPITAL POSITION

16. For a man of modest means it is quite difficult to ascertain the husband's precise financial position, largely due to piecemeal discovery and the absence of any unifying statement. The wife complains of his disclosure, saying that it was inadequate and grudging, only being extracted after substantial correspondence and repeated applications to the Court. Ms. Lomas argues that this amounts to 'litigation misconduct'. I accept that to a certain extent, but also consider that the amount at stake in these proceedings did not justify an exhaustive and prolonged discovery process. The matter should have proceeded expeditiously, on the basis of the husband's pay-slips and with the court drawing robust inferences from any failure to disclose. As it is, it has taken three years to get to this point.

17. That said, the husband has moderate but real assets, and modest liabilities. I have dealt with his capital position in the following paragraphs, but in summary it is as follows:

Assets

The House	900,000
The Car	13,000
Key Tech Shares	22,204
Capital G	379.49
BIU Credit Union	1,941.22
BIU Savings a/c for Nicole	8,393 [updated to 63 weeks]
Funds at HSBC	70,000 [held on trust for his other children]

Pension Fund 176,484.28

Liabilities

Credit card 2,222
Timeshare debt 1,762.55
Bank loan 13,204.59
Car Loan 20,125.25

THE HUSBAND'S ASSETS

18. The husband owns a property at 6 Dundonald Street in Hamilton. This was the former matrimonial home, and it is free and clear, the outstanding loan facility (see below) not being secured upon it. He brought it to the marriage, and I can make no realistic finding that the wife made any meaningful contribution towards its acquisition during their short marriage. As at 6th October 2007 it was valued at \$900,000. I do not have any evidence as to how the intervening financial uncertainty may have affected that.

19. He has a car which he says is insured for \$13,000 or more. However, that is balanced by the loan that he took out to purchase it, which as at 24th December 2009 stood at \$13,149.17 (for which see further under his liabilities below).

20. He holds 1,708 Shares in Key Tech, which is the holding company of his employer. They pay a quarterly dividend and that for 15th October 2008 was \$256.20. If that held steady it would amount to a further income of about \$1,000 per annum. Ms. Lomas values these at \$22,204.

21. As at 31st August he had \$379.49 on account at Capital G Bank. He has a savings account with the Bank of Butterfield, from which he makes the loan payments on the \$75,000 loan, but as at 31st July 2009 that had 46¢ in it.

22. He pays \$400 per week into a savings account with the BIU Credit Union. He did not recall whether this had been at \$325 per week in January 2006; he thought it had

probably increased to \$350 in March 2006; he accepted that in January 2007 it had increased to the present level of \$400 per week. He disputes that this means he was able to save during the marriage. He did not produce an up-to-date statement of the balance on this account, although undertaking to try to obtain one during the lunch break. However, towards the conclusion of his evidence he said that his personal savings account stood at \$1,941.22, and I took that to refer to this account. He said that the rest of it had gone on living expenses.

23. He has also been making regular payments of \$50 per week into a separate BIU savings account for the daughter, Nicole. He says that he does not know the current balance, but at 24th December 2008 it stood at \$4,943. Assuming, as I do, that it has continued to increase at the same rate it would have been at \$7,543 in December 2009 and will now be in the region of \$8,300. He says that is for her education, and that he expects the wife to make a similar contribution when the time comes.

24. There is a fund left by his previous wife (who is deceased) for the benefit of the children of that marriage, which is held at the Bank of Bermuda. He prevaricated about whose name it is in, but his final answer was that it was in his name as the children's guardian and that he is the sole signatory. There is about \$70,000 left on that account. Given his evidence that this is essentially held on trust, I do not think it appropriate to take it into account when calculating his assets for the purposes of this exercise.

25. As noted above, the husband pays a voluntary pension top-up of 90.90 per week, in addition to the basic payment of \$113.63. At the hearing he produced a statement from the Argus Group which showed that value of his pension fund as at 31st December 2009 was \$176,484.28.

THE HUSBAND'S LIABILITIES

26. There is a loan facility for \$70,000, on which the wife also signed. At this point the husband has not removed her name from this, although he said that he was in negotiation with the bank over it. I order that he take immediate steps to remove her name from that

account, and further order that he hold her harmless in respect of any attempt to enforce that against her, and give a liberty to apply in that respect. His evidence is that as at 10th March 2010 the balance stood at \$14,336, and that will be reducing with monthly payments of \$1,132.

27. He has a car loan with the BIU Credit Union, which was taken out in June 2006, in the sum of \$23,670 which is being paid down at the rate of \$526.53 per month, and will be paid off by 9th June 2011. As at 24th December 2008 the balance stood at \$13,149.17, and he accepted that, at the current rate, by the time of trial it should have been in the region of \$8,000. However, towards the end of his cross-examination he said that the balance was now \$20,125 and when asked to explain that said that 'obviously' he borrowed more money.

28. He has not produced his detailed credit card statements, and the Petitioner asks me to draw an adverse inference from that, namely that he is hiding a large expenditure on travel. He says that he is not, and that his credit limit is only \$1,500. He has produced summary statements to 15th September 2009, and these show that he has three cards with a total credit limit of \$4,800, and a total debt of \$2,221.99 as at 31st August 2009. In view of that I reject the suggestion that he is hiding anything on those. Nor do I think that it greatly matters whether he has spent a large amount on travel in the past. Even if I knew the figure I would disregard it in computing his available means. I therefore think that the argument about his credit card statements is a distraction, when I know his income from his pay-slips.

29. As at 14th April 2010 the print-out from the Magistrates Court Collecting Office shows arrears of \$3,003.92, which he disputes. Those will not be accumulating as he now makes payments by way of attachment of earnings.

WHAT THE PARTIES ASK FOR

30. What the wife would like is an apartment in Panama. She argues that while she lives in Bermuda the rent could be used towards her living expenses, and she could eventually retire there if she returned to that country. She produces estate agents' particulars to show that a two-bedroom, two bathroom apartment in Panama City could be had for something in the region of \$90,000 and yield a rental in the range of \$620 - \$700 per month. With that in mind Ms Lomas asks for a lump sum of \$360,000, which she says represents 40% of the net assets (excluding the \$70,000 for the former wife for the children, and the value of his pension fund), which she puts at \$908,603.40. She cited amortization figures to show that the husband could borrow \$225,000 at 6% amortised over 15 years for \$1,898.69 per month; or \$150,000 at 6% amortised over 15 years for \$1,265.79 per month. However, she also argues that he should sell the matrimonial home to raise the sum for which the wife asks.

31. In addition to the lump sum, the wife also asks for the continuance of the \$650 per month for the child, and the same figure for the wife for a period of one year from the payment of the lump sum, with a review thereafter.

32. The husband offers a lump sum of \$40,000 and maintenance for the child in the continuing amount of \$650 per month.

33. The wife has also racked up a considerable legal aid bill, starting on 25th January 2007, being \$38,150 for office work; \$3,722 for court appearances; and disbursements of \$75.98 – for a total of \$41,948. Whether all that would be allowed on taxation I do not know. It seems that Legal Aid has already paid out \$24,703 on interim billings, plus \$2,100 for mediation services, and the bill currently produced by Ms. Lomas shows \$17,244.98 outstanding. If I am reading the bills correctly that comes to 168 out-of-court hours, and 15.66 court hours, for a grand total of approximately 184 hours. I have to say that I consider that an excessive amount for a matter in which the amount at stake was always limited by the means of the parties, and where the benefits of detailed disclosure were inevitably going to be severely limited by the law of diminishing returns.

CONCLUSIONS

35. The question of the wife's pregnancy is disputed. The husband says that they had agreed not to have children, and that she was taking oral contraceptives, but discontinued them without his knowledge. He produces a prescription, although not from the relevant time. She says that they never discussed not having children, and that she took care of herself in her own way. Having heard the evidence on this, and seen the parties, I find that she was aware that her husband did not want more children, and that she deliberately ceased taking the contraception, without telling him, in order to get pregnant. I am not willing to find beyond that. In particular I do not find that she did this in order to obtain residency in Bermuda, as the husband suggests. There was no reason at that point to contemplate the break-down of the marriage. I think that she became pregnant because she wanted a child by her new husband and perhaps to cement the bond between them. Indeed she became pregnant a second time, but then had a termination at the insistence of her husband, which I suspect was very stressful for her. I consider that this aspect of the situation represents a failure of the parties to come to an understanding on the central issue of children. Although it was wrong of her to embark on such a fundamental course without obtaining her husband's concurrence, it is not something for which she can or should be financially penalized. Children are a part of the institution of marriage, and once they are in the world their interests become paramount. The child in this case is a child of the marriage and is owed support by both parties, irrespective of the circumstances which led up to her birth. In the circumstance, therefore, although I have heard evidence on and decided this issue, I do not think that it has any bearing on the outcome of these proceedings.

36. Going forward, I think that this is a case which calls for as clean a break as possible, subject to the husband's ongoing duty to maintain the child. The husband has now remarried, and a prolonged dependence by the former wife would be very undesirable. I therefore think that a lump sum is the best way to approach this. However, given that this was a fairly shortly marriage, during which the wife made no real contribution to the capital assets, I do not think that anything based on an equality of distribution would be appropriate. Instead I think that the way to treat this is to award the wife a modest lump

sum, with an income provision only until that is paid. I accept that maintenance for the child can and should continue at the present rate.

37. In all the circumstances I consider that **a lump sum of \$150,000** is the appropriate figure. That would allow her to acquire an income producing property in Panama, with something let over to get herself straight. The husband can service that amount out of his income, and has sufficient value in the house to secure a loan. That lump sum should be paid within 3 months, with a liberty to apply. Until payment is made the husband should pay maintenance for the wife at the rate of \$1,000 per month. The order of \$650 per month for the child should also continue. That gives a total of \$1,650 per month, to be paid through the collecting office by way of attachment of earnings. That is to commence from 1st June 2010, and to continue until the actual receipt by her of the lump sum. It will then reduce to \$650 per month for the child alone

38. I will hear the parties on costs when I deliver this judgment. If an award to the wife is what is appropriate in all the circumstances I would be minded to summarily assess the wife's costs, to avoid the expense of taxation.

Dated this 16 June 2010

Richard Ground
Chief Justice