

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Family Division

No. 665 of 2009

BETWEEN:

JUAN CASSANDRA HINDS

Applicant

AND

MARTIN OWEN HINDS

Respondent

Before The Honourable Mr. Justice William J. Chandler, Judge of the High Court.

2010: March 05

April 19

Ms. Abigail Linton in association with Ms. Avenel Hinkson-Forde attorney-at-law for the Applicant/Wife

Mr. Vincent Watson, attorney-at-law for the Respondent/Husband.

DECISION

Introduction

[1] This matter involves an application by the Applicant/Wife, filed on the 22nd December 2009 for an order that the Respondent/Husband pay spousal maintenance in the sum of \$100.00 per week.

- [2] The parties were married on the 6th April 1996 at the Bethel Baptist Church. They are estranged, but yet continue to live under the same roof. No proceedings have been filed for dissolution of the marriage and there are no children of the marriage.

Evidence

- [3] The wife filed an affidavit on 22 December 2009 in support of her application and deposed, inter alia, that, in 1985 when she was 18 years old she was involved in a serious vehicular accident and suffered partial paralysis on the left side of her body. She received compensation of \$500,000.00.
- [4] She used most of the money to purchase the property at Maynards where the parties reside. Some of the money was given to family members who assisted her, and the rest to defray her living expenses. She is left with \$7,000.00 from the settlement.
- [5] She has never worked and is incapable of working, and receives no benefit from the National Insurance Society (“NIS”) or any social agencies.
- [6] She is under the care of Dr. Persaud who opined in a medical report that she is limited from work or strenuous activities.

- [7] She derives a little income from the rental of chairs and tables which is now slow. Her income therefrom is about \$300.00 per job. She gets about one job per month.
- [8] The husband is a carpenter who works for his father, a contractor. He states in his affidavit filed 19 February 2010 that the wife's disability does not prevent her cooking for large family gatherings on a weekly basis; that she baked sweet bread during the 1990's and prepared juices as recently as 2006 from which she derived income.
- [9] He deposed that the wife bought two motor vehicles, travelled at least every two years and spent money excessively on clothes and entertainment. His view was that she frittered away the money from the settlement arbitrarily. He says he is financially unable to pay her the \$100.00 she seeks and prays for dismissal of her claim.
- [10] The wife gave evidence that she rented a generator at \$80.00 which was not being marketed at this time. No efforts were presently being made to market the rental of the generator, but efforts were being made to market the rental of the tables.
- [11] Under cross examination, she said some of the chairs and tables have mildew. Rentals are done by word of mouth. She rents about thirty chairs and 8 tables at present.

- [12] Mr. Hinds, under cross-examination, agreed that his wife is severely disabled, and that she has movement only on her right side. He said he had no knowledge she was experiencing difficulty on her right side prior to her filing this application.
- [13] He had no knowledge that she visits Dr. Persaud once or twice per month.
- [14] February 2001 was the last time he went with his wife to the family physician or to purchase groceries. He said he guessed that the last bottled gas was purchased by his wife.
- [15] He said he did not know if it was her family who provided her with necessities. He denied that he was indifferent to whether she ate or not, as Mr. Watson suggested.
- [16] With reference to his occupation, Mr. Hinds denied that he was a sub-contractor. He agreed that he was paid on a daily basis for his services as a carpenter. He said that over the last three years he had not been working only day work. His weekly wage is between \$600 and \$700.00 per week. It is now \$600.00 due to NIS deductions.
- [17] He works five days per week at a daily rate of \$150.00. He said that he puts on roofs. Mr. Watson suggests that he does not put on roofs at day work, and he responded "No".
- [18] He started paying NIS three weeks ago. When questioned on his

Statement of Financial Circumstances on the figure for NIS he said that \$4,212.00 is projected payments for the year. He denied that he misled the court by inserting a figure of \$4,800 for electricity and gas, when his wife pays for the gas. He said this was projected for the future because he would have to pay it in the future.

[19] With respect to his hire purchase payments, he has a charge account at Manning for which he pays \$120.00 per month. There is one more month remaining to pay.

[20] In re-examination, he said some days he eats at work, and maintained that the groceries should last longer and said that for 13 years he purchased the gas. There is a lack of communication between the parties.

Submissions

[21] Mr. Watson submitted that the Wife is entitled to spousal maintenance under s. 53 of the **Family Law Act Cap. 214**. He urges Court to take into account that she is 43 years old and disabled; that this was known to her husband. He is in good health and able to work five days a week. She is unable to work. He makes reference to Dr. Persaud's report. Her prognosis is poor.

[22] He submits that she derives a little income from rental of the generator, tables and chairs from which she gets \$80.00 per rental for the generator.

She has not had a rental since 2009 and receives only \$300.00 from the tables and chairs.

[23] She is seeking assistance only for the necessities of life. Those general needs and obligations are relevant under s.53 (2)(d) of the **Family Law Act Cap. 214**.

[24] She is not eligible for a pension, allowance or benefits under s.53 (2)(f). He pays light and water bills, telephone bill and lives in the same house. (Suggestion is that he and the Wife both benefit from these payments).

[25] He submits that the court must have regard to a standard of living which would be reasonable in all the circumstances, and must look to the position prior to the marriage going “on the rocks”. He states that both parties have an interest in the matrimonial home which has not yet been determined and that, in all the circumstances, the Wife is entitled to spousal maintenance, that the figure of \$100.00 per week is not an unreasonable sum.

[26] Ms. Linton submitted that the primary issue before the court is based on section 50(1) of **The Family Law Act Cap 214**. She submitted that there are two primary issues for consideration:

- (1) Is the Wife is unable to support herself adequately? and
- (2) Is the Husband reasonably able to support the Wife?

[27] Her further submission is that the Wife can support herself from rental of the generator, the tables and chairs. These are methods of earning income and she can earn more through better marketing strategies.

[28] Counsel urged the court to find that the wife has the capacity to support herself, though she may be incapable of working for others in a traditional way.

[29] It is also submitted that the Husband is incapable of supporting the Wife. There is a current down-turn in the building industry. His income is fluctuating and his expenses, vis a vis, his income show that it is unreasonable to expect him to pay \$100.00 per week. Counsel also submitted that the Wife ought to have used her award of \$500,000.00 to maintain herself during the rest of her life and that she used the money otherwise as she indicated in para. 8 of her affidavit, namely:

\$38,000.00 for land

\$180,000.00 to build the home

\$70,000.00 in furnishings

\$50,000.00 to family members who rendered her assistance

\$32,000.00 for vehicle

The law

[30] Section 50(1) of the **Family Law Act** provides that a party to a marriage

or union other than a marriage is, subject to subsection (2), liable to maintain the other party, to the extent that the first mentioned party is reasonably able to do so.

[31] Subsection (2) provides that the liability of a party under subsection (1) arises only where the other party is unable to support herself or himself adequately, whether by reason of having the care or control of a child of the marriage ... or by reason of age or physical or mental incapacity for appropriate gainful employment or for any other adequate reason, having regard to any relevant matter set out in section 53(2).

[32] Section 53 (2) contains the matters to be taken into account namely:

- (a) the age and state of health of each of the parties;
- (b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;
- (c) whether either party has the care or control of a child of the marriage or union other than a marriage, who has not attained the age of 18 years;
- (d) the financial needs and obligations of each of the parties;
- (e) the responsibilities of either party to support any other person;
- (f) the eligibility of either party for a pension, allowance, or benefit under any Act or rule, or under any superannuation fund or scheme, or the rate of any such pension, allowance, or benefit being paid to

either party;

- (g) where the parties have separated or the marriage has been dissolved, a standard of living that in all the circumstances is reasonable;
- (h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;
- (i) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;
- (j) the duration of the marriage or union other than a marriage, and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration;
- (k) the need to protect the position of a woman who wishes only to continue her role as a wife and mother;
- (l) if the party whose maintenance is under consideration is cohabiting with another person, the financial circumstances relating to the cohabitation;
- (m) the terms of any order made or proposed to be made under section 57 in relation to the property of the parties; and
- (n) any fact or circumstance that, in the opinion of the court, the justice of the case requires to be taken into account.

Discussion

Age and state of health

[33] In this case the Husband is about 40 years old and the Wife is about 43 years old. He is enjoying good health, she is not. The report of Dr. D. Persaud dated 4th October 2009 is instructive, she had a serious injury to her left arm with minimal movement. This arm has reduced tone, power and reflexes. The left leg was injured with similar reduced features. The doctor noted, and it was visible to the court, that when she walks, the left leg drags behind.

[34] Dr. Persaud's report is as follows:

“Dr. D. Persaud

Trents Medical Centre
Trents, St. James
(246)432-0830

Juan Dowrich-Hinds
Lot 48 Leslie Gardens, Maynard
St. Peter

October 24, 2009

The above patient is a known case of a motor vehicle accident with severe injury to the left side of her body.

She had severe injury to her left arm with minimal movement. The left arm has reduced tone, power and reflexes.

Her left leg had severe injury also with reduced tone, power and reflexes. Most of the time when the patient walks the left leg drags behind.

Over the last three months the patient began having severe pain to the right shoulder and right leg. The right shoulder is tender and painful with a decreased range of movements and she is having trouble lifting her arm above her head. Any movement of the shoulder joint causes severe pain with restrictions. From clinical exam of the shoulder, she

appears to have severe post injury osteoarthritis with ligament strain.

Patient's right leg continues to have pain off and on, especially from the right calf going on to the ankle.

From her past history and her present condition, with regards to her right shoulder, patient is limited from work or any strenuous activity.

She is presently receiving treatment with minimal changes and self physio-therapy.

Prognosis: Poor response because of the past and present condition.

SGD: Dr. D. Persaud
Family Physician.”

Income, property and financial resources

[35] I heard both parties under cross-examination. The wife's earnings are meager. Counsel for the Husband suggests that she can earn more, with proper marketing. This Wife is severely handicapped in the job market. Even with the work she has pursued there are limitations. She cannot lift objects. She would have to employ persons to transport the generator, tables and chairs. Her explanation for not continuing the juice business is consistent with the injuries detailed in the doctor's report.

[36] On the other hand, I was not impressed with the Husband's responses under the cross-examination. He outlined expenses in his Statement of Financial Circumstances which will soon come to an end, without stating this in his Affidavit in Support. Only under cross-examination did he say this. The Court would have been given a false impression that some of his expenses were ongoing.

[37] I was similarly not impressed with his evidence under cross-examination about his earnings. He is aware of the rates for putting on locks and doors (\$20 and \$80 respectively) but mentioned that he would put on locks and doors and still earn a salary of \$150.00 per day. Similarly, he states that roofs are constructed at a different rate. It is not done as day work. He also stated in evidence that he puts on more than one door per day. He only started paying NIS three weeks ago but never said that in his affidavit.

[38] When challenged about the \$4,800.00 for electricity and gas (his wife purchases the gas) he said "I know. In the future I will have to contribute to the gas". However, this is not stated in his affidavit.

[39] He states an annual figure for hire purchase at Mannings without stating that he only has one more month to clear the hire purchase. In the absence of cross-examination the court would be given the impression that this is a recurrent annual expense.

Financial needs and obligations of each of the parties

[40] It is clear that the Wife is in need. She has continuing medical bills because of her medical challenges and she needs to purchase food and be mobile. It cannot be said that her purchase of a motor car was a wastage of her award because she would need to be mobile given her hardship.

[41] The Wife has stated in her affidavit that she is not in receipt of any pension from government. She has also given an account of what moneys she received and how she spent it. The Husband has said that she gave money to her family and this was an improper application of the money she was awarded. However, the Wife said in her affidavit said that her family who had taken care of her for ten years shared \$50,000.00. The court cannot accept that this expenditure was improper if it was expended for services she would otherwise have had to pay for.

[42] The Husband deposed that the Wife frittered away her compensation moneys. He stated at para. 16 of his affidavit filed 18 February 2010 -

“Again by the Applicant/Wife’s own admission, she utilized this settlement which was to maintain her during her employable years to purchase a property. Further over the years the Applicant/Wife bought two (2) motor vehicles, traveled at least every two (2) years and spent money excessively on clothes and entertainment. I am therefore of the view that the Applicant/Wife has arbitrarily frittered away the money that was to maintain her”.

[43] Ms. Linton, for the Husband, relied on the Australian case *In the Marriage of Berta, Z and Berta, D* (1998) FLC 91-916 where the husband had had an industrial accident in 1979 and at the time of the marriage was in receipt of unemployment benefits. His benefits ceased on marriage and from then until 1982 when he was retrenched, the wife was principal breadwinner. He received a lump sum payment in 1982 by way

of settlement of his worker's compensation claim and this was primarily to discharge the mortgage on the matrimonial home bought in 1966 in his sole name and for improvements to the home.

[44] The wife left the home after separation in 1983, he continued to live there and received an invalidity pension. The wife applied for property settlement and the husband cross-applied to dismiss her application and he also applied for a maintenance order.

[45] In the course of the judgment **Lindenmayer, Nygh and Purdy JJ** the Court said:

“In the present case the husband chose to use the money paid to him to improve his capital position and thereby to rely on the invalid pension only. This was a choice which was obviously open to him but can he now turn around and seek maintenance from the wife?

In our view such a result would be plainly contrary to the justice of the case. His Honour found that the wife had consented to the husband's expenditure, but there was no evidence of any express consent on her part. At best it could be said that the wife knew of the receipt of the money and of the general nature of the expenditure, although the husband was secretive about his financial affairs, and did not object to decisions which the husband took as to how the money should be spent. But as his Honour found, the husband retained the benefit of all improvements derived from the expenditure after separation.

The husband cannot be placed in the position where he can have his cake and eat it too. He cannot retain the capital benefits of the investment of the house which now has value of \$90, 000 and seek to support his needs over and above the invalidity pension through maintenance from the wife.”

[46] Counsel submits that the wife used her lump sum payment and frittered it away as the husband deposed and ought not to be allowed to retain the

- benefits of her investment in the house, rental of chairs and tables and a generator and obtain maintenance from the husband.
- [47] Mr. Watson distinguishes the **Berta** decision on the ground that the wife has not taken onto herself the capital gains as in **Berta** nor is she entitled to a pension. He urges the Court not to follow this decision.
- [48] I am of the view that **Berta** is not directly applicable to the facts of this case for the following reasons.
- [49] The house purchased is the property in which both parties reside. It has not been demonstrated how her travel and the purchase of vehicles are extravagant. The Husband has enjoyed the benefits of her compensation package. She has not been secretive about the manner in which she spent her compensation package.
- [50] The Marriage has endured 14 years. It is clear that the parties arranged their business so that they shared expenses of the household. The Husband, it is said, contributed to the building of the house. There is no evidence as to how the Husband has affected the Wife's earning capacity, if he assisted with the rental of generator, tables and chairs. The Wife has not sought as in **Berta**, to have her cake and eat it too - she has shared some of it with the Husband.
- [51] I am of the opinion that, in all the circumstances of the case, the Wife is

in need of maintenance because she cannot adequately maintain herself by reason of physical incapacity. I am further of the opinion that the Husband is able to contribute financially to her maintenance, and that the sum of \$100.00 per week is a reasonable sum.

ORDER

[52] The Husband to pay Wife the sum of \$100.00 per week maintenance for herself with effect from Friday 23rd April 2010 and continuing every Friday thereafter until further order.

William J. Chandler
Judge of the High Court.